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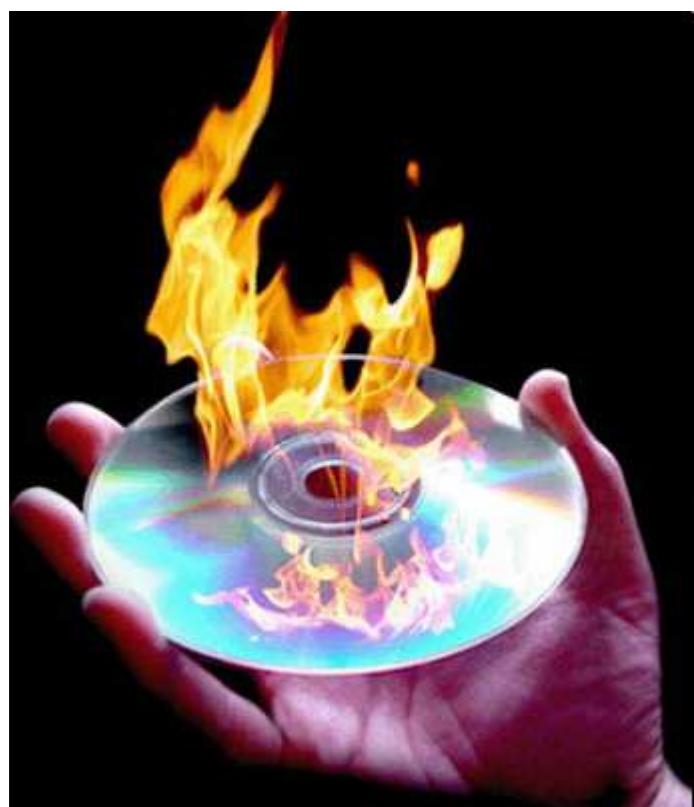
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PERFORMERS' RIGHTS LENGTH:

A VIEW FROM CULTURAL ECONOMICS

Master's Thesis



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Introduction.

The field of cultural economics, previously known as the economics of the arts, was founded by William Baumol and William Bowen. The Economic dilemma put forward in their book ‘Performing Arts: the economic Dilemma’ was the following: the technology of artistic performance is fixed and cannot be subjected to productivity improvements. A Beethoven quartet must be performed by four string players, and it takes them as long to perform it now as it did for the first players. Payments for the labor, in general, however, improve due to productivity increases and economic growth in the “dynamic” sector of economy. The arts are bound to become relatively more expensive. (Towse 2001a p3). One central theme of cultural economics has been the question of artist’s earnings and the extent to which they drive up costs of producing cultural output.

I cannot think of any time in history or place, where art did not need to be supported by private, or royal patrons, or government. Even such outstanding personalities like Mozart and Bach would not have been able to make their own living without support. Nowadays high art in Europe is mainly supported by governmental grants and subsidies. This kind of protection is called “direct”.

Direct protection has both positive and negative sides. Grants and subsidies can be given to organizations or individual artists, so that they do not have to worry about covering their costs and put all their energy and talent in art, which, by the way, is considered by cultural economists as a “common good”. However, many researchers argue that such a system can be dangerous for artistic quality, productivity and innovation. (see Towse 2006). One of the main concerns is that since there is always a need to choose who deserves to be supported, and who is not, there will always will be a danger of making a wrong choice. Even when these decisions are made by boards and committees that consist of qualified and experienced artists. A vivid example is the situation in post-Soviet countries, where for many years artistic and cultural development support was centralized. In the Soviet Union opera, and ballet theaters, classical music and dance training had a great governmental protection. The result is that Russian classical ballet has a leading position all over the world, Russian classical musicians are well known and welcome in all famous concert halls and theatres. But at the same time modern dance practically does not exist in Russia, young people have to go to study abroad, if they are interested in modern

dance or music. Two main Russian conservatories (in Moscow and Saint-Petersburg) do not have jazz and light music departments because there are simply no qualified and experienced teachers in these genres to teach there.

Another risk is that a subsidy to an artists' training may result in a significant expansion of the number of courses offered by universities, music, art and drama colleges, and produce more and more graduates, who flood labor markets causing overproduction – performances of all kinds, books, pop music, film scripts, works of art. The response of consumers and of producers in creative industries to this superabundance is to focus on superstars in order to reduce the cost of information overload. (Towse 2001 p.172)

In the United States art is supported mainly indirectly. The system provides certain conditions (like tax deductions) that stimulate private donations to the art sector. It does not mean that this kind of support does not cost anything to the government. In a simple model it can be assumed that people and organizations donate the same amount of money to art instead of paying taxes.

Cultural policy is a kind of indirect support, and it can exist not only as tax deductions. Copyright law is one of the cultural policy methods that can play a significant role in the cultural sector as an income source. Most modern cultural economists agree with the statement that the diversity of financial sources is the best solution for the art sphere. It means that money should come from three different sources: government subsidy and grants, the so called “third sphere” (private donations) and the market.

National cultural policy-makers (Ministries of Culture, Art Councils etc.) have basically two tasks: stimulating creativity and stimulating an interest in appreciation of the arts on the part of population – in other words, the supply of and demand for the arts.

My interest to copyright comes from the fact that by means of copyright the cultural policy can provide the art sector with a possibility to earn money from the market sphere, and it will not cost anything to the government. Unfortunately, nowadays copyright law that is perceived as intended to assist artists, has fostered the growth of large multinational corporations which dominate the cultural industries. These firms produce goods and services that face uncertain reception on the market so they concentrate where possible on reinforcing success and this also leads to the

promotion of superstars, cutting out smaller artists and narrowing artistic supply. Copyright law is being increasingly criticized from many different angles, among the critics being academics from the law, economics and cultural studies. (Towse 2001 p.173).

I decided to focus on performers' rights duration, first of all, because I have a so called "personal interest" in performing arts. I have been trained as a classical musician for around six years, which makes me familiar with the performing artists' life and labor market from inside. I consider the duration of intellectual property rights as one of the most important aspects of the copyright law, because the duration is the major factor of its value. The intellectual property like any other property costs money and can be sold, but its price is time limited. For example, if you once bought a house, after 50 years time you can still use or sell it, but performers' rights protection on sound recordings lasts only 50 years from the date of fixation (I am not talking about moral rights here), and the value of performers' rights diminishes proportionally to the number of years left until the expiration date. There are many other factors that affect the monetary value of copyrights and performers' rights, but I will talk about them later.

It is important to note that the problem of performers' rights duration only covers the sphere of recordings of a performers' works, because this is the only way a performance can survive in time. This is why in this research I will talk mainly about performers' rights duration on sound recordings.

Copyright law and performers' rights protection is more or less similar in all European countries. I have decided to focus on performers' rights protection in the UK, because the music industry market in this country is very large, and plays an important role in the economy of the country. Moreover, I was very lucky to find out that the data I need are available from the "Call for Evidence" of the Gowers Review (those who work on research in the performers' rights protection sphere know how difficult it is to find any evidence about it).

The European Commission is reviewing the length of copyright protection for sound recordings in 2007 as part of the review of the body of Community copyright law. Some members of the UK record industry have called for the Commission to increase

retrospectively the term of performers' rights and producers' rights from the current 50 years to 95 years. That is, that the term of protection should be extended for existing works that are already in copyright as well as future works. This extension would also apply to works that have fallen out of copyright, but which would still be in copyright if the longer term existed when they were created (the 'retroactive' revival of copyright).

Some companies and trade bodies in the UK record industry have called for the UK Government to support their submission to the Commission that the copyright terms on sound recordings should be extended. A number of reasons were put forward in the Call for Evidence from some groups in favour of extending the term of protection:

1 - parity with other countries; 2 - fairness; 3 - extension of the term would increase the incentives to invest in new music; 4 - extension of the term would increase the number of works available; 5 - maintain the positive trade balance.

After a careful and deep research Gowers Review group suggested not to change the existing terms of protection of performers' rights. Gowers Review states that the existing length of performers' rights is optimal, and any change would only harm the industry players' interests. (I will focus on the details later). I do not have any doubts about the high professionalism of the Gowers Review group, and I am sure that their findings are objective and correct. I also had a chance to make sure by reading the review, that all the arguments provided there are fair and valid.

However, since the problem of performers' rights protection length is being discussed so intensively, I think that it can be presumed, that not everything is in harmony there. Working on the data analysis, I could not find any single response to the call for evidence, saying that everything is fine, that the respondent is happy with the current performers' rights protection law and nothing should be changed. There were several responses saying that they think that the current performers' rights length should not be changed, but not because the situation is perfect, but because they just can not think of a way to improve the situation, that any change in a performers' rights duration will only make it even worse... I am afraid, that this was also the concern of the Gowers Review group.

The aim of this work is not to find an optimal duration of performers' rights protection. Neither do I want to develop any theories. I believe that the Gowers

Review group did the best work that could possibly be done here. I would like to focus on the arguments, interests and problems of the music industry players, so that we can have a look at them, not in terms of numbers, as most of the economic reports show, but in a more human way. As we can see, numbers do not give us the way to improve the situation here. In general, my aim is to show the details and facts that we usually do not find in economic reports, because reports always tend to generalize, and do not pay attention to small elements. I hope that a more human approach can help, or at least to bring us a little bit closer to a right view on performers' rights duration.

So, the aim of this research is to show the importance of the problem; to show how economists tend to find a right solution; and to show the music industry players in detail, which are usually lost, when replaced by numbers.

Contexts

Before exploring the specific contexts on economics of copyrights and performers' rights duration, I will give in the first chapter an overview of the UK music industry structure and its economic position inside the UK and abroad, to give an idea of the economic significance of copyright law for the industry. I will also give a historical overview showing how performers' rights were developing including economic reasons for this development.

The first context, in which it is interesting to raise the question of the optimal duration of performers' rights, is to have a look at scientific researches that were made on copyright duration. The majority of researches on the duration of copyrights are based on the US evidence, because US copyright law has a rich history that includes extensions and renewals of copyrights, that can be useful for researchers, because it shows what really happens in practice and concrete circumstances, not only in theory.

As far as most economists agree that copyrights should be limited, I find it useful to provide arguments for a limited duration of copyrights. Unfortunately there are not many researches that are made on performers' rights duration, but those that exist cannot be ignored, so I also provide an overview of such works in the second chapter.

As a cultural economist I have a specific interest in incentives to create and to consume artistic goods. I see three groups of industry players whose economic positions and interests seem important from this perspective. They are small record labels, who supply music recordings in diverse styles and for diverse audiences (not only commercial projects); performing artists, who cannot be ignored in a research like this; users – organizations that use recorded music. I have a specific interest in how these group members express their views on optimal length of protection, because I have a feeling, that under the numbers that are provided by most researches on IP rights duration some important elements are missing. I am interested not only in “how” they think the system should look like, but also “why” they think so. (Chapter 3)

It should be noted that other contexts could be raised. My hope is that my research will provoke and encourage further thinking, dialogue, critical debate and research about the interrelationship between artists' rights and incentives to create and supply high quality art on the market.

Before analyzing the historical background and the contexts mentioned above, I will highlight in the next chapter the methods applied to this research.

Designing the research

The methods used in this research are explorative, descriptive and qualitative. There is no hypothesis to be proven and efforts are made to avoid assumptions about what the music industry players' needs, concerns and points of view are on the optimal performers' rights duration, before the data is analyzed. Therefore, I predominantly apply the inductive method, which "*suggests that theories can be derived from observations and which is used in qualitative research*" (Seale, 2004, p.295). In general, the inductive method moves from the particular to the general. However, I do not claim to achieve widely representative results but rather theoretical generalizations. Here, it should be noted that coding is the data analysis in qualitative research. Theories are linked to observations, statements, images, concrete data, etc. The aim is to show the variety of situations, opinions, factors that affect interests of music industry players related to the duration of performers' rights.

In general, I first want to show the economic importance of copyright and performers' rights role in the UK music industry. I also want to gain the view of economists on the optimal performers' rights duration, and then the point of view of the music industry players. My research will be descriptive.

A second criterion to assess my research is its effectiveness: To what extent can my research influence policies, get rid of stereotypes, etc.?

I aim to be reflexive in my research practice, meaning that I will question my own assumptions, critically examine my process of inquiry, and "*consider my effect on the research settings and research findings*" (Seale, 2004, p.380).

Moreover, it should be noted that ethical issues play an important role in research. I am not planning to criticize works on optimal performers' rights length or optimal copyright length that already exist. I will only illuminate another side of these research works that suffers from shortage of attention. I do not think that it will harm anyone.

It should be noted, that there is a significant number of research works devoted to the optimal copyright duration, especially to renewable copyrights based on the United States copyright system and history, but there is a very small number of works

on performers' rights. Relevant information may be found in several works on the performers' labor market and music industry.

Furthermore, since the performers' rights are analogous to copyrights, I think that an overview of copyrights duration studies could give a further insight into the of the optimal performers' rights duration. I also think that a historical overview of performers' right development can be interesting and helpful in understanding the nature of performers' rights in general.

Actually, I was very lucky, because all the data I needed was already collected by the Gowers Review team, and I did not have to make any interviews. Nevertheless, the amount of work in selection of responses was significant. First, because the scope of interests of Gowers Review was much broader than mine and many submissions did not cover the aspect of performers' rights duration in the way appropriate for my research. Secondly, I was only interested in a very particular groups of respondents. I was looking for performing artists, small record labels and organizations that can be considered as users of recorded works. (I would like to note, that thought record labels have different rights than performers, in many cases they still can be considered as "users", of recorded music, and this is why I found it appropriate to include their points of view into my research.) It is worth saying that very few submissions were selected for my research, because it appears that there are too many organizations that can represent interests of several groups of industry players (for example music management agencies can represent both performers and record companies), but I was interested only in those whose position on the market is clear and simple. It should be noted, that I was not looking for responses from major record labels such as EMI for several reasons: (1)their opinion on performers' rights extension is well known. Actually, major labels were those who attracted so much attention to this problem, by their call for the UK Government to support their submission to the EU Commission that copyright terms on sound recordings should be extended. (2) As it was discussed by many economists, major labels are in a position that is very close to be considered as monopolistic. In a cultural industry this would mean a danger of reducing the diversity and quality of artistic products on the market, which is not permissible from the economics of art and culture point of view.

Cultural economics is the application of economics to the arts, heritage and the cultural industries and one of the subjects it deals with is supply of works of art,

music, literature, etc. Copyright is supposed to influence the supply of artistic work in a positive way by providing an incentive through statutory protection. (Towse 2006).

The responses to the Gowers Review call for evidence on performers' rights duration are very broad, thus a discourse analysis is the most suitable for all these collected data. It consists of the analysis of how performers' rights duration affects individual artists, small record companies and users. In such interpretative analyses it is important to identify the key themes and arguments, to look for variation in the discourses. Key issues are not only discussed from an economic and legal point of view, but also from a sociological, cultural perspective. The data contains responses of different group representatives such as artists, collecting societies, record companies... I have to be aware that the focus groups do not allow researchers to measure different responses and then generalize these to a larger population, but rather to explore how selected groups of individuals define, talk about the problem. (Seale, 2004, p.200). Moreover, members of the focus groups should be homogenous with respect to the relevant selection criteria.

1. UK music industry, copyright and performers rights

1.1.1. Music industry. Importance of copyright

UK legislation on copyright is primarily contained in the Copyright, Designs and Patents Act 1988 (the 1988 Copyright Act).

Two principal types of copyright are involved here. A separate copyright exists in the sound recording when a particular artist performs a musical work and it is recorded – performers' rights. Also, copyright exists in the music which is performed by an artist, that is in the words and music of a song and in the composition of a classical composer. In the UK, music copyright lasts until 70 years after the death of the composer and performers' right in a sound recording lasts until 50 years after the record is released. (MMC 1994)

Composers and songwriters usually assign the copyright in his or her music to a 'music publisher', a business set up to exploit and protect composers' works. The activities of music publishers are outside the sphere of my interest, since they do not supply the recordings of performances. Although some music publishers are affiliates of record companies, many artists sign up with publishers not associated with their record companies. In this case music publisher will collect a royalty for the songwriter/composer for every record containing his or her composition which is sold by a record company. This is known as a 'mechanical royalty'. It is collected by the Mechanical Copyright Protection Society (MCPS) on behalf of the music publisher and composer. Under the copyright legislation the copyright in a sound recording is usually owned by the record company, but the copyrights can also be licensed or assigned to others. A UK record company will normally license overseas exploitation to a local company and in this case the UK record company will receive a licence fee for every record sold abroad. Conversely, if a UK record company is licensed by an overseas company to issue or re-issue its sound recordings in the UK (usually

recordings of an artist signed to that company) the UK record company will have to pay a licence fee for every record that is sold. (Towse 2001 p. 121-123)

The copyright legislation grants a bundle of rights to a copyright owner which includes the exclusive right to make copies and the exclusive right to perform the work in public (including broadcasting). Thus record companies also receive licence fees every time a record is played in public (eg in clubs or pubs) or is played on the radio or television. These fees are collected by Phonographic Performance Limited (PPL) on behalf of the record companies.

Finally, the copyright legislation gives a copyright holder the right to control imports. This derives from the territorial nature of copyright, under which UK legislation gives certain rights in the UK and other countries give rights in their territories. These may differ from country to country but generally conform to international conventions under which most countries have agreed on reciprocal arrangements for a minimum level of copyright protection. Generally, records can only be imported into the UK with the permission both of the owner of the UK copyright in the music and the owner of the UK copyright in the sound recordings. The provisions of the EEC Treaty provide an exception. Where a record has been lawfully put on the market in one member state, by the copyright owner or with his consent, the record is able to enjoy free movement within the EC without the payment of licence fees or customs duties. Moreover, under an EC Directive¹ which was implemented by 1 July 1994, all member states are required to provide copyright owners with the right to control imports from outside the EC (which the UK copyright legislation already does). (MMC 1994)

1.1.2 Concluding remarks

Copyright lies at the heart of the recorded music industry. It allows record companies to invest money and enterprise in creating commercial recordings which can be exploited in both the UK and overseas markets knowing that they have legal protection against unauthorized reproduction. Copyright is also important in ensuring that the talents of successful artists and songwriters are rewarded. The protection of copyright is therefore crucial both to the creative side of the music industry and to the businesses of the record companies.

1.2.1 The history of performers' rights.

The classic definition of performing artists in international law is “actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, or otherwise perform literary or artistic works” (Art 3(a), Rome Convention). The definition is wide in that it includes performances of works in public domain, but narrow in that it excludes all those who do not perform “works”, eg variety artists, acrobats, sports personalities or extras on stage or in films.

Unlike other neighbouring rights owners, performers are physical persons, like authors, and from a purely philosophical point of view it is difficult to see the essential difference between the work of a derivative author, say a translator, or an arranger, and that of a performer. (Stewart 1989)

The Rome Convention (1961), the TRIPS Agreement (1994) and the WIPO Performances and Phonograms Treaty (1996) together form the international system of performers' rights.

It is often said that a crucial economic distinction between composer and singer is that the latter can be paid on the spot for his performance whereas the composer has to be rewarded for the (multiple) uses of her work.

The distinction between the professions of composer and performer only developed slowly. Until the end of the 18th century, not only did most composers perform or conduct their own works (even as late as Brahms, the composer had to make his name as a pianist, as Beethoven, Mozart and a host of others had done before him), they also were treated by their patrons as servants (Wagner had to wear servants' livery while at the court of Weimar in the 1840s).

Composers, however, were always vulnerable to unauthorised copying of their works whereas performers were not until relatively recently. This is no doubt an economic rationale for their different treatment under copyright law before the advent of sound recording. (Towse 2007) (see also Gillian (1992).

In the beginning of XX century, with the invention and very fast spreading of sound recording and broadcasting technologies, economic situation and the labor market of performers had changed significantly. Opening new possibilities for performers on the one hand, technical progress created the situation when their interests could easily be affected on the other hand. Listening to a performance did not necessarily imply the presence of a performer anymore. Ruth Towse (2007) argued that the effect of ‘canned’ music on the employment of musicians in the UK was countered by several moves: one was getting the BBC agree to restrict ‘needle time’ and to play so many hours of live music; another was to get compensation for the loss of income from live work via rights to remuneration in copyright law.

Going back to the beginning of the XX th century, we see the society facing the situation when once recorded, the performance could be sold and broadcasted. The amount of paid work for performers decreased. The crises that followed the First World War made the situation even worse. National and international organizations of performing artists, trade unions, specialists in copyright faced the need to find ways to solve the problem.

Performers’ rights were meant to protect performers’ economic interests in situations when recordings of their works were used.

At the international level, the first proposals concerning protection of producers of phonograms and performers took form at the 1928 Rome diplomatic conference to revise the Berne Convention. Around the same time, the International Labor Office (ILO) took an interest in the status of performers as employed workers. Further discussions took place at the Brussels revision conference in 1948, where it became clear that, due to the opposition of authors’ groups, legal protection of the rights of performers and producers of phonograms would not be provided under copyright, although there was support for development of an international instrument providing adequate protection. Different committees of experts prepared draft conventions. Finally, in 1960, a committee of experts convened jointly by BIRPI (United International Bureaux for the Protection of Intellectual Property, the predecessor organization to WIPO), United Nations Educational, Scientific and Cultural Organization (UNESCO) and the ILO, met at The Hague and drew up the draft convention which served as a basis for the deliberations in Rome, where a Diplomatic Conference agreed upon the final text of the International Convention for the

Protection of performers, Producers of Phonograms and Broadcasting Organizations, the so called Rome Convention, on October 26, 1961. (Lipszic 1997)

The Diplomatic Conference at Rome established, in Article 1 of the Rome Convention, the so-called “safeguard clause,” which provides that the protection granted under the Convention shall leave intact and shall in no way affect the protection of copyright in literary and artistic works. Consequently, no provision of the Rome Convention may be interpreted as prejudicing such protection. Under Article 1, it is clear that whenever the authorization of the author is necessary for the use of his work, the need for this authorization is not affected by the Rome Convention. Performers’ rights were only rights neighbouring on copyright, not copyright *per se*, and were collective remuneration rights, not individual exclusive rights. Performers were treated differently in legal terms from composers even though their services are mostly jointly marketed for economic reasons and their rights exercised side by side.

The Convention also provides that in order to become party to the Convention, a State must not only be a member of the United Nations, but also a member of the Berne Union or party to the Universal Copyright Convention (Article 24(2)). Accordingly, a Contracting State shall cease to be a party to the Rome Convention as from that time when it is not party to either the Berne or the Universal Copyright Convention (Article 28(4)). Because of this link with the copyright conventions, the Rome Convention is sometimes referred to as a “closed” convention, since it is only open to States which meet the above requirements. Thus began the development of performers’ rights but they were only rights neighbouring on copyright, not copyright *per se*.

Like the Berne Convention, protection accorded by the Rome Convention consists basically of the national treatment that a State grants under its domestic law to domestic performances, phonograms and broadcasts (Article 2(1)). National treatment is, however, subject to the minimum levels of protection specifically guaranteed by the Convention, and also to the limitations provided for in the Convention (Article 2(2)). That means that, apart from the rights guaranteed by the Convention itself as constituting the minimum of protection, and subject to specific exceptions or reservations allowed for by the Convention, performers, producers of

phonograms and broadcasting organizations enjoy the same rights in Contracting States as those countries grant to their nationals. (Lipszyc 1997)

Performers are entitled to national treatment if the performance takes place in another Contracting State (irrespective of the country to which the performer belongs) or if it is incorporated in a phonogram protected under the Convention (irrespective of the country to which the performer belongs or where the performance actually took place) or if it is transmitted “live” (not from a phonogram) in a broadcast protected by the Convention (again, irrespective of the country to which the performer belongs). These alternative criteria of eligibility for protection are intended to ensure application of the Rome Convention to the largest possible number of performances.

The minimum protection guaranteed by the Convention to performers is provided by “the possibility of preventing” certain acts done without their consent. Instead of enumerating the minimum rights of performers, this expression was used in order to allow countries like the United Kingdom to continue to protect performers by virtue of penal statutes, determining offenses and penal sanctions under public law. It was agreed, however, that the enumerated acts which may be prevented by the performer require his consent in advance. Performers are to be granted the “possibility of preventing” broadcasting or communication to the public of a “live” performance; recording an unfixed performance; reproducing a fixation of the performance, provided that the original fixation was made without the consent of the performer or the reproduction is made for purposes not permitted by the Convention or the performer (Article 7). (Lipszyc 1997)

In respect of the protection of performers, protection against rebroadcasting and fixation of performances for broadcasting purposes, where the performer has consented to broadcasting, is left to national law. The existence of contractual arrangements for use of performances was recognized in a provision stating that performers cannot be deprived of the ability to control by contract their relations with broadcasting organizations (Article 7(2)); it was understood, likewise, that the meaning of “contract” in this context includes collective agreements and decisions of arbitration boards. Another area where member States were allowed discretion was in respect of the participation of more than one performer in a performance; Article 8 of

the Rome Convention provides that, if several performers participate in the same performance, the manner in which they should be represented in connection with the exercise of their rights may be specified by each Contracting State.(WIPO 2002)

Perhaps the most notorious provision of the Convention which provides discretion to States is Article 12, concerning what has come to be known as “secondary use” of phonograms. It provides that if a phonogram published for commercial purposes is used directly for broadcasting or any communication to the public, an equitable remuneration shall be paid by the user to the performers, to the producers of the phonogram, or to both. The article does not grant an exclusive right either to performers or producers of phonograms in respect of secondary use of a phonogram; rather, by providing for a single remuneration, it seems to establish a kind of non-voluntary license. Yet, Article 12 does not specify that payment of remuneration is mandatory for either beneficiary; it states only that at least one of them should be paid for the use, and that, in the absence of agreement between these parties, domestic law may establish conditions for sharing of the remuneration.(WIPO 2002)

Like the Berne Convention, the Rome Convention permits member States to establish certain limitations on rights. From the standpoint of the rights of performers, Article 19 of the Convention provides a significant limitation, second only to Article 12 in the controversy it has generated over the years since the Convention was established. Article 19 provides as follows: “Notwithstanding anything in this Convention, once a performer has consented to the incorporation of his performance in a visual or audiovisual fixation, Article 7 [which sets out the rights of performers] shall have no further application.” Article 19 was intended to ensure that the Convention did not apply to the cinema industry, because film producers feared incursions on their interests if performers were to enjoy rights in films. Article 19 does not, however, affect performers’ freedom of contract in connection with the making of audiovisual fixations.(WIPO 2002)

The minimum term of protection under the Rome Convention is twenty years from the end of the year in which the fixation was made, as far as phonograms and performances incorporated therein are concerned, or the performance took place, as

regards performances not incorporated in phonograms, or the broadcast took place, for broadcasts. (Lipszyc 1997)

The Rome Convention has been referred to as a “pioneer convention.” While the copyright conventions concluded at the end of the nineteenth century followed in the wake of national laws, the Rome Convention elaborated standards of related rights protection at a time when very few countries had operative legal rules protecting performers, producers of phonograms and broadcasting organizations. The number of countries party to the Convention is growing, however, and its influence on the development of national legislation has been significant: since 1961, a number of countries have legislated on the protection of related rights, increasing the number of national laws protecting producers of phonograms or broadcasting organizations. A growing number of States have also granted specific protection to performers.

But let's not forget that performers were treated differently in legal terms than authors even though their services are mostly jointly marked for economic reasons and their rights exercised side by side. Performers' rights were only neighbouring on copyright, and were collective remuneration rights.

The TRIPS Agreement, concluded in 1994 as part of the Uruguay Round of negotiations under the former GATT (now the World Trade Organization) also contains provisions on the protection of related rights. Under the Agreement, related rights are provided to performers, producers of phonograms and broadcasting organizations.

Performers are granted the rights to “prevent” (not the right to authorize) the fixation of their unfixed performances on phonograms, the wireless broadcasting and communication to the public of such performances, and the reproduction of fixations of such performances. There are no rights in respect of broadcasting and communication to the public of fixed performances, as in the Rome Convention. (Towse 2006)

The duration of protection for related rights is 50 years for performers and producers of phonograms and 20 years for broadcasting organizations. In general, the same limitations on rights may be applied as those allowed under the Rome Convention.

An additional obligation requires application of Article 18 of the Berne Convention to the rights of performers and producers of phonograms; this means that the national legislation which implements the TRIPS Agreement must provide protection for all performances and phonograms which have not fallen into the public domain due to expiration of the term of protection in their country of origin. Finally, as noted above, the TRIPS Agreement contains detailed provisions on enforcement of intellectual property rights, including related rights, as well as a mechanism for settling disputes among members concerning compliance with the obligations under the Agreement. .(WIPO 2002)

The International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (the Rome Convention) dates back to 1961. Technological and commercial developments and practices since then (such as reprography (in other words, photocopying and printing technologies), video technology, compact audio and video cassette systems facilitating home taping, satellite broadcasting, cable television, the increase of importance of computer programs, computer generated works and databases, and digital transmissions systems such as the Internet, etc.) have profoundly affected the way in which works can be created, used and disseminated. In order to adapt the law system to these changes, in 1996 a new treaty was created - the WIPO Performances and Phonograms Treaty (the WPPT). The WPPT provides explicitly for exclusive reproduction rights for performers and for phonogram producers.

Perhaps one of the most significant contribution of the WPPT is its recognition of the rights of performers to authorize the on-line transmission of their works, fixed performances and phonograms, as the case may be. The WPPT provide that performers must be granted exclusive rights to authorize the making available of their works, performances fixed on phonograms and phonograms, respectively, by wire or wireless means, in such a way that members of the public may access those works, performances and phonograms from a place and at a time individually chosen by them (that is, interactive, on-demand services). Performers are granted an exclusive rights of distribution (Articles 8 and 12 of the WPPT). The WPPT grants an exclusive right of commercial rental to, first, as determined in national law, performers in respect of

their performances fixed in phonograms and, second, phonogram producers in respect of their phonograms. (WIPO 2002)

In general, the WPPT provides for the same level of protection for performers and producers of phonograms as the TRIPS Agreement. It should be noted that this also means that the coverage of the rights of performers in the WPPT extends only to live aural performances and performances fixed in phonograms, except for the right of broadcasting and communication to the public of live performances, which extends to all performances. However, for the first time at international level, moral rights are conferred upon performers. (Delia Lipszyc 1997)

Moral rights – rights of attribution, integrity, disclosure and withdrawal. In European Union Moral rights are inalienable and unwaivable.

In a further TRIPS-plus element, similar to Article 12 of the Rome Convention, Article 15 of the WPPT provides to performers and producers of phonograms a right of remuneration in respect of the broadcasting and communication to the public of phonograms, with the possibility of reservations, as under the Rome Convention. (WIPO 2002)

It is important to note that in the world of the performing arts, a significant distinction is made between the star and lead performers ('principals'), the 'named' performers and the 'nameless' chorus. In live performance, the principal performers are often paid on a different basis: they receive fees and/or incentive payments, such as a share of box office revenues, while the other performers are paid a weekly wage. This distinction carries over into contracts in the recorded media. In the music industry, the distinction is between the 'contracted' or 'featured' artists and the 'backing' or 'non-featured' artists.

Featured artists with royalty contracts must maintain contact with the record label that recorded their work, whereas non-featured ones do not need to do so and for a long time, there was no mechanism for tracing their contribution to a sound recording. (Towse 2006)

In 1992, the so-called EC Rental Directive was drawn up, which basically enforced the Rome Convention for all EU countries. Its drafters evidently believed that one of

the roles of copyright and related rights legislation was to correct the weaker bargaining position of the non-featured performers and that the way to do this was to require that equitable remuneration could only be administered by a collecting society set up for that purpose. (Towse 2007)

The WIPO Treaties, the so-called ‘Internet Treaties’, the 1996 WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) have made important changes to performers’ rights introducing a new exclusive right in favour of copyright owners, including performers, who make their works available on-line to the public. They also mandate the prohibition of the circumvention of copyright protection (TPMs – technological protection measures) and of tampering with rights management information (DRM – digital rights management). The European Union signed these WIPO Treaties on behalf of member states and subsequently issued Directive 2001/29/EC *on the harmonisation of certain aspects of copyright and related rights in the information society*, the so-called ‘Copyright Directive’, finalised in 2001, which required member states to reform their national copyright laws where necessary to comply with the Directive. In the USA, the Digital Millennium Copyright Act (DMCA) implements the WIPO Treaties. Thus with the WPPT, performers now have an individual exclusive right (though not a full copyright) equivalent to that of authors. (Towse 2007)

1.2.2 Concluding remarks

As we can see, a lot of changes have been made lately to performers’ rights. Their rights became more similar to authors’ rights. There still are significant differences between them. Most likely they will never become absolutely equal because of the nature of interaction between the authors’ work and the performers’ work, but we may expect some changes in performers’ rights soon. A reason for this can be, for example, changes on the market, which is becoming more and more globalised. There have been a lot of discussions about the possibility to extent the duration of performers’ rights.

The European Commission is reviewing the length of copyright protection for sound recordings in 2007 as part of the review of the body of Community copyright law. Some members of the UK record industry have called for the Commission to increase retrospectively the term of copyright from the current 50 years to 95 years. That is, that the term of protection should be extended for existing works that are already in copyright as well as future works. This extension would also apply to works that have fallen out of copyright, but which would still be in copyright if the longer term existed when they were created (the ‘retroactive’ revival of copyright).

Some companies and trade bodies in the UK record industry have called for the UK Government to support their submission to the Commission that copyright term on sound recordings should be extended. (Gowers review of intellectual property) UK Government did not agree to support them, but the question of performers’ rights extension is still a matter that worries industry players.

1.3 UK music industry structure

1.3.1 The record companies

The main activity of a record company is creating and using copyright in sound recordings. Usually, record companies achieve this by signing contracts with artists where the artist usually agrees to record exclusively with a particular record company for a certain period of time. In return, the artist will usually receive an advance of royalties at the beginning of work on every single record album and, according to copyright legislation, the record company will own the copyright in these recordings. A pop artist will usually write his own songs which he will record in a studio with the help of a record producer. (see Sand, 2003). When a satisfactory master recording has been made the record company will send it to the manufacturing plants where it will be reproduced on CDs, cassettes or vinyl. The most important activities of the record company will then be the marketing and promotion of the new release and its distribution to retailers. Promotion may take the form of videos and interviews on television, advertisements in the musical press and other media and personal appearances by the artist. Some promotion may be carried out jointly with particular retailers. In the case of a pop record the aim will be to get the record played on the

radio and to secure a place in the record charts, which will then lead to further exposure and increased sales. (MMC 1994)

The cost of making a record, including the artists' advance and costs of a video, can be very significant (up to £1 million or more for a pop album by a superstar). Thus a large number of copies should be sold, so that the record company can recover its initial costs. How many will be sold is usually not possible to predict in advance, particularly because only a small proportion of artists signed by a record companies actually achieves success. To try to secure those successes the company will put a great deal of effort into seeking to establish (or 'break') new artists during their early careers. If an artist becomes established the record company will seek to promote the artist's career and maintain a long-term relationship. If success is not achieved, the contract will be allowed to lapse. The initial outlays comprise a major source of risk for the company. (Towse 2001 p.121)

"There are five large multinational record companies operating in the UK which are known as 'the majors'; their market shares (by volume of albums sold in 1993 by the companies and their subsidiaries) are:

1The price of compact discs, Fifth report of the National Heritage Committee, 1992-93, HC 609.8%

EMI Records Limited and Virgin Records Ltd (EMI) 23.8

PolyGram UK Holdings Plc (PolyGram) 21.3

Warner Music UK Limited (Warner) 10.3

Sony Music Entertainment (UK) Limited (Sony) 9.6

BMG Records (UK) Limited (BMG) 7.0

Together these five companies have a UK market share of 72 per cent.

The remaining 28 per cent of the market is supplied by some 600 independent record companies. Many of these are very small companies, some making only one or two releases a year. However, the independent companies are a very important part of the record industry since they are often at the leading edge of developments in pop music, with the ability to discover new talent and establish new fashions. They also have to face the risks inherent in developing new repertoire". (MMC 1994 p.101)

As well as supplying records in the UK, the record companies exploit their recordings overseas. Normally this is done by licensing an overseas company to supply records in a particular country. In the case of the majors this will usually be the record company's local affiliate. The independent record companies will often rely on

unconnected companies to perform this function, including the majors' overseas affiliates. Licence income generated in this way is an important source of income for UK record companies and makes a significant contribution to the country's invisible earnings (Towse 2001 p. 122)

1.3.2 Artists

Artists involved in the recorded music industry comprise all those individuals who compose material or who perform as recording artists, or who carry out both activities. Recording artists often write their own material, particularly so far as contemporary popular music is concerned. There are also a large number of musicians who are contracted for particular recordings and who are known as 'session musicians'. (Sand, 2003)

1.3.3 The music publishing companies

The printing and selling of sheet music is now only a very small part of a music publisher's activities. Music publishers today play an important role in developing the careers of writers (both composers and lyricists), promoting those writers' works, and administering and collecting income from exploitation of the rights in those works. Most record companies, whether majors or independents, have an associated publishing arm. In the case of the majors, these are managed independently. (MMC 2004)

1.3.4 Studios and others involved in the recording process

Those who run studios where material is recorded, musical and technical equipment suppliers, producers and sound engineers are all an integral part of the process of making a recording.

1.3.5 Manufacturers

The manufacturing of records is carried out both by independent manufacturers and by companies which are vertically integrated into the major multinational record company groups. While the manufacturing arms of the majors mainly manufacture only for their own group requirements, the independent manufacturers serve both independent record companies and the majors, particularly when the latter require extra production capacity.

1.3.6 Distributors

The major record companies each operate centralized distribution systems in the UK, serving both their own record labels and third parties. The recorded music market also supports independent distributors who are closely tied both to the independent record companies and to the smaller, independent retailers. Wholesalers (such as Entertainment UK Ltd (EUK) and TBD) also play an important role in this market.

1.3.7 Promoters

Promoters of live performances organize venues, concert halls and support services. Live performances play an important part in the marketing by the record companies of individual groups and artists.

1.3.8 Retailers

Music retailing can be divided into a number of categories in the UK market: specialist music chains, such as HMV, Our Price and Virgin; non-specialist chains, such as W H Smith and Woolworths; and independent specialists, either small chains or single outlets. 'Non-traditional' outlets such as supermarkets, petrol stations and convenience stores also sell a limited selection of records. The direct mail selling of sound recordings has increased in importance in recent years.

1.3.9 Ancillary activities

There are a number of other organizations and activities which are important to the functioning of the music industry. These include:

- radio stations, clubs, pubs and discos, which play records and generate revenues for composers, performers and record companies in the form of royalties;
- trade organizations-there are a large number involved in the music industry, including the British Phonographic Industry Ltd (BPI), which represents record companies and manufacturers, and the British Association of Record Dealers (BARD), which represents retailers;
- the Musicians' Union, which represents many performers;
- collective licensing bodies-these represent copyright holders in negotiations with licensees over royalty payments and undertake the collection and distribution of these payments.
- the music press; and
- a large miscellaneous services and support sector including lawyers, accountants, managers, graphic designers, public relations companies and advertising agencies.

(MMC 1994)

1.3.10 UK music scene

“Since the emergence of The Beatles in the early 1960s, music originating from UK songwriters and performers has secured a share of world music sales disproportionately larger than would be expected given the size of the UK market. The breadth and diversity of UK artists continues to be reflected in the supply of UK repertoire to the global music market. For although sales to UK consumers account for only 7 per cent of the world total, it is estimated by the BPI that a larger proportion of world sales, about 18 per cent, are from recordings involving UK artists.

UK record companies regard the international exploitation and success of their recordings as of fundamental importance, believing that many of them would not be profitable on the basis of domestic sales of their repertoire alone. The UK music industry has over the past 30 years been a significant source of export earnings and

contributed to the country's balance of payments. Income to the UK from the licensing of recordings overseas exceeds £400 million per annum". (MMC1994)

A further characteristic of the UK music scene is its diversity. Although there is no universally accepted categorization, the BPI analyses music sales into the following categories: classical, country/folk, jazz, pop, rock, dance/soul/reggae, middle-of-the-road (MOR) and other. However, the music scene is even more diverse than this analysis would suggest, including punk, rap, heavy metal, acid-house, techno-rave, grunge and swing-beat; and new genres are constantly emerging. Accordingly, musical styles are not readily categorized. (MMC 1994)

Of the generally accepted categories mentioned above, pop and rock taken together accounted for nearly 60 per cent of album sales in 1992. Classical music accounted for a little over 9 per cent. The record companies report an accelerating trend towards fragmentation of musical genres and taste and an increased rate at which styles of music and individual releases become popular with consumers and then decline. (MMC 1994)

Certain artists and songs, however, can remain popular for many years, for example Cliff Richard or The Beatles. Classical music has enjoyed a growth in popularity in recent years. In 1982 classical music accounted for only 6.2 per cent of all albums, as measured by the BPI. In 1990 this peaked at 11.1 per cent, boosted by the popularity of such recordings as *Nessun Dorma* performed by Pavarotti and used as the theme tune for the 1990 World Cup on BBC television, but has since fallen back to 9.2 per cent in 1992. It is the changing taste of consumers which drives the relative popularity of different types of music and this in turn has dictated the wider range of music offered by record companies. Demographic trends have also affected the demand for recorded music, particularly in terms of the volume and type of music purchased by an ageing population, while younger consumers have become increasingly attracted by alternative entertainment such as videos and computer games. (MMC 1994)

1.3.11 Concluding remarks

The UK has a large and internationally important recorded music industry. The retail value of sales in the UK amounts to over £1 billion per annum and UK employment

associated with the industry exceeds 48,000. In addition, the industry earns considerable income from licensing its recordings overseas. The structure of the industry is complex and diverse, involving many activities from the creative work of songwriters and artists to the manufacturing, distribution and promotion of the finished records.

The recorded music industry is both complex and diverse, carrying out many interconnected activities from the creation and production of original pieces of music and the manufacture and distribution of recordings to the final sale to consumers. The most important participants in the industry include the record companies, the composers, the artists, the publishing companies, all those individuals and companies involved in the creation of sound recordings and the music retailers.

2. The optimal length of Copyright and performers' rights.

2.1. The optimal length of Copyright

The economic researches on optimal copyright length are based mostly on the interaction of two opposing economic effects: incentives to create and monopoly underutilization. While it is generally agreed that these two effects are important, there is disagreement among economists concerning the length of copyright protection that affects an optimal balance between these effects. Before the 1998 CTEA act, the duration of copyright protection in the US was seventy-five years for works for hire and fifty years after the author's death for works produced individually. The act extended the duration of copyright protection an additional twenty years for each type of work. (Posner, 2005)

In their *amicus curiae* brief to the Supreme Court of the United States, Akerlof et al. (2002) question the economic rationale behind the CTEA. They argue that the economic incentives from the CTEA's extension of copyright protection are not significant enough. In particular, in their analysis extending copyright duration from seventy-five to ninety-five years creates an additional compensation of 0.47% under an assumed discount rate of seven percent. The authors argue that such a small increase in compensation may not have a significant impact on the supply of new works. Akerlof et al. also argue that the retroactive extension makes the CTEA even more problematic. Welfare-enhancing benefits of retroactive extensions are not clear since there is no effect on works that have already been created. A retroactive extension might in theory increase the supply of new works if creators believe that the duration of copyright protection would be extended in the future. But the authors argue that the impact of these expectations on compensation is very small as well because there is uncertainty concerning future extensions. Furthermore, retroactive copyright extensions increase the costs to current creators of derivative works.

Liebowitz and Margolis (2005) study a sample of books published in the 1920s and show that forty-one percent of all books and fifty-four percent of best sellers remained in print after fifty-eight years. They emphasize that if the supply of new works was very elastic under the copyright terms in place before the act, then the

act could have increased the number of creative works substantially, and thus have had a positive effect on social welfare. The authors also argue that many works have relatively short lives and these works are of low commercial value. On the other hand, the works with longer lives have higher commercial value and might be sensitive to changes in copyright duration. Liebowitz and Margolis suggest that further empirical analysis is necessary before drawing any firm conclusions concerning the welfare effects of the CTEA.

Arguments that the CTEA can be rationalized because there are benefits from copyright ownership in addition to the provision of incentives needed for the initial creation of a work are provided by Landes and Posner (2003). For example, ownership might preclude the possibility of misuse of a copyrighted work. Also, a creation in the public domain may be overused, whereas ownership of the work deters “overgrazing” by providing incentives for the copyright owner to prevent a premature decline in the commercial value of the work. They also suggest that even retroactive copyright extensions can be beneficial since owners of copyrighted works incur maintenance costs and, make additional investments that enhance the value of the original work. They also state that indefinitely-renewable copyright protection can improve upon the current system of fixed-length copyright protection. They conducted an empirical analysis of copyrights and renewals for the last one-hundred years, and find that the average life expectancy for copyrights is about fifteen years and that copyright renewals are sensitive to registration fees. They suggest that under renewal fees somewhat higher than present registration fees, only a few works – those for which there are substantial social benefits of ownership – would be renewed for a long period of time. The rest of the works would enter the public domain soon after the works are created.¹

¹ Landes and Posner’s analysis is based on the registration-fee and renewal-fee system that is currently in place. The current initial registration fee is \$30 and currently for works initially produced on or after 1964 but before 1978 registration can be renewed after twenty-eight years for a fee of \$60.

2.2 Limited copyright duration

So, in general, the reasons offered in support of the proposition that copyright should be limited in duration are: (1) tracing costs increase with the length of copyright protection; (2) transaction costs may be prohibitive if creators of new intellectual property must obtain licenses to use all the previous intellectual property they seek to incorporate; (3) because intellectual property is a public good, any positive price for its use will induce both consumers and creators of subsequent intellectual property to substitute inputs that cost society more to produce or are of lower quality, assuming (realistically however) that copyright holders cannot perfectly price discriminate; (4) because of discounting to present value, incentives to create intellectual property are not materially affected by cutting off intellectual property rights after many years, just as those incentives would not be materially affected if, during the limited copyright term, lucrative new markets for the copyrighted work, unforeseen when the work was created, emerged; (5) in any event, retroactive extensions of copyright , on the one hand, can't affect the incentive to create new works, since a retroactive extension affects only the return on works already in existence. On the other hand, the possibility of obtaining retroactive extensions invites rent seeking. Landes and Posner (2003)

Determining the optimal term of copyright protection requires balancing at the margin the incentive effects of a longer term against the administrative and access costs, bearing in mind that the relevant access includes that of future creators of intellectual property as well as that of consumers of the existing property. (See Alonso and Watt, 2003)

Under existing law, when copyright protection begins is relatively unimportant because the duration of protection is determined not by that starting point but instead (except in the case of works for hire) by the death of the author. (This is not the case of performers' rights).

Consider now the public-good argument for limiting the duration of a copyright. Copyright law permits a writer or publisher or other producer of an expressive work

to charge a price that exceeds marginal cost. To extend the copyright term is to increase the duration of the restriction on output and likewise the producer's revenue.

The discounting of future deadweight costs ceases to reassure if the question is whether to extend the term of existing rather than future copyrights, at least existing copyrights that, unless extended, will soon expire. Suppose a copyright that was about to expire is extended another twenty years. The deadweight costs will begin to accrue immediately. (Novos and Waldman, 1984)

The narrow scope of the property right implies the existence of close substitutes, which increase the elasticity of demand for the copyrighted work. In the simple case of a linear demand curve and constant marginal cost, the deadweight loss of monopoly is one-half the amount by which the monopolist's revenue exceeds his cost; the higher the elasticity of demand, the smaller that amount.

If valuable works are withheld from the public domain because the copyright term has been extended, there may be significantly fewer public domain works (weighting number by quality) upon which to draw, which will reduce competition with existing copyrightable works.

Extending the copyright term might reduce socially excessive product differentiation. (Watt, 2000)

The conventional economic criticism of the length of the copyright term draws too sharp a distinction between creation and copying. If we imagine a novel published many years ago in which copyright has expired, the novelist is rediscovered and there is a surge in demand for his novels. Since no publisher could establish a property right in them, the incentives of publishers to publish and promote them might well be inadequate from a social standpoint. Often the demand for particular works of intellectual property is unknown before they actually reach the market. Some researchers suppose that an enterprising publisher has only a 20 percent chance of success with obscure public domain authors. He publishes the works of five such authors in order to have one success. In the absence of copyright protection, other publishers can wait and see which author sells and then bring out their own versions of his works. Publishers who wait avoid the costs of failure, but their free riding on the market information developed by the first to publish reduces the incentive of any publisher to search for potentially successful public domain works. The tendency

would be for only works of already well known and safe authors whose works were in the public domain to be published. (See also Varian, 2005)

It was argued that the reason so few classical composers are recorded and performed is that it is more costly to produce a musical composition than it is, say, to photograph a painting. The recording company that discovered and revived the works of a forgotten or obscure composer would be risking a substantial amount of money in an uncertain venture that could be imitated if successful. Much less expense would be involved in publishing a book or even arranging an exhibition of works of a forgotten or obscure painter. The absence of property rights in the music of well-known classical composers may also explain why many different recording companies record the same public domain works of Beethoven, Mozart, Bach, and other well-known composers. Recording companies differentiate their product by promoting the performer or artist who has signed an exclusive contract with the company. Because a recording company can, for example, copyright the Chicago Symphony Orchestra's recording of Mahler's First Symphony, it has an incentive to promote that version; it has little incentive to promote the public domain work of an unknown composer, since it could not appropriate the benefits of its promotional efforts, as distinct from benefits that might accrue from a recorded performance of the unknown composer's work by a popular performer. (Landes and Posner 2003)

Consider also the effect on the recording of a composer's obscure works when his copyrights expire. Upon the expiration of Puccini's copyrights, the rate at which his obscure works were recorded fell relative to recordings of the best-known works, since an investment in creating a demand for the obscure works would be more difficult to recoup once the works were no longer under copyright.

These examples show that a case against a definite time limit for copyrights can be grounded in the traditional incentive-based argument for property rights, though with a new twist. The new twist is recognition that the need to invest in intellectual property to maximize its value is not necessarily exhausted in the initial creation of the property. Investment may be necessary to maintain the value of the property and also to resurrect abandoned or otherwise unexploited intellectual property. (See Rappaport, 2002)

But it would not address the case in which intellectual property that has fallen into the public domain by abandonment is sought to be revived. Allowing abandoned physical

property to be withdrawn from the public domain unproblematically implements the policy that valuable property should in general be owned in order to create the correct incentives for its exploitation. (Posner, 2005)

Consider a record company that develops, promotes, and distributes new pop records. Which will be hits and which flops is not knowable in advance. In the absence of copyright protection unauthorized copying could drive the price of the successful recordings down to their cost of manufacture and distribution and leave nothing for covering the costs of developing and promoting recordings of new songs and new performers. Copyright protection enables the record company to earn enough money on the hits to cover both the costs of the hits and the production and marketing costs of the many failures. By doing this, copyright indirectly prevents free riding on marketing expenditures similar to those incurred to maintain interest in soon-to-expire copyrighted works.

2.3 Economics of performers' rights

The economic aim of copyright law is held to be that it offers an incentive to create works of art, literature, music and so on, so we may reasonably assume that this aim applies to changes in the law too: the change should improve the incentive. So, the first criterion for judging copyright reform should be: does it stimulate greater creativity? We must always remember that this is a question of marginal changes to incentives. The same rationale can be applied to performers. A performance is a work in the sense of copyright law and so the same economic logic should apply as to the work of an author, that is the exclusive right to control the exploitation of the performance is the incentive to its realization. However, the difference is that the performance, while a work in its own right, cannot be separated from the work being performed. (see Towse 1999, Towse 2007)

It is logical, that the song can exist without the singer, but the singer cannot perform without a song. On the other hand, it should be noted that there is much more composed music exist then it can ever be performed. Thus, the incentive to perform very important is highly important, if copyright is to achieve a goal of not only stimulating the creation of works but also their recording and issuing. The song that

no one is able to hear has little value to artists, and no value at all to the society. (Towse 2007)

A feature of many works that can be copied, such as sound recordings, is that it can simultaneously serve both the primary market of sales to users and the secondary market, in which the product is reused for intermediate commercial purposes or by private users. (See Towse 2001b)

2.4 Performers' rights extension

The European Commission is reviewing the length of copyright protection for sound recordings in 2007 as part of the review of the body of Community copyright law. Some members of the UK record industry have called for the Commission to increase retrospectively the term of copyright from the current 50 years to 95 years. That is, that the term of protection should be extended for existing works that are already in copyright as well as future works. This extension would also apply to works that have fallen out of copyright, but which would still be in copyright if the longer term existed when they were created (the 'retroactive' revival of copyright).

Some companies and trade bodies in the UK record industry have called for the UK Government to support their submission to the Commission that copyright term on sound recordings should be extended. A number of reasons were advanced in favour of extending the term of protection:

- (1) parity with other countries; in the USA, sound recordings are protected for 95 years. In Australia and Brazil the term of protection is 70 years;
- (2) fairness; currently composers have copyright protection for life plus 70 years,²⁰ whereas performers and producers only have rights for 50 years. Such a disparity is unfair;
- (3) 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;
- (4) 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; and

(5) maintain the positive trade balance; the UK has an extremely successful music industry. The UK industry has between a 10 per cent and 15 per cent share of the global market.²² In 2004, the UK sector showed a trade surplus of £83.4 million, earning £238.9 million in export incomes.

Copyright can be viewed as a ‘contract’ between rights owners and society for the purpose of incentivising creativity. As MacCauley argued in 1841, “it is good that authors should be remunerated; and the least exceptionable way of remunerating them is by a monopoly. Yet monopoly is an evil. For the sake of the good we must submit to the evil; but the evil ought not to last a day longer than is necessary for the purpose of securing the good”. If the exclusive right granted by copyright (or indeed any other form of IP right) lasts longer than it needs to, unnecessary costs will be imposed on consumers. (See Gowers Review of IP 2006)

Economic evidence indicates that the length of protection for copyright works already far exceeds the incentives required to invest in new works. Boldrin and Levine 2005 estimate that the optimal length of copyright is at most seven years. Posner and Landes 2003 eminent legal economists in the field, argue that the extra incentives to create as a result of term extension are likely to be very small beyond a term of 25 years. (CIPIL report 2006)

In theory, artists would receive payment for an increased period of time. The PWC report indicates that performers obtain 50 per cent of public performance income. However, the amount that performers receive from CD sales is set by a “greater variety of contractual arrangements between artists and record companies than ever before”. But, the ‘advance’ that creators receive is determined by contract and bands have to pay back the record company for initial investment. Eighty per cent of albums never recoup costs and so no royalties are paid to the creator. On average creators receive a very low percentage of royalties from recordings. If the purpose of extension is to increase revenue to artists, given the low number of recordings still making money 50 years after release, it seems that a more sensible starting point would be to review the contractual arrangements for the percentages artists receive. (Gowers Review 2006)

The length of term of protection on sound recordings and performance rights is not the only source of revenue. Performers receive pecuniary benefits beyond the return on the sale of their creations, by using celebrity status to make money. For example,

performers may choose to appear in advertising campaigns or to sell branded merchandise, and the value that they bring to the advertising campaign is derived from their creative works.

Investment decisions are typically based on the expectations of future returns. Therefore, in order for the incentive argument to hold, it must be shown that prospective extension of copyright term for sound recordings would increase the incentives for record companies to invest in new acts.

In an amicus brief to the Supreme Court in the challenge to the Copyright Term Extension Act, seventeen economists, including five Nobel Prize winners, estimate that extension for new works creates at most 1 per cent value for a twenty year prospective extension and they conclude therefore that extension of term has negligible effect on investment decisions. (*Eldred v. Ashcroft* 2003) The incentives argument is sometimes applied to artists as well as to record companies. That is, if musicians were to receive royalties for an additional period of time, they would have more incentives to make music. This seems highly unlikely given there are a large number of bands already creating music without any hope of a financial return.

Evidence suggests that most sound recordings sell in the ten years after release, and only a very small percentage continue to generate income, both from sales and royalty payments, for the entire duration of copyright. Before becoming a signatory to the Berne Convention the USA operated a system where copyright had to be applied for and renewed. Between 1923 and 1942, there were approximately 3,350,000 copyright registrations. Approximately 13 per cent of these were renewed. If current law had applied between 1923 and 1942, 3.35 million works would have been blocked to protect 77,000 commercially viable works. In a system where all works receive protection for the maximum term, the vast majority of works remain in copyright despite not being economically viable for the rights holder. The majority of income for sound recordings and books are generated within the first few years of issue. Extension would impact on all recordings. It would keep works in copyright even when they are not generating any income for rights owners. Most rights holders reissue recent works while largely ignoring earlier music. Of the sound recordings published between 1890 and 1964, an average of 14 per cent had been reissued by the copyright owner, and 22 per cent by other parties. These statistics suggest that the

costs of renewing copyright or reissuing copyrighted material are greater than the potential private return, but that these works may have enduring social and cultural value. (Gowers Review 2006)

If works are protected for a longer period of time, follow-on creators in the future would have to negotiate licences to use the work during that extended period. This has two potential implications: first, the estates and heirs of performers would potentially be able to block usage rights, which may affect future creativity and innovation; and second, this would make tracing rights holders more difficult. Thus extending term may have negative implications for all creators.

Evidence suggests that works that are protected by copyright are less available and more expensive than works in the public domain. A study by Paul Heald looked at the price and availability of 'durable books' – titles which retain their cultural and economic value and continue to sell many copies. Under copyright, these books are more expensive than those durable books that have passed into the public domain. Further study shows that works that are protected by copyright are less available than those works in the public domain. (PPL 2006)

The argument that the balance of trade would improve is doubtful. The term of protection depends on where a recording is played, not on where it was produced; therefore term extension would only be beneficial to the balance of trade if UK copyright owners were able to benefit from longer terms in other countries. However, most countries outside Europe, including the largest foreign markets for international repertoire – the US and Australia – do not apply a 'comparison of terms' to the protection granted to sound recordings. This means that the term of protection offered in a foreign country is not dependent on the country of origin of the sound recording. UK copyright owners already benefit from the longer term offered in the USA and Australia where royalties are collected from those countries. The UK is a substantial importer of sound recordings, and therefore the extra revenue from international sound recordings sold would be remitted overseas. (Gowers Review 2006)

Increasing the length of sound term increases the length of time during which royalties accrue. Once copyright in a sound recording ends, no royalties are due for that recording, and fewer licences are required to play those songs (copyright in the

composition would continue, and therefore would continue to require a licence). In 2005 PPL collected £86.5 million from venues, premises and broadcasters to remunerate rights holders.⁴⁴ The majority of this was collected from UK organisations and broadcasters. Because the cost of the licences reflects the royalties payable on the copyrights, as those copyrights expire, so the cost of the licences will fall. Term extension would keep the cost of sound recording licences higher for longer. Extension would increase costs for all businesses that play music, for example hairdressers, old people's homes, local radio and internet service providers. The impact of extension would therefore be felt throughout the economy.

Gowers Review suggests that extending the term of protection for sound recordings or performers' rights prospectively would not increase the incentives to invest, would not increase the number of works created or made available, and would negatively impact upon consumers and industry. Furthermore, by increasing the period of protection, future creators would have to wait an additional length of time to build upon past works to create new products and those wishing to revive protected but forgotten material would be unable to do so for a longer period of time. The CIPIL report indicates that the overall impact of term extension on welfare would be a net loss in present value terms of 7.8 per cent of current revenue, approximately £155 million.

The principal argument that is put forward to increase sound term retrospectively is that many recordings from the 1950s are beginning to fall out of copyright and that this will lead to a loss of revenue, therefore impacting on the incentives to invest in newer artists. As discussed earlier, investment decisions are made on the basis of expected future returns rather than those already received. Furthermore, if music companies have access to capital markets future investment decisions will be entirely unaffected by the length of protection of current works.

If recording companies receive increased revenue from an extension of copyright term, that revenue must come from somewhere. The PWC report performs an analysis of the price differential of sound recordings in and out of copyright. The report concludes that there is no statistically significant difference between the average prices of recordings that are protected by copyright and in the public domain. PWC contend that if prices do not change between works in and out of copyright, then term

extension will have no impact on consumers. Instead they suggest that those who make public domain recordings will benefit at the expense of the former rights holders.

2.5 Concluding remarks

However, it should be noted that there are problems with the data, such as the small sample size. Many public domain recordings may not be available in the large retailers where the data was sourced. They also note that as there are not a large number of popular recordings currently in the public domain, relative to the number of recordings that will enter the public domain in the coming years, there is no certainty that this observed trend will continue. As sound recordings of enduring popularity enter the public domain, economic theory suggests that competition between many release companies will drive down the price, just as has occurred in the public domain book market for classic literature. Therefore, the Gowers Review believes that most of the increased revenue from term extension would come directly from consumers who would pay higher prices for longer. Given that a low number of sound recordings or performances retain any commercial value beyond 50 years, extending term to all these would lock up the majority of recordings that are not generating income, rendering them unavailable for consumers and future creators.

(Gowers Review 2006)

3. “A view from the inside”

In this chapter I am focusing on certain groups of music industry players: small record companies, performing artists and organizations that use recorded materials for professional purposes. I tried to make my focus groups as homogeneous as possible.

“It should not be forgotten that focus groups do not allow researchers to measure different responses and then generalize these to a larger population, but rather to explore how selected groups of individuals define, talk about account for given issues” (Seale, 2004, p.200).

3.1.1 Small record labels

This section shows what small record labels think about the optimal duration of performers’ rights. Small record labels produce all kinds of recorded music. At the same time, somehow, they tend to share the market with major record labels.

Mike Batt the Chairman of Dramatico Entertainment Ltd, “*a small but successful entertainment company whose most instantly recognisable activity is as management and record label proprietors marketing and promoting the work of 21 year old singer Katie Melua, Britain’s biggest selling female artist for the past two years. Last year, the label despite having only eight employees, managed to come ninth on the Billboard magazine chart of record label market share in the UK. The company is active and successful to various degrees throughout the world but particularly strong in Europe, where Ms. Melua has achieved number one of top three placings with both her albums in most continental European countries.*” (response from Mike Batt to the Gowers Review 2006). Points of reference for Mike Batt include production writing and singing all of the Wombles records in the seventies, writing and producing Bright Eyes for Art Garfunkel and writing and producing for such acts as Steeleye Span, Elkie Brookes, David Essex, Cliff Richard, Vanessa Mae and more recently, Ms Melua. He is also active in the classical genre, having arranged for and conducted many of the major Symphony Orchestras. He had served on the board of the

Performing Right Society for many years in the past, and currently sits on the board of the British Phonographic Industry and the IFPI (European Board).

The subject of copyright term for sound recordings, is something Mike Batt has strong feelings about for many years. He *“is aware that this is a subject about which many things will inevitably have been said”* (response from Mike Batt to the Gowers Review 2006).. He points out that if a copyright extension is not the result of current efforts, he would relocate both his copyright-owning entity and the execution of all his recordings to the United States or other more copyright-friendly territory.

He does realise that the Public Domain exists so that we can all enjoy our cultural heritage without having to pay for it. Nevertheless, Mike Batt argues that *“if one builds a beautiful house - should it fall automatically into the ownership of the National Trust fifty years after it is built, causing the eviction of the now elderly person who built it?”* (response from Mike Batt to the Gowers Review 2006).The responders’ opening position (although he realises that it is untenably idealistic) is that copyright should never expire. Property is property, whether intellectual or physical. He can see no reason why it should not remain protected forever by law, unless it is gifted to the Public Domain in the will of its creator or by his or her estate.

“This is not just a matter of finance; it is also a matter of protecting the integrity of the work. Under the 1988 Copyright Act (and its 1956 predecessor) it is possible to prevent others from changing the words, tune or arrangement of a copyright work.” (response from Mike Batt to the Gowers Review 2006).Mike Batt says that when copyright expires, we can all jump on and plunder the work, like so many hyenas tearing apart a carcass. He supposes there is an argument that new art can grow from old, and indeed this does happen. He would like to think that sometimes he has created something of worth by adapting a Public Domain work, - but the nature of copyright is that it is delicate and that its preservation and protection is not just a financial matter.

“Should the protection on sound recordings be extended or not, and if yes - by how much? Sometimes quite big record companies tend to sit on recordings and allow them to languish in their vaults rather than issue them.” (response from Mike Batt to the Gowers Review 2006). This does happen, and has been a matter of enormous frustration for Mike Batt personally as an artist.

“The idea that there should be reversion with a renewal opportunity only if there is an undertaking to release or exploit the work seems to miss the point that these matters could be and should be negotiated between management for the artist and the record company or producer/owner at the time of the recording, or renegotiated during the term of its exploitation. The suggestion “to use or to louse” is actually a very good idea as an arrangement to protect artists from record companies who sometimes even deliberately keep an artist’s records off the market either as a disciplinary act against the artist, or purely to prevent others from releasing the product into the same marketplace in case it is successful and the first record company looks foolish. Large companies often make the rules because they have historically had huge negotiating power, and some of them have not always in the past favoured the interests of the artist. Some record company chiefs are pragmatic, charming and sympathetic to artists’ problems and wishes, but others can be arrogant and obstructive in the use of their power, just as can heads of Hollywood studios or other powerful bodies, possibly even including Government departments! Disagreement between parties within an industry does not degrade the value of the principle that drives the industry, - in this case, copyright.” (response from Mike Batt to the Gowers Review 2006).

The suggestion of Mike Batt is simple. Copyright in recordings should be extended. It is not for government to settle disputes between the creator and the owner if these are two separate entities. He fully supports the attempt to insert an obligation that copyright should be exploited and promoted, but if a record company or other producer or owner fails to do so, the copyright should fall back into the hands of the artist rather than into the Public Domain.

Mike Batt also provided an example: he has a friend Bruce Welch, a founder member and guitarist of the group The Shadows. Like many artists of his generation, his early recordings do not earn him a fortune but they provide him with some comfort for his approaching old age. In two years time they fall out of copyright and he will have no further right to receive royalties from those recordings, just at the time he will most need them.

According to Mike Batt this flies in the face of moral logic. *“It contradicts the ethic that created the law protecting song and composition copyright until 70 years after the death of the composer or lyricist. That period of time was designed (as recently extended from 50 years to bring us into line with other countries) so that at*

least the immediate first generation of descendants of a deceased composer can enjoy the income created for them by their parent. In the “house” analogy, only the composer’s grandchildren will be evicted from the house but the artist himself will be evicted as he reaches his seventies, if indeed he made the recordings in his teens or twenties. (response from Mike Batt to the Gowers Review 2006). As the responder said, he represents Katie Melua. They made her first album when she was eighteen years old. Under the current law, when she is sixty-eight she will lose all right to receive anything from her work as an artist in relation to the recording. It initially sold three million copies Worldwide, and one might deduce that she did very well from it and that that should be the end of the matter. Firstly the responder argues that “*substantial marketing costs diminish enormously the profit (or exacerbate the loss) imagined by many uninformed observers. It can take years with some recordings particularly the braver, higher risk catalogue investments typical of classical and jazz recordings, - even to recoup the cost of recording, never mind marketing.*” (response from Mike Batt to the Gowers Review 2006). Mike Batt even goes so far as to say that “*the majority probably never recoup. These recordings have to be subsidised for years by the profitable ones, or at least their losses atoned for by the more successful ones. The onset of new technology is already placing into the hands of the creative artist the ability to bypass and therefore in many cases severely to cramp the bargaining power of major record companies. The fact that in the past the big companies (in a free market) have always had the upper hand is no longer something we should waste time on now. It is irrelevant. This is the beginning of the age of artist-power.*” (response from Mike Batt to the Gowers Review 2006). Mike Batt’s own small company has been one of a handful of artist-run companies who have completely bypassed the major record companies who formerly represented an obstacle to our reaching an audience we knew existed, but about which they disagreed or didn’t care. These days an artist can go around, over or under the record companies and even the media.

Mike Batt suggests to focus not on any internal wrangles between artists, big record companies, independent companies and/or other parties, but merely to answer the question - is it right and equitable that a creator should be deprived of the right to prevent others from defiling his work, and the right to earn a living from it during his lifetime?

Bernard Taylor from Flare Records is an independent CD producer

Says that he is “*very much disturbed by the mooted proposal to extend the UK's period of copyright on recorded music from 50 years to 95, as is being called for by major record companies and certain musicians who feel they have much to lose.*” (response to the Gowers Review from Flare Records 2006) If the copyright period is extended, the cost to thousands of music-lovers, and small, independent CD producers, such as Bernard Taylor himself, will be devastating. Through the present cut-off time of 50 years, Bernard Taylor and the existing handful of other small CD companies are able to release long forgotten records from up to half a century earlier. “*I have no interest whatsoever in any of the music that is the basis of some of the voiced concerns. Sir Cliff Richard can rest easy.*” (response to the Gowers Review from Flare Records 2006). Bernard Taylor says that he “*should not be lining up to release Livin' Doll, or anything remotely like it - though he should think that such past hits have in any case been milked almost to extinction. In the small of number of CDs (approximately 30) that Flare Records have produced over the past few years, he dealt only with what is classed as 'nostalgia', and in doing so have made available vintage recordings from such past musicians and singers as Dinah Shore, Tony Martin, Vaughn Monroe, The King Sisters, Beryl Davis, Dennis Day et al, most of whom are long dead, and some of whom were more or less forgotten.*” (response to the Gowers Review from Flare Records 2006).

Bernard Taylor argues that it must be made clear that the major record companies themselves have no interest in bringing out such material from their archives and issuing it on CD - and it is equally clear that they have no intention of doing so. Their few token efforts in that direction quickly foundered when it was discovered how low the returns were. Further, they have no real interest in licensing their material to small companies – as Bernard Taylor discovered at first-hand when approaching several of them at different times. One company did not even return his phone calls.

Bernard Taylor is not in this little business to make his fortune - as his sales figures will show (some releases have sold fewer than 300), but out of a love for the whole operation, finding the old, rare records (mostly 78s), carefully restoring them, researching their histories and trying to present them as an attractive package, for those buyers for whom such music has the greatest appeal. If the law is changed,

according to Bernard Taylor it will have dynamic and disastrous effects. For one thing it will see the end of numerous jobs in this vital little industry. The small independent producers will all at once go out of business, as likewise will the very small companies that manufacture the finished CDs. The specialist shops that deal in nostalgia will of course close, small record companies will have nothing at all to offer of this music ever more.

*"This will, without doubt, be a major loss, but what will be absolutely tragic is that we shall lose a great part of the musical heritage. This cannot be stressed too strongly. The royalties from Sir Cliff's *Livin' Doll* will be safe, as will Acker's *Stranger on the Shore*, but these will account for a mere fraction. Without the product of 'nostalgia' coming from the small independent companies, 98 per cent of the records made over the past 95 years will be lost forever. The only recordings available to us will be those made prior to about 1910. There will be nothing else, other than the occasional, prosaic sop to our golden age, in the shape of Frank Sinatra singing *Come Fly With Me* and Glenn Miller playing *In the Mood*, as if these were the only songs of the time, and they the only musicians. By the time the proposed 95 years are up, will there be anyone in the Western world who is aware of the names of George Gershwin, Cole Porter, Irving Berlin, Jerome Kern? - or that their music had such interpreters as Dick Haymes, Margaret Whiting, Bing Crosby?*

Small CD producers set up our companies in the belief that they were safe within the law, and enjoyed their fascinating, time-consuming job." (response to the Gowers Review from Flare Records 2006). Now, according to Bernard Taylor, it appears that the rug might be pulled from under them. If so, it will not be a case of losing out on the royalties of a few Golden Oldie rock hits - as Sir Cliff and others are terrified of doing - but of losing the whole careers. Sadly, however, we are up against prominent names in the music world (who, Bernard Taylor is sure, have far more to fear from the present fashion for downloading music from the internet).

Rex Strother, the owner of Lowlights Publishing lives in the US

He has bought music from England reissue companies and has also helped compile reissue releases with the Jasmine label. He says that he doesn't make money at this (a small amount), but it is merely a hobby. His specialty is to contact the artist being re-released, if they are still alive, many are in their late 70s and early 80s, and are still

sharp and interesting people, glad to help. Rex Strother began with his own aunts (who performed as the Bell Sisters), on the RCA label in 1952-1953 and had three or four chart hits. RCA has forgotten them and of course will not sell back the master recordings to the artist either. Rex Strother says that it all was gathering dust; until he met the folks at Jasmine, who did a lovely job restoring the vinyl and making it available on a CD. He gets a lot of fan letters, which he passes on to his aunts, from those who buy the CD and are so glad to hear this music again, and to hear MORE of the Bell Sisters than they ever did – some of the music never released, some of it unreleased for 50 years.

He interviewed a dozen neglected pop stars (folks with a dozen charting hits in the late 40s and 50s; names of Richard Hayes, Toni Arden, Eileen Barton, Karen Chandler, to name a few) who are thrilled someone cares enough about their music to make it available. *“They don’t worry about their “cut.” Because their own U.S. labels have long since forgotten them, except for occasionally dropping their top hit onto a “Best of” collection. Often, their record contracts reflect no way for them to receive royalties for these sales - as re-licensing and reissuing was never a provision of the day.*

Thanks the U.K. and other European labels, some great music and a big piece of musical heritage is retained. That a U.K. label can put out a 50 track 2-CD set, can really help fans realize the scope of an artist career. There are a few who lose funds because of the sound recording licensing fees, but Rex Strother is not certain that 90%+ of the artists represented by reissue labels are neglected, forgotten or under-represented by their labels.” (The response to the Gowers Review from Lowlights Publishing 2006)

What Rex Strother would really like to see, if a copyright extension must be considered, is an "orphaned work" clause. If a label or owner hasn't made a recording commercially available for, say, 20 to 25 years; then it should be fair game. They are failing to exploit their own catalogue effectively "locking the vault" on music that may not make them the mega profits they want to see. In this digital age, it's almost unbelievable that nearly every song in a back catalogue isn't available for quick and easy legal download.

Rex Strothers' suggestion is to extend the term of protection.

Ned Newitt from Mellotone Records states that “*if the copyright period of musical performances is extended, Mellotone Records will go out of business. Mellotone Records was established to re-issue records of hot dance bands and has a very small catalogue of CDs which cater for the interests of enthusiasts all over the world.*

The kind of sums required to license recordings would make it impossible for the record label to produce any further CDs. Yet the big companies have lost all interest in re-issuing their own recordings from this period and have no interest in meeting the needs of the niche market that Mellotone Records serves. The extension of copyright would make these vintage recordings even harder to obtain.

The proposal to extend of copyright to 70 years or life plus seventy years will merely benefit the big companies and not the performers. Musicians have been poorly served by record companies over the years.” (The response to the Gowers Review from Mellotone Records 2006). Ned Newitts’ father was one such musicians who performed for a flat fee prior to 1939 and in consequence received no royalties on the few records that were reissued in the 1970s.

“A fair situation would be that there should be no copyright on sound recordings made prior to 1956 (50 years). On recordings made subsequently, the record company would retain copyright until the death of the artist subject to:

- a) the company paying appropriate royalties to the performer(s)*
- b) the company keeping the recording in their catalogue*

If either of the two conditions above are not met, then copyright should revert to the performer for the rest of his/her life.” (The response to the Gowers Review from Mellotone Records 2006).

Ned Newitt argues that he understood that the purpose of the review was to enable innovation. However, he fails to see how the extending the current copyright in sound recordings period back from 1956 to 1936 serves this purpose.

Rod Stradling from Musical Traditions Records

Rod Stradling thinks that “*if the 95 years copyright extension becomes law, and is applied retrospectively, the only people allowed to reissued recordings made in the past 95 years will be the companies who now own the copyright. Due to multiple takeovers in the past, these “parent companies” are now giants like Polygram, EMI, etc. What chance do we have that they will ever reissue any of these old recordings?*

Their collective track record of reissuing archive recordings in the last 30 years is between nil and negligible.

*There are two simple reasons for this - firstly, the vast majority of the material has no commercial value whatsoever. Secondly - and this may surprise - these record industry giants **don't actually have copies** of most of the 50-year-old records whose copyright they still own! Reason? Because they have no commercial value whatsoever. Add to that the inevitable losses due to breakages, mistakes, etc, during takeovers. Even the BBC has lost a substantial proportion of its archive.” (The response to the Gowers Review from Musical Traditions Records 2006).*

So, according to Rod Stradling, we are faced with the ridiculous proposal that a huge multinational should be allowed to own a copyright to something they have already discarded as worthless years ago, for a further 45 years! The current situation is as follows: small companies, even individuals, spend years collecting records and tapes relating to their own specialist interest which, thanks to modern technology, are now able to be published on CD for the small audience which values them. A not inconsiderable part of this CD re-issue programme involves material which is now out of copyright, and has not been recently reissued by the copyright owner. These recordings have sold in tiny quantities of typically under 100, just about covering costs, but enthusiasts will continue to reissue them if allowed to. This is a task which no commercial company will ever undertake. To leave responsibility for the reissue of historically important recordings in the hands of concerns with solely commercial interests will be fatal. Their track record speaks volumes. Enthusiasts have reissued several thousand professionally remastered CDs so far - the tip of the iceberg, but already far more recordings than the majors have between them re-issued in the past 60 years.

To make any extension of copyright retrospective will be disastrous - we know that the major labels will not (could not afford to) re-issue the vast majority of their archive material - even if they actually still had any of it. The only effect would be to stop enthusiasts from publishing it, as they currently do. What we have to consider here is part of the country's collective heritage. This decision will determine whether future generations will thank us for our efforts to preserve a disappearing part of our country's culture, or curse a short-sighted decision which will deprive them of that valuable resource. (The response to the Gowers Review from Musical Traditions Records 2006).

Tony Barker is a head of a record company Pierian Records.

Tony Barker wrote a very emotional response. I'm afraid that any change I make in his text will destroy the impression, and I do not want this to happen. The following text – is exactly what Tony Barker wrote about the extension of protection on sound recordings.

"The proposed 95 years is way too long. To show how ridiculous this is, it would mean that we could not reissue any of the many World War One recordings until 2010-2014. Only EMI would be allowed to reissue World War One Regals, Jumbos, Scalas, Coliseums and Columbias - and they don't have any of them. Only Decca would be allowed to reissue World War One Winners - and they don't have any of them. We collectors do have them, but we would NOT be allowed to reissue them. A mere handful of the young men who went to fight in World War One are still with us. That is how long 95 years is! It is a ludicrously long period to tie up our history for. World War Two - Well, we'd only have to wait till 2035-2041 to start a reissue programme of our accumulated Second World War recordings. Oh, that's a shame - I probably won't be here then! And who knows where my records will be - many collections have wound up in skips, smashed to smithereens.

A retrospective 95 years – no!

This should not just be about the interests of a few big companies and a few big stars. They are business concerns, and have no interest in reissuing loss-making old recordings just because they are of historical and social significance. This should be about our heritage and our ability to keep it alive and maintain access to it. It should be about taking a responsible attitude to preserving important historical recordings. With that as a consideration, there can be no doubt at all that a retrospective 95 years (effectively 96 years, as recordings would not come out of copyright until the end of the 95th year, i e the start of the 96th year) is far, far too long. 95 years retrospectively take us perilously close to the start of commercial recording around 1898. As most pre-1904 recordings remain undiscovered, it effectively means that we will be able to reissue just what we have rescued from the 6 years of recordings issued between 1904-1910, and a smattering from the years before. The rest will disappear behind the copyright barrier. Records were expensive, often poorly

distributed and were extremely fragile. They have been through two World Wars, home removals, one hundred years of turmoil. We have a precarious hold on what has survived. There must be a point where these recordings pass from merchandise to historical documents. Our work is akin to that of archaeologists, unearthing the world portrayed in these early recordings. Surely their finds would not be suppressed for decades, with further chance of damage and even loss. 95 years would severely shackle our efforts. It is far too long.” (The response to the Gowers Review from Pierian Records 2006).

Adrian Tuddenham is the owner of a small recording company Poppy Records. He is opposed to a 'blanket' increase. As he considers, it will have an adverse effect on the accessibility of the UK's recorded legacy.

He is opposed to a retrospective increase as it would set a dubious legal precedent by demanding retrospective payment for something which was free at the time of use. Because of the history of mergers in the gramophone industry, such an increase would place the IP rights to the majority of this country's recorded legacy in the ownership of a single company: E.M.I.

That company has disregarded the majority of its own legacy recordings and has reissued virtually nothing from the legacy recordings it has acquired from other companies. The master recordings of most of the early recordings on 'popular' labels no longer exist in the company's vaults. The recording studio log books and other written historical documents for a large proportion of recordings made during the early recording years have been lost to posterity - either destroyed by EMI themselves or by the companies they acquired.

Adrian Tuddenham “*considers this demonstrates that there is no general requirement to extend the period of protection on IP rights on recordings in the UK, as the owners of those recordings have no interest in exploiting such general rights. By contrast, small independent companies have produced many re-issues of legacy recordings and have done much useful research on the history of recording artistes, composers and recording methods. These companies contribute greatly to the accessibility of the UK's recorded legacy and knowledge of recording history in the UK; they also take British cultural history to a wider audience across the world.*

Poppy Records has developed special techniques for handling and rerecording historical material and has subsequently put these at the disposal of the British Library National Sound Archive and the Public Records Office, as well as many smaller research projects. Without the impetus of commercial re-issue, few of these techniques would have been considered worth following-up and the equipment to perform the sound recovery would not have been built.”(The response to the Gowers Review from Poppy Records 2006).

Adrian Tuddenham is sure that if this increase in protection period were to become law:

- “1) Small independent re-issue companies would, with very few exceptions, be forced to cease trading. If it were applied retrospectively, many of the companies would be bankrupted, as no financial provision has been made for such a change.*
- 2) Much of the national recorded heritage would become inaccessible to researchers and consumers across the world. Experience in the USA confirms this.*
- 3) Most of the recorded heritage would become the property of a single company with little or no interest in its preservation or re-issue.*
- 4) Re-issues, which are sometimes the only way in which heritage recordings survive for the future, would cease altogether.*
- 5) Research into better ways of recovering and preserving historic recorded sound would virtually cease through lack of commercial funding.*
- 6) A dangerous precedent would be established which would have disastrous consequences if it were subsequently applied to historic books, films, designs and other works of art.”* (The response to the Gowers Review from Poppy Records 2006).

Alternative Arrangements suggested by Adrian Tuddenham:

If a recording company or a performer regards a specific recording or set of recordings to be worth continuing to exploit after 50 years, there is no objection to permitting them to extend the period of the rights for that particular case. Adrian Tuddenham also suggests that a moderate fee should be charged for this service, on a title-by-title basis, so as to cover the administrative costs and discourage wholesale abuse of the system.

Response from the UK Association of Online Publishers

(AOP) States that “whilst the issue of copyright term in sound recordings has traditionally been a matter for debate within the music recording industry, the way in which sound recordings are now being used in an increasing number of ways within new digital services will have a bearing on a wider range of copyright owners in sound recordings in the future.

AOP recognises that the European Commission position on term of protection for producers of phonograms is currently that it should be 50 years after first publication⁵. AOP also recognises that the Rome Convention for the protection of performers, producers of phonograms and broadcasting organisations lays down only minimum terms for the protection on rights they refer to.

Since changes to the term of protection on sound recordings and performers' rights in sound recordings will need to be agreed at EU level, AOP suggests that the UK needs to take a lead in reviewing the evidence for change, bearing in mind both the status of the UK recording industry (third largest in the world behind only the USA and Japan) and the significance of use of the English language in many sound recordings produced within both the UK and the USA.

In considering whether the current 50 year term of protection on sound recordings and performers' rights in sound recordings is appropriate, AOP believes that the recent extension of copyright term to 95 years for sound recordings made for hire under the law of the USA cannot be ignored. Whilst the term now fixed under USA law should not dictate policy within the EU, there is concern that the longer term within the USA acts to distort the marketplace for those who wish to invest in the making of new sound recordings and other works for hire benefiting from the 95 year term.

Companies making recordings in the USA will have an advantage if they are able to qualify for the longer term of protection recognised within the USA, but not within the European Union.

AOP believes that any attempts to link the term of copyright in sound recordings (and therefore the term of protection for performers' rights in sound recordings) to the life of a contributor plus a number of years would be inappropriate. Such a change would work against the increased transparency and reduction of market distortion that any change should address; and create difficulties in assessing the contributors whose

lives are thought significant enough to dictate the term of protection in the sound recording to which they contribute.

In view of the above provisions, the recognition of a 70 year term for the protection of sound recordings commencing in the same way as currently provided for under EU law should be considered.” (The response to the Gowers Review from AOP 2006).

However, consideration might be given to requiring that a sound recording is available for licensed communication to the public during the last 20 years of the 70 year term, and if not, provisions along the lines of those under discussion for orphan works might be deemed to apply.

3.1.2 Concluding remarks

It should be noted that small producers of phonograms do not have one opinion on performers' rights protection extension. Some of them state that the term should not be extended. Others claim that copyright is a property just like tangible goods, and there is no reason to treat them differently. From this point of view copyrights should not have an expiration date. They also state that 50 years from the creation of work is usually the time when performers grow old, thus cannot work anymore and need the money that their recordings could bring them the most.

Small record labels are complaining that big record companies prevent the access to some recordings rather to issue them. In this case there should be reversion with a renewal opportunity, and the copyright should fall back into the hands of the artist rather than into the Public Domain. If copyrights will be extended then big labels will still have the power to prevent others from re-issuing their old recordings – the society will lose a great part of their musical heritage.

Some propose that if a recording company or a performer regards a specific recording or set of recordings to be worth continuing to exploit after 50 years, there should be no objection to permitting them to extend the period of the rights for that particular case. There is also a suggestion that a moderate fee should be charged for this service, on a title-by-title basis, so as to cover the administrative costs and discourage wholesale abuse of the system.

One thing can be assumed from the above – the law should not allow anyone to prevent others from re-issuing his recordings, if he does not re-issue them himself.

3.2.1 Performing artists

This section shows the opinions of individual performers and organizations that represent performers on the extension of performers' rights on sound recordings. A lot of organizations can represent interests not only of performing artists, but also of authors and record labels. Such organizations are excluded from this section, because economic and social interests of record companies and authors can be different from those of performers.

Nigel Parker on behalf of Association of United Recording Artists (AURA) states that *"The principal discernible effect of extension of sound recording copyright will be to compel record companies to pay a proportion of their profits from the sale of older recordings to contracted featured performers. In addition, a proportion of the income collected by PPL and equivalent societies will be distributed to both featured and non featured performers on older recordings. It should be noted that recordings from 50 years ago make up a very low percentage of all records sold or performed in public. Though that proportion may be expected to increase somewhat over the coming years as the "artistic" recordings of the sixties and seventies come into consideration, it will always be dwarfed by the sales and public performance of current recordings.*

Though the payments made to the majority of performers might be relatively modest, it is precisely those performers who most need an additional few hundred or few thousand pounds to allow them and their dependants to live a dignified and comfortable retirement, free from the need to claim state benefits.

The retail price of sound recordings to the consumer will not be increased noticeably by the modest copyright royalties payable to performers. A far greater proportion of the retail price of a recording goes to the taxman, the retailer and the record company, all of whom earn at least as much from the sale of a copyright-

expired recording as form a copyright recording. Only performers lose out completely.” (The response to the Gowers Review from AURA 2006)

Nigel Parker claims that copyright-expired recordings and books are not markedly cheaper than current copyright editions. This is at least partly due to the economies of scale in producing, promoting and distributing the larger volumes typical of current works. In any case, within a very short space of time, on-line distribution of music is likely to become the norm, greatly reducing the costs of marketing and distribution, with the effect that recordings which it is currently uneconomic to make available will become commercially viable. The range of music available to the consumer will greatly increase, and the cost will fall.

“Payments by users of copyright works under blanket licences (which includes the vast majority) will not increase if copyright is extended. The fees they pay will simply be distributed in a different way, to include those performers and record companies responsible for older recordings.

The only detrimental effect is likely to be felt by those few record companies which specialise in the release of out of copyright recordings. Whilst those companies offer a service to consumers, there is no reason to doubt that copyright owners will be equally able and willing to fulfil that need were sound recording copyright to be extended. Any perceived detriment to such companies is greatly outweighed by the gross injustice of permitting such companies to exploit and profit from recordings which they had no hand in making, without compensating the performers whose work and talent created them.

The release of public domain recordings without payment of performer or other royalties is the inevitable consequence of expiry of the copyright term. Many performers live out their old age in penury, while companies cash in on music to which they made no contribution. The only viable solution to this problem is to extend the term of copyright protection, rather than to seek some alternative "moral" basis for the payment of performer royalties after the term has expired.” (The response to the Gowers Review from AURA 2006).

Nigel Parker mentions that it has been argued that the bulk of any income from an extension of copyright would be taken by major performers who are already rich. He realises that there is some truth, but no force, in that argument. It is no answer to the plight of the impoverished musician to say that he deserves to live on

state benefit and die in poverty, simply because a few highly successful performers are already rich enough. That adds insult to injustice. The typical retired musician, whether featured or non-featured, has more in common with a retired factory or call-centre worker than he does with the tiny minority of super-rich performers.

“Major earners (including record companies) will be taxed on their income - and the taxation system, not the granting or withholding of copyright, is the appropriate means to deal with any perceived inequities in earnings. Moreover, the music which sells fifty and more years after its release may not be the music that was most popular when it was released - and in any event it sells in much smaller volumes. So the beneficiaries of extended copyright are not necessarily those who earned most during the first 50 years of its life.

The extension of sound recording copyright will take thousands of musicians off means-tested benefits - and greatly lessen the burden on the state. Moreover, the cost of doing so will be equitably, and invisibly, met by record companies and consumers who value their recordings, so reducing the need for taxation. The state will benefit both from a reduction in benefits paid to poor musicians, and from increased taxation of the earnings of wealthy musicians and record companies.” (The response to the Gowers Review from AURA 2006) .

In summary, Nigel Parker states that the effect of extending sound recording copyright will be almost imperceptible to the consumer or user of copyright works. Its principal effect will be to redirect a proportion of existing income flows within the record business away from record companies and towards performers.

British Equity Collecting Society (BECS) is the UK’s only collective management organisation for audiovisual performers. *“It represents the interests of its members – approximately 20,000 actors and other performers - in the negotiation and administration of performers’ remuneration throughout the European Union territories. Rights administered via agreements with 11 European collecting societies include the rental, private copying, cable retransmission and communication to the public rights. Since its incorporation in 1998 BECS has generated in excess of £7 million in extra income for performances in British film and television productions. BECS is a member of AEPOARTIS, an association representing virtually every audio and audiovisual collective management organisation in Europe.*

BECS supports an extension of the term of protection of performers' rights to 95 years. Extension for performers' rights is required to address the inconsistencies that exist both territorially and between different contributors to the creative economy. Copyright duration for authors is currently life plus 70 years compared with the 50 years afforded to performers. Extension of the term would therefore ensure that performers' rights do not lapse significantly before those for the author of the script.

In spite of their international success, the only secondary revenue that performers have ever received has been collected by BECS due to the existence of statutory rights in other European countries. Such payments, arising from the communication to the public and other statutory rights, would continue to contribute towards the UK's creative economy if the duration of performers' rights in the European Union was revised upwards.

Within the context of the European Commission's current review on the term of copyright, BECS urges the Review to recommend harmonisation to 95 years across the European Union. This is a necessary condition for international harmonisation given the 95 year benchmark figure set in the USA. An extension would reflect the fact that the commercial value of audio and audio-visual works now easily exceeds 50 years. While this is partly due to digitisation making possible better quality copies of older works, it is also testament to the enduring popularity of and public demand for classic sound recordings and film and television works.

BECS also believes that the ease and cheapness of digital distribution systems will prevent any so-called locking-up of protected material.

BECS believes that the extension of term should be coupled with a statutory recognition of a performers' right to receive ongoing revenue from their works in the UK. Otherwise the extension of term will not have a direct economic benefit for many of the elderly and needy performers who helped create this country's cultural heritage.

In BECS opinion the term should be extended retrospectively with similar provisions to those that applied when the copyright term was extended.

They also highlight the personal impact of an extension. BECS says that contrary to public opinion, British performers only very recently negotiated a contractual

agreement to receive revenue for the exploitation of feature.” (The response to the Gowers Review from British Equity Collecting Society (BECS) 2006).

Equity is a trade union representing 40,000 performers and creative personnel who work across the whole spectrum of entertainment. This includes a range of media and creative industries covered by the scope of the Gowers Review, such as visual broadcasts, sound recordings and film. The intellectual property framework is an essential element that supports these creative industries and ensures investment in the individual creators, both now and in the future.

“Equity notes that the copyright of performers on recordings made in the UK and the European Union is limited to 50 years, whereas sound recording copyright can continue for 95 years in the USA and for an average of 75 years in most non-EU countries. As a result of this, UK and EU recording artists can be denied income from the playing of their recordings during their lifetime. Equity has therefore supported calls for the Government to recognise this as denial of income due to artists and to alter UK and EU copyright laws accordingly.

Equity states that failure to extend the term – and apply this retrospectively to existing works – will have a detrimental impact on performers who have invested their creative energy into developing a body of work capable of providing ongoing benefits for them and their families.

While the most high-profile examples of work that would be affected by an extension of the term are in the music industry, there would also be a direct and positive impact upon the rights of actors and those involved in dramatic works. The most obvious example is that of sound recordings which were first broadcast 50 years ago or more, mainly on BBC radio. A programme such as Hancock’s Half Hour, which was first broadcast between 1954 and 1959, has recently reached this threshold and has raised issues regarding continued payment, as it is currently under licence to BBC7 and provides revenue accordingly.

In addition to these sound recordings, an extension in the period of protection would have a direct impact on payment for the work of performers in classic film and television programmes. While the actors in these productions often

received nothing more than their engagement fee under contract, the existence of a right that subsists in the performance has enabled them to benefit from a range of statutory sources of revenue, particularly from EU member states.

Films from the Doctor... series, including Doctor in the House (1954) and Doctor at Sea (1955) are already being affected by the expiration of the term, with Doctor at Large (1957) and Doctor in Distress (1963) due to fall out of protection in the next few years. While television programmes can age quickly, the economic impact of the term expiring could soon be felt on classic series such as The Avengers (1961).

Equity believes that it is in the interest of creators from past and present to see an extension to the term of protection, to ensure that there is an appropriate and ongoing reward to performers, which is consistent with other areas of copyright, as well as an incentive for the next generation. However, it will be vitally important to achieve a framework that ensures that performers actually benefit from the extension and receive a fair proportion of the royalties and payments generated by the continued exploitation of their work.

Equity states that it is also in the interests of consumers to ensure that the producers continue to retain an interest in exploiting a performance or recording to enable clear and efficient availability. Equity is not aware of any evidence that a shorter term of protection would benefit consumers by providing a cheaper or more accessible product for consumers. In instances where the producers continue to hold the copyright but the performance falls into the public domain, the producers simply make a larger profit and the performers miss out completely. This type of scenario can occur in film (which applies the copyright applicable to the publication of literary works), when rights continue to subsist for 70 years after the death of the last surviving principal, such as the producer or director.

Therefore Equity believes that copyright on sound recordings and performers' rights should be extended in line with that of the publication of literary or musical works – to 70 years after the death of the last surviving producer or featured performer on the recording.” (The response to the Gowers review from Equity – 2006).

Ian Anderson, flautist and singer of Jethro Tull says that he has been fortunate enough to spend over 40 years doing something that he loves – making music. Along

with his band, Jethro Tull, he released over 30 albums in the course of the last four decades and sold over 60 million records. Today, he still plays around 100 concerts a year and continues to push the boundaries of progressive contemporary music in the recording studio.

He says that while the sartorial excesses of tights and codpiece have long been disposed of in charity auctions or forgotten in some bottom drawer of his farmhouse home in Southwest England, what remains is a lifelong commitment to music as a profession. He feels much too young to hang up his hat, or his flute. And he expects he can find the codpiece on E-bay, if he really needs it.....

However, he is horrified that, along with countless other great artists and bands of the 60's and 70's, Jethro Tull's earliest recordings will progressively fall out of copyright in the foreseeable future under current UK legislation. *"The band's first album, "This Was" (1968), is due to fall out of copyright in just 12 years' time. From this date onwards, every year will see more and more of Tull's records slipping into the commercial quagmire of the public domain along with the all the other great works of British pop and rock music. Sir Cliff Richard's first recordings start to come out of copyright protection in just over two years time. The Beatles in six. This means loss of Royalty income not only to the (perhaps well-off, perhaps quite poor) performers on the records but, more importantly from the industry perspective, the loss of income to the record companies, and ultimately to the UK exchequer.*

Recordings are protected for 95 years in the U.S. Many other countries such as Australia, Singapore and Brazil protect recordings for 70 years, while India provides 60 years' protection. EU countries, including the UK, protect recordings for just 50 years. In other words, recordings enjoy much more protection abroad than they do back home. He believes that the society should realise that this situation puts European performers and producers at a competitive disadvantage.

Music is high-risk business and most recordings never turn a profit. Revenues from those few, precious hits have to be ploughed back in to discovering and developing new talent. As Katie Melua, a young artist who lives and breathes music, remarked: "I know that my record company had to take risks to invest in an unknown like me. Thankfully, my music quickly connected with audiences, so this risk is paying off. I am very aware that I owe my lucky break to revenues from recordings by many of the more established artists I admire."

Record companies typically use a substantial proportion of their income from successful recordings of the past to develop brilliant, new performers like Katie Melua, and that is something worth singing about. A longer term of copyright protection would promote this kind of investment.’’ (The response to the Gowers Review from Jethro Tull 2006).

As to a songwriter, vocalist and musician, it also seems completely anomalous to Ian Anderson that his compositions are protected for his lifetime plus 70 years, while his performances will fall out of copyright after just 50 years from the date of the original recording. He says that he put just as much heart and soul into his performances as he does into his compositions and lyrics. So why should his song writing be valued so much higher than his creative efforts as a singer and flute player?

He goes even further to express his personal view that such copyright is as real to him as Real Estate. If he can own the freehold, and thus the investment, in his home property, why can’t he value of the investment in his recordings be a longer-term or even indefinite heritable, saleable right? He says that he would have better protection as the bricksand-mortar builder of his house than a “builder” of recorded music.

Who could possibly argue that the Beatles’ Sergeant Pepper album is worth less than the slab-sided freehold concrete-box semi down the Viaduct Road? – asks Ian Anderson. After all, both probably cost less than £100,000 to build, even in today’s money. Which would we rather see stand forever as a living testimony to the best of the 60’s? Which would we rather protect in terms of its long-term asset value?

He says that he is always delighted to see that new fans are still discovering Jethro Tull every day. While some will discover Tull via their parents’ record collections, others will now be able to find this music for themselves via legal online services. The Internet provides an amazing opportunity to market earlier recordings that may no longer be available in record stores with limited and expensive shelf space. Ian Anderson believes that all of this potential for lateral expansion in sales of recordings from the Sixties onwards will be lost, if these recordings are allowed to fall out of copyright just at the time when the “replacement” sales of digital downloads might be beginning to compensate for the downturn in sales of conventional, physical product.

There is also growing evidence, ascertained recently, that the small and potentially “fly by night” companies now engaged in manufacturing and selling newly out-of recording-copyright works are also failing to pay Mechanical (composer’s) Royalties to Publisher and Composer. This, in Ian Andersons’ opinion, will become ever-more

prevalent with more and more small companies, or individuals, operating ad hoc and with little fear of prosecution given their small size and turnover in the now growing field of out-of-copyright re-manufacture. A double whammy to industry and singer-songwriter alike.

Ian Anderson says that it is the time to fly the flag for the great British recorded music heritage! The Beatles, Pink Floyd, The Rolling Stones – side by side with the forgotten one-hit wonders from the story of British Pop, Rock, Classical, Folk and Jazz music – will soon be traded for a mere pittance in the public domain with not a penny going, via the record companies, to invest in the future of British music and to nurture the artists of tomorrow.

Ian Anderson says that he is now really concerned that very soon the many musicians who contributed to the success of his, and others' recordings over the years will no longer be entitled to any income from their performances. This is a real problem for the less-fortunate band-members and session musicians who still rely on royalties from previous records to help make a living. For some, such monies account for all, or nearly all, of their current income.

Why should we perhaps have to see these musicians struggle in old age without heat for their homes or the wherewithal to pay their nursing home bills while their American counterparts are taken care of for life by ongoing royalty income? – asks Ian Anderson.

The European Union is now looking at its copyright legislation to see if they need to be updated to the digital age. As just one of thousands of UK performers, he hopes that the UK Government will push for term of protection be at the very least put on a par with the highest international standards. After all, equal talent deserves equal term. And equal opportunities for tomorrow's young musicians.

MP4 is a cross party parliamentary *group* – literally. Unlike other parliamentary groups they are 'practitioners' having performed live on several occasions since their formation in 2003. They have also produced a recording with Robin Millar at Whitfield Studios, which was given a digital release by EMI in 2005, with proceeds going to Save the Children. A CD version of this recording is sold for charity through the parliamentary gift shop.

"MP4 members are Kevin Brennan Labour MP for Cardiff West (guitar/vocals), Ian Cawsey Labour MP for Brigg and Goole (bass/vocals), Rt Hon

Greg Knight Conservative MP for East Yorkshire (drums) and Pete Wishart Scottish Nationalist MP for Perth and Perthshire North (keyboards). All of them have some musical background, but Pete was a full time professional musician and recording artist for many years before his election to parliament, most notably with Big Country and Runrig.

MP4 thinks that the current diversion between the copyright term for artists in the European Union and the USA is unacceptable. There is also no good reason why performers should receive such significantly inferior protection in comparison with composers.

MP4 states that technological change and increased competition have already benefited the consumer in terms of the falling price of recorded music. There is no powerful consumer argument sufficient to outweigh the unfairness of the divergence in copyright protection for performers. By no means all performers on successful recordings of half a century ago are 'fat cats'. For many individuals' payments from performance royalty is a crucial component of retirement income.

MP4 members believe that the review should recommend a retrospective extension of copyright for performers to bring the term more closely in line with longer terms available in other markets.” (The response to the Gowers Review from MP4 2006).

The Musicians' Union (MU) “*is the only trade union, in the UK, for professional musical performers' and music writers. It has over 30,000 members who work in all genres of music. Most musicians take part in recording and broadcast work, therefore strong intellectual property rights are vitally important to them.*

Upon joining and renewing their membership of the MU, members authorise the union to administer their exclusive performers' rights. These form the basis of the collective agreements that the MU has with record companies, film and TV producers, broadcasters and other audio and audio-visual producers. N.B. if a musician or a group of musicians signs an exclusive contract with a producer, the union's mandate is superseded by the recording contract. However the MU continues to act for such individuals outside their individual contracts where appropriate.

MU strongly supports the proposal put forward by the Music Industry for a review and extension of the duration of the period of protection for sound recordings. MU thinks that the current period of protection of 50 years is not only considerably less

than the period enjoyed by authors (and publishers), but makes the industry highly uncompetitive with many overseas territories.

The UK is second to the USA in the volume of music produced. It is more than equal to any territory in the quality of its music. However, a straight comparison with the USA shows that whereas income can be derived from US recordings for 95 years, in this country it remains at 50 years. Many other territories have settled for a period of protection of 70 years.

Digital dissemination of music via the internet and direct to mobile phones, has made music in all its genres, a more valuable commodity. Much music has been given a ‘second lease of life’ through digital technology, but now we are faced with famous recordings by many significant artists falling into the public domain in the next few years. These include the early recordings of Cliff Richard, Shirley Bassey, the Beatles and the Rolling Stones.

MU believes that Performers will benefit from an extension in the period of copyright for sound recordings in two ways:

a) Additional income from the Communication to the Public and Public

Performance Right: This right was extended to performers by the Rome Convention of 1961. It was enacted into UK law through transposition of the Rental and Lending Directive (92/100) in 1996. In this country Phonographic Performance Ltd (PPL) administers this right on behalf of performers and record companies. The income is derived from licensing broadcasters and other users of recorded music, and is divided equally between record companies and performers. The 50% of this equitable remuneration that is apportioned to performers is subject to another division between featured artists (usually ‘signed’ to the record label) and non-featured session and orchestral musicians.

This important source of income is paid throughout the duration of the copyright in the recording. MU states that an extension in the term would benefit all performers and in particular session musicians who, due to the volume and the variety of work that they undertake can earn more ‘PPL income’ than many featured artists.

b) An extension of royalty income based on sales

When an artist signs to a record label they receive an income based on a percentage of the profit made from the sale of the recording. Careers are often short in the performance sector of the music industry and only a very small percentage of artists achieve ‘superstar’ status. An extension of the period during which royalties are paid

could make a vast difference to the career structure of many artists.” (The response to the Gowers Review from MU 2006).

MU states that it is no secret that the music industry must reach an internal settlement regarding how any extension to the period of copyright should apply. The performers' community and the record labels are entering into a positive dialogue and MU believes that a sensible internal industrial settlement can be achieved. On this basis, the Musicians' Union totally supports the principle of extension of term.

3.2.2Concluding remarks.

In general, it can be assumed that performers support the extension. Some of them support the extension of the term of protection of performer's rights to 95 years, others prefer to be protected just like the authors for life plus 70 years. Performers argue that they put as much heart, talent and energy into their performances, as authors in their works. Some find unfair that recordings are protected for 95 years in the U.S., and many other countries such as Australia, Singapore and Brazil protect recordings for 70 years, while India provides 60 years' protection, But EU countries, including the UK, protect recordings for just 50 years.

Performers realise that the release of public domain recordings without payment to performer or other royalties is the inevitable consequence of expiry of the copyright term. They mention that many performers live out their old age in penury, while companies cash in on music to which they made no contribution. The only viable solution to this problem is to extend the term of copyright protection.

As we can see from the above, some performers claim that copyright-expired recordings and books are not markedly cheaper than current copyright editions. The only detrimental effect is likely to be felt by those few record companies that specialise in the release of out of copyright recordings. Whilst those companies offer a service to consumers, performers see no reason to doubt that copyright owners will be equally able and willing to fulfil that need were sound recording copyright to be extended. Some performers claim that copyright-expired recordings and books are not

markedly cheaper than current copyright editions. Some believe that the ease and cheapness of modern digital distribution systems will prevent any so-called locking-up of protected material.

Some performers mention that the effect of extending sound recording copyrights will be almost imperceptible to the consumer or user of copyright works. Its principal effect will be to redirect a proportion of existing income flows within the record business away from record companies and towards performers.

They believe that it is in the interest of creators from past and present to see an extension to the term of protection, to ensure that there is an appropriate and ongoing reward to performers, which is consistent with other areas of copyright, as well as an incentive for the next generation. However, it will be vitally important to achieve a framework that ensures that performers actually benefit from the extension and receive a fair proportion of the royalties and payments generated by the continued exploitation of their work.

3.3.1 Users

Music libraries, archives, radio stations, researchers, music clubs, societies, public houses, restaurants, and hotels, etc. are the users of recorded music. They are also a part of the society that is interested in the availability of music of all kinds and genres. Some of them use music for commercial purposes, some in scientific, for some of them certain types of music is a question of their self-identity. In general, users are those, whom music is made for. This makes their interests highly important.

Nick Wakeham, a Chairman of Cuillin FM

As a producer/presenter of a musical theatre radio programme, he has recently been following the debate about the extension of copyright and he is very concerned that the record labels (e.g. Naxos, Sepia, ASV Living Era, Flare, Memoir etc) dedicated to reissuing vintage music that Nick Wakeham and his listeners like, and that are out of copyright, are in jeopardy of going out of business.

The reasons why he is concerned and feels strongly that the copyright period should not be extended he elucidates as follows:

- “1. *The recordings from these CD releases of small record companies are very difficult to find elsewhere if not impossible.*
- 2. *Great care and attention are given to the artwork including the cover art by small record labels, which you can tell has been carefully sourced.*
- 3. *The liner notes provided by small record labels are often well-researched and written by experts and really give you lots of important and valuable information about the artist and the recording data.*
- 4. *The CD usually selling for around 8 pounds each represents good value for money because you do get extra photographs, rare recordings and also more information on the sleeve notes than your standard release of this calibre.*
- 5. *These releases are a labour of love and stand out in a market that puts out the same old fodder again and again. The major record labels are the worst culprits in releasing CDs like The Best of Perry Como, Vera Lynn or Bing Crosby featuring the same chestnuts time and time again.*
- 6. *Finally, as all consumers vote with their pockets – the prices of these CDs are fair and reasonable. If these companies have to pay recording royalties as well as the composer royalties currently in place, it may not be economically feasible to release these CDs anymore.” (The response to the Gowers Review from Cuillin FM 2006).*

- 7. In an era where everything is geared to charts and expensive DVDs and MP3 players and digital downloads – these are recordings that Nick Wakeham as a consumer wants to own and has not been able to find elsewhere.
- 8. Through these companies Nick Wakeham has been able to access wonderful recordings from stage musicals of the 1930s, 1940s and 1950s, recordings that the majors who own the masters have never seen fit to issue themselves. He had also discovered artists from a past era via these CD releases. If not for these smaller labels, these recordings would surely be lost forever so what they are doing is helping preserve important and historical recordings from which we are able to trace the evolution of popular music and the history of the music theatre. They are also very helpful in the fact that it is possible, through the radio station; bring these truly wonderful recordings to a greater audience, who appreciate such music.

In conclusion Nick Wakeham is saying that he hopes that these labels continue to bring music into his life and, through his radio station, to the lives of others.

Fo'c'sle Folk Club is an organisation with great interest in minority music is concerned that measures designed to optimise mechanical copyright for the benefit of recording companies and artistes also address rather than worsen the deleterious side-effects of current legislation, particularly on items of historical and cultural interest. As a general comment, they believe that 25 years from the death of the Artiste would be an adequate period, although not easily applicable to group recordings.

“To itemise these concerns Fo’c’sle Folk Club suggests concrete strategies:

- 1) *Companies having disposed of the relevant masters for particular recordings should be deemed to have lost interest in their copyright. Such material should be considered in the public domain unless claimed by the Artiste. In general, it should be possible to make release of material into the public domain the line of least resistance – if you keep your head down, that is what happens.*
- 2) *The as-of-right mechanical copyright should continue to expire at 50 years, with renewal depending on an application by the current holder who must demonstrate possession of the master and pay a fee, suggested to be £50- £100 to discourage frivolous applications.*
- 3) *Companies should not be able easily to prevent the small-scale re-issue of any recorded material, whether within 50 years or during an extended period, that they do not currently have on sale themselves. To this end, there could be a fixed per-copy royalty fee of perhaps 20-50p per hour of recorded medium (the ‘licence of right’) and no additional charge for such material, although, Fo’c’sle Folk Club suggests that there probably needs to be a mechanism for arguing (in a tribunal) for the withdrawal of ‘tainted’ material (and a ‘buyer-beware’ policy). This regulation should perhaps come in at 25 years, with a first 25 years of complete protection. In most cases of small-scale re-issue, companies would be well advised to waive the fee, since it would, by design, cost more to collect than it was worth unless large sales were anticipated.*

There would appear to be no reason why they could not set a unilateral legal threshold of say 100 copies after which the royalty would be collected.” (The response to the Gowers Review from Fo’c’sle Folk Club 2006).

International Association of Music Libraries, Archives and Documentation Centres IAML(UK & Irl)

IAML(UK & Irl) is the professional association which represents the interests of institutional and individual members involved in the provision of music library services throughout the United Kingdom and Ireland. It is a cross-sectored organisation whose members include public, academic, national, special and broadcasting music libraries, as well as representatives of music publishing and library supply. IAML(UK & Irl) members have a long history of upholding copyright law while recognising that there must be a balance between rights holder and user interests. IAML is also in a position to represent the rights of music users generally, as they are IAMLs' customers and have few avenues of formal representation. Therefore IAML represents the public good as opposed to commercial interests, although as some of its' members are also rights holders IAML is in a position to have a balanced overall view.

“Current term of protection on sound recordings and performers rights is a matter of vital importance to music in libraries and educational establishments. IAML understands the unease expressed by rights holders but there must be a fair balance.

-The existing terms of protection, while complicated, follow a logical hierarchy, contradicting the claim that the music sector is treated unfairly by the current law. IAML has seen cases where technical protection measures prevent consumers from using their purchases. Technical protection can, in effect, give perpetual protection, which goes against the public good.

-The industry's argument is that extension will allow them to invest in new talent. Many new and successful artists are, in fact, signed to independent companies or are self-published. Some are only signed by major record labels once they are popular and established.

-Record companies currently have the right to reissue their own lucrative recordings in advance of anyone else; their ability to produce reissues and profit by them is not threatened by retention of the current term.

-Certain high profile performers have been lobbying for this extension, saying that they will no longer receive royalties for their work. This view confuses copyright with royalties; royalties should be negotiated on the basis of likely sales irrespective of copyright terms. They are free to negotiate contractual terms to receive royalties for longer than the term of protection if they wish. In many cases, since with modern

pieces the work performed will still likely be in copyright (since it will run for 70 years from the death of the composer), other record companies will be unable to issue competitive re-issues without infringing the copyright in the underlying work. Hence there will be no loss of revenue to the performer.

-Librarians are committed to the principle of rewarding creators and upholding the law, but there must be a fair balance. Therefore IAML believes that the term of protection accorded to sound recordings must not be extended; any such extension would be to the detriment of education and access to the cultural heritage.

Historical recordings are increasingly important for research, the study of performance history, and the promotion of interest in a variety of interpretations. To require copyright clearance to be sought for such recordings would seriously stifle advances in music research and education.

Small enterprises are able to support a wide range of historical and specialist recordings which add diversity and interest to the market and help to fill the need of educational research. An extension would prevent them from re-issuing many interesting performances to the public as a whole.

*Major recording companies' reissues in this field in the US are estimated as 2% of back catalogue. (Library of Congress study *Copyright Term Extension: Estimating the Economic Values*. E Rappaport 1998.) Assuming that the picture has not changed significantly and that the UK industry follows a similar pattern, a blanket extension would result in 98% of recordings being tied up by protection of 2%. If re-issuing recordings were left entirely to the original companies, many more valuable and interesting recordings would lie unheard and the market would reflect even further the current emphasis on a few popular artists. Two examples can be provided here:*

*The major companies have only ever re-issued a very small number of these on CD and have concentrated on popular, saleable artists. Without the efforts of small companies, a discerning audience would have no access to these performances. The original EMI recordings of *Die Walküre* with Melchior, Lehmann and List would not be available on CD if a small company (Pearl) had not been able to reissue it. There are many such examples. Even with the growth in providing back catalogue as downloads, it is debatable whether many historical recordings will be made available in this way.*

Any extension will lead to a monopoly, as the winners would be the four major companies. It is unhealthy to have so few big players: this stifles the industry rather than promotes it.

. Extension will lead to higher prices, either from the majors re-issuing at a higher price (possible because of the lack of competition), or smaller companies paying more to license the production of recordings or going out of business. The consumer will effectively be subsidising the largest companies.

- . Music by artists who have written their own material (e.g. The Beatles) will, of course, still be protected by creators' rights (70 years after death) so such artists will not suffer if an extension is not granted.*
- . Many creators (i.e. composers) would not benefit from an extension as deals are signed between publishers (who have the rights assigned to them) and record companies.*
- . The question of preservation is one of very serious concern; continual use of the original recordings will destroy them. It is vital to be able to record them so that access can be via newer, more flexible, formats and to preserve the original carrier.*

IAML does not believe that the request for extension can be supported by the evidence. Unless the companies made their entire back catalogues available, access to our musical heritage would be seriously impaired. Even then, many valuable master recordings may have been lost so could not be made available except by using archive copies in public and private collections.

IAML believes that an extension should not be granted. The reversion into copyright of composers during the previous changes to terms for printed material resulted in confusion and chaos. Whatever else the law should provide - it should also provide clarity and certainty." (The response to the Gowers Review from IAML(UK & Irl) 2006).

Jon McNamara a Chairman International Concertina Association, Organiser of Stortfolk Music Club believes that copyright extension would cut off the current world of musicians from what is their musical heritage.

Jon McNamara studies Music Hall material for performance within a "Folk Club" environment... a study that would be impossible without the re-issue on CD of many

of the early recordings. In like manner - he also studies/ enjoys many of the early Folk Performers - an area of music that, due to lack of potential financial return, is and will be abandoned by the "copyright holders"....

As the Chairman of the International Concertina Association and it's current Sound Archivist – he feels extremely alarmed that any of the efforts to track down, preserve and circulate some of the very famous of the past masters will be frustrated and made illegal by this proposal.

Jon McNamara states that a 95 year copyright be imposed on most of the current music is fine - it's mainly rubbish anyway ... indeed to extend the current 50 year copyright from 1956 to whenever would not be unreasonable and would leave the material the specialists wish to preserve and circulate. It is surely unreasonable that material that has come out of copyright and is now freely available should be taken back into copyright. And why only 95 year? – asks McNamara. Why not make it 500 years then descendants of William Shakespeare can claim copyright breach on his works! Silly? Of course - so if there is a good reason for a 95 year copyright - then compromise by not changing the rules on what is currently out of copyright - simply extend the current 50 years to 95 years - Jon McNamara would still consider it a stupid and unnecessary change. He says that it wouldn't matter so much if there were any real chance that the companies holding the copyright would - or could process and re-release the material. (The response to the Gowers Review from International Concertina Association 2006).

Colin Dean Chairman, International Military Music Society (UK Branch)

Colin Dean has a great concern about the proposal to increase the period of copyright protection on recordings from 50 years to 95 years. He believes that Government policy generally is to give special consideration to what are termed minority interest groups, yet it is these very such groups that will particularly suffer.

International Military Music Society, for example, would like to preserve historic recordings from events prior to the Second World War which were issued on 78rpm discs. Only a very small number of these records exist and they are naturally very fragile. Colin Dean would hope to make the recordings available to interested persons of the current and future generations. There is no profit motive for what will be very small runs; the purpose would be to preserve the sounds for a small number of

interested people. It is unlikely that these recordings would survive the proposed 95 year period, resulting in a loss of part of the nation's heritage.

The recording companies that own these would not be remotely interested in re-issues for such small numbers with no serious opportunity for profit.

Colin Dean very much hopes that a sensible compromise can be reached, perhaps exempting such reissues with a run of, say 250 or less.

Alternatively, perhaps a very simple solution would be to exempt re-issues of 78rpm records. (The response to the Gowers Review from International Military Music Society 2006).

The Music Users' Council is an umbrella body representing all users of music in any delivery format. *"Its members are trade associations and individual companies which together represent some 280,000 separate businesses. These include service providers and end users such as places of recreation (public houses, restaurants, hotels, etc), shops, factories and offices.*

For more than ten years MUC has called for a fairer deal in its members' interrelationship with those organisations, collection societies that negotiate copyright licences for the exploitation of musical works on behalf of rights owners. MUC states that in general it maintains that the current system lacks transparency, is non-competitive due to the monopoly position of collection societies and lacks accountability.

From the MUC point of view the extension of protection is the subject of an Impact Assessment currently being undertaken by the Internal Market DG of the European Commission. In its' submission MUC states that it is against an extension from the present 50 years.

If such an extension is implemented many works would be lost. There would be a reduced availability of repertoire from classical and jazz catalogues long after any residual copyright interest had expired.

Recently a company which specialises in issuing re-mastered copies of original recordings estimated that some record companies have in excess of 25,000 CD-length classical recordings yet offer in the region of only 2,000 of these to the public. A similar ratio exists in the areas of jazz, folk, blues and world music. Increasing the

current period of protection from 50 years would leave consumers with a significantly reduced choice of music.

In short an extension of the period of protection would be detrimental to the use of the work concerned and be a further brake on the use of music generally.” (The response to the Gowers Review from The Music Users’ Council 2006).

3.3.2 Concluding remarks

In general it can be assumed that users are against the extension.

Some users like Nick Wakeham from the Cuillin FM are concerned that small record labels reissuing vintage music that is out of copyright, are in danger of going out of business, if copyright protection for sound recordings is to be extended. They value production of small record labels very highly, and believe in its importance to the society, because small record labels usually specialise in types of music that are not produced by big record companies. CD's of small record companies are usually interesting for very small groups of consumers, and big labels are simply not interested in such issues. These users think that if not for these small labels, these recordings would surely be lost forever, so what they are doing is helping preserve important and historical recordings, which are increasingly important for research, the study of performance history, and the promotion of interests in a variety of interpretations.

Certain high profile performers have been lobbying for the extension, saying that they will no longer receive royalties for their work. Users argue that royalties should be negotiated on the basis of likely sales irrespective of copyright terms. Performers are free to negotiate contractual terms to receive royalties for longer than the term of protection if they wish. In many cases, with modern pieces the work performed will still likely be in copyright (since it will run for 70 years from the death of the composer), other record companies will be unable to issue competitive re-issues without infringing the copyright in the underlying work. Hence there will be no loss of revenue to the performer.

Some users are going even further. They suggest that due to the fact that record labels that own copyrights do not always use them thereby making recordings

unavailable to public, there should be a possibility for others who would like to re-issue these recordings to do so. Companies, whom have disposed of the relevant masters for particular recordings should be deemed to have lost interest in their copyright. Such material should be then considered in the public domain unless claimed by the artist.

Conclusion

From cultural economics point of view copyright is supposed to influence the supply of artistic work in a positive way by providing an incentive through statutory protection but it may also raise the cost of creating new works and so reduce their supply. It also influences the demand for works of art, in part by raising prices; this is considered undesirable for goods like the arts, which are held to offer public good benefits (see Throsby, 2001). It has also been argued that copyright's effects are asymmetric: they benefit the distributor rather than the content creator.

Cultural economics have produced a number of studies of artist's supply behavior, which in general shows the following characteristics: that artists are mostly self-employed, multiple job-holders working in two separate labor markets, arts and non-arts; the individual nature of artistic creativity and talent means artists cannot easily be substituted one for another, and that the goods and services they produce are also not easily substituted. The elasticity of artists' labor supply is clearly important information for any policy-maker wishing to stimulate creativity. Copyright enables authors and performers to earn from their investment but it does not ensure that they do so and how much they earn from royalties depends on market forces. (Towse 2007)

What seems to be the case is that the copyright law plays a more important role in the economic organization and market structure of the music industry, than in providing incentive to create and supply artistic production. At the same time the earnings and the incentive to artists from copyright are weakened by the market structure in the music industry. Once economic rights have been assigned, the performer has little residual control over their exploitation. (Unless, moral rights have been infringed upon). When the record label decides to delete their work from the catalogue, performers can rarely do anything to stop them: the copyright may last 50 years but the shelf life of the recording is more likely to be 5 years or less.

This is, actually one of the main concerns of small record labels, who rely on the diversity and cultural value of the music that they issue. Most of them (but not all) worry more about the fact that if copyrights are to be extended, record labels that own them would prevent others from issuing the music recordings, rather than about having to pay performers for using their works. This is also the concern of users. However, this does not stop performers from asking for an extension of their rights in time. They do realize that big record labels are not interested in issuing most of their works, but performers still have a hope. It seems quite irrational, for those who see artists as people that care about their art in the first place. Nevertheless, we always should remember that from the moment that copyright expires performers lose all the rights (except their moral rights) on their recordings, and will never be able to control the use of their works, nor to receive any income.

Some industry players and economists mention the possibility to renew copyrights after their expiration in case if they are still valuable. Others propose that the best solution is the rule “use it or lose it”, which means that record labels should lose their rights on recordings if they do not use it. This proposition might look similar to the one that offers a comparatively short term of protection, but a possibility to renew the rights. The difference is that if the protection expires and the record label does not extend it, the work falls into the public domain, which means that no one can ever expect to receive any profit from their rights on this particular recording.

It should not be forgotten, that copyright also provides an incentive to record labels to promote the product. No one is going to spend money on a promotion campaign, if he is not the only one who is offering this particular recording. Until copyright protection exists, someone still has the right to gain revenues from its exploitation, thus an incentive to promote the work. When the copyright protection is long and a record label does not use it, the rights might go back to the artist, so that he has a possibility to offer the recording to another company.

From my point of view this scheme is a good response to all the needs of industry players, except for those who tend to prevent others from using a copyrighted work in order to reduce the concurrence. However, I do realize that the adoption of this law would mean a great reorganization, and I can hardly believe that the EU is able to do it.

Options for further research

Performers' rights are not a well researched area. I would even say – almost not researched. In fact, most policy makers do not see much use in performers' rights, because a singer can not perform without a song, but a song is already protected by authors' rights. However, performers' rights appeared because of a strong need in protecting performers' interests.

It should be noted that the relationship between performers and authors is rather uncertain, because it is not clear why authors should be protected more than performers. A singer can not perform without a song, but a song without a singer does not have much value either. However, a song is the first to be created. This fact puts authors in a better position than performers...

There is too much uncertainty in this sphere that needs to be researched...

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