

## **Address by Professor Lionel Bently to the Legal Affairs Committee of the European Parliament, November 4, 2008.**

Good morning. My name is Lionel Bently and I am a Professor of Intellectual Property Law at the University of Cambridge. I have no financial interest in the question of term of copyright in sound recordings (other than that shared by all consumers). My primary focus is thus the overall public interest. While, in general, I believe that intellectual property rights are a justifiable mechanism for rewarding creators and performers, and thus encouraging their activities, I do not believe that the proposed expansion of the term of protection is defensible by reference to the public interest. That is also the view of many of my academic colleagues, as presented in two joint statements, both of which I have signed.<sup>1</sup>

As the 1993 Term Directive (codified in 2006) harmonized the term of protection for performers and record producers throughout Europe,<sup>2</sup> there is no 'Internal Market' justification for this proposal. Therefore this proposal has to be viewed purely in terms of its substantive merits. The question is whether this change operates for the public good, and in accordance with European law. Who will benefit? What are the costs? What will performers get out of this? Does it infringe the principles of subsidiarity and proportionality?

### **1. The Real Beneficiaries: Record Companies**

The first point to note is that while this proposal is dressed up as a measure to improve the position of performers, in fact the chief beneficiaries of the proposal will be the record companies. Why is this? The answer is that virtually all contracts between recording artists and record companies involve an assignment of the rights of the performers *including any future additions to those rights*. And article 10a(1) (recital 9) of the proposed Directive requires Member States to give effect to existing contractual arrangements. So that giving performers a term extension from 50 to 95 years in practice gives them only a continuing claim to royalties from a record company under the terms of the contract. Performers with miserly royalty terms based on agreements from the 1960s, 1970s and 1980s will continue to be exploited by the record companies under those agreements. It is the record companies who are thus the chief beneficiaries of this proposal. The Commission *Explanatory Memorandum* and *Impact Assessment* admit this: record producers will gain the lion's share of revenues on sales in the extended term (something like Euro 607 million), and will also share in the revenues that accrue in the extended term from public performance and broadcasting.

Given that the record companies are the chief beneficiaries, we might ask, is there any good reason to give record companies longer rights? The answer in my view has been expressed clearly in two independent reports, one by my Centre 'CIPIL',<sup>3</sup> and the

---

<sup>1</sup> Bournemouth Statement/Joint Academic Statement to President Barroso of 16 June 2008 (published as 'Creativity Stifled?' [2008] *European Intellectual Property Review* 341); Joint Academic Statement to European Parliament, October 27, 2008.

<sup>2</sup> Directive 2006/116/EC.

<sup>3</sup> The report was commissioned by HM Treasury as part of the so-called Gowers Review of Intellectual Property.

other by the Institute for Information Law at the University of Amsterdam.<sup>4</sup> And the answer is ‘no’. The intellectual property protection that is given to record companies is designed to act as an economic incentive to those companies to invest in the expensive process of producing recordings – an incentive which would not exist if the recordings could be copied as soon as they were marketed. And 50 years is more than enough in terms of length to allow record companies to recoup their investment from the profits made on the sale of recordings.<sup>5</sup> And increasing protection for existing works, of course, has no incentive effect, precisely because the works already exist. The *Gowers Review* in the UK agreed that there was no economic justification for extending copyright term.<sup>6</sup> No evidence has been produced by the record companies that could make one question that conclusion. What is behind this proposal, I am afraid to say, is what economists call ‘rent seeking’ and what the man on the street calls ‘greed’.

## 2. The Social Costs

This proposal carries with it costs. The record companies argue, and the Commission seems to agree, that giving the longer term of protection will do no harm: that is, that “the impact on users would be minimal.” (EM p.8). It will do no harm, it is said, because the price that consumers pay for recordings which are out of copyright is no different from the price of recordings that are still within the 50 year term. So, the Commission says, we can give the record companies the extra income, and performers a slice of it, without harming anyone else. I hope a few moments reflection will reveal this to be a fairy story. The Commission estimates that Euro 758 million could be generated by this extension for the record industry and artists (EM p.9). Where one might ask will it come from? Can it come out of thin air?

Our intuition (as well as economic theory) tells us that the people who pay are the people who purchase copies of the recordings and the people who play and broadcast the recordings. The “empirical studies” to which the Commission refers in order to argue that the price of sound recordings that are out of copyright are not lower than that of sound recordings in copyright is a single study carried out by Price Waterhouse Cooper on behalf of the BPI. This was a study of 129 recordings and, in fact, revealed that for the most part copyright recordings were cheaper than ones in copyright. The mean retail price of the sample was 8.42 for out of copyright recordings, rather than 8.77 for in copyright recordings. What the PWC Report found then was not that out-of-copyright recordings are not cheaper, but that – given all the other factors that affect the pricing of individual recordings – it was not possible to establish on its small sample that out of copyright recordings were cheaper *in a statistically significant sense*. The Commission calls this study “the most comprehensive...to date.” It should be evident it is hardly “comprehensive”. The study itself admits its own limitations (PWC, p.49). It is no basis for ignoring our intuition that copyright increases the costs of recordings to consumers.

---

<sup>4</sup> IViR, *Recasting Copyright for the Knowledge Economy*– a report commissioned by the Internal Market DG of the European Commission.

<sup>5</sup> The additional 45 years will have a negligible affect on incentives to invest in new recordings in part because of the impact of ‘discounting’: at a discount rate of 7%, £1 in 50 years time has a current worth of 3 pence.

<sup>6</sup> HM Treasury, *Gowers Review of Intellectual Property*.

The Commission also argues that there will be no effect on the payments by broadcasters. This, it says, is because broadcasters pay collecting societies a sum based on their revenues (not by reference to whether phonograms are in or out of copyright) (EM p. 8).<sup>7</sup> While this is true, the Commission overlooks two key dimensions of the issue: the first is that – as the PWC Report itself recognises – as the proportion of recordings used in broadcasts which are in fact protected by copyright falls, broadcasters will seek to have the payments reduced.<sup>8</sup> The second is that, as recordings fall out of copyright, it is likely that niche broadcasters (or users) are likely to emerge who will not have to pay for a licence at all: broadcasts and venues playing just 60s music, for example. Term extension will mean that broadcasters cannot seek to reduce their payments, and that such niche users will have to pay licence fees that they would not otherwise have had to pay.<sup>9</sup>

The proposal before you, therefore, comes with a cost – a cost which corresponds to the benefit the Commission expects the industry to make, plus additional ‘deadweight loss’. Based on the Commission’s high estimates, we think the overall cost could be some Euro 1 billion.<sup>10</sup>

### **3. The Benefits to Performers**

Of course, this proposal is only of some, limited, benefit to performers, but these are miniscule in proportion to the costs to consumers and users. The benefits will come from two sources: from the extension itself, and from the transitional ‘social fund’ under proposed art 10a(3)-(5).

As a result of term extension, performers and their estates will be able to claim remuneration for public performance not just for 50 years but for a further 45 years, and featured performers will be able to continue to claim royalties on sales. There are two significant limitations on the value of this for performers. First, by extending term, recent performers must share performance income with older performers. If the size of payments remains the same, the pie will be sliced thinner. With term extension, the likes of Cliff Richard, and the estate of Keith Moon, will continue to be able to claim from the performance and broadcasting pot, leaving less for young performers. Secondly, while featured performers will also be able to claim royalties on sales in accordance with their contracts, this will be of little value for most

---

<sup>7</sup> The Commission proposes a ‘use it or lose it’ clause, art 10a(6), to ensure recordings are not locked away from the public. However, as drafted, the provision only applies in cases of transition (and not to new recordings, even though these will be given a 95 year term), lacks clarity and gives little security to third parties who wish to take advantage of it. In my view, the provision should be extended to all recordings that are not exploited after their 50<sup>th</sup> year. It should be clarified to make clear that the freedom to exploit the recordings is available if the recording is not made available *at any time* subsequent to 1 year after the additional term comes into operation. But most importantly of all, immunity from liability should be offered to any third party who undertook reasonable searches and failed to discover a source from which the recording could be acquired.

<sup>8</sup> PWC p. 30.

<sup>9</sup> Of course, such users would have to pay a licence fee in relation to composers’ rights (assuming such works are still in copyright, the term being 70 years post mortem).

<sup>10</sup> Joint Academic Statement to the European Parliament, October 27, 2008, Appendix: ‘The Proposed Directive for a Copyright Term Extension – A Backward-Looking Package’ p. 9.

performers. Many have not even recouped their advances.<sup>11</sup> In any case, given the sorts of deals that many performers entered, and the low level of continuing sales, most featured performers will get very little from this arrangement.<sup>12</sup>

The second way in which performers (and their estates) will gain is from the social fund. Under proposed art 10(a)(3)-(5), performers who have sold their copyright for a fixed sum, will be entitled to claim from the proposed social fund, which constitutes “20 % of revenues” that the record companies will gain from exploitation of the reproduction rights in the extended term. I have three comments about this provision. Firstly, in its current formulation, it is hopelessly vague: terms such as “revenue”, “phonogram producer” are left undefined – and little thought seems to have been given to various ways in which record companies might exploit the copyrights in the future.<sup>13</sup> Secondly, the proposal perversely privileges performers who entered deals for non-recurring remuneration over performers who gain royalties, however low those royalties are. Depending on how the fund operates (which is exceedingly unclear), a session musician could end up with much greater return on sales of a particular recording than the featured artists on that recording – and a particular session musician could feature on many, many recordings.<sup>14</sup> Thirdly, and most importantly, this fund will not benefit performers – whether featured performers or session musicians - *of* the future. These artists will be stuck with whatever their contracts say. Why would a rational legislature only care about existing performers, rather than those who come to be exploited once the legislation has been passed?

It is difficult to say precisely which performers will benefit and to what extent. A few featured performers will benefit from the extension itself, and a few session musicians might benefit considerably from the social fund. But the average benefits will be small.

#### **4. An Appropriate Area for Intervention ?**

While there may be justification for the European legislature intervening in copyright contracts generally (for example, by introducing a general unwaivable right to equitable remuneration) in order to avoid distortions in the internal market for authors/performers services,<sup>15</sup> it is difficult to see the justification for legislating in relation to a single group of creators or performers - session musicians.<sup>16</sup> It is all the

---

<sup>11</sup> In the Commission’s press release of Feb 14, 2008, it was suggested that even in cases where advances had not been recouped, record companies would be required to pay artists royalties under the contract. This idea has not made its way into the Proposal.

<sup>12</sup> Few performers will be able to take advantage of the termination provision in Art 10a(6) first para, which will only be available where the recording is neither available by sale ‘in sufficient quantity’ nor in digital copies on demand.

<sup>13</sup> Two further safeguards are required for performers: first, a right to audit the companies’ accounts; and second, a provision that ensures record companies cannot avoid paying into the fund by hiving off the ownership of recordings to subsidiary companies which can benefit from the SME exemption in art 10a(4) second para.

<sup>14</sup> “20% of revenues” is more than most featured artists will likely receive under their contracts. In a situation where there is one session musician and four featured artists, the resulting division could be extremely unfair.

<sup>15</sup> Bently, *Between A Rock and a Hard Place: The Problems Facing Freelance Creators in the UK Media Market-Place* (London: Institute of Employment Rights, 2002) 50-51.

<sup>16</sup> Cf. Art 4 of the Rental Directive 92/100/EEC which conferred a ‘unwaivable right to equitable remuneration’ in relation to rental of films and phonograms on ALL performers and creators.

more peculiar – and artificial - to do so by way of a term extension and transitional provisions (previously regarded as a matter for Member states).<sup>17</sup> One also can question whether the decision to extend performers rights and rights in sound recordings is proportionate to the goal of improving “the social situation of performers, and in particular session musicians” (EM 2). Is it proportionate that in order to raise a session musician’s fund worth Euro 150 million the legislature imposes costs on the public of Euro 1 billion?

I ask you to oppose this measure in its totality.

---

<sup>17</sup> In 1993, when the term of copyright was harmonized, transitional arrangements were left to Member States. There was no fund established for publishers to pay to (the estates of) editors or translators who could not participate in any remuneration resulting from the extension. This suggests that the European legislature regarded transitional arrangements as a matter to which the principle of subsidiarity was to be applied. Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights, Article 10(2)-(3) .