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**The European Commission's term extension proposal: fair concern or fruit of industry lobbying?**

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At the 10th Annual Fordham International IP Conference Prof. Jane Ginsburg gave a talk under the title 'Why copyright got a bad name for itself'[1] According to Prof. Ginsburg, "I have theory about why copyright got a bad name for itself, and I can summarize it in one word: Greed." Prof. Ginsburg points to various factors that have contributed to the bad reputation that copyright has acquired in recent times. On top of her list is term extension, in her case: the infamous Sonny Bono Act as a result of which, she convincingly argues, the moral claims of authors have lost much of their plausibility.

Prof. Ginsburg might as well have been speaking of neighbouring rights. The European Commission's proposal to extend neighbouring (or related) rights in phonograms is a public relations disaster of the worst kind – not only for the record companies that are endorsing it, but also for the general cause of copyright and related rights. The public legitimacy of copyright law, already severely undermined by the irresponsible suing of housewives, pensioners, students and children by the record industry, will receive a fatal blow if this proposal were ever adopted. In the eyes of the public, the term extension proposal is nothing but a thinly veiled attempt to make record companies richer at the expense of the general public. Greed in its undiluted form.

I admit that one can make a few plausible arguments to defend term extension for performing artists. In this day and age artists often eclipse authors in terms of creative input and entertainment value. So aligning the term of protection of artists with that of authors (either upwards or downwards – *pourquoi pas?*) does not strike me as a bad idea, provided that a legal framework is first put in place that prevents artists from immediately signing away all their rights to the first phonogram producer that crosses their path. Contract rules of this kind are, however, absent from the Commission's proposal, which is otherwise full of empathy for the poor old sessions musicians' plight.

What this proposal really is about, however, is not granting hand-outs to pensioned session musicians, but protecting the financial interests of the good old record industry. And when I say 'good' I refer mainly to the quality of the lobbying. This industry must be spending more time and money on public affairs than on artists and repertoire (A&R).

Let's have a closer look at the arguments. One often-heard argument is that phonogram producers and performing artists, or authors for that matter, deserve equal terms of protection. This is wholly unconvincing. Although the record industry has always cleverly operated and lobbied hand in hand with performing artists in pushing forward an agenda of ever expanding related rights, the arguments for having equal terms are weak. Elsewhere in the information industry, dissimilar terms of protection are not abnormal. Look at the database sector, where copyright holders have 70 years *post mortem auctoris*, and database producers just fifteen years (in Europe) or nothing at all (in the

[1] Published in *Columbia Journal of Law and the Arts*, Vol. 26, No. 1, 2002, and available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=342182.

rest of the world). Look at the publishing sector, where authors enjoy life plus 70 years, and publishers nothing – or at best a neighbouring right of short duration. Neighbouring (related) rights do not constitute a homogenous legal regime, nor do all kinds of related rights share the same rationales.

When we ask ourselves what is the proper term for protecting phonogram producers, what we must establish first, therefore, are the rationales underlying protection of phonogram producers. While the record industry likes to extol its creative role in bringing artists and records to the market (hence 'the creative industries'), record companies are not authors or artists deserving legal protection as a matter of moral principle or natural right. The record industry is what its name implies: an industry. What we are protecting, if we protect at all, is not creation, but entrepreneurial achievement. Phonogram rights are *Leistungschutzrechte* – rights that protect investment in a product, in terms of time, money and/or skill. The primary justification here is economic, not moral. Because records are easily prone to copying, we grant exclusive rights to allow producers a temporary monopoly to recoup their costs. Mind you, granting exclusive rights to businesses is by no means the general rule in the commercial world at large. Most enterprises I know invest in product development, new business models, distribution networks, goodwill and what have you, but do so without intellectual property protection of their products. Freedom of competition is what it's all about in normal business life. Phonogram producers should count themselves lucky to have any neighbouring rights at all. Indeed in large parts of Europe, until the 1980's they had none.

So the proper term of protection should be just enough to 'incentivize' record production without unnecessarily impeding freedom of competition. But what kind of investment warrants protection? In the old days, when the Rome Convention with its 20 years term of protection was conceived, record companies faced huge upfront investment costs. Recording studios were enormous and enormously expensive. The industry also required hugely expensive record presses, and an expansive and expensive infrastructure of record distribution. But those days are now long done. Today, with the proliferation of high-quality digital recording equipment, recordings are often made at home – in the home studios of the artists, or simply on home computers. In the past decade many of the large recording studios of old have disappeared. With download services rapidly replacing cd's, the costs of record mass production and distribution have also gone down spectacularly – in fact, almost to zero. Paradoxically, while the recording and distribution costs that in the past justified a relatively short term of legal protection have dramatically decreased in recent years, the record industry is calling for term extension.[2]

The main argument brought forward by the record companies to underlie this most improbable proposition relates to *digital piracy*. The recording industry is losing money to the pirates, and needs a break. Well, yes, 'piracy' (both offline and online) is indeed a problem. But does it really make sense to try to remedy the erosion of the phonographic right by extending its term of protection? If a right of limited duration cannot be effectively enforced in practice, what is the point of extending it? In my opinion the correct approach towards the problem of piracy is trying to solve it, not to hand out subsidies to the recording industry at the consumers' expense. And yes, it can be solved: not by stepping up enforcement, or by three strikes legislation, but first and foremost by offering attractive business models that can compete with piracy – something that the industry has started to do only recently, some ten years too late.

The real reasons behind the term extension proposal and the lobbying are even less convincing. The neighbouring rights in the great hits of the early nineteen-sixties are soon to expire. The major labels are about to lose control over some of the most valuable assets (the 'crown jewels') in their

[2] See N. Helberger, N. Dufft, S.J. van Gompel & P.B. Hugenholtz, 'Never Forever: Why Extending the Term of Protection for Sound Recordings is a Bad Idea', European Intellectual Property Review, 2008-5, p. 174-181.

recording catalogues. In contrast, for the smaller labels that do not have much to say in this debate, wonderful new opportunities for re-releasing older recordings will arise.

Preserving valuable intellectual property rights from falling into the public domain is an argument that undoubtedly goes down well with European commissioners at cocktail parties. Who would want to destroy economic value in times like these? But for those familiar with intellectual property law it is, of course, no argument at all. Extending rights in the face of expiry is a perverse denial of everything that intellectual property law stands for: granting *temporary* exclusive rights in the interest of general cultural and economic welfare.

[While we're at it, why don't we revive the copyrights in the works of Mozart? There's economic value for you. Austria, start lobbying!]

To answer the question the organizers of this wonderful conference have asked me to tackle: yes, term extension is a fruit of lobbying. Excellent lobbying, but that is just about all that's good about the European Commission's proposal.