



Intellectual
Property
Office

Copyright term extension for sound recordings

Post implementation review



Title: Copyright Term Extension for Sound Recordings PIR No: Original IA/IPC No: BIS1562 Lead department or agency: Intellectual Property Office Other departments or agencies:	Post Implementation Review
	Date: 01/10/2018
	Type of regulation: EU
	Type of review: Statutory
	Date measure came into force: 01/11/2013
Recommendation: Keep	
Contact for enquiries: Copyright policy team, IPO	

1. What were the policy objectives of the measure? (Maximum 5 lines)

Legislation was introduced in 2013 to extend the period of copyright protection for sound recordings from 50 years to 70 years, implementing EU Directive 2011/77/EU. The primary objective of the legislation was to enhance the welfare of performers (artists) and record labels, ensuring they receive appropriate rewards for their effort throughout their lives for their sound recordings and performances. As well as extending the copyright protection term to 70 years the legislation also includes a number of additional provisions intended to benefit artists, including a fund for session musicians, a “use-it-or-lose it” provision and a “clean slate” provision. Further details on these provisions can be found in the Annex.

2. What evidence has informed the PIR? (Maximum 5 lines)

The original [impact assessment \(IA\)](#) for this measure estimated a small expected annual net cost to business per year of £0.3 million (in 2009 prices). As this is only a small annual net cost we have taken a relatively light touch approach to collecting evidence on the impact of the measure, using publically available data where possible.

We have utilised the following evidence to assess how the expected impact compares to the actual impact:

- Data from Phonographic Performance Limited (PPL) on session fund and royalty payments
- Discussions with stakeholders within the music industry as well as users of music
- Evidence gathered for a European Parliament Committees report¹ on the term extension

The nature of the measure means the impact in the initial years will be fairly limited, but will continue to grow over time. This is because only a small number of recordings are covered by the directive (as of 2017 only recordings from 1963 to 1967), however, by 2033 there will be a 20 year period over which recordings will be covered by the directive. As a result, the full impact and consequences of the directive will not fully be established until then.

¹ Implementation of the Directive 2011/77/EU: copyright term of protection, Requested by the JURI committee 2018 [http://www.europarl.europa.eu/RegData/etudes/STUD/2018/604957/IPOL_STU\(2018\)604957_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2018/604957/IPOL_STU(2018)604957_EN.pdf)

3. To what extent have the policy objectives been achieved? (Maximum 5 lines)

As outlined above, the primary policy objective of the measure is to enhance the welfare of performers by providing them with an income source for an extended period of time. We estimate that approximately £600,000 has already been paid out to performers via the session fund, which is money that session musicians (who transferred their performer's rights to the producer of the sound recording in return for a single payment) would not have otherwise received. In addition, approximately £1.7 million has been paid out in royalties to performers for the public performance and broadcast uses of music for which the copyright would have otherwise expired. While these payments are a significant benefit to artists whose copyright would have otherwise expired, there is an equivalent cost to other business. As a result, this legislation primarily results in transfers between businesses, with a small net cost of administration associated with elements such as the session fund. Artists will also receive revenue from record sales and other exploitations of their works, however, it has not been possible to quantify this as part of this review, although more detail is contained in the Annex.

The income described above is largely revenue that artists would not have received if the legislation had not been introduced. Therefore, this suggests that the legislation has on the whole been successful at providing artists with a revenue stream for an extended period of time. However, the impact of the legislation will grow over time, therefore we will continue to monitor this and will undertake a second post implementation review in 2023. The IPO will also seek to provide additional guidance to explain how some of the provisions in the legislation should function, in particular the clean slate right.

Sign-off for Post Implementation Review: Chief economist/Head of Analysis and Minister

I have read the PIR and I am satisfied that it represents a fair and proportionate assessment of the impact of the measure.

Signed: ***Pippa Hall***

Date: 01/07/2018

Further information sheet

Please provide additional evidence in subsequent sheets, as required.

4. What were the original assumptions?(Maximum 5 lines)

In the original impact assessment it was assumed that the number of PPL members losing copyright per annum would have an even distribution. There were also additional assumptions that revenues would remain stable over time. In this review we use data on actual payments to performers whose copyright would have otherwise expired, rather than modelling payments on these assumptions.

In addition, the figures for transitional costs in the original impact assessment (IA) were described in the IA as being based on a very broad estimate by PPL and may vary considerably. We have not collected any data on this, as PPL have responded that separating out these transitional costs from other administration costs would not be feasible. However, PPL's annual reports show that the organisational cost to income ratio has remained between 14.0% and 15.0% from 2011 to 2016, indicating any transitional costs resulting from the term directive were small relative to PPL's overall revenues.

5. Were there any unintended consequences? (Maximum 5 lines)

One unintended consequence we have identified is that the term extension could, in some cases, result in lower returns for artists from sales of their music. When the copyright term ends the record producer loses their exclusive right to sell the record, meaning that anyone, including the artists themselves can sell the record. By selling the record themselves the artists could potentially earn higher returns, compared to the royalty rates they receive from record companies having exclusive rights the music (more detail in Annex). However, any potential losses to artists from not being able to release their own music should be offset by the increased royalty payments artist receive when their music is played in public or broadcast.

We have found no evidence of any artists making use of the "use it or lose it provision"² which allows performers to request the copyright to be terminated if record companies do not make the recording available in sufficient quantities. However, one potential unintended consequence of this is that, where there are multiple performers on the recording, if one performer requests the copyright to be terminated then all performers could lose out on royalty payments. However, as this provision has not been used and has not been raised as a concern to the IPO by artists this is not considered a major issue at present, but is something we will monitor.

There is also the potential issue that record companies could seek to avoid paying the 20% supplementary remuneration charge by re-mastering sound recordings and no longer commercialising the original recording.³ There is a legal question around whether a re-mastered record does constitute a new phonogram, and is therefore entitled to a new term of protection, meaning supplementary remuneration does not have to be paid for a further 50 years. This is not considered a major issue at present, as the data shows payments into the supplementary fund are continuing to grow, and this has not been raised as a concern by artists, however, this is something we will continue to monitor.

² [http://www.europarl.europa.eu/RegData/etudes/STUD/2018/604957/IPOL_STU\(2018\)604957_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2018/604957/IPOL_STU(2018)604957_EN.pdf)

Implementation of the Directive 2011/77/EU: copyright term of protection

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Commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs

³ Ibid

6. Has the evidence identified any opportunities for reducing the burden on business?

(Maximum 5 lines)

This measure mainly represents a transfer between businesses, for example from public domain specialists to record companies, with a low net cost to business. As a result, there is limited opportunity to reduce the costs to business. In addition, many of the costs involved were as a result of the transition to the extended term, and the sunk nature of these costs mean they are not relevant to this review.

One small area where the burden could be reduced is around the clean slate right, which means that any un-recouped deductions should be written off once the song enters the period of the extended term. However, the un-recouped deductions are usually attributed to an artist rather than individual songs, as the balances will be based on data which is 50 years old. This can hence create difficulties where an artist has multiple songs which enter the extended term at different time periods.⁴ The IPO will look to provide some guidance on how record companies should respond in these cases, to reduce the burden of attributing deductions to individual songs.

7. For EU measures, how does the UK's implementation compare with that in other EU member states in terms of costs to business? (Maximum 5 lines)

The EU directive only allowed for some minor flexibility on the implementation of the directive, therefore there should be limited variability in the cost to business between countries. A study commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs compares the implementation of the directive in seven member states including the UK, although the focus is on implementation rather than the cost to business.⁵ The main problem identified by the report was a "lack of information of performers about their rights, and the identification of performers entitled to enjoy said measures". Based on the findings of this report and the evidence collected for this post implementation review the IPO will seek to provide additional guidance on the provisions in the legislation, in particular the clean slate right.

Annex: Additional Analysis

Provisions in Directive

In addition to extending the copyright term the EU directive also included a number of additional provisions:

- Session fund: under this provision where session musicians have performed on a recording companies are obliged to contribute 20% of their revenues earned from their right to copy, distribute and make available of the sound recording during the extended term to a fund managed by PPL. This fund is then paid out to session musicians who originally forfeited royalties for a one off fee at the time of recording. More detail on payments made from the session fund are in the annex below.
- Use it or lose it provision: this provision gives performers the right to terminate the contract with the record producer in the extended term if the recording is not made available in sufficient quantities.

⁴ [http://www.europarl.europa.eu/RegData/etudes/STUD/2018/604957/IPOL_STU\(2018\)604957_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2018/604957/IPOL_STU(2018)604957_EN.pdf)

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⁵ Ibid

- Clean slate provision: some contracts with performers allow record companies to deduct producer's costs from royalty payments. Under the clean slate provision, after 50 years record companies are no longer allowed to make such deductions and must pay full royalties to artists.
- Renegotiation right: this is an optional provision in the directive that allowed for member states to include a right for artists to renegotiate their contracts with record companies after 50 years from when the recording is published. The UK chose not to include this provision on the basis that this is above the minimum requirements of the directive and could interfere with freedom of contract. In addition, some respondents to the original consultation commenting that the provision "would prove highly complex and confusing". France is one member state that has been identified as including this provision, however, the implementation of the provision in France demonstrates the complications in doing so. A report by European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs commented that the implementation of the provision in France "does not necessarily improve the position of performers in contractual relations" due to questions around how this right works in practice⁶. As a result, the IPO is not currently looking to introduce a renegotiation right in the UK, but this will be looked at again in future evaluations of the legislation if necessary.

Royalty payments to performers and record companies from public performance and broadcast uses of music

Performers are able to continue to earn royalty payments when recordings of their qualifying performances are played in public or broadcast for an additional 20 years as a result of the copyright term extension.

PPL have calculated that for the years 2014 to 2016 (as distributed in 2015 to 2017) they have paid out £3.4m in royalty payments for sound recordings for which the copyright would have expired without the term extension.⁷ Under equitable remuneration approximately⁸ £1.7m of this would be paid out to performers, with the same amount paid out to record companies.

Over this three year period PPL paid out a total of £529.2m million in licensing income to performers and record companies. Therefore, sound recordings covered by the term extension represent just 0.6% of total payments made over this period. However, this impact will grow over time as more recordings become covered by the term extension.

As a result, PPL are now distributing royalties to recordings released over a longer time period, and thus are likely to pay royalties to a greater number of performers than would have been the case without the term extension. In this scenario, a larger number of performers would be sharing in the same amount of revenue than would otherwise have been the case. However, there could be additional licensing revenue to pay out as royalties, as a result of an increase in the number of organisations who have to pay license fees. For example, if the term extension had not been introduced a radio station which only played sound recordings released in the 1960s would not have to pay licence fees to PPL after 2020. In either scenario this represents a transfer rather than a net cost to business.

⁶ Ibid

⁷ Provided to IPO by email from PPL, May 2018. Relates to 1963 recordings used by PPL licensees in 2014; 1963 and 1964 recordings used in 2015; and 1963-1965 recordings used in 2016.

⁸ This is not an exact 50:50 split as some aspects of PPL's licensing are not subject to the statutory rules on equitable remuneration (e.g. where the revenue relates to copying rights) and the position can also be affected by the statutory rules on performer.

It is likely that this is a combination of both increased licensing revenue and a shared distribution among more performers, with PPL indicating that they believe this to be primarily the latter. However, due to the relatively small number of years covered by the term extension at this point in time it is very difficult to isolate the relative change in revenues solely as a result of the term extension, and we have not attempted to do so, however, this is something we will continue to monitor as more information becomes available.

Session fund calculations

One of the main sources of income for performers is the supplementary remuneration fund for session musicians (sometimes referred to as the “session fund”). Where session musicians have performed on a recording that is in its extended term, record companies must contribute 20% of certain types of their revenues from exploiting the recording each year into the session fund, which in the UK is administered by PPL, and the monies are then paid out to performers by PPL.

For the 2016 fund (which covers recordings published in the period 1963 to 1965) £428,014 was paid into the fund by record companies in 2017, relating to 21,017 separate recordings. This is an increase on the 2015 fund, into which record companies paid £241,857 in 2016, and the £78,924 paid into the 2014 fund in 2015.⁹ Data on payments into the session fund for 2017 – covering recordings from 1963 to 1967- is not yet available, as these payments will be made during 2018.

There is work involved for PPL both in administering the process of obtaining session fund payments and related data from record companies, and processing the same in order to be able to pay out to the relevant performers. To allow for the costs of administering the session fund PPL makes a cost deduction before making payments to performers (which is permitted under the statutory regulations implementing the term extension), applying its overall cost percentage for the year. This was: 14.8% in 2016; 14.2% in 2015; and 14.1% in 2014.¹⁰

We subtract these administration costs from the value of payments made into the session fund to estimate the remaining value of the session fund. We then calculate that a total of £639,977 has been available to be paid out to session musicians through the supplementary remuneration fund, for recordings published between 1963 and 1965. Over half of this was as part of the 2016 fund, and as the time period covered by the term extension increases the value of the session fund should continue to increase. Likewise the number of performers benefiting from the session fund is likely to increase over time. PPL allocated session fund monies to over 3,500 performers from the 2016 fund, up from over 2,000 performers and c.1,200 performers in respect of the 2015 and 2014 funds respectively.

This figure represents a transfer from record companies (who benefit from the exclusive rights in the extended term as discussed below) to session musicians and is therefore not a net cost to business. However, there is a net cost to business involved in administering this fund. If it is assumed the cost of administering the session fund is equal to PPL’s cost deduction this would imply a cost to business of approximately £108,000 for the 2014, 2015 and 2016 funds combined.

Music sales and other additional revenues

The extension of the copyright term also means record companies maintain their exclusive right to copy, distribute and make available recordings for an additional 20 years. This means that, for an additional 20 years, the music sales of record companies will not be displaced by public

⁹ <http://www.ppluk.com/I-Make-Music/Misc-member-info/Copyright-Term-Extension/>

¹⁰ <http://www.ppluk.com/About-Us/Who-We-Are/Annual-Reports/>

domain specialists (who can sell the sound recording when the copyright expires), as the record producer maintains their exclusive right.

As payments in to the supplementary remuneration fund are based on revenues from the record companies' exclusive rights to exploit sound recordings on which a session musicians performed, this can be used to provide an indication of the value of this revenue stream. However, this only represents a lower bound on the overall value to record companies' of the exclusive rights provided by the extended term, as only certain types of revenue are included, and this only covers recordings on which session musicians performed.

From this we can estimate that, between 2014 and 2016, at least £3.7 million was earned by record companies from their exclusive rights to exploit music that would have been out of copyright were it not for the term extension. A share of this revenue received by record companies will be distributed to performers, dependent on royalty rates agreed in the original contractual arrangements.

Had it not been for the term extension it would be expected that record companies would have received a smaller amount of revenue, as they would face competition from public domain specialists who could also make the music available and thus receive revenues from doing so, displacing sales from the record producer.

Therefore, in theory this should benefit artists as they continue to receive a higher level of royalties from record companies, as the music does not enter the public domain for an additional 20 years. However, some artist managers have indicated that, were it not for the term extension, they could have released music by their artists which is in the public domain themselves.¹¹ As it would be the artists themselves releasing the records they could capture more market share than public domain specialists, as consumers would believe these releases to be more authentic. In addition, as royalty rates tend to be low on these contracts the return could be higher if the artist managers release the songs with the artists, as the artists could receive a greater share of revenues. However, any losses incomes of music sales to artists should be offset by gains in public performance and broadcasting royalties, as the value of the two revenue streams is similar, and the competition artist's face in public domain music sales will mean their market share will be limited.

The impact on music sales is therefore primarily a transfer of sales from public domain specialists to record companies. There may also be a loss for consumers, as the competition between public domain specialists and record companies could result in lower prices for consumers, although the evidence on whether this is the case is limited¹².

There is also the potential that copyright term extension could impact on the availability of music to purchase. Music entering the public domain could be re-issued by public domain specialists. However, the incentives for record companies to digitise their back catalogues and re-issue are improved by the exclusivity provided by the term extension. We have not found any evidence on the balance between these two.

Discussions with stakeholders

As this has been a relatively light touch review we have not undertaken a formal consultation to gather the views of users.

¹¹ [http://www.europarl.europa.eu/RegData/etudes/STUD/2018/604957/IPOL_STU\(2018\)604957_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2018/604957/IPOL_STU(2018)604957_EN.pdf)

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¹² The Impact of Copyright Extension for Sound Recordings in the UK

A Report for the Gowers Review of Intellectual Property prepared by PwC on behalf of the BPI. 2006.

To minimise the burden on business of responding to questions we have tried to utilise views already collected as part of a separate review into the term extension. These views were collected by David Stopps, who was the UK national expert for the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs report into the term extension.¹³ He contacted many stakeholders in the music industry including trade bodies for artists, as well as record companies to collect evidence for his report.

In addition, to get the views of users of music we contacted some groups who responded to the original consultation when the legislation was introduced. As of yet none of those users we have contacted have expressed concerns with the impact of the changes. We have also discussed the impact of the term directive separately with PPL.

¹³ Ibid

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