

Gowers upsets the music industry but does the right thing

Nothing grabs a headline like rock'n'roll, as was demonstrated in December when the Gowers Review of Intellectual Property was published in the UK. Hotly anticipated, the review sparked controversy when the music industry reacted negatively to a refusal to recommend an extension to the term of protection for sound recordings. This currently stands at 50 years in the United Kingdom.

The day after the report went public the *Financial Times* carried a full-page advertisement on behalf of over 3,500 record companies and 40,000 performers – including such luminaries as Eric Clapton, Sir Paul McCartney, Katie Melua and Sir Simon Rattle – imploring the government to ignore Gowers and extend the sound-recording term to 95 years.

The review, of course, was about more than just the sound-recording term. Covering all areas of intellectual property, it was carried out by Andrew Gowers, former editor of the *Financial Times*, at the behest of the chancellor Gordon Brown as part of a government manifesto pledge to modernise IP protection throughout the United Kingdom. Although broadly welcomed by Britain's IP community, it was the music copyright issues that grabbed most of the headlines.

Evidence-based

Gowers was at pains to point out that his review took "an evidence-based approach" and examined the economic case for altering the current copyright regime. This being the case, both the evidence and economics went against the music industry. Not only did the review recommend the government press for an EU-wide provision to help unlock orphan works, it also called for a specific exception to be created

for private copying to allow users to shift formats (ie, copy legitimately purchased CDs onto iPods). Most damning of all, it recommended that the European Commission leave the sound-recording term exactly where it was. This point was hammered home in the next recommendation: that policy makers should not alter the term and scope of IP rights retrospectively.

The music industry's crusade for an extension to the sound-recording term is not just about the Gowers Review. Recordings made in the 1950s will soon start to fall out of protection and the industry has been getting increasingly unhappy as the end of 50 years' of income approaches. It argues that the loss of this revenue stream could thwart its efforts to invest in new talent as well as resulting in financial hardship for older musicians. More compellingly, the industry also points out that as the sound-recording term is 95 years in the United States it is only fair and logical to make it the same in the United Kingdom.

The inconsistency in protection terms between jurisdictions is a powerful argument, especially with the growth of the internet. In 2004, the Australian division of Project Gutenberg, a free service that posts public domain works online, ran into trouble when it published the text of Margaret Mitchell's epic *Gone With the Wind* on-line. While the work is out of copyright in Australia, it is still protected in the United States where the copyright term is life of the author plus 70 years (instead of 50, as was the case in Australia in 2004). The text was taken down following a request by Mitchell's estate.

Harmonisation no excuse

Lack of harmonisation between

jurisdictions is a problem and with more and more content – from books to films and music – being posted and shared online, it is one that is unlikely to go away. However, it is not sufficient reason almost to double the term of protection for sound recordings. International laws are a patchwork. The difference between the length of sound recording terms is not the only, or even one of the most significant, differences between US and UK copyright law. Any serious attempt at harmonisation would also have to look at the very definition of copyright (which is registrable in the United States but not the United Kingdom) and exceptions to copyright (while the US law has a clear doctrine of fair use, UK law only sets out fair-dealing exceptions). The laws in different jurisdictions have evolved to suit the needs of those jurisdictions and so international harmonisation is not, by itself, a strong enough argument to lengthen the UK sound recording term by 45 years.

Copyright is a temporary monopoly that is designed to enable artists to secure a financial return from their creative endeavour, a fact that many rights holders seem to have forgotten. It is not intended to give rights holders a perpetual revenue stream. The copyright system is as concerned with innovation as it is with securing a financial reward for artists, so it is heartening to see the Gowers Review recognise this.

Artists and recording companies knew how long the term of protection for sound recordings was when they made those recordings. Nothing has been taken away from them – it is simply that time is up. Some might even argue that 50 years' income is not a bad return for a

piece of work completed half a century ago.

Stifling culture

While powerful voices in the music and film industries lobby for ever-longer terms of protection, it is becoming apparent that locking up content can have far-reaching effects. In the United States, documentary makers are running into problems when it comes to getting clearances for using recordings, including music, news footage and film clips. This was brought sharply into focus in 2005 when the Emmy award-winning documentary *Eyes on the Prize: America's Civil Rights Years (1954-1965)* disappeared as a result of copyright issues with photographs, news footage and music. Because of the high costs of licence fees, some of the copyrighted works – which included songs such as *What'd I Say* by Ray Charles and *Blowin' in the Wind* by Bob Dylan – had only been licensed for a five-year period. After these licences expired the film effectively became unavailable. While grants have now enabled the production company Blackside Inc to renew these rights, the problem remains on the table: ever-expanding terms of protection lock away culture.

Perhaps artists concerned about the money running out should take a leaf out of George Martin's book. Instead of complaining that the term of protection for recordings on which he had worked would soon run out, the producer, who worked closely with the Beatles during their glory years, took a more direct approach. By going back to the mixing deck and putting a fresh twist on some old favourites, he has secured another 50 years' revenue from his album *Love*. Maybe it is time for other artists to get off the picket line and back into the recording studio.