

Educational exceptions should be clarified 4.17 In order therefore to ensure that educational establishments are able to take advantage of new technology to educate pupils regardless of their location, it is necessary to expand the existing copyright exceptions. At present an educational establishment can copy a broadcast work (e.g. a radio or television programme) and show it to its students without infringing copyright provided the activity is for a non-commercial educational purpose.¹² In 2003 the exception was modified so that educational establishments could allow students on the premises to see the programme in their own time.¹³ However, the exception does not extend to situations where students are not on the premises of the educational establishment. This means that distance learners are at a disadvantage compared with those based on campus and thus these constraints disproportionately impact on students with disabilities who may work from remote locations.

4.18 The exception should therefore be expanded so that copyright is not infringed where a copy of a broadcast (e.g. a television programme) is communicated to students who are not located within the educational establishment.¹⁴ It is the Review's view that such an exception is permitted under the Information Society Directive, provided that the education provided is not commercial and any source is indicated.¹⁵ It will also be necessary to ensure that access to such material should not be generally available to the public: accordingly, distance learning students will need to access the material securely via a VLE.

4.19 At present it is also not an infringement of copyright for a non-commercial educational establishment to make reprographic copies of passages from books or similar material, providing sufficient acknowledgements are made.¹⁶ However, the exception only applies where no licensing scheme covering this sort of activity is in place. As mentioned above, the Copyright Licensing Agency (CLA) presently provides such a licence and therefore this exception has a limited impact. However, neither the exception nor the CLA currently license short extracts being sent to distance learning students by email or in a VLE. This disadvantages such students and makes it difficult for educational establishments to provide students with short extracts of study material. Accordingly, the relevant copyright exception should be extended to allow passages from works to be made available to students by email or VLE without infringing copyright.¹⁷ However, right holders have a legitimate interest in this field and so such an exception should not have effect where a licensing scheme is in place.¹⁸

Recommendation 2: Enable educational provisions to cover distance learning and interactive whiteboards by 2008 by amending sections 35 and 36 of the CDPA.

Sound recording term

4.20 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

¹²Section 35 of the CDPA.

¹³Section 35(1A) of the CDPA.

¹⁴This restriction is currently imposed by section 35(1A) of the CDPA.

¹⁵Article 5(3)(a) of Directive 2001/29/EC. However, the Review is of the view the new extended exception should continue not to apply where a licensing scheme is in place which covers such activities, in other words, section 35(2) of the Act should apply to the extended exception as well.

¹⁶Section 36 of the CDPA.

¹⁷Such use would also fall within Article 5(3)(a) of Directive 2001/29/EC.

¹⁸In other words, section 36(3) of the CDPA should apply to the extended exception as well.

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).¹⁹

4.21 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. The Review consulted widely and has considered this proposal in some detail, both for a retrospective change in copyright term and for a prospective change in term that would only affect future recordings rather than those already in existence. As part of its research into the question of term extension the Review commissioned an economic analysis from the Centre for Intellectual Property and Information Law (CIPIL) at Cambridge University.

4.22 A number of reasons were advanced in the Call for Evidence from some groups 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.²¹ 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.²³

The Review has carefully considered each of these arguments in turn.

I. Extension achieves parity with other countries

Extension is not harmonisation

4.23 It is important to note that the term of protection is only one factor determining the royalties that artists and recording companies receive. The breadth of protection is also important. In the EU, the term of protection for sound recordings and performers’ rights is harmonised at 50 years.²⁴ During this period, rights holders receive royalties for almost all public performances of their work. In the USA, the term of protection is 95 years, but under the Bars and Grills Exception²⁵ around 70 per cent of eating and drinking establishments, and 45 per cent of shops, do not have to pay royalties to performers.²⁶ In the USA, performers only receive royalty payments when their music is played on digital radio,²⁷ while in the UK all

¹⁹ From this point forward, ‘retrospective’ will refer to both forms of backward changes to copyright.

²⁰ Section 12 of the CPDA.

²¹ Section 191 and section 13A of the CDPA.

²² Department for Culture, Media and Sport.

²³ Call for Evidence submission, British Phonographic Industry.

²⁴ Article 3 of Directive 93/98/EEC on harmonising the term of protection of copyright and certain related rights.

²⁵ Section 110(5) of the USA Copyright Act. A complaint was made by the European Community against the USA that this exception was contrary to Article 13 of TRIPS. A panel found in favour of the EC and the USA was ordered to pay annual damages of US\$1.2 million. This requirement has now lapsed.

²⁶ See WTO Panel Report WT/DS160R, Section 110(5) of the USA Copyright Act, 5 June 2002.

²⁷ Section 106(6) of the USA Copyright Act.

radio performances carry royalties.²⁸ If the system in the USA was the same as that in the EU, estimates suggest that European rights holders would receive royalties of \$25.5 million per annum for the broadcasting of their recordings in the USA.²⁹ It is therefore possible that the total royalties received in the EU is no less than, and may even be more than, those received in the USA.

4.24 The argument has also been put forward that the longer length of term in the USA encourages artists from the UK to sign to US recording companies, thereby remitting profits to the USA. However, the Review has seen no evidence of UK bands choosing to sign to US labels based on copyright term. If musicians are indeed signing to labels in the USA, there may well be other reasons for doing so, such as the size of the market. In fact, there is anecdotal evidence that bands from the USA are signing to UK labels to develop in a vibrant music scene. For example, the Scissor Sisters are signed to Polydor UK, and their first album sold 2.6 million copies in the UK, and only 130,000 in the USA. Orson, another American band, achieved a number one single with “No Tomorrow” and is signed to Mercury Records in the UK.

2. Performers and composers should have equal protection

Fairness applies to society as a whole

4.25 Performers argue that the incentives to perform are no less than those required to write lyrics or compose a score, and that the performance itself is a work of art. The distinctive voice and aesthetic of the performer adds value to the composition and is vital to making a song a commercial success.

4.26 But the fairness argument applies to society as a whole. 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”.³⁰ 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.

4.27 Economic evidence indicates that the length of protection for copyright works already far exceeds the incentives required to invest in new works. Boldrin and Levine³¹ estimate that the optimal length of copyright is at most seven years. Posner and Landes, 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.³²

4.28 Furthermore, it is not clear that extending term from 50 years to 70 or 95 years would remedy the unequal treatment of performers and producers from composers, who benefit from life plus 70 years protection.

4.29 This is because it is not clear that extension of term would benefit musicians and performers very much in practice. The CIPIL report that the Review commissioned states that: “most people seem to assume that any extended term would go to record companies rather than performers: either because the record company already owns the copyright or

²⁸ In relation to sound recordings this is a result of section 20 of the CDPA. In relation to performances, this is the combined effect of sections 182CA and 182D of that Act.

²⁹ TRIPS and the Fairness in Music Arbitration: The Repercussions, Owens R., *European Intellectual Property Review*, 2003.

³⁰ MacCauley, Thomas Babington, Speech to House of Commons on 5 February 1841.

³¹ *Growth and Intellectual Property*, Boldrin M. and Levine D., 2005.

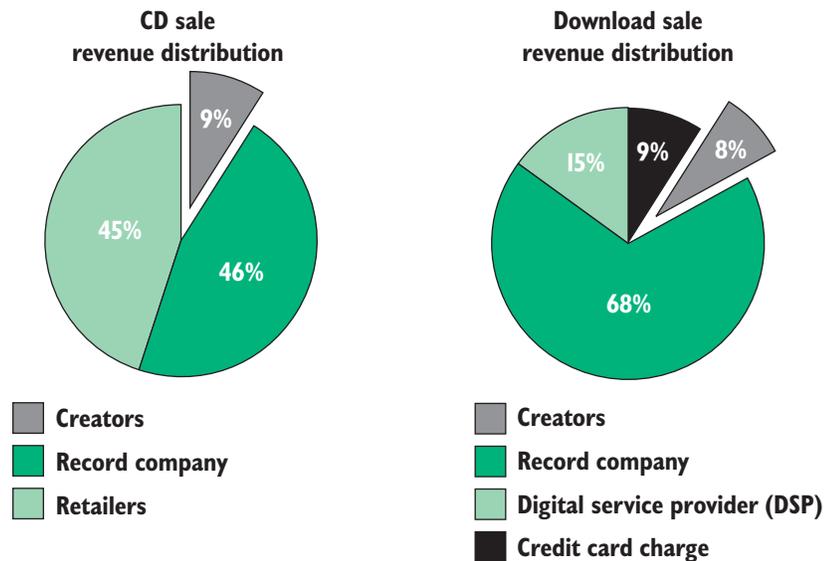
³² *The Economic Structure of Intellectual Property Law*, Landes W. and Posner R., 2003.

because the performer will, as a standard term of a recording agreement, have purported to assign any extended term that might be created to the copyright holder”.³³ The British Phonographic Industry (BPI) submitted a report by PricewaterhouseCoopers (PWC) to the Review.³⁴ Using the maximum revenues predicted in the PWC report, CIPIL estimated that the net present value (NPV) of a prospective change in term would be 1 per cent or lower for performers. The report noted that distribution of income would be highly skewed, with most income going to the relatively small number of highly successful artists whose work is still commercially available after 50 years.

Box 4.2: Artists would not necessarily benefit from extension

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”.^a 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.^b As shown in the charts below, 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.

Chart 4.1: Revenue Distribution



It is worth noting that 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.

^aCall for Evidence submission, British Phonographic Industry.

^bwww.music-law.com/contractbasics.html.

³³ *Review of the Economic Evidence Relating to an Extension of Copyright in Sound Recordings*, Centre for Intellectual Property and Information Law, 2006.

³⁴ *The Impact of Copyright Extension for Sound Recordings in the UK*, PricewaterhouseCoopers, 2006.

3. Extension will increase the supply of new music

Extension will not increase incentives **4.30** 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.

4.31 In an amicus brief to the Supreme Court in the challenge to the Copyright Term Extension Act,³⁵ 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 (using NPV calculation) and they conclude therefore that extension of term has negligible effect on investment decisions.³⁶ Furthermore, they noted that the then term of protection in the USA had nearly the same present value as perpetual copyright term. As such, many economists suggest that increasing copyright term beyond 50 years does not provide additional incentives to invest, as monies earned so far in the future fail to impact on current spending decisions.

4.32 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. Dave Rowntree, drummer with Blur and The Ailerons, commented that: “I have never heard of a single one [band] deciding not to record a song because it will fall out of copyright in ‘only’ fifty years. The idea is laughable.”³⁷

Most recordings do not sell for 50 years **4.33** 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.³⁸ 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. Without registration, it is difficult to get accurate estimates of the percentage of works protected in the UK by copyright that are commercially available. Box 4.3 below shows that the vast majority of income for sound recordings and books are generated within the first few years of issue. Therefore, extension would only raise revenue for a small minority of sound recordings, keeping the vast majority locked up.

³⁵ *Eldred v. Ashcroft* (2003) 537 USA 186.

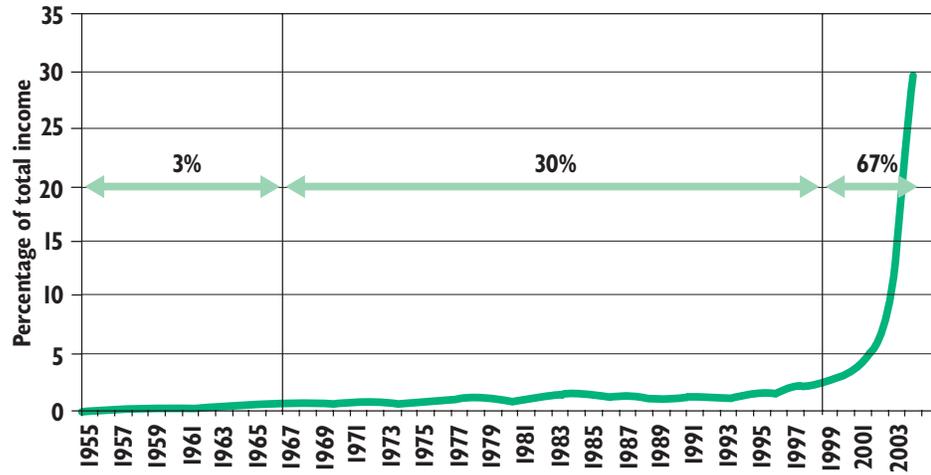
³⁶ *The Copyright Term Extension Act of 1998: An Economic Analysis*, Akerlof, G. et al., 2002.

³⁷ Call for Evidence submission, Dave Rowntree.

³⁸ Brief for Petitioners at 7, *Eldred v. Ashcroft*, (2003) 537 USA 186.

Box 4.3: The commercial life of most creative works is very short^a

Chart 4.2: Income by release year as percentage of total income, 2004

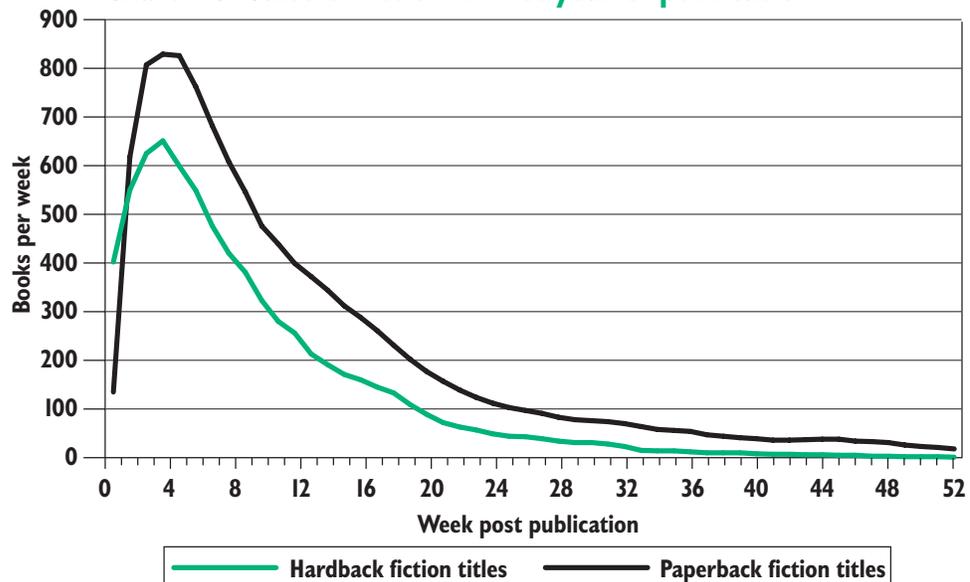


Source: Phonographic Performance Limited and PricewaterhouseCoopers.

Chart 4.2 indicates that the vast majority of income generated by sound recordings comes from those released since 1999. Therefore, the increased revenue from extension would be small, but would affect well-known artists.

A similar pattern appears for books as shown in Chart 4.3 below:

Chart 4.3: Sales of fiction in first year of publication



Source: Neilson Book Scan.

These sales shapes, and data from the USA Library of Congress, suggest that the majority of sales are from new releases, and that the majority of works do not have enduring commercial value. However, extension would impact all works – not just those that continue to be commercially successful.

^a The Copyright Term Extension Act of 1998: An Economic Analysis, Akerlof, G. et al., 2002.

4. More music would be available to consumers

Works in copyright are less available

4.34 Extension would impact on all recordings. It would keep works in copyright even when they are not generating any income for rights owners. One study found that parties without legal rights have made more historic US recordings available than have rights holders. Furthermore, rights holders reissue recent works while largely ignoring earlier music.³⁹ 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.⁴⁰ These statistics suggest that the costs of renewing copyright⁴¹ or reissuing copyrighted material are greater than the potential private return, but that these works may have enduring social and cultural value.

4.35 The lack of commercial availability impacts upon consumers and users, but it is also worth noting the impact this has for all creators and musicians. Chapter 2 noted the increasing prevalence of licensing and the complexity of rights clearance. 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.

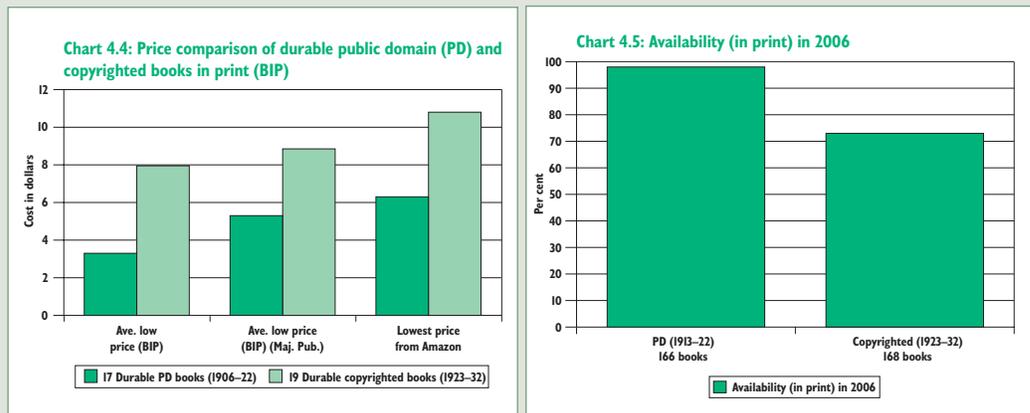
³⁹ *Survey of Reissues of U.S. Recordings*, Brooks T., Aug 2005.

⁴⁰ *Ibid.*

⁴¹ Which was a requirement of US law during the period that Brooks was studying.

Box 4.4: Comparison of price and availability of books in copyright and in the public domain

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. This suggests that extension would keep durable books at higher costs for a longer period of time, and would make all works, including the most popular works, less available for longer.



Source: Heald, Paul (2006). *Property Rights and the Efficient Exploitation of Copyrighted Works: An Empirical Analysis of PublicDomain (1906-1922) and Proprietary (1923-1933) Fiction Best Sellers (working draft)*.

5. The UK's trade balance would improve

Increasing term will damage the UK balance of trade **4.36** The argument that the balance of trade would improve makes two assumptions; first, that increasing term is necessary to receive longer terms in other countries; and second, that because the UK is a net exporter of music, more money will flow in from foreign markets. The CIPIL report argues that this is not the case.

4.37 Firstly, 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 Europe⁴², 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, and the CIPIL report notes that changes in British law would not now affect the term granted to British phonograms.

4.38 Secondly, the CIPIL report show that the US market, which is worth \$12,153 million⁴³, comprises only 5 per cent of international repertoire. In comparison, the UK market, worth \$3,508.7 million includes 43 per cent of international repertoire. Thus whilst the UK music industry is extremely successful, the UK is a substantial importer of sound recordings, and

⁴² Comparison of terms is required under Article 7 of Directive 93/98/EEC.

⁴³ The Record Industry in Numbers, IFPI, '2005.

therefore the extra revenue from 43 per cent of international sound recordings sold would be remitted overseas. In combination, extension to UK sound term would cause little additional in-flows, but would increase remittances abroad. Therefore, as the CIPIL report concludes, “increasing copyright term at home from 50 to 70 or 95 years is likely to have a disproportionate, negative effect on the balance of trade.”

Extension would cost industry 4.39 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). PPL collects monies to remunerate rights holders whenever their sound recordings are played (see Chart 5.4 for more details). 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 (ISPs). The impact of extension would therefore be felt throughout the economy.

4.40 In conclusion, the Review finds the arguments in favour of term extension unconvincing. The evidence 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.

Recommendation 3: The European Commission should retain the length of protection on sound recordings and performers’ rights at 50 years.

Retrospective changes to sound recording term

4.41 As discussed above, changes to the length of IP protection can be made retrospectively or prospectively, and the Review has considered the evidence for both forms of extension. This section will consider retrospective changes to copyright.

4.42 Copyright is a contract between creators and society; once the work has been created, altering the length of term of protection changes the terms of that contract. This is not fair for consumers, as they would be forced to pay monopoly prices for longer than they had implicitly accepted. The same logic applies to all forms of IP rights.

4.43 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

⁴⁴ PPL Annual Report and Financial Statement, 2006.

markets future investment decisions will be entirely unaffected by the length of protection of current works. Additional, anecdotal evidence suggests that some new successful bands are signed to relatively new record labels. For example Franz Ferdinand are with Domino Records, which was founded in 1993 and rarely re-releases records that predate itself, and the Kaiser Chiefs are signed to B-Unique, founded in 2004.

4.44 The PWC report estimated that at most the NPV of a twenty-year retrospective extension for revenue over the next 50 years would be around £156.1 million, and for a 45 year retrospective extension, £163 million. Using PWC's discount rate of 12 per cent, this equates to approximately £20 million per year. These figures represent **only a 1.8 per cent and 1.9 per cent respectively increase in the present value of revenue from existing recordings**; even at the upper bound, the increase in revenues from existing recordings are very small in present value terms. Correspondingly, PWC estimates that performers would also **gain 1.9 per cent** revenue in present value terms, and “the distribution of this income will be highly skewed with a relatively small number of performers of successful older works being the major gainers”.

Costs to consumers

4.45 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.

4.46 However, PWC note 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 review believes that most of the increased revenue from term extension would come directly from consumers who would pay higher (i.e. monopoly) prices for longer. Working on the maximum producer gains from sound term extension, the CIPIL report estimates that retrospective extension would cost consumers between £240 million and £480 million in net present value terms.⁴⁵

4.47 The additional revenue for producers is likely to come from the most popular recordings, which will have a correspondingly high cultural value. 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.

Recommendation 4: Policy makers should adopt the principle that the term and scope of protection for IP rights should not be altered retrospectively.

⁴⁵ *Review of the Economic Evidence Relating to an Extension of Copyright in Sound Recordings*, Centre for Intellectual Property and Information Law, 2006.