

Copyright World
last word column, October 2006

**THE TERM QUESTION:
COPYRIGHT FOR SOUND RECORDINGS IS A PATENT RIGHT FOR
INDUSTRIAL CULTURAL PRODUCTION**

With the Treasury sponsored Gowers Review on Intellectual Property due to report back, and Tony Blair's leaked support for an extension of the term on sound recordings and performers' rights, I thought I should complete the sketch from my last column on the relationship of copyright and contract. In that piece, I had dismissed the idea that any copyright extension would benefit ordinary performing musicians. Simple bargaining power ensures that the extended terms will end up in the hands of the same corporate interests – the exception being a few best-selling artists who have managed to control their contracts.

Unless policy makers are prepared to interfere with the contractual freedom of negotiating parties (for example by prescribing royalty terms, or conditions under which copyright falls back to the artists), copyright extension is simply a matter of industrial policy. Does the music industry produce the right mix of products, and at what price?

It is the same question we ask in patent policy. Exclusive rights are supposed to correct a market failure in the supply of desirable goods. As a measure for channelling profits to investors, patents are certainly effective. In a case involving GlaxoSmithKline's best-selling antibiotic drug Augmentin, a U.S. federal court invalidated, in May 2002, a patent on a derivative that was designed to extend Augmentin's monopoly (due to expire in December 2002) until 2018. GSK's sales of Augmentin had amounted to £912m per year, and the judgment wiped 9% from the value of the company. With good reason. Among recent precedents stands out the patent on Eli Lilly's Prozac that expired on 2 August 2001. Sales immediately dropped by 80% in favour of generic drug alternatives.

There is an extended literature in innovation economics charting market movements after the patent term has run out. Similarly, we can expect that the imminent expiry of the term for sound recordings for best-selling elements of the music industry's backcatalogue in Europe may have semi-catastrophic effects for the balance sheet of Universal, EMI, Sony, Bertelsmann and Warner. This is bad for the Majors, but is it bad for the rest of us? Is it the end of music as we know it?

The story of Ibuprofen

Let's return to the pharmaceutical analogy with the nice story of "2-(4-isobutylphenyl)propionic acid", a phenylalkanoic acid otherwise known as Ibuprofen. Synthesised in 1961 at Boots in Nottingham by a team lead by Dr Stewart Adams, Ibuprofen's analgetic properties were discovered by chance in an attempt to produce anti-inflammatory drugs for the treatment of rheumatoid arthritis. When the patent for the now market-leading painkiller ran out in the 1980s, Boots embarked on a major re-branding exercise of "targeted pain relief" in orange and shiny metal: Nurofen. Nurofen contains

the same active ingredient, Ibuprofen, that is now available over the supermarket counter at 30 pence. Still, Nurofen continues to trade nearer £3.

As a consumer, this gives me a choice. Do I go for cheap generics, or do I choose the Nurofen lifestyle. As a result of competition, we are all better off. Even Boots would not argue that society would benefit from reinstating its monopoly rights. You probably sense where this is leading. Substitute Boots with EMI, substitute Ibuprofen with the 1958 hit *Move It*, and substitute Dr Adams with Cliff Richard – and you are there.

In the locker

Apart from the undoubted benefits in cheaper and more innovative re-issues of well known records that will follow the end of exclusive terms, there is a second major issue that needs to be addressed. Record firms sit on large archives of recordings that are no longer deemed commercially viable. According to a recent study, only 14% of pre-1965 recordings are currently available from U.S. right holders (T. Brooks, “How Copyright Law Affects Reissues of Historic Recordings: A New Study”, ARSC Journal 36(2), Fall 2005, available at <http://www.clir.org>). In many cases, right holders do no longer even physically own the masters, either because they acquired the rights by chance in a corporate transaction, or because storage was too costly.

As a society, we cannot allow our recorded musical heritage to be locked up or destroyed. Whether compulsory licences, a registration system for re-issues or more radical “use it or lose it” measures should be adopted, is a complex question. Here, creative policy thoughts are overdue. Most at risk is not main stream culture, but the cultural diversity of music hall, ethnic recordings and classical niche repertoire.

A final thought: The named inventors of the 1961 Ibuprofen patent did not receive *any* financial reward. More on these themes in my inaugural lecture: “Escape from the Garret? Copyright and the tale of the starving artist”. 1 November, 6.30pm, Bournemouth University, Talbot Campus. For an invitation, please e-mail Christine Reaks (creaks@bournemouth.ac.uk).

About the author

Martin Kretschmer is Professor of Information Jurisprudence and Joint Director of the Centre for Intellectual Property Policy & Management (www.cippm.org.uk) at Bournemouth University, UK. He is also project director (with Prof. Lionel Bently) of a major Arts and Humanities Research Council (AHRC) project on copyright history at the Centre for Intellectual Property & Information Law, Cambridge University (2005-7). Previously, Martin was consultant editor at BBC Worldwide (1994-5) and a faculty member at City University’s Cass Business School, London (1996-9).