

Do not bow down before the famous on copyright

By Lawrence Lessig

Published: December 6 2006 02:00 | Last updated: December 6 2006 02:00

Printed on p. 15 European Edition

Today, Andrew Gowers, former editor of this paper, will release a report commissioned by Gordon Brown, chancellor of the exchequer, to examine the UK's intellectual property framework. One part of that report will address whether the copyright term for recordings in Britain should be extended from the current term of 50 years to 95. There is not much doubt about what it will say on this proposal. There is much more doubt about whether the government will follow the report's sensible advice.

There is little doubt about what Mr Gowers will say because term extension is, as the late Nobel prize-winning economist Milton Friedman once remarked, a "no-brainer". You can see why by distinguishing between the prospective and retrospective aspects of term extension. Prospectively, the question is whether adding 45 years to the existing copyright term adds any additional incentives. Intuitively, you would think it would - 45 more years of royalties ought to matter to someone.

But the key is to remember that the 45 years begins 50 years from now. Thus any incentive they might produce in the future must be discounted to today. As economist after economist has testified, the current value of that future income is trivial. Using a formula offered by 19 economists, including five Nobel prize winners, adding 45 years to the copyright term increases the present incentives by less than 3.5 per cent.

Retrospectively, the argument is even easier. Does extending the term of existing copyrights create new incentives to create? Well, so long as nature's laws against time travel remain, the answer is obviously no. Incentives are prospective, not retrospective. No matter what we do today, Sir Cliff Richard is not going to produce anything more in 1956. Extending terms simply means the public pays twice for works that have already been created. That benefits the most successful artists but with no benefit to the public.

Yet while the incentives produced by term extension are tiny, the costs are huge. The vast majority of 50-year-old recordings have no commercial value. That means many of these recordings are "orphans" - works whose owners cannot even be identified. Extending the term for these works will simply guarantee they remain orphans. For another 45 years, libraries and archives would be forbidden from making these forgotten works accessible, because they cannot clear the rights to them. Sir Cliff would thus get 45 more years of royalties, while pushing forgotten Sir Cliffs into further oblivion.

If the economics are so clear, why is this question so hard for governments? The answer is that famous copyright holders are among the most beloved of any nation. They are favourite friends of politicians. So, whenever the question of term extension has been raised, governments have said yes.

I am not optimistic that the British government will behave any better. But if it does decide to extend terms, then at least it should do so in a way that minimises harm. Before any existing British copyright holder gets the benefit of almost doubling his copyright term, they should have to ask, by sending the British Treasury five quid with an application form.

This simple proposal would filter most copyrights in recordings that have no current owner and are no longer commercially available. These works could pass into the public domain, so archives and libraries, using digital technologies, could make them accessible cheaply. Sir Cliff could get 45 more years of royalties without drowning orphan recordings in the swamp of copyright regulation.

Opponents to such a registration system suggest it would violate the Berne Convention. However, the convention does not restrict the ability of a nation to impose formalities on domestic copyright holders. As the World Intellectual Property Organization's own manual explains, a "country remains absolutely free to subordinate the existence or exercise of the right on that work in that country to such conditions or formalities as it thinks fit: it is purely a matter of domestic law". Any unfairness would be removed if all governments followed the same sensible step.

There are some who believe that copyright terms should be perpetual. Britain did the world a great service when it resolved that debate almost 300 years ago, by establishing one of the earliest copyright regimes to limit copyright to a fixed term. It could now teach the world a second important lesson: any gift of term extension should only go to those who ask.

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