

## Extended copyright term in sound recordings: UK consults on draft regulations

The UK Intellectual Property Office (IPO) launched a consultation in January on the draft regulations that will implement the European Directive that extends both copyright in sound recordings and performers' rights from 50 to 70 years. The Directive also harmonises the copyright term for co-authored songs. The consultation closes on 4 March 2013. The changes are due to commence in the UK by 1 November 2013. They will be of particular interest to record producers, music publishers, performers, collecting societies, lyricists and composers, and the parties that represent their interests.

This legal update provides a reminder of the changes, summarises the IPO's consultation questions, and highlights some of the practical effects including the thorny issue of the "use it or lose it" provision.

### Recap: what will change on 1 November 2013

The following is a reminder of the key changes to be implemented by the draft regulations:

#### SOUND RECORDINGS

- The term of protection for copyright in sound recordings and performers' rights will be increased from 50 to 70 years.
- At the expiry of 50 years, if a record producer either fails to issue to the public in "sufficient quantities", or does not make the recording available to the public by electronic transmission (e.g. does not sell records, broadcast or "narrowcast" the recording), performers may give notice to the record producer that they intend to terminate the agreement assigning their performers' rights.
- If this happens, the record producer will have 12 months to "use it or lose it". It must issue copies and make downloads available. If it fails, the agreement will terminate and the copyright in the sound recordings will expire with immediate effect.

- If performers are entitled to receive recurring payments (e.g. royalties) under an agreement, during the additional 20-year period such payments will not be subject to deductions for advances or any other contractually agreed deductions. In other words, there is a "clean slate" and the clauses relating to deductions cannot be used.
- Performers who assigned their rights for a one-off fee (e.g. session musicians) will be entitled to receive an annual payment from the record producer during the extra 20-year period. Record producers will have to put 20% of the gross income earned on records during the extension period into a central pot to be administered and distributed by collecting societies.

#### SONGS

- There will be a single term of copyright for co-authored works in the UK. Works will be co-authored if they are produced by collaboration between the author of a musical work and the author of a literary work and the two works are created to be used together (i.e. a song, co-written by a composer and a lyricist together for that purpose).
- Copyright in the co-authored work will now expire 70 years after the death of the last surviving author of either the music or the lyrics of the composition. Currently in the UK the music and lyrics of a song may have separate copyright terms. This change harmonises the copyright term for co-authored works across EU member states.

### The IPO consultation

The IPO has now produced draft regulations and asked stakeholders to comment on them, including the following in particular:

- *Meaning of "sufficient quantities"* – Because the consequence for a record producer for not issuing sufficient quantities of a sound recording is severe, the IPO wants to know how this should be defined.

- *Administration of the performers' fund* – The IPO wants to know how long record producers should have before they must transfer funds to collecting societies and whether they are best placed to provide information to performers about their entitlement to such funds (e.g. an audit right).
- *How will the “use it or lose it” right apply where there are multiple performers?* – The IPO imagines that, in practice, if one performer terminated his agreement, the record producer could no longer legally exploit the record, which may trigger a right to terminate in the contracts of the other performers. Alternatively, the other performers may also exercise their right to terminate and then the performers could agree between themselves how to exploit the record. The IPO wants to know if stakeholders agree with this analysis.
- *When can a performer trigger the “use it or lose it” provision?* – The IPO has interpreted the Directive to mean that a performer may exercise his “use or lose it” right at any time after the 50-year period has expired and wants to know if stakeholders agree. This would mean that record companies were at risk of losing their copyright at any time during the 20-year extension.

## Some practical points

**Q. Copyright in my sound recording was due to expire in 2013. Will it be protected?**

**A.** The extended copyright term will apply to sound recordings that were first published, made available or communicated to the public on or after 1 January 1963.

This is because the draft regulations say that the new provisions will apply to existing sound recordings in which copyright subsisted as at 1 November 2013, as well as new sound recordings made after that.

Because under current law the term of copyright in sound recordings expires 50 years from the end of the calendar year in which the recording is first published, made available or communicated to the public, any sound recording that was first published, made available or communicated to the public on or after 1 January 1963 will be protected (i.e. they will be protected until at least 31 December 2013 and therefore in copyright immediately before 1 November 2013).

**Q. The draft regulations say that if the assignment agreement is terminated by a performer in accordance with the “use it or lose it” provisions, copyright in the sound recordings immediately expires. What happens to the sound recordings then?**

**A.** Although the sound recording will no longer be protected by copyright, the performer’s rights in sound recordings will carry on for the full 70 years, so the performer will be able to prevent anyone from copying, issuing copies of the sound recording or otherwise making it available to the public without his consent by using his performer’s rights.

**Q. I owned the copyright in the music to a song which was co-written with a lyricist. The composer of the music died more than 70 years ago, so the music is out of copyright in the UK. The lyrics are still protected because the lyricist died in 1964. Will the new law affect me?**

**A.** Yes. If either the music or the lyrics are still protected by copyright in at least one EU member state on 1 November 2013, copyright in the co-authored work (e.g. the song) will be revived and continue until the end of the period 70 years after the death of the last surviving author of either the music or the lyrics of the composition. So in this example, copyright in the music would be revived until the end of 70 years after the death of the lyricist. The draft regulations say that the owner of the revived copyright will be the person who owned it immediately before it expired. This means that if you owned the copyright in the music immediately before it expired, you will own the revived copyright in the music when it is revived. However, depending on the outcome of the IPO consultation, there may be new rules about what you can do to protect your revived copyright where third parties have already started to exploit it before it was revived.

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