

## And the band played on...



By James Boyle

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Readers of these columns have heard me [lament](#) in the past about the fact that intellectual property policy is an “evidence-free zone”. It is the trickiest of regulatory matters to get the right level of intellectual property protection – giving incentives to creators and distributors, yet not overly burdening future innovators or imposing unnecessary monopoly prices on consumers. Getting this balance right should be a matter of empiricism, not faith. We do, for example, have good evidence about what kind of policies on [database rights](#) and on [state generated data](#) – such as maps, traffic and weather information – actually work best. In each case, the European Union has picked a plausible position – stronger rights will mean more production and innovation – and seen it convincingly falsified through empirical analysis.

The same is true with the length of our copyright term. Brilliant economists, including five [Nobel laureates](#), have pointed out that our current copyright terms are far too long. We extend copyright long beyond the time necessary to provide incentives to create and distribute. One recent economic study suggests that the optimal term is [15 years](#). Others have recommended even shorter terms. I would favour 28 years, renewable for another 28 if the author desires. We give life plus 70. Worse, since as much as 98 per cent of all copyrighted material is currently [commercially unavailable](#) that means we lock up most of our culture just at the moment when we could have been digitising it and putting it on the web for the world to share. A system that required renewal for a modest fee in order to keep the copyright would solve these problems. We have signed treaties that forbid us from doing anything so sensible.

At the end of last year, I did note [a ray of hope](#). In two cases, both in Europe, policymakers had actually looked at evidence in order to decide what to do! The Commission studied the EU database market to see if the database right was doing any good. [It was not](#). The UK government commissioned the [Gowers Review](#) of intellectual property policy to see whether we should extend the term of sound recordings retrospectively – a nice example of [suggesting the price should be renegotiated upwards after the work was already done](#). Having already “paid” for the recording through 50 years of protection, consumers were now to be forced to pay again for another 20 years. The Gowers Review carefully analysed the evidence, and commissioned a [really excellent economic study](#) that is occasionally almost readable by ordinary mortals. They came to the same conclusion every single disinterested academic policy review has come to: “Policymakers should adopt the principle that the term and scope of protection for IP rights should not be altered retrospectively.”

But it was not to be. Faced with a tidal wave of pressure by publishers of databases, who liked their monopolies very much, thank you, the Commission shamefully gave in and left the directive in place. While the British government [showed more spine](#) on sound recordings, the European Commission has now announced that it thinks the copyright over sound recordings should be extended to 95 years! (70 was not enough.) [Charlie McCreevy](#), the internal market commissioner, has declared that this will harmonise protection: composers already get the longer term. He also argues that consumers will not pay higher prices as a result, though [the best empirical study](#) on works out of copyright shows exactly the reverse. That is the point of intellectual property rights, after all. (The Gowers Review had carefully considered and rejected the argument that extension would warm the firesides of many a nameless and superannuated session musician. Because of the music industry's rapacious contracts, the vast majority of the benefits will flow directly to the corporations that lobbied for it.)

Mr McCreevy's harmonisation argument – appropriate given the subject – is worth thinking through. Political scientists tell us that there are types of issues where we can almost guarantee that the state will get things wrong; cases where the benefits of some proposed policy go to a small and well-organised lobby of repeat players while the much larger costs fall on a wider and less well informed public. That is why it is so important to have policies that are justified with facts rather than faith. We can hope that a few policymakers who actually believe in the public interest will look at the evidence and hold the

line. But now comes the harmonisation argument.

In every capital in the Organisation for Economic Co-operation and Development, lobbyists agitate for intellectual property rights that are wider, deeper and above all, longer. Remember, in intellectual property we only ever harmonise upwards. (Mr McCreevy did not consider for a moment the idea that we should reduce the protection for compositions to match that of sound recordings.) Intellectual property only harmonises to the highest level of protection. What that means is that the lobbyists only need to win once, in one country. Then they will use the seductive language of harmonisation to bring everyone else into line internationally. And then? The process begins again. "I hear Mexico has an even longer copyright term. Fairness demands that we harmonise with that!" The band plays on – but always higher, higher – we long ago stopped looking at the score.

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