

3-1-2007

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Edward A. Cosgrove

Recommended Citation

Edward A. Cosgrove, *Minstrels in the Public Domain: British Copyright Legislation, and the Argument for an Extension of Performers' Rights Protection in the European Union*, 27 Loy. L.A. Ent. L. Rev. 383 (2007).

Available at: <http://digitalcommons.lmu.edu/elr/vol27/iss3/4>

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MINSTRELS IN THE PUBLIC DOMAIN?: BRITISH COPYRIGHT LEGISLATION, AND THE ARGUMENT FOR AN EXTENSION OF PERFORMERS' RIGHTS PROTECTION IN THE EUROPEAN UNION¹

I. INTRODUCTION

Ian Anderson has been a professional musician for the past forty years.² As the leader of the British rock group, Jethro Tull, Anderson has composed approximately 300 songs,³ released over thirty albums,⁴ sold over sixty million records worldwide⁵ and—apart from a brief hiatus in the early part of the 1980s—toured the world continuously since 1969.⁶ At the height of their popularity, roughly 1971 through 1980, Jethro Tull enjoyed rock superstar status arguably on a par with Led Zeppelin and the Rolling Stones. During this period, the group would routinely perform at venues such as Madison Square Garden and the Los Angeles Forum for engagements of up to five nights per tour.⁷ Although Jethro Tull has since come down from the dizzying heights of arena-rock superstardom, the group, under Ian Anderson's leadership, continues to record, and to perform before sold-out audiences worldwide.

Because of his lifelong status in the pantheon of rock & roll icons (together with formidable entrepreneurial skills in the realm of commercial aquaculture), Anderson does not personally need to worry about earning a living—his ownership in the copyrights to the music of Jethro Tull alone would guarantee that. Nevertheless, Ian Anderson stands as a spokesperson (one of a number of such public figures) at the vanguard of a

1. The title for this Comment was inspired by the title of the 1975 album, *The Minstrel in the Gallery*, by the British rock group, Jethro Tull.

2. Ian Anderson, Anderson Speaks Out on Recorded Copyright Law in the UK, (Apr. 1, 2006), <http://www.jtull.com/news/ukcopyrightlaw.cfm>.

3. E-mail from Anne Leighton, North American Publicist for Jethro Tull, to the author (Mar. 26, 2007, 12:07 PM EST) (on file with author).

4. Anderson, *supra* note 2.

5. E-mail from Anne Leighton, North American Publicist for Jethro Tull, to the author (Jan. 19, 2007, 10:24 PM EST) (on file with author).

6. See The Ministry of Information of Tull Tour History, <http://www.ministry-of-information.co.U.K.uk/setlist/82b.htm> (last visited Feb. 15, 2007).

7. See *id.*

movement among recording artists and music industry representatives in Great Britain. These artists and executives wish to forestall the impending expiration of copyright protection for an enormous body of nationally-originated musical recordings under current British law.

The protection at issue is that which covers performers—for the purposes of this discussion the people who played on the recordings from the early years of rock & roll (as distinct from the composers of the music contained in those recordings), and the companies that manufacture and distribute those recordings. The recordings that are of greatest relevance to this issue are those that were produced throughout the formative years of rock & roll. These years laid the foundation for an industry that, for all its well-publicized tribulations of the past decade, is still a driving force in world culture and in the economics of the entertainment industry.

Ian Anderson's written thoughts on this subject formed the impetus for this Comment.⁸ Subsequent to reading Anderson's thoughts on the subject, the author engaged Anderson in a lengthy one-on-one discussion of the issues at stake, via telephone.⁹ That conversation, together with the written comments posted by Anderson on Jethro Tull's website, also provided the initial viewpoint that informs the body of this Comment.

Following the introductory comments of Part I, this Comment opens, in Part II, with a description of the basic issue—the impending expiration of performers' rights protection for music recorded in Great Britain in the 1950s and 1960s. Part III compares the doctrines that govern performers' rights and their development in the U.S., and in Great Britain and the European Union. This section of the Comment includes a step-by-step analysis of the events (governed by developments in British statutory law, and under various international treaties) that have led Great Britain and the European Union to the place where they now stand, relative to performers' rights. Next, in Part IV, the focus of the discussion is narrowed to an examination of the debate currently underway in Great Britain, concerning the imminent expiration of protection for a generation's worth of recorded music. Part V presents an analysis of the legal and philosophical underpinnings of copyright and performers' rights protections. Using analogues from the American experience in developing protections for performers, this Comment provides an examination of arguments both in favor of and opposed to an extension to the term of such protection, as it now stands in the U.K. and in the E.U. These arguments will be assessed

8. See, e.g., Anderson, *supra* note 2.

9. Telephone Interview with Ian Anderson, Singer/Songwriter for the rock group, Jethro Tull (Aug. 14, 2006) (on file with author) [hereinafter Anderson Interview].

in light of the current situation emerging in the U.K. The Comment will conclude by advocating an extension to performers' rights protections, under E.U. and U.K. law.

II. THE BASIC ISSUE

In America, sound recordings are a category of work protected under copyright law.¹⁰ In Europe, specific protection of rights is extended to performers in sound recordings (as distinct from the rights to the *compositions* contained in sound recordings).¹¹ These rights are known as *performers' rights*, which is a sub-species of what are known as *neighboring rights*.¹² Under federal law in the United States, there had historically been no protection of such rights until, in 1971, Congress amended the Copyright Act of 1909 to provide protection for this category of works, and subsequently incorporated the substance of that amendment into the Copyright Act of 1976.¹³

In Great Britain, performers' rights currently extend fifty years from the date of the release of a recorded piece of music.¹⁴ The ramifications of this fifty-year limit on protection are that the recordings of the early years of rock & roll are due to begin falling out of protection, and into the public domain, over the coming years.¹⁵ The recordings that represent the musical heritage of Great Britain thus will inexorably and continually become part of the public domain. For example, the Beatles' catalogue and the early Rolling Stones' catalogue will both become fair game for unlicensed copies of those recordings to be produced and sold in Europe.¹⁶ To be more specific, in terms of providing an example of the effects of the expiration of protection, "Cliff[] [Richards's] earliest tracks would start to come out of copyright in 2008" and "[t]he Beatles would . . . be in a similar situation from 2012, the 50th anniversary of their first hit single, Love Me Do."¹⁷

10. See 17 U.S.C. § 114 (2006); see generally MARSHALL LEAFFER, UNDERSTANDING COPYRIGHT LAW (4th ed. 2005) (providing an historical overview of intellectual property protections).

11. RICHARD ARNOLD, PERFORMERS' RIGHTS 3–5 (3d ed. 2004) (discussing the rise of performers' rights as separate and apart from those of authors').

12. *Id.* at 11, 13.

13. CRAIG JOYCE, ET AL., COPYRIGHT LAW 166, 196–97 (7th ed. 2006); see 17 U.S.C. § 114; see also LEAFFER, *supra* note 10, at 366–67.

14. Copyright, Designs, and Patents Act, Part II, § 191 (1988).

15. See Isabel Davies & Lorna Sprostan, *Term of Protection Directive*, 27 EUR. INTEL. PROP. REV. n.85 (Apr., 2005).

16. See Anderson Interview, *supra* note 9; see also Davies & Sprostan, *supra* note 15, at 85 (discussing sound recordings made before 1954).

17. *Musical Copyright Terms 'To Stay'*, BBC NEWS, Nov. 27, 2006,

This fundamental alteration in the status of recorded music will mean the loss of revenues to record companies, and to performers who own the rights to these recordings.¹⁸ In addition to the damage that this loss of revenue will do to the performers of yesteryear, there is the potential for damage to the performers of tomorrow, since the recording industry will lose revenue that might otherwise be put into the development of emerging talent.¹⁹

Recently, in Great Britain, there has been a call for a change in the basic scheme of performers' rights protections.²⁰ With increasing vigor, performers and representatives of the recording industry have been calling upon the British government to do something about the impending expiration of protection for performers' rights.²¹ Unfortunately, the issue does not simply implicate the British government. Were it limited to just the U.K., this issue might be relatively easy to resolve. However, any alteration to neighboring rights protections must be pan-European in nature, because the limits of such protection are not a matter of a single country's laws but are governed by the provisions of what is known as the "Term Directive" contained in European Union law.²² The Term Directive serves to harmonize the laws of the countries that comprise the E.U., and mandates a fifty-year term of protection for performances in sound recordings.²³

Once the European Union is added to the equation, the issue of providing an extension to performers' rights protections becomes complex. For one thing, the progression of recorded music into the public domain does not particularly harm the countries of continental Europe. On the contrary, such status—for what have previously been protected works—would represent an economic boon to consumers in those nations. The result would be that recorded music would become more cheaply available in unlicensed form since it would be produced independently of the original

<http://news.bbc.co.uk/1/hi/entertainment/6186436.stm> [hereinafter *Musical Copyright*].

18. Anderson Interview, *supra* note 9; *Musical Copyright*, *supra* note 17.

19. Anderson Interview, *supra* note 9.

20. See Davies & Sprostan, *supra* note 15, at n.85.

21. See *id.*; see also Anderson Interview, *supra* note 9; Louise Jury, *Singers Face Losing Copyright Battle*, THE INDEPENDENT, Nov. 28, 2006, available at <http://enjoyment.independent.co.uk/music/news/article2021237.ece> (stating that "Sir Cliff Richard, Mick Hucknall, Katie Melua and Ian Anderson, of Jethro Tull, are among many of the singers to have called for an extension of the limit that expires after 50 years—compared with the 95 years enjoyed by performers in the United States").

22. Council Directive 93/98, art. 3.1, 1993 O.J. (L290) 9 (EEC).

23. *Id.*; see also ARNOLD, *supra* note 11, at 37 (discussing the operation of the Term Directive).

record company, which had distributed the work and with whom the performers had maintained contractual relationships.²⁴

Additionally, there is not the same incentive in Europe to champion this issue as there is in Great Britain because, although any country undoubtedly has its top performers of popular music within a limited geographic region, the countries of continental Europe do not boast the enormous talent-pool that Great Britain represents.²⁵ There are no French Rolling Stones. There are no Dutch Beatles. What may be even more fundamentally problematic than this lack of incentive is the fact that, with respect to performers' rights, even the countries that traditionally adhere to a natural rights rationale in intellectual property (unlike the U.K., whose laws are informed by a utilitarian rationale) tend to view performers as being of subsidiary importance, as compared with authors and composers.²⁶ Thus, performers' rights are almost always temporally limited, even under rights protection regimes that afford authors and composers perpetual moral rights.²⁷

Although the economic health of the recording industry (as well as the industry's contribution to the cultural heritage) of Great Britain is at stake, there are potential roadblocks to a solution. This dilemma presents a controversial issue in the realm of international copyright law. This Comment will explore this issue, and will argue in favor of the logic and wisdom of extending the protection of performers' rights in the U.K. and the E.U., so that the protection mirrors that which is available to the very same artists in the U.S.

III. A COMPARATIVE BACKGROUND ON THE ANGLO AND CONTINENTAL EUROPEAN SCHEMES IN BASIC COPYRIGHT PROTECTION

The philosophical underpinnings of modern statutory copyright law in the United States and the United Kingdom date back to the Statute of Anne

24. Anderson Interview, *supra* note 9.

25. *Id.*

26. See, e.g., J.A.L. Sterling, World Copyright Law: Protection of Authors' Works, Performances, Phonograms, Films, Video, Broadcasts and Published Editions in National, International and Regional Law 63 (1998); see also discussion *infra* Part III (comparing Anglo schemes in copyright protection with those of Continental Europe, and delineating the differences between utilitarian and natural rights theories of copyright protection).

27. See, e.g., ELIZABETH ADENEY, THE MORAL RIGHTS OF AUTHORS AND PERFORMERS: AN INTERNATIONAL AND COMPARATIVE ANALYSIS 169, 215 (2006) (compare §§ 8.176, 8.177 (limitation on duration of performers' rights under French law), with §§ 8.18, 8.19 (perpetual nature of authors' rights under French law)).

in Great Britain in 1710.²⁸ The Statute of Anne represented the Crown's recognition of an author's property right in his or her creation, as well as the recognition that the public had the right to access to disseminations of knowledge.²⁹ The British theory behind statutory (as opposed to common law) intellectual property protection is a utilitarian one, based upon the policy of promoting the dissemination of thought in the form of works of art and science.³⁰ Under this reasoning, an author³¹ has a property right in the product of his or her labor, but holds that right for only a limited period of time.³² Subsequently, the product becomes the property of the general populace—the public domain—thus balancing the author's right with the policy of allowing the public access to artistic and scientific thought, as a means of enhancing public welfare.³³ This utilitarian argument persists as one of the bedrock principles that animate intellectual property law in Great Britain (and in America) to the present day.³⁴

A competing rationale exists, however—one that has exerted considerable influence over the nations of continental Europe.³⁵ This rationale is based upon what is said to be a “natural rights” or “inherent entitlement” theory of law.³⁶ Under the natural rights view, a person is entitled to ownership of the fruits of his or her labor.³⁷ One of the most influential spokespersons for this view was John Locke.³⁸ In fact, it was

28. Statute of Anne, 1710, 8 Ann., c. 19 (Eng.); see LEAFFER *supra* note 10, at 4 (discussing the historical development of the law of copyright).

29. See LEAFFER, *supra* note 10, at 4–5.

30. See *id.*, *supra* note 10, at 4–5, 17–18; see also Timothy P. Best, *Capitol Records, Inc. v. Naxos of America, Inc.: The Persistence of Copyright on That Old Time Rock n' Roll*, 21 BERKELEY TECH. L.J. 335, 342 (2006).

31. This Comment uses the terms *author* and *composer* interchangeably, unless otherwise noted.

32. See LEAFFER, *supra* note 10, at 5.

33. See LEAFFER, *supra* note 10, at 4–5, 17–18, 24 (4th ed. 2005).

34. See *id.* at 18 (stating that copyright law also acted as an incentive system “designed to produce an optimal quantity of works of authorship, and thereby enhance public welfare”). But see Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 350–53 (1988) (noting the subtle influence of the Hegelian “personality” rationale upon American copyright law); see also JOYCE, ET AL., *supra* note 13, at 57 (noting that natural law (as opposed to utilitarian) theories enjoy vitality in the discourse of British and American copyright law, and “throughout the history of Anglo-American copyright . . . have been successfully deployed to explain or justify virtually every extension of the scope or intensity of copyright protection.”).

35. LEAFFER, *supra* note 10, at 18.

36. *Id.*

37. *Id.* This right of ownership can be said to persist, theoretically, in perpetuity (although, for practical reasons, it is limited, even under the natural rights rationale). See, e.g., STERLING, *supra* note 26, at 381–83 (1998).

38. LEAFFER, *supra* note 10, at 18; see also JOHN LOCKE, SECOND TREATISE OF GOVERNMENT Ch. 5 (1690).

under the natural rights philosophy that Great Britain had originally conferred copyright protection under the common law, prior to the enactment of the Statute of Anne.³⁹ The natural rights rationale for copyright protection persisted in Great Britain, even after the enactment of the Statute of Anne, until the decision in the case of *Donaldson v. Beckett*, in 1774.⁴⁰ After the Statute of Anne had been enacted, a successful challenge was raised in *Millar v. Taylor*⁴¹—in essence, arguing that the work of an author *does* carry inherent rights of possession. *Donaldson* overturned *Millar*, and “has been construed as conclusive proof that natural law has no place in copyright jurisprudence.”⁴² Nevertheless, the natural rights rationale retained its vitality in the countries of Continental Europe, and is responsible for the conception of the economic rights of authors (*droit d’auteur*) in their works, and for the concept of *droit moral* that is applied in France and (under various linguistic analogues) many of the countries of the European Union.⁴³ *Droit moral* “treats the author’s connection to [his or] her work not as a mere economic interest, but rather as an inalienable, natural right, arising from a conception of the work as an extension of the author’s personality.”⁴⁴ Together, *droit d’auteur* and *droit moral* represent the fundamental principles underlying intellectual property protection throughout much of Continental Europe.⁴⁵

Today, the natural rights conception of intellectual property law can still be seen in the Berne Convention for the Protection of Literary and Artistic Property of 1886 (revised at Paris in 1971),⁴⁶ which, although it accommodated the British viewpoint, was predominantly the creation of Western European states.⁴⁷ The Berne Convention (seen by scholars of

39. For a thorough discussion of the evolution of the law of copyright in Great Britain, from the origins of the philosophy of natural law (under ancient Roman law and, later, as conceived by John Locke) through the modern statutory law, see Alfred C. Yen, *Restoring the Natural Law: Copyright as Labor and Possession*, 51 OHIO ST. L.J. 517, 522–29 (1990); see also Best, *supra* note 30, at 342–49 (2006) (providing an analysis of the evolution of copyright law, beginning in Great Britain, and continuing through the law as it is applied in the United States).

40. *Donaldson v. Beckett*, (1774) 1 Eng. Rep. 837, 847 (H.L.).

41. *Millar v. Taylor*, (1769) 98 Eng. Rep. 201, 257.

42. Yen, *supra* note 39, at 528.

43. See generally LEAFFER, *supra* note 10, at 17–19 (discussing the natural law justification for copyright protection, as an alternative to the utilitarian rationale); see also JOYCE, ET AL., *supra* note 13, at 548.

44. JOYCE, ET AL., *supra* note 13, at 548; see also ADENEY, *supra* note 27, at 168–72 (nature of *droit moral*).

45. See JOYCE, ET AL., *supra* note 13, at 27–29, 548–49.

46. Berne Convention for the Protection of Literary and Artistic Works (Paris Act of 1971), art. 11bis(2).

47. See I STEPHEN M. STEWART, INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS 100–01 (2d ed. 1989).

international law as a breakthrough in the custom of international agreements generally, rather than merely with regard to intellectual property rights)⁴⁸ heavily reflects the French/German concept of *droit d'auteur*.⁴⁹

An alternative basis for the natural rights philosophy in law (but still in contrast with the utilitarian model) comes from the German philosopher, Hegel.⁵⁰ Sometimes known as the *personality model*, this justification for copyright protection follows from the premise that an author's works are inseparably identified with that author's personality.⁵¹ For example, this viewpoint is reflected not only in the French concept of *droit moral*, but also in the U.S. under section 106A of the Copyright Act of 1976, which grants the authors of visual works the right of attribution.⁵²

In practice, the major difference, as between the utilitarian formulation of rights protections in copyright law and the natural law formulation, lies in the rationale that permits adherents to the former of these two systems to place more restrictive temporal limits upon the protection afforded to an author or musician than does the latter.⁵³ A protection regime grounded in a natural rights formulation can find justification to protect authors indefinitely, under the concepts of *droit d'auteur* and *droit moral*,⁵⁴ while simultaneously limiting the duration of protections afforded to performers.⁵⁵ The reason for this differential manner of treatment stems from an enduring unwillingness to view performers as being on a par with authors, in terms of their inherent right to ownership in their contributions to the creative process.⁵⁶ With regard to performers' rights—i.e., the performers' and record companies' rights to ownership in a recorded piece of music—under U.K. law, the limit to the

48. *Id.* at 101.

49. *See generally id.* (providing an exhaustive analysis of the Berne Convention).

50. JOYCE, ET AL., *supra* note 13, at 56–57; *see also* LEAFFER, *supra* note 10, at 20.

51. LEAFFER, *supra* note 10, at 20.

52. *See* 17 U.S.C. § 106A (2006).

53. *See* DAVID SINACORE-GUINN, COLLECTIVE ADMINISTRATION OF COPYRIGHTS AND NEIGHBORING RIGHTS: INTERNATIONAL PRACTICES, PROCEDURES, AND ORGANIZATIONS 137–40 (1993).

54. *See id.* at 113–14, 137, 140 (discussing the *perpetual rights* application of *droit moral* as one of three ways in which the duration of *droit moral* is determined within various countries).

55. *See, e.g.*, STERLING, *supra* note 26, at 63 (1998) (“[T]he general tendency of legislation has been to regard the contribution of the performer as something different from that of the author, and even . . . as entitled to a lesser degree of protection.”).

56. *See, e.g.*, SINACOR-GUINN, *supra* note 53, at 794; *see also* STERLING, *supra* note 26, at 63 & n.86 (discussing the distinction between performers and authors, and providing, by way of illustration, the example of the French legal distinction between lead performers and rank-and-file-players).

term of protection stands at fifty years.⁵⁷ This limit is in keeping with the harmonization that is mandated under European Union law, as embodied in the Term Directive.⁵⁸

A. Performers' Rights in the U.S.

Historically, in the U.S., no protection for sound recordings, under the classification known as performers rights, existed within the federal law of copyright. In fact, such a right was expressly excluded under the relevant statute.⁵⁹ Sound recordings themselves were not originally viewed by Congress as subject to copyright protection, inasmuch as the initial formulation of the statute encompassed only such works as could literally be seen and read.⁶⁰ In the 1908 case, *White-Smith Music Publishing Co. v. Apollo Co.*, the U.S. Supreme Court held that the copyright protection of a musical composition did not include a right covering the mechanical reproduction of that work.⁶¹ There, the Court stated:

It may be true that in a broad sense a mechanical instrument which reproduces a tune copies it; but this is a strained and artificial meaning. When the combination of musical sounds is reproduced to the ear it is the original tune as conceived by the author which is heard. These musical tones are not a copy which appeals to the eye. In no sense can musical sounds which reach us through the sense of hearing be said to be copies, as that term is generally understood, and as we believe it was intended to be understood in the statutes under consideration. A musical composition is an intellectual creation which first exists in the mind of the composer; he may play it for the first time upon an instrument. It is not susceptible of being copied until it has been put in a form which others can *see and read*.⁶²

In the year following *White-Smith Music*, Congress passed the Copyright Act of 1909, which again omitted sound recordings from the federal scheme of copyright protection.⁶³ Sound recordings were finally afforded federal copyright protection (prospectively, beginning in 1972)

57. See Copyright, Designs, and Patents Act, Part II, § 191 (1988).

58. See Council Directive 93/98, art. 3.1, 1993 O.J. (L 290) 9 (EEC).

59. 17 U.S.C. §§ 106(4), 114(a); see also LEAFFER, *supra* note 10, at 366–67.

60. See Best, *supra* note 30, at 335, 345.

61. See *White-Smith Music Publ'g Co. v. Apollo Co.*, 209 U.S. 1 (1908) (stating that music encoded on player-piano rolls was not afforded copyright protection).

62. *Id.* at 17 (emphasis added).

63. See Best, *supra* note 30, at 345–46.

under a 1971 amendment to the federal statute.⁶⁴ This legislation originally had provided for preemption of state copyright law to begin on February 15, 2047, but was subsequently extended, such that federal preemption of state common law protection now begins in 2067.⁶⁵ The extension was the result of efforts by former recording artist-turned-politician, Sonny Bono, which resulted in the Sonny Bono Copyright Term Extension Act (CTEA).⁶⁶

In addition to the enactment of the Sound Recordings Act of 1971, the general scheme of copyright protection underwent further revision in 1976. As the U.S. Supreme Court summarized these developments in the landmark copyright case of *Eldred v. Ashcroft*:

In 1976, Congress altered the method for computing federal copyright terms. For works created by identified natural persons, the 1976 Act provided that federal copyright protection would run from the work's creation, not—as in the 1790, 1831, and 1909 Acts—its publication; protection would last until 50 years after the author's death. In these respects, the 1976 Act aligned United States copyright terms with the then-dominant international standard adopted under the Berne Convention for the Protection of Literary and Artistic Works.⁶⁷

Eldred v. Ashcroft presented the Court with a challenge to the constitutionality of Congress' power to enact the CTEA.⁶⁸ The petitioners in *Eldred* argued that the "limited Times" language of the Constitution's Copyright Clause⁶⁹ prohibited Congress from extending the term of protection for existing works (the CTEA now protects the work for the life of the author, plus seventy years).⁷⁰ The Court rejected that argument and held that Congress had not exceeded its authority in extending the term of protection.⁷¹

Although federal preemption of state copyright law can now take effect as of the year 2067, at common law, states are free to develop rights

64. See 17 U.S.C. § 102(a) (7) (2006) (see historical note stating "Enactment of Public Law 92-140 in 1971 . . . marked the first recognition in American copyright law of sound recordings as copyrightable works")

65. See Best, *supra* note 30, at 346.

66. Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998) (codified at 17 U.S.C. 301(c) (2006)).

67. *Eldred v. Ashcroft*, 537 U.S. 186, 194–5 (2003) (citations omitted).

68. See *id.* at 186.

69. U.S. CONST. art. I, § 8, cl. 8 ("To promote the Progress of Science . . . by securing [to authors] for limited Times . . . the exclusive Right to their . . . Writings").

70. See 537 U.S. 186 at 193.

71. *Id.* at 204.

protections for sound recordings as they see fit.⁷² By far, the most important decision applying state law, with respect to sound recordings, has been the 2005 New York Court of Appeals decision in *Capitol Records, Inc. v. Naxos of America, Inc.*⁷³ In *Naxos*, the court was called upon to settle a series of questions that had previously remained unresolved under New York state copyright law—one of which was, “[d]oes the expiration of the term of a copyright in the country of origin terminate a common law copyright in New York?”⁷⁴ The court held that New York common law copyright protection continued to protect a foreign work, even where that work was no longer protected under the laws of its country of origin, and even though the expiration of its term of protection in its country of origin rendered it ineligible for protection under section 104(a) of the Copyright Act of 1976.⁷⁵

There has thus been a general trend in the United States toward greater protection—as seen, for example, in the right of attribution granted to visual artists,⁷⁶ in the holding of *Naxos*⁷⁷ and in the rationale underlying the CTEA. As the Court in *Eldred* pointed out, the CTEA was (in part) inspired by a response to European copyright rationales:

The CTEA reflects judgments of a kind Congress typically makes, judgments we cannot dismiss as outside the Legislature’s domain. . . . [A] key factor in the CTEA’s passage was a 1993 European Union [E.U.] directive instructing [E.U.] members to establish [for authors] a copyright term of life plus 70 years. . . . Consistent with the Berne Convention, the [E.U.] directed its members to deny this longer term to the works of any non-[E.U.] country whose laws did not secure the same extended term. By extending the baseline United States copyright term to life plus 70 years, Congress sought to ensure that American authors would receive the same copyright protection in Europe as their European counterparts. The CTEA may also provide greater incentive for American and other authors to create and disseminate their work in the United

72. See 17 U.S.C. 301(c) (2006). See generally *Capitol Records, Inc. v. Naxos of America, Inc.*, 372 F.3d 471 (2d Cir. 2004) (discussing the background of the law of copyright).

73. *Capitol Records, Inc. v. Naxos of America, Inc.*, 830 N.E.2d 250 (N.Y. 2005).

74. 372 F.3d at 484 (certifying three questions of New York state law to the New York Court of Appeals) (emphasis added).

75. See 830 N.E.2d at 265; see JOYCE, ET AL., *supra* note 13, at 197; Best, *supra* note 30, at 335–36.

76. See 17 U.S.C. § 106A (2006).

77. See 830 N.E.2d at 250.

States.⁷⁸

B. Performers' Rights in the U.K. and E.U.: Background Developments in the Law of Copyright Protection and the Creation of the "Neighboring Rights"

1. The Berne Convention

At the international level, the first multilateral effort to address copyright concerns was seen in the Berne Convention of 1886.⁷⁹ The Berne Convention created a union of acceding states and, according to Stephen M. Stewart (author of the treatise *International Copyright and Neighbouring Rights*), "is a success story among international conventions."⁸⁰ The Convention has been revised numerous times since its inception, most recently at Paris in 1971.⁸¹ The Berne Convention covers "literary and artistic works" [which] shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression."⁸² The Convention provides for a preclusion of formalities for protection outside the country of origin of a particular work—that is to say, within its country of origin, conditions precedent to protection of a work may be imposed but, at the international level, no formalities may be imposed.⁸³

2. The 1925 Dramatic and Musical Performers' Protection Act in the U.K.

In 1925, Great Britain first recognized performers' rights, under the Dramatic and Musical Performers' Protection Act.⁸⁴ The Act created a criminal offense for infringement of performers' rights, but did not (at least, ostensibly) create a *civil* right of action.⁸⁵ This interpretation of the 1925 Act was put to the test in a famous case involving the making of Alfred Hitchcock's film, *Blackmail*.⁸⁶ There, the British court held that the

78. *Eldred*, 537 U.S. at 205–06 (internal quotations omitted) (citations omitted).

79. See generally, STEWART, *supra* note 47 (providing an exhaustive analysis of the Berne Convention).

80. *Id.* at 101 (2d ed. 1989).

81. See LEAFFER, *supra* note 10, at 564.

82. Berne Convention for the Protection of Literary and Artistic Works (Paris Act of 1971), art. 2(1).

83. See *id.* at art. 5(2).

84. See ARNOLD, *supra* note 11, at 17–18.

85. See *id.* at 18.

86. *Musical Performers' Prot. Ass'n v. British Int'l Pictures, Ltd.*, (1930) 46 T.L.R. 485

1925 Act provided only a criminal penalty for infringement.⁸⁷

3. Revisions to the 1925 Act

In 1956, amendments to the 1925 Dramatic and Musical Performers' Protection Act reiterated that the legal consequences of infringing performers' rights were criminal, rather than civil, sanctions.⁸⁸ The amendment to the 1925 Act—known as the Copyright Act of 1956—extended performers' rights into the realm of motion pictures, without adding any other substantive provisions to the existing rights already afforded performers under the 1925 Act.⁸⁹ Two years later, the Dramatic and Musical Performers' Protection Act of 1958 combined the 1925 Act and its 1956 amendments into a single Act.⁹⁰

4. The Rome Convention

The Rome Convention was to performers' rights what the Berne Convention had been to authors' rights.⁹¹ Signed into international law in 1961 as the International Convention for the Protection of Performers, Producers of Phonograms, and Broadcasting Organizations (and entering into force in 1964), the Rome Convention set forth protections for persons “whose involvement was derivative from that of the author in that by their contribution (performance, recording, broadcast) they converted the original work into a new form.”⁹² As Richard Arnold (author of the treatise *Performers' Rights*) notes, a primary distinction between the manner in which the Berne Convention had operated, and that of the Rome Convention, was that the underlying purpose of the Rome Convention was not to harmonize pre-existing international law, with respect to performers' rights (for, in many countries, no such rights existed); rather, the purpose of the Rome Convention was to create a new class of rights beneficiaries—i.e., performers, as distinct from authors or composers.⁹³ Because this class of persons had previously enjoyed no protections under the laws of the majority of European countries, those countries were then obliged to *create*

(K.B.).

87. ARNOLD, *supra* note 11, at 18–19.

88. *Id.* at 19.

89. *Id.* at 20.

90. *Id.*

91. *Id.*

92. *Id.* at 20–21.

93. ARNOLD, *supra* note 11, at 21.

those rights under their own laws.⁹⁴ These laws would then be harmonized under the Rome Convention, much as had authors' rights under the Berne Convention. This, according to Arnold, was the true beginning of what have come to be known as "neighbouring rights."⁹⁵

Despite the groundbreaking nature of the Rome Convention, for a variety of reasons connected with the special interests of broadcasters and recording companies, performers were granted a somewhat lower level of protection than were broadcasters and recording companies.⁹⁶ Technically, under the language of the Convention, broadcasters and recording companies have "the right to authorize or prohibit" reproduction of their product, whereas performers are given only "the possibility of preventing" unauthorized reproduction of their performances.⁹⁷ There are numerous additional ways in which performers were placed at a disadvantage, even as they were in the process of receiving heretofore unrecognized rights under the terms of the Rome Convention.⁹⁸

5. Implementation of the Rome Convention in Great Britain

The Performers' Protection Act of 1963 implemented the Rome Convention in Great Britain.⁹⁹ This Act amended the 1958 Act by expanding the protected class, but still failed to provide anything other than a criminal sanction for violation.¹⁰⁰ A later amendment to the Act in 1972 again did not provide a civil remedy but merely increased the criminal penalties that were already available under the previous Acts.¹⁰¹

6. Expansion of the Remedies

The process whereby performers in the United Kingdom gained access to a civil remedy for infringement of the rights that had been created under the evolution of neighboring rights was played out in British courts

94. *Id.*

95. *Id.*

96. *See id.*

97. *Compare* The International Convention for the Protection of Performers, Producers of Phonograms, and Broadcasting Organizations, Art. 7(1) with Arts. 10 and 13; *see also* ARNOLD, *supra* note 11, at 21-22 (analyzing the balancing process which the Rome Convention imposed upon performers, record companies, and broadcasting companies, and elaborating upon the rationale underlying the difference between performers' protections and those afforded to record companies and broadcasters).

98. *See, e.g.,* ARNOLD, *supra* note 11, at 23.

99. *Id.* at 24.

100. *Id.*

101. *Id.* at 25.

over the course of twenty years.¹⁰²

During this time, major decisions went back and forth—first in favor of,¹⁰³ then against,¹⁰⁴ and again in favor of¹⁰⁵ performers' right to a civil remedy.¹⁰⁶ Meanwhile, the prospect of legislative reform had been under consideration in the U.K. since the commissioning, in 1972, of a major review of copyright law.¹⁰⁷ That review ultimately led to the enactment of the Copyright, Designs, and Patents Act of 1988.¹⁰⁸

7. The Copyright, Designs, and Patents Act of 1988

The Copyright, Designs, and Patents Act of 1988 settled once and for all the question as to whether there was a private right of civil action for infringement of neighboring rights.¹⁰⁹ Part II of the Act "created two new species of copyright which are referred to as 'performers' rights' and 'recording rights' respectively."¹¹⁰ Under the 1988 Act, protection continues "until the end of the period of 50 years from the end of the calendar year in which the performance takes place."¹¹¹ It is this length of protection that currently applies in the U.K. and that artists who are concerned with the expiration of their rights advocate an extension to.¹¹²

8. The Term Directive

At the time when Great Britain was formally recognizing neighboring

102. *See id.* at 25–34 (discussing, in exhaustive detail, the evolution of the case law toward provision of a civil remedy for infringement upon performers' rights in the U.K.).

103. *Ex Parte* Island Records, Ltd. [1978] Ch. 122, 123 (holding that a court in equity had the right to grant performers and recording companies an *ex parte* injunction against "bootleggers" of performances which were recorded, marketed, and distributed by recording companies).

104. *RCA v. Pollard* [1983] Ch. 135 (holding that the Performers' Protection Acts provided no private right of action upon which a performer or recording company could bring a claim against a maker of, or dealer in, bootleg records).

105. *Rickless v. United Artists Corp.* [1988] 1 Q.B. 40 (holding that the 1958 Dramatic and Musical Performers' Protection Act imposed not only a criminal penalty, but also a civil remedy, where a performer or their performance was exploited without the performers written consent).

106. *See* ARNOLD, *supra* note 11, at 25–34 (discussing, in exhaustive detail, the evolution of the case law toward provision of a civil remedy for infringement upon performers' rights in the U.K.).

107. *Id.* at 34.

108. *Id.* at 35.

109. *See id.*

110. *Id.*

111. Copyright, Designs, and Patents Act, Part II, § 191 (1988).

112. *See, e.g.,* Anderson, *supra* note 2; *see also* Jury, *supra* note 21; Anderson Interview, *supra* note 9.

rights as conferring a private right of action (with a term of protection lasting for fifty years), the executive body of the European Union, the E.C. Commission—formally known as the Commission of the European Communities—began investigating ways in which to “create uniform and improved Community-wide protection for copyright and related rights owners.”¹¹³ The result was the passage of a series of Council Directives (the means whereby law is enacted in the European Union), the most important of which, for the purposes of the present discussion, was the so-called Term Directive.¹¹⁴

The Term Directive provides a duration of protection that is substantially identical to that of the British Copyright, Designs, and Patents Act of 1988.¹¹⁵ One major effect of the Term Directive was its implementation of reciprocity of treatment, under which non-Member State nationals receive protection identical to that which is provided under the laws of their own countries, rather than being subject to E.U. law.¹¹⁶ The Term Directive was implemented in Great Britain in January of 1996, under the Duration of Copyright and Rights in Performances Regulations of 1995, which amended the Copyright, Designs and Patents Act of 1988.¹¹⁷ The Term Directive mandated harmonization among Member States such that their terms of protection are equivalent—requiring protection for performers for fifty years.¹¹⁸

9. TRIPs

In 1994, the Marrakech Agreement Establishing the World Trade Organization incorporated another of the most significant international trade agreements concerning performers' rights: the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs).¹¹⁹ This international agreement conferred a series of enumerated rights upon performers with respect to their live performances, notably in the area of

113. ARNOLD, *supra* note 11, at 36.

114. Council Directive 1993/98, art. 3.1, 1993 O.J. (L 290) 9 (EEC).

115. The Directive states that “[t]he rights of performers shall expire 50 years after the date of the performance. However, if a fixation of the performance is lawfully published or lawfully communicated to the public within this period, the rights shall expire 50 years from the date of the first such publication or the first such communication to the public, whichever is the earlier.” *Id.*

116. ARNOLD, *supra* note 11, at 37.

117. Duration of Copyright and Rights in Performances Regulations, 1995, S.I. 1995/3297, Part I § 3(a) (U.K.).

118. Council Directive 93/98, (2) 1993 O.J. (L 290) 9 (EEC); STERLING, *supra* note 26, at 699.

119. ARNOLD, *supra* note 11, at 39.

recording or broadcast of those performances.¹²⁰ The term of protection is set at fifty years, which begins either from the end of the calendar year in which the performance took place, or from the date on “which the fixation was made.”¹²¹ TRIPs also gives an exclusive rental right to producers of phonograms (and other rights holders in phonograms, as specified under the laws of Member States).¹²² The impact of TRIPs has been a large-scale expansion of the scope of performers’ rights, by extending such rights into the realm of live performance insofar as those performances are relevant to broadcast and reproduction for sales.¹²³

10. WIPO: Performances and Phonograms Treaty

In 1996, the World Intellectual Property Organization (WIPO) held a Diplomatic Conference, which resulted in the passage of two significant new treaties: the WIPO Copyright Treaty, and the WIPO Performances and Phonograms Treaty (WPPT). The underlying proposals which ultimately resulted in these treaties had been specifically aimed at “strengthen[ing] performers’ rights, including . . . granting performers moral rights, providing performers with a right in respect of the broadcasting of recordings of their performances and extending the term of protection to 50 years The [Performances and Phonograms] Treaty was signed on December 20, 1996, and entered into force on May 20, 2002.”¹²⁴ One of the reasons why the WPPT is significant is because of its expanded emphasis upon moral rights for performers: “Not only are [performers] afforded more extensive economic rights [under the Treaty], but the text provides explicitly for the basic moral rights of the performer ‘as regards . . . live aural performances [sic] fixed in phonograms.’”¹²⁵

Thus, in the progression of legislative and international treaty developments over the past fifty years, it is possible to see not only an ever-increasing recognition of the rights of performers in recorded musical works, but also an increasingly prevalent reliance upon a moral rights

120. See, e.g., *id.* 39 (3d ed. 2004).

121. WORLD TRADE ORGANIZATION, THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS, 372 (1994); see also ARNOLD, *supra* note 11, at 39 (citing Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 14(5)).

122. WORLD TRADE ORGANIZATION, *supra* note 121, at 372; see also Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 14(4).

123. See ARNOLD, *supra* note 11, at 39–40.

124. *Id.* at 40–41.

125. LEAFFER, *supra* note 10, at 565 (citing World Intellectual Property Organization Performances and Phonograms Treaty, art. 5(1), Dec. 20, 1996, 36 I.L.M. 76 (1997) available at http://www.wipo.int/treaties/en/ip/wppt/trtdocs_wo034.html).

justification for the creation and expansion of those rights. Notwithstanding the evidence of a progression toward greater protection of performers' rights, the performers working during the time period in which this heightened recognition has been occurring risk seeing the protection expire. It is unfortunate that the primary impediment to a remedy for this state of affairs might not originate from within the U.K.¹²⁶ Instead, opposition could come in its strongest form from the countries of Continental Europe. In these countries, although the protection of performers' rights proceeds, ostensibly, from a natural rights rationale,¹²⁷ the fundamental conception of performers sets them in a position inferior to that of authors.¹²⁸ Thus, even under a moral rights regime of protection, performers are afforded only limited term protection for economic rights.¹²⁹

IV. THE CURRENT DEBATE IN THE U.K.

The current debate in the U.K. centers upon arguments that are most seriously embraced by those who had performed on British sound recordings dating from the 1950s through the 1960s, and by the music industry companies that share in the economic benefits of such protection.¹³⁰ According to Ian Anderson's estimate, musical recordings which are of British origin comprise approximately forty percent of the entire corpus of popular music of the time period, worldwide.¹³¹ The expiration of protection for these works carries potentially deleterious effects for the performers on those records, for the record labels, and for the budding talent of tomorrow.¹³² Emerging talent faces considerable risk of never seeing the light of day, as it is, especially under the current economic duress with which the recording industry is beset. This economic duress will simply be exacerbated when revenues from major-selling catalogues—such as those of the Beatles and the Rolling Stones—dry up in the U.K. due

126. The country whose original model for statutory protection has been utilitarian in nature, and therefore more justifiably susceptible of time-limitation than would, perhaps, be true in a country that follows a natural rights-oriented scheme of protection. See *supra* Part III.

127. The natural rights rationale traditionally leads its adherents to resist time limitation, with respect to the moral rights protections that are enjoyed by authors.

128. See, e.g., STERLING, *supra* note 26, at 63 (discussing how performers are viewed as merely presenters).

129. See, e.g., ADENEY, *supra* note 27, at 214–15 (discussing the duration of performers' rights, under French law).

130. See, e.g., Anderson Interview, *supra* note 9; see generally Jury, *supra* note 21 (discussing the alarm of record companies with 1950's artists come out of protection).

131. Anderson Interview, *supra* note 9.

132. See, e.g., *id.*

to their transition into the public domain.¹³³

There are a number of different voices, and a variety of rationales, arguing for reform of the protections that are afforded performers' rights in the U.K. Richard Arnold, one of the leading copyright scholars in the U.K., advances the position that "performers' exclusive rights should be upgraded to full property rights so as to be assignable and otherwise transmissible to the same extent as other copyrights, rather than to the limited extent provided at present."¹³⁴ Indeed, as Arnold points out, in the majority of member states in the European Community, such rights *are* assignable.¹³⁵ This view of performers' rights is more in line with the natural rights theory of copyright protection (the original basis for common law protection of copyright in the U.K.)¹³⁶ than with the utilitarian view that had given rise to statutory copyright protection in the first place. As Ian Anderson has written:

If I can own the freehold, and thus the investment, in my home property, why can't the value of the investment in my recordings be a longer-term or even indefinite heritable, saleable right? I would have better protection as the bricks-and-mortar builder of my house than a "builder" of recorded music.¹³⁷

Arnold's point of view is substantially similar: "[i]t is hard to see why performers and their heirs should be prejudiced by comparison with other copyright owners in this way."¹³⁸ It should be noted that, here, Arnold is discussing the *depth* of performers' rights protections in the U.K. as opposed to those in the E.U. (under reasoning similar to that which informs *droit d'auteur*), whereas, in contrast, Anderson is discussing the *duration* of such protections (under reasoning more closely resembling the basis of *droit moral*). Nevertheless, both of these aspects of performers' rights protections are dependent upon identical policy rationales, as between the utilitarian versus natural rights theories. As such, Anderson's and Arnold's assertions each simply present a different facet of the same issue.¹³⁹

Unlike Anderson, Arnold has apparently abandoned the notion of an extension beyond the current fifty-year term of performers' rights

133. *Id.*

134. ARNOLD, *supra* note 11, at 47.

135. *Id.*

136. *See* discussion *supra* Part III.

137. Anderson, *supra* note 2.

138. ARNOLD, *supra* note 11, at 47.

139. *See* Anderson, *supra* note 2; *see also* RICHARD ARNOLD, PERFORMERS' RIGHTS 50 (3d ed. 2004).

protection.¹⁴⁰ Arnold notes that, in the first edition of his book, he had argued in favor of exactly this point, but that, “[w]ith the advent of the Term Directive, this is now a dead issue for the foreseeable future.”¹⁴¹ But Arnold is a legal scholar and Anderson is a recording artist. Ian Anderson endeavors to speak not only for a generation of recording artists of the heyday of classic popular music from Great Britain, but also for the recording industry itself and, more philosophically, for what he sees as a piece of the cultural heritage of Great Britain.¹⁴² Anderson—along with others who advocate on behalf of performers for an extension to performers’ rights under U.K. law—does not take it on faith that this represents a dead issue.¹⁴³ This is likely due to performers’ vested interest in seeing the term of protection extended. Nevertheless, the reality is that term of protection is harmonized under E.U. law by the provisions of the Term Directive, and thus would require a pan-European change in that law in order to have effect.¹⁴⁴

Countervailing arguments—some of which advocate continuing to afford performers a lesser degree of protection than that afforded to authors, and some of which would advocate the outright refusal of such protection for performers—tend to run along the same lines as those which advocate against granting copyright in the first place.¹⁴⁵ These arguments include the notions that: (1) such rights give rise to an unjust monopoly upon information; (2) such rights are merely a means whereby commercial interests exploit the labor of artists; (3) such rights place a harmful restriction upon trade; (4) such rights allow developed nations to exploit undeveloped nations economically; (5) rights protections place a tax upon information and knowledge, thus preventing the spread of ideas; and (6) the idea that protections which endure beyond the artist’s lifetime benefit a class of persons not responsible for the work itself.¹⁴⁶ Thus, a partial list of potential objections to the extension of the term of performers’ rights protections in the U.K. shows that such objections mirror the centuries-old debate surrounding the need (or lack thereof) for copyright protection in general. More specifically, many countries that embrace the natural rights view of copyright view performers as less-worthy rights-holders, compared

140. See ARNOLD, *supra* note 11, at 50.

141. *Id.*

142. See Anderson Interview, *supra* note 9.

143. See Anderson, *supra* note 2.

144. See discussion, *supra* Part II.

145. See STERLING, *supra* note 26, at 71.

146. *Id.* at 61–62.

to authors.¹⁴⁷ At an even greater level of specificity, there are arguments merely against the extension of performers' rights protections beyond their current term.¹⁴⁸ The majority of these arguments are grounded in economic considerations, and do not take into account the philosophical rationales for granting performers greater protection, in the form of extended duration of that protection.¹⁴⁹

Despite the existence of compelling arguments for why performers' rights should be afforded an extension beyond their current fifty-year term of protection,¹⁵⁰ it is likely that Parliament will give short-shrift to consideration of this issue, at least in the near future. In his discussion with the author, Ian Anderson expressed considerable pessimism with regard to Parliamentary consideration, specifically in light of events such as the terrorist bombings, in London, in the summer of 2006—events which have placed concerns over internal terrorist threats, and the security of the civil aviation system in Europe, at center stage.¹⁵¹

Regardless of whether British Parliament chooses to ignore calls for an extension to performers' rights due to a current preoccupation with matters of national security, the concerns expressed by Anderson, as well as by similarly disposed individuals and groups, represent an issue that will not go away. The transition into the public domain of recorded music from Great Britain will only accelerate, as the fifty-year mark progressively overtakes more of the recordings that were made during the formative years of rock & roll. By the year 2017, there will be a landslide of such transitioning material underway in the U.K., and those who stand to lose profits are not apt to fall silent in the face of such developments.

A. *The Gowers Review of Intellectual Property Law*

The *Gowers Review of Intellectual Property* ("Review") is of central importance to the British government's disposition regarding the prospect for an extension to the term of performers' rights protections.¹⁵² In December 2005, at Great Britain's *Enterprise Conference*, British Chancellor of the Exchequer Gordon Brown commissioned a review of

147. See ADENEY, *supra* note 27, at 214-15 (discussing the limits of performers' rights, under French law).

148. See, e.g., discussion *infra* Part IV—A.

149. See, e.g., discussion *infra* Part IV—A.

150. See, e.g., discussion *infra* Part IV—A.

151. Anderson Interview, *supra* note 9.

152. ANDREW GOWERS, HM TREASURY, GOWERS REVIEW OF INTELLECTUAL PROPERTY, available at http://www.hm-treasury.gov.uk/media/583/91/pbr06_gowers_report_755.pdf.

intellectual property rights in Great Britain.¹⁵³ Brown named Andrew Gowers to head this review.¹⁵⁴ At the time of his appointment by Brown, Gowers was the editor of the *Financial Times*,¹⁵⁵ an influential international business news publication arguably on par with *The Wall Street Journal*. The audience for the Review was Gordon Brown, the Secretary of State for Trade and Industry, and the Secretary of State for Culture, Media and Sport.¹⁵⁶

Gowers' appointment resulted in the *Call for Evidence*, a solicitation of comments, opinions, and recommendations for the future on intellectual property law in Great Britain.¹⁵⁷ Although the Review is an all-encompassing look at the current state of intellectual property law, an extension to the term of neighboring rights protections is but a sub-topic within it.¹⁵⁸ The Gowers' *Call for Evidence* described the Review's goal and expressly acknowledged the international character of the issues:

The Review will . . . fulfil [sic] the Government's existing commitment to examine whether the current term of protection on sound recordings and performers' rights in sound recordings is appropriate. In many cases the Review's recommendations will focus on how the Government might address these issues domestically. However, much of IP policy is agreed in an international context, and is often subject to [E.U.] legislation or international treaties and conventions. The Review may therefore also make policy recommendations at the international level, considering how best the Government can continue to take a lead internationally. It will bear in mind the need to balance the Government's aims of promoting innovation, openness to trade and investment, and international development concerns. It will also consider how best to influence the European Commission's agenda on intellectual property policy in the [E.U.], including its review of legislation on copyright and

153. See *id.* at § E5.

154. *Open Rights Group*, Gowers Review of Intellectual Property, <http://gowers.openrightsgroup.org> (last visited Feb. 2, 2007).

155. Andrew Gowers, WIKIPEDIA, http://en.wikipedia.org/wiki/Andrew_Gowers (last visited October 22, 2006).

156. See Johanna Gibson, *The Gowers Review of Intellectual Property – Valuable Affair*, SCRIPT-ED, 11; see also GOWERS, *supra* note 152.

157. GOWERS, *supra* note 152, §§ E10, B.2 (noting that the *Call for Evidence* produced responses from 517 individuals and organizations; a comprehensive list of respondents is reprinted at Annex B of the Review).

158. See *id.* §§ 4.42–4.47.

related rights.¹⁵⁹

The specific questions posed in the *Call for Evidence* provide an inside glimpse into the issues that are especially important in considering neighboring rights protections; these questions were as follows:

1. What are your views on this issue? 2. Is there evidence to show the impact that a change in term would have on investment, creativity, and consumer interests? 3. Are you aware of the impact that different lengths of term have had on investment, creativity, and consumer interests in other countries? 4. Are there alternative arrangements that could accompany an extension of term (e.g. licence [sic] of right for any extended term)? 5. If term were to be extended, should it be extended retrospectively (for existing works) or solely for new creations?¹⁶⁰

It is thus clear that, in the eyes of policy-makers, the central areas of concern relate to *investment, creativity, and consumer interests*. Likewise, Ian Anderson, (and other advocates of an extension to term) advance incentives to forward-looking investment by record labels, and the nurturance of creativity on the part of recording artists as important components to the argument, although their arguments rest additionally upon a natural rights philosophy.¹⁶¹

At a launch party for the *Call for Evidence*, Andrew Gowers presided over a pair of panel discussions.¹⁶² The first panel was devoted to patents.¹⁶³ The second was devoted to matters affecting copyright protection, and featured Jill Johnstone, Head of Policy for the National Consumer Council; Anthony Lilley, Chief Executive of Magic Lantern Productions; Emma Pike, Chief Executive of British Music Rights; and Jonathan Cornthwaite, Head of Intellectual Property Law for Wedlake Bell Solicitors.¹⁶⁴ With respect to the issue of performers' rights protections, "[s]everal individuals in the open discussion, including representatives from EMI and Phonographic Performance Limited (a collecting society for performers)[,] argued for an extension of term (and revival, that is, including past performances) for performers' rights. . . . on the basis that these rights are incentives to the creative process."¹⁶⁵ While this argument

159. Open Rights Groups, *supra* note 154.

160. GOWERS, *supra* note 152, at 138.

161. *See, e.g.*, Anderson Interview, *supra* note 9; *see also* Anderson, *supra* note 2.

162. *See* Gibson, *supra* note 156, at 11.

163. *See id.* at 12.

164. *Id.*

165. *Id.* at 13.

is in line with that espoused by Anderson, and by others who are at the front lines of creativity in the promulgation of recorded musical works,¹⁶⁶ there are many (including Dr. Gibson) who find such a rationale for extending performers' rights to be singularly unpersuasive.

Dissenters argue that those who create works—whether literary, visual, or musical—will do so regardless of the legal framework that is in place, simply because artistic endeavor knows no economic calculus for its impetus.¹⁶⁷ For example, Dr. Gibson believes the economic incentive argument is unpersuasive because “performers’ *economic rights*, at least in their modern form, did not exist until their introduction in 1996.”¹⁶⁸ Nevertheless, the argument for extension of term in connection with performers’ rights stands, to some degree, apart from debates regarding incentives to creativity, insofar as such debates more properly revolve around the rights of persons who are authors or composers. The reason for this difference lies in the fact that in the performers’ rights context, the right is, by definition, derivative.¹⁶⁹ Thus, despite the natural rights philosophical basis for the argument in favor of extended term of protection, the creative-incentive debate necessarily takes on a somewhat different cant—*i.e.*, that of the more economics-driven incentive-to-investment debate.¹⁷⁰

As an illustration of the incentive-to-investment rationale that would bear upon a proposed increase in the duration of performers’ rights (as opposed to, for example, authors’ rights), one might look to the justification proffered by the United States Supreme Court in upholding the constitutionality of the Copyright Term Extension Act as it was applicable to *existing* copyrights.¹⁷¹ The Court noted that a specific Legislative intent in the passage of the Act was predicated upon “rationally credited projections that longer terms would encourage copyright holders to invest in the restoration and public distribution of their works.”¹⁷² Indeed, what could be more “on point” for those who stand to benefit the most from an extension to the term of neighboring rights in the U.K. and in the E.U.—namely, the non-composer performers of recorded music and, specifically,

166. Anderson Interview, *supra* note 9.

167. *See, e.g.*, GOWERS, *supra* note 152, § 4.32.

168. Gibson, *supra* note 156, at 13 (emphasis added); *see also text supra* Part III.B–10.

169. *See* ARNOLD, *supra* note 11, at 13.

170. *See, e.g.*, GOWERS, *supra* note 152, §§ 4.30–4.33.

171. *See* Eldred v. Ashcroft, 537 U.S. 186, 207 (2003) (citing H. R. Rep. No. 105-452, p. 4 (1998), which discusses the fact that a term extension “provides copyright owners generally with the incentive to restore older works and further disseminate them to the public”).

172. *Id.* at 207 (citing Brief for Respondent).

the record labels that manufacture and distribute the products of such performers' work?

Arguments against an extension of performers' rights necessarily encompass those which have traditionally been advanced in opposition to the basic establishment of performers' rights in the first place. In his book, *Performers' Rights*, Richard Arnold enumerated many of those fundamental arguments, and the refutations available to each.¹⁷³ He began with the notion that performance itself—*e.g.*, the accompaniment of a session musician on a recorded work—is dependent upon, and therefore subsidiary to, authorship.¹⁷⁴ Indeed, it is on the basis of this reasoning that performers' rights derive their designation as “neighboring” rights.¹⁷⁵ Another argument is that granting rights to performers will place authors, such as composers of musical works, at a legal disadvantage.¹⁷⁶ Third, there are those that argue that performers' rights are more properly the province of union negotiations, rather than copyright law, while still others point out the impracticability of granting rights to the numerous performers who might be involved in complex works—for example, a symphonic work.¹⁷⁷ Some people believe performance is intrinsically transitory and, therefore, not deserving of protection.¹⁷⁸ This argument carries little force under modern technological regimes because recorded music is, for all practical purposes, fixed in perpetuity.¹⁷⁹ Some would argue that a performer can only *benefit* from free reproduction of a recorded work, on the theory that the performer's reputation will be thereby enhanced.¹⁸⁰ There is also the notion that “granting performers rights is anti-competitive.”¹⁸¹ Additionally, Arnold describes what he calls a “floodgates” argument, *i.e.*, “if you grant rights to performers, others may start demanding rights, such as sportsmen.”¹⁸²

As Arnold points out, however, each of the arguments enumerated above may be refuted.¹⁸³ The performance-as-subsidary-to-authorship argument does not satisfy the question as to why such performance is

173. ARNOLD, *supra* note 11, at 7-10.

174. *Id.* at 7.

175. *See id.* at 7-10.

176. *See id.* at 8.

177. *Id.* at 7-10.

178. *Id.* at 9.

179. ARNOLD, *supra* note 11, at 9.

180. *See id.*

181. *Id.*

182. *Id.* at 10.

183. *See id.* at 7-8.

“either economically or morally less deserving of protection.”¹⁸⁴ The prejudice-to-authors argument fails in the face of evidence that the market is sufficiently elastic to have proven that “no evidence has ever been found that authors’ remuneration has fallen as the result of the granting rights to performers.”¹⁸⁵ The union-negotiations-as-appropriate-forum argument ignores the fact that there is still a need for a *legal* framework as a reference for any collective bargaining negotiations.¹⁸⁶ Situations involving large numbers of performers on a single work can be addressed under collective licensing agreements.¹⁸⁷ Performers, whose reputations are enhanced via free reproduction of their works, still prefer to retain control over the reproduction of their works and, consequently, their remuneration for such reproduction.¹⁸⁸ The anti-competitiveness argument does not address the corollary question as to “whether unauthorised [sic] exploitation of performances is fair competition which ought to be restrained.”¹⁸⁹ The floodgates argument has yet to be borne out by experience and, as Arnold points out, it may not necessarily be a bad thing if sportsmen began to demand performers’ rights.¹⁹⁰

The Gowers Review systematically refutes the arguments in favor of the extension of performers’ rights protections.¹⁹¹ On behalf of the British government, Chancellor Brown accepted the Review’s recommendations at the time they were reported in December 2006.¹⁹² The Review listed the following arguments (culled from the *Call for Evidence*) in support of extending the term of protection for sound recordings:

- (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, whereas performers and producers only have rights for 50 years. Such a disparity is unfair;

184. *Id.*

185. ARNOLD, *supra* note 11, at 8.

186. *Id.*

187. *Id.* at 8–9.

188. *Id.* at 9; *see also*, Jury, *supra* note 21 (discussing the dissatisfaction of performers in the U.K., with respect to the current term of performers’ rights protection in Great Britain and the E.U.).

189. ARNOLD, *supra* note 11, at 9.

190. *Id.* at 10.

191. *See generally* GOWERS, *supra* note 152.

192. E-mail from Dr. Johanna Gibson, Reader in Intellectual Property Law, Queen Mary Intellectual Property Research Institute, Centre for Commercial Law Studies, Queen Mary University of London, to the author (Jan. 31, 2007, 153:16 PM EST) (on file with author).

(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 [the] 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[ing] 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. In 2004, the UK sector showed a trade surplus of £83.4 million, earning £238.9 million in export incomes.¹⁹³

After consulting widely, and relying largely upon the results of an economic analysis commissioned by the Review (from the Centre for Intellectual Property and Information Law, at Cambridge University [“CIPIL”]¹⁹⁴), the Review “carefully considered each of these arguments in turn.”¹⁹⁵

1. Parity with Other Countries

In response to the claim that an extension of the term for performers’ rights protections would foster parity with other countries, the Review suggests that the *breadth* of protection offered in the U.K. favorably offsets a shorter *duration* (as compared to the U.S.) offered for such protection.¹⁹⁶ Noting that the term of protection is currently fifty years in the E.U., and ninety-five years in the U.S., the Review points out that U.S. copyright law contains an exception to the requirement of royalties for performances in bars and similar public venues.¹⁹⁷ Additionally, royalties for radio performances in the U.S. are paid only in the context of *digital* radio, as opposed to the U.K. where the law mandates royalties for *all* radio performances.¹⁹⁸ Under an economic analysis comparing the two systems, the Review concludes that “[i]t is therefore possible that the total royalties received in the EU is no less than, and may even be more than, those

193. GOWERS, *supra* note 152 § 4.22 (citations omitted).

194. *Id.* § 4.21.

195. *Id.* § 4.22.

196. *See id.* § 4.23.

197. *Id.* (citations omitted).

198. *Id.*

received in the USA.”¹⁹⁹ Despite the relatively perfunctory nature of the economic analysis that the Review cites in support of its conclusion, the Review dispenses with the first argument proffered in support of an extension to the term of protection.

Additionally, the Review examines the claim that the longer term of protection in the U.S. has been responsible for drawing British artists away from U.K. recording contracts.²⁰⁰ The Review finds that there is “no evidence of UK bands choosing to sign to US labels based on copyright term,” and that, “[i]n fact, there is anecdotal evidence that bands from the USA are signing to UK labels to develop in a vibrant music scene.”²⁰¹

One could plausibly question how the Review’s “anecdotal evidence” is more persuasive than opposing evidence of precisely the same nature. The Review’s assertion that the motivation for bands’ signature with U.K. record labels is “to develop in a vibrant music scene”²⁰² seems optimistic, at best. The Review appears to ignore the distinct possibility that, given the realities faced by bands attempting to break into the recording industry, it is manifestly possible that most bands merely sign with the first label that evinces a willingness to offer them a contract.

2. Fairness, as Between Composers and Performers

In answering the charge of unequal treatment, as between performers and composers, the Review finds that “it is not clear that extending [the] term [of protection] 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 [of] protection.”²⁰³ Tacitly acknowledging that one of the central tenets of copyright and neighboring rights protections (as those protections currently stand in the U.K.) is grounded in the utilitarian notion that protection provides an incentive to creators, while its limitation benefits the public,²⁰⁴ the Review attacks the incentive argument directly.²⁰⁵ Offering economic evidence in support of the view that sufficient creative incentive already exists (for performers as well as authors), the Review cites, *inter alia*, its own commissioned CIPIL study, which analyzed figures obtained from PriceWaterhouseCoopers (PWC)

199. GOWERS, *supra* note 152, § 4.23 (citing Copyright, Designs, and Patents Act, 1988, c. 48, §§ 20, 182C(A), 182D (Eng.)).

200. *Id.* § 4.24.

201. *Id.*

202. *Id.*

203. *Id.* § 4.28.

204. *See id.* § 4.26.

205. GOWERS, *supra* note 152, § 4.27.

under the auspices of the British Phonographic Industry (presumably in response to the Call for Evidence).²⁰⁶

According to the Review, CIPIL's figures (based upon the PWC data) show that the Net Present Value (NPV) of the proposed alteration to term would be only one percent,²⁰⁷ and that the benefit would be unevenly distributed.²⁰⁸ The lion's share of additional profit would be given to the more successful performers whose works remain in circulation beyond the current fifty-year term.²⁰⁹ Additionally, the Review appears to sidestep the issue of potential benefits under the proposed extension to term by offering figures to support the assertion that royalties obtained under the current scheme of protection are low to begin with, and are superseded by other sources of revenue (such as name-recognition).²¹⁰ Furthermore, the Review suggests that the place to look for a remedy is not within the law of neighboring rights but, rather, in the specific contractual infrastructure of the recording industry.²¹¹

The Review thus demonstrates a remarkable willingness to base conclusions on reasoning that says, essentially: Why grant more protection to those who are unfairly treated, since, even within those ranks, there is a hierarchy of success already, and those who are currently at the bottom will nevertheless remain at the bottom? Such reasoning overlooks both the fact that the *entire group* would benefit—including those at the bottom—and the fact that even those at the top are not currently receiving benefits commensurate with those enjoyed by top *composers*. Additionally, this rationale for declining to extend the term of protection is not in keeping with fundamental free-market, capitalist economics. In other words, performers may compete with one another, and let the best of them prevail. It makes little sense to refuse to improve the lot of the group simply because some members of that group *will* prevail over others.

The Review's assertion—that the benefits conferred upon a performer in the form of revenue derived from name recognition outweighs the royalties-derived portion of his or her income²¹²—appears to disregard the Review's immediately preceding acknowledgement: that the vast majority of performers do not enjoy sufficient *status* within the industry to collect

206. *Id.* § 4.29.

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.* (citing Box 4.2).

211. GOWERS, *supra* note 152, § 4.29 (citing Box 4.2).

212. *Id.* (citing Box 4.2).

royalties beyond the current fifty-year term of protection.²¹³ It is difficult to imagine how a performer who will, arguably, not benefit much from an extended term of protection, due to his or her relatively diminutive stature within the pantheon of recording personalities, could nevertheless be adequately compensated for his or her unequal status (relative to composers) by what the Review calls their “celebrity status.”²¹⁴

3. Increased Term as Incentive to Future Investment

In refuting the assertion that an extension to term will increase record companies’ incentives to invest in new acts,²¹⁵ the Review marshals as its strongest argument the views expressed in an amicus brief to the U.S. Supreme Court in the case of *Eldred v. Ashcroft*.²¹⁶ *Eldred* presented the Court with a challenge to Congress’ power to enact the CTEA.²¹⁷ The amicus brief cited by the Review proffered the opinions of numerous economists, in support of (according to the Review) the proposition that an extension to the term of copyright protection would have little or no effect upon investment decisions.²¹⁸ The economists’ calculations tended to show that an extension to term would provide a relatively miniscule NPV (again, on the order of one percent).²¹⁹ According to the Review’s summary of the amicus brief, these economists “conclude . . . that an extension of term has negligible effect on investment decisions.”²²⁰ The point, according to the Review, is that prospective returns which lie more than fifty years from the actual time of investment do not serve to provide an incentive to such investment.²²¹

Unfortunately, the Review’s citation to the brief of amicus curiae in *Eldred* is misplaced, due to the disparity of contexts in which the Review and the amicus brief treat the subject of investment.²²² The section of the

213. *Id.*

214. *Id.* (citing Box 4.2).

215. *Id.* §§ 4.30–31.

216. *See id.* § 4.31 (citing Brief for George A. Akerlof et al. as Amici Curiae in Support of Petitioners, *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (No. 01-618) [hereinafter Amicus Brief]).

217. *Eldred v. Ashcroft*, 537 U.S. 186, 193 (2003); *see also* discussion *supra*, Part III.A (the CTEA, 17 U.S.C. § 302(a)–(c) (2006), increased the term of protection for existing and future copyrights to life-plus-70 years, and protection for works for hire was increased to 95 years from the date of publication, or 120 years from creation, whichever expires first).

218. GOWERS, *supra* note 152, § 4.31 (citing Amicus Brief, *supra* note 216).

219. *Id.* (citing Amicus Brief, *supra* note 216).

220. *Id.*

221. *See id.*

222. *Compare id.* §§ 4.31–4.33 (discussing and refuting the argument that an extension to the term of protection for performers’ rights would provide incentives to record companies to

Review in which this discussion appears is intended to refute the argument that an extension will provide incentives to record companies to invest in the future success of new artists.²²³ As the Review makes clear, “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.*”²²⁴ Indeed, such is precisely the contention of supporters of an extension.²²⁵

Meanwhile, the brief of amicus curiae in *Eldred* deals not with incentives to record companies to *invest in future acts*, but rather with incentives to authors to invest in future returns by *creating in the present day.*²²⁶ It is in this latter context that the increase in value provided by an extension would be of negligible effect, according to the brief.²²⁷ The brief speaks in terms of authors’ incentives, rather than those of record companies or publishers, although it is in that context (i.e. corporate decision-making) that the Review seeks to employ the data from the brief.²²⁸ The brief does, in a single paragraph, touch upon the fact that investment strategy, on the part of large media corporations, is informed by profit-maximization based upon expected returns as compared with cost of capital.²²⁹ According to the brief:

[i]f [a] producer has resources remaining, after funding all the projects whose expected returns are higher than the cost of capital, this remainder should be invested elsewhere, not in sub-par projects that happen to be available to the firm . . . [Thus] its incentives will not be improved from the mere fact of a windfall from consumers.²³⁰

The brief’s comment upon investment strategy ignores the fact that it is an integral part of the ongoing business of media enterprises such as record companies to take risks by investing capital in un-proven, emerging talent. Additionally, even this abbreviated treatment of corporate investments is offered by the authors of the brief only to refute the

maintain an ongoing supply of new music), with Amicus Brief, *supra* note 216 (discussing the CTEA in terms of its arguably negligible effect upon artists’ incentives to create new works).

223. See GOWERS, *supra* note 152, § 4.22.

224. *Id.* § 4.30 (emphasis added).

225. See, e.g., Anderson Interview, *supra* note 9 (arguing that an extension to term would give record companies not merely an incentive to invest in new acts, but also the fundamental continuing ability to so invest).

226. See generally Amicus Brief, *supra* note 216.

227. See *id.*

228. See *id.*; see also GOWERS, *supra* note 152, §§ 4.30–4.33.

229. See Amicus Brief, *supra* note 216, at 8–9.

230. *Id.* at 9.

argument that “the windfall to authors of existing copyrights has a positive consequence, by providing them with more resources for additional creative projects.”²³¹ What is argued by those who support an extension to the term of performers’ rights is, however, subtly different: i.e., not that an extension will result in a “windfall to authors of existing copyrights,” thus “providing them with more resources for additional creative projects.”²³² Rather, what is argued in the context of the debate in the U.K. surrounding a proposed extension is that such an extension will enhance record companies’ ability to invest in talent which has yet to hold any copyrights whatsoever (i.e., new artists), and to do so as a regular practice, rather than merely to provide additional funding to any particular existing copyright holder.²³³ Thus, it is misleading of the Review to employ the brief’s (cursory) treatment of corporate investment strategy in support of the Review’s attempt at refuting the incentive to investment argument.

Because the amicus brief cited by the Review cannot be said to squarely address the incentive-to-investment argument *in the corporate context*, the Review mischaracterizes the single document that is marshaled in support of its refutation of that argument. The amicus brief is primarily devoted to the utility to existing authors of an extension, in the form of incentive to create.²³⁴ One need not be a sophisticated economist to speculate that, whereas a single author might not be influenced by prospective returns on a single work (calculated to come to fruition more than fifty years in the future), a large corporation such as a major record label might indeed factor such returns—theoretically from a multiplicity of acts—into present-day investment decisions.

Additionally, it should be noted that discussion of the amicus brief (noted with such approval by the Review²³⁵) occurs in *Eldred* as part of Justice Breyer’s dissent in that case.²³⁶ Although the constitutional issue in *Eldred* was whether or not Congress had overstepped its authority in passing the CTEA,²³⁷ the majority looked to the legislative history of the CTEA and the dissenting opinions to economic data, in support of their opinions regarding Congress’ adherence to the intent of the Framers of the Constitution, with respect to the Copyright Clause.²³⁸ In the end, the

231. *Id.* at 8–9.

232. *Id.*

233. See, e.g., Anderson Interview, *supra* note 9.

234. See Amicus Brief, *supra* note 216.

235. See GOWERS, *supra* note 152, § 4.31.

236. 537 U.S. at 254–55, 267 (Breyer, J., dissenting).

237. See *id.* at 192–94.

238. See, e.g., *id. passim*. The Copyright Clause of the U.S. Constitution confers upon

majority in *Eldred* held that “Congress passed the CTEA in light of demographic, economic, and technological changes, and *rationaly credited projections* that longer terms would encourage copyright holders to invest in the restoration and public distribution of their works.”²³⁹ “Satisfied that the legislation before [the Court] remains inside the domain the Constitution assigns to the First Branch,” the Supreme Court upheld the passage of the CTEA.²⁴⁰ Thus, the Review’s heavy reliance upon the economic data presented in the amicus brief could be viewed as a somewhat desperate gambit to adduce evidence in support of the Review’s findings.

The Review briefly addresses a variation of its argument that an extension to term would provide an incentive for companies to invest in new artists.²⁴¹ The Review dismisses this argument, stating, “[t]his seems highly unlikely given there are a large number of bands already creating music without any hope of a financial return.”²⁴² In support of this proposition, the Review quotes a performer named Dave Rowntree (of the British rock groups Blur and The Ailerons), who finds the idea that creative incentives could be based upon term of protection “laughable.”²⁴³

On the other hand, in *Eldred*, the U.S. Supreme Court addressed this same argument in favor of term extension.²⁴⁴ There, the Court allowed that Congress could reasonably be persuaded by the House and Senate hearings committee testimonies of Quincy Jones, Bob Dylan, Don Henley, and Carlos Santana.²⁴⁵ As the Court noted, “each [of these artists] expressed the belief that the copyright system’s assurance of fair compensation for themselves and their heirs was an incentive to create.”²⁴⁶ The Court noted, “[w]e would not take Congress to task for crediting this evidence which, as [even dissenting] Justice Breyer acknowledges, reflects general ‘propositions about the value of incentives’ that are ‘undeniably true.’”²⁴⁷

Congress the power “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” U.S. CONST. art. I, § 8, cl. 8.

239. 537 U.S. at 206–07 (emphasis added) (citations omitted).

240. *Id.* at 222.

241. See GOWERS, *supra* note 152, § 4.32.

242. *Id.*

243. See *id.* (“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.”)

244. See 537 U.S. at 207 n.15.

245. *Id.*

246. *Id.*

247. *Id.* at 207–08 n.15 (majority opinion quoting Breyer, J., dissenting, at 255. Justice Breyer’s dissent relies, in part, upon the same economic rationale as does the Review’s rejection of the incentive-to-create argument.).

Naturally, the Review could offer the rejoinder that it is unpersuasive to pit the opinions of such major recording artists as were heard in the U.S. legislative sessions cited in *Eldred* against that of a more parochial, rank-and-file musician, such as the sole artist cited by the Review.²⁴⁸ This argument would make sense only under reasoning which allows the limited prospective fortunes of persons at the bottom rungs on the hierarchy of stardom to dictate neighboring rights policy in the U.K.—the approach which the Review had embraced in rejecting the fairness argument. Nevertheless, the truth as to what might or might not motivate the creative artist lies more in the content of what the (impeccably credentialed) American artists who were cited in *Eldred* feel is the relationship between rights protection and creative incentives. The Review's reliance upon the cited brief of amicus curiae in *Eldred* seems analytically suspect, inasmuch as the U.S. Supreme Court was satisfied that Congress had properly exercised its authority in passing the CTEA. The British government, should it (as the Review implicitly suggests²⁴⁹) opt to take into consideration American legal precedent, would surely be more justified in following the majority decision in *Eldred* than in setting a course based upon evidence presented in an amicus brief which failed to influence the majority in that case, in terms of the U.S. Supreme Court's analysis of Congressional decision-making.

The Review concludes its incentive-to-future-investment discussion by pointing out that “the vast majority of works remain in copyright despite not being economically viable for the rights holder.”²⁵⁰ Based, in part, upon the reasoning that “the vast majority of income for sound recordings . . . [is] generated within the first few years of issue,” the Review concludes that “extension would only raise revenue for a small minority of sound recordings, keeping the vast majority locked up.”²⁵¹ Again, as it did in its rejection of the fairness argument, the Review uses the hierarchy of success as a basis for concluding (rather paternalistically) that an increased term of protection for performers and record companies would be of negligible use to the recording industry²⁵²—an industry which in fact relies upon revenues from sound recordings and which is itself *at the forefront* of the call for an extension to term.

248. GOWERS, *supra* note 152, § 4.32.

249. *Id.* § 4.31.

250. *Id.* § 4.33.

251. *Id.*

252. *Id.*

4. Increase in the Number of Available Works

The Review summarizes this argument as follows: “[E]xtension of term would increase [the] 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.”²⁵³ The Review does not elaborate upon how this argument functions toward advocating an extension and, indeed, here it seems possible that proponents for an extension to term have opened themselves to refutation. The Review points to evidence of statistics that tend to show that works in copyright, versus works in the public domain, are actually *less* available, due to the requirement for those who would make use of such works to negotiate licensing agreements with the rights holders.²⁵⁴ By inference then, enduring works that are in the public domain are freely used, and thus the utilitarian goals of the copyright and neighboring rights systems are vindicated.

The flaw in the Review’s reasoning lies in the fact that the grounding of intellectual property rights rationales in utilitarian thought has traditionally been true mainly in the U.K. and in the U.S., but not in the civil law countries of continental Europe.²⁵⁵ In the E.U., where the concept of moral rights enjoys great vitality (and under whose law an extension to term would have to be ratified), there ought to be less forceful objection to the notion that a rights holder might retain control over his or her work for a longer period, provided that period does not prove to be indefinite.²⁵⁶ Moreover, recent trends in copyright protection schema worldwide suggest that the application of moral rights rationales to the protection of performers’ rights may currently be in a state of ascendancy.²⁵⁷

5. Improvement in the U.K. Trade Balance

According to the Review, the argument which posits that an extension to term for performers’ rights would assist in maintaining the U.K.’s balance of trade relies upon two assumptions.²⁵⁸ The first of these

253. *Id.* § 4.22.

254. *See id.* §§ 4.34–4.35.

255. *See* discussion *supra* Part III and accompanying sources cited (introducing a comparative background in Anglo and European copyright law).

256. *See* discussion *supra* Part III and accompanying sources cited (discussing the WPPT’s significance because of its expanded emphasis on moral rights for performers).

257. *See* discussion *supra* Part III.B.10 (noting developments in the U.S., and in worldwide treaties such as the WPPT, which reflect growing recognition of performers’ rights).

258. GOWERS, *supra* note 152, § 4.36.

assumptions, according to the Review, is that an increase in term in the U.K. is necessary to increase the term in other countries.²⁵⁹ The second assumption is that, due to the U.K.'s volume of exported music, an extension to term would cause more revenue to accrue in the U.K. from outside markets.²⁶⁰

The Review answers the first assumption by asserting that “[because] the term of protection depends on where a recording is played, not on where it was produced . . . [an] extension would only be beneficial to the balance of trade if UK copyright owners were able to benefit from longer terms in other countries.”²⁶¹ The Review goes on to theorize that since the largest markets for international repertoires (outside of Europe) are the U.S. and Australia, which both already offer a substantially longer term of protection, “changes in British law would not now affect the term granted to British phonograms.”²⁶² Here, the Review appears to lose track of the central point: the extension to term would, under the Term Directive, need to be a pan-European alteration in the law.²⁶³ The Review thus overlooks the fact that benefits would flow to British performers under an extension to term because their recordings would be forestalled from entering the public domain *both in the U.K. and in the E.U.*²⁶⁴

The Review addresses the second assumption (which, it argues, may be inferred from the trade balance argument for extension) by offering data (based upon the CIPIL report) to show that the U.K. imports close to half of the music sold in that country.²⁶⁵ For this reason, according to the Review, forty-three percent of the additional revenue from an extension to term would go outside the U.K. to the countries of origin for that share of

259. *Id.*

260. *Id.*

261. *Id.* § 4.37.

262. *Id.*

263. See Council Directive 93/98, art. 3.1, 1993 O.J. (L290) 9 (EEC) (The rights of performers shall expire 50 years after the date of the performance. However, if a fixation of the performance is lawfully published or lawfully communicated to the public within this period, the rights shall expire 50 years from the date of the first such publication or the first such communication to the public, whichever is the earlier); see also E-mail from Dr. Johanna Gibson, Reader in Intellectual Property Law, Queen Mary Intellectual Property Research Institute, Centre for Commercial Law Studies, Queen Mary University of London, to the author (Nov. 5, 2006, 7:52 AM EST) (on file with author) [hereinafter Gibson E-mail Nov. 5, 2006] (The U.K., as a member of the [European] Community, must ensure that its law is in compliance with the [Term] Directive. This is achieved by ‘implementing’ a Directive into national law. . . . [T]he term of protection that must be accorded to related rights according to Community law is set out in Article 3 of the Term Directive).

264. Anderson Interview, *supra* note 9.

265. GOWERS, *supra* note 152, § 4.38.

the U.K. market.²⁶⁶ Thus, the CIPIL report concludes that “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.”²⁶⁷ On the other hand, the Review suggests that, in the absence of an extension, “[b]ecause the cost of [music] licenses reflects the royalties payable on the copyrights, as those copyrights expire, so the cost of the licenses will fall.”²⁶⁸

Such reasoning is obviously grounded in a deeper concern for the market effects of particular term-of-protection schema than for the rights holders themselves, which reflects both utilitarian and contemporary neoclassical economics copyright theory.²⁶⁹ This economics-driven approach may be a fair rebuttal to the term extension argument that proceeded from a balance-of-trade perspective. But interestingly, neoclassical economic copyright theory generally *favors* strong protection for rights holders, and holds the concepts of fair use and public domain to be inefficient.²⁷⁰ Therefore, the Review’s application of the theory, and its placement of national economic interests above those of the performers themselves, does a disservice to the moral rights philosophy which (in addition to informing intellectual property law in the E.U. apart from Great Britain) is at the true heart of performers’ advocacy of an extension to term.²⁷¹

The Review concludes this portion of its examination of intellectual property law in the U.K. by formally recommending that “[t]he European Commission should retain the length of protection on sound recordings and performers’ rights at [fifty] years.”²⁷² The Review’s summary of its findings, in this respect, is as follows:

In conclusion, the Review finds the arguments in favour [sic] 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

266. *Id.* § 4.38.

267. *Id.*

268. *Id.* § 4.39.

269. *See, e.g.,* JOYCE., *supra* note 13, at 59–60 (describing contemporary economic rhetoric in copyright law as being “premised on faith in the power of the free market to allocate scarce resources”).

270. *See id.* at 60.

271. *See, e.g.,* Anderson Interview, *supra* note 9.

272. GOWERS, *supra* note 152, at Recommendation 3.

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 percent of current revenue, approximately £155 million.²⁷³

The Review then proceeds to address a proposal that the term of protection in sound recordings be extended retroactively.²⁷⁴ This proposal deals with the issue that is of greatest concern to performers who face the impending expiration of protection, as their work progressively enters the public domain over the coming years.²⁷⁵ The Review does not dwell for long upon this issue. As Ian Anderson (among others) has argued, and as the Review acknowledges, “[t]he principal argument [for an] increase [in] sound term retrospectively is that many recordings from the 1950s are beginning to fall out of copyright . . . [which] will lead to a loss of revenue, therefore impacting on the incentives to invest in newer artists.”²⁷⁶ The Review formally recommends that “[p]olicy makers should adopt the principle that the term and scope of protection for IP rights should not be altered retrospectively.”²⁷⁷ The Review arrived at this recommendation by marshalling an argument that is essentially a reiteration of the rejection of the incentive-to-future-investment argument, and by relying upon market-analysis data from CIPIL and from PWC.²⁷⁸ In addition to its reliance upon the CIPIL data, the Review again bases its conclusion, with respect to this issue, upon its reasoning that:

[t]he 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 [fifty] 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.²⁷⁹

Thus, in elevating the concerns of the theoretical future user of older recordings above those of the rights-holder, the Review returns to a classic

273. *Id.* § 4.40.

274. *Id.* §§ 4.41–4.47.

275. Anderson Interview, *supra* note 9.

276. GOWERS, *supra* note 152, § 4.43; *see also* Anderson Interview, *supra* note 9.

277. GOWERS, *supra* note 152, at Recommendation 4.

278. *Id.*

279. *Id.* § 4.47.

utilitarian argument. What the Review does not appear to anticipate is the potential shift in the importance of older recordings in the coming years. Fifty years ago, the world had yet to see the explosion of British recorded popular music which would inexorably gather momentum over the next twenty years. Thus, the recordings which are now due to begin falling into the public domain might well be of increasingly dominant cultural value, effectively rendering the Review's logic (at best) moot, and (at worst) anachronistic. In other words, whereas it may be true that the vast bulk of older recordings were of little or no cultural value beyond their fifty-year term, the recordings from the golden age of rock & roll will be of *enormous* cultural value. Such is the central thesis underlying Ian Anderson's position.²⁸⁰

Even supposing that the status quo remained unchanged regarding the cultural value of older recordings, if the Review's analysis is correct (i.e., if the majority of older recordings are of little value, from a revenue-gathering perspective), what then is the importance of handing those recordings over to a hypothetical public domain beneficiary? Such beneficiaries would have even *less* use for these recordings than the current rights holders; therefore, why favor them?

The Gowers Review of Intellectual Property will, almost undoubtedly, be the defining policy-setting instrument, insofar as the British government is concerned, with potential revisions to pan-European schemes regarding performers' rights protections.²⁸¹ If, based upon the Review's recommendations, the British government does not advocate an extension to term, then the E.U. will need to be influenced more directly by performers and recording industry representatives, who are most concerned about the increasing tempo of impending copyright expiration as the public domain overtakes the recordings of the early years of rock & roll. It remains to be seen whether the E.U. is susceptible to being persuaded to rely more upon a philosophical rationale in favor of supporting existing-rights holders, or whether economic analysis might ultimately carry the day despite the fact that rights protections on the Continent have traditionally been more heavily influenced by the *natural rights* and *personality rights* points of view whose origins lie with Locke and Hegel.²⁸²

280. See Anderson Interview, *supra* note 9; Anderson, *supra* note 2.

281. See, generally, Gibson E-mail Jan. 31, 2007, *supra* note 192 (discussing the immediate effects of the release of the Gowers Review of Intellectual Property).

282. See, e.g., JOYCE, ET AL., *supra* note 13, at 54–57; see also text *supra*, Section III and cited authorities (introducing a comparative background in Anglo and European copyright law).

V. A LEGAL/PHILOSOPHICAL ANALYSIS

There are many unanswered questions involving legal philosophy that might be raised along with the consideration of whether to extend performers' rights protections in the E.U. One of these questions centers on the extent to which countries that purport to embrace the *natural rights* view regarding copyright protection are willing to bring the central theses of that philosophy of law to the table when called upon to support a change in the law. In the current debate—under which the principal beneficiaries of such a change would be primarily British, as opposed to, for example, French or Italian—this commitment to a natural rights philosophy will be put to the acid-test. Additionally—and conversely—one might question the extent to which the legal reasoning of the eighteenth century (as reflected in Great Britain's Statute of Anne²⁸³ and, later, in the United States Constitution²⁸⁴) still provides any compelling foundation for limitations upon copyright protection. For better or worse, such limitations are, to this day, reflected both in U.S. and U.K. law under a utilitarian rationale. Indeed, even within the U.S.—which, nominally, espouses a utilitarian-based copyright system—there is evidence of a shift in legislative thinking toward the embrace of a moral rights rationale in copyright protection.²⁸⁵ This shift has manifested itself in, for example, the grant of a right of attribution for visual artists under the Visual Artists Rights Act of 1990.²⁸⁶

With respect to E.U. law, it is questionable whether a protection regime that is based upon a rationale that traditionally views performers as being of subsidiary importance to authors is consistent with the fundamental goals which underlie the unification of European states into the E.U. The dubious nature of an adherence to such a protection regime is especially salient where, as here, that regime allows a negative impact to fall disproportionately upon a single Member State—i.e., Great Britain.

283. See Statute of Anne, 1710, 8 Ann., c. 19 (Eng.) (creating statutory, time-limited copyright protection, under the utilitarian rationale, and supplanting the common law, which had offered a theoretically perpetual right of protection, based upon a natural rights rationale).

284. U.S. CONST. art. I, § 8, cl. 8.

285. See 17 U.S.C. 106A (2006).

286. See generally Peter Jaszi, *Toward a Theory of Copyright: The Metamorphosis of "Authorship"*, 41 DUKE L.J. 455, 498–99 (1991) (discussing the application of the concept of moral rights in the United States); text *supra* Part III.A (concluding with a discussion of a general trend toward a natural law-based formulation of copyright in the U.S.); JOYCE, ET AL., *supra* note 13, at 57 (noting that natural law (as opposed to utilitarian) theories enjoy vitality in the discourse of British and American copyright law, and "throughout the history of Anglo-American copyright . . . have been successfully deployed to explain or to justify virtually every extension of the scope or intensity of copyright protection").

The debate over a potential extension of neighboring rights will place new, practical emphasis upon what might ordinarily be the province of legal and economic theorists. The forces of economics might well exert an influence upon the determination as to the nature of intellectual property rights in a way that renders such theories as *natural rights* functionally moot.²⁸⁷ If that is the case, what might this say about the manner in which intellectual property is conceived in the E.U.? Is it possible that there is an essential illogic underlying the law, such that when, for example, French, Italian, or Dutch intellectual property rights are at issue, the law provides one type of protection based upon one type of theory (e.g., *droit moral*), while, at the same time, that theory is not willingly extended to a country such as Great Britain? This potential illogic comes into sharp relief assuming that Great Britain might, in fact, see the advantage of moving away from the utilitarian arguments for limitations on copyright protection, and toward the natural rights conception which underscores the rationale adhered to by the majority of E.U. states (and which had provided the original basis for copyright protection under the British common law).

If, upon close inspection, it is revealed that such an inconsistency of logic is actually to be unearthed in copyright law within the E.U., then it is clear that economic considerations are, in fact, solely responsible for driving the policy of the E.U. Consequently, concepts such as *droit moral* would, for all practical purposes, be relegated to the status of quaint, legal anachronisms, like curios preserved in a glass case in a museum. Indeed, advocates of the utilitarian model would argue that the moral rights philosophy, which arises under the natural rights rationale, represents a hindrance upon economic freedom. As Peter Jaszi says "moral rights . . . are not in the marketplace; they are inalienable Such a legal application of 'authorship' can only impede the free commerce in intellectual and artistic productions that Anglo-American copyright traditionally has fostered. In effect, moral rights represent a charter for private censorship."²⁸⁸

Jaszi's assertion is in line with the utilitarian suspicion that a natural rights approach to copyright eliminates the creation of a public domain and thus restricts the economic utility of created works. This view is shown to be simplistic however, when seen in light of competing arguments which illustrate that, rather than eliminating the public domain, the natural rights philosophy actually creates and encourages a strong public domain.²⁸⁹ One

287. See, e.g., GOWERS, *supra* note 152, §§ 4.20–4.47.

288. Jaszi, *supra* note 286, at 497.

289. See, e.g., Yen, *supra* note 39, at 552–57 (discussing the manner in which inherent limitations upon a right of property and possession serve to prevent natural law from eliminating

such argument is premised upon the inherent limitations that exist with respect to that which may be considered susceptible of possession, and that which may not be possessed: “[t]hese limits both explain and justify *limiting* the expansion of copyright law.”²⁹⁰ An additional argument rests upon the recognition that, in the modern age, authorship itself can never be truly afforded the status of an absolutely sole endeavor: “[a]uthorship is . . . not the creation of works which spring like Athena from the head of Zeus, but the conscious and unconscious intake, digestion and transformation of input gained from the author’s experience within a broader society.”²⁹¹ Under this view, the underlying influences from which a work is derived cannot become the proprietary possession of the author, and thus, this influencing material *must* be part of the public domain.²⁹² A theoretically unlimited right of possession in authored works must necessarily be premised upon the notion that the author acts in a cultural and artistic vacuum. Since this is literally not possible, authors’ rights must, even under a natural law justification, be susceptible of some degree of limitation. As Alfred C. Yen says:

Under complete authors’ rights, an author would receive compensation from any successor who borrowed from the author’s work. However, our author would also owe huge debts to her predecessors for any material she might have borrowed from them. . . . [But] if people really did have complete property rights in their intellectual products[.]. . . a hypothetical writer would have no right to use many literary techniques or language itself. If our author were a composer, other individuals would already claim exclusive rights to basic musical forms and styles such as the sonata form, impressionism, and the like. A painter would surely confront similar problems when drawing inspiration from the works of others. Indeed, if property rights in all products of the mind really were complete, practically all of mankind’s intellectual heritage would be private property. Future authors would simply have little, if any, chance of achieving any sort of viable art. If nothing else, the cost of compensating all sources for material borrowed would bankrupt any author. The problems of “reinventing the wheel” would be simply overwhelming.²⁹³

the public domain).

290. *Id.* at 552 (emphasis added).

291. *Id.* at 554.

292. *Id.* at 557.

293. *Id.* at 556.

Thus, even a natural law rationale for the protection of various forms of copyrights must recognize that *some* degree of limitation is necessary. Therefore, the voices that warn of economic waste as a byproduct of a theoretically non-existent public domain speak with an excessively strident tone.

It is true that the French concept of *droit moral* (which informs the thinking underlying most copyright legislation in the countries of the E.U.) is closely linked with the concept of *droit d'auteur*—the notion that the author of a work should possess an economic interest in that work, theoretically (though, for the reasons discussed in the preceding paragraph, not *practically*), in perpetuity.²⁹⁴ *Droit d'auteur*—the philosophy under which economic rights are conceived in France, and which is mirrored in other countries of the European Union—is, like the concept of *droit moral*, derived from the natural rights approach to copyright protection.²⁹⁵ There are those who would argue that the very notion of *droit d'auteur* creates a natural reluctance to confer anything more than a very limited scope of protections to derivative works of an author, even in countries that apply a *droit moral* approach to the overall law of copyright, based upon natural rights.²⁹⁶ Indeed, under the utilitarian model of the U.K., such is the very rationale which gives rise to neighboring rights protections.²⁹⁷ The right is said to be “neighboring” because it is derivative of the work in support of which it arises.²⁹⁸

Neighboring rights belong to performers and distributors of recorded music and are more severely limited²⁹⁹ than are the rights of authors, composers, and the like.³⁰⁰ For example, even the utilitarian model differentiates between the underlying musical composition of a recording artist and the *performance* of a musician for hire in the recording of that composition, as well as the distribution and marketing of that recording. The reluctance of countries embracing a natural rights model to grant performers' rights could possibly be seen as tacit acknowledgement of the

294. See generally ARNOLD, *supra* note 11, at 13.

295. See generally LEAFFER, *supra* note 10, at 17–19 (discussing the natural law justification for copyright protection, as an alternative to the utilitarian rationale); see also JOYCE, ET AL., *supra* note 13, at 548; see also ADENEY, *supra* note 27, at 168–72 (nature of *droit moral*).

296. See, e.g., ARNOLD, *supra* note 11, at 13.

297. See *id.*

298. See *id.*

299. Neighboring rights are limited in the U.K. under the Copyright, Designs, and Patents Act of 1988 and, in the E.U., under the Term Directive and TRIPs.

300. See generally ARNOLD, *supra* note 11, at 13–43 (providing a detailed historical overview of copyright and of neighboring rights); see also text *supra* Part III.B (discussing the development of the law).

Anglo attitude toward protecting economic interests.

Nevertheless, one would imagine that the generally broader scope of authors' rights conferred in Continental Europe under the natural rights model ought, by extension, to apply to the so-called "related rights" of performers, as reflected in an expansion of the *duration* of such protection. Indeed, advocates for change in the U.K. are not asking for unlimited or perpetual protection of performers' rights.³⁰¹ Instead, the U.K. advocates are merely asking for extending the term of performers' rights protections so as not to leave performers in the position of witnessing the fruits of their labor becoming part of the public domain within their lifetimes.³⁰² To those who view such an extension of term as an economic threat, it should be pointed out that extending the duration of performers' rights protections would be of negligible deleterious effect. This is particularly so in light of the fact that the general scope of such protections would remain circumscribed, as between the rights of performers and those of authors.

As a practical matter, even if the E.U. extends the term of performers' rights protections, what would be covered under such an extension? Would the extension apply prospectively³⁰³ or would it be retroactive? This is not an unfamiliar question, in the experience of those who have tracked developments in copyright law with respect to authors' rights. As Dr. Johanna Gibson wrote when referring to a recent extension to the term of *authors'* rights:

[T]he issue arises whether the extension should apply to existing copyright works or only works created after the law comes into effect. So, for example, if a work was created in 1990 (when the U.K. term was life of the author plus 50 years) then, when term was extended in 1995, should there have been an extension of protection for that work still in copyright? In other words, should that work now be protected for the new term of life of the author plus 70 years? In general, the new term of protection is applied to all existing works, so that means that all works currently protected would have an extended term matching the new term of protection. This is a policy decision rather than a legal matter.³⁰⁴

Such policy is borne out in the United States, as Justice Ginsburg

301. See discussion *supra* Part III.B.7-9.

302. See, e.g., Anderson Interview, *supra* note 9.

303. In which case, the very artists whose work is at peril and whose calls for reform would provide the basis for an extension, would fail to benefit.

304. Gibson E-mail Nov. 5, 2006, *supra* note 263.

illustrated in *Eldred v. Ashcroft*:

Congress' consistent historical practice of applying newly enacted copyright terms to future *and existing* copyrights reflects a judgment stated concisely by Representative Huntington at the time of the 1831 [Copyright] Act: "Justice, policy, and equity alike forbid" that an "author who had sold his [work] a week ago, be placed in a worse situation than the author who should sell his work the day after the passing of [the] act."³⁰⁵

VI. CONCLUSION

There are compelling arguments for extending neighboring rights protections under E.U. law. At their core, these arguments are founded more upon a philosophical attitude toward the proper scope of performers' rights than upon a series of cold, economic formulations. Nevertheless, as Ian Anderson has argued, there are very sound economic incentives underlying the call for an extension to the term of performers' rights.³⁰⁶ It is a matter of historical irony that economic arguments can now be marshaled in favor of an *extended* term protection, when one considers the fact that the British utilitarian model of statutory, *time-limited* copyright protection had originally proceeded under an economics-driven theory. It is a matter of even greater historical irony that opposition to the notion of performers' rights protections exceeding fifty years from the date of origin might come not primarily from Great Britain, but rather, from continental Europe. In continental Europe, the natural rights philosophy had traditionally stood in opposition to the British scheme of statutory copyright protection and was more consistent with the original common law scheme.

Unfortunately, legislation in an international organization such as the E.U. necessarily entails more than a consideration of the arguments that may be advanced in support of proponents who share a direct, vested interest in the outcome of that legislation—in this case British recording artists and record companies. Arguing for an extension of neighboring rights protections for performers of British nationality inevitably carries the

305. *Eldred v. Ashcroft*, 537 U.S. 186, 204 (2003) (emphasis added) (citing 7 Cong. Deb. 424 (1831); accord Symposium, *The Constitutionality of Copyright Term Extension*, 18 CARDOZO ARTS & ENT. L.J. 651, 694 (2000) ("[S]ince 1790, it has indeed been Congress' policy that the author of yesterday's work should not get a lesser reward than the author of tomorrow's work just because Congress passed a statute lengthening the term today.")).

306. See Anderson Interview, *supra* note 9; Anderson, *supra* note 2.

potential to set the U.K. on a collision course with the E.U., due to the disparity of interests between those entities.

In turning to the E.U. for support, British holders of neighboring rights protections are, in essence, asking for something without an immediately discernible quid-pro-quo. What is true *without being immediately discernible*, however, is the fact that, while it is true that Great Britain would be asking the E.U. to give something, the fact is that Great Britain has *already* given something. What Great Britain has done has been to provide the world with a rich heritage of recorded music—a heritage that has provided not only economic value to the Continental countries of the E.U., but also deep cultural value.

At the time when performing musical groups such as the Beatles and the Rolling Stones were in their ascendancy, the so-called “Establishment” viewed such groups as, at best, an annoyance and, at worst, a dangerously subversive chorus of voices threatening to upend society. Time has altered that viewpoint. The Rolling Stones have now played the halftime show at the Super Bowl, on live television, before one of the largest pan-American audiences ever.³⁰⁷ Indeed, the Rolling Stones’ lead singer, Mick Jagger, has been knighted by the Queen of England.³⁰⁸ Rock star Bono, of the Irish group, U-2, is a recognized force in international diplomacy.³⁰⁹ Even as much as twenty years ago, another Irish rock star—punk singer Bob Geldoff—organized Live Aid.³¹⁰ Thirty-six years ago, George Harrison organized the Concert for Bangladesh.³¹¹ The respectability of these individuals speaks to the correction in perception that must necessarily accompany any reasoned assessment of the power and value of popular music. After Bill Haley first “rocked around the clock,”³¹² after Elvis shocked viewers with his hip-gyrating antics in service to the nascent demon rock & roll,³¹³ the torch was rapidly passed to residents of

307. The Rolling Stones to Perform During Sprint Super Bowl XL Halftime Show on ABC, Nov. 29, 2005, <http://www.superbowl.com/features/entertainment/rollingstones>.

308. Jagger Knighthood: Richards Rages, CNN.COM, Dec. 4, 2003, <http://www.cnn.com/2003/SHOWBIZ/Music/12/04/jagger.richards.reut/>.

309. Nancy Gibbs, The Good Samaritans, TIME, Dec. 26, 2005, at 44, available at <http://www.time.com/time/manazine/article/0,9171,1142278,00.html>.

310. Live Aid: The Show that Rocked the World, BBC NEWS, Apr. 5, 2000, http://news.bbc.co.uk/2/low/uk_news/702700.stm. (last visited Mar. 8, 2007).

311. Rachel Bonham Carter, George Harrison Honoured on 35th Anniversary of “Concert for Bangladesh,” UNICEF BANGLADESH NEWSLINE, Aug. 1, 2006, http://www.unicef.org/infobycountry/bangladesh_35176.html.

312. Rock and Roll Hall of Fame and Museum, Inductee List: Bill Haley, <http://www.rockhall.com/hof/inductee.asp?id=116> (last visited Mar. 14, 2007).

313. Paul McNamee, Access All Areas... Polaroid Memories of Elvis, BELFAST TELEGRAPH, June 13, 2006, available at

Liverpool, and other British towns such as Dorchester, London, Manchester and, in the case of Ian Anderson and Jethro Tull, Luton. The world would not be the place it is now were it not for the likes of the Beatles and the Rolling Stones, along with all of their progeny—the so called “British Invasion.”

The U.K. has thus contributed mightily to the cultural state of the world today in the form of the music of a generation—which led, in turn, to the music of the next two generations. Certainly it is possible to advance arguments against extending performers’ rights—arguments which would rest entirely upon economic considerations. But the nature of artistic rights, *especially* in the countries of Continental Europe, has never been founded upon purely economic considerations. Even in the increasingly economics-driven marketplace, it is possible that the utilitarian ideal that once informed protection of copyright by statute in the U.K. may well have outlived its usefulness. The natural rights rationale, and, specifically the Hegelian personal rights rationale,³¹⁴ may now be called to center stage under a reasonable analysis of the state of entertainment in the modern age. Thus, what is asked of the E.U. is a reaffirmation of the natural rights philosophy that resulted in the *droit moral* basis upon which copyright is conceived, in the countries of Continental Europe.

At the very least, one might argue that the term of performers’ rights protections, as it now stands, could benefit from revision based upon developments in terms of society, economic markets, and technology. Again, turning to the U.S. for policy justifications, as Justice Ginsburg pointed out (in her opinion in *Eldred v. Ashcroft*), in passing the Copyright Term Extension Act:

[m]embers of Congress expressed the view that, as a result of increases in human longevity and in parents’ average age when their children are born, the pre-CTEA term did not adequately secure ‘the right to profit from licensing one’s work during one’s lifetime and to take pride and comfort in knowing that one’s children—and perhaps their children—might also benefit from one’s posthumous popularity.’³¹⁵

<http://www.belfasttelegraph.co.uk/imported/article982582.ece>.

314. The Hegelian personal rights rationale is that a person’s right to control and profit from their performance inheres in the fact that that performance is an expression of, and is inseparable from, that person’s personality.

315. *Eldred v. Ashcroft*, 537 U.S. 186, 207 n.14 (2002) (citing 141 CONG. REC. 6553 (1995) (statement of Sen. Feinstein); also citing 144 CONG. REC. S12377 (daily ed. Oct. 12, 1998) (statement of Sen. Hatch) (“Among the main developments [compelling reconsideration of the 1976 Act’s term] is the effect of demographic trends, such as increasing longevity and the trend toward rearing children later in life, on the effectiveness of the life-plus-50 term to provide

The Gowers Review has recommended against the extension of the term of performers' rights in Great Britain.³¹⁶ The British government accepted the recommendations of the Review upon submission.³¹⁷ Nevertheless, the debate will surely continue, although it will do so in the countries of Continental Europe rather than in the very homeland of the cultural lode that is sought to be protected.³¹⁸

It remains to be seen what voices will be brought to bear in the U.K. in an effort to secure the support of Western Europe to the cause of extended neighboring rights protection for those whose works stand to fall into the public domain *within their own lifetimes*. Should those voices not prevail, the rich cultural heritage that has been created by the artists of Great Britain could fall by the wayside of economic progress, as a result of the evaporation of record companies' economic incentives to continue marketing the product of those artists' work. But the costs—not only in terms of the future, but also in terms of the respect that is owed to a past generation of artists and the wealth of material they have created—may well outweigh the present-moment benefits. When all is said and done, perhaps the best expression, in reaction to the prospect of the United Kingdom's reluctance to support an extension of the term of performers' rights protections, is also that which is most simply stated: as Ian Anderson said, in response to early indications as to the results of the Gowers Review, “[i]t’s a sad day if an industry that has contributed so much culturally and commercially can be treated so dismissively!”³¹⁹

*Edward A. Cosgrove**

adequate protection for American creators and their heirs.”). Also cited was: *ibid.* (statement of Sen. Hatch) (“the failure of the U.S. copyright term to keep pace with the substantially increased commercial life of copyrighted works resulting from the rapid growth in communications media.”)).

316. GOWERS, *supra* note 152.

317. Gibson, *supra* note 156, at 11.

318. Musical Copyright, *supra* note 17.

319. Jury, *supra* note 21.

* For their invaluable assistance in compiling the supporting research for this Comment, the author would like to thank the following: Mr. Ian Anderson—of the British rock group, Jethro Tull; Ms. Anne Leighton, North American Publicist for Jethro Tull; Dr. Johanna Gibson, Reader in Intellectual Property Law, Queen Mary Intellectual Property Research Institute, Centre for Commercial Law Studies, Queen Mary University of London; and Professors Jay Dougherty (Entertainment Law; Copyright Law) and Jeff Atik (International Law), of Loyola Law School of Los Angeles.