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## “Fit for Purpose”: Why the European Union Should Not Extend the Term of Related Rights Protection in Europe.

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# “Fit for Purpose”: Why the European Union Should Not Extend the Term of Related Rights Protection in Europe

Susanna Monseau\*

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#### ABSTRACT

This paper argues that the European Union should not, as it currently proposes, extend the term of protection for sound recordings in Europe. It compares the U.K. government's current policy that the scope and length of copyright protection for sound recordings should not be extended, with that of the European Union which, encouraged by the French government particularly, has recently proposed an extension from the fifty-year term to a ninety-five-year term of copyright protection for sound recordings. It analyzes several major independent reviews of the evidence on extending copyright protection for sound recordings, including the findings and recommendations of the December 2006 Gowers Review of Intellectual Property, an independent study

commissioned by the U.K. government, the University of Amsterdam Institute for Information Law report for the European Commission on the harmonization of copyright and related rights protections in Europe, and subsequent government consultation and strategy documents on proposed changes to U.K. law. It also reviews the positions taken by other stakeholders, including the music industry, academics and the media, in this debate, and analyzes the likely direction of the law in Europe.

#### INTRODUCTION

Ian Anderson of Jethro Tull is apparently “horrified that, along with countless other great artists and bands of the 60’s and 70’s, Jethro Tull’s earliest recordings will progressively fall out of copyright in the foreseeable future under current U.K. legislation.”<sup>1</sup> French President Nicholas Sarkozy is reportedly similarly concerned about royalties on behalf of all Europe’s aging rock stars, and wants the European Union to extend the fifty-year period for which copyright in sound recordings and performers’ rights are protected in Europe.<sup>2</sup>

In arguing to increase the term of copyright protection, Ian Anderson has historical precedent on his side; successive copyright acts have steadily expanded the subject matter covered by copyright and related rights, and increased the term of protection, from a fourteen year renewable term in the first British copyright act of 1709,<sup>3</sup> up to 120 years for some works made for hire under U.S. law today.<sup>4</sup> However, in 2007 the British Government

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<sup>1</sup> Ian Anderson, *Anderson Speaks Out on Recorded Copyright Law in the U.K.*, JETHRO TULL: THE OFFICIAL WEBSITE, Jan. 1, 2006, <http://www.j-tull.com/news/UKcopyrightlaw.cfm>.

<sup>2</sup> Charles Bremner, *Nicholas Sarkozy’s Gold Retirement for Rock Dinosaurs*, TIMES ONLINE, Feb. 1, 2008, [http://entertainment.timesonline.co.uk/tol/arts\\_and\\_entertainment/music/article3285729.ece](http://entertainment.timesonline.co.uk/tol/arts_and_entertainment/music/article3285729.ece).

<sup>3</sup> Statute of Anne, 1710, 8 Ann., c. 19 (Eng.).

<sup>4</sup> 17 U.S.C. § 302(c) (2006).

rejected the idea of a further extension of protection for sound recordings and performers' rights,<sup>5</sup> after a review of the British Intellectual Property system by former Financial Times editor Andrew Gowers,<sup>6</sup> found that the copyright system was already stacked strongly in favor of copyright holders,<sup>7</sup> and recommended against any extension, and also recommended that U.K. law in the future adopt the principle of not retrospectively extending IP rights.<sup>8</sup>

This paper compares the U.K. government's current policy that the scope and length of copyright protection for sound recordings should not be extended, with that of the European Union which, encouraged by the French government particularly,<sup>9</sup> has recently proposed a 95-year term of copyright protection for sound recordings.<sup>10</sup> It focuses on the findings and recommendations made by the December 2006 Gowers Review of Intellectual Property commissioned by the U.K. government,<sup>11</sup> the University of Amsterdam Institute for Information Law report for the E.U. on copyright and related rights<sup>12</sup> ("IViR Report"), and the subsequent

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<sup>5</sup> HM TREASURY PRE-BUDGET REPORT, INVESTING IN BRITAIN'S POTENTIAL: BUILDING OUR LONG-TERM FUTURE, 2006, Cm. 6984, at 65, available at <http://www.official-documents.gov.uk/document/cm69/6984/6984.asp> [hereinafter PRE-BUDGET REPORT].

<sup>6</sup> A short profile of Andrew Gowers is available at HM Treasury's website. Andrew Gowers, Biography, [http://www.hm-treasury.gov.uk/gowersreview\\_biography.htm](http://www.hm-treasury.gov.uk/gowersreview_biography.htm) (last visited Mar. 12, 2009).

<sup>7</sup> ANDREW GOWERS, GOWERS REVIEW OF INTELLECTUAL PROPERTY 50 (2006), available at [http://www.hm-treasury.gov.uk/d/pbr06\\_gowers\\_report\\_755.pdf](http://www.hm-treasury.gov.uk/d/pbr06_gowers_report_755.pdf) ("Economic evidence indicates that the length of protection for copyright works already far exceeds the incentives required to invest in new works.").

<sup>8</sup> *Id.* at 6.

<sup>9</sup> See Bremner, *supra* note 2.

<sup>10</sup> Press Release, European Commission, "Performing Artists—No Longer Be the 'Poor Cousins' of the Music Business"—Charlie McCreevy (Feb. 14, 2008), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/240> [hereinafter Performing Artists].

<sup>11</sup> See GOWERS, *supra* note 7, at 1.

<sup>12</sup> BERT HUGENHOLZ ET AL., THE RECASTING OF COPYRIGHT AND RELATED RIGHTS FOR THE KNOWLEDGE ECONOMY (2006), available at [http://ec.europa.eu/internal\\_market/copyright/docs/studies/etd2005imd195recast\\_report\\_2006.pdf](http://ec.europa.eu/internal_market/copyright/docs/studies/etd2005imd195recast_report_2006.pdf) [hereinafter IViR REPORT].

U.K. government consultation and strategy document on U.K. proposed changes to copyright protections.<sup>13</sup>

The paper details the opposing views on extending the duration of protection of stakeholders within Europe, and analyzes the likely direction of the law in Europe, and the effect of the E.U. approach on the duration of copyright protection, to the ongoing global debate on the ideal balance and optimum duration for copyright and related rights in a digital age. The paper uses the term “related rights” commonly used in E.U. law for rights akin to copyright, such as recording or performers’ rights, rather than the term “neighboring rights,” more often employed under U.K. law for such rights.

Part I of the paper consists of a discussion of the purpose and policy behind copyright protection and the development of copyright laws in the common law and civil law traditions, including details of copyright and related rights protections in the United Kingdom and United States and the effect of current E.U. directives on U.K. law. Part II sets out the major challenge to the copyright system created by the revolution in digital technology and reviews the positions taken so far by the opposing sides in the debate over how copyright law should react to digitization and globalization. Part III concentrates on the empirical findings and recommendations of the Gowers Review, and other U.K. government actions, in response to the question of how to adapt U.K. copyright laws to a global and technological world, while Part IV assesses the IViR Report and proposals at the European level on the same issue. Finally, Part V considers the likely direction of E.U. law and develops the argument that there are no good reasons to increase the term of protection for related rights and the E.U. should seriously reconsider its proposal to do so and should not listen exclusively to the music industry in this debate.

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<sup>13</sup> U.K. INTELLECTUAL PROP. OFFICE, TAKING FORWARD THE GOWERS REVIEW OF INTELLECTUAL PROPERTY PROPOSED CHANGES TO COPYRIGHT EXCEPTIONS (Jan. 2008), available at <http://www.ipo.gov.uk/consult-copyrightexceptions.pdf>.

## I. PURPOSE AND POLICY OF COPYRIGHT LAW

The Gowers Review stated that Intellectual Property law serves three principal functions: “to incentivise knowledge (and hence wealth) creation; to accumulate knowledge in a culture; and to protect a distinctive identity.”<sup>14</sup> According to Gowers, the purposes of copyright protection are both to provide incentives to create knowledge, while also enabling knowledge to become publicly available. “[W]ithout protection there would be no economic incentive to fund innovation or creativity.”<sup>15</sup> Gowers recognized that copyright involves a balance between making knowledge publicly available to all, and providing economic incentives to those who create it, and that the main rationale for copyright protection, at least in the Anglo-American tradition, is the economic, utilitarian rationale.<sup>16</sup> However, in the Review’s mention of protecting a “distinctive identity,” Gowers also seemed to acknowledge another rationale of copyright law, that of protecting the property rights of the creator, a theory more often linked to civil law systems.<sup>17</sup>

### A. Utilitarian Theory

The dominant theory of copyright protection in the Anglo-American tradition is utilitarianism, where the economic incentives provided to authors by the monopoly-type protection of copyright law must be balanced by the requirement that the protected expression is not given absolute, nor indefinite, protection from all non-permitted use.<sup>18</sup> Most importantly, protected work should eventually fall into the public domain, so that it can become accessible for the benefit of future innovators and creators.<sup>19</sup> “The principle justification for intellectual property (IP) laws in the

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<sup>14</sup> GOWERS, *supra* note 7, at 11.

<sup>15</sup> *Id.* at 12.

<sup>16</sup> *See id.*

<sup>17</sup> *See, e.g.*, LIOR ZEMER, THE IDEA OF AUTHORSHIP IN COPYRIGHT 37 n.55 (2007) (“It is often claimed that . . . continental copyright law w[as] inspired by . . . authors’ natural rights.”); Jane Ginsburg, *A Tale of Two Copyrights: Literary Property in Revolutionary France and America*, 64 TUL. L. REV. 991, 991 (1990) (“French copyright law is said to enshrine the author.”); GOWERS, *supra* note 7, at 15.

<sup>18</sup> *See* ZEMER, *supra* note 17, at 9–13.

<sup>19</sup> *See id.* at 12.

Anglo-American tradition is economic.”<sup>20</sup> Although a variety of commentators have at various times favored perpetual copyright protection,<sup>21</sup> a perpetual property right for authors does not fit comfortably within this utilitarian, economic bargain that balances the rights of the public and authors.

### B. Personhood and Other Alternative Theories

There are several theories other than utilitarianism that have been used to explain intellectual property protection. According to Lior Zemer, “[s]ix major approaches dominate the literature . . . the instrumental/utilitarian approach; the labour theory of property; the personhood theory; social-institutional-planning; traditional proprietorism; and authorial constructionism.”<sup>22</sup> The main characteristics of the non-utilitarian theories of copyright protection is that they are focused more on the allocation of property rights to the author (whether in the fruits of his labor, or the creations of his personality or authorship) than in providing a balance between encouraging the author to create, and promoting public knowledge.<sup>23</sup>

Copyright protection in France and other countries of Continental Europe evolved from the theory of personality rights.<sup>24</sup> The rationale for copyright protection under this theory is that “the allocation of entitlements and control over resources in the external environment, in the guise of property, is necessary for the development of personality.”<sup>25</sup> As a result, since its inception, French copyright law has used the life of the author as a starting point for calculating the duration of the copyright term, and, in addition to economic rights, provided protection for the author’s

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<sup>20</sup> Pamela Samuelson, *Should Economics Play a Role in Copyright Law and Policy?*, 1 U. OTTAWA L. & TECH. J. 3, 3 (2004).

<sup>21</sup> See SIVA VAIDHYANATHAN, COPYRIGHT AND COPYWRONGS 71 (2001); see also Mark Helprin, Op-Ed., *A Great Idea Lives Forever. Shouldn't Its Copyright?*, N.Y. TIMES, May 20, 2007, available at <http://www.nytimes.com/2007/05/20/opinion/20helprin.html>.

<sup>22</sup> See ZEMER, *supra* note 17, at 9.

<sup>23</sup> See *id.* at 13–21.

<sup>24</sup> *Id.* at 16; see also Ginsburg, *supra* note 17, at 996.

<sup>25</sup> See ZEMER, *supra* note 17, at 16.



inalienable, natural rights, so-called “moral rights.”<sup>26</sup> Moral rights derive from the conception that the work is part of the author’s personality,<sup>27</sup> but have not received statutory protection in the U.K. tradition until fairly recently.<sup>28</sup>

It is theoretically easier, under these author-centered conceptions of the purpose of copyright, to justify perpetual copyright protection because authors’ rights are paramount,<sup>29</sup> while, on the other hand, also limiting the duration of protection afforded to performers, on the basis that they are not creators on a par with authors, but merely reproducers of already created work, and thus deserve a more limited duration of protection.<sup>30</sup> The influence of the European “personhood” or “labor-based justification” can be seen in the Berne Convention; its inclusion of moral rights,<sup>31</sup> the calculation of the term of copyright based on the lifetime of the author of the work,<sup>32</sup> and the fact that it does not protect the related rights of reproducers such as sound recordings and performers’ rights which did not received international recognition and protection until much later.<sup>33</sup>

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<sup>26</sup> Moral rights are defined as “the right to claim authorship of the work and to object to any distortion, mutilation, or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.” Berne Convention for the Protection of Literary and Artistic Works art. 6bis, Sept. 9, 1886, revised July 24, 1971, amended Sept. 29, 1979, 828 U.N.T.S. 221 [hereinafter Berne Convention].

<sup>27</sup> See ZEMER, *supra* note 17, at 51.

<sup>28</sup> Copyright Designs and Patents Act, 1988, c. 48, §§ 77–89 (Eng.).

<sup>29</sup> See, e.g., VAIDHYANATHAN, *supra* note 21, at 71–72 (discussing Samuel Clemens’ preference for perpetual copyright for authors based on moral rather than economic rationales). Although Samuel Clemens (Mark Twain), among others, favored perpetual copyright, it does not fit philosophically with the “limited times” economic rationale of Anglo-American law.

<sup>30</sup> See Ruth Towse, *The Singer or the Song? Developments in Performers’ Rights from the Perspective of a Cultural Economist*, 3 REV. L. & ECON. 745, 748 (2007), available at <http://www.bepress.com/rle/vol3/iss3/art6> (“Composers, however, were always vulnerable to unauthorized copying of their works whereas performers were not until relatively recently.”). Thus, performers did not need as much protection.

<sup>31</sup> Berne Convention, *supra* note 26.

<sup>32</sup> *Id.* art. 7.

<sup>33</sup> International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, Oct. 26, 1961, 496 U.N.T.S. 43 [hereinafter Rome Convention] was the first international recognition for rights in sound recordings. The United States is not a party to this convention.

### C. Harmonization of Copyright Law

By the beginning of the twenty-first century, copyright and related rights laws have been partially harmonized by a large number of international treaties starting with the Berne Convention, and followed later by the Rome Convention, the Universal Copyright Convention, Agreement on the Trade Related Aspects of Intellectual Property Rights and the World Intellectual Property Organization: Performances and Phonograms Treaty.<sup>34</sup> It matters little now whether a signatory countries' law was based originally on the Anglo-American tradition of the economic utilitarian bargain, or the Continental labor-based property ownership theory. It must now provide minimum protection based on these international treaties for various copyright and related rights.<sup>35</sup> Copyright must be protected for the life of the author plus fifty years under Berne,<sup>36</sup> and sound recordings and performers' rights are required to be protected for a lesser period, ranging from a minimum of twenty years, in the case of the Rome Convention,<sup>37</sup> to fifty years under the WIPO Treaty and TRIPs Agreement.<sup>38</sup> This reflects the continued conception of performers' and phonographic rights as economic rights rather than personality-based rights.

No international treaty requires these related rights to be protected for anything approaching the term of ninety-five years (or life plus seventy years) for which they are now protected under

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<sup>34</sup> See *supra* notes 32 and 33 for the Berne and Rome Conventions respectively. Other intellectual property conventions include the Universal Copyright Convention, July 24, 1971, 25 U.S.T. 1341, 943 U.N.T.S. 178 [hereinafter Universal Copyright Convention]; Agreement on the Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994; Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 108 Stat. 4809, 1869 U.N.T.S. 299 [hereinafter TRIPs Agreement]; and World Intellectual Property Organization Performances and Phonograms Treaty, Dec. 20, 1996, 36 I.L.M. 76 (1997) [hereinafter WIPO Treaty].

<sup>35</sup> Ginsburg argues in *A Tale of Two Copyrights: Literary Property in Revolutionary France and America*, *supra* note 17, at 994, that the differences between the U.S. and French copyright systems were, even at their inception, not as extensive as typically described.

<sup>36</sup> See Berne Convention, *supra* note 26, art. 7.

<sup>37</sup> See Rome Convention, *supra* note 33, art. 14.

<sup>38</sup> See TRIPs Agreement art. 12 and WIPO Treaty art. 17, *supra* note 34.

U.S. law<sup>39</sup> or for which it is currently proposed to protect them in Europe.<sup>40</sup> The current main difference in the duration of copyright and related rights worldwide is this difference in the protection of related rights in Europe and in the U.S.

#### *D. Copyright Protection Under U.K. Law*

##### 1. Statute of Anne

Modern copyright protection in the Anglo-American tradition is generally traced back to the Statute of Anne which provided a copyright term of fourteen years for books and maps.<sup>41</sup> In fact, the Statute of Anne followed from the abolition of the printing monopoly provided by over 150 years of various Licensing Acts to the Stationers' Company, the guild of London printers.<sup>42</sup>

After the stationers lost their monopoly on book publication, and censorship in 1695, chaos reigned in the newly deregulated publishing industry which the printers, used to their monopoly, were not equipped to meet, and they realized that they had to include authors in their struggle to impose some order and get back some legal control over the industry.<sup>43</sup> The resulting compromise was the Statute of Anne, "an elaborate attempt to regulate publishers, a way to balance the interests of the bookprinting industry with the concerns that monopolies were growing too powerful in England."<sup>44</sup>

Under the Statute of Anne, copyright protection was initially awarded to the author, who could register to receive a term of protection for fourteen years, renewable for another fourteen years,<sup>45</sup> but it was always recognized that "[a] manuscript is worth

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<sup>39</sup> 17 U.S.C. § 302(c) (2006).

<sup>40</sup> See Performing Artists, *supra* note 10.

<sup>41</sup> Statute of Anne, 1710, 8 Ann., c. 19 (Eng.).

<sup>42</sup> See VAIDHYANATHAN, *supra* note 21, at 39–40.

<sup>43</sup> See *id.* for details of the stationers' efforts to regain legal control of the book publishing industry.

<sup>44</sup> *Id.* at 40. See *id.* at 39 for a description of some of the first copyright lobbying: "[The Stationers] came up to Parliament in the form of petitioners, with tears in their eyes, hopeless and forlorn; they brought with them their wives and children to excite compassion, and induce Parliament to grant them statutory security."

<sup>45</sup> Statute of Anne, 1710, 8 Ann., c. 19 (Eng.).

nothing on the market until an author assigns the rights to a publisher . . . the real player in the legal and commercial game.”<sup>46</sup> In the same manner, in the music industry, middle men and distributors like recording companies see themselves as the “real players,” vital to the success of musicians.

## 2. Early Development of U.K. Copyright Law

English copyright law developed rapidly and by 1801, it had clearly abandoned the requirement of registration to gain protection.<sup>47</sup> By 1814 the law had also abandoned the specific years as a basis for the term of protection, settling instead on a period of protection based on the lifetime of the author.<sup>48</sup> Rights have been added under U.K. legislation as the types of intellectual creation have increased and new methods of distribution have been created.<sup>49</sup> A public performance right for dramatic works was first added by the Dramatic Literary Property Act 1833,<sup>50</sup> and subsequently extended to cover musical works in the Copyright Act of 1842.<sup>51</sup> Sound recordings gained protection in 1911.<sup>52</sup> Films and broadcasts were added in their own right, relatively late, in 1956.<sup>53</sup>

## 3. Current U.K. Copyright Law

Both copyrights and related rights are currently protected in the U.K. primarily under the Copyright, Designs and Patents Act 1988 (“CDPA”),<sup>54</sup> as amended. The CDPA “confers rights on the authors (and their assignees) of a number of different types of intellectual creation which are listed exhaustively in section 1 of

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<sup>46</sup> See VAIDHYANATHAN, *supra* note 21, at 40.

<sup>47</sup> Copyright Act, 1801, 41 Geo. 3, c. 107 (Eng.).

<sup>48</sup> William Patry, *The Failure of the American Copyright System: Protecting the Idle Rich*, 72 NOTRE DAME L. REV. 907, 916 (1997).

<sup>49</sup> Daniel J. Gervais, *Towards a New Core International Copyright Norm: The Reverse Three-Step Test*, 9 MARQ. INTELL. PROP. L. REV. 1, 5 (2005).

<sup>50</sup> 3 & 4 Will. 4, c. 15, § 1 (Eng.).

<sup>51</sup> 5 & 6 Vict., c. 45, § 20 (Eng.).

<sup>52</sup> Copyright Act, 1911, 1 & 2 Geo. 5, c. 46, § 19 (Eng.).

<sup>53</sup> Copyright Act, 1956, 4 & 5 Eliz. 2, c. 74, §§ 13, 14 (Eng.).

<sup>54</sup> Copyrights Designs and Patents Act, 1988, c. 48 (Eng.).

the 1988 Act.”<sup>55</sup> The Act introduced a number of new rights, such as rental rights in respect of sound recordings, films and computer programs,<sup>56</sup> and, for the first time in U.K. law, a comprehensive system of rights for performers and moral rights for authors.<sup>57</sup>

For a song, a number of rights may arise simultaneously—musical copyright in the sounds, literary copyright in the words and a sound recording right in the recording itself.<sup>58</sup> Performers’ rights may also arise in relation to the performance of the work.<sup>59</sup> All of these rights may have the same or different owners. The rights in the music and words will often be owned initially by the composer and lyricist, but will then be assigned to a publishing company.<sup>60</sup> Copyright in the sound recording will generally initially vest in the producer, a recording company.<sup>61</sup> Certain of the performers’ rights can also be assigned to another person (generally the recording company again) under an “exclusive recording contract.”<sup>62</sup> Copyright in the sound recording and the performers’ rights both have a shorter duration (fifty years)<sup>63</sup> than the copyright in the words and music of a song (life of author plus seventy years).<sup>64</sup>

#### *E. Effect of European Copyright Directives*

Although U.K. legislation is written in Westminster, it is in reality constrained by both E.U. law, which seeks to achieve the harmonization of copyright protection within the countries of the

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<sup>55</sup> CTR. FOR INTELLECTUAL PROP. & INFO. LAW, UNIV. OF CAMBRIDGE, REVIEW OF THE ECONOMIC EVIDENCE RELATING TO AN EXTENSION OF THE TERM OF COPYRIGHT IN SOUND RECORDINGS 5 (2005), available at [http://www.hm-treasury.gov.uk/d/gowers\\_cipilreport.pdf](http://www.hm-treasury.gov.uk/d/gowers_cipilreport.pdf).

<sup>56</sup> Copyright Designs and Patents Act, 1988, c. 48, § 18(2) (Eng.).

<sup>57</sup> *Id.* §§ 77–89.

<sup>58</sup> *Id.* §§ 3, 5.

<sup>59</sup> *Id.* Part II.

<sup>60</sup> *See id.* §§ 3, 11.

<sup>61</sup> *See id.* §§ 9, 11.

<sup>62</sup> *See id.* § 185.

<sup>63</sup> *Id.* §§ 13, 14.

<sup>64</sup> *Id.* § 12. The Copyright Designs and Patent Act was amended in 1995, extending the duration of copyright in literary, dramatic, musical or artistic works. Duration of Copyright and Rights in Related Performances, 1995, S.I. 1995/3297 (U.K.).

European Union, and to a lesser extent by the international copyright treaties to which the U.K. is a signatory.

### 1. E.U. Copyright Term Extension

Until 1993, copyright was protected under national law in the European Union. Most countries protected a work for a minimum of the life of the author plus fifty years,<sup>65</sup> but not all European countries were Berne signatories.<sup>66</sup> The 1993 Directive extended and harmonized the term of protection for all copyrighted works across Europe to the life of the author plus seventy years,<sup>67</sup> and for related rights to fifty years.<sup>68</sup>

The minimum term of protection for copyright, of life plus fifty years, originally laid down in the Berne Convention,<sup>69</sup> was intended to provide protection for the author and the first two generations of his descendants.<sup>70</sup> The increase in the term of protection in the 1993 Directive to life plus seventy years was justified on the basis that life expectancy in Europe, and elsewhere, had increased, making it necessary to increase the term of protection so as to ensure that the intention in the Berne Convention was still honored.<sup>71</sup> As has been pointed out by William Patry,<sup>72</sup> the logic of the extension argument is faulty. If life expectancy increases, then the author also lives longer, and can presumably continue to make provision during his longer life for his heirs.<sup>73</sup> Patry demonstrated that the increased protection is likely to benefit even fifth generation descendants.<sup>74</sup> The “[e]xtension of protection to such remote heirs is impossible to

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<sup>65</sup> See Berne Convention, *supra* note 32, art. 7(1).

<sup>66</sup> For example, several Eastern European countries (including Latvia, Lithuania, and the Czech Republic) did not join until the 1990s. See World Intellectual Property Organization, Contracting Parties: Berne Convention, [http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty\\_id=15](http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=15) (last visited Feb. 13, 2009).

<sup>67</sup> Council Directive 93/98, art. 3, 1993 O.J. (L 290) 6 (EC).

<sup>68</sup> *Id.* art. 3.

<sup>69</sup> See Berne Convention, *supra* note 32, art. 7(1).

<sup>70</sup> See Patry, *supra* note 48, at 931 n.100.

<sup>71</sup> Council Directive 93/98, art. 3, 1993 O.J. (L 290) 5 (EC).

<sup>72</sup> See Patry, *supra* note 48, at 932.

<sup>73</sup> *Id.* at 931.

<sup>74</sup> *Id.*

justify in terms of encouraging the author to create, or any reasonable societal interest in the author's immediate heirs."<sup>75</sup>

European law requires the protection of the works of foreign authors in the same manner as European works, except that if the term of protection in the foreign author's country is longer than the European term, then the European term of protection applies, whereas if the term of protection in the foreign country is shorter than the European term, then that shorter term applies to protection in Europe also.<sup>76</sup> It was partly this difference in treatment which caused U.S. lawmakers to increase the duration of copyright protection in the U.S.<sup>77</sup>

## 2. Related Rights

The term of protection for related rights was not similarly extended by the 1993 Directive and it remained at fifty years.<sup>78</sup> This difference reflected the continuing distinction in the European tradition between creators and performers, and the relatively greater importance accorded the former as creators of new material, rather than as the economic exploiters of pre-existing material.

### F. U.S. Copyright Laws and Protection of Performers' Rights and Sound Recordings

#### 1. The U.S. Constitution

The Framers of the U.S. Constitution wanted to provide a balance between creators and innovators and the public.<sup>79</sup> The U.S. Constitution required Congress to make laws "to 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."<sup>80</sup> The language makes explicit that the

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<sup>75</sup> *Id.* at 932.

<sup>76</sup> See CTR. FOR INTELLECTUAL PROP. & INFO. LAW, *supra* note 55, at 4.

<sup>77</sup> See Patry *supra* note 48, at 924.

<sup>78</sup> Council Directive 93/98, art. 3, 1993 O.J. (L 290) 5 (EC).

<sup>79</sup> See Lawrence Lessig, *Copyright's First Amendment*, 48 UCLA L. REV. 1057, 1072 (2001).

<sup>80</sup> U.S. CONST. art. I, § 8, cl. 8 (emphasis added).

Framers recognized that the interests of the public and the interests of creators had to be balanced, and, arguably, their formula “to promote the progress of the sciences and useful arts” put the interests of the public first.<sup>81</sup> James Madison, who introduced the copyright and patent clause into the Constitution, argued in *The Federalist* that it would increase access to information and operate as an incentive system for creators.<sup>82</sup> For more than 120 years U.S. copyright law adhered to a regime of fairly limited protection,<sup>83</sup> the public domain was strong,<sup>84</sup> and copyright protection correspondingly weaker.<sup>85</sup>

The structure of copyright protection in the U.S. remains somewhat different from the U.K. or Europe, being less specific in terms of rights protected and providing for a more general fair use exemption, “that can adapt to new technical environments” rather than the more specific fair dealing, found under U.K. law.<sup>86</sup> Under U.S. law sound recordings and performance rights are not treated as a lesser type of related right and afforded a type of *sui generis* protection (as they are in Europe) but are protected for the same length of time and in the same manner as true copyrights.<sup>87</sup>

## 2. Early U.S. Copyright Law

Unlike either European law, or U.K. law, from the first Copyright Act of 1790<sup>88</sup> (which borrowed heavily from the Statute of Anne) to 1976,<sup>89</sup> U.S. law stuck to the utilitarian bargain, required registration to protect copyright, and provided a fixed term of protection (extendable through additional filing

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<sup>81</sup> *Id.*

<sup>82</sup> *See* THE FEDERALIST NO. 43 (James Madison).

<sup>83</sup> *See* VAIDHYANATHAN, *supra* note 21, at 25. In 1831 the copyright term remained a twenty-eight year term, renewable for fourteen years. Under the 1909 act, the term was extended to a twenty-eight year term, renewable for twenty-eight more years. *Id.*

<sup>84</sup> *See, e.g.,* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340 (1991) (relying on *Baker v. Selden*, 101 U.S. 99 (1879), to deny copyright protection to a list of names, towns and telephone numbers); *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591 (1834).

<sup>85</sup> *See* VAIDHYANATHAN, *supra* note 21, at 25.

<sup>86</sup> *See* GOWERS, *supra* note 7, at 62.

<sup>87</sup> *See* Copyright Act of 1976, Pub. L. No. 94-553, §§ 102, 103, 90 Stat. 2541 (1976).

<sup>88</sup> Act of May 31, 1790, ch. 15, 1 Stat. 124 (Copyright Act of 1790).

<sup>89</sup> Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541.



requirements) independent of the author's lifespan.<sup>90</sup> The registration requirement and its formalities had the disadvantage of disproportionately benefiting established publishers, and other distributors of copyrighted work with access to lawyers, rather than individual authors and creators, who lost countless copyrights by failure to comply with the procedural filing requirements and deadlines,<sup>91</sup> but precisely because copyright did not arise automatically and was for a fixed term of years, a strong public domain was assured.

### 3. U.S. Copyright Law Post 1988

In 1989, the U.S. changed its longstanding copyright tradition by acceding to the Berne Convention,<sup>92</sup> which required it to change its law to protect copyrighted work from creation, without the need for formalities.<sup>93</sup> In all Berne Convention signatory countries, copyright must arise automatically on the creation of work, and last for at least the author's life and fifty years after his death.<sup>94</sup> In 1998, partly to harmonize with E.U. law, U.S. law was further amended to increase the term of copyright protections from life plus fifty years, to life plus seventy years, or ninety-five years for works made for hire.<sup>95</sup>

Since U.S. law treated performers' rights and rights in sound recordings in the same manner as copyrights, the duration of these rights was also extended, and although it harmonized the term of copyright protection in the E.U. and U.S., the new law created a significant difference between the duration of protection for related rights in the two jurisdictions.

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<sup>90</sup> See VAIDHYANATHAN, *supra* note 21, at 79.

<sup>91</sup> See Patry, *supra* note 48, at 922 & n.72.

<sup>92</sup> Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988).

<sup>93</sup> 17 U.S.C. § 408 (1988).

<sup>94</sup> See Berne Convention, *supra* note 32, art. 7(1).

<sup>95</sup> Sonny Bono Copyright Term Extension Act of 1998, 17 U.S.C. §§ 302(a), 302(b) (1998).

#### 4. Sound Recordings

The position of sound recordings in the U.S. is actually even more complicated since U.S. law did not protect sound recordings as copyrighted works before 1972,<sup>96</sup> and the law was modified in 1976,<sup>97</sup> and again in 1998,<sup>98</sup> to harmonize it with international standards. This means that the term of protection in respect of sound recordings depends on the date of a particular recording's creation. It has also not yet been clarified by court decision as to whether the "effective beneficiaries of the copyright extensions effected by the Sony Bono Act are authors rather than transferees of copyright."<sup>99</sup>

Various international treaties currently set minimum terms of protection for sound recordings. The fifty year term is "established as the most widely prevailing."<sup>100</sup> This is the minimum term required by the TRIPs Agreement<sup>101</sup> (seventy-five contracting parties including the U.K. and U.S.) and the WIPO Performance and Phonograph Treaty<sup>102</sup> (fifty-eight parties including the U.S., but not the U.K.). The earlier Rome Convention<sup>103</sup> (to which the U.S. is not a party), requires the duration of copyright in sound recordings to be not less than twenty years from the date the sound recording was made. The Universal Copyright Convention sets the duration of copyright for sound recordings at twenty-five years.<sup>104</sup>

No international treaty requires a minimum protection for sound recordings approaching the current U.S. protection of life plus seventy years or ninety-five years. The extended duration of the U.S. term, coupled with the globalization of the music and

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<sup>96</sup> See Press Release, U.S. Copyright Office, Registration for Foreign Recordings (Mar. 1972), available at <http://www.copyright.gov/history/mls/ML-83.pdf>.

<sup>97</sup> See Copyright Act of 1976, 17 U.S.C. § 114 (1976).

<sup>98</sup> See Sonny Bono Copyright Term Extension Act of 1998.

<sup>99</sup> See CTR. FOR INTELLECTUAL PROP. & INFO. LAW, *supra* note 55, at 8 (referring to the Copyright Term Extension Act of 1998).

<sup>100</sup> *Id.*

<sup>101</sup> See TRIPs Agreement, *supra* note 34, art. 12.

<sup>102</sup> See WIPO Treaty, *supra* note 34, art. 17.

<sup>103</sup> See Rome Convention, *supra* note 33, art. 14.

<sup>104</sup> See Universal Copyright Convention, *supra* note 34, art. 4, § 2(a).

other copyright-rich industries, and fear of digital technology,<sup>105</sup> has led to intense lobbying, especially by the music industry in Europe to extend the term of protection for related rights to achieve parity with the U.S.<sup>106</sup>

## II. THE COPYRIGHT SYSTEM AND THE DIGITAL THREAT

### A. Gowers' Remit

The effects of globalization and changes in technology have increasingly preoccupied not only the music industry and its users, but also governments. In 2005, the U.K. government commissioned Andrew Gowers to conduct a review to consider whether, in the light of these two phenomena—globalization and technological innovations—the U.K. intellectual property system remained fit for purpose in the twenty-first century.<sup>107</sup> Gowers sought input from as many stakeholders in the IP system as possible. In the case of copyright law, hearing from, among others, musicians, film producers, and other copyright owners, libraries, technology providers, the BBC, consumer groups, schools, and members of the general public.<sup>108</sup> His review of the whole IP system was published on the eve of the December 2006 budget by the then Chancellor, Gordon Brown.<sup>109</sup>

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<sup>105</sup> See, e.g., MUSIC BUSINESS GROUP, RESPONSE TO UK-IPO CONSULTATIONS ON COPYRIGHT EXCEPTIONS 13, available at [http://www.bpi.co.uk/pdf/MBG\\_Formatshifting\\_Response.pdf](http://www.bpi.co.uk/pdf/MBG_Formatshifting_Response.pdf) (describing studies that suggest ninety percent of music on iPods was copied and not purchased).

<sup>106</sup> Eric Bangeman, *U.K. Government Resists Music Industry Pressure, Caps Copyrights at 50 Years*, ARS TECHNICA, July 24, 2007, <http://arstechnica.com/tech-policy/news/2007/07/uk-government-resists-music-industry-pressure-caps-copyrights-at-50-years.ars>.

<sup>107</sup> See GOWERS, *supra* note 7, at 1.

<sup>108</sup> See *id.* app. B.

<sup>109</sup> See Press Release, HMTreasury, Gowers Sets Out Intellectual Property System Fit for the Digital Age (Dec. 6, 2006), available at [http://www.hm-treasury.gov.uk/prebud\\_pbr06\\_pressgowers.htm](http://www.hm-treasury.gov.uk/prebud_pbr06_pressgowers.htm).

### B. Responses to the Digital Age

In the last ten years there have been many responses to the changes wrought by digital technology on the landscape of copyright and related rights but they all fall into three main categories. Some commentators make the point that many other (equally momentous at the time) changes in technology have appeared in the past to make the current legal system obsolete, but after an initial period of adjustment, it has always survived.<sup>110</sup> In their view, we are currently in another such period of adjustment and no radical changes to the legal system are required.<sup>111</sup> Others, mainly copyright owners, argue, however, that since digital technology has made copying so much easier, the adequate protection of their rights requires a strengthening of the whole copyright system, including an increase in the duration of protection.<sup>112</sup> Finally, various academics and technology mavens, particularly, assert that while digital technology has indeed changed the status quo, the best response is not to strengthen the law, but to radically change, or even abolish it, because the current legal regime is totally unsuited to the realities of the digital age.<sup>113</sup>

#### 1. The “Do-Nothing” Argument

In *Who Controls the Internet*, Goldsmith and Wu argue that each new change in technology has been treated with horror by copyright owners and complaints that it has completely upset the balance between owners of copyright and end-users.<sup>114</sup> Copyright owners have variously complained that the introduction of sheet

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<sup>110</sup> See, e.g., JACK GOLDSMITH & TIM WU, *WHO CONTROLS THE INTERNET?: ILLUSIONS OF A BORDERLESS WORLD* 125 (2006).

<sup>111</sup> *Id.*

<sup>112</sup> See, e.g., Daniel A. Farber, *Conflicting Visions and Contested Baselines: Intellectual Property and Free Speech in the “Digital Millennium”*, 89 MINN. L. REV. 1318, 1321 (2005) (“[For many copyright owners,] the crucial aspect of the status quo is not legal but economic” since “[digital] media make it possible to make a virtually infinite number of exact copies at little or no cost.”).

<sup>113</sup> See, e.g., LAWRENCE LESSIG, *FREE CULTURE: THE NATURE AND FUTURE OF CREATIVITY* 184–94 (2004) [hereinafter *FREE CULTURE*] (arguing that the permission culture created by today’s copyright system is inefficient).

<sup>114</sup> See GOLDSMITH & WU, *supra* note 110, at 125.

music, the gramophone, photocopiers,<sup>115</sup> VCRs,<sup>116</sup> and every technology in between, would allow copying of copyrighted material and destroy their businesses. Now they make similar charges about file-sharing.<sup>117</sup> Complaints come consistently with the advent of each new change in technology, or methods of distribution, and the argument is always that copyright owners need stronger rights to incentivize and protect creativity,<sup>118</sup> but as people become familiar with each new technology, and incorporate it into their business, complaints of copyright infringement settle down.<sup>119</sup> Given this history, it is safe to assume that the new internet and digital technologies will follow a similar path and that there is no need to change the law to accommodate these new technologies, any more than was necessary for their predecessors.

## 2. Strengthen Copyright Protection

Copyright owners, however, believe that changes in the law are urgently required by the ubiquity of digital technology. Jack Valenti (former President of MPAA) was unapologetic in his view that the recording industry would be destroyed by the new technology and needed to fight back.<sup>120</sup> Chairman of the Senate Judiciary Committee, Senator Orrin Hatch favored remotely destroying the computers of those who illegally downloaded music.<sup>121</sup> The industry has lobbied hard for some time to extend the term of copyright in sound recordings, raise awareness of its

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<sup>115</sup> See Gervais, *supra* note 49, at 3 n.6.

<sup>116</sup> See FREE CULTURE, *supra* note 113, at 76 (2004). Former president of the MPAA Jack Valenti likened VCRs to tapeworms that would eat “away at the very heart and essence of the most precious asset the copyright owner has, his copyright.” *Id.*

<sup>117</sup> See Farber, *supra* note 112, at 1338.

<sup>118</sup> See, e.g., Congressional Budget Office, Copyright issues in Digital Media, at vii (2004). (“In the past, the emergence of new technologies . . . has threatened to tilt the scales of the copyright regime by loosening the control that copyright owners enjoy over subsequent uses of their works.”).

<sup>119</sup> See GOLDSMITH & WU, *supra* note 110, at 124.

<sup>120</sup> See *Privacy and Piracy: The Paradox of Illegal File Sharing on Peer-To-Peer Networks and the Impact of Technology on the Entertainment Industry: Hearing Before the Permanent Subcomm. On Investigations of the S. Comm. on Gov't Affairs*, 108th Cong. 17 (2003) (statement of Jack Valenti, President and Chief Executive Officer, Motion Picture Association of America).

<sup>121</sup> Ted Bridis, *Senator Favors Really Punishing Music Thieves*, CHI. TRIB., June 18, 2003, at 2C.

rights and push for stronger enforcement.<sup>122</sup> The copyright owners' views are that the digital age changes the status quo, so that the broad fair use rights which were recognized in the pre-digital era no longer make economic sense.<sup>123</sup> Now that users can make virtually infinite numbers of perfect copies, stronger legal protection is required to protect and support the economic rights of IP owners,<sup>124</sup> and copyright owners have mounted an increasingly aggressive campaign in the media,<sup>125</sup> the courts and the legislatures, against any unauthorized taking of copyrighted materials which the new technology makes ever easier.<sup>126</sup>

Unfortunately for copyright owners, extended legal protections have increased neither compliance with, nor respect for, the law. The copyright legal regime is finding itself more and more at odds with social practice. Copyright protections in sound recordings have become widely ignored by the general public.<sup>127</sup> The Gowers Review noted that as a result of the ease with which the law can be circumvented, "copyright in the U.K. presently suffers from a marked lack of public legitimacy. It is perceived to be overly restrictive, with little guilt or sanction associated with infringement."<sup>128</sup> "Downloading music and films from the internet is now the most common legal offence committed by young people aged between 10 and 25 in the U.K."<sup>129</sup>

"According to a report commissioned by the British Phonographic Industry (BPI), file-sharing cost the music industry £414 million in lost sales in 2005, on total sales of £1.87

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<sup>122</sup> See, e.g., GOWERS *supra* note 7, at 96; FREE CULTURE, *supra* note 113, at 218 (discussing some of the major media companies' efforts to increase the term of copyrights culminating in the Sonny Bono Copyright Term Extension Act).

<sup>123</sup> See Farber, *supra* note 112, at 1321.

<sup>124</sup> See *id.*

<sup>125</sup> Carrie-Ann Skinner, *Virgin Music Campaigns Against Illegal File-Sharing*, PC WORLD, June 6, 2008, [http://www.pcworld.com/article/146785/virgin\\_music\\_campaigns\\_against\\_illegal\\_filesharing.html](http://www.pcworld.com/article/146785/virgin_music_campaigns_against_illegal_filesharing.html); Ted Bridis, *Music Industry to Target CD Pirates in 12 Cities*, BOSTON GLOBE, May 3, 2006.

<sup>126</sup> See, e.g., GOWERS, *supra* note 7, at 103–06 (describing government policy and litigation alternatives on enforcing IP rights).

<sup>127</sup> Ted Bridis, *Most Music Downloaders Say They Don't Care About the Law*, CHI. SUN TIMES, Aug. 1, 2003, at 43.

<sup>128</sup> See GOWERS, *supra* note 7, at 39.

<sup>129</sup> *Id.* at 27.

billion.”<sup>130</sup> The position is similar all over the world. In the U.S. the recording industry has responded by suing thousands of its own customers for downloading copyrighted material without permission from the internet.<sup>131</sup> As the Gowers Review noted, the lawsuits have not halted the illegal downloading of copyrighted material.<sup>132</sup>

### 3. Complete Overhaul of Copyright Argument

Due to the immense shift in technology and its effects, commentators outside the music business go further than arguing in favor of a return to the weaker copyright and a strong public domain which prevailed in the U.S. until 1976,<sup>133</sup> and argue that the copyright model itself is totally unsuited to the digital age.<sup>134</sup> According to Daniel Farber, “[A] new technology always presents the question of whether an existing legal regime should apply.”<sup>135</sup> Lawrence Lessig, among others, believes that the balance in copyright law embodied in the Constitution, has become so skewed by the powerful economic and corporate forces in favor of protecting the monopoly rights of media corporations for near perpetual terms, that a radical overhaul of copyright law is now needed.<sup>136</sup>

The debate has become particularly intense in the last few years as each side, particularly in the U.S., strives to “portray themselves as defending the status quo ante—the [IP] regime as it existed before it was disturbed.”<sup>137</sup> Farber calls those who view IP

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<sup>130</sup> *Id.*

<sup>131</sup> Editorial, *Stopping Music Piracy...*, CHI. TRIB., Dec. 27, 2008, at C28.

<sup>132</sup> See GOWERS, *supra* note 7, at 101, 102 chart 5.5.

<sup>133</sup> See, e.g., VAIDYHANATHAN, *supra* note 21, 15–16 (arguing for “thin copyright protection” that is just long enough to encourage creativity, but not enough to chill a rich public domain).

<sup>134</sup> John Perry Barlow, *The Economy of Ideas: A Framework for Patents and Copyrights in the Digital Age. (Everything You Know About Intellectual Property is Wrong)*, WIRED, Mar. 1994, available at <http://www.wired.com/wired/archive/2.03/economy.ideas.html> (“Intellectual property law cannot be patched, retrofitted, or expanded to contain digitized expression . . . [w]e will need to develop an entirely new set of methods as befits this entirely new set of circumstances.”).

<sup>135</sup> See Farber, *supra* note 112, at 1322.

<sup>136</sup> See *id.* at 1326–27.

<sup>137</sup> *Id.* at 1320.

rights as “generating a supply of investment funds for innovation” the neo-Hamiltonians because like Alexander Hamilton, they argue for strong support from government for industry.<sup>138</sup> These neo-Hamiltonians support strong IP rights and economic dominance by the music and media industries.<sup>139</sup> He calls the other side neo-Jeffersonians, because like Thomas Jefferson before them, they champion the smaller players and look to “a decentralized future—in which the Internet and other digital technologies will place public discourse and economic innovation in the people’s hands.”<sup>140</sup> Whatever the different concepts are called, and whoever claims to be representing the status quo, there is a great deal of agreement outside government and the copyright industries, that the duration of copyright protection has become too long and is detrimental to the creation and the dissemination of information in the digital era.<sup>141</sup>

### III. THE GOWERS REVIEW

The Gowers Review was refreshing and unusually independent of the influence of the special interests which tend to dominate this debate. It avoided the doom-laden warnings and rhetoric which both the music industry and academics bring to the debate over how the copyright system needs to be adapted to the digital era.<sup>142</sup> The Review described the ideal IP system as creating “incentives for innovation, without unduly limiting access for consumers and follow-on innovators,”<sup>143</sup> explicitly returning to the forefront of the

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<sup>138</sup> *Id.*

<sup>139</sup> *See id.*

<sup>140</sup> *Id.* at 1319.

<sup>141</sup> *See, e.g.,* Patry, *supra* note 48, at 908 (“United States copyright law has failed of its essential purpose—to benefit authors—and is being shaped largely by powerful distributors and their lobbyists with the dual goals of extending a monopoly . . . while simultaneously depriving authors of as much money as possible.”); FREE CULTURE, *supra* note 113, at 231–33 (2004) (describing the collection of lawyers, organizations, corporations, professors, and economists who submitted briefs in *Eldred v. Ashcroft*, 537 U.S. 186 (2002), arguing for a limited term of copyright).

<sup>142</sup> *See New Ideas About New Ideas*, ECONOMIST, Dec. 9, 2006, at 66 (stating the rational, evidence based report will anger the entertainment industry which used “siren songs” to win over politicians).

<sup>143</sup> *See* GOWERS, *supra* note 7, at 1.



debate the fundamental importance of balance between creators and end-users.

Unlike commentators on both sides, the Review did not view the current legal system as hopelessly broken. It pronounced a “qualified ‘yes’” to the question of whether the U.K. intellectual property system was “fit for purpose in an era of globalisation, digitisation and increasing economic specialisation.”<sup>144</sup> The report dealt with all areas of IP law,<sup>145</sup> considering evidence from a broad array of stakeholders, on the U.K.’s current system of IP protection and how well it is functioning,<sup>146</sup> before reviewing in turn, the instruments of the intellectual property system and whether they were “balanced, coherent and flexible,” the operation of the system and how rights are awarded, used and enforced, and the governance of the system.<sup>147</sup> The Review was comprehensive and weighed the arguments made by all stakeholders before setting out its recommendations. The recommendations for changes to the law that the Review made which are relevant to this paper are, largely, not the changes sought by copyright owners.<sup>148</sup>

#### A. Findings and Recommendations

##### 1. Term of Protection for Sound Recordings

The Review found that the length of protection for copyright works “already far exceeds the incentives required to invest in new works.”<sup>149</sup> In terms of the correct balance for copyrights, the Review made two recommendations: first, that the fifty year term of protection currently provided in Europe for sound recordings should not be extended, and second, that the government should

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<sup>144</sup> *Id.*

<sup>145</sup> *Id.* (stating the report took “a holistic view of the [IP] system”).

<sup>146</sup> *Id.* at 5.

<sup>147</sup> *Id.*

<sup>148</sup> See Bill Thompson, *Intellectual Property Battle Rages On*, BBC NEWS, Dec. 8, 2006, <http://news.bbc.co.uk/2/hi/technology/6162139.stm>.

<sup>149</sup> See GOWERS, *supra* note 7, at 50.

adopt the principle that the term and scope of IP rights should no longer be altered retrospectively.<sup>150</sup>

The Review started by acknowledging the academic and popular debate about the optimal length of copyright and related rights protection. It listed five arguments advanced in the Call for Evidence in favor of extending the term of protection for sound recordings: parity with other countries (particularly the U.S.), fairness between composers and performers, increasing incentives to invest in new music, increasing incentives to keep work commercially available, and the maintenance of a positive trade balance for the successful U.K. music industry, and discussed each briefly.<sup>151</sup>

In assessing the parity argument, the Review noted that comparing U.S. and E.U. law is not a comparison of like with like.<sup>152</sup> While U.S. law provides a longer term of protection, it contains various provisions which limit its breadth. Rights holders in the E.U. earn royalties for almost all public performances of their work,<sup>153</sup> while in the U.S. only play on digital radio earns royalties,<sup>154</sup> and the Bars and Grills Exception<sup>155</sup> means that “around 70 per cent of eating and drinking establishments, and 45 per cent of shops, do not have to pay royalties to performers.”<sup>156</sup> The Review concluded that rights in Europe (although shorter) may even be worth more than rights in the U.S.<sup>157</sup> Although Gowers did not use this argument, it is also worth pointing out that the U.S. term is anomalous—other countries have a variety of different durations of, and breadth of, rights, but none protect sound recordings and other related rights for as long as the U.S. term.<sup>158</sup>

Gowers dismissed the fairness argument made on behalf of performers on the basis that copyright law, as a whole, is about

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<sup>150</sup> *See id.* at 6.

<sup>151</sup> *See id.* at 49.

<sup>152</sup> *See id.* at 49–50.

<sup>153</sup> *See id.* at 50.

<sup>154</sup> 17 U.S.C § 106(6) (2006).

<sup>155</sup> *See id.* § 110(5) (2006).

<sup>156</sup> GOWERS, *supra* note 7, at 49.

<sup>157</sup> *Id.* at 50.

<sup>158</sup> *See* IViR REPORT, *supra* note 12, at 32, 85–91.

fairness, as exemplified by the bargain between rights owners and society, giving the former a monopoly to incentivize creation.<sup>159</sup> The length of that monopoly is already longer than needed to incentivize creation according to various economists.<sup>160</sup> It is also unclear that any extension would benefit performers, rather than the recording companies to whom they have often assigned their rights.<sup>161</sup> Moreover, after fifty years, few, other than a small band of highly successful artists, would benefit from any increases in income.<sup>162</sup> For these reasons, any extension of the term of protection is unlikely to reach more than a few, already very well-paid, performers, but is likely to provide a windfall for recording companies with active back catalogs.

Gowers did not address the argument that there is a relatively lesser risk in performing already created material (the job of the performers), rather than creating new material (the job of composers), which is the reason that related rights were initially created in Europe, and internationally, if not in the U.S., as a lesser, economic right more akin to industrial property rather than copyright.<sup>163</sup>

The argument that an extension will increase investment in new music was dismissed by Gowers for a variety of reasons. Economic evidence has shown that the “extension for new works creates at most 1 per cent value for a twenty year prospective extension . . . [and] has negligible effect on investment decisions.”<sup>164</sup> According to Gowers, plenty of artists are vying to create new music, likely without considering whether the song will fall out of copyright in fifty, or ninety-five years time.<sup>165</sup>

Unfortunately the Review did not specifically address the record companies’ arguments that, even if calculations about the length of legal protection do not affect the decisions of individual artists, corporate investment decisions are based on incentives like

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<sup>159</sup> See GOWERS, *supra* note 7, at 50.

<sup>160</sup> *Id.*

<sup>161</sup> See *id.* at 50–51; IViR REPORT, *supra* note 12, at 133.

<sup>162</sup> See GOWERS, *supra* note 7, at 51.

<sup>163</sup> See IViR REPORT, *supra* note 12, at 132–34.

<sup>164</sup> GOWERS, *supra* note 7, at 52.

<sup>165</sup> See *id.*

the length of term of protection of sound recordings.<sup>166</sup> This industry argument is not a strong one because any investment decision ought to be based on current law and economic conditions, not on the possibility of change.

Gowers did note that, “[e]vidence suggests that most sound recordings sell in the ten years after release, and only a very small percentage continue to generate income . . . for the entire duration of copyright.”<sup>167</sup> Thus any extension of the duration of related rights would lock up that music without providing significant income for reinvestment to the producers.

There is a similar issue with another music industry argument that a longer duration for related rights would ensure that more music would be available to the consumer.<sup>168</sup> The Review found evidence that those “without legal rights have made more historic U.S. recordings available than have rights holders.”<sup>169</sup>

Additionally, there would be an impact of extension on musicians themselves: “[i]f works [were] protected for a longer period of time, follow-on creators . . . would have to negotiate licenses to use the work during that extended period” and could be blocked by the estates and heirs of performers as well as facing the problem of tracing rights holders.<sup>170</sup> The Review found that such limiting of the public domain by longer terms of protection would be more likely to restrict rather than stimulate creativity.<sup>171</sup>

## 2. Exceptions and Limitations to Copyright Protection

In terms of the flexibility of copyright protection in the U.K., the Review made four recommendations to amend U.K. law to introduce or clarify certain limited exceptions to copyright. The recommendations were to

[i]ntroduce a limited private copying exception . . .  
for the format shifting of works . . . [; to] allow

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<sup>166</sup> *See id.* at 49, 52.

<sup>167</sup> *Id.* at 52.

<sup>168</sup> *See id.* at 49.

<sup>169</sup> *Id.* at 54.

<sup>170</sup> *Id.*

<sup>171</sup> *See id.*

private copying for research to cover all forms of content . . . [; to] propose that [E.U. Directive] 2001/29/EC<sup>172</sup> be amended to allow for an exception for creative, transformative or derivative works, within the parameters of the Berne Three Step Test . . . [; and to] create an exception to copyright for the purpose of caricature, parody or pastiche.<sup>173</sup>

All of these exceptions would strengthen the public domain and limit the rights of copyright owners.<sup>174</sup>

The lack of a private copying exception under U.K. law makes it illegal for someone to copy a CD they own to a computer, something most of the British public do anyway. Gowers was concerned that this “entirely legitimate activity” should be seen as such by the law.<sup>175</sup> The Review recommended that the exception should be very limited, only allowing one copy to be made for private use of music already owned in a different format, but should not be accompanied by the “blunt instrument” of a levy, as it is in some European legal systems, especially as “[t]he European Commission is reviewing the entire body of copyright law, and is specifically investigating whether levies work.”<sup>176</sup>

The other two recommendations made by Gowers for the flexibility of U.K. copyright law—to create an exception for transformative use, or derivative works, and to create an exception for caricature, parody or pastiche—would also bring U.K. law more in line with U.S. law. As Gowers noted, the first recommendation to create a copyright exception for transformative use is not even possible under current U.K. law because it is not one of the exceptions permitted by the E.U. Information Society Directive.<sup>177</sup> Gowers recommended that the U.K. government seek to amend that Directive to permit such an exception on the grounds that “[t]ransforming works can create huge value and spur on

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<sup>172</sup> Council Directive 2001/29, art. 5, 2001 O.J. (L 167) 10, 16 (EC).

<sup>173</sup> GOWERS, *supra* note 7, at 6.

<sup>174</sup> *See id.* at 61.

<sup>175</sup> *Id.* at 63.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* at 68; *see also* Council Directive 2001/29, art. 5, 2001 O.J. (L 167) 10, 16 (EC).

innovation.”<sup>178</sup> Beethoven and Mozart were both mentioned as composers who recycled themes and segments of prior works.<sup>179</sup> Gowers also used comments from *The Beastie Boys*, and a discussion of hip hop music’s homogenization as licensing rights get more expensive, to argue in favor of this exception.<sup>180</sup>

The Information Society Directive does, however, specifically allow for caricature, parody and pastiche, so this recommendation could be enshrined in U.K. law without the need for a change to European legislation.<sup>181</sup> The Review used comments from the BBC, regarding how much easier it would make clearing programming, to explain its recommendation of this exception.<sup>182</sup>

Unlike term extension for sound recordings, where Gowers’ recommendation was not to harmonize U.K. law with U.S. law, these recommended limitations, if adopted, would have the effect of making the copyright exceptions under U.K. law more similar to U.S. exceptions. Gowers argued that exceptions “can create economic value without damaging the interests of copyright owners” by allowing others to use and build on copyright works.<sup>183</sup> The Review mentioned the Creative Commons movement to show “that not all creators are opposed to their work being used to create economic value for someone else.”<sup>184</sup>

While enabling libraries to copy and format shift for archival purposes has not excited much comment, the music industry has been unhappy to varying degrees with all the other exceptions recommended by Gowers, and particularly with the private copying exception. The music industry’s arguments are reviewed later in this paper.<sup>185</sup>

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<sup>178</sup> GOWERS, *supra* note 7, at 67.

<sup>179</sup> *See id.*; Olufunmilayo B. Arewa, *From J.C. Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context*, 84 N.C. L. REV. 547, 604–05 (2006).

<sup>180</sup> *See* GOWERS, *supra* note 7, at 67 (quoting the Beastie Boys saying “we can’t just go crazy and sample everything and anything . . .” as much as they would like).

<sup>181</sup> Council Directive 2001/29, art. 5 § 3(k), 2001 O.J. (L 167) 10, 16 (EC).

<sup>182</sup> *See* GOWERS, *supra* note 7, at 68.

<sup>183</sup> *Id.* at 62.

<sup>184</sup> *Id.*

<sup>185</sup> *See infra* notes 206–14, 263–66 and accompanying text.

### 3. Penalties for Copyright Infringement

In terms of law enforcement, the Gowers Review did make some concessions to copyright owners, recognizing the difficulties they have in enforcing their rights in a digital medium. Its recommendations were that penalties for online and physical copyright infringement should be matched to make the law more coherent,<sup>186</sup> and that rights holders in the U.K. should continue to “[o]bserve the industry agreement of protocols for sharing data between ISPs and rights holders to remove and disbar users engaged in ‘piracy.’”<sup>187</sup> If this has not proved successful by the end of 2007, the recommendation is that the U.K. government should consider whether to legislate to require ISPs to assist copyright holders in protecting their rights.<sup>188</sup>

The issue here is illegal file-sharing, which Gowers recognized as jeopardizing “the value of rights held by content industries.”<sup>189</sup> However, the Review also noted that the lawsuits used by the entertainment industry to pursue infringers have not led to a significant reduction in the activity.<sup>190</sup> The Review discussed the concepts of “contributory infringement and inducement”<sup>191</sup> under U.S. law, but declined to suggest legislative changes for the U.K., on the grounds “that secondary liability on technology purveyors would stifle the availability of public domain works and may chill technological innovation.”<sup>192</sup>

The Review preferred the idea of encouraging rights owners and ISPs to collaborate on identifying and disbarring users from engaging in illegal downloading, although it admitted that making ISPs liable for secondary infringement might not be compatible with E.U. laws,<sup>193</sup> presumably because of privacy issues. Indeed, the European Court of Justice recently held that nothing in E.U. law required that member states impose a legal obligation on ISPs

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<sup>186</sup> See GOWERS, *supra* note 7, at 98.

<sup>187</sup> *Id.* at 103.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.* at 101.

<sup>190</sup> *Id.* at 101, 102 chart 5.5.

<sup>191</sup> *Id.* at 102.

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

to disclose personal data relating to customers suspected of illegal file-sharing to help in a civil action for copyright infringement.<sup>194</sup>

Predictably, many in the music industry have not greeted any of the Gowers recommendations warmly.<sup>195</sup> The music industry does not feel that it has had much support from the ISPs in policing the web for illegal file-sharing in the past.<sup>196</sup> Even if recording companies are able to obtain records from ISPs, and ISPs were to shut down the accounts of egregious file-sharers, those individuals can usually get another internet account relatively quickly and easily. The industry is wary of collaboration with technology companies whose new technologies are often seen as the cause of the problems of the music business.

### *B. Opposing Views in the U.K. and Another Government Proposal*

Although the Gowers Review recommendations on the duration of the term of related rights, and specific exceptions to copyright were quickly adopted as U.K. government policy,<sup>197</sup> the House of Commons Culture Media and Sports Committee Report, published shortly after Gowers, disagreed with the Gowers' recommendation on the duration of the term of protection for sound recordings.<sup>198</sup> This government report recommended extending the term of protection for related rights to the life of the author plus seventy years accorded to copyrights.<sup>199</sup> It adopted many of the music industries' arguments, particularly those on parity between performers and consumers, stating:

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<sup>194</sup> Case C-275/06, *Productores de Música De España v. Telefónica de España SAU*, 2008 E.C.R. I-00271.

<sup>195</sup> The day after the Gowers Review was published, a large number of well-known figures in the music world took out a full page advertisement in a major national paper denouncing the Review's finding. See *Musicians Sign Copyright Advert*, BBC NEWS, Dec. 7, 2006, <http://news.bbc.co.uk/1/hi/entertainment/6216152.stm>.

<sup>196</sup> Paul McGuinness, Manager for U2, Address at MIDEM, Cannes (Jan. 28, 2008), available at [http://www.billboard.biz/bbbiz/content\\_display/industry/e3i062b16e707aa99916c212e660cbffd3e](http://www.billboard.biz/bbbiz/content_display/industry/e3i062b16e707aa99916c212e660cbffd3e).

<sup>197</sup> See PRE-BUDGET REPORT, *supra* note 5, at 60.

<sup>198</sup> See SELECT COMMITTEE ON CULTURE, MEDIA AND SPORT, NEW MEDIA AND THE CREATIVE INDUSTRIES, FIFTH REPORT, 2006–7, H.C. 509-II, available at <http://www.publications.parliament.uk/pa/cm200607/cmselect/cmcmds/509/50902.htm> [hereinafter FIFTH REPORT].

<sup>199</sup> *Id.* ¶ 236.



We strongly believe that copyright represents a moral right of a creator to choose to retain ownership and control of their own intellectual property. We have not heard a convincing reason why a composer and his or her heirs should benefit from a term of copyright which extends for lifetime and beyond, but a performer should not.<sup>200</sup>

Although it commended the Gowers Review as “thorough,” it suggested that the Gowers team had ignored all but economic arguments in its deliberations on extending protection for sound recordings and other related rights.<sup>201</sup> In the Committee’s view, the strength and importance of the entertainment industry in the U.K. made it particularly strange “that the protection of intellectual property rights should be weaker” in the U.K. than in countries with less successful industries.<sup>202</sup> The Committee did not appear to consider that the relatively weaker protection might be contributing to the creativity and strength of the industry.

While faulting Gowers for presenting only economic arguments relating to term extension, the Committee failed itself to present or discuss any major arguments, contenting itself with vague references to the vibrancy, importance and strength of the U.K. music industry and the morality and fairness arguments to support its conclusion that a term extension was necessary.<sup>203</sup>

In a statement before Parliament by the Secretary of State for Culture, Media and Sport, James Purnell, the Government congratulated the Select Committee on the Report “highlighting the strength and vibrancy of the U.K.’s creative industries,” but refused to adopt its recommendations since they were in disagreement with Gowers, which it stressed was an independent report.<sup>204</sup> The Secretary also mentioned the independent report

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<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> DEPARTMENT FOR CULTURE, MEDIA AND SPORT, GOVERNMENT RESPONSE TO THE CULTURE, MEDIA AND SPORT SELECT COMMITTEE REPORT INTO THE NEW MEDIA AND THE CREATIVE INDUSTRIES, 2007, Cm. 7186, at 1, 11, *available at* <http://www.official-documents.gov.uk/document/cm71/7186/7186.asp>.

commissioned by the European Commission as part of its review of E.U. copyright law,<sup>205</sup> which came to essentially the same conclusion as Gowers on sound recordings, stating:

Taking account of the findings of these reports, which carefully considered the impact on the economy as a whole, and without further substantive evidence to the contrary, it does not seem appropriate for the Government to press the Commission for action at this stage.<sup>206</sup>

The Select Committee report did agree with Gowers on the need to introduce a private copying exemption into U.K. law, and on the importance of ISPs and content owners being encouraged to work together toward finding commercial solutions for the piracy problem.<sup>207</sup> These proposals were accepted by the Government, which confirmed its commitment to taking forward the Gowers Review.<sup>208</sup>

Despite the Gowers Review recommendations being British Government official policy, a strong movement in the U.K. music industry continued lobbying for an extension of the term of protection of sound recordings.<sup>209</sup> David Cameron, Conservative Leader of the Opposition, also made known that he would support the extension if in office, giving as his reason for doing so the familiar vibrancy of the British musical scene rationale.<sup>210</sup>

Also, a private member's bill was introduced into the U.K. parliament by M.P. Peter Wishart, a former member of a Scottish folk-rock group, Runrig, with the aim of extending beyond fifty

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<sup>205</sup> See *id.* at 12.

<sup>206</sup> *Id.*

<sup>207</sup> See FIFTH REPORT, *supra* note 198, ¶¶ 143, 154.

<sup>208</sup> See PRE-BUDGET REPORT, *supra* note 5.

<sup>209</sup> See Robert Ashton, *Government Signals Extension to Copyright Term*, MUSIC WK., Dec. 11, 2008, <http://www.musicweek.com/story.asp?storyCode=1036431> (“[Term extension for sound recordings] is a major victory for the music industry, which has been campaigning for term extension for years.”).

<sup>210</sup> David Cameron, Right Honourable, Address to U.K. Music Industry: A Flourishing Music Scene Plays a Huge Role in Bolstering the Vibrancy of Our Culture (July 6, 2007), available at [http://www.conservatives.com/News/Speeches/2007/07/David\\_Cameron\\_A\\_flourishing\\_music\\_scene\\_plays\\_a\\_huge\\_role\\_in\\_bolstering\\_the\\_vibrancy\\_of\\_our\\_culture.aspx](http://www.conservatives.com/News/Speeches/2007/07/David_Cameron_A_flourishing_music_scene_plays_a_huge_role_in_bolstering_the_vibrancy_of_our_culture.aspx).

years the copyright term of sound recordings.<sup>211</sup> The bill was to receive its second reading before parliament on March 7, 2008, but it never did.<sup>212</sup> However, since it was not supported by the government, and such an extension would have to be made at the European level, it seems unlikely that it would have—currently, at least—had much effect.

### C. *Post-Gowers Action*

In January 2008, the U.K. government published a consultation document, *Taking Forward the Gowers Review on Intellectual Property*, to consult on how the reforms to the law recommended by Gowers should be made.<sup>213</sup> Responses were requested by April 2008, with legislation promised soon after.<sup>214</sup> The consultation document was ninety pages long and invited responses to sixty-six questions on all aspects of the proposed changes.<sup>215</sup> The detail and specificity of the questions suggested that the U.K. Intellectual Property Office (“IPO”) was truly interested in fashioning a copyright law that “is valued by and protects rights holders and is both understood and respected by users.”<sup>216</sup> The questions were fairly open and input was sought from all affected parties.

The Music Business Group, describing itself as “the collective view of the U.K.’s music industry,” was quick to submit to the IPO a persuasive paper on its opposition to almost all of the exceptions proposed for U.K. copyright law.<sup>217</sup> It stated that the music industry enabled a “value chain” which directly contributes £6 billion to the U.K. economy,<sup>218</sup> and copyright “is the core

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<sup>211</sup> Sound Recordings (Copyright Term Extension) Bill, 2007, Bill [33] (Gr. Brit.).

<sup>212</sup> For a history of the bill, see U.K. Parliament Website, Copyright in Sound Recordings and Performers’ Rights (Term Extension) Bill 2007–08, <http://services.parliament.uk/bills/2007-08/copyrightinsoundrecordingsandperformersrightstermextension.html>.

<sup>213</sup> U.K. INTELLECTUAL PROP. OFFICE, TAKING FORWARD THE GOWERS REVIEW OF INTELLECTUAL PROPERTY PROPOSED CHANGES TO COPYRIGHT EXCEPTIONS (2008), available at <http://www.ipo.gov.uk/consult-copyrightexceptions.pdf>.

<sup>214</sup> *Id.* at 5.

<sup>215</sup> *Id.* at 85.

<sup>216</sup> *Id.* at 1.

<sup>217</sup> See MUSIC BUSINESS GROUP, *supra* note 105, at 3.

<sup>218</sup> *Id.* at 7.

mechanism underlying this vast value chain.”<sup>219</sup> At present, according to the industry, because music is transferable into different formats, much of the value of music is enjoyed by consumers and technology companies, but creators and right holders are “effectively excluded from any value.”<sup>220</sup>

The industry paper contended that allowing an exception to copyright for format shifting would “enshrine this market failure in national legislation.”<sup>221</sup> Their proposed solution to the problem of the music business being cut out of the value chain was to require a license fee to compensate the recording companies for the grant of a limited private copying exemption.<sup>222</sup> Subject to payment of a commercially negotiated license fee, format shifting should only be permissible, according to the Music Business Group, if the initial copy is legitimately owned and retained the copy is made by the owner, for private use, with no onward distribution, communication or exploitation.<sup>223</sup> Under these conditions the industry grudgingly conceded that “a fraction of the value gained by others, and the injustice suffered by creators and rights holders, is reversed.”<sup>224</sup> Some European countries already impose a levy on private copying, something rejected by Gowers as “a blunt instrument,” and which is also being reconsidered at the European level.<sup>225</sup>

The Music Business Group’s proposal conveniently ignores the fact that it was technology companies like Apple, and not the music recording companies themselves, that created and developed the hardware and software which made the new “value chain” for music possible.<sup>226</sup> Without having been involved during the risky creation stage, the music industry is now asking for a cut of the profits. The music industry argues that if others derive value from manipulating the industry’s product, then the industry deserves some of that value, although they did nothing to assist its creation.

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<sup>219</sup> *Id.* at 4.

<sup>220</sup> *Id.*

<sup>221</sup> *Id.*

<sup>222</sup> *See id.* at 17–18.

<sup>223</sup> *Id.* at 17.

<sup>224</sup> *Id.* at 4.

<sup>225</sup> GOWERS, *supra* note 7, at 63.

<sup>226</sup> *See* FIFTH REPORT, *supra* note 198, ¶ 149.

While the problem of the loss of value to the music industry from the illegal copying and distribution of music should be addressed, Gowers decided, after consultations with all the stakeholders, and not just the music industry, that some exceptions to the monopoly rights of copyright owners were needed, particularly a private copying exception, because of the reality that consumers believed that they could legitimately copy what they already owned, and because the music industry had already derived value from that sale.<sup>227</sup> Gowers was concerned with protecting the legitimacy of the law by promoting fairness and equity. The music industry is clearly willing to continue the fight to protect and extend their rights. Recent action by the European Commission has shifted the debate to the European level.<sup>228</sup>

#### IV. THE EUROPEAN UNION POSITION ON COPYRIGHT TERM EXTENSION

##### A. *IViR Report*

In November 2006, one month before the Gowers Review came out, the Institute for Information Law at the University of Amsterdam published its final, and much lengthier report entitled *The Recasting of Copyright & Related Rights for the Knowledge Economy*.<sup>229</sup> This report had been commissioned by the European Commission's internal market directorate-general in 2005 as part of an overall review of the fifteen years of harmonization of copyright and related rights in Europe.<sup>230</sup> The 300 page report contained seven chapters, reviewing the consolidation of the

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<sup>227</sup> See GOWERS, *supra* note 7, at 63 (suggesting that rightholders could alter the pricing scheme to include the cost of the right to copy in the sale price and allow for limited private copying of the work).

<sup>228</sup> See Press Release, European Commission, Intellectual Property: Commission Adopts Forward-Looking Package (July 16, 2008), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/1156> [hereinafter Commission Adopts Forward-Looking Package] (announcing copyright initiatives to align copyright term for performers with terms for authors and harmonize copyright term that applies to co-written musical compositions).

<sup>229</sup> See *IViR REPORT*, *supra* note 12.

<sup>230</sup> See *id.* at i.

“acquis communautaire,” including one assessing the arguments for and against extending the term of protection for related rights.<sup>231</sup>

It started by noting that certain stakeholders—the report identified phonogram producers—had, for some time, been calling for such rights to be extended to align the rights of performers with those of authors “in line with the highest international standards.”<sup>232</sup> The report noted that, by contrast, several groups, mainly in the field of technology, had asked the Commission not to proceed with any term extension as the term of protection was already too long.<sup>233</sup> Interestingly, film producers and broadcasting organizations had also apparently made no claim for a term extension.<sup>234</sup> The European Commission Staff Working Paper on the European copyright framework in 2004 had summarized the policy consensus quite effectively by stating, “an extended term of protection would only tend to diminish the choice of music on the market by enforcing the flow of revenues from few best-selling recordings, while at the same time not providing any real new incentives for creation of new recordings or motivating new investment.”<sup>235</sup>

In analyzing the arguments for and against any term extension for sound recordings, the IViR had access to contributions submitted by stakeholders to the earlier European Commission working paper.<sup>236</sup> It also held its own consultations with experts in the field, and conducted an extensive evaluation of the legal and economic literature.<sup>237</sup> The Report produced for the Commission was long, detailed and thorough.

Chapter three of the IViR report described in detail the terms of protection currently enjoyed by various related rights at the

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<sup>231</sup> *Id.* at 21, 83–137.

<sup>232</sup> *Id.* at 83.

<sup>233</sup> *Id.*

<sup>234</sup> *Id.*

<sup>235</sup> *Review of the EC Legal Framework in the Field of Copyright and Related Rights* 11 (European Commission Staff Working Paper, SEC 2004-995, 2004), available at [http://ec.europa.eu/internal\\_market/copyright/docs/review/sec-2004-995\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/review/sec-2004-995_en.pdf) [hereinafter *Review of EC Legal Framework*].

<sup>236</sup> See IViR REPORT, *supra* note 12, at 83–84.

<sup>237</sup> See *id.* at 84.

international, European and national levels and evaluated all the arguments its authors could find in favor of term extension, dividing them into arguments “concerning the nature and objectives of related rights . . . economic arguments, and . . . arguments concerning the competition with non-E.U. market players.”<sup>238</sup> The Report split related rights into two categories, (analyzing the rights of performers against phonogram producers, film producers, and broadcasting organizations) stating that it considered there to be different considerations and objectives for performers as opposed to the other related rights holders.<sup>239</sup> It also contrasted the position of film producers (who as copyright owners in Europe already enjoy significantly longer terms of protection), with phonogram producers and broadcasting organizations, which are currently protected under the fifty years term like performers.<sup>240</sup>

### 1. The Nature and Objectives of Related Rights

Reviewing the legal history of the international recognition of related rights, the Report noted that protection at the international level for recordings was first achieved in 1961, with the adoption of the Rome Convention.<sup>241</sup> Phonogram producers and broadcasting organizations gained protection under this Convention on the grounds that they spent time, money and effort on the production of phonograms and broadcasts.<sup>242</sup> These rights clearly had more in common with other types of industrial property like design rights and the *sui generis* database right.<sup>243</sup>

As an industrial right, there was a good argument for shortening rather than lengthening this protection to bring it into line with the protection provided under E.U. law for other types of industrial property such as databases and registered designs.<sup>244</sup>

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<sup>238</sup> *Id.*

<sup>239</sup> *Id.*

<sup>240</sup> *See id.* at 86.

<sup>241</sup> *Id.* at 85.

<sup>242</sup> *See id.* at 92 (noting that the advance of radio and television broadcasting was accompanied by an increased investment of resources and effort by phonogram producers and broadcasting organizations).

<sup>243</sup> *See id.* at 134.

<sup>244</sup> *Id.*

Gowers also suggested that the duration of the right for sound recordings was already too long,<sup>245</sup> but did not put the nature and objective of these rights in their true place in European IP law as economic rights, rather than personality-based rights like copyright.

The IViR also considered the question of whether performers merited protection on separate social grounds, that absent protection they would be denied recompense for their creative achievements, and others would benefit from the profits from their fixed performances.<sup>246</sup> It noted that, in Europe performers enjoyed moral rights under most national legislation to protect their artistic integrity,<sup>247</sup> but that they had never been recognized as *de jure* authors since there were important conceptual differences between creators and performers.<sup>248</sup> Most importantly, there is no requirement of originality to protect a performance, as there is to protect a work of authorship under copyright law.<sup>249</sup> This places performers in a different category of rights holders because they gain protection for their endeavors simply by recording their work, without having to achieve the higher bar of originality. This point is one familiar in the civil law tradition, that performance is a lesser economic right because it protects something less risky than the creative activity involved in writing or composing.<sup>250</sup>

The Report conceded that performers may perhaps require greater rights than the producers of sound recordings.<sup>251</sup> However, if the main reason for term extension is the laudable goal of providing social security to performing artists in their later years, then, in the view of the IViR authors, it was likely only to benefit a very small percentage of performers still popular after fifty years, and generally these were the performers least in need of that

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<sup>245</sup> See GOWERS, *supra* note 7, at 56.

<sup>246</sup> See IViR REPORT, *supra* note 12, at 96.

<sup>247</sup> See *id.* at 93, 96.

<sup>248</sup> See *id.* at 133.

<sup>249</sup> See *id.* at 95.

<sup>250</sup> See Towse, *supra* note 30, at 748.

<sup>251</sup> See IViR REPORT, *supra* note 12, at v (noting that an argument could be made to extend protection for performers but not producers because the reasons for protecting performers are comparable to the reasons for protecting authors).



benefit.<sup>252</sup> The IViR suggested that perhaps extending moral rights protection for performers might be more justifiable and helpful than extending their economic rights.<sup>253</sup>

The Report pointed out that, in reality, it is not performers' intellectual property rights that need strengthening but their contractual rights.<sup>254</sup> Studies suggest that only the top performers control their own performance rights.<sup>255</sup> For most artists, whether they will receive any benefit from the increase in term depends on their contractual arrangements with the recording company.<sup>256</sup> In most cases the beneficiary of any increase in the term of performers' rights is likely to be the recording company.

As for the rights of phonogram producers, film producers and broadcasting organizations, the main justification for their rights was seen by the authors of the Report as economic; to protect and serve as an incentive for investment.<sup>257</sup> The IViR found that, given the strong economic arguments advanced by rights holders in favor of more protection, it was unfortunate that they had provided little empirical evidence to substantiate their claims for a longer term.<sup>258</sup> Although economic incentive arguments are usually given as the main justification for extending related rights, there continues to be little real evidence as to what extent any IP rights, and related rights specifically, provide "incentives to promote innovat[ion], creat[ion] and invest[ment] . . . ."<sup>259</sup>

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<sup>252</sup> *Id.* at 133.

<sup>253</sup> *See id.*

<sup>254</sup> *See id.* at 121.

<sup>255</sup> *See, e.g.,* Ruth Towse, *Copyright and Economic Incentives: An Application to Performers' Rights in the Music Industry*, 52 KYKLOS 369, 388 (1999) [hereinafter *Copyright and Economic Incentives*] ("[L]arge sums of royalty income . . . goes mainly to the publishers . . . and to a small minority of high earning performers . . . who can defend their own interests in the marketplace by virtue of their bargaining power . . . to control their own affairs by contractual arrangements.").

<sup>256</sup> *See* IViR REPORT, *supra* note 12, at 121.

<sup>257</sup> *See id.* at 105.

<sup>258</sup> *Id.* at 113.

<sup>259</sup> *Id.* at 106.

## 2. Economic Arguments

The Review considered the small amount of empirical evidence provided by the music industry concerning the revenues they spend on discovering and developing new talent.<sup>260</sup> Since recordings made before the late 1950's, and therefore about to lose protection, provided only three percent of record company income, and a similar percentage of performers' rights collected by collection societies, extending the term of protection of such rights would, in the view of the IViR authors, have no more than a limited impact on the money available to invest in new music.<sup>261</sup> The same conclusion was reached by Gowers.<sup>262</sup>

In terms of recouping investment in particular sound recordings, there was also a variety of evidence provided by the music industry from which the Report's authors adduced that between 3,000–20,000 CDs had to be sold to produce a profit for the average recording.<sup>263</sup> The average Top 40 album in March 2006 sold 100,000 copies worldwide per week, but the vast majority of recordings sold far fewer.<sup>264</sup> However, music recordings had short life cycles, typically selling mainly in the first year or even months after release.<sup>265</sup> Thus, reasoned the authors, if a recording had not recouped its investment in the first fifty years after release, it was extremely questionable whether an extension of the term of protection would enable it to do so.<sup>266</sup>

The Report considered the “[i]mpacts of extending the term of protection . . . on access, cultural diversity, and the effects of digitisation” on music.<sup>267</sup> Rights holders have argued that extending their rights is likely to increase access to music by encouraging them to exploit their back catalogs.<sup>268</sup> Gowers had found this argument unpersuasive on the basis of U.S. research

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<sup>260</sup> These estimates range from 2–17% of net revenues. *Id.* at 115.

<sup>261</sup> *Id.* at 114–15.

<sup>262</sup> See GOWERS, *supra* note 7, at 52.

<sup>263</sup> IViR REPORT, *supra* note 12, at 112.

<sup>264</sup> See *id.* at 113.

<sup>265</sup> *Id.*

<sup>266</sup> *Id.*

<sup>267</sup> *Id.* at 116.

<sup>268</sup> See *id.* at 117.

showing that more historic U.S. recordings were made available by those without legal rights than by the rights holders.<sup>269</sup> The IViR Report noted that the exploitation of back catalogs is only valuable for a small share of recordings that continues to generate commercial value.<sup>270</sup> Most recordings quickly became unavailable. Extending the term of protection for many sound recordings would simply ensure that this music remained locked away from exposure to the public for longer, especially since rights holders had no positive obligation to exploit their rights, and are unlikely to do so if they perceived no immediate commercial gain.<sup>271</sup> Allowing such material into the public domain might actually be preferable from a public welfare perspective, as it could be exploited by others, whether other commercial organizations or non-profit, or educational groups.<sup>272</sup>

The Report noted that digitization offered new opportunities to remarket and distribute back catalogs in new distribution formats but that this technology had not always been embraced by the music industry. Rights holders have now proposed, according to the IViR, that a longer term of protection would create an incentive for them to digitize their back catalogs and benefit from the so-called “long tail effect” of the many sound recordings that sell in small numbers, in contrast to the small number of high-selling, mass-appeal recordings.<sup>273</sup> An online store unconstrained by space can stock and exploit many more niche recordings and low sellers than a brick-and-mortar store, and the “long tail effect” means that it can make money from them even with low individual sales volumes.<sup>274</sup> Of course, the possibilities of digitization have been with us for a few years, and various business models have been embraced by technology companies to capture value from digitization.<sup>275</sup>

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<sup>269</sup> See GOWERS, *supra* note 7, at 54.

<sup>270</sup> IViR REPORT, *supra* note 12, at 116.

<sup>271</sup> See *id.* at 116, 118.

<sup>272</sup> See *id.* at 116.

<sup>273</sup> See *id.* at 117.

<sup>274</sup> *Id.*

<sup>275</sup> See *id.*

The IViR contended that it was questionable that an extension of the term of sound recordings would be likely to induce the recording industry to make use of new digital business models since they have so far been loath to do so.<sup>276</sup> The authors also questioned whether related rights protection would be the best means for creating incentives to explore this potential.<sup>277</sup>

The music industry, of course, sees this differently, contending that they have been left out of this new value creation.<sup>278</sup> Their response to the U.K. IPO consultation described Sony's commercially unsuccessful experience of providing customers access to digitized music that could only be played on a Sony device.<sup>279</sup> It apparently took Sony four years to listen that customers wanted portable music.<sup>280</sup> Sony (and the rest of the music industry) did not appear to learn from this experience the lesson that a successful business must adapt its business strategy to provide what the customer wants. Rather, the point made by the Music Business Group was that the customer was taking value from the business.<sup>281</sup> The proposal in the Music Business Group report is for a digital business model which would enable the industry to generate income by imposing a levy for format shifting music that the customer already owns in another format.<sup>282</sup> This would certainly create value for the industry by enabling companies to sell something they have already sold. The IViR report is right to be skeptical of whether the music industry will suddenly embrace new business ideas simply because related rights receive a longer term of protection.

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<sup>276</sup> *See id.*

<sup>277</sup> *Id.* ("It is questionable whether protection of sound recordings beyond 50 years would actually induce phonogram producers to better make use of the new business potential of digital distribution, and whether related rights protection is the adequate measure for creating incentives to exploit this potential in the first place.").

<sup>278</sup> *See* MUSIC BUSINESS GROUP, *supra* note 105, at 15.

<sup>279</sup> *Id.*

<sup>280</sup> *Id.*

<sup>281</sup> *See id.*

<sup>282</sup> *See id.* at 17 (consumers would have a private exception, while "businesses, services or device manufacturers who gain direct value from their customers' ability to format shift music have a responsibility to creators and right holders").

The IViR Report decided, on balance, that extending the term of related rights would hurt, rather than help, the diversity of European music, especially given that 81% of the European market is dominated by four global labels which already have significant control over exploitation and distribution of music within Europe.<sup>283</sup> This concentration within the industry goes some way to explaining the music industries' lobbying power, as well as providing a significant reason why politicians should be cautious about changing the law to benefit the industry without clear evidence of benefit to the rest of society. If a group lobbies for a change to the law, they should, at the least, be required to show that any change to the status quo provides a benefit, to those other than themselves and preferably to society as a whole. The increase in term for sound recordings and performers' rights clearly provides a windfall to recording companies but appears unlikely to benefit anyone else.

According to the IViR, the cost increases created by the related rights monopolies only serve a useful function if they are an "unavoidable consequen[ce] of an incentive system for which there is no better alternative."<sup>284</sup> The extension of the term beyond fifty years would increase deadweight costs and thus be detrimental to the public domain.<sup>285</sup> There would likely be higher licensing costs to pay for the secondary use of sound recordings in every area from podcasts to play in restaurants. Tracing costs to find the rights owners of older recordings would also likely increase, especially as there is no central database for such rights in Europe.<sup>286</sup> Sound recording prices would likely remain higher for consumers.<sup>287</sup> It is clear that the main beneficiaries in all this would be the recording companies. Performing artists might not even benefit greatly from any increased term of protection, since although they might receive remuneration from collecting societies

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<sup>283</sup> See IViR REPORT, *supra* note 12, at 118.

<sup>284</sup> *Id.* at 119.

<sup>285</sup> *Id.*

<sup>286</sup> See, e.g., Wikibooks—UK Database Law: Existence, [http://en.wikibooks.org/wiki/UK\\_Database\\_Law](http://en.wikibooks.org/wiki/UK_Database_Law) (last visited Feb. 12, 2009) ("Copyright arises automatically in a work that meets the criteria outlined below. There is no need to register copyright in a database with a central organisation.")

<sup>287</sup> IViR REPORT, *supra* note 12, at 120.

for the longer period (assuming, of course, their music remained popular), they have often contracted away their exclusive rights in their performances and sound recordings to recording companies, who would thus be the main beneficiaries of any term increase.<sup>288</sup>

### 3. Competition with Non-E.U. Players

The IViR Report dealt with the argument that the term of protection in Europe put European rights holders at a competitive disadvantage with rights holders in non-E.U. countries by stating that the only country with significantly longer protection for related rights—the U.S.—does not apply a “comparison of terms” so Europeans receive the same legal protection as Americans in the U.S. market.<sup>289</sup> The music industry had suggested that the European music industry might become less profitable because the longer term of protection in the U.S. might cause European producers to make recordings specifically to sell in the U.S. rather than Europe, to the detriment of European diversity and culture.<sup>290</sup> The music industry also argued that if sound recording rights were extended in Europe, then European record companies could increase the value of the intangible assets recorded in their balance sheets.<sup>291</sup>

The IViR debunked these arguments. The authors considered that it was questionable whether the term of protection would directly affect the international competitiveness of the recording industry on a large scale given the many other factors affecting its competitiveness, such as, importantly, the ability to use new distribution channels.<sup>292</sup> Given that the share of the domestic market in the U.S. provided by domestic music was 93% (much higher than the domestic share of the music market in most European countries) the Report concluded that there was no evidence to suggest that there was a large market for European music in the U.S., or that music companies were trying to develop

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<sup>288</sup> *Id.* at 133.

<sup>289</sup> *See id.* at 128–29 (discussing the level of protection that all phonogram producers receive under the U.S. Copyright Act).

<sup>290</sup> *Id.* at 122–23.

<sup>291</sup> *See id.* at 131.

<sup>292</sup> *Id.* at 127.

it, in fact, the opposite, since it was clear that most music was sold in its own national market.<sup>293</sup> There was also no good evidence that music companies would benefit in accounting terms from an increased duration of sound recording rights, given that most did not include the value of their own catalogs as intangible assets in their balance sheets at all, and amortized any externally acquired music catalogs within twenty years, strongly suggesting that the true position of recouping investment in music is that it is done within the first few years of release, or not at all.<sup>294</sup>

The IViR reiterated what the music industry has been careful to avoid mentioning, which is that “from an international perspective, American terms are anomalous and cannot serve as a justification, from a legal perspective, for extending the terms of related rights in the E.U.”<sup>295</sup> The Report concluded that there were no good legal, economic or comparative arguments for extending the term of related rights and, like the Gowers Review, recommended against it.<sup>296</sup>

#### B. E.U. Commission Proposal

Approximately one year after the IViR and Gowers had published their thorough reviews of the question of extension of the term of protection for sound recordings, on February 14, 2008, the E.U. Commissioner for Internal Market and Services, Charlie McCreevy, proposed that the term of copyright protection for European performers should be extended to ninety-five years in Europe.<sup>297</sup> In doing so, the Commissioner ignored the evidence of the Gowers Review,<sup>298</sup> the E.U. commissioned IViR report<sup>299</sup> and the Commission’s own staff working paper on the European copyright framework.<sup>300</sup> The Commission proposal has been strongly supported by French president Nicholas Sarkozy, a big fan

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<sup>293</sup> *See id.*

<sup>294</sup> *See id.* at 131.

<sup>295</sup> *Id.* at 132.

<sup>296</sup> *Id.* at iii–ix.

<sup>297</sup> *See Performing Artists, supra* note 10.

<sup>298</sup> GOWERS, *supra* note 7, at 6.

<sup>299</sup> IViR REPORT, *supra* note 12, at 101.

<sup>300</sup> *See Review of EC Legal Framework, supra* note 235.

of sixties pop, and friend of Johnny Hallyday, one of France's best-known rock stars.<sup>301</sup> Mr. Sarkozy indicated that he would make copyright extension a priority of France's six-month turn at the European Union presidency, which started in July 2008.<sup>302</sup>

The reason for the proposed change to European law, according to Commissioner McCreevy is the disparity between the copyright protection afforded the composer, and the protection afforded the performer; "[it] is the performer who gives life to the composition and while most of us have no idea who wrote our favourite song—we can usually name the performer."<sup>303</sup> According to the press release of the announcement, Mr. McCreevy was particularly concerned about royalties for anonymous session musicians, rather than those for big-name featured artists.<sup>304</sup> Mr. McCreevy stated that, because many musicians start recording in their twenties, royalty income stops when they are in the most vulnerable period of their lives (retirement) and since life expectancy in the E.U. (seventy-five for men and eighty-one for women) means performers are living longer, they need their performers' rights income to continue into retirement.<sup>305</sup>

This argument conveniently ignores the issue noted by both Gowers and IViR that only a minority of musicians remain sufficiently popular to even earn royalties for the current fifty-year term, let alone seventy years or ninety-five years,<sup>306</sup> and in any case, most performers—especially anonymous session musicians—have often signed away any rights in their recordings or performances to record companies.<sup>307</sup> Thus, as a retirement program for musicians, extending the duration of performers' rights, would be ineffective for all but the most successful performers, who probably do not require it.

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<sup>301</sup> See Bremner, *supra* note 2.

<sup>302</sup> See *id.*

<sup>303</sup> See Performing Artists, *supra* note 10.

<sup>304</sup> *Id.*

<sup>305</sup> *Id.*

<sup>306</sup> See GOWERS, *supra* note 7, at 52 (discussing how most sound recordings make profit within first ten years of production).

<sup>307</sup> See IViR REPORT, *supra* note 12, at 121.



The difference between the rights of performers and composers is also discussed in the Gowers Review and the IViR Report. In the IViR Report it is noted that there are significant conceptual differences between the two types of actors. Composers are treated as creators by European law, because they assume more risk,<sup>308</sup> while performers, having no requirement to create original materials, have more in common with the owners of other industrial property rights.<sup>309</sup>

Gowers noted that the whole copyright bargain was about fairness, and the fairness most ignored was that of the bargain between the public, and creators and performers.<sup>310</sup> Gowers also pointed out that performers were very unlikely, because of contractual arrangements with recording companies, to see much benefit from any term increase.<sup>311</sup>

Both Gowers and the IViR Report concluded from this that the rights accorded to performers are probably already too long rather than too short.<sup>312</sup> It should be noted that performers also have the opportunity to exploit their celebrity status in other ways generally unavailable to composers (who, tellingly, as McCreevy pointed out, are often unknown to the general public).<sup>313</sup>

McCreevy also advanced the music industry argument that the shorter term for performers' rights limited the recording companies' ability to reap the benefits of their original investment in the recording,<sup>314</sup> a position which is contradicted by almost everyone who has considered it outside the music industry,<sup>315</sup> but which was raised once again by the music industry in their

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<sup>308</sup> See Towse, *supra* note 30, at 748.

<sup>309</sup> IViR REPORT, *supra* note 12, at 133, 134.

<sup>310</sup> See GOWERS, *supra* note 7, at 50 ("But the fairness argument applies to society as a whole. Copyright can be viewed as a 'contract' between rights owners and society for the purpose of incentivising creativity.").

<sup>311</sup> See *id.* at 50–51.

<sup>312</sup> See *id.* at 50 ("Economic evidence indicates that the length of protection for copyright works already far exceeds the incentives required to invest in new works."); IViR REPORT, *supra* note 12, at 101 ("[T]he existing terms of protection of related rights . . . are already very long.").

<sup>313</sup> See Performing Artists, *supra* note 10.

<sup>314</sup> See Commission Adopts Forward-Looking Package, *supra* note 228.

<sup>315</sup> See, e.g., GOWERS, *supra* note 7, at 52; IViR REPORT, *supra* note 12, at 113.

response to Taking Forward, the U.K. government consultation on the Gowers' recommendations.<sup>316</sup> McCreevy also, of course, mentioned that changing the law would bring European law in line with U.S. law,<sup>317</sup> without mentioning the important point that the U.S. law in question provided a term of protection which was anomalous internationally.<sup>318</sup>

Commissioner McCreevy dealt in his announcement with the familiar counterargument for consumers—that the proposed change to the law would increase prices. He said that studies showed that the price of sound recordings out of copyright “[wa]s not lower than [those] in copyright.”<sup>319</sup> The “studies” from which he derived this evidence were not made public, but the likely candidate is the Price Waterhouse Coopers study commissioned for the British Music Industry in order to respond to the Gowers Review.<sup>320</sup> This could hardly be called an independent study. While apparently finding no price differential between music out of copyright and that still protected, even Price Waterhouse Coopers cautioned that there were not many recordings in the public domain on which to base its findings.<sup>321</sup>

In several more clearly independent studies, researchers have found what would be expected, namely that the price of copyrighted works drops once copyright protection has expired.<sup>322</sup>

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<sup>316</sup> See U.K. INTELLECTUAL PROP. OFFICE FOR CREATIVITY & INNOVATION, TAKING FORWARD THE GOWERS REVIEW OF INTELLECTUAL PROPERTY 60, available at <http://www.ipo.gov.uk/consult-copyrightexceptions.pdf> (“It is, however, important to recall the finding from the OECD’s digital music report, that most artists are still supported by recording companies.”).

<sup>317</sup> David Cronin, *Proposed EU Copyright Term Extension Faces Vocal Opposition In Parliament*, INTELL. PROP. WATCH, Jan. 27, 2009, <http://www.ip-watch.org/weblog/2009/01/27/eu-copyright-term-extension-meets-vocal-opposition-in-parliament/>.

<sup>318</sup> See IVIR REPORT, *supra* note 12, at 132.

<sup>319</sup> See Commission Adopts Forward-Looking Package, *supra* note 228.

<sup>320</sup> Press Release, European Commission, Commission Proposal on a Directive for Term Extension Frequently Asked Questions (July 16, 2008), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/08/508> [hereinafter Commission Proposal on a Directive] (citing PRICE WATERHOUSE, THE IMPACT OF COPYRIGHT EXTENSION FOR SOUND RECORDINGS IN THE UK (2006)).

<sup>321</sup> See CTR. FOR INTELLECTUAL PROP. & INFO. LAW, *supra* note 55, at 43.

<sup>322</sup> See, e.g., Paul Heald, *Property Rights and the Efficient Exploitation of Copyrighted Works: An Empirical Analysis of Public Domain and Copyrighted Fiction Best Sellers* (2007), at 3, 7, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=955954](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=955954).

Gowers and the IViR Report both referred to studies showing that prices tended to decrease once copyright protection expired.<sup>323</sup>

The French apparently believe that support for an extension is rising in Europe and that, during their six month presidency of the European Union, they would be able to overcome British and German reluctance to extending the term of copyright.<sup>324</sup> On July 16, 2008, shortly after the beginning of the French Presidency, and to the delight of older European musicians, the Commission started the process of consultation on changing the law by releasing its proposal to “align the copyright term for performers with that applicable to authors.”<sup>325</sup> The proposal envisaged extending the term of protection from fifty to ninety-five years, although the extension would contain a use it or lose it provision so that rights would only be extended for work commercially released.<sup>326</sup> Commissioner McCreevy committed himself to ensuring performers maintained “a decent income and that there w[ould] be a European-based music industry in the years to come.”<sup>327</sup>

### C. Reaction to the Commission Proposal in Europe

Reaction to the Commission proposal from the British government, European academics and even some musicians, was swift. In a press release two days after the proposal was announced, U.K. government Minister of Intellectual Property, Baroness Delyth Morgan said: “Because copyright represents a monopoly we need to be very clear that the circumstances justify an extension. We will therefore need to consider these proposals

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<sup>323</sup> See GOWERS, *supra* note 7, at 55 fig. 4.4; IViR REPORT, *supra* note 12, at 113 (citing Stan J. Liebowitz, *What are the Consequences of the European Union Extending Copyright Length For Sound Recordings?* (Feb. 2006) (unpublished study), available at <http://www.ifpi.org/content/library/liebowitz-study-aug2007.pdf>).

<sup>324</sup> See Bremner, *supra* note 2.

<sup>325</sup> See Commission Adopts Forward-Looking Package, *supra* note 228.

<sup>326</sup> See Commission Proposal on a Directive, *supra* note 320; see also Dave Rowntree, *EU Strikes the Wrong Note on Copyright*, DAILY TELEGRAPH, July 17, 2008, available at <http://www.telegraph.co.uk/opinion/main.jhtml?xml=/opinion/2008/07/17/do1707.xml>.

<sup>327</sup> Commission Adopts Forward-Looking Package, *supra* note 228.

carefully to understand how they would work and what the benefits are likely to be.”<sup>328</sup>

A change in the E.U. law harmonizing copyright and related right protection across Europe will necessitate a change in U.K. law even though current U.K. government policy opposes an extension. The U.K. IPO had been seeking input from all stakeholders on the private copying extension recommended by Gowers.<sup>329</sup> Once the European proposal was made public, the IPO extended its deadline for consultation to allow for any comments on the E.U. proposal, reiterating that evidence from Gowers and other sources suggested that extending the term of protection would hurt both consumers and industry.<sup>330</sup>

In June 2008, fifty leading European copyright academics produced a more detailed critique of the Commission proposal described in Commissioner McCreevy’s February press release.<sup>331</sup> They sent their statement to the Commission on July 16, 2008, in order, they said, to assist in “rational policy making.”<sup>332</sup> Unfortunately, it arrived too late to have an effect on the Commission’s decision making since the Commission announced the process of consultation to amend E.U. law that same day.<sup>333</sup>

The Bournemouth University statement unequivocally recommended against any term extension. It reviewed all the available empirical data on the four main arguments it identified in favor of term extension: These were the usual economic and comparative arguments favored by the music industry, namely that older artists would benefit from it, that it would result in more sound recordings being made available to the public, that price would be unaffected, and that it would remove harmful trade

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<sup>328</sup> Press Release, U.K. IPO, UK-IPO Response to the European Commission’s Proposal to Extend the Term of Copyright Protection (July 18, 2008), *available at* <http://www.ipa.gov.uk/press/press-release/press-release-2008/press-release-20080718.htm> [hereinafter UK-IPO Response].

<sup>329</sup> See U.K. INTELLECTUAL PROP. OFFICE, *supra* note 213, at 5.

<sup>330</sup> See UK-IPO Response, *supra* note 328.

<sup>331</sup> Martin Kretschmer et al., *Creativity Stifled? A Joined Academic Statement on the Proposed Copyright Term Extension for Sound Recordings*, June 2008, *available at* <http://www.cippm.org.uk/images/Bournemouth%20Statement.pdf>.

<sup>332</sup> *Id.* at 2.

<sup>333</sup> See Commission Adopts Forward-Looking Package, *supra* note 228.

disparities between the European and U.S. markets.<sup>334</sup> For each of these arguments and citing academic studies, the Gowers Review and submissions to it, as well as the European Commission's own staff working paper, the academics found the evidence was clearly against the music industry.<sup>335</sup>

On the claim that Commissioner McCreevy made about term extension assisting older artists in their declining years, the academics pointed to evidence that "artists' earnings are primarily a matter of contract, not copyright."<sup>336</sup> Extending the term of related rights protection would simply provide a windfall for record companies, while providing little or no benefit to artists, who have often contracted their rights to their recording company in return for a lump sum payment.<sup>337</sup>

Concerning the supply of new music, the Bournemouth academics findings were that, "[a]ny serious empirical work that has been done on this issue, points in the direction of common sense." That is, musical compositions were more likely to be exploited once they were in the public domain, and a vibrant public domain helped, not hindered creativity.<sup>338</sup> For example, one study they cited found that music in the public domain was more often used in films than protected music.<sup>339</sup>

On the price issue, the academics noted that it was "preposterous" for recording companies to simultaneously claim that they needed term extension to boost revenue while arguing that it would have no effect on price, and they urged the Commission to seek "robust evidence" on this subject.<sup>340</sup>

The Bournemouth academics pointed out that the trade argument made by the music industries was really two arguments. The first was essentially that American artists had the comparative advantage of a better regulatory environment due to longer terms

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<sup>334</sup> Kretschmer et al., *supra* note 331, at 3–12.

<sup>335</sup> *Id.*

<sup>336</sup> *Id.* at 3.

<sup>337</sup> *Id.* at 4, 7.

<sup>338</sup> *Id.* at 6.

<sup>339</sup> *Id.*

<sup>340</sup> *Id.* at 8–9.

of copyright protection.<sup>341</sup> The second was the unrelated balance of payment issue and the suggestion that, because of the longer term, European copyright owners were remitting money to America.<sup>342</sup> The academics believed that the shorter term in Europe actually benefited Europeans in terms of creativity, “[i]n terms of comparative advantage, the shorter term gives Europe an edge in innovation.”<sup>343</sup> Also, since the U.S. provided reciprocity, commercial conditions were equal for players on both sides of the Atlantic.<sup>344</sup>

On the balance of payment issue the academics pointed out that given that four large multinationals with opaque accounting techniques controlled over 70% of global music,<sup>345</sup> it was difficult, if not impossible, to determine whether additional revenues would flow to or from Europe. Consequently, they suggested that the effects of a term reduction for related rights needed to be as thoroughly investigated by the Commission as the effects of a proposed extension, before making policy based on this argument.<sup>346</sup>

Only a few days after the Commission proposal was made public a group of some of the same copyright scholars who had drafted the Bournemouth Statement, published a letter in *The Times* proclaiming, “Copyright extension is the enemy of innovation.”<sup>347</sup> In their letter they pointed out that the Commission proposal would prevent culturally important sound recordings from the 1950s and 60s from entering the public domain for another forty-five years, while benefiting no one other than large music companies.<sup>348</sup> They also stressed that the proposal was counter to

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<sup>341</sup> *Id.* at 10.

<sup>342</sup> *Id.* at 11.

<sup>343</sup> *Id.* at 12

<sup>344</sup> *Id.* at 11

<sup>345</sup> *Id.*

<sup>346</sup> *Id.* at 12.

<sup>347</sup> Lionel Bently et al., Letter to the Editor, *Copyright Extension is the Enemy of Innovation*, TIMES ONLINE, July 21, 2008, at 17, available at <http://www.timesonline.co.uk/tol/comment/letters/article4374115.ece>.

<sup>348</sup> *Id.*

all independent external expertise on this issue, including the IViR Report, which was a study conducted for the Commission itself.<sup>349</sup>

In addition to academics from across Europe, even some musicians made known their opposition to the Commission's proposal. Writing in the British paper, *The Daily Telegraph*, Dave Rowntree, drummer with Blur, argued that the Commission proposal was a mistake that could have disastrous consequences for "access to our recorded heritage" and that confusing copyright law with contracts and pensions was not a good idea.<sup>350</sup> It was simply not true that any increased earnings would keep "starving artists" from poverty.<sup>351</sup> In common with others in this debate, he marveled that the Commission had apparently simply ignored all the analysis done by Gowers and the other independent reviewers and had "[thrown] out the economic evidence."<sup>352</sup>

Unfortunately, once again none of these arguments appear to have been heard in Europe. On February 12, 2009 the Legal Affairs Committee of the European Parliament approved the Commission proposal to amend the European Copyright Directive to increase the term of protection for sound recordings to ninety-five years.<sup>353</sup> In what might be interpreted as a sop to the many critics who have argued that any extension will primarily provide a windfall financial benefit recording companies and not performers, the press release of the proceedings notes that the committee introduced two additions to the original directive: a clause preventing music recording companies from using previous contractual agreements to deduct money from any additional royalties due to performers under the extension; and provision for a dedicated fund for session musicians to be paid for by recording companies out of "revenues gained from the proposed extension of

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<sup>349</sup> *Id.*

<sup>350</sup> See Rowntree, *supra* note 326.

<sup>351</sup> *Id.*

<sup>352</sup> *Id.*

<sup>353</sup> See Press Release, European Parliament, Music Copyright to be Extended to 95 Years (Feb. 11, 2009), available at [http://www.europarl.europa.eu/news/expert/infopress\\_page/058-48812-040-02-07-909-20090209IPR48791-09-02-2009-2009-false/default\\_en.htm](http://www.europarl.europa.eu/news/expert/infopress_page/058-48812-040-02-07-909-20090209IPR48791-09-02-2009-2009-false/default_en.htm) (detailing the Legal Affairs Committee's approval of the extension to a 95 year term for sound recordings).

copyright term.”<sup>354</sup> The proposed legislation is scheduled to be voted on by the European Parliament in March 2009, and must also be separately approved by the Council of Europe.<sup>355</sup>

#### V. LIKELY DEVELOPMENT OF LAW ON RELATED RIGHTS IN EUROPE AND THE GLOBAL DEBATE

As so many including Rowntree have pointed out, the European Commission proposal adopted by the Legal Affairs Committee ignores all the available evidence on the topic of term extension.<sup>356</sup> The Gowers Review and the IViR Report both provided detailed analyses of the effect on all stakeholders, not simply the music industry, of extending the term of protection for sound recordings. These reports both found that the only goal likely to be served by increasing the term of protection for sound recordings was an increase in profits for recording companies. They both also concluded that the other arguments used to justify an extension by the music industry, namely that it would provide money in royalties for older artists, that it would not increase prices, and that it was necessary to harmonize E.U. law with U.S. law, did not stand up to scrutiny. Both studies found that the consequences of a change to the law were more likely to be that music became more expensive and less available, thus decreasing opportunities for creativity and innovation by the next generation of musical talent.

It is hard to believe that any stakeholders other than the recording companies, and, perhaps, a few select, successful older musicians will see a benefit from the proposed change to European law. However, in the face of similar discontent in 1998, U.S. law was amended, ostensibly to bring it into line with European law.<sup>357</sup>

Unfortunately, it is hard to think of an instance in the recent history of copyright and related rights protection where the public domain has triumphed over the interests of rights holders. The

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<sup>354</sup> *Id.*

<sup>355</sup> *Id.*

<sup>356</sup> See Rowntree, *supra* note 326; see also Kreschmer et al., *supra* note 331, at 1.

<sup>357</sup> See Patry, *supra* note 48, at 930.



content industries have far greater lobbying power than those defending the public domain, and across the globe legislation has steadily increased protection for rights holders at the expense of the public domain.<sup>358</sup> Along the way there have been a few challenges, generally unsuccessful, to extensions of the law,<sup>359</sup> but under both treaties, and national laws rights have steadily been increased and extended.<sup>360</sup>

The European Commissioner argues that the proposal to extend the term of related rights in Europe is to ensure Europe's place in the "knowledge economy" by encouraging creativity.<sup>361</sup> However, creativity and innovation in Europe, and elsewhere, is far more likely to be encouraged by expanding the public domain so that artists can reinterpret and borrow themes without fear of litigation by rights holders. Innovation is less likely to come from increasing intellectual property rights, although this will increase the profits of current rights holders.

The globalization and digitization of the world economy have changed the economics of creativity, and some industries have been better than others at determining how to derive value from their product when new technologies allow it to be copied perfectly, many times over, and at minimal cost. So far, in the copyright sphere it has not been those who control copyrights and related rights, like recording companies, who have created new opportunities for exploiting their products in the digital economy. Successful services like iTunes, and applications that enable music to be played on cell phones or social networking sites, have been created by technology companies.<sup>362</sup>

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<sup>358</sup> See Copyright Term Extension Act of 1998, Pub. L. No.105-298, 112 Stat. 2827.

<sup>359</sup> See, e.g., *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (unsuccessful challenge to the Copyright Term Extension Act of 1998, which extended the U.S. copyright term to life of the author plus seventy years or ninety-five years for works made for hire).

<sup>360</sup> See, e.g., TRIPs Agreement, *supra* note 34 (substantially increasing minimum term of protection available to fifty years).

<sup>361</sup> See Commission Adopts Forward-Looking Package, *supra* note 228.

<sup>362</sup> Charles Haddad, *Apple's iTunes: Best of Show: The New Digital-Music Player, Part of a Plan to Make the Mac an Entertainment Hub, is Easier to Use Than its Many Competitors*, BUS. WK., Jan. 24, 2001, available at [http://www.businessweek.com/bwdaily/dnflash/jan2001/nf20010124\\_897.htm](http://www.businessweek.com/bwdaily/dnflash/jan2001/nf20010124_897.htm) (noting that iTunes was developed by Jeff Robbin, who was hired away from Casady and Greene to develop iTunes for Apple).

The music industry is arguing for extension to its already long, existing rights because it has not, so far, found a successful alternative business model in this new economy and wants to derive as much value as possible from its existing, failing, business model. It has been successful in courts and legislatures in the U.S. in obtaining greater rights and has now concentrated its attention on extending the term of related rights protection in Europe.

The European Commission and Parliament are in a real position to halt the record company's lobbyists continued, unwarranted, diminution of the public domain, and influence the global debate about the optimum strength of copyright and related rights protection in the new economy. Unfortunately the current E.U. strategy appears to be to carry out the music industry's bidding and increasing the term of protection without regard to the evidence. There are two major independent analyses at European lawmakers' disposal, both of which clearly find that term extension is likely to harm rather than help Europe's position as a center of innovation in the global economy.

The European Union has the power to send a message to the music industry lobby that it has more than sufficient legal protection in Europe and that policymakers in Europe understand that the real innovation in the digital and global economy will come, not from outdated models like that of the record companies, but from new models which embrace the new possibilities for recording and distributing music, and are already being developed by the technology sector. These industries are not served by, and have not sought or supported an extension of the term of related rights.<sup>363</sup> It is hard to decrease legal protections but it is clear from all independent analyses on this topic that the music industry already has a greater degree of protection than is warranted by the evidence. The E.U. should consider very carefully before providing yet greater rights.

The Gowers Review, the IViR, the comprehensive U.K. IPO consultation on the Gowers Review recommendations, and the European Commission proposal all considered carefully the available evidence on term extension. The reports included

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<sup>363</sup> See IViR REPORT, *supra* note 12, at 83.

significant analysis, based on review of the research and extensive consultations with many stakeholders, and each report clearly concluded that content owners and distributors such as recording companies currently enjoyed rights that were already far more extensive than necessary to encourage creativity. The music industries' arguments in favor of even greater rights were weak and inconsistent, and debunked in each successive independent report.

Every serious consideration of the issues found that the price of music would be likely to increase, consumer choice would be likely to diminish, and little, if any, extra money would be provided to artists whose rights were generally more a matter of contract rather than intellectual property law. In fact, it is agreed by almost all commentators outside the music industry that the main beneficiaries of any change in the law in Europe would be music recording companies.

Despite the evidence, the E.U. has proposed extending the term of protection from fifty to ninety-five years. Any change to the legal system should only be effected if there is significant benefit to the public. Intellectual property laws are intended to provide a balance between the interests of the public and rights owners. Extending the term of protection for related rights to ninety-five years is tantamount to providing for a perpetual copyright term, and essentially eliminates all balance in favor of the interests of rights holders. It is to be hoped that the E.U. Commission and Parliament will review the evidence once again and listen to feedback on its proposal from those outside the music industry before approving any changes to E.U. law.

#### CONCLUSION

The E.U. currently has an historic chance to acknowledge that copyright and related-right owners have been extremely successful lobbyists, and have been granted rights over the last few decades far beyond those necessary to foster creativity, skewing the balancing act that copyright law is supposed to perform, clearly away from the public domain. These extensive rights are likely to eventually become a disservice even to rights holders because such

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strong rights will tend to slow innovation and restrict creativity, something likely to be particularly important in the digital age. A refusal to further expand its IP rights might even cause the music industry to change its increasingly outdated business model, and find new ways to encourage innovation in music and the arts.