

Question Q235

National Group: United States of America

Title: Term of copyright protection

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Questions

I. Analysis of current law

- 1) Have the Berne Convention amended in 1979 (BC), TRIPS 1994 and the WIPO Copyright Treaty (WCT) been ratified by your countries? Please provide your answer in relation to each individual international instrument, and provide dates and details of ratification.

The United States (US) did not join the Berne Convention until the late 1980s. President Ronald Reagan signed the Berne Convention Implementation Act of 1988 on October 31, 1988, which conformed the 1976 Copyright Act to the Berne Convention's requirements, enabling the United States to join the Convention. Official accession was made on November 16, 1988, and the Implementation Act was in force on March 1, 1989.

On December 15, 1993, President Bill Clinton submitted to Congress notification of his intent to enter into the trade agreements resulting from the Uruguay Round of multilateral trade negotiations. On April 15, 1994, the United States signed the Final Act, and this Act included the Trade-Related Aspects of Intellectual Property Rights (TRIPS). On December 8, 1994, Congress passed the Uruguay Round Agreements Act, thus implementing the TRIPS agreement of 1994.

The US became a signatory of the WIPO Copyright Treaty (WCT) on April 12, 1997, and ratified on September 14, 1999. The WCT was implemented by the WIPO Copyright and Performances and Phonographs Treaties Implementation Act as part of the Digital Millennium Copyright Act (DMCA), passed on October 12, 1998, signed into law by President Bill Clinton on October 28, 1998, and in force in the US on March 6, 2002.

- 2) Have the minimal obligations in respect of Term of protection of copyright imposed by these international instruments been implemented in your countries' laws? By means of which legislation? Please respond in relation to each of RBC, TRIPS and WCT.
- a) If the answer is no please specify (i) which obligations have not been implemented (ii) give any reasons why this has not proved possible and (iii) whether there are any current proposals for their implementation.

The minimal obligations with respect to Term of protection of copyright have been implemented in the US for all of the above international instruments (RBC, TRIPS and WCT) as of the 1976 Copyright Act revision, see Question 4, *infra*.

- 3) Do your laws provide for TRIPS + obligations with respect to the Term of protection? Please provide details of any legislation that imposes this, and specify whether it is Domestic or Regional legislation?

Yes, the US Sonny Bono Copyright Term Extension Act of 1998 (CTEA) retroactively increased term to life of author plus 70 years in the United States, from life of author plus 50 years, see Question 4, *infra*.

- 4) Have the Terms moved in an upward direction with ensuing revisions of your domestic laws, or as a result of any obligations derived from regional laws? Please provide details. Are there any current proposals for continued increases in Term of protection generally, or in relation to any specified categories of work? Please specify.

Yes, United States domestic law has in fact increased copyright terms. The 1976 Copyright Act revision provided for a copyright protection term of the author's life plus 50 years in anticipation of one day ratifying the Berne Convention. The United States enacted the Copyright Term Extension Act (CTEA) in 1998, which provides the term is the author's life plus a maximum of 70 years.¹ The United States has been instrumental in driving the upward movement of copyright terms both regionally and in its bilateral free trade agreements.² Additionally, the U.S. is actively participating in negotiations of the Trans-Pacific Partnership Agreement (TPP),³ which in a leaked draft, indicates an additional copyright term extension where the term would consist of the author's life plus at least 70 years – thus leaving significant room for additional upward movement of term protection.⁴

- 5) What is the existing rationale/justification under your laws for the existing Terms of copyright protection? In particular, is the rationale/justification a merely economical one or are other reasons given? Have there been/is there currently, any academic/judicial or general criticism of this rationale? Are you aware of any economical, sociological or other studies justifying or criticizing the current Term?

There are several justifications and underlying policy concerns cited for the increase of copyright term protection in the United States. First it is said that longer terms provide an incentive to create and allow for considerable progress in the useful arts. Additionally, term extensions are necessary due to longer life expectancy, the need for greater international reciprocity, the need to conform to the prevailing world wide

¹ 17 U.S.C. § 302.

² See Alexander Koff, Laura M. Baughman, Joseph F. Francois, & Christine A. McDaniel, *Study on the Impact of "TRIPS Plus" Free Trade Agreements*, International Intellectual Property Institute, Aug. 10, 2011.

³ United States Trade Representatives, *Trans-Pacific Partnership: 16th Round of TPP Negotiations Set for Singapore—March 4-13, 2013*, <http://www.ustr.gov/tpp>.

⁴ Trans-Pacific Partnership Agreement Draft, *Intellectual Property Rights Chapter*, Art. 4, ¶ 5, Feb. 2011.

standard, the failure of previous copyright terms to provide fair economic return for authors and the failure of the previous copyright scheme to keep pace with the increased commercial life of copyrighted works resulting from the rapid growth in communications media.⁵

There has been considerable academic criticism of the justifications provided in support of term extensions, specifically that there is little evidence that longer terms spurs greater creative productivity. Other criticism is that the value of the Public Domain is significantly decreased when access to certain works is denied nearly indefinitely. In 2003, the United States Supreme Court, in *Eldred v. Ashcroft*, upheld the constitutionality of the CTEA, holding that the CTEA does not exceed Congress' authority under the Copyright Act but that its mandate was limited "[t]o promote the Progress of Science and useful Arts."⁶ Further criticism based on sociological and economic studies target extended copyright terms, indicating that CTEA's 20 year extension provides no additional social incentive to create, and very little economic advantage to fuel creativity.⁷

II. Proposals for harmonisation

Groups are invited to put forward proposals for the adoption of harmonised rules in relation to Term of copyright protection. More specifically, the Groups are invited to answer the following questions:

- 6) In your opinion do the current Terms of copyright protection provide "adequate" standards of protection? Is this protection adequate for all interested parties i.e. authors/commercial providers/consumers? Please give reasons for your answer.

It is the consensus of this Committee that the current terms of copyright protection are unnecessarily weighted in favor of the copyright holder and are inadequate to protect the interests of the public.

The determination of adequate copyright protection involves a difficult balance between the interests of authors in the control and exploitation of their writings on the one hand, and society's competing interest in the free flow of ideas, information, and commerce on the other hand.⁸ In its Report accompanying the comprehensive revision of the Copyright Act in 1909, the Judiciary Committee of the House of Representatives explained this balance in enacting a copyright law, "Congress must consider . . . two questions: First, how much will the legislation stimulate the producer and so benefit the public; and, second, how much will the monopoly granted be detrimental to the public?"⁹ The immediate effect of copyright law is to secure a fair return for an author's creative labor, but the ultimate aim is to stimulate artistic creativity for the general public good.¹⁰

This Committee determined that the current terms of copyright protection are inadequate to serve the public interest from economic studies of the effects of the Copyright Term Extension Act of 1998, (CTEA), a twenty-year extension of the

⁵ Copyright Extension, *Senator Orrin Hatch's Introduction of The Copyright Term Extension Act of 1997*, <http://www.copyrightextension.com/page04.html>; Copyright Extension, *Senator Dianne Feinstein's Statement before Congress United States Senate, March 20, 1997*, <http://www.copyrightextension.com/page06.html>.

⁶ *Eldred v. Ashcroft*, 537 U.S. 186 (2003).

⁷ Arishalom Tor & Dotan Oliar, *Incentives to Create Under a "Lifetime-Plus-Year" Copyright Duration: Lessons From a Behavioral Economic Analysis for Eldred Ashcroft*, 36 Loy. L.A. L. Rev. 437, 490-491 (2002).

⁸ *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984).

⁹ H. R. Rep. No. 2222, 60th Cong., 2d Sess., 7 (1909).

¹⁰ *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

copyright term for existing and future works.¹¹ Every copyright statute imposes upon the public costs in the form of royalties that may be higher than necessary to evoke creation of the relevant work, and a requirement that one seeking to reproduce a copyrighted work must obtain the copyright holder's permission. The first of these costs translates into higher prices that will potentially restrict the dissemination of the work. The second translates into search costs that can prevent reproduction even where the copyright holder has no objection.¹² In an ideal circumstance, these costs are offset by the incentives to create. The current term of protection has little to no effect on the incentives in place prior to the CTEA yet serves to increase costs on the public.¹³ Furthermore, these costs are often imposed on works that no longer have commercial value.¹⁴

- 7) Do you think that there is a need for an upper limit on Term in international treaties? Please provide your reasons.

It is the consensus of this Committee that there is a need for an upper limit on term of copyright protection, as any further term extension will not advance the purpose of copyright law. Also, as term extensions in the United States have followed term extensions in Europe to bridge perceived inequities of disparate copyright term, this Committee believes that an international treaty is best suited to provide and upper limit on term.

A longer term for new works provides some increase in anticipated compensation for an author, but because the additional compensation occurs many decades in the future, its present value is small.¹⁵ This compensation offers at most a very small additional incentive for an economically minded author of a new work.¹⁶ In fact, the current copyright term effectively provides as much present value and incentive to create new work as an infinite copyright term.¹⁷ As discussed in Question 6, *supra*, extensions in copyright term for new works will further increase costs to the public that outweigh any benefits to the copyright holder.

Also, the most recent term extension, the Copyright Term Extension Act of 1998, (CTEA), retroactively extends the copyright term for *existing* works.¹⁸ Term extension for existing works makes no significant contribution to an author's economic incentive to create, since in this case the additional compensation was granted after the relevant investment had already been made. Any windfall to the copyright holder

¹¹ Copyright Term Extension Act of 1998, Pub. L. No. 105-298, 112 Stat. 2827.

¹² *See, e.g.*, Brief of the American Association of Law Libraries as Amici Curiae 20 in Support of Petitioners, *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (No. 01-618)(The clearance process associated with creating an electronic archive, Documenting the American South, "consumed approximately a dozen man-hours" per work), Brief for College Art Association *et al.* as Amici Curiae 7-13 in Support of Petitioners, *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (No. 01-618)(Describes the abandonment of efforts to include, e.g., campaign songs, film excerpts, and documents exposing "horrors of the chain gang" in historical works or archives and provides examples in which copyright holders have used their of copyright to try to control the content of historical or cultural works).

¹³ *See* Brief of George A. Akerlof *et al.* as Amici Curiae in Support of Petitioners, *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (No. 01-618)(Seventeen economists argued the extension from 50 years after life to 70 years after life provided a "less than 1%" increased incentive from the pre-CTEA terms of protection).

¹⁴ Edward Rappaport, *Copyright Term Extension: Estimating the Economic Values*, Congressional Research Service Report 98-144E (1998)(Only about 2% of copyrights between 55 and 75 years old retain commercial value—i.e., still generate royalties after that time. Additionally, of renewed copyrights, only 11% of copyrights in books, 12% in musical works, and 26% in motion pictures had some commercial value in 1998).

¹⁵ Brief of George A. Akerlof *et al.* as Amici Curiae 2 in Support of Petitioners, *Eldred v. Ashcroft*, 537 U.S. 186 (2003).

¹⁶ *Id.*

¹⁷ *Id.* at 8.

¹⁸ Copyright Term Extension Act of 1998, Pub. L. No. 105-298, 112 Stat. 2827.

comes as an added cost to the public. Further, the cost of term extension in existing works is much larger in present value than the cost of term extension in new works, especially for works whose copyrights would soon or already have expired but for the retroactively applied term extension.

Despite an imbalance in favor of copyright holders at the expense of the public, term of copyright protection has increased. The Berne Copyright Convention is the major international treaty relating to protection of copyright subject matter and adopted a copyright term of life of the author plus fifty years in 1908. In the United States, the 1976 Copyright Act revision provided for a copyright protection term of the author's life plus 50 years in anticipation of one day ratifying the Berne Convention.¹⁹ The European Union adopted a Directive on Copyright Duration, effective July 1, 1995, which generally set a copyright term of life-plus-70 for personal works, 70 years for works copyrighted by legal persons, and 50 years for related rights protection for the rights of producers of motion pictures and sound recordings. In direct response to the European extension, the United States enacted the CTEA in 1998,²⁰ which also provides the term is the author's life plus a maximum of 70 years.²¹ And as discussed in Question 4, *supra*, there is suggestion that the United States is negotiating an additional copyright term extension.

Accordingly, there is reason to believe that Congress and the European Union essentially employs "a one way ratchet, increasing the subject matter, scope, and duration of copyright with every amendment."²² Any extension, however, further contravenes the purposes of copyright protection. Thus, the evidence suggests the term of copyright protection will continue to extend in response to national extensions unless an international treaty sets out an upper limit to protect the public.

- 8) Would you like to see the Terms of copyright protection changed? If yes should the changes take place within the confines of the existing international treaties? Please give your reasons.

It is the consensus of the Committee that the current copyright term of life of the creator, plus seventy years, has little correlation to economic value or commercial life of an original work as uniformly applied across all classes of works. While it is preferable to create a consistent and harmonized set of universally applied standards for copyright law implemented through international treaties, the United States is a leader in creative capital and its economy is increasing dependent upon the acquisition and protection of copyrighted materials. Consequently, national interests in having an efficient system of copyright protection may outweigh the delays in obtaining a universal, international framework.

Copyright laws promote creativity. Over the past 200 years, copyright laws have been periodically changed to increase the term of the creator's exclusive rights, typically under the premise that, if some copyright protection is good, more must be better. It

¹⁹ The United States became a member of the Berne Convention on March 1, 1989.

²⁰ Proponents of extending the copyright term an additional twenty years by legislation in the 105th Congress, which resulted in the CTEA, made two principal arguments: 1) that economic fairness to the heirs of authors justified the 20 year increase because longevity has increased since the "life-plus-50" standard was first adopted in 1908; and 2) that the United States must match the recent 20-year extension of the copyright term adopted by the European Union in order to avoid application of the rule of the shorter term for musical works and other personal works and to enhance the bargaining position of the U.S. Government and U.S. copyright industries in international trade negotiations affecting intellectual property rights. Dorothy Schrader, *Copyright Term Extension and Music Licensing: Analysis of Sonny Bono Copyright Term Extension Act and Fairness in Music Licensing Act*, P.L. 105-298, Congressional Research Service Report 98-904A (1998).

²¹ 17 U.S.C. § 302.

²² Jessica Litman, *War Stories*, 20 *Cardozo Arts & Ent. L.J.* 337, 344 (2002).

has been argued that longer terms for copyright protection will marginally incentivize the creative class to produce more original works. However, recent scholarly work has called into question whether this proposition.²³

There exists a countervailing purpose of copyright law to increase the distribution of and access to creative works to inspire others to independently create their own new works. Increases in the term of copyrights are thought to increase social and transactions costs of creating expressive new works.

It is therefore desirable to have a term that allows creators to capture the substantial share of the economic value of their works and then dedicates the material to the public domain. This balance was recognized in the Constitution's insistence that copyrights be protected only for "limited Times."

- 9) If your answer to 8 is yes and you would like to see the current Term of protection changed, please indicate whether changes should take place in relation to all categories of work, or only in relation to specific categories of work. If only in relation to specific categories of work, please specify which categories of work, and give your reasons for this choice.

It is the consensus of the Working Committee that the term of protection of copyrighted works remain consistent in relation to all categories of works. The economic value and public benefit of individual creative works vary substantially. Moreover, the commercial life of a copyrighted work may span weeks or centuries. Sales of musical performances by popular musicians are frequently counted in the millions. However, a classic or popular song from one's youth may have substantial commercial value decades later by appealing to nostalgic tastes of a targeted consumer base. Software code may become obsolete with advances in computer processors and operation systems. However, an opportunistic photograph or movie production may capture the hearts or minds of a generation.

In view of the substantial variance in the economic value and commercial life of creative works, the consensus of the committee is for the adoption of a copyright system which includes a schedule of periodic renewals of or maintenance fees for copyrights, up to a maximum term, can be devised and uniformly applied across all classes of works. Initial application fees in such a system should be modest to encourage registration of creative works. The renewal or maintenance fees may be successively increased for each subsequent term or portion thereof. A similar system of maintenance fees presently exists in the patent laws of many countries. Such a renewal based system would shift the determination to the owners of original works whether such works retained sufficient economic value to continue the costs of copyright protection throughout the life of the work. Adopting a uniform system would also reduce political efforts and decisions to favour one category of works over another as well as unintended consequences as media and society may rapidly change over the length of present copyright terms.

- 10) Please list the factors or criteria that should in your view be used to arrive upon the optimum Term of copyright protection for any specific work, or in general. What in your opinions would this optimum Term(s) be?

It is the consensus of the Working Committee that the factors or criteria that should be used to arrive upon the optimal term of copyright protection include the following:

- Economic value of the creative work

²³ See, Raymond Shih Ray Ku, et al., *Does Copyright Law Promote Creativity? An Empirical Analysis of Copyright's Bounty*, 62 Vand. L. R., 1669 (2009).

- Social or public benefit of the creative work
- Commercial life of the creative work
- Costs of producing of the work
- Uncertainty in the expected success of the work
- The costs of distribution of the work

It is the consensus of the Committee that a series of renewable terms of between 10 and 14 years up to a maximum of 70 years would create a more optimal copyright system than currently exists in the United States.