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CHAPTER SIX

LIMITS ON THE DURATION OF COPYRIGHT: THEORIES AND PRACTICE

TYLER T. OCHIOA

SUMMARY

The question of how long a copyright should last has troubled scholars and policymakers ever since the first copyright statute was enacted. The controversy continues because there are two divergent views concerning the basic rationale underlying copyright law. Under the natural rights view, the author of a literary or artistic work has a natural right to profit from the fruits of his or her artistic labor. The logical extreme of the natural rights view is that copyright should be perpetual and is limited in duration only because of certain practical considerations. Under the utilitarian view, however, copyright exists primarily to encourage the creation and distribution of new literary and artistic works. With an exclusive right, a publisher can charge a higher-than-efficient price, earning excess profits that are used to compensate the author. Because the higher price is inefficient and contrary to the public interest in the long run, copyrights should last only as long as is necessary to accomplish their incentive function.

Historically, copyright terms have consistently increased over time, as common-law countries that initially adopted the utilitarian view have moved closer to the natural rights view in the interests of international harmonization. This increase is consistent with public choice theory, which posits that when the benefits of a law are concentrated but the costs of that law are diffuse, a small well-focused interest group will usually succeed in obtaining passage of the law, even if it does not benefit society as a whole.

How long should a copyright last? This question has troubled scholars and policymakers ever since the first copyright statute was enacted in England in 1710 and continues to do so today. The controversy continues because of fundamental differences of opinion concerning the basic philosophy and purposes of copyright law. As explained below, there are two principal schools of thought concerning the rationale for and purposes underlying copyright law: the utilitarian view and the natural rights view. While these alternative justifications for copyright often work in harmony and lead to similar public policy prescriptions, in the area of copyright duration they are in conflict and lead to diametrically opposed policy recommendations.

1. THEORIES OF COPYRIGHT PROTECTION

Copyright as a Natural Right

Under the natural rights view, the author or creator of a new literary or artistic work has a natural right to profit from the fruits of his or her artistic labor. The natural rights view finds support in the writings of John Locke, who famously posited that property results from the mixture of a person's labor with anything appropriated from the general state of nature (Locke 1988, 287–89). The application of Locke's theory to literary property was stated eloquently by William W. Ellsworth, speaking for the House Judiciary Committee in 1830:

Upon the first principles of proprietorship in property, an author has an exclusive and perpetual right, in preference to any other, to the fruits of his labor.... If labor and effort in producing what before was not possessed or known, will give title, then the literary man has title, perfect and absolute, and should have his reward: he writes and he labors as assiduously as does the mechanic or husbandman. The scholar, who secludes himself, and wastes his life, and often his property, to enlighten the world, has the best right to the profits of those labors. (Gales and Seton 1831, 7: cxx).

This view also finds support in the Universal Declaration of Human Rights, which states that "Everyone has the right to the protections of the moral and material interests resulting from any scientific, literary or artistic production of which he [or she] is the author" (Art. 27(2)).

The logical extreme of the natural rights view is that the duration of copyright should be perpetual. Only a handful of countries, however, have ever enacted a perpetual copyright law, and most of those eventually thought better of it and restricted the term of copyright.¹ There are a number of reasons why copyright is limited in time, even in countries that generally accept the natural rights view. First, legal recognition of property rights is based in part on the economic efficiency of exclusive ownership: common ownership of tangible property leads to the so-called "tragedy of the commons" in which the asset is depleted by overuse. Unlike tangible property, however, intangible works of authorship are "nonrivalrous" in nature and can be possessed by many individuals simultaneously without restricting the possession of oth-

¹ See, e.g., Law of May 27, 1927, Arts. 15(1) & 36 (Portugal). This law was repealed and replaced with a life-plus-50-years term in 1985. Law No. 45/85 of Sept. 17, 1985, Art. 31 (Portugal).

ers and without diminishing the value of the asset (Yen 1999, 550–53; Lemley 2005, 1050–52). As a result, for intangible property, greater net economic efficiency may be achieved by moderating the natural rights view.² Second, after a period of time, it often becomes difficult to identify, locate, and negotiate with all of the heirs and assignees who have a share of the copyright, meaning that many otherwise productive uses of the work will not be realized because of transactions costs (Ricketson 1992, 766; Dietz 1978, 161).³ Third, there is the possibility that an author's heirs will try to suppress works of which they do not approve or will license the works only with unreasonably restrictive conditions that will harm the public's use and enjoyment of the work (Ricketson 1992, 767–68). For all of these reasons, there is a public interest in allowing unrestricted public access to and use of an intangible work of authorship after a limited period.

The Utilitarian View of Copyright

Under the utilitarian view, copyright is an exception to freedom of expression that exists primarily for the benefit of the public, in order to encourage the creation and distribution of new literary and artistic works. Without copyright, copiers would always be able to undercut the initial publisher's price because they have not had to bear the fixed cost of producing the work. Publishers would therefore be unwilling to pay authors for the creation of new works, and only authors who had other sources of income could afford to write. By eliminating competition from free-riding copiers, copyright enables publishers to charge more than the efficient marginal price, giving them profits from which to compensate the author (Lemley 2005, 1054–55; Landes and Posner 1989). In the words of Thomas Babington Macaulay, speaking in the House of Commons in 1841:

The principle of copyright is this. It is a tax on readers for the purpose of giving a bounty to writers. The tax is an exceedingly bad one; it is a tax on one of the most innocent and salutary of human pleasures.... I admit, however, the necessity of giving a bounty to genius and learning.

² Other scholars reach the same conclusion using natural rights philosophy, criticizing the view that natural rights inevitably lead to perpetual copyright as "superficial" (Yen 1990, 554–557).

³ Empirical support for this concern can be found in studies concerning so-called "orphan works," that is, those works for which a copyright owner cannot be located despite a diligent search. (Register of Copyrights 2006, 26–34; Vetulani 2008, 7–8).

In order to give such a bounty, I willingly submit even to this severe and burdensome tax. (Macaulay 1853, 394)

But because this higher price is by definition inefficient, exclusivity should be granted only to the extent necessary to encourage the initial creation and distribution of the work, and the work should enter the public domain as soon as possible. Thus, in Macaulay's words:

The advantages arising from a system of copyright are obvious. It is desirable that we should have a supply of good books; we cannot have such a supply unless men of letters are liberally remunerated: and the least objectionable way of remunerating them is by means of copyright.... [But] Copyright is monopoly, and produces all the effects which the general voice of mankind attributes to monopoly.... [T]he effect of monopoly generally is to make articles scarce, to make them dear, and to make them bad.... Thus, then, stands the case. It is good, that authors should be remunerated; and the least objectionable way of remunerating them is by a monopoly. Yet monopoly is an evil. For the sake of the good we must submit to this evil; but the evil ought not to last one day longer than is necessary for the purpose of securing the good. (Id., 390–92).

Of course, determining exactly what period of copyright is necessary to encourage the creation and distribution of the desired number of new works of authorship is a daunting task. At one extreme, Stephen Breyer (now an Associate Justice on the U.S. Supreme Court) once argued that the lead time necessary for a free-rider to duplicate a published book was sufficiently long that copyright might not even be necessary to encourage publishers to make an initial investment in producing the work (Breyer 1970, 299–302, 309–13; see also Tyerman 1971; Breyer 1972). Although this argument breaks down for works initially distributed in digital form (which are easily copied), the fact that publishers make investment decisions using very short time horizons nonetheless suggests that relatively short terms of copyright would be sufficient to encourage publishers to invest in distributing a copyrighted work (Breyer 1970, 325).

At the other extreme, William Landes and Richard Posner have questioned the basic assumption that works of authorship in the public domain can be freely copied without losing their value. They posit that “congestion externalities” exist, such that overexposure to a work will cause consumers to value it less, whereas wise management of a work over time will help it retain its value (Landes and Posner 2003, 484–88). Accordingly, while they agree that a relatively short fixed term (about 20 years) is a sufficient incentive for most works, they

would allow copyrights to be renewed indefinitely for successive periods (Id., 517–18). Other scholars, however, dispute both the existence of congestion externalities and the belief that continued private management of a work benefits the public (Karjala 2006; Lemley 2004).

But even if short terms of copyright are sufficient to encourage publishers to distribute new works, they may not be sufficient to encourage enough authors to create new works. While it is undoubtedly true that some authors would create new works even if no copyright protection were provided, few would dispute that copyright encourages more people to become authors than would otherwise be the case. Ideally, we would like a term of copyright that is sufficient to enable an author to devote himself or herself to writing (or painting or composing) as a full-time profession (Guinan 1957, 74). This may include some provision for copyright to endure after the death of the author, as there is anecdotal evidence that authors are motivated by the need to provide for their heirs (See e.g. Brylawski and Goldman 1976, J116–17, J201). On the other hand, long terms of copyright may encourage a successful author to retire, instead of devoting himself or herself to further creative activity. In addition, economists agree that future benefits must be significantly discounted to take account of the time value of money, so that the prospect of earning additional royalties in the distant future may provide little motivation for the creation of new works in the present (Akerloff et al. 2002, 5–7, 23).

In the face of such disagreements in economic theory and lacking sufficient empirical data concerning the behavior of authors and publishers, we may be left with little more than gut feelings in deciding what the appropriate term of copyright should be. Accordingly, the behavior of legislators and interest groups takes on added importance in explaining how copyright terms are established in practice.

Public Choice Theory

Public choice theory is a branch of economics that applies game theory and decision theory to government action. One of the tenets of public choice theory is that because individuals tend to act rationally in their own self-interest, they will act to try to influence the legislature only if the perceived benefit to be gained is greater than the cost to the individual. The result is that a small interest group that has a lot of money at stake in a particular bill will expend more resources and will generally be more effective in lobbying the legislature than will

the general public, for whom the cost of the bill on an individual basis may be very small (Olson 1965; Bard and Kurlantzick 1999, 216–28; Lessig 2004, 216–18).

Public choice theory works very well in explaining how decisions concerning the duration of copyright are made. Consider, for example, the Sonny Bono Copyright Term Extension Act of 1998 (CTEA), which added 20 years to the terms of all existing and future copyrights in the United States.⁴ It was estimated that the aggregate amount of royalties that would flow to copyright owners from extending copyright terms by 20 years was approximately \$317 million (Rappaport 1998, 16). This works out to about \$2.58 per individual voter.⁵ But the benefits of that extension would accrue largely to a handful of powerful media corporations and a small number of heirs of very famous authors. Thus, it is rational for a large media company to spend millions of dollars lobbying for copyright term extension (because the benefit it would receive is several times greater), but it is also rational for the individual voter to remain ignorant of the issue. As a result, Congress disproportionately heard about the costs and benefits of the law from copyright owners, and the CTEA passed by a substantial margin, notwithstanding the fact that most academic commentators believed that it represented bad public policy (See e.g., Bard and Kurlantzick 1999; Karjala 1998; Lessig 2004, 218, 292–93).

Public choice theory helps explain why the scope of copyright protection and the duration of copyright terms have steadily increased during the past three centuries and are rarely, if ever, diminished. In the rest of this chapter, we will examine how the duration of copyright terms has increased over time and summarize the current state of the law regarding duration. Before doing so, however, it may be helpful to discuss some international differences in the general attitude toward the foregoing theories of copyright protection.

An International Perspective

As a general matter, common-law countries have proceeded from the view that copyright exists primarily to serve the public benefit, while civil law countries have historically placed a greater emphasis on the

⁴ P.L. No. 105–298, Title I, 112 Stat. 2827.

⁵ According to the U.S. Census Bureau, there were about 123 million registered voters in 1998 (the year the CTEA was enacted). (Bureau of the Census 2000, 3). If calculated on the basis of the estimated 198 million people of voting age, the amount per person works out to about \$1.60 per person.

natural rights of the author. This is apparent in the very language used to describe the law: while in common-law countries the preferred term is "copyright," in most civil law countries the more accurate translation in English is "authors' rights."⁶ It is also apparent in the greater emphasis that civil law countries place on the "moral rights" of the author. In most countries, in addition to the economic rights enjoyed by the author, which can be assigned in exchange for monetary reward, the author also enjoys an inalienable right to control certain aspects of the public presentation of his or her work. Thus, for example, Article 6*bis* of the Berne Convention requires member nations to recognize the right of an author "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."⁷

By contrast, while natural rights theories played a role in the development of copyright in Anglo-American law, it is clear that the primary justification for copyright in these common-law countries was a utilitarian rationale. For example, the Patent and Copyright Clause of the U.S. Constitution provides that "Congress shall have Power... 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."⁸ The parallel construction of the Clause indicates that copyrights are granted to "authors" for their "writings" in order to promote the progress of "science" (broadly meaning "knowledge" in the language of the eighteenth century), while patents are granted to "inventors" for their "discoveries" in order to promote the progress of the "useful Arts" (Walterscheid 2002, 11-12, 115-33).⁹ Thus, copyrights exist to promote knowledge by encouraging the creation and publication of new works.¹⁰ Both patents and copyrights, however, may be granted only "for limited Times," a restriction imposed in order to prevent the abuse of monopoly power that had existed in England prior to the Statute of Monopolies (which limited the duration of patents) and the Statute of Anne (which limited the duration of copyrights) (Ochoa and Rose 2002). In so doing, the Clause not only

⁶ In French, *droit d'auteur*; in German, *Urheberrecht*; in Spanish, *derecho de autor*.

⁷ Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, revised at Paris, July 24, 1971, art. 6*bis*, S. Treaty Doc. 99-27, 1161 U.N.T.S. 30 [hereinafter Berne Convention].

⁸ U.S. Const., Art. I, § 8, cl. 8.

⁹ On the meaning of the word "Progress," see Pollack 2001, 794-809.

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

indicates that copyright should last no longer than necessary, but it also endorses the view that the progress of knowledge is best served by the creation of a “public domain,” a body of works whose copyrights have expired and which can be freely copied by anyone (Walterschied 2002, 265–77; Ochoa 2003; Litman 1990).¹¹

Despite these differences between nations concerning the principal rationale for copyright protection, it is the case that something approaching an international consensus has emerged concerning the basic term of copyright in literary and artistic works. The following history of the development of copyright terms demonstrates how, over time, the United States and other common-law countries have gradually moved away from their primarily utilitarian perspective and closer to the natural rights theories of continental European countries, in the interests of international harmonization.

2. HISTORY OF COPYRIGHT DURATION

Through the Eighteenth Century: From Privileges to Copyright

England

After the invention of moveable type in the fifteenth Century, European monarchs quickly realized that the printing press could be used as an instrument to spread sedition and heresy. Their response was to assert legal control over the new technology: no one could operate a printing press without royal permission. Such permission often took the form of letters patent, a document granting to a particular printer an exclusive privilege to print a particular book or class of books for a specified period of time. Publishers were also required to submit any manuscripts that they wished to print to government censors for their approval (Patterson 1968, 20–27, 78–90; Kaplan 1967, 2–3; Rose 1993, 9–11, 23–24).

In 1557, Queen Mary granted a charter to the Stationers’ Company, a guild of London booksellers and printers, which provided that no one could operate a printing press in England unless they were a member of the Company or unless they received a printing patent from the monarch. Because the Stationers effectively had a monopoly, they could prevent competition among themselves by agreeing to a

¹¹ See also *Sony Corp. of America, Inc. v. Universal City Studios, Inc.*, 484 U.S. 417, 429 (1984).

system of registration. Once secured by registration, the right to print a book continued forever and could be bequeathed or sold, but only to other members of the guild (Patterson 1968, 28–32, 42–56, 63–64; Kaplan 1967, 3–5).

Under a series of decrees and statutes, no book could be printed in England unless it had first been registered with the Stationers (Patterson 1968, 46–47, 115–39). In 1695, the last licensing act expired, throwing the book trade into disarray. The Stationers petitioned Parliament for relief, seeking a statute under which authors would have the exclusive right to print their works—an exclusive right that could, of course, be transferred to a publisher. As introduced, the proposed legislation did not limit the duration of these copyrights (Patterson 1968, 138–42; Rose 1993, 42–43). When the Statute of Anne was enacted in 1710, however, the term of copyright in new works was limited to 14 years, with the possibility of renewal for a second 14-year term if the author was still living at the end of the first. For books that were already in print, the act provided a single 21-year term.¹² These terms were based upon those in the 1623 Statute of Monopolies, which had limited patents for new inventions to a single term of 14 years; that period, in turn, was derived from the traditional seven-year period for most apprenticeships (Ochoa and Rose 2002, 677–81).

At first, the London booksellers simply ignored the term limit provision. But as the terms of copyright began to expire, Scottish booksellers began publishing competing reprints. This touched off a great debate in England concerning the nature of literary property. Established publishers argued that an author had a natural right of property in his works that passed to the booksellers when the manuscript was purchased. Under this view, the Statute of Anne merely provided supplemental remedies to an underlying common-law right that was perpetual. Competing booksellers argued that there was no common-law right after a work had been published, and alternatively that any such right had been extinguished by the Statute of Anne (Ochoa and Rose 2002, 681–83; Patterson 1968, 158–68; Rose 1993, 52–55, 69–78).

The common-law right was upheld by the Court of King's Bench in *Millar v. Taylor* in 1769 (Patterson 1968, 168–72),¹³ but the defendant's view prevailed in the Scottish Court of Sessions in *Hinton v. Donaldson* in 1773 (Boswell 1975; Rose 1993, 83–85). Finally, in 1774,

¹² 8 Anne c. 19, §1 (1710) (Eng.).

¹³ *Millar v. Taylor*, 4 Burr. 2303, 98 Eng. Rep. 201 (K.B. 1769).

in the landmark decision of *Donaldson v. Beckett*, the House of Lords, acting as the Supreme Court of Great Britain, rejected the claim of perpetual common-law copyright and established that copyright was limited in term under the Statute of Anne (Ochoa and Rose 2002, 683–84; Patterson 1968, 172–79; Rose 1993, 92–104).¹⁴

France

In pre-Revolutionary France, all books had to be approved by official censors, and the author or publisher had to obtain a royal privilege before a book could be published. Such privileges were exclusive and were usually granted for a period of six years, but they could be renewed indefinitely (Dawson 1992, 3, 7–10, 22–27; Davies 1994, 73–77).

In 1777, a series of royal decrees changed the nature of these privileges (Dawson 1992, 7–8, 18–19). The decree on the duration of privileges provided a minimum duration for all privileges of the longer of ten years or the life of the author (1777 Decree, arts. 3, 4).¹⁵ The decree also prohibited the renewal of privileges and required a book to be augmented by at least a fourth to obtain a new privilege (Id., art. 2). Once a privilege had expired, anyone could obtain a “permission simple” to print or sell copies of the work (Id., art. 6). This decree, therefore, expressly recognized a public domain in books whose privileges had expired (Dawson 1992, 3).

After the French Revolution, a dispute arose concerning the exclusive privilege which had been granted to the *Comédie Française* to the public performance of all dramatic works (Ginsburg 1990, 1006). In 1791, the National Assembly voted to abolish the privilege and declared that the works of any author who had been deceased more than five years were public property (Id., 1006–07; 1791 Act, arts. 1–2).¹⁶ In the same decree, the Assembly granted to authors the exclusive right to authorize the public performance of their works during their lifetimes, and extended that right to the author’s heirs and assignees for five years after the author’s death (1791 Act, arts. 3–5).

¹⁴ *Donaldson v. Beckett*, 4 Burr. 2408, 98 Eng. Rep. 257 (H.L. 1774). For a fuller account of the debate, see Cobbett 1813, 17: 953–1003.

¹⁵ *Arrêt du conseil portant règlement sur la durée des privilèges en librairie*, Aug. 30, 1777.

¹⁶ Act of Jan. 13–19, 1791 (Fr.). An English translation is available in Sterling 2003, 1256–57.

In 1793, a new law was passed giving all authors, composers, and artists the exclusive right to sell and distribute their works, and extending the right to their heirs and assigns for a period of ten years after the author's death.¹⁷ Although this law was based in part on the natural right theory, nineteenth-century commentators characterized the 1793 law as utilitarian and "a charitable grant from society" rather than a full recognition of the perpetual right of an author's heirs to the fruits of his labor (Ginsburg 1990, 1009–12).

The United States

In 1783, in response to several authors' petitions, a committee of the Continental Congress reported that it was "persuaded that nothing is more properly a man's own than the fruit of his study, and that the protection and security of literary property would greatly tend to encourage genius [and] to promote useful discoveries" (Continental Congress 1783, 24: 326). Under the Articles of Confederation, the Continental Congress had no authority to issue copyrights; instead, it passed a resolution encouraging the States

to secure to the authors or publishers of any new books not hitherto printed... the copyright of such books for a certain time not less than fourteen years from the first publication; and to secure to the said authors, if they shall survive the term first mentioned, ... the copyright of such books for another term of time not less than fourteen years (Id., 326–27).

Three states had already enacted copyright statutes earlier that year, and within three years all of the remaining states except Delaware had followed suit. Seven of the states followed the Statute of Anne and the Continental Congress' resolution in providing two 14-year terms. The five remaining States granted copyrights for single terms of 14, 20, or 21 years' duration, with no right of renewal (Ochoa and Rose 2002, 687–88).

At the Constitutional Convention of 1787, both James Madison of Virginia and Charles Pinckney of South Carolina submitted proposals to give Congress the power to grant copyrights for a limited time. These proposals resulted in the Patent and Copyright Clause of the U.S. Constitution (Ochoa and Rose 2002, 688–90). As noted above,

¹⁷ Act of July 19–24, 1793, Arts. 1, 2 (Fr.). An English translation is available in Sterling 2003, 1260.

the Clause takes a utilitarian view of patents and copyrights, providing that exclusive rights may be granted “to Promote the Progress of Science and useful Arts” but only “for limited Times.”¹⁸

The Copyright Act of 1790 granted copyrights for a term of “fourteen years from the time of recording the title thereof,” with a right of renewal “for the further term of fourteen years” if the author survived to the end of the first term.¹⁹ The Act covered “any map, chart, book or books already printed within these United States,” as well as “any map, chart, book or books already made and composed, but not printed or published, or that shall hereafter be made and composed.” Except for the addition of maps and charts, this language was copied almost verbatim from the Statute of Anne.

Because United States law was based primarily on a utilitarian theory of copyright, it made little sense to offer copyright protection for any length of time unless the author or publisher affirmatively claimed that he or she wanted the benefit of copyright protection. Thus, United States law required that the author or publisher comply with various statutory formalities as a condition of copyright protection. For example, the 1790 Act required that the author or publisher register the copyright with the clerk of the district court before publication and publish a notice of the registration in a newspaper for four weeks within two months of the registration (*Id.* §3, 1 Stat. 125). An 1802 amendment required that the notice be printed in each published edition of the work.²⁰

In 1834, in an American replay of *Donaldson v. Beckett*, the U.S. Supreme Court ruled in *Wheaton v. Peters* that, although the author of an unpublished work had a common-law right to control the first publication of that work, the author did *not* have a common-law right to control reproduction following the first publication of the work, and that strict compliance with statutory formalities was required in order to recover under the federal statute.²¹ Thus, in the United States there developed a dual system of copyright protection. Before a work was published or registered, it was protected under state law by common-law copyright, which provided a right of first publication of potentially

¹⁸ U.S. Const., Art. I, §8, cl. 8.

¹⁹ Copyright Act of May 31, 1790, c. 15, §1, 1 Stat. 124.

²⁰ Act of Apr. 29, 1802, c. 36, §1, 2 Stat. 171.

²¹ *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591 (1834). For a comprehensive discussion, see Joyce 2005.

unlimited duration. After a work was published, however, one of two things happened. If all of the statutory formalities were satisfied, the work received a federal statutory copyright of the specified duration; but if the formalities were not observed, the work immediately entered the public domain (Nimmer and Nimmer 2005, §4.01[B], §4.03). As a result, most works were not protected by copyright for any period of time after first publication; only those few works for which the author or publisher had complied with the statutory formalities received copyright protection for the duration provided by law.

The Nineteenth Century

Throughout the nineteenth Century, the durations of national copyright or author's rights laws were extended numerous times. In 1810, France extended its author's rights law to last for the life of the author, then for the life of the author's widow, plus an additional 20 years.²² In 1814, reciting that "it would afford further encouragement to literature, if the duration of such copyright were extended," England consolidated its two 14-year terms into a single term of 28 years, "and if the author be living at the expiration of that time, till his death."²³

In the United States, lexicographer Noah Webster took up the cause of extending the existing term of copyright. Webster advocated the view "that an author has, by common law, or natural justice, the sole and *permanent* right to make profit by his own labor" (Webster 1843, 176). In 1830, a report prepared for the House Judiciary Committee by Webster's son-in-law, William W. Ellsworth, stated that "an author has an exclusive and perpetual right, in preference to any other, to the fruits of his labor" (Gales and Seton 1831, 7: cxix-cxx). Despite this endorsement of perpetual copyright as a natural right, the 1831 Act provided only an initial term of 28 years from first publication and a renewal term of 14 years, which could be claimed by the author's heirs if the author was deceased.²⁴

In 1837, Prussia adopted a term of life of the author plus 30 years after the author's death.²⁵ In the same year, in England, Thomas Noon

²² Act of Feb. 5, 1810, Arts. 39-40 (Fr.).

²³ Copyright Act of 1814, 54 Geo. III, c. 156, §9 (U.K.). The circumstances leading to the enactment of this extension are described in Lowndes 1840, 64-72.

²⁴ Copyright Act of Feb. 2, 1831, §§1-2, 4 Stat. 436. This term was extended to all subsisting copyrights. *Id.* §16, 4 Stat. 439.

²⁵ Ordinance of July 11, 1837, §§5-6 (Prussia). See Lowndes 1840, 125-26.

Talfourd introduced a bill that sought, among other things, to increase the period of copyright to life of the author plus 60 years. The bill was controversial, in large measure because of the length of term it proposed, and it was debated at length over the next five years. Talfourd's bill was opposed by Macaulay, whose opposition killed the original proposal in 1841 (Seville 1999, 6, 18–19, 31). Macaulay proposed instead that the existing term be lengthened to the longer of 42 years from first publication or life of the author (Id., 31–31, 226). Eventually a compromise was reached, and the Copyright Act of 1842 provided an alternative term of life of the author plus seven years, or 42 years from first publication.²⁶

In 1866, after a committee report that advocated perpetual rights, France extended the duration of its author's rights laws to life of the author plus 50 years after the author's death,²⁷ a term that the committee considered "a major concession to the public interest" (Davies 1994, 88–89). In 1870, the North German Confederation adopted a new copyright law which utilized the Prussian term of life of the author plus 30 years.²⁸ This law was extended to the unified German Empire in 1871.

In 1866, the United Kingdom, France, Germany, and seven other countries adopted the Berne Convention for the Protection of Literary and Artistic Works, under which member nations agreed to provide copyright protection to the citizens and residents of other member nations (Ricketson and Ginsburg 2005, 82).²⁹ At the time, however, the delegates were unable to reach agreement on a uniform duration of copyright, although they did agree on a non-binding resolution that recommended a minimum term of life of the author plus 30 years (Id. 2005, 536–38). Instead, the Convention provided for "comparison of terms" (also known as "the rule of the shorter term"), under which each country would protect works from other Berne countries for the same period of time granted to domestic works, but only so long as the work was still protected by copyright in its country of origin (Berne

²⁶ Copyright Act of 1842, 5 & 6 Vict. c. 45, §3 (U.K.).

²⁷ Act of July 14–19, 1866, Art. 1 (Fr.).

²⁸ Gesetz betreffend das Urheberrecht an Schriftwerken, Abbildungen, musikalischen Kompositionen und dramatischen Werken, June 11, 1870, §§ 8, 9 (N. Ger. Conf.). For a summary and English translation, see Jerrold 1881, 43–65.

²⁹ Berne Convention for the Protection of Artistic and Literary Works, Sept. 8, 1866, art. 2.

1866, art. 2). Once the copyright expired in the country of origin, it expired in all other Berne nations as well.

For the United States and other nations that remained outside the Berne Union, there was no legal obligation to provide any copyright protection to the works of foreign authors; and like most countries, the United States allowed the published works of foreign authors to be copied with impunity in the absence of any treaty obligation (Ochoa 2008, 167–71). Moreover, even after the United States began to extend copyright protection to some foreign authors beginning in 1891, it granted such protection only if the foreign author complied with the formalities required by United States law (*Id.*, 172–173).³⁰ Thus, for most of the nineteenth century, the term of protection provided to foreign authors in the United States was zero.

The Twentieth Century

At the 1908 Berlin Conference to revise the Berne Convention, the German delegation proposed that the term of protection be that granted to domestic authors in the country in which protection was sought, without regard to the term in the country of origin. Although this would have effectively lengthened the term of copyright, the proposal met with considerable resistance without a uniform term of protection (Ricketson and Ginsburg 2005, 538–39). Ultimately, the 1908 Berlin Revision recommended a term of life of the author plus 50 years, but otherwise retained the “rule of the shorter term.”³¹ Although the Convention did not make the term mandatory, the United Kingdom nonetheless adopted a life-plus-fifty-years term in its 1911 Copyright Act.³²

In 1905, in the United States, the Librarian of Congress convened a conference for the purpose of discussing a general revision of the copyright laws. At the conference, authors and publishers both expressed the view that the term of copyright ought to be as long as possible, and they suggested adoption of the French term of life of the author plus 50 years. The principal reasons advanced were that copyright was

³⁰ Act of March 3, 1891, c. 565, 26 Stat. 1106.

³¹ Berne Convention for the Protection of Literary and Artistic Works, Sept. 8, 1886, revised at Berlin, Nov. 15, 1908, art. 7.

³² Copyright Act of 1911, 2 Geo. V c. 46, §3 (U.K.). The Act provided, however, that after 25 years from the death of the author, anyone could reprint the work by giving notice and paying a royalty to the copyright owner of ten percent of the published price for all copies sold (*Id.*).

a natural right of the author; that authors ought not to outlive their copyrights; that it would provide income to the author's children and grandchildren; and that it ought not to be shorter than the term prevailing in many European countries (Brylawski and Goldman 1975, C3, C7, C11, C75, C78; Ochoa 2001, 33–39). At Congressional hearings in 1906, the star witness was Mark Twain, who believed that copyright ought to be perpetual (Brylawski and Goldman 1975, J116–20; Ochoa 2001, 36). Twain also remarked, however, that he had been able to negotiate a much higher price for his works at the time of renewal (Brylawski and Goldman, K20, K61–66, K88, K163, S14; Ochoa 2001, 37–38). As a result, in the 1909 Act Congress retained an initial term of 28 years, but it extended the renewal term to 28 years, for a maximum duration of 56 years from the date of first publication.³³

Elsewhere, the march toward longer terms continued. In 1934, Germany adopted a term of life of the author plus 50 years, and Austria followed suit in 1936.³⁴ Finally, in the 1948 Brussels Revision of the Berne Convention, a minimum term of life of the author plus 50 years was made mandatory, while the “rule of the shorter term” was retained for those nations that had longer terms.³⁵ The basic term of life plus 50 years was carried forward in the 1967 Stockholm Revision and the 1971 Paris Revision of the Berne Convention.³⁶

In the United States, the Copyright Act of 1976 adopted the Berne Convention term of life of the author plus 50 years for all works created on or after January 1, 1978 (except for “works made for hire,” which were given the shorter of 75 years from first publication or 100 years from creation).³⁷ Those works that had been published or registered before 1978 and were still under copyright retained an initial term of 28 years but had their renewal terms extended to 47 years, for

³³ Copyright Act of 1909, §§23–24, 35 Stat. 1075, 1080–81.

³⁴ Act of Dec. 13, 1934, Art. 1 (Ger.); Act of Apr. 9, 1936, Art. 60 (Aus.).

³⁵ Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, revised at Brussels, June 26, 1948, art. 7(1) (basic term); *id.* art. 7(2) (comparison of terms). The minimum basic term was not applied to cinematographic and photographic works. *Id.*, art. 7(3).

³⁶ Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, revised at Stockholm, July 14, 1967, art. 7(1) (basic term); *id.*, art. 7(8) (comparison of terms); Berne Convention, *supra* note 7, art. 7(1) (basic term); *id.*, art. 7(8) (comparison of terms).

³⁷ Former 17 U.S.C. §302 (1976), 90 Stat. 2451, 2572.

a maximum duration of 75 years from first publication.³⁸ As a transitional measure, those works created before 1978 that had not been published or registered (and which therefore were still protected by state common-law copyright) were accorded the same term given to new works, subject to a statutory minimum term of either 25 or 50 years.³⁹ The adoption of the life-plus-50-years term was principally motivated by the prospect of eventual U.S. adherence to the Berne Convention,⁴⁰ which finally occurred on March 1, 1989.⁴¹

In 1993, the Council of the European Community decided to harmonize copyright terms. At the time, only Germany and Spain had terms longer than life-plus-50 years; but rather than requiring Germany and Spain to reduce their copyright terms, the Council required all of the other European nations to increase their copyright terms to life plus-70-years.⁴² In the same Directive, however, the Council mandated the use of the rule of the shorter term, so that works from the United States and other non-European countries would not receive the benefit of the longer term (*Id.*, art. 7(1)). That, in turn, led American copyright holders to pressure Congress to adopt the life-plus-70 years term, which it did in the Sonny Bono Copyright Term Extension Act of 1998 (CTEA).⁴³ Shortly after its enactment, the CTEA was challenged in court on the grounds that it violated both the Patent and Copyright Clause and the First Amendment of the U.S. Constitution. On January 15, 2003, however, the United States Supreme Court held that the CTEA did not violate the U.S. Constitution,⁴⁴ meaning that the terms of protection set forth in the CTEA currently govern the duration of copyright in the United States.

³⁸ Former 17 U.S.C. §304 (1976), 90 Stat. at 2573-74.

³⁹ Former 17 U.S.C. §303 (1976), 90 Stat. at 2573. All unpublished works received a statutory minimum of 25 years until December 31, 2002; if the work was published during that period, the statutory minimum was extended through December 31, 2027 (*Id.*).

⁴⁰ See H.R. Rep. No. 94-1476, at 135 (1976).

⁴¹ See Berne Convention Implementation Act, Pub. L. No. 100-568, 102 Stat. 2853.

⁴² Council Directive 93/98/EEC of October 29, 1993, Harmonizing the Term of Protection of Copyright and Certain Related Rights, art. 1(1), 1993 O.J. (L 290) 9.

⁴³ P.L. No. 105-298, Title I, 112 Stat. 2827.

⁴⁴ See *Eldred v. Ashcroft*, 537 U.S. 186 (2003).

2. CURRENT LAWS ON COPYRIGHT DURATION

Copyright and Neighboring Rights

It is important to note that most countries of the world distinguish between copyright in literary and artistic works and so-called “neighboring rights” of performers, producers of sound recordings (“phonograms” in international parlance), and broadcasting organizations. Various reasons have been given for the distinction. For sound recordings, “the objection was made that these were productions of an ‘industrial character’ and not capable of constituting literary or artistic creations” (Ricketson and Ginsburg 2005, 1205). Both broadcasts and sound recordings are typically produced through the collaboration of a large number of individuals, making it difficult to identify the “author” or “authors” of such works. Of course, similar objections were also raised with respect to both photographs and motion pictures, both of which are now protected under the Berne Convention, so the resulting division of labor between copyright and neighboring rights seems to be rather arbitrary, a matter of historical accident more than sound principle (Id., 1205–1209). Nonetheless, it is a fact that the term of protection accorded to such “neighboring rights” has lagged behind the term of protection granted to “literary and artistic works” under the Berne Convention; indeed, even though photographs and motion pictures succeeded in being brought under Berne, the term of protection provided to such works has not always kept pace with the basic term of protection.

International Agreements Concerning Copyright

Article 7 of the Berne Convention provides that “[t]he term of protection granted by this Convention shall be the life of the author and fifty years after his death” (Berne 1971, art. 7(1)). For works of joint authorship, the term is measured from the death of the last surviving author (Id., art. 7*bis*). However, for motion pictures (or “cinematographic works” in international parlance), countries “may provide that the term of protection shall expire fifty years after the work has been made available to the public with the consent of the author,” or if the work is not made available to the public, within 50 years after its making (Id., art. 7(2)). Anonymous and pseudonymous works are also protected for “fifty years after the work has been lawfully made

available to the public,” unless the author discloses his or her identity during that time (Id., art. 7(3)). Countries are permitted to provide shorter terms of protection to photographic works and works of applied art, but such terms must last at least 25 years from the time the work was created (Id., art. 7(4)). All the foregoing terms of protection run to the end of the calendar year in which they would otherwise expire (Id., art. 7(5)).

As of October 15, 2008, there were 164 members of the Berne Union (WIPO 2008a). Those countries that were already members of the Rome Act of the Convention and that had shorter terms on the date they signed either the Stockholm text or the Paris text were permitted to retain such shorter terms (Berne 1971, art. 7(7)). All countries are permitted to grant longer terms of protection (Id., art. 7(6)). “In any case, the term shall be governed by the legislation of the country where protection is claimed; however, unless the legislation of that country otherwise provides, the term shall not exceed the term fixed in the country of origin of the work” (Id., art. 7(7)).

Article *6bis* of the Berne Convention requires that the author’s moral rights of attribution and integrity “shall, after his death, be maintained, at least until the expiry of the economic rights.” However, those countries that did not protect such rights after the death of the author at the time of their accession are permitted to retain terms that cease upon the author’s death (Id., art. *6bis*(2)).

The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) makes all of the substantive provisions of the Berne Convention (except Article *6bis*) enforceable between nations through the dispute resolution mechanism of the World Trade Organization (TRIPS, arts. 9, 64).⁴⁵ As of July 23, 2008, there were 153 members of the World Trade Organization, all of whom must abide by the TRIPS Agreement (WTO 2008). TRIPS does not change the basic term of protection provided by Berne except in one instance: Article 12 of TRIPS requires that photographs and works of applied art be given at least 50 years of protection from the year of authorized publication,

⁴⁵ Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments—Results of the Uruguay Round, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) [hereinafter TRIPS Agreement].

or if no such publication occurs, 50 years from the date the work was created (TRIPS, art. 12).

Article 9 of the WIPO Copyright Treaty requires that member nations give photographic works the same duration of protection as that provided to other literary and artistic works: namely, life of the author plus 50 years.⁴⁶ As of March 5, 2009, 70 countries (including the United States) were parties to the WIPO Copyright Treaty (WIPO 2009c).

In addition to these multilateral treaties, the United States (a net exporter of copyrighted works) has entered into a number of bilateral Free Trade Agreements that require some of its trading partners (such as Australia) to adopt a basic term of copyright protection of life of the author plus 70 years.⁴⁷ Other countries (such as Canada), however, have resisted pressure from the United States and the European Union to increase copyright terms beyond those provided in the Berne Convention.⁴⁸

International Agreements Concerning Neighboring Rights

The Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations was signed on October 26, 1961.⁴⁹ It provides that performers shall have the right to prevent fixations, reproductions, and broadcasts of their performances (*Id.*, art 7); that producers of phonograms have the right to prohibit reproductions of their phonograms and to be compensated for any broadcasts

⁴⁶ WIPO Copyright Treaty, Dec. 20, 1996, art. 9, 36 I.L.M. 65.

⁴⁷ See, e.g., United States-Australia Free Trade Agreement, art. 17.4(4) (May 18, 2004). The Agreement also provides a minimum term for works made for hire of 70 years after first publication, or if the work is not published within 50 years, 70 years after creation (*Id.*). There are similar provisions in the Free Trade Agreements between the United States and Bahrain (Art. 14.4(4)), Chile (Art. 17.5(4)), Columbia (Art. 16.5(5)), Korea (Art. 18.4(4)), Morocco (Art. 15.5(5)), Panama (Art. 15.5(4)), Peru (Art. 16.5(5)), and Singapore (Art. 16.4(4)). In the Free Trade Agreement with Oman, the alternative term is 95 years after first publication, or if the work is not published within 25 years, 120 years from creation (Art. 15.4(4)). For the full texts of these agreements, see USFTR 2009.

⁴⁸ See, e.g., North American Free Trade Agreement, Art. 1705 (life-plus-50-years); Copyright Act art. 6, R.S.C. 1985, ch. C-42, §6; R.S.C. 1993, ch. 44, §6 (Can.). Although NAFTA's minimum term remains at life-plus-50 years, in 2003 Mexico adopted a basic term of life-plus-100 years. See *La Ley Federal del Derecho de Autor*, Art. 29 (Mex.).

⁴⁹ International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, Oct. 26, 1961, 496 U.N.T.S. 44.

of their phonograms (Id., arts. 10, 12); and that broadcasting organizations have the right to prevent fixations, reproductions or rebroadcasts of their broadcasts (Id., art. 13). Under Article 14 of the Rome Convention, such protection shall last at least 20 years from the year in which the performance took place, the fixation was made, or the broadcast took place (Id., art. 14). As of February 13, 2009, 88 nations (not including the United States) were parties to the Rome Convention (WIPO 2009a). The United States, however, has acceded to the 1971 Geneva Phonograms Convention, which also provides a right against unauthorized reproduction for a minimum term of 20 years from the date of fixation or first publication.⁵⁰

The TRIPS Agreement provides rights similar to the Rome Convention (except for the compensation for unauthorized broadcasts of phonograms), but it provides a longer term of protection for performers and producers of phonograms of at least 50 years from the year in which the fixation was made or the performance took place (TRIPS, art. 14(5)). The minimum term of protection for broadcasting organizations remains 20 years from the date the broadcast took place. (Id.).

The WIPO Performances and Phonograms Treaty (WPPT) provides similar protection for both performers and producers of phonograms (omitting broadcasting organizations), and provides to performers a minimum term of 50 years from the year in which the fixation was made, and to producers a minimum alternative term of 50 years from the year in which the phonogram was first published or 50 years from the year in which the phonogram was fixed.⁵¹ As of December 18, 2008, 68 nations (including the United States) were parties to the WPPT (WIPO 2008b).

In addition to these multilateral treaties, the United States has entered into a number of bilateral Free Trade Agreements that require some of its trading partners (such as Australia) to adopt a basic term of protection for performers of life-plus-70 years, and for phonograms

⁵⁰ Geneva Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms, Oct. 29, 1971, art. 4, 25 U.S.T. 309, 866 U.N.T.S. 71. As of February 25, 2009, there were 77 members of the Geneva Phonograms Convention (WIPO 2009b).

⁵¹ WIPO Performances and Phonograms Treaty, Dec. 20, 1996, 36 I.L.M. 76, arts. 5-10 (performers); *id.* arts. 11-14 (producers); *id.* art. 17 (terms of protection).

of 70 years after first publication, or if the phonogram is not published within 50 years, 70 years after creation.⁵²

The European Union

The European Union's Directive on the Term of Protection of Copyright and Certain Related Rights applies to the 27 members of the European Union and the three other members of the European Economic Area.⁵³ Under the Directive, "[t]he rights of an author of a literary or artistic work...shall run for the life of the author and for 70 years after his death (Directive, art. 1(1))." For works of joint authorship, the term is calculated from the death of the last surviving author (Id., art. 1(2)). For anonymous or pseudonymous works and collective works, the term is the longer 70 years from the year the work is lawfully made available to the public or 70 years from the year of creation, unless the identity of the individual author or authors is disclosed (Id., arts. 1(3), 1(4), 1(6)).

Original photographs are given the same term of protection as other literary and artistic works (Id., art. 6). For cinematographic works, the term is 70 years after the death of the last of the following to survive: the principal director, the author of the screenplay, the author of the dialogue and the composer of music written specifically for the film (Id., art. 2).

The neighboring rights of performers, producers of phonograms, and broadcasting organizations last for 50 years after the date of the performance, the fixation, or the broadcast, respectively; except that if a performance or phonogram is lawfully published or communicated

⁵² See, e.g., United States-Australia Free Trade Agreement, art. 17.4(4). There are similar provisions in the Free Trade Agreements between the United States and Bahrain (Art. 14.4(4)), Chile (Art. 17.6(7)), Columbia (Art. 16.6(7)), Korea (Art. 18.4(4)), Morocco (Art. 15.5(5)), Panama (Art. 15.5(4)), Peru (Art. 16.6(7)), and Singapore (Art. 16.4(4)). In the Free Trade Agreement with Oman, the alternative term is 95 years after first publication, or if the work is not published within 25 years, 120 years from creation (Art. 15.4(4)). (USTR 2009).

⁵³ Directive 2006/116/EC of December 12, 2006, on the Term of Protection of Copyright and Certain Related Rights, art. 1(1), 2006 O.J. (L 374) 12; European Union, Europa: European Countries, Member States of the EU, at http://europa.eu/abc/european_countries/eu_members/index_en.htm (accessed Sept. 1, 2009); Agreement on the European Economic Area, May 2, 1992, 1994 O.J. (L 1) 3, annex XVII, ¶ 9f, at <http://www.cfta.int/content/legal-texts/eea/annexes/annex17.pdf> (accessed Sept. 1, 2009).

to the public during that time, then the right lasts for 50 years after the earlier of such publication or communication (Id., art. 3).

The Directive also requires that when a previously unpublished work is published or communicated to the public for the first time, the publisher must be granted an exclusive right for 25 years from the date of such publication or communication (Id., art. 4). In addition, the Directive permits members to protect "critical and scientific editions of works which have come into the public domain." If such protection is granted, it may last no longer than 30 years from the year in which the publication was first lawfully published (Id., art. 5).

As mentioned previously, the Directive mandates the use of the "rule of the shorter term" with regard to works originating in and written by nationals of countries that are not covered by the Directive (Id., art. 7). All terms run to the end of the calendar year in which they would otherwise expire (Id., art. 8). If a member state provided a longer term of protection as of July 1, 1995, the Directive does not require the member state to shorten the term of protection (Id., art. 10(1)).

Finally, it should be noted that the Directive does not apply to the moral rights of an author, leaving a member state free to apply a longer (or shorter) term for such moral rights (Id., art. 9). In France, for example, the law expressly states that an author's moral rights are perpetual.⁵⁴

In April 2009, the European Parliament approved a proposed amendment to the Directive that would extend the rights of performers and producers of phonograms to 70 years from the first authorized publication or communication to the public (European Parliament 2009). Although this amendment has not yet been approved by the Council, its probable adoption suggests that the march toward ever-longer terms continues unabated.

United States

In the United States, all works published before 1923 were in the public domain before the Sonny Bono Copyright Term Extension Act of 1998 was enacted. The CTEA did not attempt to revive any expired copyrights, so all such works remain in the public domain (17 U.S.C. §304(b)). For works first published between 1923 and 1963, the term

⁵⁴ Law No. 92-597 of July 1, 1992 (l'r.), as amended, art. L. 121-1.

of copyright under the 1909 Act was 28 years, which could be renewed once;⁵⁵ the renewal term was extended twice and is now 67 years, for a maximum duration of 95 years from first publication (17 U.S.C. §304(b)). Copyright Office records, however, show that less than 15 percent of the works registered during this time period were renewed; the remaining 85 percent are in the public domain if they are works by American authors or works first published in the United States (Ringer 1960, 222).⁵⁶ In 1992, copyright renewal was made automatic, so all works first published between 1964 and 1977 have a duration of 95 years from the date of first publication (comprising a 28-year initial term and a 67-year renewal term) (17 U.S.C. §§304(a), 304(b)).

For works created in 1978 or later, the basic term is life of the author plus 70 years (*Id.*, §302(a)). For so-called “joint works” (i.e., works of joint authorship), the term is life of the last surviving author plus 70 years (*Id.*, §302(b)). For works made for hire, the term is 95 years from the date of first publication, or 120 years from the date of creation, whichever is shorter (*Id.*, §302(c)).

Works created before 1978, but not published or registered before 1978, get the same term provided to new works: life of the author plus 70 years, or the alternative fixed term for works made for hire. These works, however, were subject to a statutory minimum term of 25 years from January 1, 1978, which has now expired (*Id.*, §303(a)). As a result, any works created before 1978 that remained unpublished as of December 31, 2002, are now in the public domain if the author of the work died more than 70 years before the current year began (Reese 2007, 591; Gard 2006, 690). Those works that were created before 1978, but which were first published between 1978 and 2002, received the same term as new works, subject to a statutory minimum term, which has been extended to December 31, 2047 (17 U.S.C. §303(a)).

A special situation applies to copyright in sound recordings. Sound recordings were not added to the federal Copyright Act until February 15, 1972. Any sound recordings fixed on or after that date are entitled to the same term of protection as that granted to other works of

⁵⁵ Former 17 U.S.C. §24 (1909; repealed 1976).

⁵⁶ Works of foreign origin that were in the public domain in the U.S. for failure to comply with formalities such as notice or renewal, but that were not yet in the public domain in their country of origin, had their copyrights restored effective January 1, 1996. See 17 U.S.C. §104A(a)(1)(A); *id.* § 104A(h)(2) (defining “date of restoration”); *id.* §104A(h)(6) (defining “restored work”).

authorship. Any sound recordings fixed before that date, however, are governed by state law rather than by federal law; and federal law provides that any state-law protection shall not be preempted by federal law until February 15, 2067 (95 years from the date sound recordings first became eligible for federal copyright protection) (*Id.*, §301(c)). This leaves the term of copyright in such pre-1972 sound recordings up to the individual states.

Only one state has a statute regarding the duration of copyright in such sound recordings: California provides that all such sound recordings will be protected until February 15, 2047.⁵⁷ In one other state there is a court decision concerning the duration of copyright in such sound recordings. In 2005, the New York Court of Appeals (the highest court in the state of New York) held that sound recordings had a perpetual common-law copyright under New York law; that such sound recordings were not placed in the public domain when phonorecords of the sound recording were reproduced and distributed in New York; and that such sound recordings did not enter the public domain in New York when their copyrights expired in their country of origin.⁵⁸ Consequently, all sound recordings will remain under copyright in the state of New York until state law is preempted by federal law on February 15, 2067.

3. CONCLUSION

A rational choice concerning the duration of copyright cannot be made until some kind of consensus has been reached on the rationale for copyright protection. While common-law systems started from a utilitarian perspective, international harmonization has moved them much closer toward the natural right view of copyright that prevails in most civil law countries. Even in such countries, however, the countervailing considerations of increased access to literary and artistic works and the difficulty of identifying and locating copyright owners have led to some temporal limit on the duration of copyright.

The history of copyright duration demonstrates that while copyright terms have been lengthened a number of times, they are almost

⁵⁷ Cal. Civ. Code §980(a)(2).

⁵⁸ See *Capitol Records, Inc. v. Naxos of America, Inc.*, 830 N.E.2d 250 (N.Y. 2005).

never shortened. This is consistent with the principles of public choice theory discussed above, which hold that when the benefits of a law are concentrated but the costs of that law are diffuse, a small well-focused interest group will usually succeed in obtaining passage of the law, even if it does not benefit society as a whole. However, because of the controversy concerning the CTEA, public awareness of the costs of extending the duration of copyright has been raised (Karjala 2007; Lessig 2004). Thus, while it can be expected that copyright owners will attempt to obtain further extensions of the copyright term in the future, it also should be expected that they will meet with more significant opposition than they faced in 1998. Whether opponents of copyright term extension will have the political power to succeed in defeating future attempts at copyright term extension, however, remains to be seen.

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