



Question Q235

National Group: United States of America

Title: **Term of Copyright Protection**

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Date: May 15, 2013

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.**

RESPONSE: The United States 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 United States became a signatory of the WIPO Copyright Treaty (WCT) on April 12, 1997, and ratified on September 14, 1999. The WIPO Copyright and Performances and Phonographs Treaties Implementation Act implemented the WCT 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 United States 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.**

RESPONSE: The minimal obligations with respect to Term of protection of copyright have been implemented in the United States 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?**

RESPONSE: Yes, the United States 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.**

RESPONSE: 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. 17 U.S.C. § 302. The United States has been instrumental in driving the upward movement of copyright terms both regionally and in its bilateral free trade agreements. 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. The AIPPI-US Division is unaware of any significant movement in the United States or elsewhere to extend the Term of copyright protection past the life of the author plus 70 years standard.

- 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?**

RESPONSE: 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 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. 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>.

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

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.**

RESPONSE: The AIPPI-US Division is not convinced that sufficient consensus exists as to whether the current Terms of copyright protection are “adequate” or “inadequate” for all interested parties, and the AIPPI-US Division does not take a position on this issue.

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. *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984). 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?” H. R. Rep. No. 2222, 60th Cong., 2d Sess., 7 (1909).

Multiple and diverse philosophies of copyright make difficult the determination of what is considered a proper balance of adequate protection. The proper balance of protection is also disputed between those of a single philosophy. For example, one commentator proceeding under an economic analysis to determine adequate Term of protection has advocated for a copyright term of fifteen years. Another commentator proceeding on the same philosophy has advocated for a copyright term of twelve years renewable up to forty-six years. Additionally, many believe that economic justification is not sufficient to determine an adequate term and recognize that a personal connection between the author and the work is a proper consideration in determining an adequate Term of protection.

The duration of copyright may pose an issue of adequate protection in certain situations. For example, a longer term of copyright protection may exacerbate the challenges and costs posed by orphan works, i.e., copyrighted works whose owners cannot reasonably be located and contacted by users who wish to secure copyright permissions. Issues such as these, however, can be addressed through targeted legislation rather than addressing the larger question of whether United States copyright law is adequate for all interested parties.

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

RESPONSE: The AIPPI-US Division does not take the position there is a need for an upper limit on Term and therefore does not currently advocate for an upper limit in international treaties.

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. A term of life of the author plus fifty year term was intended to provide protection for the author and to enable the next two generations of heirs the to benefit from the exploitation of the work. 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. 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. The Directive on Copyright Duration recognized that life expectancies had grown since 1908 and that 50 years was no longer sufficient to protect the next two generations. In direct response to the European extension, the United States enacted the CTEA in 1998,¹ which now also provides the term is the author's life plus a maximum of 70 years.

The AIPPI-US Division understands that 80 countries have adopted a Term of the life of the author plus 70 years. The AIPPI-US Division is unaware of any significant movement in the United States or elsewhere to extend the Term of copyright protection past the life of the author plus 70 years standard. Accordingly, the AIPPI-US Division does not see a need for an upper limit on Term in an international treaty.

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.

RESPONSE: The AIPPI-US Division is not convinced that sufficient consensus exists as to whether the current Terms of copyright protection are "adequate" or "inadequate" for all interested parties as set forth in Question 6, *supra*, and therefore does not take a position as to whether the Terms of copyright protection should be changed.

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.

RESPONSE: The AIPPI-US Division does not take a position as to whether the Terms of copyright protection should be changed.

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?

¹ 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).

The AIPPI-US Division believes that the factors or criteria that can be used to arrive upon the optimal term of copyright protection include the following:

- Economic value of the creative work
- 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
- The value of the author's personal connection to the work
- The value of the personal connection to the work after the life of the author
- The incentive to create new work
- The affect of copyright Term on the incentive to create new technologies

The AIPPI-US Division does not take a position at this time on the issue of what the optimum term might be.