The Copyright Term Extension Act: Is Life Plus Seventy Too Much

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The Copyright Term Extension Act: Is Life Plus Seventy Too Much?

by

JENNY L. DIXON*

Table of Contents

I. Copyrights in the Music Industry ......................................................... 949
II. American Copyright Law................................................................. 952
   A. Historical Origins ........................................................................ 952
   B. Early U.S. Copyright Statutes .................................................. 956
   C. The 1976 Copyright Act ......................................................... 958
III. International Copyright Agreements .................................................. 963
   A. The Berne Convention ............................................................ 963
   B. The EC Duration Directive .................................................... 968
IV. The Copyright Term Extension Act .................................................. 971
   A. Background ............................................................................ 971
   B. Effect of the Proposed Amendment ........................................ 972
   C. Special Interests at Work—Arguing For Life Plus Seventy .......... 974
   D. Public Interests at Work—Arguing Against Life Plus Seventy ...... 976
V. Conclusion ....................................................................................... 979

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Copyright law governs “access to the culture of our society in all its aspects—social, political, economic, educational, and artistic.” However, the average music listener is oblivious to the intricacies of copyright law. She can purchase her compact discs or listen to her favorite songs on the radio without knowing anything about the United States copyright system. Questions such as whether the music has copyright protection, or who owns the copyright, probably never cross her mind.

Unbeknownst to these typical music listeners, the nation’s legislators have been debating whether the duration of copyright protection, currently life of the author plus fifty years, should be extended another 20 years. As one commentator has observed, “the battle lines . . . [have been] drawn” over the “Copyright Term Extension Act of 1995.” “Music Row” is on one side, fighting to

3. Id.
4. Id.
9. The term “Music Row” encompasses the songwriting community—songwriters, publishers, and performance rights organizations. See generally Keel, supra note 7.
extend songwriters' rights, and the legal academic community is on the other, fighting to preserve a strong "public domain." Both sides have expressed their views on the proposed legislation in Congressional committee hearings. However, despite the adverse effects that the extension could have on the public, it has not garnered much public attention over the past two years.

10. Songwriters, such as Bob Dylan, Quincy Jones, and Don Henley, and the heirs of creators, such as Irving Berlin's daughter, Mary Ellen Barrett, testified before the Congressional committees to show their support of S. 483 and H.R. 989. In fact, testimony and prepared statements from songwriters, their heirs, and music industry representatives comprised the bulk of testimony offered in favor of the proposed legislation. Songwriters argue that they are entitled to the twenty year extension of copyright protection. As products of their creative efforts, their songs are property and deserve the same protection given any other property. Accordingly, they deserve the economic and artistic protection that the proposed legislation would afford. Heirs argue that their relatives wrote songs or musical compositions to support themselves and to provide financial benefits to future generations. They also claim that authors will suffer when commercially viable works fall into the public domain. See 1995 Senate Hearings, supra note 6 (statements of Don Henley and Bob Dylan); Copyright Term, Film Labeling and Film Preservation Legislation: The Copyright Term Extension Act, Hearings on H.R. 989 Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary, 104th Cong., 1st Sess. 272-73, 237-39 (1995)(hereinafter 1995 House Hearings) (statements of Mary Ellin Barrett and Quincy Jones).

11. See 1995 Senate Hearings, supra note 6 (statement of Professor Peter Jaszi); 1995 House Hearings, supra note 10, at 292-308 (statement of Professor Dennis S. Karjala, representing the United States Copyright and Intellectual Property Law Professors). Historically, the academic community has focused on the benefits of the public domain. See generally Jessica Litman, The Public Domain, 39 EMORY L.J. 965 (1990)(hereinafter Litman, Domain) (arguing that a strong public domain is the best way to promote the enterprise of authorship); David Lange, Recognizing the Public Domain, 44 LAW & CONTEMP. PROB. 147 (Autumn 1981)(arguing that increasing recognition of new intellectual property interests requires a corresponding increase in recognition of individual rights in the public domain).

12. In brief, the "public domain" consists of all the works which are no longer eligible for copyright protection. It is an "informational commons which is free (at least insofar as copyright law is concerned) to all users and all uses . . . . [I]t is the source to which creators of each generation turn for the materials that they refashion into new . . . works of imagination." 1995 Senate Hearings, supra note 6 (statement of Professor Peter Jaszi); See also Litman, Domain, supra note 11, at 975-76.


14. See 1995 Senate Hearings, supra note 6 (statement of Professor Peter Jaszi) (discussing the negative impact that the proposed legislation would have on the public by restricting access to works).

15. The publicity has been sparse due to the nature and strength of the special interests involved. The introduction, necessity, and status of "The Copyright Term Extension Act" has been covered primarily in the technical journals and music industry trade magazines as opposed to the general press that the public follows. See generally Legislation: House Panel Set to Consider Omnibus Copyright Measure, 52 PAT., TRADEMARK & COPYRIGHT J. (BNA) 120 (May 23, 1996);
The Copyright Term Extension Act represents the first legislative attempt to increase the duration of copyright protection since the Copyright Act of 1976. Consequently, much of the debate over the Copyright Term Extension Act centers around the propriety and necessity of another extension. Essentially, this debate raises the question: "how long should copyright protection last?"\(^{16}\)

This Note argues that, while history has shown that there is no easy answer to the question of copyright duration, the proposed extension to life of the author plus seventy years is too long.\(^{17}\) The Copyright Term Extension Act is special interest legislation that mistakenly emphasizes differences in the duration of protection afforded to copyright holders as opposed to the quality of protection between the United States and Europe. Since many of the proponents of this legislation come from the "music industry,"\(^{18}\) Part I of this Note provides background information regarding copyrights in this context. Part II examines the history of United States' copyright law and focuses in particular upon the 1976 Act.\(^{19}\) Part III identifies and discusses international copyright agreements, such as the Berne Convention,\(^{20}\) the Universal Copyright Convention (UCC),\(^{21}\) and the

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\(^{16}\) Saul Cohen, *Duration*, 24 UCLA L. REV. 1180, (1977) (discussing this basic question in the context of the 1976 Copyright Act's new term of copyright protection: life of the author plus fifty years). Cohen states that, to be fair and reasonable, copyright protection should not terminate during the life of the author. *Id.* at 1191. His ultimate conclusion is that "[O]n balance, a term of life plus twenty years seems to [him] to be fair and not unreasonable, a term of life plus fifty years seems to [him] to be fair and not unreasonable." *Id.* at 1192. His reasoning and analysis seem to suggest that at some point after the life of the author the term of protection can be limited without being unfair.

\(^{17}\) Congress can protect authors' exclusive rights only for limited times. U.S. Const. art. 1, § 8, cl. 8.

\(^{18}\) The phrase "music industry" is used in the broadest sense to include the authors or songwriters, lyricists, heirs, authors' rights associations, record companies, and music publishing companies. See infra text accompanying notes 25-38.


EC Duration Directive,\(^2\) which affect American copyright holders.\(^3\) Part IV examines the arguments for and against the Copyright Term Extension Act. Finally, Part V concludes that the proposed legislation is not within the United States copyright tradition.

I

Copyrights in the Music Industry

Many people are involved in the creation, performance, and ultimate dissemination of a popular song. "Because copyright is divisible, . . . the different rights in the copyright bundle can be, and often are, owned or controlled by different entities."\(^4\) Consequently, ownership of the various copyrightable interests involved is often difficult to ascertain.

Copyright of eligible works of authorship, such as musical works and sound recordings,\(^5\) vests automatically in the author once the work has been "fixed in any tangible medium of expression . . . ."\(^6\) Several separate copyrightable interests exist in most musical works.\(^7\) For example, copyright protection for musical works "encompasses both the words of a song as well as its instrumental component. A

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23. The General Agreement on Tariff and Trade’s (GATT) Trade-Related Aspects of Intellectual Property Rights (TRIPS) have also sought to harmonize the duration and extent of copyright protection amongst TRIPs member countries. Lisa M. Brownlee, Recent Changes in the Duration of Copyright in the United States and European Union: Procedure and Policy, 6 FORDHAM INTLL. PROP. MEDIA & ENT. L.J. 579, 583 (1996). However, because the EC Duration Directive, with its new term, created new disharmony before the United States’ implementing legislation took effect, an extensive discussion of GATT and TRIPs is beyond the scope of this Note. For a discussion of these provisions, see id. (arguing that the Copyright Term Extension Act would decrease discrimination against U.S. authors and works and benefit the public).


musical work can be embodied in various material objects such as musical notation on written paper or directly recorded on a phonorecord." There is also copyright protection for a sound recording, which is essentially "a captured performance" of a musical work. While the musical work and the sound recording are "independently copyrightable, . . . [the] sound recording is also a derivative work based on a preexisting work, i.e., a musical . . . [work]."

The confusion surrounding these two distinct copyright interests "arises because both the musical . . . work [and the sound recording] are embodied on the same material object, the phonorecord." The distinction between these two copyrights is important "because the owner of a sound recording copyright enjoys different exclusive rights than the copyright owner of the musical . . . work captured in the sound recording." For example, "[t]he sound recording copyright

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30. Id. at 89.
32. LEAFFER, supra note 29, at 88.
17 U.S.C. § 106 provides:
Subject to sections 107 through 120, the owner of copyright under this title has the exclusive rights to do and authorize any of the following:
(1) to reproduce the copyrighted work in copies or phonorecords;
(2) to prepare derivative works based upon the copyrighted work;
(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and
(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
(6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

Section 106 was recently amended to provide for the first time a very limited performance right for sound recording copyright owners. Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39 (Nov. 1, 1995). The amendment provides sound recording copyright owners with the right to control public performance by digital transmission by a subscription service or interactive service, as defined in the Act. It gives no performance rights in the context of regular radio broadcasts.

Section 114, which addresses the limitations on the scope of the exclusive rights associated with sound recording copyrights, was also recently amended by the Digital Performance Right in Sound Recordings Act of 1995 to provide a limited right to control public performances. Musical
confers no ownership right to either the material object or to the underlying musical work." Therefore, the scope of sound recording copyrights, with respect to reproduction and adaptation, is limited to the actual sounds that are recorded: a defendant in a copyright infringement suit must mechanically reproduce or lift sounds directly off the recording in order to be liable. By contrast, in other categories of copyrighted works, any form of copying or imitation will infringe.

The musical work and the sound recording copyrights are often owned by different persons or entities, because while "[a]s a rule, copyright ownership in the musical composition vests in its creators" works copyright owners have more extensive rights to control the public performance of the musical work. Section 114 provides in relevant part:

(a) The exclusive rights of the owner of copyright in a sound recording are limited to the rights specified by clauses (1), (2), (3) and (6) of section 106, and do not include any right of performance under section 106(4).
(b) The exclusive right of the owner of copyright in a sound recording under clause (1) of section 106 is limited to the right to duplicate the sound recording in the form of phonorecords or copies that directly or indirectly capture the actual sounds fixed in the recording. The exclusive right of the owner of copyright in a sound recording under clause (2) of section 106 is limited to the right to prepare a derivative work in which the actual sounds fixed in the sound recording are rearranged, remixed, or otherwise altered in sequence or quality. The exclusive rights . . . under clauses (1) and (2) of section 106 do not extend to the making or duplication of another sound recording that consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording . . . .
(c) This section does not limit or impair the exclusive right to perform publicly, by means of a phonorecord, any of the works specified by section 106(4).


34. Leaffer, supra note 29, at 89.
35. See generally id. at 217 (discussing limitations on exclusive rights afforded to sound recordings under 17 U.S.C. § 114(b)). See also Michael I. Rudell, Copyright, Musical Composition and Sound Recording, 212 N.Y.U.L.J. 3 (1994) (discussing a recent federal court decision illustrating "the differences between the copyright protection available to the proprietor of a musical composition and [of] a sound recording.").
36. Musical work copyright owners have substantially broader rights than do sound recording copyright owners. For example, these copyright owners have always enjoyed the right to control the public performance of the musical work. 17 U.S.C. § 106(4) (1994). But section 115 does place "substantial limits on the reproduction, adaptation, and distribution rights of musical copyright owners." Leaffer, supra note 29, at 212. After the musical copyright owner has distributed the musical work "to the public, any other person can make a sound recording of the work for sale to the public." Id. See also Robert A. Gorman, Copyright Law 76 (1991). Section 115 prescribes the relationship between the musical copyright owner and the sound recorder when the sound recorder chooses to utilize the compulsory licensing scheme as a means to distribute its own independent recordings.

Section 115, also known as the mechanical license, provides in part: "In the case of nondramatic musical works, the exclusive rights . . . to make and to distribute phonorecords of such works, are subject to compulsory licensing . . . ." 17 U.S.C. § 115 (1994).
someone other than the creator of the music and lyrics often records and distributes the musical composition pursuant to a contractual arrangement which effects the creator's ownership and the right to administer the copyright. Accordingly, it is important to remember both the different copyrights and the contractual agreements involved when evaluating the validity of the arguments for and against extending the duration of copyright protection.

II

American Copyright Law

A. Historical Origins

"American copyright law is unique for the purpose of copyright is specifically stated in the U.S. Constitution." The Framers, building upon English philosophies and colonial copyright laws, gave

37. NIMMER, supra note 28, at § 24.01. These contractual agreements may take many different forms. Id. The composer or lyricist may enter into an agreement with a publishing entity to exchange some or all of his/her rights regarding the musical composition in return for the entity's handling of certain services such as copyright registration. Id.

The particular type of contractual relationship involved . . . will determine the proprietorship of the copyright in the musical composition; the extent and nature of the writer's power to control the use of the musical composition will also be a matter of negotiation. The type of agreement usually is determined by the writer's leverage as well as the economic terms offered by the publishing entity.

38. The creators of the musical work often sell their rights in the work in return for the ongoing royalty payments. They receive a set percentage of the profits that the assignee of the copyright earns from exploiting the work during the terms of the copyright. See generally Don E. Tomlinson, Everything That Glitters Is Not Gold: Songwriter-Music Publisher Agreements and Disagreements, 18 HASTINGS COMM/ENT L.J. 85, 87 (1995).

39. PATTERSON & LINDBERG, supra note 1, at 48.

40. Copyright was created in England under the Statute of Anne to protect publishers under the guise of protecting authors. The King had used British censorship laws, which "granted to the Stationers' Company . . . a monopoly over book publication, . . . to control the publication of seditious or heretical works. Publishers were given an exclusive and perpetual right of publication of works that passed muster with the Government and the Church . . . there was no intention to protect or reward authors." GORMAN, supra note 36, at 1. The basic philosophy and contours of the Statute of Anne has dominated the United States copyright law "for most of our history as a nation." Id.

41. Under the Articles of Confederation, twelve of the thirteen original states had copyright statutes. Six of the states had modeled their duration provisions after the English Statute of
Congress the power "[t]o promote the progress of science and useful arts, by securing for limited times to authors and inventors, the exclusive right to their respective writings and discoveries." Hence, the Copyright clause is both a source of and a limitation on Congressional power.

In the United States, "copyright law is the infrastructure supporting the progress of learning in our free society—and that if it is to serve this crucial function, the law must take into account not only rewards for creators and disseminators but also reasonable rights for the users who provide those rewards." This copyright philosophy, with an emphasis on the public users, exemplifies the difference between "copyright, which arose under the common law system to prohibit copying, and authors’ rights, which arose under the French and other civil law systems to protect the property created by the author."

The United States does not subscribe to the authors’ rights view of copyright because it views copyright law as a mechanism to secure the general benefits derived by the public from the labors of authors.

Anne, which provided for an original term of fourteen years and a second term of fourteen years if the author was still living at the expiration of the first. The other six states adopted single terms providing protection for fourteen to twenty-one years. 1995 House Hearings, supra note 10, at 167 (statement of Marybeth Peters, Register of Copyright and Associate of Librarian for Copyright Services).

42. U.S. Const. art. I, § 8, cl. 8 (emphasis added).

43. Id.

44. PATTERSON & LINDBERG, supra note 1, at 48; GORMAN, supra note 36, at 1. See also Peter A. Jaszi, Impact of TRIPs Agreement on Specific Disciplines: Copyright Literary and Artistic Works: Goodbye to All That—A Reluctant (and Perhaps) Adieu to a Constituionally-Grounded Discourse in Copyright Law, 29 VAND. J. TRANSNAT’L L. 595, 603 n.24 (1996).

45. PATTERSON & LINDBERG, supra note 1, at 14.


47. STEPHEN M. STEWART, INTERNATIONAL COPYRIGHT AND NEIGHBORING RIGHTS 98-100 (1983). See also Burger, supra note 46, at 5.
not as one to reward the authors. The primary purpose of United States' copyright law was, from the outset, to stimulate creative production for the public good. In this spirit, the Framers created a copyright system which would "[f]oster the growth of learning and culture for the public welfare, and the grant exclusive rights to authors for a limited time as a means to that end." Accordingly, three policies underscore the American copyright system: first, that copyright promotes learning; second, that copyright preserves the public domain; and third, that copyright encourages creation and distribution of the works by protecting the author.

The origins and goals of the U.S. copyright system lead us to inquire: how long should copyright protection last? Certainly, the Framers did not intend for Congress to provide authors with exclusive rights to extend in perpetuity. In fact, as the Register of Copyright once noted, Congress has the power to give the copyright owner "exclusive control over the market for his work . . . [though] if his control were unlimited [in duration], it could become an undue restraint on the dissemination of the work."

The Framers considered the potential danger of granting authors exclusive rights to their works and reduced it by imposing conditions upon Congress' exercise of this grant. Accordingly, the duration of copyright protection must promote the "progress of science and useful arts" and must exist only for a "limited time."

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49. Stewart E. Sterk, Rhetoric and Reality in Copyright Law, 94 MICH. L. REV. 1197, 1199 (1996) (discussing the ever increasing gulf between copyright protection as a means to encourage creative activity and as a means to provide for the needs of the deserving author).
50. 1995 House Hearings, supra note 10, at 165 (statement of Marybeth Peters, Register of Copyrights and Associate of Librarian for Copyright Services, Library of Congress).
51. Patterson & Lindberg, supra note 1, at 49.
52. See generally Litman, Domain, supra note 11, at 965; Lange, supra note 11, at 147; Cohen, supra note 16, at 1180. In their articles, Litman, Lange, and Cohen examine the effect that the duration of protection granted by the 1976 Copyright Act, life of the author plus fifty, has had on the public domain. Their arguments and reasoning are applicable to the current debate over extending the duration of protection.
53. See L. Ray Patterson, Free Speech, Copyright, and Fair Use, 40 VAND. L. REV. 1, 13-36 (1987) (arguing that the constitutional language, when interpreted within the historical context, directs Congress to establish a regulatory structure as opposed to a system of property rights). See also Cohen, supra note 16, at 1182.
55. U.S. Const. art. I, § 8, cl. 8
What constitutes a limited time? This inquiry seems to beg the question as to what duration of protection is necessary to encourage composers to engage in creative work.\(^{56}\) "Does any writer write less, or worse, because of the length of the copyright term?"\(^{57}\) Common sense tells us the answer to this question: No.\(^{58}\)

There appears to be no correlation between productivity and duration of protection.\(^{59}\) A sixty year legal monopoly does not make the author three times more productive than a twenty year legal monopoly.\(^{60}\) As one scholar noted, "[d]istant advantages tend to be much less persuasive as a motivator of action than relatively immediate advantage."\(^{61}\)

If protection extends past this elusive, optimal duration, it has adverse effects upon the public because the public domain suffers.\(^{62}\) An excessive duration limits the creative tools available for the creation of new works.\(^{63}\) As Justice Holmes noted:

[Copyright] restrains the spontaneity of men where but for it there would be nothing of any kind to hinder their doing as they saw fit. It is a[n] [artificial] prohibition of conduct remote from the persons or tangibles of the party having the right . . . . It is a right which could not be recognized or endured for more than a limited time,

\(^{56}\) Cohen, supra note 16, at 1181.

\(^{57}\) Id.


\(^{59}\) Cohen, supra note 16, at 1181.

\(^{60}\) Id. at 1186.

\(^{61}\) Id. Authors would rather be compensated up front because the "difference between a twenty years' term and a sixty years' term of posthumous copyright would have been nothing or next to nothing." Chaffe, supra note 58, at 720.

\(^{62}\) Cohen, supra note 16, at 1181; See also Litman, Domain, supra note 11, at 965 (arguing that increased copyright protection adversely affects authors by contracting the public domain from which they subconsciously draw their inspiration). But see 1995 Senate Hearings, supra note 6 (statement of Senator Orrin Hatch) (arguing that the public domain is not more plentiful when works fall out of copyright protection because ownership of a work creates the incentive to exploit it and preserve it in high quality form).

\(^{63}\) Litman, Domain, supra note 11, at 966-67. During the creative process, an author draws upon her memories, experiences, inspirations, and influences in creating a new work. Subjecting the author to suit for this subconscious infringement is going to have some negative effect upon the author's decision to create and what to create. Id. The public domain is particularly important for the music industry because "[m]uch music is based on public domain sources . . . . Popular songs resemble one another—there are only a finite number of possibilities for this genre." LEAFFER, supra note 29, at 88.
and... it is one which hardly can be conceived except as a product of statute... 

Therefore, while copyright law may create property-like rights, these rights are statutory creatures and subject to limitations in subject matter, scope, and duration.

In sum, United States "[c]opyright law is a legal scheme, prescribed in the Constitution and put in place by Congress, to encourage the enterprise of authorship... . The [copyright] system creates legal rights akin to property rights." But it is crucial to realize that "[t]he monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit." Copyright law creates a limited, statutory monopoly.

B. Early U.S. Copyright Statutes

The duration of protection for copyright has evolved over the years to meet societal needs and to accommodate technological advancements. Accordingly, the subject matter, scope, and duration of copyrights have expanded since the first federal copyright statute was enacted.

The 1790 Copyright Act established an initial copyright term of fourteen years to be followed, if the author was still alive, by a fourteen year renewal term. In 1831, Congress increased the term to twenty-eight years, with an option for renewing it for fourteen more

64. Cohen, supra note 16, at 1183-84 (recounting Holmes' views on copyright in White-Smith Music Co. v. Apollo Co., 209 U.S. 1, 19 (1907)).


66. Litman, Domain, supra note 11, at 970. Moral rights also raise issues regarding the appropriate duration of protection. An extensive discussion of the differences between U.S. and authors' rights countries views is beyond the scope of this Note.


68. Bach, supra note 31, at 382. But see Patterson & Lindberg, supra note 1, at 77 (stating that "[t]he 1909 act mark[ed] the . . . change from the nineteenth-century view that copyright was more regulatory than proprietary to the contemporary consensus—whether or not sound—that copyright is more proprietary than regulatory." The authors cite the creation of the compulsory licensing scheme in section 115 for musical works as an example of the shift from statutory right to property right).

69. The technological growth since the 1909 Copyright Act has been phenomenal in and of itself. Copyright law had to change to address works of authorship fixed in new mediums, such as the phonorecord. For example, sound recordings did not receive federal copyright protection until the 1909 Act was amended in 1972. See note 26, supra; see also Patterson & Lindberg, supra note 1, at 90.

70. 1 Stat. 124 (1790).

71. 1995 House Hearings, supra note 10, at 167 (statement of Marybeth Peters, Register of Copyrights and Associate of Librarian for Copyright Services).
years. The next increase in the term of copyright protection did not occur until Congress enacted the 1909 Copyright Act. The 1909 Act increased the renewal term to twenty-eight years, which gave authors a maximum term of protection of fifty-six years.

Prior to the enactment of the 1909 Act, authors had lobbied Congress for an increase in the duration of copyright protection. Authors argued that they were outliving the protection currently afforded to them and claimed that it was unfair for their works to lose copyright protection during their lifetimes. They also argued that the growing acceptance of an international standard, which gave an author copyright protection for his work for the author's life and fifty years after his death, justified extending the United States' copyright protection. But, despite the minimal opposition against an increase in duration, "[C]ongress was not willing to accept such a radical departure from what it saw as the American Copyright tradition:" a definite number of years plus a renewal feature. The U.S. renewal system was supposed to benefit both the public and the author. The system allowed works that were not commercially viable to go into the public domain after twenty-eight years. But it also gave the author, or his or her heirs, a chance to renew the copyright of valuable works for an additional term, and to renegotiate the terms of the sale or licensing of the copyright. Congress' solution to the concern that the copyright term should be longer was to increase the renewal term to twenty-eight years.

72. Id.
74. Id.
75. See 1995 House Hearings, supra note 10, at 168 (statement of Marybeth Peters, Register of Copyrights and Associate of Librarian for Copyright Services).
76. Id. at 168.
77. Id.
78. Id.
79. Id.
80. Id.; R. Anthony Reese, Reflections on the Intellectual Commons: Two Perspectives on Copyright Duration and Reversion, 47 Stan. L. Rev. 707, 716-17 (1995). The drafters of the 1909 Act decided "to retain the bipartite term" because only a small percentage of copyrights were renewed and the structure achieved the appropriate balance between providing authors with the incentive to create and the public with creative works. Id. Authors who wanted "continued protection could obtain it by filing for the renewal term." Id. This renewal provision allowed the author who "had sold her copyright to a publisher for the original term . . . [to] regain ownership of the copyright to the exclusion of the publisher, by filing for the renewal term." Id. at 727.
C. The 1976 Copyright Act

Several attempts had been made to revise the 1909 Act between 1924 and 1974, but these general revision bills failed.\textsuperscript{81} Years of technological advancement and the ambiguity of the 1909 Act, which required judicial interpretation and interpolation,\textsuperscript{82} "made the need for judicial creativity acute."\textsuperscript{83}

By this time, most of the European countries, as well as other countries across the world, were already parties to an international agreement on copyright protection, the Berne Convention,\textsuperscript{84} which in 1908 had established a minimum term of protection at life of the author plus fifty years.\textsuperscript{85} The contracting countries were required to recognize this minimum requirement to achieve the goal of a uniform international copyright law.\textsuperscript{86} Berne signatories could give authors of other nations that were members of the Convention greater protection than the standards set out in the Convention, but under no circumstances could they give less.\textsuperscript{87}

The United States’ absence from this major international copyright agreement was significant for several reasons. While the United States had been a member of the Universal Copyright Convention\textsuperscript{88} since the 1950’s and had enacted several bilateral and regional treaties, its efforts to encourage other nations to modernize

\textsuperscript{81} Jessica Litman, Copyright, Compromise, and Legislative History, 72 \textsc{Cornell L. Rev.} 857, 857 (1987)[hereinafter Litman, \textit{Compromise}]. By the 1970’s, it had become clear that the 1909 Act was outdated and legislative action was imperative. \textit{See} Barbara Ringer, \textit{First Thoughts on the Copyright Act of 1976}, 22 \textsc{N.Y.L. Sch. L. Rev.} 477, 479 (1977).

\textsuperscript{82} B. KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 40-41 (1967).

\textsuperscript{83} Litman, \textit{Compromise}, supra note 81, at 858-59.

\textsuperscript{84} Berne Convention, supra note 20. The original Berne Convention was signed on September 9, 1886 in Berne, Switzerland. The original text of the convention did not establish a minimum term of protection because of the difficulty of coming to an agreement given the variations among contracting states at that time. The Berlin Revision of 1908, however, introduced a new term of protection into the Convention: life plus fifty years after the author’s death. Burger, supra note 46, at 23.

\textsuperscript{85} Berne Convention, supra note 20, at art. 7(1).

\textsuperscript{86} Burger, supra note 46, at 16.

\textsuperscript{87} Berne Convention, supra note 20, at art. 7(6); \textit{see also} Burger, supra note 46, at 16.

\textsuperscript{88} The UCC developed as an alternative to Berne to allow major countries, such as the United States, to participate in an international agreement addressing copyright protection. \textsc{Marshall A. Leaffer, International Treaties on Intellectual Property} 378 (1990)[hereinafter \textsc{Leaffer, Treaties}]. "The basis of the UCC is 'national treatment,' which requires all member countries to accord the same protection to foreign works eligible under the UCC as is granted to its own nationals." \textit{Id.} The UCC only required member states to grant a minimum copyright term of 25 years from publication or life of the author plus twenty years. \textit{Id.} at 379.
(or implement) copyright law were seriously undermined by its own absence from the Berne Convention, which set the international model for copyright protection. Its absence was also significant because American authors had few guarantees of protection abroad and foreign authors had few guarantees of protection within the United States. The 1976 Act was a new, detailed statute that addressed issues never imagined by drafters of the 1909 statute and, according to some commentators, it fundamentally changed the American copyright system. The 1976 Act represented a shift in the direction of U.S. copyright philosophy and "was intended to be a comprehensive solution to our copyright dilemmas."

The 1976 Copyright Act represents over twenty years of studies commissioned by Congress and many intense drafting sessions between "authors, publishers, and other parties with economic interests in the property rights which the statute defines." The legislative process used to design the 1976 Act was interesting because Congress delegated authority to an advisory council of more than one hundred industry representatives and insisted that they sit down with one other and reach mutually agreeable solutions on the substantive issues. Pursuant to this mandate, "the Copyright Office and interested parties hammered out the basic structure of the entire

90. See generally Jon A. Baumgarten & Christopher A. Meyer, Effects of U.S. Adherence to the Berne Convention, 37 PAT., TRADEMARK & COPYRIGHT J. (BNA) 462 (Mar. 9, 1989).
91. Before the U.S. joined the Berne Convention, American authors were able to reap the benefits of Berne Convention through the "back door." Leaffer, supra note 29, at 349. To take advantage of Berne privileges, American authors had to simultaneously publish their works in the U.S. and a Berne country. Id. However, this technique required money, time, and resources that not all American authors possessed. Id. Before joining Berne in 1988, the United States protected copyrights in foreign markets primarily through bilateral agreements. A. Latman, R. Gorman, J. Ginsburg, Copyright for the Nineties 795 (1989 & Supp. 1992).
92. Litman, Compromise, supra note 81, at 858-59.
93. Id. at 859; Patterson & Lindberg, supra note 1, at 91 (1991)(quoting Barbara Ringer, Register of Copyrights, who played a prominent role in the revision process).
95. Litman, Compromise, supra note 81, at 861 (stating that the 1976 Copyright Act represents a delicate balance between competing interests, which explains the difficulty the courts have had in interpreting the Act. The legislative history reflects this delicate balance.).
96. Id. at 871-72.
statute before including Congress’” in the legislative process. According to Representative Robert Kastenmeier, who sponsored the 1976 Copyright Act, “all interests in this bill are special interests.”

Much of the debate leading up to the passage of the 1976 Act centered on whether or not to extend the duration of copyright protection. Proponents of a term increase argued that the increase was necessary for the U.S. to gain preeminence in the international community for protection of intellectual property, such as copyrights. In order to compete internationally, proponents argued, U.S. copyright law had to be brought into compliance with the minimum terms of copyright protection as set forth in the Berne Convention. They also claimed that the term increase, given the increasing lifespan, was necessary to provide authors and their heirs with the requisite economic incentives.

The statutory language of the 1976 Act reflects the tumultuous process of negotiation and compromise that the proposed legislation underwent. One of the most critical compromises involved the controversial and intertwined issues of initial ownership, duration of copyright, and reversion of rights. The music industry, i.e.,

97. Id. at 870. Professor Litman observes that, while some have called this an egregious delegation of legislative authority to the ones the statute purports to regulate, others have classified it as a brilliant way to deal with a complicated matter. Id. at 879. She, however, takes the position that the merit of this process hinges at least partially upon the statute that it produces. Id.


100. 1995 House Hearings, supra note 10, at 169-70 (statement of Marybeth Peters, Register of Copyrights and Associate of Librarian for Copyright Services).


102. Id. at 163 (quoting Representative Carlos J. Moorhead).

103. Id. at 170.

104. Litman, Compromise, supra note 81, at 860, 869.

105. See id. at 865-66 nn. 56-57. Professor Litman identifies section 304(c), relating to the termination of transfers and licenses covering the renewal period for subsisting copyrights, as a product of the compromise process that generated the 1976 Act. She examines Mills Music, Inc. v. Snyder, 469 U.S. 153 (1985), a case in which section 304(c)'s legislative history proved to be ambiguous at best. Id. at 863-64. At issue in Mills was the division of post-termination royalty income derived from the sale of sound recordings of a copyrighted song. The heirs had notified the music publisher of their termination of the author's 1940 grant of rights in the renewal copyright. Id. A divided Court decided to preserve the royalty division agreement between the
publishers and distributors, wanted to eliminate the provisions allowing copyright ownership to revert back to the author when the author renewed the copyright term. The authors and their heirs wanted to retain these reversion provisions in order to renegotiate the re-relinquishment of their rights on better terms.\textsuperscript{106}

The current duration provisions\textsuperscript{107} resulted from a series of compromises involving the provisions relating to termination,\textsuperscript{108} fair

\begin{itemize}
\item[106.] Litman, \textit{Compromise}, supra note 81, at 866 nn.56-57. The 1976 Act "abolished the original renewal terms of the 1909 Act and instead generally grants an author copyright protection for a single term lasting until fifty years after her death." Reese, \textit{supra} note 80, at 708. However, "[w]ithin the new single term, the 1976 Act in fact retains a primary feature of the renewal system: the reversion to an author (or her successors), midway through the term, of any rights she has previously transferred." Id. This reversion or "termination right makes an author's inter vivos grant of a copyright interest terminable by the author . . . [or his heirs] during the period between thirty-five and forty years after the grant's date of execution." Id. at 732. Reversion ensures that the surviving dependents of an author, or her assignees, will be able to exploit the benefits of an older, economically viable work. \textit{Id.} at 737.
\item[107.] The provisions regarding the duration of protection afforded to the various copyrights are set forth in 17 U.S.C. §§ 301-05. 17 U.S.C. § 301, Preemption with respect to other laws, provides in relevant part:
\begin{itemize}
\item[(a)] On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright . . . are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.
\end{itemize}
\item[108.] 17 U.S.C. § 302 provides in part:
\begin{itemize}
\item[(a)] In General.—Copyright in a work created or after January 1, 1978, subsists from its creation and, except as provided by the following subsections, endures for a term consisting of the life of the author and fifty years after the author's death.
\item[(b)] Joint Works.—In the case of a joint work prepared by two or more authors who did not work for hire, the copyright endures for a term consisting of the life of the last surviving author and fifty years after such last surviving author's death.
\item[(c)] Anonymous Works, Pseudonymous Works, and Works Made for Hire.—In the case of an anonymous work, pseudonymous work, or a work made for hire, the copyright endures for a term of seventy-five years from the year of its first publication, or a term of one hundred years from the year of its creation, whichever expires first . . . .
\end{itemize}
\item[109.] 17 U.S.C. § 303 provides in part:
Copyright in a work created before January 1, 1978, but not theretofore in the public domain or copyrighted, subsists from January 1, 1978 and endures for the term provided by section 302 . . . .
\item[110.] 17 U.S.C. § 304 provides in part:
\begin{itemize}
\item[(a)] Copyrights in Their First Term on January 1, 1978.—(1)(A) Any copyright, the first term of which is subsisting on January 1, 1978, shall endure for 28 years from the date it was originally secured.
\item[(B)] In the case of—
use, and the definition of works made for hire. Authors benefited by increasing the term of protection to one measured by the life of the

(i) any posthumous work or of any periodical, cyclopedic, or other composite work upon which the copyright was originally secured by the proprietor thereof, or
(ii) any work copyrighted by a corporate body (otherwise than as assignee or licensee of the individual author) or by an employer for whom such work is made for hire, the proprietor of such copyright shall be entitled to a renewal and extension of the copyright for the further term of 47 years.

(C) In the case of any other copyrighted work, . . .
(i) the author of such work, if the author is still living,
(ii) the widow, widower, or children of the author, if the author is not living,

shall be entitled to a renewal and extension of the copyright in such work for a further term of 47 years.

(2)(A) At the expiration of the original term of copyright in a work specified in paragraph (1)(B) of this subsection, the copyright shall endure for a renewed and extended further term of 47 years, which—

(i) if an application to register a claim to such further term has been made to the Copyright Office within 1 year before the expiration of the original term of copyright, and the claim is registered, shall vest, upon the beginning of such further term, in the proprietor of the copyright who is entitled to claim the renewal of copyright at the time the application is made; or
(ii) if no such application is made or the claim pursuant to such application is not registered, shall vest, upon the beginning of such further term, in the person or entity that was the proprietor of the copyright as of the last day of the original term of copyright.

(b) Copyrights in Their Renewal Term or Registered for Renewal Before January 1, 1978.—The duration of any copyright, the renewal term of which is subsisting at any time between December 31, 1976, and December 31, 1977, inclusive, or for which renewal registration is made [during this period], is extended to endure for a term of seventy-five years from the date copyright was originally secured.

(c) Termination of Transfers and Licenses Covering Extended Renewal Term.—In the case of any copyright subsisting in either its first or renewal term on January 1, 1978, the exclusive or nonexclusive grant of a transfer or license of the renewal copyright or any right under it, executed before January 1, 1978, is subject to termination . . .

17 U.S.C. § 305 provides:
All terms of copyright provided by sections 302 through 304 run to the end of the calendar year in which they would otherwise expire.

108. 1995 House Hearing, supra note 10, at 335 (statement of Professor William F. Patry).
109. Litman, Compromise, supra note 81, at 867.

17 U.S.C. § 107 provides in part:
Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use, scholarship, or research) is not an infringement of copyright.

17 U.S.C. § 101 defines a "work made for hire" as one in which "a work [is] prepared by an employee within the scope of his or her employment; or . . . a work specially ordered or commissioned for use as a contribution to a collective work . . . ." The concept of a "work
author. The industries involved in the dissemination of copyrighted works also benefitted from the longer terms of protection because the work remained under its control for a longer period of time before passing into the public domain. Authors also successfully retained the right to terminate the grant of copyright for a five-year period beginning thirty-five years after execution of such grant. And the United States could finally seek membership in the Berne Convention.

III

International Copyright Agreements

While the 1976 Copyright Act and subsequent amendments to it have brought U.S. copyright law closer to international norms, U.S. copyright law and its underlying philosophy is still unique compared to that of its major European trading partners. United States copyright law does not control the international arena. International copyright agreements, such as the Berne Convention and the EC Duration Directive, have set the standards for copyright protection for the world, and have affected U.S. copyright law to a certain extent.

A. The Berne Convention

The Berne Convention for the Protection of Literary and Artistic Works is the focal point for “any discussion of international copyright protection.” Berne is the oldest international agreement protecting authors’ rights, and currently it “provides the broadest multilateral basis for international copyright protection.” It is a remarkable

made for hire” is important because of the implications it has, not only on ownership of copyright, but also on duration since the “life plus fifty” formula does not apply. Gorman, supra note 36, at 49.

110. Litman, Compromise, supra note 81, at 867.
111. See generally Chaffee, supra note 58, at 720. If authors are more concerned with obtaining compensation up front, the music industry will probably not need to compensate authors proportionally to the increase in the term of protection.
113. Leaffer, supra note 29, at 351.
114. Historical differences between common law copyright tradition and continental authors’ rights tradition are still pervasive. See generally Burger, supra note 46, at 5-8.
116. Anne Moebes, Negotiating International Copyright Protection: The United States and European Community Positions, 14 Loy. L.A. INTL. & COMP. L.J. 301, 303 (1992). The UCC has a smaller membership and has traditionally been viewed as the less influential of the two international agreements on copyright protection.
117. Id. at 305.
international agreement in that it has successfully bridged different copyright philosophies and resolved conflicts for over one hundred years.\footnote{118}

Signatories to the Berne Convention “constitute a Union for the protection of the rights of authors in their literary and artistic works on the international level.”\footnote{119} The mission of the Berne, since its inception in 1886, has been to achieve universal copyright protection.\footnote{120} Yet this mission has been complicated by the underlying ideological differences between the contracting parties’ as to what copyright is supposed to protect.\footnote{121}

The United States acceded to the Berne Convention in 1989\footnote{122} and it has “enacted amendments to the 1976 Copyright Act that brought U.S. copyright law into technical conformity with the Berne Convention as revised at Paris in 1971.”\footnote{123} However, the United States, according to some critics, took the “minimalist approach” in implementing Berne,\footnote{124} making “only the essential changes [to its law that were] necessary to comply with Convention obligations.”\footnote{125}

In the United States, which follows the common law copyright system, the grant of copyright ideally provides authors with the economic incentive to create for the public benefit, not for the authors’ benefit alone.\footnote{126} Common law copyright countries “focus more on the owner of the copyright, whether that be the author, publisher, broadcaster, individual, or corporation.”\footnote{127} This focus on the copyright owner represents a crucial distinction between common law and civil law copyright systems. In civil law countries, copyright protects “authors’ rights” first and foremost, focusing “almost exclusively on the individual author.”\footnote{128} Under this authors’ rights

\begin{itemize}
    \item \footnote{118}{Burger, supra note 46, at 1.}
    \item \footnote{119}{Berne Convention, supra note 20, art. 1.}
    \item \footnote{120}{Burger, supra note 46, at 11.}
    \item \footnote{121}{Id. at 7.}
    \item \footnote{122}{Since treaties are not self-executing in the United States, legislation had to be introduced into Congress to finalize the U.S. membership in Berne. S. Treaty Doc. No. 27, 99th Cong., 2d Sess. (1986). The history of the Berne Convention and the manner of its administration are expounded in H. R. 609, 100th Cong., 2d Sess. 11-17 (1988). BCIA, supra note 89.}
    \item \footnote{123}{Burger, supra note 46, at 2; see BCIA, supra note 89.}
    \item \footnote{124}{Leaffer, supra note 29, at 352 (emphasis in original).}
    \item \footnote{125}{Id. (emphasis in original). Some scholars would argue that the U.S. has not even made these essential changes.}
    \item \footnote{126}{Lange, supra note 11, at 160 n.56 (characterizing copyright as a barter transaction).}
    \item \footnote{127}{Burger, supra note 46, at 7.}
    \item \footnote{128}{Id.}
\end{itemize}
system, copyright is a natural property right that the author obtains by virtue of the labor he or she has expended to create the artistic or literary work. Consequently, copyright law in those countries is perceived to be more favorable to the author. Authors' rights countries do not place as high a premium on the public's interest in easy access to works as do common law copyright countries.

The difference between these two philosophies was, and continues to be, a source of tension and conflict at the international level during the Berne revision conferences. Consequently, the Berne represents a series of compromises between the different copyright philosophies of its contracting members. For instance, the Berne Convention did not attempt to create a body of supranational copyright law. Instead, it sought to create a workable system premised on reforming the copyright laws of the signatory nations themselves. The Berne established certain minimum standards of protection which all contracting countries were required to recognize. Therefore, a copyrighted work is protected by the national legislation of the country of origin, and not by the Berne Convention's provisions themselves. Thus, while any country may join the Berne Convention, it must be prepared to implement national legislation to conform to the minimum standards set forth in the Berne Convention.

129. Id.
130. Id.
131. Id.; see infra text accompanying notes 143-154 (discussing moral rights and current dilemmas with the perceived U.S. non-compliance with Art. 6 bis).
133. In the original 1884 Conference, on the issue of what form the ultimate product of Conference should embody, the delegates broke down into three philosophical groups advocating a codified international copyright law (universal law), a codified international law of copyright with domestic flexibility, and a treaty built on reciprocity with as little unification as possible (natural law). Id. at 12-13.
134. The majority position at the 1886 Conference was that the Convention should set some common legislation and leave some matters to national law. Id. at 15.
135. See Berne Convention, supra note 20, at arts. 7(1) and 36. For instance, a contracting state must provide the term of protection granted by the Convention in order to be eligible for Berne membership. The United States could not become a Berne member until it had amended U.S. copyright law to reflect this minimum term of protection. Id. at art. 36(2).
136. Berne Convention, supra note 20, at art. 36; Moebes, supra note 116, at 303. It is also interesting to note that the Berne does not circumscribe copyright agreements that supplement the Convention. "Member countries may sign separate agreements among themselves if those agreements meet the minimum standards of, and do not contradict, the Berne Convention." Moebes, supra note 116, at 303; see Berne Convention, supra note 20, at art. 20. The EC
Despite numerous revisions and additions, the general structure of the Berne Convention has remained constant over the years. However, the scope of authors' rights has increased through revisions regarding the works that will be protected under the Berne and the specific rules governing the term of protection afforded to these different types of works.

The Berne broadly defines the types of literary and artistic works that it recognizes for protection. It is important to note that while musical compositions are protected and require the minimum duration of protection, sound recordings are not formally protected under the Berne Convention. However, two international treaties, the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations ("Rome Convention") and the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms ("Geneva Convention"), do provide protection for sound recordings.

The Berne also recognizes and provides protection for moral rights. Under Berne, an author has moral rights, in addition to economic rights, in his or her works. The protected moral rights consist of the right to claim authorship of the work and to object to

Duration Directive is a perfect example of a separate agreement among Berne signatories. See supra note 22.

137. Burger, supra note 46, at 15.
138. Id. at 15-16.
139. See Berne Convention, supra note 20, at art. 2(1).
140. See generally Litman Compromise, supra note 81, at 787-810 (1989).
142. LEAFFER, TREATIES, supra note 88, at 415-36. The Rome Convention protects rights that are known as droits voisins or neighboring rights. Id. at 415. The Rome Convention is based on national treatment and establishes "minimum rights [such as performance rights] that must be conferred for performers and producers of phonograms. . . . Protection is granted for a 20-year term." Id. at 416. The Geneva Convention is similar to the Rome Convention but differs in that it does not create substantive rights, i.e., neighboring rights. In fact, the Geneva Convention was promulgated because "many states that did not recognize neighboring rights, e.g., the United States, refused to adhere to the Rome Convention." Id. at 430. Accordingly, the Geneva Convention requires only that the phonograms be protected. Id. "[T]he mode of protection is left to domestic law: whether by copyright, unfair competition, or by penal sanctions." Id. The United States belongs to the Geneva Convention but not the Rome Convention. Id.
143. Berne Convention, supra note 20, at art. 6 bis.
144. Id. at art. 6 bis (1).
any distortion, mutilation, or any other modification which would be prejudicial to his or her honor or reputation.145

Moral rights are independent of economic rights and hence continue even after the author has transferred the copyright to another.146 The Berne provisions regarding moral rights must appeal to a large cross-section of nations, some of which may not be as protective of authors’ rights as others. The drafters of these provisions compromised on the moral rights issue by allowing each contracting nation to decide the duration of protection.147 However, it appears as though the protection must, at a minimum, exist for the life of the author.148

The moral rights issue has been a source of contention between the U.S. and authors’ rights countries such as France and Germany.149 When the U.S. acceded to the Berne Convention it obligated itself to adopt measures to provide the minimum standards, including those on moral rights.150 However, the United States has traditionally not provided specific moral rights protection151 and would have had to alter the U.S. copyright system in order to add this type of protection.152 Therefore, the U.S. decided that current domestic law, such as unfair competition, defamation, privacy and contract law, adequately protect an author and his or her desire to prevent “improper alterations of an author’s work.”153 This minimalist approach has angered a great number of authors’ rights nations because they classify the U.S. attitude as a breach of the Berne Convention.154

145. Id.
146. Id.
147. Id. at art. 6 bis (2).
148. See id.
149. As noted above, an extensive discussion of the moral rights issue is beyond the scope of this Note. See generally Crabbs, supra note 46, at 168.
150. Berne Convention, supra note 20, at art. 36. Article 36 provides:
   (1) Any country party to this Convention undertakes to adopt, in accordance with its constitution, the measures necessary to ensure the application of this Convention.
   (2) It is understood that, at the time a country becomes bound by this Convention, it will be in a position under its domestic law to give effect to the provisions of this Convention.
151. C.f. Crabbs, supra note 46, at 168 n.23 (citing 17 U.S.C. § 115, and explaining that restrictions upon altering the musical composition underlying the sound recording constitute a type of moral rights protection).
152. See id. at 168 n.26.
153. Leaffer, supra note 29, at 352; see also Crabbs, supra note 46, at 168.
154. Crabbs, supra note 46, at 168.
The Berne also sets out the general terms regarding the duration of protection. The minimum standard for protection is the life of the author plus fifty years after his death, but the countries of the Berne Union are free to grant a term in excess of this minimum. Because a country is free to grant a term in excess of the Berne minimum, article 7(8) of the Convention gives the country the option of granting that longer term to authors of other Berne Union countries, or of applying the shorter minimum term.

B. The EC Duration Directive

On October 23, 1993, the Council of Ministers, which makes the major policy decisions necessary to govern the European Community, issued the “Duration Directive.” The Council directed member states to harmonize the term of protection for copyright and certain related rights. It also specified that member states had to “bring into force the laws, regulations, and administrative provisions necessary to comply with [the directive] before 1 July, 1995.” Member states of the European Community (EC) must comply with this directive because it is a form of supranational legislation.

The Duration Directive requires that each member state increase its copyright protection term to “run for the life of the author and for seventy years after his death.” The EC’s decision to promulgate and implement the Duration Directive was driven by the necessity of addressing the differences between the national laws of European Union (EU) member states that were “liable to impede the free movement of goods and freedom to provide services and to distort competition in the common market.”

Since the Berne Convention had only laid down minimum terms, contracting states were free to adopt longer terms of protection.
Some EC members, also signatories to the Berne Convention, had provided authors with terms of copyright protection greater than the Berne minimum (life of the author plus fifty) within their national laws. Different terms of protection combined with the member states' geographical proximity to one another, and the increasing growth of supranational Community law, posed problems for achieving a fully integrated European Community.

The Council was aware of the problems that stemmed from the lack of harmony in the copyright law of its members. Prior to 1993, the Council had issued several directives that began to remedy the situation within certain fields of intellectual property such as computer programs. However, what finally prodded the EC into a thorough response to the harmonization problem was the 1989 decision of the European Court of Justice (ECJ) in *EMI Electrola GmbH v. Patricia Im-Und Export*.

In *EMI Electrola*, the plaintiff alleged an infringement of its exclusive distribution rights for sound recordings on German territory and brought an action to enjoin the defendants from selling sound recordings imported from Denmark in such territory. The defendant companies argued that the sound recordings had been lawfully marketed in Denmark because the period during which exclusive rights are protected under Danish copyright law had already expired and hence the phonographic records were legally marketed in Germany without paying any licensing fee. “However, in Germany the sound recordings were still in ‘copyright’…” The ECJ held for the German plaintiff based on articles within the EEC treaty, and in reaching its decision chastised the Council by pointing out that this

165. The greatest of the different term lengths were recognized by Germany and Spain. “Germany provided 70 years p.m.a. protection and Spain provided 60 years.” See Brownlee, *supra* note 23, at 596 n.87.
167. *Id.*
168. *Id.* at 171.
170. *Id.*
171. *Id.*
173. *Id.* Germany provided copyright protection for life of the author plus seventy years.
problem arose due to the lack of harmonization of legislation regarding copyright protection.\textsuperscript{174} The EC, in order to effectuate its desire of a single internal market, therefore needed to harmonize the duration of copyright protection.\textsuperscript{175} The Council of Ministers issued the Duration Directive with “a view the smooth operation of the internal market, . . . to make terms of protection identical throughout the Community.”\textsuperscript{176} The Duration Directive represents an agreement entered into by signatories to the Berne Convention which provides protection in excess of that mandated by Berne.\textsuperscript{177} The directive operates in addition to the Berne Convention.\textsuperscript{178}

The Council cited the growing lifespan of authors to justify its decision to adopt a term of life plus seventy.\textsuperscript{179} The Council found that the Berne minimum was no longer a sufficient period of protection for the author and the first two generations of his descendants.\textsuperscript{180} However, this finding must be viewed in the context of the fact that the EC is comprised of nations embracing the authors’ rights approach as discussed above.

European countries, as members of the Berne Convention, are obligated to protect U.S. works by one of two methods.\textsuperscript{181} They can either act according to the protection that the work would receive in the United States or they can give the work the protection that the European state would grant works by its nationals.\textsuperscript{182} The EC Duration Directive, however, eliminates the latter of these methods. To ensure copyright harmonization, the Duration Directive specifically mandates that EC members adopt the rule of the shorter

\begin{flushright}
174. Id.
175. EC Duration Directive, supra note 22, Recitals 1 and 2.
176. Id. at Recital 2.
177. Article 20 of the Berne Convention provides:

The Governments of the countries of the Union reserve the right to enter into special agreements among themselves, in so far as such agreements grant to authors more extensive rights than those granted by the Convention, or contain other provisions not contrary to this Convention. The provisions of existing agreements which satisfy these conditions shall remain applicable.

Berne Convention, supra note 20, at art. 20.
178. Id.
179. EC Duration Directive, supra note 22, Recital 5.
180. Id.
181. Berne Convention, supra note 20, at art. 7(8).
182. Id.
\end{flushright}
term with respect to non-EC works. Since the Berne Convention proposes this approach when dealing with other Berne Union states, EC members do not violate any Berne provision by complying with this directive. However, if members do not apply the rule of the shorter term, the EC will have problems with intra-community trade and such a decision would threaten the workings of the Single Market.

The rule of the shorter term operates in this fashion: while EC members will be bound under EC law to protect works created by authors from other EC members for life plus seventy, American works will only receive protection for life plus fifty, the current duration under the 1976 Act. The term of protection for American works in Europe will turn upon U.S. law. Accordingly, the Duration Directive, and this rule in particular, has frightened those Americans who benefit from the exportation of American intellectual property. This fear of losing twenty years of monetary benefits is the driving force behind the Copyright Term Extension Act.

IV

The Copyright Term Extension Act

A. Background

Recent expansion of international copyright protection, combined with the impending passage of popular American musical works into the public domain, is a source of great concern to some Americans. The United States, given its reputation as one of the world's leading exporters of intellectual property, has begun to reconsider its term of copyright protection in light of these international and domestic

183. Id. at art. 7(1).
184. Berne Convention, supra note 20, at art. 7(8). In fact, prior to the issuance of the Duration Directive, "Belgium, Denmark, Finland, France, Germany, Italy, Spain, Sweden, and the Netherlands appl[ied] the rule of the shorter term . . . ." Brownlee, supra note 23, at 596.
185. If one considers the fact pattern as set forth in EMI Electrola, the Council's decision as to treatment of works originating outside of the EC becomes clear. The rule of the shorter term or comparison of terms must be adopted by all of the EC members or the EC will not realize its goal of copyright harmonization.
186. 1995 Senate Hearings, supra note 6 (statement of Senator Orrin Hatch)(suggesting that the loss of 20 years copyright protection amounts to, in trade dollars, a devastating blow to U.S. trade).
187. Id.
188. 1995 House Hearings, supra note 10, at 205 (statement of Ambassador Charlene Barshefsky, U.S. Trade Representative).
developments. While the 1976 Act has been amended several times since it became effective, the proposed Copyright Term Extension Act represents the first attempt to extend the duration of protection since the term was extended to life of the author plus fifty years. In 1993, after the issuance of the Duration Directive, the U.S. began to contemplate an amendment to the duration provisions. The Copyright Office began conducting studies and held hearings inviting public comment before any legislation had been proposed. The majority of the attendees were lyricists, composers, music publishers, record companies, and motion picture industry representatives.

B. Effect of the Proposed Amendment

The proposed Copyright Term Extension Act extends the duration of protection given to authors, including lyricists and music composers, to a term consisting of the life of the author plus seventy years after the author’s death. The sponsors of the Act feel that an additional twenty years of protection is necessary to help U.S. intellectual property remain competitive abroad.

The proposed legislation provides an across the board twenty year increase in copyright terms. For instance, works already in existence, if the author of the preexisting work is still alive, would receive a term of protection identical to those created in the future after the effective date of the Act. Works in which the author is not

189. The Copyright Office began conducting hearings and studies after the European Community reached a final agreement in June of 1993 regarding life plus seventy as a uniform standard of copyright duration, and the Committee of Experts on a Possible Protocol to the Berne Convention began discussing the possibility of life plus seventy as the new minimum standard of protection. Copyright Office Considers Life Plus 70 Years, 11 J. Of Proprietary Rights 30, 31 (Nov. 1993).
190. The Berne Convention Implementation Act of 1988 is just one of these amendments. See BCIA, supra note 89.
191. 1995 House Hearings, supra note 10, at 161 (statement of MaryBeth Peters, Register of Copyrights and Associate Librarian for Copyright Services, Library of Congress).
192. Copyright Office Considers Life Plus 70 Years, supra note 189, 30-31.
193. Id.
195. 1995 Senate Hearings, supra note 6 (statement of Senator Orrin Hatch); 1995 House Hearings, supra note 10, at 2 (statement of Representative Carlos Moorhead).
alive would also receive an additional twenty years of protection, provided that the works have not already gone into the public domain.\textsuperscript{198}

Terms of copyright protection which are not tied to the life of the author, \textit{i.e.}, older works on the fixed term system and "works made for hire,"\textsuperscript{199} would also receive the benefit of an additional twenty years of protection.\textsuperscript{200} This means that works that have already been renewed, or that are up for renewal soon, would receive a renewal period of sixty-seven years in lieu of the forty-seven year renewal period which took into account the changes in duration from the 1976 Copyright Act.\textsuperscript{201} "Works made for hire" would be protected for 95 years from publication or 120 years from creation, whichever is shorter.\textsuperscript{202} "Anonymous"\textsuperscript{203} and "pseudonymous works"\textsuperscript{204} would also get a twenty year increase under the proposed legislation.\textsuperscript{205}

Lyricists and the music industry in general favor the proposed extension.\textsuperscript{206} Their support stems largely from the personal benefit they would derive from such an extension.\textsuperscript{207} The proposed extension would entitle the songwriter's estate to collect the royalties from his or her works for an additional two decades before these works would fall into the public domain.\textsuperscript{208} Opposition to the proposed extension comes primarily from the academic community.\textsuperscript{209}

\begin{footnotes}
\item[201] Id.
\item[203] 17 U.S.C. § 101 (1994) provides that "[a]n anonymous work is a work on the copies or phonorecords of which no natural person is identified as author."
\item[204] 17 U.S.C. § 101 (1994) provides that "[a] 'pseudonymous work' is a work on the copies or phonorecords of which the author is identified under a fictitious name."
\item[206] See generally 1995 Senate Hearings, supra note 6 (statements of songwriters Don Henley, Quincy Jones, Bob Dylan, and Carlos Santana).
\item[207] 1995 House Hearings, supra note 10, at 272-73 (statement of Mary Ellin Barrett, daughter of composer Irving Berlin).
\item[208] 1995 Senate Hearings, supra note 6 (statement of Senator Orrin Hatch).
\item[209] See 1995 Senate Hearings, supranote 6 (statement of Professor Peter Jaszi); 1995 House Hearings, supra note 10, at 292-311 (statement of Professor Dennis S. Karjala).
\end{footnotes}
C. Special Interests at Work—Arguing For Life Plus Seventy

Those individuals who have an economic stake in the United States copyright system influence the legislative process because the system is abstract and difficult for the layperson to understand. Consequently, the proposed legislation in this case, as well as others, likely benefits the interested individuals. Proponents of the term extension argue that the current term does not provide the requisite protection, namely protection for the life of the author and two generations. Increasing lifespans and the tendency to have one's children later in life, they argue, make life plus fifty years inadequate to meet this target term of protection.

Authors and composers argue that it is reasonable for them to consider their copyrights as "valuable resource[s] to be passed on to their children and through them into the succeeding generation." According to many composers, it never occurred to them that their songs—their legacy to their children—would someday fall into the public domain, as opposed to passing to their estate after their deaths and providing a source of income to successive generations. Heirs feel that it is "monstrously unfair that other recognized forms of property—lands, business, and so on—can be handed down indefinitely, . . . whereas the value of intellectual property under current copyright laws is arbitrarily cut off . . . ."

Proponents also argue that new technologies make older works commercially viable and exploitable for longer periods of time. Consequently, allowing these works, upon which authors' livelihoods are based, to enter the public domain will cause great hardship to the authors and their families. A term extension will increase the economic rewards of creativity which, in turn, will stimulate continued artistic activity.

211. Id. at 235 (statement of songwriter Quincy Jones).
212. 1995 Senate Hearings, supra note 6 (statement of Senator Orrin Hatch).
213. 1995 House Hearings, supra note 10, at 235-36, 240 (statements of Quincy Jones and Bob Dylan).
214. 1995 Senate Hearings, supra note 6 (statement of Shana Alexander, writer and daughter of songwriter Milton Ager). She also states that "in a family such as ours intellectual property is the only property." Id.
216. Id. at 272 (statement of Mary Ellin Barrett, daughter of composer Irving Berlin).
217. 1995 Senate Hearings, supra note 6 (statement of Don Henley, songwriter).
Yet, the most powerful argument for extending the term of protection that proponents have proffered is the recent changes in copyright duration within the European Community. "The changed rules pertaining to copyright duration are of critical practical importance to the international exploitation of existing works." U.S. authors and works will, by operation of these changed rules, be discriminated against abroad. Now that the EC Duration Directive has been implemented, U.S. copyright protection in Europe will be measured by "the rule of the shorter term."

Songwriters, such as Don Henley, argue that if the U.S. does not act quickly to extend U.S. law, then Europe will get "essentially a twenty-year free-ride . . . they [will be able to] use and abuse our works for free, while we [will] have to pay for the use of theirs." Since it is undisputed that American music is popular abroad, this would result in an enormous loss in valuable trade dollars.

Proponents argue that this proposed extension is true to the Constitutional grant of copyright. They argue that Congress must have the power to grant exclusive rights to authors for a term of life plus seventy years. They state that the "change is necessary to strengthen the economic incentives to our creators, to maintain our international trading position, to protect our investment in intellectual property and to help preserve our culture.\(^\text{223}\) Therefore, this proposed term falls within the "broad and flexible\(^\text{224}\) requirement that the Framers set forth in Article I, section 8 of the U.S. Constitution, that Congress grant such rights "for limited Times.\(^\text{225}\)

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219. Id.
221. "European audiences have always enthusiastically welcomed American popular musicians. They buy our records, they play our music over the airways and they attend our concerts." Id. at 240 (statement of Bob Dylan, songwriter).
222. "Copyright term extension is very much in America's economic interest. Along with our country's interest in maintaining the trade surplus we currently enjoy in the area of intellectual property, I respectfully urge this Congress to also consider the prospective loss of American culture . . . ." 1995 House Hearings, supra note 10, at 245 (statement of Ellen Donaldson, vice president of Donaldson Publishing Company).
223. See Price, supra note 13, at A2; 1995 Senate Hearings, supra note 6 (statement of Senator Orrin Hatch).
224. Senator Orrin Hatch argues that the copyright and patent clause should be interpreted broadly and flexibly to be true to the Framers' intent. 1995 Senate Hearings, supra note 6 (statement of Senator Orrin Hatch).
D. Public Interests at Work—Arguing Against Life Plus Seventy

Opponents of the extension argue that traditionally, the Copyright Clause has been given a much narrower interpretation than the one currently espoused by the proponents of this legislation. Extensions of the duration of copyright protection have been gradual, and hotly debated, since Congress enacted the first copyright statute. For instance, the United States was reluctant to increase copyright protection in 1909 because it felt that a term of “life plus fifty” was a departure from its traditional copyright roots. Congress was reluctant to extend the duration of protection even though other Western countries had adopted this term or even longer terms. It was not until sixty-nine years later that Congress approved the change from a fixed term to a longer term measured by the life of the author. As one participant in the recent Congressional hearings revealed:

Each time the term of protection was increased in the past, there appeared to be ample justification for increasing the term. . . . [T]oday the need to increase the copyright term is not as pressing as it was in 1831, 1909, or 1978 . . .

Thus, opponents argue that the extension is premature and unwarranted at this time.

Members of academic circles, who oppose the extension, claim to represent the interests of “the larger community of users of the ‘public domain’ materials.” They argue that typical music listeners and the users of other “public domain” materials are threatened by the proposed extension. According to these critics, the fact that the support for the extension comes almost exclusively from the parties

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226. Id.
227. See supra text accompanying notes 39-68 (discussing historical origins of American copyright law).
228. See supra text accompanying notes 69-80 (discussing early copyright statutes).
230. Id.
231. Id. at 170.
232. Id. at 215 (statement of Bruce A. Lehman, Asst. Secretary of Commerce and Commissioner of Patents and Trademarks) (favoring the extension after balancing the benefits and detriments).
233. 1995 Senate Hearings, supra note 6 (statement of Professor Peter Jaszi).
234. Id.
that benefit from a longer term of protection demonstrates that the proposed extension does not take the users' interests into account.235

Opponents argue that extending copyright weakens the "public domain"236 and makes public access to works more difficult.237 Although it is true that when a work passes into the "public domain" it does not necessarily become cheaper,238 an extended term of copyright would shrink the informational commons that people turn to for information in educational or creative situations.239

Proponents argue that extra protection provides authors with the economic incentive to create. Yet this argument cuts both ways: authors must receive financial benefits from their works but they also must be free to create, i.e., have the requisite tools available. No creator would create if he or she was in constant fear of subconsciously infringing upon the work of another creator.240 For these reasons the "public domain" is a source of real social value, and incursions should not be undertaken lightly.241 The public domain should be of particular importance to the music industry because, as discussed above, "much music is based on public domain sources . . . . Popular songs resemble one another—there are only a finite number of possibilities for this genre."242

Another flaw in this "economic incentive to create" argument arises when one considers that the twenty year extension applies across the board. It extends the protection of works already in existence. To say that we need to extend the term of protection for works that the author has already created without the incentive of increased protection is simply fantastic.243 An extension cannot be the incentive for works already in existence.244

235. The expansion of Twentieth Century copyright protection is a product of "the interests of small but organized groups [rather] than the interests of the public at large." Stewart E. Sterk, Rhetoric and Reality in Copyright Law, 94 MICH. L. REV. 1197, 1244-45 (1996).
236. See generally Litman, Domain, supra note 11.
237. 1995 Senate Hearings, supra note 6 (statement of Professor Peter Jaszi).
238. Id. (statement of Quincy Jones, songwriter); 1995 House Hearings, supra note 10, at 217-18 (statement of Bruce A. Lehman, Asst. Secretary of Commerce and Commissioner of Patents and Trademarks).
239. See generally Litman, Domain, supra note 11, at 1019.
240. Id. Copyright infringement is a strict liability offense; there is no intent or knowledge requirement.
241. 1995 Senate Hearings, supra note 6 (statement of Professor Peter Jaszi).
242. LEAFFER, supra note 29, at 88.
243. See Sterk, supra note 235, at 1197.
244. 1995 House Hearings, supra note 10, at 292 (statement of Professor Dennis Karjala).
Opponents argue, in response to proponents' claim of an entitlement to protection for two succeeding generations, that the U.S. has never subscribed to these goals. The U.S. does not consider copyright as a "natural right" as do many countries in continental Europe.\textsuperscript{245} U.S. copyright law has never provided "a legacy for two generations"\textsuperscript{246} nor did the Framers intend for it to do so.\textsuperscript{247} In sum, why should an author need income for his or her grandchildren?\textsuperscript{248}

The United States has always viewed copyright primarily as a vehicle for achieving social benefit based on the belief that encouragement of individual effort by personal gain is the best way to advance the public welfare.\textsuperscript{249} This philosophy distinguishes U.S. copyright law from that of other countries.\textsuperscript{250} Accordingly, the opponents argue that many of the reasons given by the proponents to extend copyright can be dismissed due to the nature of the right that U.S. copyright law affords to authors.\textsuperscript{251}

Opponents do, however, have a more difficult time addressing the argument that the extension is necessary for international trade purposes.\textsuperscript{252} As the proponents cite, intellectual property is the United States' second largest export,\textsuperscript{253} and as the opponents concede, the extra protection "will bring extra income to the owners of some internationally popular domestic works."\textsuperscript{254}

The threat of losing the trade surplus in copyrighted works, which stems in part from the success American works enjoy abroad, appears daunting at first glance. However, whether or not a U.S. copyright extension is the appropriate response to the EC Duration Directive is not as simple as the proponents argue.

\begin{thebibliography}{99}
\bibitem{245} 1995 Senate Hearings, supra note 6 (statement of Professor Peter Jaszi).
\bibitem{246} Id.
\bibitem{247} See supra text accompanying notes 39-55 (discussing historical origins of American copyright law).
\bibitem{248} "[A]n advantage that is to be enjoyed more than half a century after we are dead, by somebody we know not whom, perhaps by somebody unborn, by somebody utterly unconnected with us, it really no motive at all to action . . . ." Chafee, supra note 58, at 719 (citing 8 MACAULY, WORKS (Trevelyn ed. 1879) 199-201).
\bibitem{249} 1995 Senate Hearings, supra note 6 (statement of Professor Peter Jaszi).
\bibitem{250} 1995 House Hearings, supra note 10, at 294 (statement of Professor Dennis Karjala); See also supra text accompanying notes 126-136 (discussing how the underlying philosophical differences between common law copyright and authors' rights countries posed a challenge to the success of the Berne Convention).
\bibitem{251} 1995 House Hearings, supra note 10, at 290-91 (statement of Professor Dennis Karjala).
\bibitem{252} 1995 Senate Hearings, supra note 6 (statement of Professor Peter Jaszi).
\bibitem{253} Id. (statement of Senator Orrin Hatch).
\bibitem{254} Id. (statement of Professor Peter Jaszi).
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First, there is no data suggesting how many of the works that are approaching the end of their terms of protection and entrance into the public domain are truly still marketable abroad. The trade dollars that come from selling American music abroad probably comes from popular, newer works, not those on the verge of becoming ineligible for copyright protection.

Second, United States copyright law currently protects certain types of works for longer terms than the EC Duration Directive. For instance, even without the proposed extension, the U.S. copyright owner of a sound recording will be protected for "75 years from first publication or 100 years from creation whichever is shorter." The EC affords only five extra years of protection to sound recordings. Accordingly, in these situations where U.S. protection is greater, the rule of the shorter term would not operate to take away this fifty-year protection.

Third, even if the United States does extend its protection, the EC could refuse to honor copyright protection for U.S. authors on other grounds, such as inconsistencies between U.S. copyright law and the minimum standards mandated by the Berne Convention, i.e., failure to comply with the moral rights provisions. According to opponents of the extension, the "unequal" treatment that U.S. copyright owners may receive in Europe is not an excuse "for mimicking a bad European move that favors the owners of a few old, but economically valuable, copyrights over the interests of the general public." There are also Constitutional arguments against a copyright term of this duration, but as one scholar has noted, these constitutionally-grounded arguments "for limitations on proprietary rights" are being rejected time and time again.

V
Conclusion

Special interests are again at work in the promulgation of the proposed Copyright Term Extension Act. Economic reasons do make
a strong case for extending copyright protection. Yet, if Congress allows economics to dictate the future of U.S. copyright laws, then the U.S. is not being true to the constitutional mandate regarding copyrights.261 The only way this extension can be justified is if the economics of the extension promote the progress of science and the arts. The proposed extension promotes greed as creators or their assignees hope that an increase in copyright duration will enable them to receive a higher price. The public will pay the price if life plus seventy becomes the rule.