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ARTICLES

THE FAILURE OF THE AMERICAN COPYRIGHT SYSTEM: PROTECTING THE IDLE RICH

*William Patry**

I. INTRODUCTION

Since the inception of American copyright law at the end of the eighteenth century, legislators and scholars have struggled with two fundamental, related issues. First, what is the purpose of copyright? Second, to whom should benefits be granted? A number of reasons exist for this struggle, beginning with the constitutional copyright clause.¹ Instead of focusing on a single rationale, the clause provides at least two rationales, which may, on occasion, conflict.² In addition to the lack of a guiding principle, copyright legislation usually has been enacted in response to interest group pressures rather than as the product of a coherent philosophy. Finally, and more recently, there has been congressional inattention to serious divergences between rhetoric and reality,³ resulting in laws that bear little relationship to the objectives espoused at the time of passage.

Nevertheless, until 1976 copyright proposals were roughly anchored to the constitutional mooring of protecting authors in or-

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1 U.S. CONST. art. I, § 8, cl. 8: "Congress shall have Power: . . . To Promote the Progress of Science and useful Arts, by securing for limited Times, to Authors and Inventors, the exclusive Right to their respective Writings and Discoveries."

2 See *infra* text accompanying notes 16-34.

3 See Stewart E. Sterk, *Rhetoric and Reality in Copyright Law*, 94 MICH. L. REV. 1197 (1996).

der to promote the progress of science.⁴ However inadequately conceived or compromised past legislation may have been, one could at least find solace in the fact that authors and their immediate family were usually the beneficiaries.

This is no longer true. Regardless of whether one views copyright as an instrumental device providing incentives for authors to bring their works to the marketplace, or as a natural right recognizing the genius of creativity for its own sake,⁵ aspects of our current copyright statute fail to accomplish either objective. Proposals during the recently concluded 104th Congress to extend the term of copyright an additional twenty years⁶ present us with a striking snapshot of how far adrift current copyright thinking is from the constitutional objectives. Instead of protecting authors, these proposals are heavily weighted in favor of distributors such as publishers. Instead of encouraging living authors to create new works for the benefit of the public, term extension is being pushed by the estates of long deceased authors.

Horror stories of famous musical compositions from the 1920s falling into the public domain, thereby impoverishing the trust funds of composers' grandchildren, were trotted out to great effect at star-spangled congressional hearings in 1995.⁷ The committees were also informed that failure to extend the copyright term will result in lost international royalties, since our copyright nemesis, the European Union, in previously mandating a term extension for its members,⁸ permits Union countries to grant the benefits of the extended term to non-Union authors solely on the basis of reciprocity. In other words, no additional royalties will flow across the Atlantic unless the United States grants Union authors an extra twenty year term. Members of Congress, eager to reduce the balance of payments trade deficit,⁹ in-

4 See U.S. CONST. art. I, § 8, cl. 8.

5 See *infra* text accompanying notes 16-34.

6 H.R. 989, 104th Cong., 1st Sess. (1995); S. 483, 104th Cong., 1st Sess. (1995). (Hatch). In the current, 105th Congress, similar bills were introduced by Representative Gallegly, H.R. 604, and Senator Hatch, S. 505, 105th Congress, 1st Sess. (1997).

7 See *Copyright Term, Film Labeling, and Film Preservation: Hearings on H.R. 989, H.R. 1248, and H.R. 1734 Before the Subcomm. on Courts and Intellectual Property of the House Judiciary Comm.*, 104th Cong., 1st Sess. 265 (1995) [hereinafter *House Term Hearings*].

8 Council Directive 93/98, 1993 O.J. (L 290) 9, 12.

9 See *House Term Hearings*, *supra* note 7, at 50 (testimony of Jack Valenti, Motion Picture Association of America: "I think copyright term extension has a very simple, but compelling enticement and that is it is very much in the economic interests of the United States at a time when the words, 'surplus balance of trade,' are seldom heard in the corridors of Congress, when we are bleeding from trade deficits, and at a time when our ability to compete in the international marketplace is under assault.").

crease domestic jobs, and please constituents, were told that term extension is a no-brainer: the royalties resulting from the increased term will be paid by Europeans to United States authors.¹⁰ And they believed it.¹¹

Regrettably, reality is quite different. Contrary to what Congress was told, United States and not European consumers will pay the lion's share of royalties generated by term extension, and in the process will be denied access to new, competitively priced editions of twentieth century classics.¹² The reality is that those increased payments will rarely go to individual living authors, the only group to whom the Constitution empowers Congress to grant copyright.

This Article will explore how things have come to this sorry state. I take a heretical position: United States copyright law has failed of its essential purpose—to benefit authors—and is being shaped largely by powerful distributors and their lobbyists with the dual goals of extending a monopoly (in order to extract high prices from the public) while simultaneously depriving authors of as much money as possible (though they push authors forward, puppet-like, as the intended beneficiaries). In creating this system Congress has exceeded its authority under the Constitution, and unless checked by the courts it is likely to transmogrify copyright from a vehicle for the promotion of learning into a form of business protectionism divorced from the creation of new works.

We are already far down that path. In this decade, the "copyright industries" have sought (usually successfully) to block the public's access to works of authorship disseminated by new technologies, until

10 See *House Term Hearings*, *supra* note 7, at 52 ("Congress can, without reaching into the pockets of any [U.S.] consumer, magnify the revenue curve of copyright owners, which can be delivered back to this country. . .") (testimony of Jack Valenti).

11 Six weeks after the testimony given by motion picture association head Jack Valenti, quoted *supra* note 10, Congressman Carlos Moorhead, chairman of the House copyright subcommittee, made the following statement at the next round of hearings: "[O]ur own people will be shortchanged . . . as far as use in other parts of the world. To protect those has to be *totally a plus for our country and no negatives whatsoever* because, to the extent that it brings in additional revenues, additional taxable income, and so forth, regardless of whether it's small or large . . ." *House Term Hearings*, *supra* note 7, at 232 (emphasis added).

12 An article in the *Houston Chronicle* on the term extension proposals provides the following concrete example of how the public benefits when copyright in a work expires: "In 1993, Willa Cather's *My Antonia*, which was originally published by Houghton Mifflin, moved into the public domain. In 1994, at least seven new editions of the book appeared, from a \$2 paperback version from Dover Books to a \$24 hardcover from Buccaneer Books." Mary B.W. Tabor, *Publishers Lose Rights over Classics*, *HOUSTON CHRONICLE*, June 1, 1995, at 1.

legislation is enacted permitting them to control the terms and conditions of the access. Beginning with the Audio Home Recording Act of 1992,¹³ followed by the Digital Performance in Sound Recordings Act of 1994,¹⁴ and more recently in the "information superhighway" proposals¹⁵ and efforts to encode digital video discs with mandatory copy-blocking schemes, copyright legislation is in danger of becoming little more than a codified set of industry-drafted technical requirements prohibiting all access except as approved by the corporate rights holder.

II. WHY HAVE COPYRIGHT?

Before any copyright legislation is enacted, it would seem essential to determine why copyright protection should be granted in the first place. Without an understanding of what purpose is to be achieved, legislators will be unlikely to know who is best able to accomplish the desired goal. Fortunately, Congress's right to grant copyrights,¹⁶ enumerated in Article I, section 8, clause 8 of the Constitution,¹⁷ is tied to a specific purpose: to "Promote the Progress of Science."

An initial question is whether the clause is merely a declaration of purpose, whether it is a substantive limitation on Congress's power, or both. The answer appears to be both. The clause clearly restricts Congress's ability to grant copyright; it may do so only "for limited Times." Any effort to grant a perpetual copyright would violate the clause. The clause further restricts Congress's power by limiting protection to authors, as opposed to also including publishers as initial beneficiaries.

But the clause also clearly states a purpose: "to promote the Progress of Science." The term "Science" should be construed according to its eighteenth-century usage of "learning,"¹⁸ so that the purpose of

13 Audio Home Recording Act of 1992, Pub. L. No. 102-563, 106 Stat. 4237.

14 Digital Performance in Sound Recordings Act of 1994, Pub. L. No. 104-39, 109 Stat. 336.

15 S. 1284 (Hatch), H.R. 2441 (Moorhead), 104th Cong., 1st Sess. (1995); see Jessica Litman, *Revising Copyright Law for the Information Age*, 75 OR. L. REV. 19 (1996).

16 To be precise, that section does not grant Congress the power to enact legislation granting copyright protection; instead, it empowers Congress to grant authors the "exclusive Right to their . . . Writings" U.S. CONST. art. I, § 8, cl. 8.

17 See U.S. CONST. art. I, § 8, cl. 8.

18 This interpretation is borne out in the preamble to the first copyright act, which reads: "An Act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned." Act of May 31, 1790, 1st Cong., 2d Sess., ch. 15, 1 Stat. 124

copyright is to encourage learning. Unfortunately, this conclusion doesn't get one too far: besides importantly limiting initial protection to authors, no guidance is given to legislators on how to encourage learning. Some assistance, however, may be found in documents surrounding the clause's adoption.

On March 10, 1783, the Continental Congress established a committee of three members to "consider the most proper means of cherishing genius and useful arts through the United States by securing to the authors or publishers of new books their property in such works."¹⁹ On May 2, 1783, the committee (which included James Madison) issued its report:

The committee . . . to whom were referred the sundry papers and memorials from different persons on the subject of literary property, [are] persuaded that nothing is more properly a man's own than the fruit of his study, and that the protection and security of literary property would greatly tend to encourage genius.²⁰

The rationales for copyright were thus two-fold: (1) a view, perhaps influenced by John Locke²¹ or perhaps derived from continental theories of natural justice,²² that authors should be protected because their creations are the result of their own effort; and (2) an instrumental view according to which copyright is desirable because it will tend to encourage authors to create works from which the public may benefit.

Based on the committee's favorable recommendation, the Continental Congress passed an act encouraging all states to pass legislation

(1790); see also *Williams & Wilkins Co. v. United States*, 172 U.S.P.Q. 670, 683 (Ct. Cl. 1972), *rev'd on other grounds*, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd*, 420 U.S. 376 (1975) (equally divided Court). Structurally, the Constitution couples "Science" with "Authors" and "writings," while "useful arts" is coupled with "discoveries" and "inventors." See *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 56 (1884); *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 100 (2d Cir. 1951).

19 24 JOURNALS OF THE CONTINENTAL CONGRESS 180 (1783).

20 *Id.* at 326.

21 See JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* § 27 (C.B. Macpherson ed., Hackett Publishing 1980) (1690); John O. McGinnis, *The Once and Future Property Based View of the First Amendment*, 63 U. CHI. L. REV. 49, 80-82 (1996); Wendy J. Gordon, *On Owning Information: Intellectual Property and the Restitutionary Impulse*, 78 VA. L. REV. 149 (1992); Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287 (1988).

22 See McGinnis, *supra* note 21, at 79-85; Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533 (1993); Alfred C. Yen, *Restoring the Natural Law: Copyright as Labor and Possession*, 51 OHIO ST. L.J. 517 (1990).

protecting authors.²³ All did except Delaware. These colonial copyright laws, like the committee's report, combine both Lockean or natural justice and instrumental rationales. The New Hampshire preamble is typical:

As the improvement of knowledge, the progress of civilization, and the advancement of human happiness, greatly depend on the efforts of ingenious persons in the various arts and sciences; as the principal encouragement such persons can have to make great and beneficial exertions of this nature, must consist in the legal security of the fruits of their study and industry to themselves; and as such security is one of the natural rights of all men, there being no property more peculiarly a man's own than that which is produced by the labor of his mind.

Therefore, to encourage the publication of literary productions, honorary and beneficial to the public.²⁴

The drafting of the constitutional copyright clause was done by the Continental Congress's Committee on Detail in April 1787. We know nothing of the substance of the committee's discussions because they were conducted in secret, but some indication of the committee's reasoning may be derived from Madison's famous comment in *The Federalist Papers*, No. 43:

The utility of the power will scarcely be questioned. The copyright of authors has been solemnly adjudged, in Great Britain, to be a right of common law. The right to useful inventions seems with equal reason to belong to the inventors. The public good fully coincides in both cases with the claims of individuals. The States cannot separately make effectual provision for either of the cases, and most have anticipated the decision of this point, by laws passed at the instance of Congress.²⁵

Madison's reference to copyright being a common law right in Great Britain is only half right. Presumably his reference was to the 1769 decision of the King's Bench in *Millar v. Taylor*,²⁶ construing the Statute of Anne as not abrogating common law copyright. *Millar*,

23 The Continental Congress did not propose a federal copyright act because the Articles of Confederation did not authorize the exercise of such power. That power was subsequently granted in Article I, § 8, clause 8 of the Constitution.

24 Act of Nov. 7, 1783, ch. 1, 1783, 4th Sess., N.H. Laws (Vol. 4, at 521) (omitting capitalized nouns in the original). See discussion in Jane C. Ginsburg, *A Tale of Two Copyrights: Literary Property in Revolutionary France and America*, 64 TUL. L. REV. 991, 998-1002 (1990).

25 THE FEDERALIST NO. 43, at 270-71 (James Madison) (Clinton Rossiter ed., 1961).

26 4 BURT. 2303, 98 Eng. Rep. 201 (1769).

however, had been overruled five years later by the House of Lords in *Donaldson v. Becket*.²⁷ *Donaldson* foreshadowed the conclusion of our Supreme Court in *Wheaton v. Peters*,²⁸ which went further by holding that there was no federal common law copyright and that all federal copyright protection "originated, if at all, under the acts of congress."²⁹ In Great Britain, by contrast, there had, incontestably, been a common law before the Statute of Anne.

The more significant statements made by Madison, however, are that "[t]he utility of this power will scarcely be questioned," and that "[t]he public good fully coincides . . . with the claims of individuals." These two statements, moreover, appear to be related. It is through the grant of copyright to private individuals that the public good is achieved. The source of this harmony between public and private interests is not difficult to discern once we strip away our present consumer-oriented perspective: in place of government control or patronage,³⁰ Madison believed that private property in intellectual work was *in pari materia* with society's interest in recognizing genius.

It is not apparent, though, from *The Federalist* whether Madison believed society has an interest in recognizing authors through copyright apart from "the utility of the power" in encouraging the creation of new works.

The issue is important because while the two rationales (instrumental and natural rights) are frequently complementary, on occasion if viewed as independent objectives they may lead policy-makers in different directions. A strictly instrumental approach would proba-

27 4 Burr. 2408, 98 Eng. Rep. 257 (H.L. 1774).

28 33 U.S. (8 Pet.) 591 (1884).

29 *Id.* at 663. A contrary decision, based on natural rights, would have meant that Congress is required to grant copyright protection, although presumably the scope of that protection would have been discretionary. Certainly there is nothing in the clause itself that indicates a mandatory nature: Congress is empowered to grant protection; it is not directed to do so. If the clause had not been included in the Constitution at all, it is unlikely one would view copyright as a "natural" mandatory right: what is the source of such a right? The "common law" is an unlikely choice since England did not regard it as applying to the colonies. See Edward C. Walterscheid, *Inherent or Created Rights: Early Views on the Intellectual Property Clause*, 19 HAMLINE L. REV. 81 (1995). And, as mentioned in the text, the English courts held that common copyright was superseded by the Statute of Anne, a decidedly anti-natural rights conclusion. The only other source for common law copyright in the U.S. before the Constitution would be state common law. There is no evidence of such rights, and the existence of the colonial copyright statutes is some evidence of the lack of such a common law. Why enact state statutes pending a new federal statute if common law existed?

30 Modern day governmental efforts at patronage have been mixed, at best. See Marci A. Hamilton, *Art Speech*, 49 VAND. L. REV. 73, 112-19 (1996).

bly deny copyright protection to works of architecture—the actual, built three-dimensional structure—because it is highly unlikely that the carrot of copyright will encourage architects to build.³¹ A natural rights approach, based on recognizing genius, would grant protection because the architect's creative efforts are on an equal par with many other works protected by copyright, and thus the architect is equally entitled to recognition.³²

Whether a natural rights theory can withstand rigorous analysis apart from an instrumental purpose fortunately need not be resolved here, since the grant of an additional period of copyright protection in preexisting works to entities or individuals who do not create works of authorship fails under either rationale.³³ Indeed, it is doubtful that either rationale is satisfied by providing a longer term of protection even for works not yet created, since it is unlikely that any author will be induced to create more works under a term of life of the author plus seventy years than under a term of life of the author plus fifty years. Still, if a term of life plus fifty years is constitutional, it is not apparent that an extra twenty years would cross the line of unconstitutionality.

For works that are already in existence, retroactively providing a longer term is on shakier ground. If protection is limited to living authors, one may argue that increased revenues (from a longer royalty period) may lead to the production of additional future works. For this class of works, it may not be of concern to the public whether term extension is granted directly to the author or to a distributor (according to a contract giving the distributor the right to any future

31 See Stewart E. Sterk, *Rhetoric and Reality in Copyright Law*, 94 MICH. L. REV. 1197, 1225–26 (1996) (criticizing on this ground the Architectural Works Copyright Protection Act of 1990, Pub. L. No. 101-650, 104 Stat. 5133).

32 This is how one important architectural interest viewed the matter. See *Architectural Design Protection: Hearing on H.R. 3990 and H.R. 3991 Before the Subcomm. on Courts, Intellectual Property, and the Administration of Justice of the House Judiciary Comm.*, 101st Cong., 2d Sess. 129 (1990) (statement of Richard Carney, Chief Executive Officer, Frank Lloyd Wright Foundation): “We feel that architecture is the mother art . . . and it's only just that architecture should be copyrighted.”

33 In the case of distributors, it may be argued that an increase in funds through extended royalties will permit the distributor to reinvest in the enterprise, possibly leading to the future distribution of new works. There is no guarantee that such reinvestment will take place though, and in the case of large enterprises, additional profits may be invested in a myriad of ways having nothing to do with the distribution of new works. Finally, it is likely that the decision whether to distribute a future work will be made on the merits; namely, whether distribution of that particular work will be profitable. A distributor is unlikely to conclude that it can afford to lose money on a new work because it is receiving additional royalties from an increased term of copyright from earlier works.

extensions): in either event, the author will share in the royalties and presumably be in a better position to create new works. Where the extended retroactive term is granted to works of deceased authors, though, it is unclear how such a grant can withstand constitutional scrutiny: obviously no further works can be induced.

III. WHO SHOULD BE THE BENEFICIARIES OF COPYRIGHT?

The answer to the second basic question posed at the beginning of this Article has been addressed almost entirely in the context of proposals to extend the term of copyright. The House Judiciary Committee accompanying the 1976 Copyright Act observed that "[t]he debate over how long a copyright should last is as old as the oldest copyright statute and will doubtless continue as long as there is a copyright law."³⁴ The "oldest copyright statute" referred to is the 1710 English Statute of Anne.³⁵ Under Anne, new works were granted an original term of fourteen years measured from the date of first publication, renewable for another fourteen years if the author was alive at the time of renewal; if not, the copyright went into the public domain notwithstanding any bequest or inter vivos transfer. If the author did survive to the renewal period, the statute precluded honoring any assignment of rights for that period made during the original term.³⁶

A. *The 1790 Act*

Our constitutional clause gives Congress the power to grant exclusive rights to authors for a "limited Time," but without explanation as to those limits. While the First Congress may have been innovative in some areas, copyright was not one of them. No doubt thrilled to have in hand a template in the form of the Statute of Anne, our first copyright act of 1790³⁷ followed the Statute of Anne in setting an original term of fourteen years followed by a renewal term of fourteen years provided the author survived to the twenty-eighth year. There were, however, a number of departures from the Statute of Anne. Most importantly, under our 1790 Act, the renewal term could be assigned as a contingent interest during the original term.³⁸ This result

34 H.R. REP. NO. 94-1476, at 133 (1976).

35 Statute of Anne, 1710, 8 Anne, ch. 19 (Eng.).

36 *Id.* A final proviso: "Provided always, that after the expiration of the said term of fourteen years, the sole right of printing or disposing of copies shall return to the authors thereof, if they are then living, for another term of fourteen years."

37 Act of May 31, 1790, ch. 15, 1 Stat. 124 (enacted in 1st Cong., 2d Sess.).

38 The interest was contingent because the author had to survive until the time for renewal.

follows from the statutory language referring to the renewal term being for the benefit of the author and the author's "executors, administrators, and assigns."³⁹ As discussed below,⁴⁰ this language was changed in 1831 in order to deprive publishers of the right to obtain such contingent assignments.

The decision to have two terms of protection, for a set number of years, with the renewal term conditioned on refileing the title page with the clerk of the court, set the United States on a course from which it was not to depart for 186 years, notwithstanding England's abandonment of that basis of measurement in 1814 and the rest of the world's rejection of it *ab initio*. The French, for example, in 1793 adopted a term based on life of the author, and this, rather than our 1790 Act, became the model followed throughout the world. The implications of our choice were profound: authors were dependent on publishers complying with the (many) required formalities.⁴¹ Additionally, by permitting the publisher to obtain simultaneously an assignment of both the original and the renewal term the value of the renewal term to authors was seriously diminished if not eliminated.⁴² The only value to authors of having such a dual term structure was that it gave them a second bite at the apple; it permitted authors of works that have unexpectedly become popular during their first term to renegotiate their contract for the second term to accurately reflect the work's market value for the renewal period.⁴³

By permitting an assignment of the renewal right simultaneous with an assignment of the original term, the 1790 Act invited publish-

39 Act of May 31, 1790, ch. 15, 1 Stat. 124 (enacted in 1st Cong., 2d Sess.).

40 See *infra* text following note 48.

41 Unpublished works were protected without the need to comply with formalities. The term of protection for such works was not specified, however. See 1 WILLIAM F. PATRY, COPYRIGHT LAW AND PRACTICE 463 n.16 (1994).

42 The contrary argument is that by restricting authors' ability to sell the renewal term, the value of the copyright is reduced for publishers and authors. Unable to sell the renewal term, authors will receive only an estimated value for the original 28 year term, rather than for the full 56 years possible. See Sterk, *supra* note 3, at 1219-20. Economic rhetoric aside, the reality is that publishers generally had the clout to insist on assignment of both the original and renewal term on terms that did not place any value on the renewal term. In other words, because publishers could force sale of the renewal term, they did, and at no extra cost beyond the cost of the original term.

43 See H.R. REP. NO. 60-2222, at 14-15 (1909):

It not infrequently happens that the author sells his copyright outright to a publisher for a comparatively small sum. If the work proves to be a great success and lives beyond the term of twenty-eight years, your committee felt that it should be the exclusive right of the author to take the renewal term, and the law should be framed as is the existing law, so that he could not be deprived of that right.

ers to obtain both terms for the price of one, and publishers readily accepted.

B. The 1831 Act: Extension of the Term and Restoration of the Renewal Right in the Authors' Favor

In 1831, the first general revision of the 1790 Act occurred.⁴⁴ At the urging of Noah Webster,⁴⁵ Congress doubled the original term of protection to twenty-eight years. The renewal term remained at fourteen years. The purpose of this extension was "[c]hiefly to enlarge the period of copy-right, and thereby to place authors in this country more nearly in equality with authors in other countries."⁴⁶

Also of importance, the 1831 Act ensured that the work did not fall into the public domain when the author died during the original term without a surviving spouse or children. This amendment was tied to two other innovations, also involving the renewal term. The first limited the renewal right (in the case of authors who died before the renewal term vested) to the author's surviving spouse and children. This result was accomplished by deleting the reference in the 1790 Act to "executors, administrators or assigns" and inserting in lieu "widow, child, or children." In reporting the bill to the floor of the House of Representatives, Congressman William Ellsworth, its chief sponsor, noted the plight of the author's family under the 1790 Act, who, "by the very event of the death of the author . . . stand in more need of the only means of subsistence ordinarily left to them." The question, simply put, was "whether the author or the bookseller shall reap the reward."⁴⁷ Of course, in the case of predeceased authors, it was not the author who would be reaping the reward but his family, and thus Congressman Ellsworth's remarks might be confusing but for the second innovation made by the 1831 Act: elimination of contingent assignments of the renewal term made simultaneously with an assignment of the original term. This result seems fairly straightforward from the following comparison of the two acts:

In Whom the Renewal Term May Vest

1790 Act
Author, author's executors,
administrators, or assigns

1831 Act
Author, unless deceased,
then to widow and children

⁴⁴ Act of Feb. 3, 1831, ch. 16, §§ 1-2, 4 Stat. 436 (enacted in 21st Cong., 2d Sess.).

⁴⁵ See WILLIAM ELLSWORTH, *COPYRIGHT MANUAL* 21-22 (1862).

⁴⁶ 7 Cong. Deb. App. CXIX-CXX (1830) (remarks of Representative Ellsworth).

⁴⁷ 7 Cong. Deb. App. CXIX (1830).

By eliminating the author's executor, administrator, and assigns and replacing them with the author, widow, and children, the 1831 Act limited the renewal term to those individuals only. Congressman Ellsworth's remarks about the question being simply whether the author or the bookseller should reap the reward reinforces this interpretation, but no court appears to have clearly addressed the issue.⁴⁸ However, thirty-two years later, in his treatise on copyright, Mr. Ellsworth wrote that the renewal term "may be contracted for in purchasing the copy-right, but it is not so, of necessity, nor of course, nor *prima facie*."⁴⁹ While Mr. Ellsworth's views should be given great weight, since he was the chief sponsor of the 1831 Act as well as its floor manager in the House, if the statutory language conflicts with his interpretation (or even his intention) the statute, of course, governs. As we shall see,⁵⁰ the 60th Congress, which drafted the 1909 general revision act, was of the opinion that the 1831 Act eliminated the ability anticipatorily to assign the renewal right; it continued that understanding in the 1909 Act.

Regardless of how the issue of anticipatory assignments of the renewal term should be resolved, the conflict between authors and publishers over the latter's efforts to gain the rights granted to authors was strongly felt from the inception of our copyright laws. Congress, in 1831, consistent with the Constitution, resolved the conflict in authors' favor.

C. *The 1909 Act: Extension of Term and Restriction of Assignment of the Renewal Term*

At a joint hearing before the House and Senate Committees on Patents on December 7, 1909, Samuel L. Clemens, better known as Mark Twain, testified in favor of the term of protection then being proposed: life of the author plus fifty years, or forty-two years from first publication, whichever was longer.⁵¹ In an off-the-record conversation, however, Mr. Clemens informed Chairman Currier that he had

48 *Paige v. Banks*, 80 U.S. (13 Wall.) 608 (1871) involved an assignment made in 1828 that vested after the 1831 Act became effective. *Pierpont v. Fowle*, 19 F. Cas. 652, 659-60 (C.C.D. Mass. 1846) (No. 11,152), involved an assignment that arose under both the 1790 and 1831 acts.

49 WILLIAM ELLSWORTH, *COPY-RIGHT MANUAL* 29-30 (1862).

50 See *infra* text accompanying notes 52-60.

51 *Arguments Before the Comms. on Patents on S. 6330 and H.R. 19853*, 59th Cong., 1st Sess. 116-21 (1906). Mr. Clemens's first preference was for perpetual copyright. He also remarked that he liked the 50 years *post mortem auctoris* "because that benefits my two daughters, who are not as competent to earn a living as I am, because I have carefully raised them as young ladies, who don't know anything and can't do any-

benefitted from the success of *Innocents Abroad* only because he had managed to retain the right to the renewal term. Mr. Currier later cited this comment as support for retaining the durational structure of the 1831 Act,⁵² and others began attacking abandonment of a renewal term as an attempt by publishers to deprive authors of the right to renegotiate contracts.⁵³ But on January 30, 1907, Currier's committee favorably reported a bill providing for a life plus thirty year term conditioned on the author filing, twenty-eight years after first publication, a notice in the Copyright Office indicating a desire for the full term. Failure to file the notice would result in the work falling into the public domain at the expiration of the original twenty-eight year term as under then-current law.

The following year Representative Currier introduced a bill that retained the existing structure of an original and a renewal term, although the renewal term was doubled to twenty-eight years⁵⁴ in response to testimony that some famous authors had outlived some of their copyrights.⁵⁵ The bill also measured term from the date of publication rather than filing a prepublication copy of the title page with a government official. These provisions were included in a bill introduced in the next session of Congress; they eventually became part of the 1909 Act.⁵⁶

The term granted in the 1909 Act was thus fifty-six years: a twenty-eight-year original term and a twenty-eight-year renewal term conditioned on the timely filing of a renewal application. In reporting the 1909 revision bill, Representative Currier's committee was straightforward in its reasoning for jettisoning a term based on life of the author:

It was urged before the committee that it would be better to have a single term without any right of renewal, and a term of life and fifty years was suggested. Your committee, after full consideration, de-

thing. So I hope Congress will extend them that charity which they failed to get from me." *Id.* at 117.

52 *Revision of Copyright Laws: Joint Hearings Before the Comms. on Patents*, 60th Cong., 1st Sess. 62 (1907).

53 See Barbara A. Ringer, *Renewal of Copyright*, in *STUDIES ON COPYRIGHT* 503, 514-16 (Arthur Fisher Memorial ed. 1963).

54 H.R. 22183, 60th Cong., 1st Sess. (May 12, 1908).

55 Examples included Mark Twain, Harriet Beecher Stowe, John Philip Sousa, Dean Howell, and Dr. Hale. See H. REP. NO. 60-2222, at 14 (1909):

The present term of twenty-eight years, with the right of renewal for fourteen years, in many cases is insufficient. The terms, taken together, ought to be long enough to give the author the exclusive right to his work for such a period that there would be no probability of its being taken away from him in his old age, when, perhaps, he needs it most.

56 17 U.S.C. § 12 (1909) (repealed 1978).

cided that it was distinctly to the advantage of the author to preserve the renewal period. It not infrequently happens that the author sells his copyright outright to a publisher for a comparatively small sum. If the work proves to be a great success and lives beyond the twenty-eight years, your committee felt that it should be the exclusive right of the author to take the renewal term, and the law should be framed as is the existing law, so that he could not be deprived of that right.⁵⁷

It is ironic that Mr. Clemens's comment to Representative Currier about *Innocents Abroad* may have persuaded Congress to retain the existing structure, in light of his strong testimony in favor of term for life of the author plus fifty years. At the same time, however, there was other agitation to retain the two-term structure as in authors' best interests,⁵⁸ as well as opposition to a life of the author term from music publishers, typographers, and piano roll manufacturers, all of whom favored a set term of years.⁵⁹

D. *The 1976 Act and Term of Copyright*

Notwithstanding a conclusion that the two term structure of the 1909 Act had "largely failed to accomplish its purpose"—namely to permit the author or the author's family to renegotiate contracts for exploitation of the work during the renewal term⁶⁰—in its early efforts to draft a general revision bill the Copyright Office proposed a two term structure, albeit with a few changes designed to ameliorate some of the harsher features of the 1909 Act.⁶¹ There was strong objection to the proposal from authors and distributors, all of whom favored a term of life of the author plus fifty years.⁶² Distributors also had another objection, in the Office's proposal that for existing works, the renewal term be extended twenty years and vest in the author or the author's heirs unless an assignee was obligated to continue paying roy-

57 H.R. REP. NO. 60-2222, at 14 (1909); S. REP. NO. 60-1108, at 14 (1909).

58 See Barbara A. Ringer, *Renewal of Copyright*, in STUDIES ON COPYRIGHT 503, 514-16 (Arthur Fisher Memorial ed. 1963).

59 See 1 LEGISLATIVE HISTORY OF THE 1909 COPYRIGHT ACT, 138 (E. Fulton Brylawski & Abe Goldman eds., 1978); 2 LEGISLATIVE HISTORY OF THE 1909 COPYRIGHT ACT 39-40, 42, 218-19 (E. Fulton Brylawski & Abe Goldman eds. 1978); 4 LEGISLATIVE HISTORY OF THE 1909 COPYRIGHT ACT 36, 136-37 (E. Fulton Brylawski & Abe Goldman eds., 1978); 5 LEGISLATIVE HISTORY OF THE 1909 COPYRIGHT ACT 100, 127-28, 135, 139, 412-13 (E. Fulton Brylawski & Abe Goldman eds., 1978).

60 STAFF OF THE HOUSE COMM. ON THE JUDICIARY, 86TH CONG., REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 53 (Comm. Print 1961).

61 See PATRY, *supra* note 41, at 484-85.

62 *Id.* at 485.

alties during the entire life of the copyright.⁶³ Motion picture companies vigorously opposed the continuing royalty obligation,⁶⁴ and that was the end of the matter.

The Office's response was to offer two alternatives, a fixed term of seventy-five years measured from first publication, or life of the author plus fifty years.⁶⁵ For existing works, the Office proposed retaining the 1909 Act's dual term structure but extending the renewal term for an additional nineteen years, for a total of seventy-five years (twenty-eight plus twenty-eight plus nineteen).⁶⁶ Importantly, there was to be a termination of transfer right for preexisting assignments exercisable notwithstanding an agreement not to terminate.⁶⁷ Complementing this right, an automatic termination right was to be granted for transfers of exclusive rights made on or after the date of enactment, exercisable twenty-five years after the assignment.⁶⁸ These termination proposals were strongly objected to by distributors and strongly defended by authors,⁶⁹ and became, in the words of the Copyright Office, "the most explosive and difficult issue in the revision process."⁷⁰

In 1965, a compromise package was worked out among authors, distributors, the Copyright Office, and Congress. It was ultimately enacted in 1976. The package involved a "work made for hire" section more advantageous for distributors, and a general term of life of the author plus fifty years; the contentious termination of transfer provisions were seriously weakened. The weakening occurred not by forcing authors to wait thirty-five years to terminate instead of twenty-five years (although this was a weakening), but by deleting their automatic nature. Instead of the copyright vesting automatically in the author or the author's heirs, the burden was placed on them to file a notice of intent to terminate the transfer. And the hoops erected for filing the termination notice are even more complicated than those for filing a renewal application, the latter hoops having been rightly described by the Copyright Office as "the source of more confusion and litigation than any other in the copyright law."⁷¹ Failure to follow the right procedure for termination means that the assignee enjoys the extended

63 REPORT OF THE REGISTER OF COPYRIGHTS, *supra* note 60, at 57-58.

64 *Id.* at 103-04.

65 REPORT OF THE REGISTER OF COPYRIGHTS, *supra* note 60, at 50.

66 *Id.* at 51.

67 See PATRY, *supra* note 41, at 486 n.136.

68 *Id.* at 486-87 n.137.

69 *Id.* at 487 n.142.

70 *Id.* at 489 n.156.

71 See *id.* at 482 n.111.

term of protection with no obligation to the author other than what was agreed to in the original contract, which may have provided for a one-time lump sum payment.

One objective of the 1976 Copyright Act was to end, as much as possible, the United States's isolation from international standards as reflected in the Berne Convention for Literary and Artistic Works. The switch from a dual term of protection to a basic term of life of the author plus fifty years was an important part of this objective. Authors supported the objective not for international reasons but because of its domestic importance: the tortured renewal requirement had caused the unintended loss of countless copyrights,⁷² while the Supreme Court's opinion in *Fred Fisher Music Co. v. M. Witmark & Sons*⁷³ had deprived authors of any benefit of the dual system, a second bite at the apple.

One disadvantage of a unitary term of protection is the likelihood that a distributor will require an assignment of all rights for the entire term. To prevent such a result, a right to terminate a transfer notwithstanding any agreement to the contrary was included.⁷⁴ Unfortunately, the predictable interest group politics substantially eviscerated these provisions by not making termination automatic, and by requiring authors to jump through hoops even more formidable than those renewal presented. Consequently, in practice, the termination right has become virtually meaningless, much to distributors' delight: approximately 0.72% of transfers have been recorded, as required, with the Copyright Office.⁷⁵

On the balance of author-publisher relations, the 1976 Act was a significant loss for authors. One explanation for this loss is the

72 Data compiled by the Copyright Office has shown an average renewal rate of about 15%. See Barbara A. Ringer, *Renewal of Copyright*, in STUDIES ON COPYRIGHT 503, 514-16 (Arthur Fisher Memorial ed. 1963); PATRY, *supra* note 41, at 482-83 n.112. Some of the works not renewed were the result of a conscious choice, but authors and authors' groups have vast experience with unintentional mistakes that resulted in works going into the public domain. Those who have worked in the Copyright Office, as I have, can recount from first hand experience inquiries from authors' heirs pleading for any way to recover an unintended loss of the renewal period.

73 318 U.S. 643 (1943). *Fred Fisher* permitted anticipatory assignments of the renewal term simultaneous with assignment of the original term.

74 17 U.S.C. §§ 203(a)(5) & 304(c)(5) (1978).

75 See William F. Patry, *Copyright and the Legislative Process: A Personal Perspective*, 14 CARDOZO ARTS & ENT. L.J. 139, 150 (1996). But, just to show that greed knows no bounds, music publishers, in testifying at the 1995 term extension hearings before the House and the Senate, argued for elimination of the provisions entirely. See *House Term Hearings*, *supra* note 7, at 74-85 (testimony of Edward P. Murphy, President and CEO, National Music Publishers' Association).

changed nature of the political process. While interest groups certainly played a role in shaping the content of the 1909 Act,⁷⁶ by the 1960s and 1970s the nature of the political process had evolved so that any significant interest group could—and did—exercise powerful negative influence by virtue of procedural devices (especially in the Senate, with its unanimous consent rules) permitting them to block bills from even being considered.⁷⁷ Faced with a twelve-year legislative effort, the perceived best bargains were struck. Authors, faced with an adverse decision from the Supreme Court in the *Fred Fisher* case and a renewal system that threw eighty-five percent of all registered works into the public domain, were in the unenviable position of desiring legislative change. Distributors, by contrast, while not fully satisfied with the status quo, were in the stronger position of being able to live within the existing regime. Anyone familiar with the legislative process understands that those desiring change face a difficult uphill battle when those whose position will be altered by the change can live with the status quo. The typical result is either no change or a change far less than the proponents desire. Authors in the 1976 Act found themselves in the unenviable position of desiring change, while distributors could live without it. As a result, authors were forced to make significant concessions, some of which ended up appreciably worsening their status, particularly the status of authors who work for hire.⁷⁸

Unfortunately, the undesirable bargains in the 1976 Act came back to haunt authors in the recent term extension bills.

IV. THE COPYRIGHT TERM EXTENSION ACT OF 1995

On February 16, 1995, Representative Carlos Moorhead and nine others introduced H.R. 989, a proposal to extend the term of copyright by twenty years. On March 2, 1995 Senators Orrin Hatch and Diane Feinstein introduced a substantially similar bill, S. 483. Hearings on H.R. 989 were held on June 1 and July 13, 1995.⁷⁹ Hearings

⁷⁶ See Jessica D. Litman, *Copyright Legislation and Technological Change*, 68 OR. L. REV. 275, 283–88 (1989).

⁷⁷ See Patry, *supra* note 75. For example, from 1968 to 1972, cable television groups were able to kill any consideration of the general revision bill that led to the 1976 Act. Jukebox interests also exercised formidable political muscle, far out of proportion to the money involved. See also Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857 (1987).

⁷⁸ See Marci Hamilton, Comment, *Commissioned Works as Works Made for Hire Under the 1976 Copyright Act, Misinterpretation and Injustice*, 135 U. PA. L. REV. 1281, 1309 (1987).

⁷⁹ *House Term Hearings*, *supra* note 7. The author testified at these hearings.

on S. 483 were held September 27, 1995.⁸⁰ While the Senate Judiciary Committee marked up the bill on May 23, 1996, and favorably reported it (with dissenting views) on July 10, 1996,⁸¹ the House bill never made it out of committee. It was tied, politically, to initiatives to reform music licensing of bars, restaurants, and religious broadcasting. That reform was opposed by the music performing societies, ASCAP (American Society of Composers, Authors, and Publishers) and BMI (Broadcast Music, Inc.), which are the principal proponents of term extension. Although there was substantial political support behind the reform effort, the serious threat of revenue loss to ASCAP and BMI from the proposed reform resulted in a stalemate, blocking passage of any legislation.

The main rationale given for term extension is the reciprocal nature of the European Union's 1993 directive on term extension: no United States author can benefit from the additional twenty years in Europe unless the United States grants Union authors an extra twenty years. Reciprocity means that United States copyright owners are losing money in Europe, or so we are told.⁸² Other reasons include the

80 *Copyright Term Extension Act of 1996: Hearing on S. 483 Before the Senate Judiciary Comm.*, 104th Cong., 1st Sess. (1996). The author submitted a statement for the record at the invitation of the committee.

81 S. REP. NO. 104-315 (1996).

82 See text accompanying notes 8-12. In testimony submitted to Congress, the United States Trade Representative noted the following industry estimates

that term extension would result in a modest increase in revenues from international sources. [T]he Motion Picture Association estimates of less than \$1 million per year by 2000, and \$3 million per year by 2010, rising more dramatically to \$160-200 million by 2020. One of our two major collecting societies estimates additional international revenues of \$14 million per year if U.S. right holders are in a position to take advantage of a further 20 years protection in Europe.

House Term Hearings, *supra* note 7, at 211 (testimony of Deputy [now Acting] U.S. Trade Representative Charlene Barshefsky).

When Assistant Secretary of Commerce and Commissioner of Patents & Trademarks Bruce Lehman asserted that term extension would result in "considerable additional growth in GDP," Representative Hoke remarked: "I don't know how, Mr. Lehman, you can extrapolate [from USTR's figures] that as having some sort of material effect on our GDP that's over \$6 trillion." *Id.* at 229; see also *id.* at 230 (further discussion).

The Motion Picture Association's figures seem highly suspect. In addition to not being able to project what inflation, exchange rates, and consumer tastes will be decades ahead, the idea that in 2020 the extra revenue from extending the term 20 years will leap from \$3 million to \$160 million a year is a bit perplexing. In 2019 motion pictures first published (or registered with the Copyright Office) in 1944 will be saved from public domain status. In the magic year 2020, motion pictures from 1945 will be saved. It may be that motion pictures from 1945 (or a few years later) are

purported need to harmonize United States law with world standards, the increased lifespan of authors, increased costs of marketing works,⁸³ and increased commercial life. Each of these arguments deserves to be examined separately.

A. *Reciprocity*

While the reciprocal nature of the European Union directive has been advanced as a principal reason for extending the copyright term in the United States, the term extension bills were not narrowly drafted to recover only royalties United States copyright owners are "losing" in Europe. Had this been the sole objective, the legislation would have increased the term only for works whose country of origin is the European Union.⁸⁴ Instead, the extended term was also to be

more commercially valuable than ones from 1944 (or a few years earlier) but the extreme jump predicted seems suspect. However one regards these figures, though, one must recall that they must be reduced by two-thirds because only one-third of additional European revenues will flow across the Atlantic, that one-third being the director's share. The lack of any realistic expectation of meaningful foreign royalties from term extension leads one to speculate about other motives for term extension, the most obvious of which is the domestic market, in particular the home video market which provides more revenues than theatrical exhibition. Classic movies from the 1930s and 1940s are quite popular in rental stores, but as these movies will go into the public domain, motion picture companies are unable to charge monopolistic prices. Thus, following the usually reliable idea that one looks for the largest source of revenue to discern motive, it would appear that the principal motive for term extension for motion picture companies is to continue high royalties from the home video market in the United States for classic movies. Whether this objective is consistent with the public interest is quite another question. At the least, the existence of this question illustrates the misleading nature of the debate on term extension, which is being deliberately cast in international terms in order to mask the much more consequential domestic impact.

83 See *House Term Hearings*, *supra* note 7, at 191-97.

84 There may, however, be a technical reason why term extension was not so limited. Article 7.1 of the European Term Directive, states in relevant part that the "term of protection granted by the Member States shall expire on the date of expiry of the protection granted in the country of origin of the work . . ." Council Directive 93/98, art. 7.1, 1993 O.J. (L290), 12. This means that if the United States retained for its own works a term of life of the author plus 50 years but granted European Union authors a term of life plus 70, European Union member countries would usually grant U.S. works a term of life plus 50 since the term for U.S. works will have expired 50 years after the author's death in the U.S. One exception is Germany, with which the United States has a bilateral treaty obligating each country to accord the other's authors national treatment. Interestingly, under the 1988 English Copyright, Designs and Patents Act, 85b, U.S. works are also given national treatment, which may result in a longer term of protection in the U.K. than in the U.S. Such national treatment under the U.K. is prohibited by the European Union directive because it is not based on a treaty obligation. See Justine Antill and Peter Coles, *Copyright Duration: The Euro-*

granted to works whose country of origin is the United States.⁸⁵ The reason is obvious: the United States is the largest market in the world for United States authors.⁸⁶ Of course, United States consumers will be footing the bill for this increased protection, not European consumers. The specter of a pot of European royalties waiting to be captured painlessly should thus be seen for what it is: a fig leaf disguising the real prize—an additional twenty years' royalty payments by United States consumers for use of United States works in the United States.

No cost-benefit analysis of extending term in this fashion has been made, a failure that led the Register of Copyrights to testify before Congress that, from a "pure economics analysis," it was difficult to support term extension because of the lack of supporting economic data.⁸⁷ At least regarding the retroactive provisions of the bills—those

pean Community Adopts "Three Score Years and Ten", 7 EIPR 379, 380 (July 1996) (describing how U.S. works will lose this favorable treatment under pending U.K. bills to implement the EU Directive).

Regardless of such fine points of interpretation of the European directive, it is doubtful that the proposals in the U.S. to extend term to life plus 70 is motivated primarily by this admittedly important consideration; instead, it is more likely that the decision was motivated by a desire to capture royalties *within* the United States. See *infra* note 83.

85 As well as to any other works eligible for protection under 17 U.S.C. §§ 104, 104A (1995 & Supp. I 1996).

86 See testimony of Marybeth Peters, Register of Copyrights, *House Term Hearings*, *supra* note 7, at 201.

87 See written testimony of Marybeth Peters, Register of Copyrights, before the Senate Judiciary Committee on S. 483, Sept. 20, 1995, *available in* 1995 WL 557187 (F.D.C.H.) at 71:

One must also factor in what will be the cost of extending the term in the United States since this is the largest market for U.S. works. Unfortunately, there are no meaningful statistics to assist in determining the cost of extending the term and the benefits to be gained. Thus, on a pure economics analysis at this point it would be difficult to support.

Id.

Even though this identical testimony was submitted to the House of Representatives, in her oral testimony before the House, Ms. Peters, after listening to Chairman Moorhead wrongly state that term extension would result in extra royalties from Europe with no extra cost to U.S. consumers interjected:

Ms. PETERS: Can I just say one thing?

Mr. MOORHEAD: Yes.

Ms. PETERS: I agree, and I support this bill wholeheartedly. There is a cost, though, in the United States. By adding 20 years in the United States, then people have to pay in the United States. So although I support it, and agree that we would be getting additional revenue from the foreign countries of the European Union, there is an impact in the United States itself.

House Term Hearings, *supra* note 7, at 201.

extending the term to preexisting works first published as early as 1922 (assuming the bills are enacted in 1997)—it is extremely doubtful whether an economic analysis would reveal any benefit to the public, if public benefit is defined as the creation of new works. The number of authors whose works were first published in 1922 or shortly thereafter, who are still alive, and who are still creating new works, must be very, very small.

A generous assumption is that works first published in 1922 were created by authors at least in their mid-twenties. This means that such authors, if alive, are now almost one hundred years old.⁸⁸ If the purposes of copyright are to acknowledge the efforts of authors and to encourage them to create new works, extension of term to preexisting works by deceased authors fails both purposes.⁸⁹ Instead, the only benefit will be to the estates of predeceased authors and to distributors, who will gain by charging the public monopoly prices for an additional twenty years, though neither the estates nor the distributors created the works.

Finally, due to deliberate drafting, the extra twenty years will not appreciably benefit even living authors. The extended term automatically vests in distributors, if, as is frequently the case, the author assigned his or her rights to the distributor and the assignment contains a clause granting the distributor the right to any future term extensions.⁹⁰ Under the bills, if the author is to receive any benefits from the extended term, he or she must look solely to the contract previously entered into with the distributor—a contract that may have been written as long ago as 1922, before the widespread use of talking movies, music cassettes, videocassettes, television, cable, and satellite transmissions (to say nothing of computers, compact discs, and the Internet). Many such ancient contracts give the distributor the exclu-

88 This assumption errs on the side of advocates of term extension. In a study undertaken by the Copyright Office in connection with revision of the 1909 Act, data were compiled on 673 authors of English language books who died between 1930 and 1955, 61 composers of "serious" music, and 191 authors of popular music who died between 1930 and 1950. These data showed that the average age at median between the first and last work was 48 years of age and the average age at death was 68 years. See STAFF OF THE HOUSE COMM. ON THE JUDICIARY, 86TH CONG., REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 53 (Comm. Print 1961). Taking 48 years as the median age for a work first published in 1922 results in the author being 123 years old in 1997. This math indicates the reality of the term extension proposals: they are designed to benefit solely remote heirs, not authors or the public.

89 Whether Congress can constitutionally extend protection to such works is less than evident.

90 See *House Term Hearings*, *supra* note 7 (statement of William Patry).

sive right to exploit the work in "any medium now known or hereafter developed." Some courts, with Lochnerian solicitude for the sanctity of contract,⁹¹ have upheld these contracts even though neither party could have foreseen future statutes appreciably increasing the term of protection, or dramatic technological developments that have fundamentally changed the method of the work's exploitation, and even though authors receive little or no compensation for exploitation by these unforeseen technologies.⁹² By contrast, in many European countries, authors cannot assign away rights to exploitation by technologies not in existence at the time of the contract, thereby ensuring that they will fully benefit from exploitation of their works in new media.⁹³

Most outrageously, those authors and performers—and there are many in the music industry—who received one-time lump-sum payments for assigning their rights will not receive a penny from the extended twenty years of copyright. Every penny will go to corporations who, in the words of former Register of Copyrights Barbara Ringer, "did not bargain for it, did not expect it, and did nothing to deserve it."⁹⁴

A second way in which reality diverges from representation is that for the most economically significant works⁹⁵—sound recordings and motion pictures—increasing the term of protection from the current

91 *Bourne Co. v. Tower Records, Inc.*, 976 F.2d 99 (2d Cir. 1992); *Platinum Record Co. v. Lucasfilm, Ltd.*, 566 F. Supp. 226 (D.N.J. 1983); *Rooney v. Columbia Pictures Indus.*, 538 F. Supp. 211 (S.D.N.Y.), *aff'd*, 714 F.2d 117 (1982); *Burnett v. Warner Bros. Pictures, Inc.*, 493 N.Y.S.2d 326 (N.Y. App. Div. 1985); *see also* Barbara D. Griff, Note, *A New Use for an Old License: Who Owns the Right*, 17 CARDOZO L. REV. 53 (1995).

92 Fortunately some courts, concerned about a windfall to transferees, have taken a stricter view, refusing to construe contract as covering technology not expressly referred to in the contract. *See* *Rey v. Lafferty*, 990 F.2d 1379, 1388 (1st Cir. 1993); *see also* *Cohen v. Paramount Pictures Corp.*, 845 F.2d 851 (9th Cir. 1988); *Tele-Pac, Inc. v. Grainger*, 570 N.Y.S.2d 521 (N.Y. App. Div. 1991); *Subafilms, Ltd. v. MGM-Pathe Communications Co.*, No. 91-56248, 1993 U.S. App. LEXIS 4068 (9th Cir. filed Feb. 17, 1993), *on rehearing en banc on different issue*, 24 F.3d 1088 (9th Cir. 1994).

93 *See, e.g.*, Polish Copyright Law of Feb. 4, 1994, art. 41(4).

94 *Civil and Criminal Enforcement of Copyright Laws: Hearings Before the Subcomm. on Patents, Copyrights and Trademarks of the Senate Judiciary Comm.*, 99th Cong., 1st Sess. 40 (1985). Ms. Ringer was referring specifically to 17 U.S.C. § 304(c), but the principle referred to is identical.

95 Although U.S. computer programs are certainly economically significant in Europe, term extension is irrelevant to them. Most software is continuously revised, qualifying for extended protection as derivative works, and even for the unamended versions, in the fierce competitive environment of the computer industry, few programs have a commercial lifetime of even a decade.

seventy-five years to ninety-five years⁹⁶ cannot increase the royalty flow across the Atlantic (or will increase it ever so slightly). The reason is simple: the European Union directive mandates a term of protection *shorter* than our existing seventy-five years, namely fifty years.⁹⁷

96 To be precise, because such works are almost invariably for hire, the current term of protection is 75 years from publication or 100 years from creation, whichever occurs first in the case of works created on or after January 1, 1978. 17 U.S.C. § 302(c) (1994). For motion pictures first published or registered with the Copyright Office before January 1, 1978, the term is 75 years from publication or registration. 17 U.S.C. § 304(b) (1994). Sound recordings, however, were first protected federally on February 15, 1972, by the Act of October 15, 1971, Pub. L. No. 92-140, 85 Stat. 391. Thus, the first date U.S. sound recordings can be affected by term extension is 2048, a fact that may explain why the Recording Industry of America has not exactly been chomping at the bit to get term extension passed. Ironically, it is foreign sound recordings that will benefit the most from term extension since as a result of the GATT implementing legislation, pre-1972 published foreign sound recordings are protected federally for the same term of protection as other copyrighted works, such as books. See 17 U.S.C. § 104A(h) (6) (C) (ii) (1994).

97 See *European Term Directive*, *supra* note 88, arts. 3.2 (sound recordings), 3.3 (audiovisual works). The term for directors as authors of motion pictures is, though, life plus 70 years. *Id.* at 2. In testimony before the House of Representatives, now-Acting United States Trade Representative Charlene Barshefsky opined that a portion of the extended royalties would be recoverable in the case of motion pictures in light of the European treatment of directors as authors. See *House Term Hearings*, *supra* note 7, at 210-211. According to Barshefsky, even though directors of U.S. films are not authors due to our unique work-for-hire relationships, Europeans would be willing to pay one-third royalties to an American director, although not to the producer or to the motion picture company. Once the one-third royalty payment (the director's share) is received in the United States, it would be split with the producers and motion picture companies according to an agreement worked out among the Directors Guild of America, the producers, and the motion picture companies. The expected amount of such royalties has not been estimated, but for the immediate future it would be infinitesimal, since the term extension would, if passed in 1996, "save" from falling into the public domain only motion pictures first published in 1921, six years before the advent of talking movies. Even projecting ten years in advance, to 2006, for motion pictures first published between 1921 and 1931 (*and* renewed), the total number that are actively exhibited in Europe must be extremely low. And, even for this tiny number, it must be recalled that only the director's one-third share would, theoretically, be recoupable. Perhaps for this (or other reasons) the Motion Picture Association of America has modestly projected additional revenues of less than \$1 million (which could be zero) until the year 2000, when the figure jumps to \$3 million.

Even if such partial payments are worked out for the motion picture industry, there is no possibility for such an arrangement for sound recordings, which are not protected under the Berne Convention and thus do not have an "author." Yet, unlike motion pictures, older sound recordings (such as historic classical recordings and jazz) do have an active current market. The proposed term extension bills will not benefit a single one of these older U.S. recordings since under the European Union

One could, nevertheless, justify additional payments by United States consumers under the theory that increased protection will result in the creation of new works, but alas the bills have serious deficiencies in this regard, since the proposed term extension is not limited either to works created after the date of enactment, or, with respect to preexisting works, to living authors. It is of course not possible to increase the production of new works by dead authors.

B. Harmonization

Proponents have also argued that aside from the reciprocal nature of the European Union's term directive, extending the term of copyright an additional twenty years is desirable in order to harmonize United States law with international standards.⁹⁸ This argument has facial appeal since other countries are likely to follow the European Union's lead, particularly those who seek to join the Union and must harmonize their laws beforehand. But the United States existed with an unharmonized term of protection from 1888 until 1978 without any untoward effects. If harmonization is so important, it is baffling that United States negotiators did not seek (or seek to acquiesce in) a basic international standard of life plus seventy in the Uruguay Round of the General Agreement on Tariffs and Trade (GATT). If life plus seventy had been set as the GATT standard, United States trade negotiators could have come to Congress and argued that term extension had to be put in the fast-track GATT-implementing legislation. But no such effort was made or even contemplated because the harmonization argument is entirely *post hoc*.

Moreover, if harmonization is a genuine objective, there are a number of deficiencies in United States copyright law that cause far greater losses in international royalties. Most important is the lack of a true public performance right for sound recordings.⁹⁹ ASCAP, BMI, and music publishers, the forces behind the term extension proposals, have adamantly opposed harmonization of the public performance right for sound recordings in the belief that such a right would reduce their income under the "one pie" theory. This theory holds that broadcasters (who pay the royalties) have only so much money—one

term directive they receive only 50 years protection, twenty-five years shorter than the current term in the United States.

98 *House Term Hearings*, *supra* note 7, at 196-97.

99 The Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336 is nothing of the sort. The royalties it can expect to generate are considerably less than that of term extension. This Act is savaged in WILLIAM PATRY, *COPYRIGHT LAW AND PRACTICE* (Supp. 1996).

pie—and if sound recording copyright owners are permitted to sit at the table, ASCAP, BMI, and music publishers will have to share the pie, something that is definitely out of the question. Harmonization appears, therefore, to be a highly selective concern.

C. *Increased Lifespan*

The term of life of the author plus fifty years is derived from Article 7(1) of the Berne Convention for the Protection of Literary and Artistic Works, and was adopted by the United States in 1978.¹⁰⁰ One rationale given by the European Council for going to a term of life of the author plus seventy years is that “the average lifespan in the [European] Community has grown longer, to the point where this term is no longer sufficient to cover two generations.”¹⁰¹ This argument is internally contradictory. While it is true that a longer lifespan means that grandchildren of the author will live longer, it also means that the author will live longer and, therefore, will be able to provide for his or her grandchildren for an equally longer period.

On balance, then, increased lifespan cannot provide support for increasing the term of protection. In fact, increasing the term by twenty years leads to protection for four and perhaps five generations. To calculate some examples I will use the figure of twenty-five years for a generation, implicit in the Berne Convention and the European Union directive, and a term of life of the author plus seventy years.¹⁰² For an author who dies at age seventy-five and has children who have children at twenty-five, protection will be passed on as follows: 1971, author born; 1996, child born to author; 2021, grandchild born; 2046, author dies; 2056, great-grandchild born; 2071, author's child dies; 2081, great, great-grandchild born; 2096, author's grandchild dies; 2106, great, great, great-grandchild born; 2116, protection ends. In

100 See 17 U.S.C. § 302(a) (1978, as amended). It is intended to provide protection for the author and the first two generations of his descendants.

101 See Council Directive 93/98, Preamble at (5), 1993 O.J. (L290), 9 (harmonizing the term of protection of copyright and certain related rights).

102 One could argue that in some countries, mostly those in the industrialized West, couples are having children at a later date and thus the 25 year figure should be altered. Using life plus 70 and two generations, the base line figure would thus be 35, not 25 years, significantly altering the analysis in the text. The European Union has not, however, suggested this is a reason for its decision to extend term. Indeed, the principal reason behind the increased term was a desire to “harmonize up” rather than “down.” A number of Union members, such as France and Germany had terms longer than life plus 50. The Union chose to increase the term to harmonize up to these longer terms, rather than require France and Germany to shorten their term to conform to the dominant term of life plus 50.

2116, the author's child will have been dead for forty-five years; the author's grandchild will have been dead for twenty years; the great-grandchild will be sixty years old; the great, great-grandchild will be thirty-five years old, and the great, great, great-grandchild will be ten years old.

Extension of protection to such remote heirs is impossible to justify in terms of encouraging the author to create, or any reasonable societal interest in the author's immediate heirs.

D. Increased Costs of Protection and Extended Commercial Life

The argument that the term of copyright needs to be increased twenty years because of increased costs of creation for works such as sheet music¹⁰³ and motion pictures is without economic foundation. Not a single example has been given of a work that failed to make a profit in its first seventy-five years, or during the life of the author plus fifty years, but which would make a profit if term was extended an additional twenty years.

However, the argument that works of authorship have an increased commercial life is undoubtedly correct. With new media and a proliferation of cable television channels, older works are now more widely available. But the fact that money can be made for a longer period of time is not a sufficient reason for term extension. Under the Constitution, copyright must be for a limited time. It has to end regardless of whether the work still has commercial value. The music of Bach, Mozart, and Beethoven, the paintings of Rembrandt and countless others, are highly popular. Should they still be under copyright because they still have commercial value?

At some point, a long term of protection loses all connection to acknowledging the author for his or her creativity, to providing incentives for the author to create, or to looking after the author's immediate family. A term of two hundred years is outside of reason. A term of life of the author plus seventy years is also unlikely to inspire the creation of a single work that a term of life plus fifty would not also have inspired.

V. CONCLUSION: THE REAL IMPETUS

The real impetus for term extension comes from a very small group: children and grandchildren of famous composers whose works are beginning to fall into the public domain, thereby threatening trust funds. These estates have considerable political and financial impact

103 See *House Term Hearings*, *supra* note 7, at 82-84.

with ASCAP, the music performing rights collecting society. It is ASCAP and the other collecting society, BMI (in its traditional me-too role) who are pushing term extension, although their advocacy led to term extension being killed in the 104th Congress by those seeking to reform ASCAP and BMI's licensing practices for restaurants and bars. The estates of these famous composers frequently are music publishers as well, completing the royalty loop and eliminating any concerns about termination of transfers.

Individual songwriters and other authors have been left in the lurch, in a sad reminder that those who have forget those who have not. Instead of vesting the additional twenty years in the author, the twenty years is vested in the assignee, the music publisher. The result is that publishers and distributors have now become the initial beneficiaries of copyright. This violates the Constitution, which vests power in Congress to grant copyright solely to authors and solely in order to promote the progress of science. Granting rights to distributors and the estates of deceased authors cannot fulfill the constitutional imperative and is, therefore, outside of Congress's authority. It is time for the courts to set things right.

