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CRS Report for Congress

Proposed U.S. Copyright Term Extension

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Proposed U.S. Copyright Term Extension

SUMMARY

Duration of copyright is one of the major parameters for establishing the amount of protection accorded authors and other owners of copyright. It is also the principal dividing line between the property rights of such owners and the public domain -- the domain of unprotected works, available to the public for unrestricted, uncompensated used.

Under current law, copyright in post-1977 works endures generally for the life of the author(s) plus 50 years for personal works, or the shorter of 75 years from publication or 100 years from creation in the case of works made-for-hire, anonymous works, or pseudonymous works. If a personal work is created jointly by two or more authors, the copyright is measured by the life of the last surviving author. Copyright in pre-1978 works endures generally for 75 years from publication with notice of copyright or registration as an unpublished work.

The United States last extended the copyright terms in 1978 when it adopted the international standard of life of the author plus 50 years for new works.

Bills now pending in Congress (S. 483 and H.R. 989) would extend the copyright terms an additional 20 years. The extension would apply retroactively to all works in which copyright subsists.

The principal justifications for extension of the copyright terms are: 1) the need to assure authors, their heirs, publishers, and other distributors of copyrighted works of fair economic benefits for the creation and dissemination of works, and 2) the need to conform the copyright terms to the standards followed by the European Union, in order to enjoy reciprocal protection for American works in Europe and to enhance the bargaining position of the United States in trade negotiations.

Opponents of term extension deny any economic unfairness in the existing 75-year and life-plus-50 basic terms. They find the arguments concerning an improved international trading posture baseless or not proven, especially since the existing United States terms for commercially significant works exceed the new European Union terms. Opponents also emphasize the value of the public domain in the creation of new works and the costs to the public of copyright term extension without any increase in creativity.

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PROPOSED U.S. COPYRIGHT TERM EXTENSION

Duration of copyright is one of the major parameters for establishing the amount of protection accorded authors and other owners of copyright. It is alsothe principal dividing line between the property rights of such owners and the blic domain -- the domain of unprotected works which are therefore available for unrestricted, uncompensated use by any member of the public.

Under the United States Constitution, Art. I, Sec. 8, Cl. 8, Congress is authorized to grant copyright protection only for "limited Times." Under current law, copyright in post-1977[1] works endures generally for the life of the author plus 50 years for personal works, or the shorter of 75 years from publication or 100 years from creation in the case of works made for hire, anonymous works, or pseudonymous works. If a personal work is created jointly by two or more authors, the term is measured by the life of the last surviving author. Copyright in pre-1978 works endures generally for 75 years from publication with notice of copyright or registration in the Copyright Office as an unpublished work.

Bills pending in Congress would extend these terms generally by an additional 20 years. The extended terms would apply retroactively to all works in which copyright now exists. The principal justifications for extension of the copyright terms are: 1) the need to assure authors, their heirs, publishers, and other distributors of the fair economic benefits derived from creation and dissemination of copyrighted works, and 2) the need to conform the copyright terms to international standards, especially the standards followed by the European Union.

This report summarizes the pending bills, compares them with the copyright terms that took effect within the European Union on July 1, 1995, and reviews and summarizes the arguments for and against the proposed extension of United States copyright terms.

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[1]The last general revision of the copyright law was enacted in 1976 and took effect on January 1, 1978. Title 17, U.S. Code, secs 101 et seq. This general revision effected many important changes in the law, including a change in computation of the copyright term. For various reasons, including fairness and possible impairment of contracts, Congress changed the basis for computing the copyright term only for post-1977 works, that is, works in which copyright is secured under the conditions of the law effective January 1, 1978. In general, the term for post-1977 works is based on the life of the author plus 50 years. The term for pre-1978 works is a fixed period of 75 years generally, computed from the date copyright was secured -- either by publication with notice or by registration with the Copyright Office as an unpublished work.

HATCH-MOORHEAD BILLS

S. 483 (Senator Hatch) and H.R. 989 (Representative Moorhead) are identical bills which would generally extend the terms of United States copyrights by 20 years.

* *For post-1977 personal works,* the term would become life of the author plus 70 years.

* *For post-1977 works for hire, anonymous, or pseudonymous works,* the term would become the shorter of 95 years from publication or 120 years from creation.

* *For pre-1978 works*, the term would become 95 years from the date copyright was secured either by publication with notice or, in the case of unpublished works, by registration.

Hearings were held on H.R. 989 by the House Subcommittee on Courts and Intellectual Property on June 1, 1995 and July 13, 1995.

All of the extended terms would apply retroactively to any work in which copyright now exists, and to the works that will be retrieved from the public domain by the 1994 GATT implementing legislation.[2] The legislation has no effect on any other works in the public domain.

Other special provisions would extend the term of works created but not copyrighted before 1978 (unpublished, unregistered works) by a minimum of 10 years if the work is never published and by 20 years if the work is published before December 31, 2012.[3] Preemption of common law/state law copyright in

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[2]Uruguay Round Agreements Act, Pub. L. No. 103-465 (December 8, 1994). For eligible works, copyright restoration occurs automatically one year after the effective date of the World Trade Organization. The copyrights would be restored effective January 1, 1996. While eligibility rules are complicated, in general copyright is restored for "foreign-origin" (i.e., non-United States origin) Berne Convention works.

[3]The general revision of the copyright law effective January 1, 1978, preempted common law and state statutory copyrights in unpublished works. Congress granted these works a minimum term of 25 years. The term could be increased to 50 years by publication on or before December 31, 2002. The bills propose a minimum 35-year term if the works are not published, or 70 years if published timely. The purpose of the existing law was to provide minimum federal protection for pre-1978 common law works, in order to assure the constitutionality of federal preemption, and to encourage early publication of unpublished works. Since common law copyright was apparently perpetual, many of these works had been protected already for decades or hundreds of years by the states before 1978. It is not clear what interest is served by extending the copyright terms of these works. Arguably, the additional 10 years of minimum protection discourages early publication through which the general public could have greater access to the formerly unpublished works.

pre-February 15, 1972 sound recordings is delayed 20 years from February 15, 2047, to February 15, 2067.[4]

EUROPEAN UNION COPYRIGHT TERMS

Effective July 1, 1995, the members of the European Union (EU) are obligated to harmonize their terms of copyright protection by adopting as their general standard "life of the author plus 70 years" -- a 20-year extension of the term for personal works. Before adoption of the EU Directive on Copyright Duration, most of the EU members applied the existing international standard of the Berne Convention, life of the author plus 50 years. A few members, however, applied longer terms. For example, Germany applied life of the author plus 70 years; France applied life plus 70 for musical works. As part of its program of harmonization, the EU opted in favor of an across-the-board extension of the term in each country rather than compel France and Germany to reduce their copyright terms.

It is misleading, however, to believe that the EU will apply life plus 70 to all categories and types of copyrighted works. To the contrary, unlike the United States (which grants approximately 75 years to all works),[5] the EU

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[4]No explanation is given for the proposal to delay another 20 years until federal law preempts common law/state law protection for sound recordings. Sound recordings were not protected by federal copyright law until February 15, 1972. At least since the 1960s, however, sound recordings enjoyed relatively strong protection under the criminal or misappropriation laws in most of the states. When the 1976 general revision was enacted, the recording industry successfully argued that these state laws should not be preempted immediately because the recordings had not enjoyed decades of state law protection. Congress in effect gave pre-1972 sound recordings an additional 75 years of state law protection, even though copyright preemption of state laws took effect immediately for all other works. (These other works were of course given a minimum federal term of 25 years, as discussed earlier.) A further 20-year delay presumably benefits the corporate owners of sound recordings. Since most sound recordings are works made-for-hire, the heirs of the performers would not generally benefit from the proposed delay in preemption of state law. Nor would the added state law protection be required to conform to international standards. Sound recordings are frequently protected only for the international minimum term of 20 years. Under the European Union Directive, sound recordings are protected for 50 years. Moreover, federal copyright protection becomes available for pre-1972 foreign sound recordings on January 1, 1996, when copyright is granted retroactively under the Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809, 4811 (December 8, 1994). Presumably, the bills propose to delay state and common law preemption, because pre-1972 domestic recordings are not covered by the URAA.

[5]The United States does differentiate slightly between personal and impersonal works and post-1977 and pre-1978 works with respect to the method of computing the term of copyright. The fixed 75-year period for pre-1978 works and impersonal works, however, was selected specifically to approximate the average number of years of copyright protection accorded a work using the life-plus-50 method of computing the term. The intent has been to give all published works about 75 years of protection.

Directive sets different copyright terms for certain categories (books and music versus sound recordings) and certain types of works (personal works versus corporate and other impersonal works). The EU adopts shorter terms for the less-favored sound recordings and corporate works.

In comparing United States and EU copyright laws, one must understand that the fundamental approaches of the two copyright systems differ, even though they have been joined under the umbrella of the Berne Convention since 1989.[6] The EU law stresses the rights of individual authors to a greater extent than United States law, which places more emphasis on the owner of copyright and principles that facilitate marketing of the works. This difference is reflected in many ways in the two copyright systems. The EU emphasis on the individual author leads the Europeans to accord shorter terms of protection to so-called related rights (rights "neighboring" on copyright)[7] and to works made-for-hire[8] (and other impersonal works).

These differences are neither merely philosophical nor of marginal impact. They affect trade in copyrighted works between the EU and the United States with respect to the most important sectors of U.S. copyright industries: motion pictures, sound recordings, and computer software. Under U.S. law, most

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[6]Although the Berne Convention was created in 1886, the United States did not adhere to the Convention until March 1, 1989. During the 100 years before 1989, the United States and Europe developed different copyright systems. Many fundamental principles are shared by these different systems, but in certain cases, it is difficult to bridge the differences. Two of the major difficulties concern the treatment of sound recordings and other corporate or impersonal works.

[7]The continental European theory of copyright focusses on the individual author as the one responsible for the creative activity which copyright laws seek to encourage. The individual creates "works" -- literary and artistic works. Under continental European theory, sound recordings are not "works," both because they are created primarily by corporate organizations and because the nearly "mechanical" creation of the sounds is not considered sufficiently original and creative to merit copyright protection. Sound recordings are considered worthy of a lesser form of protection known as related or neighboring rights. The Europeans tend to argue strenuously for systems of protection which recognize a hierarchy of greater protection for literary and artistic works and lesser protection for so-called "related rights." The former are considered superior and merit longer terms of protection. Related rights are considered subordinate to copyrighted works and warrant a shorter term of protection. In addition to the rights of producers of sound recordings, the most common related rights encompass the rights of broadcasters and performers.

[8]Works made-for-hire under United States law include works created by an employee within the scope of his or her employment, and certain categories of specially ordered or commissioned works which are deemed works made-for-hire by a written agreement of the parties. The work for hire concept is almost unknown in continental copyright laws. The concept is recognized in a limited way in works of journalism and computer software. The United Kingdom, which once had a work for hire law similar to the United States concept, will gradually have to conform to the continental European distaste for the doctrine.

commercially significant works in these categories are works made-for-hire. They are now protected by U.S. law for a minimum of 75 years. Under the EU Directive that took effect July 1, 1995, U.S. sound recordings (and possibly motion pictures also) would be protected only for 50 years from first publication or communication to the public; most computer software would probably have a term of 70 years from public availability. All of these terms are shorter than existing United States terms of copyright protection.

Given these fundamental differences between U.S. and EU copyright systems, a question arises whether the United States will gain any significant trading benefit by extending the terms of all U.S. copyrights by 20 years. The merits of this argument will be explored further in the summary of arguments for and against term extension. Provisionally, it seems likely that the major benefit arises in the case of musical works, most of which are not works made-for-hire under US law. Under EU law, musical works, books, and works of art will be governed by life plus 70,[9] and most U.S. works in these categories are not works made-for-hire.

SUMMARY OF EUPOREAN UNION COPYRIGHT TERMS

* *For literary or artistic works* within the meaning of Article 2 of the Berne Convention, the term is life plus 70.

* *For anonymous or pseudonymous works,* the term is 70 years after the work is "lawfully made available to the public," or 70 years after creation.

* *For collective works or works created by a legal person (e.g., works made-for-hire),* the term may be 70 years after the work is lawfully made available to the public, or 70 years from creation.

* *For motion pictures and other audiovisual works*, the term is 70 years after the death of the survivor of the following contributors: principal director, author of screenplay, author of dialogue, and composer of music specially created for the work. However, the rights of a film producer terminate 50 years after first fixation, or 50 years after the fixation is lawfully published or communicated publicly, whichever is earlier.

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[9]Of these categories, only music appears to have a significant impact on trade and the U.S. international economic interests. While books are very important to the U.S. domestic sector, international trade in books is not as significant as trade in music because of language and cultural differences, and the market for books more than 75 years old is modest. Also, informal marketing agreements among U.S. and English book publishers have tended to divide world markets for English-language books into exclusive marketing territories. Consequently, English book publishers (which are sometimes American subsidiaries and which are sometimes the parent company of an American subsidiary) continue to maintain a large share of the English-language international book sales. The international markets for new works of art are not economically significant.

* *For sound recordings,* the term is 50 years, measured in the case of the rights of the producer, from fixation, except if the recording is published or communicated publicly, from the earlier of these two events. In the case of the rights of the performers, the term is 50 years after public performance of the work, but if the fixation is lawfully published or communicated publicly, the term is computed from the earlier of these two events.

* "*Critical and scientific publications*" in the public domain may be protected for 30 years from the first lawful publication.

* *For photographs that qualify as an "author's own intellectual creation,"* the ordinary term of life plus 70 years applies. For the remaining "non-artistic" photographs, a lesser unspecified term is permissible.[10]

SPECIAL PROVISIONS FOR NON-EUROPEAN UNION WORKS

If the work originates in a country that is not a member of the European Union and the author is not a European Union national, the term expires on the expiration of protection in the country of origin, if the term is shorter than the term applicable in the EU for copyright subject matter.[11]

The EU terms for protection of related rights (rights of performers, producers of motion pictures, producers of sound recordings, and broadcasters) apply if the EU member grants protection to non-EU rightsholders. In essence this means that, unless a treaty obligation dictates otherwise, the EU members are entitled to require reciprocal protection of the same related rights before extending any protection to non-EU holders of related rights.[12]

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[10]Article 7(4) of the Berne Convention sets the minimum term for photographs at 25 years from their making.

[11]Article 7 of European Union Council Directive #93, June 22, 1993, effective July 1, 1995. This Article mandates application of the rule of the shorter term in all EU member countries. The United Kingdom, for example, did not apply the rule formerly but is required to apply it by the Directive.

[12]The provision for reciprocity in granting related rights to foreigners is a traditional principle of this type of protection. Under reciprocity, nationals of Country "A" are protected in Country "B" to the same extent as "A" protects the nationals of "B." By contrast, copyright protection is available on the basis of national treatment, except with respect to the term of protection. Under national treatment, the nationals of Country "A" are protected in Country "B" on the same basis as "B" protects its own nationals, irrespective of the protection that nationals of "B" receive in Country "A." The EU's application of reciprocity to related rights may present serious problems for the United States, even though we have satisfied some EU objections to inadequate protection of performers rights by enacting a federal anti-bootlegging law as part of the GATT implementing legislation. For a given right, if our level of protection falls below that provided in the EU, an EU country is likely to deny protection to U.S. performers

(continued...)

Subject to any existing treaty obligation, the term of protection for related rights claimed by a non-EU rightsholder expires upon expiration of protection in the non-EU country or in the EU country where protection is claimed, whichever term is shorter.[13] If an EU member has a treaty obligation to grant a longer term, this longer term may be maintained until the conclusion of a superseding international agreement.

COMPARISON OF FIXED TERM AND LIFE-BASED SYSTEMS

In reviewing the arguments for and against term extension, it may be important to understand the benefits and disadvantages to authors of the two different methods for computing the copyright term that are reflected in the differing treatment of post-1977 and pre-1978 works under U.S. law. This difference may be especially significant in evaluating the arguments for a 20-year extension for all works, even though each method operates differently to terminate the copyright.

The term for pre-1978 works is fixed at 75 years now. If the author died young or shortly after creating a significant work or works, the heirs receive a longer period of protection under the fixed term of 75 years than if life plus 50 were applicable. On the other hand, if the author is long-lived, the author and the heirs benefit from the longer period of copyright during life under a "life-plus" system compared to a copyright measured by a fixed term of 75 years. In short, the author always enjoys full copyright during his or her lifetime under the "life-plus-50" system, and almost always enjoys full copyright while living under a 75-year fixed-term system. The heirs, however, could receive more or less than 50 years of protection under the 75-year fixed term. On the other hand, the entire period of protection could be more or less than 75 years under "life-plus-50," depending upon when the work was published and when the author died.

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[12](...continued)
on the basis that U.S. protection for the implicated right is inadequate. This is an issue, therefore, not merely about the term of protection Americans enjoy in the EU, but whether any protection will be granted for a given related right. The anomaly for the United States is that, since we protect sound recordings as copyright subject matter, protection should be available to foreign recordings on the principle of national treatment (if we have a treaty obligation with the relevant country). The EU will protect sound recordings on the basis of related rights reciprocity. The U.S. therefore will generally accord more protection to foreign recordings than American recordings will receive in the EU. This fact is most clear with respect to duration of protection (which is the topic of this report), but will also be reflected in the nature of rights granted. At some point, these issues will probably be thrashed out in the context of the World Trade Organization.

[13]This provision is known as the "rule of the shorter term." Comparison of terms and application of the lesser period of protection is also permitted under copyright conventions or treaties. The terms being compared, however, are usually longer in the case of copyrights than in the case of related rights.

For example, George Gershwin and Irving Berlin are famous American composers whose works are generally governed by the fixed term of 75 years.[14] Since Gershwin died young his heirs have benefitted from a longer term of copyright under the fixed term of 75 years compared to life-plus-50. Technically, Gershwin's works are in the public domain in those countries that apply life-plus-50. (The copyrights expired at the end of 1987.)[15] His works remain under copyright in the United States, if published after 1919. A Gershwin work published in 1925 will remain under copyright in the U.S. until 2000, 13 years longer than under a life-plus-50 system; a work published in 1935 will remain under U.S. copyright until 2010, 23 years longer than under a life-plus-50 system. ("Porgy and Bess" is an example.)

By contrast, Irving Berlin, who began publishing in 1907 and died in 1989 at age 101, lived to see some of his copyrights expire after 75 years. Even for some of his most famous works, his heirs will enjoy only a few years of copyright protection, unless Congress extends the term for pre-1978 works. If Berlin's works had been governed by a life-plus-50 system, the copyright for a work created in 1925 would have endured until 2039, a total of 114 years. Berlin works first published before 1925 would have enjoyed an even longer period of protection. "Alexander's Rag Time Band," first published in 1911, is out of copyright in the United States. If life plus 50 had applied, the copyright would have endured for a total of 128 years. (Seventy-eight years during Berlin's life plus 50 years post mortem.)

If the works are created by joint authors, one of whom outlives his or her co-author by many years, the life-plus-50 method operates to extend the period of copyright protection greatly. Under United States law, the term for post-1977 joint personal works is measured from the life of the last author to survive, no matter how many joint authors created the works.[16] In the case of pre-1978 U.S. works, the term for joint works remains a fixed period of 75 years from the date copyright was secured.

These contrasting benefits and disadvantages of the different methods of computing the copyright term are noted to assist in the evaluation of the arguments for extension of the term for both pre-1978 and post-1977 works. As

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[14]This comment is true of all of Gershwin's works since he died in 1937, unless an unpublished work is discovered and gains statutory copyright for the first time after 1977. The comment is also generally true of Berlin's works, since he stopped composing before 1978, with perhaps minor exceptions.

[15]Some foreign performing rights societies may continue to pay some copyright royalties to Gershwin's heirs as long as the works remain under copyright in the United States. They do not have any legal obligation to pay royalties, and, under the EU Directive, the European societies may be foreclosed from paying royalties to works in the EU public domain by application of the rule of the shorter term.

[16]Article *7b2is* of the Berne Convention also requires computation of the term for life-based copyrights from the death of the last surviving joint author.

a member of the Berne Convention since 1989, the United States is bound to apply "life-plus-50" years at a minimum, in the case of post-1977 personal works.[17]

TERMINATION OF RIGHTS

Author interests support copyright term extension, but some author groups condition their support on an automatic grant of the extended term (i.e. the additional 20 years) to the author or the author's heirs.[18] The pending bills do not grant the extended term to authors or the heirs automatically. To obtain the extended term, authors or heirs in most cases would have to terminate rights already granted to others (usually publishers or other disseminators of works). The authors or heirs would have to exercise their termination rights pursuant to section 203 (for post-1977 works) or section 304(c)(for pre-1978 works) of the Copyright Act.

Termination rights were created in the 1976 Copyright Act as an agreed compromise between author and publisher-producer interests. Both sides at that time favored extension of the copyright term and tended to favor the life-plus-50 term for new law works. Authors, however, wanted a reversion right to reclaim a copyright transferred originally to a publisher or producer. Authors needed a reversion right since, by custom and practice, an overwhelming number of copyrights are assigned by authors to publishers or producers. Without a reversion of rights, only the publisher-producer would benefit from the longer term.

As a compromise, authors were not given an automatic reversion of rights. Instead, they were given a termination right, which has to be exercised deliberately within a certain period of years and is subject to precise conditions. The termination right was applied both to the 19 years added to the former 56-year term for pre-1978 works, as well as to the copyright terms for post-1977 works. Both exclusive and nonexclusive grants can be terminated, but the

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[17]Some would argue that the United States is technically in violation of the Berne Convention because we apply a fixed term of protection to pre-1978 personal works. Technically, the Berne Convention requires application of the life-based system to personal works, even if the works were copyrighted before a country assumed the treaty obligations of the Berne Convention. In adhering to the Berne Convention, however, the United States took the position that our copyright duration system for pre-1978 works was transitional and that the Berne requirements for retroactive application of the treaty were sufficiently unclear to permit the United States to maintain the fixed term of years system for these works.

[18]For works governed by the life-based term, these author groups mean the heirs should receive the extended term. For personal works governed by the fixed 75-year term, again these groups really argue that the heirs should receive the 20-year extension. Irving Berlin out-lived the 75-year term for some of his works, but authors rarely live more than 75 years after the work is created. They would have to do so to benefit personally from term-extension.

termination right does not apply to works made-for-hire. For old law works, termination has to be exercised by a legally appropriate notice, essentially not less than two years before the end of the 56 year period (with an exception where the 56 years ended around 1978 or shortly thereafter). For new law works in general, rights may be terminated 35 years after the execution of the grant by serving the legally appropriate notice within five years.

Those authors or heirs who neglected to exercise their termination rights in a timely manner will not receive rights in the extended copyright term under the pending bills. (This point applies only to pre-1978 works since the earliest date for termination of a post-1977 grant of rights for the entire term is 2013.) The copyright owner (usually the publisher or producer) will receive ownership of the extended term as a continuation of the copyright. Many authors or heirs, however, may have a contractual right to receive royalties while the copyright endures. Other less fortunate authors/heirs, who sold their rights up-front for a lump-sum payment and also failed to terminate the grants timely, will receive nothing from the term extension.

The termination rights clauses are indeed complex. It is always exceedingly difficult to provide for reversion of rights by statute.[19] The bifurcated 28-plus-28-year copyright periods of the 1909 Copyright Act were intended to effect reversion of rights to authors. They failed to achieve that objective.

Publishers-producers required authors to assign both copyright terms in the initial contract, usually without separate compensation for the grant of the second term (although there might be an obligation to pay royalties). The Supreme Court held the assignments valid if the author lived into the last year of the first term and timely renewal of the second term was effected by registration. *Fisher v. Witmark*, 318 U.S. 643 (1943). The publisher-assignee held the copyright for the entire 56 years, notwithstanding Congress' intent to award the second term to authors as a new grant of rights.

With this history in mind, Congress in the 1976 Copyright Act drafted precise provisions to ensure authors could have a legally binding reversion right. Authors do have legally binding termination rights. The price of that certainty, however, is that the rights must be exercised in accordance with strict provisions.

The reality is that authors generally must assign their rights to someone in order to obtain revenue from the licensing of their works. Given this reality, it is extremely diifficult to give authors an automatic grant of the 20 year extended term and yet leave them with valuable rights to market. Further, Congress would have to deal with complex situations in which termination rights might or might not have been exercised with respect to the 19 year added period for pre-1978 works.

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[19]The whole law of trusts was developed by lawyers and the English Chancery Courts to circumvent the statutory rule against perpetuities, which was intended to prohibit alienation of property after a period of years.

MOTION PICTURES: THE EU TERM AND U.S. LAW

Term-extension proponents place great weight on the need to harmonize our copyright terms with the European Union's terms. They argue that this harmonization will result in increased economic benefits, which would flow from the additional 20 years of royalties from foreign licensing of copyrighted works.

In the case of motion pictures, it is not certain that term extension will result in 20 years of added royalties abroad. The question arises because of the treatment of impersonal works, works made for hire, and "related rights" in the EU, in comparison with the treatment of these works or rights in the United States.

This much is clear: under the Berne Convention (which is the final word on the acceptable, minimum term), the minimum term for a cinematographic work (i.e., motion picture) is either i) life of the author plus 50 years, or ii) 50 years from its public availability or, if the work is not made publicly available, 50 years from its making.[20]

On the one hand, Article 2(2) of the EU Directive sets the term for "cinematographic or audiovisual works" as life of the author(s) plus 70 years after the death of the last of four contributors to survive -- the principal director, the author of the screenplay, the author of the dialogue, and the composer of the music specifically created for use in the work. This life-based term is established in the context of another provision that mandates that at least the principal director of a cinematographic or audiovisual work shall be considered the author.[21] Can this life-based term be applied to a motion picture created as a work made-for-hire under United States law? Perhaps.

There is a second possibility for the term for U.S. motion pictures: the term for "film" producers rights. Article 3(3) of the EU Directive provides that the "related" rights of the film producer shall expire 50 years after the fixation

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[20]Article 7(2) of the Berne Convention. Berne Members may choose either to grant a life-based term or a fixed-years term to cinematographic works. This provision, like Article 14*bis* (which deals with ownership of such works) is a compromise between the continental European and American-English systems of copyright. Many Europeans, especially the French and Germans, hold that the major individual contributors (for example, the director and principal writers) are the authors of a motion picture. Common-law countries tend to view the producer as the author, or at least the first copyright owner, of the motion picture.

[21]Article 2(1) of the EU Directive. This decision to make the director the author harmonizes EU law in favor of the French-German view. It means that the United Kingdom probably will no longer be able to consider the producer as a possible author or first owner of the copyright. This clause may also compound the difficulties for United States motion picture producers when they seek to obtain the benefits accorded authors under EU law.

is made, or if the film is lawfully published or lawfully communicated to the public during that period, 50 years from the first publication or communication to the public, whichever is earlier. Film producers' rights are designated as "related rights" -- not as rights under copyright law. The term "film" specifically designates a "cinematographic or audiovisual work," according to Article 3(3).[22]

Since copyright and related rights are separate rights, arguably the term for a copyright in a cinematographic or audivisual work must be governed by Article 2(2): life-plus-70 years after the last one of four "authors" to survive (even though none of those persons is an "author" under U.S. law).

Deputy U.S. Trade Representative, Charlene Barshefsky, took this position at the House Subcommittee hearing on July 13, 1995. While she seemed to concede that the producers in their own right can only enjoy a term of 50 years (accepting that the "related rights" term governs), she presented an argument that U.S. producers as assignees of the rights of the director (or other contributors) will be able effectively to claim the benefit of the extended EU term,[23] if the U.S. extends the term for works for hire to 95 years.

Will U.S. motion picture producers be able to assert the rights of the individual contributors (who are "authors" in Europe but not under U.S. law) through assignments of rights?[24] A favorable answer is not certain.

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[22]The optional term of 70 years of Article 1(4) of the EU Directive does not seem applicable to U.S. motion pictures, even though the works are made for hire and a legal person is the first rightholder. The requirement of Article 2(1) to make the director an author seems to foreclose application of the "legal person" provision to theatrical motion pictures, even if an EU country like the United Kingdom were inclined to take that approach. Since the director of a theatrical motion picture is given screen credit, the naming of this "author" on the work means the "legal person" option cannot be applied. In theory the "legal person" option might be applied to educational and training films if the director is not named on the film. This outcome seems highly unlikely, however, and, in any case, these works have no trade significance beyond 50 years.

[23]Statement of Ambassador Charlene Barshefsky, Deputy U.S. Trade Representative, before the House Judiciary Committee, Subcommittee on Courts and Intellectual Property, July 13, 1995, page 4 (unpublished). Apparently, this is also the position taken by the U.S. motion picture industry.

[24]Certainly, U.S. motion picture producers have asserted rights under existing European laws on the basis of assignments from major contributors to their works. A question may arise about the added 20 year term, however, because this is the first time EU members will harmonize their laws on the terms for copyright and related rights. Also, this is the first time each EU country must exceed the term provided in the Berne Convention, must apply the rule of the shorter term, and must consider the director the author. How the EU Directive will be applied to motion pictures made for hire does not seem absolutely certain. There is interpretive "room" for the EU to make it difficult for U.S. producers to claim the added 20 years.

There is some precedent for the Deputy Trade Representative's solution in the history of the French and German video recording levies. After some resistance, U.S. motion picture producers were able to participate in the authors' share of the video levies as assignees of the "authors" -- as defined in the French and German copyright laws.[25] By analogy, U.S. producers may obtain valid, enforceable assignments of the 20 years added to the life-based EU copyright term. A distinction may be drawn, however, between pre-existing motion pictures and ones created after the EU Directive takes effect.

The EU Directive essentially adopts the French view of motion picture authorship: the director (and perhaps some other contributors) is(are) the author(s). Article 17 of the French Copyright Law[26] creates a presumption of assignment to the producer of the exclusive right of "cinematographic exploitation," if the employment contract has no contrary provision. This presumption is qualified, however, by Article 31 of the French Copyright Law. No assignment is valid unless the right transferred is specifically mentioned in an assignment contract with respect to extent, purpose, place, and duration.

To the extent an EU country has contractual regulations similar to French law, will it recognize non-explicit U.S. contracts between the producers and motion picture contributors as sufficient for the U.S. producers to exercise rights in the extended 20 year period? If new, explicit assignments are made post-July 1, 1995 (the effective date of the EU Directive), will these new assignments be recognized for all motion pictures or only for those created on or after July 1, 1995?

In summary, arguments can be made that the life-plus-70 year term applies to U.S. films through explicit assignment of rights (at least for post-July 1, 1995 works), or alternatively that U.S. film producers will enjoy with certainty only the 50-year term reserved for "related" rightholders. Unless the United States recognizes the director as an author of theatrical films, the EU may argue its members satisfy the minimum 50-year term for cinematographic works set by the Berne Convention by applying Article 3(3) of the EU Directive. At a minimum, the European Union may not make it easy for U.S. producers to benefit from the 20 year added term.

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[25]Ironically, however, the U.S. motion picture producers have been unsuccessful in obtaining the "producers" share in France because the French have held that the film must be first fixed in France to obtain that share.

[26]Copyright Law of March 11, 1957, as amended by the Law of July 3, 1985 ("Law on Author's Rights and on the Rights of Performers, Producers of Phonograms and Videograms and Audiovisual Communications Enterprises," No. 85-660).

ARGUMENTS IN FAVOR OF COPYRIGHT TERM EXTENSION

Summary of Arguments[27]

* Increased life expectancy means children and grandchildren of the author outlive their copyrights; the increase in the author's longevity does not make a sufficient increase in the total copyright term to provide fairly for the two succeeding generations.

* Term extension is a matter of fairness to the heirs of authors who die young or whose creative output falls mainly in their last years of life.

* Strong copyright laws foster creation and the broad dissemination of cultural and information works.

* Public availability of a work is often diminished by its entry into the public domain; generally, if the work is available, the consumer pays the same as if the copyright had not expired.

* As a matter of equity, tangible personal property like copyright should be treated as favorably as real estate holdings.

* Term extension will improve protection for American works in foreign countries by guaranteeing reciprocal protection in the European Union, improving the standing of the United States as an international copyright leader, helping to sustain the U.S. trade surplus in the copyright industries sector, and sending a clear message to support demands for increased protection of American works in less developed countries (especially, Latin America, the Pacific Rim, and Eastern Europe).

* If the United States does not extend the copyright terms, the European Union will invoke that lesser protection against the U.S. in World Trade Organization negotiations and will retaliate against U.S. works by application of the rule of the shorter term.

* Even where the U.S. term exceeds the EU standard -- as in works made-for-hire -- term extension is justifiable: the U.S. must remain true to its copyright principles and must not distinguish between types of works.
*Term extension for works made-for-hire enhances the investment of producers and disseminators; U.S. copyright laws protect entrepreneurs as well as authors; the additional economic incentive will finance future authorship, production and distribution.

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[27]The summaries of arguments for and against extension of the United States copyright terms are drawn primarily from the hearing record of the Copyright Office's 1993 public hearing. *Public Hearing and Notice of Inquiry: Duration of Copyright Term of Protection,* Docket No. RM 93-8, Copyright Office, Library of Congress (September 29, 1993) (Transcript and written comments available from the Copyright Office upon request and payment of applicable fees.)

* Term extension for existing works also encourages investment in new technology to maximize the distribution of older works.

* The benefits of added royalties for 20 additional years of domestic and international exploitation of copyrights far outweigh the costs to domestic users: the added term will create new jobs and increase the income available for investment.

* International harmonization of the copyright terms would foster international comity, discourage retaliatory legislation and trade practices, facilitate international trade, and encourage a greater exchange of copyrighted properties.

* Works travel on the international information superhighway across national boundaries in the "blink of an eye," and harmonization of the copyright terms will promote dissemination of works to the "global village."

* Parity with EU standards is critical for music licensing since European states account for nearly 60 percent of worldwide music licensing revenues.

* Term extension is necessary to place the United States in a position to challenge unfavorable applications of the EU standards against American works: private parties can litigate the issues, and the U.S. Government can attack the EU policies in trade talks and through dispute settlement procedures, but U.S. interests can take these positions only if the U.S. increases its copyright term to life plus 70.

ARGUMENTS IN OPPOSITION TO COPYRIGHT TERM EXTENSION

Summary of Arguments

* U.S. copyright tradition is *not* based on the theory of an author's "natural right" to copyright protection; under the U.S. Constitution, Congress has the power to recognize intellectual property rights only if the purpose and effect are to promote the progress of science and the useful arts.

* Copyright laws should encourage the creation and dissemination of an optimal number of quality works, but the grant of proprietary rights should be no stronger than necessary to achieve this public benefit.

* A 20-year extension of existing copyright terms does not benefit the public: in the case of existing works, the current term was ample to encourage creation and dissemination of new works; in the case of future works, there is no proof that 20 additional years of protection will stimulate greater creativity.

* Term extension creates windfall profits for copyright owners of existing works: the primary beneficiaries are corporate owners of copyright.

* The public domain is enriched by the expiration of copyrights; new works can be created using the public domain material, especially in the fields of documentaries, educational films, compilations, and information works.

* A 95-year period is an excessive copyright term: the economic utility of most works ends a few years after publication, except for the marginal profits that sustain public domain vendors.

* Term extension benefits "old" authors at the expense of "new" authors, since the public domain contains the building blocks for new authors.

* The existing copyright terms are already generous to authors, and proponents have not demonstrated the public benefits of term extension.

* There is no proof that adoption of the life-plus-70 copyright term would be beneficial to the U.S., given the conflicts in copyright principles and the insistence of the Europeans on "mirror image" reciprocity.

* Except for musical works and books, the existing U.S. copyright terms already exceed the protection under the new EU standards: Hollywood motion pictures and sound recordings receive only 50 years under the EU standards; computer programs and works made-for-hire in all categories other than films and sound recordings receive 70 years of protection.

* Prices for public domain publications are competitive and sometimes lower than copyrighted works; there is greater diversity and availability of works through use of the public domain.

* Music licensing costs will increase if the terms are extended.

* International trade will not suffer if the existing copyright terms are retained, since, except for music, the existing U.S. copyright terms for works produced by the economically important copyright industries already exceed protection in the EU and other countries.

* Retroactive extension of the copyright term is constitutionally unsound: it violates the spirit of the "limited Times" clause of the U.S. Constitution; stagnation for new authors is the price of retroactive protection.

* Copyright in older works interferes with teaching and research: it has become increasingly difficult to determine when a copyright expires, to locate the author or publisher of the older work, and to obtain a response from publishers.

ANALYSIS OF THE MAJOR ARGUMENTS FOR AND AGAINST COPYRIGHT TERM EXTENSION

The arguments in favor of term extension distill to two main points: 1) economic fairness to the heirs of authors in view of their increased longevity since the life-plus-50 standard was "adopted" in 1908;[28] and 2) the "economic necessity" of matching the European Union standard of life-plus-70 in order to a) avoid application of the rule of the shorter term for musical works and other personal works[29] and b) to enhance the bargaining position of the U.S. Government and U.S. copyright industries in international trade negotiations, both bilateral and multilateral.

Those who oppose term extension, in addition to denying the validity of the proponent's arguments, argue that the public domain will be diminished to the detriment of the public and new authors, and that there is no proof or reason to believe that a 20-year extension of the term will motivate any author to greater creativity. Therefore, any possible benefits of an improved international trade position are far outweighed for the public by the added costs of an extension of the term without more creativity to balance the costs.

Longevity and Fairness

The argument based on longevity assumes the following points: the Berne Convention adopted life-plus-50 so the copyright would endure to benefit the author and two generations (children and grandchildren); in 1910, when the average life-span was 52 years and a generation could be calculated as 25 years, 50 years after the author's death covered two generations. Now that the average life-span is 76 years, 50 years after the author's death is inadequate to make provision for children and grandchildren; a 70-year period after the author's death is needed to provide fairly for them.[30]

A subsidiary argument concerning economic fairness to the author's heirs is that modern technologies have increased the value of copyright properties for longer periods. The heirs should have the benefit of this extended value.

Opponents of term-extension respond with these points regarding longevity. Life-plus-50 was not really established as an international standard until the 1948 Brussels Act became accepted by the majority of Berne member states, which occurred in the 1950s. The United States adopted life-plus-50 only in

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[28]Although the Berne Convention recommended a term of life-plus-50 as early as 1908, that standard did not become mandatory until the 1948 Brussels Act.

[29]The direct benefit of term extension appears limited to these categories since the European Union accords lesser protection than *existing* U.S. law in the case of corporate works and works made-for-hire.

[30]Comment No. 3 in the Copyright Office public hearing on copyright duration, Joint Comments of the Coalition of Creators and Copyright Owners, at 19-21.

1978, seventeen years ago; since 1978, average longevity of life has increased about 3 years.

Even if 1910 is accepted as the base year for comparing longevity, the copyright term has increased significantly because authors live longer. Also, the total copyright term under a life-based system is always subject to many variables: the age when an author creates his or her most significant work in relation to the age at death (that is, whether creativity occurs early or late in life), and whether creative output is spread throughout a lifetime or is bunched together.

With respect to children and grandchildren, many authors do not have any heirs of the body who survive them; the fixed term after the death of the author, which is not restricted to heirs of the body, often benefits corporate interests or persons other than children and grandchildren.

With respect to the increased value of works for longer periods, this occurs only for a relatively small number of commercially significant works. It remains true that the overwhelming bulk of works lose economic significance a few years after their public availability. Also, the impact of technology on the extended value of works can never be an incentive for an author who is creating the work some 30-50 years in advance of the technological development.

While authors need copyright protection during their lifetimes as an incentive to create and some protection after death to provide for the immediate surviving family, opponents of term-extension say there is no proof that 20 additional years of protection post-mortem will have any positive effect on creativity. Some argue that it is parasitic to extend the term further to protect grandchildren. Society might benefit more if the grandchildren create their own works or are productively employed otherwise than as managers of their grandfather's or grandmother's copyright estate.

Conformity with European Union Standards

Proponents of term-extension appear to place greater weight on their second argument: the "economic necessity" of conforming to the EU standards to avoid application of the rule of the shorter term and to enhance trade bargaining positions.

The EU standards permit reciprocity with respect to rights and term in the case of related rights (rights of producers of motion pictures and sound recordings). United States rightsholders will receive only as much protection as U.S. law extends to foreign producers of sound recordings and motion pictures.

With respect to copyrights, EU members must compare terms of copyright and apply the shorter term. Unless the United States adopts life-plus-70, valuable American works will receive 20 years less protection in the EU. This will have a significant impact on our currently good balance of trade in intellectual property.

Of even greater importance, the U.S. must adopt life-plus-70 to forestall possible trade retaliation by the EU and to permit the United States and its copyright industries to argue persuasively for the EU to conform to U.S. standards for motion pictures, sound recordings, and computer software. Thus, even though the existing U.S. terms for these works are greater than the new EU standards, the U.S. should extend the terms for these works by 20 years to confirm that all works should have essentially the same term of copyright protection.

Opponents of term-extension see the international trade argument as either baseless or not proven. Since most economically significant U.S. works, other than music, are works made-for-hire, the U.S. term of 75 years already exceeds the new EU terms of 50 years (for producers of motion pictures and sound recordings) and 70 years (for computer software). Given the deep philosophical differences between the United States and European Union systems of copyright and related rights, there is no reasonable likelihood that U.S. adoption of life-plus-70 will enhance U.S. bargaining strength in international negotiations. The U.S. stands nearly alone in protecting works made-for-hire as favorably as personal works. The U.S. has no allies on this point among other trading partners.

The Recording Industry Association of America (representing U.S. record producers) is on record in opposition to life-plus-70 because adoption of the EU standards, they say, perpetuates the unfair treatment internationally of related rights compared to copyrights.[31]

Opponents also maintain that, even if a slight justification existed for extension of the term to life-plus-70 for personal works, there is absolutely no justification for extension of the term for pre-1978 works and for post-1977 works made-for-hire (proposed 95-year term). The EU will never grant as much protection to works made-for-hire and related rights as they will for personal copyrighted works.

Even in the case of personal copyrighted works, the benefit from avoiding application of the shorter term is very slight and will be felt only in 2027 and much later. If the U.S. maintained life-plus-50, the earliest date for application of the rule of the shorter term is 50 years after 1977 (assuming an author died the first day life-plus-50 became effective in the U.S.). As a practical matter, the shorter term will not apply significantly to life-based copyrights until about 2040.

With respect to pre-1978 works, for which the U.S. applies only the fixed years term, it appears unlikely that the U.S. could persuade the EU to forego application of the rule of the shorter term to these works. Adoption by the U.S. of life-plus-70 in the case of post-1977 works gives the U.S. no basis for demanding that the EU not apply the rule of the shorter term to pre-1978 works. The U.S. is technically in violation of treaty obligations under the Berne

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[31]Comment No. 15 in the Copyright Office public hearing on copyright duration, Recording Industry Association of America, at 3-4.

Convention with respect to pre-1978 copyrights.[32] The EU and other members of the World Trade Organization know this. The EU is on firm legal ground since the Berne Convention permits application of the rule of the shorter term.[33] Therefore, extension of the copyright term for pre-1978 works to 95 years not only will not stop the EU from applying the rule of the shorter term; the added 20 years extends the treaty violation by the U.S. in failing to establish a minimum life- plus-50 year term for personal works. The additional 20 years does mean, however, that the EU may, in some cases, wait 20 years before applying the shorter term.[34]

Diminution of the Public Domain

Opponents of term-extension cite the diminution of the public domain as one of the major arguments in opposition to the proposed extension. They are concerned both with respect to added copyright transfer costs, and more importantly, the burden on derivative works and new authors caused by a reduction in the public domain. They argue that the public domain contains the building blocks of new works of authorship. They also argue, although without clear supporting data, that the public pays more for works in copyright than public domain works, and that for many works, copyright serves as an inhibitor to the dissemination of the works. They assert that copyright owners are primarily concerned with dissemination of very profitable works and have no interest in trying to market those works that may achieve only marginal profits, if any. Opponents say it is only common sense that copyright increases the cost of distribution of older works, if the owner markets the work. Also, in those cases where public domain distributors charge the same as distributors of copyrighted works, the explanation is that different costs are a factor.

Proponents of term-extension deny these points. They assert that copyright adds very little if anything to the cost of the product at the retail level. The Bible is cited as an example of a public domain work that is priced the same as comparable copyrighted publications. It is argued that public domain status actually inhibits distribution of specific works, because the lack of exclusivity means that no major distributor can be assured of making a profit. Therefore, any distribution of public domain works is marginal compared to what a major distributor would do in the case of copyrighted works.

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[32]The United States technically violates the Berne Convention by application of only a fixed years term of copyright instead of life-plus-50 in the case of personal works. The latter is the minimum term allowed by the Berne Convention for personal works. This technical violation of the Berne Convention will remain until 2052, when the last 75-year copyright expires under current law. If the copyright term is extended to 95 years for these works, the treaty violation will persist until 2072.

[33]Article 7(8) of the Berne Convention (Paris Act).

[34]This should occur for those U.S. works whose copyrights expire in the U.S. before expiration of the term in Europe. Of course, if the U.S. term exceeds the EU term, the EU will apply its own term. The shorter term will be applied.

Creativity and Term Extension

According to opponents of term-extension, there is no proof and little likelihood that an additional 20-year period post mortem will encourage any author to greater creativity during his or her lifetime. In fact, the longer term may even stifle additional creativity: older works are favored by term extension and may depress the market for new works; also, corporate authors may be more inclined to market older works whose marketability is known rather than risk capital on the creation of new works.

Opponents of term-extension also maintain that the U.S. must balance the creation incentives of a limited copyright term against the public benefits of free use upon expiration of the term. "This delicate balance is upset by extending the term of copyright protection absent a showing of a counterbalancing increase in creation incentives." [35] They emphasize that the public domain contains the material through which further progress in science and the useful arts is promoted. A rich public domain, rather than an increased copyright term, promises an increase in the creation of new works, which then have current marketing value.[36]

Proponents of copyright term-extension counter these points by emphasizing that copyright protection -- not free use -- is the engine for the creation of new works. The whole theory of property rights in copyrightable subject matter is that the grant of rights induces the creation of new works for the benefit of the public.

In addition, proponents contend that the copyright incentive applies both to creators and disseminators of works. The Copyright Clause of the U.S. Constitution has a dual purpose: copyright stimulates creativity and encourages and facilitates distribution of the works for the benefit of the public. A work that is created but never distributed provides little if any benefit to the public. Term extension will encourage copyright owners to continue to market their works for maximum public availability. The added protection will encourage further investment and lead to the creation of new works and jobs.

Even if individual authors are not stimulated to greater creativity by term extension, copyright industries will be stimulated by term extension to invest in the distribution of old and new works and the creation of new works.

Finally, proponents of term-extension argue it would be economically foolish for the United States to allow copyright terms in American works to expire before the terms set by the EU and thereby allow Europeans free use of valuable American copyright properties.

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[35]Comment No. 19 in the Copyright Office public hearing on copyright duration, Copyright Law Professors (Dennis Karjala and 34 others), at 14.

[36]Comment No. 19, Copyright Professors, at 13.

CONCLUSIONS

The United States last considered extension of copyright duration during the general revision of the copyright laws, which became effective January 1, 1978. Bills now pending in the Congress would extend the copyright terms an additional 20 years for all works in which copyright subsists.

Proponents of copyright term-extension include authors, copyright owners, publishers, performing rights societies, and representatives of author's estates. These groups represent virtually all of the United States copyright industries, with the exception of the sound recording industry.

The principal arguments in favor of copyright term extension may be summarized in two points: 1) economic fairness to authors, their heirs, publishers, and other distributors of copyrighted works; and 2) an improved international trade position for U.S. negotiators and U.S. copyright industries, especially with respect to the members of the European Union, which have adopted a basic term of life of the author plus 70 years.

Opponents of copyright term-extension include a group of 35 copyright law professors, other educators and researchers, and distributors of public domain works, especially in the fields of educational television and films. At least with respect to opposition to the life-plus-70 term, these opponents are joined by the Recording Industry Association of America.

The principal arguments of most of the opponents are these: they deny there is any economic unfairness in maintaining the existing 75-year and life-plus-50 basic terms, and they find little or no merit in the international trade arguments since U.S. copyright terms for most commercially significant works already exceed the new terms adopted by the European Union. Opponents emphasize the value of the public domain in the creation of new works and the costs to the public of an extension of the copyright terms, unless the added costs are balanced by an increased incentive to create new works. Opponents of term extension argue the case has not been made to justify the added costs for the public.

As a counter-response, proponents of term-extension argue that copyright, and not the public domain, is the engine that stimulates new creativity, that term extension will in any case encourage investment in the distribution of old and new works, and that the U.S. should not make a free gift to the European Union of valuable American copyright properties by allowing their copyrights terms to expire in the United States.