

**COPYRIGHT TERM, FILM LABELING, AND FILM  
PRESERVATION LEGISLATION**

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**HEARINGS**  
BEFORE THE  
SUBCOMMITTEE ON  
COURTS AND INTELLECTUAL PROPERTY  
OF THE  
COMMITTEE ON THE JUDICIARY  
HOUSE OF REPRESENTATIVES

ONE HUNDRED FOURTH CONGRESS

FIRST SESSION

ON

**H.R. 989, H.R. 1248, and H.R. 1734**

COPYRIGHT TERM, FILM LABELING, AND FILM PRESERVATION  
LEGISLATION

—————  
JUNE 1 AND JULY 13, 1995  
—————

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# **COPYRIGHT TERM, FILM LABELING, AND FILM PRESERVATION LEGISLATION**

**THURSDAY, JUNE 1, 1995**

**HOUSE OF REPRESENTATIVES,  
SUBCOMMITTEE ON COURTS AND  
INTELLECTUAL PROPERTY,  
COMMITTEE ON THE JUDICIARY,  
*Pasadena, CA.***

The subcommittee met, pursuant to notice, at 9 a.m., at the Richard H. Chambers U.S. Court of Appeals Building, 1255 Grand Avenue, Pasadena, CA, Hon. Carlos J. Moorhead (chairman of the subcommittee) presiding.

Present: Representatives Carlos J. Moorhead, Sonny Bono, John Conyers, Jr., Howard L. Berman, and Xavier Becerra.

Also present: Joseph V. Wolfe, counsel; Mitch Glazier, assistant counsel; Sheila Wood, secretary; Julian Epstein, minority staff director; and Betty Wheeler, minority counsel.

## **OPENING STATEMENT OF CHAIRMAN MOORHEAD**

Mr. MOORHEAD. The Subcommittee on Courts and Intellectual Property will come to order.

Today, the subcommittee is conducting a hearing on H.R. 989, the Copyright Term Extension Act of 1995; H.R. 1248, the Film Disclosure Act of 1995; and H.R. 1734, the National Film Preservation Act of 1995.

H.R. 989, which I introduced, would extend the term of ownership of a copyrighted work from the life of the author plus 50 years to the life of the author plus 70 years. I am pleased that the ranking minority member of the subcommittee, Representative Schroeder and Representatives Coble, Goodlatte, Bono, Gekas, Berman, Nadler, and Clement are cosponsoring the legislation. This change will bring U.S. law into conformity with that of the European Union whose member States are among the largest users of our copyrighted works.

The last time the Congress considered and enacted copyright term extension legislation was 1976. At that time, the House report noted that copyright conformity provides certainty and simplicity in international business dealings.

The intent of the 1976 act was twofold: First, to bring the term of the works by Americans into agreement with the then minimum term provided by European countries; and second, to assure the author and his or her heirs of the fair economic benefits derived from

the author's work. The 1976 law needs to be revisited since neither of these objectives is being met.

In October 1993, the European Union adopted a directive mandating copyright term protection equal to the life of the author plus 70 years for all works originating in the European Union, no later than the first of July of this year. The E.U. action has serious trade implications for the United States.

United States and the E.U. nations are all signatories of the Berne Copyright Convention, which includes the so-called rule of the shorter term, which accords copyright protection for a term which is the shorter of life plus 70 years or the term of copyright in the country of origin.

Once this directive is implemented, U.S. works will only be granted copyright protection for the shorter life plus 50-year term before falling into the public domain.

The main reasons for this extension of term are fairness and economics. If the Congress does not extend to Americans the same copyright protection afforded their counterparts in Europe, American creators will have 20 years less protection than their European counterparts; 20 years during which Europeans will not be paying Americans for their copyrighted works. And whose works do Europeans buy more than any other country? Works of American artists. This would be harmful to the country and work a hardship on American creators.

The second bill before us this morning is H.R. 1248, the Film Disclosure Act of 1995. This legislation seeks to protect the rights of filmmakers who fear that post production changes in films threatens the integrity of their creative works. The bill would require that films be labeled to indicate what alterations have been made and to indicate if the director, screenwriter, or cinematographer objects to these alterations.

I recall when the former chairman of this subcommittee, Bob Kastenmeier, held a hearing on legislation similar to H.R. 1248 at UCLA back in January 1990. At that hearing, Bob indicated that it was his belief that there are certain criteria that Congress must use in considering any dispute of this nature.

They are: First, we must ask the proponents of change to bear the burden of proving that the change is necessary, fair, and practical.

Second, we must always recognize and balance the legitimate rights of creators, producers or copyright holders, and the public interest.

Third, a private solution negotiated by interested parties is always preferable to congressional intervention. I think this set of criteria is just as valuable today for evaluating a proposal such as H.R. 1248.

I would urge all of the parties involved to get together some time this year, or as early as possible, and try to see what arrangements can be made that is agreeable to all the parties. I would really urge you to do that. I think it would be very serious to have Congress make the determination. And I think that all of you work in the same industry, and you live off of the proceeds of these films. And, surely, I think everybody should try to work out something together that satisfies everyone's interests.

The third piece of legislation on the agenda for this morning's hearing is H.R. 1734, the National Film Preservation Act of 1995. In 1988, Congress established the National Film Preservation Board to focus on the important goal of film preservation.

In 1992, the board was reauthorized for another 3 years. The 1992 act also called for a 1-year study of the national film preservation problem.

Among the many important findings in the film preservation study was that fewer than 20 percent of feature films from the 1920's survive in complete form. For features of the 1910's, the survival rate falls to about 10 percent. Of films made before 1950, only about half survive.

In addition to the study, the 1992 Reauthorization Act also called for a plan to address the issues of film preservation. Completed in August 1994, the plan entitled, "Redefining Film Preservation," was the product of 6 months of negotiations and consensus building among archivists, educators, filmmakers, and film industry executives.

Under H.R. 1734, the Librarian of Congress would be able to continue implementation of the national film preservation plan. Title I of the legislation would reauthorize the National Film Preservation Board while title II would establish the National Film Preservation Foundation to raise funds to concentrate on those films that are not preserved by commercial interests such as public domain, educational, historical footage, and so forth as well as to further other parts of the national film preservation plan.

This morning we have two distinguished panels of witnesses and I look forward to their testimony.

[The bills, H.R. 989, H.R. 1248, and H.R. 1734, follow:]

104TH CONGRESS  
1ST SESSION

# H. R. 989

To amend title 17, United States Code, with respect to the duration of copyright, and for other purposes.

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## IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 16, 1995

Mr. MOORHEAD (for himself, Mrs. SCHROEDER, Mr. COBLE, Mr. GOODLATTE, Mr. BONO, Mr. GEKAS, Mr. BERMAN, Mr. NADLER, Mr. CLEMENT, and Mr. GALLEGLY) introduced the following bill; which was referred to the Committee on the Judiciary

---

## A BILL

To amend title 17, United States Code, with respect to the duration of copyright, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the "Copyright Term Ex-  
5 tension Act of 1995".

6 **SEC. 2. DURATION OF COPYRIGHT PROVISIONS.**

7 (a) **PREEMPTION WITH RESPECT TO OTHER**  
8 **LAWS.**—Section 301(c) of title 17, United States Code,

1 is amended by striking "February 15, 2047" each place  
2 it appears and inserting "February 15, 2067".

3 (b) DURATION OF COPYRIGHT: WORKS CREATED ON  
4 OR AFTER JANUARY 1, 1978.—Section 302 of title 17,  
5 United States Code, is amended—

6 (1) in subsection (a) by striking "fifty" and in-  
7 serting "70";

8 (2) in subsection (b) by striking "fifty" and in-  
9 serting "70";

10 (3) in subsection (c) in the first sentence—

11 (A) by striking "seventy-five" and insert-  
12 ing "95"; and

13 (B) by striking "one hundred" and insert-  
14 ing "120"; and

15 (4) in subsection (e) in the first sentence—

16 (A) by striking "seventy-five" and insert-  
17 ing "95";

18 (B) by striking "one hundred" and insert-  
19 ing "120"; and

20 (C) by striking "fifty" each place it ap-  
21 pears and inserting "70".

22 (c) DURATION OF COPYRIGHT: WORKS CREATED  
23 BUT NOT PUBLISHED OR COPYRIGHTED BEFORE JANU-  
24 ARY 1, 1978.—Section 303 of title 17, United States  
25 Code, is amended in the second sentence—

1 (1) by striking “December 31, 2002” each  
2 place it appears and inserting “December 31,  
3 2012”; and

4 (2) by striking “December 31, 2027” and in-  
5 sserting “December 31, 2047”.

6 (d) DURATION OF COPYRIGHT: SUBSISTING COPY-  
7 RIGHTS.—

8 (1) Section 304 of title 17, United States Code,  
9 is amended—

10 (A) in subsection (a)—

11 (i) in paragraph (1)—

12 (I) in subparagraph (B) by strik-  
13 ing “47” and inserting “67”; and

14 (II) in subparagraph (C) by  
15 striking “47” and inserting “67”;

16 (ii) in paragraph (2)—

17 (I) in subparagraph (A) by strik-  
18 ing “47” and inserting “67”; and

19 (II) in subparagraph (B) by  
20 striking “47” and inserting “67”; and

21 (iii) in paragraph (3)—

22 (I) in subparagraph (A)(i) by  
23 striking “47” and inserting “67”; and

24 (II) in subparagraph (B) by  
25 striking “47” and inserting “67”; and



1 (B) in subsection (b) by striking “seventy-  
2 five” and inserting “95”.

3 (2) Section 102 of the Copyright Renewal Act  
4 of 1992 (Public Law 102-307; 106 Stat. 266; 17  
5 U.S.C. 304 note) is amended—

6 (A) in subsection (c)—

7 (i) by striking “47” and inserting  
8 “67”;

9 (ii) by striking “(as amended by sub-  
10 section (a) of this section)”; and

11 (iii) by striking “effective date of this  
12 section” each place it appears and insert-  
13 ing “effective date of the Copyright Term  
14 Extension Act of 1995”; and

15 (B) in subsection (g)(2) in the second sen-  
16 tence by inserting before the period the follow-  
17 ing: “, except each reference to forty-seven  
18 years in such provisions shall be deemed to be  
19 67 years”.

20 **SEC. 3. EFFECTIVE DATE.**

21 This Act and the amendments made by this Act shall  
22 take effect on the date of the enactment of this Act.

○

104TH CONGRESS  
1ST SESSION

# H. R. 1248

To amend the Lanham Act to require certain disclosures relating to materially altered films.

---

## IN THE HOUSE OF REPRESENTATIVES

MARCH 15, 1995

Mr. FRANK of Massachusetts (for himself, Mr. CONYERS, and Mr. BRYANT of Texas) introduced the following bill; which was referred to the Committee on the Judiciary

---

## A BILL

To amend the Lanham Act to require certain disclosures relating to materially altered films.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the "Film Disclosure Act  
5 of 1995".

6 **SEC. 2. AMENDMENT TO THE LANHAM ACT.**

7 Section 43 of the Act entitled "An Act to provide for  
8 the registration and protection of trade-marks used in  
9 commerce, to carry out the provisions of certain inter-  
10 national conventions, and for other purposes", approved

1 July 5, 1946, commonly known as the Lanham Act (15  
2 U.S.C. 1125), is amended by adding at the end the  
3 following:

4 “(e)(1)(A) Any distributor or network that proposes  
5 to exploit a materially altered motion picture shall—

6 “(i) make a good faith effort to notify each ar-  
7 tistic author of the motion picture in writing and by  
8 registered mail and in a reasonable amount of time  
9 prior to such exploitation;

10 “(ii) determine the objections of any artistic au-  
11 thor so notified to any material alteration of the mo-  
12 tion picture;

13 “(iii) determine the objection of any artistic au-  
14 thor so notified by the questionnaire set forth in  
15 paragraph (9) to any type of future material alter-  
16 ations which are in addition to those specifically pro-  
17 posed for the motion picture to be exploited;

18 “(iv) if any objections under clause (ii) or (iii)  
19 are determined, include the applicable label under  
20 paragraph (6) or (8) in, or affix such label to, all  
21 copies of the motion picture before—

22 “(I) the public performance of the materi-  
23 ally altered motion picture if it is already in dis-  
24 tribution, or

1           “(II) the initial distribution of the materi-  
2           ally altered motion picture to any exhibitor or  
3           retail provider; and

4           “(v) in the event of objections by an artistic au-  
5           thor to any future material alterations, include or  
6           affix such objections to any copy of the motion pic-  
7           ture distributed or transmitted to any exhibitor or  
8           retail provider.

9           “(B) Whenever a distributor or network exploits a  
10          motion picture which has already been materially altered,  
11          such distributor or network shall not be required to satisfy  
12          the requirements of subparagraph (A) (i), (ii), and (iii),  
13          if—

14               “(i) such distributor or network does not fur-  
15               ther materially alter such motion picture; and

16               “(ii) such motion picture was materially altered  
17               by another distributor or network that complied fully  
18               with all of the requirements of subparagraph (A).

19           “(C)(i) The requirement of a good faith effort under  
20          subparagraph (A)(i) is satisfied if a distributor or network  
21          that has not previously been notified by each artistic au-  
22          thor of a motion picture—

23               “(I) requests in writing the name and address  
24               of each artistic author of the motion picture from  
25               the appropriate professional guild, indicating a re-

1       sponse date of not earlier than 30 days after the  
2       date of the request, by which the appropriate profes-  
3       sional guild must respond; and

4             “(II) upon receipt of such information from the  
5       appropriate professional guild within the time speci-  
6       fied in the request, notifies each artistic author of  
7       the motion picture in a reasonable amount of time  
8       before the exploitation of the motion picture by such  
9       network or distributor.

10       “(ii) The notice to each artistic author under this  
11       paragraph shall contain a specific date, not earlier than  
12       30 days after the date of such notice, by which the individ-  
13       ual so notified shall respond in accordance with subpara-  
14       graph (A)(ii). Failure of the artistic author or the appro-  
15       priate professional guild to respond within the time period  
16       specified in the notice shall relieve the distributor or net-  
17       work of all liability under subparagraph (A).

18       “(D) The requirements of this paragraph for an ex-  
19       hibitor shall be limited to—

20             “(i) broadcasting, cablecasting, exhibiting, or  
21       distributing all labels required under this section in  
22       their entirety that are included with or distributed  
23       by the network or distributor of the motion picture;  
24       and

1           “(ii) including or affixing a label described in  
2 paragraphs (6) and (8) on a materially altered mo-  
3 tion picture for any material alterations performed  
4 by the exhibitor to which any artistic author has ob-  
5 jected under subparagraph (A)(iii).

6           “(E)(i) The provisions of this paragraph shall apply  
7 with respect to motion pictures intended for home use  
8 through either retail purchase or rental, except that no  
9 requirement imposed under this paragraph shall apply to  
10 a motion picture which has been packaged for distribution  
11 to retail providers before the effective date of this sub-  
12 section.

13           “(ii) The obligations under this paragraph of a retail  
14 provider of motion pictures intended for home use shall  
15 be limited to including or distributing all labels required  
16 under this paragraph in their entirety that are affixed or  
17 included by a distributor or network.

18           “(F) There shall be no consideration in excess of one  
19 dollar given in exchange for an artistic author’s waiver of  
20 any objection or waiver of the right to object under this  
21 subsection.

22           “(2)(A) Any artistic author of a motion picture that  
23 is exploited within the United States who believes he or  
24 she is or is likely to be damaged by a violation of this  
25 subsection may bring a civil action for appropriate relief,

1 as provided in this paragraph, on account of such viola-  
2 tion, without regard to the nationality or domicile of the  
3 artistic author.

4       “(B)(i) In any action under subparagraph (A), the  
5 court shall have power to grant injunctions, according to  
6 the principles of equity and upon such terms as the court  
7 deems reasonable, to prevent the violation of this sub-  
8 section. Any such injunction may include a provision di-  
9 recting the defendant to file with the court and serve on  
10 the plaintiff, within 30 days after the service on the de-  
11 fendant of such injunction, or such extended period as the  
12 court may direct, a report in writing under oath setting  
13 forth in detail the manner and form in which the defend-  
14 ant has complied with the injunction. Any such injunction  
15 granted upon hearing, after notice to the defendant, by  
16 any district court of the United States—

17               “(I) may be served on the parties against whom  
18 such injunction is granted anywhere in the United  
19 States where they may be found; and

20               “(II) shall be operative and may be enforced by  
21 proceedings to punish for contempt, or otherwise, by  
22 the court by which such injunction was granted, or  
23 by any other United States district court in whose  
24 jurisdiction the defendant may be found.

1       “(ii) When a violation of any right of an artistic au-  
2 thor is established in any civil action arising under this  
3 subsection, the plaintiff shall be entitled to the remedies  
4 provided under section 35(a).

5       “(iii) In any action under subparagraph (A), the  
6 court may order that all film packaging of a materially  
7 altered motion picture (including film packages of motion  
8 pictures intended for home use through either retail pur-  
9 chase or rental) that is the subject of the violation shall  
10 be delivered up and destroyed.

11       “(C) No action shall be maintained under this para-  
12 graph unless—

13               “(i) it is commenced within 1 year after the  
14 right of action accrues, and

15               “(ii) if brought by a designee described in para-  
16 graph (5)(A)(ii), it is commenced within the term of  
17 copyright of the motion picture involved.

18       “(3) Any disclosure requirements imposed under the  
19 common law or statutes of any State respecting the mate-  
20 rial alteration of motion pictures are preempted by this  
21 subsection.

22       “(4) To facilitate the location of a potentially ag-  
23 grieved party, each artistic author of a motion picture may  
24 notify the copyright owner of the motion picture or any  
25 appropriate professional guild. The professional guilds



1 may each maintain a Professional Guild Registry includ-  
2 ing the names and addresses of artistic authors so notify-  
3 ing them and may make available information contained  
4 in a Professional Guild Registry in order to facilitate the  
5 location of any artistic author for purposes of paragraph  
6 (1)(A). No cause of action shall accrue against any profes-  
7 sional guild for failure to create or maintain a Professional  
8 Guild Registry or for any failure to provide information  
9 pursuant to paragraph (1)(A)(i).

10 “(5) As used in this subsection—

11 “(A) the term ‘artistic author’ means—

12 “(i) the principal director and principal  
13 screenwriter of a motion picture and, to the ex-  
14 tent a motion picture is colorized or its photo-  
15 graphic images materially altered, the principal  
16 cinematographer of the motion picture; and

17 “(ii) a person designated by an individual  
18 described in clause (i), if the designation is  
19 made in writing and signed by such individual;

20 “(B) the term ‘colorize’ means to add color, by  
21 whatever means, to a motion picture originally made  
22 in black and white, and the term ‘colorization’  
23 means the act of colorizing;

24 “(C) the term ‘distributor’—

1           “(i) means any person, vendor, or syn-  
2           dicator who engages in the wholesale distribu-  
3           tion of motion pictures to any exhibitor, net-  
4           work, retail provider, or other person who pub-  
5           licly performs motion pictures by means of any  
6           technology, and

7           “(ii) does not include laboratories or other  
8           providers of technical services to the motion pic-  
9           ture, video, or television industry;

10          “(D) the term ‘editing’ means the purposeful or  
11          accidental removal of existing material or insertion  
12          of new material;

13          “(E) the term ‘exhibitor’ means any local  
14          broadcast station, cable system, airline, motion pic-  
15          ture theater, or other person that publicly performs  
16          a motion picture by means of any technology;

17          “(F) the term ‘exploit’ means to exhibit publicly  
18          or offer to the public through sale or lease, and the  
19          term ‘exploitation’ means the act of exploiting;

20          “(G) the term ‘film’ or ‘motion picture’  
21          means—

22                 “(i) a theatrical motion picture, after its  
23                 publication, of 60 minutes duration or greater,  
24                 intended for exhibition, public performance,  
25                 public sale or lease, and

1           “(ii) does not include episodic television  
2           programs of less than 60 minutes duration (ex-  
3           clusive of commercials), motion pictures pre-  
4           pared for private commercial or industrial pur-  
5           poses, or advertisements;

6           “(H) the term ‘lexiconning’ means altering the  
7           sound track of a motion picture to conform the  
8           speed of the vocal or musical portion of the motion  
9           picture to the visual images of the motion picture,  
10          in a case in which the motion picture has been the  
11          subject of time compression or expansion;

12          “(I) the terms ‘materially alter’ and ‘material  
13          alteration’—

14                 “(i) refer to any change made to a motion  
15                 picture;

16                 “(ii) include, but are not limited to, the  
17                 processes of colorization, lexiconning, time com-  
18                 pression or expansion, panning and scanning,  
19                 and editing; and

20                 “(iii) do not include insertions for commer-  
21                 cial breaks or public service announcements, ed-  
22                 iting to comply with the requirements of the  
23                 Federal Communications Commission (in this  
24                 subparagraph referred to as the ‘FCC’), trans-  
25                 fer of film to videotape or any other secondary

1 media preparation of a motion picture for for-  
2 eign distribution to the extent that subtitling  
3 and editing are limited to those alterations  
4 made under foreign standards which are no  
5 more stringent than existing FCC standards, or  
6 activities the purpose of which is the restoration  
7 of the motion picture to its original version;

8 “(J) the term ‘network’ means any person who  
9 distributes motion pictures to broadcasting stations  
10 or cable systems on a regional or national basis for  
11 public performance on an interconnected basis;

12 “(K) the term ‘panning and scanning’ means  
13 the process by which a motion picture, composed for  
14 viewing on theater screens, is adapted for viewing on  
15 television screens by modification of the ratio of  
16 width to height of the motion picture and the selec-  
17 tion, by a person other than the principal director of  
18 the motion picture, of some portion of the entire pic-  
19 ture for viewing;

20 “(L) the term ‘professional guild’ means—

21 “(i) in the case of directors, the Directors  
22 Guild of America (DGA);

23 “(ii) in the case of screenwriters, the Writ-  
24 ers Guild of America–West (WGA–W) and the  
25 Writers Guild of America–East (WGA–E); and

1           “(iii) in the case of cinematographers, the  
2           International Photographers Guild (IPG), and  
3           the American Society of Cinematographers  
4           (ASC);

5           “(M) the term ‘Professional Guild Registry’  
6           means a list of names and addresses of artistic au-  
7           thors that is readily available from the files of a pro-  
8           fessional guild;

9           “(N) the term ‘publication’ means, with respect  
10          to a motion picture, the first paid public exhibition  
11          of the work other than previews, trial runs, and fes-  
12          tivals;

13          “(O) the term ‘retail provider’ means the pro-  
14          prietor of a retail outlet that sells or leases motion  
15          pictures for home use;

16          “(P) the term ‘secondary media’ means any me-  
17          dium, including, but not limited to, video cassette or  
18          video disc, other than television broadcast or theat-  
19          rical release, for use on which motion pictures are  
20          sold, leased, or distributed to the public;

21          “(Q) the term ‘syndicator’ means any person  
22          who distributes a motion picture to a broadcast tele-  
23          vision station, cable television system, or any other  
24          means of distribution by which programming is de-  
25          livered to television viewers;

1           “(R) the terms ‘time compression’ and ‘time ex-  
2           pansion’ mean the alteration of the speed of a mo-  
3           tion picture or a portion thereof with the result of  
4           shortening or lengthening the running time of the  
5           motion picture; and

6           “(S) the term ‘vendor’ means the wholesaler or  
7           packager of a motion picture which is intended for  
8           wholesale distribution to retail providers.

9           “(6)(A) A label for a materially altered version of a  
10          motion picture intended for public performance or home  
11          use shall consist of a panel card immediately preceding  
12          the commencement of the motion picture, which bears one  
13          or more of the following statements, as appropriate, in leg-  
14          ible type and displayed on a conspicuous and readable  
15          basis:

16          “THIS FILM IS NOT THE VERSION ORIGI-  
17          NALLY RELEASED. \_\_\_\_\_ mins. and \_\_\_\_\_ secs.  
18          have been cut [or, if appropriate, added]. The director,  
19          \_\_\_\_\_, and  
20          screenwriter, \_\_\_\_\_, object because this  
21          alteration changes the narrative and/or characterization.  
22          It has (also) been panned and scanned. The director and  
23          cinematographer, \_\_\_\_\_, object be-  
24          cause this alteration removes visual information and  
25          changes the composition of the images. It has (also) been

1 colorized. Colors have been added by computer to the  
2 original black and white images. The director and cine-  
3 matographer object to this alteration because it eliminates  
4 the black and white photography and changes the photo-  
5 graphic images of the actors. It has (also) been electroni-  
6 cally speeded up (or slowed down). The director objects  
7 because this alteration changes the pace of the perform-  
8 ances.'

9       “(B) A label for a motion picture that has been mate-  
10 rially altered in a manner not described by any of the label  
11 elements set forth in subparagraph (A) shall contain a  
12 statement similar in form and substance to those set forth  
13 in subparagraph (A) which accurately describes the mate-  
14 rial alteration and the objection of the artistic author.

15       “(7) A label for a motion picture which has been ma-  
16 terially altered in more than one manner, or of which an  
17 individual served as more than one artistic author, need  
18 only state the name of the artistic author once, in the first  
19 objection of the artistic author so listed. In addition, a  
20 label for a motion picture which has been materially al-  
21 tered in more than one manner need only state once, at  
22 the beginning of the label: ‘THIS FILM IS NOT THE  
23 VERSION ORIGINALLY RELEASED.’.

24       “(8) A label for a film package of a materially altered  
25 motion picture shall consist of—

1           “(A) an area of a rectangle on the front of the  
2 package which bears, as appropriate, one or more of  
3 the statements listed in paragraph (6) in a conspicu-  
4 ous and legible type in contrast by typography, lay-  
5 out, or color with other printed matter on the pack-  
6 age; and

7           “(B) an area of a rectangle on the side of the  
8 package which bears, as appropriate, one or more of  
9 the statements listed in paragraph (6) in a conspicu-  
10 ous and legible type in contrast by typography, lay-  
11 out, or color with other printed matter on the pack-  
12 age.

13           “(9) The questionnaire required under paragraph  
14 (1)(A)(iii) shall consist of the following statement and re-  
15 lated questions:

16           “‘In order to conform [insert name of motion  
17 picture], of which you are an “artistic author”, to  
18 ancillary media such as television, airline exhibition,  
19 video cassettes, video discs, or any other media, do  
20 you object to:

21           “(a) Editing (purposeful or accidental deletion or  
22 addition of program material)?

23           Yes \_\_\_\_\_ No \_\_\_\_\_

24           “(b) Time compression/time expansion/lexiconing?

25           Yes \_\_\_\_\_ No \_\_\_\_\_



1       “(c) Panning and scanning?

2               Yes\_\_\_\_\_               No\_\_\_\_\_

3       “(d) Colorization, if the motion picture was origi-

4 nally made in black and white?

5               Yes\_\_\_\_\_               No\_\_\_\_\_.”

6 **SEC. 4. EFFECTIVE DATE.**

7       This Act and the amendments made by this Act shall  
8 take effect 180 days after the date of the enactment of  
9 this Act.

○

104TH CONGRESS  
1ST SESSION

# H. R. 1734

To reauthorize the National Film Preservation Board, and for other purposes.

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## IN THE HOUSE OF REPRESENTATIVES

MAY 25, 1995

Mr. MOORHEAD (for himself, Mr. COBLE, and Mr. BONO) introduced the following bill; which was referred to the Committee on the Judiciary, and in addition to the Committee on House Oversight, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

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## A BILL

To reauthorize the National Film Preservation Board, and  
for other purposes.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

3 **TITLE I--REAUTHORIZATION OF**  
4 **THE NATIONAL FILM PRESER-**  
5 **VATION BOARD**

6 **SEC. 101. SHORT TITLE.**

7 This title may be cited as the "National Film Preser-  
8 vation Act of 1995".

1 **SEC. 102. NATIONAL FILM REGISTRY OF THE LIBRARY OF**  
2 **CONGRESS.**

3 The Librarian of Congress (hereafter in this Act re-  
4 ferred to as the "Librarian") shall continue the National  
5 Film Registry established and maintained under the Na-  
6 tional Film Preservation Act of 1988 (Public Law 100-  
7 446), and the National Film Preservation Act of 1992  
8 (Public Law 102-307) pursuant to the provisions of this  
9 title, for the purpose of maintaining and preserving films  
10 that are culturally, historically, or aesthetically significant.

11 **SEC. 103. DUTIES OF THE LIBRARIAN OF CONGRESS.**

12 (a) **POWERS.—**

13 (1) **IN GENERAL.—**The Librarian shall, after  
14 consultation with the Board established pursuant to  
15 section 104—

16 (A) continue the implementation of the  
17 comprehensive national film preservation pro-  
18 gram for motion pictures established under the  
19 National Film Preservation Act of 1992, in con-  
20 junction with other film archivists, educators  
21 and historians, copyright owners, film industry  
22 representatives, and others involved in activities  
23 related to film preservation, taking into account  
24 the objectives of the national film preservation  
25 study and the comprehensive national plan con-

1 ducted under the National Film Preservation  
2 Act of 1992. This program shall—

3 (i) coordinate activities to assure that  
4 efforts of archivists and copyright owners,  
5 and others in the public and private sector,  
6 are effective and complementary;

7 (ii) generate public awareness of and  
8 support for these activities;

9 (iii) increase accessibility of films for  
10 educational purposes; and

11 (iv) undertake studies and investiga-  
12 tions of film preservation activities as  
13 needed, including the efficacy of new tech-  
14 nologies, and recommend solutions to im-  
15 prove these practices;

16 (B) establish criteria and procedures under  
17 which films may be included in the National  
18 Film Registry, except that no film shall be eligi-  
19 ble for inclusion in the National Film Registry  
20 until 10 years after such film's first publication;

21 (C) establish procedures under which the  
22 general public may make recommendations to  
23 the Board regarding the inclusion of films in  
24 the National Film Registry; and

1 (D) determine which films satisfy the cri-  
2 teria established under subparagraph (B) and  
3 qualify for inclusion in the National Film Reg-  
4 istry, except that the Librarian shall not select  
5 more than 25 films each year for inclusion in  
6 the Registry.

7 (2) PUBLICATION OF FILMS IN REGISTRY.—The  
8 Librarian shall publish in the Federal Register the  
9 name of each film that is selected for inclusion in  
10 the National Film Registry.

11 (3) SEAL.—The Librarian shall provide a seal  
12 to indicate that a film has been included in the Na-  
13 tional Film Registry and is the Registry version of  
14 that film. The Librarian shall establish guidelines  
15 for approval of the use of the seal in accordance  
16 with subsection (b).

17 (b) USE OF SEAL.—The seal provided under sub-  
18 section (a)(3) may only be used on film copies of the Reg-  
19 istry version of a film. Such seal may be used only after  
20 the Librarian has given approval to those persons seeking  
21 to apply the seal in accordance with the guidelines under  
22 subsection (a)(3). In the case of copyrighted works, only  
23 the copyright owner or an authorized licensee of the copy-  
24 right owner may place or authorize the placement of the  
25 seal on any film copy of a Registry version of a film se-

1 lected for inclusion in the National Film Registry, and the  
2 Librarian may place the seal on any film copy of the Reg-  
3 istry version of any film that is maintained in the National  
4 Film Registry Collection in the Library of Congress. Any-  
5 one authorized to place the seal on any film copy of any  
6 Registry version of a film may accompany such seal with  
7 the following language: "This film was selected for inclu-  
8 sion in the National Film Registry by the National Film  
9 Preservation Board of the Library of Congress because of  
10 its cultural, historical, or aesthetic significance."

11 **SEC. 104. NATIONAL FILM PRESERVATION BOARD.**

12 (a) NUMBER AND APPOINTMENT.—

13 (1) MEMBERS.—The Librarian shall establish  
14 in the Library of Congress a National Film Preser-  
15 vation Board to be comprised of 20 members, who  
16 shall be selected by the Librarian in accordance with  
17 this section. Subject to subparagraphs (C) and (N),  
18 the Librarian shall request each organization listed  
19 in subparagraphs (A) through (Q) to submit a list  
20 of 3 candidates qualified to serve as a member of the  
21 Board. Except for the members-at-large appointed  
22 under subparagraph (2), the Librarian shall appoint  
23 one member from each such list submitted by such  
24 organizations, and shall designate from that list an  
25 alternate who may attend at Board expense those

1 meetings to which the individual appointed to the  
2 Board cannot attend. The organizations are the fol-  
3 lowing:

4 (A) The Academy of Motion Picture Arts  
5 and Sciences.

6 (B) The Directors Guild of America.

7 (C) The Writers Guild of America. The  
8 Writers Guild of America East and the Writers  
9 Guild of America West shall each nominate  
10 three candidates, and a representative from one  
11 organization shall be selected as the member  
12 and a representative from the other organiza-  
13 tion as the alternate.

14 (D) The National Society of Film Critics.

15 (E) The Society for Cinema Studies.

16 (F) The American Film Institute.

17 (G) The Department of Theatre, Film and  
18 Television of the College of Fine Arts at the  
19 University of California, Los Angeles.

20 (H) The Department of Film and Tele-  
21 vision of the Tisch School of the Arts at New  
22 York University.

23 (I) The University Film and Video Asso-  
24 ciation.

1 (J) The Motion Picture Association of  
2 America.

3 (K) The Alliance of Motion Picture and  
4 Television Producers.

5 (L) The Screen Actors Guild of America.

6 (M) The National Association of Theater  
7 Owners.

8 (N) The American Society of Cinematog-  
9 raphers and the International Photographers  
10 Guild, which shall jointly submit one list of 3  
11 candidates from which a member and alternate  
12 will be selected.

13 (O) The United States Members of the  
14 International Federation of Film Archives.

15 (P) The Association of Moving Image Ar-  
16 chivists.

17 (Q) The Society of Composers and  
18 Lyricists.

19 (2) MEMBERS-AT-LARGE.—In addition to the  
20 Members appointed under paragraph (1), the Li-  
21 brarian shall appoint up to 3 members-at-large. The  
22 Librarian shall also select an alternate for each  
23 member at-large, who may attend at Board expense  
24 those meetings which the member at-large cannot  
25 attend.



1 (b) CHAIR.—The Librarian shall appoint one member  
2 of the Board to serve as Chair.

3 (c) TERM OF OFFICE.—

4 (1) TERMS.—The term of each member of the  
5 Board shall be 5 years, except that there shall be no  
6 limit to the number of terms that any individual  
7 member may serve.

8 (2) REMOVAL OF MEMBER OR ORGANIZA-  
9 TION.—The Librarian shall have the authority to re-  
10 move any member of the Board, or the organization  
11 listed in subsection (a) such member represents, if  
12 the member, or organization, over any consecutive 2-  
13 year period, fails to attend at least one regularly  
14 scheduled Board meeting.

15 (3) VACANCIES.—A vacancy in the Board shall  
16 be filled in the manner in which the original appoint-  
17 ment was made under subsection (a), except that the  
18 Librarian may fill the vacancy from a list of can-  
19 didates previously submitted by the organization or  
20 organizations involved. Any member appointed to fill  
21 a vacancy before the expiration of the term for  
22 which his or her predecessor was appointed shall be  
23 appointed for the remainder of such term.

24 (d) QUORUM.—11 members of the Board shall con-  
25 stitute a quorum but a lesser number may hold hearings.

1 (e) BASIC PAY.—Members of the Board shall serve  
2 without pay. While away from their home or regular places  
3 of business in the performance of functions of the Board,  
4 members of the Board shall be allowed travel expenses,  
5 including per diem in lieu of subsistence, in the same man-  
6 ner as persons employed intermittently in Government  
7 service are allowed expenses under section 5701 of title  
8 5, United States Code.

9 (f) MEETINGS.—The Board shall meet at least once  
10 each fiscal year. Meetings shall be at the call of the Li-  
11 brarian.

12 (g) CONFLICT OF INTEREST.—The Librarian shall  
13 establish rules and procedures to address any potential  
14 conflict of interest between a member of the Board and  
15 responsibilities of the Board.

16 **SEC. 105. RESPONSIBILITIES AND POWERS OF BOARD.**

17 (a) IN GENERAL.—The Board shall review nomina-  
18 tions of films submitted to it for inclusion in the National  
19 Film Registry and consult with the Librarian, as provided  
20 in section 103, with respect to the inclusion of such films  
21 in the Registry and the preservation of these and other  
22 films that are culturally, historically, or aesthetically sig-  
23 nificant.

24 (b) NOMINATION OF FILMS.—The Board shall con-  
25 sider, for inclusion in the National Film Registry, nomina-

1 tions submitted by the general public as well as represent-  
2 atives of the film industry, such as the guilds and societies  
3 representing actors, directors, screenwriters, cinematog-  
4 raphers, and other creative artists, producers, and film  
5 critics, archives and other film preservation organizations,  
6 and representatives of academic institutions with film  
7 study programs. The Board shall nominate not more than  
8 25 films each year for inclusion in the Registry.

9 (c) POWERS.—

10 (1) IN GENERAL.—The Board may, for the pur-  
11 pose of carrying out its duties, hold such hearings,  
12 sit and act at such times and places, take such testi-  
13 mony, and receive such evidence, as the Librarian  
14 and the Board consider appropriate.

15 (2) SERVICE ON FOUNDATION.—Two sitting  
16 members of the Board shall be appointed by the Li-  
17 brarian, and shall serve, as Board members of the  
18 National Film Preservation Foundation, in accord-  
19 ance with section 203.

20 **SEC. 106. NATIONAL FILM REGISTRY COLLECTION OF THE**  
21 **LIBRARY OF CONGRESS.**

22 (a) ACQUISITION OF ARCHIVAL QUALITY COPIES.—  
23 The Librarian shall endeavor to obtain, by gift from the  
24 owner, an archival quality copy of the Registry version of  
25 each film included in the National Film Registry. When-

1 ever possible, the Librarian shall endeavor to obtain the  
2 best surviving materials, including preprint materials.  
3 Copyright owners and others possessing copies of such  
4 materials are strongly encouraged, to further the preserva-  
5 tion purposes of this Act, to provide preprint and other  
6 archival elements to the Library of Congress.

7 (b) ADDITIONAL MATERIALS.—The Librarian shall  
8 endeavor to obtain, for educational and research purposes,  
9 additional materials related to each film included in the  
10 National Film Registry, such as background materials,  
11 production reports, shooting scripts (including continuity  
12 scripts) and other similar materials.

13 (c) PROPERTY OF UNITED STATES.—All copies of  
14 films on the National Film Registry that are received as  
15 gifts or bequests by the Librarian and other materials re-  
16 ceived by the Librarian under subsection (b), shall become  
17 the property of the United States Government, subject to  
18 the provisions of title 17, United States Code.

19 (d) NATIONAL FILM REGISTRY COLLECTION.—All  
20 copies of films on the National Film Registry that are re-  
21 ceived by the Librarian under subsection (a), and other  
22 materials received by the Librarian under subsection (b),  
23 shall be maintained in the Library of Congress and be  
24 known as the “National Film Registry Collection of the  
25 Library of Congress”. The Librarian shall, by regulation,

1 and in accordance with title 17, United States Code, pro-  
2 vide for reasonable access to the films and other materials  
3 in such collection for scholarly and research purposes.

4 **SEC. 107. SEAL OF THE NATIONAL FILM REGISTRY.**

5 (a) USE OF THE SEAL.—

6 (1) PROHIBITION ON DISTRIBUTION AND EXHI-  
7 BITION.—No person shall knowingly distribute or ex-  
8 hibit to the public a version of a film or any copy  
9 of a film which bears the seal described in section  
10 103(a)(3) if such film—

11 (A) is not included in the National Film  
12 Registry; or

13 (B) is included in the National Film Reg-  
14 istry, but such film or film copy has not been  
15 approved for use of the seal by the Librarian  
16 pursuant to section 103(a)(1)(D).

17 (2) PROHIBITION ON PROMOTION.—No person  
18 shall knowingly use the seal described in section  
19 103(a)(3) to promote any version of a film or film  
20 copy other than a Registry version.

21 (b) EFFECTIVE DATE OF THE SEAL.—The use of the  
22 seal described in section 103(a)(3) shall be effective for  
23 each film after the Librarian publishes in the Federal Reg-  
24 ister, in accordance with section 103(a)(2), the name of

1 that film as selected for inclusion in the National Film  
2 Registry.

3 **SEC. 108. REMEDIES.**

4 (a) JURISDICTION.—The several district courts of the  
5 United States shall have jurisdiction, for cause shown, to  
6 prevent and restrain violations of section 107(a).

7 (b) RELIEF.—

8 (1) REMOVAL OF SEAL.—Except as provided in  
9 paragraph (2), relief for violation of section 107(a)  
10 shall be limited to the removal of the seal of the Na-  
11 tional Film Registry from the film involved in the  
12 violation.

13 (2) FINE AND INJUNCTIVE RELIEF.—In the  
14 case of a pattern or practice of the willful violation  
15 of section 107(a), the United States district courts  
16 may order a civil fine of not more than \$10,000 and  
17 appropriate injunctive relief.

18 **SEC. 109. LIMITATIONS OF REMEDIES.**

19 The remedies provided in section 108 shall be the ex-  
20 clusive remedies under this title, or any other Federal or  
21 State law, regarding the use of the seal described in sec-  
22 tion 103(a)(3).

1 **SEC. 110. STAFF OF BOARD; EXPERTS AND CONSULTANTS.**

2 (a) **STAFF.**—The Librarian may appoint and fix the  
3 pay of such personnel as the Librarian considers appro-  
4 priate to carry out this title.

5 (b) **EXPERTS AND CONSULTANTS.**—The Librarian  
6 may, in carrying out this title, procure temporary and  
7 intermittent services under section 3109(b) of title 5,  
8 United States Code, but at rates for individuals not to  
9 exceed the daily equivalent of the maximum rate of basic  
10 pay payable for GS-15 of the General Schedule. In no case  
11 may a member of the Board or an alternate be paid as  
12 an expert or consultant under this section.

13 **SEC. 111. DEFINITIONS.**

14 As used in this title—

15 (1) the term “Librarian” means the Librarian  
16 of Congress;

17 (2) the term “Board” means the National Film  
18 Preservation Board;

19 (3) the term “film” means a “motion picture”  
20 as defined in section 101 of title 17, United States  
21 Code, except that such term does not include any  
22 work not originally fixed on film stock, such as a  
23 work fixed on videotape or laser disk;

24 (4) the term “publication” means “publication”  
25 as defined in section 101 of title 17 United States  
26 Code; and

1           (5) the term "Registry version" means, with re-  
2       spect to a film, the version of a film first published,  
3       or as complete a version as bona fide preservation  
4       and restoration activities by the Librarian, an archi-  
5       vist other than the Librarian, or the copyright owner  
6       can compile in those cases where the original mate-  
7       rial has been irretrievably lost.

8 **SEC. 112. AUTHORIZATION OF APPROPRIATIONS.**

9       There are authorized to be appropriated to the Li-  
10      brarian such sums as may be necessary to carry out the  
11      purposes of this title, but in no fiscal year shall such sum  
12      exceed \$250,000.

13 **SEC. 113. EFFECTIVE DATE.**

14      The provisions of this title shall be effective for 10  
15      years beginning on the date of the enactment of this Act.  
16      The provisions of this title shall apply to any copy of any  
17      film, including those copies of films selected for inclusion  
18      in the National Film Registry under the National Film  
19      Preservation Act of 1988 and the National Film Preserva-  
20      tion Act of 1992, except that any film so selected under  
21      either Act shall be deemed to have been selected for the  
22      National Film Registry under this title.

23 **SEC. 114. REPEAL.**

24      The National Film Preservation Act of 1992 (2  
25      U.S.C. 179 and following) is repealed.



1 **TITLE II—THE NATIONAL FILM**  
2 **PRESERVATION FOUNDATION**  
3 **ACT**

4 **SEC. 201. SHORT TITLE.**

5 This title may be cited as the “National Film Preser-  
6 vation Foundation Act”.

7 **SEC. 202. ESTABLISHMENT AND PURPOSE OF FOUNDATION.**

8 (a) **ESTABLISHMENT.**—There is established the Na-  
9 tional Film Preservation Foundation (hereafter in this  
10 title referred to as the “Foundation”). The Foundation  
11 is a charitable and nonprofit corporation and is not an  
12 agency or establishment of the United States.

13 (b) **PURPOSES.**—The purposes of the Foundation  
14 are—

15 (1) to encourage, accept, and administer private  
16 gifts to promote and ensure the preservation and  
17 public accessibility of the nation’s film heritage held  
18 at the Library of Congress and other public and  
19 non-profit archives throughout the United States;

20 (2) to further the goals of the Library of Con-  
21 gress and the National Film Preservation Board in  
22 connection with their activities under the National  
23 Film Preservation Act; and

24 (3) to undertake and conduct other activities,  
25 alone or in cooperation with other film related insti-

1        tutions and organizations, as will further the preser-  
2        vation and public accessibility of films made in the  
3        United States, particularly those not protected by  
4        private interests, for the benefit of present and fu-  
5        ture generations of Americans.

6        **SEC. 203. BOARD OF DIRECTORS OF THE FOUNDATION.**

7        (a)    ESTABLISHMENT AND MEMBERSHIP.—The  
8        Foundation shall have a governing Board of Directors  
9        (hereafter in this title referred to as the “Board”), which  
10       shall consist of 9 Directors, each of whom shall be a Unit-  
11       ed States citizen and at least 6 of whom must be knowl-  
12       edgeable or experienced in film production, distribution,  
13       preservation or restoration, including 2 who shall be sit-  
14       ting members of the National Film Preservation Board.  
15       These 6 members of the Board shall, to the extent prae-  
16       ticable, represent diverse points of views from the film  
17       community, including motion picture producers, creative  
18       artists, nonprofit and public archivists, historians, film  
19       critics, theater owners, and laboratory and university per-  
20       sonnel. The Librarian of Congress (hereafter in this title  
21       referred to as the “Librarian”) shall be an ex officio non-  
22       voting member of the Board. Appointment to the Board  
23       shall not constitute employment by, or the holding of an  
24       office of, the United States for the purpose of any Federal  
25       law.

1 (b) APPOINTMENT AND TERMS.—Within 90 days  
2 after the date of the enactment of this Act, the Librarian  
3 shall appoint the Directors of the Board. Each Director  
4 shall be appointed for a term of 5 years. A vacancy on  
5 the Board shall be filled, within 60 days after the vacancy  
6 occurs, in the manner in which the original appointment  
7 was made. No individual may serve more than 2 consecu-  
8 tive terms as a Director.

9 (c) CHAIR.—The initial Chair shall be appointed by  
10 the Librarian from the membership of the Board for a  
11 2-year term, and thereafter shall be appointed and re-  
12 moved in accordance with the Foundation's bylaws.

13 (d) QUORUM.—A majority of the current membership  
14 of the Board shall constitute a quorum for the transaction  
15 of business.

16 (e) MEETINGS.—The Board shall meet at the call of  
17 the Librarian or the Chair at least once a year. If a Direc-  
18 tor misses 3 consecutive regularly scheduled meetings,  
19 that individual may be removed from the Board by the  
20 Librarian, and that vacancy shall be filled in accordance  
21 with subsection (b).

22 (f) REIMBURSEMENT OF EXPENSES.—Members of  
23 the Board shall serve without pay, but may be reimbursed  
24 for the actual and necessary traveling and subsistence ex-

1 penses incurred by them in the performance of the duties  
2 of the Foundation.

3 (g) GENERAL POWERS.—

4 (1) ORGANIZATION OF FOUNDATION.—The  
5 Board may complete the organization of the Foun-  
6 dation by—

7 (A) appointing, removing, and replacing of-  
8 ficers, except as provided for in paragraph  
9 (2)(B);

10 (B) adopting a constitution and bylaws  
11 consistent with the purpose of the Foundation  
12 and the provisions of this title; and

13 (C) undertaking such other acts as may be  
14 necessary to carry out the provisions of this  
15 title.

16 (2) LIMITATION ON APPOINTMENT OF EMPLOY-  
17 EES.—The following limitations apply with respect  
18 to the appointment of employees of the Foundation:

19 (A) Employees may not be appointed until  
20 the Foundation has sufficient funds to pay  
21 them for their services. Except as provided in  
22 subparagraph (B), employees of the Foundation  
23 shall be appointed, removed, and replaced by  
24 the Secretary of the Board. All employees (in-  
25 cluding the Secretary of the Board) shall be ap-

1 pointed and removed without regard to the pro-  
2 visions of title 5, United States Code, governing  
3 appointments in the competitive service, and  
4 may be paid without regard to the provisions of  
5 chapter 51 and subchapter III of chapter 53 of  
6 such title relating to classification and General  
7 Schedule pay rates, except that no individual so  
8 appointed may receive pay in excess of the an-  
9 nual rate of basic pay in effect for grade GS-  
10 15 of the General Schedule. Neither the Board,  
11 nor any of the employees of the Foundation, in-  
12 cluding the Secretary of the Board, shall be  
13 construed to be employees of the Library of  
14 Congress.

15 (B) The first employee appointed shall be  
16 the Secretary of the Board. The Secretary shall  
17 be appointed, and may be removed by, the Li-  
18 brarian.

19 (C) The Secretary of the Board shall—

- 20 (i) serve as its executive director, and  
21 (ii) be knowledgeable and experienced  
22 in matters relating to film preservation  
23 and restoration activities, financial man-  
24 agement, and fund-raising.

1 **SEC. 204. RIGHTS AND OBLIGATIONS OF THE FOUNDATION**

2 (a) **GENERAL.**—The Foundation—

3 (1) shall have perpetual succession;

4 (2) may conduct business in the several States,  
5 the District of Columbia, and any commonwealth,  
6 territory, or possession of the United States;

7 (3) shall have its principal offices in the Dis-  
8 trict of Columbia; and

9 (4) shall at all times maintain a designated  
10 agent authorized to accept service of process for the  
11 Foundation.

12 The serving of notice to, or service of process upon, the  
13 agent required under paragraph (4), or mailed to the busi-  
14 ness address of such agent, shall be deemed as service  
15 upon or notice to the Foundation.

16 (b) **SEAL.**—The Foundation shall have an official seal  
17 selected by the Board which shall be judicially noticed.

18 (c) **POWERS.**—To carry out its purposes under sec-  
19 tion 202, the Foundation shall have, in addition to the  
20 powers otherwise given it under this title, the usual powers  
21 of a corporation acting as a trustee in the District of Co-  
22 lumbia, including the power—

23 (1) to accept, receive, solicit, hold, administer,  
24 and use any gift, devise, or bequest, either absolutely  
25 or in trust, of real or personal property or any in-  
26 come therefrom or other interest therein;

1           (2) to acquire by purchase or exchange any real  
2           or personal property or interest therein;

3           (3) unless otherwise required by the instrument  
4           of transfer, to sell, donate, lease, invest, reinvest, re-  
5           tain, or otherwise dispose of any property or income  
6           therefrom;

7           (4) to borrow money and issue bonds, deben-  
8           tures, or other debt instruments;

9           (5) to sue and be sued, and complain and de-  
10          fend itself in any court of competent jurisdiction, ex-  
11          cept that the Directors of the Board shall not be  
12          personally liable, except for gross negligence;

13          (6) to enter into contracts or other arrange-  
14          ments with public agencies and private organizations  
15          and persons and to make such payments as may be  
16          necessary to carry out its functions; and

17          (7) to do any and all acts necessary and proper  
18          to carry out the purposes of the Foundation.

19 A gift, devise, or bequest may be accepted by the Founda-  
20 tion even though it is encumbered, restricted, or subject  
21 to beneficial interests of private persons, if any current  
22 or future interest therein is for the benefit of the Founda-  
23 tion.

1 **SEC. 205. ADMINISTRATIVE SERVICES AND SUPPORT.**

2 The Librarian may provide personnel, facilities, and  
3 other administrative services to the Foundation, including  
4 reimbursement of expenses under section 203, not to ex-  
5 ceed the current per diem rates for the Federal Govern-  
6 ment, and may accept reimbursement therefor. Amounts  
7 so reimbursed shall be deposited in the Treasury to the  
8 credit of the appropriations then current and chargeable  
9 for the cost of providing such services.

10 **SEC. 206. VOLUNTEER STATUS.**

11 The Librarian may accept, without regard to the civil  
12 service classification laws, rules, or regulations, the serv-  
13 ices of the Foundation, the Board, and other officers and  
14 employees of the Board, without compensation from the  
15 Library of Congress, as volunteers in the performance of  
16 the functions authorized in this title.

17 **SEC. 207. AUDITS, REPORT REQUIREMENTS, AND PETITION**  
18 **OF ATTORNEY GENERAL, FOR EQUITABLE**  
19 **RELIEF.**

20 (a) **AUDITS.**—The Foundation shall be treated as a  
21 private corporation established under Federal law for pur-  
22 poses of the Act entitled “An Act to provide for audit of  
23 accounts of private corporations established under Federal  
24 law.”, approved August 30, 1964 (36 U.S.C. 1101–1103).

25 (b) **REPORT.**—The Foundation shall, as soon as prac-  
26 ticable after the end of each fiscal year, transmit to the



1 Congress a report of its proceedings and activities during  
2 such year, including a full and complete statement of its  
3 receipts, expenditures, and investments.

4 (c) RELIEF WITH RESPECT TO CERTAIN FOUNDA-  
5 TION ACTS OR FAILURE TO ACT.—If the Foundation—

6 (1) engages in, or threatens to engage in, any  
7 act, practice, or policy that is inconsistent with its  
8 purposes set forth in section 202(b), or

9 (2) refuses, fails, or neglects to discharge its  
10 obligations under this title, or threatens to do so,

11 the Attorney General of the United States may file a peti-  
12 tion in the United States District Court for the District  
13 of Columbia for such equitable relief as may be necessary  
14 or appropriate.

15 **SEC. 208. UNITED STATES RELEASE FROM LIABILITY.**

16 The United States shall not be liable for any debts,  
17 defaults, acts, or omissions of the Foundation, nor shall  
18 the full faith and credit of the United States extend to  
19 any obligation of the Foundation.

20 **SEC. 209. AUTHORIZATION OF APPROPRIATIONS.**

21 (a) AUTHORIZATION.—There are authorized to be ap-  
22 propriated to the Library of Congress not to exceed  
23 \$2,000,000 for each of the fiscal years 1996 through  
24 2005, to be made available to the Foundation to match  
25 private contributions (whether in currency, services, or

1 property) made to the Foundation by private persons and  
2 State and local governments.

3 (b) ADMINISTRATIVE EXPENSES.—No Federal funds  
4 authorized under this section may be used by the Founda-  
5 tion for administrative expenses of the Foundation, includ-  
6 ing for salaries, travel, and transportation expenses, and  
7 other overhead expenses.

○

Mr. MOORHEAD. This morning, the ranking minority member of the full committee, Mr. Conyers, is on his way. I left him just a few minutes ago. And he will have, I am sure, an opening statement. But in the meanwhile, our good friend, Howard Berman, who represents a district very much involved in the film industry, just to the west of my district, is here this morning and I am sure he has an opening statement.

Mr. BERMAN. Well, it is true I represent a district which has a lot of people that work in the film industry and in the entertainment industry generally. And the only thing I don't have is an opening statement. But I do appreciate the hearing on these important issues.

We have been talking about a lot of them for a long time. And it is also very nice to have a hearing so close to home. And so I thank you, Mr. Chairman, for scheduling the hearing. And I will be active in the question periods, but I don't have anything particularly to add right now.

Mr. MOORHEAD. Another member that is here, and actually the first member that arrived here, was Xavier Becerra, who represents the district just to the south of us here. He only lives 3 miles from this courthouse.

Mr. BECERRA. Mr. Chairman, I am pleased that you scheduled the hearing 3 miles from my house. It is a lot better than scheduling them 2,500 miles from my house. And I will just associate myself with all the remarks made by my colleague, Mr. Berman, and leave my opening statement as that.

Mr. MOORHEAD. This morning, we have a very distinguished panel before us. Our first witness will be Mr. Jack Valenti, who is the president of the Motion Picture Association of America. I have had the pleasure of working with him on many occasions.

Mr. Valenti is a graduate of the University of Houston and Harvard Business School. He cofounded the advertising and political consulting agency of Weekly & Valenti. He served as Special Assistant to the President in Lyndon Johnson's White House and became the third president and CEO of the MPAA in 1966.

Since that time, Mr. Valenti has presided over many changes in the film industry and has authored numerous books and essays. We welcome Mr. Valenti.

I am going to introduce the other three, and then I will have you come on first.

Our second witness will be Ms. Marilyn Bergman, who is the president and chairman of the American Society of Composers Authors and Publishers, or ASCAP.

Ms. Bergman is a three-time Academy Award winner, a two-time Grammy Award winner, and a two-time Emmy Award winner; all of those awards.

She was introduced into the Song Writers Hall of Fame in 1979. She and her husband, Alan Bergman, are one of the most respected song writing teams in music today. Ms. Bergman is a graduate of New York's high school of music and art and of New York University.

In 1985, she became the first woman to be elected to the board of directors of ASCAP. Ms. Bergman is a member of the executive committee of the music branch of the Academy of Motion Pictures

Arts and Sciences and the board of directors of the National Academy of Song Writers and she has recently been appointed to the U.S. Department of Commerce's Private Sector Advisory Council of the National Information Infrastructure. Welcome, Ms. Bergman.

Our third witness is Mr. Edward Richmond. He is currently the curator of the UCLA Film and Television Archives. He is a graduate of the University of Cincinnati and holds a master's in film and television studies from Ohio State University.

Mr. Richmond worked his way up from laboratory assistant at the archives to administrative assistant, assistant director, acting director and finally curator. He is the president of the Association of Movie Image Archivists and a member of the Archivist Advisory Council for the Film Foundation. He also lectures and has written several papers on film preservation. Welcome, Mr. Richmond.

Our fourth witness is Mr. Edward Murphy. Mr. Murphy is the president and CEO of National Music Publishers' Association [NMPA].

Prior to assuming his duties at NMPA, Mr. Murphy served as President of the G. Shirmer, Inc., a large American music publishing house. He serves on the advisory board of the International Intellectual Property Alliance and is a member of the International Copyright Panel of the U.S. Advisory Committee on International Intellectual Property.

He founded the International Copyright Coalition and is secretary of the National Music Council. Welcome, Mr. Murphy.

We have written statements from our four witnesses, which I ask unanimous consent to be made a part of the record. And I ask that you all summarize your statements in 10 minutes or less.

I ask that the subcommittee hold their questions of all four witnesses until they have completed their oral presentations.

We will begin with the testimony of Mr. Valenti.

#### **STATEMENT OF JACK VALENTI, PRESIDENT AND CEO, MOTION PICTURE ASSOCIATION OF AMERICA**

Mr. VALENTI. Thank you, Mr. Chairman. 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," is 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.

Anything that can be done must be done, then, to amplify the ability of American movies and television programs to keep alive their marketing dexterity in other countries around the world.

Europe is already girding its economic loins. They have lengthened their copyright term to 70 years plus life of the author. The Europeans understand all too clearly what the marketplace is all about. And I think in that kind of audiovisual landscape, the United States has to match Europe.

It can do so by extending the U.S. copyright term, which will put our term span on the same level as the Europeans. Europeans have life of the author plus 70 years. That means that we would have under works for hire, 95 years as the term extension.

I want to give you four major reasons which command our attention and which certify, I think, the need for copyright term extension.

One, the Berne Convention has a minimum protection time span. And that is life of the author plus 50 years. But, under Berne, any nation can add additional terms if they choose. But—and this is the pivotal point that we have to understand—other Berne countries are obligated only to protect the minimum length that Berne certifies, the life of the author plus 50. They are not required nor would they guard any other country's works beyond what that country puts down as its yardstick for term extension, which means that when we go to Europe with 50 years—70 years, that is life of the author plus 50, or 70 years for works for hire, we would be at a grave disadvantage, that our movies would be in the public domain, whereas the European movies would be fully protected. That is one reason.

Two, the minute that American works go into public domain, in Europe, our revenues that are brought back to this country as part of our surplus balance of trade, which we provision in this country, those revenues would be cut off and they would pass into other hands, not U.S. producers.

Three, American creative works are the most popular, the most patronized, the most sought after, not only in Europe, but all over the world, which is why, and here I have said this over and over again, and maybe about the 28th time somebody will recall what I have said—and that is that the American movie, television program and home video return to this country annually more than \$4 billion a year in surplus balance of trade.

If you take all of the products in this country, made or grown, manufactured, or those that leap from the brain pan of people like Marilyn Bergman and others, everything can be matched, cloned, or duplicated by any other country in the world. Argentine wheat and Korean steel and German automobiles and Japanese electronics.

But the one product which at this hour has never been duplicated or matched by any other country in the world is the American movie. It is a trade prize beyond all imagination.

The case for copyright term extension, Mr. Chairman, I believe is that simple. And I am so pleased that 10 of the members of your subcommittee have already cosponsored and I hope that Ms. Wheeler will pass along to Congressman Conyers all of these melodious and triumphant phrases which I am uttering this morning because he has not yet signed on as a cosponsor, and I need to persuade him.

What are the contrary views? If someone comes to me and tries to persuade me, I want to know what the upside and the downsides are. Some academics plead that the consumer is going to be benefited if there are more public domain works because public domain works would be cheaper, more readily available, and therefore be consumer benefits.

What academics do not know or do not observe is that while an American public domain work may be sold more cheaply to someone, in many exhibitors in many international markets, consumers are not granted cheaper prices, either here or abroad. Not at all.

Why? The theater ticket price remains the same, no matter what picture is showing. I do not know of any home video store that gives you a discount nor do I know of any television station that lowers its advertising rates because it happened to buy a program more cheaply than did its competitors. That is a fact of life.

The academics also assert that when copyrighted works lose their protection, they become more widely available to the public. Again, what the academics do not know are the marketplace realisms which exist. Whatever work is not protected is a work that nobody preserves. The quality of the print is soon degraded. And there is no one around who is going to invest the money for enhancement. Why? Because there is no longer a financial incentive to rehabilitate and preserve because it belongs to everybody and therefore it belongs to nobody.

A public domain work is an orphan. No question about that. No one is responsible for its future life. But everyone exploits its use until that time certain when it becomes soiled and haggard and barren of all of its former virtues. Who then—who then will invest the funds required to renovate it and to nourish its future when nobody owns it?

How does the consumer benefit from that scenario? The answer is the consumer has no benefit. What the academics offer in numbing detail are the arcane drudgeries of graphs and charts and arithmetical lines that cross a page. But the fact is that all of these scholarly works are separated from the real world in which realism exists.

And that brings me now to the fourth reason why it is necessary to extend copyright terms. That Congress can, without reaching into the pockets of any consumer, magnify the revenue curve of copyright owners, which can be delivered back to this country and thereby help, maybe modestly, but nonetheless help in the reduction of our trade deficit, as well as encouraging the preservation and nourishment of what I think is one of America's great, glittering trade prizes, the American movie.

In the global intellectual property world of tomorrow, I think competition is going to reach a ferocity unimagined today. And you have to understand what intellectual property means to this country. The core copyright industries represent intellectual property, movies, home video, books, musical recordings and computer software.

Together they comprise about 4 percent of our gross domestic product. About \$240 billion. They collect some \$45 billion in revenues abroad. Their employment rate is growing four times faster than the national economy.

If ever there was a prize that ought to be protected by the Congress of the United States and by this administration, it is this wonderful world of intellectual property in which we are superior and dominant throughout the world.

So I say the Congress ought to equip us with the kind of intellectual property protection we need by extending this copyright term. Otherwise, competition in Europe particularly is going to get skewed against us.

Which brings me now to the singular premise on which this, I hope, passionate plea is based and that is what we are asking you

to do is very much and confirmably so in the long-range economic interest of the United States.

And now, since Congressman Conyers has arrived, may I do this all over again, please?

[The prepared statement of Mr. Valenti follows:]

PREPARED STATEMENT OF JACK VALENTI, PRESIDENT AND CEO, MOTION PICTURE ASSOCIATION OF AMERICA

Copyright term extension has a simple but compelling enticement: it is very much in America's economic interests.

At a time when our marketplace is besieged by an avalanche of imports, at a time when the phrase 'surplus balance of trade' is seldom heard in the corridors of Congress, at a time when our ability to compete in international markets is under assault, whatever can be done ought to be done to amplify America's export dexterity in the global arena .

Europe is girding its economic loins. One small piece of that call to arms is that the European Union has lengthened copyright term to 70 years plus life of the author. Europe's planners understand all too clearly how the market works. In that kind of audiovisual locale, the U.S. has to match Europe. It can do so by extending U.S. copyright term to put our term span at the same level as Europe's - 70 years PLUS life of the author or 95 years for works made for hire.

There are Four major reasons which command our attention and certify the need for copyright term extension:

First, while the Berne Convention has a minimum term (life of the author plus fifty) any nation can provide longer terms. But, and this is pivotal, a nation does not have to protect other countries' works beyond what those countries provide for their works. To put it plainly, Europe would not guard American works beyond the American term limit, whereas European works would have longer security and energy in the marketplace.

Second, this means that American works would go into public domain in Europe, thereby cutting off revenues for American copyright owners, and transferring those revenues into European hands, and elsewhere.

Third, American creative works are the most globally popular, the most patronized, and the most sought after by exhibitors in theaters, television and home video all over the world. Which is why U.S. movies/TV programs and home video are America's **most wanted exports**, delivering back to our country more than \$4 Billion in **SURPLUS** balance of trade. Intellectual property, consisting of the core copyright industries, movies, TV programs, home video, books, musical recordings and computer software comprise almost 4% of the nation's Gross Domestic Product, gather in some \$45 Billion in revenues abroad, and has grown its employment at a rate **four times faster** than the annual rate of growth of the overall U.S. economy. Whatever shrinks that massive asset is **NOT** in America's best interests.

The case for copyright term extension is that simple.

What are the contrary views?

Some academics plead that the consumer would be benefited because more public domain works would find wider circulation at cheaper prices. What academics do not observe or do not know is that while an American public domain work may be **SOLD** cheaper to exhibitors in many international markets, consumers are **NOT** granted cheaper prices. Not at all. The theater ticket remains the same price. TV station, home video stores give no discounts to the public. Advertising rates do not come down.

Academics also assert that when copyrighted works lose their protection, they become more widely available to the public. Again what academics do not observe or do not know is a simple marketplace truth: Whatever work is not protected is a work that



no one preserves. The quality of the print is soon degraded. There is no one who will invest the funds for enhancement because there is no longer an incentive to rehabilitate and preserve. A public domain work is an orphan. No one is responsible for its life. But everyone exploits its use, until that time certain when it becomes soiled and haggard, barren of its previous virtues. Who, then, will invest the funds to renovate and nourish its future life when no one owns it? How does the consumer benefit from that scenario? The answer is, there is no benefit. What academics offer in numbing detail are the arcane drudgeries of graphs, charts, and arithmetical lines drawn across a page, all of which dwell in isolation, separated from the realisms of the marketplace.

And that brings us to the Fourth reason why it is necessary to extend copyright term limits.

The Congress can, without reaching into the pockets of the average consumer, magnify the revenue reach of copyright owners, and thereby help, perhaps modestly, but help nonetheless, in the reduction of our trade deficit, as well as encouraging the preservation and nourishment of this nation's great, unmatched trade prize, the American movie. In the global intellectual property world of tomorrow, competition will reach a ferocity unimagined today. The Congress must equip American owners of intellectual property with a full measure of protection, else competition, in Europe particularly, becomes skewed and U.S. copyright owners are reduced in their effectiveness.

Which returns us to the singular premise on which this plea is based: It is in the economic best interests of this country to extend copyright term limits. Now.

Mr. CONYERS. I may have heard it before.

Mr. MOORHEAD. He wants you as a cosponsor on the bill.

Mr. VALENTI. I said, Mr. Chairman, if I may, Mr. Chairman, 1 more minute. I said that I wanted you here, Congressman Conyers, because you are one of the three or four members of this subcommittee who hasn't cosponsored this copyright term extension and I felt like you would be susceptible to some of my passionate pleas.

Mr. CONYERS. I always have been.

Mr. VALENTI. Anyway, thank you, Mr. Chairman. I am grateful for the time.

Mr. MOORHEAD. Thank you.

Our next witness is Marilyn Bergman and many of you have heard, "The Way We Were," and many of the other wonderful, wonderful songs that she has written. We are very fortunate to have you here today.

**STATEMENT OF MARILYN BERGMAN, SONGWRITER, PRESIDENT AND CHAIRMAN OF THE BOARD, AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS**

Ms. BERGMAN. Thank you. Good morning, again, Mr. Chairman. And thank you for holding these hearings about 12 miles from my home. You beat me by 8 miles.

Mr. BECERRA. Close enough.

Ms. BERGMAN. Good morning, Mr. Chairman, and members of the subcommittee, my name is Marilyn Bergman. I am a song writer. I am also president and chairman of the board of ASCAP. I very much appreciate the opportunity to express our strong support for H.R. 989, the Copyright Term Extension Act of 1995.

At the risk of repeating some of the eloquent words of our chairman, and certainly the passionate words of Mr. Valenti, for the record I have to make my statement.

I wish to start, Mr. Chairman, by applauding your recognition of the importance of extending our copyright term. You have been a leader on this important question, as on so many others vital to American creators and owners of copyright. We wish to express our deepest thanks for your support and for that of the many cosponsors of this legislation from the subcommittee, Representatives Becerra, Berman, Bono, Coble, Gallegly, Gekas, Goodlatte, Nadler, and Schroeder.

As you know, ASCAP exists to license the nondramatic public performances of copyrighted music written and owned by our more than 65,000 composer, lyricist, and music publisher members. We license music users and monitor, collect, and distribute royalties to our members. These royalties are the largest single source of income to song writers and that is what enables us to work in our chosen field and create the music that enriches the culture and the economy of our country.

ASCAP, together with our sister societies BMI and SESAC, are among the many interested parties which have joined together to form the coalition of creators and copyright owners to support your bill. The coalition will submit a written statement.

My testimony today will focus on why this legislation is vital for America's music, and I will do so from my personal perspective as both ASCAP's chairman and as a working lyricist.

H.R. 989 proposes to extend the terms of all copyrights in the United States by 20 years. There are two overriding reasons why that is an important idea. The first is economic. Term extension is necessary as a matter of international trade. It is necessary if our intellectual property, which does so much for the American economy, is to be protected internationally.

The second is that it is the right thing to do. The United States should do all it can to encourage creativity and to protect intellectual property. Extension of copyright term will serve to encourage the tens of thousands of music creators who struggle to earn a living in this highly competitive business, and for whom the prospect of leaving an asset of their own making to their children and grandchildren is a powerful incentive.

Copyright of all forms of property transcends both national and international boundaries. In recent years, we have seen a true internationalization of the demand for and use of copyrighted works. Music, among a wealth of other copyrighted works, flows freely among and between nations.

The technological developments which have resulted in the information superhighway, the national and global information infrastructures, will result in even greater ease of access to and commerce in copyrights and copyrighted music on a worldwide basis.

The creativity the world wants, as Mr. Valenti so passionately put it, is overwhelmingly the creativity of our country. America's music is what the world wants to hear and our music is far more popular overseas than foreign music is here. That means that we have a very positive balance of trade in music, as in all other copyrighted works.

Last year, ASCAP sent \$27 million overseas for performance of foreign music here, but we received \$103 million for the performance of our music abroad. If we were to count the amounts received by foreign subsidiaries of American music publishers for foreign performances the amount would be much greater.

As you know, the European Union has adopted a directive to go into effect 1 month from today, which will make the copyright term throughout the E.U. 20 years longer than it is in the United States. But because of the rule of the shorter term, those European countries will not protect American works for additional 20 years unless our copyright term is also lengthened by 20 years.

I and my American colleagues will have less protection than our European counterparts. And what is worse, we will lose, our country will lose, the 20 years of royalties which we would otherwise earn if our country's copyright term was equal to that of the E.U.'s.

ASCAP has calculated that the loss of ASCAP performing rights revenues earned in Europe alone by American writers and music publishers for the oldest 20 years of copyrighted music would amount to about \$14 million annually.

When we consider that performing rights are half the total income writers and publishers receive, we could estimate that in music alone term extension would mean a trade surplus of about

\$25 million annually; money which would go directly to American creators, businesses, and the American economy's benefit.

The loss of these revenues would not be fair to those of us who work so hard to create America's music, to those who invest considerable sums to bring that music to the public, and to our fellow citizens who rely on a strong U.S. economy.

Mr. Chairman, if nothing else, it comes down to this: We can obtain 20 years of continued trade surplus for American creativity in the European market at no cost to ourselves simply by enacting your legislation. If we do not do so and do not do so now, over the next 2 years, the following great American songs and many others will fall into the public domain. The revenues they and other copyrighted works would generate in Europe for another 20 years, which would serve the economic good of our country, will simply vanish. Let me mention a few.

Appropriately, "California, Here I Come," "Toot Toot Tootsie Good-Bye," "Rhapsody in Blue," "Tea for Two," "It Had To Be You," "The Man I Love," "I Will See You in My Dreams," "Lady be Good," "Ain't We Got Fun," "All By Myself," "April Showers," "Avalon," "I'll Be With You in Apple Blossom Time," "I'm Just Wild About Harry," "Look For The Silver Lining," "Make Believe," "Say It With Music," and "Secondhand Rose," only to mention a few.

Logic and our country's economic self-interest dictate that we extend our copyright term to take advantage of this opportunity for extended protection in the European market. We can do so by enacting H.R. 983. Mr. Chairman, thank you for introducing this vital legislation and for this opportunity to voice our strong support for it.

[The prepared statement of Ms. Bergman follows:]

**PREPARED STATEMENT OF MARILYN BERGMAN, SONGWRITER, PRESIDENT AND  
CHAIRMAN OF THE BOARD, AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND  
PUBLISHERS**

Good morning, Chairman Moorhead and members of the Subcommittee. My name is Marilyn Bergman. I am a songwriter. I am also President and Chairman of the Board of ASCAP. I very much appreciate the opportunity to express our strong support for H.R. 989, the Copyright Term Extension Act of 1995.

I wish to start, Mr. Chairman, by applauding your recognition of the importance of extending our copyright term. You have been a leader on this important question, as on so many others vital to American creators and owners of copyright. We wish to express our deepest thanks for your support, and for that of the many co-sponsors of this legislation from the Subcommittee, Representatives Becerra, Berman, Bono, Coble, Gallegly, Gekas, Goodlatte, Nadler, and Schroeder.

As you know, ASCAP exists to license the nondramatic public performances of copyrighted music written and owned by our more than 65,000 composer, lyricist and music publisher members. We license music users, and monitor, collect and distribute royalties to our members. These royalties are the largest single source of income to songwriters, and that is what enables us to work in our chosen field and create the music that so enriches the culture, and the economy, of our country.

ASCAP, together with our sister societies BMI and

SESAC, are among the many interested parties which have joined together to form the Coalition of Creators and Copyright Owners, to support your bill. The Coalition has submitted a written statement. My testimony today will focus on why this legislation is vital for America's music, and I will do from my personal perspective as both ASCAP's head and as a working lyricist.

H.R. 989 proposes to extend the terms of all copyrights in the United States by 20 years. There are two overriding reasons why that is a good idea. The first is economic -- term extension is necessary as a matter of international trade. It is necessary if our intellectual property, which does so much for the American economy, is to be protected internationally. The second is that it is the right thing to do, for the United States should do all it can to encourage creativity. Extension of copyright term will serve to encourage the tens of thousands of music creators who struggle to earn a living in this highly competitive business, and for whom the prospect of leaving an asset of their own making to their children and grandchildren is a powerful incentive.

Copyright, of all forms of property, transcends both national and international boundaries. In recent years, we have seen a true internationalization of the demand for and use of copyrighted works. Music, among a wealth of other copyrighted works, flows freely among and between nations. The technological developments which have resulted in the information superhighway -- the National and Global Information Infrastructures -- will

result in even greater ease of access to, and commerce in, copyrights, and copyrighted music, on a world-wide basis.

And the creativity the world wants is overwhelmingly the creativity of our country. United States culture sets the standard for the world. America's music is what the world wants to hear, and our music is far more popular overseas than foreign music is here. That means that we have a very positive balance of trade in music, as in all copyrighted works. Last year, ASCAP alone sent \$27 million overseas for performance of foreign music here, but we received \$103 million for the performance of our music abroad. If we were to count the amounts received by foreign subpublishers -- foreign subsidiaries of American music publishers -- for foreign performances, the amount would be much greater. That is money that went straight into the pockets of American writers and publishers, supporting American workers and American businesses.

As you know, the European Union has adopted a Directive, to go into effect one month from today, which will make the copyright term throughout the EU 20 years longer than it is in the United States. But because of the "rule of the shorter term," those European countries will not protect American works for those additional 20 years unless our copyright term is also lengthened by 20 years. I and my American colleagues will have less protection than our European counterparts. What's worse, we will lose -- our country will lose -- the 20 years of royalties which we would otherwise earn if our country's copyright term was

equal to that of the EU's. ASCAP has calculated that the loss of ASCAP performing rights revenues earned in Europe alone by American writers and music publishers for the oldest 20 years of copyrighted music -- the revenues that would be lost to our country -- would amount to about \$14 million annually.

The loss of these foreign revenues would not be fair to those of us who work so hard to create America's music, to those who invest considerable sums to bring that music to the public, or to our fellow citizens who rely on a strong United States economy. Our country needs every penny of trade surplus we can get, and enactment of H.R. 989 will ensure that we do not lose a significant portion of the trade surplus in copyrights which we receive from Europe.

Mr. Chairman, if nothing else, it comes down to this: we can obtain 20 years of continued trade surplus for American creativity in the European market at no cost to ourselves, simply by enacting your legislation. If we do not do so, and do not do so now, over the next two years the following great American songs, and many others, will fall into the public domain; the revenues they and other copyrighted works would generate in Europe for another 20 years, which would serve the economic good of our country, will simply vanish:

AIN'T WE GOT FUN  
 ALL BY MYSELF  
 APRIL SHOWERS  
 AVALON  
 I'LL BE WITH YOU IN APPLE BLOSSOM TIME  
 I'M JUST WILD ABOUT HARRY  
 LOOK FOR THE SILVER LINING  
 MAKE BELIEVE



SAY IT WITH MUSIC  
SECOND HAND ROSE

Logic, and our country's economic self-interest, dictate that we extend our copyright term to take advantage of this opportunity for extended protection in the European market. Let's do so by enacting H.R. 989.

Mr. Chairman, thank you for introducing this vital legislation, and for this opportunity to voice our strong support for H.R. 989.

Mr. MOORHEAD. Thank you. The next witness is Mr. Richmond.

**STATEMENT OF EDWARD RICHMOND, PRESIDENT,  
ASSOCIATION OF MOVING IMAGE ARCHIVISTS**

Mr. RICHMOND. Thank you, Chairman Moorhead and members of the subcommittee. I am going to change the pace and talk about H.R. 1734, the National Film Preservation Act of 1995. And I want to thank you for giving me this opportunity to speak in support of it.

I am here today representing the Association of Moving Image Archivists. AMIA is a professional association established in 1991 to provide a means for cooperation among individuals concerned with preservation and use of moving image materials. It currently represents nearly 250 professional archivists working at more than 100 institutions in both the public and private sectors.

In commenting today, I will confine my remarks to title II of the proposed legislation, which seeks to establish a federally chartered foundation dedicated to the preservation of America's film heritage.

I would like to say, however, that I also fully support title I, which seeks to reauthorize the National Film Preservation Board. The Film Board is an indispensable element in ensuring that the progress made to date in dealing with the real crisis in film preservation can be continued and expanded.

In 1992 Congress asked the Film Board to prepare a comprehensive report on the nationwide efforts to preserve American motion pictures. The Board, with the invaluable assistance of the Library of Congress, accomplished this task in two stages.

First, it undertook an extensive 1-year study to determine the current state of film preservation throughout the United States. This study entitled, "Film Preservation 1993," persuasively demonstrated that America's film heritage is at serious risk.

And Chairman Moorhead has already mentioned some of the findings of this study. Fewer than 20 percent of feature films from the 1920's survive in complete form. Of the films made from 1895 to 1950, less than half survive. Films made after 1950 continued to be endangered by many threats including color fading, the so-called vinegar syndrome, and sound track deterioration. And perhaps most alarmingly, funding for film preservation, which has never been adequate, has fallen to less than half its 1980 level when adjusted for inflation.

As a second stage the Board oversaw the creation of a national plan to address these issues. The process of arriving at this plan was unprecedented. For the first time archivists, educators, filmmakers, technical specialists, entertainment industry executives and others came together to find solutions to film preservation problems.

The resulting plan entitled, "Redefining Film Preservation," represents the consensus, which emerged from this process. And, Chairman Moorhead, I would like to ask if a copy of the plan could be included as part of my written statement.

Mr. MOORHEAD. So ordered.

[See appendix, p. 423.]

Mr. RICHMOND. The centerpiece of this plan is the creation of a federally chartered foundation. Working with the film preservation

community, the foundation will seek to raise private gifts and will be eligible to match those gifts with a limited amount of Federal funds. The foundation in turn will establish grant programs to make its assets available to nonprofit film-preserving institutions throughout the country.

The foundation's primary role will be to help preserve and make accessible those films which are held in the public trust by nonprofit institutions and which simply will not survive without public intervention. These films, sometimes referred to as orphan films, constitute a very large and indispensable portion of our film heritage.

They include newsreels, documentaries and actuality footage, independent and avant-garde films, socially significant amateur footage, regional materials of historical interest, films that have fallen into the public domain, and other films of cultural and educational value whose copyright owners are unable or unwilling to provide long-term preservation.

Important collections of such films exist in each of the 50 States. They can be found in local archives, museums, historical societies, libraries, and universities.

And in most cases, the institutions holding these collections cannot afford on their own adequately to preserve, store, or make them accessible to the public.

In addition to my work with AMIA, I am also the curator of the UCLA Film and Television Archives. Turning to my own institution as an example, UCLA holds many collections of films which are unique or represent the best remaining copies. Our largest collection consists of more than 5,000 hours of newsreel footage from the 1910 through the early 1970's, much of which has never been seen by the public.

This collection contains footage from all over the country and all over the world, but since these hearings are being held in Pasadena, I checked to see what footage existed on this area. We have coverage of the Tournament of Roses parade and Rose Bowl games dating back to the 1930's. We have films of many events which occurred over the years at the California Institute of Technology and the Jet Propulsion Laboratory.

We have stories documenting an automobile race through the streets of Pasadena in 1936, new techniques being used by the Pasadena police to combat crime in 1938, and a rally by the Women's Christian Temperance Union in Pasadena in 1947 and dozens more.

The archive at UCLA is probably in a better position than many. We are partially funded by the University of California. And we have a good record of attracting outside support. Despite this success, however, we need help. Without it, we cannot properly store all of our materials. We cannot provide students and the public with as much access to our collections as we should and we cannot preserve all or even most of our films, including the Pasadena footage I just mentioned.

And we are not alone. Other major archives such as the Library of Congress, the Museum of Modern Art, George Eastman House as well as hundreds of important regional local and specialized archives are all facing similar problems. Each year the Nation's film

archives are losing unique footage, historically and culturally valuable footage which deteriorates beyond saving and is gone forever.

What we believe is needed urgently is the new approach represented by the proposed National Film Preservation Foundation. Unlike the isolated efforts of individual archives, the foundation will have the national base to maximize private sector fundraising, foster public-private partnerships around preservation initiatives, assure the most efficient use of every preservation dollar and help address problems that are beyond the scope of any one institution.

For these reasons, I believe passage of H.R. 1734, including title II, is vital to ensuring preservation of and access to America's film heritage and I urge you to give it your support. Thank you.

[The prepared statement of Mr. Richmond follows:]

**PREPARED STATEMENT OF EDWARD RICHMOND, PRESIDENT, ASSOCIATION OF MOVING  
IMAGE ARCHIVISTS**

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On behalf of the Association of Moving Image Archivists (AMIA), I am writing in support of H.R. 1734, the National Film Preservation Act of 1995 (Title I) and the National Film Preservation Foundation Act (Title II). AMIA is a professional association established to provide a means for cooperation among individuals concerned with the preservation and use of moving image materials. AMIA currently represents nearly 250 professional archivists working at more than 100 institutions in both the public and private sectors. Its members constitute most of the working professionals in the film archive field.

I believe strongly that passage of H.R. 1734 is vital to insuring preservation of and access to America's film heritage. For the purpose of this statement, I will confine my remarks to Title II, which establishes a federally chartered foundation dedicated to the preservation of American motion pictures. I would like to say, however, that I also strongly support Title I, which reauthorizes the National Film Preservation Board. If Congress had not established the Film Board, the nation's film preservation crisis may

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never have been addressed in a cooperative and comprehensive manner, and the Board's reauthorization is an indispensable element in assuring that the progress made to date can be continued and expanded.

I. The National Film Preservation Report.

I would like to begin by providing a very brief overview of the process which has resulted in the proposal to create a national film preservation foundation.

Congress originally established the National Film Preservation Board in 1988. When the Board was reauthorized in 1992, Congress added to its duties the task of preparing a comprehensive report on the nationwide efforts to preserve American motion pictures. The Board accomplished its assignment in two stages:

STAGE ONE: the National Study. The Board undertook an extensive one year study to determine the current state of film preservation throughout the United States. This study, which was published in June of 1993 under the title FILM PRESERVATION 1993, persuasively demonstrated that America's film heritage is at serious risk. Among its alarming findings were the following:

- \* Fewer than 20% of feature films from the 1920s survive in complete form; for features from the 1910s, the survival rate falls to 10%. Of films made from 1895-1950, less than half survive.
- \* Films made after 1950 face several serious threats to their survival, including "color fading," the so-called "vinegar syndrome," and soundtrack deterioration.
- \* Many American films can be found only in foreign archives.
- \* Funding for film preservation, which has never been adequate, has fallen to considerably less than half its 1980 level, when adjusted for inflation.

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STAGE TWO: the National Plan. The Board next oversaw the creation of a national plan to address the problems identified in FILM PRESERVATION 1993. The process of arriving at this plan was unprecedented and historic in nature. For the first time, archivists, educators, filmmakers, technical specialists, and entertainment industry executives all came together to discuss, negotiate, occasionally to argue, but ultimately to find solutions to film preservation problems. More than thirty people directly participated as members of five task forces and committees, which met in person or by conference call more than twenty times over a period of six months. Through the task force and committee members, the discussions reached out to hundreds of others working in all the professions and disciplines mentioned above.

The resulting plan, which was published in August of 1994 under the title REDEFINING FILM PRESERVATION, represents the consensus which emerged from this process. I think I am safe in saying that it is widely supported by all elements of the film community involved with preservation.

The hallmark of the plan is the recognition that the preservation of America's film heritage requires a comprehensive, meaningful and ongoing partnership among public and non-profit archives, the film industry, the creative community, the educational community, other segments of the private sector, and the government.

## II. The National Film Preservation Foundation.

In all, the national plan outlines thirty-one specific recommendations; among these are proposals for:

- \* Redesigning preservation policies to underscore the importance of low-temperature, low-humidity storage in retarding film deterioration.

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- \* Increasing the availability of films for education, research and public exhibition.

- \* Developing public-private partnerships to restore selected films, share preservation information, and repatriate "lost" American films from foreign archives.

However, the key proposal which serves as the necessary centerpiece for the entire plan is to create a new federally-chartered foundation which would raise funds for two related purposes: (1) to promote the preservation of and public access to America's film heritage, concentrating on those films not preserved by commercial interests, and (2) to further the implementation of other components of the national plan and related activities.

The basic concept of the foundation is simple. It is envisioned as a 501(c)(3) nonprofit organization in the District of Columbia. Working in close coordination with the film preservation community, it will seek to raise private gifts (both cash donations and in-kind contributions) and will be eligible to match those gifts with a limited amount of federal funds.

The foundation in turn will establish grant programs to make its assets available to non-profit film preserving institutions throughout the country. Grants will be awarded only for specific projects, and no foundation funds will be used to cover administrative overhead on any project. The types of projects eligible for funding might include: grants to fund the archival preservation and restoration of film collections; grants to help establish regional climate controlled storage facilities to house endangered collections from many institutions; grants to make collections available to the public through cataloging, the striking of access and exhibition copies, and even the digitizing of collections of special educational interest to facilitate their access over the Internet.



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III. The Role of the National Foundation.

Let me be clear about one point. I do not think anyone expects or wants the foundation to fund the preservation of Hollywood studio films, or any films controlled by copyright owners who are capable and willing to preserve them. Such films should be and, in most cases, are being preserved by their owners, either through internal company preservation programs or through collaborative restoration programs established between for-profit companies and non-profit archives.

Rather, the foundation's role will be to help preserve those films which are held in the public trust by non-profit institutions and which simply will not survive without public intervention. These films -- sometimes referred to as "orphan" films -- constitute a very large and indispensable portion of America's film heritage. They include newsreels, documentaries and actuality footage, independent and avant-garde films, socially significant amateur footage, regional materials of historical interest, films that have fallen into the public domain, and other films of cultural and educational value whose copyright owners are unable or unwilling to provide long-term preservation.

Important collections of such films exist in each of the fifty states. They can be found in local archives, museums, historical societies, libraries, universities, and non-profit associations. And in most cases, the institutions holding these collections cannot afford on their own adequately to preserve them, store them, or make them accessible to the public. This is the reality which film preserving institutions confront on a daily basis.

In addition to my work with AMIA, I am the Curator of the UCLA Film and Television Archive. Turning to my own institution only as an example, the Archive at UCLA holds many collections of films which are unique or which represent the best

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remaining copies. Our largest such collection consists of more than 5,000 hours of historical newsreel footage dating from the 1910s through the early 1970s, much of which has never before been seen publicly. It is a virtual treasure trove for the study of the twentieth century. The collection includes extensive footage on most major events in the areas of American government, international relations, social and cultural developments, as well as coverage of most major figures in the fields of politics, business, technology, entertainment, and sports.

Since hearings on H.R. 1734 are being held in Pasadena, I checked the newsreel collection for footage on this area. We have extensive coverage of the Tournament of Roses Parades and Rose Bowl Games dating back at least to the early 1930s. We have films of many events which occurred over the years at the California Institute of Technology and the Jet Propulsion Laboratory. We also have stories documenting an antique automobile race through the streets of Pasadena in 1936, new techniques being used by the Pasadena police to combat crime in 1938, a rally by the Women's Christian Temperance Union in Pasadena in 1947, and dozens more.

Now, the Archive at UCLA is in a better position than many. We are partially funded by the University of California, and our track record in attracting outside support is probably above average. Despite this success, we cannot properly store all of our materials; we cannot provide students, educators and the public with as much access to our collections as we should; and we cannot hope to preserve all of our films, most of our films, or even a substantial portion of our films -- not without help.

And UCLA is not alone. The same can be said, to greater or lesser degrees, of most other archives and film preserving institutions throughout the country. Other major

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film archives such as the Library of Congress, the Museum of Modern Art, the International Museum of Photography and Film, as well as hundreds of important regional, local and specialized archives are all facing similar problems.

Each year the nation's film archives lose unique footage -- historically and culturally valuable footage which is then gone forever. Already in 1995, UCLA has been forced to dispose of almost 30,000 feet of film because it deteriorated, in some cases literally to dust, before we could raise funds to preserve it. And the same situation, on larger and smaller scales, is being repeated all over the country, all the time.

What is needed urgently is the new approach represented by the proposed national film preservation foundation. Unlike the isolated efforts of individual archives, the foundation will have the necessary national base to: (a) maximize private sector fundraising, (b) foster public-private partnerships around preservation initiatives, (c) insure the most effective use of every preservation dollar, and (d) help address problems beyond the scope of any one institution.

For these reasons, I urge you to support H.R. 1734, including Title II. Please give the nation's film archives the national foundation we need to save America's film heritage, for the benefit of the American people.

Mr. MOORHEAD. Mr. Murphy.

**STATEMENT OF EDWARD P. MURPHY, PRESIDENT AND CEO,  
NATIONAL MUSIC PUBLISHERS' ASSOCIATION, INC.**

Mr. MURPHY. Good morning, Mr. Chairman and members of the subcommittee. I am Edward P. Murphy, president and chief executive officer of the National Music Publishers' Association, Inc. [NMPA]. I am pleased to appear before you today to provide the American music publishing community's views on H.R. 989, the Copyright Term Extension Act of 1995.

NMPA represents more than 600 music publishers and NMPA's subsidiary, the Harry Fox Agency, serves as a licensing agent for more than 14,000 music publishers located in California, Tennessee, New York, and throughout the United States.

Music publishers generally speaking are holders of copyright in musical works. The publisher's role is to nurture the creativity of song writers and composers through artistic, professional and economic support. Following the creation of a musical work, the publisher functions as a promoter seeking recordings, performances and other modes of distribution.

The publisher is the business side a partnership with music creators. He or she administers the copyright in the work and takes steps to protect it from unauthorized exploitation, including acting as an advocate, sometimes individually and sometimes through NMPA, for strong copyright protection and enforcement throughout the world.

The music publisher also serves as a counselor in the overall development of the creator's career. For all of their contributions to the creative process, the music publishers enjoy a close partnership with their song writer and composer colleagues.

In light of the special role that the music publishers play in the creative process, and because of the strong bonds between publishers and songwriters and composers, NMPA is especially pleased to voice its support for term extension. The trade arguments in support of term extension are overwhelmingly persuasive. More and more the U.S. economy is supported by the production of intellectual property by American creators and its dissemination to an eager world market.

According to the economic study released by the International Intellectual Property Alliance in 1993, the American copyright industries accounted for nearly 4 percent of the gross domestic product and produced nearly \$46 billion in foreign sales.

The benefits to the United States of maintaining a leadership position in advancing strong international copyright norms are self-evident. In numerous bilateral negotiations, in the North American Free Trade Agreement and in the Uruguay Round Agreement and on the trade-related aspects of intellectual property rights, United States' persistence yielded improved levels of protection.

As the world's leading provider of copyright content, the United States charted the way for recognition of exclusive rental rights in certain works, for copyright protection for software, and for an adequate term of protection for sound recordings in countries that do not protect those works under copyright.

On the issue of duration of protection for copyrighted works in general, however, the European Union is pointing the way, and NMPA fears that way will be a dark and hostile one for American creators and copyright owners. The E.U. directive invokes reciprocity through the Berne Convention rule of the shorter term. Works of U.S. origin will fall into the public domain in the countries of the European Union at the expiration of their life plus 50 term while those same countries will grant works of their own authors an additional 20 years of protection.

The only way U.S. works can qualify for the extended term in Europe is for our law to grant an equal extension. In other words, for H.R. 989 to become law.

As this subcommittee considers H.R. 989 and issue of term extension from a domestic policy standpoint, however, NMPA urges you to consider addressing an additional point not now covered by the bill; the issue of duration of transfers of rights.

U.S. copyright law, back to the very first copyright act passed in 1790, has struck a balance between interests of individual authors who create works and the publishers who foster the goals of copyright by promoting the wide dissemination of those works to the public. In various acts up to and including the 1909 Copyright Act, this was accomplished by a split-term of protection.

The 1909 act, for example, divided 56 years of copyright protection into two 28-year terms, often referred to as the original and renewal terms. The theory behind this approach in part was to give the author a second opportunity at the beginning of the second or renewal term, to renegotiate a transfer of rights that may have proven to be less than satisfactory. The author was given a "second bite at the apple" that could take into account the demonstrated value of the works in the marketplace.

With the evenly divided bifurcated term, each time the duration of the copyright was extended to the benefit of authors, publishers who made the initial investment in bringing the work to the public received an extended opportunity to recover their investment through a longer original term of protection.

Congress, with an eye toward the U.S. accession to the Berne Convention, determined in the 1976 Copyright Act to switch from a fixed 56-year term of protection to the Berne's minimum of life of the author plus 50 years.

In the years of congressional review that preceded the major statutory rewrite, the question of how to maintain a balance between creators' and publishers' interests achieved by the split copyright term was thoroughly debated.

The notion of incorporating a statutory cap on the duration of copyright transfers was eventually agreed upon as the appropriate approach. When it was suggested that the cap be set at 25 years, Julian Abeles, then head of the organization had later become NMPA, pointed out that a 25-year limitation would make publishers 3 years worse off than they had been under the 1909 act's 28-year original term.

Before the panel of experts convened by the Copyright Office, Mr. Abeles said:

Today there are so few songs of any one publisher that have the potential. The publisher has to employ all possible ways and means, including a substantial ex-

penditure, to promote them. The competition is drastic today, and few songs ever become popular standards. If you are going to terminate the rights after 25 years, you are going to put the legitimate publishers out of business, because they must live on those few popular standards.

It is the income from those popular standards he receives that places him in a position where he can exploit the new compositions. Such a provision would mean the death knell of our industry. I ask, why this radical curtailment of existing rights, instead of participation in the extension of such rights?

Today, I ask the same question. Why extend the duration of copyright protection without an equitable extension of the statutory limit on the duration of transfers?

Following Mr. Abeles's appeal, the preliminary draft of the act was amended to provide for termination of transfers after 35 years, and, in fact, that is now codified in section 203. Congress recognized, then, that the extended term warranted an extended period in which publishers could recoup their investments from the creative process and the promotion of the works.

I would like to illustrate with a little chart to show under the 1909 act what the relative duration of transfers was in terms of years under the bifurcated term and what it is under the 1976 act, and under the legislation being proposed here. The chart shows what would happen in terms of a balance between the publishers' rights if they were left unamended the way it is listed in the bill now.

What we are trying to bring to your attention is that the publisher's interest is what we are trying to get across here and if we don't do something to change what has been put forward here, there will be a significant imbalance of the rights that exit right now.

What Mr. Abeles noted more than 30 years ago is no less true today. That many works and the investments in those works never show a profit. Given the rich variety of music available to the American public, few think about it, but for every song that becomes a hit, hundreds, many more, go unnoticed.

From a business standpoint, duration of the publisher's opportunity to exploit a work and recover his or her initial investment is crucial. While this is true for all categories of music, it is particularly true for serious works—classical works and musical theater.

According to the Music Publishers' Association, an organization whose constituency is primarily involved with the production of sheet music, and that endorses NMPA's points of view, the rising costs of production makes investment in serious copyrighted material a very speculative undertaking.

MPA has stated that in the United States, printing costs alone for a symphonic work average \$15,000. Printing costs for a full operatic work range from \$100,000 to \$150,000. The markets for recovering such an investment are small and have been harmed greatly by increasingly sophisticated photocopying technology.

The problems confronting publishers of such works is compounded because much serious music gains little public exposure or acceptance until many years after its creation. For example, the famous Barber composition, "Adagio for Strings," experienced only modest economic success following its debut in 1939. It became popular 25 years later, however, when the piece of music was used in connection with the funeral of President Kennedy.

Another Barber work, an opera, "Anthony and Cleopatra," premiered in 1966, but it was not performed or recorded again until 1991. This cycle of earnings which is typical of serious and classical works means that a composition, which may some day be recognized as an American classic may not return a profit to the creator's descendants or to the music publisher owner within the current term of copyright protection, let alone during the 35-year period set under section 203 for the duration of transfers.

The term of protection granted the author and the heirs under the 1976 act was life plus 50. The term of works made for hire is generally 75 years. But publishers who take copyrights by transfer and who invest a range of resources in promoting the work and its success, have their rights terminated in 35 years.

Like many other copyright-based businesses, the music publishing business is a global one. In assessing where to invest limited resources, publishers must look at, among other things, the state of national law as it affects their operations. Nations of the European Union do not limit the duration of transfers by statute, as the United States does. Under the laws in these important markets publishers and writers are free to negotiate a transfer for the duration of copyright, or any portion of the term.

Without some adjustment of the Copyright Act's existing provisions on term of transfers, U.S. law may have the unintended effect of driving publisher investment overseas.

We urge you to consider these points carefully as you proceed in your review of this important legislation and to act to maintain the balance between author and publisher interests that has been a feature of the U.S. copyright law virtually since its inception.

We look forward to working with the subcommittee on this important point and towards passage of H.R. 989.

In closing, I would like to offer one final observation. In the period of consideration of the 1976 Act, Congress recognized that, with each day that passed, works were falling into the public domain. Some heirs would lose copyright protection forever, in part owing to the press of other legislative priorities.

Should consideration of this important legislation be delayed, I strongly urge this body to follow the precedent of earlier Congresses and pursue a resolution calling for a temporary moratorium on the expiration of copyright. Such a step would be a demonstration of the commitment to the preservation of the jewels in the crown of our Nation's cultural heritage and enduring respect for the American artists and creators.

Again, our thanks to the chairman and so many members of the subcommittee for their sponsorship of this very important legislation. Thank you.

[The prepared statement of Mr. Murphy follows:]

**PREPARED STATEMENT OF EDWARD P. MURPHY, PRESIDENT AND CEO, NATIONAL  
MUSIC PUBLISHERS' ASSOCIATION, INC.**

Good morning Mr. Chairman and members of the Subcommittee. I am Edward P. Murphy, president and chief executive officer of the National Music Publishers' Association, Inc. ("NMPA").

I am pleased to appear before you today to provide the American music publishing community's views on H.R. 989, the "Copyright Term Extension Act of 1995." NMPA represents more than 600 music publishers, and NMPA's subsidiary, The Harry Fox Agency, Inc., serves as licensing agent for more than 13,000 music publishers, located in California, Tennessee, New York and throughout the United States.

Music publishers, generally speaking, are holders of copyright in musical works. The publishers' role is to nurture the creativity of songwriters and composers through artistic, professional, and economic support. Following the creation of a musical work, the publisher functions as its promoter, seeking recordings, performances and other modes of distribution.

The publisher is the business side of a partnership with the music creator. He or she administers the copyright in the work and takes steps to protect it



from unauthorized exploitation, including acting as an advocate (sometimes individually and sometimes through NMPA) for strong copyright protection and enforcement throughout the world.

The music publisher also serves as a counsellor in the overall development of the creator's career. For all of their contributions to the creative process, music publishers enjoy a close partnership with their songwriter and composer colleagues.

In light of the special role that music publishers play in the creative process, and because of the strong bonds between publishers and songwriters and composers, NMPA is especially pleased to voice its support for term extension.

The trade arguments in support of term extension are overwhelmingly persuasive. More and more, the U.S. economy is supported by the production of intellectual property by American creators and its dissemination to an eager world market. According to an economic study released by the International Intellectual Property Alliance, in 1993, the American copyright industries accounted for nearly four percent of the Gross Domestic Product and produced nearly \$46 billion in foreign sales.

The benefits to the United States of maintaining a leadership position in advancing strong international copyright norms are self evident. In numerous bilateral negotiations, in the North American Free Trade Agreement and in the Uruguay Round agreement on the Trade-Related Aspects on Intellectual Property Rights, the United States' persistence yielded improved levels of

protection. As the world's leading provider of copyright "content," the U.S. charted the way for the recognition of exclusive rental rights in certain works, for copyright protection for software, and for an adequate term of protection for sound recordings in countries that do not protect those works under copyright.

On the issue of duration of protection for copyrighted works in general, however, the European Union is pointing the way. And NMPA fears that way will be a dark and hostile one for American creators and rights owners. The E.U. directive invokes reciprocity through the Berne Convention's "rule of the shorter term." Works of U.S. origin will fall into the public domain in the countries of the European Union at the expiration of their life-plus-50 term, while those same countries will grant works of their own authors an additional 20 years of protection. The only way U.S. works can qualify for the extended term is for our law to grant an equal extension -- in other words, for H.R. 989 to become law.

As this Committee considers H.R. 989 and the issue of term extension from a domestic policy standpoint, however, NMPA urges you to consider an addressing an additional point not now covered by the bill: the issue of the duration of transfers of rights.

U.S. copyright law, back to the very first Copyright Act passed in 1790, has struck a balance between the interests of individual authors who create works and the publishers who foster the goals of copyright by promoting the wide dissemination of those works to the public. In various Acts, up to and including

the 1909 Copyright Act, this was accomplished by a split-term of protection. The 1909 Act, for example, divided 56 years of copyright protection into two 28-year terms, often referred to as the original and renewal terms. The theory behind this approach, in part, was to give the author a second opportunity, at the beginning of the second or renewal term, to renegotiate a transfer of rights that may have proven to be less than satisfactory. The author was given a "second bite at the apple" that could take into account the demonstrated value of the work in the marketplace.

With the evenly divided, bifurcated term, each time the duration of copyright was extended to the benefit of authors, publishers who made the initial investment in bringing a work to the public received an extended opportunity to recover their investment through a longer original term of protection.

Congress, with an eye toward U.S. accession to the Berne Convention, determined in the 1976 Copyright Act to switch from a fixed 56-year term of protection to Berne's minimum of the life of the author plus 50 years. In the years of congressional review that preceded that major statutory rewrite, the question of how to maintain the balance between creators' and publishers' interests achieved by the split copyright term was thoroughly debated.

The notion of incorporating a statutory "cap" on the duration of copyright transfers was eventually agreed upon as the appropriate approach. When it was suggested that the cap be set at 25 years, Julian Abeles, then head of the organization that later became NMPA, pointed out that the 25-year limitation

would make publishers three years worse off than they had been in under the 1909 Act's 28-year original term. Before a panel of experts convened by the Copyright Office, Mr. Abeles said:

[t]oday there are so few songs of any one publisher that have potential. The publisher has to employ all possible ways and means, including substantial expenditure, to promote them. The competition is drastic today, and few [songs] ever become popular standards. If you are going to terminate the rights after 25 years, you are going to put the legitimate publishers out of business, because they must live on those few popular standards. It is the income from those popular standards he receives that places him in a position where he can exploit new compositions. Such a provision would mean the death knell of the industry. I ask, why this radical curtailment of existing rights, instead of participation in the extension of such rights. [Emphasis added.]

Today, I ask the same question. Why extend the duration of copyright protection without an equitable extension of the statutory limit on the duration of transfers?

Following Mr. Abeles' appeal, the preliminary draft of the Act was amended to provide for termination of transfers after 35 years, and, in fact, that is period now codified in section 203. Congress recognized then that extended term warranted an extended period in which publishers could recoup their investments in the creative process and in the promotion of works.

What Mr. Abeles noted more than 30 years ago is no less true today: that many works -- and the investments in those works -- never show a profit. Given the rich variety of music available to the American public, how think about it, but for every song that becomes a hit, hundreds -- maybe more -- go unnoticed.

From a business standpoint, duration of the publisher's opportunity to exploit a work and recover his or her initial investment is crucial. While this is true for all categories of music, it is particularly true for serious works, classical works and musical theater. According to the Music Publishers' Association, an organization whose constituency is primarily involved with the production of sheet music, the rising costs of production make investment in serious copyrighted material a very speculative undertaking. MPA has stated that, in the U.S., printing costs alone for a symphonic work average \$15,000. Printing costs for a full operatic work range from \$100,000 to \$150,000. The markets for recovering such investments are small (and, have been harmed greatly by increasingly sophisticated photocopying technology).

The problem confronting publishers of such works is compounded because much serious music gains little public exposure or acceptance until many years after its creation. For example, the famous Barber composition, "Adagio for Strings," experienced only modest economic success following its debut in 1939. It became popular 25-years later, however, when the piece was used in connection with the funeral of President Kennedy. Another Barber work, the opera "Anthony and Cleopatra," premiered in 1966, but was not performed or recorded again until 1991. This cycle of earnings, which is typical of serious and classical works, means that a composition which may some day be recognized as an American classic may not return a profit to the creator's descendants or to the music publisher owner within the current term of copyright protection.

The term of protection granted the author and heirs under the 1976 Act is life-plus-50 years. The term for works made for hire is generally 75 years. But publishers who take copyrights by transfer, and who invest a range of resources into promoting the work and its success, have their rights terminated at 35 years.

Like many other copyright-based businesses, the music publishing business is a global one. In assessing where to invest limited resources, publishers must look at, among other things, the state of national law as it affects their operations. Nations of the European Union do not limit the duration of transfers by statute, as the U.S. does. Under the laws in these important markets, publishers and writers are free to negotiate a transfer for the duration of the copyright, or any portion of the term. Without some adjustment of the Act's existing provisions on termination of transfer, U.S. law may have the unintended effect of driving publisher investment overseas.

We urge you to consider these points carefully as you proceed in your review of this important legislation, and to act to maintain the balance between author and publisher interests that has been a feature of U.S. copyright law, virtually since its inception. We look forward to working with the Subcommittee on this important point and toward passage of H.R. 989.

In closing, I would like to offer one final observation. In the period of consideration of the 1976 Act, Congress recognized that, with each day that passed, works were falling into the public domain. Some heirs would lose copyright protection forever, in part owing to the press of other legislative

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priorities. Should consideration of this important legislation be delayed, I strongly urge this body to follow the precedent of earlier Congresses, and pursue a resolution calling for a temporary moratorium on the expiration of copyright. Such a step would be a demonstration of commitment to the preservation of the jewels in the crown of our nation's cultural heritage and of enduring respect for America's artists and creators.

Again, our thanks to the Chairman and so many members of the Subcommittee for their sponsorship of this important legislation.

Mr. MOORHEAD. Thank you very much. The procedure we are going to follow now is that each one of the members will have 5 minutes to ask questions. If it is necessary, we could have a second round.

I am going to give both Mr. Conyers and Mr. Bono, who were late for no reason of their own fault whatsoever—they had a little problem finding the building and the bus had left for John Conyers, so they will have time to make an opening statement if they desire to do so. I will take the first 5 minutes.

Mr. Murphy, you have told us what is presently wrong with the law and that the bill that we have doesn't really correct the problems that you want.

I would appreciate it if you would give us specific recommendations in writing at a later time as to how to correct the problem that you are concerned with. And anyone else that has—on the panel that has a concern about this issue, can also make comments and we will put it in our record.

Opponents of copyright term extension point out that there are a number of benefits to the public domain that will be lost or postponed as a result of this legislation.

Ms. BERGMAN, how would you respond to that?

Ms. BERGMAN. Well, I think the point was well alluded to by my colleague on my right, Mr. Valenti, when he spoke of the fact that the consumer really does not have any benefit when a work goes into public domain. The last time I looked, a recording of a Beethoven symphony, for example, cost no less to a consumer than a current pop album.

I also think that it is a question of economics. It is a question of getting the works for free and they are not free to the consumer just because they are in the public domain. Rather, they became unavailable because there is no one to promote them or because they are not protected. They are not promoted or they degrade, in the case of film or they go out of print, in the case of books or recordings. I think the benefit to the public is not served by having works go into the public domain.

Mr. MOORHEAD. Mr. Valenti, in Europe there is not an equivalent work-for-hire system for motion pictures. Wouldn't extending the copyright term in work-for-hire situations from 75 to 95 years give American companies more protection than their European counterparts?

Mr. VALENTI. What protection would they get, Mr. Chairman?

Mr. MOORHEAD. Moving it from 75 to 95 for work-for-hire situations.

Mr. VALENTI. Of course, we are talking about—one is the European method or process of copyright is called *droit morale*, moral rights, in which those people, other than the producer or the distributor of the film have the right to sometimes dictate the compass course of that work through the sequential marketplaces in which it goes.

Our works for hire allows the producer to gather in his one hand all of the rights which allows them a disciplined and aggressive marketing campaign in all the sequential marketplaces. The fact is that the moral rights system that is now the nature of Europe hasn't been working too well if you judge by the success of the cin-



ema industries in Europe, which Europeans will tell you, somewhat unhappily, is in decline.

I spent the last week meeting with European producers on how to revitalize the European cinema. Whereas the American system of works for hire is confirmably and singularly the most successful in all the world. Therefore, I don't think there is any rational person that would want to inflict a system on this country that doesn't seem to work anywhere else in the world.

But under copyright, the Europeans are bound to protect us. We are a member of Berne. We joined in 1989. I wanted us to join a lot earlier. But we are a member of Berne and therefore we are accorded the protection of Berne. And if this copyright term extension is granted, as I pray it will by the Congress, then we will be on equal footing because as I said in my opening statement, the Europeans are bound only by Berne, which is life of the author plus 50 years or 70 years, and they do not have any requirement to protect beyond that, though they do have the right to lift their own copyright extension far beyond Berne as they have done.

So all we are asking very simply, this thing shouldn't be too complicated. This is an economic issue, Mr. Chairman. It is a crucial and pivotal economic issue. And that is we must match the Europeans, else we are at a severe disadvantage. It is very simple. And I am not going to try to complicate it by giving you any arcane theories.

Mr. MOORHEAD. I have a question here for either Mr. Richmond or Mr. Murphy. Would you describe the types of film archives and film preservation activities which might be eligible for the foundation, how numerous are they and where are they located?

Mr. RICHMOND. In terms of how numerous they are, there are archives of all sizes and descriptions. One of the strengths of the American archival community is that we do not have one national archive. The national collection, so to speak, is held by literally hundreds of repositories throughout the country, which are geographically dispersed and philosophically diverse.

The types of activities that could be funded by the foundation, I can imagine, several. Certainly the funds to preserve and restore archival collections that are held in nonprofit institutions that have historical or cultural importance. Funds to catalog collections so that information about them can be made available to the public. Obviously, the public can't have effective access to this heritage of theirs if they do not know what is there.

One of the major new shifts in film preservation community is the emphasis on storage. It is no longer simply a question of preserving a film by doing laboratory work. We recognize now the films have to be stored under very good temperature and humidity control in order to make sure that they can last as long as possible. So I could certainly see this foundation working cooperatively with others to help try to establish regional storage repositories where many archives from a region could place their collections under archival conditions.

I think one of the big areas would be trying to make the American film heritage more accessible to people by cataloging is one way, and the striking of reference prints and access copies. And even for collections that are of special educational interest, the

digitizing of collections so they can be made available over the Internet. Those would be some of the possibilities.

Mr. MOORHEAD. My time has expired. The ranking minority member of the full Judiciary Committee, John Conyers, is here today. He represents a district near Detroit and has been very active in these issues. John Conyers.

Mr. CONYERS. Thank you. And good morning, Mr. Chairman and members of the committee and my friends on the panel and the ladies and gentlemen of interest who are here in this courthouse this morning.

I am so pleased to be, by virtue of being the senior member of Judiciary, a member on all of the subcommittees. And this one is my favorite because it is the most farflung in terms of its operation.

In terms of shoring up intellectual property and looking at the international questions, we have gone from Beijing to Xian to Guangzhou to Seoul, but it took us coming to Pasadena to find out that there was a south Pasadena. And not only one Grand Street, but two, which made for an interesting diversion as we roamed the Nation and sometimes the world in terms of these very important intellectual questions.

But I am here. And all is well, here. I think this is a tremendous subcommittee and a very important part of the Judiciary Committee. The fact of the matter is that under the new leadership, frequently many of the issues that are subcommittee issues become full committee issues. And so as you look upon us as guardians of American intellectual property, don't forget that we also have to deal with questions of how many automatic weapons should be allowed in the United States of America; what should we do with flag burners, if there are any and if they are conducting their horrible activities; how much damages can be awarded under civil disputes; and then, of course, these great questions of culture that bring us to our subject matter today. Two measures that are actually relatively simple in terms of the issues that are confronting us.

I see all of these things moving in the course of a great supporter of our culture and music, in particular, as one who came on the scene when the Vietnam issue was dividing the Nation, when the civil rights movement was nascent and began to build. And there was a young man with Lyndon Johnson named Valenti and a young man with Dr. King named Conyers. And we both wove a web of interrelationships that have spanned some 31 years, as I recall it.

And it has been interesting because the basis of all our activity here in this committee is essentially based on a constitutional premise primarily embodied in the first amendment; this thing called freedom of expression, this thing called the right to dissent. And they have come together in a very curious way.

And the more I examine the Constitution and the laws of this country, the more I realize that these laws don't just hang out there by themselves. That, in fact, the laws give the framework for people, government leaders, frequently fueled by public opinion, to do things and make decisions within a constitutional framework that have rather large ramifications.

And, so, we come here today to talk about the film industry and, you know, history is one of those things that can frequently be short-lived. The French made, to me, some of the most initial and profound developments in the history of cinematography. But there was something in the creative force in this country that I argue was embedded in the first amendment, that allowed a creativity that would not let culture become a department within a government.

And that energy, that unlimitedness that is here in this country, quickly moved us ahead, not just in movies, but in all the arts, the literature, the languages.

And so today, we are premier. But it was not just a given that it started off like that. To me, I think there is a constitutional nexus that this committee, of all committees in the Congress, is bound to observe and relate to every now and then.

And so, I am happy to be here now because the questions are not as easy as they used to be in another generation, Mr. Valenti. We are now torn between the first amendment and some very, very delicate questions. How obscene is "Pulp Fiction," and as great an art, and what if anything can or should we do about it? And what about gangster rap? Want to play it for your 4-year-old son?

And so we come here now caught up in new and more difficult constitutional questions at the very moment that we are moving now into a more technical, a more technological era than ever before where all of our telecommunications, our digital, our TV, our telephones, begin now to interact in new and powerful ways that will require us to now go back and examine some of the very basic premises that we have nurtured for all these years.

And so I close my comments observing that very much with us, today, Carlos, is the spirit, and the former leadership of Bob Kastenmeier, who for more than a decade led and inspired this committee.

As a matter of fact, he did such a good job, that if you weren't on the Intellectual Property Subcommittee you left it to Kastenmeier and Moorhead and later on Berman and let it go at that. The rest of the Judiciary Committee took a pass on these questions.

But we can't do it anymore. And the reason we can't do it and because a lot of my wonderful new leaders in government are telling us that venerable institutions no longer need to exist. I am told on one hand that we don't need to worry about antitrust activity in the department and then I am told on the other that the very agency they would cede it to, the FCC, doesn't need to exist. You only need an executive office there. Who needs Federal Communications Commissions?

Well, I think we need both. And I am not one of those—and maybe I am one of the old dinosaurs around the 104th, but I am not one of those that rush to this dismantling process with unconcealed glee. I think it ought to be a very careful, deliberate, well-thought-out approach. And now that we are out of that forced march called 100 days, we are now able to give some thought and dignity to the proceedings in the Congress. And this committee, under our chairman, I know is committed to that.

As a matter of fact, some consider it a weakness; his fairness is too fair. I think it is a strength. And I think it keeps this commit-

tee in the nonpartisan and yet forward-thinking way that is demanded of the times on the subject of intellectual property.

When we got back from China, the first announcement that we received was that after long last, the movie industry would be able to open an office in Beijing. We think that we may have had something to do with that.

We were looking in Asia, another huge area of our concern, for the enforcement of the intellectual property agreements that they have signed. You know, signing them are great days and great sound bytes, but who is going to enforce intellectual property rights in a country that has never heard of the subject in their judicial system before?

And, thankfully, we have a provision in which we will help train and that they are agreeable to that sort of thing.

And so, this, as you can tell, is a committee of—that I approach with great enthusiasm. The concurrent resolution on jazz has always been one of my great delights. The movie industry which—most Americans consider themselves to be movie authorities, not just movie buffs and I am no exception to that. And to tour lots and see African-Americans working on stages as construction hands—I remember when that used to be fought bitterly, year after year, how to get some black carpenters in the lots in Hollywood. And you can walk in anywhere now and look around and they weren't put there for me. It wasn't my benefit. I wasn't even supposed to have been on one lot that we walked into last night.

To see African-American vice presidents of motion picture corporations is a brand-new development and it continues the thread that two guys brought, one with President Johnson and one with Martin Luther King, over 30 years ago.

Thank you, Mr. Chairman for allowing me so much time.

Mr. MOORHEAD. Thank you, John.

One other member that has come in, he went to the wrong courthouse, which is understandable because there are several here in Pasadena. But he is probably our most famous member, Sonny Bono from Palm Springs, CA, the freshman Member in Congress, someone who has had a fantastic career prior to coming here. Sonny.

Mr. BONO. Thank you, Mr. Chairman. I will keep my opening statement brief. Being a songwriter and coming from that industry, there were always inequities that were hard for me to understand, first initially as a songwriter.

I didn't know why the Government got involved in a song at all or in a movie at all. As far as I was concerned, I wrote the song, or somebody else did, and it was mine. But then I found out that I could only have it for 25 years, I think, or 26 years. This was in 1952 when I started and wrote, "You Bug Me Baby."

And if you missed that moment, the song went away, and it wasn't yours anymore and it became public domain. And it was so strange. It is a very interesting business because a lot of the creators now are kids, and they grab a guitar and they write a song, and it is just a sound to them. It is theirs. And that song becomes a piece of art later on. And the creator never suspects sometimes that that will become a piece of art for the rest of life. And so to

him it is just a little song that he wrote for his girlfriend or whatever.

And so you have somebody who is really not as serious as other people who realize the commercial aspect of this. So you have got a songwriter, then you have got the publishers, as Mr. Murphy was talking about, who are aware of the commercial value of a song. So if they hear a song, they hear the value, the commercial value of a song. And their input is good. And they direct it in a proper way with more maturity.

But it goes from a little song to a commercial venture and then to a piece of art. And during this travel, it becomes public domain or under a legislative body that can direct where it goes and how it goes and what rights you have after you have created it.

So, I have a few questions that I want to ask. The public, and even this committee—and I certainly don't mean that arrogantly—sometimes, unless you are a performer and unless you are a writer, there are more details at that level than anyone else is able to understand.

And one of the issues I want to—Mr. Murphy gave a beautiful speech about publishers and I presume you represent publishers; is that correct? I guess my question to you would be what right does the songwriter have once he has designated it to a publisher as far as reproductions of his song?

Say some group wants to do his song and he doesn't care for this group or he doesn't think that his piece of art is represented properly, but the publisher sees the commercial side. What are the rights of the songwriter?

Mr. MURPHY. Mr. Bono, I think that a lot depends upon the contractual understanding the songwriter entered into with the particular publisher.

Mr. BONO. And let me just stop you there and let me bring out a point. And the point there that I want to go back to, the contractual rights, you have creators now that are 18, 17, so they enter into a contract. And once they enter into that contract, they are stuck to that, you know. And that goes on for life. It is unchangeable.

And I guess I want to raise the issue of equity between the songwriter and the publisher. And now we will go back to what does the songwriter have to say if somebody records his song and demeans his song or does his song in a demeaning fashion, what rights does the artist have?

Mr. MURPHY. In terms of the sale of recordings, as you know, Mr. Bono, there is a compulsory mechanical license in America. And as such, under the compulsory license, anyone, after the first use—you understand that under the licensing system that has been put together by Congress, the first use has always been reserved to the songwriter and to the publisher—the songwriter can prevent any use, the first use. Once that has been done, performed and made available to the public, the second and subsequent use then fall under the compulsory mechanical license. And as such—

Mr. BONO. Is that the songwriter's control when he records it for the first time basically is what you are saying, correct?

Mr. MURPHY. That is correct. The second time, once it has been recorded and made available to the public, then other individuals

can come along and record your song. And, of course, under the compulsory license, the song shouldn't be changed in any demonstrable way. Because there are some changes that are made to the song, but it shouldn't be demonstrable. No one should change the lyrics or the original melody in any way.

There are certain liberties that are taken in the arrangement of a song. It can be done electronically as opposed to an original piano version or instrumental version. Generally speaking, that is the right within the scope of the compulsory license. One cannot change the lyrics of your song. One cannot in any way change the song—the writer owns the song and they can't change it. If they do, there is recourse under the law and you can go before the courts and stop that.

Mr. BONO. Right. But let's go back to that. You can have your song demeaned in other ways than just the lyrics altered. And that is in the hands of the publisher only; correct?

Mr. MURPHY. I am not sure I understand what you mean.

Mr. BONO. I am saying if another artist takes the song and it displeases the creator of that song and he would prefer not to have that money or the song recorded by that person if they don't record it in the fashion that it was written and the intention is somewhat demeaning, does he have any rights or is it to the discretion of the publisher only to say, yes, you can record that or, no, you can't record that?

Mr. MURPHY. Again, under the terms of the compulsory license, anyone can record a song. I can think of some times when I was a publisher that the original creators didn't particularly like a version that was published, but under the U.S. act and regulations, that version had to go out. I am talking about a recorded version. This is not a revision of lyrics or text.

But the recording companies, as you know, do sign up an artist and do make the selection of that song. And of course, once they make that selection they have a right to put it out as long as it doesn't in any way change the original constitution of that song.

Mr. BONO. Here is what I would like to suggest to you, because we are getting into rhetoric. After a song is turned over to the publisher, he becomes more or less the owner of that song and really the fate of that song is up to the publisher.

And when we talk about this legislation, since we are going to have legislation and I understand you may get involved in that legislation, one of the bones of contention that I have as a songwriter is that you have nothing to say about your song after you write it and after you turn it over to a publisher. So the publisher has all of the say-so from that point forward.

So, if someone wants to take a song and mock you with that song and use it to debase you, I guess that is the word, they can. They have to be a little clever, but they can. But if it represents dollars to the publisher, the publisher might let it fly.

Anyway, I think that one consideration we have to talk about, since legislation is involved here, is that the songwriter—the creator should have as much rights as the publishers. And they don't at this point in time because hypothetically they signed a contract and it could have been when they were very, very green and didn't know a thing about the business.

And so I would urge you, because I will be active in that area, to let the songwriter have a say so. That has occurred with me several times and there was nothing I could do about it. On the—

Mr. MURPHY. Mr. Bono, I would be happy to talk to you and give you or any songwriter any advice that I can. Our organization stands ready to help songwriters in this area and would be happy to do this, and we do. That is what our organization does. And we would be pleased to review that.

Mr. BONO. I hope, again, if we are going to go with legislation, that we recognize the creator of the product. It is kind of like a painting belongs to the painter, but the song gets taken away from the writer. And I think it is inverted in some degree. So I think that equity should be worked out.

As far as archives are concerned, wherever the Government contribution is, is that public domain or is that for personal use? I mean, does it belong to a movie company? Does it belong to a private company or is it all public domain?

Mr. RICHMOND. I am not quite sure I understand the question. I think I do. The way that the House bill 1734, title II would set up the foundation, the foundation's primary role would be to work with the film community to raise private sector funding and the foundation would be eligible to match that funding with a limited amount of Federal funds and then those funds would be given out as grants to nonprofit institutions throughout the country for specific projects.

Mr. BONO. Are any of those preservations for private companies?

Mr. RICHMOND. No, the grants would be given to nonprofit institutions for specific projects. None of the funding would go to pay for any overhead on a project. And the foundation would focus on what has been described as orphan films, films that are held in the public trust by public institutions.

The Hollywood studio films, I think we all agree, and the Hollywood community certainly has agreed, are the responsibility of the studios to preserve.

Mr. BONO. I just think if they are privately held, then that should be up to that private person. My time is up. Thank you.

Mr. MOORHEAD. Mr. Howard Berman.

Mr. BERMAN. Thank you very much, Mr. Chairman. How did the ninth circuit ever get to Pasadena?

Mr. CONYERS. Political power.

Mr. BERMAN. It is interesting hearing Mr. Bono's questions, or reaction, the different ways we look at government. He sees it, after I wrote my first song, how come the Government is only letting me keep that song for 22 or 25 years. And I am thinking, the Government is protecting me from all the thieves who want to steal that song for 25 years. And here is a useful role for the Government, trying to protect the creative rights of Sonny Bono and others. And, in fact, on several occasions have extended that period of time and now we are proposing to extend it further.

The Government is playing the role of protecting the rights of the individual creator against the people who would want to steal his or her property. And so I guess it is all how you look at it.

Mr. BONO. Will the gentleman yield?

Mr. BERMAN. Sure.

Mr. BONO. There is a price to pay for that protection, to give up your property. I mean, a song is like a chair. Public domain means you don't get the money anymore.

Mr. BERMAN. It is the Constitution, the legislature, and the judicial branch that gave meaning to—well, we are getting back to the state of nature in a way, but gave meaning to this notion of your exclusive right to control and exploit your property.

And I guess we could take Mr. Murphy's suggestion of a temporary moratorium and just make a permanent moratorium on the expiration of copyrights. At some point, you have to—at some point the property right is going to end. I mean, I haven't heard any serious discussion that generations after you have created it—

Mr. BONO. Why can't the family keep it? It is an asset?

Mr. BERMAN. How far down?

Mr. BONO. Like a house or a car or like a painting, like any asset, it should be whoever created it.

Mr. BERMAN. The Founding Fathers said this was in order to encourage you in your work. For a limited amount of time, you would be protected. We are talking about, and I support the extension.

Mr. BONO. I would like to have the choice of the protection.

Mr. BERMAN. Well, I think you will need a constitutional amendment to do that.

But I would like to ask just a few questions of the panelists. First, Jack Valenti, when you deal with a motion picture—I know this could drift into other issues that you are not here to testify on, and I don't mean it to—what is the life of the author? Is it the studio that owns the copyright? Is it the producer who produces it? What is the life of the author?

Mr. VALENTI. The answer, Mr. Congressman, is it is not life of the author under works for hire. It would be 95 years, period.

Mr. BERMAN. Ninety-five years. Because it is this kind of—

Mr. VALENTI. Under the works-for-hire concept, one can be a person or one can be an enterprise.

Mr. BERMAN. Persons under present law get life of the author plus 50—

Mr. VALENTI. Right now it is 50 years. Under the European Union, it is life plus 70, which is the trampoline from which this whole hearing springs, in my judgment.

Mr. BERMAN. What is the European Union's directive doing with respect to motion pictures? How is it changing existing law?

Mr. VALENTI. It would mean that a motion picture that is in 1 of the 15 member States of the European Union produced in 1 of those member States, would have a life expectancy in the market of thorough protection by the government for the life of the author plus 70 years. It goes into effect—

Mr. BERMAN. I am confused about this as to motion pictures, the life of the author.

Mr. VALENTI. In Europe there is a different concept.

Mr. BERMAN. You don't have work for hire in Europe?

Mr. VALENTI. They have what they call moral rights. It comes from the French phrase, *droit morale*, which gives the right to the author under a theory called the *auteur* theory. In Europe it is the director who has the authority over that motion picture, no matter



who invested money in it or who produced it, et cetera. It is a different concept than ours.

Mr. BERMAN. I understand. And I am just trying to translate that into the different ways we treat copyright protection. In the United States under the 1976 law, then, a motion picture is protected for a set period of years, which is what? How many years under existing law?

Mr. VALENTI. Correct. Fifty now.

Mr. BERMAN. Seventy-five years?

Mr. VALENTI. Excuse me. I am sorry; 75, because you are going 20 more years in order to match the Europeans. Forgive me. I erred. It is 75 years.

Mr. BERMAN. And the chairman's bill would extend that 20 additional years in the case of motion pictures?

Mr. VALENTI. Correct. Correct.

Mr. BERMAN. Well, 20 additional years in all cases, but that is how it would work here. From 75 to 95.

Just on the issue, since there is nobody testifying against the copyright extension, the statement that works in the public domain don't get effectively—clearly, I am for the bill. I think the trade arguments are compelling and I think the notion of rewarding the creator and thereby incentivizing the creator and the creator's heirs for a reasonable period of time, not for centuries, but for a reasonable period of time, argues for the bill and that is why I am a co-sponsor of it.

But one of the arguments being given by some of you is that in addition works that go into the public domain lose value and don't get exploited. But books that have gone in the public domain, all kinds of classical music is in the public domain. People have found it economical to publish them and to produce the sheet music from which symphonies in the public domain are performed and recorded and sold.

I mean, there is still value to a lot of those works. How would—I am I wrong about that?

Mr. VALENTI. I don't want to speak about sheet music. I will leave that to Mr. Murphy and the music I will leave that to Marilyn.

In the movie business, let me give you the argument that I have read in several papers which are in opposition, mostly by academics. And I haven't read any paper by anybody who is a professional in the business who is opposed to this.

The academic argument is that, one, the customer benefits because he gets these public domain properties cheaper. The answer is let's take "It's a Wonderful Life" in the public domain. I pay \$52 a month for cable, and when it is shown on cable, my cable bill is not reduced 1 cent. When it is shown on television, the television station charges the advertiser the same rate that he charges him for the hour previously, if it is in fringe time.

There is no economic benefit to the consumer that I have been able to figure out. I have read a paper by Mr. Gomery of the University of Maryland in which he is talking about—he made his principal pitch on silent film and if you had public domain, silent films would suddenly become very popular. But even the ones that are in public domain now, the distributors of public domain films

are fortunate and happy to sell a few hundred copies. So we are talking about an infinitesimal amount in the marketplace.

The fact is, Mr. Berman, that a picture that is in public domain, unless it is a unique thing, like "It's a Wonderful Life", which of the 500,000 films on deposit at the Library of Congress, stands out singularly, nobody invests money to enhance that film.

Beethoven is different. I presume you can put out some sheet music on Beethoven or make a copy of the Beethoven symphony. But when you are mucking around with a negative on which you have to spend hundreds of thousands of dollars on that negative and knock off the prints on that, too, you are talking about a sizable investment and, therefore, few people are willing to make it. That is why some of these public domain prints become so haggard after a while.

I have seen some "It's a Wonderful Life" renditions on television that I think it is a disgrace to put on the air, with lines across it and the print is in a debilitated form.

Mr. MURPHY. Mr. Berman, two examples that come to mind about the public domain and its value—what it means. When you think of what happens in the Soviet Union or in any country where there is absolutely no control over copyrighted works, you don't have any products available, be it classical music or anything. People will not invest where there is no stability or no copyright base.

Where the copyright base is there and there is protection for copyright, people are willing to invest and they make the products available. It is truly that simple. I was president of G. Schirmer Music Co. before I came to head up NMPA and the Harry Fox Agency and G. Schirmer was the leader in the world in producing classical music and educational music.

And in our repertoire we had a lot of classical music and we had a great deal of difficulty competing with China and the Philippines and places where they would produce product and ship it on into the United States from Asia where it was cheaper to manufacture, so we didn't do it.

What we did do is things that were copyrighted and often the copyrighted works are what actually carried our expenses to put out works which we wanted to have for a full repertoire. So you would bring the classical music out, but also hopefully get some royalties from other works from ASCAP and BMI from some of our composers.

Mr. BERMAN. Let me make sure I understand how the whole copyright law works. When Toscanini conducts and some record company records a Beethoven symphony which is in the public domain, is that Toscanini recording conducting the New York Philharmonic in a Beethoven symphony, is that a copyrightable record?

Mr. MURPHY. No, sir. No, it is not copyrightable. You may--

Mr. BERMAN. Somewhere, a record company over and over and over again has decided that notwithstanding, that it is not protected, notwithstanding that there is value in going out—

Mr. MURPHY. Have you copyrighted "Circle P," that is a copyrightable work as a phonogram. "Circle C,"—the music itself—is not copyrightable unless you do an arrangement of that work, there may be rearrangements of a public domain classical work which

are copyrightable. Although the preponderance of classical work that is out there for "Circle C" is in public domain.

Ms. BERGMAN. If I may, I think that you stack the deck a little bit when you go to Beethoven. I think the earlier example that Mr. Murphy gave of the Samuel Barber piece is a better example of a work that was created some 25 or 28 years before it found an audience.

Now, that is very common in the world of serious music. I don't like to use the term "serious music." It makes our music sound frivolous, but I mean classical music. But it also happens in popular music where one never knows when a piece of music is revived, a song that either had a life at one time and expired and then is revived by a contemporary artist and becomes a hit.

I submit—

Mr. BERMAN. But the problem for that is the unfairness to the original creator and his heirs.

Ms. BERGMAN. That is the point.

Mr. BERMAN. It is not that that won't happen. No works will disappear necessarily.

Ms. BERGMAN. But your question went to the promotion. Who then is going to print sheet music? Who then is going to work on the song from the creator's point of view? If you are depending upon the creator himself or herself, it might not be economically feasible. It may be the one song in somebody's catalog that earns them some money long after the copyright is gone. You never know where and when an older work suddenly gets a second life.

And I think this goes to the heart of the whole concept of intellectual property as property. And I certainly agree with Congressman Bono that at the heart of that argument, property is the operative word here and it is no less real because it comes from the factory of someone's mind as this cup that somebody made, which is not biodegradable, may I add.

But I don't think that a piece of intellectual property should be biodegradable either. And I think why we are here today is precisely what you were talking about to enhance the right of the creator and extend the length of the protection of the work.

Mr. BERMAN. And put the Government on the side of enforcing those rights.

Ms. BERGMAN. Exactly. Exactly. Exactly.

Mr. BERMAN. Thank you, Mr. Chairman.

Mr. MOORHEAD. Thank you, Mr. Berman. Our next questioner would be Xavier Becerra.

Mr. BECERRA. Remember to say the H, Mr. Chairman. Xavier.

Let me ask a question to anyone on the panel who wishes to try to answer this. Back in 1976, when we did alter the copyright laws to extend them for the 20 years, there was some debate about who would receive the right to that extended copyright.

Ultimately, the right was given to the owner of the copyright and not to the author, if the author had transferred that right to the present owner, the publisher, for example.

What was conceded to the author was a 5-year period under which the author, if he or she submitted some type—or initiated a termination of that right, could then during that 5-year gap, get full rights to that copyright.

I just realized in reading—in preparing for the hearing that the current legislation that we have before us, H.R. 989, doesn't alter the language in the current law which says that the right goes to the owner, but can be canceled by the author if the author acts within 5 years, the time under which the right would expire for the possessor of the copyright.

I don't know if that was an oversight, Mr. Chairman, on the part of the sponsors and the cosponsors of the legislation, but I would be interested in hearing the opinion of the panel as to whether or not we should be providing the same type of protection to the original authors of that work that we provided in 1976, a 5-year right, which I understand in many people's eyes was a major concession on the part of the authors since no one bargained for an additional 20 years back in 1976. And I suspect the same thing applies now in 1995 that no author or current owner or purchaser of that copyright bargained for an additional 20 years.

Mr. VALENTI. I cannot speak for other members of the panel because there is a difference in this gossamer sculpture of an author. Marilyn and Alan Bergman are authors. They write their songs. They do not deploy 100 people to help them. I guess they sit in a room and do it alone. You don't sit in Hollywood Bowl when you are creating, do you?

Ms. BERGMAN. No, sir.

Mr. VALENTI. They are authors. Samuel Barber is an author. He wrote a symphony. In the movie business we are the only art form in this country that I know about that is collaborative. I guess a stage show would be the same thing.

Mr. BERMAN. And legislation is.

Mr. VALENTI. It is a collaborative effort. You deploy a hundred, a thousand people on the set. And who is the author? That is why the author in the motion picture, the copyright owner, can be an enterprise that puts the money together and organizes the entity.

A good example, tell me who the author is of "Gone With The Wind"? It was written by Margaret Mitchell and the book was bought by David O. Selznik, whereupon he hired, count them, seven different directors. Hired one, they get on the set; fired him and finally brought on a fellow by the name of Victor Fleming. He finished the picture. He hired, count them, over 20 writers.

Mr. BECERRA. Let me interject. I think the case of films is different because we do in this country recognize work for hire. But in the case of those works—

Mr. VALENTI. I will withdraw from the microphone.

Mr. BECERRA. I am more interested, I guess I should say, in hearing from the publishers or ASCAP, those people who represent both the original authors and those who purchase the rights to that copyright; in many cases the publishers.

Should we be providing the same type of extension, even if it is the minimal extension of 5 years, to try to terminate that right that we provided back in 1976? As I understand it, correct me if I am wrong, the legislation that we have before us does not alter section 304(c)3, which provided for that 5-year time period within which to revoke the transfer.

Ms. BERGMAN. My counsel just handed me a note which says because the bill doesn't alter the existing termination right, it still

would be—and I cannot read this word. Looks like “placed” and the author, if he exercised the termination right, would recover the copyright for an additional 20 years. It was considered in drafting the bill.

Mr. BECERRA. And maybe your counsel could come to the mike. As I read section 304(c)3, as I have it here, the right—the language is very specific. It doesn’t say it is a 5-year right to terminate at expiration of the current copyright. It says 5 years within which to terminate after 56 years.

So once 56 years expires, you are out of luck. And this 20-year extension would still not help those authors who had works back in the 1920’s and the 1930’s who are about to expire because the 56 years would expire for them in many cases in the mid 1990’s or 1997, whatever the case may be, but they will not get the extra 20 years. We would have to amend the language to say over the next 76 years.

Give us your name.

Mr. MOORHEAD. Take the mike.

#### STATEMENT OF FRED KOENIGSBERG, COUNSEL, ASCAP

Mr. KOENIGSBERG. My name is Fred Koenigsberg. I am counsel to ASCAP. I thank you for the opportunity to answer the question.

This point was considered, Congressman, very carefully. The termination right that is provided in section 304, which allows the author to recapture the work at the end of 56 years would still be in effect even for those works that were originally published in the 1920’s as you just alluded to. But the recapture that the author would then have under the bill as drafted and as introduced would be a recapture not for the last 19 years of the copyright term, which is what the 1976 act provides, that is 56 years into the 75-year term, but it would be a recapture at 56 years for a 95-year term. So that the author would then be recapturing not 19 years, but 39 years, the entire remainder of the copyright term. And that takes care of the author’s rights fully.

It is not that the author needs another termination right. To the contrary, the existing termination right would enable the author to recapture this entire extension period as well.

And the bill, as drafted, doesn’t have to provide for an additional termination right because by keeping the termination right exactly the way it works under current law, it enables the author to recapture not merely for the remainder of the old copyright term, but for the remainder of the extended copyright term as well.

And as Mr. Murphy’s testimony indicated, there is a delicate balancing here. There is a question of publisher’s rights, of author’s rights, and obviously that has to be discussed and worked out. But the point was most definitely considered in the drafting of the bill and was considered, I think, from the perspective that have you looked at it.

Mr. BECERRA. Let me ask this question, and follow me through on the scenario. Someone writes a song in 1923. Under this current law and under this legislation, you are given 56 years—

Mr. KOENIGSBERG. The song was written in 1923?

Mr. BECERRA [continuing]. And say the author perishes, dies in 1923. So you are given—you count the 56 years, correct?

Mr. KOENIGSBERG. Right. Which takes us to 1989.

Mr. BECERRA. And then you count a 5-year period.

Mr. KOENIGSBERG. There was a 5-year period from 1989 to 1994 under which the author's heirs could have recaptured that copyright. And, presumably, if it was a work of commercial value and if they did not reach an agreement with their existing publisher—which in many cases occurred because they were happy to reach agreement; but, presumably, if they wanted to recapture it then, they did recapture it; and they have recaptured it.

Mr. BECERRA. Let's say someone didn't negotiate during that period or didn't try to terminate during that 5-year period in 1989 to 1994, for whatever reason, believing that there was no reason to try to extend the right for those extra 20 years.

Mr. KOENIGSBERG. For the extra 19.

Mr. BECERRA. Now, it is 1995. This legislation passes, and now we have extended the right of the copyright another 20 years. The owner now has another additional 20 years. But the author, because current language says you must act between 56 years plus 5, no longer has the right to go to the owner of that copyright and say, you have got 20 extra years on something I wrote. That was not negotiated when we first transferred the copyright to you. So, in essence, that owner of the work is losing 20 years' worth of copyright.

Mr. KOENIGSBERG. First of all, let's talk about what case we are talking about. We are talking about the narrow case where the work is older than 56 years today but younger than 75 years. That is all we are talking about.

And I should tell you, Congressman, we very carefully looked at this question as well. Don't think we overlooked it.

The thought was that, in this case, if the work had had any commercial value at all and if it was in the author's—actually, the author's heirs is what we are talking about—interest to recapture that copyright, they would have done so for 19 years as readily as they would have done so for 39 years.

Mr. BECERRA. But what if the author never knew about the extension that was granted in 1976? Say it was an obscure piece—

Mr. BONO. Will the gentleman yield?

Mr. BECERRA. Sure, if I can just finish this; and then, of course, I will yield.

What if the author—it was an obscure piece, never got much notoriety, and all of a sudden Michael Jackson picks it up and, boom, it just takes off. What if the person thought why try to pick up \$200 worth of royalties for the next year for 19 years? I will let it expire. All of a sudden Michael Jackson does something with it, and the 20 years' extension is granted through this legislation, and now there is megadollars being lost by the author because he or she may haven't understood the law well, been advised of it and now no longer has that opportunity.

Mr. KOENIGSBERG. That is a danger that always exists. It doesn't merely apply to these works. And it is for that reason that authors—I think particularly in the music area songwriters have groups like the Songwriters Guild of America that makes it a point of telling their members you have got a work, and it is coming up. And publishers do this, too.

Mr. BECERRA. I am hearing that I shouldn't worry about something that affects your membership. You are telling me that you are OK with the way it is. You wouldn't rather see the legislation amended to, say, 76 years versus 56 years.

Mr. KOENIGSBERG. That is exactly right, Congressman.

I can tell you and Ms. Bergman, as a member of ASCAP's board can confirm, that ASCAP's board, who are songwriters and music publishers, ASCAP's board voted a resolution that said that this bill, the bill that Congressman Moorhead has introduced and that you all have cosponsored, is the bill that ASCAP supports.

Mr. BECERRA. Was there any dissension or discord among the songwriters or the authors within ASCAP?

Mr. KOENIGSBERG. There was a great deal of discussion by both the writers and the publishers. It doesn't just go one way or the other, as Mr. Murphy has pointed out. But the conclusion of ASCAP's members was that this was the bill that they were supporting.

Mr. BECERRA. Thank you. Let me yield to my colleague.

Mr. BONO. Thank you.

You raise an excellent point, and it is a classic case of legal knowledge and very little knowledge about legalities. And what can easily happen is what you are talking about, is that a nonlegal mind can just go on with life and suddenly realize they should have done something. Not everybody—excuse me, not everybody gets the data that the lawyer is conveying to you. Not every songwriter—and, again, bear in mind a lot of these guys are kids. They are brilliant, but they are kids who go on with life and forget about these things. So it is a strange situation.

And I think this—I think your point is very well taken. I think at the point of transition that the songwriter could be informed that they have rights or should have an opportunity at the point of transition, but on the one hand you are doing the songwriter a tremendous favor. You are letting some guy maybe in the south who wrote three songs and they hit be a source of income for him for his annuity all his life, so that is wonderful.

But, on the other hand, like you say, this other scenario could get played out; and he could blow billions. So, you know, I think it is only fair that there is some effort made to inform them of this situation.

In most cases, probably 99 percent of the cases, the songwriter would say, great, we want the extra time—I know I would—and probably would not grumble about that. But it is an excellent point, and that occurs. The publishers have a battalion of attorneys. The songwriter has none.

Mr. BECERRA. I thank the gentleman for his insightful comments, and I will yield to my other colleague from California.

Mr. BERMAN. I understand the songwriter who decided to continue the publisher, not terminate the publisher and continue him for 19 more years, probably would make the exact same decision if it was 39 more years. I mean, it is hard to understand the situation where he would not make that extension.

It is the flip side that I am wondering about in terms of the publishers. This reminds me of one of my less successful entries in the

copyright field with a Supreme Court case called Mills Music where I got chewed up on all sides.

But is—Mr. Murphy, are you saying that you think it is all right—we agree that it is all right for the songwriter to be able to cut us out of 19 more years even though we did all the work, exploited it and did all this stuff to make it a successful commercial effort. It is all right to cut us out for 19 more years but not to cut us out for 39 more years?

Is that, in a sense—that that—are you taking the other side, in a sense, of Mr. Becerra's question and wanting the bill to change—whatever publishers were on the board of ASCAP don't reflect your view on this issue?

Mr. MURPHY. Yes. What we are saying is we want a balance of the publishers' rights. If there is a term extension, we would like to see the balance be kept so that the publishers would be able to receive an additional term extension, if you will, as the writers would be.

Mr. BERMAN. You would be able to if they don't terminate you after the 56 years; right?

Mr. MURPHY. That is correct.

Mr. BERMAN. But if they do terminate you, then you are no longer terminated for the next 19 years before it goes into the public domain. You are terminated for 39 years, and that bothers you?

Mr. MURPHY. Yes, sir.

Mr. BERMAN. Thank you.

Mr. BECERRA. I will leave this point, other than to say it almost feels patronizing to think that we need to do something for you if you all don't think it is necessary. So I will drop it for now.

But I am a bit concerned that there may be some songwriters or others who write a copyrightable work that may not find the same protection afforded to them that was afforded in 1976. And it was hotly debated then as to whether the rights should adhere to the owner rather than the author, and the burden is on the author to somehow terminate that right or that extension to transfer that right.

If anyone on the panel is interested in answering this question, if I can get a brief response, we are considering extending for another 20 years; and I am a cosponsor of this legislation to do so. Can we expect that in another 10, 15, 20 years we will be hearing from you all again to extend another 15 or 20 years because people's life expectancy has grown and because Europe is doing something different as well?

Ms. BERGMAN. I think that most of us have made clear that this request is in response to the life-plus-70 that the European Community will be entering into a month from now.

The life-plus-50 was based on an agreement in Berne, which was to cover two generations. That was the original plan. Two generations now is longer than it was.

Mr. BECERRA. So would it be your opinion that if Europe changes its current regimen and says life-plus-90—

Ms. BERGMAN. I think the trade argument speaks to that. I think if, at a certain point, it becomes clear, as it is now to us, that our country will be operating at a disadvantage in terms of the balance of trade, then, yes, I don't see why it shouldn't be reopened. If the



trade argument is valid for life-plus-70 then maybe some day it would be valid for life-plus-90.

Mr. BECERRA. We want to be sure that we are competitive in the market.

Ms. BERGMAN. Exactly.

As the only songwriter on this side of the table, I think there is some confusion that I hear about the way the word owner, author, artist, songwriter is being used. Sometimes they are used interchangeably here this morning. And I am sorry Mr. Valenti is not here; but, for example, the author of "The Way We Were" on the copyright form in Washington is Columbia Pictures. It is not us.

And, as he said, my husband and I and Marvin Hamlisch sat alone in a room. It was not quite the same thing as Victor Flemming and a team of directors working on a sound stage creating the whole frame of the movie.

And under that contract, Congressman Bono, because this enterprise is the author, yes, the words can be changed; yes, the music can be changed; and, yes, we don't have control because it was a work for hire.

Mr. BONO. I understand.

Mr. BECERRA. Thank you very much for that.

And let me just short-circuit this. I close with just a question for Mr. Richmond. Mr. Richmond, can you tell me—again, briefly, because I know my time has expired, pretty much—what efforts have been made to protect or preserve works of less general or public recognition or less industry recognition such as some of the works done by early black filmmakers or—there is a particular film that comes to my mind, "The Salt of the Earth," which I thought was a tremendous piece; but, obviously, it was a low-budget piece that talked about a subject that may not be that appealing to the general audience.

What is the preservation board doing in regards to works which are culturally and historically important to this Nation but may not have always been considered culturally and historically important?

Mr. RICHMOND. Well, I think what the board is doing—the main thing they are doing is trying to get the legislation passed for the National Film Preservation Foundation, because that is the entity, working with the Nation's archives, that will focus on the preservation of films that do not have a Hollywood studio with both the economic interest and the financial capabilities of preserving it.

Many archives throughout the country do have to focus on those kinds of films. Many of the black films, films by black filmmakers that you are talking about, I know have been preserved or are waiting to be preserved at the Library of Congress, at the Southwest Film and Video Archive in Texas and at other archives throughout the country.

So the archival community certainly is aware of the importance of this. We spend a lot of time trying to acquire the footage we need on these types of films that we know are especially in danger. And we do prioritize trying to preserve them.

But it is our inability right now to stay ahead of the race against time that is really the impetus to the legislation that we have been talking about today.

Mr. BECERRA. The legislation speaks about, with regard to the foundation, creation of the foundation, about providing for a diversity of points of view from the film community, and it does mention the different players within the film community.

I am wondering what your opinion would be about extending that beyond diversity of the film community. Because I know for the longest time there were few people who spoke up for black filmmaking or for the growth of Latino artists within the film industry. How do we make sure that there is a voice that reflects that portion of the American community?

Mr. RICHMOND. I think including historians and educators in the process would be a very good thing.

Mr. BECERRA. We currently do include them. And I know that the preservation board has a membership of about 20, and it is fairly specific in the law as to who sits on the board, from which associations and which sectors of the industry. And I believe there are two or three members who are appointed at large.

Do you know what the membership is of the current preservation board? For example, how many African-Americans or minority members might sit?

Mr. RICHMOND. I am sorry. I am not a member of the board, and I am not familiar with the current membership.

Mr. BECERRA. Do you think it would be worthwhile to have language in the legislation that reauthorizes not only the preservation board but also the foundation, that considers not only the diversity points of view of the film industry but the diversity of the points of view of the American community?

Mr. RICHMOND. I think the intention of the foundation is to include that kind of diversity of input, and anything that can be done to ensure that I would be very much in favor of.

Mr. BECERRA. And I am happy to hear you say that.

I see nothing in the legislation, as it is currently drafted, which would urge in the formation of the foundation's board, or even in the current preservation board, that we move toward ensuring that type of diversity to the degree—as the language is—to the degree practicable.

Do I hear you saying that that is something that you think might be worthwhile considering, including diversity beyond that within the film industry?

Mr. RICHMOND. I would be very much in favor of that, yes. Input from the broadest range of the American public is necessary in making decisions on what does get preserved with the limited funding that is available. Even with the foundation in place, realistically, not everything gets saved. It is impossible. Not everything in any area of life gets saved. So, hard decisions have to be made; and those decisions should be as informed as possible.

Mr. BECERRA. I agree. And I think these days we are recognizing more and more that there are works out there that are culturally and historically significant which maybe 10 or 30 or 40, 50 years ago we would never have considered them as such. And I think you are right, and I hope we head in that direction with this legislation as well.

Thank you, Mr. Chairman, for the time.

Mr. MOORHEAD. Thank you. And I want to thank this panel. It has been excellent. We appreciate you coming over and contributing to this discussion.

Mr. CONYERS. Mr. Chairman, could I add my compliments to the panel and to Mr. Valenti who recently had to leave because of a time consideration? But I think this has been an extremely rewarding discussion about some very important issues within the two pieces of legislation that you have commented on. Thank you very much.

Mr. MOORHEAD. Thank you.

I am going to ask the second panel to come forward.

Our first witness on the second panel will be Ms. Martha Coolidge, who is the cochair of the Directors Guild of America's President's Committee. Ms. Coolidge is one of today's most well-known directors. She directed two major film productions back to back in the past year: "Angie" and "Lost in Yonkers." Ms. Coolidge has directed other award-winning movies such as "Rambling Rose" and "Valley Girl."

She holds a masters of fine arts degree from New York University and started her professional career by directing award-winning documentaries. She helped to found the Association of Independent Video and Filmmakers, Inc. She serves on the board of directors of the Directors Guild of America, Women in Film, the American Film Institute, and was named to the dean's advisory board of UCLA's School of Theater, Film and Television.

Welcome, Ms. Coolidge.

Our second witness will be Jeffrey P. Eves. Mr. Eves is the president of the Video Software Dealers Association. The VSDA represents over 20,000 video retail stores in North America.

Prior to his present position, Mr. Eves was the corporate vice president of Fort Howard Corp. He served in senior level management positions in the areas of international trade government and market. Mr. Eves was appointed by President Nixon as Special Assistant to the President and Chief Liaison between the White House and the business community and by President Ford as Director of White House Conferences.

He holds degrees in business from the University of Nebraska and in economics from the University of California at Berkeley.

Welcome.

Our third witness is Mr. Michael Weller. Mr. Weller is a playwright and screenwriter, having written over 40 plays and screenplays, including "Hair" and "Ragtime." He is a member of the Writers Guild of America East and the Dramatists Guild of America, where he serves as a council member.

Welcome.

Our fourth witness is Ms. Judith M. Saffer, assistant general counsel of Broadcast Music, Inc., BMI, one of the Nation's largest performance rights society.

Ms. Saffer was a graduate of the New York University Law School, a member of the executive committee and the president-elect of the Copyright Society of the United States. She is also secretary of the Foundation for a Creative America and is active in the American Intellectual Properties Lawyers Association.

Before commencing her career in the law, Ms. Saffer was a professional ballet dancer with the Ballet Russe de Monte Carlo and appeared in films and television as an actress and dancer.

Welcome, Ms. Saffer.

We have written statements from our four witnesses, which I ask unanimous consent to be made a part of the record; and I ask that you all summarize your statements in 10 minutes or less.

Again, I ask that the subcommittee hold their questions of all four witnesses until they have completed their presentations. And I feel we are very fortunate to have such a very fine panel today and with so many accomplishments.

Mr. BECERRA. Mr. Chairman, I hate to interrupt, but I do notice that it is 11:30, and we probably took a lot more time with the first panel than we should have. I know that each panelist has a great deal of information to provide.

We do have their written testimony, and I would urge us to ask the panelists, as much as possible, to limit their opening statements so we can have as much time to engage in a good dialog with them and have the question-and-answer period extended, because I know we are going to start losing members because we were told that the hearing would end at about 12.

Mr. MOORHEAD. I don't want to limit them too much, because they have waited for a long time. Use those comments with discretion.

Mr. CONYERS. Mr. Chairman, I respectfully enjoyed the discussion that my colleague engaged in, so for him to suggest that maybe the witnesses ought to be briefer might come at a little bit inopportune moment.

This panel will not convene again, and I know that members have to leave. We are very important people. But let's give them as full a time as possible. Normally, it is a 5-minute period, but let us be as generous as we can.

Mr. BECERRA. And, Mr. Chairman, I meant in no way to limit them. I only wish to be able to participate, as I know some of the individuals who are on the panel probably have some urgent matters to care for. And I would hate to see that we lose some members because we all have things to do. And I would love to have them talk as much as possible.

Mr. MOORHEAD. Well, let's let the witnesses get started.

#### **STATEMENT OF MARTHA COOLIDGE, MEMBER, DIRECTORS GUILD OF AMERICA, INC.**

Ms. COOLIDGE. My name is Martha Coolidge. I am a feature film director and a member of the Directors Guild of America and a member of its president's committee, which has guided our legislative efforts in Washington.

I am here to ask the subcommittee to support H.R. 1248, the Film Disclosure Act, in the name of fairness to consumers and to film artists as well.

What we would like to see is a simple statement of fact regarding motion pictures altered after their initial release and shown on TV, airlines, and cassettes. Tell consumers clearly and succinctly how the movie has been altered and give the director, screenwriter, and cinematographer a chance to object if she chooses to do so.

Hardly revolutionary, H.R. 1248 is a truth-in-the-marketplace bill entirely consistent with current practices which tell consumers about the products they buy.

Soon I will be completing my next major film, "Three Wishes." It will be released at about Thanksgiving, and I hope that you will all come to see it and you will bring your families, and I hope that you will see it more than once.

About a year from now, "Three Wishes" will start to show up in the ancillary marketplace—on cable, in hotels, on airlines, on cassettes, and then perhaps on the networks and then syndicated television. What is virtually certain is that when this film is distributed in these markets it is going to be altered. Shot for the wide screen, it will be squeezed into a square TV form and edited for TV viewing, not for violence or sex but to fit in an assigned time slot. And it may be speeded up on TV, a process called lexiconing, destroying all my careful timing.

I have high hopes for this movie, commercially and artistically. I am applying the 25 years of experience I have in directing films to guide this project frame by frame to the best possible outcome. It is my reputation that is on the line when people see this film. And when they see less than I have given, I would like them to know that.

When "Three Wishes" is altered in the ancillary markets, I would like people to know how it has been altered; and I would like the opportunity to object to these changes if I judge them egregious. This is all that H.R. 1248 seeks to accomplish.

I consider myself a film artist. I am a painter, a storyteller, using motion picture cameras, sound, and music. I am involved in an art form, the great American art form; and what we do in making films enriches the artistic and cultural heritage of our country.

Let us treat the people who see movies and those who craft them with the modicum of legal respect this bill provides.

What will happen if the labels in the Film Disclosure Act are applied to films? Great upheaval in the marketplace if you listen to our opponents. But where is the evidence for this? There are three labeling regimes in place today, including the inadequate one from the MPAA, and no economic catastrophes have ensued.

The companies have a history of opposing every innovation on the basis that the sky will fall, and it is appropriate for the subcommittee to keep this in mind. The companies have argued that TV, the director's cut, and even VCR's would all ruin the motion picture industry. Not only were they wrong, but all of these advances have vitalized the industry economically. And judging from this history, if the subcommittee wanted to boost the financial fortunes of the producing companies and distributors, it ought to pass H.R. 1248 unanimously today.

Why do we need a law? Why can't we work this out among ourselves? We tried, and we failed. We couldn't get the major companies to agree on a factual label that would in any way recognize the efforts of those on the creative side.

But even if we had agreed on the words on a label, we would have failed in application because of the complexity of the universe of film ownership and distribution. There are too many players. No table in Hollywood, nor anyone in Washington where the tables are

even bigger, could accommodate everyone whose presence would be required.

Here is a personal example reflective of this complexity. A few years ago, I directed a motion picture called "Rambling Rose" about the awakening of human love. It was not a movie about sex, but one sexual scene was critical to the film's plot and the development of its main characters.

The airline distributors simply cut the scene out of the movie, turning the story into gibberish. I had offered to trim the scene, but my offer was refused. This happened at Academy Award time when the film was being considered for nominations. The reputations of the actors, the writer, and my own reputation were at stake.

The copyright holder, Carrolco, insisted in defense of the movie that the altered version carry a label laying out the alterations, but many airlines refuse to buy movies with restrictive labels. Here we have the copyright holder insisting on a label and distributors and exhibitors turning thumbs down.

This is an example of the complexity in the world of production and distribution and the reason why only a national law can address the matter of labeling.

Let me briefly add the endorsement of the Directors Guild to both of the other measures under review today, copyright extension and the reauthorization of the National Film Preservation Act.

As the Europeans move ahead to extend copyright terms, we need to do the same thing as a matter of equity and economics.

We enthusiastically support reauthorization of the Film Preservation Act, particularly since the act grew out of our own early lobbying efforts. With funding for film preservation choked off at the National Endowment for the Arts, it is more important than ever that the Library of Congress continues to hoist the banner for preservation efforts.

Mr. Chairman, I am sure this hearing is a first, taking testimony on three different bills that affect directly, though in disparate ways, the motion picture industry. I take it as a sign that Congress now recognizes the complexity of the economic, artistic, and cultural issues related to motion pictures.

In our view, all of these measures advance either a sense of economic fairness related to movies or advance their importance in the cultural sphere. The most elemental advance would be to end deception in the U.S. marketplace and tell consumers when the movie they are watching has been altered. This stamp of authenticity is a small step to take to enhance respect for our greatest art form.

And I want to personally applaud Mr. Bono for his concern for the creators of songs which I think is very similar to our concern for the creators of film, our film artists.

I just have three things that I would request, Mr. Chairman, to be placed into the record:

The first is the position paper supporting the Film Disclosure Act by the American Cinema Editors and by the Motion Picture Editors Guild.

The second is a short letter to you and the committee from Jimmy Stewart supporting H.R. 1248. Mr. Stewart has been con-

cerned with this issue for many years and has visited Congress several times.

And, finally, I am pleased to announce that the Screen Actors Guild East and West have officially voted to support the Film Disclosure Act. This is a tremendous vote of support for the bill. SAG is a huge union with almost 80,000 members all over the United States. And I would like to point out that this position of support underscores the traditional relationship of trust between actors and directors.

Thank you very much, Mr. Chairman, for listening to our petition.

[The prepared statement of Ms. Coolidge follows:]

PREPARED STATEMENT OF MARTHA COOLIDGE, MEMBER, DIRECTORS GUILD OF AMERICA, INC.

My name is Martha Coolidge, and I am privileged to appear before the subcommittee today in my capacity as a feature film director and as a member of the Directors Guild of America. I have been a member for some years of the DGA's President's Committee, which has steered our efforts in Washington to provide greater protection for films and film artists.

Perhaps I am alone among the witnesses giving testimony this morning in being enthusiastic about all three pieces of legislation that the subcommittee is considering today, though my remarks in the main focus on H.R. 1248, the Film Disclosure Act of 1995.

I would doubt that any other single Congressional hearing has ever focused on three bills together that relate so directly, though in disparate ways, to the motion picture industry. I take this as a recognition by Congress of the importance and complexity of our industry in economic and cultural terms.

Before the main focus of my remarks, let me briefly touch on H.R. 989, the bill extending copyright term, and H.R. 1734, the bill reauthorizing the National Film Preservation Act.

H.R. 989

Within the last year or so, the European Union has adopted a rule extending the term of copyright among its member nations, essentially seeking to harmonize differing copyright terms among the countries of the Union. And as is almost always the case when the Europeans lead the way, the emphasis is on providing greater protection to authors.

Too often, our own country, the world's leading copyright exporter, follows along, rather than leads, in efforts to enhance protection. We must not delay, though, in adopting a longer term of copyright protection for reasons that essentially have to do with equity and economics.

It simply is unfair that authors and copyright holders in Europe should enjoy a greater incentive to the production of further work through enhanced protection denied their American counterparts. There is also what I would call the "Free lunch" issue, in which Europeans will be able to enjoy American copyrighted works without paying for them, though European authors will be compensated.

The average theatrical motion picture these days costs many millions of dollars to make. To recoup this investment, the companies have to distribute product in many countries and over a long period of time.

The copyright term of a number of landmark films, such as "Gone With The Wind," will expire within a few years, even though there is obviously considerable commercial value left in the film. Cycling more money through the system through an extended copyright term will help insure future production.

Having said this, it is worth noting that the directive from the European community that encourages a longer copyright term also explicitly states that "the principal director of a cinematographic or audiovisual work shall be considered as its author or one of its authors. Member states shall be free to designate other co-authors."

Again, as in the case of Berne implementation, we in the U.S. seem spurred on to higher levels of copyright protection by following a European model, but we do so selectively. So long as we studiously avoid a discussion of moral rights, of natural persons as authors, even in a collaborative setting, we will not close the gap of hypocrisy with which the Europeans regard our copyright policy.

So, we support the extension of the term of copyright, but we would ask that the subcommittee hold hearings on H.R. 1244, the Theatrical Motion Picture Authorship Act, introduced by Congressman Bryant, to explicate the issues surrounding moral rights. Maybe we can find a way to close this hypocrisy gap completely.

#### THE NATIONAL FILM PRESERVATION ACT

Of course, the DGA enthusiastically supports the reauthorization of the National Film Preservation Act, an act which grew out of our earlier lobbying efforts to enhance film protection.

Without recounting the whole history of this act's passage, suffice it to say that in its initial bill form, it offered elements relating to *labeling and preservation*. The labeling elements have been dropped, and in fact, picked up in a more extensive way by the Film Disclosure Act.

But the preservation act, as it is presently constituted, continues to do important work, particularly in trying to salvage and restore artistically and culturally important films on the edge of extinction.

The National Endowment for the Arts used to provide some funding for film preservation efforts, but has been forced to abandon these efforts in the face of previous budget cutbacks. Given the Endowment's present peril, it seems extremely unlikely that any of these funds will ever be restored.

So it seems particularly appropriate that the Library of Congress should continue to raise a small banner on behalf of preservation efforts.

The bill before you adds another title to establish a mechanism for preservation fundraising in the private sector in support of the Act's purposes. Given the times, particularly the cutback in Endowment funding, we believe this title is a creative and necessary adaptation if we as a nation are to continue even mincing efforts to save our country's extraordinary film heritage.

These funding efforts are essentially private and voluntary, and government appropriations are only available on a matching basis.

#### H.R. 1248

Both of these measures concern us, but the bill that has the most import for us is the Film Disclosure Act, H.R. 1248, sponsored in the House by Congressman Barney Frank and in the Senate by Senator Alan Simpson.

This is the third Congress in which a measure similar to this one has been introduced; we intend to persevere as do our legislative friends. This subcommittee has previously taken testimony on a similar bill, but the times and circumstances have changed somewhat, and so we are particularly glad to have another opportunity to raise some issues regarding the bill with the subcommittee.

The purpose of the bill is simple. When a theatrical motion picture has been changed, after its initial release, for viewing on, among other avenues, TV or on a cassette or on an airliner, tell people. Describe succinctly the changes that have been made and give the director, the screenwriter, and the cinematographer a chance to object to these changes if they choose to do so. It is the artistry of the film that suffers through alterations, and so it is only proper, in our view, that the main creative authors ought to have a chance to comment on an altered version.

We consider this bill in the vein of consumer protection. When a film is advertised for viewing on television, either the networks or syndicated television, the public is given the clear impression that what they will be seeing is the version they saw, or wish they had seen, in the movie theater.

Our opponents have argued that the viewing public is aware that changes have been made to the film when it is shown on TV. We contend that the argument is preposterous—the viewing public has no idea of the extent to which feature films are routinely cannibalized for TV viewing.

When the rectangular dimensions of a film's theatrical version are squeezed (panned and scanned) into the square format of a TV screen, as much as 45 percent of the visual image is lost. To fit a film into a specified time allotment, usually two hours, substantial chunks of the film are often edited out—*not primarily for taking out objectionable scenes of violence or sex, but for fitting in more commercials*. Often this gross editing turns a coherent narrative into gibberish. Then you have an insidious process called lexiconing which speeds up scenes (altering the pace of the performances), again in order to fit in more commercials. Finally, among the alterations most common is the one most well known, colorization, in which a computer's colors are added to a film originally shot in black and white.

Obviously not all of these alterations are made to all films, but a very, very large percentage are subjected to panning-and-scanning and gross editing. Obviously, as filmmakers who labor over each scene, we find all of these alterations objectionable.



But we are not here to seek your help in ending or deterring these alterations. Absolutely not!

What we are saying is that these alterations are egregious and widespread, and that the public has absolutely no idea of the extent to which movies shown on TV do not reflect the theatrical version they believe they are seeing.

So, as a matter of truth-in-advertising, simply tell the people. Put it another way. Those who oppose labeling are really putting themselves in the position of defending false advertising in the marketplace, hardly a high moral plane from which to mount a defense.

But leave morality out of this. The real fear about the labeling bill we endorse is that its implementation would somehow cause economic harm to the industry. This is always the argument to which the producers and distributors return.

Firstly, we would advocate nothing that would harm the industry in which we make our living. When movies are shown in ancillary markets, as they must be to recoup their costs, directors get something out of it, thanks to the negotiated residual arrangements. We would not support legislation that negates these arrangements.

Secondly, the producers have a long history of wailing how innovations are going to ruin the industry. Television was going to ruin movies; VCR's were going to ruin movies. Now labels are going to ruin movies. Congress should bear in mind this chicken little, the-sky-is-falling style of arguing. If history is any guide, labels ought to *increase* revenue substantially through the public demand for authentic theatrical versions in ancillary markets.

Thirdly, there currently are a variety of labeling regimes in place and operating, and there is absolutely no evidence that any untoward economic consequence has occurred as a result.

This really is the crux of the matter. Would labels have a negative impact on the production or distribution processes? Based on systems in place, the empirical answer, the answer with any evidence behind it, is emphatically no. The MPAA has produced no factual evidence to support their view. In fact, each time they have warned that their fortunes would be ruined by the institution of a new idea, exactly the reverse has turned out to be true.

The subcommittee is aware that the MPAA companies instituted a voluntary labeling system a few months ago relating to the release of new (and altered) feature films into the ancillary markets.

From our point of view, these labels are totally inadequate and misleading. They do not provide information succinctly as to what changes have been made in a film, nor do they provide an opportunity for a director, cinematographer, or screenwriter to object if he or she would choose to do so.

Let me give an example. When a movie has been edited, the company label states that the film "has been edited for content." Clearly, the implication is that the violence and sexually provocative scenes have been deleted in conformance with family viewing sensibilities.

But this is the phrase applied to editing, period. Family movies, where there is no violence or no sex scenes, bear the same label. If the company labels are crafted to be so manipulative, much better not to have them at all. Consumers are being misled when we ought to play it straight.

What is wrong, or what untoward economic consequence would flow from saying "five minutes have been deleted from this film"? There is nothing to be afraid of on any level from telling the truth, and that is what the Frank-Simpson bill is all about.

Let me also point out that the labeling regimes adopted by Turner Entertainment on their colorized films or the American Movie Classics cable channel have not and do not harm in any way the marketing and distribution of films.

(Turner Entertainment adamantly opposed the original adoption of the National Film Preservation act because of its *labeling* provisions. Within weeks of passage, and before the Library dropped these provisions, Turner began running labels on all its colorized films, again doing no discernable marketing damage whatsoever.)

Let me also point out that the MPAA companies lobbied the FBI successfully so a very official looking label warning of piracy infractions goes on cassettes. So the opposition by the MPAA to official labels is pretty selective.

Why do we need a law? Why can't we sit around a table in Hollywood and work this out?

We tried. And we failed. We failed because we wanted the labels to be clear about the alterations that were made, and because we wanted an artistic author's disclaimer.

And we failed because in a very important regard the MPAA could not deliver on a promise it made to Congress in encouraging voluntary discussions.

The MPAA had said that any agreement we reached would be embraced by copyright holders and distributors across the board. They could bring them along, so they said.

They couldn't; they haven't. And this was one of the main reasons we were reluctant to begin talks in the first place. As a matter of fact, when we began voluntary negotiations, there was an explicit commitment that the networks would go along with whatever emerged from the talks.

When the talks broke off, the MPAA said to us and the other creative guilds sitting around the table, they would simply go ahead and implement the label they found satisfactory and we did not.

But that is not the label presently appearing on a few feature films because the networks, for whom the MPAA was supposedly acting as a good faith surrogate, objected. The networks forced the MPAA to make a bad label even worse. As we said, the MPAA can't bring all the players to the table; the table isn't big enough.

In any case, Congressman Frank and Senator Simpson have set out to make the American public aware of changes made in films—not a few films, as is the case through the MPAA labels, but the 20,000 films in domestic circulation. Film ownership and distribution is in many hands; only some of which are MPAA companies.

The simple and indisputable fact of the complexity of the universe of film ownership and distributorship is the reason for legislation. Only a *national* commitment to inform film consumers will bring all firm copyright holders and distributors under the tent of disclosure.

We would argue that the time for notices on films, such as the labels we support, is more important now than ever before. The new digital revolution quickly unfolding before us provides greater and greater opportunities for manipulating entertainment and information products. Film labels are nothing more than certificates of authentication—that something has been changed from the original version you were expecting.

When movie industry officials—and government officials—press the Europeans to let our film and television programs pass freely into their countries; when we press China to put a stop to the theft of our films—we hear that all of this is done in the name of America's film artists. It is they, we hear, who are being denied the rewards of their labor. It is they who craft the artistic and cultural products that are craved in foreign markets.

Would that the producers would take the same line in this country as they take abroad. We believe that rhetoric that films are an art form, created by artists, and that they are our best and most ubiquitous ambassadors of the American way of life.

We don't believe the producers should play the violins of pathos about American film artists when it suits them abroad, only to stand adamantly against a respectful regard for films and film artists in this country.

Telling consumers what changes have been made in a film, giving directors, screenwriters, and cinematographers a chance to object, is a small increment of respect.

Ms. COOLIDGE. And I believe I am supposed to introduce Mrs. Henry Mancini.

Mr. MOORHEAD. Without objection, the documents are made a part of the record.

Ms. COOLIDGE. May I do that?

Mr. MOORHEAD. Yes.

[See appendix, p. 503.]

Ms. COOLIDGE. Mrs. Henry Mancini has a very short statement.

Mr. MOORHEAD. Go ahead.

#### STATEMENT OF MRS. HENRY MANCINI

Mrs. MANCINI. I will be very, very brief.

I am the widow of Henry Mancini who passed away last year, and I am here to just point out to you that the body of work that he left is certainly woven into the fabric of the international music landscape. I urge you to pass the legislation that extends the copyright law.

And, with that, I won't take up any more of your time. Thank you very much.

Mr. MOORHEAD. Mr. Eves.

**STATEMENT OF JEFFREY P. EVES, PRESIDENT, VIDEO SOFTWARE DEALERS ASSOCIATION, ON BEHALF OF THE COMMITTEE FOR AMERICA'S COPYRIGHT COMMUNITY**

Mr. EVES. Good morning, Mr. Chairman. My name is Jeffrey Eves. I am president of the Video Software Dealers Association, an international trade association for the home video entertainment industry.

VSDA's 3,000 member companies represent some 20,000 video stores and provide more than 500,000 jobs nationwide, and I appreciate the opportunity to share our views with you on this important matter this morning.

I am here this morning on the behalf of the Committee for America's Copyright Community. We are a group of industries that work together to protect the flourishing U.S. copyright system from so-called moral rights legislation.

We believe moral rights laws, such as the film labeling legislation that you are considering today, would disrupt a legal regime that is working well for copyright owners, for distributors, for American consumers and for the U.S. economy.

Today I will focus my remarks on the film labeling bill and its impact on the people that I represent, the men and women who manage and run tens of thousands of stores where American consumers rent and purchase prerecorded movies on videocassette.

Mr. Chairman, the American consumers vote with their pocket-books every day. They have made home video their No. 1 leisure time activity and their top choice for viewing movies. Last year, American consumers spent \$14.5 billion renting and buying videos, almost three times what was spent to acquire and purchase movie theater tickets. In fact, each week over 60 million people in the United States visit a video store—60 million people a week.

You are all probably familiar with the typical video store. As you know, it is an environment that lends itself to conversation. People discuss whether a movie was good or bad, whether an actor was right for the role, whether the movie was as good as the book. I can assure you that you will not hear debates on the issue of film to video adaptation, which is the essence of the moral rights dispute raised by some members of the creative community.

Consumers love the low cost, variety, and convenience offered by home video; and they know the experience of watching a movie in their living rooms is different from watching it in a darkened theater. Consumers do not need a warning label to tell them that, and video dealers do not need a disparaging label that seems to discourage renters from renting and buying movies on video.

I do not mean to take anything away from the creative geniuses that are involved in the movie-making process. In fact, in response to concerns raised by proponents of this legislation, the motion picture industry adopted a voluntary film labeling program in 1993.

The voluntary program, which calls for labeling of both the video and the video package, has been a great success. In fact, we recently reviewed the top 40 video rentals listed in the May 13th edi-

tion of Billboard magazine and found that 90 percent of them were in compliance with the voluntary labeling program.

The voluntary label in use today informs the consumer without disparaging the video product. It says: "This film has been modified from its original version. It has been formatted to fit your television set." And I will show an example or two of that in a minute.

This voluntary labeling system applies to home video, cable, pay-per-view, broadcast television, and every other medium. It is likely that the film that was shown on your flight from Washington to Los Angeles was labeled under this system.

In our opinion, the legislation before you is a quintessential example of unnecessary Government regulation. Congressman Frank's bill represents Government intrusion into a marketplace that is working successfully for the industry and for the consumer. This legislation, Mr. Chairman, would seem to have all the characteristics of a solution in search of a problem.

While the supporters of this legislation may quarrel with the precise wording on the voluntary label, that does not mean that Government needs to step in in this case. This is an issue that the industry can and should resolve on its own.

The labels included in this legislation would mislead consumers by making it appear that they are getting an inferior product when they buy or rent a video. Under H.R. 1248, if an artistic author objects to any alterations, pay-per-view, cable, and network television broadcasters would be required to note the objection in a signboard warning at the beginning of the film. The home video release would carry the additional burden of permanently noting the objection not once, but twice, on the video boxes which serve as the primary means of marketing the video product.

Mr. Chairman, I would like to take a moment and show you a video that demonstrates the voluntary labeling program that I have been speaking about. I will show you several labeling examples, including home video, broadcast television, and pay-per-view; and I will compare these labels to the Government mandate label for automobiles. I think you will see how much more effective the voluntary labels are when compared to the Government-mandated label.

If you will play the tape, the first clip is taken from the home video of Disney's "Angels in the Outfield." As you can see here, the label is in legible type and displayed in a conspicuous and readable basis.

The second example comes from a Universal film, "The River Wild", with Meryl Streep.

Mr. BERMAN. Is this on TV or video?

Mr. EVES. This is on videocassette. Again, this clip comes from a video; and it is available in stores all over the country.

Next, I would like to give you a couple of examples of how these labels appear on the home video package. I have copies of a couple of movies here, and I think you may have copies of this as well. And you will see the labeling in both cases appearing on the back side of the videocassette.

It says: "The film has been modified from its original version. It has been formatted to fit your television set." One just like the one

that you see here in front of you and the kind most everyone watches at home.

As additional evidence—and if you don't have some boxes of this, Mr. Chairman or Members, we can certainly pass them out—as additional evidence of the widespread implementation of the program, I would like to show you this from the CBS movie that was shown on free TV in May viewed by millions of people. It is with Whoopi Goldberg in "Ghost." You will notice that the label for the broadcast movies indicates that the film was altered to fit within a 2-hour time slot and omits certain content.

The other example, from a pay-per-view movie offered in Washington in May, Arnold Schwarzenegger with "True Lies." And this is the labeling that went on that where it talked about the movie being formatted to fit the TV screen.

Now, Mr. Chairman, let's compare the voluntary label to one that would be required in H.R. 1248.

The following label can be found on pages 13 and 14 of the bill. What is on the screen is not exaggerated or embellished in any way. It is too long and difficult to understand; and if anyone takes the time to read it at all, they are going to think they are getting an inferior product. A broadcaster who carried that label would be inviting the audience to do something else with their time.

We are concluding with a label that is actually used today, a federally-mandated label. You will see it goes through three different screens. I am talking about the label required for the advertisement of an automobile. I don't know how many of you have taken the time to read it.

The particular example that have you seen here comes from an advertisement for an automobile broadcast in Washington, DC, in May. As you can see, the voluntary labeling program very effectively informs the consumer about the product that they are viewing without disparaging the product itself.

A Federal law such as the one proposed in H.R. 1248 is simply not necessary.

Mr. Chairman, I thank you for your time and attention.

[The prepared statement of Mr. Eves follows:]

**PREPARED STATEMENT OF JEFFREY EVES, PRESIDENT, VIDEO SOFTWARE DEALERS ASSOCIATION, ON BEHALF OF THE COMMITTEE FOR AMERICA'S COPYRIGHT COMMUNITY**

**INTRODUCTION**

Mr. Chairman, my name is Jeff Eves and I am President of the Video Software Dealers Association. VSDA is the national trade association of home video retailers and distributors. We represent the vast majority of the 30,000 video stores across the country.

Although my expertise is in home video, I am also here today on behalf of the Committee for America's Copyright Community. The Committee represents a wide range of copyright industries, including producers of books, magazines, newsletters, computer software and databases, sound recordings, broadcasting, cable, video, advertising and motion pictures (A list of CACC members is attached). Its purpose is to ensure the continued vitality of the American copyright system. This copyright system has made the United States the world leader in virtually all areas of creative works.

Mr. Chairman, we are strongly opposed to H.R. 1248, the Film Disclosure Act of 1995, which would create a complicated, burdensome, government-mandated labeling program to address a problem that does not exist.

Mr. Chairman, this particular legislation was first considered by your Subcommittee in 1992. It remains a solution in search of a problem. American consumers enjoy access to the finest of films in the world through a variety of channels - theatre, video, network television, cable etc. Since the advent of television, consumers have been able to view

motion pictures in their living rooms through "panning and scanning," a technique which adapts the film to the television screen.

Mr. Chairman, as VSDA noted in its testimony before this subcommittee in 1992, there has been no consumer dissatisfaction and no call for labeling. Rather, Americans have salivated over their ability to view films through television, and more recently have welcomed the ability to access films through video rental. Despite the complete lack of evidence of a problem, in 1993, the industry itself embarked on a voluntary labeling program, sensitive to providing full disclosure to consumers about "panning and scanning," colorization and editing for content and time.

Today, Mr. Chairman, under the voluntary program, the videocassette jacket bears a label indicating that the theatrical version has been adapted. Furthermore, the videocassette itself includes a label at the beginning of the movie which says, "**THIS FILM HAS BEEN MODIFIED FROM ITS ORIGINAL VERSION. IT HAS BEEN FORMATTED TO FIT YOUR TV,**" or "**THIS FILM IS A COLORIZED VERSION OF THE ORIGINAL BLACK -AND-WHITE FILM.**" Studios, TV networks, cable networks, TV affiliated stations, and independent TV stations have been using these labels since October 1993. In fact, we did a survey of the top forty video rentals listed in the May 13 Billboard Magazine and found that 90% of the theatrical films that are now in video are already labeled.

This industry-led effort is providing consumers with concise, clear labels so that viewers are actually informed rather than confused by streams of differing, complex and lengthy messages. The marketplace works. It is not appropriate for government to jump in and micromanage this issue. This is not only a bill that would pose terrible problems to the film industry, it would be a devastating precedent that would threaten the bargaining and contractual process that underlies our copyright system.

H.R. 1248 is not a simple labeling bill. It is not as it claims, a simple measure to inform consumers of changes made to a film's theatre version. In addition to important technical adaptations, such as "panning and scanning" described above, the bill also would regulate broadcaster editing for community taste and minimal changes made in order to meet a preexisting schedule. Under the bill, if a local TV station edited one minute from the 4 o'clock movie to expand its news hour to cover a breaking local story, it would have to check on whether any of the artistic authors had objected, and if so, include a label. This legislation is an administrative nightmare for not only a video store, but America's television stations and will clearly impede consumer access to films.

#### I. H.R. 1248 WOULD RESULT IN THE DENIGRATION OF HOME VIDEOS

H.R. 1248 requires notification to the "artistic author" of a motion picture to determine objections to any "material alteration" to a film. If there is any objection, the bill would require a label. For example, if there is objection to "panning and scanning," the



label must bear the following statement:

**"THIS FILM IS NOT THE VERSION ORIGINALLY RELEASED. IT HAS BEEN PANNED AND SCANNED. THE DIRECTOR AND CINEMATOGRAPHER OBJECT BECAUSE THE ALTERATION REMOVES VISUAL INFORMATION AND CHANGES THE COMPOSITION OF THE IMAGES."** This label would be affixed to the video box, not once, but in two locations, and then placed on the shelf in a video store to advertise the availability of the movie.

The voluntary labeling program that covers 90% of the films distributed, makes this kind government mandated requirement totally unnecessary. A consumer is informed, but without having the product denigrated. Under the dictates of H.R. 1248, a consumer is likely to perceive that they are being told the altered version is an inferior product, one they would not enjoy nearly as much as the original version that had been approved by the director and screenwriter. These denigrating labels would be confusing to customers and deter them from renting or purchasing the cassette.

## II. H.R. 1248 COULD IMPEDE THE DISTRIBUTION OF FILMS

H.R. 1248 would create the possibility of restraints on the sale of films after adaptation for television or home video. Just as a product is ready to send to a network or video retailer, squabbling over whether labeling was adequate could delay the availability of the product until it was stale or prevent distribution to the retailer and, more importantly,

the consumer.

The bill's complicated, time-consuming process of tracking down the artistic author(s) to determine objections to "material alterations" poses significant impediments to the distribution of a film. The delay for negotiating an acceptable resolution and repackaging the cassettes with an adequate label could deny retailers access to the product during the peak marketing window immediately following the principal theatre exhibition promotion campaign. The legislation would also provide for an injunction against further distribution of inadequately or improperly labeled products, literally pulling them right off the shelf.

H.R. 1248 threatens not only the thousands of mostly small businesses who provide motion pictures in videocassette form to the public, but even more importantly, the customers -- millions of Americans who look to home video for a wide variety of affordable and convenient family entertainment.

### III. H.R. 1248'S RECOGNITION OF MORAL RIGHTS THREATENS OUR THRIVING FILM INDUSTRY

Along with the other members of CACC, VSDA strongly opposes H.R. 1248 because applying moral rights to motion pictures sets a dangerous precedent and threatens our thriving U.S. copyright system. We are concerned that H.R. 1248 is sought, at least in part, to strengthen the artist's economic bargaining power vis-a-vis the studios

with "moral rights." To the extent this is true, the Act could threaten the constitutional goal of promoting the production and dissemination of copyrighted works and the traditional practices and relationships that are fundamental to the daily operation of copyright intensive industries in the U.S.

If writers or directors are given "moral rights," they could insist that their films be letter-boxed, rather than "panned and scanned." Letter-boxing is the technique used to present a film on a square TV screen by diminishing the size of the picture, leaving thick black lines across the top and bottom of the screen. Anyone who has ever spent any time in a video store can attest to the fact that, generally, the public finds letter-boxing a distracting interference with their enjoyment of the film. In addition, writers and directors could prevent conversion of films to videocassette in any format, claiming that both letter-boxing and panning and scanning adulterate the "artistic integrity" of their films.

Writers and directors could also leverage their "moral rights" to increase compensation. The studios would pass on that increased cost of production to distributors and, in turn, to video retailers. We -- the retailers -- would have to absorb that increased cost (although our margin of profit is far smaller than those of screenwriters and directors) and pass it on to our customers.

Finally, negotiations over "moral rights" could lead to very substantial delays in the release date of a videocassette. That is the most likely outcome for many films. Almost

five years passed before "E.T." was released on video because of such negotiations; not every film has the remarkable longevity of that picture. For most films, delay could significantly reduce the market demand because more recently publicized films tend to displace consumer interest in older ones.

The gravity of these concerns is part of the reason the Committee for America's Copyright Community came together -- to ensure the continued vitality of the American copyright system. The potential harms outlined above demonstrate that embarking the U.S. "moral rights" regime in the area of films, sets a dangerous precedent and threatens our currently thriving marketplace of copyrighted works. Proponents of this legislation have not demonstrated a compelling public interest to justify such a radical departure from traditional copyright law which has produced a flourishing creative industry. The remainder of my testimony will focus on the strength of our current system and the threat posed by proposals such as H.R. 1248.

#### IV. AMERICA'S COPYRIGHT SYSTEM IS THRIVING.

The existing system for distributing films through theatres, home videocassette, television and cable broadcasts has been an unparalleled success in making these films widely accessible to the public. It is the envy of the world. This is also the case for the rest of America's copyright industries.

Copyright industries are one of the largest and fastest growing segments of the U.S. economy. They contribute more to the U.S. economy in terms of value added to Gross Domestic Product (GDP) than any single manufacturing sector and more than most industrial sectors. In 1993, they accounted for 3.7 percent (\$238.6 billion) of U.S. GDP.

The U.S. leads the world in entertainment, news, business information, books magazine publishing, sound recording, motion pictures, advertising, video and other film products, computer software packaging, and virtually all other areas of copyrighted works. Our country's global preeminence in copyright works is reflected in 1992's foreign sales, which exceeded \$39.5 billion, an increase of more than 9% from 1991.

Here are some examples of America's preeminence in the copyrighted works arena:

- American *films* dominate theatres and TV screens throughout the world. In 1992, U.S. films returned an estimated \$4 billion in surplus balance of trade.
- In 1993, worldwide revenues from all media - theatrical, television, Pay-TV and home video - were \$20.4 billion, up 7% (1.4 billion) from 1992.
- The U.S. *recording industry* is one of the most influential, creative and visible industries in the world. In 1993, U.S. record companies generated \$10 billion in domestic sales, and worldwide record sales reached \$30.5 billion. As a trade commodity, foreign sales of U.S. sound recordings accounted for an estimated \$12.3 billion.
- The U.S. is the world's largest market for *printed* products and the second largest exporter of printed products, with 1993 shipments of more than \$4 billion.

V. THE MARKETPLACE AND CONTRACTUAL AGREEMENTS PROMOTE OUR THRIVING SYSTEM

We believe the success of our copyright system is attributable, in large part, to the fact that our copyright law establishes an economic framework to encourage the creation and dissemination of new works. First, the Act gives creators the financial incentive to devote resources and energy to producing creative works. They know they will have the opportunity to secure financial compensation for the exclusive rights granted them under the Act.

Second, the Copyright Act provides the predictability and certainty that business activities will be governed by the objective four corners of business agreements. Finally, the Act allows owners and users the commercial flexibility to devise and implement their own business relationships to make works available to the public. This flexibility has allowed copyrighted works to be made available to the public through a wide range of new media and delivery systems.

H.R. 1248, with its burdensome labeling and notification requirements, runs counter to the long-standing practice in the U.S. that business relations should be governed by the marketplace - a system under which the copyrighted works industries have thrived.

In addition to the voluntary film labels, directors, screenwriters and cinematographers routinely negotiate contractual terms regarding the work to be

performed, including compensation and residuals. Similarly, adaptations made to a film following its initial release are clearly an appropriate subject for negotiation. Through avenues of both collective and individual bargaining, directors, screenwriters and cinematographers are able to effectively bargain on these issues.

The collective bargaining agreement provides a bundle of rights to every director, regardless of his track record or whether the film he makes is a success. These agreements also give every director the right to participate in the film-to-video adaptation. For example, in 1987 negotiations, the DGA and the Alliance of Motion Picture and Television included a contract provision requiring producer consultation with a director regarding adaptation techniques.

Other copyright industries also rely on the marketplace and contractual agreements. H.R. 1248 is clearly a first step toward a moral rights regime which could stymie technological innovation, bring the distribution of copyrighted works to a standstill and strike a devastating blow to the predictability and certainty that is critical to the copyright system.

VI. ENACTMENT OF H.R. 1248 WOULD SET A TERRIBLE PRECEDENT WITH DEVASTATING IMPLICATIONS FOR THE U.S. COPYRIGHT COMMUNITY.

A motion picture is a collaborative effort derived from the creative energy of multiple parties. Similarly, books, magazines, sound recordings, newspapers, databases

publishing, software packaging and advertisements are collaborative efforts in which numerous individuals contribute to a creative work. If H.R. 1248-type requirements were applied to the broad range of these copyrighted industries, a breakdown in the publishing and distribution of copyrighted works could occur. For example:

- Would a newspaper be unable to submit its daily edition for edited electronic publication because it was unable to comply with labeling and notification of its 40 reporters?
- Would a magazine miss its printing deadline because it had not been able to notify a freelance photographer that last year's picture needed to be cropped for this week's story?
- Would the publisher of a textbook be unable to meet a deadline to update a textbook to reflect new developments in science, because it could not reach agreement with the principal editor on the content of the label?
- Would an advertiser be unable to adopt an ad for next month's publication because of burdensome requirements to notify an array of contributors to the ad, including writers, graphic artists, creative directors, photographers and others?
- Would a recording company be unable to rearrange the order of an album's songs



for a second release?

Government-mandated labeling of films may strike some as a narrow exception to the American tradition of permitting the parties to make their arrangements and settle their disputes by contract. However, at its heart, this proposal seeks to undo the very system which carefully balances risk and reward and has made America the undisputed leader in the creative industries.

**VII. THE MARKETPLACE IS THE BEST BAROMETER OF CHANGES MADE TO A FILM POST-RELEASE.**

The marketplace responds to meet consumer needs regarding motion pictures. Consumers are the best check on post-publication changes made to copyrighted works. Consumers find that technical adaptations of a movie - for the T.V. screen and/or colorization - enhance their film enjoyment. To meet consumer demand, many movies today are available on videocassette in both original and made-for-T.V. form. Adaptation of films give consumers more choice. In fact, there has been no demonstration of consumer dissatisfaction with the changes that would be regulated under this bill. When consumers are dissatisfied, they will voice their displeasure and the market will respond without unnecessary government intrusion.

One way the market responds is by giving consumers a choice. For example, a consumer can walk into a Blockbuster and rent either the colorized version of

"Casablanca" or the original black and white version -- whichever suits their taste. As you know, the motto of the home video industry has long been "freedom of choice for American consumers" -- freedom to rent or purchase the films they wish to see, when they want to see them.

**VIII. H.R. 1248 RAISES SIGNIFICANT FIRST AMENDMENT QUESTIONS AND IS INCOMPATIBLE WITH THE U.S. LANHAM ACT**

The First Amendment and the Copyright Clause share the mutual goal of increasing the flow of information to the public. This important constitutional goal is thwarted by both the labeling and notification requirements in H.R. 1248. Even in the case of commercial speech, such as a videocassette box which advertises the film, the litmus test for the protection of commercial speech, laid out by the Supreme Court in Central Hudson Gas and Electric Corporation v. Public Service Commission of New York, 447 U.S. 55 (1980), is that the restrictions on speech must be the least intrusive to serve the governmental interest asserted. The requirements of H.R. 1248 are over- broad, unnecessary and likely to confuse consumers.

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This bill also masquerades as a consumer bill. In fact, it is nothing of the kind. Modified versions of films are already labeled under the voluntary program to ensure the consumer is not confused. H.R. 1248 provides that a third party can be designated by the artistic author to object to a film. Why should a film be labeled based on the opinion of a third party? Are they looking out for the consumer?

Finally, Section 43(a) of the Lanham Act already provides remedies to ensure that consumers are not deceived.

Not only does the Lanham Act exist to protect consumers from misrepresentation, it also provides remedies for individual artists whose reputation is injured as a result of misrepresentation. In the event a director, screenwriter, or cinematographer felt that edits had seriously altered his work, he or she could pursue relief under the Lanham Act. The landmark case on this subject is Gilliam v. ABC, Inc., 538 F2d 14 (2nd Cir. 1976). In that case, the court found that an allegation by Monty Python's creator of a mutilation of his work – 24 minutes of a 90 minute Monty Python work were edited out by ABC – stated a cause of action under Sec. 43(a) of the Lanham Act, 15 U.S.C. 1125(a).

In a March 4, 1992 letter, then Commerce Department General Counsel Wendell Wilkie recognized that the broad application of Section 43 has protected authors from misrepresentation.<sup>1</sup> It opposed the amendment of the Lanham Act to create additional rights for film artists.<sup>2</sup> In a 1989 Patent and Trademark Office report to Congress, it found that Section 43 is functioning in the way that Congress intended, as a broad, uniform law regulating unfair competition, and that amending the law to cover one specific industry was

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<sup>1</sup> March 4, 1992 Letter Of Commerce Department General Counsel, Wendell Wilkie to Honorable William Hughes, Chairman of the Subcommittee on Intellectual Property and Judicial Administration, regarding H.R. 3051 ("Film Disclosure Act of 1991").

<sup>2</sup> Id.

inappropriate.<sup>3</sup> It also concluded that the legislation would frustrate the work for hire doctrine applicable to motion pictures under U.S. copyright law and film industry contractual practice.

#### VIII. CONCLUSION

Mr. Chairman, VSDA and the Committee for America's Copyright Community oppose H.R. 1248. We submit that the current system works. It works because over the last two hundred years, it has encouraged the creation and dissemination of works which has made our copyright industry a national and world leader. It is a system that provides both flexibility and predictability, allowing parties to create contracts that adapt to meet new technologies. The industry-wide voluntary labeling program and the collective bargaining agreements are perfect examples. The marketplace, not Congress, should respond to the consumers.

Congress should continue to let this marketplace operate under its thriving system. H.R. 1248 is not only a threat to our country's film industry, it is a threat to our entire copyright system. In order to protect consumers, Congress should continue to reject efforts to recognize moral rights across a broad range of copyrighted works. Starting down the road of moral rights will only bring the dissemination of copyrighted works to a grinding halt.

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<sup>3</sup> "Trademark Act of 1946 and Technologies for Alteration of Motion Pictures," 1989 Patent and Trademark Office Report to the Subcommittee on Intellectual Property and Judicial Administration of the House of Judiciary Committee

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## CACC Member List

The American Film Marketing Association  
Association of American Publishers  
Association of Independent Television Stations, Inc.  
Association of National Advertisers  
Magazine Publishers of America  
Meredith Corporation  
Motion Picture Association of America, Inc.  
National Association of Broadcasters  
The Reader's Digest Association  
Recording Industry of America, Inc.  
Time Warner, Inc.  
Times Mirror Co.  
Turner Broadcasting  
Viacom International  
Video Software Dealers Association

Mr. MOORHEAD. Mr. Weller.

**STATEMENT OF MICHAEL WELLER, PLAYWRITE, SCREEN-  
WRITER, AND MEMBER, WRITERS GUILD OF AMERICA, EAST**

Mr. WELLER. I have got my remarks beginning with good morning, Mr. Chairman—I think it is afternoon now—

Mr. MOORHEAD. Not quite.

Mr. WELLER [continuing]. Members of the subcommittee, and thank you for sponsoring this hearing on legislation which, in my view, cuts to the heart of our system. That may sound like pretty big talk, but in my few minutes here I hope to suggest a reason why it isn't.

I am not Harrison Ford. I am not Sylvester Stallone. I am not even Tom Cruise, alas. What I am is one of the legion of folks who gives them things to say and stories to act in. My name is Michael Weller.

I am a writer, and I wear two hats. Wearing one, I write movie scripts; and I do this under the protection of the Writers Guild of America East. With the other hat, I write plays for the stage. This work is protected by the Dramatists Guild of America, on whose governing board I serve.

I have had luck wearing both hats. My plays have won awards and have been performed all over, here and abroad—most frequently, "Moonchildren," "Loose Ends," "Fishing," "Spoils of War." And several films I have worked on are held in high esteem—"Hair" and "Ragtime" in particular. I even won an Academy Award nomination. In other words, as writers go, I am a happy camper and a very lucky one.

The term writer has become so commonplace and the word artist so carelessly flung about in recent years, it might be worth a few seconds of your time for me to describe what I actually do.

I am a craftsman, an artisan, a fabricator. I make things. Exactly the way a leather worker makes belts or a furniture maker makes a chair, I make stories. Instead of leather or wood, my medium is words. I shape them, cut them, polish and trim until I have made a story that feels interesting, durable and true.

We are here today to discuss the fate of what I make. I will address my main remarks to H.R. 989, the Copyright Term Extension Act, but I would also like to state my position and the position of the Writers Guild of America East on H.R. 1734 and H.R. 1248, the Film Preservation and the Film Disclosure Act.

I support any effort to protect my work and my colleagues' work from mutilation by future owners and exploiters.

I mentioned that I have written the screenplay of a film called "Hair." Let me relate briefly how the film came about.

It was because of the passion of one man, the director Milos Forman, a Czech. While living under a Communist regime, he visited New York. He was young, adventurous and penniless and ended up sleeping for several nights in Central Park where he was befriended by a bunch of people called hippies. The anarchy of those few nights, the joy, the friendship, effected him profoundly.

When he made the film "Hair" years later, it was his way of celebrating the spirit of freedom he felt that night, of sending a message home to his fellow countrymen still living behind the Iron

Curtain, a message that in a free society joy and trust are possible, unlike the despair and paranoia that haunt a country under totalitarian rule.

It came from his heart, this film, and it was intended in a small way to weaken the hold of an oppressive regime over the minds of people thirsty for freedom.

The original film had 22 songs. When it was shown on television, only 11 survived. The other 11 were cut. You might say that what the audience saw was half "Hair," a celebration of half freedom.

And yet it was called "Hair," the screenplay was credited to me and the direction to Milos Forman. The most fundamental intention of the film was violated. The spirit it was made to celebrate, the energy embodied in its songs, virtually everything it stood for was violated on television.

I am aware that an argument can be made that it is entirely within the rights of purchasers to do what they please with the work they buy. Just as it is arguably within the rights of millionaire X, who owns a Rembrandt that won't fit the wall where he wants it hung, to cut 6 inches from the top and a foot from the side. In fact, he can cut it in half and hang it in two separate rooms if he pleases. But does he now own two Rembrandts? No, what he owns is a Rembrandt, mutilated, altered, and destroyed.

The law may support his right, as an owner, to do this, but should it support his right to advertise it subsequently as the work of artist Y or Z? I would argue no.

Simple logic tells us that an artist should be allowed to protect himself from such abuse. If inches are lopped off his work, give him a chance to warn the public that what they are seeing is no longer his. Let viewers know, especially discerning viewers who might be in a position to employ him now or at some future date, that what they saw doesn't represent his abilities. It may even, in some cases, harm his reputation.

As regards preservation of our firm heritage, a nation is esteemed and remembered mainly by the stories it tells about itself. America's undeniable contribution to storytelling is film, and films deteriorate. With them a cherished record of our heritage vanishes. The Government can help prevent this and for, relatively speaking, a pittance.

We would not allow the Lincoln Memorial to crumble. We provide a budget to ensure that Lincoln's memory is honored in the form of maintenance. I encourage you to throw a few dollars to the maintenance of another great heritage of ours, film.

Now to my main area of concern, copyright. You have heard testimony describing the hard arguments which are economic. We are basically hemorrhaging money for 20 years to Europe. I would like to talk about the testimony to the effect that the artist's work is his heritage, his legacy, the means by which he hopes to provide for his children and his children's children.

Even in writing film, for which I hold no copyright, I count on the duration of the film owner's copyright, which ensures that I am compensated for future exploitation of my work on television, video-cassettes and possible merchandising or publication, the use of film clips and so on. The duration of these rights is my main concern today.

I have two young sons, 8 and 6. They seem proud of the work I do. One even shows signs of being a bit of a storyteller himself—on occasion, quite a big storyteller.

If either of them should choose to launch his little boat on the same dangerous waters as dad, I would like him to expect that at the end of a lifetime of hard work in the arts he could anticipate a certain degree of respect for his accomplishments and that this respect would be reflected in the law.

But, at the moment, I am compelled to explain things as follows: I make stories for a living. If I made a chair or a shoulder bag or a pot, it would belong to me for as long as I lived or until I chose to sell it. It would be mine to give to my children, and this would become theirs to give to their children and so on.

Instead, I make stories; and they can only belong to my family until 50 years after my death. When my older son, who is very smart and curious, asks me why my stories can be taken away after 50 years I say it is the law.

When he asks why can laws allow things to be taken from people, I try to explain what laws are, how they come about and why we are lucky to live under a system that provides so many ways to alter and improve them, ways such as the hearing we are involved in today.

But his eyes glaze over at these explanations. He is too young to understand and the logic is too complicated and, finally, irrelevant to the essential issue which is property, be it intellectual or physical. As I said earlier, H.R. 989 is about something at the very heart of our system. It is about property.

Imagine for a moment how it would feel if your grandmother had left you an exquisite quilt of her own making and after a certain time government officials appeared at your door and said this quilt has been in your family long enough, now it belongs to the world. Yet that is exactly what happens to the things I make during my life.

H.R. 989 is about one thing: property. It is about how soon after people like me have made what we make can the Government, by law, allow it to be taken from us. At the moment, they must wait only 50 years. It is a small thing to ask that we be allowed to keep it in the family for another 20. It is a modest request. I urge you to grant it.

Thank you for this opportunity, and I hope your efforts will result in a change of law that I can hold up to my sons as an example of why our system and the extraordinary vigor of the arts it generates are the envy of the world.

[The prepared statement of Mr. Weller follows:]



PREPARED STATEMENT OF MICHAEL WELLER, PLAYWRIGHT, SCREENWRITER, AND  
MEMBER, WRITERS GUILD OF AMERICA, EAST

Good Morning Chairman Moorhead, Members of the Subcommittee, and thank you sponsoring this hearing on legislation which, in my view, cuts to the heart of our system. That may sound like pretty big talk, but in my few minutes here I hope to suggest a reason why it isn't.

I am not Harrison Ford. I am not Sylvester Stallone. I am not even Tom Cruise, alas. What I am is one of the legion of folks who gives them things to say and stories to act in. My name is Michael Weller.

I am a writer with two hats. Wearing one, I write movie scripts. I do this under the protection of the Writers Guild of America, East. With the other hat, I write plays for the stage. This work is protected by the Dramatists Guild of America, on whose governing board I serve.

I've had luck wearing both hats. My plays have won awards, and have been performed all over, here and abroad--most frequently "Moonchildren," "Loose Ends," "Fishing" and "Spoils of War." Several films I've worked on are held in high esteem--"Hair" and "Ragtime" in particular. I've even won an

Academy Award nomination. In other words, as writers go, I'm a happy camper.

The term writer has become so commonplace and the word artist so carelessly flung about in recent years, it might be worth a few seconds of your time for me to describe what I actually do.

I'm a craftsperson, an artisan, a fabricator. I make things. Exactly the way a leather-worker makes belts or a furniture maker makes a chair, I make stories. Instead of leather or wood, my medium is words. I shape them, cut them, polish and trim, until I've made a story that feels interesting, durable and true.

We are here today to discuss the fate of what I make. I will address my main remarks to H.R. 989 - Copyright Term Extension Act of 1995. But I would also like to state my position and the position of Writers Guild of America, East on H.R. 1734 - National Film Preservation Act of 1995 and H.R. 1248 - Film Disclosure Act of 1995.

I support any effort to protect my work from mutilation by future owners and exploiters. I mentioned that I had written the screenplay of a film called "Hair."

Let me relate briefly how the film came about. It was because of the passion of one man, the director Milos Forman, a Czech. While living under a Communist regime he visited New York. He was young, adventurous and penniless, and ended up sleeping for several nights in Central Park, where he was befriended by a bunch of people called hippies. The anarchy of those few nights, the joy, the friendship, affected him profoundly.

When he made the film "Hair" years later, it was his way of celebrating the spirit of freedom he felt that night, of sending a message home to his fellow countrymen still living behind the Iron Curtain, a message that in a free society joy and trust are possible, unlike the despair and paranoia that haunt a country under totalitarian rule.

It came from his heart, this film, and it was intended in its small way, to weaken the hold of an oppressive regime over the minds of people thirsty for freedom.

The original film had twenty-two songs. When it was shown on television, only eleven survived. The other eleven were cut. You might say that what the audience saw was "Half-Hair." A celebration of half-freedom.

And yet it was called "Hair," the screenplay was credited to me, and the direction to Milos Forman. The most fundamental intention of the film was violated, the spirit it was made to celebrate, the energy embodied in its songs--virtually everything it stood for--was violated on television.

I'm aware an argument can be made that it is entirely within the rights of purchasers to do what they please with the work they buy. Just as it is arguably within the rights of millionaire X who owns a Rembrandt that won't fit the wall where he wants it hung, to cut six inches from the top and a foot from the side. In fact he can cut it in half to hang in two separate rooms, if it pleases him. But does he now own two Rembrandts? No. What he owns is a Rembrandt, mutilated, altered and destroyed.

The law may support his right, as an owner, to do this, but should it support his right to advertise it subsequently as the work of artist Y or Z? I would argue "No."

Simple logic tells that an artist should be allowed to protect himself from such abuse. If inches are lopped off his work, give him a chance to warn the public that what they are seeing is no longer his. Let viewers know, especially discerning viewers who might be in a position to employ him now, or at some future date, that what they saw does not represent his abilities. It may even, in some cases, harm his reputation.

As regards preservation of our film heritage: a nation is esteemed and remembered mainly by the stories it tells about itself. America's undeniable contribution to storytelling is film, and films deteriorate. With them, a cherished record of our heritage vanishes. The government can help prevent this and--for relatively speaking--a pittance. We would not allow the Lincoln Memorial to crumble. We provide a budget to insure that Lincoln's memory is honored in the form of maintenance. I encourage you to throw a few dollars to the maintenance of another great heritage of ours, film.

Now to my main area of concern today--copyright. You will have heard testimony describing the inequity of our current copyright protection of fifty years after an artist's death vs. that of the common market countries of Europe, which lasts for seventy years. You've heard that our current laws amount to a twenty year gift to the European Union, since that's how long they can use our artists' works for free, while we have to pay for the use of theirs. We are basically hemorrhaging money, and for nothing in return.

You have heard testimony to the effect that an artist's work is his legacy, the means by which he hopes to provide for his children, and his children's children. Even in writing film, for which I hold no copyright, I count on the duration of the film owners' copyright which ensures that I am compensated for future exploitation of my work on television, videocassettes, and possible merchandising or publication, the use of film clips and so on. The duration of these rights is my main concern today.

I have two young sons, eight and six. They seem proud of the work I do. One even shows signs of being a bit of a storyteller himself. On occasion quite a big storyteller.

If either of them should chose to launch his little boat on the same dangerous waters as Dad, I'd like him to expect that at the end of a lifetime of hard work in the arts, he could anticipate a certain degree of respect for his accomplishments and that this respect would be reflected in the law.

But at the moment, I'm compelled to explain things as follows. I make stories for a living. If I made a chair, or a shoulder bag, or a pot, it would belong to me for as long as I lived, or until I chose to sell it. It would be mine to give to them, and then it would become theirs to give to their children, and so on.

Instead, I make stories, and they can only belong to my family until fifty years after my death. When my older son--who is very smart and curious--asks me why my stories can be taken away after fifty years, I say "It's the law."

When he asks why can laws take things away from people, I try to explain what laws are, how they come about, and why we're lucky to live under

a system that provides so many ways to alter and improve them--ways such as the hearing we are involved in today.

But his eyes glaze over at these explanations. He is too young to understand, and the logic too complicated, and finally irrelevant to the essential issue, which is property, be it intellectual or physical--as I said earlier, H.R. 989 is about something at the very heart of our system...

Property. Imagine for a moment how it would feel if your grandmother had left you an exquisite quilt of her own making, and after a certain time government officials appeared at your door and said, "This quilt has been in your family long enough, now it belongs to the world!?"

Yet that's exactly what happens to the things I make during my life. H.R. 989 is about one thing--property. It's about how soon after people like me have made what we make, can the government, by law, take it away from us. At the moment, they must wait only fifty years. It is a small thing to ask that we be allowed to keep it in the family for another twenty. It is a modest request. I urge you to grant it.

Thank you for this opportunity...and I hope your efforts will result in a change of law that I can hold up to my sons as an example of why our system and the extraordinary vigor of the arts it generates, are the envy of the world.

Mr. MOORHEAD. Ms. Saffer.

**STATEMENT OF JUDITH M. SAFFER, ASSISTANT GENERAL COUNSEL, BROADCAST MUSIC, INC.**

Ms. SAFFER. Good morning Chairman Moorhead and other Members of the subcommittee. My name is Judith Saffer. I am the assistant general counsel of Broadcast Music, Inc., referred to as BMI, and also the president-elect of the Copyright Society of the U.S.A.

I am here this morning to speak on behalf of the composers, songwriters, and publishers of BMI who are members of the copyright coalition. I wish to express their support for copyright term extension. I am also authorized to advise the committee that another group with which I am associated, the American Intellectual Property Lawyers Association, 9,000-plus lawyers in the intellectual property field, have also passed a resolution in support of copyright term extension.

I am undoubtedly the shortest witness who has testified this morning; so I, therefore, think it behooves me to have the briefest comments. In view of the fact that we are short of time, I don't want to repeat the statements that have been made by other witnesses in support of the copyright term extension. I don't believe that it would benefit anybody to hear me try to articulate the reasons why the bill should be enacted when others have spoken so well before me.

It is, in fact, because I sat here listening to those other speakers that I am reminded of exactly why we are here arguing for copyright term extension. I listened to Mrs. Bergman speak so articulately, and I was again reminded when I listened to Mr. Weller, just a moment ago, that we have right here, right now, perfect examples of why copyright term extension should be enacted.

It is not simply the points that these individuals made, but it is the way that they expressed them. People such as myself, lawyers, can make the points, perhaps with all the right words, but not with the eloquent words that are really persuasive. It is these individuals, the creators, who should be entitled to the protection that this bill seeks to grant for them. And it seems particularly appropriate that they should get the same kind of protection that the writers and creators of works in Europe receive. I can see no reason why they should be second-class citizens.

One of the things that came up during the course of the questioning of the first panel was why the rights of people like Mrs. Bergman and Mr. Weller should be granted additional protection versus the claims of entrepreneurs who wish to benefit from their creativity. And I guess the response that I have to that is that, in balance, if somebody is going to reap the rewards of their creative product, shouldn't it be them and their families? Shouldn't it be them and their children and, yes, even their grandchildren if they are fortunate to have them?

There is no indication to me as a consumer—and I am sure to most of you as consumers—that the American public really benefits more from the exploitation of a work once it goes into the public domain. When I bought my ticket to see "Phantom of the Opera" I didn't pay any less money for that than I paid for a ticket for

"Miss Saigon" just because one was based on a story that was in the public domain.

In fact, I think pragmatism tells us that the converse is true. The entertainment industry, which is the industry from which I come and can therefore speak on behalf of, is much more likely to exploit a work that is protected by copyright, given the extremely high costs of production, distribution, advertising, et cetera.

One of the points that was made by Congressman Conyers in his introduction really struck home to me this morning. He talked about being in China and the role that the United States has played in trying to get other countries to protect intellectual property. How can we go to other countries and ask them to grant strong copyright protection if we are not going to do it right here at home?

And having promised to be brief, I am going to conclude with just one statement. I think it behooves us to remember that creators and copyright owners will not be the only beneficiaries of copyright term extensions. All Americans will be winners in jobs, in trade, in the balance of payments flowing into the United States from intellectual property.

Thank you.

Mr. MOORHEAD. Thank you very much.

[The prepared statement of Ms. Saffer follows:]

PREPARED STATEMENT OF JUDITH M. SAFFER, ASSISTANT GENERAL COUNSEL,  
BROADCAST MUSIC, INC.

Legislation has been introduced in both the House and the Senate whose purpose is to extend the term of copyright in the United States by providing for an additional twenty-year term of protection for copyrighted works. The primary provision would extend the term of copyright to life of the author plus 70 years. The proposed legislation is based on the belief that if works copyrighted in the United States are to be properly protected internationally, our term of copyright must coincide with the term of copyright being granted in the European Community ("EC") and many other countries.

It isn't necessary to outline in detail the many reasons why the current term of copyright is inadequate. I respectfully refer the Committee to the excellent comments submitted by the Coalition of Creators and Copyright Owners to the Copyright Office in 1993, and to the statements presented by the witnesses speaking for the Copyright Coalition at today's hearing.

On behalf of the composers, songwriters and music publishers represented by BMI, I would like to stress that extending the term of copyright will help further the general purpose of the copyright law—to encourage creativity and protect the rights of authors. In the general revision of the Copyright Act of 1976, there was a recognition that copyrighted works should receive protection for the life of the author plus an additional 50 years. At that time, Congress recognized that the prevailing international standard of protection should be adopted by the United States, because it was believed that this extended protection would help foster creativity, which ultimately enures to the benefit of everyone, not just the author.

In addition, there is no doubt that there are significant economic benefits to be obtained by extending the term of copyright. We are all aware that demand for United States' copyrighted materials transcends political boundaries and that all kinds of American intellectual property such as music are exceedingly popular throughout the world. Foreign payments for works of American authorship far exceed American payments for works of foreign authors. Many estimate that United States' copyrighted related industries account for more than 5% of the gross national product and return a trade surplus of billions of dollars. However, a significant amount of this revenue could be put in jeopardy because of the principal referred to as "the rule of the shorter term", which provides that if the duration of protection in a foreign state is shorter than a member state, that member state may limit the protection it gives to works of the foreign state's nationals, to the latter's shorter copyright term. Accordingly, countries could protect works of United States'



citizens only for the United States' shorter term of life plus 50 years, while protecting their own works for life plus 70 years. This might result in depriving United States' authors of 20 years of protection in the international market, eliminating an important source of revenue.

Finally, the most frequently used argument against the United States in trade negotiations is that we are not in a position to chastise other countries for low levels of copyright protection when our own law does not provide the high level of protection in copyright laws of many western countries, particularly those in the EC. In 1976, various arguments were put forth for extending the term of copyright, including the need to bring U.S. law in line with the laws of similar countries. It was also thought that extending the term of copyright would allow the United States to be a leader in international copyright, would discourage retaliatory legislation, and would facilitate international trade. Twenty years later, these points are even more valid.

Mr. MOORHEAD. Because we have certainly limited time, I am going to ask our members to be very brief in their questioning and certainly no more than 5 minutes, and that will be enforced.

One thing that I wanted to ask, we have a voluntary film labeling program that is working to some extent. The film label in the bill doesn't seem to be satisfactory to many of the others because it is too long. If we would bring representatives of the motion picture association and the various groups that are represented here that are concerned with it together in a hearing room in Washington and let you start the negotiations and see that it is carried out, is it at all possible you could come to terms?

You are both making money from the same thing, the sale of the same films, everything else. Is it possible to come to any kind of an agreement on this without having legislation passed that enforces it? We can put it into legislation if you can come to an agreement. But is it possible for you to come to agreement? Any comments on that?

Ms. COOLIDGE. We tried. We did. And we couldn't get anywhere.

Mr. MOORHEAD. Over how long and under what circumstances?

Ms. COOLIDGE. There were several meetings. I was in contact with our representatives, but I was not involved in the meetings themselves. But I know that they were very frustrating. And, also, they did not represent everyone involved. In other words, the artists were represented, but all the producers and distributors were not 100 percent represented.

Mr. MOORHEAD. Would you give us a list of those people who you think should be involved?

Ms. COOLIDGE. Boy, would that be a big list. That is sort of the point I tried to make. One of the points that I tried to make is that this goes on and on and on. It is a giant pyramid of people that it affects.

And, second, the producers claimed that they could deliver certain people and they didn't.

And, third, we do not represent the nonunion artists who are working in this country. There are a large number of film artists who do not, for whatever reason, either the size or scale of their work, are not members of the unions; and we cannot represent them.

So it is a very large issue, to say nothing of the fact that in the end the entire concept, as you can see by our testimony here today of what the label should be, is kind of night and day.

Mr. EVES. Mr. Chairman, the view the coalition takes and the view our organization takes, is that there is a vast difference between a Government-mandated label and a voluntary label. I think it would be difficult to point to very many programs that exist today that have achieved a 90-percent compliance rate, as has this labeling program in barely 20 months that it has been in existence.

Directly to your question, I think that there clearly has been a responsiveness on the part of the motion picture industry to the concerns that have been raised here, and this is why a labeling program was developed.

Now, people will quarrel over the precise language, but certainly we are willing, and I know the MPAA is willing, to sit down and continue discussions to see if we can come to some agreement on that; and we are very willing to do it.

We certainly do not want to see a disparaging label that is harmful for our business and would seem to be designed to tell people that the product that they are buying is an inferior kind of product, and we have concerns about that.

One of the points that was made in the testimony a few minutes ago was that the labeling program that we have in existence right now has not created any economic hardship on the industry. I agree completely with that point; but that is because it is a clear, unambiguous, informative label without taking an arbitrary or a disparaging kind of position with regard to the film.

As to your question, we are certainly willing to do that.

Mr. MOORHEAD. That voluntary label, if it were mandatory, is that something that would be satisfactory to you?

Ms. COOLIDGE. No. Because although he may say it is unambiguous, we disagree. I don't think it is clear. It is not a clear label, and it is not unambiguous. For example, what does edited for content imply? If what it implies is true, meaning that it has sex and violence removed, that is actually not even involved in this bill. That editing is something that we do as part of our contract when we deliver a film made for motion pictures to a television screen. So that isn't even a part of it.

Second, formatted for your television screen. That sounds like the companies are doing the consumer a favor rather than removing 50 percent of the image from the picture. So we do have a very different opinion about how does the cinematographer or director feel about having 50 percent of the image removed from the picture.

Mr. MOORHEAD. Would you be willing to sit down one more time and see if some linguists among the group can come up with something that could be agreed to by everybody?

Ms. COOLIDGE. Well, I have to tell you, Mr. Chairman, that we have been—this request has been made to us several times; and we did sit down one more time and one more time and one more time again. So I don't know how to further answer you.

Well—I mean, the problem is we know what the problems are. We know that the producers, when we sit down and discuss together, will not consider the idea of the creative authors having an objection. We know that. There doesn't seem to be any way around it. And the authors, on the other hand, are extremely emphatic in their concern for having the opportunity to make this objection.

I would like to point out, though, something that I think is obvious, and I hate to say the obvious. This example of a worst possible scenario label is almost laughable. Who would put a product out with this gigantic label on it? Most films would hardly have any label on them at all. Most films, particularly that go into the video market on a videocassette, are not altered. The most common alteration that is done would be panning and scanning. That would be the only common label, and you don't know if it would have an objection. It might not. It depends on the author.

But a situation in which a film has had, let's say, 20 minutes taken out plus they have lexiconed it, which is almost ridiculous, why would you speed up the film if you are cutting out a huge amount of it? Say you lexicon it to speed it up plus you cut out 20 minutes plus you colorize it. The idea of doing that many alterations on it—I have to say that I would argue with you that maybe such a radically altered version is an inferior product and maybe it ought to have a label so that the purchaser of this film would know that their favorite scene in that movie may not be there.

But, anyway, most films out there today with this voluntary labeling situation are not labeled. First of all, syndicated films do not have labels. Releases prior to 1993 do not have labels. There are tens of thousands of movies out there that are not labeled under this voluntary labeling system, which we consider to be inadequate because it doesn't reach all the distributors and it is an inadequate label.

Mr. MOORHEAD. Thank you.

Mr. Conyers.

Mr. CONYERS. Thank you, Mr. Chairman.

I don't know who was supposed to enforce the time against the chairman. It is not important, because we are all here because of the compelling, important nature of this subject.

Let me just throw out a few questions. Throw back a few responses. Write to me. This matter will not be ultimately disposed of today. And I loved Mr. Weller's testimony. I think most people appreciated it. But why don't you tell your son about the Constitution? It isn't just laws that we flip around. The Constitution, article one, says that we shall limit it.

And that is where we get to Brother Bono. If you are saying you want a constitutional amendment, great. Somebody—I am sure there are people around that will want to do that.

What I would like to do is to find out—we know what kind of labels we don't want. I would like to see the kind of label we do want in this subject matter. And I don't think it is accurate to say that this is a solution in search of a problem.

You have been negotiating, Mr. Eves. You couldn't have been negotiating about a nonproblem. This is not only a problem, it is a big problem. And I approach this with great interest and concern. I am not sure why we do need two labels instead of one.

I think it is important to consider the fact that this moral rights discussion deriving from French law is very important. I think—I don't think we need to adopt it in its whole entirety, but I do think that it is subject to being dismissed out of hand. I mean, they have parliamentarians and people who know legal theory just as we do, and I am interested in pursuing it some more.

Another question that occurs to me is, doesn't the Lanham Act protect creators against excessive edits without proper labeling? And it seems to me that many viewers, unfortunately, ignore all labels. I am not real optimistic about labels doing much; but in the appropriateness of this subject matter it seems to me that at least a prima facie case has been made on the part of the writers that there ought to be a little bit more to this than volunteerism.

And I close with my observation about letting people voluntarily correct things never works unless there is a huge pressure behind saying, "If you don't do it right, brother, we are going to do it for you." My experience has led me not to leave automobile corporations to voluntarily do anything or anybody else.

And so, starting with you, Ms. Coolidge, would you make any responses you might make to these number of questions and observations that I have? And then I would like to invite Mr. Weller and Ms. Saffer to do the same.

Ms. COOLIDGE. Well, I don't know if this is a direct response or an indirect response, but I do agree with you. I think that our continued efforts to discuss this over the past few years—and the more deeply we look into this problem—I think that the simplest possible solution and the most truthful solution for the public is to have specific factual labels, including an objection, on these pictures.

So the question I ask is, "how burdensome is the truth?" The more I hear my colleague over here argue that it is burdensome to put these very factual labels on the film, the more I wonder does that mean marketing implies lying about the material you are selling?

And this is something that there is some history about in marketing. The truth is, if they have a director's cut that they consider to be a new product, that label is put in very big letters across the top of the videocassette, and it is considered a positive element in selling the picture.

Mr. BERMAN. What do you mean?

Ms. COOLIDGE. You can re-release a movie, you know, with the director's cut. There are criterion and other companies who release laser discs and even in videocassettes where they are going back to director's cut and using that as a new product and marketing tool to promote it.

I think that what the ultimate result of labeling, truthful labeling and objections, will be is that the public and the artists will more value the original authentic version of whatever film it is that they are buying.

Mr. CONYERS. Thank you.

Mr. Weller, any comments?

Mr. WELLER. My response is essentially emotional. What we make is who we are, and it is important to us that it be seen the way we intend it to be seen. When an outside person intervenes in that process, it is insulting and it is upsetting. Obviously, it is a very emotional issue.

And when Mr. Moorhead said that we have to try to get together and work this out, I think that attempts are so heated when this process begins that, finally, alas, it may be necessary for legislation to encourage certain compliance here. I think the issues are just

to the interests are just too disparate in both ends. That is my emotional sense of what is going on.

Ms. SAFFER. I am here as a lawyer, and I assume that means that I am not supposed to be emotional. I am just supposed to be logical. But I am always tempered by the fact that I am a human being, and so my comments, really, express both my logical and emotional reaction.

You addressed a point Mr. Weller made about how he should explain to his son about the fact that the duration of copyright is limited. And perhaps—

Mr. WELLER. That is not a year, by the way. He is only 8.

Mr. CONYERS. He is not ready for the Constitution. OK.

Ms. SAFFER. I am supposedly —

Mr. CONYERS. I hate to tell what your my son is asking me about, and he is only 4. Excuse me.

Ms. SAFFER. I have read the Constitution several times over my lifetime, and I think that the point here is that nobody is trying to change the Constitution. The Constitution provides for copyright protection for a limited time, but it doesn't say what that limited time should be.

What we are attempting to do is to change the law so that the limited time will be one that makes sense in our lifetime, and in these circumstances, in order to provide the best benefits for the creators and for America as a whole. And as we see it now that is simply to give us parity with European counterparts, extend another 20 years, not change the Constitution.

Mr. CONYERS. Thank you.

Last but not least, Mr. Eves.

Mr. EVES. Congressman, we are not objecting to a label for a label's sake. I think the very willingness of the MPAA to try to start a voluntary program is indicative of our willingness to do that.

We are admittedly very, very protective about this industry. We are certainly aware of a difference in the way the Americans and the Europeans have approached the moral rights issue. But in thinking about those differences, we are also terribly aware of how successful we have been in this country with the movie business. And the success that we have met with in this country causes us to ask ourselves the question: Why have we been so much more successful than those in other countries?

Mr. CONYERS. The implication is that you will be less successful with this labeling? Is that your point?

Mr. EVES. That is very much a concern, sir, yes.

Mr. CONYERS. OK.

Mr. EVES. We also think that many of the kinds of issues that we are talking about today ought to be issues that are discussed at the bargaining table. When people sit down and they talk about wages and terms of work and conditions and benefits and residuals and all of the factors that go into the agreement, this is the place and venue for artists' rights discussed to occur. If there is an argument or disagreement later on, it should be resolved by the parties themselves and we should not ask Congress once again to step into it.

Certainly, from our point of view, we are very willing to sit down and continue the discussion; and I would certainly urge both sides to do so.

Mr. CONYERS. Thank you so much. You are talking to the committee who has jurisdiction over the baseball strike. And sometimes have you got to go back in, unfortunately.

Thank you, Mr. Chairman. You are very generous with your time.

Mr. MOORHEAD. Mr. BONO.

Mr. BONO. This is tough because this is a practical issue, and it is an emotional issue. I certainly understand the emotional portion of it. But you are getting down to philosophy here, and I think what you have to identify is what your philosophy is.

Basically, what some of you are asking for is a mandate from Government. And I would think twice about asking the Government to mandate your industry in any form. Could it stop here or could it keep going? Could it go to a script? You are a writer. Where will that end?

I think the second question I would like to ask Ms. Coolidge. What language would you like to have on a general basis? I mean, "This picture is ruined"? I don't know where you want to take it to.

Ms. COOLIDGE. Well, outside of reading the label that was up on the screen, the language has been carefully thought through and it is listed in the bill and it is kind of a sort of a domino set. You can have just one tiny label; and the more things that are done to a movie, the stronger it gets.

Mr. BONO. Is the idea to tell the public that the product is less than what it was?

Ms. COOLIDGE. The idea is to tell the public that the product is changed.

Mr. BONO. Changed?

Ms. COOLIDGE. Changed from the original version. I really appreciate Mr. Conyer's question. Because the point is—the implication we keep hearing is we don't want this label because the label will damage the sale of the product.

First of all—and I think the part of the label that we want, that our opponents find more damaging, is the objection. But the objection is very important. If they feel that the objection is so damaging to the product, then obviously the audience should know that the people who made this piece of art feel that something is wrong. The logic is very simple.

Mr. BONO. That it has been changed or altered?

Ms. COOLIDGE. I am talking now specifically about the objection.

The label starts with a change; and that change, by the way, can be positive. Let's say we are talking about something that could be sold as a director's cut. Let's say that the original version of a film that everybody decided on was 1 hour and 54 minutes long, and so it was a very popular film. And this has happened recently with "Blade Runner" and "Lawrence of Arabia." Then they go back to the original director's cut which may be 20 minutes longer. Let's ask the director to reassemble his first cut, put that together and market that as the original director's cut.

That film would include a label that says this film is not the original version that was released. It is 20 minutes longer. And there will be no objection on it. They promote it as the director's cut, and the artists approve of it, and there is more material.

Mr. BONO. The question got a little complicated. Are you saying that there should be two versions available at a store, the cut version and the director's cut version?

By the way, the director's cut is when a director makes a picture. It is his work of art or her work of art, and they cut the picture in the cutting room, and they finalize the picture. At that point, they turn it over to the studio. In some cases, the director preserves the right to keep that final cut. In other cases, whatever the contract is, the studio can then recut it if they want.

You know, again, you were compensated for directing the picture. So you are going down to the basics of compensation, is what I am trying to tell you that you are starting to dig up. You are paid well.

Ms. COOLIDGE. With due respect, you know, Michelangelo was compensated for painting the ceiling of the Sistine Chapel; but, on the other hand, I think he would be upset if it was changed. As you said, it is a difficult issue.

Mr. BERMAN. They just restored it.

Ms. COOLIDGE. I know, and I don't know how he would feel about it. We can't ask him.

At any rate, the point is what we are talking about—we are not asking, demanding that there be two versions in the video store. Most of these suggestions become too complicated. All we are asking for is that when a film is changed from its originally released version that it bear a truthful and specific label that tells the buyer exactly what was done.

Mr. BONO. That is why I ask what the language was.

Ms. COOLIDGE. It is in the bill.

Mr. BONO. It is in the bill?

Ms. COOLIDGE. The language is completely outlined in the bill in a simple, step-by-step manner as to exactly how to label. It's very simple, how many minutes have been removed. Then, if there is an objection, that is included; but if there isn't, that is not included. And then it goes on from there.

The point is, Mr. Bono, that in the end maybe the video store—and I don't understand why this is burdensome to a video store even in the slightest—might want to include the original version on their sales shelf because the original version might have more value.

Mr. BONO. They are taking the position we paid for this product. They paid you. They paid the scriptwriter. They may—everybody was paid. So, from that point of view, who is the owner? I think that you have to ascertain at some point who owns the product, because it takes a collaboration of people to create the product, correct?

Mr. MOORHEAD. I think your time has expired. We have each taken 3 minutes more than was originally planned.

Mr. BONO. I understand how you feel. It happened to me. And I produced a picture, and I had to sell it for 350 bucks, and they cut the picture to shreds. But I knew I had to sell the picture, so at that point I sold it.

Mr. CONYERS. You need protection.

Mr. BONO. We need legislation.

Mr. BERMAN. I am not sure of the philosophical distinction between mandating the extension of the copyright term and the notion that it is inappropriate to mandate—

Mr. BONO. May I respond to that?

Mr. BERMAN. Only if it is not on my time.

Mr. BONO. One is paid for and one isn't.

Mr. BERMAN. In other words, you are not talking about the song as a work for hire for a film. You are talking about an independent song.

Mr. BONO. That is true.

Mr. BERMAN. I think that is a fair distinction.

Mr. EVES, I don't think you should continue to use the argument that we—we in the sense of whoever all is in the coalition—the studios, the video dealers, the television stations, the networks—have out of the goodness of our heart and because it is a right thing to do come up with an appropriate label for these films.

The fact is, you did it because there was legislation in over the last 5 or 6 years and it was in that context that those labels appeared. And so already the legislation has had some role. It has caused you to decide to come to an agreement on a label.

To me, this is sort of a continuum. You start on the far end with should any of the creators be able to veto this, the noncopyright holder creators be able to veto this? Should they be able to object to it? Should it be accurately described?

I can certainly see your concern about disparaging comments affecting the marketability of the product. And I know that were negotiations. They came fairly close. I think the folks who have labeled—the studios and the people who have labeled—have fallen short of where they were in the negotiation process; and the other side in this legislation is asking for more. I guess both of these are to be expected since no deal was worked out.

But what is wrong—if 22 minutes of the film has been cut, saying this film is 22 minutes shorter or 22 minutes have been edited from the film originally released in the motion pictures? Which is, by the way, why you are renting it because you heard about it when it was released in the motion pictures. What is wrong with that?

Mr. EVES. Mr. Berman—

Mr. BERMAN. Is that a disparaging comment? I guess that is my question.

Mr. EVES. That statement made in isolation, by itself, no, sir, I don't think it is.

Mr. BERMAN. So why haven't you gone—why haven't you agreed—that is a heck of a lot more communicative than "This film has been modified."

Mr. EVES. What we are testifying today, sir, is the legislation that begins with a warning label that states this is not the original product and then it goes through the litany of all the people that object and the reasons they object.

Mr. BERMAN. I understand you don't like the legislation, but in part of your argument you went to the trouble of bringing a television set that shows the labels that you are proud of that you have



done, quote, voluntarily, unquote. And I am saying what is wrong with including in your voluntary system, understanding your opposition to the legislation, the amount of minutes that you have cut from a film?

Mr. EVES. Sir, I think that, as we indicated, I know that the MPAA is certainly willing to sit down and to continue discussions. I recognize that there are legitimate differences of opinion over the precise language.

Mr. BERMAN. To your way of thinking, that does not affect the marketability of your video dealer's inventory, an accurate description of the amount of time that has been cut from the originally released film? Is that a fair conclusion?

Mr. EVES. The average film today costs \$50 million to produce.

Mr. BERMAN. My question is, does an accurate description of the amount of time that has been cut from the originally released film negatively affect the marketability of your product in the video stores?

Mr. EVES. I believe that one has to take a look at the entire label in its context.

Mr. BERMAN. Nothing else for a second, hypothetically, except where the modification has been a shortening of the film, a cutting of the time of the film, adding or substituting for the modification the words, "18 minutes has been edited from this film as originally released." Would that negatively affect the marketability?

Mr. EVES. This is going to be more of a television issue than a video store issue since it is rare to cut from a video cassette. There may be a marketability question as to the ability to show the film on free television in terms of whether it could fill the time slot.

Mr. BERMAN. I was asking about video dealers at this point.

Mr. EVES. No, as a matter of fact, with the video dealers generally there is not a situation where there is anything cut. And, in many cases, there are more than one version of the film that is available, including the director's cut. And also some of the studios are making available the film without the pan and scan technique used.

Mr. BERMAN. I am gathering you are saying it would not affect marketability in the video dealer context.

Mr. EVES. It is not an issue primarily in the video context unless the language used on the label is disparaging to the product.

Mr. BERMAN. What about a label that said, this film has been colorized?

Mr. EVES. Again, in the video area, the label relating to colorization already appears in this way.

Mr. BERMAN. Was "Angels in the Outfield"—was that originally in the color? I just saw it, and I didn't see a label that said it was colorized.

Mr. EVES. It was made in a color version just in the last 2 or 3 years. It is a remake. It is a relatively recent production.

Mr. BERMAN. So, it is not a colorized version. I missed the new one. It came and left without me knowing about it.

Mr. MOORHEAD. The gentleman's time has expired.

Mr. BERMAN. Thank you.

Mr. BECERRA. Mr. Chairman.

Mr. MOORHEAD. The gentleman from California, Mr. Becerra.

Mr. BECERRA. Thank you.

I think you can see that a lot of us are struggling with this issue, because I don't believe that legislation doing what either side would like would ever pass. I think it is too convoluted, too esoteric. And it would be difficult to get 218 Members in the House and 60 Members in the Senate—that there is some good compromise out of this. And I think it is unfortunate because I wish it would be resolved.

Let me ask a question—I will try not to take too much of a side on this, but let me ask a question of the directors and the screenwriters and ask why not also include within the list of people who can raise an objection—actors or other artists who are involved in the film?

Ms. COOLIDGE. Well, the short answer is twofold. One is that there is some precedent in Europe as to who are considered to be the authors of a motion picture. And they vary slightly from country to country, but we have followed the most standard traditional approach.

Second, through equally important—and I think that the statements from the Screen Actors Guild that I have submitted, you know, really prove that—is the traditional relationship of trust between the people who work on a motion picture—the editors, the grips, the crew people, makeup, hair, actors—and the director. They sign on to do a movie with a director, and that director is making the final decisions as to whether or not that actor's performance is up to snuff or not and whether or not the development of the character is correct.

And those actors have always had, and continue to have, a relationship of trust which is a part of taking that job.

So the entire process of making a film is to develop it and to follow it in terms of production, realizing one vision. It is very, very difficult to make a movie with more than one person saying what kind of a movie you are making. And that is why the director traditionally has had the final decisions.

Mr. BECERRA. It's only natural, I would want to be there with the screenwriters and directors, but I would like to see the other artists involved. Because whether you bargained away your part as an actor to be a part of that decisionmaking process, I think the same comparison could be made between the directors and the producers. And coming from a union home, where I wish my father had more say as to his working conditions and the things that he produced, I wish there were a better way to try to get others involved.

Ms. COOLIDGE. But here is the twofold problem or issue: One is, they haven't asked for it. That is very simple. They have supported this bill, and they have supported the bill as it stands, which is further proof that they trust that if a director's work is hurt the actor's work is hurt. It is very simple.

We also all know, and this has been a ploy of some of our opponents, that if you put more and more and more people into the objection portion of this bill it will be impossible—impossible to create anything realistic that would work.

But there really is precedent for this in Europe, and we could further educate you about that.

Mr. BECERRA. Thank you for that.

Let me ask Mr. Eves a question. At what point do you reach that threshold where you, in fact, have to in some degree undermined the character or the artistic value of a film by cutting 20 minutes or by cutting out too much of the film because you have to fit it on a TV screen?

At what point is it true that the work that is being displayed is no longer the work that has been promoted that is causing people to want to go view it?

Mr. EVES. Congressman, I wouldn't honestly know how to possibly answer that question, because I think in the eye of the person looking at it you will probably get a different version.

There are certainly a lot of creative artists and directors who object to the panning and scanning of a film to fill up the television set. There are other people, customers of ours, who come into a video store when they see an original cut of a movie and return the tape telling them the tape must be defective because they had these big black bands on the top and the bottom of their picture.

So it is an awful lot in the eye of the beholder, and I would not presume to know exactly at what point that happens. I guess that is going to be up to each individual to decide.

Mr. BECERRA. I think you just illustrated the problem for this particular issue. No one really knows what is sufficient or what is a sufficient compromise for us to go with. And if you all can't sit down, I don't think that you can expect us, who have less knowledge than you do about the industry and the product and the artistic value, to come up with something that anyone would be satisfied with.

I think it is unfortunate because I know that you all tried very hard a couple of years back, and I am in a quandary.

Mr. CONYERS. Will the gentleman yield briefly?

Mr. BECERRA. I will just finish the statement. Of course, I will yield to the ranking member.

I wish you all could find a way. I think there must be some middle ground. I think that at some point the art has been disparaged or has been changed so much so that the artistic value or character has been altered; and the consumer, because of I think a truth in advertising or a customer's right to know, should understand that.

But I also believe that it is difficult with the legislation in hand to define or give us the understanding of what an objection—what constitutes a proper objection on the part of a director. At what point does it reach the threshold where the director has the right to object because the character has been changed? And I think it becomes very difficult, and you are asking us to do something subjective which you all are having a difficult time doing yourselves.

I yield to the ranking member.

Mr. CONYERS. My admiration for my colleague from California leads me to know that frequently we make the decisions that experts who have far more knowledge than us—that is why we hold hearings.

Mr. BECERRA. That is why Government is so disparaged.

Mr. BERMAN. That is why we wanted the job.

Mr. CONYERS. The witnesses come to us as experts and, guess what, we make the decisions. That doesn't mean it is right, but that is why the hearing is held.

Mr. BECERRA. Nor does it mean that the decision we make is the best one for the industry, but we will strap the industry to live with it. And I suspect at some point we will find one sector of the industry coming back and saying you did a darned awful job and try to fix it.

Ultimately, we are going to get guidance, the expert assistance, from the industry; and it just helps us if we had more of a concrete answer from the industry as to where we would go so that we could focus on trying to define what we can do, if anything needs to be done at all.

Mr. CONYERS. You are up to it.

Mr. BECERRA. Thank you, Mr. Chairman. And I thank all the panelists for being here.

Mr. MOORHEAD. I want to thank all the panelists and all the people who have come and provided our audience today. And I want to thank the four other members of the panel that have come over here for this hearing. This has been a good hearing. I am sorry we kept you so long. But I think it has been important that we have gone over the subject and given it the time it deserves.

Thank you.

The subcommittee is adjourned.

[Whereupon, at 12:46 p.m., the subcommittee adjourned.]

# COPYRIGHT TERM EXTENSION ACT OF 1995

THURSDAY, JULY 13, 1995

HOUSE OF REPRESENTATIVES,  
SUBCOMMITTEE ON COURTS AND  
INTELLECTUAL PROPERTY,  
COMMITTEE ON THE JUDICIARY,  
*Washington, DC.*

The subcommittee met, pursuant to notice, in room 2237, Rayburn House Office Building, Hon. Carlos J. Moorhead (chairman of the subcommittee) presiding.

Present: Representatives Carlos J. Moorhead, F. James Sensenbrenner, Jr., Howard Coble, Bob Goodlatte, George W. Gekas, Martin R. Hoke, Patricia Schroeder, and John Conyers, Jr.

Also present: Thomas E. Mooney, chief counsel; Mitch Glazier, assistant counsel; Veronica Eligan, secretary; Betty Wheeler, minority counsel; and Susie Park, intern.

Mr. MOORHEAD. The hearing will come to order.

Today the subcommittee is conducting a second day of hearings on H.R. 989, the Copyright Term Extension Act of 1995. H.R. 989 would extend the term of ownership of an individually copyrighted work from the life of the author plus 50 years to the life of the author plus 70 years, and the works for hire from 75 to 95 years. This change will more closely resemble the new directive implemented by the European Union member states, who are among the largest users of our copyrighted works.

Last time the Congress considered and enacted copyright term extension legislation was in 1976. At that time the House report noted that copyright conformity provides certainty and simplicity in international business dealings. The intent of the 1976 act was twofold: first, to bring the term for works by Americans into agreement with the then minimum term provided by European countries; and, second, to assure the author and his or her heirs of their fair economic benefits derived from the author's work. The 1976 law needs to be revisited because neither of these objectives is currently being met.

In October 1993, the European Union adopted a directive mandating copyright term protection equal to the life of the author plus 70 years for all works originating in the E.U., no later than the first of July this year. The E.U. action has serious trade implications for the United States.

The United States and the European Union nations are all signatories of the Berne Copyright Convention, which includes the so-called rule of the shorter term, which accords copyright protection for a term which is the shorter of life plus 70 years or the term

of the copyright in the country of origin. Once this directive is implemented, United States works will only be granted copyright protection for the shorter life plus 50-year term before falling into the public domain in Europe, whereas all of the others will continue on for the 70 years.

The main reasons for this extension of term are fairness and economics. If the Congress does not extend to Americans the same copyright protection afforded their counterparts, American creators will have 20 years less protection than their European counterparts—20 years during which Europeans will not be paying Americans for their copyrighted works. Europeans buy more works of American artists than they do of any other country's nationals. Any imbalance would be harmful to the country and work a hardship on American creators.

I would like to be introduced—to introduce our ranking member at this time, but all of us are having two or three markups or hearings this morning all going on at the same time. I have two markups going on right now, plus this hearing, and I know Howard Berman and Mrs. Schroeder and Barney Frank and many of the other members have the same problem.

I will now introduce Jim Sensenbrenner.

Mr. SENSENBRENNER. Thank you very much, Mr. Chairman.

This subcommittee has important work to do, and this bill is an important issue that is before the subcommittee. We've had a number of hearings on copyright and patent legislation, and I expect that the subcommittee will take action on much of this legislation.

There is one piece of legislation, however, that hasn't had any action, and that's H.R. 789, which relates to background music and licensing fees that have to be paid by owners of retail establishments. That's just as important as this legislation is, and there have been some negotiations that have been going on between parties on both sides of the issue. Another negotiation session is scheduled for July 28, a little bit more than 2 weeks from now.

Let me say that the first two negotiation sessions have gotten nowhere in terms of resolving the problem of retailers having to pay licensing fees for having the radio on or having the television on. I will not look at this bill favorably unless there is some legislative action on H.R. 789 or something similar to it, because leaving the music licensing fee issue the way it is now in the passage of this bill will simply allow the licensure organizations like ASCAP and BMI to harass retailers for another 20 years. I don't think that that's acceptable. It is not acceptable to the one-quarter of the House of Representatives that have cosponsored H.R. 789, and it seems to me that this issue has to be dealt with as a package.

And I thank the chairman for giving me this time.

Mr. MOORHEAD. Our ranking minority member of the full Judiciary Committee, John Conyers, is here. John.

Mr. CONYERS. Good morning, Mr. Chairman.

I'm just trying to get the import of my colleague from Wisconsin's remarks as I came in. I guess this is what they call in the music business a tie-in. You don't get one without the other. What I want to do is look at his bill, though, and find out what the other is, and I'm sure I'll have a reaction to it. I don't know how happy I'll be,

but I'd like to reserve any other additional comments that I may make for later on in the hearing.

Thank you.

Mr. MOORHEAD. The gentleman from Virginia, Mr. Goodlatte.

Mr. GOODLATTE. I'd just like to thank the chairman for holding these hearings. I don't have any comments at this time. Thank you.

Mr. MOORHEAD. Our first witness will be Ms. Marybeth Peters, who is the Register of Copyrights for the United States. From 1983 to 1994, Ms. Peters held the position of Policy Planning Advisor to the Register. She also served as Acting General Counsel of the Copyright Office, Chief of both the Examining and Information Reference Divisions. Ms. Peters holds an undergraduate degree from Rhode Island College and a law degree from George Washington University. She has served as a consultant on copyright law at the World Intellectual Property Organization and authored the "General Guide to the Copyright Act of 1976."

Welcome, Ms. Peters.

Our second witness on the first panel will be Ambassador Charlene Barshefsky, the Principal Deputy U.S. Trade Representative. Ambassador Barshefsky has been instrumental in achieving important intellectual property trade agreements, most recently helping to formulate an extensive intellectual property rights agreement with China. She was the key policymaker and negotiator of the Comprehensive Framework Agreement with Japan which serves to protect American copyright owners in an important consumer market. Ambassador Barshefsky has also led the administration's effort to develop bilateral regional trade initiatives in South and Central America, with particular emphasis on intellectual property rights in Brazil and Argentina.

Welcome, Ambassador Barshefsky.

Our third witness on the first panel is Commissioner Bruce Lehman, the Assistant Secretary of Commerce and Commissioner of Patents and Trademarks of the United States. Commissioner Lehman served as counsel to this subcommittee for 9 years and as chief counsel for a number of those years. Mr. Lehman has been a key player on intellectual property issues between the United States and Asia and the European Union, and has also headed numerous delegations to consider intellectual property issues at the World Intellectual Property Organization.

Welcome, Commissioner Lehman.

We have written statements from our first three witnesses, which I ask unanimous consent be made a part of the record, and I ask you each to summarize your statements in 10 minutes or less. I ask that the subcommittee hold their questions for all three witnesses until they have completed their oral presentations.

We will begin with Ms. Peters.

**STATEMENT OF MARYBETH PETERS, REGISTER OF COPYRIGHTS AND ASSOCIATE LIBRARIAN FOR COPYRIGHT SERVICES, LIBRARY OF CONGRESS**

Ms. PETERS. Thank you.

Mr. Chairman, members of the subcommittee, I am pleased to offer my comments on H.R. 989, the Copyright Term Extension Act of 1995.

In 1993, before any legislation was introduced, the Copyright Office initiated a study on duration of copyright which included a hearing as well as a long comment period. I have submitted a detailed analysis and statement for the record. Much of what we learned is reflected in that statement. I will speak briefly now on what I believe are some of the more important factors to be weighed in considering this legislation.

This legislation, which appears in part to be an attempt to have equivalent terms of protection with the important countries of the European Union, would increase copyright terms of all works, including existing works, for 20 years. This would be a significant change in our copyright law, and it would have a significant impact on our society.

Our Constitution gives Congress the power to grant to authors exclusive rights for limited times to promote the progress of science and the arts. Thus copyright is granted to promote the public interest by stimulating creativity and by stimulating the dissemination of knowledge. Authors are given control over their works as an incentive to produce. This control, however, is for a limited time. After this time, the work becomes part of the public domain and is available to be used by society as a whole.

When considering the constitutional mandate, a number of questions are raised. First, is this legislation in the public interest? Will it encourage authors to create and publishers to disseminate new works? If so, at what cost? Specifically, what will be the effect of freezing the public domain for 20 years? Second, does this legislation violate the limited times provision of the Constitution?

In attempting to evaluate how extending the term would stimulate creativity, it is difficult to see how moving from a term of life-plus-50 to life-plus-70 will encourage more authors to write. It could, however, provide additional income that would finance the production and publication of new works. Moreover, I believe there is a broader public interest.

Mr. Chairman, in your statement introducing this bill, and again today in your opening remarks, you emphasized the importance of having harmonization of copyright terms of protection among our major trading partners. As you said, conformity vis-a-vis the copyright term, as well as conformity in other areas, provides certainty and simplicity in international business dealings.

You also noted that American authors should be given the same protection afforded their counterparts in Europe. I agree with this assessment. The importance of granting American authors the same protection as that granted to authors elsewhere has long been a position of the United States. When the copyright term was first extended in 1832, this was the argument on which the increase was based. The rapidly expanding international markets for copyrighted works, especially in light of the global information superhighway, supports such an effort.

Moreover, the reason for amending our law at this time is to bring us into conformity with that of the European Union. Unless the United States extends its terms, our authors and other copyright owners will be denied money that they otherwise would be entitled to receive.



The Copyright Office supports H.R. 989 for two reasons. One, in the global information society, we have a need to harmonize copyright terms throughout the world, and we believe that life-plus-70 will become the international norm. Two, as a leading creator of copyrighted works, the United States should not wait until it's forced to increase the term. Rather, it should set the example for other countries.

We support this bill largely on international grounds. However, we are not unmindful of some negative impacts that this bill would have in the United States. Enactment of this bill in one stroke freezes works from coming into the public domain for 20 years. This involves works copyrighted between 1920 and 1940. I am concerned about the effect that this will have on libraries, archives, and educational institutions who are striving to improve American education and who serve as the guardian of our Nation's cultural heritage.

Libraries, like the Library of Congress through its National Digital Library efforts, are attempting to bring unique materials, including those still protected by copyright, to the American educational community. The Library of Congress has been diligent in seeking copyright permissions for its digital library projects. However, much of the unique materials, photographs, prints, manuscripts, letters are very difficult to determine the copyright status and the copyright terms of such works. Finding the current copyright owner is almost impossible. The Library has spent thousands of hours searching copyright records and seeking permissions.

Thus, considering the need to balance the rights of copyright owners with the benefits to be gained by the public, the Copyright Office opposes an additional term of 10 years to the unpublished works covered by section 303. The authors of these works died before 1953. Many libraries, archives, and historical societies, as well as authors and publishers, have been anxiously awaiting January 1, 2003, when these works are scheduled to enter the public domain.

We also suggest a very narrow exemption for the additional 20-year term to provide instructional materials to American schools by nonprofit libraries, archives, historical societies, and the like. In addition, there are other issues that were raised by four library associations in their letter of July 11 and by Dr. Billington, the Librarian of Congress, in his letter of July 12. The problems identified are preservation of materials and the ability to provide users with access of those materials.

These problems are not caused by this bill. They are, however, exacerbated by it. This is because the older the work is, the harder it is to find the copyright owner and the more it costs to obtain permission to use the work.

Libraries and archives play a critically important role in our country's social and cultural welfare, as well as its economic growth. The unique materials in their collections must be preserved and made available to our citizens.

I would like to see these problems solved, and I hereby offer the services of the Copyright Office and the Library of Congress to address the issues of, one, the unlocatable copyright owner; two, preservation by libraries of these unique materials; three, access to col-

lections of works that are no longer commercially available or viable. The Office has served this committee in the past in the revision of the Copyright Act of 1909, and it served it again recently in the Copyright Reform Act, when through an advisory committee recommendations were made to solve a number of problems that had been identified with the registration system. I believe we can serve this same useful role now.

I would welcome the opportunity to discuss with you and your staff the specifics of how the Copyright Office can assist the subcommittee in its work on these important issues. Thank you for the opportunity to testify here today.

[The prepared statement of Ms. Peters follows:]

PREPARED STATEMENT OF MARYBETH PETERS, REGISTER OF COPYRIGHT AND  
ASSOCIATE LIBRARIAN FOR COPYRIGHT SERVICES, LIBRARY OF CONGRESS

H.R. 989 proposes to extend the basic United States copyright term by twenty years in order to reflect increased life expectancy and to harmonize the U.S. copyright term with that of the European Union. The most prominent change ordered by the EU Directive is the requirement that member states recognize a general duration standard of life of the author plus 70 years. With respect to countries outside of the EU, the Directive applies the rule of the shorter term, meaning countries having a shorter term will be limited to the term established by the country of origin.

The development of a global information infrastructure where consumers can purchase directly from creators located anywhere in the world is, in itself, a strong argument for harmonization of copyright term. Other valid arguments include the loss of revenues for U.S. authors by the application of the rule of the shorter term and the fact that the existing terms may not cover an author during his or her lifetime, a widow or widower, or one generation of heirs.

This is the first time that the United States has considered extending the copyright term since the 1976 act went into effect on January 1, 1978. A key consideration is whether H.R. 989 satisfies the constitutional goal of fostering the creation and dissemination of intellectual works.

While the Copyright Office generally supports H.R. 989, it does oppose adding ten years to the term of unpublished works covered by 17 U.S.C. 303. We also question whom the beneficiary of the extra 20 years should be, especially in cases where there is no existing termination right. Moreover, we condition our support on the solution of certain problems faced by libraries and educational institutions with respect to preservation, access and appropriate nonprofit educational uses that are beyond fair use. We have made several suggestions concerning approaches for resolving those issues, including creating a licensing system for authors and owners who cannot be located, developing guidelines under section 108 for material that can be used without payment for nonprofit educational purposes or creating an exemption for nonprofit uses related to instructional activities in the extended term.

Solutions to these problems might be more forthcoming if this subcommittee directed the parties to work these problems out. The Copyright Office would be willing to assist in facilitating agreement on possible solutions to the problems of preservation and access of older copyrighted works.

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Chairman Moorhead, joined by Representatives Schroeder, Coble, Goodlatte, Bono, Gekas, Berman, Nadler, Clement, and Gallegly,<sup>1</sup> introduced H.R. 989 on February 16, 1995. The bill known as the "Copyright Term Extension Act of 1995" would add twenty years to the basic U.S. copyright term, bringing it to life plus seventy years. Senator Hatch introduced an identical bill, S. 483, on March 2, 1995. In part these bills are a response to a 1993 Directive of the European Union (EU) on harmonizing copyright term;<sup>2</sup> the thrust of this Directive is the requirement that member states recognize a general copyright duration standard of life of the author plus 70 years. It is clear that the EU Directive on Term will ultimately result in a longer term for most, if not all, European nations, since countries wishing to join the Union or the European Economic Area will also be required to go to life plus 70. Also certain non-European countries already have longer terms or will consider extending them in the future. With respect to countries outside of the EU, the Directive applies the rule of the shorter term, meaning countries having a shorter period of protection will be limited to the term established by the country of origin.<sup>3</sup>

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<sup>1</sup> Since then four other representatives have signed on to H.R. 989: Becerra, Gordon, Quillen and Conyers.

<sup>2</sup> Council Directive 93/98, 1993 O.J. (L 290/9), [hereinafter EU Directive on Term].

<sup>3</sup> EU Directive on Term, art 7.

Under current U.S. copyright law, the EU mandatory adoption of the rule of the shorter term will mean that popular U.S. works will not get the benefit of a longer term in any of the EU countries. Other countries with longer terms than life plus 50 may also move to make any period of protection longer than 50 years reciprocal. The question of harmonizing copyright term in all countries is critical for U.S. rightsholders. Consequently, with some reservations, the Copyright Office generally supports term extension. Those reservations concern the preservation and access to unpublished and other works that are no longer commercially available.

Congressman Moorhead, in introducing H.R. 989, noted that times have changed since duration was considered in the 1976 revision effort:

The last time the Congress considered and enacted copyright term extension legislation was in 1976. At that time the House report noted that copyright conformity provides certainty and simplicity in international business dealings. The intent of the 1976 act was two-fold: First, to bring the term for works by Americans into agreement with the then minimum term provided by European countries; and second, to assure the author and his or her heirs of the fair economic benefits derived from the author's work. The 1976 law needs to be revisited since neither of these objectives is being met.<sup>4</sup>

My statement summarizes the background and history of copyright duration in the United States, analyzes the changes proposed in H.R. 989 in light of existing U. S. copyright law and the EU Directive, notes and evaluates the major arguments for and against term extension in light of the considerations the House Judiciary Committee weighed when extending the copyright term in 1976, and summarizes certain questions and issues in the conclusions.

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<sup>4</sup> 141 Cong. Rec. E379 (daily ed. Feb. 16, 1995) (statement of Rep. Moorhead).

## II. HISTORY OF DURATION OF COPYRIGHT TERM IN UNITED STATES LAW

The history of the duration of copyright protection in the United States reveals a strong international influence. When it came time to adopt the first copyright law, Congress looked to the English common law system, the model it knew best. England viewed intellectual property as a property right but also viewed it in certain functional terms — as a device “to promote creative endeavors, on the one hand, and to ensure maximum public access to the benefits of these endeavors on the other.”<sup>5</sup> Early U.S. copyright statutes adopted English duration standards. As discussed below, the United States abandoned the standard of one fixed term of protection, renewable for an additional fixed term in 1976 when it adopted the life of the author plus 50 years, standard of the Berne Convention.<sup>6</sup> At that time most developed and industrialized countries with the exception of the United States,<sup>7</sup> belonged to Berne and the Berne minimum term was life of the author plus 50, years.

### A. DEVELOPMENT OF FEDERAL COPYRIGHT LAW

The first federal copyright law enacted in 1790 stems from the constitutional clause giving Congress the power “To promote the Progress of Science and useful Arts, by securing for limited Times

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<sup>5</sup> Sam Ricketson, The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986 321 (Centre for Commercial Law Studies Queen Mary College 1987).

<sup>6</sup> See Convention concerning the Creation of an International Union for the Protection of Literary and Artistic Works (Sept. 9, 1886, revised in 1908, 1928, 1948, 1967, 1971). Berne Convention art. 2(8) (Paris text) [hereinafter Berne Convention].

<sup>7</sup> China and the Soviet Union were not members of Berne at that time either.

to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." <sup>8</sup> The constitutional clause thus sets out two goals "to foster the growth of learning and culture for the public welfare, and the grant of exclusive rights to authors for a limited time is a means to that end." <sup>9</sup>

Although the primary purpose of the copyright law is to foster the creation and dissemination of intellectual works for the public welfare, it also has an important secondary purpose. To give authors the reward due them for their contribution to society.

These two purposes are closely related. Many authors could not devote themselves to creative works without the prospect of remuneration. By giving authors a means of securing the economic reward afforded by the market, copyright stimulates their creation and dissemination of intellectual works. Similarly, copyright protection enables publishers and other distributors to invest their resources in bringing those works to the public. <sup>10</sup>

Authors would not be able to continue to create unless they earned income on their finished works. The public benefits not only from an author's original work but also from his or her further creations. Although this truism may be illustrated in many ways, one of the best examples is Noah Webster who supported his entire family from the earnings on his speller and grammar during the twenty years he took to complete his dictionary.

#### 1. The English Statute of Anne.

The Statute of Anne, enacted in England in 1710, was the first copyright statute to gain wide attention. Its provisions served as a model not only for the United States, but many other nations as well.

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<sup>8</sup> U.S. Const. art. I, §8, cl. 8.

<sup>9</sup> REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW, HOUSE COMM. ON THE JUDICIARY, 87TH CONG., 1ST SESS., COPYRIGHT LAW REVISION (Part 1, 5) (Comm. Print 1961). [hereinafter Copyright Law Revision Part 1].

<sup>10</sup> *Id.* at 5-6. These principles are noted in more detail in H.Rep. No. 2222, to Congress, 2d Sess. on the Copyright Act of 1909. "Not that any particular class of citizens, however worthy, may benefit, but because the policy is believed to be for the benefit of the great body of people, in that it will stimulate writing and invention to give some bonus to authors and inventors." *Id.*

This historic legislation was adopted at the insistence of publishers, who were experiencing increasing problems with literary piracy.

The Statute of Anne granted an author and his assigns an original term of 14 years from the date of publication, plus a second term of 14 years should the author be living at the expiration of the first term.<sup>11</sup> In 1814, England changed its duration standard to a term of 28 years plus the remainder of the author's natural life, should he or she be living at the expiration of the first term.<sup>12</sup> In 1842, England again extended the copyright term to 42 years or the life of the author plus seven years, whichever should be longer.<sup>13</sup> England was one of the original signatory countries of the Berne Convention and has been a member since December 5, 1887. The original Berne text left the copyright term to the member country in order to encourage countries to join. In 1908, however, the Berne Convention went to a term of life of the author, plus 50 years.<sup>14</sup> Nine out of fifteen Berne countries had gone to life plus fifty by 1908.<sup>15</sup> In the Copyright Act of 1911, England extended copyright duration to the life of the author plus 50 years.<sup>16</sup>

## 2. Development in Colonial America.

Under the Articles of Confederation, 12 of the original 13 states enacted copyright statutes. Of these 12 states, six applied the duration standard of the Statute of Anne: an original term of 14 years from

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<sup>11</sup> 8 Anne, ch. 19, 1710.

<sup>12</sup> 54 Geo. 3, ch. 156.

<sup>13</sup> 5 & 6 Vict., ch 45.

<sup>14</sup> Berne Convention art. 7(1) (Berlin text). This term was made compulsory in Brussels in 1948.

<sup>15</sup> Ricketson, *supra* note 5, at 325.

<sup>16</sup> 1 & 2 Geo. 5, ch. 34.



the date of first publication, plus a second term of 14 years should the author be living at the expiration of the first term.<sup>17</sup> The other six states adopted single terms ranging from 14 years to 21 years.<sup>18</sup>

### 3. The 1790 Copyright Act.

In the deliberations over the drafting of the U.S. Constitution, there appears to have been near unanimity among the framers that copyright and patent should fall within federal powers. James Madison, in writing the Federalist Papers, only devoted one paragraph to the Copyright-Patent Clause in which he observed that the "utility" of the provision could "scarcely be questioned." One of the early tasks performed by the first Congress was passage of the Copyright Act of 1790.<sup>19</sup> This historic legislation established an initial copyright duration term of 14 years, to be followed, should the author still be living, by a 14 year renewal term. This term was the same as the Statute of Anne's and also that of six states under the Articles of Confederation. In 1831, Congress increased the term to 28 years, with a renewal term of 14 years.<sup>20</sup> The purpose of increasing copyright duration was to place "authors in this country more nearly upon an equality with authors of other countries."<sup>21</sup> England had, as previously mentioned, changed its term in 1814 to 28 years plus life if the author was still living at the end of the 28th year.

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<sup>17</sup> James J. Guinan, Duration of Copyright, Copyright Office Study No. 30 (1957), Subcomm. on Patents, Trademark, and Copyrights of the Senate Comm. on the Judiciary, 85th Cong. 2d Sess., COPYRIGHT LAW REVISION STUDIES I (Comm. Print 1960).

<sup>18</sup> Massachusetts, Rhode Island, and Virginia adopted a single term of 21 years, New Hampshire adopted a single term of 20 years, and North and South Carolina adopted a single term of 14 years.

<sup>19</sup> 1 Stat. 124 (1790).

<sup>20</sup> 4 Stat. 436 (1831).

<sup>21</sup> Report of the Committee on the Judiciary of the House of Representatives, 7 Register of Debates, appendix CXIX.

## B. SIGNIFICANT 20TH CENTURY REVISIONS OF COPYRIGHT TERM

### 1. The 1909 Copyright Act.

When Congress increased the U.S. copyright term in 1909, Berne had already adopted life of the author plus 50 years for the basic copyright term. The new U.S. provision created a basic copyright term of 28 years from the date of first publication or registration, plus a renewal term of 28 years.<sup>22</sup> Early drafts of this legislation proposed that the basic copyright term be life of the author plus 50 years. Copyright proprietors advanced two arguments in support of the life plus 50 duration. They argued that authors were increasingly outliving the copyright protection in their works and that it was unfair for authors to lose their protection in their old age. Second, the life plus 50 standard was gaining increasing acceptance as the international standard of protection.

Although little organized opposition was raised against the life plus 50 term, Congress was not willing to accept such a radical departure from what it saw as American copyright tradition. The U.S. renewal system permitted works that were not commercially valuable and, therefore, not renewed to go into the public domain after 28 years. The increase in the renewal term from 14 years to 28 years appears to have been the congressional response to copyright proprietors' concerns that the term should be longer. A renewal mechanism was preferred over one set term because it gave authors who sold their rights for less than full value a second chance to secure a more equitable return in the renewal period and because it placed works that were not renewed in the public domain where they could be used by anyone.<sup>23</sup>

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<sup>22</sup> 35 Stat. 1075, 17 U.S.C. §24.

<sup>23</sup> H.R. Rep. No. 2222, 60th Cong. 2d Sess. (1909).

## 2. Copyright Revision.

Congress was finally willing to embrace the international standard of life plus 50 when it revisited the issue in deliberations leading to the 1976 Copyright Act. In the initial report prepared "to pinpoint the issues and stimulate public discussion,"<sup>24</sup> the Copyright Office proposed a duration of 28 years from first public dissemination, coupled with a renewal term of 48 years. This would bring the maximum term from 56 to 76 years.<sup>25</sup> The Copyright Office Report noted two general approaches to measure the copyright term (1) from the dissemination of the work or (2) from the death of the author. It concluded that "a term based on dissemination has the greater advantages for the public, and that the principal purposes of a term based on the death of the author can be achieved by a sufficiently long term based on dissemination."<sup>26</sup> The Office's proposal was widely criticized; the parties preferred a life plus 50 year standard.<sup>27</sup> By 1964, the working draft proposed one copyright term, life plus 50 years for most works.<sup>28</sup> Debate continued, however, on how long this term should be and what should be done about corporate works and subsisting copyrights.

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<sup>24</sup> Copyright Law Part 1, at Preface, p. i.

<sup>25</sup> *Id.* at 50.

<sup>26</sup> *Id.* at 48-49 (emphasis added). One reason the Report recommended measuring the term from dissemination was that approximately 40% of works were "corporate" and many individual works were disseminated anonymously.

<sup>27</sup> SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW: 1965 REVISION BILL, HOUSE COMM. ON THE JUDICIARY, 89TH CONG., 1ST SESS., COPYRIGHT LAW REVISION PART 6 (Comm. Print 1965) [hereinafter Copyright Law Revision Part 6]; REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW: DISCUSSIONS AND COMMENTS, HOUSE COMM. ON THE JUDICIARY, 88TH CONG., 1ST SESS., COPYRIGHT LAW REVISION PART 2 (Comm. Print 1963) [hereinafter Copyright Law Revision Part 2].

<sup>28</sup> PRELIMINARY DRAFT FOR REVISED U.S. COPYRIGHT LAW: DISCUSSIONS AND COMMENTS ON THE DRAFT, HOUSE COMM. ON THE JUDICIARY, 88TH CONG., 2D SESS., COPYRIGHT LAW REVISION PART 3, 19-20 (Comm. Print 1964) [hereinafter Copyright Law Revision Part 3].

It is interesting to review those earlier discussions. The opposing arguments are set out by two well known copyright experts. The first said:

I am in favor of, generally speaking, short rather than long terms. I've never yet heard any case, except the fact that it's done differently elsewhere, for a longer term, and if you're going to measure by life, then life-plus-25. That takes care of the minority [sic] of children, and indeed their education, even these days. The only possible case it doesn't take care of is the case of a very young author who dies leaving a very young wife, and my only answer to that is if she hasn't been able to remarry in the course of 25 years perhaps this copyright shouldn't necessarily continue to support her.<sup>29</sup>

The second said:

I would prefer that protection be for at least 100 years, rather than 76, when there is a renewal. It is not unreasonable to allow an author and his heirs to keep and enjoy property rights in the work he has created for at least that long — particularly since others will be exploiting his work for profit after he has been divested of it.<sup>30</sup>

### 3. 1976 Act.

Congress reviewed all of the views expressed during the revision period when determining the appropriate U.S. copyright term and ultimately opted for a basic term of life plus 50 years. The House Judiciary Committee summarized seven reasons for changing the copyright term:

1. The present 56-year term is not long enough to insure an author and his dependents the fair economic benefits from his works. Life expectancy has increased substantially, and more and more authors are seeing their works fall into the public domain during their lifetimes, forcing later works to compete with their own early works in which copyright has expired.

<sup>29</sup> Copyright Law Revision Part 2 at 90 (statement of Professor Ralph S. Brown).

<sup>30</sup> Id. at 316 (statement of Irwin Karp).

2. The tremendous growth in communications media has substantially lengthened the commercial life of a great many works. A short term is particularly discriminatory against serious works of music, literature, and art, whose value may not be recognized until after many years.
3. Although limitations on the term of copyright are obviously necessary, too short a term harms the author without giving any substantial benefit to the public. The public frequently pays the same for works in the public domain as it does for copyrighted works, and the only result is a commercial windfall to certain users at the author's expense. In some cases the lack of copyright protection actually restrains dissemination of the work, since publishers and other users cannot risk investing in the work unless assured of exclusive rights.
4. A system based on the life of the author would go a long way toward clearing up the confusion and uncertainty involved in the vague concept of "publication," and would provide a much simpler, clearer method for computing the term. The death of the author is a definite, determinable event, and it would be the only date that a potential user would have to worry about. All of a particular author's works, including successive revisions of them, would fall into the public domain at the same time, thus avoiding the present problems of determining a multitude of publication dates and of distinguishing "old" and "new" matter in later editions. The bill answers the problems of determining when relatively obscure authors died, by establishing a registry of death dates and a system of presumptions.
5. One of the worst features of the present copyright law is the provision for renewal of copyright. A substantial burden and expense, this unclear and highly technical requirement results in incalculable amounts of unproductive work. In a number of cases it is the cause of inadvertent and unjust loss of copyright. Under a life-plus-50 system the renewal device would be inappropriate and unnecessary.
6. Under the preemption provisions of section 301 and the single Federal system they would establish, authors will be giving up perpetual, unlimited exclusive common law rights in their unpublished works, including works that have been widely disseminated by means other than

publication. A statutory term of life-plus-50 years is no more than a fair recompense for the loss of these perpetual rights.

7. A very large majority of the world's countries have adopted a copyright term of the life of the author and 50 years after the author's death. Since American authors are frequently protected longer in foreign countries than in the United States, the disparity in the duration of copyright has provoked considerable [sic] resentment and some proposals for retaliatory legislation. Copyrighted works move across national borders faster and more easily than virtually any other economic commodity, and with the techniques now in common use this movement has in many cases become instantaneous and effortless. The need to conform the duration of U.S. copyright to that prevalent throughout the rest of the world is increasingly pressing in order to provide certainty and simplicity in international business dealings. Even more important, a change in the basis of our copyright term would place the United States in the forefront of the international copyright community. Without this change, the possibility of future United States adherence to the Berne Copyright Union would evaporate, but with it would come a great and immediate improvement in our copyright relations. All of these benefits would accrue directly to American and foreign authors alike.<sup>31</sup>

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<sup>31</sup> H.R. Rep. No. 1476, 94th Cong., 2d Sess. 134-5 (1976).

## II. ANALYSIS OF H.R. 989

Before one can compare the provisions of H.R. 989 with existing law and the EU Directive on Term, it is first necessary to review U.S. term provisions and those established by the EU Directive.

### A. EXISTING U.S. LAW

One of the major underpinnings of the 1976 Copyright Act was the adoption of a single copyright term for works that are created and fixed in a tangible medium of expression for the first time on and after January 1, 1978. For most works, the basic copyright term is life of the author plus an additional 50 years after the author's death. This protection attaches automatically from the moment of creation. In the case of a joint work by two or more authors who did not work for hire, the term lasts for 50 years after the last surviving author's death. For works made for hire, and for anonymous and pseudonymous works (unless the author's identity is revealed in Copyright Office records), the duration of copyright is 75 years from first publication or 100 years from creation, whichever is shorter.<sup>22</sup>

The United States has not considered extending copyright term since 1976. In the 1976 Act, with an eye to possible future adherence to the Berne Convention, the United States adopted a basic term of life plus fifty years for works created after January 1, 1978. Consequently, when the United States joined the Berne Convention in 1989, its basic term was already consistent with Berne.

Before we joined Berne, there was some discussion about the term for anonymous and pseudonymous works, and the Ad Hoc Working Group on U.S. Adherence to the Berne Convention concluded that §302 (c) was "incompatible with Berne because those such works published more than 50

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<sup>22</sup> 17 U.S.C. §§302-305.

years after creation would be protected for less time than Berne requires." <sup>33</sup> However, no changes were made to the copyright term provisions in the act implementing Berne. <sup>34</sup>

## B. THE EU DIRECTIVE ON TERM

When some European countries began to form what is now the European Union, <sup>35</sup> certain member countries already had longer terms than the Berne minimum or different terms for certain works. <sup>36</sup> At a hearing in Brussels on October 24, 1980, these countries began to consider what differences in copyright term would mean in light of a single internal market. <sup>37</sup> Some commentators have observed that the EU really did not discuss whether or not the term should be longer but simply discussed whether the term should be harmonized. <sup>38</sup>

### 1. Purpose.

On October 29, 1993, the EU issued its Directive on Term requiring member states to implement the terms of the Directive by July 1, 1995. The Directive requires a basic term of life plus 70. The

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<sup>33</sup> Final Report of the Ad Hoc Working Group on U.S. Adherence to the Berne Convention, 10 COLUM.-VLA J. L. & ARTS 581 (1986).

<sup>34</sup> Berne Convention Implementing Act, Pub. L. No. 100-568, 102 Stat. 2853 (1988).

<sup>35</sup> We primarily use the term European Union rather than the European Community.

<sup>36</sup> Germany had the longest term life + 70, but Spain's term was life + 60 and France had a life plus 70 term for musical works. Other countries had made extensions to compensate for war loss. Ricketson, supra note 5, at 336.

<sup>37</sup> Silke von Lewinski, EC Proposal for Directive Harmonizing the Term of Protection of Copyright and Certain Related Rights, 23 IIC 785, note 1.

<sup>38</sup> Id. at 786. See also Peter Wienand, Copyright Term Harmonisation in the European Union, 40 Copyright World (May 1994). But see Proposal for a Council Directive Harmonizing the Term of Protection of Copyright and Certain Related Rights, Commission (92) 33 final.



purpose of the EU Directive is to harmonize the terms of copyrighted material and related works among member countries.

Although the adoption of life plus 70 years as the standard may appear somewhat surprising since most nations of the EU had a term of life plus 50 years, the EU gave a number of reasons for moving to a term of life plus 70 years including that since the average lifespan in the Community had risen, the life plus 50 years standard was no longer adequate to cover an author and two generations of his or her descendants,<sup>39</sup> and that harmonization to life plus 50 years would have required some rightsholders to lose existing rights, and the European Union was philosophically opposed to such a result.<sup>40</sup>

## 2. Comparison of specific EU provisions with U. S. law and H.R. 989.

Although adoption of life plus 70 years has received the most attention in the United States, other provisions in the Directive should be examined in light of existing U.S. law and the H.R. 989 proposals. As in U.S. law, the term for a joint author is measured from the death of the last surviving author.

a. Anonymous works. In the case of anonymous or pseudonymous works, the Directive establishes a term of 70 years after the work is lawfully made available to the public.<sup>41</sup> Current U.S. law establishes a term of 75 years from first publication or 100 years from creation, whichever expires first.<sup>42</sup> H.R. 989 would increase this term to 95 years from first publication or 120 years from creation, whichever expires first.

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<sup>39</sup> Protection of two succeeding generations is the standard goal recognized in Berne. See EU Directive on Term, Recital (5).

<sup>40</sup> EU Directive on Term, Recital (5) & (10); P. Wienand, Copyright Term Harmonization in the European Union, 40 Copyright World 24, 25 (May 1994).

<sup>41</sup> EU Directive on Term, art. 1, para. 3.

<sup>42</sup> 17 U.S.C. §302(c).

b. Legal entity as initial rightsholder. Where a member state law vests rights in an entity other than in an individual author, the Directive provides a term of 70 years measured from the year of publication.<sup>43</sup> The compatible provision in U.S. law is the works for hire one which establishes the term as 75 years from first publication or 100 years from creation, whichever expires first.<sup>44</sup> H.R. 989 would increase this term to 95 years from first publication, or 120 years from creation, whichever expires first.

c. Audiovisual works. Provisions governing audiovisual works are considerably different. In the United States, audiovisual works are generally works made for hire. This is not true in Europe. Under the Directive, the term is determined by the lives of four individuals.<sup>45</sup> The Directive states the term shall expire 70 years after the death of the last of the following persons to survive "the principal director, the author of the screenplay, the author of the dialogue, and the composer of music specifically created for use in the cinematographic or audiovisual work."<sup>46</sup> The Directive's term for audiovisual works is at least equivalent to and may be longer than existing law or the proposal in H.R. 989.<sup>47</sup>

d. Rights protected as neighboring or related rights. The Directive also specifies terms for neighboring rights. The Directive gives producers of sound recordings 50 years from first

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<sup>43</sup> EU Directive on Term, art. 1, para. 4. The laws of most member states of the EU do not recognize the work for hire doctrine; rights generally vest in individual authors. However, it does exist in certain countries and for certain works, e.g., collective works, and paragraph 4 covers those exceptions.

<sup>44</sup> 17 U.S.C. §302(c).

<sup>45</sup> EU Directive on Term, art. 2, para. 1.

<sup>46</sup> *Id.* EU Directive on Term, art. 2, para. 2.

<sup>47</sup> A number of the comments received in RM 93-8 confuse the term for motion pictures which is spelled out in art. 2 of the EU Directive on Term. The provision in art 1, para. 4 for collective works or where a legal person is designated as the rightsholder.

publication or first communication to the public, whichever is first.<sup>48</sup> In the United States, where sound recordings are protected generally as works made for hire, they are under copyright for at least 75 years. The Directive gives broadcasting organizations protection for 50 years from the date of first transmission.<sup>49</sup> Finally, the Directive generally gives performers protection for 50 years from the date of the performance.<sup>50</sup>

e. Protection of previously unpublished work. Article 4 of the Directive provides a special term of protection to anyone who publishes a previously unpublished work whose copyright term has otherwise expired.<sup>51</sup> The term of protection is 25 years from the time when the work is first lawfully published or lawfully communicated to the public. The intent is to induce for early publication.<sup>52</sup> The only corollary in U.S. law is §303, which provides that where a work is created but not published before January 1, 1978, and is published by December 31, 2002, the copyright term is extended for 25 years. H.R. 989 extends the term for these works by ten years. If such works are published by the end of 2002, there is another 35 years of protection.

### 3. Effect of EU Directive on other countries.

The most prominent change ordered by the Directive is the requirement that all member states recognize a general copyright duration standard of life of the author plus 70 years and that, with respect to countries outside of the EU, each state is to apply the rule of the shorter term: Foreign countries

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<sup>48</sup> *Id.*, art. 3, para. 2.

<sup>49</sup> *Id.*, art. 3, para. 4.

<sup>50</sup> *Id.*, art. 3, para. 1.

<sup>51</sup> Art. 1, para. 1 sets the first term, life of the author and 70 years after his or her death, running irrespective of the date a work is lawfully made public.

<sup>52</sup> Lewinski, *supra* note 36 at 801, n. 65.

having a shorter term will be limited to the term established by the country of origin.<sup>53</sup> U.S. rightsholders reaction to this was immediate—their position was that the U.S. had to raise its term of protection to avoid imposition of the rule of the shorter term.

The Directive mandates that these changes should be made by July 1, 1995. Although that goal has not been met, the United Kingdom has already proposed amending its law to the longer term and other EU members are expected to comply. In addition, countries that belong to the European Economic Area must also adopt the Directive.

There are a number of countries that are seeking eventual membership in the European Union or the European Economic Area. Such countries include Poland, Hungary, Turkey and the Czech Republic. In preparation for this, it is likely that these countries will amend their copyright laws to reflect the requirements of the Directive. There is also some indication that other countries that are in the process of adopting new copyright laws will adopt a life plus 70 standard. For example, the new Slovenian copyright law provides for a term of life plus 70.

With respect to the Berne Convention, it is unclear whether life plus 70 will be adopted in the near future.<sup>54</sup> However, the likelihood increases as more countries move to a life plus 70 term.

## **B. SECTION BY SECTION ANALYSIS OF H. R. 989**

The approach taken by H.R. 989 is basically to amend the existing copyright provisions on term by adding 20 years to the date in the provision. The bill does not propose any changes to ownership of rights in the copyright of the extended term.

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<sup>53</sup> EU Directive on Term, art. 7.

<sup>54</sup> Life plus 70 was on the original agenda of the exercise begun in 1991 to adopt a Protocol to the Berne Convention. However, at the meeting of the Governing Bodies in September, 1992 there was agreement to reduce the scope of the possible protocol to 10 critical issues. Life plus 70 was removed from the agenda. A number of countries, not including the United States, have suggested that this topic be put back on the agenda.

1. Duration of works created on or after January 1, 1978.

Under H.R. 989, the basic copyright term would be extended from life of the author plus 50 years to life of the author plus 70 years. The extended term would vest in either the original author, or, if rights have been transferred, in the transferee. All transfers on works created and fixed after January 1, 1978, are subject to termination generally after 35 years;<sup>55</sup> therefore, the extended term could be reclaimed by the author or his or her heirs.<sup>56</sup>

The term for works made for hire, anonymous and pseudonymous works would go from a term of 75 years from the year of first publication or 100 years from the year of creation, whichever expires first, to 95 years from the year of first publication or 120 years from creation, whichever expires first.

2. Renewal term.

For works which had secured federal copyright protection prior to January 1, 1978, the 1976 Copyright Act retained the old system of computing the term with one major change: the length of the second renewal term was increased to 47 years. Under pre-1978 law, copyright was secured either on the date a work was published or on the date of registration if the work was unpublished. In either case, the copyright lasted for a first term of 28 years from the date it was secured. The copyright was eligible for renewal during the 28th year of the first term. If renewed, the copyright was extended for a second term of 28 years. If not renewed, the copyright expired at the end of the first 28-year term. The addition of 19 years to the second renewal term by the 1976 Copyright Act was subject to an author's right of termination.<sup>57</sup>

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<sup>55</sup> 17 U.S.C. §203. A work made for hire does not have a termination right under section 203.

<sup>56</sup> Currently, no transfers concerning works created and fixed on or after January 1, 1978, have aged the requisite 35 years to be subject to termination.

<sup>57</sup> 17 USC §304(c).

In June, 1992, Congress amended the law to make copyright renewal registration optional.<sup>14</sup> As a result, works securing federal copyright protection between January 1, 1964, and December 31, 1977, are automatically renewed on the last day of the 28th year unless the owner of the renewal right registered a renewal claim with the Copyright Office earlier in that year.

Under H.R. 989, the second renewal term would consist of 67 years in place of the current 47 years. In instances where the renewal right has been transferred, the 20 year extension under H.R. 989 would pass to the transferee. In instances where the time period for exercising termination under section 304 has already lapsed, there would be no additional opportunity to terminate the transfer.

3. Sound recordings filed before February 15, 1972.

For pre-February 15, 1972, sound recordings under section §301(c), the federal copyright law would preempt state law on February 15, 2067, instead of February 15, 2047.

4. Works created but not published or copyrighted before January 1, 1978.

There is a special duration provision for works in existence but not published or copyrighted on January 1, 1978.<sup>15</sup> These works were automatically given federal copyright protection beginning on January 1, 1978. The typical standards of life plus 50 years or 75-100 year terms generally apply to these works. However, all works in this category are guaranteed at least 25 years of federal copyright protection. The existing law specifies that in no case will copyright in a work of this type expire before December 31, 2002. If the work is published before that date, the term will extend another 25 years through the end of 2027.

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<sup>14</sup> Public Law 102-307, 106 Stat. 264 (1992).

<sup>15</sup> 17 U.S.C. §303.

a. H.R. 989. Under H.R. 989, the minimum term of protection guaranteed an unpublished work will be extended 10 years to December 31, 2012. If the work is published by that date, the term is extended another 35 years to December 31, 2047.

b. Comment on proposed extension of section 303. While the Copyright Office generally supports passage of H.R. 989, it does not endorse the proposed extension of section 303. For unpublished works created before January 1, 1978, section 303 of the copyright law already provides a minimum copyright term running through December 31, 2002. Essentially, the works covered by this provision are works by authors who died before 1952 which remain unpublished through the year 2002.

In his thorough analysis of copyright term, Sam Ricketson discussed the considerations involved with unpublished works and questioned whether they should be subject to temporal limits or be protected indefinitely until publication takes place. He mentioned two possibilities: to protect for the same term as published works and add no additional term if disclosure occurs subsequently or to allow protection indefinitely and then to grant a further fixed term once the work is disclosed. Ricketson asserted that the disadvantages to the public of the second approach may be cured if post-publication protection is relatively brief.<sup>40</sup> He also noted

A more substantive objection, however, is that where ownership of the copyright and ownership of the unpublished work itself have become separated, this can place severe restraints upon later users, in particular those engaged in research and scholarship.<sup>41</sup>

We believe that the unpublished works covered by section 303 have social, educational and historical significance. In the 17 years since the effective date of the 1976 copyright revision act, they

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<sup>40</sup> Sam Ricketson, The Copyright Term, 23 IIC 776 (1992).

<sup>41</sup> Id. at 776.

have not been published. Extending the term will not benefit the copyright owners of such works; there are, however, broad public benefits to be gained when these works enter the public domain. Many institutions, including the Library of Congress, have photographs, letters and manuscripts that can and will be made available to the public. For example, the Library of Congress has a unified collection on the American composer Edward A. Mac Dowell (1861-1908). The rights in all of the material in that collection except his correspondence, can be cleared, and there is no way to locate the heirs of those letters sent to Mac Dowell. This collection is being prepared for distribution to the public in 2003; nothing would be gained by restricting such dissemination until the year 2013.

### III. ARGUMENTS FOR AND AGAINST TERM EXTENSION

Although there was no pending legislation, the Copyright Office published an announcement in the Federal Register on July 30, 1993, that it would be conducting a study on copyright duration and also announced a public hearing to be held on September 29, 1993. In addition to publication in the Federal Register, the Copyright Office contacted user groups about the hearing. Perhaps because legislation did not appear on the horizon, only representatives who strongly supported increasing the term of protection appeared. They represented lyricists and composers, music publishers, and the motion picture industry.<sup>42</sup> The Copyright Office extended its comment period to ensure that all views would be heard. Later other

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<sup>42</sup> The National Music Publishers Association (NMPA) (Comments 1 and 99); Music Publishers Association (MPA) (Comment 2); International Confederation of Music Publishers (ICMP) (Comment 4); Songwriters Guild of America (SGA) (Comment 6); David Nimmer (Comment 7); Wade Williams Productions (Comment 23); Nashville Songwriters Association International (NSAI) (Comment 24) Joint Comments of the Coalition of Creators and Copyright Owners (CCCO) (Comments 3 and 98). But see Comment 15 filed by the Recording Industry Association of America (RIAA). The RIAA is primarily interested in removing the "distinction between author's rights and so called neighboring rights..." and asserted that there were far more pressing issues than duration. Id. at 3-4



views were presented primarily by users of public domain motion pictures and law professors.<sup>43</sup> All of these comments are considered in the discussion below of arguments for and against extension of Copyright term.

Staff shortages kept the Office from completing this study, but we kept all of the materials and have made them available to the public on request. Moreover, we will be glad to provide a copy of the transcript of the hearing and comments should the subcommittee want them for the record.

Having reviewed both sides of the argument presented to the Copyright Office in 1993 and those made before this subcommittee at the June 1 hearing on H.R. 989 in California, one can only conclude that the issue of term extension is more complicated than the sometimes oversimplified or overblown arguments made on both sides would lead one to believe. Instead of an exhaustive retelling of those arguments, the Office has prepared a chart identifying most, if not all, of them.<sup>44</sup> We choose here to review the major arguments on term extension in light of the 1976 considerations that are still relevant and to evaluate other considerations.

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<sup>43</sup> One individual educator opposed term extension (Comment 51). Another commentator opposed extension because he felt it would cause great harm to the Gutenberg Project, which makes public domain works available internationally via electronic media. (Comment 83). A coalition group of law professors also opposed extension. (Comment 19). See also Comment 136, Society for Cinema Studies. Another individual commentator deplored not being able to put deteriorating materials on the Internet to promote public access. (Comment 26). Some individual authors, producers, scriptwriters and filmmakers also opposed extension. See e.g., Comments 75, 77, 86, 128, 130 and 160. [All of the other commentators who opposed extension were either those who want to use public domain motion pictures or want to have access to these films].

<sup>44</sup> This chart is attached to the statement as an Appendix.

A. REVIEW OF ARGUMENTS BASED ON CONSIDERATIONS WEIGHED BY THIS COMMITTEE IN 1976<sup>65</sup>

Four of the seven considerations that led the Judiciary Committee to conclude that copyright terms should be extended in 1976 are still relevant today. Each of them is discussed below with a brief summary and evaluation of the arguments on that particular consideration.

1. Public Benefit and Limited Times.

a. Arguments. Many of the opponents arguing against term extension have raised the legal problems associated with removing property from the public domain.<sup>66</sup> H.R. 989, however, does not propose applying term extension retroactively to restore copyrights in works already in the public domain.<sup>67</sup> Opponents also argue that term extension provides the public with no benefits and imposes substantial costs,<sup>68</sup> and freezes the public domain for 20 years. They assert that diminishing the public domain stifles creativity especially in the production of derivative works and they cite examples of contemporary works based on materials in the public domain.<sup>69</sup> Some opponents also assert that

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<sup>65</sup> See text at pages 9-11 *supra* for the complete text of these provisions.

<sup>66</sup> See, e.g. Comments 127, 125, 123, 121, 122 and 120. These and others reveal concerns about restoration of films under the North American Free Trade Agreement or any other law.

<sup>67</sup> Some authors' groups, however, will likely argue that this should be done, citing the recent restoration of foreign copyrights under the Uruguay Round Agreements Act or the North American Free Trade Agreement. Since H.R. 989 does not propose to restore works in the public domain, this statement does not address the host of complex policy issues raised by restoration of U.S. copyrights.

<sup>68</sup> See Comments 85 and 97 at 8-9.

<sup>69</sup> See Comment 19 "Comment of Law Professors on Copyright Office Term of Protection Study" [hereinafter Comment 19 law professors]. Comment 11 (Fairness in Copyright Coalition) at 2 "We are concerned with NEW authors, NEW creativity, and the promotion of learning. New authors need a rich and diverse public domain to create and educate." *Id.* See also Comment 19, at 12; Comment 147, at 2; and Comment 148, at 1.

term extension would violate the "limited times" provision of the copyright clause of the constitution which authorizes Congress to give rights for "limited times." <sup>70</sup>

Most of those who presented arguments to the Copyright Office in 1993 against the copyright term extension were small movie/film companies and coalitions who were concerned that adding twenty years to the copyrighted life of a work would deny access to the general public and constrict the creative efforts of those who use public domain materials in the creation of new works. They also argued that term extension would be detrimental to the preservation of twentieth century culture. They urged that extension will make a large portion of our motion picture heritage inaccessible. <sup>71</sup>

Proponents argued that extension of the copyright term will not affect the creation of new works and that there is no evidence that works created from public domain materials are any cheaper. They also argued such works may be of lesser quality. This argument was made most forcefully by Irwin Karp during the revision that led to the 1976 Act:

In fact, the advantage of the "public domain" as a device for making works more available to the public is highly overrated; especially if availability is equated with "low cost" to the public. In contrast with the fact that the prices charged the public do not necessarily come down, or the supply of the work increase, when copyright terminates—the paperback book is evidence that copyright protection is not incompatible with mass circulation at low cost to the public. <sup>72</sup>

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<sup>70</sup> See Comment 19, at 10.

<sup>71</sup> See e.g., Comment 17 (John Belton, Member National Film Preservation Board). Another argument this group made was that films in the public domain are more likely to be preserved and presented to the public than copyrighted works. They assert this is so because many holders of such films control the only available copy, which is often lost or destroyed, and almost never made available to the public. Extending the term or decreasing it will, of course, have nothing to do with whether the holder of the only available copy releases it. See e.g., Comments 32, 29 and 28 deploring the fact that Mary Pickford wanted to destroy the negative copies of all of her early films. The Fairness in Copyright Coalition asserts that public domain distributors are waiting to release many silent movies and will not be able to do so for another 20 years if term is extended. Comment 11, at 4-5.

<sup>72</sup> Copyright Law Revision, part 2 at 316-317.

Representatives of songwriters stated that there is no savings for consumers where their works pass into the public domain because there is no reduction in price and that, therefore, only the creator loses.<sup>73</sup> An independent distributor of motion pictures and television shows urged that it was not fair to penalize the creator and that "There is an effort by 'public domainers' that pirate motion pictures world-wide to obstruct the efforts to restore copyrights so they [can] use freely motion pictures without licenses from the owners."<sup>74</sup>

b. **Evaluation.** In evaluating any change to the copyright law, Congress must go back to the constitutional mandate. With respect to extending the copyright term two provisions must be considered: that copyright laws exist for the benefit of the public, and that copyright shall be for "limited times."

(i) **Public benefit.** In the United States, economic and social effects of protection must be considered. The key is to promote creativity on the one hand, and to ensure maximum public access to this creativity on the other. One question raised is whether shorter terms inhibit creativity and the production of new works. The Copyright Office does not believe a case has been made that extension of the copyright term would diminish the creation of new works. To make such a case, we suggest comparing the experiences in countries with a shorter term to those with a longer term.

Strong copyright laws foster rather than discourage the creation and broad dissemination of cultural works. Particularly since copyright, unlike patent, only protects expression not ideas or facts, and a new author is free to use his or her own expression to create a different work out of the same public domain idea or facts. It is only when the new author appropriates the expression of the earlier author that considerations of copyright arise. Moreover, it has not been shown that the creation of

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<sup>73</sup> See, e.g., Comment 6 at p. 3. (George David Weiss, President, The Songwriters Guild of America).

<sup>74</sup> See Comment 23 (Wade Williams Productions).

derivative works decreased following term extension in 1976. In looking at the current entertainment industry, one sees a large number of remakes regardless of whether the work is based on a public domain work such as Little Women or a licensed version of a more recent title such as the Broadway show, "How to Succeed in Business Without Really Trying."<sup>75</sup>

Maintaining and enhancing the health of our copyright industries should be viewed as being in the public interest. Historically, Congress on numerous occasions has rejected the notion that thrusting works into the public domain prematurely is a positive thing, and the law has been amended many times to reduce this possibility. The 1992 amendment providing for automatic vesting of copyright renewal is a recent example. The Copyright Office believes the same principle applies to this term extension.

There are some costs to term extension, however, and they must be weighed against the benefits. While it does appear likely that as a result of term extension, some items may become more expensive, the impact on individual consumers should be minimal.<sup>76</sup> When it comes to choosing whether to protect authors or slightly decrease costs associated with making materials available, the balance should be in favor of authors.<sup>77</sup>

(II) **Limited times.** Unlike other countries which have no similar requirement, the United States Constitution provides that copyright shall be for "limited times." Determining what the appropriate term of copyright should be and what "limited times" means is extremely difficult. There is no guidance—only the history of how Congress interpreted that mandate. Nor is the criteria to be used in deciding the term clear.

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<sup>75</sup> Interestingly enough although opponents assert that "It's a Wonderful Life" became popular because it went into the public domain, "Miracle on 34th Street" is equally popular and it is not in the public domain.

<sup>76</sup> Companies which are dedicated to exploiting public domain material are affected by term extension. No matter what the term is, however, some works will enter the public domain each year.

<sup>77</sup> See, e.g., Barbara A. Ringer, The Demography of Copyright, Second of the R.R. Bowker Memorial Lectures New Series (New York 1974).

The history of the United States and other copyright laws show that generally the term of protection has steadily increased. A fundamental assumption seems to be that the author and at least his immediate family should have the ability to earn some return on his work. Thus, even if the author himself receives little remuneration during his lifetime, his spouse and children may receive some benefit later if the work has a delayed success, which often is the case with serious music. Whatever the term, one must also consider that the author frequently assigns his right to a publisher, film producer or other disseminator of the work. In such cases, the copyright in the work represents a protection for the investment that is undertaken in the publication or production of the work. Here the term granted must be sufficient to allow the investor time not only to recover but also to earn a reasonable return on his investment. This is very difficult to estimate; different types of works and individual works within different genres may have varying levels of longevity and may reach a point of profitability at different times. Another part of the equation is that there is a risk involved in publishing or producing works; successful ventures subsidize marginal works. Unfortunately, there are few relevant statistics to show on the average what a minimum term would be to make sure that a publisher or producer received a reasonable term on his or her investment. Although protection of the investment may seem far removed from protecting the author, in most cases authors' rewards are tied to the interests of those who exploit their works.<sup>71</sup>

In earlier debates of the 1909 Act and 1976 Act, Congress appeared to conclude that the copyright should benefit at least two generations. The legislative history refers to an author's family without specifically stating what constitutes a family. Samuel Clemens, an ardent proponent of a longer term, stated that he did not care about his grandchildren since they could take care of themselves, but that the

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<sup>71</sup> See generally Ricketson, *supra* note at 320-1.

term should take care of his daughters.<sup>39</sup> On the other hand, the Berne Convention seems to have accepted the premise that a work should extend to the author and two generations, thus, to the grandchildren. The EU Directive on Term also mentions the author and two generations of heirs.

In 1978 the United States adopted a term of the life of the author plus 50 years. This eliminated the possibility that an author might outlive his work. However, for the pre-1978 copyrights, it added an extra 19 years; thus, making 75 years the longest possible term. Also, for these works, to obtain the full term, a renewal claim had to be made in the 28th year of the first term.

In looking at the criteria used in the past, since some authors of pre-1978 copyrights or their widows or widowers are outliving the current term, the 20 year extension would seem justified. With respect to works created on or after January 1, 1978, a longer term may be necessary to safeguard even one succeeding generation.

However, life plus 70 is an extremely long period of time, as is a term of 95 years from publication or 120 years from creation. To reflect the balance intended in the Constitution, Congress must make sure that works that are not being made available to the American public are still accessible. This is especially critical to students, scholars and researchers. Thus, if the term is lengthened, the concerns expressed from library associations in their July 11, 1995 letter to Mr. Moorhead must be addressed.<sup>40</sup> One way to address some of these concerns is to create a limited exemption during the extra 20 years for nonprofit educational institutions and libraries who provide materials that are directly related to nonprofit instructional activities.

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<sup>39</sup> See note *supra* at *Proposal to Amend and Consolidate the Acts Respecting Copyright, 1906: Hearings on S. 6330 and H.R. 19833 Before the Joint Committees on Patents, 59th Cong., 1st Sess. 116 (1906)* (statement of Samuel L. Clemens, author).

<sup>40</sup> See Letter from Robert Oakley, Washington Affairs Representative, American Association of Law Libraries; Carol Henderson, Executive Director, Washington Office, American Library Association; David Bender, Executive Director, Special Library Association; and Carla Funil, Executive Director, Medical Library Association; to the Honorable Carlos Moorhead, Chairman, Intellectual Property Subcommittee, House Judiciary Committee (July 11, 1995).

Few would argue that a perpetual copyright term under federal law would be constitutional. Despite a history of over two hundred years of copyright jurisprudence, judicial authority on the meaning of the "limited times" provision is scant.<sup>11</sup> In 1976 Congress believed that life plus 50 years did not violate the Constitution. Consequently, the Copyright Office believes that H.R. 989 which proposes adding an additional twenty years is within reasonable bounds.<sup>12</sup>

## 2. Increase in the Commercial Life of Copyrighted Property.

a. Arguments. Opponents assert that most works already enjoy a term much longer than their commercial value and that adding an additional 20 year term will simply make it more difficult to create new works based on protected materials.<sup>13</sup> They argue that copyright is designed to protect living authors and to ensure new works are created. Users of motion pictures strongly urge that current copyright owners do nothing in return for this extra copyright protection, that they feel no obligation to preserve the work, make it available to the public, or even to grant permission for archival showings, and

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<sup>11</sup> Perhaps the best judicial authority on the "limited times" provision, United Christian Scientists v. First Church of Christ, 829 F.2d 1152 (D.C. Cir. 1987), is subject to a number of different interpretations. In that case, Congress had enacted a private bill restoring and extending copyright in the writings of Mary Baker Eddy, founder of the Christian Science Church. Copyright in those writings was vested in a particular faction of that church. The new copyrights established a duration of approximately 150 years. In spite of the extraordinary duration, the D.C. Circuit Court of Appeals did not invalidate the law on the basis of the "limited times" provision of the Copyright Clause, although the dictum did criticize the length of the term. Instead, the Court declared the statute unconstitutional on the basis of principles of separation of church and state in the establishment clause of the First Amendment.

<sup>12</sup> Another constitutional objection which may be raised is the failure of the public to secure a "benefit" for the extended copyright in works already in existence. This argument essentially seeks to reduce issues of constitutionality to an inquiry over identification of specific public benefits for each individual copyrighted work. The copyright clause has never been interpreted in such a fashion. It appears reasonable to conclude that a longer revenue stream for copyrighted material is to the public good because funds become available for the creation of new works. Some may disagree with the length of the copyright term chosen by Congress, but the Constitution gives Congress the right to decide this issue. When the 1976 Copyright Act was enacted, Congress specifically embraced longer terms for works already in existence. This decision was never challenged as unconstitutional. For these reasons, the Copyright Office believes consideration of term extension is well within the Constitutional powers of Congress.

<sup>13</sup> Comment 19, at 4-6 (law professors); Comment 97, at 9-11 (CFPPA).



that, therefore, there can be no public benefit without public access.<sup>44</sup> Proponents assert that technological developments since 1976 have greatly increased the life of copyright property. They also note that some works may, through new uses, become hits late in life.<sup>45</sup>

b. **Evaluation.** There is a great deal of anecdotal evidence on both sides. Obviously some works have a much longer commercial life than others. Some works have a very short commercial life, e.g., novelty items; others, such as computer programs, will have a relatively short life, while others, such as music, may have a very long commercial life. Moreover, technological developments clearly have extended the commercial life of copyrighted works. Examples include videocassettes, which have given new life to movies and television series, expanded cable television and satellite delivery, which promise up to 500 channels thereby creating a demand for content, the advent of multimedia, which also is creating a demand for content, and the network phenomenon, i.e., the global information highway.

The question is who should benefit from these increased commercial uses? Much creative effort and significant capital investment went into the creation of copyrighted works which now have an extended commercial life. It seems only fair that the authors and owners of these works should be the beneficiaries as long as the term of protection does not violate the limited times provision of the Constitution. Increased income to publishers helps to subsidize the creation of new works, which is of benefit to the public. Thus, as long as copyright owners take the increased income and use it for the public benefit, such as in the creation of new works, the constitutional goals are met.

The fact that many works have an economic life that is relatively short is not an argument in favor of a shorter term. For such works a lengthy term of exploitation is immaterial. One of the commentators suggested there should be a different term for categories that do not require such lengthy

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<sup>44</sup> Comment 97, at 10 (CFPPA).

<sup>45</sup> *See* Comment 6, at 2 (SGA).

protection.<sup>46</sup> In fact the Berne Convention does allow a shorter term for photographs, works of applied art, and cinematographic works. However, the United States, unlike some other countries, has never differentiated copyright term on the basis of the category of the work, and we are not advocating such an approach.

Another concern that must be addressed and that is reflected in the letter of the library associations to Chairman Moorhead, is that where a work no longer is commercially exploitable, we must ensure that it is still accessible.<sup>47</sup> This is an issue today with our current terms of protection. It is an issue that would be made worse by H.R.989. Creative ways must be found to deal with this issue.

Librarians, educators and historians have traditionally opposed any extension of the copyright term; however, library associations are not opposing this bill per se. No one is trying to deny economic reward to creators of works that are capable of and are being commercially exploited. Rather they are asking that their legitimate concerns be addressed.

Ideas and facts are in the public domain, and fair use and certain exceptions allow students, patrons of libraries, scholars and researchers to make certain uses of copyrighted works. But as we move to a digital environment, it is unclear how all this will play out. Key issues today include preservation of materials in both facsimile and digital formats and guaranteeing access, including electronic access, to copyrighted works.

There is a critical need to improve American education. Libraries, like the Library of Congress through its National Digital Library efforts, are attempting to bring unique copyrighted materials to the American educational community. The Library of Congress has been diligent in seeking copyright permissions for its Digital Library projects. However, it is exceedingly difficult to determine the

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<sup>46</sup> Ricketson *supra* note 60, at 770-1.

<sup>47</sup> See *supra* note 80.

copyright status of certain types of works, e.g., photographs, prints and labels. Moreover, finding the current owner can be almost impossible. Where the copyright registration records show that the author is the owner finding a current address or the appropriate heir is extremely difficult. Where the original owner was a corporation, the task is somewhat easier but here too there are many assignments and occasionally bankruptcies with no clear title to works.

Limited uses of older copyrighted material for instructional activities must be allowed.<sup>14</sup> With respect to libraries, guidelines could be worked out under section 108 as to what materials might be used without permission or payment as long as the use was related to instructional activities in nonprofit educational institutions.

There is a separate issue relating to facilitating licensing of copyrighted materials, especially where after a reasonable search the copyright owner cannot be located. A mechanism must be devised to resolve this problem. In Canada, the Copyright Board, a government organization, is given the right to grant a non-exclusive license for the use of previously published materials where the copyright owner cannot be found. A license is granted only if every reasonable effort has been made to find the copyright owner. Such a license, which will set the terms and conditions, such as the amount of royalties to be paid

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<sup>14</sup> There is also some confusion about what can be used. See, e.g., Comment 39 where commentator asserts copyright registration kept him from using a 70's PBS series to learn sign language.

and the license period, only covers use in Canada. " Apparently, Japan and Hong Kong have similar provisions. "

Solutions to these problems might be forthcoming if the Subcommittee directed the parties to work these issues out. If the Subcommittee wishes, the Office would be most willing to try to facilitate this process. We believe we have considerable expertise in this area, and we would like to see these issues resolved.

### 3. Fair Economic Benefit.

a. Arguments. Opponents argue that the existing law already gives authors a sufficiently long term, and that even if there has been some increase in life expectancy since 1976, it would not warrant a 20 year extension of the basic term. They argue that the existing term is already long enough to take care of most authors and their heirs and that it should not be extended to cover a second, succeeding generation. They also assert that the longer term will not really go to authors, but

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" Section 70.7 of the Canadian copyright law provides as follows:

#### OWNER WHO CANNOT BE LOCATED

(1) Where, on application to the Board by a person who wishes to obtain a license to use a published work in which copyright subsists, the Board is satisfied that the applicant has made reasonable efforts to locate the owner of the copyright and that the owner cannot be located, the Board may issue to the applicant a license to do an act mentioned in section 3.

(2) A license issued under subsection (1) is non-exclusive and is subject to such terms and conditions as the Board may establish.

(3) The owner of a copyright may, not later than five years after the expiration of a license issued pursuant to subsection (1) in respect of the copyright, collect the royalties fixed in the license or, in default of their payment, commence an action to recover them in a court of competent jurisdiction.

" See e.g., art. 67 of the Japanese Copyright Code.

will benefit large corporations.<sup>91</sup> In particular they assert that there is no need to increase the terms for works for hire which already enjoy a longer term than that proposed by the EU.<sup>92</sup>

Proponents argue that the existing term does not cover life expectancies and two generations<sup>93</sup> and that a longer term is needed to give authors and copyright owners a fair economic benefit.<sup>94</sup> They note cases where the copyright expires while the author or his or her immediate heirs are still alive. They assert that the existing term is unfair since it does not account for the untimely deaths of some authors or for works by mature authors.<sup>95</sup> They also urge that the term should be longer to allow a reasonable return on economic investments.<sup>96</sup>

Furthermore, they assert that it takes a long time to recover astronomical production costs for books, films, plays, and computer programs and that they never recover costs on most of the works produced in these categories.<sup>97</sup> One author asserted that even in writing for a film for which he held no copyright, he could "count on the duration of the film owner's copyright which ensures that I am compensated for future exploitation of my work on television, videocassettes, and possible merchandising or publication, etc...."<sup>98</sup>

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<sup>91</sup> Comment 97 at 5-8, 24 (The Committee for Film Preservation and Public Access). They argue that Corporations are not natural authors; therefore, life expectancy is irrelevant for works for hire. Changes in generational age are meaningless in the context of film investments, which are either recovered quickly or not at all. *Id.*

<sup>92</sup> *See e.g.*, Comment 18 at 1 (Reel Movie International).

<sup>93</sup> Comment 98 at 10 (CCCO Supplementary).

<sup>94</sup> *See generally* Comment 2 (MPAA); Comment 1 (NMPA); Comment 3 (CCCO); Comment 4 (ICMP).

<sup>95</sup> Comment 1 at 4, 5 (NMPA).

<sup>96</sup> Comment 4 at 3 (ICMP).

<sup>97</sup> *See* Comment 2 at 2.

<sup>98</sup> Statement of Michael Weller, Member of the Writers Guild of America, Los Angeles Hearing (June 1, 1995).

b. Evaluation. Although it is clear that the existing term is long enough to take care of works that achieve commercial success early, most works do not fall into that category. As discussed earlier, a number of works, especially serious ones, may never recover what it costs to produce them. A number of authors may spend a great deal of their life working on books that never garner much income. In order for authors to keep writing, they must be supported by publishers. In order for publishers to keep publishing these less popular authors, there must be sufficient reason to believe that they can recover their investments on other works.

For these reasons, H.R. 989 would provide additional money that could be used to invest in works by untried authors or serious works. Dissemination of such material does benefit the public.

#### 4. Harmonization.

Harmonization of national copyright laws provides "certainty and simplicity" in international business dealings. It also brings about a fairer and more equitable result. In 1976 the U.S. adoption of a term of life plus 50 was a move toward international harmonization. At that point, life plus 50 years was the standard in the Berne Convention, and the vast majority of countries had already adopted this term. Although there were countries that had longer terms, there was no significant movement internationally toward a longer term. Now there is such a movement, albeit limited at this time to Europe.

a. Arguments. Opponents argue that the Berne Convention and the GATT TRIPs agreement only require a term of life plus 50, and that this standard will not be raised without the United States.<sup>99</sup> Therefore, the United States should not increase its term. Proponents of copyright term extension argue that the EU Directive on Term once again creates a significant difference in the term of protection in a number of important, industrialized countries.<sup>100</sup> They argue that the term should be

<sup>99</sup> Comment 19, at 13 (Law Professors).

<sup>100</sup> See e.g., Comment 29, at 7, 8 (NMPA).

increased to match that mandated by the Directive, and they assert that this indeed will become the new standard.

b. Evaluation of arguments. The Copyright Office believes harmonization of the world's copyright laws is imperative if there is to be an orderly exploitation of copyrighted works. In the past, copyright owners refrained from entering certain markets where their works were not protected. In the age of the information society, markets are global and harmonization of national copyright laws is, therefore, crucial.

There has been a distinctive trend towards harmonization over the last two decades; however, the development of the global information infrastructure makes it possible to transmit copyrighted works directly to individuals throughout the world and has increased pressure for more rapid harmonization. This is reflected in the exercise to create a Protocol to the Berne Convention. That exercise has been characterized as a norm setting exercise; the stated goals are to address important areas where application of the 1971 Paris Act is either unclear or the interpretation of existing obligations are the subject of dispute.

As discussed earlier, H.R. 989 does not completely harmonize our law with the Directive on Term. In some cases, the U.S. term would be longer; in others the EU terms would be. These areas include, for example, the provisions for pre-1978 copyrights and terms for anonymous and pseudonymous works and the EU provisions for cinematographic works as well as the limited cases in the EU where a corporate entity is a rights holder. Moreover, in some areas, for example, sound recordings, our present term is already longer than that called for in the Directive.

It does appear that at some point in the future the standard will be life plus 70. The question is at what point does the United States move to this term? If harmonization is a goal, adoption of the rule of the shorter term should be considered. This could put pressure on other countries to raise their term of protection for sound recordings thereby leading to harmonization of the term for this type of work.

## B. OTHER CONSIDERATIONS

### 1. Rule of the shorter term.

Finally, copyright term extension without adoption of the rule of the shorter term could lead to trade imbalances against the United States in every area of the world except Europe. This is because foreign works would be protected for the life of author plus 70 years, while U.S. works, outside of Europe, would be protected only for the life of the author plus 50 years. Therefore, non-European foreign authors would receive copyright royalties for twenty additional years for use of their works in the United States, while no offsetting royalties would be generated for U.S. works used in those countries.

The Office is not taking a position on whether the United States should go to the rule of the shorter term. Adopting this rule may have benefits vis-a-vis harmonization and economic impact. Others, however, have recommended that the United States should adopt this rule, and that, of course, will be your decision.<sup>101</sup> The Coalition of Creators and Owners provided us with information in 1993 that indicated that 16 countries applied the rule of the shorter term and that at least two more would have to apply it in the future.<sup>102</sup>

### 2. Transferees.

The fact that copyright extension vests in transferees has been cited by opponents of term extension as another objection. Some argue that giving the extra term to assignees may be unconstitutional.

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<sup>101</sup> See D. Nimmer, Nation, Duration, Violation, Harmonization: An International Copyright Proposal for the United States, 55 Law & Contemp. Probs. 211-4 (1992) (submitted as Comment 7).

<sup>102</sup> See Comment 98, at 7, 8 (Joint Supplemental Comments of the Coalition of Creators and Copyright Owners).



However, in 1976 the copyright term for pre-1978 copyrights was extended by 19 years. There was considerable debate as to who should be the beneficiary of those extra 19 years. Congress chose not to vest the rights in those extra years in the authors of those works. Instead, it created a mechanism by which authors could reclaim those rights from transferees—a right of termination. With respect to these works, notifications of termination have been received and recorded with the Copyright Office from 1978 to present.<sup>103</sup>

On balance, it seems that authors should be the beneficiaries of the longer term.<sup>104</sup> Clearly the structure of the present law with the two termination rights covers most works. In these cases authors do have the opportunity to benefit from the additional years. In the case of pre-1978 copyrights for which the right of termination has not yet vested, the right of termination would cover 39 years rather than 19 years. For new law works and for transfers that were made on or after January 1, 1978 the law provides a right to terminate such transfers generally 35 years from the date of the transfer. Thus, for these works, the right of termination is available and authors and their heirs will have the right to benefit from the longer term.

There is one category of works, however, where the author would not have the possibility of striking a new deal for the extra 20 years—works where the period to terminate has already passed. Congress may wish to consider the possibility of creating a new right of termination for these works. The Copyright Office has been recording documents concerning the termination of transfers since 1978. Our experience is that the number of transfers for copyrighted works that are terminated is proportionately small when compared to the universe of copyrighted works that are subject to termination in any given

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<sup>103</sup> Only 566 notices of termination were recorded in the Copyright Office between November, 1993 and May 5, 1995. Of these, 551 were musical works.

<sup>104</sup> The Nashville Songwriters Association International (NSAI) Board of Directors indicated that while it wholeheartedly supported the possibility of extending the copyright term, "it would oppose legislation directed toward this end should that legislation contain any extension of The Right of Termination." Comment 24.

year. By far the vast majority of terminations involve musical works that continue to be commercially valuable.

In considering the right of termination, Congress should examine the derivative work exception, especially as it relates to musical works, and the effect of that exception on authors and especially composers. The problem of small scale derivative works such as musical arrangements versus large scale derivative works like motion pictures is fully set out in Mills Music, Inc. v. Snyder, 469 U.S. 153 (1985).

Thus, there is a question as to who should benefit from the extension of the term. But this is a different question from whether the term should be extended.

#### IV. CONCLUSION

The rapidly expanding international market for copyrighted materials especially in light of the global information superhighway supports harmonizing national copyright laws and adjusting, where necessary, international copyright treaties. Indeed such harmonization is crucial. Harmonization as evidenced by the European Directive has many advantages including simplifying copyright transactions. Achieving harmonization will be difficult, but, as a major producer and exporter of copyrighted works, the United States should lead the effort.

Except for sound recordings, anonymous, pseudonymous, and collective works, the European Union has generally adopted a life plus 70 standard. Increasingly as countries revise their laws, the copyright term will be life plus 70; however, the United States does not have to move to life plus 70 at this time. It is not yet the international norm and clearly neither the Berne Convention nor the GATT TRIPS agreement require more than life plus 50.

That countries with copyright terms longer than life plus 50 adopt the rule of the shorter term, which is clearly provided for in both the Berne Convention and the Universal Copyright Convention,

should not be surprising. What we now have is at least 15 European countries, i.e., the European Community, imposing that rule as of July 1, 1995, although some member states may take a while to implement the requirements of the Directive on Term. Thus, if the United States does not go to the longer term, copyright owners will be denied money that they otherwise would be entitled to receive.

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 H.R.989. Congress could, to lessen the economic impact, adopt the rule of the shorter term, i.e., make the availability of extended term depend on reciprocity. This would be most helpful in the case of sound recordings where the U.S. extended term would be 45 years longer than the international norm.

On the issue of the constitutionality of the term of protection, Congress decided in 1976 that life plus 50 years met the Constitutional requirement of "limited times." If life plus 50, which is a very long time, is constitutional, life plus 70 would seem to be constitutional. The question that we don't face here is what is the limit on "limited times?"

The major points that lead the Copyright Office to support H.R. 989 are 1) the need to harmonize copyright terms throughout the world and the acceptance that life plus 70 will sometime in the future become the international norm and 2) as a leading creator and exporter of copyrighted works, the United States should not wait until it is forced to increase the term, rather it should set an example for other countries.

While the Copyright Office generally supports H.R. 989, we do oppose adding ten years to the term of the unpublished works covered by 17 U.S.C. 303. We believe there is also a question as to who the beneficiary of the extra 20 years should be especially in cases where there is no existing termination right. We also condition our support on working out solutions for libraries and educational institutions

that will address questions of preservation and access and also clarify the appropriate nonprofit educational uses that are beyond fair use. We have made several suggestions concerning how these issues can be resolved including adopting a system similar to the Canadian one for authors who cannot be located, developing guidelines under §108 for materials that can be used without payment for nonprofit educational purposes or perhaps excluding such uses from the extended term. Solutions to these problems would be more forthcoming if the Subcommittee directed the parties to work this out, and the Office would be willing to assist in facilitating agreement on possible solutions to the problems of preservation and access of older copyrighted works.

	ARGUMENTS FOR	ARGUMENTS AGAINST
TRADE BALANCE	1. As a net exporter of intellectual property, the United States would improve its trade balance by copyright term extension.	1. Issues with respect to trade imbalances are more complex than depicted by proponents of HR 989. While the U.S. currently enjoys a large trade imbalance in intellectual property, most of this imbalance involves contemporary works, such as popular music, sound recordings, motion pictures, and software.
LEADERSHIP	2. Adoption of term extension would enhance the position of the United States as a world leader in copyright protection. By upgrading our protection at home, we encourage other countries to increase their national level of protection.	2. The EU member states adopted the life plus 70 standard strictly for the sake of uniformity. They did not consider or balance any of the factors we consider to be important. Instead of simply following them, it would be better for the United States to use its influence to encourage the rest of the world to remain at the current international standard.
HARMONIZATION	3. Especially in light of the NZ and GII, harmonization is becoming crucial; this is no longer a question of if, but when. Further, by harmonizing with the EU, the United States would avoid discrimination in that major market.	3. Harmonization for its own sake is inappropriate if it means compromising other important principles. Further, the term extension proposed in HR 989 would not make U.S. law compatible with European laws. The U.S. already exceeds the European standards for works for hire. enactment of HR 989 would only widen this gap.
INCENTIVE	4. Term extension would provide a financial incentive for authors to create more works and make them available to the public.	4. The current term of life plus 50 years provides authors with sufficient incentive to produce.
LONGER LIFE/HEIRS	5. Since the goal is to protect five generations of an author's heirs, copyright duration should be extended to accommodate the increase in life expectancy and the trend toward postponing childbearing until later in life.	5. The heirs of an artist may not care enough to ensure that the artist's work is kept alive. The goal should not be to reward an author's grandchildren for the author's work; rather, the grandchildren should be forced to write their own works.
SERIOUS WORKS	6. Since the popularity of serious works moves in long cycles, and because publication and promotion of such works is expensive, an author may not be able to reap the economic rewards for his work for many years after creation. These works, then, should get the benefit of a longer duration.	6. Government subsidization of these special works for the public benefit might be a better alternative than term extension.
INEQUITIES	7. Extension of duration will alleviate the inequities caused by the untimely deaths of some authors (John Lennon), the deaths of mothers but still prolific authors (Leonard Bernstein), and the deaths of authors whose works do not receive any attention until after the author dies.	7. The term is already long enough to cover such inequities.

- ACCESS**
5. Works protected by copyright are far more likely to be made widely available to the public than works in the public domain. Without guarantees of exclusivity in manufacturing and distribution, a publisher will often decline to invest in the publication of a public domain work for fear of a severely unjustified economic return. The result is a dearth of quality copies of many works after their term of protection has expired.
5. Public domain works are important to the preservation of twentieth century culture. Extension would injure potential biographers who fail to obtain permission to use copyrighted materials. Documentaries and educational films cannot be made without accessible public domain materials. Therefore, many important works that have educational and historical importance will either not be made or will be inaccessible to the public. Extension will result in almost complete inaccessibility of a large portion of our motion picture heritage.
- COST**
9. Too short a term harms the author without giving any substantial benefit to the public. The public frequently pays the same for works in the public domain as it does for copyrighted works, and the only result is a commercial transfer to certain users at the author's expense.
9. The ultimate cost of term extension is paid by the consumer in the greater costs of the finished products. A copyright extension will result in more licensing costs for music and film. Extension postpones the date at which works will go into the public domain, which puts off the date at which the works become cheaper to produce and buy.
- PERPETUITY v. LIMITED**
10. Extension of the term for 20 years is within the constitutional framework. Viewed in terms of moral rights of the author, some say intellectual property should be vested in perpetuity. Any extension from present-day durations would be a sacrament in keeping with this view of moral rights.
10. Term extension violates the United States constitutional mandate, which specifically provides for a limited term of protection. The purpose of copyright is not simply to provide income for authors and creators; rather copyright should serve the public by encouraging new creations and wide dissemination of works of authorship.
- TECHNOLOGY**
11. Technological improvements have increased the commercial life span of many copyrighted works, and copyright terms should be adjusted to reflect that.
11. The term is already long enough to accommodate new technology.
- ALL WORKS**
12. The goal is to reward all copyright owners, including corporations, who make substantial investments in the creation and distribution of copyrighted works.
12. Corporate owners have not done anything to merit an extended term. Most motion picture and music studios do not pay to preserve historic films, yet they control the only available copies of such films, so their archives are often lost or destroyed. Extending their monopoly without a corresponding requirement to keep the footage viable will only facilitate the destruction of the public record.
- PUBLIC BENEFIT**
13. Extended copyright protection benefits the public by promoting the progress of science and useful arts through increased incentive, which spurs creativity.
13. Term extension benefits only a handful of large companies, not the public. Extension puts the needs of the public and the needs above the interests of authors (i.e., big corporate conglomerates). Small businesses, scholars, and collectors will suffer from such an extension, while a few large corporate conglomerates will flourish. There is no public benefit in this.
- MONOPOLY**
14. Copyright is an acceptable limited monopoly, which is more than justified by the incentives it creates. These incentives spur productivity and feed the marketplace.
14. The result of term extension would be the monopolization and privatization of twentieth century American culture. Extension of terms amounts to an extension of monopoly in copyrighted material to an author and his heirs. This reduces public distribution.
- CREATIVE DERIVATION**
15. Unrestricted paratitling and derivative can dilute and distort creative works. An extended term of copyright will at least delay this result.
15. Sending works into the public domain is beneficial to the public because it allows creative users as well as the general public access to the works, and it increases public exposure to the work for, among other things, educational and research purposes. Shutting off availability for 20 years would stifle creative efforts, while putting works in the public domain would enhance a creator's creativity by encouraging the authorship of derivative works.

Mr. GOODLATTE [presiding]. Thank you, Ms. Peters.  
Ambassador Barshefsky.

**STATEMENT OF AMBASSADOR CHARLENE BARSHEFSKY, DEPUTY U.S. TRADE REPRESENTATIVE, OFFICE OF THE U.S. TRADE REPRESENTATIVE**

Ms. BARSHEFSKY. Thank you very much, Mr. Chairman and Mr. Conyers. It's a pleasure to be here.

I ask that my full statement be accepted into the record.

Mr. GOODLATTE. And it will be.

Ms. BARSHEFSKY. Our copyright law provides strong protection to the rights of American creators and artists. It also provides a flexible market-responsive means of transferring and exploiting these rights. These two factors have enabled the U.S. copyright-based industries to become the clear leaders in the creation and supply of informational materials and entertainment products around the globe. Consumers all around the world appreciate the quality of our films, music, books, and software. This enables our copyright industries to generate very significant positive trade flows for the United States.

Recognizing the importance of the U.S. copyright industries in the U.S. economy and in our international trade, the Office of the U.S. Trade Representative has given very high priority to raising the level of protection afforded copyrighted works around the globe and of securing market access for these works. We will continue to pursue these objectives using a wide range of mechanisms.

First, through bilateral agreements, particularly with countries that we have identified under the special 301 process as failing to provide adequate and effective protection of intellectual property rights—this is the mechanism, for example, that we have utilized most recently in connection with China.

Second, through monitoring and enforcement of the groundbreaking Uruguay Round Agreement on trade-related aspects of intellectual property rights, the TRIPS Agreement.

Third, through regional exchanges such as in APEC, the Asia Pacific Economic Cooperation Forum, and in the Americas through the free trade of the Americas process.

And, last, through negotiating in the World Intellectual Property Organization, WIPO, the international rules needed to insure the protection of copyrighted works that will be transmitted over the global information infrastructure.

Mr. Lehman will review for the subcommittee the full range of issues that the administration has considered in assessing H.R. 989. In light of my agency's missions and responsibilities, I would like to focus on the international trade implications of the proposed legislation.

Based on recent changes to the laws of the European Union member states, the passage of H.R. 989 would have a positive effect on our balance of trade. The member states of the European Union are in the process of implementing the 1993 European Council directive to harmonize their copyright terms to 70 years. The directive requires member states to deny the increase in protection, to deny the additional 20-year protection, to foreign nationals of any country that does not also provide long terms to nationals from

the E.U. member states. The directive takes advantage of a rare reciprocity-based provision in the Berne Convention called the rule of the shorter term, which permits reciprocity-based extensions to the life-plus-50-year term required by the convention.

In light of the differences in the terms of protection for certain works and rights in the U.S. and E.U. systems, some U.S. rightholders will be denied the extended term in the European Union if the U.S. term of protection is not also increased accordingly. I've detailed in my written testimony how U.S. rightholders would be affected in E.U. member States if H.R. 989 is enacted.

In sum, the increase in the term of protection called for by the legislation will permit the creators of works that are not made in a work-for-hire context, such as independent writers, composers, playwrights, architects, painters, and sculptors, to enjoy a term of protection that is life-plus-70 years rather than life-plus-50 years. Additionally, the owners of certain works-for-hire, such as motion pictures, will enjoy the right to exploit the films in the EU member states for up to 20 years longer than the 75 years they now have.

The countries of the European Union are a large and very affluent market for U.S. copyrighted works. According to a number of our copyright industries, European accounts for more than half of their international revenues, and the reach of European law will extend to the E.U.'s neighbors to the east and south as they attempt to harmonize their legislation with E.U. standards to forge closer associations with the European Union. Given our large surplus in trade with Europe in copyrighted works, I'm confident the term extension in the United States will generate more revenues for the United States than it will cost us in outflows.

Mr. Chairman, Mr. Conyers, one of the main trade policy objectives of USTR is to promote the establishment of legal and enforcement structures overseas that allow our intellectual property rights industries to exercise their rights in the intellectual property that they create. In that role, we're, of course, much more accustomed to commenting on changes in foreign laws than we are in commenting on changes on U.S. domestic law. Nonetheless, there is no doubt that H.R. 989 has international, as well as domestic, implications. Its passage would have a positive effect on our trade balance, and USTR strongly supports its passage.

I'd be happy to answer any questions the committee has on the international implications of the legislation. Thank you.

[The prepared statement of Ms. Barshefsky follows:]



**PREPARED STATEMENT OF AMBASSADOR CHARLENE BARSHEFSKY, DEPUTY U.S. TRADE REPRESENTATIVE, OFFICE OF THE U.S. TRADE REPRESENTATIVE**

I am pleased to have the opportunity to convey to the Subcommittee the views of the Office of the United States Trade Representative concerning H.R. 989, the Copyright Term Extension Act of 1995.

There can be no question of the importance of strong copyright protection in promoting the creation and dissemination of works of art, literature, music, film, photography, drama and architecture. The laws of the United States afford strong protection to the rights of its creators and artists; our laws also provide for flexible, market-responsive means of transferring and exploiting these rights.

This system of copyright protection has contributed immeasurably to the richness of our culture. It has also provided a firm basis for the development of a dynamic copyright industry that has made the United States a world leader in supplying informational materials and entertainment products around the globe. Because our films, music, books, and software are attractive to consumers around the globe, our copyright industries consistently generate a trade surplus for the United States.

We must also recognize the importance of copyright industries to our economy. Our copyright-based industries employ hundreds of workers in the United States and are employing new workers at almost three times the annual rate of the economy as a whole. These U.S. industries contribute over \$30 billion in foreign sales, more than any other U.S. industry except agriculture and aircraft, and are growing at twice the annual rate of the economy.

Recognizing the significance of the U.S. copyright industries in our international trade, the Office of the U.S. Trade Representative, in conjunction with other U.S. Government agencies and the Commerce and State Departments, has given high priority to raising the level of protection afforded to copyrighted works around the globe, and to securing market access for these works.

We negotiated the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPs Agreement) which established strong international disciplines in an area of great importance to the U.S. economy and was one of the most significant achievements of the Uruguay Round. At the same time, we continue to make effective use of the Special 301 process and other bilateral channels to advance our goals. This year, we concluded a far-reaching agreement with China on the enforcement

of intellectual property rights, and on market access for those who depend on the exploitation of those rights. Our copyright industry arguably is the primary beneficiary of this combination of enhanced protection and market access. Among other things, the agreement required China to:

- take immediate action against those well-known factories producing huge quantities of pirated and counterfeited products;
- make structural changes to ensure effective enforcement of intellectual property rights over the long term, with coordination of enforcement efforts at the national, regional and local levels;
- prohibit the use of infringing products -- particularly computer software -- in government ministries;
- create a customs enforcement system modeled after the U.S. system;
- create a title verification system to help prevent the unauthorized production, importation, exportation and retail sale of U.S. audio-visual works,
- allow U.S. intellectual-property related companies to enter into joint ventures for the production, reproduction and distribution of their products within China.

In some areas of the agreement, China has gotten off to a good start, with establishment of enforcement task forces, raids against computer software pirates, action against CD-ROM piracy, and issuance of new regulations. At the same time, we recognize that piracy remains a serious problem in China, and that we must keep up the pressure on China to implement the agreement effectively. USTR has established an Executive Secretariat, with private sector participation, to collect and analyze information on China's implementation of the agreement, and to coordinate training programs. A high-level USTR team plans to visit China for consultations under the agreement in late July.

In April 1995, to address the uncontrolled piracy of U.S. sound recordings in Bulgaria, we reached a detailed agreement with Bulgaria on the protection of U.S. copyrighted works. Under that agreement, Bulgaria signed on to the Geneva Phonograms Convention, amended its laws to make copyright infringement a criminal offense, and committed itself to put into place a copyright verification system.

Also in April, to address the rampant piracy of U.S. copyrighted works, particularly computer software, in Indonesia, we secured a commitment from the Government of Indonesia to undertake significant efforts to fight copyright piracy.

In the coming years, we will use existing multilateral mechanisms, such as the TRIPS Agreement, and bilateral mechanisms, such as the Special 301 of our Trade Act, to combat the piracy of U.S. copyrighted works. We will also work on a regional basis -- in Asia and in the Americas -- to seek better IPR laws, and to ensure that these laws are enforced. Finally, we will work with other agencies in the U.S. government to negotiate with our trading partners the international rules that will be needed to ensure the protection of copyrighted works that will be transmitted over the Global Information Infrastructure.

It is against this backdrop that I will assess the impact of HR 989.

It is clear that there are numerous factors and interests to take into account in determining whether a copyright term extension of 20 years is in the overall interests of our country. Many of the domestic issues connected with this decision lie outside the competence of the Office of the United States Trade Representative. We are therefore reluctant to insert this Office into a discussion of the full range of questions that the Subcommittee has before it.

The focus of this statement, rather, will be on the implications for our trade balance of an extension of the copyright term.

It is impossible to talk about those effects without taking note of the fact that less than two weeks ago, the European Union implemented a decision, taken in 1993, to harmonize its copyright term at life plus 70 years. This means that all members of the European Union, with the exception of Germany (which already had a term of protection of life plus 70 years) had to extend the term of protection that they provide to their own copyright holders, and to copyright holders from the other member states.

Unfortunately, the members of the European Union are under no international obligation to extend this longer term of protection to U.S. right holders, or to right holders from any other country that does not provide a reciprocal term of protection to works of European authorship. The so-called "rule of the shorter term" in Article 7(8) of the Berne Convention permits member countries to limit the term granted foreign origin-works to the term of protection provided in the country of origin. In other words, Berne member countries are permitted to provide terms in excess of that required by Berne -- generally life plus fifty years -- to nationals of other Berne member countries on the basis of reciprocity rather than national treatment. The EU directive, taking advantage of this rare reciprocal provision in Berne, requires member states to apply the rule of the shorter term to non-EU nationals, except in certain narrowly defined circumstances.

As a result, U.S. right holders will not be able to take

advantage of the longer term of protection in EU member states if they are subject to a shorter term in the United States. Because some works protected under U.S. law already receive a longer term of protection than in the EU system, the longer terms provided by this legislation will have no effect on the term of protection they receive in Europe. Other U.S. works, however, are currently provided a shorter term of protection than in Europe, so will receive a longer term if the U.S. term is extended.

In the U.S., works whose term is measured from the life of the author -- where the work is created outside an employment relationship and the author is known -- are currently granted a term of protection of the life of the author plus fifty years. If the U.S. term is modified to life of the author plus seventy years, these authors or their assigns will enjoy a longer term of protection in the EU member states. As a result, paintings, books, sculptures, plays, architectural drawings and other such works would enjoy twenty more years of protection in EU member states if H.R. 989 is passed.

On the other hand, works made for hire are protected under current U.S. law for a term of seventy-five years from their publication or 100 years from their creation, whichever expires first. Right holders in works subject to this rule, such as the producers of sound recordings and films, currently enjoy a term of protection twenty five years in excess of that provided by the EU system, which is fifty years from first publication or communication to the public. Because the maximum term of protection for producers of sound recordings and films in the EU system is fifty years, increasing the work for hire term in the U.S. to ninety five years will have no effect on the term they are granted in the EU system. As I will now explain, however, there is a means through which U.S. film producers would benefit in Europe from term extension in the United States.

If H.R. 989 or similar legislation is adopted, right holders in some U.S. works made for hire will be able to exploit these works in EU member states for up to twenty years longer than they can under the current system. The contracts under which these works are created typically permit the person for whom the work is created to exercise all economic rights granted to the actual creator of the work throughout the world. In the case of films, for example, directors are considered the authors under the EU system and are given a term of protection of life plus seventy years. These rights are in addition to, and more expansive than, those rights granted directly to the producer that I just mentioned. But pursuant to the contracts under which U.S. films are made, all rights granted to the directors of the films by EU member states are exploited by the producers of U.S. films.

The term of protection granted directors of U.S. films in the EU system, however, is capped by the term granted the film in the United States. Currently, then, the life plus seventy year term they are granted in the EU system is capped by the seventy

five year term granted in the United States. If the U.S. work for hire term is extended to ninety five years, the term of life plus seventy years granted directors of U.S. films in the EU system would be capped at ninety five years rather than seventy five years. Directors of such films would therefore receive -- and the producers who hold their rights would therefore enjoy -- up to twenty years more protection in EU member states, depending on the life span of the director.

Consequently, if the U.S. extends its copyright term in accordance with this legislation, some U.S. right holders will be able to collect revenues from the exploitation of their works in Europe for up to an additional 20 years.

The countries of the European Union are a large and affluent market for U.S. copyrighted works. The population of the member states of the EU -- ever increasing in number -- is now nearly 370 million. Moreover, the reach of EU legislation will expand even further in the coming years. Turkey, for example, has just enacted legislation to raise its copyright term for newly-created works to life plus seventy years. It is unlikely that Turkey would have done so were it not for the need to meet the standards of EU protection of intellectual property rights as part of the obligations it took on in concluding a Customs Union agreement with the EU. The countries of east-central Europe are also moving in the direction of harmonizing their legislation with EU standards as they move toward eventual membership in the Community.

Given the preponderant balance in the U.S. favor in US-EU trade in copyrighted works, an additional 20 years of copyright protection on both sides of the Atlantic would add more to the revenue flows headed from the EU to the U.S. than it would to the monies we would be required to pay out to Europe. While the Administration has not undertaken the complex process of quantifying the precise extent of these benefits, the Motion Picture Association estimates that term extension would result in a modest increase of revenues from international sources 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 music 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.

In view of the international benefits to U.S. rights holders as a result of copyright term extension as proposed by HR 989, the Office of the United States Trade Representative supports the proposed legislation.

Mr. GOODLATTE. Thank you, Ambassador.  
Commissioner Lehman, welcome.

**STATEMENT OF BRUCE A. LEHMAN, ASSISTANT SECRETARY  
OF COMMERCE AND COMMISSIONER OF PATENTS AND  
TRADEMARKS**

Mr. LEHMAN. Thank you very much, Mr. Goodlatte.

In the interest of efficiency and since I know that everyone has a lot of other things to do today—I will attempt to be extremely brief, particularly in view of the fact that this is not really a complicated subject. I would like to begin by apologizing for the Administration getting its testimony to the subcommittee so late. However, it seems as if we were all on the same wave length anyway. In fact, if Government works were copyrighted, the administration's opening statement might be an infringement of the chairman's opening statement. [Laughter.]

So it's quite clear that he understands what the issues are, and I think that the other members of the committee do too.

I think you will find unanimity among the three witnesses that the principal reason for making this change is that it will enable us to harmonize with the European Union, our largest single market for copyrighted works outside the United States. In fact, in some cases it might even be larger than the United States.

The Register of Copyrights, Ms. Peters, was correct when she suggested that this legislation would have an immediate impact, a very near-term impact, on works between 1920 and 1940. If we just think a little bit about that period of time, that was a period in which America's copyright industries really came into global dominance. There is a great deal of material that will have great commercial value on an international scale. I think it is fair to say that, with the passage of this legislation, there will be considerable revenue flowing into the United States because of the capacity to continue to exploit these works.

Now that does have an impact on creativity in the United States because much commercial creation—in fact, almost all commercial creation—is funded by commercial enterprises. This day and age of the information superhighway, and so on, it requires considerable financial resources to get product out to the public, particularly on the global scale. The extension of the copyright term will provide commercial copyright-based industries with the capacity to do that.

In the course of considering this legislation within the administration, we considered a number of very specific cases. We had some experience with this because we restored copyright protection to some works that had fallen into the public domain as a part of a NAFTA implementing legislation. There is some evidence, that the restoration of copyright protection under the NAFTA legislation actually encouraged industry to make available to the public in new editions, and much finer editions, works which otherwise would have remained moldering in the library. So on balance, we agree that there is a great deal of merit in this legislation.

I'd just like to say a word about the concern that works will not go into the public domain. Obviously, that's always a concern, but there's very little evidence that as a practical matter that will work a hardship on Americans or American industry in any way. In fact,

there's very little evidence, for example, that the consumer pays a great deal less for published works, which are in the public domain, versus published works which are copyrighted. If you go to a bookstore, the prices tend to be comparable. So in our view, there is relatively little down side to this legislation and it will definitely provide additional revenue for one of America's fastest growing industries.

I'd just like to make one final point. It isn't in our written testimony, but I would like to comment on the Register's concern about section 303 and the term extension works that were unpublished prior to 1978. I'd just like to remind the committee that prior to 1978 unpublished works enjoyed common law copyright protection and virtually have perpetual protection and never would have gone into the public domain. So the additional period does not strike me personally as being an extensive additional period of time. Therefore, I can say that the administration, without reservation, supports the Chairman's bill in its entirety.

[The prepared statement of Mr. Lehman follows:]

PREPARED STATEMENT OF BRUCE A. LEHMAN, ASSISTANT SECRETARY OF COMMERCE  
AND COMMISSIONER OF PATENTS AND TRADEMARKS

Mr. Chairman and Members of the Subcommittee:

Thank you for this opportunity to appear before the Subcommittee to testify on H.R. 989, the Copyright Term Extension Act of 1995. The bill would extend the term of copyright protection in all copyrighted works that have not fallen into the public domain by twenty years in an effort to conform U.S. copyright law with the copyright laws of the European Union Member States.

Since the first Federal copyright law in 1790, the term of copyright protection has steadily increased. In 1790, copyright protection was granted for an initial term of 14 years from the date of publication plus an additional 14-year renewal term if the author was still living when the original 14-year term expired. In 1831, the length of the original copyright term was increased to 28 years (with a 14-year renewal term). Then, in 1909, the length of the renewal term was increased to 28 years (for a total



term of 56 years). Finally, effective in 1978, the length of the copyright term was increased so that copyright protection would last either from the time the work was created until fifty years after the author's death or, where the length of copyright protection is not measured by the author's life under the 1976 Copyright Act, 75 years from first publication or 100 years from creation, whichever is shorter. Now, with the introduction of H.R. 989 an increase in the term of copyright protection is being considered by Congress once again.

Each time the term of protection was increased in the past, there appeared to be ample justification for increasing the term. Although today the need to increase the copyright term is not as pressing as it was in 1831, 1909 or 1978, there are several reasons that a copyright term increase may be warranted. Most notably, the bill would provide U.S. copyright owners benefits in other countries and in international fora. Accordingly, we support the twenty-year extension of copyright protection as proposed in H.R. 989.

The primary reason for changing the copyright term by twenty years would be to bring U.S. law into conformity with that of the European Union. The European Union (EU) passed a directive that, *inter alia*, requires each EU Member State to provide copyright protection for a term of life-plus-seventy years by July 1, 1995. A provision in the EU Directive explicitly requires each Member State to implement "the rule of the shorter term," which prohibits any EU Member State from protecting a work originating outside the EU for the entire life-plus-seventy years term unless the country in which the work originated also provides for a term of life-plus-seventy years. Thus, U.S. copyright owners will only be protected for a term of life-plus-fifty years in the EU, while their EU counterparts will be protected

for a term of life-plus-seventy years in the EU - unless the U.S. copyright term is extended.

If the United States extends the copyright term to life-plus-seventy years as proposed in H.R. 989, the EU Member States would be required to protect U.S. works for the life-plus-seventy years term. Thus, an extension of the copyright term as proposed in H.R. 989 would serve the dual purpose of providing U.S. copyright owners with extended protection in the EU as well as in the United States. This would benefit the copyright owners of many U.S. works by allowing them to exploit their works in the EU and the United States for an additional twenty years and reap the rewards therefrom.

For many other U.S. works the copyright owner will get the benefit of the entire copyright term in the EU regardless of whether the U.S. copyright term is increased. For instance, the term of protection in the EU for sound recordings under the EU Directive is 50 years from publication or creation, while the term of protection in the United States for sound recordings is 75 years from first publication or 100 years from creation, whichever is shorter. As the term of protection in the United States for sound recordings is already greater than the EU grants those works under the Directive, the EU Member States could not apply the rule of the shorter term to sound recordings and the EU Member States would be required to protect U.S. sound recordings for the entire EU term of 50 years from publication or creation. Even though U.S. sound recording producers would not benefit directly in the European Union from a copyright term extension as proposed in H.R. 989, sound recording producers would still benefit in the United States by getting an additional twenty years in which to exploit their sound recordings in the United States.

Extending the term of copyright protection by twenty years may also benefit the U.S. economy and, in particular, the U.S. trade balance. Last year, the U.S. copyright industry contributed approximately \$40 billion in foreign sales to the U.S. economy. Since the United States is a net exporter of intellectual property products to the European Union and an increase in the U.S. copyright term would extend the copyright term for U.S. works in the European Union, an additional twenty years of protection would likely increase the trade balance of the United States in the long-term.

Having established that extending the copyright term as proposed in H.R. 989 appears to offer some short and long-term advantages for U.S. copyright interests, it should be pointed out that the U.S. copyright-based industry and the public might benefit even more if the European Union and United States were to harmonize our copyright laws in other areas as well. There are numerous differences between the U.S. and EU copyright laws and many benefits may be had by the U.S. copyright-based industry and the public from extending the copyright term as part of a comprehensive harmonization agreement with the European Union.

Those that oppose H.R. 989 suggest that the public will be harmed by a copyright term extension. These individuals suggest that works will be cheaper and more widely available once the work falls into the public domain and that the public will be deprived of these benefits for an additional twenty years if H.R. 989 is enacted. This contention may be true in theory, but in reality it may have little significance.

Once a work falls into the public domain there is no guarantee that the work will be more widely available or cheaper. In fact, there is ample evidence that shows that once a work falls into the public domain it is neither cheaper nor more widely

available than works protected by copyright. One reason quality copies of public domain works are not as widely available may be because publishers will not publish a work that is in the public domain for fear that they will not be able to recoup their investment or earn enough of a profit.

There is also no evidence that once a work falls into the public domain that the work will be less expensive than its copyrighted counterpart. In fact, the public frequently pays the same for works in the public domain as it does for copyrighted works. Thus, the public may benefit little from a shorter term. The only parties that benefit from a shorter term are the parties who exploit public domain works. An argument could be made that these individuals are not deserving of the commercial windfall from a shorter term as they have not created any new works for the public's benefit. If anyone is deserving it is the copyright owners because they or their assignors are the ones that have taken the time and effort to create new works for the public to enjoy.

Opponents of H.R. 989 also suggest that an additional twenty years of protection as proposed will not be sufficient incentive to increase the number of works created. They contend that an author would create a new work regardless of whether the term is life-plus-seventy years or life-plus-fifty years. We believe that this contention misses the point. It is unlikely that an author would create a new work solely because the term was life-plus-seventy years but that very same author would not create a new work because the term would be only life-plus-fifty years. This, however, does not mean that the potential of greater rewards provided by a copyright term extension would not be an incentive for some authors to create more new works for the public to enjoy.

Granting a copyright term extension as propose in H.R. 989 would provide copyright owners with an additional twenty years in which to exploit their works. The additional twenty years will enable copyright owners to increase the exposure of their works. This would result in greater financial rewards for the authors of the works, which will in turn, encourage these authors to create more new works for the public to enjoy.

In the past, Congress has found it necessary to change the copyright law to adjust to economic, social and technological changes. We are already immersed in a technological revolution that demands we take a close look at our copyright regime and once again alter our copyright laws to keep pace with these technological changes. As we speak, we are at the dawn of the digital age which is generating unprecedented new challenges and opportunities for the copyright world. Congress and the Administration are presently addressing many of these challenges. For instance, there are two bills pending before Congress that would give a limited performance right in sound recordings disseminated by digital means.

Similar to the two performance rights bills, H.R. 989 also recognizes the significance of adequately protecting digital works. Granting a twenty-year copyright term extension will encourage copyright owners to restore and digitize works that are about to fall into the public domain. This will ensure that many celebrated works are preserved so that future generations can enjoy quality copies of these works. Without a copyright term extension, copyright owners will have little incentive to restore and digitize their works. If many of these works are not restored, they might deteriorate over time and our children would be unable to enjoy these works as we have.

Increasing the copyright term may also help to reaffirm the role of the United States as a world leader in copyright protection. By taking the lead, and increasing protection in the United States, we encourage our trading partners to follow our lead and increase the term of protection. If other countries increase their term of copyright protection, then U.S. copyright owners will be able to increase the rewards they receive for their works by exploiting their works in these countries for a longer period of time and therefore, they will have more incentive to create new works for the public to enjoy.

The United States has been and will continue to be a leader in the copyright field. We have gained this reputation for leadership in this area by providing strong copyright protection and by making well-informed, justifiable changes to our copyright law as necessary to keep pace with changes in society and technology. As a result of the strong protection afforded by our copyright law, the U.S. copyright industry has become one of the largest and fastest growing parts of the U.S. economy. The U.S. copyright industry contribute more to the U.S. economy than any other manufacturing industry and comprises almost four percent of the nation's Gross Domestic Product. Further, the annual growth rate of the core copyright industries has been more than twice the growth rate of the whole economy. This success resulted only after making changes in our copyright policies and practices after careful consideration of all the factors.

After careful consideration of all the factors, the Administration supports H R 989.

Mr. MOORHEAD [presiding]. Well, thank you all very much.

I'm sorry I couldn't be here for all of your testimony, but I've got two markups going at the same time. I can't be every place at once.

Mr. CONYERS. Commissioner Lehman was exceedingly brief this morning. [Laughter.]

I wanted you to know that.

Mr. MOORHEAD. Does the ranking minority member of the full committee have questions of this panel?

Mr. CONYERS. I don't. I was going to ask Ms. Peters to give us some ideas about what the legislative suggestions she made would look like, but, as usual, Bruce Lehman's talked me out of whether we really want to make those changes or not.

You know, what—this is a really big business going on here, and I'm still provincial enough to wonder about the little guys and how we can continue to expand their interests and their protection. I mean, even though we are proud of our culture and support all the music and the movies and the record-playing, and so forth, some of the creators have received short shrift in the past, and we're trying to bring our society out of that.

And to the extent that while we're looking at these measures that we can keep remembering some of the jazz musicians that were overlooked in a different era and other contributors, that would be my concern. And if any of you have any comments about that, I'd be delighted to entertain that.

Ms. PETERS. I'd like to respond on the point that I made, which is that the way that the law was put into effect, which Mr. Lehman pointed out, was if the work was unpublished, it was protected perpetually, and those works came under the Federal law on January 1, 1978. The law gave them a 25-year term of protection, and if they were published in that 25 years, 25 years more.

What I'm talking about are photographs, letters, manuscripts from 1780, 1790, 1820 which have not been published in the 17 years since 1978, where a number of institutions have been preparing them for distribution to the American public. We're not talking about any of the works that have commercial life and where a publisher has taken them and published them. Where those works have been published, we support the additional term. So we're really only talking about the works that are sitting, that have seen no use, and in the 17 years since the passage of the law nobody has published them; I don't think that much music is in this category. I think it's mostly photographs and letters, the kinds of things that historical societies basically collect.

Mr. CONYERS. Commissioner, does that accommodate some of your reservations on that point?

Mr. LEHMAN. Well, I don't think that this is an earth-shatteringly significant subject, but I wanted to point out to the committee that, until 1978, these works, even if they may have been created in 1820, enjoyed perpetual copyright. There is an argument that one of the incentives to disseminating works to the public is to provide some kind of exclusivity to a publisher who is able to obtain those rights.

So I think there are two sides to the matter. The question is: would some kind of eleemosynary organization be encouraged to disseminate works by virtue of not having to clear any rights, and

thus, be more likely to make the work available, or would a commercial organization, who might be spurred by rights have the incentive to get the works out?

This wasn't just something we considered in my office; every single department of the administration with any involvement in this—the Justice Department, the U.S. Trade Representative, the Education Department, and others—support this view. On balance, we felt that the commercial incentive of the additional period of time warranted supporting the legislation above and beyond even the international implications.

Mr. CONYERS. Now my colleague, Mr. Sensenbrenner, had observed that his legislation should be reported out or given the same contemporary consideration that the measure before is, and it was my impression that all of that work was in negotiations and that the negotiations weren't as hopeless as they were referenced this morning. And I was just wondering, does anybody have any update, any late flashes that we could be apprised of here? Anything you can tell us—

Ms. PETERS. Well, the only part that I know is that negotiations are ongoing and that we would hope to see them continue. Personally, on similar legislation a year ago, I wrote to the then committees basically opposing that kind of legislation. The complaint seemed to be with business practices rather than the way that the performing rights were handling the rights that is rather than with the extent of the rights. I'm somebody who feels very strongly that narrowing the rights with respect—it's called section 110(5)—would violate our international treaty obligations and would send exactly the wrong signal to the rest of the world.

Mr. LEHMAN. The Register has put her finger on something that's extremely important. We already have enough compulsory licenses in U.S. copyright law, and enough difficulties attempting to harmonize on a global basis where it is to our benefit on this basis, I think that Mr. Sensenbrenner's legislation would be ill-advised. However, I don't know that we've cleared that position in the administration. If you have a hearing on it, I'm sure that we will be able to offer more comprehensive testimony.

It's important to understand that the performing arts societies are—or at least ASCAP is currently covered under a Justice Department antitrust decree and we have a long history of antitrust regulation. Further, as Ms. Peters points out, the appropriate way to deal with business practices that are alleged to be anticompetitive, is through antitrust law, rather than mixing competition principles with the basic copyright law.

Mr. CONYERS. Ambassador, any comments on the above?

Ms. BARSHEFSKY. No comments.

Mr. CONYERS. OK. Thank you very much, Mr. Chairman.

Mr. MOORHEAD. The gentleman from Virginia, Mr. Goodlatte.

Mr. GOODLATTE. Thank you, Mr. Chairman.

I don't have any questions at this time. I do very much support this legislation. I think the witnesses have all very articulately stated the merits for it.

Thank you.

Mr. MOORHEAD. The gentlelady from Colorado, the ranking minority member of the subcommittee.



Mrs. SCHROEDER. Thank you, Mr. Chairman. I apologize for being late, but being one of the 24 targeted—or 28 targeted—on that list, we had a press conference to point out we did not appreciate being labeled.

So I would put my opening statement in the record, if that's OK.  
[The prepared statement of Mrs. Schroeder follows.]

PREPARED STATEMENT OF HON. PATRICIA SCHROEDER, A REPRESENTATIVE IN  
CONGRESS FROM THE STATE OF COLORADO

I thank the Chairman for scheduling this hearing. As a cosponsor of H.R. 989, I am pleased that we have this opportunity to hear from this distinguished group of witnesses, and to identify any issues that we may need to address in terms of refining this bill as we move to markup. I understand that the Chairman is looking at July 27 for a markup of this bill, and I would certainly support that, and hope we can work on a bipartisan basis to move this bill forward.

H.R. 989 represents an important harmonization -- even though it is an imperfect harmonization -- because without it, U.S. copyright owners will receive less protection in the European Union than their E.U. counterparts. I think it is very important that we make sure that U.S. copyright owners are on an equal footing in Europe with E.U. copyright owners.

The evidence is clear that this change will benefit the U.S. trade balance, and I think that is a significant factor. Passage of H.R. 989 will also signal our commitment to provide strong protection of intellectual property, both domestically and internationally. It is critical that the United States continue to play a strong leadership role internationally in the development and enforcement of intellectual property rights, and in the ongoing effort to achieve harmonization where possible.

At the same time, I am interested in hearing about aspects of the bill that

our witnesses believe can be improved. I know from reviewing the written testimony, for example, that there are concerns that libraries, educational institutions and archives may suffer unintended negative impacts in their efforts to preserve and provide access to older copyrighted works for educational use. I want to make sure that we look carefully at those issues and take any steps necessary to make sure that those concerns are addressed. There are also concerns about works for which the time period for exercising termination under section 304 has already lapsed, and about unpublished works covered by section 303.

I join the Chairman in welcoming our witnesses today, and look forward to hearing your views, and in particular, your suggestions for any fine-tuning that would strengthen this bill as it moves forward.

Mrs. SCHROEDER. And let me say, Ms. Peters, it's very nice to have you with your voice back.

Ms. PETERS. With my voice back. Thank you very much.

Mrs. SCHROEDER. Absolutely.

Commissioner Lehman, you said that the U.S. copyright-based industry and the public could benefit even more if we harmonized our copyright laws in further areas. Would you like to provide a list for the record or could you tick them off, or what other additional harmonizations should we consider?

Mr. LEHMAN. I think in previous testimony before the committee I've indicated some of the areas. For instance, at the present time, the United States has a law that governs sound recordings that is not compatible with most of the rest of the world, and in particular, the European Union. Now the legislation that is pending before this the subcommittee, that I believe you and the chairman are sponsors of, does move us in that direction, but it only moves us part of the way there. So that continues to be a problem area.

We also have differences in rental rights between the United States and our foreign trading partners. At this point I wouldn't want to propose changing that, but we should understand that the international negotiations in this area will probably only bear so many differences in the system. If we're going to retain anomalies in U.S. copyright law that currently exist, to the extent that we can find areas of common agreement with our trading partners, it makes it easier for us to come to that agreement that we all seek.

One of the areas that will probably be coming to your attention that we are discussing with Europe right now, is the protection of noncopyrightable database. The European Commission is moving to promulgate a new directive on noncopyrightable data base. Non-copyrightable data bases are very important collections of data, particularly those that might be in a computer, that don't meet the test of authorship. In our own law we had a famous Supreme Court case, the *Feist* case, which very much narrowed the scope of copyright protection for such extremely valuable commercial works. These works will be very valuable on the global information super-highway.

Europe has really taken the lead in this area, I think, it is rare for Europe to be more proactive than we are in trying to address that problem. That's an area I would look to where we might wish to take a look at their directive and consider harmonization in the same way we do here. So if there are areas where we can move in their direction, then it makes it easier for them to move in our direction or to accommodate some of the remaining anomalies that will be very hard to remove in U.S. law for an extended period of time.

Mrs. SCHROEDER. Ms. Peters, you said you had concerns for libraries and educational institutions and their ability to carry out preservation and access, and so forth. Do you have some language or anything that could help us with those concerns?

Ms. PETERS. We would certainly be—we'd like to try to do that for you. We're really not talking about any work that is commercially available. If it's commercially available, it's not an issue in a library. The American public has access to it. And the older the work is, the more difficult it is to secure permission to use it. So

we would like to take the opportunity to try to give you some very narrow language to solve some of those problems, to work with the library associations to see that their needs are met.

Mrs. SCHRÖEDER. We would really appreciate that.

You also raised some questions about the beneficiaries of the extra 20 years and who they should be, especially where there's no existing termination right. Do you or Mr. Lehman have anything you want to say about that.

Ms. PETERS. I just noted that in general the Constitution talks about authors, and authors have benefit, and that in 1976 the way that we handled that with giving the author the right to terminate, and that for some of the works that right has passed, and that that's a question. We're not actually advocating a position one way or the other because we actually are the ones who record the termination notices, and we get very, very small numbers compared to the works at large. I think last year we looked at what we got as far as termination notices, and it was something like 549, 541 of which covered musical compositions, and most didn't have multiple titles. So when you look at that small percentage in relation to the work as a whole, I'm not really sure where you want to come out, but I just did point out that in one instance there is no way for the author to basically recoup the extra 20 years, where all the other authors have that possibility.

Mrs. SCHROEDER. So you don't have any solution for us, but you're just—

Ms. PETERS. Well, I'm basically saying that—

Mrs. SCHROEDER [continuing]. Making us mindful of it?

Ms. PETERS [continuing]. Possibly you could consider another termination for those works, but I think that's your choice. What you really have is every other author having the ability to renegotiate for the extra 20 years, and there's this one little narrow category where that opportunity has passed.

Mrs. SCHROEDER. I really have no further questions, Mr. Chairman. I just want to thank Ambassador Barshefsky. I really did appreciate the terrific work you did in China. I know the committee was very, very impressed by the intellectual property agreement that you got, and you kind of pulled the rabbit out of the hat. So thank you very much—

Ms. BARSHEFSKY. Thank you.

Mrs. SCHROEDER [continuing]. For your hard work.

Thank you, Mr. Chairman.

Mr. MOORHEAD. The gentleman from Ohio, Mr. Hoke.

Mr. HOKE. Thanks, Mr. Chairman.

There are always winners and losers, and I'm trying to figure out who the winners are and who the losers are with this legislation. Maybe we could start with that.

Ms. Peters, have you got any thoughts on it?

Ms. PETERS. Who are the winners?

Mr. HOKE. Well, the winners are fairly obvious.

Ms. PETERS. OK.

Mr. HOKE. But go ahead.

Ms. PETERS. The winners are obvious. It's the owner of works that are commercially viable and where there are new uses, especially because of new technology. Authors and other copyright own-

ers should be the beneficiary of that, and so they win the extra 20 years and they certainly, with regard to Europe and other countries that go to the longer term, have the ability to recoup that money that they're really entitled to, because it's their works that are being used.

On the loser side, it's less clear. I believe that there's a public benefit in this legislation. However, you have to be mindful of the fact that it is very difficult to find copyright owners in some cases and that there maybe legitimate and beneficial uses of those works.

In my statement we pointed out that Canada, Japan, and a number of countries have specific provisions dealing with situations where the copyright owner cannot be located, and I think it's time that this country looked at this issue.

And I do feel very strongly, that the works that haven't been published in the 17 years since the effective date of the current copyright law should enter the public domain in 2003. The likelihood of their being published seems to be very small and the benefit to be gained by the American public is large. I could give a list of the things that are just sitting in the Library of Congress that fall into this category.

Mr. HOKE. And what will happen exactly with those?

Ms. PETERS. The Library has the ability to make them available to the public. We could either make them widely available through the Internet or could put them into class rooms. I have in my testimony an example where we've cleared an entire collection except the letters, but the letters are absolutely critical to the collection. One of the collections that we're going to be working on next year, but with the help of the family, is the works of Leonard Bernstein. The family would like to see the collection disseminate to the American public. We're going to have to work out the various necessary clearances of rights.

I think you're going to hear from a lot of people—and we certainly did that many people use the public domain to spur new creations, and that much of the material that authors use is material that's in the public domain.

Mr. HOKE. What does the word "use" mean there?

Ms. PETERS. "Use" means to basically take a work and create a new version of that work. I was reading on the plane the other day about "Little Women." "Little Women" is in the public domain. A key point of the article was that now there are many, many versions of "Little Women," and some of the versions actually have Beth living because Americans don't like young women to die. When a work is under copyright, you can't have that happen. You have to have permission of the copyright owner to make a new version of the work. Once it's in the public domain, people can take it and change it. So to the extent that there are people who basically create new derivative works, that—

Mr. HOKE. And they don't have to—but they don't have to give an attribution to the derivation. They don't have to make a—

Ms. PETERS. Well, there's actually a question about moral rights that I'm not going to get into. The issue is whether or not you have to give credit to authors. The United States is a member of the Berne Convention which requires that we provide a right of attribution at least during the author's life and 50 years after that. I

guess Louisa May Alcott's been dead longer than that. So, no, they really don't have to.

But I think there's a lot of documentary films—I know that the film that Ken Burns did about the Civil War, where a lot of the footage came from material in the public domain that was in the collections in the Library—I'm talking about those kinds of works where there could be a down side caused by the extension of the copyright term.

Mr. HOKE. Has anybody calculated on the up side to the holders of the copyright what the additional 20 years means in terms of dollars?

Ms. PETERS. Somebody in their testimony has that.

Mr. LEHMAN. I don't think we have a figure within the administration, but I'm sure that an estimate could be developed if you're willing to spend taxpayer money or other resources to have economists work on it. Nevertheless I think we can take judicial notice of the fact that the period that we're talking about going to in the fairly near future is a period in which U.S. commercial copyrighted works exploded onto the international scene in a very big way. So there is very little question that very large sums of money will be flowing into the U.S. economy. You mention, winners and losers? In many ways, Congress in its struggle to try to balance the books of the Federal Government is going to be a winner because, without increasing a single tax rate, there's going to be considerable additional growth in the GDP as a result of this bill. Keep in mind that copyright-based industries are one of the biggest U.S. industries. I think about the second biggest exporting industry in the United States, and there will be tax paid on this revenue that's flowing into the country.

Mr. HOKE. How much are we talking about?

Ms. BARSHEFSKY. If I may—if I may comment, sir—

Mr. HOKE. Please.

Ms. BARSHEFSKY. In my testimony I've indicated that, based on estimates from ASCAP with respect to the music industry, one of the music-collecting societies, that works that would otherwise have not—that some \$14 million annually in revenue would be received as a result of the term extension. The Motion Picture Association estimates that in the earlier years additional term extension would result in relatively minor revenue additions, a million dollars by the year 2000. But as you go out to 2010, 2020, the numbers rise very dramatically to between \$160 million and \$200 million annually.

Mr. HOKE. Well, I appreciate that. I don't know how, Mr. Lehman, you can extrapolate that as having some sort of material effect on our GDP that's over \$6 trillion. You're talking about a \$14 million addition. I'm not—am I missing something here?

Mr. LEHMAN. Well, those were figures from two industry trade associations from ASCAP, a performing arts society, which has annual revenues of perhaps, a half a billion dollars, and from the motion picture industry, which is a big industry, and has revenues of perhaps \$10 billion. In total, I think the copyright industries are well over \$200 billion. So that's why I say, to really have an accurate study, you would have to get some Ph.D. economists and really do an extensive analysis. But our view is that we can take judicial

notice of the fact that there probably will be considerable additional revenue.

Mr. HOKE. All right. Well, considerable additional revenue, though, is we're—I mean, if we order a—or we increase it by an order of magnitude, we could be saying maybe \$140 million or \$200 million. I mean, this is not a material impact on our economy. I just want to make that point.

The last thing I want to say is this, or I really want to ask you: let's get to the other side of this question, which I think is more interesting. I mean, we just went from 50 years to 70 years. We're talking about a new—we're talking about an information age. We're talking about new technology. We're talking about some works that will have lasting impact. I mean, maybe the works of Gershwin may be considered to be like the works of Mozart in 200 years. Why 70 years? Why not forever? Why not 150 years?

Ms. PETERS. Actually, that's a very good question. There certainly are proponents of perpetual copyright: We heard that in our proceeding on term extension. The Songwriters Guild suggested a perpetual term. However, our Constitution says limited times, but there really isn't a very good indication on what limited times is.

The reason why you're going to life-plus-70 today is because Europe has gone that way, and I think—

Mr. HOKE. Well, let's follow Europe; they're—

Ms. PETERS. No, what I'm saying is even if you look at the European Community, it largely settled on a term of life-plus-70 because Germany had that term. That was the longest term in the European Community. Had Germany not been there, that wouldn't have been what was chosen as the community term of protection.

So I can't answer that question. I don't know what it would be. If you look at the history of increasing the term in the United States, every so often people say it needs to be increased because—and they give a list of reasons, and it's up to you as Congress to decide whether or not it's in the public interest.

Mr. HOKE. Thank you very much, Mr. Chairman. Thank you very much.

Mr. MOORHEAD. The gentleman from North Carolina, Mr. Coble.

Mr. COBLE. Mr. Chairman, I apologize for my belated arrival. I had two or three other places to be. I apologize to the panel as well for having missed your testimony.

This may have already been asked, but I'm just curious to know, Commissioner, what you and your colleagues think about this. There have been proposals that, in lieu of the author or, more realistically, his or her heirs, receiving money from licenses or royalties earned during the extra 20 years, that that money be placed in a fund for the promotion of arts and authors in general. What would be you all's response to that?

Mr. LEHMAN. The administration has considered that issue and has concluded that we do not support that approach at this time.

Mr. COBLE. And I don't mean to imply that I do. I just was curious to know what you all had to say about that.

Ms. PETERS. I would just speak, on behalf of the Copyright Office. We studied Senator Dodd's bill, which was similar to that. He had an Arts Endowment Act of 1994, where you'd auction off copyrights at the end of the term. There was also a bill that would cre-



ate a public trust. In general, we have been opposed to such bills, especially on international grounds. One of the things that you don't want to do is place support for the arts on the backs of authors and other copyright owners. Moreover, it wouldn't be fair to only fund Americans with money that is being raised from works of all countries. So although I think everybody's in support of the arts and wants to see the arts adequately funded, you'd have to study very carefully any kind of a proposal that would use either copyright or copyrighted works as a vehicle to do that.

Ms. BARSHEFSKY. Sir, if I may add that, with respect to our copyright policy and the European Union, we've consistently opposed the mandatory allocation of funds to subsidize domestic cultural activities. There's a great concern that, were the United States to move in that direction, the European Union and other trading partners might try and imitate our actions, but in a manner even less desirable than they currently have.

Mr. COBLE. Thank you. Thank you, Mr. Chairman.

Mr. MOORHEAD. The gentleman from Pennsylvania, do you have any questions you wish to ask?

Mr. GEKAS. Yes, where are we? [Laughter.]

That's my question and I'll reserve my time.

Mr. MOORHEAD. I've been told that a number of our early motion pictures, which are certainly a part of our heritage in which we have been trying, through various pieces of legislation, to preserve at least the best of them, but we've been told that those that are not under copyright any longer are rapidly deteriorating because there's no one who feels the responsibility to spend money on them and to keep them and care for them. I guess that happened a great deal in the early days of motion pictures when they didn't cost as much.

Do you think this is true and that legislation of this kind will be of assistance in that respect?

Ms. PETERS. I can't—personally, I don't know whether it's true or not. I'm aware that the Library of Congress which has one of the largest film collections in the world, is dedicated to preservation of films. Public money goes to preserve those films. There's a new film preservation bill which would provide partial funding; the Government would be funding part, but the rest of the funding would come from copyright owners, that is, the studios.

Film preservation is critical to this country's cultural heritage, and there are a number of ways to do it. However, I really don't know whether or not having the work in the public domain has affected film preservation efforts.

Mr. MOORHEAD. There's a limited number of pictures, motion pictures, that come under that film preservation. Each year we add a few.

Ms. PETERS. Twenty-five. I think you're talking about the Film Preservation Board adding 25 films to the film registry each year, but there's another effort to basically preserve films in general as part of our cultural heritage.

Mr. LEHMAN. Mr. Chairman, the very situation that you just described was one of the things that the administration considered in deciding to support the legislation. It was persuasive to us, because we had some anecdotal evidence that resulted from when certain

works were brought back out of the public domain as a part of the NAFTA agreement.

I think that there is an evolving consensus in U.S. society on a bipartisan basis that marketplace solutions are preferable to Government regulation and bootstrap schemes for accomplishing larger social purposes. To the extent that you can provide an economic incentive for the preservation and dissemination of works, you're on pretty solid ground, and, of course, that's why the copyright law and intellectual property is such a magnificent thing.

Getting back to the earlier question by, I believe, Mr. Hoke, about when should copyright expire, this is an evolved law but many of the decisions that were made were very arbitrary. One of the things that is now being talked about on an international basis in connection with the new global information infrastructure and the digital highway and has been floated by our Japanese trading partners, is the idea that perhaps there ought to be some kind of new intellectual property right specifically for people who take something which even might be in the public domain, and then revive it, digitize it. Obviously, it would only be in their particular digitized version of it, but give them some incentive for taking something and adding value to it, so that it can be made available to people. This is something that is being talked about. Certainly, to the extent that copyright provides an economic incentive for people to rerelease works, it's an advantage of this bill.

Mr. MOORHEAD. You state that the grant of copyright term extension may encourage copyright owners to restore and digitize works that are about to fall in the public domain.

Mr. LEHMAN. That's correct.

Mr. MOORHEAD. As Chairman of the administration's Task Force on Information Infrastructure, do you believe that this bill would encourage copyright owners to add to the content which will be available to the Internet?

Mr. LEHMAN. Yes, I do.

Mr. MOORHEAD. I know this problem of money has been discussed here several times and the questions that are asked—I think one of the big problems that we run into here is the fact that copyrighted works in other parts of the world are being protected beyond the term limits of our copyright, and, yet, our own people will be shortchanged in that respect 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, will be a plus for us. True?

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.

Mr. MOORHEAD. Well, I have no further questions. I don't—does any member of the panel have an additional question?

[No response.]

Mr. MOORHEAD. If not, we want to thank you very much.

Ms. BARSHEFSKY. Thank you.

Ms. PETERS. Thank you.

Mr. LEHMAN. Thank you, Mr. Chairman.

Mr. MOORHEAD. Our next witness will be Mr. Quincy Jones. Over the years Mr. Jones' career has encompassed the roles of composer, record producer, artist, film producer, arranger, conductor, instrumentalist, TV producer, record company executive, magazine founder, and multimedia entrepreneur. He's won 26 Grammy Awards, the Recording Academy's Trustee's Award, and a Grammy Living Legend Award. He's also an Emmy winner and seven-time Oscar nominee, and was recently honored by the Academy of Motion Picture Arts and Sciences with their John Hersholt Humanitarian Award. He's the chief executive officer of Quincy Jones Entertainment.

Welcome, Mr. Jones.

Mr. CONYERS. Could I, Mr. Chairman, could I add my welcome to Mr. Jones, our witness?

Mr. MOORHEAD. You sure can.

Mr. CONYERS. As one who may have known him as long as anybody in the Congress—we don't like to get into the numbers thing, but it's a real pleasure to have him come here. It was at some expense of his time to travel across the country, and it makes me feel very good because I've seen him in every part of our society except as a witness in Congress. [Laughter.]

I don't know if you've been doing this a long time or not, but Quincy, you are probably one of the last survivors of that part of the jazz era called "bop," and reviewing this in one of the documents about you, it made me remember that you tie—through you have come all the contacts with almost all the musicians—black, white, Latin, international, local, foreign, domestic, and everything else. And whenever I used to hear a good tune that I didn't know who did it, after about three or four times of finding out that it was you, I probably attributed tunes to you that maybe you didn't do, but it always fascinated me, that great variety in your repertoire that you could reach to it. So I'm very, very happy to have you here.

And thank you for allowing me to say that, Mr. Chairman.

Mr. JONES. Thank you.

Mr. MOORHEAD. And we felt you needed one more thing to put in your bibliography. So that's why you can say you're a witness at a congressional hearing.

Would you summarize your statement in 10 minutes or less, and then we'll all ask you all kinds of questions.

#### **STATEMENT OF QUINCY JONES, SONGWRITER AND MEMBER, AMSONG, INC.**

Mr. JONES. OK. Good morning, Chairman Moorhead and members of the subcommittee. My name is Quincy Jones and I'm a songwriter, among other things, and a member of An.Song, Inc.

I'd like to take this opportunity also to sincerely thank all of you here in the administration for your support for this bill. It means a lot to us.

And I'm particularly fascinated with Representative Hoke's statement. I found a whole new view of things there. He just mentioned, why not forever? I never thought of that before. That's a good one.

AmSong is a not-for-profit association representing a vast cross-section of America's songwriting community. AmSong's membership ranges from the great American musical estates of Irving Berlin, Ira and George Gershwin, Rodgers and Hammerstein, Hoagy Carmichael, Johnny Mercer, Henry Mancini, to America's finest contemporary songwriters, such as Bob Dylan, Don Henley, Billy Joel, Stephen Sondheim, Alan Menken, Dave Brubeck, and Lionel Richie, just to name a few.

AmSong is dedicated to the protection of American intellectual property. And of paramount concern to AmSong's membership, and one of the reasons that I, myself, became a member of AmSong, is to ensure that this country provides copyright protection for its citizens' creations for a fair and reasonable period of time.

Several members of AmSong who are unable to testify this morning have prepared statements in support of H.R. 989, and I'll be placing—we'll be placing into the record personal statements by a number of AmSong members, including Bob Dylan and, just most recently, Don Henley, Stephen Sondheim, Alan Menken, Ellen Donaldson, and Mrs. Henry Mancini.

Mr. MOORHEAD. Are you offering those statements for the record at this time?

Mr. JONES. Yes.

Mr. MOORHEAD. Without objection, they will be placed in the record.

Mr. JONES. Two weeks ago, on July 1, 1995, the countries making up the European Union implemented a uniform term of copyright which is that of the life of the author plus 70 years, and as part of that process these countries have invoked the rule of the shorter term when determining the extent of copyright protection. This means that the works created outside of the countries that are a part of the European Union will be protected for the shorter of life-plus-70 years or the term in effect in the country when the work was created. This means that under the current laws songs such as "In the Heat of the Night," "In the Eyes of Love," both of which I wrote in 1967, will go out of copyright in 2042, while a song written in England, France, or Germany in the same year by an author of the same age as myself, 49—[laughter]—will remain protected until 70 years after his death. If the European author dies at the age of 85 in the year 2018, his work will continue to be protected until 2088. That's a full 46 years of protection beyond that which is provided for my work in the United States. And it's ironic that this great country, which has spawned cultural treasures that are unsurpassed in the world, should deny the creators of these treasures protections commensurate with those offered in virtually every democratic nation in the world.

The intent of our copyright laws is to encourage creativity by guaranteeing the protection for the life of the creator plus two generations of his or her successors. My own situation illustrates all too clearly how this intent is not currently being satisfied. I began writing songs as a young man back in 1948. If I'm 49, I have to change that. [Laughter.]

Like so many people today, I've been blessed with children later in my life--I have a 2-year-old--indeed, more than 45 years after I published my first song. And I believe that my children are entitled to the same rights with respect to my songs as the children of yesteryear born to parents in their twenties. Today people have a greater life expectancy and they begin families in their thirties and forties, and such societal changes necessitate a revision of our current laws.

The alternative to copyright protection is, of course, that works will fall into the public domain. While the term "public domain" implies that the ultimate public, the consumer, will have free and easy access to creative works, this is really not the case. The price of a quality compact disk recording of Beethoven is no less expensive than the price of the latest Pearl Jam LP. This is Leo Tolstoy; this is John Grisham. This book costs more than John Grisham, and we know how long Tolstoy's been around. He was influenced by Alexander Pushkin years ago, 19th century. [Laughter.]

The record company that manufactures the CD does not have to pay royalties to the Beethoven estate, and these cost savings are not passed on to the consumer. Beethoven's "Violin Concerto" costs exactly the same as "Garth Brooks' Greatest Hits." The book publisher does not need to pay royalties to the Leo Tolstoy estate. And, again, this is not reflected in the cost of the book to the public.

My songs are my legacy to my children. Because my pre-1978 works, which represent at least 40 percent of my catalog, are only protected for a fixed term of 75 years from registration, my catalog will begin to fall into the public domain when my youngest child is only 30 years old. And without an extension of the current copyright period, my children, my most immediate successors, will be deprived of their legacy from me while they're still young adults. And I have no desire at all to see my children be denied that which I have intended for them.

Fortunately, I have written well over 400 songs in my lifetime, but we must not forget that there are many songwriters, musicians, particularly blues and jazz musicians, who support themselves entirely and their families on the royalties earned from the three or four songs that they composed that may have become a hit. An extended term of copyright will make an acute difference in the quality of life for these artists.

An extension in the term of copyright would also benefit the families of writers, great songwriters, such as Duke Ellington, Thelonious Monk, Muddy Waters, and Willy Dixon, who early in their careers were often required to enter into agreements relinquishing ownership of their works, and I've seen this happen on many occasions. The 20-year term extension would give their families some of the benefits of ownership that they may have lost in the first 50 years of their copyright, way past the popularity of the song.

Just as important to remember is the sad reality that, once works fall into the public domain, the families of the creators have no incentive to maintain the works in a format that is useful to the public. Most of the estates represented by AmSong maintain extensive archives that are not only sources of information for scholars, but also serve as cultural resource centers for the public,

anxious to perform a special piano concerto by George Gershwin or an orchestral arrangement by Leonard Bernstein. It is the public who will wind up losing if an unreasonably short copyright term puts the archives of these master songwriters out of business.

And, finally, compelling economic factors mandate an extension of our copyright laws. America's intellectual property is this country's second largest export, and it also provides a significant revenue base at home. Our country's culture is universally popular. I've seen it all over the world myself personally. It is heard, seen, performed, and enjoyed everywhere throughout the world.

In light of the recent European Union action, copyright term extension in the United States has become an essential element in safeguarding our national economic security. And, moreover, every year more and more works are falling into the public domain while they're still commercially viable. This not only deprives the owners of the works and their families of the benefits of income, but it diminishes the flowback of taxable revenues generated from overseas sales.

Under the existing copyright laws, Americans and Europeans are required to pay for every use of Revel's "Bolero," while neither Americans nor Europeans are required to pay when using W.C. Hanley's "St. Louis Blues," written in 1914. It's kind of difficult for me to comprehend this logic.

We must extend the term of the copyright in the United States if we are to continue to reap the economic benefits of our intellectual property in the world and domestic marketplaces. And for all of the foregoing reasons, it is imperative that we extend the term of copyright in the United States by 20 years.

I commend you, Chairman Moorhead, for introducing H.R. 989, the Copyright Term Extension Act of 1995. I urge each and every member of the subcommittee and every Member of Congress to support this bill and vote H.R. 989 into law this year.

And I thank you for your time.

[The prepared statements of Mr. Jones, Mr. Dylan, Mr. Henley, Mr. Menken, Mr. Sondheim, Mrs. Mancini, Ms. Donaldson, Mr. Schoenberg, Ms. Durham, Ms. Miller, and Ms. Barrett follow:]

**PREPARED STATEMENT OF QUINCY JONES, SONGWRITER AND MEMBER OF AMSONG, INC.**

Good morning, Chairman Moorhead and members of the subcommittee. My name is Quincy Jones, and I am a songwriter and member of AmSong, Inc.

AmSong is a not-for-profit association representing a vast cross-section of America's songwriting community. AmSong's membership ranges from the great American musical estates of Irving Berlin, Ira and George Gershwin, Rodgers and Hammerstein, Hoagy Carmichael, Johnny Mercer and Henry Mancini, to America's finest contemporary songwriters such as Bob Dylan, Don Henley, Billy Joel, Stephen Sondheim, Alan Menken, Dave Brubeck and Lionel Richie, to name a few.

AmSong is dedicated to the protection of American intellectual property. Of paramount concern to AmSong's membership, and one of the reasons that I myself became a member of AmSong, is to insure that this country provides copyright protection for its citizens' creations for a fair and reasonable period of time. Several members of AmSong, who are unable to testify this morning, have prepared statements in support of H.R. 989. I will be placing into the record, personal statements by a number of AmSong members, including Bob Dylan, Stephen Sondheim, Alan Menken, Ellen Donaldson, and Mrs. Henry Mancini.

Two weeks ago on July 1, 1995 the countries making up the European Union implemented a uniform term of copyright which is that of the life of the author plus 70 years. As part of that process, these countries have invoked the "rule of the shorter term" when determining the extent of copyright protection. This means that the works created outside of the countries that are a part of the European Union will be protected for the shorter of life plus 70 years or the term in effect in the country where the work was created. This means that under the current laws, songs such as "In The Heat Of The Night" and "The Lyes Of Love" both of which I wrote in 1967 will go out of copyright in 2042, while a song written in England, France, or Germany in the same year, by an author the same age as myself, will remain protected until 70 years after his death. If the European author dies at the age of 85 in the year 2018, his work will continue to be protected until 2088. That is a full 46 years of protection beyond that which is provided for my work in the United

States. It is ironic that this great country that has spawned cultural treasures unsurpassed in the world should deny the creators of these treasures, protections commensurate with those offered in virtually every democratic nation in the world. The intent of our copyright laws is to encourage creativity by guaranteeing the protection for the life of the creator plus two generations of his or her successors. My own situation illustrates all too clearly how this intent is not currently being satisfied. I began writing songs as a young man back in 1948. Like so many people today, I have been blessed with children later in my life—indeed more than 45 years after I published my first song. I believe that my children are entitled to the same rights with respect to my songs as the children of yesteryear born to parents in their twenties. Today people have a greater life-expectancy and begin families in their thirties and forties. Such societal changes necessitate a revision of our current laws.

The alternative to copyright protection is, of course, that works will fall into the public domain. While the term "public domain" implies that the ultimate public, the consumer, will have free and easy access to creative works, this is really not the case. The price of a quality compact disc recording of Beethoven is no less expensive than the price of a Pearl Jam CD. The record company that manufactures the CD does not have to pay royalties to the Beethoven estate and these cost savings are not passed on to the consumer. Similarly, the price of a quality paperback by Henry James is no less than the price of the latest John Grisham release. The book publisher does not need to pay royalties to the Henry James estate, and again this is not reflected in the cost of the book to the public.

My songs are my legacy to my children. Because my pre-1978 works, which represent at least 40% of my catalogue, are only protected for a fixed term of 75 years from registration, my catalogue will begin to fall into the public domain when my youngest child is only 30 years old. Without an extension of the current copyright period, my children - my most immediate successors - will be deprived of their legacy from me while they are still young adults. I have no desire to see my children be denied that which I intended for them.

Fortunately, I have written well over 400 songs in my lifetime. But we must not forget that there are many songwriter/musicians, particularly blues and jazz musicians who support themselves and their families on the royalties earned from the three or four songs that they composed. An extended term of copyright will make an acute difference in the quality of life for these artists. An extension in the term of copyright would also benefit

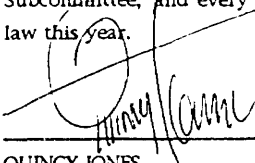


the families of songwriters such as Muddy Waters, Willie Dixon, and Duke Ellington, who early in their careers, were often required to enter into agreements relinquishing ownership of their works. The 20 year term extension would give their families some of the benefits of ownership that they may have lost in the first 56 years of copyright.

Just as important to remember, is the sad reality that once works fall into the public domain, the families of the creators have no incentive to maintain the works in a format that is useful to the public. Most of the estates represented by AmSong maintain extensive archives that are not only sources of information for scholars, but also serve as cultural resource centers for the public, anxious to perform a special piano concerto by George Gershwin or an orchestral arrangement by Leonard Bernstein. It is the public who will wind up losing if an unreasonably short copyright term puts the archives of these master songwriters out of business.

Finally, compelling economic factors mandate an extension of our copyright laws. American intellectual property is this country's second largest export and it also provides a significant revenue base at home. Our country's culture is universally popular; it is heard, seen, performed, and enjoyed everywhere throughout the world. In light of the recent European Union action, copyright term extension in the United States has become an essential element in safeguarding our national economic security. Moreover, every year more and more works are falling into the public domain while they are still commercially viable. This not only deprives the owner of the works and their families the benefits of income, but it diminishes the flowback of taxable revenues generated from overseas sales. We must extend the term of copyright in the United States if we are to continue to reap the economic benefits of our intellectual property in the world and domestic marketplaces.

For all of the foregoing reasons, it is imperative that we extend the term of copyright in the United States by 20 years. I commend you, Chairman Moorhead, for introducing H.R. 989, the Copyright Term Extension Act of 1995. I urge each member of this Subcommittee, and every member of Congress to support this bill and vote H.R. 989 into law this year.

  
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 QUINCY JONES

7/13/95

**[The prepared statement of Mr. Dylan follows:]**

## PREPARED STATEMENT OF BOB DYLAN

My name is Bob Dylan and song writing is my profession. Allow me to express myself concerning the Copyright Term Extension Act of 1995.

My first song was published by Witmark Music in 1961. My status at the time was 20 years old, unmarried, with no children. My situation changed to include a wife and family and the writing of many more songs.

The impression given to me was that a composer's songs would remain in his or her family and that they would, one day, be the property of the children and their children after them. It never occurred to me that these songs would fall into the public domain while my children are still in the prime of their lives, and while my grandchildren are still teenagers or young adults. Yet this is exactly what will occur if H.R.989 is not enacted.

Our current term of copyright is a flat 75 years for works written prior to 1978, and life plus 50 years for works written on or after January 1, 1978. This term is significantly shorter than the term of copyright adopted by the fifteen member nations of the European Union, the countries making up the European Economic Area and the numerous other countries which will be changing their copyright laws to provide for a term of life of the author plus 70 years.

The discrepancy between the term of protection offered to American creators and the term of protection offered to European creators is particularly striking. European audiences have always enthusiastically welcomed American popular musicians. They buy our records, they play our music over the airways, and they attend our concerts, often in sell-out crowds. And yet, due to the application of the rule of the shorter term, our works will cease to be protected long before European works of comparable age. The enactment of H.R.989 will go a long way towards equalizing the playing field for American and European works and rectifying the injustice to American creators.

It is important for the congress to enact H.R.989, and its companion bill, S.483 this year.

[The prepared statement of Mr. Henley follows:]

PREPARED STATEMENT OF DON HENLEY

Dear Chairman Moorhead, Members of the Subcommittee on Intellectual Property, and distinguished members of Congress:

My name is Don Henley. I am a songwriter, music publisher and recording artist. I appreciate the opportunity to express my support for H.R. 989, the Copyright Term Extension Act of 1995.

You have heard many compelling arguments for the extension of the term of copyright protection for American intellectual property to match that of the European Union Directive of life plus 70 years. The members of the United States creative community have testified that this is a trade matter, an economic issue of vital importance to the American participation in the global marketplace. You've been told that our current laws create what is essentially a twenty-year free ride to the European Union -- they can use and abuse our works for free, while we have to pay for the use of theirs. You've also heard about the questionable real value to the people of public domain material. It is all this, but it is very much more.

On a daily basis, I wear many hats. I care passionately about the preservation of our dwindling wilderness areas, and I have devoted a great portion of my life and my life's work to make sure that a respect for the land and the protection of our environment is a part of the legacy we leave our children. We have found that in order to foster this respect and protection, it has been necessary to enact laws. Many of you are acquainted with me in this role.

I am, however, first and foremost, an artisan, except my tools are words and melodies instead of brushes and canvas. I cut, shape, refine, and position each word and each note until I have crafted a song that I believe is true. My songs are an expression of who I am and what I stand for, and the laws which govern the results of my endeavors demand that people respect my work. The copyright law provides me with the right to protect my work from those who would otherwise compromise its integrity, who would exploit, abuse and mutilate my art. I do not allow my songs to be used in conjunction with advertising commercials, and I am extremely selective about other ancillary uses of my music in films and other projects. The law gives me this right, but only for a limited time.

No one would question my right to prevent someone from painting graffiti on my house or from stealing its contents. No one would question my right to benefit from its value or to ensure that my heirs benefit from its value. And if I were to

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design and build a house, instead of a song, I could own this house and would have the right to protect it throughout my lifetime. I would be able to pass this along to my children, and it would be theirs to pass to their children and so forth.

But I don't make houses or other tangible property. I just make songs, and they can only belong to me and my family for a limited time. I can't erect a fence around my kind of property to defend against trespassers. As a creator of intellectual property, I must rely on the law for protection, both economic and artistic.

As much as I believe that we are inextricably connected to one another in our individual and collective impact on the global environment, I also believe ours has become a global economy, and American creators should be accorded at least as favorable a protection at law as creators in other countries. We cannot chastise countries which do not provide as high a level of copyright protection as is provided under American law, when American law does not provide as high a level of protection as laws in other western countries, such as the European Community.

I urge you to pass H.R. 989, to extend the maximum protection to American intellectual property, to encourage the creative minds in America to continue to produce the songs, the plays, the books, the films, the photographs, the designs, the software – the art – that inspires the world.

Thank you.

[The prepared statement of Mr. Menken follows:]

PREPARED STATEMENT OF ALAN MENKEN, COMPOSER

I am sorry I can't be with you today to discuss the Copyright Term Extension Act in person. However, the terms of the proposed act are very important to me both professionally and personally and I want to take this opportunity to make my position clear to the Members of the House.

You may know me as the composer of Pocahontas, The Little Mermaid, Beauty and the Beast and Aladdin. I have made my living as a composer since my first musical-theatre shows God Bless You, Mr. Rosewater and Little Shop of Horrors and I've been fortunate enough to have received many awards for my work including six Academy Awards and nine Grammy's. While recognition of one's work is always gratifying, I am very concerned that the copyright protection of my work and the interests of my family receive the maximum possible protection.

The basic theory of copyright duration is that protection should exist for the life of the author and two succeeding generations. The life-plus-50 year term no longer offers that protection due to increased life expectancy and the tendency to have children later in life. On July 1, 1995 the European Union will adopt a uniform term of copyright equal to life of the author plus 70 years. Because of the application of the rule of the shorter term, American authors will not benefit from the extended term unless we enact copyright term extension legislation.

The 20-year term extension is a modest proposal which will bring us in line with The European Union. I strongly urge you to join your colleagues in support of H.R. 989.

[The prepared statement of Mr. Sondheim follows:]

PREPARED STATEMENT OF STEPHEN SONDHEIM

To whom it may concern -

As a working songwriter, former president and current council member of the Dramatists Guild and member of AmSong, I am committed to the protection of U.S. copyrights, and so I regret that I am unable to attend the July 13, 1995 Hearing to voice my support for H.R. 989.

The current term of copyright -- a fixed period of 75 years for pre-1978 works and life plus 50 years for works written on or after January 1, 1978 -- no longer protects American creators for a reasonable period of time. All too often works have been falling into the public domain during the author's lifetime (e.g., Irving Berlin) or the lifetime of the author's immediate successors, which is contrary to the intent of our copyright laws. H.R. 989 reflects the reality that life expectancy has increased by at least 20 years.

The countries of Europe, and nearly every other civilized country, implement a copyright term of life of the author plus 70 years. Our copyright law should do

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everything possible to encourage American creativity. A modest 20-year term extension will further this purpose.

I applaud Chairman Moorhead for introducing H.R. 989 and urge Congress to enact the Bill this year.

[The prepared statement of Mrs. Mancini follows:]

PREPARED STATEMENT OF MRS. HENRY MANCINI

I regret that I am unable to attend today's Hearing on H.R. 989.

I am Ginny Mancini. My husband was Henry Mancini, the songwriter. Since my husband's work became widely known in the early 1950's, it has become part of the fabric of American culture.

I commend Chairman Moorhead for introducing the Copyright Term Extension Act of 1995.

In light of the harmonization of copyright laws in the European Union, all European works will soon be protected for the life of the author plus 70 years. Some of my husband's best known works were written before 1978 and therefore are protected for a flat term of only 75 years.

My husband always intended that his work would be a legacy for his children. Indeed, our children are actively involved in the business aspects of my husband's catalogue and insuring that his works continue to be available to the public. It is inconceivable that such works would go into the public domain at a time when our children will most need the support from the copyrights left to them by their father. It is particularly egregious because foreign works written contemporaneously with my husband's works will continue to be protected for 70 years beyond the author's death.

Many persuasive arguments support a 20 year extension of our copyright.

Copyright term extension is very much in the interests of the American economy as it relates to maintaining a surplus balance of trade in an expanding world marketplace and generating income tax revenues from American creators and copyright owners. Moreover, strong ethical concerns support the enactment of term extension legislation as a matter of justice for creators and their families.

I urge the members of Congress to support H.R. 989, and its companion Bill S. 483, and to implement this legislation now.



[The prepared statement of Ms. Donaldson follows:]

PREPARED STATEMENT OF ELLEN DONALDSON, DONALDSON PUBLISHING CO., VICE  
PRESIDENT, AMSONG

I welcome the opportunity to express my strong support for H R 989, The Copyright Term Extension Act of 1995, and to submit a statement for the record.

On behalf of my family I wish to thank Chairman Carlos Moorhead for introducing H.R. 989. I also thank the many co-sponsors of this legislation from the Subcommittee, Representatives Becerra, Berman, Bono, Clement, Coble, Conyer, Gallegly, Gekas, Goodlatte, Nadler and Schroeder

On March 10, 1994 I wrote a letter to the Acting Register of Copyrights Barbara Ringer, expressing my deep concerns and strong support for copyright term extension, explaining in detail the devastating consequences we and others face if Congress fails to enact such legislation. That letter is attached hereto as part of my statement.

We are just one of many music publishing families, writers and owners of pre-1978 copyrights with a fixed term of copyright of 75 years from date of registration, who face the imminent loss of our works (our livelihoods) to public domain while they still have a viable commercial life. The extent of such works varies widely among copyright owners, from those who have enormous song catalogues to those with catalogues of two or three income-producing songs who live quite literally from check to check in order simply to pay the rent or put a child through school. There are many writers and their families who do not share in publishing income at all and rely solely on the

writer's share of copyright income.

Despite the intent of the 1976 Copyright law and the basic theory of copyright duration - that protection should exist for the life of the author and two succeeding generations- the fact is that the life -plus 50 year term **and** the term of 75 years from date of registration for pre-1978 works no longer afford that protection, due to an increase in life expectancy. Indeed, many authors' children are born late in the authors' lives, often well past their most productive creative years. An extension of copyright term by a modest 20 years would approximate this increase in longevity. It would as well approximate the sustained popular appeal of such authors' copyrights. The rapid growth in communications media has substantially lengthened the commercial life of innumerable works. If we fall behind in protecting our own works at home, our domestic short sightedness will lead to global losses.

The European Union, along with most of the developed countries of the world, have adopted a uniform term of copyright equal to life of the author plus 70 years or longer. However, because of the E.U.'s application of "the rule of the shorter term," American copyrights will not benefit from this extended term unless Congress enacts copyright term extension legislation. Without such legislation, foreign works will have far longer security in the rapidly expanding global marketplace, while American works will not be protected beyond the current (and inadequate) American term of copyright. Our works, upon which our livelihoods are based, will be irrevocably lost to public domain, virtually worldwide. The question must be asked: Why should 20 extra years of protection (and income) be given away to the world, free, at the expense of America's writers and copyright owners?

Copyright term extension is very much in America's economic interest. Along with our country's broad, vitally important concerns in maintaining the trade surplus we currently enjoy in the area of intellectual property, I respectfully urge this Congress to also consider the prospective loss of American culture, the loss of foreign and domestic income, loss of livelihood, and the concomitant loss of income tax revenues generated by its creators and copyright owners.

We desperately need harmonization of international copyright laws.

We need such legislation now.

It is a matter of economics. It is a matter of trade.

It is also a matter of justice.

Ellen Donaldson

Los Angeles, California 90004

March 10, 1994

Ms. Barbara Ringer  
Acting Register of Copyrights  
The Library of Congress  
Washington, D.C. 20559

Dear Ms. Ringer:

This past December I was fortunate indeed to have attended the "U.S. Copyright Office Speaks" seminars in Los Angeles. I came away profoundly impressed...with the speakers from the Copyright Office, the complexity and analysis of the issues discussed, the clarity of the presentations...and with a renewed appreciation that such people make up one of the most important institutions in our country. One which affects the very foundations of our government generally...and which affects my family and me very specifically.

At the seminars we were urged to respond to the issues under consideration in the Copyright Office...and how those issues would affect us. And so this letter.

My father was Walter Donaldson (b.1891, d.1947) who wrote popular songs from 1915 to 1947...a gentle man of the "Tin Pan Alley" years, the early years of American popular music. (I have enclosed a song book for your information.)

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My letter concerns the possibility of an extension of term of copyright, the effects of imminent (in our case) Public Domain, and the truly disastrous effect of EU Copyright Law vs. U.S. Copyright Law...the conflicting International Copyright Laws...on my family's business, Donaldson Publishing Company, within three years time.

Our company consists solely of, and is built upon my father's songs, most of which were brought into our firm at the Termination Period.

If our company is to survive, an extension of term is imperative. As time is so critically of the essence, we urge you to initiate a moratorium until the issue can be fully studied and recommendations set forth.

My concerns are complex. The issues about which I'm writing are complex. For the sake of clarity, I've chosen to focus on one song, but the circumstances are strikingly similar for all of the music in our catalog.

In 1919 my father wrote, with lyricists Sam Lewis and Joe Young, "How 'Ya Gonna Keep 'Em Down On The Farm (After They've Seen Patee)", a song celebrating Armistice and the end of World War I, with wildly irreverent, peculiarly American humour...and a certain mad "take" on life after so much tragedy. Lt. James Reese Europe and

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his legendary syncopated brass band, The "Hellfighters Regiment" (369th Infantry Division) introduced it...in the Victory Parade, February, 1919, that welcomed President Woodrow Wilson home from Paris and the Treaty of Versailles preliminaries...to an uproarious, still grieving, celebratory and exhausted populace in New York City.

The song marked a moment in time. It became, virtually overnight, a singular part of American culture and history. It still is.

There followed many performances and many recordings, which have been regularly re-mastered and re-issued over the years. The song has become a musical, journalistic, commercial and literary catch phrase, often quoted, and (still!) often used in concerts, on television and radio, in films and documentaries...often to convey a sense of time and a sense of place to the generations that followed...at other times used in a whole other way to lend new meaning (for instance, a print ad by a Japanese company doing business in Paris...)

My point is: Still used, still there. After all these years. Not lost somewhere in "cyberspace". It is

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a small piece of the jigsaw puzzle of distinctly American intellectual property that helps define our national culture. It has been protected and promoted and always available. It has been of benefit to my mother, my sister and to me, as my father's direct heirs, because the song is still earning a very substantial amount of money for Donaldson Publishing Company, (we own the Donaldson share, which is 1/3 of the copyright) as well as for the heirs/publishers of the lyricists.

(See II - Business History - attached.)

I must add that we have granted synchronization rights...on a gratis basis...for this song and others, for use in historical documentaries aimed at libraries, museums, schools and Public Television. This seems appropriate to us; it is how we do business.

This song, musically and lyrically certainly, but also because of its unique place in our cultural history, represents the cornerstone of my father's career and, in turn, of my family's publishing company, which is our livelihood.

On December 31 of this year, "How 'Ya Gonna Keep 'Em Down On The Farm" is due to go into Public Domain, as have all of my father's songs from 1915-1918.

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I protest.

The loss of this song, which I believe to be in conflict with the intent of the 1976 Copyright Law, will have a profound effect on our publishing company. It will also mark the beginning of the losses of our most valuable, income-producing copyrights: my father's music of the 20's, which forms the very core of our business, and will mark the beginning of the end of our publishing company, and my family's livelihood. Next year: "My Mammy"...in two years: "My Buddy" and "Carolina In The Morning"...and on and on and on...

I do not believe this was the intent of the 1976 Copyright Law, although it is the effect. Who could have foreseen the ultimate beneficiaries of that most welcome law or the healthy longevity of U.S. senior citizenry. I believe the intent was that the term of copyright should be enlarged to cover the lifetime of the author and his immediate family. Yet here we are, my father's immediate family: my mother, in her 80's; my sister, 59; and me, 55...all going strong, running a thriving publishing business, and facing a daunting prospect: the loss of our copyrights upon which our business is based. Surely the issue of current life expectancy must be



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reconsidered; yet another reason for a much needed moratorium until a final decision is made on extension of term.

The current "market" is very healthy indeed for the old songs. I would venture a guess that it will continue to be healthy for at least another 20 years. The songs, because they are good, will continue to be used. Artists will be paid for recording them, records will be sold, vintage records will continue to be re-mastered, re-issued and sold, record companies will be paid, the stores selling the recordings will make money, an ad agency will use a song to sell its clients' products, a motion picture company will include it on a soundtrack to help sell tickets. But the creator's share, meant, according to the intent of the 1976 copyright law, for his heirs, will be left out. Everyone will benefit from the creator's work except his heirs.

Further, and most seriously: It appears that the EU is moving toward extending its term of copyright to life plus 70 years. Germany has already done so, and apparently England will soon comply with the EU Directive. It is my understanding that Europe will not honor American copyrights with the same extension of term

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unless the U.S. extends its term of copyright to be in accord; and that Europe will revert, for American copyrights, to a term of life plus 50 years. If that happens, it will be nothing short of catastrophic for us.

It means: that in three short years, in 1997, virtually every single income-producing song in Donaldson Publishing Company and every song my father wrote alone, will go into Public Domain in every territory in the world with the exception of the U.S. (Please see list - I - attached.)

The reasons?

- I. My father died in 1947; 1997 is the fiftieth year after his death.
- II. Most of his co-writers pre-deceased him.
- III. He was the sole author of many, many songs.

It means: that our total income will be cut exactly in half, at the same time that our most important copyrights continue to go into Public Domain in the U.S.

The importance of Europe, the UK and Canada to our business cannot be overstated.

It is ironic that just now, when the old songs are

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in demand again throughout the world, the international market for music is expanding at a breathtaking pace, and scientific and technological wizards have made possible an Information Superhighway and a world of new markets for our music. It is ironic and heartbreaking that now, as the EU moves to extend the term of copyright in Europe, and now, in what promises to be a new "golden age" for American music, both old and new, and now, when, for the first time, it will be possible to earn a more substantial income from our old, classic songs on a worldwide basis...Now, our songs are rapidly going into Public Domain in our own country; and, in three years, because of conflicting International Copyright Laws, virtually an entire market, indeed a world of markets will be irrevocably lost to us forever.

The finality of this is particularly Draconian for our family as we will no longer be able to claim ownership of my father's songs.

An extension of the U.S. Term of Copyright and international accord in extension of Term of Copyright, would resolve the issue. Conflicting International Copyright Laws have a devastating effect on some of us. Indeed, eventually, all of us.

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My greatest fear is that the intent of the 1976 Copyright Law has now become muddled with political rhetoric and conflicting interests that...surely!...can and must be resolved to everyone's benefit.

Ms. Ringer, I have chosen to personalize this letter. I do not presume to speak for others in similar situations. However, I do know, from numerous private conversations with others, that they too will be profoundly affected by the term of copyright issue, most acutely those families with very small catalogs who are struggling to pay bills, and who live, quite literally, from check to check simply to pay the rent! We are suffering from "the law of unintended consequences". Dire consequences. Right now, that law seems to prevail, causing grievous harm to us.

We are so grateful for the 1976 Copyright Law: grateful for the foresight, wisdom and perseverance that went into the writing of it. Believe me, it made a positive impact. The honorable intent implemented by that law is the basis of so much good for so many people!

Now, in the 90's, given the unexpected longevity of the immediate heirs to copyrights, the unexpected longevity and continuing popularity of the songs on which

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our businesses are based, the technological advances, and the terrifying effects of EU copyright laws, and faced with formidable challenges and opposition, we must preserve that intent. Our copyrights must be protected in foreign territories as well as in the United States. We must have an extension of term of copyright if our businesses are to survive. We must have a moratorium at the very least.

There must be a way for the matter to be pursued to a more just conclusion for everybody concerned.

Your wise counsel and advice would be most deeply appreciated.

Thank you for your consideration and attention to this urgent matter.

Sincerely yours,



Ellen Donaldson  
Donaldson Publishing Company

cc: Honorable James H. Billington,  
The Librarian of Congress  
Charlotte Douglas, U.S. Copyright Office  
Mary B. Levering, U.S. Copyright Office  
Marybeth Peters, U.S. Copyright Office  
William Roberts, U.S. Copyright Office  
Dorothy Schrader, U.S. Copyright Office  
Eric Schwartz, U.S. Copyright Office

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cc: (continued)

ASCAP: Marilyn Bergman, President  
Jack Heeson Leon Brietler  
John Cacavas Arnold Broido  
Cy Coleman Ronald Fried  
Hal David Nick Furth  
Morton Gould Donna Hilley  
Arthur Hamilton Dean Kaye  
Wayland Holyfield Leeds Levy  
Burton Lane Keith Mardak  
John Mandel John McKellan  
Stephen Paulus Jay Morgenstern  
Stephen Sondheim Irwin Robinson  
Fred Konigsberg, Esq.

The Songwriters Guild of America:  
George David Weiss, President

## I

Without an extension of U.S. Term of Copyright, in accord with the EU extension of Term of Copyright, the following songs, among others, will go into public domain in virtually every territory of the world outside the United States in three years, in 1997:

My Buddy

Carolina In The Morning

Beside a Babbling Brook

My Best Girl

Yes Sir! That's My Baby

That Certain Party

I Wonder Where My Baby Is Tonight

After I Say I'm Sorry

Don't Be Angry

Thinking Of You

Where'd You Get Those Eyes

No More Worryin'

He's The Last Word

Sam, The Old Accordion Man

At Sundown

My Ohio Home

My Blue Heaven

Changes

Because My Baby Don't Mean Maybe Now

Out Of The Dawn

The entire score of the musical "Whoopæ", including:

Makin' Whoopee!

Love Me Or Leave Me...among many other songs

Kansas City Kitty

Reaching For Someone

'Tain't No Sin

Romance

Little White Lies

My Baby Just Cares For Me

Sweet Jennie Lee

You're Driving Me Crazy

Hello Beautiful!

Without That Gal

That's What I Like About You

Ev'ning In Caroline

Nobody Loves No Baby Like My Baby Loves Me

My Mom

Dancing In The Moonlight

Hiawatha's Lullaby

You've Got Everything

Riptide

I've Had My Moments

Sleepy Head

Okay Toots!

An Earful of Music



When My Ship Comes In

Clouds

Why'd Ya' Make Me Fall In Love

Fit To Be Tied

etc., etc., etc...and every single song  
for which my father wrote both music and lyrics.  
(I have not listed the complete works.)

[The prepared statement of Mr. Schoenberg follows:]

PREPARED STATEMENT OF E. RANDOL SCHOENBERG

I apologize for not being able to attend today's hearing on H.R. 989, The Copyright Term Extension Act of 1995, but appreciate that my views and the views of other heirs and copyright holders will be represented by AMSONG, Inc., of which I am a member.

It is my understanding that the proposed bill will extend the term of copyright to 70 years after the death of the author, or 95 years for pre-1976 works. The bill would bring the United States in line with the intellectual property protections offered by the European Community and other Berne Convention signatories.

Beyond the obvious symbolic significance of a measure which would make the United States once again the world's leading protector (and producer) of intellectual property, copyright extension will greatly impact my family, as well as the families of many other composers and authors.

My grandfather, the world-renowned Austrian-American composer, Arnold Schoenberg, came to this country in 1933 after being forced by the Nazis to abandon his position as the leading composition teacher at the Academy of Arts in Berlin, Germany. He worked and taught in Boston and New York, and from 1934 until his death in 1951, in Los Angeles, where my family still resides. After his death, UCLA named its music building Schoenberg Hall in his honor, and USC built the Arnold Schoenberg Institute to house his archives. He is generally considered to be the most important and influential composer of the twentieth century, and is called by some the "father of modern music."

We are informed that, notwithstanding its longer copyright term, the European Community has decided not to recognize the copyrights of American authors and composers beyond the term for protection provided in the United States. If this "rule of the shorter term" were applied to my grandfather's works, many of them might lose their copyright protection in the year 2001.

As you might imagine, our family receives a large portion of our royalty income from European performances. It would be a tremendous loss for us if in 2001 the European Community stopped protecting my grandfather's landmark American works, such as the Violin Concerto, the Piano Concerto, and "A Survivor from Warsaw" (which was performed at the opening of the Holocaust Museum in Washington, D.C.).

The extension of the copyright term will assist the families who are the intended beneficiaries of the copyright term. Despite his importance in the field of music, my grandfather died in 1951 with few assets aside from his artistic works. (He gave his letters to the Library of Congress, forming one of the most

valuable collections in the Music Division.) He left behind my grandmother and three young children (age 10, 14 and 19) who survived primarily on copyright royalties. Today, our family continues to spend a great deal of time and energy promoting my grandfather's works and protecting his cultural legacy which is a treasured asset of the City of Los Angeles.

My generation, the grandchildren, span from age 17 to 35. It would be a great loss if our family were not now able to reap the benefits of my grandfather's life's work, just as those benefits are coming to fruition. In serious music, even 70 years after death is sometimes insufficient. J. S. Bach's music had to wait almost 100 years after the composer's death before Felix Mendelssohn "discovered" it and proclaimed its greatness to the world.

My grandfather wrote an essay in 1949 in which he challenged the philosophical underpinnings of the copyright term and questioned:

why an author should be deprived of his property only for the advantage of shameless pirates, while every other property could be inherited by the most distant relatives for centuries.

Indeed, there does not seem to be any sound reason for this disparity in the treatment of intellectual property from other forms of property. As the nations of the world lengthen the term of copyright, intellectual property is beginning to be placed on an equal playing field with other forms of property. This is as it should be. For the record, I have attached a copy of my grandfather's essay.

For my grandfather, as with most serious composers today, the prospect of performances and recognition after his death was his only hope of compensation and support for his young family. Had he not had faith in the ability of his copyrights to support his family, he would not have been able to devote the time that his groundbreaking work required. Certainly, The Copyright Term Extension Act of 1995 will be a further inspiration to those artists creating today, whose works are also not likely to receive their due during their lifetimes.

Thank you for your support of this important measure.

## COPYRIGHT

1949

The copyright law was considered up to now as forbidding pirates to steal an author's property before a maximum of fifty-six years after its registration. After this time every pirate could use it freely, making great profits without letting the real owner 'participate' in the profit of his property.

The moral which had created a law of this kind seemed so low and unintelligible that one always wondered in whose interest it was created, and why an author should be deprived of his property only for the advantage of shameless pirates, while every other property could be inherited by the most distant relatives for centuries. Nobody can prove that the 10 per cent which the author—the creator, the real owner of this property—would receive after the fifty-six years would have caused any damage to the public. Because, if a work is still sellable after fifty-six years, the editions which a publisher prints can be so large that the cost of products decreases to 25 per cent of the cost of the smaller editions. Accordingly, the prices after the expiration of the 'protection period' go down 60 per cent and more (as, for instance, the cases of Wagner and Brahms indicate). Accordingly, even at 60 per cent plus 10 per cent for the author, the public would buy the work for much less than during the 'protection period'.

All this seems to be perfectly senseless and one can only think that it is maliciousness against the heirs of an author—while other heirs remain unmolested!

Now I have discovered the true solution to this problem:

At the time when this law was made there did not yet exist the so-called 'small rights'; there was not yet the radio, the movies, recordings, there was no payment for performance. At this time most authors sold their works to a publisher entirely, with all rights included. The participation of the authors in royalties of sales, of rentals, of performances, recordings, radio, and movie transcriptions was not foreseen by the author nor by the publisher. I conclude that the law was not made to deprive the author of his property.

It was made in analogy to the patent laws, admitting exclusive rights only

## SOCIAL AND POLITICAL MATTERS

for a limited time. A publisher, a manufacturer was not considered as the only one who should profit from other people's creation. And especially in respect to the patent laws there are many interests which require protection. Never could it have become possible that everybody could travel by railroad or steamship or possess an automobile, if one manufacturer had the production monopolized. One should also here regret the poor inventor who seems to be damaged. But generally an inventor is forced to sell his patent to a powerful man, because he is unable to produce himself. If there were such a thing as 'Human Rights', he should be protected—though the risk of marketing a new invention is a great one, and seldom is an invention from the very beginning perfect enough to become a success. Think of all the improvements which were required to make an automobile as perfect as it must be.

Such is not the case in the realm of copyright. A publisher's risk is not as large and he usually gambles on several numbers, one of which might cover all possible losses. The publisher is seldom forced to make improvements. Generally the works are finished and ready to be sold. Still, if one had the monopoly, he would not reduce the prices, as Schott's and Simrock's attitude proved, and therefore his rights must be limited. He is still thereafter in the position to compete successfully with the pirates, especially if he improves his editions.

It seems to me that this was the intention of the lawmakers. It is regrettable that they had no imagination to foresee at least some of the values which might be added to a work, and that they worded this law so poorly that the wrong interpretation was possible—that the law wanted to deprive the creator and serve the pirates.

How it was possible to extend this misinterpretation to royalties, performance fees, recording fees, etc., is entirely unintelligible. Admitting that the lawmakers in whose hands our destiny was delivered were unthinking and possessed no imagination, one is still surprised that nobody tried to find out for which purposes such a law should serve. In whose interest was it? Is the interest of those people to whom it is advantageous worthy of protection? Or is this law based on the same consideration as the law which protects the criminal instead of the victim?

[The prepared statement of Ms. Durham follows:]

PREPARED STATEMENT OF MARSHA DURHAM

My name is Marsha Durham. I am a daughter of Eddie Durham, an African/Indian American composer, writer, arranger, trombonist, guitarist and innovator of the electric guitar and of South Western Swing. When my father died in 1987 he left his estate to 4 children ranging in age from 18 to 50. At that time, my father had 3 grandchildren ranging in age from 1 to 18.

I am a divorced parent of two young daughters. I receive no child support and rely on my salary as a paralegal and whatever income I derive from my father's estate to cover our household and education expenses.

My youngest sibling, T. Edward, is a very talented musician in his own right, and now the father of two children. The small income he derives from my father's copyrights have allowed him to pursue the difficult livelihood of the new songwriter.

My sister, Lesa, who is at the beginning of her professional life and my brother, Eddie Jr., who is in retirement, similarly rely on their share of the small royalty income to care for themselves and their families.

I should stress that the income we derive from my father's work is indeed small - a great deal smaller than would seem fair, given his extraordinary variation of musical talents and a great deal smaller than the legacy our father hoped to leave for his children and grandchildren.

My father, like many jazz composers in the first half of this century, was often at the mercy of unscrupulous advisers. His lack of business sophistication caused him to lose many of the fruits of his creative labor and greatly diminished the royalties he and our family should have received over the past 65 years.

For example, my father was the arranger of the world renown Glenn Miller classic "IN THE MOOD" However, he received nothing for his work beyond a very small one-time fee. The monetary loss from this one historical song is devastating to my father's legacy. We similarly receive no compensation for "1 O'CLOCK JUMP" which my father wrote for Count Basie.

The copyrights my father did manage to retain include "TOPSY", "GOOD MORNING BLUES," "I DON'T WANNA SET THE WORLD ON FIRE," "MOTENS SWING" and "LUNCEFORD'S SPECIAL". These songs were assigned to various publishers, and very little income has accrued to my father's estate. However, after many years of arduous research I am finally in the process of recapturing the rights to these songs for the final 19 years of copyright protection available under the 1976 Copyright Act. I am hopeful that through careful management of my father's catalogue my brothers, sister and I will be able to recoup our legal expenses and to derive some revenues from our

father's songs. The irony is, of course, that absent an extension of the term of copyright we will have only a few short years of income from these songs which should rightfully have been a source of income for my father, his children and his grandchildren for many years.

On behalf of myself, my brothers Eddie Durham Jr. and T. Edward Durham and my sister Lesa Durham I wish to thank Chairman Moorhead for introducing H.R. 989 and to urge Congress to enact the Bill this year.

[The prepared statement of Ms. Miller follows:]

PREPARED STATEMENT OF BETTY KERN MILLER

Dear Chairman Moorhead:

I am the daughter and only child of the late Jerome Kern, and I have been following with great interest your proposal to extend the period of copyright protection in this country. I am grateful to you for having introduced legislation that would extend copyright protection in this country for my father's work and for all other intellectual property for an additional twenty years, and I urge you to continue to support that legislation and to attempt to have it enacted into law as soon as possible.

My health has not permitted me to travel to New York to see the current successful revival of SHOW BOAT for which my father wrote the music, and it does not permit me to come to Washington for the hearing that is scheduled for July 13th. I wanted you to understand however, that my absence does not mean that I am not fully in support of the proposed extension of copyright and grateful to you for what you are doing in support of American copyrights.

Writing with such wonderful lyricists as Oscar Hammerstein II, P.G. Wodehouse, Otto Harbach, Dorothy Fields, Johnny Mercer and Ira Gershwin to name but a few, my father wrote many of our best known and loved songs and musical scores. In addition to the score of SHOW BOAT, among the more than 1,000 songs he wrote are "Smoke Gets In Your Eyes", "All The Things You Are", "A Fine Romance", "The Way Your Look Tonight", "The Last Time I Saw Paris", "I'm Old Fashioned" and "Long Ago and Far Away". Under the current law his earlier works have been falling into the public domain each year for some time. For example, his songs "How'd You Like to Spoon With Me", "They Didn't Believe Me" and "Till The Clouds Roll By" are already in the public domain, and "Look For The Silver Lining" will fall into the public domain on January 1, 1996, if copyright extension legislation is not passed this year.



Honorable Carlos Moorhead  
July 7, 1995  
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I urge you to extend copyright in this country as soon as possible, not only because of the economic considerations involved but also because of the lack of control that occurs when copyrights are permitted to fall into the public domain during the lives of the first generations of authors' heirs. The musical "SHOW BOAT" is still playing to hundreds of thousands of people throughout this country and the world, and yet it will soon fall into the public domain if copyright is not extended in this country, thereby ending our ability to control the quality of its many productions. Since my father died fifty years ago this year, his works will also begin to fall into the public domain in foreign countries unless we extend copyright so that foreign countries who give protection for seventy years after death to their own authors will grant that same protection to United States authors.

I thank you again for the support that you have shown not only for the works of my father but also for the works of all of those whose work during this century has contributed to our American musical and literary heritage.

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**[The prepared statement of Ms. Barrett follows:]**

**PREPARED STATEMENT OF MARY ELLIN BARRETT, DAUGHTER OF IRVING BERLIN**

First I want to thank Representative Carlos Moorhead for introducing H.R. 989, the Copyright Term Extension Act of 1995. All children of authors, not to mention authors themselves, should be enormously grateful to him.

Obviously I, and those I presume to speak for, have a personal stake here and that basically is what I'm going to talk about ... the question of what is fair and right for the creative people of this country, and their heirs

Because of my father's long life and young beginnings, his songs - most notably "Alexander's Ragtime Band" - began falling into the public domain more than a decade ago, before he himself died. At that time his daughters were in their forties and fifties and his grandchildren (all but one) in their teens and twenties. Every year now more of those songs he hoped to leave as a legacy to those children and grandchildren become public property. The past ten years have seen the loss of, among others, "When I Lost You", "When The Midnight Choo Choo Leaves for Alabam", "Play A Simple Melody", "I Love A Piano", "A Pretty Girl is Like a Melody", "You'd Be Surprised", all still money makers. There is also "Oh How I Hate to Get Up In the Morning" which, like all my father's wartime army show songs belongs to the God Bless America Fund. (But that is a whole other story, the rich royalties he has given away to his country) Next year "All By Myself", "Everybody Step", "Say It With Music" will go, and so it will continue year by year

Yet the basic principal of copyright duration is that protection should exist for the **life of the author and two succeeding generations**. My father began young but had his children relatively late - something that is happening more and more today. 75 years from registration of pre-1978 works - our situation - doesn't come close to offering that traditional protection. Nor, given today's life expectancy, does "life plus 50 years" give proper coverage.

So authors and their families will indeed suffer if works fall into the public domain while still commercially viable. Someone - not the public - will be making money out of another person's property. And there are many families much more at risk than the heirs of Irving Berlin - those whose catalogues are more concentrated in time, with a smaller number of huge continuing hits.

And with the new uniform term of copyright adopted by the European Union - "life plus 70" - there will be further attrition. Because of the "rule of the shorter term", American authors will not benefit from the 20 year extension abroad unless we enact similar legislation here. (In the case of pre-1978 works, it must become 95 years from registration).

This, of course, brings up the much broader balance of trade issue. Intellectual property, I'm told, is America's second largest export. It won't only be individual composers, lyricists, film makers, playwrights, writer of fiction and fact, who will suffer but American trade as a whole. That all important question is one for trade experts to address. I am not an economist.

My question, as the child of a creator, as a person who values the arts (and as a working writer), is simply this: why is my country, so protective of other kinds of property, so reluctant to recognize the rights of the creative variety?

Non-creative, non-intellectual, property can be handed down indefinitely, as long as each generation pays its death taxes. Land rich in natural resources, businesses based on manufacturing, clothing, cars, liquor, fortunes in real estate, etc etc etc, can be supporting a fourth, fifth, sixth generation. Why shouldn't businesses based on creativity have a similar right -- or at least be guaranteed protection for the life of the author and two succeeding generations - which is what this bill, if passed, conceivably might do.

This as a question that troubles me greatly, beyond my own immediate interests, and those of every heir and living author who shares my gratitude for what you, Representative Moorhead, have proposed.

Mr. MOORHEAD. Well, thank you very much.

Opponents of copyright term extension point out that there are a number of benefits to the public domain that will be lost or postponed as a result of this legislation. How do you respond? Is there any public benefit in extending the copyright?

Mr. JONES. I'm sorry, I didn't get the question.

Mr. MOORHEAD. Opponents say that term extension will deprive the general public of certain of their benefits or at least postpone them, as a result of this legislation. How do you respond and is there any public benefit in extending the copyright?

Mr. JONES. Well, the public benefit is copyrighted works usually are more available. The cost to the public stays exactly the same, and, also, it allows the estates to be involved in receiving the benefits of what the creators have left as their legacy, but the public I think will get more efficient programming possibilities and have access to people that are really concerned with all of the accouterments that it takes to make a piece of music become exposed and to grow.

To me, copyright is in many ways like creative real estate, and it depends on—depending on the song—you were speaking about economics earlier. When we did the album "Thriller," the song, the value of the songs on that album to the various songwriters—there were nine songs in that. The songs were worth about \$1.6 million each in terms of just each individual writer. That's just with one album.

Mr. MOORHEAD. One of the things that people have been concerned about was that our works in Europe are not protected for the same length of time as we would protect the works of European authors in the United States. Is this a substantial economic switch as far as we're concerned? As far as the balance of trade, does it give the Europeans and other nations a big advantage of us—

Mr. JONES. A tremendous advantage. I'd cite examples. When records in America like "Thus Sprach Zarathustra," Richard Strauss was adapted because my teacher always told me that the melody is what lingers on, and that's always the power of a song. Even though they changed the rhythms throughout the ages, when "Spracht Zarathustra" was released as a single in the United States, it was public domain. And when it was released in Europe, they still had to pay the estate of the Strauss estate for that particular piece.

They have a tremendous edge on us. I lived in Europe for a while. I was a member of SACEM. It's a sister of ASCAP, and BM is the sister agency of BMI. Michel LeGrande is one of my closest friends, and I'm embarrassed to have a conversation with him about our various setups.

Mr. MOORHEAD. A while ago, the discussion centered on what the benefit would be for us in taxes, but there is also a benefit, is there not—as we bring more money into the United States, it percolates down in jobs and in investment, and so forth. So whether it gets into taxes or not, we have a real benefit in money coming into our country instead of going out, as it does with the purchase of so many foreign cars and the foreign equipment, and so forth. We need something to balance it.

Do you think extending the copyright, as we're trying to do here, will make a difference there?

Mr. JONES. Yes, I do. I think it could be a strong factor in a young person determining whether they want to be a composer or a songwriter, very much so.

Mr. MOORHEAD. Well, I have no further questions, but I'm sure that our ranking minority member of our committee, Pat Schroeder of Colorado, will.

Mr. JONES. I just wanted to say one more thing. Probably in 3 or 4 years all of the rules will have to be rewritten anyway because we are, as we step out of the industrial revolution century into the century of information and computers, it will be unbelievable.

There was a question asked before about the Internet. It will become one global unit, and I can feel that already, the way we do interviews now and the way we would be doing them in 2000, when you do satellite interviews. Twenty years ago, when America had totally dominated the record field, we would have our records released here and become hits, and 2 years later maybe they would be released in the European countries. Today they may come out in Europe before they come out in America. And it's become such a global and unified situation that it seems to me like it makes a lot of sense to have—at least be equal with our European counterparts.

Mrs. SCHROEDER. Thank you, Mr. Chairman, and thank you very much for being here this morning.

Basically, what I thought I heard you saying is public benefit doesn't seem to work because, even when there is no copyright, the price doesn't go down?

Mr. JONES. That's right.

Mrs. SCHROEDER. So that somebody is pocketing it?

Mr. JONES. The wrong people are making the money.

Mrs. SCHROEDER. The question is, who pockets it; right?

Mr. JONES. Right, with the manufacturers.

Mrs. SCHROEDER. And I think most of the consumers don't understand any of this, so that they wouldn't know to look for a cheaper product because it's now out from under copyright.

Mr. JONES. Right. That's the example with the Tolstoy book.

Mrs. SCHROEDER. And that is really one of the issues that concerns you. Either we've got to get the consumer smarter and get the price down or you may as well keep the person who created it, give them the property right and let them get it. Somebody's being unjustly enriched.

Mr. JONES. You're absolutely right, and I think that the main point is to inspire our young people to want to be in this field. It would be very easy to say it's not worth the trouble. It takes a long time to develop a musical background, and with some of my kids I try to discourage them from being in music because it's a very touch-and-go type of a profession and the first 30 years are the hardest. [Laughter.]

And if you do happen to get lucky later on—but it's a very tough profession, and I think every type of encouragement should be right down front and there for them.

Mrs. SCHROEDER. So your last 19 years have been great; right? [Laughter.]

But, basically, what the Constitution says about public benefit, because the idea being, then, after so many years then the whole public gets to share it—you're saying that that's not true; that what they had in mind when they wrote that in the Constitution isn't what's happening in today's real world. So I think that that's a very interesting point.

I think the other point is we in this country tend to have cornered the creative market, not totally cornered it, but we have a phenomenal amount of creativity generating out of here. And if after a smaller number of years than in other countries people can pick that up freely in their country and use it, that that's also harming this country, where the creators are more apt to live. I don't know how you break that out, but I think I've seen numbers showing we've got more creative little minds living here on this continent than we have in other places.

Mr. JONES. We do, and I think it's very ironic that, with the 400- or 500-year history of western music, out of all the possibilities—bagpipes, kabuki, string quartets, et cetera—that the youth of the entire planet have made the decision to adopt our music as their *esperanto*, all over the world. And it always fascinates me to go to these places, even Tahiti, and hear the same records that you hear in New York City. It's one of the most powerful exports that we have.

Mrs. SCHROEDER. Well, just remember what Tip O'Neill said, though, that the Irish gave the bagpipes to the Scotch as a joke and they never figured it out. They thought it was real. [Laughter.]

But, no, we thank you very, very much for being here this morning—

Mr. JONES. Thank you.

Mrs. SCHROEDER [continuing]. And appreciate your insight.

Mr. MOORHEAD. The gentleman from Virginia.

Mr. GOODRICH. Thank you, Mr. Chairman.

Mr. Jones, we're honored to have you here with us today.

I want to comment on Martin's comment about why not forever. Martin neglected to state that he's an accomplished musician and pianist in his own right, and I'm sure he's happy to support this legislation so long as your sheet music will remain competitively priced so he can get it. [Laughter.]

In asking that very question, I support this legislation. I think the extension is important to protect you and others who are creators of wonderful works, and we want to encourage that creation by allowing you get to just recompense for your work, and I think that that ought to carry on for your children and your grandchildren as well.

I think the reason why not forever is that at some point in time—family trees tend to go like this [indicating], and at some point in time the number of ancestors of a great—I don't know how many Tolstoy has out there today, but if they all had to get together and agree on how to handle the rights to his works, it might have at some point in time a stifling effect on the ability to promote great works of past centuries, rather than a positive effect, which I think it does for the immediate ancestors.

I wonder if you have any comments on that thought.

Mr. JONES. Well, I can't think of a situation where it hasn't been worked out when this type of legacy—

Mr. GOODLATTE. But we have a limit. If you go back 10 generations, you might have 200 or more heirs who would then all be potentially, depending on how wills were written, and so on, have the right to make a decision.

Let me give you an example outside of this area. My wife's parents are both from Ireland and her father's father owns a beautiful little house that overlooks—it's in Galway and it overlooks Galway Bay and it's just absolutely fabulous. It sits there abandoned. It's a small two-room house. The view is worth a million dollars, but her grandfather had 10 children and they've had several children each, and we're not all that far down the line, but to figure out who owns that property and for somebody to take control of it and do something with it involves a huge legal task. So at some point in time it seems to me that having an indefinite and unlimited copyright right that's passed on forever creates these kind of entanglements that could stifle the use of something beautiful rather than promote it.

Mr. JONES. You're right, but it's still a great concept. [Laughter.]

Mr. GOODLATTE. Yes, well, 70 years won't do it. I support the legislation, but I would not support—

Mr. JONES. If we can start with 70, add 20, it would be a good start.

Mr. GOODLATTE. We'll do it for 70 years plus your life, and you won't have to worry about it. [Laughter.]

Thank you very much, Mr. Chairman.

Mr. JONES. Thank you.

Mr. MOORHEAD. The gentleman from Michigan.

Mr. CONYERS. Thank you very much.

Quincy Jones, it's a pleasure to have you here and to listen to you, and I keep thinking about all the impact you've had on our music and our culture.

And what I'm thinking about is how we can build a system that encourages creativity, the creativity that you talk about and that has been referred to, to be so profuse in this country, because we're now in a time of cutbacks. Our cultural system is now being told that we don't need the National Endowment for the Arts; we don't need as much education programs. I hate to tell you this. Some have actually suggested abolishing the Department of Education, and education-wise we don't come up too high in industrialized countries of the world. We have a 25-percent rate of functional illiteracy among adults in this country. Millions of youngsters in this century could have added much to our country, had they had an opportunity to go to school and to go as far as their talents would carry them.

And so in a way, we need more cultural spokespersons to help us understand that you can't continue this stream of talent by reducing the Federal relationship to this. We have to have—particularly in my favorite arena, the jazz musicians have come through tremendous obstacles, the few that have made it. Many, as you know, go unnamed, unnoticed. There was no way they could take advantage of any royalties; that was out of the question.

And so I know that your presence here helps in this direction as well as in support of this important bill, 989.

Mr. JONES. Thank you. I think we're so—it goes back to the expression: how can I miss you if you never leave? And I think we are so rich in culture and we do not realize—we take it for granted, and we don't realize how much the culture plays a part in our life.

I would like, just out of curiosity, to see what would happen if America had to experience 2 weeks with no music, with no film, no television, no books. We'll say books. Books will always be around, but without a sound. Everything from the dentist's office to the elevators, to the radios, to television, to music, to records—there's a total absence of sound. I don't think we could stand it because it is the food for our soul, especially this country. That's why the world has adopted this music on such a large level, and it's one of the most important things. It saved millions and millions of kids from the urban situation, millions, and given them a way to see the light.

Mr. CONYERS. And we want to try to make it better than it has been in the past. I mean, if we can't do that, then we're not living up to our mandate, and I think you have been doing all you can in that area to bring forward other young talents of all disciplines.

And, you know, you mentioned this next century coming up. You know, with digital, the telecommunications, the recombinations of our new technology, it is going to make a whole different kind of playing field for all of the players—

Mr. JONES. I agree.

Mr. CONYERS [continuing]. And you're right, this is just—

Mr. JONES. I totally agree.

Mr. CONYERS. Unless we really begin to look at this more deeply than we ever have before, we'll end up sliding backwards instead of moving forward.

Mr. JONES. Absolutely. And if—we've been very involved, very, very involved in the conversion technology, just out of curiosity and because of necessity really. This is a place where—this is a situation where not—reading and writing is one thing, but a young person that enters into the 21st century who is not equipped to deal with this technology will be doomed before they start. There's no question about it.

And I've been working with Allen Kay, who's one of the inventors of Mac I and Mac II. He's the Apple fellow. We've already proposed them coming up with another one called Mac Daddy III to get the kids interested in it, so they won't think it's authoritarianism or institutionalized.

It's very important that everybody come to this party because of what's happening online, and this technology will probably be one of the biggest changes in civilization since the industrial revolution. I'd bet my life on it.

Mr. CONYERS. This subcommittee was in Hollywood recently holding hearings on this and related measures, and I couldn't help but notice—we visited a couple of studios, and I was very pleased to see that in some of our meetings there were African-American vice presidents of film companies; there was a general counsel. We went through one of the lots on a studio, and there was an African-American carpenter. And, you know, it's only a few years ago that



I could remember when trying to integrate the film industry and the movie industry, television, and the music industry was an awful experience. I mean, the battles—and I don't mean to suggest that it's over, but there has been movement in this direction. And I think that it's very important for the country itself, and also for the creative experience that you've referred to so much here.

Mr. JONES. I agree with you, and I appreciate the compassion and understanding and attention that's been given this. It will drive the next century; there's no doubt about it.

Mr. CONYERS. Well, I'm happy that you've come here in this regard, and I hope that we will continue to hear some of the wonderful contributions that you've made. You've now crossed over into television and other kinds of activity, but I suppose the creative urge never leaves. I certainly hope it doesn't in your case.

Mr. JONES. Thank you.

I'll close with this. I keep remembering that the entire entertainment business is about six things: the song, the song, the song, and the story, the story, the story. That's all it's about, the whole thing. [Laughter.]

Without those two things, there's nothing to talk about. That's what hires millions of people. You don't call them, directors or actors or musicians or anything, until you have a song or a story.

And I think I would appreciate all the support you can give me, NEA, and anything that fosters the arts in America, because it is part of our heartbeat; it's part of our soul, a big part of our soul. And we dominate it; we really do. We do it better than anybody in the world, all of America.

Mr. CONYERS. Yes, thank you very much.

Mr. JONES. Thank you.

Mr. GEKAS [presiding]. Thank you, Mr. Jones.

Your "Eyes of Love" I think is one of the most exquisite compositions of our time. You continue now to receive royalties from that, do you not?

Mr. JONES. Yes.

Mr. GEKAS. And you will through the life of the copyright that is now accorded you as the composer of that number, and the pricing of whatever use is made of "Eyes of Love" takes into account the royalties to be paid to you, does it not? The marketplace, in producing, wherever it does, a reissuing or reproduction of "Eyes of Love," has to price it in such a way that they know that part of it has to go to you, the composer; isn't that right?

Mr. JONES. That's right.

Mr. GEKAS. So the marketplace still works within the confines of the copyright world. The reason I'm asking that is, Beethoven, the example that you gave, which is in the public domain, itself is governed by the marketplace. It appears from what you tell us that the demand is still there for Beethoven; therefore, the pricing can be even higher than for the "Eyes of Love," for example; is that correct?

Mr. JONES. That's right. That's right.

Mr. GEKAS. Well, you don't have any quarrel with that, do you? You don't have any quarrel with the fact that the marketplace still gathers in a large demand for Beethoven or for public domain—

Mr. JONES. No, I don't have any quarrel with that at all. I just—when we reduce the time down to—we're speaking in increments of 70 and 80 years, is a big difference from the 500 years. Beethoven was, without a doubt, one of the geniuses of our time, of that time. And I have the same feeling that in 100 years from now in America—we probably are the least informed about our own music—I promise you that Louis Armstrong and Count Basie and Duke Ellington and Charlie Parker will be recognized as the same type of genius, because jazz is the classical music of the world.

Mr. GEKAS. The only other question I'd have—I'd like to enlist your aid. I wrote a piece a long time ago for the oboe. [Laughter.]

Mr. JONES. You did?

Mr. GEKAS. I don't know if the marketplace is going to be able to accept this. So I'll need your help on this. [Laughter.]

Thanks very much.

Mr. JONES. Thank you.

Mr. GEKAS. This hearing is recessed for 10 minutes.

[Recess.]

Mr. MOORHEAD [presiding]. Our first witness in the third panel will be John Belton, who is a professor of English and film at Rutgers University. Professor Belton holds a bachelor's degree from Columbia University in Greek and Latin, and both a masters and doctorate from Harvard University in classical philosophy. He's the former Chair of the Task Force on Public Access and Education Use of Motion Pictures of Society for Cinema Studies and a member of the Film Preservation Hearings Board of the National Film Preservation Board, the Library of Congress. He's written extensively in the area of cinema studies and is here today representing the Society for Cinema Studies.

Welcome, Professor Belton.

Mr. BELTON. Thank you.

Mr. MOORHEAD. Our second witness on the third panel will be Dennis S. Karjala, professor of law at Arizona State University College of Law. Professor Karjala holds a bachelor's degree from Princeton University in electrical engineering and physics, a law degree from the University of California at Berkeley, and a doctorate from the University of Illinois. He teaches and researches copyright law. He was a Fulbright Senior Research Scholar at the Max Planck Institute in Munich, Germany, studying the implementation of the European Union's directive on the copyright protection of computer software.

Welcome, Professor Karjala. Am I pronouncing that right?

Mr. KARJALA. Karjala. Thank you.

Mr. MOORHEAD. Our third witness on the third panel is William S. Patry, associate professor of law at the Benjamin N. Cardozo School of Law of Yeshiva University. Mr. Patry served as counsel to this subcommittee and as policy planning advisor to the Register of Copyrights. He is editor-in-chief of the Journal of the Copyright Society of the USA and has written several treatises and law review articles on copyright law.

Welcome, Professor Patry.

The fourth witness on the third panel is Jerome H. Reichman, who is a professor of law at Vanderbilt University where he teaches intellectual property law. Professor Reichman holds a bachelor's

degree from the University of Chicago and a law degree from Yale University. He currently serves as chairman of the Intellectual Property Section of the American Association of Law Schools and is a member of the Copyright Society of the USA. He has served as an advisor to the Office of Technology Assessment and helped to prepare that body's 1992 report to Congress on computer software and intellectual property.

Welcome, Professor Reichman.

We have written statements from our four witnesses, which I ask unanimous consent to be a part of the record. I ask that you all summarize your statements in 10 minutes or less. All being lawyers, that's hard to do, I know. [Laughter.]

I ask that the subcommittee hold their questions for all four witnesses until they've completed their oral presentations, and we'll begin with the testimony from Professor Belton.

**STATEMENT OF JOHN BELTON, PROFESSOR, RUTGERS UNIVERSITY, ON BEHALF OF THE SOCIETY FOR CINEMA STUDIES**

Mr. BELTON. Thank you, Chairman Moorhead.

I guess I should say I'm not a lawyer, so maybe I can be briefer than my colleagues. I represent an organization of academics, the Society for Cinema Studies, which teaches film and television in colleges and universities around this country.

First, I might begin with prefacing my testimony by suggesting that there is a very simple answer to the question of the day about perpetual copyright, and it can be done without increasing term limit. All you have to do is live forever.

One of the points that I think that whole idea raises is the sort of conformity with other standards and terms, and so forth. And if you just think for a minute about the arbitrary terms that come with life-plus-50 or life-plus-70, you realize that copyright terms can be very, very short. Think of Buddy Holly, for example, as opposed to Irving Berlin, a man who died in his twenties, a man who's tried to live forever. And I think these need to be weighed when we talk about conformity in copyright law, that there really is no conformity of term in copyright law. But I'm speaking as a lawyer, so I should stop that.

What I'm going to talk about specifically is the proposed legislation as it relates to works-for-hire; in particular, motion picture and television works, and I have very little to say about protection for authors. The proposed legislation actually fails to distinguish between works made for hire and works protected by authors. It awards a 20-year extension to both works produced by authors and works made for hire. One of the reasons I think that the 20-year extension figure came up was that it would provide authors and their immediate heirs for two generations with extended copyright protection. Works-for-hire are made by corporations. Corporations have a life expectancy that is not determined by human longevity. There is, therefore, no need to increase the copyright term for works made for hire using the logic that's being used for works produced by flesh-and-blood authors.

One of the—I guess the other issue that I think needs to be addressed when I'm talking about conformity is that appeals are

made to the European Community and the way in which the European Community has structured its provisions of Berne in regard to this new copyright procedure. However, within the European Community works-for-hire, if they exist at all—I've done some research on this—suggest to me that cinematic works in England and France, and so forth, are protected for 50 years. The United States, actually with its current legislation, protects works-for-hire for 75 years. It is in excess of the European Community. I see no point in extending protection of works-for-hire to 95 years, given that there is no European precedent for the 95-year figure. It seems to me that we're sort of moving too fast in an escalation of term extensions that do not need any further escalation.

One of our concerns is, again, speaking in kind of a disinterested way—in other words, we're not copyright holders; we have no financial interest in the proposed legislation, but we are users of copyrighted material, and there is some question about the impact this will have on the public domain. You'll hear extensively, I think, more about theories of copyright law and the delicate balance that exists between a limited monopoly which protects the copyright holder and eventual dissemination and spread of intellectual ideas to the public, which benefits the public.

In this term extension, there seems to be no real impetus for creativity, which is one of the reasons that copyright protects authors, is to spur their creativity—in this particular instance, for works-for-hire. Authors may decide to produce works to benefit their immediate heirs for several generations. A corporation does not make works with an eye to some sort of successive corporation. The motion picture industry, for example, has a very short payoff of its properties that last from 2 to 5 years.

This will include theatrical revenues, sale to cable, sale to video, sale to network, and syndication. After that the film becomes part of their library of works, one of their assets. Any moneys made from a motion picture while it is in the status of an asset is pure gravy. This is not the incentive which drives the production of new works. So the logic that can be used to talk about the copyright law as a spur to creativity really does not apply at all to works made for hire.

On the other hand, works that fall into the public domain become a very valuable resource for new creations, and this is an argument that's been made again, but I will give you one or two examples. I think one of the most forceful copyright holders is the Disney Corporation. Yet, a great majority of their animated films are based on stories that come from the public domain. You can go back to "Snow White and the Seven Dwarves," "Pinocchio." More recently, we have "Little Mermaid," "Beauty and the Beast," "Aladdin," and "Pocahontas." And without this kind of well of source material, a kind of cultural matrix of property that Disney very much needs, depends upon, these great animated films of the last few years would not have been made.

The same thing could be said for live action films. Kenneth Brannagh has made two adaptations of Shakespeare films, "Henry V," "Much Ado About Nothing." Martin Scorsese has recently adapted Edith Wharton's "Age of Innocence," and Agnieszka Holland has done an adaptation of "The Secret Garden," and so on and

so forth. "Little Women" was mentioned earlier. And we have Gillian Armstrong's recent version last year of "Little Women."

But the real problem with the term extension in terms of the way to fix the public domain is that in 1976 the term was extended 19, 20 years, whatever it is. It's proposed that it be extended again, just as that term is about to run out. Will there be yet another proposal within 20 years when this term is about to run out? In other words, what kind of logic is driving this.

I understand the desire of copyright holders is to extend their copyright protection in perpetuity, but, again, this necessarily must be balanced against the, what I would say, larger needs of culture, which has not been mentioned much here today; education, which has not been mentioned at all today. So that the financial rewards that come to creative artists, who are actually casted, unfortunately, in the role of people who want to make more money out of their works rather than people who are artists who are creative because they have to be. So I want to readdress this issue to suggest that this balance between financial rewards and our responsibility as citizens, the culture as a whole, must necessarily be regarded.

One of the problems with granting extension of 20 years to motion pictures and television works is that the American film industry has been a notoriously poor custodian of its copyright materials. Most of you know that up until 1950 over 50 percent of all American films perished. We're talking about a term of extension that sort of begins in 1919 and goes to the forties or something. If you look at that period of silent films of the twenties, only 20 percent of all those films survived. This is because the studio said, "We have sound. These silent films are economically worthless to us. We will junk them," and that's, indeed, what happened. These films have deteriorated in studio vaults or been dumped in the Pacific Ocean.

It's been the public archive, on the other hand, that has taken the initiative over the course of the copyright protection of actually funding—perhaps they shouldn't have funded with public funds—the preservation of some of these copyrighted works. It's only been in the last 10 years, with the advent of aftermarkets of video and cable, that the motion picture industry has taken a very, very active role in preserving its own assets.

One of my concerns is preservation and access. I'm a member of the National Film Preservation Board. And although it's not appropriate to talk about this in the context of copyright, it seems to me that, if extended term is to be given to motion pictures and other audiovisual material, there ought to be some assurance that these materials would not suffer the experience that it had in the past; that it would be preserved, and that there would be reasonable access to it.

As educators, our problem is reasonable access, and I have a whole document, anecdotal evidence of just how difficult it is to get reasonable access to copyrighted and uncopyrighted materials, which is in the record, but it is not trivial, the problems that are faced by educators in trying to pass on the culture of the moving image to our students.

And I think that the extension of rights to copyright holders in this particular instance is not necessarily going to help us at all;

that quite often the public domain is in some ways—facilitates the availability of certain kinds of films that's not worth the studio's time and effort to make available.

I see my time's run out. So I should stop here.

[The prepared statement of Mr. Belton follows:]

**PREPARED STATEMENT OF JOHN BELTON, PROFESSOR, RUTGERS UNIVERSITY, ON  
BEHALF OF THE SOCIETY FOR CINEMA STUDIES**

**Introduction**

Founded in 1959, the Society for Cinema Studies is a professional organization of college and university educators, filmmakers, scholars, historians, and others concerned with the study of the moving image and recorded sound. Membership of the Society currently numbers more than one thousand. Activities of the Society include the organization of an annual conference that is regularly attended by over 600 participants and the publication of Cinema Journal, a quarterly magazine devoted to film and television studies. The Society has established a number of committees to deal with issues related to our field; these include a moving image archive policy committee and a committee on the preservation and access of film, radio, and video/television materials for research and classroom use. SCS is also an active member of the National Film Preservation Board.

**Comments and Rationale**

The Society offers the following comments on the proposed extension of copyright protection. These comments are concerned chiefly with the proposed legislation's application to motion pictures and other audio-visual media. They seek to address issues of term extension as they relate to works made for hire:

**1. The proposed legislation fails to distinguish adequately between different kinds of works.**

Copyright law has established distinctions between works created by individual authors and works made for hire. Arguments in support of this proposed legislation ignore those distinctions. The principles of authorship that prevail in other art forms, such as painting and literature, cannot be naively applied to the cinema and other audio-visual media. The works of individual artists and authors are being considered for extended protection in large part because of the hardship that surviving family members might endure without continued income from these works. However, this argument cannot be applied to works made for hire, such as motion pictures and television programs, which are copyrighted by large corporations. A corporation cannot be compared to surviving family members nor can it be said to experience individual hardships. Corporations are, by definition, not individuals but collective entities established for the pursuit of certain kinds of business ventures. The claim of "natural right" as authors should not be extended to corporations.

**2. The proposed legislation would impoverish the public domain as a source for new works without providing any clear compensating advantages.**

Copyright protection is designed to encourage creativity by

granting artists and authors a limited monopoly; it gives authors exclusive rights to exploit their own work. The proposed addition of twenty years of copyright protection may encourage future creativity on the part of individual authors who wish to provide a livelihood for themselves and their immediate heirs. Indeed, the reason given for extending the term from "life plus fifty" to "life plus seventy" is the projected increase in the human life span. Thus the post mortem auctoris term of seventy years should protect two generations of descendants. Again, the logic used to arrive at the proposed twenty year extension of present protection cannot be applied to works made for hire. Their "authors" are corporations whose "life span" is not changed by increases in human longevity.

Works made for hire are currently protected for a term of seventy-five years. The new legislation proposes an extension of twenty years to give corporations a "limited monopoly" of ninety-five years. The argument that has been used to support this extension has been the need for international conformity. Yet, since the Copyright Act of 1976, American works for hire have enjoyed a longer period of protection than their European counterparts. The Berne Convention established a term of fifty years of protection after publication for cinematographic works. Have we suddenly entered an international term-extension race where our seventy-five has forced the Europeans to abandon their fifty for a new ninety-five? Is there a reason for the new numbers? On what needs are they based?

The extension of copyright protection can have no impact as a stimulus for creativity in terms of existing works. This argument cannot be used to justify a retroactive term extension for existing works. These works already exist, produced under different incentives and constraints. It is not clear that the proposed change for works made for hire from seventy-five to ninety-five years will measurably increase creativity. The corporations that produce motion picture and television programs operate on a short-term financial basis. Their incentive for the publication of these works is far more immediate in terms of rewards. They need to recoup their costs and make a profit during their initial play-off, which runs from roughly two to five years and includes a film's initial theatrical release, its sale to cable, its marketing on video, its sale to network television, and its syndication. After its initial play-off, a film becomes an "asset" in the corporation's library of holdings. Any profit that it generates after its initial play-off is pure gravy and has little or no relation to the initial incentives which led to its production.

The extension of copyright poses a threat to the concept of public domain, which lies at the basis of copyright law. The United States Constitution has given Congress the 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."<sup>2</sup> As the Supreme Court noted, the concept of a limited monopoly encourages and rewards creativity on the one hand while assuring that the work will ultimately enjoy widespread public availability.<sup>3</sup> The public domain is designed to function as a vital source for new works. Indeed, Disney, one of the corporations that



will benefit from term extension, has based a number of its recent works on public domain stories. This goes back, of course, to Snow White and The Seven Dwarfs (1937), but includes The Little Mermaid (1989), Beauty and the Beast (1991), Aladdin (1992), and Pocahontas (1995). Within the last few years, Kenneth Branagh has adapted two Shakespeare plays, Henry V and Much Ado About Nothing; Martin Scorsese has brought Edith Wharton's Age of Innocence to the screen; Gillian Armstrong has filmed Louisa May Alcott's Little Women (1994), and Anieszka Holland has made Frances Hodgson Burnett's The Secret Garden (1993). Term extension will impoverish the public domain and poses a threat to the spirit of copyright law. In 1976, terms were extended and this came at the expense of the public domain. Just as those earlier extensions are now about to expire, it is proposed that they be extended yet again. Will additional term extensions be proposed twenty years from now? Copyright holders naturally wish to extend their rights, but successive extensions of copyright terms will undermine--or perhaps even destroy--the concept of public domain and the rights of the public.

**3. The proposed legislation fails to consider the needs of users of copyrighted material.**

Lengthening copyright protection would have a significant impact on users of copyrighted and public domain works. As educators and scholars, we are concerned that this material will be increasingly difficult to obtain for scholarly and classroom use. As part of the nation's cultural heritage, such documents should be preserved and studied by disinterested scholars and educators rather than hoarded by copyright owners who may have little regard for the public good. If copyrighted material is never made available for use, that material has effectively been repressed or censored by its owners. This is especially critical for motion picture and television works.

With the publication of a book, copies are sold to the public; some copies are deposited in libraries. If that book goes out of print, copies continue to survive in libraries and can be obtained by users (via inter-library loan if your local library does not have it). Motion pictures and television programs are not made available in the same way. Copies of these works on film are not sold. Nor are they deposited at libraries. Even the Library of Congress, which once required two deposit copies of motion pictures, now returns deposit prints at the request of the depositor. If motion pictures or television programs have been deposited at the Library of Congress or at a public archive, they can be studied on the premises. But they cannot be used in the classroom or screened in theaters without the permission of copyright holders.

Traditionally, copyright holders have not readily make films and other materials available for educational or scholarly use. Or, if access is given, the costs involved have been prohibitive. It is not cost-effective for Hollywood studios, television networks, and large distributors of television programs which make their profit from the mass market to serve educational needs. Consequently, they frequently refrain from providing educators with ready access to

culturally important audio-visual materials. Hundreds of American films are no longer available for classroom rental in 16mm or 35mm. For example, existing 16mm copies of Alfred Hitchcock's 1943 classic Shadow of a Doubt were recently discovered to be some damaged that they had to be destroyed and the distributor considered it to be too expensive to strike new prints. However, small distribution outlets that deal in public domain films have learned how to make a profit in this market. Hundreds of little-known films that educators would like to use in classrooms that will never find their way to 16mm distribution or even video if the copyright term is extended. A similar situation exists with regard to other audio-visual materials. The more films that fall into the public domain, the more early cinema, silent films, and historically important, early sound movies will be available for educators to use in the classroom.

Historically, motion picture studios have not been responsible custodians of their property. Half of all American films made before 1950 no longer exist, having been left to deteriorate in studio vaults. For the last decade of silent films (the 1920s), the statistics are even worse: only twenty per cent of these survive. Only in the last ten years, with the expansion of video and cable markets, have many of the studios taken steps to preserve their holdings. This has also been the case for many television networks and large television production companies. In the past, it has quite often been the public archives, not the studios, that have taken on the task of preserving our moving image heritage. To give the studios an additional twenty years of copyright protection over material that many of them have ignored for seventy-five years or more is inappropriate. If the owners of works for hire secure these additional rights, they should at least be required to preserve and make available all titles that fall under this proposed legislation. As users of copyrighted material, scholars and educators remain concerned about the preservation of and access to these works. Any new legislation should attempt to ensure that additional rights copyright owners are accompanied by additional responsibilities of these owners to the public.

Even when copyright owners do grant educators permission to use their materials, they frequently set forth policies that make access next to impossible. They may charge prohibitively high rates or establish unnecessarily onerous conditions for their use. For example, Hollywood studios have often demanded exorbitant fees or unreasonable conditions for the use of stills and frame enlargements which serve as evidence in scholarly arguments and teaching tools in textbooks. In one instance, Paramount requested a payment of \$20,000 from an educator for the use of several frame enlargements in a textbook published by a university press. Columbia Pictures has granted requests to reprint photos from its films at exorbitant terms (\$500 per photo) and insisted that scholars secure releases from all those depicted in the photo. In a similar case, CBS insisted that a scholar publishing an essay in Cinema Journal dealing with visual style in television soap operas secure releases from all those depicted in the photos. As educators, we realize that much of our use of copyrighted material is protected by fair use provisions of

copyright law. However, the principle of fair use remains ambiguous, decided in court by judges on a case-by-case basis. Copyright owners tend to define the principle of fair use very narrowly and threaten those who reproduce even the smallest part of a copyrighted work, such as a frame enlargement, with expensive lawsuits. Given this sort of intimidation and the potential expense of going to court against large corporations, educators and university presses are reluctant to test the limits of fair use in court.

The proposed copyright extension also effects unpublished works, such as studio papers, production information, correspondence, stills, and other materials. These materials were to enter the public domain in 2002. The new legislation proposes to shield them for an additional ten years. Extended protection of these materials will restrict future film scholarship.

#### Conclusion

Scholars and educators have unique problems which are not addressed by the proposed legislation to extend the period of copyright protection. The proposed copyright extension threatens to strengthen the rights of copyright holders in ways which we find to be problematic. Even if term extension is deemed desirable for certain works, it is not necessarily desirable for other kinds of works, such as motion pictures or television programs made for hire. A copyright extension will do little or nothing to spur creativity in the making of new films and other audio-visual works and will have an adverse effect on the production of new films based on public domain works. Most importantly, by limiting our access to documents of cultural and historical significance it will seriously hamper the mission of educators as custodians and transmitters of our national moving image heritage.

submitted by John Belton

#### Notes

1. Silkie von Lewinski, "EC Proposal for a Council Directive Harmonizing the Term of Protection of Copyright and Certain Related Rights," *IIC*, 23, No. 6 (1992), 787.
2. Quoted in "Who Will Set the Tolls on the Information Superhighway," unpublished comments by David Pierce of the Committee for Film Preservation and Public Access (November 29, 1993), 9.
3. *Twentieth Century Music Corporation v. Aiken*, 422 U.S. 151, 156 (1975).

Mr. MOORHEAD. Professor Karjala.

**STATEMENT OF DENNIS S. KARJALA, PROFESSOR OF LAW, ARIZONA STATE UNIVERSITY, ON BEHALF OF THE U.S. COPYRIGHT AND INTELLECTUAL PROPERTY LAW PROFESSORS**

Mr. KARJALA. Thank you. I want to thank the chairman and the members of the subcommittee for inviting me to testify today. I will present my views on this legislation and those of a great number of my academic colleagues who work and conduct research on a daily basis in the areas of copyright and intellectual property. Our comments are based on a familiarity with the subject matter and, we believe, a sensitive understanding of how copyright has traditionally sought to balance competing public and private interests.

I'd like to begin with a few words about American copyright philosophy and tradition. The special genius of the U.S. copyright system has been its emphasis on an appropriate balance of these public and private interests. Our system has been remarkably successful in promoting the creation of economically and culturally valuable products, particularly in the copyright industries like movies, music, and computer software. This is shown by our current dominant position in international trade in these areas.

We should know, however, that our dominance is primarily in current products of authorship. Our system has been phenomenally successful at continuing a supply of new and valuable work. The movies like "The Lion King" and the most recent Sylvester Stallone film, for example, generate vastly more revenues, probably any single one of those movies generates more revenues, than all of the works that are the true focus of this bill, which were produced in the 1920's and 1930's. Nobody has the precise numbers, apparently, but from the numbers we heard this morning, that seems not an unfair estimate.

And the creation of these new products is possible because of the rich and vibrant public domain that has been passed down to us and our current creative authors from earlier authors. This valuable source of cultural building blocks is itself a product of our system's careful balance of public and private interests. Our Constitution provides for the protection of intellectual property for limited times to encourage the production of creative works. On the other hand, the longer exclusive rights last in a particular work, the more expensive it is for subsequent artists to create new works based upon it. And the most important goal in drawing the balance is that of promoting the creation and dissemination of information. This, in turn, depends on the existence of a rich public domain consisting of works on which contemporary authors can freely draw.

I'm glad that Representative Conyers has returned. He expressed earlier this morning a special concern for the little guy, and I think that's one of the more important people we're talking about. The person who's out there today trying to create new works needs and wants a vibrant box, if you will, of building blocks out of which new works can be created. I think that it is very important to focus our attention on this difference between old works and new works.

In my opinion, the extension legislation would prematurely, and without compensating benefit, abandon our traditional balance in favor of a stronger emphasis on private interests, in particular,

vested private interests. Europeans have long followed a different copyright philosophy based on notions of so-called natural rights rather than economic efficiency and overall social progress. We should not abandon what has worked for us so well in the past simply to imitate an untried European model that will provide an economic bonanza to the owners of a relatively small number of very old copyrights at a cost of taking crucial building blocks out of the hands of current authors.

We must ask whether we really wish to remake our cultural industries in the image of Europe. We should not make the mistake of viewing the extension proposals as an us-against-them conflict between Europe and America. This, in fact, is not a conflict between Europe and the United States. The real conflict in both places is between the interest of the public in a richer public domain and the desires of copyright owners, who incidentally may or may not be related to the authors in question, to control the economic exploitation of the works that remain in their hands. That Europe has resolved the conflict in one way does not mean that we should blindly follow suit.

Our written testimony details the deficiencies of the arguments offered in support of this extension legislation. The proposed extension would supply no additional incentives to the creation of new works and it, obviously, supplies no incentive to the creation of works already in existence. Moreover, the notion that copyright is supposed to be a welfare system to two generations of descendants has never been a part of American copyright philosophy, nor has anyone made any showing, in fact, that life plus 50 years is insufficient to sustain a revenue stream through two generations.

In addition, so-called harmonization with European law would, in any event, not be achieved by this legislation, even with respect to length of term, much less with respect to other fundamental differences like moral rights and fair use. Nor is the so-called unequal treatment of U.S. copyright owners in Europe a ground for mimicking a bad European move that favors the owners of a few old, but economically valuable, copyrights over the interests of the general public. It is not unfair that a work enter the public 50 years after the death of the author. Rather, that's an integral part of the social bargain on which our highly successful system has always been based. In fact, the works in question here, which were produced in the 1920's and 1930's, have already received one 19-year extension from the original 56-year term promised to their authors. After supplying a royalty stream for such a long time, now 75 years, these old works should be available as bases on which current authors can continue to create culturally and economically valuable products.

We already have a balance of public and private interests that protects works of authorship for a very long time. As I said earlier, there's no tension here between Europe and America. The tension is between the heirs and assignees of copyrights in old works versus the interests of today's general public in freer competition, lower prices, and a greater supply of new work. Europe has resolved the tension in favor of the owners of old copyrights; we should rather favor the general public.

Thank you.

[The prepared statement of Mr. Karjala follows:]

PREPARED STATEMENT OF DENNIS S. KARJALA, PROFESSOR OF LAW, ARIZONA STATE UNIVERSITY, ON BEHALF OF THE U.S. COPYRIGHT AND INTELLECTUAL PROPERTY LAW PROFESSORS

#### INTRODUCTION

The proposed legislation (H.R. 989) would extend the term of copyright protection for all copyrights, including copyrights on existing works, by 20 years: For individual authors, the copyright term would extend for 70 years after the death of the author, while corporate authors would have a term of protection of 95 years. Unpublished or anonymous works would be protected for a period of 120 years after their creation. The legislation would also extend the copyright in works that may be as old as our Republic or even older but that were never published prior to 1978 (when these works were first brought into the federal copyright system). Initially, these copyrights would be extended by another 10 years (to the year 2013), and if the copyright owners publish the works prior to 2013, copyrights in these already ancient works would continue in force until the year 2047.

We believe that enactment of this legislation would impose substantial costs on the United States general public without supplying any public benefit. It would provide a windfall to the heirs and assignees of authors long since deceased, at the expense of the general public, and impair the ability of living authors to build on the cultural legacy of the past. In following a European model of regulation and rigidity, it would hinder overall United States competitiveness in international markets, where the United States is currently at its most powerful. We therefore conclude that it would be a mistake to extend any of the copyright terms of protection.

#### SUMMARY OF ARGUMENT

Various reasons have been offered in support of the extension proposal: Some say that the extension is necessary as an incentive for the creation of works. Some argue that the current period for individual authors--50 years after the death of the author--was intended to provide an income stream for two generations of descendants and that the longer human life span now requires a longer copyright term. Some maintain that we should adopt an extended term because the countries of the European Union have done so, in order to "harmonize" our law with theirs. Some claim that the longer copyright term is necessary to prevent royalty inequality between United States and European copyright owners.

None of these arguments take into consideration the costs to the United States public of an extended copyright term. Moreover, the arguments are either demonstrably false or at best without foundation in empirical data. If incentives were the issue, there would be no need to extend the copyrights on existing works, even if one were to accept the dubious proposition that the extra 20 years provide an incentive for the creation of new works. If we were worried about two generations of individual descendants, we should prohibit the first generation from selling the copyright outright, and we would have no need to extend the term for corporate authors. If we believe in harmonization, it is in any event not achieved under the proposed legislation nor does supposed royalty inequality provide a basis for extending the term. The discussion below shows the failure of these arguments in detail. It also shows that the costs to the United States general public vastly exceed even the gains to those relatively few copyright owners who would

benefit from the extension and that the general public itself would receive no compensating benefits.

Once the errors in the arguments for increasing the term have been exposed, the real reason for the legislation becomes clear: The maintenance of royalty revenues from those relatively few works from the 1920's and 1930's that continue to have significant economic value today. The continued payment of these royalties is a wealth transfer from the United States public to current owners of these copyrights. These copyright owners are in most cases large companies and in any case may not be descendants of the original authors whose works created the revenue streams that started flowing many years ago. To our knowledge, no one has made a study of just how great this wealth transfer would be, although it is clearly large enough to generate fervent support for the proposed legislation by performing rights societies, film studios, and other copyright owners in economically valuable works whose copyrights are otherwise due to expire in the next few years.

The works about to enter the public domain, absent this legislation, were created in 1920. At that time and for many years thereafter, society's "bargain" with the actual authors was a period of exclusive rights under copyright for a maximum of 56 years. Those authors produced and published their works with the understanding that the works would enter the public domain 56 years later. Yet, notwithstanding that bargain, the period was extended by 19 years in 1976 to 75 years, as were the terms of all copyrights acquired after 1920. Now, 19 years later, these same copyright owners have returned seeking yet another extension to continue the wealth transfer for another 20 years, without supplying any evidence, or even any arguments, that the public will benefit.

This wealth transfer from the United States general public to copyright owners is, moreover, only a part--probably a small part--of the total cost that we and coming generations will bear if the extension is adopted. It is important to remember that the extension would apply to foreign as well as United States works. Therefore, in order to maintain a flow of revenue to the owners of United States copyrights, the general public will continue to pay on foreign copyrights from the 1920's whose terms must also be extended. No one has shown that there will even be a net international inflow of royalties from the works at issue.

Even worse, to maintain the royalty revenues on those few works from this period that have continued economic viability, the copyrights must be extended on *all* works. This includes letters, manuscripts, forgotten films and music, out-of-print books, and much more, all potential sources on which *current* authors and scholars can base new works. Copyrights can and usually do have very complicated multiple ownership so many years after an author's death. The transaction costs of negotiating for use can be prohibitively high, even for works that no longer have economic value. None of the arguments for extension take into consideration the loss to both revenue and culture represented by the absence of new popular works that are *not* created because underlying works that would have served as a foundation remain under the control of

a copyright owner. By definition, this loss can never be known, but that makes it no less real or substantial.

The creation of new works is dependent on a rich and vibrant public domain. Without good reason to expect a substantial compensating public benefit, we should not risk tying the hands of current creative authors and making them less competitive in domestic and international markets just to supply a financial windfall to owners of copyrights in works created long ago. Just as Santa Claus and the Easter Bunny are part of the public domain that anyone can use every Christmas and Easter season, so eventually should Mickey Mouse and Bugs Bunny also join our freely available cultural heritage. That is a crucial part of the copyright "bargain" that the public made at the time these works were created.

We recommend that the proposed legislation be rejected. The issue is certainly an important one, but the legislation is premature at best where there has been no empirical demonstration of a public benefit and no thorough exploration of alternative approaches.

#### UNITED STATES COPYRIGHT POLICY

Both Congress and the courts have uniformly treated United States copyright law as an instrument for promoting progress in science and the arts to provide the general public with more, and more desirable, creative works:

The limited scope of the copyright holder's statutory monopoly, like the limited copyright duration required by the Constitution, reflects a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts. The immediate effect of our copyright law is to secure a fair return for an "author's" creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.<sup>1</sup>

United States copyright tradition is in this respect philosophically different from that of many other countries that treat intellectual property as natural rights of individual creators. Under our system, Congress need not recognize intellectual property rights at all, but if it does, the purpose must be to promote innovation in science and the useful arts.

Our system of copyright protection is delicately balanced. We recognize exclusive rights in creators so that consumers have available an optimal number and quality of works but want those rights to be no stronger than necessary to achieve this goal.<sup>2</sup> We do not recognize new

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1. Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975)(footnotes omitted).

2. I P. Goldstein, Copyright § 1.1, at 6-7.



intellectual property rights, or strengthen old ones simply because it appears that a worthy person may benefit; rather, we do so only for a public purpose and where it appears that there will be a public benefit. The current statutory foundation of copyright protection, the Copyright Act of 1976, is itself the product of lengthy debate and represents innumerable compromises that seek to achieve the proper balance between private returns to authors and public benefit, including a broad public domain that permits current authors to build on the cultural heritage from those who have come before them.

We are aware of no effort by the proponents of this extension legislation to show that the public benefits from its enactment would outweigh the costs. Indeed, they have demonstrated no public benefit whatsoever and have barely attempted to do so. Yet, the public cost in the form of a diminished public domain is obvious.<sup>3</sup> As we demonstrate below, this public cost is not offset by any increased incentive to create new works, nor does international trade in intellectual property rights fill the gap between public costs and public benefits.

Europe, whose copyright law is based more on a natural rights tradition, has recently moved to a life + 70 regime for individual authors and a 70-year period of protection for corporate authors. That should not cause us to change our underlying intellectual property philosophy. Nor does it provide a reason for avoiding the careful cost/benefit analysis called for by that philosophy. The United States joined the Berne Convention for many good reasons, one of which was to become an influential leader in world intellectual property policy. Our underlying policy has served us well, as shown by our dominant position in the worldwide markets, particularly for music, movies, and computer software. Rather than following Europe we might better seek to persuade Europeans that our approach to intellectual property rules both rewards creativity and promotes economic efficiency.

In the following sections we consider in some detail the arguments put forward in support of the extension. We first show the very real and substantial costs to the public that would result from adoption of this legislation--costs that are ignored by the arguments of its proponents. We

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3. The proponents of the extension could at least have considered less drastic means of achieving their asserted goals. They might have proposed, for example, a "no injunction" regime 50 years after the author's death, which could provide a continuing royalty to the owners of copyrights in economically valuable works (at the expense of the public) but would at least permit current and future authors to use all old works, 50 years after their authors' deaths, in creating new ones. The proponents might also have considered a reversion of all rights in the extended term to the descendants of the individuals who created the work, whether in a work-for-hire situation or not. Or they might have suggested at least prospective limitation of the work-for-hire term to 70 years, in the interest of harmonizing our law with that of Europe. The law professors who have signed this testimony are not in agreement about whether any such limitations might temper their objections to the bill. The absence of any sign that measures of this type have even been considered, however, shows that the proponents of the extension have not concerned themselves with the public cost of their proposal. Congress, as representative of all the people and not just the special interests whose voices are loudest, must seek to maintain an appropriate balance by very carefully weighing the costs against the purported benefits.

then go on to show that the arguments in favor are either logically fallacious or unsupported by any plausible evidence.

#### COSTS OF A LONGER PROTECTION PERIOD

While the asserted public benefits of an extended copyright protection period range from speculative to nonexistent, two identifiable costs are real and substantial: The first is the economic transfer payment to copyright owners during the period of the extension from consumers or other producers who would otherwise have free use of works. The second is the cost to the public of works that are *not* produced because of the diminished public domain.

##### *Economic Costs and Transfers*

The direct economic costs of a 20-year-longer period of protection, although difficult to calculate precisely, includes higher cost to the consuming public for works that would otherwise be in the public domain. That these costs are substantial is shown by the very claims of the proponents of this legislation that they will miss out on the European windfall if we do not extend our term to that of Europe. This windfall does not arise out of whole cloth. Rather, it is ultimately paid by consumers, that is, by the general public. And if Europeans will be paying for the right to use United States works in Europe, the United States public will be paying for the right to use both United States and European works here at home, increasing the windfall to copyright owners at the expense of United States consumers.

In the legislative history of the Copyright Act of 1976, it was argued that the general public received no substantial benefit from a shorter term of protection, because the cost for works in the public domain was frequently not significantly lower than that for works still under copyright.<sup>4</sup> Even without the fervor of the special interest protagonists of this legislation, however, economic theory tells us that the price to the public for popular works must, through competition, decrease to the marginal cost of producing the work if there are no exclusive rights. If the work is under copyright, the marginal cost of production would have to include the royalty owing to the copyright owner, even if there is general licensing to competing producers of the work. Moreover, if there is no general licensing of a copyright-protected work, the price can be expected to be set at the level that maximizes the return of the copyright owner, which is invariably higher than the marginal cost of production. Consequently, any claim that the public pays the same for public domain works as for protected works is implausible, at least in general.<sup>5</sup> Educational and scientific uses would also seem to be large markets for public domain

4. H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 133 (1976).

5. Of course, the market for many public domain works may often be small, with the result that competition is thin, or even nonexistent. This can allow, say, a book publisher to charge a price for a republished public domain work that is consistent with prices for similar types of books that are under copyright. Given the thin market, such a price may be necessary for this publisher even to cover

works. At a time of rising educational costs we should inquire into the effect on our schools of a reduced public domain due to an extended protection period. Something more than anecdotal evidence should be presented before we accept the claim that the consuming public will not incur higher costs from the longer period.

#### *Cost of a Diminished Public Domain*

An even more important cost to the public is that paid in desirable works that are *not* created because of the continuing copyright in underlying works:

More than a nodding acquaintance with the concept of public domain is essential to comprehension of intellectual property law and the role of the United States Congress in creating that law. The addition of a creation to the public domain is an integral part of the social bargain inherent in intellectual property law.<sup>6</sup>

While primary control over the work, including the rights to refuse publication or republication and to create derivative works, properly remains in the author who has created it, giving such control to distant descendants of the author can deprive the public of creative new works based on the copyright-protected work. Artistic freedom to make creative derivative works based on public domain works is a significant public benefit, as shown by musical plays like *Les*

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production costs (including a normal return). This does not mean that the public domain status is irrelevant, because if a royalty were required in addition, such a book might not be republished at all.

It may also be that the works in question are not public domain works but rather derivative works based on public domain works. A new derivative work is, of course, itself copyright protected and can be expected to sell at the same price that the public pays for other protected works in that category. In this case, continued copyright protection for the underlying work may require sharing of the profits generated by the new work, with no economic benefit to the public in the form of a lower net price. As there is also no net economic cost to the public, however, the economic effect of lengthening the protection period requires identification of the parties sharing the monopoly. One of those parties is, by hypothesis, the new author, whose creativity has resulted in the new derivative work. The other will be the owner of the copyright in the underlying work, who may or may not be distant descendants of the original author. In this case, true concern for authors would seem to favor *not* lengthening the protection period.

Finally, as discussed below, when the underlying work remains under copyright, the real cost to the public may come from those new derivative works that are *not* created because of the new author's inability to negotiate permission from whoever owns the copyright 50 years after the original author's death.

6. Robert W. Kastenmeier & Michael J. Remington, *The Semiconductor Chip Protection Act of 1984: A Swamp or Firm Ground?*, 70 Minn. L. Rev. 417, 459 (1985); see also Peter Jaszi, *When Works Collide: Derivative Motion Pictures, Underlying Rights, and the Public Interest*, 28 U.C.L.A. L. Rev. 715, 804-05 (1981).

*Miserables*, *Jesus Christ Superstar*, and *West Side Story*, as well as satires like *Rosencrantz and Guildenstern are Dead* and even literary classics like James Joyce's *Ulysses*. Although these might not necessarily be considered infringing derivative works even if the underlying work were under copyright, or might be excused by the fair use doctrine if otherwise infringing, their authors must necessarily take a cautious approach if a license is unavailable. When copyright subsists long after an author's death and there is no provision for compulsory licensing, the creation of derivative works that closely track a substantial part of the underlying work can be absolutely prohibited by copyright owners who have no creative relationship with the work at all. Authors of histories and biographies can also be inhibited from presenting independent analyses of earlier authors and their works by descendants who, for whatever personal reason, use copyright to prevent the publication of portions of protected works.

An important cost paid by the public when the copyright term is lengthened, therefore, is contraction of the public domain. The public domain is the source from which authors draw and have always drawn.<sup>7</sup> The more we tie up past works in ownership rights that do not convey a public benefit through greater incentive for the creation of new works, the more we restrict the ability of current creators to build on and expand the cultural contributions of their forebears. The public therefore has a strong interest in maintaining a rich public domain. Nobody knows how many creative works are *not* produced because of the inability of new authors to negotiate a license with current copyright holders, but there is at least anecdotal evidence that the number is not insubstantial.<sup>8</sup> Unless evidence is provided that a life + 70 regime would provide a significant added incentive for the creation of desirable works, the effect of an extension may well be a net reduction in the creation of new works.

This point may be highlighted by the rapid developments now occurring in digital technologies and multimedia modes of storing, presenting, manipulating, and transmitting works of authorship. Many multimedia works take small pieces of existing works and transform them into radically different combinations of images and sounds for both educational and entertainment purposes. The existing protection period, coupled with termination rights, may well be distorting or inhibiting the creation of valuable multimedia works because of the transaction costs

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7. See generally Jessica Litman, *The Public Domain*, 39 Emory L.J. 965 (1990); David Lange, *Recognizing the Public Domain*, 44 L. & Contemp. Probs. 147 (1981). For an argument that copyright is also intended to accommodate users' rights, see L. Ray Patterson & Stanley W. Lindberg, *The Nature of Copyright* (1991), which includes a *Foreword* by former Congressman Kastenmeier.

8. Nearly 50 years ago Professor Chafee pointed to examples in which the veto power of copyright in an author's descendants deprived the public of valuable works. Chafee, *Reflections on the Law of Copyright: II*, 45 Colum. L. Rev. 719 (1945). There have been press reports of refusals by the estate of Lorenz Hart of permission to use Hart's lyrics to any biographer who mentions Hart's homosexuality and of censorship by the husband of Sylvia Plath of the work of serious biographers who wish to quote her poetry. Professor Jaszi has provided examples of derivative-work films whose continued distribution has been limited or even suspended because of conflicts with the owner of the copyright in the underlying work. Peter Jaszi, *supra* note 6, at 739-40.

involved in negotiating the number of licenses required. Ultimately, the rapid changes in the intellectual property environment for creating and disseminating works may necessitate a reassessment by the international community of the underlying intellectual property rules. In the meantime, extending the protection period can only exacerbate this problem. The United States should be leading the world toward a coherent intellectual property policy for the digital age and not simply following what takes place in Europe.

## REBUTTAL OF ARGUMENTS IN FAVOR OF THE EXTENDED COPYRIGHT TERM

### *Incentives for the Creation of Works*

It does not follow that a longer term automatically drives creative authors to work harder or longer to produce works that can be enjoyed by the public. Indeed, there is necessarily a type of diminishing return associated with an ever-longer protection period, because the benefit to the author must be discounted to present value. As Macaulay observed over 150 years ago:

[T]he evil effects of the monopoly are proportioned to the length of its duration. But the good effects for the sake of which we bear with the evil effects are by no means proportioned to the length of its duration. . . . [I]t is by no means the fact that a posthumous monopoly of sixty years gives to an author thrice as much pleasure and thrice as strong a motive as a posthumous monopoly of twenty years. On the contrary, the difference is so small as to be hardly perceptible. . . . [A]n advantage that is to be enjoyed more than half a century after we are dead, by somebody, we know not by whom, perhaps by somebody unborn, by somebody utterly unconnected with us, is really no motive at all to action. . . .<sup>9</sup>

Thus, while an additional year of protection has little or no incentive effect at the time of a work's creation, the *costs* are immediate and substantial if the extension is to apply to existing works, as provided in the proposed legislation.

The copyright industries are by their nature very risky, and no one in these industries makes financial decisions based on even 50-year, let alone 70-year, projections. Moreover, under the United States Copyright Act, most transfers of copyright by an individual author may be terminated 35 years after the grant.<sup>10</sup> The existence of these inalienable termination rights in individual United States authors makes it even more unlikely that anyone would pay more to

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9. 8 Macaulay, *Works* (Trevelyan ed. 1879) 199, quoted in Chafee, *Reflections on the Law of Copyright: II*, 45 *Colum. L. Rev.* 719 (1945), quoted in R. Gorman & J. Ginsburg, *Copyright for the Nineties* 307 (4th ed. 1993).

10. 17 U.S.C.A. § 203.

exploit a work under the extended term than would be paid under the current life + 50 period.<sup>11</sup> The extension, therefore, holds little promise of financial benefit to individual authors.

The absence of any additional incentive for corporate authors from the extension of the copyright period to 95 years is also easily seen. Consider an *assured* \$1,000 per year stream of income. At a discount rate of 10%, the present value of such a stream for 75 years is \$10,992, while the present value of a 95-year stream is \$10,999, a difference of less than 0.1%. Even at a 5% discount rate, the present values are only \$20,485 and \$20,806, respectively, a difference of about 1.5%. And these minuscule present value differences are for guaranteed streams of income. When risk is factored into the analysis, the present value of a 75-year stream and that of a 95-year stream must be considered essentially identical. The chance that a given copyright will still have nontrivial economic value 75 years after the work is created is very small--only a tiny fraction of all works retain economic value for such a long time. No company will take the "extra" 20 years into consideration in making a present decision to invest in the creation of a new work. In fact, an ongoing successful company like Disney is more likely to be spurred to the creation of new works like *The Lion King* or *The Little Mermaid* because it realizes that some of its "old reliable" moneymakers, like Mickey Mouse, are about to enter the public domain.

It is therefore extremely unlikely that an additional 20 years of protection tacked onto the end of a copyright protection period that is already very long will act as an incentive to any current author to work harder or longer to create works he or she (or it) would not have produced in any event. What is certain, however, is that such an extension of the copyright term would seriously hinder the creative activities of future as well as current authors. Consequently, the only reasonable conclusion is that the increased term would impose a heavy cost on the public--in the form of higher royalties and an impoverished public domain--without any countervailing public benefit in the form of increased authorship incentives.

Indeed, if incentives to production were the basis for the proposed extension, there would be no point in applying it to copyrights in existing works. These works, by definition, have

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11. No human author can possibly receive anything more in exchange for terminable rights in his or her work under a life + 70 regime than under the current life + 50 regime. The reason, quite simply, is that no purchaser of copyright rights will pay anything for the "extra" 20 years of the term, because those supposed extra years can be freely terminated, along with whatever remains of the current period, before they ever begin. An exception is the right to continued exploitation of derivative works, which cannot be terminated. Even in this case, however, the maximum "extra" value to the transferring author is the present value difference between a 50-year and a 70-year protection period. Even for guaranteed income streams, this difference is around 5.4% (at an assumed 5% discount rate). That is, a guaranteed income stream of \$1,000 per year for 50 years has a present value of \$19,256 while the same stream for 70 years has a present value of \$20,343. The purchaser of the derivative work right, however, will not be willing to pay anything close to this difference in present value, because of the overwhelmingly high risk that the derivative work created pursuant to the purchased right will have an economic life, like most works, far less than even the 50 years now afforded.

already been produced. Yet, if the extension were purely prospective (i.e., applicable only to new works), we could be certain that support for it would wither rapidly. Thus, the real issue is the continued protection of *old* works--not those that will enter the public domain 50 (or 70) years from now but rather those due to enter the public domain *today*. These works were originally published in 1920 (works published before 1978 have a flat 75-year copyright rather than the current life + 50 for individual authors). At that time, the law afforded a maximum of 56 years of copyright protection. This period was expanded to 75 years in 1976, and now the descendants and assignees of these authors want yet another 20 years. The very small portion of these works that have retained economic value have been producing royalties for a full 75 years. In order to continue the royalty stream for those few copyright owners, the extension means that *all* works published after 1920 will remain outside the public domain for an extra 20 years. As a result, current authors who wish to make use of *any* work from this period, such as historians or biographers, will need to engage in complex negotiations to be able to do so. Faced with the complexities of tracking down and obtaining permission from all those who by now may have a partial interest in the copyright, a hapless historian will be tempted to pick a subject that poses fewer obstacles and annoyances.

#### *Copyright in Works Never Published Prior to 1978*

Until the effective date of the Copyright Act of 1976, works that had never been published were protected under the various state copyright statutes. Only published works were governed by the federal statute. However, the 1976 Act preempted state protection for unpublished as well as published works and, as a quid pro quo for the loss of perpetual state copyright protection, recognized a copyright in these previously unpublished works until the year 2003. As an incentive to publication of these works, the current law also extends their copyrights until the year 2027, provided they are published prior to 2003. The proposed legislation would extend these periods by 10 and 20 years, respectively, so that a previously unpublished work will be protected until 2013 and, if published prior thereto, it will remain under copyright until the year 2047.

An example is the recently discovered fragment from a draft of Mark Twain's *Huckleberry Finn*. The copyright on the published novel was registered in 1884, renewed by Twain's daughter in 1912, and expired in 1940. Even if a life + 70 system had been in place at the time of the work's creation, the copyright would have expired in 1980, along with everything else Mark Twain wrote (because he died in 1910). Because this story of *Huckleberry Finn* and *Jim in the cave* has now been published, however, current law recognizes the copyright until 2027. Under the proposed extension, the copyright on this story, already over 110 years old, will continue until the year 2047.

We are not aware of any arguments in support of these particular extensions of the copyright period of protection. In contrast to the Mark Twain fragment, most of these works have only scholarly value, because if they were readily available and had economic value, they would already have been published. Moreover, many of these works are truly ancient--letters

and diaries from the founding fathers, for example--and constitute a vital source of original material for historians, biographers, and other scholars

Obviously, the normal copyright incentive to creative authorship is not involved here. This is simply an incentive to current owners of copyrights in very old works to find the works and publish them so that they will be accessible to everyone. By the year 2003 we will already have afforded the very distant descendants of the authors of these works 25 years of protection, plus the possibility of 50 years of protection if they find and publish the works. Twenty-five years is enough time for these owners to accomplish the ministerial tasks. These unpublished works should be allowed to go into the public domain in 2003, so that others will then have an incentive to find and publish them.

Finally, even as to such of these works that are published prior to 2003, we can think of no argument, whether founded in natural law or otherwise, to support extending their term of protection until 2047. Fifty years of copyright protection for such old works, in favor of people who have no creative relationship with the works at all, is more than enough.

#### *Support for Two Generations of Descendants*

It is also argued that the copyright protection period was initially designed to provide a source of income to two generations of descendants of creative authors. Given the longer life spans of today, the argument goes, a longer term is necessary to achieve this goal.

Far from requiring longer copyright terms to compensate for longer life expectancies, these actuarial changes could be an argument for keeping the current term of life + 50, or perhaps even reducing it, because the longer life expectancy of the *author* automatically brings about a longer period of copyright protection. A longer overall life expectancy, moreover, does not in itself imply that the second generation loses anything in comparison with earlier eras. The crucial age for the second generation is not the absolute number of years grandchildren may be expected to live but rather the number of years they survive after the author's (i.e., their grandparent's) death. The copyright period is measured from the death of the author, and if grandchildren are living longer, so too are authors themselves. Certainly no one has provided data to show that grandchildren of today have significantly longer life expectancies than today's grandparents, let alone 20 years longer. Consequently, we should expect the current cohort of authorial grandchildren to remain alive for roughly the same length of time after their grandparents' deaths as at other times in this century.

Second, protection of two generations of descendants is not the inevitable result of a longer protection period. The copyright in a work that has been exploited and become popular will often have been transferred by the author or her descendants. Any termination rights with respect to the work will have already been exercised before the descendants in question here ever



come into the copyright picture.<sup>12</sup> It is very likely that the copyright will have been retransferred after any termination before the current life + 50 year period has expired. Unless these transfers provide for a continuing royalty, there will be no royalties for the author's descendants who are alive thereafter. Moreover, even if the transferee is under obligation to pay a continuing royalty, it cannot be assumed that the royalty stream will accrue to distant relatives of the original author, such as great-grandchildren. The royalty may well be transferred outside the family, by will or otherwise, by earlier descendants. If sustenance to two generations of authorial descendants is really the goal, we should be considering prohibitions on transfers and/or stronger termination rights rather than a longer term of protection.

Third, even the "natural law" argument on behalf of such distant descendants of authors is very weak. These equitable claims to a continued income stream obviously diminish with increasing temporal distance of descendants from the creative author. More important, while one can understand the desire of authors to provide a substantial estate to their immediate offspring, one must question the economic efficiency of a system that, as a matter of policy, seeks to grant an easy flow of income to a group of people the majority of whom the actual author may never have known. The descendants themselves would probably be better off, and certainly the general public would be better off, if they were to engage in some productive activity. United States copyright policy is not and has never been designed as a welfare system. It is therefore not entirely flippant to say to these distant descendants of creative authors who died 50 years ago what many now say to current welfare recipients: "Get a job!"

Fourth, while the Directive in the European Union mentions protection for two generations of descendants as one of twenty-seven "Whereas" grounds for the extension in Europe,<sup>13</sup> it has never been recognized as a goal of United States copyright law. Indeed, today's longer life expectancies were offered as a basis for the recent substantial extension of the copyright term in 1976, from 56 years to life + 50 years, without any mention of a "two generation" goal.<sup>14</sup> Surely life expectancies have not increased since 1976 to justify an additional 20 years of protection on this ground. Going to our current life + 50 system was necessary in order for the United States to join the Berne Convention, and one could at least make a coherent argument that the benefits of joining Berne might outweigh the costs of the diminished public domain resulting from the longer copyright. The "two generation" argument, however, is devoid of any relationship to a public benefit. We therefore question whether such a claim comports with basic United States copyright principles and the social bargain that places works in the public domain after the copyright has expired.

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12. Termination rights accrue 35 years after a grant by an author and expire 40 years thereafter. Because the extra 20 years that would be added by the extension to the protection period begin 50 years after the author's death, all termination rights with respect to any authorial transfer will either have been exercised or have expired.

13. Council Directive 93/98/EEC (Oct. 29, 1993).

14. H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 133-34 (1976).

Finally, even if "two generations of descendants" were a valid basis for extending the copyright term for works of individual authorship, it provides no justification whatsoever for extending the term for corporate authors from 75 to 95 years.

We conclude that the "two generation of descendants" argument is invalid on its face, advocates economic inefficiency, fails to comport with basic United States copyright principles, and is applicable at best to the term for individual authors. It cannot serve as a basis for the diminished public domain that the extension would effect.

*"Harmonization" with European Law*

The European Union has now directed its members to adopt a life + 70 term of copyright duration. Possibly because of the European natural rights tradition, neither the proposal in Europe nor its adoption was based on a careful analysis of the public costs and benefits of extending the term. Nevertheless, some argue that we must do the same to "protect" United States copyright owners, against whom the "rule of the shorter term" may be used to provide a shorter period of protection in Europe for United States works (life + 50) than is given to European works (life + 70). They also argue that harmonization of the worldwide term of protection is a desirable goal in its own right and that failure to adopt the European term will have an adverse effect on the United States balance of international trade. We first consider the general harmonization goal and, in the next sections, take up the question of the supposed "prejudice" United States copyright owners and the balance of trade would suffer in Europe were we not to follow the European example.

Harmonization of worldwide economic regulations can often be useful, especially if differences in legal rules create transaction costs that inhibit otherwise beneficial exchanges. In some cases harmonization can be beneficial even if the uniform rule is in some sense less than ideal. Thus, a uniform first-to-file rule for patents might make sense even if we believe that a first-to-invent rule is better in the abstract, because otherwise United States inventors--the very people whom we are hoping to encourage through the offer of a patent monopoly--might find it too burdensome to seek international protection. In that case the uniform rule goes to the very existence of the patent and not simply an extension of the duration of protection. We need not, however, seek uniformity for its own sake, if it means compromising other important principles. If the United States determines that works should belong to the public domain after life + 50 years, no transaction cost problem is posed to United States authors by the longer period in Europe. The ultimate owners of their copyrights will, of course, be able to exploit them for a shorter period, in both Europe and the United States, but that is the result of our policy choice to make the works freely available and not because of the absence of harmonization.

In addition, even if harmonization is desirable, the question remains, who should harmonize with whom? Although doubts were expressed about the constitutionality of a life +

50 year period of protection at the time the Copyright Act of 1976 was adopted,<sup>15</sup> that standard could then accurately be denominated international<sup>16</sup> and was in any event necessary if we were ever to join Berne. Life + 70 years is not an international standard today, notwithstanding recent actions in the European Union, nor will it become one without United States support. It was not even the standard in Europe until the European Council of Ministers directed that its member states adopt a uniform term of protection equal to the longest of any of its members. If the cost/benefit analysis required by our copyright tradition does not justify changing the social policy balances we have drawn, we might better use our influence to encourage the rest of the world to remain with our standard, and Europe to return to it, rather than follow a decision in Europe that was made without consideration of the factors we have always deemed crucial to the analysis.

Moreover, the proposed legislation is not really aimed at harmonizing United States and European law. It would, for example, extend the copyright period for corporate "authors" to 95 years (or 120 years if the work is unpublished). The European Union, by contrast, now offers corporate authors, for countries recognizing corporate "authorship," 70 years of protection, which is less than the 75 years we currently offer such authors. Consider also the works of Sir Arthur Conan Doyle, who died in 1930 and whose works have since 1981 been in the public domain in England (and Europe). Because works first published before 1978 have a 75-year period of protection rather than the current life + 50 term, those works of Conan Doyle published in the 1920's remain under United States copyright. Thus, production in this country of public domain collections of his entire works is prohibited, although Europeans may do so freely. Because his last work was apparently published in 1927,<sup>17</sup> it is scheduled to go into the United States public domain at the end of the year 2002. The extension would continue this "disharmony" until the year 2022.

There are many other features of copyright law that are not "harmonized" even within Europe, let alone between Europe and the United States, including moral rights and the

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15. *E.g.*, 14 Omnibus Copyright Revision Legislative History, House Hearings 1975 (Part 1) 133-34, 141-42 (testimony of Irwin Goldbloom, Deputy Assistant Attorney General, Civil Division, Department of Justice). Some believe that special constitutional problems arise from an extension of the period of protection for works already under copyright, because it recaptures from the public domain works that should be freely available under the "bargain" made at the time the work was created and offers no countervailing public benefit. They argue that the constitutional term "limited times" must be interpreted in terms of the constitutional goal to promote the progress of science and the useful arts.
  16. *E.g.*, *id.* at 108 (testimony of Barbara Ringer, Register of Copyrights); *id.* at 120 (testimony of Joel W. Biller, Secretary for Commercial Affairs and Business Activities, Department of State).
  17. *The Adventure of the Veiled Lodger* was published on January 22, 1927, and *The Adventure of Shoscombe Old Place* was published on March 5, 1927. Robert Burt de Waal, *The World Biography of Sherlock Holmes and Dr. Watson* 13, 23 (1974). This same source lists other Conan Doyle stories as having been published in 1921, 1922, 1923, and three each in 1924 and 1926.

important United States concept of fair use. "Harmonization" is therefore not in itself a valid ground for extending any of our current copyright protection terms.

*Unequal Treatment of United States Copyright Owners*

In addition to lengthening the copyright term for individuals to life + 70 years, the European Union has adopted the "rule of the shorter term," under which works are protected only for the shorter of the European term or the term in the country in which the work originates. Therefore, it is true that retaining our current term of protection would deny some United States copyright owners (mainly companies rather than individuals) the financial benefit of this European windfall. But the mere fact that the European Union has adopted a bad idea does not mean that the United States should follow suit. France might elect in the future, for example, to give the works of Voltaire or Victor Hugo perpetual copyright protection, but that would be no reason for us to do the same with Mark Twain or Emily Dickinson. The European copyright tradition, as we have noted, differs in important ways from that of the United States, primarily by treating copyright as a kind of natural entitlement rather than a source of public benefit. The European approach may on balance tend to discourage, rather than promote, new artistic creativity. We should not, therefore, assume that a policy giving a few United States firms and individuals an added financial windfall from works created long ago necessarily is one that promotes our long-term competitiveness in the production of new works.

This extension proposal is perhaps an occasion to consider the special character of United States copyright and the features that distinguish our law from its continental counterparts. The constitutional concept of a limited term of copyright protection is based on the notion that we want works to enter the public domain and become part of the common cultural heritage. It is worth noting that in this century United States cultural productivity and international market share has been much greater than that of Europe. The genius of the American system is that it balances public and private rights in such a way as to provide a rich collective source on which to base new and valuable productions. This makes us wealthier not only culturally but in a hard-nosed economic sense as well.

We must ask whether we really wish to remake our cultural industries in the image of Europe. This is not, in fact, a conflict between Europe and the United States. The real conflict, in both Europe and the United States, is between the interest of the public in a richer public domain and the desires of copyright owners (who may or may not be relatives of authors) to control economic exploitation of the copyright-protected works that remain in their hands. That Europe has resolved the conflict one way does not mean that we should blindly follow suit.

The arguments for maintaining a rich public domain in the United States are not diminished by the withdrawal of works from the public domain in Europe, or even by the partial withdrawal of only "European" works. If Europe protects "its" copyright owners for a life + 70 year period, its public domain is reduced, and the European general public suffers a net loss. The United States public, however, as opposed to individual copyright owners, is not harmed

by the absence of protection in Europe 50 years after the death of a United States author. Conversely, the public will pay a real cost, both as consumers and as potential creators of new works, to the extent the public domain is further reduced by the longer protection period.

It should be borne in mind that we are no longer talking about *authors*, whether European or American, of the works that would remain protected for the extra 20 years. Those authors will have been dead for 50 years. We *are* talking about current authors, however, who create new and valuable works based on the public domain. If the underlying work is unprotected in Europe as well as in the United States, those new United States derivative work creators, as authors, will reap the kind of economic benefits in both jurisdictions for which copyright is indisputably designed. There is real cultural value in allowing works to become part of the common heritage, so that other creative authors have the chance to build on those common elements.

In this context, therefore, the notion of international "harmonization" simply obfuscates the real issue: There is no tension here between Europe and the United States. The tension, rather, is between the heirs and assignees of copyrights in old works versus the interests of today's general public in lower prices and a greater supply of new works. Europe has resolved the tension in favor of the owners of old copyrights. We should rather favor the general public.

#### *The Balance of Payments*

We have conceded that certain United States copyright owners will receive royalty payments from European users for a shorter period than will European copyright owners from European users, if the United States does not follow Europe in extending the copyright term. It does not follow, however, that this will have any net negative effect on the United States balance of trade, even in the short term and much less over the longer term.

Increasing the term in the United States means not simply that European users will pay longer. It also means that United States users will pay longer, and not just to United States copyright owners but also to owners worldwide. Works that are about to enter the public domain were created in 1920, and while Europeans may take more of our current works than we take of theirs, that is not necessarily true of works from the 1920's and 1930's. Our use of European works of classical music and plays as well as art works from this era may outweigh the use Europeans make of United States works from the same period. Short term balance-of-trade analysis therefore requires an investigation of whether our use of such works that would remain protected under the proposed extension would cost more than we would receive in return.

Moreover, a shorter term of protection in the United States will encourage rather than discourage the production of new works for worldwide markets. We must recall that the public domain is the source of many of our finest and most popular works. The United States market is itself so large that, with both European and United States works in the public domain here 50 years after the author's death, it alone serves as a strong creation incentive. If the new work

is based on a United States work that is also unprotected in Europe, that new work should be a part of the continuing United States export engine in the world market. Even if the new work is based on a European work that remains under protection in Europe, popularity of the work in the United States will necessarily result in a license (to use the underlying work) in Europe, again with a net export gain to the United States.

The argument that United States copyright owners will unfairly "lose" royalty revenues from Europe is therefore both wrong and incomplete. It is wrong because it is not unfair that a work enter the public domain 50 years after the death of its author. It is incomplete because it does not consider that the royalties in question will be paid not just by Europeans but also by Americans, and not just to United States copyright owners but also to copyright owners worldwide. Additional revenues to a few owners of old copyrights is not a public benefit justifying adoption of the legislation, and this remains true even though some part of those revenues would be paid by Europeans. The extension represents, rather, a heavy public cost, both in additional royalties paid by the United States public and in the loss of creative new works that will not be produced because the exclusive rights of copyright remain in full force on works that cost/benefit analysis would clearly place in the public domain.

#### CONCLUSION

The proposed legislation extending all copyright terms by 20 years is a bad idea for all but a few copyright owners. None of the current copyright terms of protection should be extended.

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Mr. MOORHEAD. Mr. Patry.

**STATEMENT OF WILLIAM F. PATRY, PROFESSOR, BENJAMIN N. CARDOZO COLLEGE OF LAW**

Mr. PATRY. Mr. Chairman, having sat on the other side of the dais in the 102d and 103d Congresses, I know how important it is to be brief at this time of the day, and I shall be.

Your goals in introducing—

Mr. CONYERS. Were you in the Congress?

Mr. PATRY. I worked for Mr. Hughes as counsel to this subcommittee.

Mr. CONYERS. Oh, I see. OK.

Mr. PATRY. H.R. 989 has two laudable goals: first, to create parity between European and U.S. authors, and, second, to assure the author and his or her heirs of the fair economic benefits derived from the author's work. Unfortunately, I believe, as currently drafted, H.R. 989 does not achieve either of your worthy objectives; quite the contrary.

Professor Karjala referred to Mr. Conyers' comments about looking out for the little guy. I had thought Mr. Conyers was referring to jazz musicians in the forties and fifties and sixties who had to sign rather unfair contracts. On pages 4 through 6 of my written statement I refer to that situation. That's just the tip of the iceberg because we all know what it was like then. As an appendix to my written statement there is a Billboard editorial about this issue.

Unfortunately, this bill as currently drafted doesn't look out for those musicians at all. Mr. Hoke asked about who the winners and losers were. Ironically, you can't say that many authors are winners under the bill as introduced. In fact, many of them will only marginally benefit, some of them not at all, while the disparities between European authors and U.S. authors will increase, not decrease. Why? Because, as currently drafted, the bill grants the 20 years of copyright to the purchasers of the copyright when the author assigned his rights. The bill doesn't grant these 20 years to the author or to his family. And, moreover, the bill enforces very old contracts. In other words, Congress is statutorily enforcing private contracts that were written decades ago in the forties and fifties and sixties, very unfair contracts that we all know exist. This bill enforces those contracts, and it gives the purchasers of those copyrights the benefit of those old contracts for the 20 years. That's why I say the bill doesn't achieve the objectives that you set out, and they're very wonderful objectives.

No one has given you, nor do I think anybody can give you, a reason why purchasers of copyrights from the forties and fifties shouldn't be required to sit down at the table and bargain with authors and their families for what the value of the copyright is right now for those new 20 years. After all, the purchasers of the copyright are going to sit down with users and they're going to charge them what the value is in today's market. The only person who doesn't get the benefit of today's market is the author, and that's unusual, to say the least.

The contracts I'm talking about could have been entered into as long ago as 1920 because there's a 75-year copyright. Think back. That's the very year commercial radio began. That's before talking

movies, before television, cable, videocassettes, audiotape cassettes, compact disks, computers, and before international markets were very important.

In Europe, since there's a lot of talk about Europe, European law doesn't generally permit a contract that was entered into that long ago to cover technologies that were not in existence at the time. That's fair. It makes sense. If you sit down, negotiate a contract, it shouldn't cover technologies that come about 70 years later when you can't negotiate what the fair market value is, but this bill doesn't do that. This bill enforces those old contracts, and I think that what it does, therefore, is to perpetuate a disparity between U.S. authors and European authors.

There's lots of glowing testimonials such as the one about international royalties Charlene Barshefsky gave earlier, and that's all wonderful, and I think it's great and I think that U.S. authors should get them; and that's important. But what's lost is the fact that U.S. authors aren't going to get those international royalties in many cases.

For example, there's the Billboard article about jazz and blues musicians from the forties and fifties refers to this. Recently, a number of companies have agreed to reform their contracts for international royalties. The whole article is in my written statement, so you can read it. The most enlightened of these companies are going to give these musicians 10 percent of foreign royalties. Some of them don't give them anything. Some of them give 1 percent. So if we're talking about how great it is to get international royalties, it's a little unusual when 90 to 99 percent of those royalties are being siphoned off and not given to authors. At least you have to wonder whether the objectives of the bill are being achieved.

I don't think that these disparities are limited to foreign royalties. Indeed, there are many musicians who have been forced to sell their rights for a small, lump sum payment. Quincy Jones referred to some of them: Willie Dixon, Muddy Waters. These people had to sign retroactive work made for hire agreements. Two hundred dollars was all they got. I have statements from record companies where people like Muddy Waters and Hawlin' Wolf were in debt \$50,000 for recoupable expenses for things like personal betterment or all sorts of other nonrecording costs. These people never made it out of the hole.

Some companies the article refers to are reforming those contracts. Certainly not all of them are, and it's a very fair question to ask, if we're going to be extending copyright for 20 years, do we really want to extend those kind of contracts? I say no.

Since introduction, there have been a number of groups and individuals who have written to you asking that the bill be changed so that the copyright vests automatically in the authors. These include Branford Marsalis, whom many of you know; the father of Jimi Hendrix, the National Writers Union, and the Graphic Artists Guild. These authors make the point much better than I can, of course, and Quincy Jones made the same one. Their families depend upon their ability to receive royalties for their compositions. Many of these artists, such as Jimi Hendrix, signed their contracts in their twenties. Frankie Lymon who with his group the Teen-

agers wrote, "Why Do Fools Fall In Love," he was 12 years old when he signed that contract, and his record company producer got himself listed as a coauthor of the song, even though he wasn't, so that he could get 50 percent of the author's share of the publishing royalties. Mr. Hendrix in his letter wrote to you about how he had spent years of litigation to try and get the fair economic benefits of his son's royalties.

The point I'm making is not intended to disparage the music industry. It's a great industry. I'm not saying that any of these practices are current practices. Hopefully, they're not; I assume that they're not, but the past is relevant. It's not beating up on the music industry. The part is relevant because this bill statutorily enforces contracts from the forties, fifties, and sixties, and I think it's a fair question to ask whether you really want to do that.

Mr. Bono at the Pasadena hearing observed that 99 percent of the songwriters or their families would want their copyright back, if you asked them. Of course: what songwriter is going to say, "Oh, no, don't give me that 20 years back; give it to the music publisher. That contract I wrote in the forties or fifties, sure, it only gave me \$200 or 1 percent of the royalties, but that's OK; I don't need the money." Mr. Jones referred to many jazz musicians who make a living off of three or four songs. Well, they're not going to make much of a living if they have to live off of contracts from the forties or fifties. Why shouldn't they get the copyright back and to be able to negotiate what the fair market value is right now?

The Copyright Office in its written statement I think takes a very similar position. They said, "On balance, it seems that authors should be the beneficiaries of the longer term." That's what the Constitution says, by the way. It says Congress has the power to grant copyright to authors, not to purchasers of copyright: to authors.

Mr. Chairman, I want to note two very important drafting problems. Even if you decide against vesting the copyright in the author—and that's my very strong recommendation—for works published between 1920 and 1933, and for which a termination of transfer notice hasn't been filed, the way the bill works these people can't get their copyright back because their time for terminating has past. In other words, Congress said in 1976 we're going to give you an extra 19 years and you can get it back if you ask. Well, guess what? These authors from 1920 to 1933, who Mr. Lehman pointed out were from a very important era, they can't get the new 20 years back because the time limits have passed. And that inability is deliberate.

At the Pasadena hearing there was a question from Mr. Becerra about this, and the answer was, "Oh, well, the author would have terminated if the work is commercially valuable." That's kind of a silly answer I think because, if the work is commercially valuable for the publisher, how come it isn't commercially valuable for the songwriter? Of course it is.

Ms. Peters also referred to the lack of termination notices; there haven't been very many. Of course, there haven't been many. It's incredibly complicated. In my written statement, I set out about six or seven pages of the history of this provision of the law and the technical details of it. Unfortunately, in our country we haven't

been generous to authors. We have set up almost as many obstacles as we possibly can to make sure that authors cannot get the benefits of all their rights. We can do better than that, and we should do better. At the very least, we should let people who want to terminate terminate.

My final point is on *Mills Music*. This was a 1985 decision from the Supreme Court that misinterpreted section 304 of the Copyright Act and had the result of unfairly depriving authors of many of their benefits. Former Register of Copyrights Barbara Ringer, who Mr. Moorhead of course knows very well, authorized me to tell you that she supports reversing this decision.

In testimony before the Senate on this issue a number of years ago, she put it very succinctly: "The decision takes money away from authors and their families and gives it to entrepreneurs who did not bargain for it, did not expect it, and did nothing to deserve it." I notice that Register of Copyrights Marybeth Peters also asked you to examine this. This issue involves a lot of money, and involves a provision that deprives authors right now of what they should be getting, and if it isn't corrected, that unfairness is going to be perpetuated for yet another 20 years.

Mr. Chairman, I trust that you'll understand that my comments are offered in the spirit of constructive suggestions. You have wonderful intentions in the bill. I think it's an excellent idea to benefit authors. My only hope is that the bill can be changed so that it can achieve your very worthy objectives.

Thank you very much.

[The prepared statement of Mr. Patry follows.]

PREPARED STATEMENT OF WILLIAM PATRY, PROFESSOR, BENJAMIN N. CARDOZO  
COLLEGE OF LAW

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Overview

Mr. Chairman, your intention and that of your cosponsors is noble: to create parity between European authors and U.S. authors. I do not believe your intention was to create parity between European authors and those who merely purchased the copyright from U.S. authors, leaving U.S. authors empty handed. Unfortunately, as currently drafted, H.R. 989 does not create parity between U.S. authors and European authors. Instead, because of drafting that statutorily enforces decades old contracts, the bill awards the new 20 years of copyright to purchasers of copyright rather than to the author or his family. These purchasers of copyright neither bargained for nor paid for the new 20 years.

As I detail below,<sup>1</sup> the history of these old contracts can be traced back at least to 1919, when lawyers for music publishers began inserting boilerplate language in contracts with songwriters claiming that any future extensions of term granted by Congress would automatically vest in the publisher.<sup>2</sup> H.R. 989 has the effect of statutorily enforcing this 1919 boilerplate language with

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<sup>1</sup> See page 16.

<sup>2</sup> This practice was candidly noted during 1964 Copyright Office meetings on revising the 1909 Act by Philip B. Wattenberg:

Since 1919 my firm has represented music publishers, and during those years we've drawn numerous contracts under which the renewal contract was assigned to the publisher. Invariably, these contracts contained the following language: "If the copyright law of the United States now in force shall be changed or amended so as to provide for an extended or longer term of copyright, then the writer hereby sells, assigns, transfers, and sets over unto the publisher, its successors and assigns or designees, all his right, title, and interest in and to said musical compositions covered by this agreement, for such extended or longer term of copyright."

Copyright Law Revision Part 4: Further Discussions and Comments on Preliminary Draft for Revised U.S. Copyright Law, 88th Cong., 2d Sess. 39 (House Comm. Print 1964).

That music publishers were able to force writers to sign such agreements does not mean that music publishers paid for the right and thus should have the benefit of a term of copyright not even in existence until decades later.

the result that, as in the board game "Monopoly," the copyright goes right to the publisher without even stopping at the author.

Your laudable goal of parity for U.S. authors has thus been distorted into an involuntary subsidy for purchasers of copyright. This subsidy is the difference between the market value of the copyright in today's market and the market value of the copyright when the original contract was signed. The subsidy will be paid by authors and their families, the very people the bill is intended to help. No one has or can give you a reason why purchasers of copyright shouldn't be required to sit at the table and bargain with authors or their families for the value of the new 20 years copyright in today's market; after all, the copyright is for exploitation in today's market.

Mr. Chairman, the contracts I'm talking about could have been written as long ago as 1920, the very year commercial radio began, at a time before most talking movies, before television, before cable, before videocassettes, before audio tape cassettes, before compact discs, before computers, and before foreign markets were important. While the terms of these old contracts vary even within industries, some courts have upheld broadly drafted contracts from the 1920s and 1930s that give the purchaser of the copyright the right to release the author's work in new technological media not in existence at the time of the contract, sometimes with no payment, and always at a rate that does not reflect the current market conditions.

Most countries throughout the world, including those in Europe, do not permit assignments of rights in technologies not in existence at the time the contract was signed. By enforcing these old contracts, your goal of achieving parity between U.S. authors and European authors will not be achieved. Instead, a disparity is being perpetuated.

Moreover, in the past U.S. musicians have received very few foreign royalties, as revealed in the attached June 10th article in Billboard magazine. If that's the case now, it will be the case for the new 20 years. But this problem is hardly limited to foreign royalties. There are many well-known musicians who were forced to sell their rights for a one-time small, lump-sum. These musicians won't receive one penny if H.R. 989 passes.

Since the introduction of H.R. 989, a number of groups and individuals have had the chance to fully study the bill. They are writing to you asking that the bill be changed to vest the copyright automatically in authors. These authors make the point better than I can: their families depend upon their ability to receive royalties from their compositions. As Mr. Bono stated at the Pasadena hearing, many musicians sign contracts when they are very young, often without legal (or any) representation, without any knowledge of the copyright law, and with little experience in



the music business.

At the Pasadena hearing Mr. Bono made the same point, observing that songwriters don't have the rights they should because many of them signed contracts when they were very green about the music business, whereas music publishers have, as he put it, "a battalion of lawyers." Although Mr. Bono's comments need no support, articles in Billboard magazine (reproduced in the appendix to this statement), as well as number of biographies or autobiographies of musicians, statement reinforce his comment. For example, Willie Dixon, the most famous and prolific of blues composers, put it this way in his autobiography:

I call it swindling but most people call it smart business when you take advantage of someone who don't know no better. I didn't know anything about copyright laws or anything like that.

I thought I was dealing with honest people and when you trust someone who's dishonest, you get bitten. The law can take care of it if you can get enough money and get a lawyer to get justice. They [Chess Records] felt like if they could keep you poor enough, you wouldn't have nothing to fight with and that's the truth. I didn't have \$2 a lot of times to have a copyright paper on a song sent into Congress.<sup>3</sup>

Don Snowden, who collaborated with Willie Dixon on the autobiography explained how the copyright in the musical composition dovetailed with record contracts:

[T]he chief bone of contention among Chess artists concerned the symbiotic relationship with Arc Music, the label's in-house publishing company formed in 1953. The Chess brothers were partners in Arc Music with Gene and Harry Goodman, who ran the publishing company from New York. Ironically, given the number of claims that have been filed against Arc Music by black blues artists, the Goodmans were the brothers of Benny Goodman, who had effectively broken the color barrier in jazz in 1936 by including pianist Teddy Wilson and later vibes player Lionel Hampton in his group.

It was common practice for the early independent record companies to start up their own publishing wings -- and sometimes placing the rights to their songs with the in

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<sup>3</sup> Willie Dixon, "I Am the Blues" 99-100 (1989). Like Muddy Waters, Dixon signed a retroactive work for hire agreement, which he subsequently got overturned with legal help. In his autobiography he also talks about Chess's practice of putting its publisher's or other people's names on composer's songs. See *id.* at 200.

-house publishing company was a condition of an artist getting recorded. Label owners could, with a stroke of the pen, split songwriting credits (and therefore royalties) by adding names or pseudonyms to the copyright. The most famous example at Chess was "Maybelline," credited to Chuck Berry, rock n'roll deejay Alan Freed and Russ Fratto, the man who was printing up the record labels for Chess at the time.<sup>4</sup>

Chess/Arc Music was hardly alone in this practice; Atlantic Records was also notorious, and even famous composers such as Duke Ellington were forced to share authorship credits and royalties with their music publishers. In his book "Hit Men," Frederic Dannen stated regarding the independent labels:

The pioneers deserve praise for their foresight but little for their integrity. Many of them were crooks. Their victims were usually poor blacks, the inventors of rock and roll, though whites did not fare much better. It was a common trick to pay off a black artist with a Cadillac worth a fraction of what he was owed. Special mention is due Herman Lubinsky, owner of Savoy Records in Newark, who recorded a star lineup of jazz, gospel, and rhythm and blues artists and paid scarcely a dime in royalties.

Dannen also quotes Hy Weiss, founder of the Old Town record label, as stating "What were these bums off the street?" and as defending the practice of giving Cadillacs instead of royalties with reasoning that evokes the memory of Earl Butz, President Nixon's one-time Secretary of Agriculture: "So what, that's what they wanted. You had to have credit to buy the Cadillac."<sup>5</sup> Apparently even those songwriters without an appetite for Cadillacs had no choice but to give up their copyright:

[Levy] saw nothing wrong, for example, in putting his name on other people's songs so that he could get writer's as well as publisher's royalties. When Ritchie Cordell wrote "It's Only Love" for Tommy James and the Shondells, ... Morris [Levy], [Cordell] said, "gave me back the demo bent in half and told me if his name wasn't on it, the song didn't come out."<sup>6</sup>

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<sup>4</sup> Id. at 185. Freed was indicted in 1960 in a payola scandal and admitted taking \$2,500. See Frederic Dannen, "Hit Men" 43 (1991).

<sup>5</sup> Id. at 49.

<sup>6</sup> Id. at 48-49.

Bunk Johnson, a pianist and bandleader, is quoted in Dizzy Gillespie's autobiography "To Be or Not to Bop" (page 298) as follows:

A lotta guys who weren't keeping up with what was going on [with copyright law] would get a [recording] date, so the [record company's] A&R man, or some fellow, ofay or whatever, would say "O.K., gimme a riff. You know, just make up a head. We don't need no music; we're gonna record."

So the cats would record, make up something. And they're actually creating the music right on the record date. Now, when it comes out, they wouldn't completely beat them, but usually the guy, the A&R man, had his own publishing firm or his buddy's got one and right away he would stick in all of this material -- because you have recorded it and you didn't have it protected -- and in order for him, he says, to save the material, he's put it in a publishing company. The publishing company would give you one of them jive contracts, where you'd never get no royalties. So this was a rip-off.

The music industry's historically poor treatment of jazz, blues, and popular musicians led to a recent editorial in the June 10, 1995 issue of Billboard magazine, part of which states:<sup>7</sup>

One of the music industry's best-kept secrets for decades centered on an ugly period of economic injustice often perpetrated by owners of masters and song copyrights against artists and songwriters who mainly made their way (if not much of a living) in the R&B and blues fields.

An article accompanying the editorial notes that

Old recording contracts often saddled unrepresented artists, most of them African-Americans, with royalty rates as low as 3% of wholesale or 1% of retail price. Still other artists accepted no-royalty "buy-outs" of between \$50 and \$200 per record.

Mr. Chairman, I do not raise these points to disparage the music industry or to suggest that these represent today's practices. But this unfortunate past is relevant to H.R. 989, because as currently drafted, the bill will enforce these very contracts for another 20 years.

Nor Mr. Chairman, am I saying that all publishers are evil or

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<sup>7</sup> The entire editorial is attached to this statement.

that all contracts are unfair. That's not the case, and some record companies/publishers are revising old contracts to give artists a better deal.<sup>8</sup> Authors need publishers, and publishers need authors. I have an excellent, long term relationship with my publisher, and I am an avid purchaser of both books and sheet music. I appreciate the efforts publishers undertake to get a work to market and make it successful, and I agree they should get the full benefit of their bargain. But I don't agree that contracts entered into decades ago should govern a situation neither side bargained for -- a grant in 1995 of a new term of 20 years copyright. It is only reasonable and fair to grant the new copyright to authors, thereby permitting the author (or his heirs) to sit down in 1995 and say to the purchaser of copyright: "We now have a new right, how do we fairly negotiate a deal in 1995?"

No one can refute Mr. Bono's observation at the Pasadena hearing that 99% of songwriters or their families would want the copyright back if given the chance. It is my understanding that music publishers may not support a bill that does not give them the copyright. Indeed, music publishers may also seek to delay the termination of transfer provision in Section 203 of the 1976 Act for copyrights assigned on or after 1978. This section says that the author can get his or her copyright back 35 years after it was assigned. Music publishers are supposedly seeking to make the songwriter wait even longer. But there is no connection between extending the term of copyright and Section 203.

This proposal will place songwriters in a worse position than they are under today's law. For this reason, the Nashville Songwriters Association has said that they would rather have no bill than a bill that includes the music publishers' proposal.

But the unintended negative effects of the bill as drafted aren't limited to assignments made from 1978 on. For works that were first published between 1920 and 1933 and for which a termination of transfer notice under Section 304 of the Act has not been filed, the author cannot get his copyright back for the new 20 year term, even if he wants to, because the 5 year window for termination is past. As ASCAP's lawyer testified at the Pasadena hearing, in response to a question from Mr. Becerra, barring these authors from getting their copyright back was deliberate. The reason given was that if the work was valuable, the author would have already terminated. This response blames the victim. If a work is commercially valuable for the publisher, it is valuable for the composer. And, of course, how could a composer have known in 1978 that he was supposed to file a notice with the Copyright Office because 17 years later Congress was going to grant an additional 20 years copyright?

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<sup>8</sup> See attached March 4, 1995 Billboard article.

Fortunately, the problems with H.R. 989 can be easily fixed and your good intentions full realized. As discussed more below, all you need do is either vest the proposed extra 20 years automatically in the author, either following the approach already taken in the bill, or, alternatively -- and this is my preference -- by going to a life plus 70 term for all works, regardless of when published.

#### A Brief Review of Term of Protection in the United States

In order fully to understand the provisions of H.R. 989, a brief review of the history of the term of protection in the United States may be helpful since H.R. 989 reaches back as far as works first published in 1920.

Article I, section 8, clause 8 of the Constitution empowers Congress to grant authors the exclusive right to their writings "for Limited Times," but without any guidance as to what the phrase means, other than, obviously, not permitting perpetual copyrights. Congress has not been particularly generous in granting copyright protection, so the limits of the Constitutional power have never been tested.

The first U.S. Copyright Act, the Act of 1790,<sup>9</sup> began the pattern, only broken 186 years later in the 1976 Act,<sup>10</sup> of measuring copyright from an event other than the author's life.<sup>11</sup> From 1790 to 1908, that event was filing a prepublication title page of the work either with the clerk of the district court where the author resided (from 1790 to 1869) or with the Library of Congress (from 1870 to 1908). From 1909 to 1977, copyright was measured from the date of first publication of the work.<sup>12</sup>

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<sup>9</sup> Act of May 31, 1790, 1st Cong., 2d Sess., 1 Stat. 124.

<sup>10</sup> The 1976 Act was effective January 1, 1978.

<sup>11</sup> By contrast, the first French Act, that of 1793, was based on the life of the author. In 1814, the British went to a term of 28 years plus the remainder of the author's life if he or she was alive at the end of the 28 year period. 53 Geo. III, ch. 156. In 1842, the British switched to a term of 42 years or life of the author plus 7 years, whichever was longer. 5 & 6 Vict., ch. 45. In 1911, England, as a result of its adherence to the Berne Convention, went to life plus 50. (The 1908 Berlin Berne Convention had stated a desire for a life plus 50 term, but that term did not become a requirement until the 1948 Brussels Convention).

<sup>12</sup> An exception was provided for so-called "Section 12" works: unpublished works that were typically performed and not sold in copies, such as motion pictures and speeches. Although the statute

Beginning in 1978, the basic term was switched to life of the author plus 50 years.<sup>13</sup>

#### The 1790 Act

The term set forth in the 1790 Act (like much of that Act) was derived from the 1710 English Statute of Anne:<sup>14</sup> an original term of 14 years from the date the title of a prepublication copy of the work was filed with the clerk of the United States district court,<sup>15</sup> followed by a second renewal term also of 14 years for the benefit of the author or the author's executor, administrators, and assigns if the author was alive at the expiration of the first term and the work was again filed with the district court. If the author died during the first term, the work fell into the public domain at the expiration of that term. And if the author lived until the renewal term, but failed to timely renew, the work also fell into the public domain. If the author died during the renewal term (and a timely renewal had been made) rights were owned according to the author's bequest, or if assigned, according to the assignment.

#### The 1831 Act

In 1831, at the request of Noah Webster, Congress doubled the original term of copyright to 28 years.<sup>16</sup> The renewal term stayed

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did not provide a term for these works, the courts held that the term was measured from the date of registration with the Copyright Office.

<sup>13</sup> 17 U.S.C. section 302 (1978). For works created by corporations the term could not be measured by the life of the author, and is instead set at either 75 years from the date of first publication or 100 years from creation, whichever occurs first.

<sup>14</sup> 8 Anne c. 19 (1710).

<sup>15</sup> Interestingly, the Statute of Anne and all of the colonial statutes, as well as the Continental Congress's May 2, 1783 resolution urging the states to adopt interim copyright laws measured term from the date of first publication of the work. No evidence has turned up explaining the 1790 Act's departure from this prior practice.

<sup>16</sup> Act of February 3, 1831, 21st Cong., 2d Sess., 4 Stat. 436; W. Ellsworth, COPY-RIGHT MANUAL 21-22 (1882). Ellsworth was Webster's son-in-law, and a member of the House of Representatives at the time of this Act (including the Judiciary Committee, upon whose behalf he reported out the bill), 52 ANNALS OF CONGRESS, Appendix cxix, 21st Cong. (Dec. 17, 1830) (Gale & Seaton's Register

at 14 years. This Act also changed the prior law so that the work did not go into the public domain if the author died during the original term, and limited the renewal right to the author's surviving spouse and children, eliminating executors, administrators, and assignees. The intent of these changes appears to have been to prohibit the author from making a binding inter vivos transfer of both the original and renewal term, and to prohibit the author from conveying the renewal term to anyone other than his family.

#### The 1909 Act

In the 1909 general revision, Congress doubled the renewal term, so that both the renewal term and the original term were 28 years, for a possible total of 56 years. ("Possible" because if a timely, proper renewal was not filed in the final year of the original term, the work went into the public domain after only 28 years). At the same time, the term was switched from the date of filing a prepublication title with the Library of Congress to the date of first publication. Congress had come very close to adopting a term of life of the author plus a fixed number of years, but at the last minute switched to the 28+28 structure, perhaps swayed by Mark Twain's testimony that he had only made money off of Innocents Abroad because he had retained the copyright in the renewal term.<sup>17</sup> The House Patent Committee<sup>18</sup> report accompanying the 1909 Act explains that it believed 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 term of twenty-eight years, your committee felt that it should be the exclusive right of the author to take the renewal term...<sup>19</sup>

This passage also indicates Congress's intent that the author should not be able to assign the renewal term until that term

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of Debates in Congress).

<sup>17</sup> If true, this is ironic since Twain had testified in favor of the life plus a fixed term bill, adding that he wished copyright could be perpetual. See Arguments Before the Committees on Patents on S. 6330 and H.R. 19853, 59th Cong., 1st Sess. 116-121 (1906).

<sup>18</sup> At this time the Patent Committee, rather than Judiciary, had primary jurisdiction over intellectual property.

<sup>19</sup> H.R. REP. NO. 2222, 60th Cong., 2d Sess. 14 91909).

vested. This has been the consistent view of the Copyright Office.<sup>20</sup> Nevertheless, in Fred Fisher Music Publishing Co. v. M. Witmark & Sons,<sup>21</sup> the Supreme Court, openly rewriting the Copyright Act,<sup>22</sup> held that an assignment of the renewal term, made by the author during the original term was binding. In Miller Music Corp. v. Charles N. Daniels, Inc.,<sup>23</sup> the Court tempered the Fred Fisher holding slightly, by holding that where the author died before the renewal term the assignment of the renewal term, as a contingent interest, failed and the author's statutory successors took the renewal term free and clear of all assignments made during the original term.

#### The 1976 Act

Efforts at revising the 1909 Act began in 1955 with a comprehensive way with a series of 36 issue studies by the Copyright Office. In 1961, Register of Copyrights Abraham Kaminstein issued a report to Congress containing the Office's preliminary conclusions and recommendations about what a revised law should contain.<sup>24</sup> The Register recommended that for works created after the new law went into effect, the copyright should last for an initial term of 28 years from the first public dissemination of the work,<sup>25</sup> and that at any time during the last 5 years of this initial term, any person claiming an interest in the copyright could file a renewal application, which would then

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<sup>20</sup> See COPYRIGHT LAW REVISION: REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW, 87th Cong., 1st Sess. 53 (House Comm. Print 1961).

<sup>21</sup> 318 U.S. 643 (1943).

<sup>22</sup> See 318 U.S. at 647, "if we look only to what the Act says, there can be no doubt as to the answer," the answer being the opposite of what the Court held.

<sup>23</sup> 362 U.S. 373 (1960). In Stewart v. Abend, 495 U.S. 207 (1990), the Court applied Miller Music to cases involving derivative works prepared during the original term, overruling Rohauer v. Killiam Shows, Inc., 551 F.2d 484 (2d Cir.), cert. denied, 431 U.S. 949 (1977).

<sup>24</sup> This report was published by the House Judiciary Committee, Copyright Law Revision: Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law, 87th Cong., 1st Sess. (House Comm. Print 1961).

<sup>25</sup> This differed from the 1909 Act, which measured term from the date of first publication.



extend the copyright for 48 years, for a total of 76 years.<sup>26</sup> Despite this somewhat more liberal approach,<sup>27</sup> as under the 1909 Act, failure to renew would throw the work into the public domain.

For works that had already been published at the time the new law went into effect, the copyrights would be extended for the same period of time.<sup>28</sup> The Register also expressed the view that due to the above-mentioned Supreme Court decisions, Congress's intent in giving the renewal term to authors or their heirs had been thwarted.<sup>29</sup> To cure this problem, the Register proposed that there be a 20-year limit on any assignment of copyright, or at least those assignments that did not provide for continuing royalties, so that authors or their heirs would be "in a position to bargain for remuneration on the basis of the [then present] economic value of their works."<sup>30</sup> This same concern animates my earlier remarks that the current version of H.R. 989 unintentionally deprives authors and their families from bargaining for the current value of the work.

In meetings with industry groups and others interested in the revision, the Copyright Office heard considerable criticism of its proposals,<sup>31</sup> with the Register later describing the termination

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<sup>26</sup> *Id.* at 56. The 76 year period came about as a result of a study of 673 authors of English-language books who died between 1930 and 1955, a survey of 61 composers of "serious" music, and a survey of 191 authors of popular music who died between 1930 and 1950. This data showed that the average age at median between the first and last work was 48 years and the average age at death was 68 years, for a span of 20 years. Based on these figures, the Register assumed that a term of 70 years from first publication would approximate the life plus 50 term. But because life expectancies were rising, a slightly longer term of 76 years was proposed.

<sup>27</sup> Under the 1909 Act, there was only one proper renewal claimant and the renewal application had to be filed within the final year of the first 28 year period of protection.

<sup>28</sup> I do not discuss the separate issue of the treatment of unpublished works. I understand that the Copyright Office is addressing this issue in its statement.

<sup>29</sup> Register's 1961 Report at 53-54.

<sup>30</sup> *Id.* at 93.

<sup>31</sup> See Copyright Law Revision Part 2: Discussions and Comments on the Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law, 88th Cong., 1st Sess. (House Comm. Print 1963).

of transfer provisions as "the most explosive and difficult issue" in the revision drafting.<sup>32</sup> Some criticized the Office's failure to propose a term of life of the author plus 50 years,<sup>33</sup> while publishers and motion picture companies criticized the author's proposed ability to terminate an assignment after 20 years.<sup>34</sup> Authors' groups and some scholars, such as Melville Nimmer, supported the termination right,<sup>35</sup> with some arguing it should apply to all assignments (i.e., regardless of whether there was a continuing obligation to pay royalties).

In 1963, the Copyright Office circulated a preliminary draft bill.<sup>36</sup> As a result of the Office's abandonment of its earlier proposal that copyright vest upon first public dissemination in favor of copyright vesting automatically upon creation and fixation, alternative approaches to term were offered in Sections 20 and 22. Section 20 covered works created after the effective date of the new law. Section 22 covered works created before the effective date of the new law. Alternative A in Section 20 provided for a term of 75 years from publication or 100 years from creation, whichever occurred first. Alternative B provided for a term of life of the author plus 50 years. Section 22(b) extended the renewal term for 47 years for a total of 75 years, a period that was viewed as roughly equivalent on an actuarial basis to life plus 50.<sup>37</sup> This extra 19 years (28+19=47) was subject to an important right, in Section 22(c), of the author to terminate the transfer beginning in the first year of the extra 19 years (year 57 of the

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<sup>32</sup> Copyright Law Revision Part 6: Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law: 1965 Revision Bill, 89th Cong., 1st Sess. 71 (House Comm. Print 1965).

<sup>33</sup> Id. at 77-107, 229, 235-237, 247, 252-254, 376-377. But see id. at 263-267, 279, 299-300, 353-356, 370, 375-376, 382-383, 413.

<sup>34</sup> Id. at 104, 108, 230, 353, 357-358, 360-362.

<sup>35</sup> Id. at 238-239, 248, 258-259, 317, 370, 374, 379, 385, 392-393, 415

<sup>36</sup> Copyright Law Revision Part 3: Preliminary Draft for Revised U.S. Copyright Law and Discussions and Comments on the Draft (Sept. 1964).

<sup>37</sup> See Copyright Law Revision Part 4: Further Discussions and Comments on Preliminary Draft for Revised U.S. Copyright Law, 88th Cong., 2d Sess. 17 (House Comm. Print 1964).

copyright).<sup>38</sup>

With respect to terminations of transfer of works created after the effective date of the new law (as well as transfers executed after that date), the Office offered two alternatives in Section 16. Alternative A contained an inalienable 20 year limit on transfers. Alternative B permitted authors or their successors to bring suit to recover strikingly disproportionate profits received by the assignee beginning 20 years after the transfer.

For both termination of transfers of "old" and "new" works, the draft provided that a licensed derivative work prepared before termination could continue to be exploited according to the terms of the license after termination, but no new derivative works could be created. This right was particularly important to motion picture companies and encyclopedia publishers, whose works frequently included multiple contributions.

In Copyright Office meetings on the draft, then Chief of the Examining Division Barbara Ringer, in discussing Section 16 stated that the section had proved to be quite controversial, with strong opposition.<sup>39</sup> At the same time, though, she added a belief that the support for "the basic principle [that] some sort of time limitation on transfers of copyright ownership may be as strong and deep-seated as the opposition."<sup>40</sup>

Opposition to the section was voiced by the motion picture industry<sup>41</sup> and the book publishers<sup>42</sup> who argued that contractual

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<sup>38</sup> A written notice of termination had to be served on the transferee six months before the termination became effective, and had to be recorded in the Copyright Office. Unlike the bill passed in 1976, there was, though, no "window" within which the notice had to be served.

<sup>39</sup> Copyright Law Revision Part 3 at 277.

<sup>40</sup> Id. See also id. at 277-278, explaining various positions.

<sup>41</sup> Id. at 278-281, 288-289. Motion picture companies favorably remarked on a provision that permitted the owner of a derivative work (such as a motion picture version of a novel) prepared under the authorization of a transfer to continue to exploit the derivative work after termination, but believed that even in cases of non-derivative works (as in a screenplay), they should be able to continue to exploit the work on a non-exclusive basis after termination. Copyright Law Revision Part 4: Further Discussions and Comments on Preliminary Draft for Revised U.S. Copyright Law, 88th Cong., 2d Sess. 40 (House Comm. Print 1964). Although this proposal appears reasonable, in many cases (particularly with motion pictures), a non-exclusive licensee who continues to exploit the

freedom and investment should be respected, as well as music publishers, who argued that the potential value of many compositions is not ascertainable until years after the work is published.<sup>43</sup> Authors groups "ardently" supported a termination (or as it was also called, a reversion) right.<sup>44</sup>

Authors offered a number of defenses. First, a single, unified term of protection (whether 75/100 years or life of the author plus 50 years), would place authors in a worse condition than the existing law unless a termination right was provided,<sup>45</sup> since under the existing law contracts for both the original and renewal term were not supposed to be enforceable, and even though the Supreme Court had thwarted Congress's intent in this respect in the Fred Fisher opinion,<sup>46</sup> if the author died before the renewal term, his heirs nevertheless got the copyright back free and clear of all assignments. Second, the only reason authors sign away their copyrights for long periods of time is the unequal bargaining position they find themselves in in negotiating with publishers. And finally, "the basic terms of a book contract are the same wherever you go," including a requirement that the author assign both the original and renewal term.<sup>47</sup> This conclusion was supported by a reputed statement from a book publisher that, "I have never in my entire publishing experience accepted a grant of rights to publish a book for only one term. I hope I never have to. I know of no other publisher who has ever accepted a grant of only a single term. We all accept grants of only the original and renewal terms."<sup>48</sup>

It was argued that authors, not publishers, should benefit from any extension of term (beyond the then-granted 56 years) for subsisting copyrights because publishers had only bargained and

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work may, as a practical matter, preclude the author from marketing the work to anyone else.

<sup>42</sup> Id. at 281-283, 290-292, 300, 341-343.

<sup>43</sup> id. at 283.

<sup>44</sup> Id. at 286-287, 293-295, 296-197.

<sup>45</sup> See Copyright Law Revision Part 5: 1964 Revision Bill with Discussions and Comments, 89th Cong., 1st Sess. 161 (House Comm. Print 1965) (remarks of Harriet Pilpel).

<sup>46</sup> See page 11.

<sup>47</sup> Id. at 287.

<sup>48</sup> Copyright Law Revision Part 5: 1964 Revision Bill with Discussions and Comments, 89th Cong., 1st Sess. 155-156 (House Comm. Print 1965).

paid for a 56 year term. The Authors Guild of America declared, referring to the then existing 28-year renewal term and the proposed extension of that term by 19 years:

[Book publishers] sit down and carefully estimate what their 50 percent share of those 28 years of earnings will be, and they pay a modest portion of it as an advance.

I don't see how they'd be hurt one iota if they don't get the next 19 years . . . . [T]hey haven't paid for it or bargained for it. They've simply computed the value of a 28-year annuity, and they've had a full and fair opportunity to recover that and a profit as well.<sup>49</sup>

Similarly, the American Guild of Authors and Composers stated that

[Music publishers] aren't bargaining for any more than 28 years. They're not giving an advance of \$15,000 saying, "Well, \$13,000 for 28 years and \$2,000 if we get a few more years if [Congress] extend[s] the law." They are bargaining for 28 years, and they have thrown in the other wording on the theory that "if we can get it good; if we can't well then we have lost just a few words. We haven't lost a single dollar."<sup>50</sup>

This reference to "other wording" was to a previous statement by an attorney whose firm had been representing music publishers since 1919, and had inserted the following language in all contracts with songwriters:

If the copyright law of the United States now in force shall be changed or amended so as to provide for an extended or longer term of copyright, then the writer hereby sells, assigns, transfers, and sets over unto the publisher, its successors and assigns or designees, all his right, title, and interest in and to said musical compositions covered by this agreement, for such extended or longer term of copyright.<sup>51</sup>

This practice of inserting this clause in contracts was common.<sup>52</sup> These are, though, the contracts that H.R. 989 will,

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<sup>49</sup> Id. at 43. But see criticism of this characterization of "advances," id. at 45, and its defense, id.

<sup>50</sup> Id. at 42.

<sup>51</sup> Id. at 39.

<sup>52</sup> See id. at 41, 45.

unless amended, enforce: contracts dreamed up by lawyers as early as 1919 (ten years after the 1909 Act) on the off-chance that some time in the distant future Congress might extend the term, and if and when that occurred, maybe, just maybe, Congress would let them get away with boilerplate language assigning publishers all future rights, even though those rights had not been paid for.

#### The 1964 Revision Bills

In 1964, the first revision bills were introduced.<sup>53</sup> Section 20(a) of the bills adopted, for new works, the term of life of the author plus 50 years, or, where the work was not created by an individual, 75 years from first publication or 100 years from creation, whichever occurred first.<sup>54</sup> For old act works, the bills kept the durational structure of the 1909 Act: an original term of 28 years plus a renewal term of 28 more years (if timely applied for), but as in the 1963 preliminary draft, an extra 19 years was tacked on to the renewal term for a total of 75 years: 28+28+19.

Again, as in the 1963 draft, there were termination of transfer provisions both for assignments executed before the effective date of the bills (governing, therefore, the extra 19 years) and for assignments executed after the effective date (governing, mostly, but not exclusively works with a life of the author plus 50 years term).

For assignments of "old act" works, the author or his heirs could terminate the extra 19 years beginning in the first year of the extra 19 years (i.e., in year 57 of the copyright) if they had served a written notice on the assignee one year before the effective date of the termination and recorded a copy of the notice with the Copyright Office.<sup>55</sup> For assignments of "new act" works, the assignment could be terminated at any time beginning 35 years after the execution of the assignment, but notice of termination had to be made two years before the effective date.<sup>56</sup>

For both termination of transfers of "old" and "new" works, the draft provided that a licensed derivative work prepared before

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<sup>53</sup> S. 3008, H.R. 11947, H.R. 12354, 88th Cong., 2d Sess. (1964).

<sup>54</sup> The bill also provided for a uniform, federal system by protecting all unpublished works.

<sup>55</sup> As with the 1963 draft, there was no "window" period within which the notice had to be filed.

<sup>56</sup> For new act (but not old act) transfers, there were exclusions from the termination right for transfers by will and works made for hire.

termination could continue to be exploited according to the terms of the license after termination, but no new derivative works could be created.

Discussions on the bills held at the Copyright Office with private sector groups showed strong opposition to the reversion (termination of transfer) provisions by book and music publishers<sup>57</sup> and by the motion picture and television industries, who described the provisions as "at best misguided paternalism."<sup>58</sup> Authors' groups defended the provisions as essential to preserving the status quo authors were supposed to enjoy under the 1909 Act<sup>59</sup> and as protecting authors from the unequal bargaining leverage of purchasers of copyright.<sup>60</sup> At the same time, authors' representatives objected to making the author wait 35 years before a "new act" transfer could be terminated, noting that in his 1960 report to Congress, the Register had indicated the period should be 20 years, and that the 1963 draft bill had set the date at 25 years.<sup>61</sup>

The 1965 Bills and House hearings, Register of Copyrights' 1965 Report

The 1965 revision bills<sup>62</sup> retained the 1964 bills' provisions on duration, but made extensive changes in the termination provisions that greatly complicated them for authors, thus ensuring that their utility would be greatly diminished. The changes,

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<sup>57</sup> See Copyright Law Revision Part 5: 1964 Revision Bill with Discussions and Comments, 89th Cong., 1st Sess. 154-155, 156, 157, 222, 225-226 (House Comm. Print 1965).

The book publishers characterized the provisions as "intolerable" and stated their "unequivocal opposition to any form of reversion," claiming that out-of-print clauses vesting the copyright back in the author if the book remained out of print for five years adequately protected authors. The out-of-print argument was plainly ridiculous: publishers were willing to give the copyright back to the author only when they determined the work no longer had any commercial value.

<sup>58</sup> Id. at 160, 162, 299-300.

<sup>59</sup> See page 11.

<sup>60</sup> Id. at 155-156, 157, 158, 162, 163, 240-250, 257 (making suggestions for amendments).

<sup>61</sup> Id. at 241.

<sup>62</sup> S. 3008, H.R. 11947, 89th Cong., 1st Sess. (1965).

nevertheless, or perhaps predictably, reflected a compromise that had been worked out.<sup>63</sup> With the exception of amendments made in 1966 clarifying who may terminate and specifying the allocation of the terminated interests,<sup>64</sup> the termination provisions in the 1965 bills are identical to those incorporated in the 1976 Act. This fact is significant because it demonstrates that the parties stuck with the compromise for eleven years while the revision process struggled through a number of explosive issues. Indeed, the compromise has been followed by all the parties until last month, June 1995, when music publishers at the Pasadena hearing indicated they would send the Subcommittee a proposed amendment to Section 203 further delaying the 35 year termination period.

The differences between the 1964 and 1965 bills are as follows: (1) the 1965 bills permitted nonexclusive licenses to be terminated<sup>65</sup>; (2) transfers of copyrights in wills were excluded from the termination right; (3) termination was limited to the author, or if he was deceased, his widow and children;<sup>66</sup> (4) under Section 203, termination could be made only during a five year window commencing at the end of 35 years from the execution of the transfer;<sup>67</sup> (5) the termination notice could be served not less than 2 or more than 10 years before the effective date of the termination, with recordation made a condition of the termination;<sup>68</sup> (6) where the author was deceased, the termination notice had to be filed by all those entitled to terminate;<sup>69</sup> (7)

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<sup>63</sup> See Copyright Law Revision: Hearings on H.R. 4347 et al Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Judiciary Comm., 89th Cong., 1st Sess. 148-149 (1965); Mills Music, Inc. v. Snyder, 469 U.S. 153, 17-176 (1985). The compromise also involved amending the work-for-hire provisions in publishers' favor.

<sup>64</sup> See H.R. 4347 as reported by the House Judiciary Committee, H.R. REP. NO. 2237, 89th Cong., 2d Sess. (Oct. 12, 1966).

<sup>65</sup> The 1964 bills were limited to exclusive licenses.

<sup>66</sup> The 1964 bills included legal representatives and legatees.

<sup>67</sup> The 1964 bills permitted the termination to be filed at any time after the 35 years had elapsed.

<sup>68</sup> The 1964 bills had the 2 year, but not the 10 year provision. They also required recordation with the Copyright Office, but did not state that the failure to record rendered the termination ineffective.

<sup>69</sup> By contrast, the 1964 bills more liberally required only a "written notice."



to ensure that the termination right was inalienable and unwaivable, no agreement to transfer rights after termination would be valid unless entered into after termination had occurred, with the exception that a future agreement between the author and the original transferee would be valid if entered into after the notice of termination has been filed; (8) the proportionate shares between the widow and children were specified.

In preparation for the first congressional hearings on the revision effort, Register of Copyrights Abraham Kaminstein issued a supplementary report.<sup>70</sup> The report traces the origins of the termination of transfer provisions to the failure of the 1909 Act to adequately give authors a second bite at the apple.<sup>71</sup> Although noting the objections of publishers and the motion picture industry, who asserted that authors are not generally in a poor bargaining position, the Register concluded that the Copyright Office "remained committed to the general principle of reversion as one of the most important elements of the copyright law revision program."<sup>72</sup>

At hearings before the House in 1965, the parties noted their individual wishes that the bill had been more favorable to them, but stuck by their compromise on termination, and strongly supported the life plus 50 term.<sup>73</sup>

#### How the Term of Protection Provisions in the 1976 Act Work

The 1976 Act's treatment of duration may be divided into three parts: (1) works created on or after January 1, 1978; (2) works unpublished and unregistered on January 1, 1978.

Works Created On or After January 1, 1978: Section 302

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<sup>70</sup> Copyright Law Revision Part 6: Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law: 1965 Revision Bill, 89th Cong., 1st Sess. (House Comm. Print 1965).

<sup>71</sup> Id. at 71-72.

<sup>72</sup> Id. at 72.

<sup>73</sup> See Copyright Law Revision: Hearings on H.R. 4347 Before Subcomm. No. 3 of the House Judiciary Comm., 89th Cong., 1st Sess. 82-84, 92-94, 95-96, 1761-1765 (Authors League); 129, 142, 147-148 (book publishers); 162-164 (magazine publishers); 228-234, 239, 242-245 (American Guild of Authors & Composers); 251, 255, 257 (magazine photographers); 996-997, 1010, 1035-1037, 1048-1049 (motion picture companies); 1866-1870 (Copyright Office) (1965).

For this category of work, the 1976 Act adopted a basic term of life of the author plus 50 years. Where the work is made for hire, anonymous, or pseudonymous the term is 75 years from first publication or 100 years from creation, whichever occurs first.

**Works Unpublished and Unregistered on January 1, 1978:  
Section 303**

This category encompasses works formerly under perpetual state common law copyright. The 1976 Act preempts that state protection and substitutes a somewhat complicated system. The minimum term of protection for these works is December 31, 2002, but if the work is published before that date, the term is extended until December 31, 2027. Alternatively, if a longer term is possible under the life plus 50 regime, that regime is applied.

**Works Published Before January 1, 1978**

These works were formerly governed by the 1909 Act's 28+28 year term: 28 years from first publication, with another 28 year renewal term if a timely renewal was filed. The 1976 Act essentially incorporated the 1909 Act's term structure into the 1976 Act for these works, but added on an additional 19 years to the renewal term for a possible total of 75 years (28+28+19). Where a work was in its first term on January 1, 1978, a timely renewal application still had to be filed.<sup>74</sup> If the renewal application was timely filed, the author was granted a 47 year renewal term. If the work was in its renewal term on January 1, 1978, it was automatically granted a 47 year term.

**Termination of Transfers**

At an August 1964 meeting at the Copyright Office with the private sector on the first revision bills, an in-house lawyer for Time, Inc. expressed an opinion that the termination of transfer provisions would not help authors because they were too complicated and would instead "realistically" only benefit private sector attorneys "who are going to make a lot of money out of it."<sup>75</sup> This comment was made, interestingly, before the provisions became appreciably more onerous for authors in the 1965 bills. Evidence being compiled by the Copyright Office for this hearing bears out the prediction.

<sup>74</sup> This requirement was finally abandoned in the Automatic Renewal Act of 1992, Act of June 26, 1992, Pub. L. No. 102-307 (title I), 102d Cong., 2d Sess., 106 Stat. 264, but that act only governs works that were first published between 1964 and 1977.

<sup>75</sup> See Copyright Law Revision Part 5: 1964 Revision Bill with Discussions and Comments, 89th Cong., 1st Sess. 166 (House Comm. Print 1965) (remarks of E. Gabriel Perle).

There are two termination of transfer provisions in the 1976 Act, Sections 203 and Section 304(c). They are very similar, but not identical. Section 304(c) governs transfers and licenses executed before January 1, 1978 and thus is limited to 1909 Act works whose term is measured from the date of first publication. Section 203 covers transfers and licenses executed on or after January 1, 1978 and thus covers three categories of works: (1) works that were subject to common law copyright on January 1, 1978; (2) works protected under the 1909 Act that were in their first or renewal term on January 1, 1978, but where the transfer or license was executed on or after that date; and (3) works created on or after January 1, 1978, and thus governed by the term structure of the 1976 Act. The possibility of termination under Section 304(c) began on January 1, 1978. Terminations under Section 203 cannot begin until January 1, 2013.

#### Termination under Section 304(c)

The termination right under Section 304(c) is only for the extra 19 years added on to the 28 renewal term of the 1909 Act. The provision is quite complex:

- (1) Grants covered
  - (a) exclusive or nonexclusive transfers or licenses of renewal rights
  - (b) executed before January 1, 1978
  - (c) by a renewal claimant covered by the second proviso of Section 304(c)
  - (d) with respect to a work in its first or renewal term of statutory protection
- (2) Persons who may exercise the right
  - (a) as to grants by author(s):
    - (i) the author(s) to the extent of the author's interest (§304(c)(1));
    - (ii) if an author is dead, by owners of more than one half of the author's termination interest, such interest being owned as follows:
      - (A) by surviving spouse if no children or grandchildren;
      - (B) by children and surviving children of dead child if no surviving spouse, per stirpes and by majority action; or
      - (C) shared, one half by widw(er) and one half by children and deceased child's children (§304(c)(1) and (4)).
  - (b) as to grants by others -- all surviving grantors (§304(c)(1) and (4)).
- (3) Effective date of termination
  - (a) designated time during five year period commencing on later of:
    - (i) beginning of fifty-seventh year of copyright or
    - (ii) January 1, 1978 (§304(c)(3)).

- (b) upon 2 -- 10 years notice (§304(c)(4)).
- (4) Manner of Terminating
- (a) written and signed notice by required persons or agent's to grantee or grantee's "successor in title"
- (b) specification of effective date, within above limits
- (c) form, content, and manner of service in accordance with Copyright Office regulation (§304(c)(4)(B)); 37 C.F.R. §201.10)<sup>76</sup>
- (d) recordation with the Copyright Office before the effective date (§304(c)(4)(A))
- (5) Effect of termination
- (a) of grant by author
- (i) reversion to that author, or if dead, those owning the author's termination interest (including those who did not join in signing the termination notice) in proportionate shares (§304(c)(6) and (c)(6)(C))
- (b) of grant by others -- reversion to all entitled to terminate (§304(c)(6))
- (c) in either case, future rights to revert upon proper service of notice of termination (§304(c)(6)(B)).
- (6) Exceptions to termination
- (a) works made for hire are not subject to termination
- (b) dispositions by will are not subject to termination

<sup>76</sup> These regulations require that the notice be served upon each "grantee" whose rights are being terminated, or "the grantee's successor in title," by personal service, or by first-class mail sent to an address "which, after a reasonable investigation, is found to be the last known address of the grantee or successor in title." 37 CFR §201.10(d)(1). The regulation further provides that "a reasonable investigation" includes but is not limited to a search of the records in the Copyright Office. *Id.* §201.10(d)(3). In the case of musical performing rights, a report from a performing rights society identifying the person(s) claiming current ownership of the rights being terminated is sufficient. *Id.* For a discussion of the term "successors in title," see *Burroughs v. MGM*, 491 F. Supp. 1320 (SDNY 1980); 519 F. Supp. 388 (SDNY 1981), *aff'd*, 683 F.2d 610 (2d Cir. 1982). One issue in *Burroughs* was the meaning of "successors in title." Is the term limited to transferees of exclusive rights, or does it also include nonexclusive licenses? Although the issue was not reached by the Second Circuit majority, Judge Newman, in a concurring opinion, reasoned that since the Copyright Office regulations speak of providing for a reasonable investigation of "ownership," and since under Section 101 of the Act a "transfer of ownership" includes assignments and exclusive licenses but excludes nonexclusive licenses, see 17 USC §101, the term must be construed accordingly. This reading of "successor in title" is believed to be correct.

- (c) derivative works prepared under a transfer or licensee executed prior to termination may continue to be utilized under the terms of the transfer, but with no right to make new derivative rights (\$304(c)(6)(A))<sup>77</sup>
- (d) rights that arise under any other federal statute or under any state or foreign law are not affected (\$304(c)(6)(E)).
- (7) Further grants of terminated rights
  - (a) each owner is regarded as a tenant in common except that a further grant by owners of a particular deceased author's terminated rights must be in the same number and proportion of his or her beneficiaries as required to terminate, but then binds them all, including nonsigners, as to such rights
  - (b) must be made after termination, except that, as to original grantees or successor in title, it may be after notice of termination.

While there is no form for termination notices, Copyright Office regulations specify that the notice must contain a "complete and unambiguous statement of facts ... without incorporation by reference of information in other documents or records,"<sup>78</sup> and include the following:

- (1) the name of each grantee whose rights are being terminated and each address at which service is made;
- (2) the title and the name of at least one author of, and the date copyright was

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<sup>77</sup> In *Mills Music, Inc. v. Snyder*, 469 U.S. 153 (1985), the Supreme Court reversed a lower court opinion construing this provision as granting the author all of the royalties from the exploitation of the sublicensed derivative works after termination of the original grant. Under *Mills Music*, middlemen (transferees who have granted sublicenses) are entitled to share in the royalties from the derivative work's continued exploitation according to the terms of the original contract. See former Register of Copyrights Barbara Ringer's criticism of *Mills Music* in Civil and Criminal Enforcement of the Copyright Laws: hearing Before the Subcomm. on Patents, Copyrights, and Trademarks of the Senate Judiciary Comm., 99th Cong., 1st Sess. 79-95 (1985); and generally The Copyright Holder Protection Act: Hearings on S. 1634 Before the Subcomm. on Patents, Copyrights, and Trademarks of the Senate Judiciary Comm., 99th Cong., 1st Sess. (1985).

<sup>78</sup> 37 CFR §201.10(b)(2).

- originally secured in, each works to which the notice applies (including if available the copyright registration number);
- (3) a brief statement reasonably identifying the grant being terminated;
  - (4) the effective date of the termination;
  - (5) the name, actual signature, and address of the person executing the termination.<sup>79</sup>

In the case of works consisting of a series or containing characters, special care has to be taken to list separately each and every work in the series or all works in which the character appears.<sup>80</sup> A complete copy of the termination notice must be recorded with the Copyright Office before its effective date of termination, and such recordation must be accompanied by a statement setting forth the date on which the notice of termination was served and the manner of service (unless the information is already contained in the notice)<sup>81</sup> and by the prescribed fee.<sup>82</sup>

The Section 304(c) termination right is inalienable and unwaivable,<sup>83</sup> but further grants may be made after termination. An agreement to make a further grant may be made after the notice of termination has been given (but before termination is effective) if that agreement is made between the author or designated

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<sup>79</sup> 37 CFR §§201.10(b)(1) and (c)(1), (4). A duly authorized agent may also sign the notice but care should be taken to clearly identify the person(s) on whose behalf the agent is acting. 37 CFR §201.10(c)(3).

<sup>80</sup> See *Burroughs v. MGM*, 491 F. Supp. 1320 (SDNY 1980); 519 F. Supp. 388 (SDNY 1981), *aff'd*, 683 F.2d 610 (2d Cir. 1982) (a notice of termination listing 35 titles (including the first "Tarzan" story), but omitting five sequels in which the character Tarzan appeared, was found to be ineffective in preventing the grantee's continued use of the Tarzan character). Cf. Judge Newman's concurring opinion, in which although agreeing in the result, he disagreed on the effect of not terminating the five sequels, reasoning that the right to base a motion picture on those sequels would permit uses not derived from the sequels.

<sup>81</sup> 37 CFR §201.10(f)(i), (ii).

<sup>82</sup> 37 CFR §201.10(f)(2).

<sup>83</sup> 17 USC §304(c)(5): "Termination of the grant may be effected notwithstanding any agreement to the contrary, including an agreement to make a will or to make any future grant."

statutory successors and the original grantees.<sup>84</sup> This provision, erroneously described sometimes as a "right of first refusal," does not give the original grantee a right to conclude such an agreement; it only means that if such an agreement is made, it will be enforceable.<sup>85</sup>

#### Termination Under Section 203

Section 203's provisions are similar but not identical to Section 304(c), but are equally complex:

- (1) Grants covered
  - (a) exclusive or nonexclusive transfers or licenses
  - (b) executed on or after January 1, 1978
  - (c) by an author
  - (d) as to any work
    - (i) created before or after January 1, 1978;
    - (ii) subject to common law copyright (§303);
    - (iii) in first-term copyright (§304(a));
    - (iv) in renewal term (§304(b))
- (2) Persons who may exercise right
  - (a) the author or a majority of the authors who exercised it (§203(a)(1));
  - (b) if the author is dead, his or her right may be exercised by (or if the author was a joint author, the author's interest may be "voted" by) majority action of the owners of more than one half of author's termination interest, such interest being owned as follows:
    - (i) by surviving spouse (if no children or grandchildren)
    - (ii) by children and surviving children of deceased child (if no surviving spouse) per stirpes and by majority action or
    - (iii) shared, one half by widow and one half by children and deceased child's children.
- (3) Effective date of termination (§203(a)(3))
  - (a) designated time during 36th through 40th year after grant or
  - (b) if grant covers right of publication, designated time during five year period beginning on the earlier of the following dates:
    - (i) 35 years after publication
    - (ii) 40 years after grant.

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<sup>84</sup> 17 USC §304(c)(6)(D)(1978).

<sup>85</sup> Bourne v. MPL Communications, 675 F. Supp. 859 (SDNY 1987), 678 F. Supp. 70 (SDNY 1987).

- (4) Manner of terminating  
 (a) written and signed notice by required persons to "grantee or grantee's successor in title" (§203(a)(4))  
 (b) specification of effective date, within above limits (§203(a)(3))  
 (c) form, content, and manner of service in accordance with Copyright Office regulations (§203(a)(4)(B); 37 CFR §201.10)  
 (d) recordation in Copyright Office before effective date (§203(a)(4)(A))
- (5) Effect of termination  
 reversion to author, authors, or others owning author's termination interest (including those who did not join in signing termination notice) in proportionate shares (§203(b)).
- (6) Exceptions to termination  
 (a) work made for hire are not subject to termination;  
 (b) dispositions made by will are not subject to termination;<sup>86</sup>  
 (c) derivative works prepared under a transfer or license executed prior to termination may continue to be utilized, but with no right to make a new derivative work (§203(b)(1))  
 (d) rights that arise under other federal statute or under any state or foreign law are not affected (§203(b)(5)).
- (7) Further grants of terminated rights (§203(b)(3))  
 (a) must be made by same number and proportion of owners required for termination, then binds all (§203(b)(3))  
 (b) must be made after termination, except, as to original grantee or successor in title, may be made after notice of termination (§203(b)(4)).

The key distinctions between termination rights under Section 304(c) and 203 may be summarized as follows:

Section 304(c)

Section 203

Grants covered

Before January 1, 1978

On or after January 1, 1978

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<sup>86</sup> See *Larry Spier, Inc. v. Bourne Co.*, 953 F.2d 774 (2d Cir. 1992) for a discussion of this provision.



By author or other "second proviso" renewal beneficiary

By author<sup>87</sup>

Of renewal right in statutory copyright

Of any right under copyright

Persons who may exercise

Author or majority interest of statutory beneficiaries (per stirpes) to the extent of that author's share; or

Author or majority of granting authors or majority of their respective beneficiaries, voting as a unit for each author and per stirpes

In case of grant by others, all surviving grantors

Beginning of five-year termination period

End of 56 years of copyright or January 1, 1978, whichever is later

End of 35 years from grant of, if covering publication right, either 35 years from publication or 40 years from grant, whichever is earlier

Further grants

Grantors are generally tenants in common with right to deal separately, except where dead author's rights are shared, then majority action (per stirpes) as to that author's share

Requires same number and proportion as required for termination

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<sup>87</sup> The reason for limiting the Section 203 termination right to the author was explained as follows in the Register of Copyrights' 1965 report, "as a result of the present renewal provisions, a large number of binding transfers and licenses covering renewal rights have been executed by the author's widow, children, and other statutory beneficiaries, as well as the author himself. We believe that, for example, where the author's widow was the proper renewal claimant but had previously executed a transfer of her renewal rights, she should be able to gain the extended term after the present 28-year renewal period is over." SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW: 1965 REVISION BILL, 89th Cong., 1st Sess. 96 (House Comm. Print 1965).

Section 203 also poses the following conundrum in its interrelation with Section 304(a). Works first copyrighted as late as 1977 enjoy both a termination right and a renewal right. If the author's renewal contingency does not vest, there may be no termination right at all, since post-1977 grants by other renewal beneficiaries are not terminable under Section 203. Moreover, suppose a grant is made in 1978 by an author who later decides to terminate at the earliest possible moment. To exercise the 35-year termination right in 2013, the author may give notice 10 years earlier, in 2003. Although Section 203 provided (as does section 304(c)) that the future rights to be terminated "vest" upon service of such notice, the renewal provision still must be taken into account, since 2003 is only the 25th year of the first term copyright. If the author dies shortly after service of the termination notice and the author's widow(er) renews two years later, what is the effect of the author's termination notice?<sup>88</sup>

The astonishing complexity of these provisions amply demonstrates why they have not served their purpose of permitting authors and their families to get a second bite at the apple, despite Congress's 86 year effort to do so. There is no reason to perpetuate such an obviously flawed system. The solution is simple, obvious, and effective: vest the proposed new 20 years directly in the author or his heirs.

#### H.R. 989

H.R. 989 seeks to extend the term of copyright protection by adding on an extra 20 years for both "old act" and "new act" works. New act works by individuals will go to life of the author plus 70 years. New act works that are made for hire, anonymous, and pseudonymous works and old act works will go to a term of 95 years from first publication, or 120 years from creation, whichever occurs first. The basic rationale for this increase is the reciprocal nature of the European Union's 1993 term directive.

In order to harmonize the various laws of its member countries toward the goal of a single market without (internal) trade barriers, the European Union ("EU") has issued a number of directives establishing a single law for all EU countries.<sup>89</sup> Some of these directives have been in the field of intellectual property, including copyright. In the case of term of copyright protection, most EU countries have a term of life of the author

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<sup>88</sup> See Dreben, Section 203 and a Call for a Hurried Review, THE COPYRIGHT ACT OF 1976: DEALING WITH THE NEW REALITIES 229, 232-233 (N.J. Copr. Soc'y 1977).

<sup>89</sup> The directives are not self-executing: they must be implemented by domestic legislation in each country.

plus 50 years, the 50 years being intended to benefit the author's children and grandchildren. A few EU countries, however, have a term of copyright longer than life plus 50, at least for certain categories of works, such as musical compositions. Given these differences in term, the EU had three choices: (1) do nothing, allowing different terms; (2) issue a directive requiring all member countries to follow the predominant life plus 50 term (also found in the Berne Convention and in the GATT agreement); or, (3) issue a directive requiring all member countries to adopt the higher term found in the minority number of countries.

The first option was clearly undesirable because it would perpetuate the very sort of inconsistencies that directives are intended to eliminate. The second option was also believed undesirable because it would take away protection from authors in countries that granted a term longer than life plus 50.<sup>90</sup> Accordingly, the third option, harmonizing the term of protection up was chosen. The EU's October 29, 1993 directive on the term of copyright thus establishes a basic term of copyright of life of the author plus 70 years. The directive is to be implemented by EU member countries by July 1, 1995. However, like past EU Directives, most member countries will take years after that date to actually implement the directive. France has yet to implement the 1991 computer program directive. Few countries have implemented the term directive, and thus internationally, there is no reason precipitously to pass a bill this session of Congress.

With respect to the question of the term granted works by authors from non-EU countries, Article 7 of the directive essentially states that works from non-EU countries, such as the United States, will be given in the EU the term of protection granted by the non-EU country, and not the term granted by the EU. Thus, if the United States grants a term of life of the author plus 50 years, works of U.S. authors will receive that term in the EU and not the life plus 70 term EU authors enjoy. On the other hand, if the United States grants a term of life of the author plus 70 years, works of U.S. authors will receive that term in the EU.

Music publishers, the estates of music composers who published songs in the 1920s and 1930s, and others have argued that U.S. law needs to be changed so that they may take advantage of this extra 20 years protection in the EU. My concern is not so much with going to a life plus 70 term (aside from the music publishers' Section 203 proposal), but with how, for old act works, authors can be

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<sup>90</sup> See Preface to the Directive, paragraph (9): "Whereas due regard for established rights is one of the general principles of law protected by the Community legal order; whereas, therefore, a harmonization of the terms of protection of copyright and related rights cannot have the effect of reducing the protection currently enjoyed by rightsholders in the Community... ."

better protected than they currently are in H.K. 989.

As discussed above, the basic term of copyright in the United States for works created before January 1, 1978 is 75 years from the date of first publication, but it is important to realize that this 75 years is not an undifferentiated period, but is instead an aggregation of 28+28+19 years, with the 19 years having been added by the 1976 Act. Congress, in drafting the 1976 Act, considered converting, retroactively, the 1909 Act's cumbersome 28+28 term to a term of life plus 50 years, but declined to do so because of the argument that this would be unfair to transferees who had purchased both the original and renewal copyright terms by assignment from authors: switching to a life plus 50 term for these already assigned works would, it was said, would deprive them of their bargain, i.e., to exploit the work without the author's further permission during the "full term" of copyright, which was at that time 56 years. As a result, for "old act" works (works published before January 1, 1978), the 1976 Act continued the 1909 Act's structure of measuring the term of protection from publication, rather retroactively providing them a life plus 50 term. See Section 304 of the 1976 Act.

In my opinion, the failure to convert to a life plus 50 term for old act works was a mistake and confused two different issues: the first being how to measure the term of protection, the second being the need to honor a transferee's contract to exploit a work for a maximum of 56 years. This unfortunate decision has caused U.S. trade negotiators innumerable difficulties overseas as they attempt to persuade foreign countries that we want them to give our works -- old and new-- a life plus 50 term. even though we don't give our works (or theirs) that term in the case of old act works. The trade negotiators gamely argue that 75 years from first publication is the actuarial equivalent of life plus 50 years, but this is met with skepticism, skepticism that was eminently justified before the end of 1992 since before that date if a proper renewal application was not filed, the author would only get a 28 year term. I have heard that some foreign countries are refusing, in their GATT retroactivity legislation, to give U.S. works a life plus 50 term, and instead are proposing to give them as little as 20 years based on our failure to give their pre-1978 works a term of life plus 50. At the end of my statement, I outline an amendment in the nature of a substitute to H.R. 989 that would take care of this problem by going to a life plus 70 term for pre-1978 works, yet would still honor transferees' contracts.

There are, of course, some authors such as those in the Amsong group, who will benefit domestically and internationally from H.R. 989 as currently drafted because they can afford to employ a lawyer to timely file termination notices. But there also are a significant number of authors under H.R. 989 as currently drafted who will not fully benefit because they cannot terminate

transfers for the 20 years granted under the bill. For these authors, the extended copyright granted in the bill will irrevocably vest in a transferee, even though the transferee did not bargain for the extra term. In fact, all the transferees ever bargained for was a copyright term of 56 years.

Here's why this will occur. There is no special termination of transfer right for the new 20 years granted old act works in H.R. 989. Instead, the bill will apply the existing termination right in Section 304, or will it? Because the time limits for termination have not been amended, for works first published between 1920 and 1933 (coincidentally important years for the Amsong group), the five-year window for termination has already passed. These authors or their children can't terminate even if they want to. And with each successive year, authors or their children will lose the ability to terminate for another year's works: in 1996, authors and their children will no longer be able to terminate for works first published in 1934.

This manifest unfairness can be prevented by vesting the extra 20 years solely and directly in the author or his or her heirs. Purchasers of copyright can then renegotiate contracts and pay for the real value of the extra 20 years, rather than reaping the wholly undeserved windfall of a contract negotiated 75 years ago. This can be done either by amending the bill to simply vest the extra 20 years in the author, or, by going to a term of life plus 70 for these old act works (as well as for new act works of course). What follows is my life plus 70 proposal.

#### Proposal for a Term of Life Plus 70 for All Works

- There are a number of ways to amend the bill to protect authors. One way would be to convert to a term of life of the author plus 70 years (if the decision is made to extend the term) for old Act works, while still preserving the ability of the publisher to exploit the work according to the term of the original contract. This should also include the 1976 Act's extra 19 year term for works for which the author had to terminate the transfer between 1978 and 1995, thereby not disadvantaging transferees. (The author would still have the right to terminate where currently available). This would, importantly, accomplish other objectives: it would prevent authors from outliving their copyrights, it would give the new 20 years to authors, it would harmonize U.S. law with EU law, and it would help our trade negotiators get a term of at least life plus 50 in foreign countries' GATT retroactivity provisions.

Here's how the proposal would work in practice. Assume in 1920, an author transferred his rights in both the original and renewal terms to a publisher. The publisher published the author's

book in 1920. The author died in 1950.<sup>91</sup> The work was renewed in 1948. Under the current regime, the copyright lasts for 75 years, expiring in 1995. Under a life plus 50 regime, the copyright would expire in 2000; under life plus 70 in 2020.

The original contract between the author and publisher for the 56 year term granted in the 1909 act, as well as the 19 years added in the 1976 act, would be honored in the proposal, meaning that the publisher would receive the full benefit of its contract for 75 years -- until 1995. In 1996, the copyright would vest automatically in the author's heirs for the duration of the copyright -- 2020 under the life plus 70 year regime. The author's heirs would thus be free to negotiate a contract for the remaining 25 years on the copyright.

This approach would give to purchasers of copyright the full benefit of what they had bargained for with the author, plus the windfall they received in 1976. At the same time, it would place U.S. law in harmony with the rest of the world and would give to the author or the author's heirs the benefit of any extension of term consistent with Congress's power to grant copyright to benefit authors.

#### Mills Music v. Snyder

The 19 year termination right for old act works granted in Section 304 of the 1976 Act contained an exception for derivative works created under a grant from the author or transferee before termination. This exception permitted, for example, a record company that had licensed from a music publisher (which had itself been licensed by the composer) the right to make a record of a musical composition to continue to sell the records after termination, provided, of course, it continued to pay the previously agreed to royalties. These derivative royalties were, however, to go 100% to the author after termination. In Mills Music v. Snyder,<sup>92</sup> the Supreme Court, in a 5-4 opinion held that the author does not get 100% of the royalties but has to share them with the music publisher according to the terms of the original

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<sup>91</sup> Because in a number of cases, a 75 year term provides a longer term than life plus 50 regime-- in the hypo given in the text if the author died before 1945 -- there will need to be a transitional section continuing copyrights presently protected by virtue of existing 75 year term, otherwise the result would be to place into the public domain works that are currently protected. An alternative to a transitional section would be to provide an "either/or" way of measuring term as in current section 303. Under such an alternative, the author or the author's heirs would receive the longest term possible -- either under a life plus 70 or under the current law.

<sup>92</sup> 469 U.S. 153 (1985).

contract.

The Copyright Office, which had drafted the section in question, passionately argued that the Supreme Court was wrong and had cheated songwriters out of an important part of the 1976 Act deal. A bill was introduced by Mr. Berman to overturn this erroneous decision, but it was not passed. H.R. 989, which is being pushed by music publishers, should correct Mills Music by requiring that the author receive 100% of the royalties. Music publishers should not reap the unfair advantage of Mills Music for yet another 20 year term extension. Failure to reverse Mills Music will compound the injustice by depriving authors of the derivative royalties Congress intended them to have during the new 20 years.

### Reciprocity

H.R. 989 is not reciprocal; that is, it grants a term of life of the author plus 70 years to works of foreign authors without requiring the foreign country to grant U.S. authors the same term. Thus, Japanese authors would enjoy a term of life of the author plus 70 years in the United States, while U.S. authors would only get life of the author plus 50 years in Japan. If the motivating force behind H.R. 989 is the reciprocal provisions of the EU term directive, it is perplexing that H.R. 989 is not reciprocal too. Reciprocal protection beyond life plus 50 is, moreover, consistent with -- even required by -- Article 7(8) of the Berne Convention.

Thank you for the opportunity to testify, Mr. Chairman.

# Billboard

THE INTERNATIONAL NEWSWEEKLY OF MUSIC VIDEO AND HOME ENTERTAINMENT

IN MUSIC NEWS



**MNB Emanates R&B Edge**  
On Work Group Release  
SEE PAGE 10

JUNE 10, 1995

**YOU READY FOR THIS?**

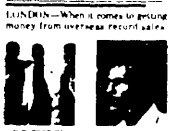
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News From The Extreme Issues  
The FBI'S EYES global  
competition of extreme sports

Extreme Blue by  
THE STY  
BANDS IN TOWN  
BONNARD  
SHIRAZ  
HONORARY  
THE HAPPY  
POSTER CHILDREN  
THE GLE  
S WILLS  
DIEDY (SABE  
THROUING ROCKS

## The Thorny Issues Of Int'l Royalties R&B Acts' Problems Just Scratch Surface

BY DOMINIC PRIDE



**RHYTHM & BLUES FOUNDATION**

older R&B artists whose repertoires have weathered the test of time outside the U.S. face a difficult and daunting challenge.

Some of reasons by early R&B jazz, and most artists have worked in the last decade, powered by the CD, which spawned a healthy trade in collection, budget sets and budget compilations.)

Yet there are several factors that can prevent older artists or their heirs from enjoying the benefits of new re-

issues. These include:

- Nonexclusive contracts or those that don't address the artist's interests.
- National use of artists' masters.

rights issues.

In the U.S., more recent composers are making attempts to rectify some of the historical injustices suffered by



**as "tax shelters."**

- Inequitable or nonexistent publishing contracts for songwriters.
- Piracy and unauthorized use of artists' masters.
- Masters of licensing by pirates.
- Artists' licensing by legitimate



**R&B artists**

Royalty rates of 10% are being set, while unrecovered balances are being written off. Billboard March 11: These actions have engendered sufficient debate about the water issue if it surfaced on page 10.

## Ice's Lion Reigns As Calypso King

BY ISAAC FERGUSON



**Ice Records marks Ice's 10th year as a**

**NEW YORK**—The June 27 release of Ice Cube's "The Lion King" is a

In 1984, Ice Cube's "The Lion King" made his

**BATMAN FOREVER**

THE 11th ANNUAL  
OSCAR V. HISTORY  
BY JOHN BERRY  
THE 11th ANNUAL  
OSCAR V. HISTORY  
BY JOHN BERRY

## Radio Station Cap Elimination Likely

BY BILL HOLLAND

WASHINGTON, D.C.—Radio industry officials and station owners are optimistic that the Senate this month will accept a proposal to eliminate a cap on the number of radio stations that can be owned by one person.

The House Committee on Commerce and Transportation has passed a similar bill, which would allow the number of stations to be owned by one person to be unlimited.

Industry officials say they expect the Senate to pass the bill in the next few weeks.

## ILLINOIS ACTS ENHANCE THE CHICAGO SCENE

BY CARRIE BORZILLO

With just a few months left in its second year, the Chicago

BY LARRY FLICK

Pop's split success. Seeking



**HUM**



**SACRIFICING POP**

Hum has become one of the biggest and most successful acts in the city.

It's a sign of the city's growing music scene.

Pop's split success. Seeking

## Luaka Bop Revives Peru's Black 'Soul'

BY PAUL VERRA

NEW YORK—Although it is still an



**Luaka Bop**

A thriving Afro-influenced musical



**BILLBOARD INTERNATIONAL**

**HEATSEATERS**

**Blessid Union Of Souls**  
'Home' Alone At No. 1  
SEE PAGE 10



NEW ALBUM COMING JUNE 20TH

## VAN MORRISON DAYS LIKE THIS

DAYS LIKE THIS... PERFECT FIT... ANILENT HIGHWAY



## THE THORNY ISSUES OF INTERNATIONAL ROYALTIES

(Continued from page 1)

problems for older artists and managers, as well as the benefits of contracts that form the basis of the new generation of music business. R&B artists who produced an increase in sales rates for their artists in 1992, as well as their affiliates to all new available sales of these artists under all South West contracts that raise of 100% in royalties in February, as well as all international sales by select artists, some of the companies say they are making it in R&B artists and their heirs to all terms of their business.

Executives at MCA, Atlantic and Rhino, which has all reflected their profit structures for older artists in the U.S., could not be reached by press time to discuss their international efforts.

Such moves will fight some of the more blatant abuses of recent contracts, power that remained in the hands of R&B and the artists and their estates will benefit. Yet for many, the issue of international royalties often neglected and in some instances never raised.

For many U.S. based R&B labels operating between the end of World War II and the end of the '70s, the international marketplaces had to be treated as "one of the rules" in terms of generating revenue.

When contracts between labels and artists expired, it was rare to find either men or women domestic royalty rates. Hence from sales outside the U.S. was rarely addressed in contracts, and artists were usually unaware that for non-royalty records.

Even today, many artists are not aware of what rights they own or that their recordings are being exploited outside the U.S.

Says Lela Thomas, a still active New Orleans-based singer who had several hits for Motown, "I don't know about foreign royalties. I see them now and then when the statements come in, but I have no idea whether the amounts are correct."

Because many artists have never been represented by a manager, they do not always know the value of their returns outside the U.S. Says Floyd Lefkowitz, who works with Sire's Sire Artists Association as financial manager for B.B. King, "There are a lot of hard-luck stories. Many artists and their estates don't know where to go to find out about foreign income."

As King will reverts and tours in terminal, he is followed from most of the R&B generation "B.B. was an exception," says Lefkowitz. "We have an edge, and he's not the typical blues artist."

Before King signed with Sire, he was with Atlantic. The new setting to royalties from Motown Records in 1967, so we signed and got half on everything back.

Are Records, which was used to go to the Motown catalog in Europe, has also taken action against those it believed were infringing copyrights, many of whom are magazine publishers giving away free CDs with their publications.

Thomas Boretz, CEO of Los Angeles-based Atlantic, leaving Atlantic on behalf of artists in their estates, including the late Brother Jack McDuff and the Sherman, Gene Pitney and Ray Charles, as well as representing acts such as the Hollies/Dovey/Hollies label, is a prominent regulatory figure in international copyright for masters in the U.S. and Continental Europe.

Boretz says many of the problems R&B artists are now facing in their international markets is the same factors

that gave them a raw deal in the U.S. "It is the old scenario: you don't get what you deserve, you get what you negotiate. Many of the early artists did not have a good negotiating strength and suffered as a result of that for the rest of their lives."

For older R&B artists actually negotiating rights to either the recordings or their work or the publishing in the U.S. and could lay claim to international rights.

"Says Neil Sloman, music historian, writer. "In many instances, the artists were looked after and got many of payments in kind. Many of them were uneducated and were unaware of the fact they were owed royalties as well."

In new standard practice for artists to initiate royalty audits if they feel their labels are not handling over their fair share of sales. But audits are expensive and many older artists believe it would not be worth the effort.

Says A.C. Liechtenhan, who manages Martha Reeves, Martha & the

When artists and their heirs cannot find an EMI label, one of the factors "the money is put into an account while we make attempts to find these artists," Hughes says. "Many of them make themselves known to us and most have been easy to find." Hughes says the new royalty rates, which he will not disclose, include the money the major label receives from licensing their masters to third parties.

EMI has put out some "hand-of-compliments" from the Roulette label to the majority of the estate's beneficiaries for Europe in U.K. based Sound Records, a label owned by U.S. Com Music.

Sound managing director Bob Fisher says, "We're selling records to collectors. We're specialists and there aren't many specialists around. What we can do with some of these titles, EMI isn't interested in. Nevertheless, we are talking about putting out a few thousand copies of most titles, so the license fees are not huge."

## EDITORIAL All Must Address Past Moral Failures

This is indeed an era in which one form of recognition has become the great R&B and blues artists of the past. In a startling revelation of the personal genius of Robert Johnson, his Columbia recordings, destined back more than 80 years, became a big chart success in 1960, and, more recently, the best-selling "Fried Chicken" record, best featured, as he left his subject matter, a theological warning of R&B masters. In addition, numerous CD box retrospectives, assembled with loving scholarship, are permanent documents of a crucial, remarkably fertile creative era in American music. And readers of Billboard's Contemporary page may recall a piece by BMI president CEO Frances Preston in the May 2, 1992, issue, when, calling attention to the industry's charitable endeavors, she pointed to the Rayburn & Bluse Foundation's mission to help R&B artists to meet, especially through the Dr. Thomas Phelan Foundation Program, the one noted how the foundation's Phelan Awards "have brought the world's attention to artists who a

music has been overlooked or forgotten, honoring them with a monetary gift as well."

Badly, the music industry is only beginning to come to terms with broad-based, broad-based issues regarding the welfare of these artists.

One of the music industry's best-kept secrets for decades remained an "off" period of economic stagnation, first perpetrated by owners of masters and being repeated by equal artists and songwriters who initially made their way (if not much of a living) in the R&B and blues fields.

Among them were acknowledged presence on today's pop music, which generates a major portion of a multi-billion-dollar music industry in the U.S. and further billions in other markets. Yet, many accustomed to legal, though mostly questionable, contractual obligations. Others, through their own ignorance, ineptitude, or corrupt representation, accepted pitiful fees at signing away the product of their creativity, with little knowledge that they could have retained a measure of con-

tractual ownership at recent renegotiations. As a result, licensing income from third parties has in some instances gone directly into the labels' coffers and has not been directly subject to the will of the artist, even to the recent contracts.

"The story from the basic contracts of the contract that most artists signed negotiated long before masters began to have managers and the international marketplace was thought of as a 'hand-off' matter source."

Talk at all about artists being given cash or gifts in return for their royalties on domestic sales or being told "it was your money, you give the check?" In his autobiography, Little Richard recalls how, when the issue of royalties was raised, Duke Pearson (not Duke Bowen) punched him so hard that he developed a hernia.

Not all old labels were the same, says Royce Armstrong, managing director of Ace. "The people running these labels ran from the criminal to the

attracted to their work. During financial recognition in the past of their careers, they were also denied future economic protection for their heirs and their families. With the CD and digital music recording technology, successor companies of those who failed to do the right thing are making new dollars from the sale of these retrospectives."

Through the efforts of individuals and organizations, the laws led to the industry's outcry against the worldwide practices of the past, some of these artists or their heirs are more justly enjoy royalties once denied to us by a greedy few who withheld proper remuneration.

However, there is yet to be a universal recognition of commitment among those who continue to benefit from legendary R&B and blues catalogs, many of which are under the banner of major music companies. The way of the past are no longer records that can be kept from their artists and their heirs. Voluntary admission of these moral failures is a clear obligation.

Very "conscious," he says, "I met some real masters and I listen in my line who always attempted to paying their royalties."

Armstrong adds it would be foolish to assume that all labels had the same attitudes toward international sales. Many were actively engaged in complex and widespread international licensing. "If you look at someone like the American Home label, they were sending things all around the world. It says 'Sometimes the only remaining tape can be in EMI vaults in Brazil.'"

Yet for some labels, the concept of royalties was so abstract enough without introducing an international dimension.

**SUBSTANTIAL AMOUNTS OWED**  
Apples Beagle, founding executive director of the Rayburn & Bluse Foundation and attorney at Vernon, Lippert, Barnhart, McPherson and Ward in Washington, D.C., admits that there may be substantial amounts owed to artists as a result of the inequities of their original deals.

"I'm sure over the years the licensing catalogs have been no more just than

the attitude toward domestic sales," he says. "While negotiating the contracts, Beagle says he has structured them so that in determining the amount of royalties, he has been in the driver's seat."

The final stage of this licensing is, should the right parties have seen the Atlantic and Warner, it proved a most important aspect of the licensing because of the complexity of accounting between one division of Warner Music operations and another. "I just got tired of asking and I'm sure that business is best to them. Licensing is a very important aspect of this business, but few people have the time to try and understand it quite simply. I just don't have another 10 years to go after the license."

Despite the foundation's success, success there says that an international effort for better royalties as part of the agenda. Instead, it is long-term goals for more in the streets of manufacturing for artists who have experienced success more recently. Having some success with royalty management of artists from the '60s to the '70s, the foundation is likely to try to help back musicians from the '70s and '80s who often found it hard to do so.

When the music of many R&B artists was reissued by the U.S. and other labels, it was rarely done. "There was never a reference to licensing money in the contracts I've seen," says Beagle.

"I don't know how many of the original recordings were used as the basis when the master was reissued on CD."

Until the recent reforms were instituted by labels artists ended up being paid on the basis of singles or the album as a unit per record. "That's certainly not fair but that's the reality," says Liechtenhan. "Some labels had provision for 25-year contracts with these artists and after that they could receive payment."

"The amount of licensing money was still far from the best of practices when contracts were drawn. Meanwhile, some independent labels were not above keeping the same records to several different labels overseas simultaneously. Even when the larger catalogs fell into the hands of major labels in the '70s and '80s, it was not unheard of for them to license R&B masters more than once on an exclusive or non-exclusive basis for overseas territories. At the time, labels were more concerned with the eventual potential of current repack-

As a result, outside the U.S. it is not always simple to establish a clear ownership to what material, let alone to exert moral or legal pressure on those parties to change their attitudes toward artists' royalties. Efforts to establish a chain of ownership almost inevitably become bogged down in a legal quagmire. When cases do come before the courts, it is not uncommon to find both the plaintiff and defendant claiming ownership from license deals made decades ago.

Sometimes courts provide clear indication of whom they believe to be the rightful owners. Last year, Chubb, Checker and Klaten the U.S. won a significant court victory, when ruled that they had the rights to exploit some 70 titles from the Domino catalog. In a judgment in the Texas state court, Chubb and Klaten were awarded \$611,000 in damages, as well as the

(Continued on page 37)

Vandella, and Billy J. Kramer. "Sure, you can have a lawyer, if you have the money to do that, and track everything around the world. How many older artists can do that? It's insane."

**LAGGED LABELS CAN HELP**  
Compulse still should do it as possible to make sales outside the U.S. However, the accumulation of a time lapse by larger labels can have a beneficial effect. And provided that a measure of master rights is not to dispute, it is a relatively straightforward matter to pay artists.

EMI, which bought the Roulette catalog in 1989, says the major label label has had no doubts if benefited artists. David Hughes, now EMI's director of communications, used to head the company's strategic marketing division in the U.K. and was involved in the Roulette purchase.

"There was very little documentation as we put up papers with royalty rates for those artists who didn't have a written contract," says Hughes. "These contracts were more generous than the ones they had to sign the last."

Most of the time, the royalties from the licensee are paid on the basis of an advance for the minimum number of copies the record company hopes to sell, and on a percentage basis after that.

Often, the structure of a sales can bring about significant changes in artist royalties.

Japan-independent Nippon Columbia bought the entire Savoy Records catalog in early 1991 and it says it has put out R&B releases, mainly out side Japan, through its Devon sub-label.

A&R staffer Atsushi Hashimoto says, "The problem with the heavy deal was that sometimes Savoy didn't pay royalties to artists. For example, Dexter Gordon's widow saw the story in Billboard about our Savoy releases and wrote to us asking that he be paid the royalties."

Hashimoto says Nippon Columbia is now paying Gordon's widow the requested royalties for sales in Japan.

Yet such moves don't bring up little lawsuits for artists. Despite the fact that many artists ran up significant un-

## THE THORNY ISSUES OF INTERNATIONAL ROYALTIES

Continued from preceding page

right to protect unmanufactured use of the masters (Billboard, Feb. 26, 1981).

When there is a real algebraic question over the ownership of a catalog or a case problem.

Almost every month at least one fresh lawsuit appears in the Music Court here, with one party claiming to be a right to catalog masters has been assigned.

One of the most bitter disputes has been waged over the international rights to the Chess catalog. Reunited-Records claims it has manufacturing rights to exploit the repertoire in the U.K. and in October 1980 brought libel proceedings against MCA because of statements that appeared in the trade press. MCA Records Inc. and the major U.S. subsidiary, MCA Records Ltd., filed a joint action against Charlie Records Inc. in February 1981, alleging infringement of copyright on 20 recordings including works by Chuck Berry, Sonny Boy Williamson, Muddy Waters, and Buddy Guy. It is asserted that the trials will take place next April. There is also trademark action relating the Chess name and logo in France and the Benelux.

The increase in such cases does not necessarily represent an overall infringement of rights. It is more a sign that the money to be made from catalog masters in the uncharted waters of the U.K. is so high that it is worth defending even when it involves costly and protracted lawsuits.

MCA, for example, says it sold some 800 copies in the U.K. of a home video of compilation "The Greatest Artists" which sold for more than 12 pounds (£9.20).

### THE BUDGET DIAPY

Many of the disputes in the R&B budget market stem from the power struggle of the U.S. record industry, before major labels tightened their hold on the business.

In instances where labels have acted in tandem to the rights and needs of artists, the international income stream can still be slowed to a trickle by those just within and those outside the law.

The CD boom of the '80s and '90s produced high demand for catalog masters, especially among older buyers. The market is essentially split into two distinct parts. First, there are the high-priced, well-presented titles that come complete with extensive liner notes and are aimed at collectors, and retail for \$20-\$80. By contrast, the budget market is characterized by "cheap and cheerful packaging" and single discs retail for \$4 to \$6 and four-CD sets at about \$14.50.

Art's Armstrong says that the company has some 900 titles, most of them selling at a wholesale price of 750 pounds (£11.80), making them a full-price product. "The most we can expect to sell in the U.K. is in the tens of thousands, and if we were to sell any less than 1,400 we'd be disappointed."

It would be wrong to suggest that the budget market is one in which royalties are as a matter of course, but it is a complicated and impenetrable business, and one in which artists and their heirs may be losing significant sums.

In the U.K. alone, the budget sector, which is mostly based on older catalog, last year was worth \$9.9 million pounds (£14.5 million) or 11.1% of the market value, and 18.9% of U.K. trade revenue, or \$3.3 million, says the International Music Publishers' Association. In four years, the market has more than doubled. In 1980 the budget market represented 8.1% of units and 3.9% of sales value.

The IFPI does not keep details of that proportion of sales versus R&B revenues, but a brief survey of titles in London records and clearance rates suggests that 40% to 50% of budget repertoire on sale is by R&B and jazz artists. The most common names on the racks are Jackie Wilson, the Jolly Brothers, Ella Fitzgerald, Fats Domino, Lonnie Johnson, Muddy Waters, Earl Bostick and John Lee Hooker.

In most instances, the appropriate rights are owned by the rights holders, although many informants agree that the market is not clear.

Estimates of the annual income to the new industry through catalog masters range from conservative \$100 million to \$200 million and a significant proportion of a R&B repertoire from the '50s, '60s or '70s. At first sight it is most surprising to discover that a parcel material and what is legitimate here the appropriation "grays." There is a great deal of uncertainty about the legal status, with the unexpected as well as the unexpected one and up by being as the unscrupulous can and up by being as the unscrupulous can.

Master suppliers provide licenses in various of ways that they claim are legitimate, but in some instances the original artists. The DAT does business records may contain some recordings, but in some instances the original artists. The DAT does business records may contain some recordings, but in some instances the original artists.

It is not uncommon to find in some of the unscrupulous can and up by being as the unscrupulous can. It is not uncommon to find in some of the unscrupulous can and up by being as the unscrupulous can.

### TAX DEDUCTIONS AND PROTECT

The problem became significantly worse after the Reagan administration created a tax loophole for "cultural investments" in the early '80s. The definition would include the acquisition of a sound recording master irrespective of whether it was actually turned into a manufactured product. Because of the tax advantages, many artists sold their master rights to shelter companies and were able to realize significant sums.

Many of these companies changed hands rapidly, with each sale representing a 10% tax break. The paperwork created at the time of sale is now used to dispute foreign companies that wish to return the budget market. While the DAT has licenses revenue may compare to the track listing on the paperwork, the masters can be a combination of bootlegs and rerecordings.

The paperwork can also be used as the basis for supposedly legitimate title documents that accompany the DAT. When the masters were put into tax shelters, the new companies were able to grant licenses to exploit a certain number of tracks in a certain order for a given territory. Thousands of such nonexclusive licenses were granted, often using the same tracks for the same territory, but in a different order. The licenses issued by the shelter companies expressly forbade altering the routing order and also prevented the selection of size or two choices sought from the compilation.

In reality, these restrictions are frequently ignored, and many licensing companies use documents from these

companies as proof of chain of title. To unscrupulous international operators, all appear to be in order. The tax loophole was closed by 1988, but before the same 100-plus masters had been licensed several thousand times.

Some U.K. representatives of the repertoire, many of the rights to manufacture the material were based on these licenses, although the sheer number of licenses in existence means that it was possible to float the original terms without much fear of apprehension.

This makes the revenue business a place where this experts can take advantage of the market. R&B and rock titles from older Japan, are finding clean masters is difficult. "Some times it has to go through five or six people and it can take up to two years. With older recording sometimes nobody knows who holds the rights. Sometimes we give up, but if we really want a recording, we'll keep trying."

Says Andrew Heyn, staff lawyer at German label and distributor edition. "Great importance is attached to stating the precise title to be added as well as an acronym and administrative clause. We frequently turn down offers because the legal situation appears unworkable and administrative matters are being offered—this makes it so messy about agency copies."

The International Federation of Phonogram and Videogram Producers has a committee to study the legal situation in attacking catalog piracy. However, since the beginning of the year it has been without a full-time secretary in that area.

Margo Langford, who previously undertook catalog piracy work as IFPI, says she is presently involved in a joint venture with Green David Conroy & Co.

"No one appreciated the value of the repertoire until CDs came along. I don't think it is going to get any less popular in the future, so it is especially protecting. This is a highly important

when you transfer the possibility of it being a viable one." Langford's experience with attempting to identify recordings and her belief that there is no substitute for getting the artists involved in the repertoire work. "We've encountered various versions of license deals," she says. "Sometimes we find that the different version is actually a lampshaded original, with his added or pitch changed. Often there are other versions which we've located in which the original is the superior."

Langford believes a significant amount of product could be removed from the "gray" area of artists licensed to the material.

"The artists were able to identify the recordings immediately, such as parties star TV shows, gags, imitations and studio versions. Like expert profilers, we remember every song that we remember the mistakes that were made, that there was no opportunity to correct, or the version that was selected for the album because of its focus or highlight."

### PUBLIC DOMAIN

An added problem is that some recordings are effectively in the public domain in some parts of Europe. Germany, for example, only started protecting non-German recordings after World War II, and international recordings before that date are technically in the public domain and free of performers' rights about agency copies.

In practice, many recordings find their way into other European Union territories in some parts of Europe.

Sequel's Fisher says that is the main factor affecting his company's business. "It is really annoying when you pay for a license and still get a record, and someone else has got it for free."

In Japan, material of this protection does not apply to sound recordings issued before 1948, and many major companies release low priced CDs of mainly non-Japanese material recorded before that year, and only new to any licensing record.

It is anticipated that some of the worst abuses of catalog piracy will be eliminated when the Trade Related Intellectual Property Agreement of the GATT treaty takes effect this year. This will bring some 115 countries back into operation. In many instances, companies are pressing up against the wall in the public domain before the treaty takes effect.

The downside is that TRIPS will have a profound effect on international royalties. If TRIPS comes into effect, it will have a profound effect on international royalties. If TRIPS comes into effect, it will have a profound effect on international royalties.

In the long term, the only real way to avoid piracy is to have a strong legal system in place. In the long term, the only real way to avoid piracy is to have a strong legal system in place.

### PIRACY OUTSTANDING

Piracy outstanding some industry observers say it may be critical record labels for behavior that they see reprehensible by London's standards. In these countries, the most serious being in today's unregulated environment, the long-term survival of the industry is taken for granted.

Working in a very high risk business that would you rather have it than when the man offered it to you on the promise of a percentage of sales which you might never see."

As Art's Armstrong says, "If you were a singer from the South which would you rather have it than when the man offered it to you on the promise of a percentage of sales which you might never see."

Armstrong is preparing this article was provided by Bill Holland in Warwick, U.K. Steve McLean in LA and Wolfgang Spahr in Germany.

## WORK GROUP'S MNO AT 'NEXT LEVEL'

(Continued from page 10)

"To develop a core audience, I've Got A Little Something For You" will initially be serviced to R&B radio June 20, followed by crossover and pop stations. Work plans to service pop and R&B mixtures to appropriate stations.

Affrey admits that passing R&B air play will be the label's biggest challenge, but is confident the group will find a home. "Mainstream R&B programmers aren't automatically diametric," he says. "I've Got A Little Something For You" because of the U.K. approach to R&B. Says WQUE New Orleans PD Gerard Stevens, "They profiled me, especially have to meet your sound. If listeners like them, we'll play it."

WEDR Miami PD James Thomas says MNB will not be automatically counted out just because it is U.K.-based. "It won't be any more difficult for them than local acts, if the song is there."

However, retailers in black communities say the group may have a difficult road. Chicago independent retailer George Daniels, owner of George's Music Room, cites poor record sales of popular R&B group act A&J—his last show as an example of MNB's challenge ahead. "I thought their song 'I Should Have Got It Well for Us, But I Didn't.' The same thing happened with Color

Me Bank," he says. "Both groups did well in mainstream communities, but had rough going here." W'9 will pull a pop-sounding act every once in a while, but (MNB) going the route radio is the best way for them to do well with my customers."

Jeffery Moore, buyerto-owner of Lansing, Mich.-based, 10-store Where House Records has a broader perspective and says domestic R&B fans don't expect U.K. acts to sound like U.S. based acts.

Says Morse, "LUK I bands have more polyrhythms and overall continental flavor, although the kind of group will probably appeal more to younger folks and women in their 20s, as opposed to men."

Despite the challenges, The Talk remains optimistic MNB will appeal to U.S. record buyers. He describes the group's music as "the funk emanating out of Lyr that illuminates the blind between one's ears."

The artist says the group's vocals are strong and clean and present an authentic attitude that listeners pick up on. "Originally, we started our harmonies before we went into the studio," he says. "But once we got in and the label wanted a softer R&B sound, we didn't overlay a whole lot of parts."

"To The Next Level," released in late August. He says "Both groups did well in mainstream communities, but had rough going here." W'9 will pull a pop-sounding act every once in a while, but (MNB) going the route radio is the best way for them to do well with my customers."

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BILLBOARD, JUNE 10, 1989

# Artists & Music

## Sony, Rhino Plan Royalty Reforms For Older Artists

BY BILL HOLLAND

WASHINGTON, D.C.—Sony Music Entertainment and Rhino Records have passed a number of bills to Congress that would allow them to initiate royalty reforms for former artists whose catalog material is reissued.

The two companies join Atlantic, MCA, EMI and Universal, among others, in their efforts to get the reforms passed to their former artists still held to original contract provisions.

The Feb. 21 Sony Music reissues a letter from executive VP Michele Archangis to Tom Draper, chairman of the Division of Blue Foundation, outlining a plan to extend the reforms to more than 80 R&B performers whose work originally appeared on such labels as Columbia Epic, Okeh, Brunswick and Vocalion.

The reforms include an updated royalty fee of 10% of full retail price for the former recording artists or their heirs, and the elimination of unrecouped initial advances.

The policies, which will grant royalties as soon as possible according to Sony's Mary Ellen Aulander, senior VP of communications, will be retroactive to Jan. 1.

Robert Emmet, executive VP of Rhino Records, which owns the catalog of labels such as Roulette and Atlantic labels such as Blue Note and Warner, says the label is initiating among the least royalty reforms.

"We at Rhino have adopted the same policy as EMI in respect to the Roulette and affiliated label artists," Emmet says.

In 1992, EMI met with the industry's most experienced former publishing, PRO, and performing rights organizations for a year in 1992 at its headquarters in Irving, N.J., to discuss the music industry's needs for the 1990s and how labels, as well as former artists, can best serve the industry and artists.

The new reforms are the result of months of behind-the-scenes discussions among industry executives and board members of the R&B Foundation.

There was a segment of A&R TV's "Nightline" program on R&B reissues, but a segment on the reforms was not included.

"We are sensitive to the rights of these artists and want to ensure that all those involved are identified, listed and fairly compensated," Sony Music's Archangis wrote in the letter dated Feb. 17. "The artists affected by this [bill] are listed on page 311."



**ME On The Hill** Warner Records and Atlantic Records met with R&B chairman Jay Berman, left, and A&R president COO Barry Rosen at a VIP reception at the U.S. Capitol Building. He is to the right of Capitol Hill meeting with members of Congress on the issue of performance rights. Berman and Rosen were her hosts for the day.

## Denny Cordell<sup>®</sup> Producer, A&R Luminary, Dies

BY PETER CRONIN

It's a producer's producer, music publisher and A&R man (plus a couple) died of lymphoma Feb. 18 in Los Angeles.

Over the course of a distinguished 30-year career in the music business, Cordell played a major role in the careers of prominent artists, including Neil Young, the Mark Blue Trio, Clark Gable, the May Jukes, Tom Petty, Phoebe Snow, Leon Russell, Debra Taylor, Freddie King, Albert King, the Gap Band, J. J. Cale, Melissa Etheridge, and the Grateful



CORDELL

Deadly Cordell was the most humane, understanding, wonderful talented person I ever met in my life," says Island Records president John Barlow, who was given his first opportunity in the music business by Cordell when he was hired to work as a general promoter for Island's shelf label in the San Francisco area in 1964. "The '60s era industry where you were in the company, you had to work hard for you. It's not always had a better general reputation than in Barrow Area and England. Cordell started out as a managing promoter, worked for a brief period before joining Island. He always thought Island Records in this to him the label is now Atlantic's biggest."

Cordell left Atlantic to produce the first Moody Blues album, "The New The Moody Blues," which introduced him as a member of the music world of independent production. Cook then formed Island Records, who he produced his first album for the West and Fred Martin, the label included the smash hit "Whisper" (continued on page 31)

## Whelan Song Does Unusual 'Dance' To Top Irish Indie Son Records Seeks Alternate Promo Routes

BY KEN STEWART

DUBLIN—The perseverance of Irish indie Son Records helped to bring Bill Whelan's composition "Riverdance" to chart success in the U.K. this year.

The song, which topped the Irish single chart for a record-breaking five consecutive weeks last year, was No. 20 on the U.K. Top 40 singles chart for the week of Feb. 25. It peaked at No. 10 in the week after.

The single, which Son says has sold 100,000 units so far, was featured on the RTÉ television 1994 European Song Contest, where it was originally performed by the RTÉ Concert Orchestra, the choral group Anúna, and a team of dancers led by the Irish American duo Michael Flatley and Lisa Butler.

The single, which Son says has sold 100,000 units so far, was followed by a single, "Riverdance For You," with proceeds of its 40,000 units being donated to a charity for the Irish.

Although a runaway hit in Ireland, "Riverdance" initially failed to capitalize on its European exposure in the U.K. But Son Records pushed in

with a robust promotional campaign centered on inclusion of "Riverdance" in the Royal Variety Show last November after which it charted in Britain.

"Riverdance" to chart success in the U.K. this year. "What whole strategy was based on that show," says the label's general manager Dave Pennefather. "What we did was that we worked with a number of promoters across the U.K. with press, radio, TV, and sales team. We didn't use any agencies. I don't think that's been done before."

The label also sought a variety of outlets for the composition. "Special programs were an obvious choice because of its unique nature of the track and they used it as hooks and music was phenomenal. It was the theme for the Ireland English night match in Dublin in January."

The "Riverdance" album was released Feb. 17 on the U.K. indie K Telco label. Records at Linn, which has a joint venture between Atlantic Rec-

ords and U2 manager Paul McGuinness. Claimed manager David Kavanaugh and Barbara Galvan.

"I was in Ireland, the single has moved into 'Riverdance—The Show,'" which opened at the Ford Theatre here Feb. 6 for 27 performances.

"Riverdance—The Show" introduced by Moya Roberts, was an Irish dance event involving Irish international singers, musicians, and dancers in contemporary Irish setting.

"Part I takes an elemental look at the relationship between people and their environment, integrating Irish music, dance, and song. Part II reveals the migration of the Irish to the New World, along with a rich musical and dance tradition that was inherited by their children." A landmark in this music "Riverdance" presents the tradition of many years of Whelan's experiments in music, during which time he arranged and produced for the Irish. U2, Eurythmics, U2, Bush, the Dubliners, Hothouse Flowers, and others. Whelan directed, which just the best of a career partnership between Atlantic Rec-

**RECORD COMPANIES** Peter Asher named as CEO of Sony Music Entertainment in New York. He was chairman and CEO of Polygram Music Group.

**Julia Blackford** is promoted to VP of marketing and distribution for Atlantic Records in New York. She was director of artist national marketing.

**Susanne May** was promoted to VP of publicity for Virgin Records in Los Angeles. She was senior director of publicity in New York.

**Sony Music Nashville** promotes **Carrie Harter** as VP of marketing and artist development for Epic Records. Nashville and **Tom Latham** as VP of marketing and artist development for Epic Records. Nashville. They were respectively VP of marketing and artist development for Sony Music Nashville.

**Helen Lawrence** is named as VP of marketing for Virgin Records in Los Angeles. She was a former video producer for Warner Bros.



**Steve K** is promoted to VP of marketing and distribution for Atlantic Records in New York. She was director of artist national marketing.

**Marcelo Sultana** is appointed VP of music and business development for Warner Music Mexico. He was chief of music office for Sony Music Venezuela and Sony Music Mexico.

**Monte Lipman** is named national director of the CD promotion for Atlantic Records in New York. He was national director of CD promotion at EMI.

**Kim Stanton** is named senior director of sales for Virgin Records in Los Angeles. She was a former video producer for Warner Bros.

**Ken in Weeks** is appointed national director of promotions for Eagle-Tone Records in Los Angeles, N.J. He was national radio promo team director at Wild Pitch Records.

**Travis White** is named VP of CD promotion for Atlantic Records in Los Angeles. He was an A&R representative on the radio department of Hollywood Bowl Records.

**DISTRIBUTION** **Jim Kelly** is named VP of marketing for Epic Records in Los Angeles. He was VP for the iTunes (continued on page 31)

## Artists & Music

### SONY, RHINO PLAN ROYALTY REFORMS

(Continued from page 10)

perform, or their heirs or payees, will be notified by letter as soon as possible."

Clemens letter also discusses an "initial response" and asks that plans to extend the reforms to a larger number of artists be being evaluated.

The names of the individual artists affected are being withheld for the present, "because we're still compiling the list," she says.

A sample roster of well-known, early blues performers on the Vocalion, Brunswick, Columbia, and OKeh labels includes Bease Smith, Robert Johnson, Joe Turner, Champion Jack Dupree, Bill Broonzy and Memphis Minnie.

R&B artists from the 30s and 40s on Epic and OKeh include Roy Hamilton, Major Lance, Big Maybelle, the Ravens, Sherman Jay Hawkins, Little Joe & the Fourlites, and the Swallows.

A quick check of the roster of the Rh-

no-owned labels includes R&B and rock 'n' roll artists such as the Crown, the Heartbeats, and Roscoe Hawkins, just to name a few. Other artists include Count Basie, Joe Williams, Sarah Vaughan, and pop stars like Art Satherly and Jimmy Rodgers.

Some early-blues pioneers may have no clear heirs or estates, according to several music historians. Old recording contracts often assigned unrepresented artists, most of them African-Americans, with royalty rates as low as 8% of wholesale or 1% of retail price. Still other artists accepted no-royalty "buyouts" of between \$50 and \$200 per record.

Atlantic was the first label to initiate the royalty reforms in 1988, followed by MCA in 1989, EMI in 1992, and Decca in 1993. Atlantic initially eliminated unre-

covered balances for 36 of its seminal former artists in 1988 (resulting in first-time lump-sum payments to many of the artists) and later extended the reform to other artists. Those artists, however, were not coupled with an increase in royalty rates.

A year later, MCA eliminated unrecovered royalty balances for artists who reported for Chase & the Checker labels and increased their royalty rate to 10%.

However, MCA has not yet extended these reforms to other R&B artists who were recorded for labels such as Decca, Coral, Parrot, and Duke, which MCA now owns.

EMI followed with broader reforms, including a 10% royalty to all pre-1972 artists in all genres and the elimination of unrecovered royalty balances.

Decca/the Nippon Columbia Co. which owns the jazz and R&B-rich cat-

egories of Mercury, National, and Royal Road, also provides artists and heirs with a current 10% royalty and has issued away old unrecovered balance provisions of old contracts.

Not all labels agree with the movement to reform royalties for other artists. Among the companies expressing reservations about the changes is PolyGram Holding Inc., which owns the Mercury label and its affiliates and the Verve catalog and its predecessors. In addition, PolyGram Holding bought the Motown catalog several years ago.

Eric Kronfeld, COO for PolyGram Holding Inc., says the reforms initiated by the R&B Foundation board members are "the wrong way to go" in solving the underlying concerns about aging R&B performers—their generating funds for medical needs.

Kronfeld says updating royalty rates and eliminating unrecovered royalty balances is a "Band-Aid approach." Rather, he supports a concurrent effort by foundation board members to establish a comprehensive medical-insurance program for older artists.

"I support the efforts of board members Boorne, Ratt and [EMI Music president] Jim Fink to find and provide a means to allocate funds to alleviate the suffering of previous recording artists," says Kronfeld, "and that's what the issue of all these discussions we've had, really."

He also says that "even if we completely revised royalty rates and set aside unrecovered balances, many former artists on labels now owned by PolyGram would not sell well enough to make enough difference to help them."

Furthermore, Kronfeld says he does not want to "fracture" the issue of royalty reform by restricting it to R&B artists. "That's distasteful to me," he says, while adding that "probably most of those affected are African-Americans."

He says he had determined "it would take at least three years to change the accounting procedures during which time a lot of aging veteran artists would not see any possible benefits."

Special reporting by B.M.G. member of

the remaining majors still pending for more recording artists under old contract royalty provisions are under debate for comment.

B.M.G. owns the RCA catalog along with its jazz and blues-oriented subsidiaries, as well as the catalog of several small indie R&B labels such as Chart and Crown.

Warner Music Group—of which Atlantic is a part—has not indicated any of the board reforms. Even so, there did not respond to inquiries about royalty reforms.

Responding to questions about whether Atlantic planned to update its reforms to meet the EMI and Rhino increases, Patti Conie, Atlantic's senior VP music and artist relations, released a statement saying the label had been "a major supporter" of the R&B Foundation since its inception. "Beyond that," the statement says, "our financial relationship with our artists—past and present—are private matters on which it would be inappropriate to comment."

Another label yet to make any reforms is Fantasy, which owns the catalog of the jazz giants Prestige, Riverside, Milestone, and their subsidiary labels, and the R&B catalog of Specialty and Swan.

Some critics of the royalty reforms say, in fact, that the take to a 10% royalty could be offset by unpublished, current, industry contract stipulations, such as a 30% packaging charge or a 25% new studio taping (and digital) charge.

But the Sony and Rhino developments, slow progress on the royalty reform front has frustrated some R&B Foundation board members, especially in light of the record of generous financial support by the industry in other areas, such as such as ballads used to underwrite the foundation's annual Pioneer Awards ceremony.

Industry gifts and donations have totaled more than \$1.25 million since the R&B Foundation's inception in 1988.

The foundation's sixth-annual awards presentation will be held March 2 at the Hollywood Palladium in Los Angeles as a part of Grammy Week.

### BMG CLASSICS GETS INTERNET RETAIL SITE

asks "How better to your shopping?" The classical music industry that once feared that role has been being audience and changing format, he adds.

The cost of creating the database is considered minimal compared to the potential. Bourne, a musician and a computer professional who began advertising Classics World barely five months ago, estimates the investment-to-launch it well below \$100,000. "It's unbelievably efficient," he says.

With an estimated \$5 million-30 million participants in 180 countries, the Net user base has been growing 10% a month. Among their destinations, as of mid-February, 17 million domains more than double the 700,000 used in cyberpace in September when Bourne started work on the project. The list of entry, about 500, and greater design flexibility has allowed the Net to "completely replace" services like Compuserve and America On-Line, he adds.

Classics World reached at www.classicsonline.com consists of seven directories: Artist Area, Composer Area, Concert Hall, Beginner's Guide, Opera

Vocal Area, Mail And Bulletin Board, and CD Store. All feature CD-quality audiotapes and videos of acts, in addition, Concert Hall has Quartet-time videos of performances.

Bourne has included 85 B.M.G. performers and "the first 114 composers I thought were important." Four operas have been entered, with more on the way—Bourne was busy accepting praise from "Madame Butterfly" and "Carmen" the week before the launch of Classics World. "Eventually, there will be audiotape for every one," Bourne boasts of Classics World sound quality.

"We got very clever about compression." Reaching domain capacity isn't a concern. "I don't think we'll ever get near it," he says. Looking for more ways to promote B.M.G. releases, Bourne eventually would like to add in interviews with artists and perhaps co-present performances with releases such as Carnegie Hall.

Even if that benefits non-B.M.G. labels, "it also makes us that much more viable," he says.

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Mr. MOORHEAD. Professor Reichman.

**STATEMENT OF J.H. REICHMAN, PROFESSOR OF LAW,  
VANDERBILT UNIVERSITY**

Mr. REICHMAN. Thank you, Mr. Chairman. Thank you for——

Mr. MOORHEAD. Am I pronouncing your name——

Mr. REICHMAN. Reichman.

Thank you. Thank you for the opportunity to appear again before your committee.

Let me begin by emphasizing that with respect to duration, current U.S. copyright law complies with all the international minimum standards, both those in the Berne Convention and those that issued from the all important TRIPS Agreement, which has not been mentioned here today. So if we move to a term of life-plus-70 years, that would exceed the mandated international standard.

Now, I want to talk technically for a moment about the works made for hire problem because I agree with Bill Patry; it's much more complicated than appeared in this morning's testimony. There is no express minimum standard for works made for hire under the Berne Convention. But let me stress here, because I did not make this point strongly enough in my written statement, that article 12 of the TRIPS Agreement does establish a basic minimum standard of 50 years for copyrightable works that are treated as corporate creations in the domestic laws of member States. Article 12, would include both computer programs and original compilations.

Now, then, the TRIPS Agreement goes on to establish a minimum 50-year term for producers of sound recordings, but only 20 years for television broadcasts. So, except for broadcasts, the trend clearly favors the minimum term of 50 years for most corporate productions, whether they are treated under copyright laws, as we do, or under neighboring rights law, related rights laws, that the Europeans use. So the United States already exceeds this minimum, the new, emerging standard of 50 years, by giving 75 years of protection to all works made for hire.

Now what has the European directive done? First, it adopts a basic term of life-plus-70 years which Germany and France, to a lesser extent, had reached in a somewhat haphazard fashion. It does this to quickly integrate their national markets at lower transaction cost and with fewer trade restraints than would be the case if they were to respect acquired rights under a life-plus-70 formula in those countries while otherwise implementing a life-plus-50 term everywhere else.

Then, in effect, the European Union meets the minimum term of 50 years under TRIPS by giving it to all the related rights holders, including broadcast organizations, which it didn't need to do, film producers, sound recording producers, as well as the corporate creators of computer programs. More interesting, the directive has also established an ambiguous, catch-all category for works attributed to legal persons under the domestic copyright laws, and these works will obtain 70 years of protection. Now I really do not know how this provision will be applied. I hope the drafters had in mind works made for hire originating in the Netherlands, which is one of the few European countries that has a true works-made-for-hire principle. If they did, then those works from the Netherlands would

get 70 years, and under the MFN principle of TRIPS, that would help set a trend to harmonize toward our 75-year term, but I can't guarantee that is what will happen.

Now, if we move unilaterally to 95 years for works made for hire, magnitude of the existing divergences will obviously increase. Even if we stay with 75 years for works made for hire, disharmony will prevail at the margins. Why? Well, on the one hand, the United States will give 75 years of protection to many productions that obtain only 50 in the European Union. On the other hand, the European Union may continue to give some works by recognizable, identifiable employee authors a life-plus-70 term over there, while we might treat those works as entitled to only 75 years of protection over here. Of course, this outcome depends on how courts actually apply this new 70-year term for legal persons.

All this leads us to the rule of the shorter term, which is allowed by the Berne Convention and mandated by the EC directive. European countries must apply the rule of shorter term. Now, to the extent that some employee works obtain only 75 years in the United States, they might be cut back over there under the rule of the shorter term to 75 or 50 years, as the case may be. As I said, I hope these cases will diminish. I hope that more and more employee works originating on both sides will simply end up with 70 years, of protection over there, but I can't guarantee it. I can guarantee that U.S. corporate producers of computer programs, sound recordings, films, and television broadcasts should expect to be cut back to 50 years under the EC directive as a matter of course.

The proper response to this is for the United States to adopt a version of the rule of the shorter term. This would enable the United States to apply reciprocity in these and other cases where U.S. law exceeded the minimum standard, but the law of the foreign creator's state gave less than we did.

My written statement contains a word of caution in this regard. Some time in the future we may hear that the shorter-term rule, under the EC directive, conflicts with the MFN principle of the TRIPS Agreement. There are now at least two commentators who take this position. I do not necessarily share this view but it is open to some doubt in the long run. In the meanwhile, as long as Europe has such a rule and uses it, we should have one and use it too.

All this suggests that we should encourage the Europeans to amplify their new-found interest in the copyrightable works of legal entities. We should press them, to give all legal persons at least 70 years, if not 75 years of protection, whether these productions happen to fall under copyrights or under their neighboring rights laws.

Having said this, however I simply do not see how a 95-year term for U.S. corporate creations furthers the cause of harmonization, and I do agree with those critics who find that 95 years is excessive on the merits. A 95-year incentive is not needed to stimulate investment in the cultural industries, and its social costs for research and educational users alone would greatly exceed any benefits to society.

In contrast, I do agree in principle with Bill Patry. I believe that a much stronger case can be made for prolonging the basic term of protection afforded true authors and artists to life-plus-70 years.

Why? It should enable these authors and artists, but not corporate entities, to use income streams to help their longer-lived progeny. In Nashville, we see many cases, like those we heard about this morning, in which the children of successful country music writers literally depend on the royalties from evergreen musical works. It seems unfair that persons unconnected with the creation of these works can profit from them, while the author's longer-lived progeny, direct progeny, get nothing.

Ironically, I believe that the case for life-plus-70 is much stronger in the United States than in the European Union. For all their lofty talk about authors' rights, the real beneficiaries of life-plus-70 over there will almost always be publishers as assignees of copyrights and not authors and artists. All the literature agrees on this point.

Over here, instead, Congress has already enacted the principle of termination of transfers in section 203 of the copyright law, and that principle can insure that authors and their heirs actually obtain the benefits of extended protection. However, the termination right is imperfectly implemented in the statute as it stands, and the principle has further suffered at the hands of the courts, as in the *Mills Music* case for example.

So, I believe Congress should not lengthen the basic term to life-plus-70 without closing these loopholes, including the big one through which producers of derivative works now escape. True, the derivative work holder should not be subject to termination, I fully agree, with that because the derivative work holder invests a lot to make the film or the adaptation and he or she pays the author once for the privilege. But the derivative work holder should not be exempt from the principle of periodic renegotiation in order to take into account changing circumstances and the demands of equity.

I call to your attention that in the restoration of foreign copyrights provisions, which this Congress just enacted, there is a provision looking to renegotiation for equitable compensation of existing derivative works. I believe that sets a good precedent for what we're talking about here.

My remarks so far should help to demonstrate that copyright laws today are not about natural rights, as the Europeans like to think, nor are they strictly about incentives to create, as we like to pretend, either. Copyright laws are really about cultural policy, and it is our policy in the United States to give less than natural rights thinking would have us give, which is perpetual protection and quite a bit more than pure incentives theory would justify. Why do we do this? We do this because we all benefit culturally from the contributions of artists and authors, and, also, because we are lucky enough at the moment to benefit from the positive terms of trade our cultural and technical products enjoy in the international market place.

But let us not exaggerate or fool ourselves. Talents abound in the world at large. There will be other fashion trends and innovation cycles. There will be new musical groups like the Beatles and fine computer programs designed in Italy, Japan or Malaysia that will adversely affect our balance of trade under the rule of national treatment. If we are not careful, if we get too far ahead of the

international minimum standards, then our own cultural and technical industries will become less competitive over time vis-a-vis firms in third countries who just stick to those lower minimum standards of the Berne Convention and the TRIPS Agreement.

Thank you very much, and I'm happy to take your questions.  
[The prepared statement of Mr. Reichman follows:]



PREPARED STATEMENT OF J.H. REICHMAN, PROFESSOR OF LAW, VANDERBILT  
UNIVERSITY

Introduction

The following remarks attempt to evaluate the pending proposal to extend the term of United States Copyright protection<sup>1</sup> in the light of this writer's larger concerns about the future evolution of intellectual property rights in an integrated world market.<sup>2</sup> My recent studies show that the conditions governing creativity and innovation at the end of the twentieth century differ significantly from those that gave rise to the Paris and Berne Conventions in the nineteenth century.<sup>3</sup> These changed conditions require legislative attention to the limits of the classical patent and copyright paradigms and to the need for new and more limited forms of protection dealing with

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<sup>1</sup> See H.R. 989, 104th Congress, 1st session, Feb. 16, 1995 [hereinafter H.R. 989].

<sup>2</sup> See generally J.H. Reichman, Universal Minimum Standards of Intellectual Property Protection Under the TRIPS Component of the WTO Agreement, 29 INTERNATIONAL LAWYER 345 (1995) [hereinafter, Universal Minimum Standards]; see also J.H. Reichman, Beyond the Historical Lines of Demarcation: Competition Law, Intellectual Property Rights, and International Trade After the GATT's Uruguay Round, 20 BROOKLYN J. INT'L L. 75 (1993) [hereinafter, Competition Law, Intellectual Property and Trade].

<sup>3</sup> See Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, as last revised at Stockholm, July 14, 1967, 21 U.S.T. 1583, 828 U.N.T.S. 305 [hereinafter Paris Convention]; Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as last revised at Paris, July 24, 1971, 828 U.N.T.S. 221 [hereinafter Berne Convention].

noncopyrightable, subpatentable forms of innovation.<sup>4</sup> At the same time, legitimate concerns about the proper degree of incentives for new technologies and about the proper means of regulating new modalities of diffusion tend to obscure the enduring problems and tribulations of this country's traditional artists and creators, whose livelihood and ability to care for their families literally depends on the cultural policies embodied primarily in our domestic copyright law.<sup>4a</sup> Balancing both sets of concerns in the long-term public interest of the United States will not be an easy task under the best of circumstances. My goal here, as an academic advisor, is to try to shed some neutral light on these issues without engaging in the polemical debates of those whose immediate interests are at stake.

To this end, my statement first establishes the extent to which current U.S. copyright law substantially complies with the elevated international minimum standards that issued from the

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<sup>4</sup> See generally J.H. Reichman, Legal Hybrids Between the Patent and Copyright Paradigms, 94 COLUMBIA L. REV. 2432 (1994) [hereinafter, Legal Hybrids]; J.H. Reichman, Charting the Collapse of the Patent-Copyright Dichotomy: Premises for a Restructured International Intellectual Property System, 13 CARDOZO ARTS & ENTERTAINMENT L. J. 475 (1975) [hereinafter, Collapse of the Patent-Copyright Dichotomy]; see also Pamela Samuelson, Randall Davis, Mitchell D. Kapor, & J.H. Reichman, A Manifesto Concerning the Legal Protection of Computer Programs, 94 COLUMBIA L. R. 2308 (1994) [hereinafter Samuelson et al., Manifesto].

<sup>4a</sup> See, e.g., H.R. Rep. No. 1476, 94th Cong., 2d Sess. 134 (1976) (stressing that a term of copyright protection lasting for an author's life plus fifty years was justified, in part, because the term under the 1909 Act was too short "to insure an author and his dependents the fair economic benefits from his works").

latest round of multilateral trade negotiations.<sup>5</sup> It then examines the pending proposal to emulate the Council of the European Communities' Directive on harmonizing the term of copyright and certain related rights.<sup>6</sup> This analysis focuses on the drive for uniformity of copyright laws and on efforts to improve the condition of authors and artists in general.

The statement find that proposals to extend the term of protection under U.S. law cannot be justified in terms of a drive for uniformity as such, nor do they appear socially desirable in so far as the protection of works made for hire and corporate authors in general are concerned. However, a better case can be made for extending the proprietary rights of traditional artists and authors on the grounds of cultural policy, provided that certain conditions and safeguards are observed. Among the most

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<sup>5</sup> See Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, done at Marrakesh, Morocco, April 15, 1994 [hereinafter Final Act], reprinted in THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS -- THE LEGAL TEXTS 2-3 (GATT Secretariat ed., 1994) [hereinafter RESULTS OF THE URUGUAY ROUND]; Marrakesh Agreement Establishing the World Trade Organization [hereinafter WTO Agreement], Annex 1C: Agreement on Trade Related Aspects of Intellectual Property Rights, Apr. 15, 1994 [hereinafter TRIPS Agreement], reprinted in RESULTS OF THE URUGUAY ROUND, SUPRA, at 6-19, 365-403. For congressional approval, see Uruguay Round Agreements Act, Pub. L. No. 103-465 [H.R. 5110], Dec. 8, 1994 [hereinafter URAA], §§ 101-103 (authorizing President to accept Uruguay Round Agreements and implement WTO Agreement, SUPRA, art. VIII; but denying treaty status and domestic legal effect to Uruguay Round Agreements as such, and excluding private actions under those Agreements).

<sup>6</sup> See Council Directive 93/98/EEC of 29 October 1993, harmonizing the terms of protection of copyright and certain related rights, [1993] O.J.L. 290/9, reprinted in SWEET & MAXWELL'S E.C. INTELLECTUAL PROPERTY MATERIALS 29-35 (A. Boody & A. Hor'con eds., 1994) [hereinafter E.C. Directive].

important of these is the need to ensure that creators, and their heirs, rather than publishers, obtain real opportunities to benefit from any prolongation of the term of protection, lest the resulting social costs become an intolerable subsidy to cultural industries that should stand on their own feet. Moreover, both Congress and the courts must take steps to ensure that these and other measures designed to affect only the specialized market for literary and artistic works do not end, in practice, by disrupting competition on the general products market, especially on those segments devoted to computer programs and other electronic information tools.<sup>6A</sup>

A. Substantial Compliance with International Minimum Standards  
 1. General Impact of the TRIPS Agreement

The proposal to extend the basic term of copyright protection from fifty to seventy years after an author's death,<sup>7</sup> as triggered by the European Communities' Directive to this effect,<sup>8</sup> is not mandated by the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), as

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<sup>6A</sup> See generally, J.H. Reichman, Electronic Information Tools: The Outer Edge of World Intellectual Property Law, 24 I.I.C. 446 (1993) [hereinafter Electronic Information Tools].

<sup>7</sup> See H.R. 989, supra note 1.

<sup>8</sup> See E.C. Directive, supra note 6, art. 1(1).

finalized in 1994.<sup>9</sup> This Agreement required all members of the World Trade Organization (WTO)<sup>10</sup> to comply with the minimum terms of protection set out in the Berne Convention, as revised in 1971, whether or not these countries formally adhere to that Convention.<sup>11</sup> The Berne Convention establishes a basic term of life plus fifty years.<sup>11A</sup> In addition, article 12 of the TRIPS Agreement imposed a minimum term of fifty years for copyrightable works treated as corporate creations in the domestic laws of member states.<sup>11B</sup> The TRIPS Agreement further required WTO member states to protect computer programs and qualifying compilations for at least fifty years from publication;<sup>12</sup> to protect the reproduction rights of sound recording producers for at least

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<sup>9</sup> See TRIPS Agreement, supra note 5, arts. 9-14

<sup>10</sup> See WTO Agreement, supra note 5.

<sup>11</sup> See TRIPS Agreement, supra note 5, art. 9(1) (not applicable to moral rights under Berne Convention, supra note 3, art. 6 bis); Universal Minimum Standards, supra note 2, at 366-67.

<sup>11A</sup> See Berne Convention, supra note 3, art. 7(1).

<sup>11B</sup> See TRIPS Agreement, supra note 5, art. 12 (mandating minimum fifty year term whenever duration "is calculated on a basis other than the life of a natural person," but exempting photographs and works of applied art.

<sup>12</sup> See TRIPS Agreement, supra note 5, arts. 10(1), (2), 12 (applying life plus fifty term when the author is deemed to be a natural person and fifty year term from publication in all other cases, except that a fifty year term from creation applies if no publication occurs). However, compilations not rising to the level of "intellectual creations" are exempted. See id. art. 10(2); cf. 17 U.S.C. §§ 102(a), 103 (1988); Feist Publications, Inc. v. Rural Tel. Serv. Co., 111 S. Ct. 1282 (1995).

fifty years; to protect the rights of broadcasting organizations to fix, reproduce, transmit, and televise their broadcasts for at least twenty years; and to protect performers against unauthorized fixation of their unfixed performances on sound recordings (and of the reproduction of such fixations) for at least fifty years from the date of authorized fixation.<sup>13</sup>

United States copyright law, as amended in 1992, already protected computer programs for at least seventy-five years.<sup>14</sup> Moreover, the United States does not relegate the producers of sound recordings and broadcasting organizations to neighboring rights regimes, as do most European Union countries.<sup>15</sup> For this and other reasons, this country does not adhere to the International Convention for the Protection of Performers, Producers of Phonograms, and Broadcasting Organizations (known as the Rome Convention).<sup>16</sup> Instead, the United States Copyright Act

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<sup>13</sup> See TRIPS Agreement, *supra* note 5, art. 14.

<sup>14</sup> See 17 U.S.C. §§ 101, 102(a), 201, 302(a), (c), 304, as amended.

<sup>15</sup> See, e.g., WORLD INTELLECTUAL PROPERTY ORGANIZATION, GUIDE TO THE ROME CONVENTION AND TO THE PHONOGRAMS CONVENTION 7-13 (1981) [hereinafter GUIDE TO THE ROME CONVENTION]; see also Paul E. Geller, International Copyright: An Introduction, 1 INTERNATIONAL COPYRIGHT LAW AND PRACTICE, §3(c) (P.E. Geller, ed., 1995) [hereinafter, Geller, Introduction]; Stephen M. Stewart & Hamish Hamilton, Neighboring Rights, in INTERNATIONAL COPYRIGHT AND NEIGHBORING RIGHTS 185, 188-91, 194-220 (S.M. Stewart & H. Sandison, eds. 1989).

<sup>16</sup> See International Convention for the Protection of Performers, Producers of Phonograms, and Broadcasting Organizations, adopted at Rome, Italy, Oct. 26, 1961, 496 U.N.T.S. 43 [hereinafter Rome Convention].

of 1976 treated both sound recordings and radio or television broadcasts as protectible works of authorship and afforded the relevant copyright owners seventy-five years of protection at least.<sup>17</sup> In conformity with the TRIPS Agreement, Congress recently enacted legislation prohibiting "unauthorized fixation and trafficking in sound recordings and music videos" for an indefinite period of time,<sup>18</sup> and it also largely restored the rights of foreign (but not national) copyright owners, including producers of sound recordings, whose copyrights had been technically forfeited under specified conditions.<sup>19</sup>

In sum, the trend established in the TRIPS Agreement clearly favors a minimum term of fifty years for most corporate productions (except broadcasts), whether they are governed by copyright or neighboring rights laws. The United States already exceeds this trend because its laws give seventy-five years of protection to all works made for hire.

As regards other relevant requirements of the Berne

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<sup>17</sup> See 17 U.S.C. § 101, 102(a), 106, 114, 201, 302, 304 (1988).

<sup>18</sup> See U.R.A.A., *supra* note 5, §512, codified at 17 U.S.C. §1101; see also MELVILLE B. NIMMER AND DAVID NIMMER, *ON COPYRIGHT*, ch. 8E ("Rights Against Bootlegging Musical Performances") (forthcoming 1995) [hereinafter M. & D. NIMMER]; PAUL GOLDSTEIN, *COPYRIGHT PRINCIPLES, LAW, AND PRACTICE*, § \_\_\_\_\_ (2nd ed., forthcoming 1995) [hereinafter P. GOLDSTEIN].

<sup>19</sup> See TRIPS Agreement, *supra* note 5, arts 14(6), 70(2), (3); Berne Convention, *supra* note 3, art. 18; U.R.A.A., *supra* note 4, §514, amending 17 U.S.C. §104 (a) (1988). See generally Universal Minimum Standards, *supra* note 2, at 366-72 (citing additional authorities).

Convention, respect for which is generally mandated by the TRIPS Agreement<sup>20</sup> (and thus subjected to the WTO's dispute-settlement machinery),<sup>21</sup> current United States copyright law appears no less compliant than it was prior to our entering the WTO Agreement and substantially more compliant than in 1989, when this country first joined the Berne Union.<sup>22</sup> For example, the United States now protects architectural works.<sup>23</sup> It does not avail itself of the right to limit the terms of protection afforded photographers and the producers of cinematographic works to twenty-five<sup>24</sup> and fifty years,<sup>25</sup> respectively. Moreover, the treatment of applied

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<sup>20</sup> See supra note 11 and accompanying text.

<sup>21</sup> See TRIPS Agreement, supra note 5, arts. 64, 68; WTO Agreement, supra note 5, Annex 2, Understanding on Rules and Procedures Governing the Settlements of Disputes [hereinafter Settlement of Disputes]; Universal Minimum Standards, supra note 2, at 385-88 ("Uncertainties of the Dispute-Settlement Process").

<sup>22</sup> See Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988); David Nimmer, Nation, Duration, Violation, Harmonization: An International Copyright Proposal for the United States, 55 LAW & CONTEMP. PROBS. 211, 218-35 (1992) [hereinafter Nimmer, Duration].

<sup>23</sup> See Berne Convention, supra note 3, art. 2(1); 17 U.S.C. 101, 102(a)(8), as amended by Pub. L. 101-650, 104 Stat. 5089, 5133 (1990).

<sup>24</sup> See Berne Convention, supra note 3, art. 7(4) (allowing twenty-five year term of protection for photographic works). But see E.C. Directive, supra note 3, art. 6 (mandating life plus seventy years of protection for photographs amounting to an "author's own intellectual creation," notwithstanding Berne Convention).

<sup>25</sup> See Berne Convention, supra note 3, art 7(2); SAM RICKETSON, THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS: 1886-1986, at 338 [hereinafter S. RICKETSON] (noting that Berne countries may protect films either for the standard life plus fifty term or for fifty years from publication (or creation



art in domestic copyright law exceeds the twenty-five year minimum that the Berne Convention tolerates,<sup>26</sup> while the criterion of separability used to distinguish copyrightable works of applied art from noncopyrightable industrial designs remains firmly entrenched in long-standing state practice.<sup>27</sup> However, the United States design patent law may not fully comply with the TRIPS provisions concerning the protection of industrial designs as such.<sup>28</sup>

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if no publication occurs)). The E.C. Directive, *supra* note 6, art. 2, affords a copyright to the authors of cinematographic or audiovisual works, (including the principal director, author of screenplay, author of dialogue, and composer of specially created music), which expires seventy years after the death of the last of these designated persons to survive; and in art. 3, it also affords neighboring or related rights to the producers of films, and to broadcasting organizations, which last fifty years from publication, communication, or transmission to the public.

<sup>26</sup> See Berne Convention, *supra* note 3, art. 7(4); TRIPS Agreement, *supra* note 5, art. 12 (allowing this exception); 17 U.S.C. §101 (definition of pictorial, graphic, or sculptural works). See generally, J.H. Reichman, Design Protection and the New Technologies: The United States Experience in a Transnational Perspective, 19 U. BALTIMORE L. REV. 6, 56-81 (Symposium Issue on Industrial Design Law and Practice, 1989/1990) ("Copyright Protection of Applied Art: The Retreat from Partial Cumulation") [hereinafter Designs and New Technologies].

<sup>27</sup> See J.H. Reichman, Design Protection in Domestic and Foreign Copyright Law: From the Berne Revision in 1948 to the Copyright Act of 1976, 1983 DUKE L.J. 1143, 1153-74, 1249-64 [hereinafter Designs Before 1976]. See also J.H. Reichman, Design Protection After the Copyright Act of 1976: A Comparative View of the Emerging Interim Models, 31 J. COPYRIGHT SOCIETY U.S.A. 267, 360-65 (1984) [hereinafter Designs After 1976].

<sup>28</sup> See TRIPS Agreement, *supra* note 5, art. 25 (1) (mandating the protection of "independently created industrial designs that are new or original"); Universal Minimum Standards, *supra* note 2, at 375-77.

To be sure, U.S. compliance with the relevant minimum standards under the Berne Convention arguably remains imperfect in some respects, notwithstanding recent Congressional action rendering the renewals of pre-1978 copyrights automatic<sup>29</sup> and restoring foreign copyrights that had suffered technical forfeiture.<sup>30</sup> For example, U.S. treatment of anonymous or pseudonymous works by foreign authors may still fall short of the Convention standard when such works are not published promptly upon creation.<sup>31</sup> Certain pre-1978 works by foreign authors may still obtain less than life plus fifty years of protection if publication occurs too early in relation to the author's death.<sup>32</sup> Moreover, the degree of U.S. compliance with the moral rights provisions of the Convention, though improved since 1989, still falls short of the standards that state practice generally accepts.<sup>33</sup>

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<sup>29</sup> See 17 U.S.C. §304, as amended by the Copyright Renewal Act of 1992, Pub. L. 102-307, 106 Stat. 264.

<sup>30</sup> See U.R.A.A., supra note 5, §514, amending 17 U.S.C. §104(A) (1988); M. & D. Nimmer, supra note 18, ch. 9A ("Copyrights Restored from the Public Domain") (forthcoming 1995); P. Goldstein, supra note 18, §2.5.4.3 (2nd ed. forthcoming 1995).

<sup>31</sup> See Berne Convention, supra note 5, arts. 7(3), 15(3); 17 U.S.C. 302(c) (1988); Nimmer, Duration, supra note 22, at 224-25.

<sup>32</sup> See Berne Convention, supra note 5, art 7(1); 17 U.S.C. 304 (as amended in 1992); Nimmer, Duration, supra note 22, at 225-27.

<sup>33</sup> See Berne Convention, supra note 5, art. 6 bis; 17 U.S.C. 106A, as added by the Visual Artists Rights Act of 1990, Pub. L. 101-650, 140 Stat. 5128; S. RICKERTSON, supra note 25, at

Nevertheless, the proposals contained in H.R. 989 would only alleviate, without necessarily curing, the minor technical deficiencies noted above. As to moral rights, neither the Berne Convention nor state practice have established a norm governing the ultimate term of protection, although the basic principle does link the minimum term to the duration of the author's economic rights.<sup>34</sup> In any event, while pressure for greater U.S. compliance with the moral rights provisions of the Berne Convention appears inevitable, there is nothing in either the TRIPS Agreement or the E.C. Directive that requires Congress to take precipitous action in this regard.<sup>35</sup>

A more relevant misfit between U.S. copyright law and that of other Berne Union countries stems from the greater reliance of the former on the work made for hire doctrine in general and on the principle of corporate authorship in particular.<sup>36</sup> On the

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467-75. But see FINAL REPORT OF THE AD HOC WORKING GROUP ON U.S. ADHERENCE TO THE BERNE CONVENTION, reprinted 10 COLUMBIA-VLA J. LAW & ARTS 513, 547 (1986) [hereinafter FINAL REPORT].

<sup>34</sup> See Berne Convention, supra note 5, art. 6 bis (2); S. RICKETSON, supra note 25, at 473-75.

<sup>35</sup> See supra note 11; E.C. Directive, supra note 6, art. 9 (excluding moral rights). See also Silke von Lewinski, E.C. Proposal for a Council Directive Harmonizing the Term of Protection of Copyright and Certain Related Rights, 23 INT'L REVIEW OF INDUS. PROP. & COPYRIGHT LAW (I.I.C.) 785, 801-03 (1992).

<sup>36</sup> See Berne Convention, supra note 3, art. 15(3); 17 U.S.C. 201(b), 302(c), 304(a) (as amended in 1992); FINAL REPORT, supra note 33, at 613-20 (stressing that the Convention "does not contain any general provision concerning works made for hire, and does not define the word "author" (or the ownership of copyrights);" and finding that U.S. Law is not clearly incompatible in the context of actual state practice). "The

whole, other Berne Union countries tend to relegate the creations of corporate entities to neighboring rights laws covered by the Rome Convention,<sup>27</sup> to which the United States does not adhere. With some exceptions, they also confer the full life plus fifty term on creations by identifiable employee authors.<sup>28</sup> However, these tensions with U.S. law were not considered a major irritant even in the 1980s, and recent tendencies in the evolution of the European Union's intellectual property law have greatly reduced them.

For example, the E.C. Directive on computer programs, though purporting to treat eligible programs as copyrightable literary works, expressly recognized the principle of corporate creations and provided a term of fifty years for this purpose.<sup>29</sup> The

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domestic copyright systems vary with respect to the requirement of 'authorship,' to the treatment of employee-authors in general, and to the extent they attribute authorship in certain classes of works to persons other than the actual intellectual creators." J.H. Reichman, Overlapping Proprietary Rights in University-Generated Research Products: The Case of Computer Programs, 17 COLUMBIA-VLA J. LAW & ARTS 51, 54-60 (1992) (citing authorities) [hereinafter Overlapping Proprietary Rights].

<sup>27</sup> See supra note 16.

<sup>28</sup> See, e.g., FINAL REPORT, supra note 33, at 614-20 (noting that Netherlands copyright law applies the work made for hire principle). See generally S. RICKETSON, supra note 25, at 158-59, 346-49; ALAIN STROWEL, DROIT D'AUTEUR ET COPYRIGHT -- DIVERGENCES ET CONVERGENCES 323-389 (1993) [hereinafter A. STROWEL]; Ghislain Roussel, The Copyright of Salaried and Employed Authors -- A Comparative Study of National Laws, 26 COPYRIGHT (W.I.P.O.) 221 (1990).

<sup>29</sup> See Council Directive 91/250 on the legal protection of computer programs, [1991] O.J.L. 122/42, art. 2(3), reprinted in SWEET & MAXWELL'S E.C. INTELLECTUAL PROPERTY MATERIALS, supra note 6, at 2 [hereinafter E.C. Directive on Computer Programs]. For

proposed E.C. Directives on data bases and commercial designs are also likely to embrace the principle of corporate creation,<sup>40</sup> although in most cases, this would occur under qui generis regimes operating outside the relevant copyright laws as such.<sup>41</sup> Above all, the E.C. Directive on harmonizing the term of protection of copyright and certain related rights expressly confers a seventy year term upon collective works and works whose rightholders under the domestic laws are deemed to be "legal persons." Concomitantly, this Directive prolongs the related rights conferred on performers, producers of sound recordings, films, and broadcasting organizations to a period of fifty years.<sup>42</sup>

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criticism of this approach, see e.g., Jan Corbet, Does Technological Development Imply a Change in the Notion of Author?, 148 R.I.D.A. 58 (1991); Herman Cohen Jehoram, The E.C. Copyright Directives, Economics, and Authors' Rights, 25 I.I.C. 821, 829-30 (1994).

<sup>40</sup> See Amended Proposal of 4 October 1993 for a Council Directive on the Legal Protection of Databases, COM (93) 464 final - syn 393 (1993), O.J.L. 308/1, art. 3(4), reprinted in SWEET & MAXWELL'S E.C. INTELLECTUAL PROPERTY MATERIALS, supra note 6, at 39, 41 [hereinafter Proposed E.C. Directive on Databases]; Proposal of 3 December 1993 for a European Parliament and Council Directive on the Approximation of the Legislation of Member States on the Legal Protection of Industrial Designs, COM (93) 344 final - COD 464 (1993), O.J.L. 345/14, art. 14(2), reprinted in SWEET & MAXWELL'S E.C. INTELLECTUAL PROPERTY MATERIALS, supra note 6, at 292, 300 [hereinafter Proposed E.C. Directive on Design]; see also Cohen Jehoram, supra note 39, at 829-31.

<sup>41</sup> See e.g., Proposed E.C. Directive on Databases, supra note 40, art. 13(2); Pamela Samuelson, The Missing Foundations of the Proposed European Database Directive (forthcoming 1996) [hereinafter Samuelson, Database Directive].

<sup>42</sup> See E.C. Directive, supra note 6, arts. 1(3)(4), 3; von Lewinski, supra note 35, at 790-94, 798-801.

None of these provisions would, of course, necessarily resolve the difficulties that could continue to arise if U.S. law attributes work-for-hire status to a given work and the relevant domestic law within the European Union continues to attribute the same work to an identifiable person, notwithstanding the Directive. With the exception of computer programs, however, the Directive does tend to equalize the terms of protection in the United States and the European Union when the copyrightable works in question are attributed to legal entities under both jurisdictions. Moreover, the disparities in the terms of protection that previously occurred when copyright law applied in one jurisdiction and related rights law applied in the other are at least attenuated to the extent that related rightholders in the European Union (as well as corporate creators of computer programs) will now obtain a fifty year term rather than the twenty year term normally available under the Rome Convention.<sup>43</sup>

In these respects, H.R. 989, if enacted, would unilaterally worsen these existing disparities. By prolonging the term of protection for employer authors and corporate entities from seventy-five to ninety-five years, it would destabilize the de facto harmonization that has recently taken place, without addressing the underlying substantive issues.<sup>44</sup>

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<sup>43</sup> See Rome Convention, supra note 16, art. 14.

<sup>44</sup> See H.R. 989, supra note 1, sec. 2(b).

## 2. Uncertainties Affecting the Comparison of Terms

The TRIPS Agreement allows WTO member states to "implement in their [domestic] law more extensive protection" than its minimum standards require,<sup>45</sup> and Article 7(6) of the Berne Convention expressly recognizes the same principle with respect to its minimum terms of protection.<sup>46</sup> In the latter case, however, Article 7(8) of the Berne Convention retains a residual material reciprocity clause, known as the rule of the shorter term.<sup>47</sup> This clause encourages states exceeding the agreed terms of protection to override the principle of national treatment by limiting the term in the country where protection is claimed "to the term fixed in the country of origin of the work."<sup>48</sup>

The E.C. Directive harmonizing the terms of protection goes one step farther by requiring European Community countries to apply the rule of the shorter term to authors and related

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<sup>45</sup> See TRIPS Agreement, *supra* note 5, art. 1(1).

<sup>46</sup> Berne Convention, *supra* note 3, art. 7(6); see also *id.*, art. 19 ("not precluding the making of a claim to the benefit of any greater protection which may be granted by legislation in a country of the Union").

<sup>47</sup> See id., art. 7(8).

<sup>48</sup> See id., arts. 5(1) (national treatment), 5(3) (protection in the country of origin to be governed by domestic law), 5(4) (defining the country of origin), 7(8) (comparison of terms). Article 7(8) encourages states to apply the rule of the shorter term by requiring their legislators affirmatively to waive it if they so desire; but the rule is not obligatory. See, e.g., WORLD INTELLECTUAL PROPERTY ORGANIZATION, GUIDE TO THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS (Paris Act 1971) 50-51 (W.I.P.O. ed 1978) [hereinafter GUIDE TO THE BERNE CONVENTION].

rightholders whose works and productions originate from third countries and who are not Community nationals.<sup>49</sup> These provisions should thus prevent creators who are nationals of third countries from automatically obtaining the prolonged terms of protection in Community countries where protection is sought, notwithstanding the principle of national treatment, absent a reciprocal provision on duration in the laws of the respective countries of origin. They also serve as "a means of persuading third countries to extend their terms of protection and thus to improve their levels of protection."<sup>50</sup>

By similar logic, Congress should consider enacting a domestic version of this same principle under article 7(8) of the Berne Convention. A domestic rule of the shorter term would avoid bestowing the benefits of our seventy-five-year terms for, say, employer-created computer programs, producers of sound recordings, and the producers of television broadcasts upon rightholders originating in European Community countries that provide shorter periods of protection. Rightholders outside the European Community who adhered to the fifty-year minimum term for corporate productions under article 12 of the TRIPS Agreement would likewise obtain only fifty years of protection under a U.S. rule of the shorter term.<sup>50A</sup>

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<sup>49</sup> See E.C. Directive, supra note 6, art. 7; see also von Lewinski, supra note 35, at 803-04.

<sup>50</sup> von Lewinski, at 803 (citing the legislative history).

<sup>50A</sup> See supra note 11B and accompanying text.



However, some caution may be needed in view of the fact that Article 4 of the TRIPS Agreement introduced a Most-Favored Nation Clause (MFN),<sup>51</sup> long-familiar in trade law,<sup>52</sup> into international intellectual property law for the first time.<sup>53</sup> Some scholars have begun to question the continued viability of even the Berne Convention's own comparison of terms clause on the grounds that it inherently conflicts with Article 4 of the TRIPS Agreement,<sup>54</sup> as might every bilateral arrangement in which a WTO member state affords a better "intellectual property" deal<sup>55</sup> to another member state without making that same deal available to the membership

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<sup>51</sup> See TRIPS Agreement, *supra* note 5, art. 4, which states: "With regard to the protection of intellectual property [as defined and limited by Art. 1(2)], any advantage, favour, privilege or immunity granted by a Member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other members."

<sup>52</sup> See, e.g., JOHN H. JACKSON, *WORLD TRADE AND THE LAW OF GATT* 249-72 (1989).

<sup>53</sup> See, e.g., Wolfgang Fikentscher, TRIPS and the Most Favored Nation Clause, in *CURRENT ISSUES IN INTELLECTUAL PROPERTY, PROCEEDINGS OF THE ANNUAL CONFERENCE OF THE INTERNATIONAL ASSOCIATION FOR THE ADVANCEMENT OF TEACHING AND RESEARCH IN INTELLECTUAL PROPERTY (ATRIP)*, Ljubljana, Slovenia, July 11-13, 1994, at 137, 137-39 (J. Straus, ed., 1995) (stressing that, historically, "free trade is based upon a world principle and the protection of intellectual property upon national law and territoriality").

<sup>54</sup> See, e.g., Fikentscher, *supra* note 53, at 140; Cohen Jehoram, *supra* note 39, at 826-27.

<sup>55</sup> However, the term "intellectual property" appears expressly limited to the specific subject-matter categories covered by the TRIPS Agreement. See *supra* note 51; Universal Minimum Standards, *supra* note 2, at 348-49.

as a whole.<sup>56</sup> Even if the Berne Union's comparison of terms clause were rescued by express exceptions to Article 4 of the TRIPS Agreement,<sup>57</sup> as I think likely, the E.C. Directive limiting the benefits of longer terms to Community members might nonetheless fall afoul of the MFN Clause of Article 4.<sup>58</sup>

In a recent article on the TRIPS Agreement, I have interpreted Article 4 in a manner that would not override the

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<sup>56</sup> See, e.g., Fikentscher, *supra* note 53, at 138-39 (regretting this barrier to bilateral experimentation). Prof. Fikentscher states: "It is a matter of logic that. . . [the] principle of [international] minimum protection and the principle of Most Favored Nation treatment stand to each other in opposition. For, wherever Most Favored Nation applies, it makes no sense to permit the members of the treaty to grant intellectual property protection which goes beyond the internationally stipulated minimum standard." *Id.*, at 139. See also Hanns Ullrich, TRIPS: Adequate Protection, Inadequate Trade, Adequate Competition Policy, 4 PACIFIC RIM LAW & POL. J. 153, 182-83, 183 n. 133 (1995) (stressing unclear meaning of MFN treatment in context of intellectual property and regretting that it constrains parties from making bilateral concessions).

<sup>57</sup> See, e.g., TRIPS Agreement, *supra* note 5, art. 4(b) (exempting privileges "granted in accordance with the provisions of the Berne Convention (1971) or the Rome Convention authorizing that the treatment accorded be a function not of national treatment but of the treatment accorded in another country"); see also *id.*, art. 4(c) (exempting privileges and immunities "in respect of the rights of performers, producers of phonograms and broadcasting organization not provided under this Agreement"); and 4(d) (those "deriving from international agreements related to the protection of intellectual property which entered into force prior to the entry into force of the WTO Agreement"). See further *infra* text accompanying notes 59-66.

<sup>58</sup> See, e.g., Cohen Jehoram, *supra* note 39 at 826-27 (reasoning by analogy from E.C.J. decision 20 Oct. 1993, joined cases C-92/92 and C-326/92 - Phil Collins v. Intrat Handelsgesellschaft mbH and Patricia Im - und Export Verwaltungsgesellschaft mbH v. EMI Electrola GmbH, 68 CMLR 21 and 28 Dec., 1993, No. 947-948, at 773-799 [hereinafter Phil Collins Decision]).

rule of the shorter term under the Berne Convention." While acknowledging that the precise mesh of all the relevant provisions remains uncertain, I believe the following overall framework to be more plausible.

First, international intellectual property treaties existing at the time that the TRIPS Agreement takes effect<sup>60</sup> are generally immunized from the MFN clause (but not the national treatment clause except as expressly provided) under a grandfather provision within the TRIPS Agreement, which only this Agreement can override.<sup>61</sup> Second, existing and future agreements establishing "customs unions and free-trade areas" of a regional character may, to varying degrees, be immunized from applying MFN treatment, and possibly national treatment, to non-TRIPS-mandated proprietary rights affecting intra-regional trade in intellectual goods, at least insofar as past practice under Article XXIV of the General Agreement on Tariffs and Trade is carried over to the

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<sup>59</sup> See Reichman, Universal Minimum Standards, *supra* note 2, at 348-51.

<sup>60</sup> See Final Act, *supra* note 5, Par. 3 (setting Jan. 1, 1995, as target date for entry into force, if possible); WTO Agreement, *supra* note 5, arts. VIII, XIV. See also URAA, *supra* note 5, § 101(b) (authorizing President to implement WTO Agreement after determining that "a sufficient number of foreign countries are accepting the obligations of the Uruguay Round Agreements").

<sup>61</sup> See TRIPS Agreement, *supra* note 5, art. 4(d) (with the proviso that immunized measures "not constitute an arbitrary or unjustifiable discrimination against nationals of other members"). See also *id.* art. 4(b) (exempting inconsistent provisions of Berne Convention, *supra* note 3, and Rome Convention, *supra* note 3.)

WTO Agreement and applied to the proprietary rights in question.<sup>42</sup> Third, states otherwise contemplating unilateral measures to protect intellectual goods in the future must generally weigh the costs and benefits of non-reciprocity with respect to other WTO member countries, unless the measures contemplated fall outside the seven categories of "intellectual property" recognized by the TRIPS Agreement<sup>43</sup> and outside the residual national treatment

<sup>42</sup> See General Agreement on Tariffs and Trade (as amended through 1994) [hereinafter GATT 1947], art. XXIV, reprinted in RESULTS of the URUGUAY ROUND, supra note 5, at 485, 522-25; WTO Agreement, supra note 5, Annex 1A: Multilateral Agreements on Trade in Goods--General Agreement on Tariffs and Trade 1994, art. 1 reprinted in RESULTS of the URUGUAY ROUND, supra note 5, at 20-21 [hereinafter GATT 1994] (incorporating by reference GATT 1947, supra, art. XXIV); see also GATT 1994, supra, Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994, reprinted in RESULTS of the URUGUAY ROUND, supra note 5, at 31-34. An analysis of Article XXIV lies beyond the scope of this statement. Nevertheless, it suggests the possibility that advantages created under the North American Free Trade Agreement, ch. 17 (Intellectual Property), 32 I.L.M. 612, 670 [hereinafter NAFTA] that are not covered by TRIPS need not always or automatically be granted to non-NAFTA countries that are parties of the WTO Agreement, supra note 5. See also Richard E. Neff & Fran Smallson, NAFTA - PROTECTING AND ENFORCING INTELLECTUAL PROPERTY RIGHTS IN NORTH AMERICA 1-16 (1994) [hereinafter Neff & Smallson]. Naturally, the strongest case for avoiding MFN treatment arises when the proprietary rights in question fall outside the definition of "intellectual property" set out in Art.1(2) of the TRIPS Agreement. See infra notes 63-64 and accompanying text.

<sup>43</sup> See supra note 51 and accompanying text. On this reading, the TRIPS Agreement would appear to override unilateral claims to material reciprocity like those incorporated into the United Kingdom's unregistered design right of 1988 (see Copyright, Designs and Patents Act, 1988, ch. 48, §§ 213-264 [hereinafter CDPA]; see also MICHAEL F. FLINT et al., INTELLECTUAL PROPERTY -- THE NEW LAW 151 (1989) (construing CDPA, supra § 256 to require material reciprocity)) and into the United States' Semiconductor Chip Protection Act of 1984 (SCPA) (Pub. L. No. 98-620, 98 Stat. 3335, 3347 (1984) (codified in ch.2, 17 U.S.C. §§ 901, 902(a)(1)(A)-(C), 913, 914 (1988)). This follows because

clauses of the Paris and Berne Conventions."

Whether any specific measures that were arguably not cognizable under existing conventions, such as the European Union's proposed regime to protect electronic data bases or certain levies for private copying of audio and visual recordings like those implemented in France, may escape the MFN and national treatment clauses of the TRIPS Agreement will thus depend on a variety of factors. These include evolving state practice with respect to regional trade agreements and the extent to which decision-makers interpret "intellectual property" as narrowly defining the seven categories of subject matter to be protected or as broadly defining certain modalities of protection. It may also depend on who interprets these clauses, given the uncertain jurisdictional and substantive powers of the WTO panels to be established under binding dispute-resolution procedures set out in the TRIPS Agreement.<sup>45</sup>

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industrial designs and integrated circuit designs fall within the operative definition of intellectual property. In practice, the need for reciprocity under the GCPA was largely obviated by TRIPS Agreement, *supra* note 5, arts. 35-38, which harmonize the protection of integrated circuit designs.

<sup>44</sup> See TRIPS Agreement, *supra* note 5, arts. 2(1) and 9(1), respectively incorporating by reference Paris Convention, *supra* note 3, art. 2(1) and Berne Convention, *supra* note 3, art. 5(1); see also André Kerever, Le GATT et le droit d'auteur international, 47 REVUE TRIMESTRIELLE DE DROIT COMMERCIAL 629, 641 (1994).

<sup>45</sup> See Reichman, Universal Minimum Standards, *supra* note 2, at 349-50; see also Paul Edward Geller, Intellectual Property in the Global Marketplace: Impact of TRIPS Dispute Settlement?, 29 INT'L L.W. 99, 104-07 (1995).

Nevertheless, one must concede that the drafters of the TRIPS Agreement may themselves have been motivated by unresolved conflicts concerning the application of Article 4,<sup>64</sup> and that the extent to which prior respect for regional arrangements in GATT practice will be carried over to intellectual goods cannot accurately be foretold.<sup>65</sup> If for these or other reasons, the rule of the shorter term -- whatever its legal foundation -- should fail to survive an attack based on Article 4 of the TRIPS Agreement (an unlikely result in my opinion), then the position of U.S. creators vis-a-vis their E.C. counterparts would become particularly advantageous in the absence of amendments like those contained in H.R. 989. In such an event, U.S. creators would obtain all the benefits of the longer terms of protection under the E.C. Directive without having to prolong the benefits afforded Community creators under the Copyright Act of 1976. To the extent that longer terms abroad resulted in overprotection of cultural goods tending to produce economic disutilities, as critics charge,<sup>67</sup> American firms operating under more rigorous conditions at home might be in a position to supply more competitive products abroad. Conversely, foreigners operating

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<sup>64</sup> See, e.g., Fikentscher, *supra* note 53, at 140 n. 2 (reporting differences between representatives of the European Community, the United States, and Switzerland).

<sup>65</sup> See, e.g., Cohen Jehoram, *supra* note 39, at 826-27.

<sup>67</sup> See, e.g., Dennis S. Karjala *et al.*, Comment of U.S. Copyright Law Professors on the Copyright Office Term of Protection Study, 12 E.I.P.R. 531, 532-38 (1994) [hereinafter Karjala *et al.*, Comment].

under an overly protective regime at home might find their products less competitive on the relevant market segments in this country."<sup>6</sup>

If, instead, the European Community continues to apply its comparison of terms clause against U.S. creations notwithstanding Article 4 of the TRIPS Agreement, then Congress should defensively proceed to enact a domestic version of that same rule, as suggested above. It would also justify further investigation of the desirability of enacting amendments like those in H.R. 989, in response to the European Union's use of "the comparison of terms as a means of persuading third countries to extend their terms of protection and thus improve their level of protection."<sup>6</sup>

#### B. The Term of Copyright as Cultural Policy

The pros and cons of prolonging the term of copyright protection are amply expounded in the literature and in various statements taken at these Hearings, and I will not exhaustively

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<sup>6</sup> Cf. J.H. Reichman, Intellectual Property in International Trade: Opportunities and Risks of a GATT Connection, 22 VAND. J. TRANSNAT'L L. 747, 844-48 (1989) ("functional implications of non-reciprocity") [hereinafter GATT Connection].

<sup>6</sup> von Lewinski, supra note 35, at 803.

review them here.<sup>70</sup> In the rest of this statement, I will selectively focus on those considerations that seem particularly relevant to an even-handed assessment of H.R. 989 on the merits.

#### 1. The Unattainable Goal of Uniform Law

Even the opponents of H.R. 989 concede that an overall reduction in transaction costs might bolster the case for conforming U.S. copyright law to the E.C. Directive,<sup>71</sup> even though international intellectual property law does not mandate this result.<sup>72</sup> The foregoing analysis of the divergent conceptual approaches to authors' rights suggests, however, that uniformity with respect to the term of copyright protection remains an unrealistic goal even as between the United States and the European Union, which otherwise share a common concern for high levels of protection for cultural goods. When the rest of the world is factored into the calculus, the goals of greater uniformity and harmonization than that which occurred under the

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<sup>70</sup> See, e.g., Statement of Marybeth Peters, Register of Copyright and Associate Librarian for Copyright Services before the House Subcommittee on Courts and Intellectual Property, 104th Cong., 1st Sess., July 13, 1995. See also A. STROWEL, supra note 38, at 595-627; Kanwal Puri, The Term of Copyright - Is It Too Long in the Wake of New Technologies?, 1990 E.I.P.R. 12, 14-17 (summarizing arguments for and against longer terms of protection); Sam Ricketson, The Copyright Term, 23 I.I.C. 753 (1992).

<sup>71</sup> See, e.g., Karjala et. al., supra note 67, at 23.

<sup>72</sup> See supra text accompanying notes 9-44.



TRIPS Agreement become chimerical, indeed.

In principle, of course, H.R. 989 would harmonize the basic term of copyright protection applicable to traditional literary and artistic works as between two major trading blocks, the European Union and the United States, and this could, perhaps, pave the way to its adoption in the NAFTA context as well. In terms of economic effects as distinct from conceptual formalism, however, this apparent uniformity is offset by the divergent terms of protection that the U.S. and E.U. would continue to afford rightholders in sound recordings, cinematographic and audiovisual productions, computer programs, and in the bulk of all works made for hire, including those within the categories listed above, whether employee-authored or merely deemed the products of corporate legal responsibility.<sup>73</sup> The pending E.C. Directives on databases and industrial designs could further deepen these differences.<sup>74</sup>

In a larger perspective, a true harmonization exercise requires "horizontal levelling" between participating states to reduce the substantive legal and philosophical differences that

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<sup>73</sup> See supra text accompanying notes 14-19, 36-44. For the view that the works-for-hire category has greatly expanded under the copyright Act of 1976 and that this undermines the classical assumptions of the Berne Convention, see Marci A. Hamilton, Appropriation Art and the Immanent Decline in Authorial Control Over Copyrighted Works, 42 J. COPYRIGHT SOCIETY USA 93, 98-110 (1994).

<sup>74</sup> See supra notes 40-41 and accompanying text.

are directly or indirectly tied to the issue of duration.<sup>75</sup> The European Commission has doggedly pursued this path with respect to the criterion of originality used to determine eligibility in the domestic copyright laws of the Community, for-example.<sup>76</sup> To do otherwise would saddle the Community with hidden barriers to trade and disregard the edicts of the European Court of Justice, as most recently manifested in the Phil Collins Decision.<sup>77</sup>

Absent such levelling to lessen the divergent national traditions of the participating states, however, a superficial alignment with respect to selected terms of duration alone produces illogical and contradictory results. By prolonging the basic term of protection afforded works made for hire under U.S. law from seventy-five to ninety-five years, H.R. 989 would only compound pre-existing differences and destabilize the degree of harmonization already underway in the context of U.S. - E.U. copyright relations.<sup>78</sup>

Moreover, developing countries already struggling to defray the costs of imported cultural and technological goods will hardly welcome lengthened terms of copyright protection, any more than the United States did at earlier stages of its own economic development. On the contrary, these countries would normally

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<sup>75</sup> See, e.g., Cohen Jehoram, *supra* note 39, at 827-31.

<sup>76</sup> See, e.g., *id.*, at 828-30.

<sup>77</sup> See *id.*, at 825-27; *supra* note 58 and accompanying text.

<sup>78</sup> See *supra* text accompanying notes 26-44.

stand on their rights under the Berne Convention, except when expressly overridden by the TRIPS Agreement,<sup>79</sup> or, perhaps, when longer terms happened to benefit economically significant local interests. As noted, the TRIPS Agreement requires a minimum term of fifty years for most literary and artistic productions that are attributed to corporate entities.<sup>79A</sup> Subject to this proviso, the Berne Convention, together with the neighboring rights provisions of the Rome Convention and of the TRIPS Agreement, allow member countries to maintain shorter terms of protection for sound recordings, cinematographic or audiovisual works, fixations of performers' renditions, photographic works, works of applied art, anonymous or pseudonymous works, joint works, and works made for hire in general (including computer programs) than those that might be operative in either the European Union (under its Directive harmonizing the term of protection) or in the United States (if Congress enacted H.R. 989), as the case might be.<sup>80</sup> Moreover, the developing countries would continue to retain both their shorter, basic term of life plus fifty years,<sup>81</sup> and their rights to invoke compulsory licenses for the use of certain

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<sup>79</sup> See supra notes 11-13 and accompanying text.

<sup>79A</sup> See supra note 11B-13 and accompanying text.

<sup>80</sup> See TRIPS Agreement, supra note 5, arts. 9, 10, 12, 14; Berne Convention, supra note 3, arts. 2(7), 7, 7 bis; Rome Convention, supra note 16, art. 14; supra text accompanying notes 9-44 (describing effects of E.C. Directive and H.R. 989).

<sup>81</sup> Berne Convention, supra note 3, art. 7(1); TRIPS Agreement, supra note 5, art. 9(1).

scientific and educational works on favorable terms.<sup>22</sup> For the foreseeable future, in short, the developing countries have no reason to diminish their own competitive prospects or to otherwise burden their trade balances by exceeding the minimum international standards under the relevant treaties.

Unless third countries were prodded into entering a harmonized E.U. - U.S. framework, the MFN and national treatment provisions of the TRIPS Agreement could tend progressively to render their cultural and technical products more competitive in the international market than the corresponding goods produced in territories that had succumbed to higher levels of protection. To the extent that higher levels of protection in developed countries actually triggered the disutilities that critics attribute to overly long terms of protection in general, the benefits accruing to more competitively manufactured products in developing countries would further increase once the learning curve and other built-in disabilities afflicting producers in these countries were overcome.

This course of conduct would undoubtedly subject developing countries to new trade pressures attempting to elicit higher levels of protection. Yet, the hard truth is that such pressures will only generate countervailing demands for further trade concessions to offset the social costs of more intellectual

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<sup>22</sup> See Berne Convention, *supra* note 3, art. 21 and Appendix; Guide to the Berne Convention, *supra* note 48, at 105, 146-75.

property protection.<sup>33</sup> Until it becomes possible to evaluate the costs and benefits of the Uruguay Round as a whole, these demands for greater market access would almost certainly exceed the technical and political capabilities of developed countries to grant them.

For these and other reasons, the proposals contained in H.R. 989 cannot be justified as an exercise in harmonization. Their justification in terms of cultural policy remains to be assessed.

## 2. The Logic of Cultural Policy: More Than Utility, Less Than Natural Law

According to Professor Ricketson, a most ardent and distinguished supporter of authors' rights in general, "one is hard-pressed to find reasoned justification for the move for longer terms of protection," which culminated internationally in the life plus fifty standard adopted at the Brussels Revision of the Berne Convention in 1948.<sup>34</sup> The explanation lies in the "strong emphasis that has always been placed on the natural property rights of the author in his work. In this respect, ideology has replaced critical inquiry, and has led to a long period of protection. . . becoming enshrined as an absolute value that has seldom been challenged, except where there have been

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<sup>33</sup> See Reichman, Universal Minimum Standards, *supra* note 2, at 382-85 ("compensation as the key to future concessions").

<sup>34</sup> See Ricketson, *supra* note 70, at 778, 783.

moves for its further extension."<sup>45</sup>

In practice, a life plus fifty formula derogates from both the natural property rights thesis, which argues for perpetual protection on a par with the treatment of tangible property, and from the incentive rationale for copyright protection, which posits that free competition should only be curtailed for the minimum period needed to overcome the public goods problem inherent in intellectual creations generally.<sup>46</sup> Among the various justifications for this standard that have been put forward, the most generally accepted and least controversial is that an author should have the possibility of providing for himself during his own lifetime and then for his immediate dependents.<sup>47</sup> Thereafter, the balance tips in favor of free access to the public domain for later authors who benefit from those who preceded them.<sup>48</sup>

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<sup>45</sup> SAM RICKETSON, THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS: 1886-1986, at 323 (1987); see also A. STROWEL, EUPRA note 38, at 623-24.

<sup>46</sup> See, e.g., Ricketson, supra note 70, at 754-56, 763-67; Collapse of the Patent-Copyright Dichotomy, supra note 4, at 485-87; see also William M. Landes & Richard A. Posner, An Economic Analysis of Copyright Law, 18 J. LEGAL STUD. 325 (1989); Wendy J. Gordon, An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory, 41 STAN. L. REV. 1343, 1351, 1413-63 (1989).

<sup>47</sup> See, e.g., Ricketson, supra note 70, at 761-62 (noting that the fifty year term rests on anecdotal but not scientific evidence); see also Theodore Limberg, Duration of Copyright Protection, 103 R.I.D.A. 53, 68-69, 72-77 (1980); Zecharia Chafee, Jr., Reflections on the Law of Copyright, 45 COLUM. L. REV. 503, 507-08 (1945).

<sup>48</sup> See, e.g., Jessica Litman, The Public Domain, 39 EMORY L.J. 965 (1990); David Lange, Recognizing the Public Domain, 44 LAW & CONTEMP. PROBS. 147 (1981). See also R. Anthony Reese,

In other words, despite the persistent claims of lawmakers, administrators, courts, and commentators, that United States copyright law rests on the utilitarian theory of protection, that theory will no more account for all the peculiarities of developed copyright systems, ours included, than natural rights thinking and the protection-of-personality principle still prevalent in Europe:

For example, incentive theory cannot explain the moral rights. . . that prevent even one who has paid to commercialize an author's work from doing so in a manner that could prejudice the author's honor or reputation.<sup>89</sup> Nor will incentive theory adequately explain such paternalistic measures in American copyright law as the right to terminate transfers<sup>90</sup> or even the long period of protection, which enables living authors and their immediate heirs to partake of revenues generated many years after the creation of their works. The incentive theory of copyright protection thus tends to underestimate the extent to which all states, to varying degrees, have deliberately subordinated efficiency to other cultural policy goals in the market for traditional literary and artistic works.<sup>91</sup>

Acknowledging that copyright laws represent cultural policy does not lessen their importance as providers of incentives to

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Reflections on the Intellectual Commons: Two Perspectives on Copyright Duration and Reversion, 47 STAN. L. REV. 707, 717-19 (1995) (discussing tensions in 1976 Act).

<sup>89</sup> See, e.g., 17 U.S.C. 106(A), as amended by the Visual Artists Rights Act of 1990, Pub. L. 101-650, 104 Stat. 5128; see also W.R. CORNISH, INTELLECTUAL PROPERTY: PATENTS, COPYRIGHT, TRADE MARKS, AND ALLIED RIGHTS 309 (2nd ed. 1989).

<sup>90</sup> See 17 U.S.C. §§203, 304(c) (1988).

<sup>91</sup> J.H. Reichman, Goldstein on Copyright Law: A Realist's Approach to a Technological Age, 43 STAN. L. REV. 943, 947-48 (1991) [hereinafter Realist's Approach]. See also Hamilton, supra note 73, at 98-109.

create. Indeed, even the possibility such laws afford authors to provide for their heirs and dependents can, in part, be rationalized as an incentive to create.<sup>22</sup> Nor does it mean that copyright laws disregard, or should disregard, the concerns of economic efficiency. Rather, "any efficiencies that copyright law produces in the market for literary and artistic works are an integral part of the larger cultural policy this body of law seeks to implement. By the same token, the most fundamental of all the negative economic premises underlying the mature copyright paradigm is that the peculiar mix of cultural and economic policies it implements on the market for artistic works *should not disrupt competition in the general products market as regulated by the mature patent paradigm.*"<sup>23</sup>

In other words, the social costs attributable to the relevant cultural policies remain tolerable only so long as the peculiar and specialized market for literary and artistic productions remains insulated from the general products market, where industrial property laws traditionally tip the balance toward free competition rather than legal incentives to create.<sup>24</sup>

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<sup>22</sup> See e.g., Ricketson, *supra* note 70, at 761.

<sup>23</sup> Reichman, *Collapse of the Patent-Copyright Dichotomy*, *supra* note 4, at 495.

<sup>24</sup> See e.g., 17 U.S.C. §102(b); *Baker v. Selden*, 101 U.S. 99 (1879); *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 151, 156-60 (1989); *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 111 S. Ct. 1282 (1991). For the breakdown of the historical line of demarcation separating artistic from industrial property law, see *Collapse of the Patent-Copyright Dichotomy*, *supra* note 4, at 496-512; *Legal Hybrids*, *supra* note



It follows that the limits of cultural policy must be taken into account in any effort to expand the rewards and benefits flowing from the exclusive rights of copyright law.<sup>88</sup>

Once proposals to extend the term of copyright protection are viewed through the lens of cultural policy, one can reach different conclusions depending on whether the beneficiaries are the authors and artists themselves or merely the publishers and corporate entities that invest in the exploitation and dissemination of cultural goods.<sup>89A</sup> In this connection, the case for extending the protection of works made for hire appears particularly weak, while the case for extending the basic term of authors' rights as such merits further consideration.

a. Works Made for Hire

Disregarding the rewards to authors and their heirs as the primary beneficiaries of cultural policy, the copyright monopoly also functions as an incentive to publishers, who must overcome

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4, at 2448-2504.

<sup>88</sup> See, e.g., Reichman, Realist's Approach, *supra* note 91, at 34 (stressing that this "need becomes imperative at a time when manufacturers of computer programs and other industrial products increasingly avoid competition by masquerading as providers of cultural goods entitled to copyright protection on a par with literary and artistic works." See also Reese, *supra* note 88, at 715-47.

<sup>89A</sup> See, e.g., Statement of Prof. William Patry on H.R. 989 before the Subcommittee on Courts and Intellectual Property, 104th Cong., 1st Sess., July 13, 1995.

the high degree of risk aversion that affects decisions to invest in the dissemination of literary and artistic productions.<sup>66</sup> I am not one of those who underestimates either the difficulties of "prospect[ing] the public's taste"<sup>67</sup> or the degree of risk aversion that publishers must overcome. Nor do I believe that the level of investment in cultural industries would remain adequate if publishers were forced to depend solely on natural lead time.<sup>68</sup> To the contrary, my studies make strenuous efforts to demonstrate that a contraction of natural lead time, with its attendant risks of market failure,<sup>69</sup> afflicts all industries engaged in information technologies and other cutting-edge, innovative pursuits. As a result, I believe new types of intellectual property rights -- rooted in liability principles -- will be needed to cope with subpatentable innovation of all kinds in the twenty-first century.<sup>70</sup>

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<sup>66</sup> See, e.g., Ricketson, supra note 70, at 756-60.

<sup>67</sup> Cf. Edmund W. Kitch, The Nature and Function of the Patent System, 20 J. L. & Econ. 265 (1977) (prospecting function of the patent system).

<sup>68</sup> But see Stephen Breyer, The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs, 84 HARV. L. REV. 281, 325 (1970) (marshalling no scientifically valid data for the opposite thesis).

<sup>69</sup> See generally Wendy J. Gordon, Asymmetrical Market Failure and Prisoner's Dilemma in Intellectual Property, 17 U. DARTMOUTH L. REV. 853, 854-59 (1992) (discussing conditions for market failure).

<sup>70</sup> See generally Legal Hybrids, supra note 4; Samuelson et al., Manifesto, supra note 4, at 2332-65 (predicting cycles of under-and over-protection with regard to computer programs); see also Collapse of the Patent-Copyright Dichotomy, supra note 4, at

This said, the existing term of protection already afforded publishers of works made for hire under domestic law already appears overly long and empirically unjustified when viewed either as the product of a pure incentive rationale or, more generously, through the lens of cultural policy.<sup>100</sup> To be sure, some subject matter categories will be less indulged than others. For example, producers of classical music and other serious or high-brow works may require a longer period of time in which to recuperate their losses from unsuccessful ventures and to post a profit from those that do succeed.<sup>101</sup> As regards the great bulk of copyrightable productions, now including computer programs and other electronic information tools, however, the existing term of protection afforded publishers of works made for hire appears too long as matters stand.<sup>102</sup>

The evidence further suggests that still longer periods of protection would not elicit significantly greater investment in the copyright industries than already occurs, and would instead

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512-20 ("The Competitive Ethos under Attack"); Competition Law, Intellectual Property and Trade, *supra* note 2, at 81-98 ("Interaction Between Intellectual Property and Trade Regulation in Innovation-Based Market Economies").

<sup>100</sup> See, e.g., Ricketson, *supra* note 70, at 763-66 (finding it "hard to believe that publishers and other initial exploiters of works base their present investment decisions on prospects of exploitation that may only arise in the distant future"); Reese, *supra* note 88, at 719-27.

<sup>101</sup> See, e.g., Puri, *supra* note 70, at 15.

<sup>102</sup> See, e.g., *id.*, at 17-20 (citing authorities); see also Ricketson, *supra* note 70, at 763-69.

simply add to the social costs of monopoly that users of the copyrighted culture must already endure.<sup>103</sup> To accord more protection without hard evidence that the benefits outweigh the costs would thus amount to an indefensible subsidy at a time when the cause of regulatory reform dictates more, not less, emphasis on competition. Other industries could hardly be blamed for seeking comparable protectionist cushions of their own.

Contrary to the facile predictions of some, moreover, I believe that protecting corporate productions for ninety-five years could have uncertain, and possibly negative, effects on the long-term balance of trade. True, some domestic publishers whose employee-works become subject to the rule of the shorter term in foreign markets might benefit from the longer term at home because application of that rule turns in part on the continued existence of copyright protection in the country of origin.<sup>104</sup> It remains equally true, however, that most U.S. works made for hire (including computer programs) that are treated as corporate productions -- rather than as the works of recognizable authors and artists -- in the European Community, whether under copyright or the neighboring rights laws, would themselves become subject to the E.C. Directive's own rule of the shorter term, based on a

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<sup>103</sup> See, e.g., Karjala *et al.*, *supra* note 67, at 532-33; *supra* note 102.

<sup>104</sup> See *supra* text accompanying notes 47-50.

fifty or seventy year duration as the case may be.<sup>105</sup>

More generally, short-term efforts to rig international intellectual property relations so that they favor a particular country or group of countries run the risk of disfavoring this same country or group of countries in a medium or long-term perspective. Copyright law is like a lottery that produces a winner-take-all sweepstakes reward. Unlike other lotteries, however, the copyright paradigm is constructed in such a way that the lucky strikes scored by some authors do not necessarily preclude similar strikes by others working in the same creative vein.<sup>106</sup> No one can predict the public's fancy more than a year or two in advance, if that. While consumers worldwide display unabated appetites for American films, music, and computer programs, there is no reason to doubt that European, and increasingly, Asian and Latin American producers will not periodically mount serious challenges in the future. One has only to recall the prominence of the English musical group known as "the Beatles" (and of English fashion designs as well) over a period of two decades to rein in the hubris of our present-day cultural exponents. To the extent that longer terms of protection are enacted into law, they augment the tribute that

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<sup>105</sup> See supra text accompanying notes 14-17, 36-42. However, U.S. film "authors," as defined in the E.C. Directive, supra note 6, art. 2, might try to claim at least ninety-five years of protection in the European Community, in contrast with the life-plus-seventy term afforded E.C. film authors.

<sup>106</sup> See, e.g., Reichman, Collapse of the Patent-Copyright Dichotomy, supra note 4, at 492-96.

must be paid to successful foreign creators. They also augment the concomitant risk that foreign firms operating in less protected environments will ultimately become more competitive in the world market than our overly protected domestic contestants.<sup>107</sup>

Given the tendency toward more rapid exploitation of cultural goods in a digitalized universe, indeed, a good case can be made for shortening the seventy-five year term of protection already afforded corporate creators, at least with respect to some subject-matter categories.<sup>108</sup> Efforts to further extend that term in the absence of hard evidence showing that the resulting social benefits would outweigh the palpable social costs appears to be mere rent-seeking by powerful special interests.<sup>108A</sup>

b. True Authors and Artists

The drafters of the E.C. Directive claim that their primary motive in adopting a basic term of life plus seventy years for

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<sup>107</sup> In this connection, it is well to recall that the French delegation to the Paris Convention in 1863 was reviled as traitorous at home because it was thought that they had opened French markets to too much foreign competition. It may well be that the heroes of today's multilateral trade initiatives, especially the TRIPS Agreement, will suffer a similar fate down the road.

<sup>108</sup> See, e.g., Puri, *supra* note 70, at 17-18; Karjala *et. al.*, *supra* note 67, at 533; see also S.J. Liebowitz, Copyright Law, Photocopying, and Price Discrimination, 8 RESEARCH IN L. AND ECON. 189, 198 (J. Palmer, ed. 1986).

<sup>108A</sup> Cf. Jessica Litman, The Exclusive Right to Read, 13 CARDOZO J. ARTS & ENTERTAINMENT L.J. 29 (1994).

traditional literary and artistic works was the need to reconcile copyright law with the longer lives that authors and artists now expect to lead.<sup>109</sup> This apparently innocuous declaration has been met with almost uniform skepticism even by those commentators who otherwise congratulate the E.C. Commissioners on the success of their Directive.<sup>110</sup> Their derision stems in part from the realization that a prolongation of the author's own life automatically tends to offset some of the need for longer protection after death.<sup>111</sup> Mainly, it stems from a nearly unanimous conviction that, despite the lofty position of authors in Continental copyright theory, it is their publishers who would normally expect to benefit from the lengthened term of protection in practice, as transferees of the authors' copyright interests.<sup>112</sup>

The real motive for the Commission's Directive, and the reason it has elicited grudging approval, is that it reconciles

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<sup>109</sup> See, e.g., E.C. Directive, supra note 6, Preamble, item 5 ("average lifespan in the Community has grown longer, to the point where . . . [standard] term [of life plus fifty] is no longer sufficient to cover two generations"); von Lewinski, supra note 35, at 788-89 (citing legislative history).

<sup>110</sup> See, e.g., id., at 788-90, 807; Cohen Jehoram, supra note 39, at 834-35 ("this argument is far from convincing").

<sup>111</sup> See, e.g., id.

<sup>112</sup> See, e.g., von Lewinski, supra note 35, at 788 ("usually, assignment or transfer of copyright goes to an exploiting enterprise for the entire duration of protection"); see also Ricketson, supra note 70, at 768-69; Puri, supra note 70, at 17 ("The usual pattern is that the author seldom retains the copyright").

the goal of rapidly eliminating trade distortions arising from different levels of protection in the Community at large without curtailing rights previously acquired under the most deviant domestic laws.<sup>113</sup> Once Germany, and to a lesser extent, France, had haphazardly moved to longer periods of protection,<sup>114</sup> the technical ground rules of market integration thus led to an upward harmonization, despite widespread recognition that, on the merits alone, the German and French leads were examples of what not to do.<sup>115</sup> Indeed, a more enlightened view might have installed an additional twenty-year domain publique payant, during which period users would enjoy free access to works that had otherwise entered the public domain on condition that they paid equitable compensation directly to authors, but not to publishers.<sup>116</sup> Needless to say, the publishers' lobby defeated this sensible proposal and beat back a last minute push to retain the life-plus-fifty formula as well.

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<sup>113</sup> See, e.g., E.C. Directive, supra note 6, Preamble, items (9), (18); Cohen Jehoram, supra note 39, at 834-35 (choice of seventy years p.m.a. "justified/. . ./by the aim of all the harmonizing effort, namely the realization of the internal market"); von Lewinski, supra note 35, at 834-36.

<sup>114</sup> See generally, A. STROWEL, supra note 38, at 600-01, 602-05, 623-27.

<sup>115</sup> See, e.g., id., at 624-27; von Lewinski, supra note 35, at 788-90.

<sup>116</sup> See, e.g., von Lewinski, supra note 35, at 789-90, 790 n. 23 (approving this proposal, but noting that the Commission's earlier proposal to this effect in 1980 had been rejected); see also Ricketson, supra note 70, at 784 (endorsing this scheme); Statement of Patry, supra note 95A.



Given this background, Congress might plausibly reach the same conclusion on this specific question as the drafters of the E.C. Directive did, with less contorted reasoning. The claim that the existing term accounts inadequately for the greater longevity of authors and their heirs under present-day conditions often rings true, even though the magnitude of the problem is held in check by the possibility that the original author's own lengthened lifespan will reduce the burden on his or her dependents. We see this often in Nashville, where families literally depend on royalties from country music that continues to be exploited long after the composer's or lyricist's death. The prospects that persons in no way connected with the creation or promotion of such works might continue to exploit them without payment to the authors' direct heirs does raise concerns of fairness and equity, as a matter of cultural policy.<sup>116A</sup>

Under the Copyright Act of 1976, moreover, authors and their dependents expressly retain the right to terminate at least one transfer of their exclusive rights, and possibly others, at the expiration of thirty-five years from the date such grants were made.<sup>117</sup> To the extent that domestic law otherwise inhibits publishers from circumventing this termination right, the chances that a lengthened basic term of protection would actually benefit authors, artists, and their immediate families, rather than

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<sup>116A</sup> See, e.g., Reese, *supra* note 88, at 724-25.

<sup>117</sup> See 17 U.S.C. §§ 203, 304(c) (1988). For simplicity, only §203 is considered here.

publishers, are higher in the United States than in Europe. This makes such a proposal worthy of further study as a matter of cultural policy.<sup>117A</sup>

This line of investigation presupposes, however, that Congress should deem it advisable to strengthen and further safeguard authors' termination rights in the context of an adjustment to the term of protection. At the least, a technical reexamination of the termination right should be undertaken, with a view to eliminating its weaknesses, and to closing loopholes through which publishers might otherwise capture the extended period of protection.

For example, Section 203 may already authorize multiple terminations at successive thirty-five year intervals,<sup>118</sup> but no harm would be done if Congress said so expressly and thus prevented the Courts from indulging in discordant speculation about freedom of contract. Errant judicial opinions in this regard need correction,<sup>119</sup> while the wholesale exemption of derivative works from termination under Section 203 should be reassessed.<sup>120</sup> At present, the derivative rights holder may expect to continue to exploit a derivative work under an initial

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<sup>117A</sup> See, e.g., Reese, *supra* note 88, at 732-35.

<sup>118</sup> Professor Karjala, for one, reads the statute this way.

<sup>119</sup> See Mills Music, Inc. v. Snyder, 416 U.S. 153 (1985); Howard B. Abrams, Who's Sorry Now? Termination Rights and the Derivative Works Exception, 62 U. DET. L. REV. 181 (1985).

<sup>120</sup> See 17 U.S.C. §§106(2), 203(a), (b)(1) (1988); Reese, *supra* note 88, at 733-35, 740-41.

transfer, without periodically subjecting the payment structure to scrutiny on equitable grounds, even though he or she may not produce a new derivative work once the initial grant has been terminated.<sup>121</sup> Because most derivative right holders are corporate entities, a failure to reexamine this provision could effectively deny authors, as distinct from publishers, many of the benefits to be expected from prolonging the basic term of protection.

Radical measures to solve this problem are undesirable, however, because it might prove unfair to expose publishers, who had invested heavily in derivative works, and who had paid authors handsomely for the privilege, to the full rigors of the termination right.<sup>121A</sup> It suffices to oblige the derivative right holders periodically to renegotiate the rate at which royalties are paid in light of changed circumstances, if any, in return for the grantee's right to pacific enjoyment of the derivative work even during the period of years that might be added to the existing life-plus-fifty term. In this connection, the treatment of existing derivative works under the restoration of copyright provisions, enacted in connection with the TRIPS Agreement, could be emulated with respect to transfers of the right to prepare derivative works in general.<sup>122</sup>

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<sup>121</sup> See 17 U.S.C. §203(b)(1).

<sup>121A</sup> See, e.g., P. GOLDSTEIN, *SUPRA* note 18, §4.9.3.2.

<sup>122</sup> See U.R.A.A., *SUPRA* note 5, section 514, amending 17 U.S.C. 104A(a)(3).

### 3. The Limits of Cultural Policy

If, after further study, Congress opted to combine a prolongation of the basic life-plus-fifty term with a strengthened right of termination, as outlined above, it should consider further undertaking to clarify the frontier between copyright law and other intellectual property laws, with a view to limiting trade distortions in the general products market. While this opens a topic that this statement cannot deeply cover, there are two closely related phenomena that require attention in this regard. One is a short-term need to reinforce the crumbling line of demarcation that historically separated artistic from industrial property, pending the formulation of new approaches to the protection of borderline subject matters that fit imperfectly within the classical patent and copyright paradigms. The other is the long-term need to develop such new approaches, in order to reduce the pressure on the world's intellectual property system while elevating the level of investment in routine, subpatentable innovations generally.<sup>123</sup>

Fortunately, the federal appellate courts have facilitated the first task by reinvigorating the rule of Baker v. Selden<sup>124</sup> as a barrier to copyright protection for functionally dictated

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<sup>123</sup> See generally, Legal Hybrids, *supra* note 4, at 2500-2557; see also Collapse of the Patent-Copyright Dichotomy, *supra* note 4, at 504-19 ("Empirical Limits of the Classical Bipolar Structure").

<sup>124</sup> Baker v. Selden, 101 U.S. 99 (1879).

matter of all kinds.<sup>125</sup> These issues are poorly understood even among experts, however, and there is always the risk that courts may backslide, especially in cases where they perceive elements of gross misappropriation not otherwise actionable in unfair competition law.<sup>126</sup> In other words, efforts to avoid overprotecting borderline subject matter in copyright law, such as computer programs and commercial designs, readily give way over time to countervailing decisions that offset the resulting state of underprotection with a renewed risk of overprotection. History shows, indeed, that any protracted inability to deal with a market failure affecting borderline subject matter that eludes the classical patent and copyright paradigms tends routinely to trigger recurring cycles of over- and underprotection.<sup>127</sup>

In this context, the difficulties encountered in formulating a proper regulatory framework for computer programs and

<sup>125</sup> See, e.g., Realist's Approach, *supra* note 93, at 970-76; Pamela Samuelson, Computer Programs, User Interfaces, and Section 102(b) of the Copyright Act of 1976: A Critique of Lotus v. Paperback, 55 LAW AND CONTEMP. PROBS. 311 (1992); J.H. Reichman, Electronic Information Tools, *supra* note 6A, at 455-61. See also Jessica Litman, Copyright and Information Policy, 55 LAW AND CONTEMP. PROBS. 185 (1992).

<sup>126</sup> See, e.g., Whelan Associates v. Jaslow Dental Labs., Inc., 797 F. 2d 1222 (3d Cir. 1986) (broad copyright protection for elements of structure, sequence, and organization in computer programs), cert. denied, 479 U.S. 1031 (1987); see also Designs and New Technologies, *supra* note 26, at 81-123 (criticizing use of Lanham Act §43(a) to protect unpatentable, noncopyrightable industrial designs).

<sup>127</sup> See, e.g., J.H. Reichman, Design Protection and the Legislative Agenda, 55 LAW AND CONTEMP. PROBS. 281, 287-90 (1992) (case of industrial designs); Legal Hybrids, *supra* note 4, at 2504-2519.

industrial designs is not some isolated, transitory phenomenon, but rather two facets of an ongoing technological revolution affecting electronic information tools, biogenetic information, and other cutting-edge technical pursuits. The problem is that these and other design-dependent forms of subpatentable innovation do not fit within the classical intellectual property paradigms. The further inability of classical trade secret law to protect the applications of scientific know-how most valuable to industry today then tends to generate a progressive contraction of natural lead time under present-day conditions.<sup>128</sup>

Without further delving into these complex matters, my point is that, unless Congress begins actively to investigate these problems, the odds are high that the winds of overprotection blowing from the European Community -- as evidenced by one economically unsound intellectual property Directive after another -- will lead to a proliferation of equally ill-conceived legislative initiatives over here.<sup>129</sup> This, in turn, could yield cumulative protectionist restraints on free competition that could irreparably harm the small and medium-sized firms largely responsible for this country's continued technological superiority. To forestall future misadventures of this kind, Congress should begin to investigate the need for a new

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<sup>128</sup> See generally, Legal Hybrids, supra note 4, at 2434-52, 2504-2519.

<sup>129</sup> See id., at 2453-2500 ("The Proliferation of Legal Hybrids: Selected Case Studies"); see also Samuelson, Database Directive, supra note 41.

intellectual property paradigm not rooted in the exclusive rights model typical of the patent and copyright paradigms, even as it struggles to perfect these same paradigms with respect to their traditional objects of protection.<sup>130</sup>

Any decision to increase the term of copyright protection as an instance of cultural policy should thus trigger a searching investigation into the limits of cultural policy in an Age of Information. If this investigation then leads to the elaboration of new protective schemes that can cure market failure without erecting new barriers to entry, it would ultimately free U.S. innovation law from the grip of undemocratically appointed foreign bureaucrats who have surrendered to sectoral protectionist demands. This, in turn, could help to ensure that American innovation law continues to help American innovators to lead the way into a complex technological future.

#### C. Specific Recommendations

The foregoing analysis suggests that enactment of H.R. 989 in its present form would be premature and counterproductive. Proposals to lengthen the term of copyright protection for works made for hire seem particularly inopportune, although Congress should give further study to the possibility of prolonging the

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<sup>130</sup> See generally, Reichman, Legal Hybrids, *supra* note 4, at 2520-2557 ("Portable Trade Secrets"); see also Samuelson et al., Manifesto, *supra* note 4, at 2413-2430.

basic term of life plus fifty years.

Whether or not specific action is taken on the proposals contained in H.R. 989, Congress should enact an American version of the rule of the shorter term to limit some of the adverse effects of recent initiatives in the European Community. At the same time, Congress should monitor the evolution of the TRIPS Agreement, with a view to ensuring the overall compatibility of such a rule with the Most Favored Nation clause of that Agreement.

If Congress decides to prolong the basic term of protection for true literary and artistic creations as a matter of cultural policy, it should take steps to strengthen the author's termination rights under existing law. This is needed to ensure that authors, rather than publishers, reap the benefits of such a policy. The merits and demerits of a "paying public domain" also deserve study. However, the term of protection currently afforded works made for hire should not be further extended, lest U.S. law become overly protective in comparison with the applicable foreign laws generally.

Looking to the future, it seems clear that Congress will have to investigate the limits of cultural policy in at least two dimensions. Pressures for greater U.S. compliance with moral rights will certainly grow, and Congress may wish to consider measures to preserve the domestic cultural heritage as a possible counterweight to demands for exorbitant protection of such rights.



More important, Congress should lose no time in investigating the inability of the classical copyright and patent paradigms adequately to protect new technologies that progress through small, incremental improvements in design and know-how, rather than through major inventive steps. Unless timely action is taken to deal with borderline subject matter that falls into the penumbra between the classical patent and copyright paradigms, efforts to further strengthen copyright law by, say, prolonging the basic term of protection, could boomerang against some of this country's long-term trade interests, which it was nominally supposed to help.

Mr. MOORHEAD. Thank you.

There was one concept that was presented here that I want to ask a couple of questions about, and that's the idea of being able to disregard contracts because they're old or because situations have changed. I leased a piece of property one time for a very small amount of money for a long period of years, and that property became very valuable. The man that leased it from me was able to release it for about four or five times what I had leased it to him. I don't think I'm entitled to that money because I made a contract; things changed, and I don't think I'm entitled to getting additional remuneration because things have changed or because Government actions caused it. I have real concern with rescinding any kind of a contract that is made between two parties. If you've got a 12-year-old child, they have to have a legal guardian or it's not a valid contract to begin with. It isn't really—the guardian, on behalf of the child, is making the contract, if there is a contract.

Mr. PATRY. I'm happy to answer that. There are a few responses. One response is that the origins of these music contracts—and this is in my written statement, pages 2 through 3—you can go back as far as 1919, when a lawyer for a music publishing company said, "You know, even though the Copyright Act was just passed 10 years ago"—and that's when we went to a term of 28 plus 28 years, 56 years—"I'm going to put in all of our contracts a provision saying that if at some time in the future, decades, decades later, Congress happens to extend the term of copyright, the publisher is going to get it. What does it cost me? Nothing. They're words; I can put them down there." And, Mr. Moorhead, they did. They were put in every single music publishing contract. If you wanted to sign a contract, that's what you signed. Did the music publisher bargain for that? Of course not. Did the publisher who purchased the copyright pay for that? Absolutely not. At that time that contract was for 56 years because that's all Congress gave. The person who bought the copyright paid only for 56 years because that's all they could get.

I don't think that Congress in 1995 should be governed by what some publishing lawyer did in 1919 to put boilerplate language in a contract. The publisher got everything it could from that contract, 50 years, and nothing more.

The second answer is that, yes, parties to private contracts should be able to negotiate good deals, bad deals, and reasonable deals, whatever, but that's not what we're talking about here. What we're talking about is what the U.S. Congress does, and what the U.S. Congress does pursuant to a constitutional provision that says: "You, Congress, have the power to grant copyright to authors to benefit the public." And I think it's very fair for you to say 75 years after boilerplate language was put in, and you're giving a new property right that that right should go to the author. We're not talking about a private deal that you privately have to stick to. We're talking about 75 years later when Congress decides to give new property, because this 20 years is new property. It's going to be exploited now. I think it's fair for you to say, what's the correct public policy in granting new rights, new rights that weren't in existence when that contract was signed. I think under the Constitu-

tion you have to give it to authors, and I think the public policy has to be to give it to authors.

Mr. MOORHEAD. Yes?

Mr. REICHMAN. Your question is a good one. Narrowly, let me just say we already have adopted the policy of terminating authors' contracts to restore ownership of copyrights after 35 years. So this would not be a novel principle. It would just be continuing a principle we've already accepted.

The question is, why do we do this? Why do we treat intellectual property different from tangible property? Well, if you think about it, it is different because you can put up a fence around your property and you don't need the State to intervene, and I can't come on to your property. But, in reality, there are no fences around intellectual property. There would be no publishers unless you, as Congressmen, manufactured these artificial legal fences that travel imperceptibly with intangible works and that tell me, even though I have possession of the physical support that I can't make uses of the work it embodies.

Why do you create these legal fences? Because you want to make a market that wouldn't exist without intellectual property rights. However, you also want to attain a fair market place and a competitive balance between those who create and those who exploit. Therefore, when you make that market artificially and erect a fictitious fence that doesn't exist in nature, you tell publishers that we have to look out for our authors and our artists because people like W.C. Handy can't always look out for themselves. So we have a paternalistic element in our copyright law; all copyright laws contain some paternalistic measures to protect authors.

And I don't think we need to apologize for it. We would think twice about disturbing a lease; but I don't think we would need to think twice about allowing W.C. Handys, to terminate transfers, because if we didn't already give the publisher this artificially created exclusive right, he couldn't exploit the artistic works of the W.C. Handys in the first place. So it's only fair to say, well, if he exploits your work, you, the artist ought to get a fair return for as long as he exploits it.

Mr. MOORHEAD. Well, you know——

Mr. HOKE. Would you yield for a moment, Mr. Chairman?

Mr. MOORHEAD. I'd be happy to.

Mr. HOKE. The point you're making, the only problem with it is when you say that the publisher couldn't exploit the right if we didn't give the right to Handy in the first place, it's a little bit circular in that, if the right wasn't given, if the right had not been given to the author in the first, then there would be no right——

Mr. REICHMAN. There would be no market. There would be zero lead time. Anyone could copy such a work——

Mr. HOKE. Precisely. Everybody would be able to publish the same piece of intellectual property.

Mr. REICHMAN. And the thinking is that market failure would be virtually total; that it would be a great disincentive to invest in these enterprises because you can't tell in advance which works are going to be successful. Even a very successful one would be there for a minute only, and then copiers would move in like sharks. Consider even the most successful musical comedies, say those of

Rodgers and Hammerstein. You may recall all their successes. Their investors know the two and three times in a row when they failed. The copyright monopoly makes this type of investment possible by insuring that free riders cannot come in and reduce the lead time of the investor to zero by simply copying the product that succeeds. Remember, there's no trade secret law available in copyright. What you see is what you get. You can't keep anything back. So you artificially manufacture this market by granting exclusive right to intangible creations, a market that wouldn't otherwise exist. All I'm suggesting is that in manufacturing it, you have a burden to the public that you don't have with respect to tangible property, where everyone takes care of themselves.

Mr. MOORHEAD. Well, what do you do in a situation like you buy a Picasso when Picasso was young and you get it for \$1,000, and Picasso becomes famous and eventually dies, but you bought it for \$1,000. You own the copyright on that figure that you bought, but then 50 years later you say, hey, I can make some money on this by putting out copies, duplicate copies of this. You have the copyright; you can do it.

But your argument falls flat on its face if you're going to let them do that. You'd refer it back to the family of Picasso.

Mr. REICHMAN. I expect that sooner or later we're going to be in a hearing to talk about that. In Europe they have a right called the *droit de suite* which allows—

Mr. MOORHEAD. Well, I know they do and that's why I brought the point up.

Mr. REICHMAN. That's a very interesting concept. I personally am not prepared to speak in favor or against a *droit de suite* today, but I think your point is very well taken, that it raises the kinds of things we're talking about, equitable considerations. And in California, I'm sure you know that that you have *droit de suite* resale royalties for this purpose: that is, to help painters receive a share of the added value from the resale of their works over time. And I think that that point is fully consistent with Bill Patry's points about the need to protect—

Mr. PATRY. Mr. Chairman, if I could respond—that's not the law in the United States, as you know. The situation you're talking about doesn't occur here. If somebody buys a Picasso, they don't buy the copyright; they buy the physical object. And if the value of the physical object goes up, that's the way it goes for Picasso, but that's not what we're talking about here.

What we're talking about here is the copyright and we're talking about Congress giving new property to somebody that didn't exist at the time the contract was signed. The question is, who's going to get the benefits? I just don't understand—

Mr. MOORHEAD. Well, it's still property. You own a motion picture. You own whatever it is you own that you have bought. It's still property.

Mr. PATRY. Well, that's true; you can buy the copyright. And when you bought it in the past, you negotiated for 56 years. We now have a market in 1995. Congress is going to give 20 more years for that market. The question is, are you going to let authors sit down at the table and negotiate for what the value is worth in 1995 or not? Or are you going to let the person who bought the

copyright in 1920 sell it to the public at 1995 rates and the author's not going to be able to share in that? I don't know why there should be a subsidy. Without a right to renegotiate, authors are paying a subsidy to people who bought it long ago. I don't know why it's wrong to let an author and his family, the people whom this bill is supposed to protect, sit down and negotiate for what it is worth now. You're giving the 20 years now. You didn't give it 75 years ago. It's a question of fairness.

Mr. MOORHEAD. I'm of the opinion—and I know that the direction things go, if you sell your services with all you create for a certain amount, say in today's market a million dollars, you might only be able to get a half a million if you had all kinds of strings tied to that sell. Presumably, they've contracted for it, but they made a deal. They made a contract. They made a sale. And they've probably been paid more than they would have been paid if there were strings on it. And, yet, if the Government come back and puts the strings on it, they have certainly interfered with the private contract arrangement.

Mr. PATRY. I don't know how you can say there's interference by the Government if the contract is being honored for every single day that it was negotiated, and what you're talking about is giving something that neither party expected, anticipated, bargained for, or paid for.

Mr. MOORHEAD. We have all kinds of Government changes made due to zoning of property of all kinds. If the Government makes rules after that, that would make it more expensive or make it cheaper; that doesn't alter the terms of the contract. And that's something that was never anticipated, but it still happened.

I wanted to ask Mr. Belton something. You were referring—you know, in the early days of the motion pictures—I grew up in the neighborhood. So I watched them to a great extent come along. The early motion picture companies were just little companies really, a lot of them. They didn't have a lot of money for modern-day storing of motion pictures, and so forth, like we have now. There's no question about it; a lot of them were lost.

But if you would go through the Disney libraries and Sony's and Warner Brothers' and others out there now, you would find that they are very meticulously being cared for, and the opportunity of them being discarded or lost just isn't really there any longer. Things have changed by the years, and I think that film preservation is wonderful and I have supported it all along. It's nice for a Government control agency or support agency to have those available for people that want to use them or see them at a given time, or at least know that they will be there for years to come.

But it's very difficult to criticize those early-day studios for having lost some of those things that we wish they would—

Mr. BELTON. Well, it certainly is the nature of the medium itself. We would expect to find books published in the same period in libraries, but it's because of the unstable nature of motion picture film and the nature of the business—it was quite a different business from publishing—that these films don't survive. And the ones that do tend to belong the major six to eight studios who have survived along with them. So you're right, there is a great problem in these small companies that have disappeared that have made

films, but many of them, like Mutual, which made all the Chaplin films, these films are in the public domain and you can find them everywhere. They're the only Chaplin films, in fact, that you can show in universities because the Chaplin estate has decided to withhold all of his feature films. This is from, "The Gold Rush" I guess is still public domain. You can't rent them. You can't see them at a theater. You can get them on video, if you want. So every story is going to be different about the way in which films have been regarded and preserved. Chaplin preserved his films that he owned very, very carefully.

Mr. MOORHEAD. For those of you who like "Gone with the Wind," they'll bring them out one at a time later on and they'll be very valuable. People will come and see them.

Mr. BELTON. But even "Gone with the Wind," there was trouble with the color deteriorating, and if they weren't careful about checking their preservation process, it might not have been restored fully.

Mr. MOORHEAD. I recognize the gentleman from Michigan.

Mr. CONYERS. Please don't show "Gone with the Wind" at a hearing, Mr. Chairman. I'd just as soon pass on that one. [Laughter.]

Mr. MOORHEAD. I just picked that one out of the hat.

Mr. CONYERS. I know.

Dear friend Carlos, where is your sense of capitalistic Republican responsibility here? Here you come weighing in on the side of big government, and all these professors are doing—we had a wonderful hearing. We had Government people. We bring in the pre-eminent leader of American cultural music, Quincy Jones, and then you bring in these four guys. And here this little party is getting turned upside down, and you're opposing people that produce, independent entrepreneurs, businessmen, like in early studios in the days you grew up in your neighborhood, and now you're saying, no, we don't think that private ownership rights should be given that greater regard. I am shocked as I listen to you here—

Mr. MOORHEAD. Well, you misunderstood what I said.

Mr. CONYERS. Are you for the little guy? Are you for the small businessman?

Mr. MOORHEAD. I'm for the sustaining contractual rights.

Mr. CONYERS. You're for what?

Mr. MOORHEAD. Sustaining contractual rights.

Mr. CONYERS. Well, let's worry about this a little bit more because you called this panel—this is almost like the days before the Republican takeover. I mean, if I were Chair, I would have you guys up here, but you call these people—

Mr. MOORHEAD. We try to be fair. We bring every point of view we can bring.

Mr. CONYERS. You brought these men full well knowing what they might do in this hearing, and, damn it, they've done it, Carlos. [Laughter.]

Mr. HOKE. Would you yield for a moment, Mr. Conyers?

Mr. CONYERS. No, thanks. [Laughter.]

No, thanks.

And what is the problem here, because I want to go along with the program here. I'm in the minority now. I'm really learning what that's all about.

And what is happening is that I find that you fellows keep harping on our conscience and sense of fairness and where all this is going, and it's a little bit disturbing. I mean, this party was just about sealed, signed, and delivered, and now we've got to go in and try to untangle your arguments of fairness and conscience. We're going to put a big job, a big responsibility on this committee; I can tell you that. I don't know how we're going to be able to handle it.

And I am, frankly, worried. Maybe we need to go back into this. Now I'm a late bloomer to the subcommittee, and I'm a late member of the major sponsors on the bill here, and you're creating some awful problems. You've raised issues here. I mean, couldn't you have just submitted your testimony in writing maybe and we would have filed it away and it would have been put in—Bill, you know where they go in the Judiciary Committee. [Laughter.]

And we would have written you letters back thanking you very much, and we'd be having lunch about now and I wouldn't be having to decline to recognize my dear colleague from Ohio.

So, I mean, what—who are you guys really? I mean, what's your purpose here today? I mean, are you going to set the intellectual property industry on its ears with this kind of talk going on in this room? Are you going to turn away the trade balance that we've carefully nurtured through the film industry and others? I mean, it's one of the few things we can hold up with pride. So what's happening?

Mr. PATRY. Mr. Conyers, I think the fixes to this bill are very easy. You give the copyright directly to the author. The Constitution and public policy says you give it to authors, I'd say it's a rather sad day when we have to entertain the thought, however amusingly, that we're going to set the system on its head by protecting the very people the Constitution says should be benefited. Everyone gets up and you have wonderful testimony about how great creators are and how we love everyone's music, and I do, too, but guess what? When it gets down to dividing up the money, we're going to say the sanctity of a contract written in 1930 means a lot more than what the Constitution says, and what good public policy dictated in 1995. I think if you're going to say, "Oh, no, we're not going to take the time to do what's the right thing to do," then that's a big problem.

Mr. CONYERS. Professor Karjala.

Mr. KARJALA. Thank you. I think I agree with Bill Patry on this question insofar as this bill is being presented as it's a benefit to authors. It isn't. And if you want to benefit authors from the twenties, thirties, forties, and fifties, you should follow his suggestion.

But, more generally, I would suggest that in doing so we not turn intellectual property law on its head. I'm suggesting that we keep what has worked so very well in the past. We have a very successful balance between private and public interests, between the payment to past authors and the encouragement to future authors, and we want to make sure we don't upset that balance.

I'm sympathetic to the views we heard from Mr. Jones this morning, and if we can find a way to ameliorate some of the bad effects of those contracts written in those years, I would certainly be happy to consider it, but what I seriously worry about, the hin-

drance, the negative effects of this extension legislation on new authors, both large and small, but especially small, whom we count on to keep this export engineer rolling.

Mr. BELTON. If you—you were about to recognize me maybe?

I think it might be impractical to try to redress the errors of a culture from this vantage point, but I think one of the things you could focus on is whether or not you want to extend copyright term for works made for hire because that would, then, at least put an end to whatever inequities may be part of that system, and that is a very minor change and it also does not violate conformity with your present agreement.

Mr. CONYERS. Thank you.

Mr. REICHMAN. What makes our provision the most generous in the world is that works for hire last 75 years. As I said earlier, the norm is 50. I would agree that there's no reason at all to change the current term of 75 years. I agree completely with Bill that if you are impressed by the testimony of people like Quincy Jones, the important thing is that artists, not publishers, get the money.

And when people came in here this morning and said this is not a very complicated question, that was not true. This is one of the most complicated issues that I've looked at in a long time, and I specialize in very complicated issues. It is not simple. [Laughter.]

It is not simple. And when people say that it's simple, there's usually a hidden motive for doing that.

Second, be careful about trade balances. We in the United States have a tendency to try to rig international law for short-term advantages and then get hit over the head by the long-term disadvantages. I used to teach international law, and there are examples of this piled up all over. The developing countries used to do that too, but they learned to be more cautious. They extended their shorelines, the offshore rights, exclusive rights, by 200 miles, thinking, ah, that will really fix things, and then what did they find out? They can't exploit their own zones very well, and they can't reach distant waters; but developed countries can exploit their own 200-mile zones and the most distant waters. So, when you start fooling with international law for short-term benefits, then you're locked in. Everybody's been thinking about the wonderful short-term advantages of the TRIPS Agreement; no one is worrying about national treatment and MFN, which are now universal norms.

Copyright law is a kind of lottery, and it's a wonderful kind of lottery because it doesn't limit the number of winners. If we have some winners, that doesn't preclude there being winners in Australia, winners in Malaysia, winners in Latin America, winners in Africa. And I have to tell you that the rate of innovation at the moment is about five times higher in Indonesia, Malaysia, and Thailand than it is right here, and I have documented evidence of that.

So I get very nervous when our trade representatives, captured temporarily by certain oligopolies, want us to believe that the market we see today is the world for all time. I recall that the United States, only a few decades ago, controlled 70 percent of the world market for general purpose machine tools. The United States is now a net importer of general purpose machine tools. It's an exporter of special purpose machine tools known as computer pro-



grams. That is not going to last forever. Other countries are pretty clever. They're pretty good. They've got good design.

Mr. CONYERS. I remember when we used to laugh at Japan's work—

Mr. REICHMAN. That's right. That's right.

Mr. CONYERS. It was a big joke.

Mr. REICHMAN. So it's important to find a balance that's fair, that's good for the international market. If it's good for the market as a whole, then we will get our share because we're good competitors. If it's tipped too far in our favor temporarily, when the other guys get good, we'll have to pay them tribute for as long as national treatment requires us to do that.

Mr. CONYERS. Mr. Chairman, you've been very generous with time.

And I want to—I suppose I should thank you gentlemen about this, but I should thank Carlos for calling all of you. You know what he could have done if we want to be clever? We call one of you guys and then we all gang up on you, and this never gets in the record.

But he's a fair Republican chairman. Take note of that. He allows me to go over time and only whispers to me that my time has run out. [Laughter.]

So, you know, this is a wonderful hearing and I'm glad that you were able to present your views, and I thank you very much.

Mr. MOORHEAD. The gentleman from Ohio, Mr. Hoke.

Mr. HOKE. Thank you, Mr. Chairman.

I agree that this is not a simple area of the law; that's for sure. I have to express some disappointment with my friend and colleague from Michigan, that either through paranoia or fear of what I was going to ask, he didn't find it possible to yield me time for a question.

But the question that I wanted to pose—and I'm sorry that Mr. Jones is no longer here—is it seems to me that, according to his testimony, he was under the impression, or is under the impression, continues to be under the impression, that this bill actually extends the 20 years of additional benefit, this new property that we are creating, that that new property is actually bestowed upon the author, not upon the current copyright holder. And I don't, obviously, have the transcript of the testimony yet—and Mr. Jones isn't here to testify again for us, but that was the clear impression that I got from his testimony. Can anybody either confirm that or—yes?

Mr. PATRY. Of course, I couldn't confirm what he—

Mr. HOKE. Just what your recollection of it was.

Mr. PATRY. I wouldn't characterize it one way or the other. I think a fair question would be—

Mr. HOKE. Well, can anyone else on the panel? I mean, I was under the clear—I clearly was under the impression that Mr. Jones believed that this new property benefit would go to the authors.

Mr. MOORHEAD. He has his own production company.

Mr. HOKE. No, but he was talking about—he named jazz artists from the twenties and thirties that have made—that have written two or three or four songs, and upon whose family—or whose families depend upon the royalty.

Mr. KARJALA. As I listened to him, it appeared that he was assuming that the author still held the copyright, and I think much of his testimony was predicated on that. I certainly assumed that he still held all the copyrights to his works. I don't think he actually said one way or the other, but that was my assumption on the basis of his testimony.

Mr. HOKE. All right, well, in any event, I've got a couple of areas that I'd like to look into with respect to this.

Professor Karjala, I'm trying to get a handle on exactly what your complaint is with respect to the extension and outside of this other issue that has come to light through other testimony, and it seems to me—and I'm going to ask you to recharacterize this because I don't want to put words in your mouth, but it seems to me that you had two basic complaints about it or objections to it. One is that you believe that material in the public domain is the source of inspiration for new material, and the other is I got the idea that you had some sort of a general dissatisfaction with the notion of creating welfare system for authors' estates or children. Am I—maybe you could recharacterize that.

Mr. KARJALA. Well, yes. I apologize for not saying it as clearly as I'm sure is possible. I may not even be any more successful.

I think the point, my basic point was that our current system, and our very successful system, has always been predicated—

Mr. HOKE. The old way is always the best way kind of an argument?

Mr. KARJALA. No, no, no. Well, it's been very successful and I think we should be careful about changing something that's been very successful. I don't say that the old way is always the best way, but we have a long history of carefully balancing both sides, and nobody who works in this field I think disagrees that there is a public interest involved in granting—

Mr. HOKE. What are the bad things that are going to happen if we extend it 20 years? That's what I'm trying to determine. And is there something bad other than not having more—

Mr. KARJALA. The bad things are two.

Mr. HOKE [continuing]. Public domain material?

Mr. KARJALA. No. 1, there's a cost to the public. Contrary to the example that Mr. Jones gave this morning, he gave a Tolstoy book and a—

Mr. HOKE. John Grisham.

Mr. KARJALA [continuing]. John—what's his name?

Mr. HOKE. Grisham.

Mr. KARJALA. Right. Sure, a Tolstoy book may sell, I don't know, 1,000, 5,000 copies a year; a Grisham book sells millions of copies. It may well be that you have to charge that kind of a price for a Tolstoy book just to cover the fixed cost of production. It may be that if Tolstoy were not in the public domain, it wouldn't get published at all. I don't think the fact that they sell at the same price necessarily means the public isn't paying a royalty.

When a royalty is flowing to the publisher or to the author, somebody's paying that. Now Representative Schroeder asked some questions this morning: Was the market working or not? I see no reason, no evidence to say that the market, the free market, does not work for copyright-protected works. If you do believe that the

market is working in this country, then it necessarily means the public is paying these extra royalties—

Mr. HOKE. Excuse me. I'm going to run out of time.

I want to know what—I still don't see where the objection is, though, to the extension to the 20 years on this. What's the specific objection?

Mr. KARJALA. Well, that's an additional public cost with no public benefit.

Mr. HOKE. OK, we had testimony earlier that cost is de minimis on a per-unit basis.

Mr. KARJALA. That's right, and I'm—my first point is that I don't accept that testimony.

Mr. HOKE. Oh.

Mr. KARJALA. I think it's factually wrong. We ought to have a study of that cost before we push ahead. That's the first point.

The second point I think is a much higher cost. The money, the royalties that flow into the hands of the copyright owners whose copyrights would be extended is only a small part of the total cost paid by the public because of the way we tie up the hands of new creators who aren't able to take things that would have otherwise been in the public domain and create new works. Mr. Belton gave a number of examples of derivative works that are based on public domain works. I have offered some more examples in my own written testimony.

And so to the extent that we tie up the hands of these unknown creators—we don't know who they are or where they'll be in the future—we take a serious risk of losing whatever they would otherwise have created. The system is now carefully balanced to encourage these people to produce. Therefore, to the extent that the extension does not provide new incentives for production—and I didn't hear any testimony even suggesting that it provides increased incentives—we have a public cost, a risk of a serious loss in creation of new works, with no public benefit. That's what's wrong with this legislation.

Mr. HOKE. I want to make a couple of observations and then ask one other question, if I could, Mr. Chairman. All right.

There's been a lot of talk about what the justification is for creating the copyright law or the copyright asset in the first place, the protection. And Mr. Jones testified that he thought this would create, by extending the length of the term another 20 years, that this would create an additional incentive, and I suppose that's part of what you could call the fundamental incentive theory. I personally think that that theory doesn't hold up very well except for a very short period of time. I think that there clearly has to be a short period of protected time with respect to creating an incentive to go to the things that you, Professor, were discussing, and I think it's very important at the period of inception.

But I think if you rely intellectually on that incentive theory to the prop for which you're going to justify copyright law, you're going to run into a real problem because, frankly, you've got to come up with a much more compelling reason for giving that right in the future. I don't have a hard time coming up with that compelling reason. That is that there is a value to intangible property which is intellectually created, which is unique, and which is very

special. And, therefore, you're saying that talent, and the fruit of talent specifically, shall be protected and its value will be protected by these laws.

Now when you start to analyze it from that perspective, I think that—first of all, I think it's much more accurate because you're trying to describe human—or you're trying to describe nature more accurately, but I think, more importantly, it also begins to show you how much more complex this is than simply creating a right, a property right based on an incentive theory.

What happens, then, when you start to deal with these complexities—and this is where I want to get to my question—is that you realize that there really are, in fact, fairly profound distinctions between different kinds of intellectual property that's being created. There's a distinction between musical property, performance of—I'm sorry, musical property, between that and an image that is created, between that and literature, and then, finally, between that and what we are calling works made for hire, although the difference there is more one of an economic distinction.

But I wonder if you have given thought to, and if we ought to be thinking at this level, about the direction that we should be going ultimately in these things, or maybe not ultimately, but as we progress as a nation, with respect to first, drawing these distinctions and second, recognizing that perhaps the reproduction of a work in literature, let us say, in a verbatim way, in a perfect reproduction, ought to be treated differently with respect to copyright law as the use of it in a much more derivative fashion, and that one ought to be protected in a way that is different from the other.

And at what point, without, clearly, wanting to get into the business of micromanaging these problems and these complexities, but at what point should and could and may the U.S. Congress get involved in thinking about dealing with these complexities in a way that more accurately comports with real life, with nature? Professor?

Mr. REICHMAN. I think you raise a capital point, and I just wish to add something to your list of things that might not be the same, even though the copyright law makes them look the same. I would like you to have added computer programs and electronic information tools in general.

What we're doing is stretching the copyright law to cover defects of the 19th century copyright paradigm and to the 19th century patent paradigm which just don't work very well for the 21st century technologies in which we happen to excel. I believe that your question leads to this: I would urge the Congress to consider the need for a proper innovation law, a proper innovation law that would deal particularly with subpatentable, noncopyrightable innovations. As regards computer programs, the courts have done exactly what we predicted they would do; the valuable parts of computer programs are not really protected in copyright law at all. Copyright law just keeps you from making a slavish imitation.

We need an innovation law, and my recent work has raised the question of whether we need one based on exclusive property rights under the models of the 19th century or whether we need one based on liability principles, which I believe would elevate investment in subpatentable innovation of all kinds without creating new

barriers to entry and without putting at risk our longrun creativity. I discuss a default liability regime for incremental innovation in my article, "Legal Hybrids Between the Patent and Copyright Paradigms," which appeared in the December 1994 issue of the *Columbia Law Review*. But you're opening a whole new can of worms. Without going that far, your observations do raise questions about whether existing rights are going to work in multimedia, and whether these existing rights are going to work in a digitalized age on the Internet. And I believe that a congressional investigation of an innovation law that, a priori, said we are not going to be bound necessarily by these old paradigms would be very useful for all of these purposes. I don't think any premature action should be taken, but if we don't start the ball rolling what's going to happen is that we're going to be inundated by bad European directives after another.

This morning we heard about the database directive. I believe the pending EC data base directive was already appalling in its second incarnation, the second amended proposal, but the one good thing it had was a compulsory license for sole source publishing where you really had a 100-percent monopoly. Now, however, the Commission has eliminated even the compulsory license for sole source monopolies, and the staff is saying privately, well, we had to do it, we know it's wrong. So if we don't start taking now and begin a study of what is the appropriate innovation policy and law for the United States, we're going to end up hearing again and again endless testimony in which our officials come in and say, well, Europe did it, so we have to do it, too. If Europe wants to get itself into a position where it is technologically monopolized, and thereby, in my view, becomes progressively uncompetitive with respect to those emerging markets in Asia, that's their business, but no one will convince me that that is good policy for the United States.

Mr. HOKE. I want to finish with one final thought, and that is that I think it's clear that we are creating with this bill new wealth that doesn't exist today. We're creating money, capital, wealth, property that doesn't exist, and we're creating a lot of it. And I want to be clearly on the record that it is—I have no interest in creating new wealth for other than the creators, that that is the talent, the creators of the property itself.

And my personal background is as a musician. I've always considered myself to be a musician first before a lawyer or a business person or a Member of Congress. And it seems to me that because both my own personal feelings about this and also because I know what—I know very profoundly and deeply what the value is and what the uniqueness is of the creative process, that when we, the Congress, create new property out of old cloth that did not exist before, that property should be created for the benefit of those people who made it in the first place.

Thank you, Mr. Chairman.

Mr. MOORHEAD. Thank you very much. I have just a couple of questions I wanted to ask.

Mr. CONYERS. Mr. Chairman, I noticed that Professor Karjala was hoping to get an interjection in.

Mr. MOORHEAD. Do you have something you wanted to say?

Mr. KARJALA. Well, Mr. Hoke started off with a question that started off more or less addressed to me. I was going to make a quick response.

Mr. MOORHEAD. Go ahead.

Mr. KARJALA. Mr. Hoke said that we had abandoned, or he personally at least had abandoned, the incentive theory, as the current term is already, if I understood him correctly, too long. I'm not here arguing against the current term. There are lots of reasons why we adopted the current term and lots of arguments against it, but I do think it's important to focus on this bill, which effects a further extension of the copyright period. As Professor Reichman said, there are many ways we might consider how to promote and stimulate innovation in the 21st century, and I think that's going to be a continuing topic. Some of us may be back talking with some of you in the future on that. But on the limited topic of this extension, I think we should have a clean reason in mind of why are we going forward. What is going to be the benefit from this extension? And if it's not going to be an incentive to the creation of new valuable works, what is it? I haven't heard anything.

Mr. HOKE. Well, what I—just if I may respond very briefly, Mr. Chairman—it is because that property that was created, that intellectual property has value, and we're saying it used to only have the value of the life-plus-50; now it will have the value of the life-plus-70. As you heard, I raised the question as to why life-plus-70. I mean, I think these are arbitrary numbers. I thought that my colleague from Virginia's reasons for not making it in perpetuity were novel, but probably not as persuasive as the reasons that you don't want to make a perpetual right because, in fact, at some point you do chill the use of that information. But I don't think there's anything magical about life-plus-70 or life-plus-50, but I think it's a sham to try to hang on the theory that we're creating incentives.

Now Mr. Jones and nobody that's writing music today is going to be having a greater incentive because they've got an extra 20 years of copyright for their heirs. That's ridiculous and we ought not to engage in that kind of intellectual buffoonery. But I do think it's very easy to justify the additional time by saying, look, this was valuable when it was created and it's purely arbitrary that we're saying it's no longer valuable at the end of 50 years past the death of an author. So that's the reason.

Mr. MOORHEAD. Well, thank you.

I just had one question here I wanted to ask. I understand that an amendment of mine is being offered by somebody else because I'm not there in one of the other committees.

But this is a complicated area; there's no question about it. And the rights are balanced in a number of different directions. There's no question but what conditions have changed. The average motion picture now, if you put it on the market, unless it reaches \$50 million, it's going to lose money, at least in the whole market. A lot of their hope for profit usually rests in what may be sold years later in European markets or wherever.

One reason for raising the amount of money that goes for works made for hire is that in Europe they have a little different system than we have, but I think it was pointed out by Ambassador Barshefsky—she said that the reason for extending the copyright

for made-to-hire works was to benefit directors of U.S. films in Europe by bringing the amount of protection they receive closer to that received by European directors. They have a split between the company that owns, that may own the picture, and the directors of the film, so that both receive some of the money.

If we extend the made for hire amount, the 95,000, the directors will get a much larger share of that money under the European system in Europe, and that was the point that she was making for us when you heard the earlier testimony, and that was a reason that was given for that change.

Would you like to comment on that?

Mr. BELTON. I probably am not the right person to talk about it. You're saying that whatever contracts a director has with a studio in the United States will be ignored by a European exhibitor who will decide that the director and the cinematographer, and so and so, should receive royalties?

Mr. MOORHEAD. The Europeans' money—in Europe the money received will depend upon their determination of how they made those splits, and the director, as I understand it, shares with the holder of the copyright. In other words, he has a copyright protection also. We don't do that here in the United States.

But they will not—we have an agreement where—with other countries, and they give our people the protections or at least the amount of money that they would be able to get in the United States. With the pot being shifted, it becomes larger for them or it lasts longer.

Mr. BELTON. So that the Europeans are giving artist protections we do not give them.

Mr. MOORHEAD. That's right.

Mr. BELTON. And this is wonderful, but I don't think it's the reason for—

Mr. MOORHEAD. No, but they will—our directors will share in that increase in the 75,000. That's what I'm told; that's what she said here in her testimony.

Mr. BELTON. I know that American directors have certain rights. I don't know that they have commercial or financial rights.

Mr. MOORHEAD. I think she's in a better position to give that information that anybody else.

Mr. REICHMAN. That is possible. If the director—the European law recognizes not only the director, it recognizes the screenwriter, the musical composer, and one other person.

Mr. BELTON. The cinematographer.

Mr. REICHMAN. And, actually, the copyright will last until the last of the four of those dies. This is the copyright as distinct from the related right, which they give to the producer. So it is possible that if our director, as director, obtained moreover, it would make it harder to give him less under the rule of the shorter term, if they're applying it to the director as such. It's not clear to me exactly how they will mesh the director under the new directive; that is, will they do that and give him 95 or will they continue to say it's just a work made for hire; we'll give you 70? I'm not 100 percent sure.

Mr. MOORHEAD. Well, she's been telling us that they would benefit from that increase.

Mr. REICHMAN. They cut it down to 95.

Mr. MOORHEAD. That's what we heard in her testimony that she gave.

Mr. REICHMAN. Well, I think there's a substantial chance that that would be the case, that the director would get 95—would get another 20 years.

Mr. MOORHEAD. So that's the reason for the—

Mr. REICHMAN. The producer would not, of course. The producer would continue to get 50 years.

Mr. KARJALA. May I just interject briefly? It's not clear that the director would get anything. We would measure the term by the director's life, but if the director has assigned his right, if he had any rights and has assigned them to the movie company, the director is not going to get anything anyway.

Mr. MOORHEAD. They—Europe does it differently in the split of the benefits, and the director shares over there, even Americans, and that would help that. At least that's what I heard in the testimony that was given.

John, do you have anything else that you want to ask?

Mr. CONYERS. No, Mr. Chairman, I'm totally exhausted by this panel and the comments that have gone back and forward for the last hour and a half. Thank you very much for asking.

Mr. MOORHEAD. Thank you very much for coming.

Mr. REICHMAN. Thank you for inviting us. Thank you very, very much.

Mr. MOORHEAD. The subcommittee is adjourned.

[Whereupon, at 1:32 p.m., the subcommittee adjourned.]



# APPENDIX

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## MATERIAL SUBMITTED FOR THE HEARINGS

**REDEFINING FILM PRESERVATION  
A NATIONAL PLAN**

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**RECOMMENDATIONS OF THE  
LIBRARIAN OF CONGRESS**  
in consultation with the  
**NATIONAL FILM PRESERVATION BOARD**

Library of Congress  
Washington, D.C.  
August 1994

PREFACE

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**By James H. Billington**  
**Librarian of Congress**

This year, film is one hundred years old. Throughout its history, film has been a powerful force in American culture and national life, often shaping our very notion of contemporary events. Our challenge now is to appreciate its fullness and diversity and to protect our rich heritage for the study and enjoyment of future generations.

With the passage of the 1992 National Film Preservation Act, Congress recognized the strong national interest in preserving motion pictures as an art form and a record of our times. This landmark legislation directed the Library in consultation with my advisory group, the National Film Preservation Board, to conduct a national study on the state of American film preservation and to design an effective program to improve current practices and to coordinate preservation efforts among studios and archives.

The report, submitted to Congress in June 1993, documented a film heritage at-risk. Of America's feature films of the 1920s fewer than 20% survive; and for the 1910s, the survival rate falls to half that. But what is even more alarming is that motion pictures, both old and new, face inevitable destruction--old films from nitrate deterioration and newer films from color fading and the "vinegar syndrome." Only by storing films in low-temperature and low-humidity environments can nature's decay processes be slowed. The majority of American films, from newsreels to avant-garde works, do not receive this type of care and are in critical need of preservation.

While it is difficult to diagnose problems, it is even more difficult to solve them. In the field of film preservation, there has not been a history of coordination: Archives and studios have too often worked in isolation, duplicating one another's efforts.

The Library and National Film Preservation Board saw the importance of bringing a fresh approach to these problems. We called upon the field to set aside old differences, share ideas, and work together in developing a coordinated national strategy. Film preservationists rose to the challenge. Over the past six months, representatives across the film community--from the motion picture studios, nonprofit and public archives, repertory theaters, laboratories, universities, and the creative community--have participated in the planning process.

The tangible product of their work is this document. *Redefining Film Preservation: A National Plan* outlines basic steps that must be taken to save American films and make them more accessible to the public.

Greater public-private partnership is the central theme of the plan. In this age of shrinking federal resources, we need private support to achieve broad public goals and a national framework in which partnerships can be encouraged. I urge Congress to act upon our proposal for a new federally chartered foundation dedicated to the cause of film preservation and access. Federal matching funds are a vital part of the funding structure; they act as an incentive to corporate, foundation, and individual donors to provide seed money for public preservation investment. We need these combined public-private funds to put new ideas into action. To redefine film preservation, we must redefine relationships among archives, the entertainment industry, the educational community and the general public and find ways to forge a broadly beneficial program.

The less tangible, but equally important, product of the planning process is the spirit of cooperation that has developed within the film community. In this spirit we must move ahead. The Library and the National Film Preservation Board look forward to continuing our role as facilitators and to guiding implementation of the national film preservation plan.

July 25, 1994

**PREFACE**

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**By Fay Kanin  
Chair, National Film  
Preservation Board**

The National Film Preservation Board, the advisory group to the Librarian of Congress, brings together representatives of major organizations in the film community. Created by Congress in 1988, the Board has as its initial mission the recommendation of motion pictures for inclusion in the National Film Registry. Each year we advise the Librarian on titles exemplifying the diversity and richness of American film production. Our purpose is not to single out the "best" or the "most popular" films but to honor those of lasting cultural, historical or artistic distinction. In recent years the additions to the National Film Registry have showcased cartoons, documentaries, newsreels, and the avant garde as well as Hollywood and independent features. By publicizing these films and acquiring copies for study at the Library of Congress, the Librarian draws attention to historically significant films and to the public importance of film preservation.

Over the last two years, the Board has become prominent in national efforts to coordinate and improve American film preservation. In 1993 we conducted public hearings, gave interviews, contributed written statements, and recruited colleagues to participate in the Librarian's fact-finding study. This year we have taken an even more active role. We chaired the planning groups and formed a special committee to investigate ways to increase funding for the preservation work of public archives. We advised the Librarian on the final plan.

Solving America's film preservation problems is beyond the resources of any single institution. While many of us have furthered the cause of film preservation within our own organizations, it is through the Board that we have a structure for collaborative action. By harnessing the support of the entire film community--writers, directors, actors, cinematographers, craftspeople, theater owners, archivists, educators, broadcasters, and studio executives--we can make a lasting contribution to film preservation.

The Board has been honored to advise the Librarian of Congress on promoting interest in film and its preservation. We will continue our support as we assist the Librarian in putting the national film preservation plan into practice.

July 25, 1994

**The National Film  
Preservation Board**

- Academy of Motion Picture Arts and Sciences: Fay Kanin  
 Alliance of Motion Picture and Television Producers: J. Nicholas  
 Counter III, Carol Lombardini (Alternate)  
 American Film Institute: John Ptak, Jill Sackler (Alternate)  
 American Society of Cinematographers and International  
 Photographers Guild: Allen Daviau, William A. Fraker  
 (Alternate)  
 Directors Guild of America: Arthur Hiller, Martin Scorsese  
 (Alternate)  
 International Federation of Film Archives, United States: Mary Lea  
 Bandy, Museum of Modern Art; Jonas Mekas, Anthology Film  
 Archives (Alternate)  
 Motion Picture Association of America: Jack Valenti, Matthew  
 Gerson (Alternate)  
 National Association of Broadcasters: Edward O. Fritts, Stephen  
 Jacobs (Alternate)  
 National Association of Theater Owners: Theodore Pedas, William F.  
 Kartozián (Alternate)  
 National Society of Film Critics: David Kehr, Julie Salamon  
 (Alternate)  
 New York University, Department of Film and Television: William  
 Everson, William Paul (Alternate)  
 Screen Actors Guild of America: Roddy McDowall, Barry Gordon  
 (Alternate)  
 Society for Cinema Studies: John Belton, Lucy Fischer (Alternate)  
 University Film and Video Association: Ben Levin, Peter Rainer  
 (Alternate)  
 University of California, Los Angeles, Department of Theater, Film  
 and Television: Robert Rosen, Teshome Gabriel (Alternate)  
 Writers Guild of America: Jay Presson Allen, EAST; Del Reisman,  
 WEST (Alternate)  
 At-Large Member: Roger Mayer, Turner Entertainment; Milt  
 Shefter, Miljoy Enterprises (Alternate)  
 At-Large Member: John Singleton, New Deal Productions; Janet  
 Staiger, University of Texas, Austin (Alternate)

**EXECUTIVE SUMMARY**

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*Redefining Film Preservation* is an action plan to save America's motion picture heritage. Concluding a two-part process mandated by the National Film Preservation Act of 1992, it builds from the study *Film Preservation 1993*, submitted to Congress last year, and presents recommendations by the Librarian of Congress and his advisory National Film Preservation Board. The plan integrates agreements by five working groups of archivists, educators, filmmakers, industry executives, and other participants in the earlier fact-finding study.

**Storage.** The plan singles out low-temperature, low-humidity storage as key to a balanced preservation strategy. New electronic technologies hold promise, particularly for access, but retaining film on film remains necessary for long-term preservation. To assure archival copying quality, the plan recommends creating a group to review laboratory preservation work and establishing technical guidelines.

**Access.** Film preservation also involves questions of private ownership and public access. To expand educational access, the plan recommends simplifying rights clearances, clarifying archival photo-duplication policies, creating resource guides, and experimenting with remote delivery systems for public domain films in archives. The plan also presents options to foster the theatrical film-viewing experience. The National Film Registry Tour, which will exhibit selected Registry titles across the country beginning in 1995, will be a step toward this goal and the centerpiece of an outreach campaign.

**Partnerships.** Public-private cooperation is critical to the plan. Major studios have primary responsibility for preserving their products but collaboration makes sense for many areas, including restoring key titles, pooling preservation information, discussing technical issues, sharing storage costs, and repatriating "lost" American films held in foreign archives. The principal public responsibility is for "orphan" films, works without clearly defined owners or immediate commercial potential. These include newsreels, documentaries, independent films, and significant amateur footage.

**Funding.** Federal preservation copying grant programs, although important, lack the scope and funding to address the current problem. The plan advocates a federally chartered foundation to raise funds for the preservation of orphan films and to encourage their storage, copying, cataloging, access, and exhibition. Affiliated with the Board, the foundation would secure private partners for broad-based initiatives and be eligible to match donations with federal funds.

The Librarian of Congress and the National Film Preservation Board are committed to furthering the national preservation program and invite written comment on implementation strategies.

## 1. BUILDING A NATIONAL PLAN

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This document is an action plan to save America's film heritage for future generations. Recognizing film as an important cultural resource, the National Film Preservation Act of 1992<sup>1</sup> directed the Librarian of Congress and his advisory panel, the National Film Preservation Board, to rethink how American film preservation is practiced. Over the following year, the Librarian and the Board conducted a nationwide study to document the current state of American film preservation. Over 100 experts from the film industry, public and nonprofit archives,<sup>2</sup> and the educational community contributed information through public testimony, interviews and written comment. *Film Preservation 1993*, a four-volume study submitted to Congress that July, reports the findings.<sup>3</sup>

The key conclusion of *Film Preservation 1993* is that motion pictures of all types are deteriorating faster than archives can preserve them. Film is a fragile medium, intended for brief commercial life; preservation aims at slowing its inevitable decay through environmentally controlled storage and duplication onto newer filmstock. But film preservation involves more than extending the physical life of film. It also involves questions of ownership and access. Films made by American motion picture companies and independent filmmakers are privately owned but publicly experienced. Indeed, for most films in public collections, copyright remains with the donors, depositors or creators. A national plan must recognize, balance and integrate the interests of film owners and film users.

*Redefining Film Preservation: A National Plan* builds upon the earlier study. The plan outlines recommendations to improve the state of American film preservation over the next five years, especially by fostering better coordination among archives, the motion picture industry, independent filmmakers, the educational community, and others concerned with the survival and accessibility of American film.

This national plan is a collaborative work. It is constructed in the belief that only through the efforts of the entire film community and the support of the public can significant progress be made to save American film. In this spirit, the plan unites the ideas of four task forces and a special National Film Preservation Board committee appointed by the Librarian of Congress to develop solutions to the issues raised in *Film Preservation 1993*. Representing a cross-section of the participants in the earlier study, each planning group brought diverse points of view to a single issue area: physical preservation,

access, public outlet, and distribution. The task forces, comprising members among studios, filmmakers, and archivists. The recommendations reflect the collective agreements mandated out by each group. Some difficult points, of course, remain to be resolved but the parties have listened to each others' arguments and looked for common ground.

It is useful to describe how the task forces worked. With members scattered across the country, the groups exchanged ideas largely by conference call and collaborative papers. (Four of the more polished documents are included as part of this publication.) The task forces met face-to-face in late May and reached consensus on the issues discussed over the previous four months. In June each task force reviewed its final recommendations. A Board member chairing each group served throughout the process as the communication link with the National Film Preservation Board. In July 1994, the Librarian met with the Board to discuss and refine the final written plan. The overall process was coordinated by two outside consultants, who assembled the recommendations of the five groups into the following document.

1. Public Law 102-307 (June 26, 1992), Title II, Sec. 203; codified as 2 U.S.C. 179.
2. "Public archive" is used here, as in *Film Preservation 1993*, for any public or nonprofit repository--library, museum, historical society, university collection--committed to the preservation of film.
3. *Film Preservation 1993: A Study of the Current State of American Film Preservation* is available from the U.S. Government Printing Office (phone number: 202-783-3238; order number: 030-000-00251-2). The July 1994 price is \$47.



## 2. THE CHANGING CONTEXT OF FILM PRESERVATION

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*Film Preservation 1993* concluded that American film preservation is at a crisis point, notwithstanding the strides made by public archives and the film industry. The reasons for this unsettling conclusion are complex and reflect three primary changes in the nature of the film preservation challenge: (1) new scientific understanding of film deterioration, (2) greater public and scholarly interest in diverse types of American films, and (3) declining public funding. Given these changes, continuing business as usual is no longer possible.

The goal of this national plan is to rethink film preservation practice and to suggest where the most promising opportunities lie. Each of these three broad changes has brought huge additional problems to preservationists, but the changes are not without certain opportunities. Recent scientific knowledge about film deterioration, for instance, brings disheartening evidence that extensive deterioration exists not simply in volatile pre-1950 nitrate-base film but in later acetate "safety" film as well. And yet, there is equally solid evidence that cool-and-dry storage conditions can significantly retard every variety of film deterioration. One challenge for the national plan, then, is to use this new technical knowledge to advantage.

Similarly discouraging is the sheer number of films needing preservation attention. One common thread in the public testimony and written submissions in *Film Preservation 1993* is that, with the single exception of the Hollywood sound feature, large facets of American film production are seriously neglected by current preservation efforts, notably the vast majority of newsreels, documentaries, independent features, and avant-garde works. The demands to study and use such records of America's cultural memory are bringing added costs and responsibilities to archives. Fortunately, there is increasing reason to believe that the preservation of the older Hollywood feature, long the central emphasis among large public archives, might be supported by commercial interests, allowing public funds to be directed to other film types. With new markets for "classic" features, major studios are investing in sophisticated storage facilities and in restorations of motion pictures for which they own rights. Public archives still have a role in ensuring that Hollywood films are available for study and enjoyment, but the implications of these broad shifts in responsibility need to be incorporated into a national plan.

The decline in public funding is perhaps the most discouraging finding of *Film Preservation 1993*. Federal support for the preservation copying program of the Library of Congress and for the National Endowment for the Arts film preservation grants, administered by the American Film Institute, has fallen to less than half of its 1980 level, adjusted for inflation. Put in terms of the laboratory work that federal grant dollars can buy, the decline is even more striking: It falls to about one-sixth of the 1980 level. There is no easy fix to the funding crisis. And yet, new funds to implement new ideas must be central to any national plan. In this era of reduced federal spending, it would be quixotic simply to recommend an increase in direct appropriations commensurate with the problem. Instead, this plan proposes a new type of funding strategy based on shared public and private responsibilities.

In the following pages, *Redefining Film Preservation* takes up each of these three broad issues in turn: physical preservation in Part 3, public and educational access in Part 4, and funding in Part 5. The problems explored here are large ones, but the cooperation displayed in the creation of this plan suggests that they need not be insoluble.

### 3. RETHINKING PHYSICAL PRESERVATION

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Film preservation is necessary because of film's unstable chemical properties. Most obviously unstable is cellulose nitrate, the support base used in virtually all theatrical films produced before 1950. Nitrate's dangerous flammability at relatively low temperatures, along with its greater age, long made it the almost exclusive focus for preservation attention. Decisions have become less simple, however, with the growing realization that the cellulose acetate "safety" film that replaced nitrate has no greater permanence and degrades at essentially the same speed, if with less fire hazard. Further complicating the problem is the rapid fading of new "dye-coupler" color emulsions that became standard after 1953.

In casual language and traditional practice, "preservation" has been synonymous with duplication. "Has the film been preserved?" a question still often asked of archivists, is understood to mean, "Has the film been copied onto newer film stock?" Preservation copying (during which "preprint" material is made, ideally with little visual or aural degradation) remains key for two reasons: Deteriorating older works need immediate copying if they are not to join the vast numbers of American films already permanently lost, and films need copying if they are to be publicly accessible, especially through theatrical exhibition.

Nevertheless, this narrow definition of preservation cannot be sustained if there is to be hope of saving more than a fraction of American film production. Costs for preserving a single color feature by copying can run to \$40,000 or more, and the short lifespans once thought to be a problem only for nitrate now confront nearly all films. There is, however, an additional way to prolong the life of film: by storing the original film artifact in such a way that it can itself survive. Ongoing research and practical experience continue to demonstrate the capacity of low-temperature, low-humidity storage conditions to extend the useful life of films, including those in the early stages of deterioration.

These scientific findings come at a time when historians, students of American culture, ethnic communities, and the general public are demanding that a fuller range of film production be preserved and made available for exhibition and study. Only by redefining the approach to physical preservation--by integrating improved storage with selective duplication and restoration--will it be possible to save these irreplaceable cultural artifacts. The two ways of understanding

physical preservation are not so much *opposing* as *balancing* philosophies: Proper storage can buy time for a planned restoration program and help prevent the need for emergency copying.

**Recommendation 3.1:  
Storage**

**Establish the improvement of storage conditions as the cornerstone of national film preservation policy and an integral part of federal funding programs.** By improving storage conditions and copying selectively, we can extend the useful life of a greater number and variety of films. Costs for the construction of storage facilities and their operation are admittedly large, but such expenditures nevertheless can maximize each preservation dollar. State-of-the-art storage facilities now aim at maintaining films at temperatures ranging from 35° to 45° Fahrenheit and at a relative humidity between 25% and 45% (depending on the type of film material and its intended use), but even small decreases in temperature and humidity have been shown to bring substantial extensions to film life. Because improving storage environments is a less visible and less dramatic solution than the project-oriented striking of new prints, it does call for greater foresight and longer-range planning among funders and archivists.

This balanced approach is used increasingly by motion picture companies in their asset protection strategy. Public archives too are investing in improved storage, but federal grant programs, for the most part, remain designed to fund duplication exclusively. Given the importance of proper environmental conditions in extending film life, the Librarian of Congress and the National Film Preservation Board recommend realigning federal grant programs. Current duplication grants should consider the quality of the institutional storage environment that will house new preservation copies. Similarly, grants to filmmakers should alert creators to the preservation needs of their works. Most importantly, federal dollars should be used to encourage the upgrading or building of cool-and-dry storage facilities.

The federal government is itself the largest single holder of American fiction and nonfiction films. Thus federal repositories should serve as exemplars of an approach that balances improved storage with selective duplication. Continued funding and support for storage, copying, and access in federal institutions will demonstrate the national importance of film preservation.

Recommendation 3.1 is the basis of many that follow, and its rationale is laid out more fully in the attached Supporting Document A, *Keeping Cool and Dry: A New Approach in Film Preservation*,

drafted by task force members. The National Film Preservation Board plans to distribute this document widely.

**Recommendation 3.2:  
Saving Original Film**

**Recognize the importance of saving the original film, even after copying, unless it has deteriorated beyond any use.** Saving the original film artifact remains a basic principle, and one that needs underlining in this era of scarce preservation dollars and of new electronic technologies that can seem to offer a quick fix. The original film has maximum image resolution and sound quality and, if stored satisfactorily, can long remain the best source for copies in any future format.

For many years nitrate film was considered discardable after being copied onto safety stock, but archives and studios have rethought this policy. Even the best current safety-film copies have proven incapable of reproducing nitrate film's subtle visual qualities. Except when dangerously deteriorated, nitrate should be retained for reuse as duplication technology improves, as well as for the color-tinting records lost in the black-and-white copies of most silent films.

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**IMPROVING THE QUALITY OF PRESERVATION COPYING**

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To save endangered films and to provide public access, selective copying and restoration remain an essential part of a national preservation effort. However, preservation copying must be measured not only in terms of the quantity of footage copied but also in terms of the quality of the laboratory work accomplished. As is evident from the testimony in *Film Preservation 1993* (and from onscreen evidence), much early preservation copying needs to be redone, insofar as that is still possible. Laboratory equipment and techniques have improved, and knowledge about aging nitrate has deepened. Standards that slipped by when 16mm was the major television and educational format no longer apply. If films are to survive in copies true to the originals, the caliber of archival duplication must meet the highest standards. Recommendations 3.3 through 3.6 address this goal.

**Recommendation 3.3:  
Archival Laboratory  
Copying**

**Under the auspices of the National Film Preservation Board, convene a working group to screen and discuss archival-quality laboratory duplication work.** Currently there are no mechanisms to assure nationwide quality for archival duplication. A new working group, convened initially by the National Film Preservation Board, will answer this need. Producers and purchasers of archival services, including laboratory, studio, and archive representatives, should come together to review visual and sound duplication work in a non-confrontational setting. This might build from the annual

preservation screening hosted by the Association of Moving Image Archivists and be arranged in association with other technical and archival organizations. The new group might view and discuss a blind, random sample of recent preservation work or of specifically printed test material. The goal would be to increase communication about archival-quality duplication toward making film copies as true as possible to the originals.

**Recommendation 3.4:**  
**Technical Guidelines**

**Encourage development and acceptance of standardized technical guidelines for the laboratory duplication of black-and-white and color film of archival quality.** It would be useful to complement the subjective comparisons proposed in Recommendation 3.3 with agreed-upon technical guidelines and a common grading system for archival-quality copying. The National Film Preservation Board will help launch this effort through a survey of U.S. laboratories specializing in archival services in order to gather information on current practices in specific technical areas (for instance, frame-line stability or the exposure and processing of interpositives). Such data may point to the value of certain film stock improvements (for instance, YCM separations with improved panchromatic emulsions on a polyester base). The disputed question of whether archival copying onto acetate base should be abandoned in favor of polyester could also be productively discussed.

**Recommendation 3.5:**  
**Substitutes for  
Harmful Chemicals**

**Encourage the development of substitutes for environmentally dangerous chemicals vital for film preservation.** Archival-level laboratory work depends on quality methods and tools. At least two chemicals that may soon be banned in the United States appear essential to preservation copying as it is currently practiced. 1,1,1-trichloroethane, commonly employed for cleaning film, is scheduled for a federal environmental ban in 1995; perchloroethylene, a known carcinogen used in wetgate printing, may soon be added. No satisfactory substitutes have yet been identified and, without such chemicals, the quality of preservation copying of older American films will suffer. (Cleaning prevents dirt from being permanently printed into the copy; wetgate printing makes scratches and other flaws less visible in the copy.) Until alternatives are found, the National Film Preservation Board, working with national technical organizations, plans to seek an environmental exemption and to urge development of viable substitutes.

**Recommendation 3.6:**  
**Sharing Preservation  
Information**

**Lay the groundwork for sharing information on the surviving preservation elements of American film titles.** A cooperative national preservation effort requires the capacity to exchange information in all areas. In order to prevent costly and unnecessary replication of preservation copying and to assure that the best

available source materials are used for each title, the film holdings in public and commercial archives should be made accessible to preservationists in an online environment. We recognize reasonable proprietary restraints in making private holdings public but also see potential benefits to all parties.

As a first step, the National Film Preservation Board plans to convene a working session for large archives and the appropriate studio rightsholders to explore sharing inventories for pre-1950 materials. Existing databases should be surveyed for their accessibility and usefulness as preservation tools.

### **PLANNING FOR FUTURE PRESERVATION TECHNOLOGIES**

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Electronic technologies are improving with astounding speed. With them come great opportunities but also a temptation to find preservation panaceas. It is impossible to predict the future, but we make the following general recommendation.

#### **Recommendation 3.7: Digital Preservation**

Encourage a "two-path" approach that (1) actively explores the preservation potential of digital and other copying technologies while also remembering that (2) it remains essential to save original films for as long as possible. The distinction between digital *access* and digital *preservation* is key to the archival role for new electronic technologies. These are already transforming film access but archives should insist that certain stringent criteria be met before new technologies are adopted as preservation media. These criteria include: (a) picture and sound quality equal to the original; (b) ability to support production of new film elements without significant picture or sound loss; (c) an archival longevity (ideally, 100 years) alongside assurance that playback equipment would be available for an extended time; (d) capability to be stored in reasonable temperature and humidity conditions; (e) capability to record data from the original film needed for restorations (e.g., splices, edge codes); and (f) a cost no greater than film-to-film copying.

Even when such a technology is attained, two fundamentals remain. A master always holds more information than any reproduction, and no matter how faithful, inexpensive, or durable an electronic copy, it must be refreshed and reconfigured for use with changing access systems. The only thing that seems certain about future electronic systems is their rapid obsolescence. Already a central problem in video preservation is constructing equipment to play recordings made only a few years ago. Notwithstanding unforeseen advances in electronic copying and access technologies, film remains the most

reliable format for holding film information. As noted in Recommendation 3.2, saving the original film artifact remains a basic archival principle.

New preservation technologies offer opportunities to break through the current impasse, but they need to be approached cautiously. The very speed of technological evolution reinforces the apparently old-fashioned importance of saving film as film.

## **TELEVISION AND VIDEO PRESERVATION**

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Motion pictures represent, as testimony and written comments last year pointed out, only a portion of America's moving image heritage. Since the advent of television broadcasting, archives have moved rapidly into collecting 16mm newsfilm, kinescopes of early broadcasts, and videotape--often rescuing material thrown away by television stations. As video has become more portable and inexpensive, many organizations, including most U.S. government agencies, have switched from film to video for internal documentation and educational outreach. These organizations are now sending videotapes, many in obsolete formats, to archives.

There is little up-to-date information on the problems facing American television and video preservation. Merely documenting the size of national collections is a formidable task. The most recent survey, completed eight years ago by the National Center for Film and Video Preservation at the American Film Institute, counted among 28 responding archives over 125,000 hours of video in a range of formats--1/2-inch and 3/4-inch cassette; 1/2-inch, one-inch, and two-inch open reel--as well as millions of feet of newsfilm and filmed television programs. To judge from the popularity of video and the evolution of digital-tape formats, holdings are undoubtedly much larger today.

### **Recommendation 3.8: Television and Video Preservation Study**

**Conduct a national study on the state of preservation of American television and video materials.** The Library of Congress will seek Congressional authorization for a national study of television and video preservation, similar to that completed in 1993 for American film. This study will cover technical problems, current practices in public and commercial archives, the concerns of copyright owners, and the access needs of educators. The Library will request funding for both the study and development of a national television and video preservation plan under the framework of the American Television and Radio Archive (ATRA) legislation.



#### 4. RETHINKING ACCESS AND ARCHIVES

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Less clear-cut than the issues of physical preservation are those surrounding the changing needs of film users.

Increasingly, "preservation" is understood by users and archivists alike to be incomplete without access to the preserved film. But as was evident from the hearings and testimony for *Film Preservation 1993*, "access" encompasses a wide variety of film uses, including educational study, public exhibition, and commercial distribution.

The principle of wider access to films is one to which everyone can subscribe. In practice, however, there are reasons why access will continue to be selective. Among studios, concerns over piracy remain, and cycles of access and withdrawal are used to promote interest in a given title. Among public archives--which typically hold physical copies of many films to which they possess only certain limited rights--there can be four broad restraints on access to any single work: copyright status; donor and depositor contracts; staffing and funding constraints; and concerns about physical fragility. Public archives must balance access with protecting master film copies.

In rethinking access, the distinction between educational use and commercial exploitation is central. As the enabling legislation for this national plan directs, the recommendations below are intended to promote either wider educational access or public availability for films that, for one reason or another, remain undistributed through commercial markets. These recommendations look, in a sense, both backward and forward: attempting to save what is best in traditional film viewing at the same time that they encourage new delivery possibilities for archives and their users. It is not just nostalgia to believe that the theatrical film-viewing experience promotes, as does little else, an excitement and passion for saving older film. As things stand now, such exhibition is generally confined to a few large cities, and the number of available titles with satisfactory prints is limited. Recommendations 4.1 through 4.4 (as well as the tour mentioned in 4.14) respond to this situation. There are also opportunities to reshape the relationships among archives, scholars, educational users, and rightsholders in light of evolving digital access technologies. Increasingly, such technologies hold the promise of opening archives to off-site use. Recommendations 4.6 through 4.10 look toward this future.

## PRESERVING THE THEATRICAL EXPERIENCE FOR OLDER FILMS

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One key to promoting repertory exhibition is increasing the availability of good-quality 35mm prints of older U.S. films. Currently these prints are screened in a handful of commercial theaters, nonprofit museums and archives, and film festivals. The commercial repertory market is small compared to first-run exhibition, but such screenings are important in continuing public education about American culture and film art.

Repertory programmers, in informal interviews this spring, believed that availability of titles in good-quality 35mm prints has declined over the past five years, although no national statistics have been kept. They identified as unavailable many relatively recent independently produced narrative features as well as older "classic" titles, with the availability of the latter varying significantly among the major studios. The range of 35mm prints available to an exhibitor currently depends on personal contacts, the theater's reputation, and its nonprofit or commercial status. A few difficulties merely involve communication and logistics. Tracking down exhibition prints of older American films is probably the most time-consuming challenge of repertory work and can require contacting any number of studios, exhibitors, archives, or collectors.

The following four recommendations suggest various options to expand access to American films as they were originally experienced.

### **Recommendation 4.1:** **Repertory Exhibitors**

**Urge exhibitors of older American films to work as a group to increase 35mm print availability.** Representatives of several major studios have expressed general willingness to strike new 35mm exhibition prints if preprint is available and if assured of a sufficient number of exhibition engagements. However, it is currently difficult to get collective feedback from exhibitors of older American films. Many such exhibitors--the commercial theaters, nonprofit museums and archives, and film festivals--exchange information informally, but they lack a means of pooling preferences for print suppliers.

As a first step, the National Film Preservation Board plans to convene a working session of studio, distributor, archive, and exhibitor representatives to review the current interrelationships of market demand, preservation work, and exhibition print production for older American fiction films and look for ways to integrate exhibitor input. Ideally, after meeting informally, specialized repertory exhibitors would choose to form an organization of their own to work with print suppliers.

One promising approach for expanding the number of circulating titles, explored by task force members, is to solicit exhibitor booking preferences when new preservation materials are about to be prepared by studios and archives; thus additional theatrical prints could be produced at the most cost-effective point in the preservation cycle. This approach should be tested in a pilot project involving a single studio and a group of exhibitors.

Exhibitors should also be allowed to pay the cost of striking new prints when studio preprint is available, with those costs credited against rentals, not charged separately.

There is no simple way to increase the number of theaters where audiences can experience older films. One useful step would be to address lenders' concerns about sending archival and studio prints to unfamiliar venues. Increased circulation of rare prints rests to a large extent on an assurance that they will be returned in good condition or replaced if damaged. Task force members did not see formal certification of theaters for rare print exhibition as a practical alternative at this time, although they did see value in sharing information among archives, distributors and studios about theaters capable of showing such prints correctly and without damage. Task force members have also developed Supporting Document B, *Handling and Projecting 35mm Archive and Studio Prints*, to encourage proper care of rare prints. The National Film Preservation Board will make these voluntary guidelines available to lenders, exhibitors and projectionists.

**Recommendation 4.2:**  
**Studio Repertory**  
**Operations**

**Encourage each major studio to designate and publicize the name of a contact person for repertory matters and, where possible, to establish a regular repertory distribution service.** In terms of ease-of-access, exhibitors distinguish between studios with repertory (or "classics") divisions and those without. Repertory divisions generally carry an inventory of circulating 35mm prints of well-known back titles and will negotiate internally for the striking of new prints, should there be sufficient exhibitor interest, good-quality preprint material, and no rights restrictions. Some studios also license their back titles through distributors, who may not have physical custody of the 35mm prints. The step proposed in this recommendation would begin to simplify communications.

**Recommendation 4.3:**  
**Fee-Sharing for**  
**Archival Loans**

**Compensate public and nonprofit archives for the loan of prints of commercially owned titles that are unavailable from other sources.** Large U.S. public archives are regularly called upon to lend prints of titles that are (a) commercially owned but (b) unavailable from studios or their distributors. As now configured,

these loans are a source of discontent to both borrowers and lenders. The borrower usually pays a handling fee to the archive but also pays the standard rental fee to the studio (or distributor), notwithstanding the source of the print. Archivists are wary of approving many such loans (and those to only well-established nonprofit exhibitors and festivals), primarily because they have insufficient funds to replace film materials, should damage occur. Public archives would prefer that commercially owned films be available through commercial distributors but are willing to fill the gap in special circumstances.

Task force members have endorsed the principle that archives should charge a handling fee for the loan of prints of commercially owned titles that are unavailable from other sources. In these cases, the handling fee is paid to the archive to help offset print maintenance, loan and replacement costs. Fee-sharing for commercially out-of-print titles has been pioneered by the Universal City Studios in loans from the UCLA Film and Television Archive to the Stanford Theatre. The National Film Preservation Board will work to promote this fee-sharing approach for rare, commercially unavailable prints and stimulate discussions to extend the Universal-UCLA-Stanford Theatre model.

**Recommendation 4.4:**  
**Print Banks**

**Expand nonprofit distribution of archival exhibition prints, particularly of public domain titles, through centralized "print banks."** In addition to the commercially owned titles discussed above, there is need to improve the print availability of public domain films, especially those older than 75 years (generally the maximum term of U.S. copyright). Many older public domain titles are distributed in poor duplicate prints that do little justice to their originals. Nonprofit print banks can serve as an expanded distribution node for good-quality 35mm prints of public domain films preserved in public archives. Print banks might also handle selected copyrighted films designated by rightsholders.

The National Film Preservation Board will explore a range of implementation options, including the creation of a new service with the cooperation of U.S. archives and the expansion of 35mm loans through the Museum of Modern Art's Circulating Film Library.

**Recommendation 4.5:**  
**16mm Film**

**Promote the continued availability of certain categories of unique 16mm film.** Although there is a widespread sense that 16mm film is a dying format--replaced in the classroom and elsewhere by videotape and videodisc--the 16mm gauge deserves continued support in certain cases. One important distinction is between 16mm reduction copies of 35mm films and works created on 16mm, including most postwar documentaries, home-movies from the 1920s through the 1940s, and

many independent shorts and features. These original 16mm works deserve the principal preservation and access support, but an unknown number of titles created on 35mm survive only as 16mm reduction prints and also require attention.

Because original works or best surviving copies are sometimes buried within 16mm collections, the National Film Preservation Board urges those institutions that are shifting to video to consult with archives before disposing of their 16mm film.

## **THE ARCHIVAL ROLE IN THE INFORMATION AGE**

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Now that visual information can be transmitted through a combination of new communications and digital technologies, many roles are opening to film archives. But for all the hopes and promises, their exact future is not at all clear. Will archives become museums of film? Will they become nodes on the information highway? Will they try to offer a range of options? Proponents of new technologies predict that public archives will be able to deliver services to more users and to remote locations, although the costs associated with digitization of visual material suggest that private partners will be necessary. With such partnerships can come a blurring of the boundary between educational and commercial uses. The challenge is to craft new access technologies and entrepreneurial opportunities so as to respect the concerns of copyright holders while furthering the two historical missions of archives: to support scholarship and education at minimal cost to users, and to preserve film artifacts.

The next five recommendations seek to improve archival access, beginning with current issues.

### **Recommendation 4.6: Archival Photoduplication Services**

Urge individual archives to clarify their policies for photoduplication services, particularly for obtaining "frame enlargements" and copies of titles for which no copyright or donor restrictions exist. In testimony and submissions for *Film Preservation 1993*, two archival photoduplication policies were the subject of particular contention: those for "frame enlargements" and those for copies of public domain films.

Among scholars, frame enlargements--still photographs made directly from the motion picture film--have become important in publication and to a lesser degree in classroom teaching. They reproduce the exact on-screen image, unlike "production stills," which are crisper and more easily obtainable publicity images preferred for commercial illustrations.

Of more interest to collectors, distributors and filmmakers is another archival service allowing for the purchase of copies of films for which there are no copyright or donor restrictions.

Making copies from archival material often involves questions of rights clearances (see Recommendation 4.7 below) or of donor restrictions (see 4.8). Archives are additionally concerned about possible physical damage to prints used in making frame enlargements and to preprint used to strike purchase copies of public domain films. There is no universal solution to these essentially local problems. The National Film Preservation Board, however, recommends that archives clarify their policies and procedures in both areas.

**Recommendation 4.7:**  
**Rights Clearances**

**Begin discussions on simplifying rights clearances for the reuse of film images and sequences in educational and scholarly applications.** Film reproduction in scholarship is beginning to move from frame enlargements in print publications to frames, sounds and sequences in educational multimedia. Meanwhile, the legal framework for rights clearances is still embedded in the past. To obtain permission to reproduce copyrighted material from a studio-produced film, an educator must now negotiate with the studio, and, in some cases, the rights owners of the underlying materials, such as the music or story. Such clearances are currently so complex and expensive that, in practice, the "fair use" permitted by U.S. copyright law is often stretched past the breaking point and proper permissions evaded.

The National Film Preservation Board recognizes the value to all parties of exploring a centralized, "one-stop" approach to rights clearances for film materials. Under the auspices of the U.S. Copyright Office, the Board will begin discussions among educators and rightsholders on mechanisms to simplify rights clearances for the reuse of film materials in educational and scholarly applications. As an intermediate measure, the Board will ask studios to publicize the name of contact persons handling educational and scholarly requests to publish film-related images and sequences.

**Recommendation 4.8:**  
**Updating Donor**  
**Agreements**

**Encourage film donors and public archives to discuss, on a case-by-case basis, increased access to public domain films older than 75 years.** Another obstacle to greater educational and public access to film lies in the gift agreements negotiated years ago by donors and public archives. Under the terms of some older contracts, donors have the right to control access to their collections in perpetuity. As critics pointed out at the 1993 hearings, these arrangements can restrict the archive's ability to screen films in public programs and

can limit types of access even after the 75 years permitted by U.S. copyright law.

The Board, recognizing that circumstances surrounding gifts vary widely, recommends that increasing access to donor-controlled public domain materials be approached on a case-by-case basis. In particular, the Board encourages individual archives and donors to reexamine access provisions for public domain titles older than 75 years.

**Recommendation 4.9:**  
**Public Domain Films**  
**in Archives**

**Explore delivery methods for making public domain titles held in archives more widely available to remote users through video and online access technologies.** Archives have traditionally made films available for study and exhibition on their own premises. Increasingly, it is technically possible for archives to make parts of their holdings--older films unrestricted by copyright or donors--available to users off-site. Several archives, including the Library of Congress and the International Museum of Photography and Film at George Eastman House, have experimented with releasing on videotape a handful of such unrestricted silent films. The films released have great cultural significance but a small commercial market.

The Board encourages archives to explore ways of releasing such unrestricted films on videotape, possibly through a consortium of archives. They should also begin investigating online access technologies for disseminating this public domain material.

**Recommendation 4.10:**  
**The Future of**  
**Archival Access**

**Support conferences and goal-oriented working groups among archivists, users, rights holders, and technological innovators to redefine archival access in light of emerging technologies.** Although it is impossible to make precise recommendations about the future, archives can work to shape it and take an active part in redefining archival access. The UCLA Film and Television Archive has begun planning a Fall 1995 conference to explore innovative educational use of archival film materials and the application of new technologies in archival access. The National Film Preservation Board supports continuing such dialogue among archivists, educators, studio representatives, and technological innovators on changing access opportunities, especially in relation to new technologies.

**Recommendation 4.11:**  
**Educating Film**  
**Preservationists**

**Create a systematic graduate program for educating new film preservation professionals and continuing education opportunities for those already in the field.** Because film preservation is rapidly changing, so too are the educational needs of film preservation professionals. Traditionally, film archivists have learned their skills

on the job. As preservation has matured and technology grown more complex, *ad hoc* instruction is no longer adequate. New professionals require background in a broader range of subjects--from chemistry to information systems--as well as exposure to different types of nonprofit and commercial facilities specializing in preservation work. Recognizing these changing workplace demands, the United Kingdom has established a graduate program for film archivists. No similar program is now available in the United States.

The National Film Preservation Board will work toward the creation of a master's degree program in film preservation at an American university and invite curriculum discussions with pertinent professional organizations. The Board will urge that this new program integrate within the academic curriculum internships providing hands-on experience and that the program make special effort to recruit students among women and from diverse ethnic and racial backgrounds.

In addition, the Board will encourage those already active in the field to expand their expertise by participating in continuing education conferences and workshops and by on-site training.

**Recommendation 4.12:**  
**Film Resource Guides**

Develop guides to facilitate educational and public access to film resources. A step in increasing access to film is increasing access to film information. Educators, exhibitors, scholars, and the general public need guidance in navigating the sea of rapidly changing data on film availability and archival services.

Task force members advise creating three new informational tools: (1) a directory of commercial and nonprofit organizations lending 35mm and 16mm exhibition prints, (2) a guide describing the general holdings and educational services of film archives, and (3) a guide to automated sources about film available to the public on CD-ROM, through commercial database vendors, and through the Internet.

The Board will work with scholars and archivists to explore currently available related tools, to develop the new guides to film resources, and to explore their publication through hardcopy and online distribution.

**Recommendation 4.13:**  
**Public Outreach**

Make public education an on-going part of the national film preservation program. Film preservation is not a household topic. Indeed, with the burgeoning availability of videotapes and laserdiscs of Hollywood features, it is easy to assume that any preservation problem that once existed is now "solved." Increasing the public awareness of film preservation is a key part of a national program.



Only with public interest will there be public support for rescuing documentaries, educational films, historical footage and other noncommercial works whose survival is now threatened.

To reach a broad audience, preservationists need a variety of educational tools: a basic informational brochure explaining film preservation to the nonspecialist, short public service announcements for broadcast and cable transmission, and mini-documentaries, such as those produced by the American Film Institute, American Movie Classics, and Sony Pictures Entertainment. These outreach materials can vividly relate preservation to a range of films--from home movies to Hollywood features--and suggest sources for more information.

Brochures, public service announcements and mini-documentaries gain in power when orchestrated in a coordinated plan. The Board urges creation of these materials or, in cases where good models exist, adaptation and reuse for national purposes. The Board will strive to integrate these outreach tools into an on-going public education campaign, beginning with the tour noted below.

**Recommendation 4.14:  
National Film Registry  
Tour**

**Use the National Film Registry Tour, now in the planning stage, as the backbone of a national public awareness campaign on film preservation.** In 1995, the Library of Congress will launch a national tour to celebrate American filmmaking by showcasing a selection from the National Film Registry. The tour will enable audiences to experience historically, culturally and aesthetically significant American films as they were intended to be seen: as good-quality prints in public theaters. The tour, planned in cooperation with copyright owners and archives, will present the preservation work of many organizations.

The National Film Preservation Board will use the tour as the centerpiece in an outreach campaign to alert the public to the diversity of American film production and to draw attention to the national preservation plan. The Board will explore creating supporting brochures, public service announcements, and mini-documentaries that can continue to be used to promote preservation after the tour ends.

## 5. RETHINKING PARTNERSHIPS AND FUNDING

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Large and small alike, public archives agree that the defining preservation problem is money. As the sheer magnitude of film deterioration becomes evident and user demands multiply, where can archives raise the funds to improve storage and better serve the public?

The current system of film preservation funding, if indeed it can be called a system at all, is a patchwork of federal money, institutional outlays, foundation grants, and private donations. For over twenty years, federal funds have supported duplication of decaying film, largely nitrate fiction film, onto newer filmstock through the internal program of the Library of Congress and the grants awarded through the National Endowment for the Arts. These federal programs have not kept pace with rising costs. Allocations in 1992 plummeted to less than half of the 1980 level, when adjusted for inflation.

Local funding has not bridged the gap. Film archives, like most public organizations in the 1990s, are squeezed by shrinking budgets. Among the specialist archives surveyed for *Film Preservation 1993*, only half received funds the previous year from their own institutions for laboratory work. Most archives' preservation efforts depend largely on private gifts and grants. Grants, however, are difficult to secure, particularly with the small number of corporate and private foundations targeting film preservation as a primary funding area. While preservationists sense wide interest in preserving American films, there is currently no on-going mechanism for harnessing national support.

### PARTNERSHIPS

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The Librarian of Congress and the National Film Preservation Board, recommend a different approach to funding: one that will recognize the distinct public and private responsibilities in preserving American film and build partnerships to support preservation activities in the public interest.

As so often noted in the 1993 hearings and comments, the major film companies now have ample financial reason to improve storage, automate inventories, restore key titles, and maintain their libraries. The preservation policies for commercially owned material in public archives, designed in the 1960s and 1970s when studios valued older

titles differently, can now be reconsidered. Public institutions still have a long-term role in ensuring that privately owned films that have shaped American culture are available for public study and enjoyment. What we propose here is more clearly defining public and private responsibilities: Profit-making entities have the *primary* responsibility to preserve their own product and should contribute to public institutions for work done on their behalf.

In what areas do public and commercial interests most closely intersect and warrant special cooperative ventures? Following the directive of the 1992 National Film Preservation Act, we have explored where greater collaboration can bring benefits to all and increase the number and variety of American films available to the public. Drawing upon the task force agreements, we have identified in Recommendations 5.1 through 5.6 several key initiatives.

**Recommendation 5.1:**  
**Restoration**  
**Partnerships**

**Encourage partnerships between studios and archives to restore films of special cultural impact or historical value.** Particularly for restoration projects requiring extensive research and planning, film owners and public archives can create a better preservation product by pooling resources and expertise. Over the last decade, significant American motion pictures restored through public-private ventures include *The Guns of Navarone* (1961), *On the Waterfront* (1954), *Phantom of the Opera* (1943), *His Girl Friday* (1940), *Mr. Smith Goes to Washington* (1939), *Holiday* (1938), *The Plainsman* (1936), *Shanghai Express* (1932), early sound shorts by the Vitaphone Company (1927-29), *Noah's Ark* (1929), and *Tess of the Storm Country* (1914).

Although arrangements vary from case to case, typically partners work together to select titles and carry out the restoration. The studio pays the laboratory costs; the archive contributes the time and skills of its preservation staff and retains copies of the restored film for archival study, exhibition and safekeeping.

Task force members, drawing upon their own experience, have developed guidelines to assist interested studios and archives in developing constructive partnerships of this type. *Voluntary Guidelines for Joint Studio-Archive Restoration Projects* is included as Supporting Document C. The National Film Preservation Board plans to distribute these voluntary guidelines to the film community and promote the concept of collaborative restoration projects.

**Recommendation 5.2:  
Repatriating  
"Lost" Films**

**Develop public-private ventures to repatriate American films in foreign archives.** The vast majority of American silent films are lost. Roughly 90% of the U.S. features from the 1910s and 80% from the 1920s are thought to have been thrown away or allowed to deteriorate. Of the survivors, many owe their existence to the efforts of foreign archives, which saved internationally distributed prints long ago abandoned or forgotten by their American producers.

Through a repatriation effort begun in 1987, American audiences may get a second chance to study and enjoy these lost works. Public archives and the National Center for Film and Video Preservation, working through the International Federation of Film Archives, have negotiated for the return of some 460 American shorts and features, including the earliest surviving feature directed by an African American, Oscar Micheaux's *Within Our Gates* (1919); *Capital Punishment* (1925) with Clara Bow; the silent adventure picture *The Sea Hawk* (1924); and Maurice Tourneur's gangster film *Alias Jimmy Valentine* (1915). Similarly, U.S. archives have identified "lost" foreign films in their collections and returned them to their national archives.

The underfunded effort to repatriate American films is, however, proceeding slowly. The opening of Eastern Europe, while providing an opportunity, also underscores the urgency; many Eastern European archives, faced with worsening economic conditions, do not have the funds to copy or store American nitrate films in low-temperature and low-humidity environments that will prolong their survival.

Repatriation could be expedited with the assistance of the private sector. Major American studios are interested not only in obtaining titles missing from their early libraries but also films with foreign-language soundtracks, an asset of renewed value in ancillary markets. As a first step, the National Film Preservation Board will facilitate discussions among U.S. nitrate archives and studios holding copyrights from the silent and early sound period regarding a framework and funding mechanism for a joint repatriation effort. The goal is to present a proposal to foreign archives by mid-1995.

**Recommendation 5.3:  
Archival Gifts and  
Deposits**

**Alert independent filmmakers to the preservation needs of their work and encourage them to transfer to archives films of cultural or historical interest.** A less obvious public-private partnership involves custodial agreements between archives and film owners. As noted in the 1993 hearings and interviews, avant-garde and independent films are today among the most in need of preservation attention--due to the conditions under which the films were made, the limited number of release prints, and the inability of filmmakers to

pay for adequate storage. Transferring materials to archival custody in many cases benefits the filmmaker while serving the public interest. Filmmakers from D.W. Griffith to Andy Warhol are known today largely through films that have come into the safekeeping of public archives.

Some independent filmmakers interested in establishing archival relationships are put off by the complex custodial and copyright questions that accompany gifts or deposits. They fail to take the necessary steps to protect their work and run the risk of having films lost, destroyed or tied up in court battles after their death.

To explain the advantages of these arrangements and to assist filmmakers and archives in developing mutually beneficial agreements, task force members have prepared a checklist, *Depositing Films With Archives: A Guide to the Legal Issues* (Supporting Document D). The National Film Preservation Board plans to make the checklist widely available to the film community. Additionally, the Board will work with archivists and filmmakers' groups to alert independents to the preservation needs of their works.

**Recommendation 5.4:**  
**IRS Valuations**

**Clarify U.S. Internal Revenue Service (IRS) practices for valuing films, film copyrights and related materials donated to public archives.** The tax environment can be a critical factor in the individual or corporate decision to give films, film copyrights and other film-related materials to archives. Some archivists argue that the valuations allowed by the IRS are too low, particularly in cases involving the gift of copyright as well as physical materials, and that these low valuations discourage donations. Without incentives to encourage archival gifts, many materials will remain in private hands and unavailable for public study and use. The National Film Preservation Board will request that the Internal Revenue Service elucidate its administrative guidelines and practices for valuing donations of films, film copyrights and related materials.

**Recommendation 5.5:**  
**Sharing Storage Costs**

**Develop, with rightsholders and archives, cost-sharing arrangements for the storage of commercially controlled nitrate film in public institutions.** Few will dispute that public archives performed an important cultural service when they opened their vaults to studio nitrate films in the 1960s and 1970s. At that time, most major studios presumed that older works had limited commercial value and sold off their libraries or copied more valuable titles onto safety film, in some cases destroying the unstable nitrate. Transferring the films to public custody and retaining the copyrights offered studios another option. Now, of course, the market has

changed but archives still pay for storing materials to which studios have continuing access for making new copies.

In 1993 public archives maintained over 131 million feet of nitrate preprint for which large motion picture studios maintained full commercial exploitation rights. Some companies have begun assisting archives in paying costs related to their own materials. To clarify the mutual responsibilities now appropriate for these arrangements, the National Film Preservation Board will encourage further negotiations between individual depositors and archives as well as discussions within a larger industry-archive forum.

**Recommendation 5.6:**  
**Studio-Archive**  
**Communication**

**Create an informal group of studio and archival representatives to facilitate public-private cooperation.** A key byproduct of the creation of the national plan has been increased communication between the film industry and public archives. Only by continuing to build public-private trust and cooperation will a national film preservation program be implemented.

The National Film Preservation Board will encourage studio and archival representatives to continue meeting on projects of mutual concern and will designate an informal coordinating group.

**ORPHAN FILMS**

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The cooperative ventures described above, although critical to national collaboration, address a fraction of American films. The larger and more difficult concern is "orphan films," works without clearly defined owners or belonging to commercial interests unable or unwilling to take responsibility for their long-term care. Throughout the 1993 hearings, scholars and archivists underscored the historical and cultural importance of these works and their urgent preservation needs. Drawing upon task force discussions, the Librarian of Congress and the National Film Preservation Board recommend the following actions to encourage public investment in the survival of orphan films.

**Recommendation 5.7:**  
**Public Responsibility**  
**for Orphan Films**

**Use federal preservation copying dollars for films of long-term cultural and historical value that are not being protected by commercial interests.** In recent years orphan films have become the focus of federal copying grant programs and we affirm that emphasis.

These endangered films include a broad range of materials of artistic and documentary value:

- (a) newsreel and actuality footage of social importance held in nonprofit and government organizations
- (b) films that have fallen into the public domain
- (c) independently produced avant-garde and experimental films
- (d) socially significant home movies, particularly those documenting ethnic and minority communities
- (e) political commercials, and advertising, educational and industrial films of historical and cultural interest
- (f) independent fiction and documentary films made and distributed outside the commercial mainstream (Although copyrighted and privately owned, many of these films will not survive without public archive intervention.)
- (g) commercially produced works whose owners are unwilling or unable to provide long-term preservation. Public archives preserving these films should expect financial compensation from the copyright owners to cover preservation costs, should these films later generate revenue.

In determining duplication priorities among these films, we recommend following the principles developed by North American members of the International Federation of Film Archives and making decisions on the basis of physical condition; rarity; interest of the educational community, film archives and museums, and other potential film users; and long-term cultural and historical importance.

**Recommendation 5.8:**  
**Federal Grants**

**Improve the coordination among existing federal preservation copying grant programs and return their funding to former levels.** Currently there are few federal grants directed toward film preservation and these address the copying of a narrow range of orphan films. There is concern among archivists that some works of historical and cultural interest do not fit the current funding criteria of existing federal programs.

A particularly gray area is the nonfiction film. The American Film Institute-National Endowment for the Arts (NEA) grants program, administratively linked with the NEA's Media Arts (a unit charged to support works of artistic excellence), must distinguish in its awards between films of "artistic" and of purely factual interest. The National Historical Publications and Records Commission is open to proposals involving newsfilm and unpublished documentary footage, but has supported few film projects. The National Endowment for the Humanities, in its first film copying grant in a decade, funded in 1993 the duplication of nitrate newsreels onto new filmstock.

The National Film Preservation Board will encourage these three agencies to ensure that a full range of motion picture subjects, genres and physical film types are eligible for grants. The Board also urges these agencies to articulate clearly the parameters of each program to potential grantees.

Additionally, we recommend returning funding for preservation copying to the former level of purchasing power. The well-established AFI-NEA program, the lifeline for archival copying in U.S. film archives over the past two decades, has been particularly hard hit. From 1980 to 1992, the program's annual allocation dropped from \$514,215 to \$355,600, while the cost of laboratory work more than doubled. Thus archives have been caught in a double bind: fewer grant dollars and higher laboratory costs.

**Recommendation 5.9:  
Federally Chartered  
Foundation**

**Create a federally chartered foundation to redefine the scope of American film preservation through its grant programs and to recruit new financial partners into the effort.** Even with additional support, existing federal copying programs are simply inadequate. They attack the effects of film deterioration, not the causes, and, as currently structured, look after only a small portion of America's diverse film production.

Given the magnitude of the preservation problem and the realities of the current federal budget, we must try a different approach. What is necessary is a broad-based structure to integrate storage, cataloging, restoration, educational access, and public exhibition into a coherent national plan and promote this more balanced program. Redefining film preservation requires a new funding strategy.

Among possible models the National Fish and Wildlife Foundation (NFWF) is closest to the type of organization envisioned. Created by Congress in 1984, the NFWF was the first nonprofit foundation eligible to receive federal matching funds to support the conservation mission of a federal agency. It stimulates wider investment in conservation projects by creating public-private partnerships aimed at species habitat protection, environmental education, public policy development, natural resource development, habitat and ecosystem rehabilitation, and leadership training for conservation professionals. Its grants programs combine private and corporate contributions with federal dollars and are flexibly structured to encourage new ideas from the field. The NFWF is a lean, mission-driven organization. It secures all operating expenditures from private sources and spends less than 5% of its budget on administrative support and overhead. Between 1984 and 1993, the NFWF awarded 873 grants, contributing



\$37 million in federal funds toward a total of \$108 million for conservation projects.

We recommend creating a similar federally chartered foundation dedicated solely to the preservation of American film. Affiliated with the Library of Congress and its National Film Preservation Board, this new foundation would secure private support for national preservation initiatives and be eligible to match these donations with federal funds. Federal money is a vital part of the funding partnership. The promise of a federal match acts as an incentive to corporate, foundation, and individual donors to view their gifts as seed money for public preservation investments. The foundation would work in cooperation, not competition, with existing organizations.

The Board believes that the creative community and the communications industries could become key partners in the initiative. A new federally created foundation has the potential to: (1) build preservation relationships among archives, the film community and the industry to reflect changing technologies and public needs, (2) match public initiatives with donor interests, (3) foster constructive working relationships with federal grants programs so that each public preservation dollar is maximized, (4) extend national preservation programs into improving film storage and access, and (5) have the national base to address problems beyond the scope of a single institution.

The National Film Preservation Board, working through the Library of Congress, will seek legislation to establish a new film preservation foundation. The foundation will be designed to forge public-private partnerships to attack film preservation problems and be eligible to receive federal funds to match corporate, foundation and individual donations. Members of the Board will enlist the support of their organizations for this initiative.

## 6. TOWARD IMPLEMENTATION

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The Library of Congress and the National Film Preservation Board are committed to implementing the action plan outlined here, but we need your input and support. Only by continuing the collaboration among the film community and building a wide base of public interest can there be hope for genuine gains in American film preservation. To this end, we invite written comments on the plan.

It is worth restating that the recommendations in *Redefining Film Preservation* express agreements among the archivists, educators, filmmakers, industry executives, and others who participated in the five planning groups. To reach this point, groups achieved compromise on issues that individual representatives might have preferred to push harder or downplay. For some more controversial issues, this plan is the first attempt at open discussion and private-public sector consensus. It is hoped that written comments can build from this foundation, suggesting priorities, partners, and specific implementation approaches.

The National Film Preservation Board, currently authorized by Congress through June 1996, will discuss implementation at its Fall 1994 meeting and guide the overall process. Recognizing that a national funding structure is the critical factor for the plan's success, the Library of Congress will take steps to introduce the legislation for a new federally chartered foundation dedicated to film preservation. The Librarian will issue an implementation document, incorporating public comments and the Board's discussion, by the end of January 1995.

To contribute to the initial implementation discussions, please address written comments by October 3, 1994 to: Steven Leggett, Motion Picture, Broadcasting and Recorded Sound Division, Library of Congress, Washington, D.C. 20540-4800; FAX: 202-707-2371.

## **Keeping Cool and Dry: A New Emphasis in Film Preservation**

Just as film itself has a history, so does film preservation. Today the National Film Preservation Board is suggesting that our national preservation policy change to reflect new technical knowledge about film decay. Research shows that film needs better storage to survive, and that film in all stages of decay can have a longer useful life with small improvements to its environment.

Our new policy should broaden the definition of "preservation" beyond its traditional meaning of copying old film stocks to newer ones. It should view preservation as a "whole film" enterprise, integrating previously separate issues of storage, access, and selective restoration into a coherent, cost-effective approach. The other purpose of "whole film preservation" is to develop a balanced use of resources to save films in all formats and types in large archives and small collections.

Film long ago ceased to be only for the movie theater; as film technology became simpler and more accessible, it entered many arenas of education, industry, documentation, and personal expression. Our challenge now is to appreciate the fullness of film's variety, to locate and consolidate important fiction and nonfiction films, and to prevent their further decay. The reward will be more films for ourselves and future generations to study and enjoy.

### ***The New Film Preservation Challenge***

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Current realities in film preservation have been shaped by the history of film itself. From the 1890s to 1950 most professional cinema films (35mm format) were made on cellulose nitrate plastic supports. Nitrate base film can become chemically unstable, and many films that were stored in unfavorable conditions deteriorated beyond use before they could be copied. The focus of preservation activities came to be a systematic program of nitrate duplication as a preemptive measure, before deterioration occurred. The goal of copying all nitrate was a rallying point for preservation, and in some collections it was attained. Nationwide, however, the rising costs of duplication soon outstripped available resources, and it became clear that the scale of the nitrate problem was far too large to deal with in that way.

When manufacture of nitrate film ended, two far-reaching innovations in film technology occurred almost simultaneously. One was the replacement of nitrate with nonflammable cellulose acetate plastic film support. Based on the (now obsolete) accelerated aging tests of the day, film manufacturers announced that safety films had far superior permanence over nitrate films. Attitudes toward preservation were shaped by the conviction that acetate stock was "permanent," while nitrate was not. We now know that acetate and nitrate both share a tendency to degrade; in fact, in some collections, the losses from acetate decomposition are greater than from nitrate. Nature does not distinguish much between cellulose nitrate and cellulose acetate when it comes to deterioration.

The second key innovation of the early 1950s was the introduction of chromogenic color motion picture stocks, to replace the cumbersome Technicolor process of the 1930s and 1940s. Audiences and cinematographers embraced color with thoroughgoing and deep affection, so that few films after 1960 were made in black and white. Unfortunately, the use of color introduced a tremendous new problem of rapid color fading. The instability of organic color dyes, like the decomposition of nitrate and acetate film base, results from a chemical process which can be speeded up or slowed by the temperature and humidity of the storage environment. Warm-and-humid conditions accelerate the rates of fading and decomposition, while cool-and-dry conditions greatly slow the reactions.

The focus on nitrate and on duplication that has dominated film preservation efforts does not confront the current realities of unstable safety stock and color dyes. A rising tide of deterioration is flowing through film collections, touching the smaller and medium-sized institutions most acutely. The short life expectancies which once were thought to be only a problem for nitrate now face nearly all films, because almost every film is either on nitrate or acetate base, or else is in color. Today's color is more stable than earlier emulsions, but it still has a short life in archival terms, unless it is stored properly.

### ***Prevention Should Be New Preservation Policy Emphasis***

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The starting point for policy change is to recognize a number of unpleasant facts. One is the sheer size of the task. There are enormous quantities of films in established film archives, and perhaps even larger amounts in other kinds of collections and institutions. The huge volumes of film mean that *massive* efforts would be required to address the problem through preemptive copying. Film archives face shrinking budgets for preservation. Resources are diminished not only by rising duplication costs,

but also by greater demands that films be accessible. Some collections have no funds at all for preservation copying.

The goal in film preservation is to extend the useful life of collection materials so that they remain accessible to future generations. The problem is to maximize each preservation dollar. Moreover, it is often not enough just to understand how to improve the care of collections; the benefits of preservation actions taken now must be communicated to funding agencies and somehow quantified in order to lay claim to scarce resources. This has been a source of great difficulty for film archives because so much of their work is preventive, rather than remedial, in nature. The benefits of such work are difficult to quantify in terms of dollars-and-cents or years of extended life.

Take an analogy from health care: Preventive medicine (regular checkups, immunization, etc.) is very cost effective, because when conditions are diagnosed early they are less costly to treat and involve fewer complications. Still, there remains a reluctance to endorse a new preventive medicine emphasis because the traditional "late treatment" pattern is already so expensive. Only with thoughtful analysis and a long-term view does the value of prevention become clear.

The film preservation equivalent of preventive medicine is the collection storage environment. Making original films last longer will reduce the need for emergency duplication and will "buy time" for collections. In the future, film will be reproduced and distributed by a host of new technologies, some now available and some as yet undreamed of. The key to access in the future is to preserve the original long enough to be converted, restored, and distributed in these new ways. Original films have the maximum image and sound quality, and will be the best "platform" from which to create access copies in the future. Digital restoration techniques will be a part of, but not a substitute for, preservation of original film materials.

The major preservation problems which now occupy so much of our efforts—degrading nitrate and acetate film base, color dye fading, audio and video tape deterioration—are all heavily dependent upon storage temperature and relative humidity (RH). Both science and actual experience agree that temperature and RH are the *primary* rate-controlling factors in such deterioration. Every treatise on preservation and conservation advises that cooler and (within limits) drier conditions are better for film.

### ***Putting Research into Practice***

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With color fading and acetate degradation becoming all too evident in film collections, research has turned to investigating these problems. The Image Permanence Institute,<sup>1,2</sup> Eastman Kodak Company,<sup>3</sup> and other laboratories around the world have provided a fuller picture of deterioration behavior. Although the role of temperature and moisture in governing the rate of decay has been acknowledged in preservation science and practice for many decades, something profound has only recently been brought to light: the actual quantitative relationships involved.

Over the last twenty years—and especially within the last five—a great deal of laboratory work has been done to establish predictive models of deterioration for dye fading<sup>4</sup> and film base decomposition in nitrate and acetate.<sup>5</sup> These models have shown just how long inherently unstable materials can last under the right storage conditions. They also show the converse—that the wrong environment can doom collections to very short lifetimes. Deterioration is always proceeding, sometimes faster, sometimes slower. It is now possible to know, at least in a general way, how long it is reasonable to expect collections to last in any plausible combination of temperature and RH conditions.

### ***Helping Original Films To Last Longer***

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Recent advances in our understanding of film deterioration point the way to a balanced and cost-effective strategy of improved storage and selective copying. Research shows that even degraded film will last longer under cooler and drier conditions. If film is stored properly from the beginning, life expectancies measured in centuries are possible. A number

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<sup>1</sup> P. Z. Adelstein, J. M. Reilly, D. W. Nishimura, and C. J. Erbland, "Stability of Cellulose Ester Base Photographic Film: Part I—Laboratory Testing Procedures," *Journal of Society of Motion Picture and Television Engineers*, 101, 5:336-346, May 1992.

<sup>2</sup> P. Z. Adelstein, J. M. Reilly, D. W. Nishimura, and C. J. Erbland, "Stability of Cellulose Ester Base Photographic Film: Part II—Practical Storage Considerations," *Journal of Society of Motion Picture and Television Engineers*, 101, 5:347-353, May 1992.

<sup>3</sup> A. Tulsi Ram, David F. Kopperl, Richard C. Sehlín, Stephanie Masaryk-Morris, James L. Vincent, and Paige Miller, "The Effects and Prevention of the 'Vinegar Syndrome,'" presentation at the IS&T 46th Annual Conference, Boston, MA (May, 1993).

<sup>4</sup> *Conservation of Photographs*, Kodak Publication No. F-40 (Rochester, Eastman Kodak Company, 1985).

<sup>5</sup> James M. Reilly, *The IPI Storage Guide for Acetate Film* (Rochester, NY: Image Permanence Institute, 1993).

of major film companies have installed low-temperature storage vaults to protect their valuable film assets. The heart of the new preservation approach is to understand and exploit the relationship between storage conditions and film decay to the advantage, rather than the detriment, of film collections.

Clearly it is time to broaden the scope of film preservation activities and abandon a narrow focus where copying in anticipation of future decay claims such a large share of funding and staff resources. Duplication and physical restoration of films is a vital part of preservation. It should continue, but as part of a balanced program that emphasizes prevention of decay through improved storage. Duplication should be used selectively in cases where films are showing signs of active deterioration, or where physical restoration is needed to make films accessible.

The advantages of such a balanced "whole film" approach are lower costs and greater useful life for all the films in collections. The costs of improved storage can be considerable, but they are still far lower than any other preservation option. Cold-storage vaults and major environmental control projects conjure up an image of outrageous cost, but when a single feature-length film can cost \$40,000 to copy, prevention seems by far the better bargain. While major vault construction is costly, it is also cost-effective for many large collections when the value of the collection and the costs of duplication are considered. For smaller collections, centralized, shared storage in large vaults is a viable way to achieve long film lifetimes.

The new research in film deterioration shows that small, incremental changes in storage conditions can result in considerable life extension for film collections. Staff education and new approaches to environmental monitoring can help collections with few resources to determine where such low-cost but still potent improvements would be possible. In fact, much can be done to preserve films short of large capital projects. The first steps are to understand how deterioration is affected by temperature and RH, and to measure actual conditions. Considerable improvements can then be made by small, simple steps such as lowering thermostats, shutting off heat vents, relocating collection materials within a structure, etc. For some small collections, household freezers can be a very successful storage approach.

Because managers of film collections have become accustomed to thinking that only grand projects and ideal conditions will make a difference, they have lacked the incentives to make incremental improvements. There is a need for better tools with which to evaluate storage environments in light of the new understanding of deterioration behavior. Such tools might include simple electronic monitors that sense temperature and RH and "read

out" in film life, as well as computerized analysis of environmental data that "sums up" a long period of temperature and humidity readings into a single life-expectancy value. There is also a need for improved techniques for monitoring the condition of films over time so that archives can duplicate films or take other preservation measures when necessary.

### ***Conclusion***

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Film must be managed like any other valuable, but finite, national resource. We can no longer afford to have a narrow focus in film preservation, concentrating on just one approach or one type of film. A new preservation policy must emphasize education, prevention of decay, and closer integration with outreach activities that make film accessible to a wider audience. This requires an educational initiative to teach the theory and practice of preventive care, and new tools with which to monitor and assess storage conditions. It will involve reexamination of both the funding structures and the practices of film preservation, but it will result in more films being available to us and to future generations.

*Drafted by James Reilly (Image Permanence Institute), in collaboration with the other members of the Redefining Preservation Task Force: Allen Daviau (American Society of Cinematographers), Peter Gardiner (Warner Bros.), Stephen Gong (Pacific Film Archive), Robert Heiber (Chace Productions), and William Murphy (National Archives and Records Administration).*



### **Handling and Projecting 35mm Archive and Studio Prints: Voluntary Guidelines**

The continued availability of older American films for public exhibition depends on proper care of existing 35mm prints. Archive and studio prints (sometimes known as *vault prints*), unlike distribution copies, are produced in small quantities for internal use. Often a title is represented by a single 35mm print made from preservation materials or surviving from the original year of release. Additional copies can be difficult and expensive to make. Thus archives and studios lend only to exhibitors willing to take special care in handling and projecting these fragile materials.

The Public Access and Educational Use Task Force, appointed by the Librarian of Congress to advise on the national film preservation program, has developed the following voluntary guidelines to assist exhibitors, archives and studios in framing acceptable practices for handling and projecting rare 35mm archive and studio prints. These voluntary guidelines draw upon the experience of archive and studio projectionists. They are presented as an informal reminder list for the practicing projectionist.

#### ***Preparing Projection Equipment for Use***

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1. Inspect equipment for dirt and dust, particularly at all contact points along the film path and at any optical or magnetic scanning points.
2. Check the mechanical alignment to insure that the film runs through the projector in a straight path and is not skewed.
3. Check film tension. Under normal operating conditions film tension should be between 6 and 16 ounce-feet (oz-ft). Because film and sprocket tooth combinations tear when the tension exceeds the uppermost limit of 15 pound feet (lb-ft), the tension of all film handling equipment should be far below this level. Tension as low as 6 oz-ft is sufficient to provide a steady screen image. Tension greater than 16 oz-ft accelerates film wear.

To measure film tension in the feed or take-up system, place the equipment in its normal operating mode. Circle about 3 to 6 feet of film around the hub of the reel, attaching the other end to a dynamometer.

To measure the tension necessary to move the film through the projector gate, place a short length of normal print material in the projector gate and close the gate. Attaching the film to a dynamometer, pull the film through the gate.

Test and adjust rewind equipment to meet the same tension specifications.

4. Provide an adequate supply of undamaged take-up reels. Take-up reels should be free from burrs and other defects, properly aligned and seated on their spindles, and of the largest practical hub diameter. The hub diameter should always be at least 4 inches.

### ***Storing and Handling Prints***

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1. To create a spotless projected image, good housekeeping in the projection area is essential. Clean frequently any equipment or surface that may come in contact with the film. Select new, perfect reels for storage. House prints so that they will be free of dust.
2. Take-up reels on reel-to-reel machines should be cleaned at the start of each day to remove dust and debris, and checked for dirt at the end of each show.
3. Before screening, inspect the print for physical damage, handling the film itself as little as possible. When handling is necessary, hold film by its edges. During thread-up, handle only the leader and keep finger contact to a minimum. Never allow the film to touch the floor.
4. Whenever possible, film should be handled in a work area provided with positive pressure and with a filtered, temperature- and humidity-controlled air supply.
5. Clean film only where necessary. Use a commercially available film cleaner. Generally cleaning and lubrication should be done at the laboratory.

## ***Projecting***

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Film prints should be shipped with an instruction sheet listing the correct aspect ratio, projection speed for silent films, special handling requirements, and name of the person to call should questions arise about the print.

Archiva and studio prints should be shown only by a qualified projectionist, who remains in the booth throughout the screening. Accidents do happen, even with the most sophisticated equipment. Should film damage occur, do not mend the film yourself unless repairs are required for the screening. It is essential to notify the lender of damage when the print is returned. Lenders should include with the print a form on which projectionists can note the condition of the print, as received, and report any new damage.

1. Check that the projector is fitted with an aperture plate and lens appropriate to the film's aspect ratio.
2. Set lamphouse output for proper screen brightness. The brightness recommended by SMPTE is 16 foot lamberts (FL) in the center and no less than 12 FL at the sides. If the lamphouse is properly adjusted and installed, light will not damage the film.
3. Run a black, opaque 35mm film loop through the projector to test for scratching.
4. Adjust gate pressure to the "minimum setting" to eliminate jitter and to achieve a steady picture.
5. Adjust take-up and hold-back tension to the least amount necessary for proper film handling.
6. Before loading the film, check all guide rollers for dirt, flat spots, and smooth rotation. Check the focus using the SMPTE test film.
7. When threading the film, set the loop sizes according to the specifications particular to the projector type. Be sure to keep the loops small enough so that they do not slap against the machine. Also, be sure the loops are the right size for the synchronization of picture and sound.

8. Clean the gate frequently. At the end of each show, check for dirt and clean as necessary. Clean the lens as necessary.
9. Unless specifically negotiated with the lender, do not use a platter projection system. With platter systems, the head and tail leader of each reel of film must be removed. Platter systems also have more guides and therefore are more likely to damage film.

*Drafted by the Public Access and Educational Use Task Force: John Belton (Rutgers University), David W. Packard (Stanford Theatre Foundation), Richard Prelinger (Prelinger Associates/Home Box Office), Eddie Richmond (UCLA Film and Television Archive), Karan Sheldon (Northeast Historic Film), James Watters (Universal City Studios), George Stevens, Jr. (independent producer).*

### **Joint Studio-Archive Restoration Projects: Voluntary Guidelines**

Increasingly studios and public archives are recognizing the value of working together to preserve American films. An initiative of special promise is the joint studio-archive restoration project, pioneered by Sony Pictures Entertainment with the International Museum of Photography and Film at George Eastman House, the Library of Congress, the Museum of Modern Art, and the UCLA Film and Television Archive. In this type of partnership, a studio and archive join forces to produce high-quality preservation materials of major studio-owned titles. Such projects differ from standard preservation in that they usually entail extensive research, planning, and specialized laboratory work to restore films to their original state. The Film Foundation encourages these arrangements, finding that they further the studios' proprietary interests, the archives' cultural mission, and the public's study and enjoyment.

Here is how such voluntary arrangements typically work. The studio contributes funding for laboratory costs; the archive contributes the time and skills of its preservation staff. The studio provides access to its materials; the archive evaluates these elements and searches for additional source materials in noncommercial custody. Both partners work together to prioritize titles for restoration and to carry out the process.

Each partner gains from the collaboration. The studio obtains: (1) detailed and confidential written evaluations on the quality and condition of existing film elements, (2) information on relevant existing materials, and (3) new high-quality preprint elements of key titles. The archive acquires (1) preprint of the same works for safekeeping for future generations, (2) prints for use in research and public programs, and (3) a role in projects having a broad popular impact. Both profit from building a wider circle of working relationships and the cross-fertilization of ideas and techniques.

It is important to note that archives are as eager as studios to see preserved films re-enter the marketplace and become available to the public through theatrical exhibition and ancillary distribution. Significant American motion pictures restored through public-private ventures include *The Guns of Navarone* (1961), *On the Waterfront* (1954), *I've Always Loved You* (1946), *Phantom of the Opera* (1943), *His Girl Friday* (1940), *Mr. Smith Goes to Washington* (1939), *Holiday* (1938), *The Plainsman* (1936), *Shanghai*

*Express* (1932), early sound shorts by the Vitaphone Company (1927-29), *Noah's Ark* (1929), and *Tess of the Storm Country* (1914). In addition the studios and archives have collaborated in promoting screenings of studio-preserved titles such as *The Bridge on the River Kwai* (1957), *Gone with the Wind* (1939), and *The Wizard of Oz* (1939), and thus furthering public interest in preservation and increasing the audience for restored films.

### ***Why Prepare Voluntary Guidelines?***

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The Public-Private Cooperation Task Force, appointed by the Librarian of Congress to advise on the national film preservation plan, has developed the following voluntary guidelines to assist interested studios and archives in developing constructive partnerships. The guidelines draw upon task force members' experiences over the past decade in joint restoration ventures and summarize key features contributing to successful efforts. The guidelines suggest an informal framework for designing mutually beneficial collaborations and can be applied to single projects or ongoing programs.

### ***Benefits of Cooperative Restoration Projects***

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By pooling resources and expertise to preserve major studio-owned titles, a studio and a public archive can produce high-quality preservation materials, adding to a film's long-term commercial value and supporting the role of archives in safeguarding America's film heritage.

The studio specifically:

- Obtains advice in determining which films are of considerable cultural interest to the American film-viewing public and worth the investment of a full-scale restoration.
- Develops a clear framework for preservation planning and prioritization.
- Obtains detailed research on key titles and evaluations of the preservation quality of film materials in its library.
- Ensures that the best-available materials--from both commercial and public collections--are used in the restoration process.

- **Creates high-quality preprint materials for studio use as well as additional preservation materials safeguarded in public archives that can be consulted by the studio should the need arise.**
- **Realizes commercial benefits from the exploitation of newly restored titles in exhibition and ancillary markets.**

**The archive specifically:**

- **Obtains high-quality preprint materials to safeguard the title for future generations.**
- **Obtains high-quality film prints for use in research and in public programs.**
- **Contributes to projects having a broad popular impact, and thus promotes the archives' film preservation work and cultural mission.**

**Both partners:**

- **Develop a wider circle of working relationships and trade ideas and preservation techniques.**

***Key Features of Successful Projects***

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- A. The studio and archive would jointly select titles for preservation evaluation.** The studio, in consultation and agreement with the archive, would select and prioritize titles from its library for the purpose of determining their preservation needs. Prime candidates for early inclusion would be titles that the studio already suspects require restoration.
- B. The archive would evaluate the preservation needs of each title.** The archive would inspect and evaluate the preservation status of each selected title. This process would involve two steps:
  - 1. Physical inspection.** The archive would inspect the studio's existing preservation elements and other appropriate materials to determine their quality (picture and sound) and condition (scratches, tears, splices, signs of deterioration, etc.). Many titles may be found to be adequately protected and need no further work. Others, however, may require upgrading or even restoration to insure proper preservation.

**2. Written report.** The archive would prepare and submit to the studio a confidential written report on each title inspected. The report would include:

- Evaluation information on the picture and sound quality and physical condition.
- Recommendation on whether new preprint materials should be prepared. If new materials are recommended, the report also would include: (a) a description of the improvements that could be obtained and (b) a budget estimating the cost of the project.

**C. The studio would authorize preservation work.** The studio would approve or reject each recommended project on a title-by-title basis. No further work--beyond inspection and evaluation--would begin without studio authorization.

**D. The studio and archive would collaborate on the preparation of materials and the supervision of laboratory work.** Once a project is approved, studio and archive personnel would coordinate the restoration effort. Typically, this work would include: determining which elements to use in the restoration process; assembling, repairing, and preparing the footage for printing; coordinating laboratory processing; and doing quality control. In some cases, the archive holds in its own collection film materials that are useful in the preservation process. The archive may borrow additional materials from other public archives, in the United States and abroad, or from private sources. The laboratories used for each project would be jointly selected by the studio and the archive.

**E. The studio and archive would each receive new preprint and print materials at the time of preservation.** For each upgraded or restored title, the studio would order the preprint and print materials needed for its own operations. In addition, the archive would receive 35mm preprint elements (picture and sound) and an answer print for permanent addition to its preservation collection. The archive and studio would jointly determine the types of elements to be produced for the archive. The studio would be guaranteed limited access to the archive's materials, as determined by mutual agreement.

The archive also would receive a 35mm viewing print for in-house screening and loan to other cultural institutions (museums,



universities, festivals, archives, etc.). All loans would be subject to prior written approval by the studio.

- F. The studio would underwrite the cost of all laboratory work and contribute to the cost of the archive's services.** Financial arrangements would vary from program to program and depend on the particular features of the project and internal factors unique to each studio and archive. Typically, the studio would cover the costs for laboratory services on those titles approved for upgrade or restoration, and contribute to the archive's direct costs for inspection, evaluation and restoration services.

The studio would control the annual cost of the program by the number of titles selected and the types of elements prepared. These costs would be estimated in the budgets prepared by the archive for each title prior to studio approval of restoration work.

- G. The studio and archive representatives would meet on a regular basis to monitor the work and share preservation information.** This might involve one-on-one meetings between the studio and archive, or, should the studio prefer, larger sessions in which the studio meets with several public archive partners to share information on joint projects and preservation issues.

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## **Depositing Films With Archives: A Guide to the Legal Issues**

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### **Why deposit your film(s) with an archive?**

Archives play a central role in preserving America's film heritage. Many filmmakers, from D.W. Griffith to Andy Warhol, are known today largely through works that came into the safekeeping of these institutions. Archives not only make films available for research, study, and appreciation, they also provide secure storage -- often in low-temperature, low-humidity environments designed expressly to protect film. For active filmmakers, archives often make special arrangements to allow continued access to the materials under conditions that insure their preservation.

A "deposit agreement" defines the relationship between a donor of film materials and the archive to whom the materials are entrusted (for the sake of clarity, the term "donor" is used throughout this agreement to refer to the party entrusting the film to the archive and term "deposit agreements" is used to refer to the agreement between the donor and the archive, regardless of whether the deposit is in the form of a loan or a gift). Sorting through the legal issues addressed in these agreements can be complicated, particularly for filmmakers and archives who do not have the help of legal counsel experienced in the issues raised by such arrangements. Some filmmakers, discouraged by these complexities, fail to take the necessary steps to protect their work, and as a result materials can be lost or destroyed. In the public hearings accompanying the Librarian's Report to Congress, entitled *Film Preservation 1993*, archival and scientific experts emphasized that proper storage is as key to the preservation of film as is restoration of the film elements.

In 1994, the Librarian of Congress appointed a group of task forces to encourage the development of a National Film Preservation Plan, under the guidance of the National Film Preservation Board. One of those task forces, the Public-Private Cooperation Task Force, has developed the following checklist to explain the legal issues involved in archival deposit agreements, and to do so in accessible, nontechnical language.

### **Introduction to the Checklist**

This checklist is a tool to help donors and archives negotiate mutually beneficial agreements. It is our hope that it will help ensure the preservation of films (especially the works of independent filmmakers) by encouraging deposits of films and related materials, while at the same time decreasing the likelihood of misunderstandings regarding the archives' role and capabilities. The checklist is intended to serve several different functions:

- to introduce the legal issues that exist between owners of film materials and the archives that collect and preserve films and related materials;

- to aid in the negotiation of deposit agreements; and
- to provide a reference source for parties which already have deposit agreements in place in order to ensure that those documents are comprehensive and accurately reflect the intentions of the parties.

There are as many types of archival deposit agreements as there are types of donors. Deposit agreements are customized documents, reflecting the commercial status of the donor, her motivations for deposit, her on-going interest in the materials, and archival considerations. We have, therefore, laid out the possibilities in the form of a checklist of issues from which archives and potential donors can chose the applicable sections.

We have demurred from presenting a so-called "model" agreement, finding that no single model can fit all situations. Furthermore, model agreements carry the dangerous implication that there is a "right" and "wrong" approach to the many issues listed on the following pages. The only "wrong" approach is one that fails to anticipate and clarify the key issues of donor-archive relationships.

The checklist is footnoted with excerpts from actual deposit agreements, generously supplied by film archives and motion picture studios participating in the development of the National Film Preservation Plan. The footnotes are intended to amplify the discussion with "real-life" illustrations and to suggest sample language. In all instances we have deleted the names of the parties from the excerpts. The checklist uses the term "archive" as shorthand for: any public or non-profit repository -- library, museum, historical society, university collection -- committed to the preservation of film. Again, we emphasize that the best clause for each situation is the one that meets the specific needs of both parties.

#### **Don't be put off by the length of the checklist!**

Because this checklist is designed as much for non-lawyers as for lawyers, we have attempted to use as little technical legal language as possible. The checklist is lengthy because there are so many important issues that must be addressed in almost every deposit arrangement, not because these issues are particularly complicated.

A quick glance over the table of contents of the checklist on the next page should reveal that there are four basic elements that should be addressed in the deposit agreement:

- (1) the materials that are being deposited (not only a clear description of the physical materials, but a thorough discussion of what additional rights, if any, accompany those materials);
- (2) the nature of the deposit (including whether it is a loan, a gift, or some variant of those two);
- (3) the role of the archive regarding those materials (such as conservation, duplication, restoration, and security); and

- (4) the use of the deposit materials (including any restrictions on the use of those material by the archive, by patrons of the archive, and by the donor).

It is our hope that the checklist will clear away some of the mist that often surrounds archival deposits and encourage an informed dialogue between donors and archives. In doing so, we also hope that it will ease film owners' hesitations about entrusting films to archives.

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## CHECKLIST FOR DEPOSIT AGREEMENTS

### **I. Nature of the deposit arrangement**

Any review of an archival deposit agreement should begin with a consideration of the nature of the deposit arrangement between the donor (the party lending or donating the film materials) and the archive. Is the deposit in the nature of a gift or a loan? Exactly what physical property and which rights are changing hands? How long is the deposit for, and how long will restrictions (if any) imposed on the use of the materials last?

#### **A. Type of transfer: gift, bequest, or loan**

There are two types of transfer: a gift and a loan. The concerns addressed by each section of this checklist apply equally to both, since even an outright gift may be subject to restrictions and limitations.

##### **1. Gifts and bequests**

A gift may be made either in the form of an immediate transfer<sup>1</sup> or as a bequest in a will which takes effect only upon the death of the donor. Archives prefer, in almost all situations, an outright gift to an extended loan.

##### **2. Loans**

Even where the deposit is in the form of a loan,<sup>2</sup> the term of the loan may be open-ended and not limited to a set term of years (for a discussion of the duration of deposit agreements, see section I.D). (It is, of course, also possible that a loan may at some point convert to an outright gift, such as upon the death of the donor. This later approach is generally taken where an individual donor wishes to retain certain rights to the material during her lifetime.)

### **B. Subject matter of the transfer**

All motion pictures consist of two distinct sets of rights: the tangible rights to the physical property (i.e., the reels of film) and the intangible rights contained in that property (most importantly, the copyright). Particularly with commercial releases, these dual sets of rights are often owned by different parties. Even where a donor owns both sets of rights, she may wish to transfer to the archive only the physical property, but no rights in the copyright. Absent permission of the copyright owner, the archive's use of the material is limited to scholarly study and duplication for preservation purposes (see the discussion of "fair use" and archival use in section I.B.2.e. below)<sup>3</sup>

#### **1. Physical materials**

The donor and the archive should discuss precisely which materials are to be deposited. Deposits may include prints, preprint materials,

duplicating materials, background and production reports, shooting scripts, continuity scripts, publicity stills, etc. The agreement should set forth in detail exactly what materials are being deposited, listing not only the titles but also each element being deposited (i.e., prints, preprint materials, background and production reports, shooting scripts, continuity scripts, publicity stills, etc.) together with a description of the format (35mm, 16mm, black & white, color, etc.), number of reels (A/B reels), and running time. Where the list is long, it is frequently attached to the agreement as a schedule.

The parties should agree on the status of the physical materials that are to be deposited with the archive. In most cases, the agreement will specify that the materials are being donated in an "as-is" or "best available copy" condition. If other arrangements are agreed upon, such as where the donor agrees that new prints will be created for deposit, the agreement may specify "newly-struck release prints from the best available original master materials."

Archives frequently request preprint materials. When the donor does not have secure archival facilities, with proper temperature and humidity controls, in which to protect those elements, such deposit may well be in the best interest of all parties.

## **2. Copyrights**

If the donor is also the owner of the copyright in the deposit materials, the agreement should address which aspects, if any, of the copyright are being licensed or assigned to the archive.

### **(a) Exclusive rights of the copyright owner**

The copyright owner controls the following five exclusive rights (which, as discussed in the next subsection, can be licensed in whole or in part):

#### **(1) The right of reproduction**

This is the right to make physical copies of the copyrighted material.<sup>4</sup> Examples would include copies made from the original film to duplicate film (including reference prints), to videotape, or to other medium such as still photographs. Absent a grant of permission, the archive does not have the right to make any copies of the deposit materials, except as provided under the "fair use" provisions of the Copyright Act (discussed below in section I.B.2.e.).

**(2) The right of distribution**

The copyright owner also controls the right to distribute physical copies of the work to other parties.<sup>6</sup> The distribution right reserves to the copyright owner the right to control the dissemination, including the rental, of the work. Once the copyright owner sells a copy, however, the purchaser of that copy has the right to re-sell or lend it to others. For example, a legally made home video of a commercial motion picture may be resold or given away without notifying the studio which owns the copyright in the film.<sup>6</sup>

It should be noted, however, that the copyright owner can contractually limit the authority of the archive to transfer the deposit materials to other parties, even where the copyright law gives the archive more flexibility. This is particularly true where the deposit agreement is in the form of a loan rather than a gift. (For a discussion on contractual limitations on transfers, see section III.E).

**(3) The right of public performance**

The copyright owner also controls the right to perform the copyrighted work in public.<sup>7</sup> Absent permission, the archive cannot publicly screen the film (either on or off the premises of the archive), broadcast it on television or cable, or make it available in an on-line digital format without the express prior consent of the copyright owner.

In-house viewing by the archive staff or individual members of the public for scholarly purposes (for example, on a Stoenbeck) would generally not be a violation of the donor's copyright based on the "fair use" provisions of the Copyright Act (see section I.B.2.e below). The copyright law also provides a very limited exception for non-profit education institutions which permits the screening of a film in an academic classroom context even absent the permission of the copyright owner.<sup>7</sup>

While the copyright owner has the right to contractually limit the archive's ability to conduct screenings of the deposit materials, including restricting uses which might otherwise qualify as "fair use" or classroom educational, such an outright prohibition of this type would negate most of the value of the deposit. More limited restrictions, such as restrictions defining the nature of scholarly access,<sup>8</sup> are not uncommon.



Some agreements that do not convey an unrestricted right of public performance nevertheless grant the archive the right to conduct a limited number of public showings of the film, particularly on the archive's premises.<sup>10</sup>

**(4) The right of public display**

The right of public display does not apply to motion pictures themselves, but can apply to objects associated with motion pictures which an archive may wish to display.

The right of public display reserves to the copyright owner the right to control the public display of copyrighted objects. This right applies to still photographs (both publicity stills and frame enlargements), costumes, set design sketches, props, or other artifacts. This right, like the right of public performance in the film itself, is retained by the copyright owner unless specifically licensed or transferred to the archive.<sup>11</sup> As a result, the archive may need to obtain the copyright owner's permission to display such items.

It should, of course, be kept in mind that the claim of "fair use", discussed below, applies to all of these exclusive rights.

**(5) The right to prepare derivative works**

The fifth right of the copyright owner is the right to create new copyrightable works based on the original work.<sup>12</sup> Absent permission, the archive would not have the right to create new versions of the film (for example, creating a "director's cut" by adding scenes removed during the original editing process), create a soundtrack album, or license sequels, remakes, stage productions, or novelizations.

**(b) Types of copyright grants**

Because all aspects of a copyright are divisible, a copyright owner can assign any portion of it to other parties, including the archive. A limited grant can be defined many possible ways: by one or more of the five rights discussed above, by geographic area, by length of time, or by other factors. In addition, any grant of rights may be either exclusive or nonexclusive.

Thus when donating physical copies of films, the copyright owner needs to consider which aspects, if any, of the copyright will be included with the loan or gift. There are three options:

(1) The copyright owner retains all rights to the copyright, and the deposit is limited to a transfer of the physical materials only.<sup>13</sup>

(2) The copyright owner transfers to the archive a non-exclusive license.<sup>14</sup> As previously noted, such a grant can be of any combination of rights and for any combination of territories or time periods. Where a non-exclusive license is granted, it is typically a grant by the copyright owner to the archive of permission to show the film either at the archive's premises<sup>15</sup> or at public showings,<sup>16</sup> and/or to reproduce copies for archival and other limited purposes (such as reference prints).

(3) The copyright owner transfers to the archive exclusive rights. Such a grant can again be of any combination of rights and for any combination of territories or time periods. Where an exclusive assignment is made, it is generally an assignment of the entire copyright, with the donor retaining no interest in the copyright and the archive assuming full ownership. The archive is then free to license the copyright to other parties.

Without a copyright assignment, the archive is limited in how it may use the film during the term of copyright protection (which, for most films, will be 75 years). Reproduction, distribution, performance, public display, or the preparation of derivative works by the archive or by others, without the prior consent of the copyright owner, constitutes an act of copyright infringement (subject, of course, to the defense of "fair use" discussed below in section I.B.2.e).

(c) Termination of grants made by the copyright owner

It should be kept in mind that, under U.S. copyright law, the author of a copyrighted work may cancel assignments or licenses of the copyright under certain circumstances.

Any grant of rights made after January 1, 1978, by the author of a copyrighted work, other than a work-for-hire,<sup>17</sup> can be terminated 35 years after the transfer.<sup>18</sup> Similarly, a grant of rights made prior to that date is subject to termination during a five-year period commencing with the end of the 56th year of the copyright in the work.<sup>19</sup>

Since these termination rights do not apply to works-for-hire, they will not apply to most commercially produced films. However, where a motion picture is based on a literary work, such as a novel or short story, a termination of the grant of rights in such literary work could terminate the right to create new works.

As a general rule, this termination right has relatively little impact on archival deposit agreements for two reasons. First, any such termination would affect only the grant of copyright, not the deposit of the physical material, and thus, even where the copyright grant is terminated, the deposit materials will remain with the archive. And second, any derivative works created prior to the termination may continue to be exploited notwithstanding the termination. In other words, if the grant of motion picture rights in a novel were terminated, the resulting motion picture could continue to be screened and broadcast, but no new sequels or remakes could be produced.

**(d) Copyrights in underlying material contained in the film**

It should be kept in mind that a license or assignment of the copyright to a motion picture does not automatically result in a license or assignment of underlying copyrights contained in the film, such as music or the rights to the literary work on which the film was based. A donor can never grant greater rights than she herself has, and therefore even a grant of "all rights" may not convey the rights necessary for the exhibition or distribution of the picture if the donor did not actually have those rights to transfer.

There are two ways in which this problem can arise: either the creator (generally the producer) of the film failed to acquire the necessary licenses for the underlying copyright material (extremely unlikely with studio and major independent productions, but more likely with student films, low-budget independent films, and avant-garde works); or the creator of the film once had the necessary rights but those rights expired or reverted back to the original grantor.

The most common type of "reversion," called the *Rear Window* reversion after the Supreme Court case involving this classic film, occurs when the author of an underlying work published before December 31, 1977, dies during the first term of copyright (i.e., within 28 years from the date the work was first published or registered with the Copyright Office). The second term of copyright then belongs to the author's heirs,<sup>20</sup> regardless of any licenses or assignments made by the author. In the *Rear Window* case, the Hitchcock film was based on a short story written by Cornell Woolrich. Woolrich assigned motion picture rights in the story to another party who in turn passed it on until ultimately Universal Pictures owned the motion picture rights to the story for both the first and second terms of the copyright. But Woolrich died during the first term and a suit was filed between Woolrich's heirs and Universal over the question of who owned the motion picture rights to the story for the second (renewal) term of the copyright. As a result of the Supreme Court's decision, all rights to the

second term, including motion picture rights, reverted to Woolrich heirs. Thus, for example, if an archive had a copy of *Rear Window* in its collection and had received the right from Universal to screen it publicly on its premises, it would lose this limited right of exhibition.<sup>21</sup> Reversion, however, does not affect "fair use" applications permitted under U.S. copyright law (discussed in the next section).

Donors and archives should not, therefore, blindly assume that, because the donor owns the copyright to the film, she also has all necessary rights to the underlying copyrights.

**(e) "Fair use" and archival uses**

"Fair use" is one of the most misunderstood areas of copyright law. Many users of copyrighted material like to believe that *their* use -- whatever it is -- is fair use.

Section 107 of the Copyright Act sets forth the test for determining whether a given use qualifies, on a case-by-case basis, as "fair use." Before discussing this test, it should be kept in mind that "fair use" is a defense to a claim of copyright infringement; if the use in question does not infringe on one of the exclusive rights of the copyright owner (discussed above in section I.B.2.a), there is no infringement and no need to consider whether the use qualifies as a "fair use".

Examples of "fair use" set forth in Section 107 include making copies of the protected work "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research." In determining whether a given use of a copyrighted work satisfies the "fair use" test, the statute sets forth the following factors.

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit education purposes;<sup>22</sup>
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

Archives and libraries have certain special privileges under Section 108 of the Copyright Act. They are permitted to do certain forms of copying which otherwise would be an infringement of the copyright owner's exclusive rights and which might not qualify as "fair use" according to the test described above.

Section 108 gives archives and libraries the right to make a single copy of a copyrighted film "solely for the purpose of replacement of a copy that is damaged, deteriorating, lost, or stolen, if the library or archive has, after a reasonable effort determined that an unused replacement cannot be obtained at a fair price." This right to make what is, in effect, a safety back-up copy, applies only if the copy is made "without any purpose of direct or indirect commercial advantage" and only if the archive or library is either (1) open to the public or (2) accessible to researchers affiliated with the archive or library as well as other persons doing research in a specialized field.<sup>23</sup>

As a result of Section 108, absent a contractual prohibition in the deposit agreement, an archive may have the right to make a single "replacement" copy of the deposit materials for use in the event that the primary copy is damaged, deteriorated, lost, or stolen.<sup>24</sup> The deposit agreement can, of course, reiterate, expand, or even restrict this statutory right.

As previously noted, the archive is limited in its uses of a motion picture only so long as that motion picture is protected by copyright (usually 75 years). All of these restrictions and limitations end with the expiration of copyright protection unless restrictions imposed by the donor continue based on the terms of the deposit agreement.

### **3. Other intellectual property and allied rights**

Although copyright is by far the most important intangible right pertinent to archival deposit agreements, the transfer and use of materials can involve many other issues – including moral rights, the right of publicity, privacy law, trademarks, and collective bargaining agreements with craftspeople, actors, writers, and directors. While these concerns do not generally have an impact on the terms of deposit agreements, the issues that they pose should be kept in mind by both parties. For a brief discussion of these issues, see the attached appendix.

### **4. Agreement to supplement the deposit materials**

Where the donor plans to supplement the initial deposit with additional films or other materials in the future, the deposit agreement may provide that such future installments will be governed by the same terms applicable to the original deposit.<sup>25</sup>

### **C. Mechanics of the transfer**

The agreement should explicitly state what materials are being deposited, listing not only the titles but also each element being deposited (i.e., prints, preprint picture and sound materials, background and production reports, shooting scripts,

continuity scripts, publicity stills, etc.) together with a description, where appropriate, of the film format (35mm, 16mm, black & white, color, etc.), number of reels (A/B reels), and footage or running time. Where the list is long, it is frequently attached to the agreement as a schedule.

Where no such inventory is attached to the deposit materials or accompanies their delivery, the archive may require an indemnification against claims of lost or non-delivered materials which may arise when the archive contends that it never received materials which the donor contends were included in the deposit.

The parties should make certain that the materials are covered by adequate insurance while in transit from the donor to the archive, even where this is not an express requirement of the agreement. The donor should be aware that any damages that occur to or loss of the deposit materials before the deposit agreement is signed and the materials are received by the archive may not be covered by the archive's insurance.

**Recordation of copyright assignments.** If the donor is assigning the copyright in the deposit material to the archive, the donor should also agree to assign any copyright registrations for such material and to provide the archive with whatever documentation is necessary to effectuate the transfer.<sup>26</sup> Either the donor or the archive should then record the assignment with the U.S. Copyright Office.<sup>27</sup> (No such recordation is necessary where the archive is being granted only a non-exclusive license.)

#### **D. Duration of the deposit arrangement**

The deposit agreement should address the duration of: (1) the deposit itself; (2) the restrictions governing the use of the deposit materials; as well as (3) the termination provisions which may cut short the duration of the deposit arrangement.

##### **1. Term of the deposit**

Where the deposit is a gift, the term of deposit is in perpetuity because title to the materials is permanently transferred to the archive. Where the deposit is in the form of a long-term loan, the donor may define the time span of the loan in many different ways: it may be at the discretion of the donor,<sup>28</sup> it may be for a set period of time (for example, a fixed number of years); it may be open-ended, subject to termination only in the event of a certain specified events,<sup>29</sup> or it may be a loan for a fixed time after which it converts to a permanent gift (for example, a loan during the life of the donor which converts to a gift to the archive upon her death).

##### **2. Term of restrictions on the use of the deposit materials**

The next section discusses restrictions that are frequently imposed by donors on the use of and access to materials deposited with film archives (section II). Some agreements limit these restrictions to the term of

copyright in the deposit materials, other agreements contain restrictions which continue to apply even after the materials have entered the public domain. On the one hand, an archive may not wish to be burdened by contractual restrictions on public domain material, on the other hand donors may hesitate to donate public domain material (or material about to enter the public domain) absent some restrictions on the possible commercial use of the materials by the archive or the archive's patrons out of concern that the deposited materials could be used to compete with the donor's on-going commercial use of those materials.

Neither approach is right for every situation. The best solution, as with all provisions discussed in this checklist, is for both parties to be aware of the issues and to negotiate the approach that best serves that specific concerns of the individual donor and archive.

One specific note of caution: A motion picture produced in the United States will enter the public domain in certain countries long before, and, in others, long after it enters the public domain in the United States. Therefore, where the restrictions are limited to the term of copyright the agreement should specify exactly which term of copyright is intended to control.<sup>30</sup>

### **3. Termination provisions**

Deposit agreements for a loan of film materials frequently provide that the donor has the right to terminate the deposit agreement and retrieve the deposit materials if the archive violates the terms of the agreement. This termination right may be limited by a "cure" right, which permits the archive to correct the violation before the deposit is terminated.<sup>31</sup>

If the agreement contains an unrestricted termination right, where the loan may be terminated at any time for any reason, the right is generally mutual: either the donor or the archive may terminate.

## **II. Access to the deposit materials**

The core of every archival deposit agreement are the provisions dealing with access to and use of the materials. As discussed above in section I, the deposit agreement should carefully describe the permissible uses of the deposit materials by the archive and its staff and the types of distributions and public screenings that the archive is authorized to undertake.

In addition, these provisions should spell out in clear detail the conditions under which both patrons of the archive and the donor herself may access and use the deposit materials.

**A. Access to the materials by patrons of the archive**

Perhaps the most important part of any deposit agreement are the provisions setting forth the restrictions on the use of the materials by patrons of the archive.<sup>32</sup>

The agreement should specify who has access to the materials (e.g., the general public, public school systems, researchers or scholars engaged in serious research, etc.), and whether the use of the deposit materials is limited to the archive premises.<sup>33</sup>

The deposit agreement may also require the archive to take steps reasonably necessary to protect the donor's copyright interests in the deposit materials.

**B. Access to the materials by the donor**

As a general rule, archives prefer to minimize loans of deposit materials to the donor because the risk of damage when outside of archival custody defeats the original preservation intent of the deposit arrangement.<sup>34</sup>

However, where the donor is depositing her only copy of the deposit materials – either as a loan or a gift, it may be important to the donor to retain the right of access to the deposit materials. This right of access must, however, be balanced against the archive's goal of preserving the materials for future generations, to minimize the archive's administrative costs for retrieval and copying of the material, and to protect against over-copying which can harm the physical property. One compromise is to permit the donor to request that the archive prepare copies of the deposit materials, at a mutually approved lab and at the donor's own expense.<sup>35</sup>

**III. Role of the archive**

All deposit discussions should address the role of the archive, including storage, preservation, restoration, and cataloging of the deposit materials, as well as insurance and indemnification arrangements, security arrangements, prohibitions on transfer of the deposit materials, and de-accession procedures. As discussed below, these roles will vary greatly depending on the needs of the donor, the capabilities of the archive, and the availability of funding and administrative support. Absent a clear understanding on these issues, it should not be assumed by the donor that the archive will undertake any of these roles.

**A. Types of archival care**

The archive may assume the obligation to store deposit materials and endeavor to conserve them. Duplication onto newer film stock or full restoration (the effort to compensate for past decay and return the work to its former state), however, requires considerable financial investment. Depositing parties should not assume that the archive will be able to fund storage, duplication, or restoration projects without outside financial and administrative assistance.



### 1. Storage

Deposit agreements are frequently site-specific. In other words, the donor and the archive agree in advance where the deposit materials will be stored.

With a major institutional archive, it is sufficient to state that the deposit materials will be stored at the usual storage facility(ies) of the archive. If the agreement restricts the storage location of the deposit materials, the agreement should allow the archive to move the materials to another location at a later date, if deemed necessary by the archive, after written notice to the donor giving the donor the opportunity to raise questions about the proposed move and voice any objections.<sup>34</sup>

The issues of the costs of storage, whether the archive or the donor will pay (or share the costs), and how to pay for and accommodate handling and shipping of the deposit materials should also be addressed in the agreement.

### 2. Conservation

The archive may agree to endeavor to conserve and safeguard the quality and condition of the deposit materials. This is generally only an undertaking to stabilize and protect the materials, and should be distinguished from the duplication or restoration of deposit materials (as discussed below).

Any such provision should, however, contain an express acknowledgment of the fact that all film materials deteriorate over time. Where the deposit agreement involves unstable materials, particularly nitrate film stock, it may contain an acknowledgement of the volatile nature of the deposit materials and provide the archive with the right to destroy unsafe materials where necessary.<sup>37</sup>

It is extremely important for potential donors to be aware that film materials may already be in a state of deterioration at the time of deposit in an archive, and it may not be possible for the archive to stabilize such materials. For example, materials may have been treated or repaired in such a way that deterioration, such as vinegar syndrome, increases. In addition, existing damage and deterioration, which may not be detected at the time of deposit, may exist. Donors should, therefore, understand that, regardless of technical capabilities and funding sources, a commitment by an archive to conserve and safeguard the deposit materials is never an undertaking to guard against pre-existing or normally occurring damage and deterioration to those materials.

### 3. Duplication and restoration

Occasionally, where special funding is available, an archive will agree to go beyond merely stabilizing the deposit materials and will endeavor to

copy and repair those materials.<sup>38</sup> For example, an archive might agree to undertake preservation work including the expensive transfer of nitrate materials to safety film or the even more expensive restoration work which would add film materials to restore a film to its original release condition or to repair color fading. Even where the deposit materials are only on loan, archives require that materials which the archive creates shall remain the sole property of the archive (but subject to any contractual access restrictions imposed on the original deposit materials).

In light of the substantial expense of such efforts, coupled with the limited financial resources of most archives, this type of commitment can generally only be undertaken by an archive where supplemental external financial support is available.

If the archive assumes an obligation to duplicate or restore the deposit materials, the agreement may contain an acknowledgement that, where the materials are in an unstable condition (and thus most in need in duplication and restoration), it is possible that the original materials will be damaged or destroyed in the process.<sup>39</sup>

#### **B. Cataloging**

The agreement may provide that the archive will catalog the materials in accordance with its standard practices and procedures. This provision is more for the benefit of the donor than the archive: an archive does not need permission to catalog its collection.

#### **C. Insurance and Indemnification**

Although many deposit agreements do not delineate obligations of either party to insure the deposit materials, this does not mean that insurance is unimportant. If the donor has a continuing financial interest in the deposit materials (for example, the deposit may involve preprint material for a film that the donor is still distributing), the donor should consider insuring against possible financial harm which could result from loss, damage, or destruction of the deposit materials.

It may also be advisable to purchase insurance coverage for times during which the deposit materials are at the greatest risk of loss or damage: while in transit from the donor to the archive or from the archive to a laboratory. Even where the materials may be covered by the archive's insurance, the donor may wish to purchase additional coverage if the donor desires more than replacement-value coverage.

While insurance provisions are rare, indemnification provisions are not. These provisions frequently provide for cross-indemnifications in the result of claims or liability arising from breaches of the agreement.<sup>40</sup> It should be kept in mind, however, that certain archives are financially unable to assume indemnification obligations, and archives of the federal government are prohibited by law from assuming such obligations.

Since archives are generally not in a financial position to assume liability for the loss or destruction of deposit materials, the agreement may limit liability to instances of negligence or willful misconduct on the part of the archive, and exclude any claims for damages resulting from losses of artistic or historical value in excess of the replacement cost of the materials.<sup>41</sup>

#### **D. Security arrangements**

Piracy and unauthorized duplication of motion pictures, particularly in video cassette format, is a constant concern of copyright owners. When the donor has reservations about the archive's security, the donor should discuss her security concerns with the archive prior to the deposit and satisfy herself that the necessary protections are in place. Where security issues are addressed in the deposit agreement, it is usually phrased as a general undertaking on the part of the archive, as opposed to a laundry list of requirements.<sup>42</sup>

#### **E. Prohibition on transfer of the deposit materials to other parties**

The decision of a donor to deposit her materials with an archive is frequently based on the nature (i.e., non-commercial and scholarly) and reputation of the specific archive, including its conservation and/or preservation facilities, its prominence among film scholars, etc. The donor may, therefore, specify that the archive's rights under the agreement are non-assignable and the deposit materials may not be transferred to any other party (including another archive) absent the her permission.<sup>43</sup>

#### **F. De-accession of deposit materials**

Since all archives are faced both with growing financial and storage constraints, deposit agreements frequently contain clauses permitting the archive to de-accession material. (The de-accession provisions differ from the termination provisions, discussed in section I.D.3, because they do not involve a breach situation or the termination of the agreement.)

There should be nothing objectionable about these provisions, provided that there is a mechanism for notifying the donor of the planned de-accession and giving her the right to recover the deposit materials or specify a new recipient of those materials.<sup>44</sup>

### **IV. Publicity and confidentiality**

Where control over publicity regarding the deposit or the deposit materials, or regarding the confidentiality of proprietary information, is a concern, the limitations should be expressly set forth in the agreement to avoid later misunderstandings.

#### **A. Publicity regarding the deposit agreement and materials**

Particularly when the donor is still distributing copies of the deposit materials to the public, the donor may wish to control publicity regarding the deposit

agreement or the deposit materials. Similarly the archive may wish to have a voice in how its affiliation with the deposit materials is publicized. These issues should be discussed prior to the deposit and then expressed in mutually acceptable language.<sup>46</sup>

#### **B. Confidentiality**

Although confidentiality is generally not a concern in deposit agreements, some agreements may require both parties to keep the terms and conditions of the agreement confidential, as well as any proprietary information regarding the parties' business or operations.<sup>46</sup>

### **V. Miscellaneous provisions**

No legal document would, of course, be complete without legal boilerplate. While these provisions are not as key as the preceding points, they should nevertheless not be overlooked.

#### **A. Representations and warranties**

Archives occasionally ask the donor to represent and warrant that she has the right to enter into the agreement. Where these provisions are included, they are usually reciprocal between the donor and the archive.<sup>47</sup>

Where the donor does not own the copyright to the deposit materials (such as a collector of classic films), special attention should be made that no representations are made of ownership or control of copyrights by the donors.

Where an agreement contains representations and warranties, it will frequently include an indemnification/hold-harmless undertaking in the event that those representations or warranties are breached. Any such clause should be reciprocal between the donor and the archive.<sup>48</sup>

#### **B. Address for notices**

As obvious as this seems, it should not be overlooked. Notices cannot be given and consents cannot be sought if addresses are unavailable.

Less obvious, but equally important, is the responsibility of the donor to keep the archive apprised of any changes in her address subsequent to the signing of the agreement.

#### **C. Requirement that amendments be in writing**

It is generally a good idea to include a statement, occasionally referred to as an "integration clause," that the signed document constitutes the full agreement between the parties, and that it can be modified only by a subsequent written agreement signed by the parties.

This not only protects both parties against any latent claims of oral commitments or changes, but also helps focus the parties on the fact that the only binding obligations are those set forth in the agreement, and not those discussed but never documented.

**D. Reservation of rights**

Particularly in cases where none of the copyright is assigned to the archive, it is generally prudent to include a clause reserving for the donor all rights not expressly stated in the agreement. Given the speed at which new technology is evolving, this type of clause reserves to the donor any exploitation possibilities for the film that did not exist at the time the parties entered into the deposit agreement.<sup>49</sup>

**E. Assignment**

Deposit agreements frequently provide that the donor may freely assign any of her rights, but the archive may not make any assignment of its rights absent the donor's consent.<sup>50</sup>

**F. Choice of law**

Where the donor and the archive are located in different states (and especially where they are located in different countries), the agreement should indicate by a "choice of law clause" which state's law will govern the agreement in the event of a dispute.

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*Drafted by Scott Martin (Paramount Pictures Corporation) and Eric Schwartz (U.S. Copyright Office) in collaboration with the other members of the Public-Private Cooperation Task Force: Mary Lea Bandy (Museum of Modern Art), Raffaele Donato (Film Foundation), Douglas Gomery (University of Maryland), William Humphrey (Sony Pictures Entertainment), Brian O'Doherty (National Endowment for the Arts), and Edward Richmond (UCLA Film and Television Archive).*

## **APPENDIX**

### **Other intellectual property and allied rights**

The transfer and use of film materials can involve intellectual property issues other than just copyright. These issues include moral rights, the right of publicity, privacy law, trademarks, and collective bargaining agreements with craftspeople, actors, writers, and directors. While these concerns do not generally have an impact on the terms of deposit agreements, the issues that they pose should be kept in mind by both parties.

#### **1. Moral rights laws**

Moral rights are inherent rights of artists, authors, or other creators of copyrightable works that remain with the creator even if she no longer owns the work or the copyright to the work.<sup>51</sup> The U.S. has generally not followed other countries in granting statutory moral rights protection. With the Visual Artist Rights Act of 1990, however, U.S. federal law for the first time granted the creator of artworks a *statutory right of paternity* (the right to claim or disclaim authorship of a particular work), and *right of integrity* (the author's right to object to modification of her work).<sup>52</sup> The statute excludes all works-for-hire, motion pictures, and still photographs (other than those "produced for exhibition purposes"). Therefore, moral rights are not likely to be an issue in film deposit agreements in the U.S.<sup>53</sup>

#### **2. Right of publicity laws**

Most states now have either a statutory or case law right of publicity which prohibits, to varying degrees, the unauthorized commercial exploitation of a person's name, likeness, or voice. In virtually all cases, these laws either do not apply to motion pictures or are waived by the fact that the performer's appeared in the film with the implicit knowledge that the resulting film would be shown to the public.

The right of publicity might, however, have an impact on archival activities involving sale of merchandise based on the deposit materials. For example, the sale of frame enlargements of a performer, absent the consent of the performer, might give rise to a right of publicity claim. Licensing a still from a picture (or a publicity still) for use in a commercial advertisement is even more likely to give rise to such a claim.

#### **3. Privacy laws**

Claims under state law for invasion of privacy are extremely unlikely against commercial motion pictures (either studio-produced or independent). In such films, the actors were aware that their filmed performances would be publicly shown. However, for some home movies, actuality footage (including documentaries), and avant-garde works, the individuals appearing on-screen may not have signed employment or consent forms and may never have expected the footage to be shown in public.

If an archive intends to publicly exhibit such material, it should consider requesting releases from the on-screen individuals if the donor can obtain such releases.

Perhaps the best known use of privacy laws to block the exhibition of a film involved the 1966 film by Fredenck Wiseman entitled *Titicut Follies*. The documentary exposed the squalid conditions of the Bridgewater State Hospital for the Criminally Insane, and contained extensive footage of patients from whom no consents had been obtained. The governor of Massachusetts, embarrassed by the publicity over the conditions at the hospital, sought an injunction against the showing of the film on the grounds that it violated the right of privacy of an inmate shown naked in his cell. The trial judge agreed with the privacy argument and banned the film. The Supreme Court twice declined to hear an appeal of the case. It was not until twenty-one years later, in 1987, after most of the patients in the film had died and a new prison had been built to replace the original 1850 building, that a court reversed the original ruling and permitted the film to be exhibited. (The film finally aired on PBS in 1993.)

#### **4. Trademark laws**

Issues regarding trademark law generally do not occur in connection with typical archival film deposits or archival exhibition activities. Trademark claims may, however, be triggered if the archive engages in licensing or merchandising efforts related to the film (such as offering fund-raising tee shirts featuring materials from a film).

Although unlikely, trademark claims of "false attribution" or "false light" may also arise from restoration efforts which dramatically alter the original appearance of a film.

#### **5. Collective bargaining agreements with talent**

Most studio-produced and many independently produced motion pictures are subject to the terms of collective bargaining agreements with the major industry guilds, including the Screen Actors Guild (SAG), the Writers Guild of America (WGA), and the Directors Guild of America (DGA).

As a general rule, no re-use or residual payments will be triggered by an archive making a film available to researchers or exhibiting the film to its visitors.

Any "new use" of the film material may, however, trigger obligations -- including editing portions of various films together (in the format of the film *That's Entertainment!*). Under certain circumstances, the publishing of script material in book form can trigger WGA obligations to the original screenwriter(s).

Therefore, if any derivative uses are contemplated for the deposit materials, either by the donor or by the archive, the relevant Guild agreements should be consulted.

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**ENDNOTES**


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<sup>1</sup>**Sample language:** "Donor hereby conveys to the Archive the physical property set forth in Exhibit "A" of this Agreement which shall, upon receipt of such items by the Archive, become the sole and exclusive property of the Archive."

<sup>2</sup>**Sample language:** "Donor hereby agrees to lend to the Archive the physical property set forth in Exhibit "A" of this Agreement, which shall, at all times, remain the sole and exclusive property of the Donor."

<sup>3</sup>For a discussion of the types of copyright grants which a copyright owner might make, see section I.B.2.b, at page 56.

<sup>4</sup>Section 106(1) of the Copyright Act grants the copyright owner the exclusive right "to reproduce the copyrighted work in copies."

<sup>5</sup>Section 106(3) of the Copyright Act grants the copyright owner the exclusive right "to distribute copies . . . of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending."

<sup>6</sup>This is known as the "first sale doctrine"; it provides that the owner of a legally made copy of a copyrighted work may dispose of that copy without the permission of the copyright owner. (Section 109 of the Copyright Act.) This right is limited, however, to re-sale of the single copy. It does not convey any right to create additional copies.

<sup>7</sup>Section 106(4) of the Copyright Act grants the copyright owner the exclusive right "in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly." To perform a work publicly is defined in Section 101 of the Copyright Act as performing or displaying a work at a place open to the public or at any place where a substantial number of persons is gathered as well as the transmission or communication of a performance or the display of a work.

<sup>8</sup>Section 110(1) of the Copyright Act provides that the following is not an infringement of copyright:

"[the] performance or display of a work by instructors or pupils in the course of face-to-face teaching activities of a nonprofit educational institution, in a classroom or similar place devoted to instruction, unless, in the case of a motion picture or other audiovisual work, the performance, or the display of individual images, is given by means of a copy that was not lawfully made under this title, and that the person responsible for the performance knew or had reason to believe was not lawfully made."

<sup>9</sup>**Sample language:** "The Deposit Materials may be used only for private study on the Archive's premises by researchers and scholars engaged in serious research under the Archive's usual and special regulations governing the accreditation of such scholars."

<sup>10</sup>For a discussion of sample language permitting a limited number of screenings of a film, see endnotes 15 and 16.



<sup>11</sup>Section 106(5) of the Copyright Act grants the copyright owner the exclusive right "in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly."

<sup>12</sup>Section 106(2) of the Copyright Act grants the copyright owner the exclusive right "to prepare derivative works based upon the copyrighted work."

<sup>13</sup>**Sample language:** "This is a gift/loan of only the physical property constituting the Deposit Materials, and the Donor reserves all right, title, and interest it may have in and to all of the intellectual property constituting the Deposit Materials, including, but not limited to, the right of reproduction, publication, exhibition, television broadcasting or transmission (or reproduction and transmission by any other means now existing or by future improvements and devices which are now or may hereafter be used in connection with the production, transmission or exhibition of such materials) or any other intangible rights to which the Donor is entitled throughout the world under copyright law, trademark law, common law, or other laws now existing or which may exist or be passed in the future." **Alternative sample language:** "The [donation/loan] of the Deposit Materials is limited solely to the physical materials listed on the schedule attached to this Agreement. Donor reserves all right, title, and interests it may have in and to the intellectual property which constitutes or is embodied within the Deposit Materials, including, but not limited to, the right of reproduction, publication, exhibition, television broadcasting or transmission (or reproduction and transmission by any other means now existing or by further improvements and devices which are now or may hereafter be used in connection with the production, transmission, or exhibition of such materials), videocassette, videodisc reproduction rights, or any other intangible right to which Donor is entitled throughout the world whether by license under copyright, common law, or otherwise."

<sup>14</sup>A non-exclusive license is a license which does not limit the copyright owner's right to grant similar or identical licenses to other parties.

<sup>15</sup>**Sample language:** "The Archive may show the Film at its premises for educational and research purposes and as part of film series without admission charge." **One archive has used the following language:** "The Archive is granted the right to exhibit the Deposit Films up to two times per calendar year at special exhibitions at the Archive to audiences admitted to the Archive but not charged a separate fee for such film exhibition."

<sup>16</sup>**Sample language:** "The Archive may conduct a limited number of public showings of the Film, provided that the details of such arrangement are separately negotiated between the parties (including the number and location of the screenings and the royalty, if any, to be paid to the Donor)."

<sup>17</sup>For motion pictures, a work-for-hire is a work created either by an employee as a part of her employment relationship (for example, a press release regarding a film written by an employee of the marketing division of a studio) or as a contribution to a motion picture or other collective work where there is a written work-for-hire agreement. Virtually all commercially produced motion pictures, as well as all elements of the picture including the screenplay and the original music, are works-for-hire. This could, however, be a

concern with the transfer of copyright in films by individual creators (such as with certain avant-garde films, documentaries, and home movies)

<sup>18</sup>This right is set forth in Section 203 of the Copyright Act. This termination right may be exercised by the author or by the author's statutorily defined heirs.

<sup>19</sup>This right is set forth in Section 304(c) of the Copyright Act. This termination right may also be exercised by the author or by the author's statutorily defined heirs. Since the term of copyright under the 1909 Copyright Act was, in most cases, 75 years, this termination right permitted the author (or his heirs) to recapture the last 19 years of the Copyright term (years 57 through 75 of the copyright)

<sup>20</sup>These heirs, known as the "statutory heirs," are defined by the Copyright Act. They are not necessarily the same as the author's heirs under her will, and the author cannot choose or disinherit these heirs for this purpose.

<sup>21</sup>In fact Universal subsequently entered into an agreement with the Woolrich heirs to acquire the rights necessary to continue distributing the picture during the second term of copyright.

<sup>22</sup>The legislative history of the Copyright Act indicates that "fair use" should permit "the non-sequential showing of an individual still or slide, or . . . the performance of a short excerpt from a motion picture for criticism or comment." See House Committee on the Judiciary, Copyright Law Revision, 94th Cong., 2d sess., 1976, H. Rept. 94-1476, 72-73.

<sup>23</sup>The legislative history of the Copyright Act indicates that Congress intended to specifically allow the archival copying of nitrate film: "A problem of particular urgency is that of preserving for posterity prints of motion pictures made before 1942. Aside from the deplorable fact that in a great many cases the only existing copy of a film has been deliberately destroyed, those that remain are in immediate danger of disintegration; they were printed on film stock with a nitrate base that will inevitably decompose in time. The efforts of the Library of Congress, the American Film Institute, and other organizations to rescue and preserve this irreplaceable contribution to our cultural life are to be applauded, and the making of duplicate copies for purposes of archival preservation certainly falls within the scope of 'fair use.'" [The reference to "1942" was either a transcription error or a misinformed belief as to the year ending the nitrate era.] See House Committee on the Judiciary, Copyright Law Revision, 94th Cong., 2d sess., 1976, H. Rept. 94-1476, 73.

<sup>24</sup>One form agreement requires the donor to provide replacement copies in the event of damage. **Sample language:** "If any of the Deposit Copies are, at any time, damaged, such damaged Deposit Copy will be replaced by the Donor, at the Archive's expense, upon presentation of the damaged Deposit Copy to the Donor."

<sup>25</sup>**Sample language:** "Such other and related materials as the Donor may, in its sole discretion, from time to time donate to the Archive shall be governed by the terms of this Deposit Agreement or by such written amendments as may hereinafter be agreed upon in writing by the by the Donor and the Archive."

**<sup>26</sup>Sample language:** "Donor [or Copyright Owner] agrees to assign to the Archive any and all copyright registrations for the Deposit Materials. Donor [or Copyright Owner] further agrees to duly acknowledge, execute, and deliver or procure the due execution and delivery to the Archive of any and all further assignments or other instruments that may be necessary or expedient to carry out and effectuate the purposes and intent of this Deposit Agreement, including but not limited to, any and all copyright assignments which have been or are to be executed in connection therewith. Donor [or Copyright Owner] hereby appoints the Archive, or its nominee, as Donor's [or Copyright Owner's] irrevocable attorney-in-fact, with the right, but not the obligation, to complete any such copyright assignment, fill in any blanks which may be left therein (including dates, Copyright Office information, etc.), execute the same in Donor's [or Copyright Owner's] name, or obtain execution thereof by others, as the case may be, and record the same in the United States Copyright Office, or elsewhere, as the Archive sees fit."

<sup>27</sup>For free information about recording copyright assignments or about copyright registrations, write to the U.S. Copyright Office, LM 455, Library of Congress, Washington, D.C. 20559. To speak with a Copyright Information Specialist at the Copyright Office, call 202/707-3000.

**<sup>28</sup>Sample language:** "The Archive agrees to return the Deposit Materials to the Donor upon written demand of the Donor at the Donor's sole expense." ***Where the agreement takes this form, the archive may insist on a similar right to divest itself at any time of the deposit materials:*** "The Donor agrees to remove the Deposit Materials from the Archive's custody, at the Donor's sole expense, within sixty days of the Donor's receipt of the Archive's written request that the Deposit Materials be removed."

**<sup>29</sup>Sample language:** "The Archive shall be entitled to retain possession of the Deposit Materials commencing as of the date of receipt of the Deposit Materials from the Donor and continuing until the occurrence (if ever) of any of the following events:

- (1) The termination (by act of law, by decision of a court of law, or by agreement of the parties) of this Agreement;
- (2) The finding by any court of law that any provision of this Agreement is void or unenforceable as drafted;
- (3) The dissolution of the Archive;
- (4) The sale or transfer of control of the Archive; *[this clause appeared in a deposit agreement with a privately owned archive; it would not apply to a public archive or to a museum-based or university-based archive]*
- (5) The failure by the Archive to maintain agreed-upon security measures; or
- (6) A breach by the Archive of any provision of this Agreement.

Upon the occurrence of any of the above events, the Archive agrees that it will promptly return all of the Deposit Copies to the Donor."

**<sup>30</sup>Sample language:** "The restrictions imposed by the terms of this Agreement on the use of the Deposit Materials by the Archive and users of the Archive shall apply for so long as the Deposit Materials are entitled to claim protection for this [motion picture, script, etc.] under copyright law anywhere in the world."

**<sup>11</sup>Sample language:** "If any breach of this Agreement is deemed curable by the Donor, the Archive shall have reasonable time, but in no event more than thirty days after receipt of notice from the Donor, to cure such breach on a one time only basis. Any act of breach which is not subject to cure, or which is subject to cure but is not timely cured, will result in termination of this Agreement and the prompt return by the Archive, at the Archive's expense, of the Deposit Materials to the Donor."

**<sup>22</sup>Sample language, covering various aspects of rights accorded to the archive and its patrons:** "The Deposit Materials shall be subject to the following restrictions on use:

- (1) Access to the Deposit Materials will be made available only to qualified scholars for private study at the Archive.
- (2) No material contained in the Deposit Materials will be publicly performed, as defined by the Copyright Act, except as may be permitted by the "fair use" provisions of the Copyright Act, without the prior written permission of the Donor.
- (3) No part of the Deposit Materials will be removed from the premises of the Archive without the prior written permission of the Donor.
- (4) Except as expressly provided elsewhere in this Agreement, no part of the Deposit Materials may be copied or duplicated without the prior written permission of the Donor. This restriction includes, but is not limited to, transference to film, videotape, and laser disc formats."

**<sup>33</sup>Sample language restricting access to scholars but not limiting use exclusively to the archive's premises:** "Use of the Deposit Materials shall be limited to study by researchers or scholars engaged in serious research, which shall be conducted on the premises of the Archive [or on the premises of other archives in the United States which are members of the International Federation of Film Archives]. The Archive shall, at all times, retain possession and control over all of the Deposit Materials. [The Archive shall, however, have the right to reproduce 16mm or 35mm positive prints of the Deposit Materials, in accordance with the terms of this Agreement, and may loan such 16mm or 35mm positive prints to other archives in the United States which are members of the International Federation of Film Archives for purposes of serious scholarly research."

**<sup>44</sup>Sample language: Where loan-back arrangements do exist for the deposit materials, they may be along the following lines:** "Donor may borrow from the Archive the Deposit Materials donated by Donor for Donor's own use in accordance with the following conditions:

- (a) Donor shall assume full responsibility for the Deposit Materials when in Donor's care, custody, and control;
- (b) Donor shall pay all shipping, insurance, and handling costs for Deposit Materials it borrows from the Archive;
- (c) Donor shall endeavor to return the Deposit Materials to the Archive within thirty days after receipt, or within a period mutually agreed upon in advance between the Donor and the Archive; and
- (d) Donor agrees to return all borrowed Deposit Materials in the same condition as when borrowed, normal wear and tear excepted, and to replace, or pay

for the costs of repair or restoration of any lost or irretrievably damaged Materials."

**<sup>36</sup>Sample language:** "If the Donor requests the Archive to manufacture material from print or preprint materials (collectively the "Materials") from the Deposit Materials, the Archive will do so according to the following procedures:

- (1) Only for emergency situations (e.g., destruction of previously manufactured materials), and then only to prepare new master Materials of the complete Film.
- (2) Manufacture will be done at a mutually-agreed-upon laboratory and pursuant to the Donor's order, after which the Archive's Materials will be returned directly to the Archive within a reasonable time.
- (3) The Donor shall be responsible for all lab, shipping, and related insurance costs (if any), plus the reasonable administrative expenses of the Archive in arranging for and handling the duplication."

**<sup>37</sup>Sample language:** "Donor and the Archive acknowledge that the Deposit Materials will be stored at the following location: \_\_\_\_\_. Prior to the transfer of the Deposit Materials to a vault or facility other than this facility, the Archive shall notify Donor in writing of such proposed change and shall give Donor the opportunity to inspect any such vault or facility prior to any move. Donor shall not unreasonably withhold its consent to the move to a facility of comparable quality, location, service, and security. If the Archive should build a facility of its own, shall facility shall be deemed pre-approved if the Archive warrants its suitability and comparability to this pre-approved facility."

**<sup>38</sup>Sample language:** "The Archive shall endeavor to maintain and preserve the Deposit Materials, and shall take reasonable steps necessary to safeguard the quality and condition of all Deposit Materials while such physical property is under the Archive's control or possession. The parties recognize, however, that, because of the natural deterioration of motion picture film materials, and in particular the highly unstable quality of parts of the Deposit Materials, the Deposit Materials will deteriorate over time and may deteriorate to an unsafe condition. In such cases, the Archive agrees to notify the Donor of such deterioration and of the Archive's intent to destroy the unsafe material(s). The Donor shall be given the opportunity to remove such unsafe material(s) from the Archive's collection, at the Donor's expense, prior to its scheduled destruction."

**<sup>39</sup>Sample language:** "The Archive shall use reasonable means to repair, restore, and/or preserve the Deposit Materials as may be necessary as determined by the Archive. The Archive agrees to notify the Donor immediately of any Deposit Materials (or components thereof) which the Archive does not intend to preserve and to give immediate access to Donor for preservation purposes."

**<sup>40</sup>Sample language:** "The parties recognize that, because of the highly unstable quality of parts of the Deposit Materials, some of the Deposit Materials may be damaged or destroyed in the conversion of such materials to preservation copies."

**<sup>41</sup>Sample language:** "The parties indemnify each other against any and all claims, damages, and liabilities, costs and expenses (including reasonable attorney's fees, which includes an allocation for in-house counsel fees) arising out of any breach by either party

of any representations, warranties, or other obligations set forth in this Agreement " **Some agreements limit this indemnity by providing that:** "such indemnification shall be only in proportion to and to the extent such liability, loss, expense, attorneys' fees, or claims for injury or damages are caused by or result from the negligent or intentional acts or omissions of the Archive, its officers, agents, or employe

<sup>41</sup>**Sample language:** "The Archive shall not be responsible for any damage to, destruction of, or loss of the Deposit Materials or any portion thereof unless said damage, destruction, or loss occurs as a result of negligence or willful misconduct on the part of the Archive, its officers, agents, or employees " **Such limitation on liability may further provide:** "Should the Deposit Materials or any portion of those materials be damaged or destroyed as a result of negligence or willful misconduct by the Archive, its officers, agents, or employees, the Donor will be compensated up to the full replacement cost of the affected materials, excluding any consideration of artistic or historical value "

<sup>42</sup>**Sample language:** "The Archive acknowledges the Donor's concern about protecting the Deposit Materials against theft and unauthorized access, use or duplication, and agrees to take all reasonable precautions necessary to guard against the theft, loss, or unauthorized use of or access to the Deposit Materials "

<sup>43</sup>**Sample language:** "The Archive shall not have the right to assign any of its rights under this Agreement to any other party, nor may the Archive transfer possession of any of the Deposit Materials to any other party, absent express written permission of the Donor " **See also the discussion at section V.E.**

<sup>44</sup>**Sample language:** "Should the Deposit Materials, or any part thereof, be found by the Archive to include materials which the Archive deems inappropriate for permanent retention with the Archive's collection or excess to its needs, the Archive shall offer to return such materials to the Donor or forward them to such institution as the Donor may designate, at Donor's expense. If Donor does not respond to such offer within a reasonable time, then the Archive shall have the right to dispose of such materials in accordance with the Archive's standard procedures."

<sup>45</sup>**Sample language:** "Both parties agree that they will consult with each other before issuing any publicity with respect to this Deposit Agreement, and that neither party will issue any such publicity without the consent of the other. The Archive agrees to consult with Donor prior to issuing any publicity regarding the Deposit Materials, and the Donor agrees to consult with the Archive before making any public references to the inclusion of the Deposit Materials in the collection of the Archive." **Where there are limits on the right of the archive to use elements of the Deposit Materials in connection with publicity:** "The Archive further agrees that it will not use, or permit the use of, any materials from the Deposit Materials in connection with publicity regarding the Deposit Agreement or the Deposit Materials without the express written consent of Donor."

<sup>46</sup>**Sample language:** "Donor and the Archive agree at all times to maintain the confidentiality of the terms and conditions of this Agreement and of any proprietary information regarding Donor's or the Archive's business or operations which becomes known to either party as a result of this Agreement Notwithstanding the foregoing, nothing herein shall prevent either party from announcing the donation of the Deposit

**Materials to trade papers or to the general press** [subject to the restrictions on publicity set forth elsewhere in this Agreement]."

<sup>47</sup>**Sample language:** "Donor represents and warrants that it has the right to enter into this Agreement, but makes no representations or warranties regarding the quantity, quality, or condition of the deposit materials. The Archive represents and warrants that it has the right to enter into this Agreement, to accept the donation of the deposit materials, and to preserve the deposit materials and to perform all obligations required of it pursuant to this Agreement."

<sup>48</sup>**Sample language:** "The parties indemnify and hold each other (and their subsidiaries and related companies) harmless against any and all claims, damages, and liabilities, costs and expenses (including reasonable attorney's fees, which includes an allocation for in-house counsel fees) arising out of any breach by either party of any representations, warranties, or other obligations set forth in this Agreement."

<sup>49</sup>**Sample language:** "All rights not specifically granted to the Archive are expressly reserved by Donor and Donor shall be free to exercise those rights in its sole discretion. The act of transferring possession of the Deposit Copies to the Archive shall not be deemed to constitute any implied grant of rights." **Where the archive is not granted exhibition rights or is granted only non-exclusive exhibition rights:** "Nothing contained in this Agreement shall in any way restrict, impair, diminish, or in any way alter Donor's right to exhibit and exploit the deposit material in all media, to produce, distribute and exploitation purposes or television programs based on the deposit materials, or to otherwise exploit the deposit materials."

<sup>50</sup>**Sample language:** "Donor may freely assign any of its rights under this Agreement. However, no such assignment shall relieve Donor of its obligations hereunder [unless assumed in writing by Donor's successor]. [In the event of any assignment by Donor, Donor agrees to notify the Archive in writing of such assignment.] The Archive may not assign any of its rights or obligations under this Agreement without the prior written consent of Donor." **Also see the discussion at section III.E.**

Moral rights include the following author's rights: to be known as the author of her work, to prevent others from being named as the author of her work, to prevent others from falsely attributing to her the authorship of work which she has not in fact written, to prevent others from making defaming changes in her work, to withdraw a published work from distribution if it no longer represents the view of the author; and to prevent others from using the work or the author's name in such a way as reflect on her professional standing.

<sup>51</sup>This Act was included in the Copyright Act as Section 106A ("Rights of certain authors to attribution and integrity")

<sup>52</sup>Congress is currently considering laws which, if enacted, would require some form of disclosure labeling for films that have been altered - such as where a film has been colorized, edited, or panned & scanned (which refers to the process of converting the rectangular motion picture image into a square television image). Such legislation could have an impact on film archives in cases where the deposit materials have already been

altered or where the resulting print is altered -- for better or for worse -- as part of a restoration or preservation effort.

U.S. law is, of course, not the only consideration. If a motion picture is being distributed in a foreign territory which has moral rights law applicable to film, the law may well apply notwithstanding the country of origin of the film. France, for example, at the urging of the heirs of John Huston, blocked the distribution of a colorized version of *The Asphalt Jungle* under French moral rights law. Similarly, several internationally recognized composers of music, including Shostakovich, sued to block the use of public domain music they had written as background music in film which espoused political views which were inconsistent with those of the composers. Their efforts to block the use of the music in the U.S. failed (Shostakovich v. Twentieth Century-Fox Film Corp., 196 Misc. 67, 80 N.Y.S.2d 575 (1948)), but succeeded in France (Soc. Le Chant de Monde v. Soc. Fox Europe et Fox Americaine Twentieth Century, Judgment of Jan. 13, 1984, 1 Gax Pal. 191 (1954) D.A. 16, 80 (Cour d'Appel Paris)).

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A Position Paper on  
**THE FILM DISCLOSURE ACT OF 1995**  
By The American Cinema Editors and  
The Motion Picture Editors Guild.

Prepared by Michael Hoggan A.C.E.,  
and Mark Goldblatt A.C.E.

May 29, 1995

The following is a statement of position by motion picture editors in support of *The Film Disclosure Act of 1995* as sponsored by Senator Alan Simpson of Wyoming and Representative Barney Frank of Massachusetts.

The American Cinema Editors is the professional organization whose purpose is to advance the art and science of the editing profession and to increase the entertainment value of motion pictures by attaining artistic pre-eminence and scientific achievement in the creative art of editing. The membership of this organization includes the top editors in the profession and is only offered by invitation after years of qualifying experience. The Motion Picture Editors Guild is the organization that has the responsibility of representation for the contracts and conditions under which editors are required to work and whose membership includes all editors in the film industry.

Editors find themselves in a unique position on this issue as they are intimately involved in both the creation of a film as well as the execution of any required alterations to it after it is completed. In the collaborative enterprise of authorship we must account for the efforts of all the other artists involved in the filmmaking process. In our domain we must maximize the use of the cinematic elements that come into our care and mold and manipulate them into an entertaining art form. Conversely, when studios, distribution companies, or TV Networks require us to re-edit films for different

market needs that usually means dealing with changes in time, structure and sometimes content. In resolving these market needs we have found that, in most instances, such re-editing does indeed harm the films we work on. The essence of this harm is that the original design and intent of the piece is altered enough so as to give it a meaning other than what was created by the original artists.

As editors in the creative process of filmmaking we are the ones with the responsibility of taking into account all the raw material conceived by the writer, the director, the actors, the producers and the cinematographer when we carefully sculpt a story. Dances with Wolves, Schindler's List, The Mission, The Right Stuff, True Lies and so many others are very special experiences that editors gave shape and character to in our editing rooms. Each and every element is examined and re-examined and screened and re-evaluated in order to elicit specific emotional responses in our audiences.

In the same way that an audience has a right to view a film in its original state we believe that they have the right to know if it has been altered. Most spectators will dedicate time and money to be entertained by a film for one of two reasons; 1) their expectations regarding the subject matter of the film or 2) because of the various reputations of the artists who make films. There is an important relationship between an audience's entertainment expectation on the one hand and the artistic reputation of the filmmakers on the other.

When unauthorized alterations occur, they not only harm the works in question, but affect the reputation of the makers of such works. The consumer is

simply not getting the so-called "original version" of the film that people paid admittance to see in the theaters.

In a hypothetical case, if I decide to take Dances With Wolves, which ran over three hours, and compress it to 120 minutes so it can fit onto a single video tape, is this in fact the same film that the world perceives as Dances With Wolves, or is it not in fact a condensed altered version of the original film? Is it ethical to sell a shortened by one-third version of this film in the same video box, with the same cover art as the original, without noting, in fact, that it is a different product than the film that we have come to know as Dances With Wolves. We believe that it is not. We believe that the principal authors of the film have the right to object and that the video box should list their objections, and clearly list the alterations.

#### THE INTEGRITY IN CINEMA AND THE PROBLEMS OF CHANGE:

The aim and function of every cinematic work of art is the connected and sequential exposition of a theme, through material, plot and action. This is accomplished through the simple matter of telling a connected story through the logical construction of well crafted images which evoke emotion and excitement.

In the typical running time that is usually allotted to the screening of a film in a theatre we take care to use that special time wisely. For many obvious reasons it is not possible for us to tell everything in normal real time. We must construct another kind of time that is based uniquely in the perceptions of our audience. Through the course of action we must produce a living impression on the spectator. We do this by creating a specific sequence of representations that demonstrate our concept.

Accepting the adage that “a picture is worth a thousand words” we now must mention a very unique part of filmmaking that is pertinent to making and watching motion pictures. Since the early part of the century filmmakers have understood the power of images and how the juxtaposition of any two images can change their individual and collective meanings. Experiments from over a half a century ago have demonstrated that by taking, for example, the picture of the normal face of a man with no expression whatsoever and putting it next to, for example, an image of a grave or sorrow filled sight the audience will associate an emotional feeling with the subject and subsequently project a feeling of “sadness” in the man. Taking that same man’s face again and putting it next to a different image, for instance, clowns in a circus or perhaps a couple romantically embraced, will give a very different value to the spectator with respect to what they feel about the subject’s emotions. Change the juxtaposition and you will in some measure change the meaning.

In the architectural construction of the narrative story line the editor uses great care with the building blocks that will give the film its unique shape. In a well written, directed, shot, performed, produced and edited movie the editor will have worked diligently with the director to achieve what all the contributors and the studio ultimately believe to be the best possible version of that movie. Tampering with that delicate construction, after the fact, is damaging to the work. The more that you alter it the more it is something other than intended.

Unlike a building that can collapse and do physical harm to those inside, a disrupted or abbreviated film may simply cheat or disappoint the spectator. However,

to the artist it is another matter. The dilemma of breaking up the flow of a film for commercials or shortening it for the purpose of a limited running time creates clear editorial problems in the drama that most often cannot be resolved in order to clearly maintain the integrity of the original work. Yet the auxiliary markets have requirements which in turn obligate the adjustment of films for time constraints, commercial breaks and sometimes, content. These changes unravel the finely woven tapestry of a film.

The film editor, in collaboration with the director, often with input from the producer and the studio, work very passionately to achieve the final release version of a motion picture. Then, we agree that this is the Final Version. ("Special editions or director's cuts," when released later, are always labeled as such.)

So it is very troubling to see our work turn up later in venues, containing unauthorized alterations, deletions, time compression, or time expansions (achieved by altering the 'speed' of the picture). For a film editor, dealing in delicate rhythms and counterpoints, it severely demeans our contributions. (Just as it does to the contributions of the actors, directors, cinematographers, etc.). Our names still appear on these works. We would like to hope that the compromise to our work would be noted (as provided by *The Film Disclosure Act*). And we would suggest that this compromise, which obviously affects our film culture and heritage tremendously, might also have an ultimately negative affect on the marketability of the works. Motion pictures are an annuity. To chop up, colorize, speed up, or slow down such long acknowledged classics as The Maltese Falcon or The Treasure of the Sierra Madre is to actually drain them of the effectiveness which made them classics in the first place.

And it is our conjecture that this also drains them of their greatest commercial viability, for by mutilating these classics for a quick profit, we may have forever compromised the perception of these works. We reap what we sow.

Therefore, in light of the foregoing, the American Cinema Editors and the Motion Picture Editors Guild support *The Film Disclosure Act of 1995*.



**RESOLUTION AND REPORT  
OF THE AMERICAN BAR ASSOCIATION  
SECTION OF INTELLECTUAL PROPERTY LAW  
APPROVED BY THE SECTION  
AT THE SECTION'S JUNE, 1995 CONFERENCE**

**COPYRIGHT TERM EXTENSION**

RESOLVED, that the Section of Intellectual Property Law favors, in principle, legislation to extend copyright duration by twenty years, which would prevent United States creators and copyright owners from losing twenty years of protection for works of United States origin in, and the concomitant trade surplus in copyright works from, the European Union; and Specifically favors H.R. 989, 104th Cong., 1st Sess. (Moorhead) and S. 483, 104th Cong., 1st Sess. (Hatch).

Discussion:

H.R. 989 and S. 483 would extend copyright duration under United States copyright law to life of the author plus 70 years for post-January 1, 1978 works, and to 95 years from publication for pre-1978 works. Such an extension is necessary: (1) to protect fully United States works internationally, because doing so will enhance our nation's economy; (2) because developments since the enactment of the 1976 Copyright Act warrant it; and, most importantly, (3) because our country should do all it can to encourage creativity generally and American creativity specifically.

As a general matter, for works first created or copyrighted after January 1, 1978, the current term of copyright protection in the United States equals the life of the author plus 50 years. 17 U.S.C. § 302(a). In October, 1993, the European Union ("EU") adopted a directive to harmonize the copyright term in all its member countries for a duration equal to the life of the author plus 70 years. That action has significant ramifications for works of United States origin, as follows:

One of the most significant economic developments of recent years has been the establishment of a single market in the European Union. The EU established a single internal market effective January 1, 1993. Among the barriers to that single market were the different substantive provisions of each member state's copyright laws.

The most fundamental difference among those national copyright laws was the variation in copyright term. All EU members are also members of the Berne Convention, and so adhere to Berne's minimum required term of life of the author plus 50 years. But that term is only a minimum -- Berne members are free to adopt longer terms, and certain, but not all, EU members did so.



These differences in term were seen to impede the free movement of goods and services, and to distort competition, within the common market. Hence, harmonization of copyright duration was necessary. That harmonization was accomplished through a Directive of the EU Council of Ministers adopted June 22, 1993, which requires all member states to amend their national copyright laws to embody a basic copyright term of life-plus-70-years. They must do so by July 1, 1995.

Copyright, of all types of property, transcends political boundaries. That is true within nations (as evidenced by our Constitution's recognition of the necessity for Federal copyright protection to replace the exclusively State protection which existed under the Articles of Confederation), as well as among nations.

Recent history has seen a true internationalization of the demand for and use of copyrighted materials. Copyrighted materials, whether movies, music, books, art or computer software, flow freely between nations.

What is especially striking about this phenomenon is that the copyrighted works the world wants are overwhelmingly works created in the United States. Our country's culture now sets the standard for the world.

The consequence, of course, is not merely cultural, but economic. American copyrighted works are far more popular overseas than foreign works are here. And thus foreign payments for the use of American works far exceed American payments for the use of foreign works. Indeed, intellectual property generally, and copyright in particular, are among the few bright spots in our balance of trade.

It is not an exaggeration to say that adequate international protection of United States copyrights is a matter of the highest importance to our national economic security. In light of the EU action, copyright term extension in the United States has now become an essential element in safeguarding that economic security, for the following reason:

The basic principle of international copyright relations under the Berne Convention is the principle of national treatment. Each Berne member state is required to protect copyrights created by foreign nationals under its own substantive copyright law (which must, of course, meet Berne's minimum standards for protection). Thus, a copyrighted work created by a French national is protected in the United States under our substantive law; and a work created by an American citizen is protected in France under French substantive copyright law.

If the principle of national protection, which applies generally, also applied to the duration of copyright protection, no term extension in the United States would be necessary for American creators and copyright owners to reap the benefit of the EU's term extension. Unfortunately, however, that is not the case, for the one significant area in which Berne provides for reciprocal, rather than national, treatment, is in the duration of copyright.

Berne allows each member state to allow the "rule of the shorter term." That is to say, if the duration of protection in a foreign state is shorter than in a particular member state, that member state may limit the protection it gives the foreign state's nationals to the foreign state's shorter copyright term.

The EU Directive requires all member states to adopt the rule of the shorter term. Thus, after the life-plus-70-year term goes into effect in the EU on July 1, 1995, if United States law remains unchanged, United States copyrights will be protected only for our applicable copyright term (generally life-plus-50-years), and not for the longer life-plus-70-years term. American creators and copyright owners will enjoy 20 years less of protection in Europe than their European counterparts.

If our copyright term is not harmonized with the EU term, the effect will be particularly harmful for our country in two ways.

First, the EU nations will likely use our failure to provide commensurate protection as an argument against us when we seek better protection for our works in their countries.

Second, we will be deprived of 20 years of valuable protection in one of the world's largest and most lucrative markets. That will have a most harmful effect on our balance of payments, cutting off a vital source of foreign revenues.

Logic and simple self-interest dictate that we extend our copyright term so as to take advantage of the opportunity which is being handed to us for extended protection in the lucrative EU market.

In addition, the basic theory of copyright duration is that protection should exist for the life of the author and two succeeding generations. The life-plus-50-year term, generally adopted internationally about 100 years ago, accomplished that result at that time. But, with the increase in life expectancy which has occurred over the last century (and the trend towards having children later in life), a life-plus-50-year term no longer accomplishes that intended result. Hence, a 20-year extension is warranted.

Finally, our copyright law should do everything possible to encourage creativity -- especially American creativity. A modest term extension will do so.

JAMES STEWART

May 31, 1995

Carole Moorhead  
Members of the Committee  
Courts and Intellectual Property Subcommittee  
Judiciary Committee  
U. S. House of Representatives

Dear Mr. Chairman:

The Film Disclosure Act is an excellent piece of legislation. I strongly urge you to support R and vote for it.

My thanks and kind personal regards.

Sincerely,

James Stewart



# SCREEN ACTORS GUILD

**CONTACT: HARRY MEDVED**  
**(213) 549-6651**

**FOR IMMEDIATE RELEASE**  
**MAY 31, 1995**

The National Board of Directors of the Screen Actors Guild recently gave their full support to two ground-breaking bills that will provide artists with more control over what happens to movies after they have been made and will protect their performances from being altered.

The Theatrical Motion Picture Authorship Act of 1995, introduced by Rep. John Bryant, D-Texas, would give directors, cinematographers and writers recourse in federal court to stop copyright holders who alter films without their permission.

The Film Labeling Act of 1995 would require studios to attach more extensive and complete labels to movies that have been altered. Rep. Barney Frank, D-Mass., along with Sen. Alan Simpson, R-Wyo., is sponsoring this truth-in-advertising bill, which would necessitate, if passed, that a specified message be placed on the screen or video cassette box stating exactly what changes have been made in the film after its first release.

These two bills will be winding their way through various Congressional committees in the coming months.

# # #



Judith M. Saffer  
Assistant General Counsel

May 25, 1995

**VIA AIRBORNE**

**Representative Henry J. Hyde  
Chairman  
Committee On the Judiciary  
Congress of the United States  
House of Representatives  
2138 Rayburn House Office Building  
Washington, D.C. 20516-6216**

**RE: H.R. 989  
"Copyright Extension Act of 1995"**

**Dear Chairman Hyde:**

Pursuant to your request, enclosed is a one page prepared statement which I have prepared for entry into the record of the hearing on H.R. 989 scheduled for Thursday, June 1, 1995. (In view of the brevity of my statement, I have not prepared an additional summary.)

Also enclosed is a copy of a biographical sketch.

Seventy-five copies of the enclosed statement are being forwarded directly to the Glendale office.

Very truly yours,

Judith M. Saffer

JMS:ri  
Enc.

cc: Henry J. Hyde - Glendale Office



Judith M. Saffer, Esq.  
Assistant General Counsel  
Broadcast Music, Inc., (BMI) New York City

Judith M. Saffer graduated from New York University School of Law in 1967 and Phi Beta Kappa from Washington Square College of New York University. As Assistant General Counsel for Broadcast Music, Inc. (BMI), her duties include supervising staff attorneys in the Legal Department and coordinating outside counsel throughout the United States, handling approximately 500 copyright infringement suits each year on behalf of composers and publishers of music. Prior to joining BMI, Mrs. Saffer held a series of senior legal positions at ASCAP.

Mrs. Saffer is currently a member of the Executive Committee, and is Vice President/President-elect of the Copyright Society of the United States. She is the Secretary of the Foundation For A Creative America and is a member of the Board of Directors and Vice President of Symphony Space, a center for the performing arts in New York City. She also serves on a number of other boards and is active in various bar associations, including the American Bar Association and the American Intellectual Property Lawyers Association.

Mrs. Saffer lectures frequently on copyright law, and is a regular speaker for United States Copyright Training Seminars sponsored by the United States Copyright Office, the United States State Department and the World Intellectual Property Organization (WIPO).

Mrs. Saffer is married to Brian H. Saffer and has two grown children. Before commencing her career in the law, Mrs. Saffer was a professional ballet dancer with the Ballet Russe de Monte Carlo and appeared in films and television as an actress and dancer.

STATEMENT OF JUDITH M. SAFFER  
ASSISTANT GENERAL COUNSEL  
BROADCAST MUSIC, INC.  
ON H.R. 989, COPYRIGHT TERM EXTENSION ACT OF 1995  
BEFORE THE SUBCOMMITTEE ON COURTS AND INTELLECTUAL PROPERTY  
OF THE HOUSE COMMITTEE ON THE JUDICIARY

Legislation has been introduced in both the House and the Senate whose purpose is to extend the term of copyright in the United States by providing for an additional twenty-year term of protection for copyrighted works. The primary provision would extend the term of copyright to life of the author plus 70 years. The proposed legislation is based on the belief that if works copyrighted in the United States are to be properly protected internationally, our term of copyright must coincide with the term of copyright being granted in the European Community ("EC") and many other countries.

It isn't necessary to outline in detail the many reasons why the current term of copyright is inadequate. I respectfully refer the Committee to the excellent comments submitted by the Coalition of Creators and Copyright Owners to the Copyright Office in 1993, and to the statements presented by the witnesses speaking for the Copyright Coalition at today's hearing.

On behalf of the composers, songwriters and music publishers represented by BMI, I would like to stress that extending the term of copyright will help further the general purpose of the copyright law - to encourage creativity and protect the rights of authors. In the general revision of the Copyright Act of 1976, there was a recognition that copyrighted works should receive protection for the life of the author plus an additional 50 years. At that time, Congress recognized that the prevailing international standard of protection should be adopted by the United States, because it was believed that this extended protection would help foster creativity, which ultimately enures to the benefit of everyone, not just the author.

In addition, there is no doubt that there are significant economic benefits to be obtained by extending the term of copyright. We are all aware that the demand for United States' copyrighted materials transcends political boundaries and that all kinds of American intellectual property such as music are exceedingly popular throughout the world. Foreign payments for works of American authorship far exceed American payments for works of foreign authors. Many estimate that United States' copyrighted related industries account for more than 5% of the gross national product and return a trade surplus of billions of dollars. However, a significant amount of this revenue could be put in jeopardy because of the principal referred to as "the rule of the shorter term", which provides that if the duration of protection in a foreign state is shorter than a member state, that member state may limit the protection it gives to works of the foreign state's nationals, to the latter's shorter copyright term. Accordingly, countries could protect works of United States' citizens only for the United States' shorter term of life plus 50 years, while protecting their own works for life plus 70 years. This might result in depriving United States' authors of 20 years of protection in the international market, eliminating an important source of revenue.

Finally, the most frequently used argument against the United States in trade negotiations is that we are not in a position to chastise other countries for low levels of copyright protection when our own law does not provide the high level of protection contained in copyright laws of many western countries, particularly those in the EC. In 1976, various arguments were put forth for extending the term of copyright, including the need to bring U.S. law in line with the laws of similar countries. It was also thought that extending the term of copyright would allow the United States to be a leader in international copyright, would discourage retaliatory legislation, and would facilitate international trade. Twenty years later, these points are even more valid.

MAJORITY MEMBERS  
 HENRY J. HYDE, ILLINOIS, CHAIRMAN  
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ONE HUNDRED FOURTH CONGRESS

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### MEMORANDUM

TO: Members of the  
 Subcommittee on Courts and Intellectual Property

FROM: Carlos J. Moorhead  
 Chairman

RE: Continued Hearing on H.R. 989, the "Copyright Term Extension Act of 1995"

DATE: July 10, 1995

On Thursday, July 13, 1995, we will hold continued hearings on H.R. 989, the "Copyright Term Extension Act of 1995," at 10:00 a.m. in Room 2237, Rayburn Building.

### BACKGROUND

H.R. 989 would extend the copyright term granted to copyright owners by 20 years. Currently, U.S. law protects copyrighted works during the life of the author plus 50 years. For movies and other works made-for-hire ("work-for-hire"), the term of protection is 75 years from publication or 100 years from creation, whichever expires first. Generally, works created before 1978 are protected for 75 years.

The Copyright Term Extension Act was introduced in response to a European Union (EU) Directive requiring member countries to grant a copyright term of life-plus-70-years. In order to keep pace with this international development and to protect U.S. "creator" copyright owners (authors and authors' families) and "corporate" copyright holders (producers and publishers who hold assigned or transferred copyrights from creators or own copyrights of works-for hire) for at least an equal amount of time, H.R. 989 would match the term now required in Europe for "creator" owners and extend the amount of time granted to "corporate" owners.



The U.S. and all EU countries are members of the Berne Copyright Convention<sup>1</sup> which provides for a minimum copyright term of life-plus-50-years. Any nation, however, may provide a longer term of protection. Under the Convention and the EU Directive, the "Rule of the Shorter Term" dictates that if one member country provides a longer copyright protection term than another member country, the country that grants its own nationals a longer term may limit the protection it gives to nationals of the country with the shorter term to that shorter term. In other words, while EU copyright holders will enjoy life-plus-70-years protection by European governments, American "creator" copyright holders will only receive life-plus-50-years protection in Europe and in the U.S.

## PROVISIONS

Under the bill, all copyrighted works (creator-owned and works-for-hire) receive term extensions of 20 years. Subsections 2(d)(1), (2) and 3(B) grant a total copyright term of 95 years (increased from 75 years) to works for which a copyright was secured before January 1, 1964; subsection 2(d)(3)(A) grants a total copyright term of 95 years (increased from 75 years) to works for which a copyright was secured between January 1, 1964 and December 31, 1977; and subsection 2(b) grants a total copyright term of life-plus-70-years (increased from life-plus-50-years) for creator-owned copyrights and a total copyright term of 95 years (increased from 75 years) for works made for hire, anonymous and pseudonymous works, where a copyright was secured on and after January 1, 1978.

### Section 2. Duration of Copyright Provision

#### Subsection (a). Preemption With Respect to Other Laws

Section 301 (c) of the current copyright statute contains an exception to the general preemption of state common law and statutory copyright. The exception "grandfathers" state common law and statutory protection for sound recordings against record piracy for 75 years from February 15, 1972, the date the federal copyright statute was amended to first grant federal protection for sound recordings. Congress granted 75 years of protection because that was the total duration of an "old law" (pre-1978) copyright. Because this bill will extend the total term of protection for "old law" copyrights by 20 years, to a total of 95 years, a similar 20-year extension is given to the "grandfathered" pre-February 15, 1972 sound recordings in H.R. 989.

#### Subsection (b). Duration of "New Law" Works

Section 302(a) of the current copyright statute grants a basic term of life-plus-50-years; in the case of joint works, Section 302(b) measures the "life" by that of the longest surviving co-author. The bill makes both terms life-plus-70-years. Section 302(c) of the current statute

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<sup>1</sup> The U.S. became a member of the Convention in 1989.

grants a term of 75 years from publication or 100 years from creation (whichever expires first) in the cases of works made for hire, anonymous and pseudonymous works (as there is no known "life" to be measured in those cases). The bill extends those terms by 20 years, to 95 years from publication or 120 years from creation, whichever expires first. Section 302(e) of the current statute establishes a presumption with respect to an author's death: if a search of Copyright Office records made after 75 years from publication or 100 years from creation of a work does not disclose that the author died within the past 50 years, the author is presumed dead for at least 50 years and no infringement action will lie. The bill extends all those time periods by 20 years.

Subsection (c), Duration of "Old Law" Works Which Had Not Been Published or Copyrighted Before January 1, 1978

Prior to January 1, 1978, state common law copyright for unpublished works was perpetual. The 1976 Copyright Act preempted such perpetual common law protection, and the perpetual term for unpublished works protected by common law on January 1, 1978 transformed to the life-plus-50-years (or other applicable) term for "new law" works. However, because some of those unpublished works were written by authors who had been dead for more than 50 years on January 1, 1978, it was thought unfair to thrust those works into the public domain immediately (which would have been the effect if the life-plus-50-year term were applied). Therefore, Section 303 of the current law gave those unpublished works a minimum of 25 years of protection (for a total of 50 years, the full post-mortem duration), until December 31, 2027. To keep this structure (in terms of half and full post-mortem duration), the bill would extend the first period by 10 years (to 35 years) and the second by 20 years (to 70 years).

Subsection (d), Duration of "Old Law" Works

The provisions dealing with the duration of "old law" works are the most complex of the bill.

Subsection (d)(1), Copyright Renewal Act of 1992 Amendment

In 1992, Public Law No. 102-307 (the Copyright Renewal Act of 1992) amended the then-current Section 304(a) to make renewals of "old law" works automatic rather than dependent on timely filing of a renewal application. Section 102(2) of Title I of Public Law No. 102-307 spoke of the effect of renewal "for a further term of 47 years" on grants of transfer or license made before the amendment went into effect. As the bill will make the renewal term 67 rather than 47 years, this provision of Public Law No. 102-307 is accordingly amended, to avoid any implication that a shorter term still applies to some older works.

Subsection (d)(2). Amendment of Superseded Section 304(a)

Although the Copyright Renewal Act of 1992 amended Section 304(a), it left the preexisting text effective for copyrights secured before January 1, 1964. Hence the bill amends that text to extend renewal terms from 47 to 67 years.

Subsections (d)(3)(A) and (B). Extension of Terms for "Old Law" Works

The bill amends the text of Section 304(a) as amended by the Copyright Renewal Act of 1992, to extend the renewal terms of applicable "old law" works by 20 years, from 47 to 67 years. (The amended Section 304(a) is applicable to "old law" works for which copyright was first secured between January 1, 1964 and December 31, 1977.) The bill also amends Section 304(b), which applies to works which were renewed in the year between enactment of the 1976 Act and its effective date, to grant a total term of copyright of 95 years.

**ARGUMENTS**

Proponents of the bill will argue that one of the major reasons Congress originally adopted the life-plus-30-years provision was to provide copyright protection not only to the creator (eg., the writer, musician, artist, or computer programmer), but to his or her children and grandchildren -- in other words, for three generations. With people living longer today, an extension of the term by 20 years would roughly correspond to the increase in longevity of human life.

Proponents will also argue that Congress rightly felt it was important in 1976 to extend the copyright term to match the terms guaranteed by other major trading nations in order to grant at least equal protection to American copyright owners and, consequently, American intellectual property exports. If the American copyright term is not extended, American "creator" copyright owners will have 20 years less protection than European copyright owners which would mean 20 years during which Europeans will not be paying Americans for our copyrighted products. This would taint one of the "bright spots" in our balance of trade picture, the export of intellectual property.

Proponents will argue that harmonization is important for trade negotiations. In bilateral and multilateral negotiations, shortcomings in our own copyright protection are often used against us when we are negotiating for stronger protection of U.S. copyright owners abroad.

Proponents will further argue that many works become less available when they fall into the public domain (at least in a form that resembles the original) because few companies are willing to invest the capital necessary to reproduce and distribute non-copyrighted material.

Opponents of H.R. 989 will argue that a term extension is contrary to the purpose of copyright outlined in the Constitution because it does not equally balance the incentive to create original works with access through the public domain. Many works which are about to fall into

the public domain are of great educational and historical importance and may be used in creating new works.

Opponents of H.R. 989 will also argue that term extension merely protects distant relatives of original creators and a handful of large production and publishing companies, without any benefit to the public. When copyright subsists long after an author's death and there is no provision for compulsory licensing, the creation of new derivative works that closely resemble the original can be prohibited by copyright owners who have no creative relationship to the work. Because the original author is already deceased when the copyright expires, a 20 year extension grants no more incentive to a creator to profit from his or her work, yet the public domain is unjustifiably contracted.

Opponents will further argue that extension of the copyright term for U.S. copyright owners will not bring about harmonization with the EU Directive because copyright protection is viewed differently under EU and U.S. law. In EU countries, copyright law is based on a natural rights tradition where ownership rests with the creator and not a company such as in a work-for-hire situation in the U.S. Thus, extending work-for-hire protection in the U.S. to 95 years will only protect the companies holding the copyrights and not the creators of the work, depriving the public access for the benefit of production companies and publishers.

**CONSEQUENCES OF NEW LAWS AND PROPOSED LEGISLATION AFFECTING DURATION OF COPYRIGHTS**  
 Comparison of Effects on Rights Between EU and US Nationals/Works

<u>Law</u>	<u>Effects</u>	<u>Beneficiaries</u>	<u>Detriments</u>
<b>EC Term Directive</b> Implem 1/7/95	<ul style="list-style-type: none"> <li>•Revives EU Cs<sup>1</sup></li> <li>• EU term individ/joint works 70 yrs p.m.a.</li> <li>•EU term for corporate works 70 yrs. post-publ.</li> <li>•r.o.s.t. impermissible ag. EU nationals</li> </ul>	EU nationals	<ul style="list-style-type: none"> <li>•U.S.-origin works excluded (unless created by EC national)</li> <li>•mandatory r.o.s.t.<sup>2</sup> treatment of U.S. works</li> <li>•disincentive for first-publication in U.S.<sup>3</sup></li> <li>•incentive for "habitual residence" in E.U.</li> <li>•"acquired rights" of third parties not specified</li> </ul>
<b>Phil Collins</b> (Eur. Ct. Just.)	<ul style="list-style-type: none"> <li>•copyright term/r.o.s.t must be applied on nondiscrim basis</li> </ul>	EU nationals	<ul style="list-style-type: none"> <li>•U.S. authors excluded</li> </ul>
<b>GATT-TRIPS</b>	<ul style="list-style-type: none"> <li>•requires non-Berne WTO members to adhere to Berne (EU/US=Berne)</li> </ul>	EU and US nationals (no effect on rts. in EU/US)	<ul style="list-style-type: none"> <li>•min. term for calculation from publ. date is 50 years p.m.a.</li> </ul>
<b>U.R.A.A.</b> (adopted-effect. 1/1/96)	<ul style="list-style-type: none"> <li>•Restores foreign Cs that lapsed from formalities<sup>4</sup></li> </ul>	Foreign nationals/works	<ul style="list-style-type: none"> <li>•U.S.-origin works excluded (unless created by EC national)</li> <li>•works by US nationals excluded</li> <li>•no revival of lapsed pre-1978 Cs</li> </ul>
<b>U.S. Extension Act</b> (proposed)	<ul style="list-style-type: none"> <li>•Extends US term to 70 years p.m.a. (75 yrs after publ. for corporate works)</li> </ul>	Foreign and US nationals	<ul style="list-style-type: none"> <li>•no revival of "lapsed" pre-1978 Cs</li> <li>•mitigates effect of pre-1978 post-pub. calc</li> <li>•mandatory notice to enforce ag. "reliance" parties</li> </ul>

<sup>1</sup>Cs is an abbreviation for "copyrights"

<sup>2</sup>Abbreviation for "rule of the shorter term"

<sup>3</sup>Unless Extension Act is adopted.

<sup>4</sup>e.g., that lapsed as a result of failure to use proper copyright notice and/or renew copyrights.

**AmSong, Inc.  
MEMORANDUM**

To: AmSong, Inc. -- Members

From: Mary Rodgers

Date: August 2, 1995

RE: Copyright Term Extension Act of 1995 -- H.R. 989 and S.483

A hearing was held on the Copyright Term Extension Act of 1995--H.R. 989--in Washington, D.C. on July 13, 1995. We were extremely fortunate to have AmSong member Quincy Jones testify at the hearing in support of the Bill. In addition, a number of AmSong members submitted written statements in support of the legislation.

Other witnesses testifying in support of H.R. 989 were Marybeth Peters, Register of Copyrights, Ambassador Charlene Barshefsky and Bruce Lehman, Assistant Secretary of Commerce and Commissioner of Patents and Trademarks.

A third panel of witnesses consisting of four (4) Law Professors testified in opposition to the legislation as drafted. Unfortunately, this testimony raised several issues which will need to be overcome during the course of our future lobbying.

I am enclosing herewith copies of the testimony of Quincy Jones and the written statements of other AmSong members. I am also enclosing copies of the testimony of the Administration witnesses. If you have any questions about the enclosed, or if you would like copies of the opposing testimony of the law professors, please contact AmSong's counsel, Lisa Alter, at (212) 644-8100. --

The next step in the House of Representatives will be a mark-up of the Bill in the Subcommittee on Intellectual Property which we expect will happen in September.

We are currently preparing for the hearings in the Senate Judiciary Committee on the Senate version of the Copyright Term Extension Act, S. 483. These hearings have been tentatively scheduled for some time in September.

C:\amsong\hr989\mem.ams(8/2/95)

APPLICATION FOR MEMBERSHIP

Are you a  Writer  Successor  Designated Representative

Name of Writer \_\_\_\_\_

ASCAP  BMI  SESAC

Nature of Authorship

Composer \_\_\_\_\_

Author \_\_\_\_\_

Legal Successors / Designated Representative

Name & Address \_\_\_\_\_

\_\_\_\_\_

Tel & Fax (h) \_\_\_\_\_

(b) \_\_\_\_\_

Business Address: \_\_\_\_\_

\_\_\_\_\_

Name & Address \_\_\_\_\_

\_\_\_\_\_

Tel & Fax (h) \_\_\_\_\_

(b) \_\_\_\_\_

Business Address \_\_\_\_\_

\_\_\_\_\_

The following successor, designated representative is designated for voting purposes, receipt of mail and other communications and eligibility for office, until a replacement is named in writing and signed by all successors

Name \_\_\_\_\_

Please fax/send mail to  Home  Business

Signature of Writer/Composer \_\_\_\_\_

Signature of Successor(s)/Authorized Rep(s) \_\_\_\_\_

Signature of Successor(s)/Authorized Rep(s) \_\_\_\_\_

AmSong is a non-profit organization and relies on its members for funding. Basic dues are \$500/year. Dues for new writers are \$100/year. Dues will be reduced or waived in cases of need. In addition, each member is asked to make a voluntary contribution in one of the following suggested categories

\_\_\_ \$750      \_\_\_ \$1,500      \_\_\_ \$3,000

\_\_\_ \$6,000      \_\_\_ \$10,000      \_\_\_ other

Please make checks for dues and volunteer contributions payable to AmSong, Inc

AmSong™

545 Madison Avenue, 4th Floor  
New York, NY 10022

AmSong™

Copyright Protection for  
the American Songwriter

AmSong, Inc  
545 Madison Avenue, 4th floor  
New York, NY 10022  
Tel/(212) 515-0400  
Fax/(212) 644-8105



*Dear Songwriters:*

*AmSong, Inc. is a songwriters' organization dedicated to the protection of musical copyrights. At this critical time in the life of your intellectual property, AmSong is educating its members regarding issues of common concern and representing the interests of all songwriters in the national and international arenas.*

*Every year we lose more of our creative works to the gray area of public domain. Moreover, as new technology develops, the owners of musical copyrights are facing erosion of rights traditionally secure to our fellow songwriters. The impact on all songwriters is profound.*

*AmSong members represent every genre of American music: jazz, rock, country, theater and classical. AmSong is an important and dynamic force for the protection and preservation of America's greatest heritage: your work.*

*Please join us by completing the membership application form and mailing it today with your check.*

*Very sincerely,*

Marv Rodgers  
President

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**Legal Counsel**

Lisa Alter, Esq. Reuben, Wentrub, Ceta & Alter

**WHAT'S AT STAKE:**

• **Copyright Term Extension**

AmSong is a leader in the effort to extend the term of copyright in the United States to the life of the author plus 70 years, and a total of 95 years for pre-1978 works. The extension will bring the U.S. term of copyright into harmony with the term of protection throughout the European Union and therefore help the United States retain its favorable balance of trade in the area of intellectual property.

• **Fairness in Music Licensing Bill**

AmSong is organizing its membership in opposition to this bill which threatens to prevent the owners of musical copyrights from being compensated for the use of their works in bars, restaurants, nightclubs, and other public establishments.

• **Digital Performing Rights in Sound Recordings Bill**

AmSong is representing the interests of its membership to ensure that the rights of musical copyright owners are not compromised by legislation proposing to establish digital performing rights in sound recordings.

• **Grand Rights**

AmSong's Grand Rights Committee is addressing the problems of unauthorized grand rights usages of music on the foreign and domestic fronts and making recommendations for the prevention of further abuses.

• **New Media**

AmSong's New Media Committee is analyzing the impact of new technological developments, and the information super highway, on the interests of songwriters and musical copyright owners.

• **Relationship with Foreign and Domestic Societies**

AmSong is acting as a liaison between musical copyright owners and the foreign and domestic performing rights societies to promote action, and to facilitate dialogue, in areas of common interest and concern.

• **Education and Information**

AmSong holds at least four bi-coastal general meetings per year for the benefit of its membership. AmSong's staff is also a resource for its members, and will pass on new information, rulings, and guidelines on a timely basis.

**With Every Passing Day You Are One Day Closer To Losing Your Copyrights**

**Members of AmSong include.**

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Milton Ager (Shana Alexander)  
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### LEGAL COUNSEL

Lisa Alter, Esq.	-	Reuben, Weintraub, Cera & Alter
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**Comments Regarding HR 989  
Copyright Term Extension**

**Statement of Daniel Abraham  
Graphic Artists Guild National Vice-President for  
Legislation  
before the  
Subcommittee on courts and Intellectual Property  
House Judiciary Committee**

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The Graphic Artists Guild is pleased to add its voice in favor of extending the copyright term twenty years, to seventy years beyond the life of the creator. The Guild is a national artists' advocacy organization, with a membership composed primarily of individual authors who create copyrighted material for publication, broadcast and manufacture.

The life plus seventy copyright term is already in place in the European community. But as overseas protection is extended to American copyright holders only for the duration of our domestic copyright term, a twenty-year extension of the domestic term is necessary to assure the fullest worldwide return on American creativity.

The proposed legislation raises these questions:

- 1) Who should receive windfall profits from the extension of subsisting copyrights?
- 2) Should the term be extended on works made for hire?

**1) Windfall Profits in Subsisting Copyrights.**

As drafted, HR 989 will add twenty years to subsisting copyrights, automatically extending current contractual arrangements. This creates a windfall for licensees and commercial rightsholders at the expense of the creative community. Rather than extending the status quo for another generation, extension legislation should automatically terminate extant contracts at the end of a work's original copyright term, with all rights reverting to the heirs of the original creator. The heirs will then have the opportunity to sell or license rights based upon existing market value, and not be forced to acquiesce in the extension of existing commercial arrangements by Congressional fiat.

At the heart of American copyright law is a contractual relationship; creators license their work to publishers,

Graphic Artists Guild p.2

manufacturers, distributors, etc., who are able to exploit the it. The contract determines the creator's remuneration; the experience and relative economic strength of the parties determines the contract. Congress recognized the potential for abuse in this relationship when it included the recapture provision in the 1976 copyright law. The creator, or his or her heirs, can reshuffle the deck.

But adding another twenty years to the copyright term weights disposition of subsisting copyrights heavily in favor of the exploiter of the work, rather than the creator or his or her heirs. Twenty years makes a great deal of difference in the value of a work. Styles change, reputations are made and unmade. What might have appeared to be reasonable compensation, even if negotiated in good faith on both sides, may actually be wholly inadequate.

If copyrights are to be extended another twenty years, disposition of subsisting copyrights must rest with the creators of the work, or with their inheritors. The windfall of a longer term should not be the unnegotiated windfall of the licensee.

**2) Works Made For Hire**

American copyright law is unique in that it equates two classes of creators; creators-in-fact, and commissioners of works made for hire, or creators-at-law. All creative work is done by creators-in-fact, although the rights to some of their work is acquired by creators-at-law. Copyright term extension must not be achieved at the expense of creators-in-fact.

Extending the copyright term to life plus seventy requires that the rights be retained by the creator-in-fact, in order that the copyright term may be calculated. Copyrights held by creators-in-fact benefit both the individual rightsholder and the licensees with whom he or she does business.

Works made for hire do not benefit the creator-in-fact, but the creator-at-law. Because the creator-in-fact relinquishes creator standing, there is no possibility of renegotiating payments over the life of the copyright, no option of recapturing rights, and no possibility of additional payment for subsequent additional uses of his or her work. Work made for hire does not offer incentives to the creator-in-fact.

The Guild does not support extension of the work made for hire term. Adding twenty years to the copyright term across the board means that the term for works made for hire will be extended to ninety-five years. To encourage creativity, the term of works

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made for hire should not be extended, but should remain at seventy-five years. Commercial entities wishing to obtain a potentially longer copyright term will thus make certain that the creator-in-fact retains his or her rights, and will be able to share in the profits derived from his or her work. As there is no equivalent to American work for hire in the European copyright community, it is not necessary to extend work for hire to bring American law in line with European practice.

**Conclusions.**

Without the protection of effective copyright law, creators lose the economic incentive to create. The creative industries cannot exist without the work of individual creators; protecting the individual copyright holder is basic to the public interest.

Extending the copyright term does not immediately benefit the creator. But creative work often becomes more popular over time, through changes in fashion, or even after the creator's death. The creator's knowledge that his or her work will benefit their heirs is an incentive to the creative process.

To truly be an incentive, term extension must benefit the individual creator. It should not offer unnegotiated windfalls to licensee rightsholders, but should allow the heirs of the creator to determine disposition of the extended term.

Extending the term on works made for hire increases the incentive for commercial clients to place unreasonable demands on the creator-in-fact, and deprives the true creator of the ability to bargain effectively for either immediate benefit or for the benefit of his heirs.

The copyright term should be extended to life plus seventy for creators-in-fact only. Extended term on subsisting copyrights should be returned to the heirs of the creator, and should not be the property of the current rightsholder. Work for hire need not be extended to bring American law into harmony with European practice, and should not be extended because to do so would prejudice the rights of creators-in-fact.

-end-



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MATTHEW GERSON  
VICE PRESIDENT  
CONGRESSIONAL AFFAIRS

**MEMORANDUM**

To: Congressman Carlos Moorhead  
From: Matt Gerson *MG*  
Date: July 24, 1995  
cc: Jack Valenti

At the July 13, 1995 hearing on H.R. 989, your bill to extend the term of copyright protection under U.S. law, the witness for the Society for Cinema Studies made a number of inaccurate statements about the commitment that the major film studios have to film preservation.

I know that you have visited many of the state-of-the-art facilities that the studios have constructed to ensure that their libraries will be preserved, protected and accessible to future generations of film enthusiasts. However, I am disturbed that the record unfairly denigrates all of the work that we do. I would ask you to consider including in the hearing record the following statements that were made during a 1993 Library of Congress hearing on film preservation. The testimony was given by executives who are responsible for film preservation initiatives at many of the MPAA member companies.

I appreciate your attention to this request.



**Statement of Harrison Ellenshaw, Vice President, Buena Vista Special Effects,  
Walt Disney Company**

**MR. ELLENSHAW:** Thank you. First, let me thank you for allowing us to be here. We take this very seriously, so trust that none of this is taken lightly. I will, in my remarks, tell you who I am, why I am the person representing Disney. But first I'd like to say, maybe somebody pointed out this morning that your logo is in color and will fade over a period of time [Laughter], just in case you don't know that. The logo every time I've seen it so far has been in black and white, but it's very nice to see those rich colors.

That's the reason we're here today, every studio in town, as you can see by this panel. I won't speak for them, but there is a certain commonality here, and that is that somebody at each studio is addressing this situation. So we all take it seriously. This is not an ad hoc kind of thing where somebody calls and says, "You'd better get over there because they're talking about film preservation."

I'm a vice president of Walt Disney Pictures and Television. I'm in charge of visual effects there. It may seem a little incongruous that that puts me also in charge of preservation. However, if I explain to you my background it may make a little more sense. I began in the industry in 1970 as an apprentice matte artist. I went into visual effects. I followed in my father's footsteps, who also worked in the motion picture industry as did his stepfather, so there's a bit of a legacy there. So I have a background in films and an interest in films.

I remained in visual effects and I am still in visual effects today. I left Disney after a number of years and freelanced as a visual effects supervisor, working on films for many of the major studios in town--Twentieth Century Fox, Warner Bros., Paramount, etc. So I see a lot of similarities and I see some differences in how studios work. But the differences are very minimal.

When I was asked to take over visual effects at Disney three years ago, included in our task was to run a visual effects department and support the visual effects for various motion pictures coming from Disney, as required. Also included were theme park motion picture productions that are shown in the various theme parks of Disney. We also do trailers and titles. We also have a black-and-white processing lab, a very extensive one, more than one machine that does black-and-white processing, and black-and-white printing.

Black and white is very important in visual effects because when you do a visual effects shot of combining two elements, one element may be shot against a blue screen. As most of you probably know, to get rid of the blue, you have to go to a black-and-white element that filters out the blue. So black and white--when it comes to making mattes, when it comes to making elements, when it comes to combining film--is a very

important process. Even though all the films almost without exception are shot in color--we're used to seeing color in everything--we still find that black and white is something that we need. So we're very familiar with black and white.

For this reason and for others, part of our responsibility became the restoration of park films, those films that are running in the park. Many of them have run for a number of years and it is found that, as we know, things do deteriorate. The prints that you make today aren't as good as the prints that were made five years ago. Some of these films get changed out every eighteen months. Some do not get changed out every eighteen months, but have existed in the parks for ten years and more.

Disney has found it necessary to make sure that these films as projected have "opening day quality" to them. To do that such things as rewashing negatives, going back, remaking, preprint elements, IP's and IN's need to be done. With improving film stocks, this is something that would have to be done or should be done regardless if something were to fade or something were to deteriorate in some manner.

So one of the important things that I want to stress today is that we're not looking at a situation that is necessarily entirely due to neglect by a previous generation. We're looking at a situation where the technology continues to evolve. There are emerging technologies. We'll hear the word digital used over and over especially when it comes to sound. Digital is a very good thing for sound. Digital is a very good thing for the visual medium as well, but of course it takes far more ones and zeros to record a visual image than it does a sound piece.

But the main important thing here is that no matter the condition of the film--let's say the original negative in park films, if it's been kept in pristine condition, and the best vaulting conditions to industry standards or exceeding industry standards--you still, every so often, will want to go back and make another preprint element using a better piece of film, a finer grain, intermediate stock.

Library restoration also comes under our responsibilities and I say library restoration because, in fact, at Disney we do have a title to it. Funds have been set aside for library restoration of the theatrical films at the Walt Disney Company. I'd like to read basically the statement of policy concerning library preservation, because there is a difference here and I'll get into that as soon as I finish this statement.

The following is the policy of the Walt Disney Company on film preservation:

The company has conducted and continues to conduct preservation efforts for all titles owned by the Walt Disney Company. Black-and-white separation masters, exist for all theatrical films and continue to be made as protection elements on current feature productions. With the exception of 13 titles all original nitrate film elements have been copied

onto safety film. The remaining 13 nitrate titles are due for completion September 1, 1993. Vault conditions exceed the generally accepted industry standards and appropriate elements are geographically separated.

One added note, all sound elements have been protected and all sound nitrate elements have been copied onto safety film. Preservation and restoration are two separate items, but when you restore a film, when you go back and clean it up, you then naturally make a new protection element. It's only logical to do that. If you go to the trouble to restore something, you don't want to use the old protection element, which may not be as fine quality as a new one would be.

Briefly, I hope, that has been my presentation. Do you have any questions?

MR. TABB: We'll save the questions for later. Thank you very much. Mr. Bell?

**Roger Bell, Director of Administration, Library Services, Fox Studios Operations**

MR. BELL: I just want to add a brief note here. I just want to mention that since 1975 we've had a restoration program in which we've converted over 800 titles. We're about to embark on a program of redoing the early safety film where the original negative is damaged. And that will start immediately. And as, of course, everyone knows, we're about to digitize the Movietone News Library.

Thank you.

MR. TABB: Mr. Ainsworth?

**Statement of Gray Ainsworth, Director of Film Operations, MGM Worldwide Services, Metro-Goldwyn-Mayer**

MR. AINSWORTH: Yes, my name is Gray Ainsworth. I'm the director of film operations for Metro-Goldwyn-Mayer and would probably have to be considered the youngster of the group, ironic as that may sound.

MGM has had the last several years a quite confusing history and turbulent. So we're really here to learn just as much as contribute. And I appreciate the opportunity to come here and take part.

If we agree that film is preferred medium on which to store moving images, then it is the responsibility of the owners and keepers of our libraries to protect them. In a current world of private ownership and sales generated exploitation, we have a built in

system of checks and balances. At MGM as with most owners, we actively sell our movies.

What we deliver to our clients must be acceptable quality, which is often subjective and a rather changing concept. The acceptability of a negative or videotape or magnetic sound track is governed by things such as changing technology and the quality of the source material that we're dealing with. At MGM we found that what was being accepted on videotape five years ago is not being accepted today.

Foreign distributors are demanding product of the highest quality now and with the advent of digital tape, we have been faced with the job of remastering our entire library, which we embarked upon approximately two years ago based on sales of our entire library to certain foreign countries.

These contracts have led us to the decision to remaster this library and our reasoning was twofold. First, we needed to satisfy the immediate need of delivering to our clients. Secondly, we wanted to prepare our film elements for future technological changes such as high def, as well as preservation. Once we undertook the project of this sort, you have to take a hard look at your film elements. They must be good to start with if your end product is to also be good.

And as we embarked on our remastering, whatever that may be, we were forced to do this. This exercise obviously leads us to some far and strange worlds but it's also a very worthy exercise. We've had the opportunity to take a look at a very large library. We have approximately fifteen hundred titles encompassing United Artists, Cannon and some smaller libraries.

If we find an element has problems when we're looking at it for video remastering, we will fix that problem at the time and, if it's unfixable, we will replace it. That's one thing that we've been very adamant about and mainly because, obviously, we're interested in protecting the film itself. But also if it doesn't get accepted by our clients, we don't get paid. So it's a rather effective kick in the butt, if you will, to make sure that that's taken care of.

Our elements are separated for protection purposes with material on the West Coast, the East Coast and London. If we move something we confirm where other material is and then we return it to a different place. The upkeep of this library is obviously an uphill battle for us but we're constantly faced with it. No amount of vigilance can stop aging but help is always welcome. Organizations like the Library of Congress and the archives we have consulted with and used often to both of our benefits.

We would welcome any form of assistance in the maintenance of these libraries as long as the ultimate responsibility lies with the owners of these libraries. Briefly, some projects that we have in progress right now are television shows that we have that were

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finished on videotape, which is something new in the last several years. We're going back and reconfirming those negatives that are still in pieces to make sure that we have a proper negative representation of those shows.

We also have almost completed the nitrate conversion to safety film project. We have about, I would say, twenty titles left and once that is done, we're donating the nitrate to the Library of Congress for storage and future use and research. The safety film we will keep for exploitation. Thank you.

MR. TABB: Thank you. Mr. Murphy.

**Statement of Philip E. Murphy, Vice President, Operations, Television Group,  
Paramount Pictures**

MR. MURPHY: I'm Phil Murphy, vice president of operations for the television group of Paramount Pictures Corporation, the motion picture and television arm of Paramount Communications, Incorporated. Those of you in the room that have seen me speak before, such as at the AMIA, realize that I usually don't work from a prepared script. I usually get up and I'm very animated, playing the room, but I notice that Annette has put velcro on my chair today, so I will read. [Laughter.]

We appreciate the opportunity to testify today before the National Film Preservation Board of the Library of Congress. Paramount has a deep commitment to preserving our motion picture and television heritage and applauds the effort of the Library pursuant to the National Film Preservation Act to study and report on this subject.

Paramount Pictures adopted a worldwide preservation commitment many years ago. Our visual heritage includes many of the major filmmakers of this century and the corporation recognized its obligations of archival continuance early on. Almost ten years ago the studio stated refurbishing the original architecture of the Hollywood lot. Buildings were renamed after such notables from the Paramount past as Sturges, De Mille, Lubitsch, Wilder, Adolf Zuker, B.P. Schulberg and Hal Wallis.

The studio was lauded by the Los Angeles Conservancy for its efforts to preserve its historic buildings. Our efforts in motion picture film asset protection were the results of a major management commitment that gave Paramount the industry's most comprehensive preservation program and established the Paramount preservation standard, one to which all preservationists could actually refer.

In 1987 Paramount's top management formed a working group to determine the most effective means of assuring that the studio's vast library would, in fact, be preserved for future generations. The group determined that an asset protection program would

have to encompass three areas.

The first was a computerized database utilizing bar code technology in order to identify all film and tape elements, their condition, storage location and, very importantly, their movement tracking.

Second was the program method of inspection and evaluation, repair, replacement, restoration, proper secured storage with authorized access and a prioritized system identifying elements that needed attention before deterioration destroyed the element.

And the third area was a philosophy of protection by separation, as others have mentioned, to insure that all elements were not stored in the same physical location, thereby precluding the total loss of a title.

This translated into a goal of being able to produce a high-quality commercially acceptable product from at least two diverse geographic locations. Our own self-imposed criteria for full protection is to maintain the original camera negative in our Los Angeles archive at 40°F, 25% relative humidity.

We also inspect and repair as needed an interpositive for the Los Angeles archive and inspect and repair a three-strip separation protection YCM to be located in our East Coast underground vault, which we also maintain at 40°F, 25% relative humidity. Split track magnetic audio is also stored at the bicoastal locations.

Even in the rare instance when market potential does not warrant manufacture of material following inspections, we still position the existing material in our environmental vaults to arrest further deterioration. By so doing, we protect everything. The preservation project took on a life of its own as concurrent assignments proceeded on a scheduled basis. A gifted in-house computer programmer developed the necessary software and system configurations to enable the worldwide inventory to commence.

We visited each major underground storage site in the United States to choose a second home for Paramount elements. Outside vendors were chosen to handle the huge volume of element inspection, evaluation and repair or replacement and all information was continuously fed into the database. While the preservation progress of commercial titles proceeded at an active pace, Paramount continued to nurture the historic stars of its past.

The 1957 Fred Astaire, Audrey Hepburn [film] *Funny Face* was restored for the 1990 AFI Los Angeles Film Festival. Original nitrate elements of the 1912 *Queen Elizabeth*, the 1914 *The Squaw Man* and the 1923 *The Covered Wagon* were transferred to safety film at Paramount's expense and the original elements were then loaned to public archives in order to complement their collections, including the Museum of Modern Art,

UCLA Archive, Library of Congress and the Academy of Motion Picture Arts and Sciences film archive.

Several hundred other films such as *Barbarella*, *Escape from Alcatraz*, *Greatest Show on Earth*, *Gunfight at the OK Corral*, *Harlow*, *Is Paris Burning?*, *Lady Sings the Blues*, *Mahogany*, *Out of Towners*, *Paint Your Wagon*, *Romeo and Juliet*, *Samson and Delilah*, *Shane*, *Ten Commandments* and *True Grit* were fully or partially restored.

The protection-by-separation goal took a major step forward in January of '89 when the first trailer truck full of Paramount elements was shipped to the custom constructed deep mine vaults in the eastern U.S., a site which is shared by such noteworthy institutions as the U.S. Patent Office, the FBI and the Library of Congress. These vaults were constructed under Paramount direction and to our specifications of temperature, relative humidity, fire suppression and validated security access.

Almost at the same time Paramount Communications, Incorporated, authorized the construction of a 40,000 square-foot archive building on our Hollywood lot in order to house all Los Angeles-based original materials which at that time were spread among several outside storage facilities, laboratories and on-lot storage modules. The archive would hold the original elements of Paramount titles on film and tape and an editing complex for the staff that created ancillary market versions of Paramount theatrical titles who were the prime users of this vault material.

The archive building was truly a fast-track project. After the January '89 approval, our in-house planning and development department coordinated the needs of the building with the size restrictions placed on the site by governmental agencies. The building's environmental, fire suppression and security systems were custom designed.

Ground was broken in September and the building was completed in July of the following year. The first weekend in August we moved over 70,000 magnetic items into the building over a 36-hour period. Film items followed shortly thereafter. The third leg of the protection-by-separation scheme was installed in 1991 with the completion of an environmentally controlled storage facility in London, England, in order to house Paramount's European elements.

All three facilities are tied into a personal computer network which now includes prime vendors and some 100 users around the world. Any movement, plus editor and product notes about any item in the data base, is available to all in our corporation who need the information regarding the three-quarter million items worldwide now in our database. This free flow of information contrasts greatly with the typical fiefdom where individuals hoard information that they need on file cards, lined pads, binders or, in the worst case of all, in their memories.

The major preservation work is done. We can't know what future technology will

require. Whatever the demand, we feel confident that by protecting the original film elements we have retained all the creativity the original artists intended to capture and that we'll be able to respond to any needs with a resolution, aspect ratio and quality inherent in the original.

Paramount has, for the past four years, transferred feature films onto digital videotape for distribution into electronic markets but even the upcoming digital high definition television system cannot totally capture the image which is stored on the original film. We're often asked after people tour our Los Angeles archive, "Now that you've transferred the film to video tape, why do you need to keep the film?"

The answer can be summarized by saying that the resolution of video technology continues to grow, but still cannot effectively come close to the image quality residing on that 35mm motion picture film. Our entire archival project succeeded because it had the motivated support of our top management, who never backed off or down from any of the changing requirements. It was and is the philosophy of our company that Paramount itself have total preservation responsibility for the material that we own.

While independent and public archival institutions are also important to maintaining the history of motion pictures, we cannot subrogate our responsibilities to their needs or activities. This is not to say that there isn't room for cooperation. We have and continue to work with other institutions to assist in important preservation work. We loan material; we finance; we share technological data. Indeed, as we proceeded with the archive we were encouraging other studios, archives, libraries and preservationists to monitor our progress and share in the information that we uncovered.

The imprecise science of preservation is fairly new. We hired outside consultants to provide known technical information about film preservation which was unavailable through industry organizations. During this archival adventure we have found many inherent economic incentives to protect one's own library. Film preservation need not be a philanthropic endeavor. There is a huge worldwide market for all films, be it from domestic, basic and pay cable, the privatization of television in Europe and Latin America or the hoped for advent of better worldwide copyright protection. Our product is constantly in demand.

With many new technologies poised for home introduction, our product will remain in demand well beyond our lifetimes. This demand, though, is for high quality state of the art renderings of our features and series product. Distorted, color faded or blurry 16mm prints and 3/4-inch tapes no longer sell. Our preservation efforts allow us to utilize pristine film elements to produce the latest digital videotapes for our customers.

The other economic advantage for our archival efforts is that all of our film elements last five to ten times longer than they did before they were housed in proper environmental conditions. This added life more than covers our annual storage cost and



is dramatically cheaper than continually replicated deteriorating film elements whose lives were shortened by improper storage.

In the future archival film storage may be replaced by digital computer storage to an image resolution equivalent to 35mm film. However, although such digitalization technology does exist today two significant problems exist. First, the process is exceedingly slow and more importantly, the amount of digital data in each frame of film is so great that no practical storage technologies have yet to be invented. A full film transfer to a film equivalent digital domain with its complete essence stored on computer tape would cost at least ten times as much as producing protection separations on film. However, digitalization of film may be an alternative to film archiving in the not-too-distant future.

There is a great need for the Library of Congress and Congress to focus on the parts of our American visual heritage which do not naturally fall under someone's ownership. We speak here of that great collection of public domain material much of it on nitrate film.

Those titles are called orphans because they have no protectors, no organization with the wherewithal to transfer the material to safety film to assure that future generations will have the opportunity to view what the early part of our century looked like on film.

It's our suggestion that a national preservation policy address this great collection of material before time, its greatest enemy, takes it away from us forever. We've all heard the tragic figure that half of the films produced before 1950 are gone. They're lost, deteriorated or destroyed. The other half is only partially protected. Recently Paramount, at our own expense in cooperation with UCLA archive, transferred a 1927 version of Mary Pickford's *Tess of the Storm Country* from nitrate to safety film. We were surprised to find that it was the only theatrical copy of that title in existence and we were shocked to think that it may have been lost forever.

It's gratifying that the U.S. Congress recognizes the need to preserve our visual cultural heritage. It's likewise impressive to know that the Librarian of Congress is marshalling the effort. We offer our cooperation, our expertise. As for Paramount, we will continue to protect and preserve our visual heritage with total commitment and dedication.

MR. TABB: Thank you, Mr. Murphy. We're also glad today to welcome Mr. Kirkpatrick, the film archivist from Republic Pictures. I understand you didn't wish to make a prepared statement at this time, but you'll take questions; is that correct?

We'll begin by hearing from Mr. Humphrey. I'll remind everyone that we're ready to hear up to ten minutes of prepared remarks. We'll go through the entire group and then we'll be asking questions. Mr. Humphrey?

**Statement of William A. Humphrey, Senior Vice President and General Manager,  
Sony Pictures Entertainment**

**MR. HUMPHREY:** Good afternoon. Sony Pictures Entertainment has taken a leadership role in film preservation and restoration. Our program has broken new ground in creating a model for collaborative effort on a national scale, the Film and Tape Preservation Committee, which is represented by the Library of Congress, UCLA, The Museum of Modern Art and the AFL.

Sony Pictures has developed a proactive financial support program for major American archives. Currently five institutions, including a few of which are not associated with Columbia's library, are funded annually. These funds directly support specific film preservation activities as well as public viewing to promote seeing films as they were intended, on the motion picture screen.

Significant financial and staff resources have been concentrated on preserving Columbia Pictures Library, consisting of 3,000 full length feature films, shorts, and serials. Over the last three years, preservation work has been completed on 200 films, nitrate conversion of 420 films has been completed, and 13 films have undergone significant restoration.

Sony Pictures has dedicated resources to creating a state-of-the-art storage facility to strengthen inventory control over film elements worldwide and has prepared and implemented corporate policies to assure proper disaster recovery, quality control and asset management.

As a leader in new technologies, Sony Pictures has initiated research into the impact of new technologies, such as high definition digital tape, to find positive contributions to film preservation. Our position on film preservation focuses primarily in three areas. First, the strong belief that a preservation partnership between the major motion picture studios, film archives, and technical specialists is required. We view our Film and Tape Preservation Committee as a model program.

Second, a standard for the planning and prioritization of the preservation and restoration of films should be established. Preservation of existing film libraries should be prioritized. Third, new technologies will increasingly impact film preservation as well as the storage and distribution of feature films. The film preservation community must carefully evaluate the impact of these changes and the use of new electronic and information technologies to enhance the permanent recording of picture and sound

image.

I'd like to elaborate briefly on the three points. Regarding the first, our recommendation is for a well-defined, broad-based national partnership between the Library of Congress, The National Film Preservation Board, archives, studios, independent producers and the technical community, including SMPTE. In this way, a greater awareness of preservation and improved decision making will prevail.

Sony Pictures recognizes that our commercial-driven requirements and the work on the preservation community should be integrated. The efforts of our committee demonstrate that such an arrangement does work.

Sony Pictures established its corporate Film and Tape Preservation Committee in June of 1990 with the institutions I just mentioned. This committee has become a catalyst for accelerating film preservation and assisting in the prioritization and restoration for the Columbia Pictures Library.

The committee has also prepared the groundwork for the identification of preservation issues on the national level and the development of resolutions to these issues. A very important component has been the sharing of information and research. The partnership arrangement between Sony Pictures and these archives has made us all better problem solvers in the preservation area.

A collective effort will result in improved communications for ongoing preservation projects, coordinated guidelines for storing and preserving film, and create insights into new technological developments.

Referring to our second point, an offshoot of the needs for preservation partnership in the United States is a need for clarification of priorities and increased planning of preservation and restoration projects. We have found that good planning and analysis of a restoration project, prior to starting work, results in higher quality and cost effectiveness. Prerestoration planning also includes a high level of inventory control and quality control. Without this, the ability to carry out restoration is not possible.

Sony Pictures has concentrated significant resources through its Film and Tape Operations Division to develop and implement a comprehensive plan to inventory all Sony Pictures assets, which total over one million units of film material.

Our final point, new technologies must be integrated into the film preservation effort. In the long term, new electronic and data processing technologies will be an integral component of preservation. New technologies impact restoration in three ways. First, as new electronic mediums are created, the demand to use original film materials increases. Second, new technologies can, in theory, assist film preservation, correcting or enhancing film, which cannot be accomplished through conventional means. Third, new

digital mediums have a tremendous impact on the storage of visual and audio information, and will, in the mid-term, improve storage of master material of theatrically released products.

It remains imperative that the preservation, archival and creative communities become integrated in this engineered process in order to preserve the creative nature of this art form.

In closing, I'd like to thank the National Film Preservation Board and the Library of Congress for this opportunity to express our views. We're hopeful that this dialogue continues. Thanks.

MR. TABB: Thank you, Mr. Humphrey. We'd next like to welcome Roger Mayer, who is a member of the National Film Preservation Board as well as a representative, of course, of Turner.

**Statement of Roger Mayer, President and Chief Executive Officer, Turner Entertainment Co., accompanied by Richard May, Vice President, Film Preservation and Distribution Services, Turner Entertainment Co.**

MR. MAYER: Thank you. We have really not prepared a statement different than the one that I submitted to you. We've given you not only the history of our preservation efforts, but all the present preservation status of what we've done and how our ongoing system works.

We work a little bit differently than other companies do, in that we are not as structured. I'm very, very impressed by the manner in which they work and I think I have no criticism of it. We just work differently. And that is that we have a general overall policy that this is what we want to do and my instructions are simply to get it done and with the gentleman on my right, Mr. Dick May, we put in a budget each year for the amount of money we think is appropriate to spend. And if that is approved, and it always has been, then we go forward and do the job.

We do it in collaboration with the community. We do it in collaboration with laboratories and optical houses, with archives, with people that can help us, with people with whom we have relationships. And we try to learn as much as we can. But we really don't do it in a structured manner.

I hear people talking about prioritization. In our case, we really don't have too much of a problem with that because as you all, all the people on this panel certainly know, Turner Entertainment is a successor to MGM and we started this work in 1967. And we in effect have preserved every piece of film, as far as we know, that is under our

**regis.** That includes the 1,750 MGM features, 700 cartoons, every picture made by Warner Bros. prior to January 1, 1950, and all the pictures of RKO.

There are a few things we haven't completed, such as some short subjects from the Warner Bros. library. But our policy is we will simply protect them one way or another in their entirety without any exceptions. I think that really is the most important thing we bring to this. And that is, if you have a dedication toward film preservation and you can get the backing of your top management to back up your dedication, it will get done.

I certainly approve of the technological committees. I certainly approve of each company integrating their needs because of where they are in the film preservation process. But the most important thing is an overall dedication to the fact that it needs to be done.

As far as priorities are concerned, I can best state my feeling about them by describing a few incidents that have occurred over the years. Mostly what has happened is every time a committee sits down to figure out priorities there isn't anybody on the committee can agree what their priorities should be. So that's one problem.

And why is that? Because each member of the committee has a different reason for being there; somebody wants something for videocassette release, somebody wants it for theatrical, somebody wants to beam it on cable, somebody loves shorts, and somebody else likes cartoons.

The things that get lost at our end of it is from time to time you have things that no one's interested in. Those are probably the things you should give priority to because in many cases two years later it's found that there is a market for those things, and there is an interesting concept of how to distribute them, and they do have some commercial value. And therefore, you just move on. And I would suggest that that is probably the best preservation policy for a company that has a job to be done.

However, when you're talking about the amount of film the United States and the world has to preserve, there certainly is a requirement for priorities. I will not try to state for you how we do things, the way we do them. Mr. May is our expert, and he will answer those questions if any members of the panel want to ask him those questions. But there are a few more things I'd like to touch on from a policy point of view.

The proper goals that are attainable in the private sector are so much easier than the goals in any other sector that they should be looked at separately. I would certainly recommend that you urge everyone that has an ownership interest in film that probably there are at least two priorities, if not number one, is to preserve it for their own purposes and for posterity. And I think it's that simple. And I think what you're going to do by public statements, by pointing out to people how important it really is, that this

is not an artistic enterprise. It's really much more than that. I think that should do the job. And to the extent you can put pressure on people to do that job, I would suggest that you do so.

There's no question about the cultural benefit of film preservation. But I would be prepared to point out to almost anyone that there would be almost an unlimited economic benefit and they should get at it because otherwise there will be no benefit at all. And if they can't figure out what to do with the preserved material, someone will figure out something that can be done with it in the future. When you try to prioritize on the basis of what the economic advantage is definitely going to be, you may end up simply not doing the job.

I think the record will show, the history of preservation would show, that there's very little film preservation that has been done that does not have both an educational and an economic benefit.

There have been several questions that have been asked concerning some sort of support of the archives, some sort of concept of having many archive collections of prints or negative materials. Rather than making a speech on that subject, I would like to treat with that when you're ready, because that does present a practical problem to all of us and at least we would like the opportunity to tell you why it's a practical problem.

Somebody said something here before that I would like to mention. And that is, what's happening to the films that do not have the ownership of a major distributor. That was passed over a little bit. But I think it really is extremely important. I think when a major has an interest, in all likelihood the preservation will be done. And as you can tell from my fellow panelists here--Paramount, Disney, Sony, Universal and all of us--I think we're doing a pretty good job. And particularly we are doing a good job in the last three-to-five years.

But what is happening to the pictures that are being distributed by independent distributors where the ownership is not entirely clear, or is so diffuse that really there is no father and mother to take care of them, and to say nothing of the fact, as you all know, there are an awful lot of these distributors and production companies that have disappeared from the face of the earth in Chapter 11 or wherever the face of the earth disappears? [Laughter.] And I think there has to be some national source of information whereby we would know at some point what's going on and something could be done about it.

But I know that there is limited time. You have my statement. You have the record as to what we have done as a company. We're certainly very proud of it. And we also have a record of cooperating with you in the past and we would be happy to cooperate even more in the future. Thank you very much.

**MR. TABB:** Thank you, Mr. Mayer. We'll next hear from Universal. I believe Mr. Watters will be speaking first.

**Statement of James Watters, Executive Vice President, Studio Operations, Universal City Studios, accompanied by Dan Slusser, Senior Vice President and General Manager, Universal City Studios, and Bob O'Neil, Director, Preservation Vault Services, Universal City Studios**

**MR. WATTERS:** That's correct. Thank you for having us here today. Universal Library consists of more 2,330 theatrical titles. This material is protected by either separation masters, interpositives or fine grains. There are over 740 color titles, 89% have YCM separation master protection, which is approximately 17,058,000 feet. The balance of these titles are either negative pick-up titles that were shot on 16mm, or protected by color interpositives.

Our black-and-white and theatrical titles are protected by over 10 million feet of either nitrate or acetate finegrain or dupe negative. As part of our ongoing preservation program, we're replacing our nitrate elements with acetate elements.

Additionally, we have created over 27 million feet of color interpositives or finegrains for television productions. The exception to this is a 13-year period before the advent of videocassette and laserdiscs when other small gauge film formats were considered sensible protection. However, we are currently in the process of manufacturing interpositives on these titles.

Since 1976 Universal has spent approximately \$21 million building and maintaining vaults, creating a computer database, relocating material to provide for geographical separation and maintaining knowledgeable staff personnel. Our main archive facility is located in Universal City, California. There are five buildings totalling 49,000 square feet with a capacity of 1.7 million containers.

In 1976 Universal built its first modern vault building. This structure is a state-of-the-art facility in which we're able to meet the vendor-recommended storage conditions of 50°F and 50% relative humidity. In addition, removable storage racks were installed, providing maximum utilization of space.

In 1987 Universal converted one of its older vaults to an environment of 46°F and a relative humidity of 35%. We realized at that time the correlation between humidity and the deterioration of color negative, and chose to improve the storage conditions beyond Eastman Kodak's recommended standard of 50°F and 50% relative humidity.

In making this change, we extended the life of our color elements before they succumbed to color fading. In both instances, Universal was well ahead of the industry in

the area of archival film storage. In 1986 Universal established an additional storage location in Boyers, Pennsylvania, owned by National Underground Storage (NUS).

These vaults are situated in underground limestone mines and are guarded by 24-hour security. Currently our storage environment at NUS is 50°F, 25% relative humidity. Universal was the first major studio to enter into an agreement with this facility. It was later followed by Paramount, Columbia and Disney in 1992 and 1993.

This operation is the cornerstone of our geographical separation philosophy wherein we're able to store separate preprint, picture and sound elements 3,000 miles apart.

In 1988 Universal expanded its total storage area, by adding a state-of-the-art videotape, audio tape and viewing print vault. This area comprises a total of 7,000 square feet with a capacity of 510,000 containers. Incorporated into this vault is a high-tech removable shelving system that allows 60% more usable space than that of conventional stationary storage systems. This facility operates in an environment of 65°F and 50% relative humidity.

Kearney, New Jersey, is another location dedicated to the storage of assets for Universal. Approximately 23,000 cans of nitrate film are the primary residents of this facility. These film assets are inspected on a regular basis. If a film element is found to be deteriorating, the Universal vault services researches other film element availability to expedite preservation.

Universal is also currently reviewing the new ANSI standards and SMPTE recommendations for the storage of motion picture film and will be addressing them in the near future.

In 1986 Universal undertook the arduous task of creating a computerized tracking system for picture, sound and videotape elements. The task of implementing this system included the creation of a vault inventory software program, the establishment of nomenclature, the inventorying and barcoding of over one million elements, thus providing interface throughout the studio postproduction departments, home video and MCA-TV areas.

This system allows us to track elements in our vaults in New Jersey and Pennsylvania, in addition to our location in Universal City.

In the area of film and sound preservation, Universal has spent approximately \$7.6 million since 1981. Additionally, \$2 million is earmarked for calendar year 1993. Those figures do not include the cost of separation masters made for current theatrical product, or the manufacture of protection interpositives for our current television series.



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In the area of theatrical production, Universal creates timed separation masters on all of its color features. As a follow-up, we ourselves physically inspect all of our current separation masters and periodically make color internegatives and check prints to further confirm the quality of these masters.

It is very important to note that Universal is the only major studio to inspect its own separation masters. We have a negative-cutting facility which is part of Universal Studios.

Universal has had a great degree of success restoring the older theatrical titles to their original length and quality by utilizing its separation masters. The other goal is the preservation of nitrate titles. Universal began the process of transferring its nitrate material to acetate in the early 1980s.

We are continuing with this process. And to date, approximately 429 features have nitrate preprint elements with acetate backup. In the event two preprint elements exist, i.e., black-and-white original negative, and a black-and-white finegrain, analysis is made to confirm the best element for the preservation process.

When completed, Universal will retain an answer print, the composite finegrain, dupe negative, check print, and optical track negative. If the title was originally shot on three-strip camera negative, we would produce a 35mm answer print, timed interpositive, internegative check print, optical track negative and separation masters. In all cases, utilizing this procedure, each title is both protected and geographically separated. Although a majority of our nitrate titles have undergone preservation, we will continue to store these elements for the foreseeable future in the likely event new technology emerges, thus assuring quality without compromising the original integrity.

We are currently working with the Directors' Film Foundation on the restoration of 10 films. These restorations are being undertaken in cooperation with the UCLA Archive. They are titles such as *Phantom of the Opera*, *The Plainsman*, *Animal Crackers* and *Shanghai Express*.

In the mid-1970s Universal's sound department began protecting soundtrack masters. The program was then called STUMPF copies. This process involves the copying of track masters to 1/2-inch nonsprocketed tape with sync pulse. The phrase STUMPF was defined as studio track universal multichannel print facility, and incidentally was also the name of the director of sound for Universal at that time.

The STUMPF copy process of protecting our feature and TV sound masters continued into the 1980s. We concluded that as stereo tracks became more complex the three tracks available on the 1/2-inch tape weren't sufficient for our needs.

Under the guidance of Bill Varney, vice president of sound, Universal instituted

the following procedures for preservation of sound elements. Physical cleaning and/or repairing of original master elements whether magnetic or optical, relabeling and bar coding of those masters, simultaneous transferring of these tracks to both 32-track digital and analog 24-track protection masters, the shipping and protection of masters off the lot to storage facilities.

Older sound masters with unique inconsistencies are processed through the sonic solution system, which is a digital noise removal system. Sonic solution equipment removes distracting noise from the valuable titles without damaging the integrity of the original mix of track. This affords the preservationist the ability to choose many different degrees of noise reduction with minimal adverse effect upon the original soundtrack.

Most importantly, this process allows all this flexibility and improved quality through the digital medium eliminating any additional analog generation loss. Universal itself solely continues to evaluate emerging technology which could assist our sound preservation goals.

Universal Studios has mutually cooperative relationships with various archives, museums, foundations, libraries, and educational institutions. Because of this relationship we are able to inquire as to the availability of alternate film elements on our various titles. Occasionally we have found different versions of elements for use in preservation in these institutions. In the past Universal has been cooperative in this manner to outside archives for the betterment of preservation.

A large number of titles are also stored at the UCLA Film Archive, Library of Congress, Museum of Modern Art, Museum of Broadcasting, The Academy Foundation, etc. And under our existing agreement scholars may access titles for research free of charge in a library or classroom environment. With prior authorization under certain circumstances, screenings are permitted, providing no fee is charged for admission.

Thank you very much.

MR. TABB: Thank you. Mr. Gardiner, Warner Bros.

**Statement of Peter Gardiner, Vice President, Operations, Corporate Film  
Video Services, Warner Bros.**

MR. GARDINER: Thank you for the opportunity to address you, as Warner is very dedicated and committed to preservation and restoration. We believe we're using the best currently available technology with the eye to the previously mentioned future emergence of technologies.

I am going to give you a brief overview of the overall preservation and restoration

projects as well as our experience of the value concurrence, which includes computer information, which may assist in formulating other archival and preservation programs. I am not going to address any access, budget or rights issues because that is in our larger corporate arena.

You will hear a few similarities between our program and what Mr. Murphy was talking about earlier. And to that end, we also have just completed a state of the art archive building with a capacity of approximately 600,000 cans. We do not own any of our pre-1950 material, which is under the care of our friends down the table. [Laughter.] Therefore, we also have very little nitrate. What nitrate we do have we are not storing on the lot. It is in a facility in Van Nuys, which I will address later.

The temperature and humidity of the building is very, very close and heavily controlled to standards. We will give you all that for the sake of brevity in the statement that I still owe. There's a lot of technical stuff that I'll include in it.

The other part of the building that is quite new and very, very, very satisfactory, addresses the current film issues, the triacetate problem and the vinegar syndrome. We have put in an air filtration system as part of the overall air conditioning systems in order to try and combat vinegar syndrome both in the film triacetate base and the magnetic. This has been very, very successful and we've established a way to actually monitor it on a computer where you can actually see gas trends and how the film is actually reacting.

As the building is filled, we believe that this will be valuable information to all archives, as far as being able to come up with trends as to the deterioration of films stored in various areas and monitored.

The concurrent programs that we have going, we were fortunate in that a lot of YCMs were made through the years by Warner for all of our films. The ones that we have not made YCMs on we are currently doing so. Over 60% of our library at this point is already protected. And within the next two years they will all be protected. With YCMs, there is other protection already.

We are doing feature sound restoration as has been described at Universal. Very similar we're doing at Warner Hollywood. We are protecting all formats to 24-track, which includes the newer multistem formats as well as the older composite formats. We're making two copies of those. And National Underground Storage must be doing very well, because the second copy is going there for us as well. As well as our YCMs.

As far as the concurrency issue, we have found that in inspecting all of this material, we also have our central computer system, which is on a mainframe. And also a separate PC-based system to track this material.

We have found in our experience that as you go through the material and watch

it, and see it, and look at it, and inspect it, and catalog it, that if you do all of this concurrently--and do not, as Roger was saying earlier, try and prioritize--one gets the sense that you have to just do all of this, and then you have to go do something else. And in this case, what we've done is, the computers react to this particular part of the research. The film then is classified, cataloged and/or preserved and restored. And this allows a flexibility in the program to see if physically you find that you have a different type of problem. You can then go back, stop one part of the program, pick up on the other. Your computer knowledge base expands rapidly and then you can go on with all phases of the program concurrently. Picture, sound and cataloging.

As far as the restoration is concerned, we have done very extensive restoration projects. Since the overall preservation project and restoration project involves inspecting every piece of film and every soundtrack at some point. As this is done, preservation is taken care of and restoration is taken care of on an as-needed basis as well as obviously being market-driven for material that we want to release.

The moment we find a piece of material that has a problem, either picture or sound, restoration work is taken up to do that immediately. We've also done extensive research to restore elements to their original versions, which has been with limited success with the cooperation of collectors, as Mr. Murphy mentioned before. And I'm happy to say with much greater success with the Library of Congress with material that has been on copyright deposit.

We also feel that computerization is vital to any preservation effort. We have found that the mistakes made in the past--you know, I don't even know what the word is in the industry now, except to use the word infamous three-by-five cards that everybody seems to have--should not be made again just because they're on a computer. So what we've done is we've undertaken to put in a mainframe system, very similar in scope to what Phil described earlier, in that it will be a company-wide access and it will be worldwide.

In addition, we have a vault management system, which is a PC-based system. That system in fact is meant to track the material as it goes back and forth and who had it, where it went, when it's supposed to return, as opposed to the last entry on the famous three-by-five card that said it went someplace in 1954. And that's the last entry on the card front or back. [Laughter.]

Also, Warner has undertaken to preserve, with my friend Leif Adams, who is in the audience today, all nonfilm and sound material. If we find assets that are paper, or props, or anything else, Leif is on the case and is immediately trying to rescue them from wherever they may be going.

I'd also like to mention, as we have all discussed today, where did you get the idea for this, where did you get the idea for that? The industry cooperation between all of us

and also with Eastman Kodak and various other companies—the magnetic tape companies, 3M, Ampex—has all helped us formulate some of these policies that didn't exist three or five years ago because nobody was paying attention. And nobody knew. And we all know and we are paying attention and we're all trying. And I think the industry as a whole, and the town as a whole, has developed an enormous amount of knowledge just based on intercompany cooperation. And again, I'd like to thank you and the Library, and the Board, for the chance to address you on these vital issues.

MR. TABB: Thank you. Now we're ready to take questions for the panel. Who would like to be first? Milt?

MR. SHEFTER: I'd like to address the same question to this panel as I did to the other one in fairness. Since the goal of this group here is to come up with a national preservation plan, as private copyright owners, what would you, if anything, like to see in this national preservation plan. May I start at this end please, Mr. Humphrey?

MR. HUMPHREY: I think maybe, as I mentioned in my brief piece for the company, that we believe that more partnership arrangements need to be worked out. Maybe they don't need to be formal; they could be informal. But sharing of data information is really important. I think what Roger had mentioned earlier is that in many, many cases the business is becoming more complex, and the risk of protecting product is being spread out a little bit more between different companies because independent producers, independent distributors and the studios have separate rights on the same products.

What that means is that we may make a feature film product, for example, but the German rights, and the German tracks are made by somebody else. However, we may have the rights for those German tracks in the home video or the television markets. So what I'm finding is that asset management is becoming more complicated and more global, means that there needs to be more cooperation in terms of sharing data and information.

We also find a library product that Columbia Pictures may have rights for a certain period of time, but Warners or Paramount may have the same picture, but rights over a different period of time, or in different territories or in different media. Therefore, I think it is imperative that studios coordinate using their connections, resulting in cooperation in archival activities.

I have found that when I exhaust the studio sources, I go directly to the archives, who seem to have a lot of connections that I don't have, to find materials that I didn't know existed. I use the example of the restoration with the Library of Congress on *Mr. Smith Goes to Washington*, where we found some of the original materials, some of the best materials, with the British Film Institute in London. I don't know why it was there. But it was, and I was thankful that we were able to locate it.

So, from our perspective, more cooperation, more information sharing is really important. Also, I think one thing the Board could do, with the Library of Congress and with us, is to prepare standards. I know that SMPTE and others are in the process of preparing standards for how to store film, how to do preservation work. We all do it a little differently; we all store it a little differently; we all distribute it a little bit different. And when you go and look at other archives, in Germany, or in France, or in Britain, they have other methods and other standards.

I think it's important that someone take a leadership role in defining what the best standards are and define these in engineering terms as opposed to just what everybody believes. So those are the two points I think that are important. Thank you.

MR. SHEFTER: Who speaks for Turner? Mr. Mayer?

MR. MAYER: Ted does. [Laughter.]

MR. SHEFTER: One can make an argument that Jane might. [Laughter.]

MR. MAYER: No comment. Unfortunately Bill said everything I was going to say. I agree with his points. I may have a different emphasis on a few of them, but I think they're well taken.

We would suggest some method by which film preservation, technological information, be made available on a worldwide basis. Maybe it could be by a Library of Congress bulletin or something, whereby we all contribute what we know, and the archives contribute what they know. You also know a lot. And there are people around the world. And that exchange of information might occur twice a year or something like that.

As you can see, we all at this table exchange this information. I think that might really be helpful to the entire world. And then we wouldn't necessarily all do preservation the same way, but we would all be doing it based on the same technological information. I think that would be helpful.

In regard to preservation guidelines, I think that general recommendations concerning preservation guidelines, from time to time--again, once a year, twice a year, once every couple of years--would be very helpful. I think we would certainly like to see them, and I think we would be helped by them. I think all of us would be. It would be something that you would be contributing not just to the United States but to the world.

None of us are in a position to do it, but perhaps the Library is. And I think it, again, might be extremely helpful. There's always the possibility as you look at this situation and say well, there should be uniform or mandated guidelines. I don't think there should be. I don't see any necessity for them. The results over the years have

indicated that that would not have been particularly helpful. But in any event, it's something that might be in your mind and that would be my attitude toward it.

With regard to a national inventory of films and film materials: extremely helpful. It would be a terrific thing that could be done. All of us could give you the input from our various PCs and master computers and all the other things we all try to do. And someone could compile it. Then you would have all the information you're getting from archives. Plus you have your own sources of information. And we could all jointly find out where the holes are and what could be done and how we could all fill them.

So I think that another reason that all of this might be a good idea is that one tends to emphasize too much the major collection problems, the problems of the major holders of film. But there are a lot of people that are independent. There are a lot of people that have film under their control or guidance, one way or the other, that have really no opportunity to get the information that we get.

And so you would be really doing something for them, and not just this industry, for the country and all of that. But actually I think all this information would be even more useful to the smaller owner of film. So those would be among the things that I think would be helpful.

For a policy in regard to this question of the archival collections, which I think is something you're going to have to address on a national basis, maybe we ought wait for the questions on that particular issue. It is something I think that should be handled nationally. But I think we all have maybe diffuse opinions on that. To the extent those comments are helpful, thank you.

MR. MAY: Let add something to this if I may.

MR. SHEFTER: You may, Mr. May.

MR. MAY: Thank you. The exchange of information between the archives and the private holders can help to divert a lot of money that's being spent that is duplication of restoration. All of our original MGM negatives are at Eastman House. The Warner and RKO nitrate negatives are at the Library of Congress. The Warner and RKO nitrate finegrains are at the Museum of Modern Art.

I've run into numerous cases where the Library of Congress preserves something, MoMA preserves something, and we already have preservation on the same thing. We talk about funds that may be diverted to the orphan films, wherever they may be, information in order to coordinate and eliminate that duplication and triplication and in sharing those preservation elements, where necessary, between us could add economies that we don't now exercise.

MR. SHEFTER: Thank you. Dan?

MR. SLUSSER: I think these gentlemen have stated the desire for sharing documentation and for transmitting data among studios, collectors, educational institutions and creating an ability for us to document this data. I think on an immediate basis, without being repetitive of what they said, one of the simplest and quickest things that this Board and this Committee could do is to start immediately to try to standardize the nomenclature among the various vaults, collectors, studios and companies that are involved in the preservation movement.

I found during the inventorying and barcoding of all of our material that there are a multitude of different terms, all of which mean the same thing. I think we can lose an awful lot in translation if we don't get into a standardization that we can all work from.

MR. SHEFTER: Anyone else from Universal?

MR. O'NEIL: Yes.

MR. SHEFTER: Bob?

MR. O'NEIL: From a technical standpoint I want to bring up one thing that I think is going to effect all of us. And it was talked about a little bit, but I think it's something that really needs to be more in the forefront. With the environmental changes that are going on, there are certain chemicals that the studios and everybody, Library of Congress, we are all using. They are very important chemicals to preservation. Without these chemicals we're going to lose it.

We've got a couple more years where we're going to be able to use trichlorethane and perchloroethylene and then they're going to be gone. As soon as they're gone, the quality, the heritage, the integrity of the film that we have today is going to perhaps go with it unless somebody comes up with the technology to replace that. And that's something that is really going to be important.

Because we can talk about preserving this material, but the quality of it is going to be gone. And it's something--in Hollywood, the Technology Council--we're looking at it; we're trying to find other ways. I think some of the other companies around the country are as well. But if there's any way that you can help to encourage, either, whatever your sources are, to start looking into finding replacements, so we are going to be able to continue to sonic clean film and get a good piece of clean film before we print. When we print, be able to print liquid gate and get rid of the scratches and the digs and all the inherent problems that are in the film. Without that, we're all going to be very disappointed.

And the people, our kids, and the generations past us, they aren't going to have--



it's not going to be good material they're looking at. We've got to address that now before we lose these chemicals altogether.

MR. SHEFTER: Peter?

MR. GARDINER: I would sort of go over and elaborate on really what everybody else is saying. The interesting thing about the database was found the same thing in our own system on the lot; there were many, many different terms for very valuable material.

And the subject that I brought up before is how we all were cooperating and Eastman, and the magnetic manufacturers. It was very hard to get all that data together, as Milt knows certainly. You've got eight million different answers. And I think that we're all relatively comfortable with what we're doing now. And as part of a preservation national policy, that is I think going to be very difficult for any independent, and also worldwide. I don't think that they're worldwide nearly as far along as we are in our discovering information.

So if we can figure out a way to disseminate what we already know, and mostly agree on, as well as figure out a way to standardize these terms. And even if it's a glossary where everybody's experiences--if there are eight different types of definitions for the one element or term--it would be very, very helpful to, on a centralized basis, put that out.

MR. WATTERS: We'd be happy to volunteer ours.

MR. GARDINER: I'd be happy to give you mine too and then we'd confuse everybody.

MR. CHASMAN: This question is in varying degrees applicable to the whole panel. And it's this: Most of your companies control a great many older titles, which are just beginning to fall out of copyright protection. Do you have an opinion, an attitude, a recommendation, as to how these films should be regarded? Should there be a special extension of copyright? How would this affect your preservation responsibilities? Somebody say something.

MR. SLUSSER: I'm not sure, at least in my case, the people sitting on this panel would be the appropriate people to answer that question. I can give you an opinion in that regard, which is a rather simple one. The motivation to preserve something is often tied very strongly to the right to use it. I wouldn't want to venture any recommendations as to the best way to accomplish that, but I think that's an integral part of it. There's a moral, a romantic, a creative motivation for wanting to preserve our heritage. Most companies, most industries, are driven by economic motivations more so than emotional ones.

MR. CHASMAN: That's a sound answer.

MR. MAYER: I don't know how you can say that, Dan. [Laughter.]

MR. SLUSSER: It was easy, Roger. [Laughter.]

MR. MAYER: I think that the solution, David, to your question, is to urge everyone on to full preservation of all film prior to the time they lose copyright protection. And if we do that it will not become an issue. What you, of course, are saying is absolutely true. And there are films falling out of protection. And if we could get an extension of this protection, the economic advantages of spending the money certainly would be much more forthright. We would welcome that, obviously.

We're completely motivated to get any additional protection we might possibly be able to get. I do, however, point out to you that we have protection in other countries of the world, sometimes even when we are beginning to lose our--or in fact lose--our protection here. So that would motivate us to continue preservation efforts. But we do get that argument from time: "Oh well, what the heck, only two years to go, why bother?" I've heard that said in priorities meetings as an example. When somebody is trying to set their priority, that if it's only a couple of years to go, "why bother."

So I would suggest that it would be very helpful. But the main thing is if we thrust forward and get this stuff protected, then it will not become an issue. And secondly, that where it is an issue a proper study of other reasons to protect the film will probably result in your coming to a decision that you should protect it anyway.

CHAIRWOMAN KANIN: From what you've all said, are we to assume that you would all be willing to list your holdings and information about your holdings for the use or for the information of each other, and for collectors, and for the archives and all interested parties? Is that what we're hearing?

MR. SLUSSER: Fay, I think what you're hearing, at least from me, is that I think it's essential that we are able to document what is available from all sources, be it educational institutions, studio archives, private collectors, or whatever. The point that was made, and I think made very strongly, is that there appears to be a lot of duplication by institutions that are spending either foundation money or other money to do these projects.

The standardization of the information, number one, has to happen before the sharing can occur. I believe, for my case, I can tell you I would be more than glad to share the information.

MR. GARDINER: Same thing. I think it's a qualified yes in the sense that it depends on how it's cataloged, how it's done, where it goes. And then how it's

redisseminated. But obviously there's a point where there's a brick wall that everybody will run into if this information is not shared at some point.

MR. HUMPHREY: Sony's point of view too, we would share whatever information is valuable. The only thing I'd warn is that the information gets complex. We have a very large library, but in some of the titles we have limited ownership, rights expire at certain times, at different points of time in different territories and different mediums, as I mentioned earlier. So that's important also.

CHAIRWOMAN KANIN: And that would be part of the information that would be valuable for all to know. Besides yourself.

MR. HUMPHREY: If we had all that information ourselves we would be a very efficiently run company.

CHAIRWOMAN KANIN: Whatever you do know.

MR. HUMPHREY: We're also still in the process of pulling together all of our inventory and data. We haven't completed our process yet. We still have three years to go.

MR. MAYER: We would absolutely share all the information. I would like to point out, however, that in some cases the information to be shared could be subject to a critical and negative reaction by people. It is extremely easy to take a look at what somebody else is doing, and critique it, and say, "oh, I didn't know they didn't do that, and I didn't know they did it that way." And start pitting one faction against the other and so forth.

In the best of all possible worlds, where people were wonderful, there would be no such negative implications. It is possible, people share information of this kind and they're all trying to top one another one way or another, to show how much better they are than somebody else, or people that are interested in film preservation want to use this information in order to criticize what's being done. It would be a shame. However, regardless of that caveat, yes, we would share the information and hope that people would use this information in a positive manner.

CHAIRWOMAN KANIN: Because that certainly would be the best tool to avoid the duplication that you were all talking about. If you shared it and if the archives shared theirs, we would know where everything is and what's going on, and we would avoid a lot of useless spending. So that's very encouraging.

MR. MAYER: I think you'd also zero in on where the problems are.

CHAIRWOMAN KANIN: Right. Quite quickly. I have one other question, if I

may. I read somewhere in the material we had that Warners was trying to find soundtracks by asking collectors. And we had an experience with that--at the Academy Foundation. Actually it was the impetus to restoring *A Star is Born*, because in that search, Warners had found the complete soundtrack to that film. And that was a great help for us in finding visual film segments and in doing that restoration.

What has been your experience with that and how is that useful in the whole picture?

MR. GARDINER: Well, it was mentioned here earlier; the amnesty question came up. And I believe it was Phil who said that these people are afraid to come forward because they're going to get arrested. Whether or not [this is true], those legal issues are, I think, are very sensitive. What our success has been, *A Star is Born*, as you know, was supervised by Ron Haver. And there was a lot of restoration, a lot of research that was going on.

Our experience with other things has been on essentially the two pictures that come to mind, *Rebel Without a Cause* and *East of Eden*. And what happened was, it just so happened that the Library for copyright reasons had the magnetic prints of these pictures. And that's where we found most of our sound. Because it was gone from everywhere else.

The collectors heard about that. We said that we would collaborate as much as we could. We set up all sorts of suggestions about "leave it with a locked door and we'll send you back the key" and all that sort of stuff. It worked to an extent.

But then we always hear, I think all of us hear the same thing, which is that somebody has a blank of something. It's the version of *Gypsy*; it's the version of *Damn Yankees*, it's this; it's that. And I think that one of the things, going back to Milt's question on a preservation plan, if there's a way, and, obviously again, it's very sensitive because of the legal issues, the MPAA, etc., etc., etc. But if we could figure out as maybe part of a central database, or central sharing of information on a limited basis, a way to include these people and figure out a way to resurrect this material, it would be very helpful.

I know it can be done. It's just very, very difficult to do for all the reasons. And frankly, even with the collectors cooperation on those two pictures, the basis was the prints on deposit at the Library.

MR. WATTERS: We found that for the most part private collectors have been very helpful. There pretty much has been amnesty because the titles that we're really talking about are titles that are so old they can give us any story in terms of how they got it and we'd probably believe them. Because most of those people aren't even alive anymore.

But for the most part, they've been very cooperative. In a lot of cases we've tried to approach private collectors through educational institutions because it seems whenever--and this is not always the case, maybe it's an exception--whenever the name Universal is attached to a piece that we need from a private collector, suddenly there is a very expensive price that goes with this piece. And you then lose the sort of spirit of preservation and the privateer comes into play. So we found a lot of cases that that's happened to us also.

MR. GARDINER: We actually were in that situation where that happened to us. And even though there would have maybe been an agreement, there was a back away just out of fear. Regardless of whether there was going to be any money exchanged or not. That's where this issue of "should I or shouldn't I" comes into play.

CHAIRWOMAN KANIN: So the amnesty thing would be a very good thing, if we could ever achieve it.

MR. GARDINER: Yes.

MR. MAY: We've had quite--a few quite nice things come forth from collectors, primarily through the UCLA Archive, who holds a lot of Warner material. And people have come forth to UCLA and said we have this. And we have cooperated with UCLA in the preservation of it.

And in another case, simply a private collector who had a thirty-year-old 16mm print of a picture that was better than we can provide just came along and said I've got it. It isn't a lot though. We have gone more to saying "thank you, we are happy to give you a cassette or whatever of what you helped to provide."

MR. TABB: Dr. Billington?

DR. BILLINGTON: On the question of sharing information, if you're going to make vast national efforts to collate and do these things, it's important to not only have just sort of a general agreement, but specific knowledge of what the limitations of the exercise would be. For one thing, on copyright, that's all publicly available from us, from the copyright office. So that's not a big problem.

But I wanted to ask the more realistic question of what are the other kinds of information that you would not want to divulge to such a thing? What's the studios' position on that? In other words, you agree in principle, but when it comes to practice, are there some categories of things you would not want to divulge about your holdings?

MR. SLUSSER: I think quite frankly that the answer to that is probably yes and no. Until we start to get in it, until we start to--

DR. BILLINGTON: This is a matter of simple logic. It's either yes or no.

MR. SLUSSER: Well, it depends on the given time.

DR. BILLINGTON: Your answer is no then.

MR. SLUSSER: No, my answer is not no. My answer is I don't know all the issues and until such time as we're able to define all the issues, it's absolutely impossible to make a blanket statement that applies across the board.

DR. BILLINGTON: So probably no in other words?

MR. SLUSSER: If you want no, take no. If you want my answer, the answer is until I know exactly what we're talking about it wouldn't make much intelligence sense to answer a specific question, as opposed to a general question.

DR. BILLINGTON: Well, it helps to have some indication. We have a date certain by which we have to produce a plan. If you're going to recommend on the one hand that we make a vast effort, or somebody make a vast effort to inventory these things, and you who are in the industry can't give us sort of an educated guess as to whether there are significant things that wouldn't be divulged, then it's hard to assess how worthwhile such an inventory would be.

MR. SLUSSER: You can't do anything along this line until you get an understanding of common terms among all of us, because believe me there are tremendous differences, and they mean different things and would have great consequence: that's number one. Number two, I think it would be absolutely important to try just to define what it is you think are the problem areas and once we all get an opportunity to look at that, I think you'll find most of us care about preservation. And most of us want to share that information.

We would all be primarily interested in preserving our own rights, our own individual rights. It's that simple.

MR. HUMPHREY: I think from our perspective that sharing primary information about preprint elements, which is really what we're all getting at--who has an IP, who has the YCM, who has a German track, who has a stereo soundtrack. I don't see a major problem sharing this kind of information. We already share that information with a lot of people. We share that information with our clients, because they sometimes help us out in finding materials also.

So if those are the parameters, I don't see a major problem with it. The only problem may be titles as they come into the public domain, which is down the road. It's not the titles of the 1920s that really sell, it's the titles that are in the 1930s and 1940s

which are sold in deals. Those studios or those people that possess the best elements are the ones that will be able to exploit the marketplace with them.

Therefore, I think in general people may be less willing to share information on that basis in the long run. I know there are some instances now with Columbia Pictures or other studios' titles in the public domain which are being sold in the same markets. But that's only the tip of the iceberg at this point because most films are still privately owned by the studios. I think this is a long term kind of situation that needs further evaluation.

MR. GARDINER: I would say pretty much the same thing, in that I think that a program of sharing information is probably what's needed in that we all agree that the terminology is key to what it is that you're trying to identify in the information. And perhaps the--you know, previously mentioned duality of effort is the first body of information that is shared, possibly just with the Library and see how that goes. And see what the reaction is before a larger, broader, more detailed amount of information is released, would be my opinion.

MR. TABB: Go ahead.

MR. FRANCIS: I'd like to make just one comment first and then ask a question. I think the sharing of specific information is vitally important. I still come back to what I said to the earlier panel. I think if we're to stop duplication there must be some possibility of actually comparing material held in national collections with material held by the studios. We all know that sometimes the best material does not necessarily come from a negative or finegrain, sometimes it comes from a studio print or there are different versions.

It seems to me that there must be some kind of comparison before we can decide not to copy material. Records can only take you so far. But the question I really wanted to ask is this, I suppose there must be something like 200 million feet of nitrate in national collections in this country. Now we heard this morning two things I think very important.

One, was that it's important to keep nitrate because technology might change in future. We might need to copy it again. We also heard, both from archives and from the studios, that some of the preservation we all did in the seventies, we have to redo because stocks have become more sensitive; we've learned a lot about preservation.

The public archives are spending a huge amount of money on maintaining this nitrate collection, on inspecting it, etc., and making certain that it's in as good a state as possible.

Would you be prepared, if you copied this material, and were satisfied with the

results, for the national collections to destroy the nitrate?

MR. SLUSSER: I would not.

MR. MAY: No.

MR. HUMPHREY: We would not either.

MR. FRANCIS: I think this puts a very important responsibility on the national archives to maintain the nitrate because we know that we might need it again. I wanted to get that out on the table because I [think] it has to be addressed.

MR. SLUSSER: That's a very valid, very real concern. And that's the reason we have kept it all the years we have and we've spent the money to continue to maintain and inspect it.

MR. MAY: David, I think a slight variation from what Dan has just said. Black and white I would lean more toward possibly disposing of. I definitely would not dispose of any three-strip Technicolor, ever.

MR. MAYER: I'd like to make a couple of comments on this. I think there's a little bit too much certainty to these answers. The reason a lot of nitrate was in fact destroyed was that the opinion you just stated, that it should not be destroyed, was not the conventional wisdom, 10, 20 years ago. It was not the conventional wisdom because no one could figure out how to keep nitrate in a safe manner. It was not the conventional wisdom because it wasn't known that some of the conversions were not as good as they should be or that there would be some of the problems we're now having.

So although I agree with what everyone said, I think one of the problems is that it is not that certain what these results are going to be or what these policies ought to be. The amount of nitrate you now have is incomplete. It is not the nitrate backup for the libraries of the world. It's selected nitrate backup. I think everybody's looking at it now and saying, don't get rid of it, yes, it could be useable, because that's the way it looks now. But these are things that are just not that certain. You may also find it gets too dangerous to keep it. Or very costly; whatever "too costly" is I don't know. But I just think that these are not absolutely objective things; there are not absolute standards. And I think it's got to be thought about a little more than that.

We're all saying, very clearly, "keep it, that's great, that's wonderful." Because, yes, we might be able to use it at some point. And the other point I'd like to make about your comment earlier, that there should be some method of comparing the various conversions that have been made to decide which is best. Again, I'd like to say that's a subjective situation. In whose opinion?



We have been down that road an awful lot. And that is, that we will do what we think is a wonderful preservation job, which is completely subjective on our part. And we will hear from a lot of our very good friends from the archives saying, "we don't agree with that at all." [Laughter.] That should have been more blue, that should have been more--my God, I mean, we spent hundreds of thousands of dollars on a job on *Gone with the Wind*, which we thought really was quite superb, most people agree.

I can't tell you how many people wrote into us and told us that that 43rd frame in reel 7B is not what it should have been and this is the way you should do it. And we have had such discussions a number of times. So I think one of the problems to what you are--would like to have, is that if you're the one to decide which is best, fine, but it is not a term that's readily definable.

MR. TABB: John?

MR. FRANCIS: I just have one follow-up question. If we are to keep all the nitrate--the national collections are paying for keeping that at present--and if you're all saying, yes, we should keep it, shouldn't there be some way in which you should be supporting this activity financially.

This is the issue I was leading up, because this seems to be something that the national collections are really doing which benefits the studios. And I think the thing that's come out today is that we're looking after that nitrate material. We all know, we've suffered in the past from thinking we had things under control and then finding out we could do a better job.

MR. SLUSSER: David, a couple of things happened to us in the past. There was an approach a few short years ago where most of our nitrate was backed up by 16mm. This 16mm turned out not to be the right source of material for developing markets, markets that at the time we had no idea would exist. Secondly, there is a lot of technology, digital technology, on the horizon right now that could change a number of the directions that we've gone in the past or we may want to go in the future.

Based on that I don't think anybody can tell you, at least I can't, that we're prepared to change the approach we've taken, which is to continue to maintain the nitrate we have. We spend a lot of time and a lot of money doing it, because we think it's the right thing to do. We currently maintain nitrate vaults in New Jersey. It would be, in my opinion, a premature judgment at this point. If something were to occur over the next decade or so which brought a finality to that question, then I think we'd have to review it in that light.

MR. MAYER: I'd like to comment that I think we should pay when it is our obligation to do so. But in all cases where nitrate was contributed, whether to the Library or other archives, we were asked to contribute and we volunteered to do so.

And the archive wanted to expend the money to hold onto it and preserve it because they felt it was a public-spirited thing to do, or an artistic thing to do, or whatever their reasons were. And we said, "okay, if you feel that way, fine." And now you're coming back and saying, "whoops, we forgot to ask you to pay for it."

And I think that's proper that you do so. But I look at this as part of the overall economic plan of the United States as to where we should spend public money. And in effect this would be an additional tax on us and we certainly should discuss it and we certainly should consider the pros and cons of it. But I don't think any of us are ready to say to you you're absolutely right we should pay for it. I don't think we're ready to do that yet.

CHAIRWOMAN KANIN: Are we hearing that if the archive community decided to dump the nitrate because it was too expensive to maintain, would you all be happy with that? I have not heard that they're willing to do that. But since money is pressing now and we have to figure where to put it, would you all be happy if the archives should make such a decision? I don't know that they all would, but I just am wondering what you would think.

MR. FRANCIS: Let's say we would offer it back to you first.

MR. MAY: I think that's fair. If we want it, we'll take it. If we don't, then we'll tell you what you can do.

MR. FRANCIS: We'd be prepared to offer it back to you with a bill for the cost of storing it during the period we had it.

MR. MAY: Well, we're not charging you for the period that you borrowed it.  
[Laughter.]

MR. GARDINER: I'm remaining mute on this subject because I deferred to Mr. Mayer before and I continue to do so since our nitrate collection is--

MR. HUMPHREY: In terms of the Library of Congress holdings, I think Columbia Pictures has about 50% of the holdings in Dayton, Ohio. This agreement was made many years ago. What we're working on right now makes me think that I may have made a statement too absolute. We're working with the Library now to take a look at nitrate materials.

For example, what we've done is we've moved some nitrate materials to other archives, for example, British titles, we've moved those out. But there may be titles that are so deteriorated and so low on the list that no matter what technological mediums come up they will not be able to be kept. And I think we may have to make some hard decisions with our own company as to that long-term permanent storage.

I think we have to have very specific standards on that. And I agree with everybody else on the panel that I'd like to share a standard in terms of where do we make that decision of what do we destroy and what do we keep. And there has to be some real standards of measurement. Not just hearsay as to what those are. We've sort of just started with the Library to struggle with these issues in the last four or five months.

MR. MAYER: Fay, I'd like to make a comment. No, we would not be happy if that were done. We also would not be happy to agree to pay a tab that we don't even know the size of. And there might conceivably be some position in between.

CHAIRWOMAN KANIN: Thank you.

MR. TABB: John?

MR. BELTON: I've sort of been asked to ask a question, but it's my question really. Mr. Mayer, in your written testimony you used the term "national film bank." I wonder if you could talk a little bit about that and explain what you mean by the term, and how you think it might relate to our interests and the interest of the legislation that authorized this investigation here, this hearing.

MR. MAYER: One of the reasons, and the reason I mentioned it, of course, is that everybody talks about it from time to time. One of the reasons I brought it up is that I think it is part of what you're trying to accomplish. And that is, preserve our heritage. And there's not much use in preserving our heritage if it's not accessible to the public you're preserving it for. We agree with that.

The reason I mention it is that I find it to be such a practical problem. We have dealt with it. There is no national film bank. However, there is a national demand for this sort of thing. And it's not being met. And I'm hoping that through the testimony you gathered you might have some suggestions for it. I have not sat down and at length tried to come up with how one could do such a thing and what the pros and cons of it might be.

However, I am in favor of it being studied. I'm in favor of your asking about it. And I'm in favor of our commenting on it. And among the comments we would have to make is that we really don't see how it could be done, even though we think it's a good idea.

The one thing that doesn't work for us at all is to have the demands on us by the variety of archives of the United States and the world. And please understand that it is not easy for us to say yes to UCLA and no to the archives in Paris. Because we are in a worldwide business and every country has national archives, both television and theatrical. And they all want prints of everything. They certainly want prints of several

hundred pictures from every company.

And they all have the same reasons for wanting them. They want them for study. They want them for posterity. They want them in order to be able to exhibit them. They want to control how to exhibit them. It is not satisfactory to them that they borrow it from someplace else, they want one of their own. And it is not a matter of one archive, and it's not just archives.

I mean, it happens. We make a list of the archives of some of the universities in this country and national archives of one sort or another. But if you started to do this, why are you preferring Harvard over the University of Pittsburgh. They all have film programs. They all have these needs. They all want to show films. And they all want some way to have access to them.

It was certainly--you would certainly think that some sort of a national method of doing that would be a good idea. I think it requires study. I don't know exactly how you would do it. But certainly this inventory we're talking about might be a print inventory as well as a film materials inventory--we all have those inventories.

How should we handle it as a practical matter now, because those demands are on us right now? What should we do? I'm sure the rest of the panelists will comment in a similar vein. What we do is, we try to have one good print, hopefully in both 35mm and 16mm, of everything. And any reasonable demand for it, any reasonable request for it, by professionals, we fulfill.

We ask them hopefully, in many cases, to pay the transportation. We take it on ourselves usually to replace it after they rip it up, but sometimes we ask them, please could they pay for reel 2B they just scratched. You've got all those problems. You've got the problem of transportation; you've got the problem of what they do with the prints. And you've got the problem of the fact that if you've lent it to one group, you have a demand the next day by another group, and they simply don't understand why you can't make another print for them.

So all in all I think there's a need. I think it is an appropriate need. I think it would be something we could do of a very, very positive nature for study throughout the country. I'm not entirely clear how you'd do it, but I certainly think it should be studied.

And we certainly ask that our problems in trying to meet the requirements of such a thing be taken into account. Because when you own the amount of film we own and when you can think of the number of film festivals that everybody in this world would like to have tomorrow, I think you can see the size of the problem.

**DR. BILLINGTON:** I would just point out that I think behind this whole enterprise we've been commissioned to undertake, the idea to form a national policy is part of the realization in the Congress that we are headed for tough budgetary times, that's no secret to anybody.

And one thing that isn't realized I think; we think in terms of who's going to pay the bill, how is it going to be divided up. This is competing not just against other things on the social agenda, but against a whole range of preservation things. We have a hundred million items in the Library of Congress. It's the largest accumulation of recorded creativity. And sound is basically a large portion of the American memory. And all of it is on material that is--we're a throw-away society. I mean, our records, recorded sound, we haven't even talked about that. It's all--paper itself is disintegrating. All paper made since 1840 with very little exception.

So practically everything that we have, and that all other great repositories of American creativity have, is all disintegrating. The preservation problem of [modern] American creativity, particularly. The papers of the founding fathers are fine; you're dealing with vellum and parchment and high-rag content quality papers. The incunabula, you don't have to worry about them for the good old fifteenth century.

But modern America is on throw-away goods. It's a massive problem. On the public policy side, the Congress and legislators and others are just beginning to become fully aware of it. So the idea of defining some kind of rational pattern is essential. Not just so that everybody's rowing in the same boat in the same direction, but because there are all kinds of other preservation boats that one has to worry about too.

And that leads to the last question I wanted to ask the panel, which is the technological future that Mr. Rothman was engaging in a bit, and talking about the new digitized universe and one thing and another. Might it be the case that film itself is not going to be the long-term preservation media of this form of American creativity?

**MR. WATTERS:** It's possible.

**DR. BILLINGTON:** And I wondered what your thoughts about that would be.

**MR. MAY:** That may be, but nothing has come up yet that we all feel comfortable with.

**MR. HUMPHREY:** Sony Pictures may be in a different position in that Sony, our parent company, is in the business of new technologies. We are in a partnership with them. Sony is experimenting with film in the high definition area. But again, IBM, Apple, all kinds of other companies are looking at compression technologies and other information technologies, that can store the visual image and the audio image.

Right now, for example, in sound restoration we're all talking about 24-track. But I think that--not trying to sound too much like a futurist--using compact disc for storage of tracks may be not that far away. But in terms of 35mm film, it's down the road. But I think in terms of storage of materials, there will be new technologies out there that are smaller and are easy to store, especially in the area of sound.

And in film, no one has found a medium yet to represent the film image. A lot of people are talking about it.

MR. MAYER: I would like to reemphasize that in the following sentence. That is, we're all--the industry and the world--looking for technological improvement, in all areas of making motion pictures, and still photography, and all that sort of thing, for many, many years.

In every case, what has happened is film has been improved. And the rest of it, electronic and other technologies, have not kept up. And every time we've looked for an improvement in photography and all the other things that you are very familiar with, it always seems that film is the medium that will get us the best image, and from there we should go to preservation techniques of a technological nature that include tape and whatever.

I do not believe that film will become obsolete. And as far as I can tell--and as I remember you're a photographer--film as the medium to capture the image is likely to continue to be the best method to do so.

MR. SLUSSER: I have to agree totally with Roger. There is a lot of work being done on digitized scanning of film; however, we all have to remember film has been here for a hundred years; it's got a track record. We're relatively certain it will make it a few more years. We can wait a hundred years to see if some of the new technology works.

MR. MAY: Let's also consider the playback technology. Not too many years ago two-inch tape was the ultimate for television. Now you're down to Sony Beta Cam that does just as well as the two-inch tape. It's all that magic in that invisible magnetic image on the tape. Whereas film is still a physical medium that with basic light, lens, etc., can be reproduced. And 50 years from now, are we going to have the playback medium to reproduce the item that is made on videotape today?

MR. WATTERS: In terms of film as a storage medium there really is nothing out there that's been out there long enough to know. I mean, I heard compact discs might start skipping after a year or two years. And if you have a master on there, I don't know, could you lose it?

So in terms of a storage medium of film, it's been around. It's a known commodity. It's relatively inexpensive, okay, if you're talking about a release print. If

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you keep your negatives in good condition. And the release prints could be transformed into high definition. They can be scanned. There's a lot of things you can do with those release prints that are relatively low cost. There really is nothing out there with the track record that will replace film. At least not right now, not for the foreseeable future.

**MR. GARDINER:** Warner obviously, and Time Warner, is looking into every new technology available. And as you all heard about our super highway in Florida, we're actually utilizing some of it already. But what we're finding on the film side, especially in the preservation side, even these new scanning technologies like Domino and like Cineon from Kodak, the whole purpose behind them is to get film, digitize it, and get it back to film, which is very interesting. A lot of people are spending a lot of money to do it.

We're finding that everybody is still, for the far foreseeable future, saying we're going to put film in a camera and capture the image on that. Where it goes from there is anybody's guess because we've all had the conversation about glass discs are going to come out, super dense pack glass disc storage from IBM. All that. But that's more a backup storage medium. The original capture medium still seems to be film.

The way to protect film on film seems to be the right way to do it. It was mentioned this morning I believe that it costs ten times as much to do it electronically as it does to do it on film, even though it's already expensive. And the only thing I think that we're going to continue to protect, we're protecting all of our new production with the YCM separations and, as I said before, the past will be absolutely taken care of the same way.

And I think that the new technologies as far as dissemination of information will be much more readily used for people to see this material but not necessarily to preserve it. Because I think the preservation of the original will still be film-based for many years to come.

**MR. TABB:** I want to thank all of you for your useful presentations and responses. We're a little bit behind, so we need to move quickly to the next and last panel. If Mr. Luce and Ms. McLane will come forward quickly we'd appreciate it. All right. Mr. Luce, Gregory Luce, from The Committee for Film Preservation and Public Access.

**Statement of Gregory Luce, The Committee for Film Preservation and Public Access**

**MR. LUCE:** I want to thank the panel for allowing us to testify today. I know we're running late, I will try to get through our oral testimony as quickly as I can.

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16 July 1995

The Honorable Carlos Moorhead, Chairman  
Courts and Intellectual Property Subcommittee  
B 351 A Rayburn  
Washington, DC 20515

Dear Mr. Moorhead;

I would like to express my opposition to House Bill HR989, The Extension of Copyright Act.

This bill is designed to extend the current copyright laws for all intellectual property, adding additional years of protection and re-instating some copyrights that have previously lapsed.

My opposition is twofold. First, that extended copyright protection would be detrimental to academic, scholarly and literary interests. Second, that it would seriously undermine the principal of a free and open Public Domain.

HR989, while extending copyright for a handful of works in which some fiduciary interest still remains almost a century after initial publication, would also condemn thousands (perhaps millions) more works to the same rules -- even though there is no longer any fiduciary interest in these works. Publishing houses, which control the use and printing of the copyrighted materials they own, are usually reluctant to reprint works that do not sell. Yet, despite this, neither are they willing to let small press and academic groups reprint these works without paying hefty royalties. Thus, works that were published once but never reprinted (or have not been reprinted in years) may have to wait an additional 20 years before they can be made more readily available. It makes no sense to extend copyright on a work published in 1923 and never reprinted (such as R.W. Chambers book on the Medieval English poem "Widsith"), but which is still thought by scholars in the field to be an important, albeit hard to find, work. Were it allowed to go into the public domain, as it should, there is a good chance it will finally be re-issued, and hence be made more widely available.

HR989 would also contribute to a further weakening of the principal of a strong Public Domain. It has been long recognized that there should come a point at which the works of an author cease to become the property of their creator and instead become the intellectual



legacy of the people. To the founding fathers, especially Benjamin Franklin, a mere decade or two was considered adequate (hence, our laws in regard to patent protection). By the late 20th century, this concept had grown to include the life of the author plus a period of time to benefit the author's heirs. While I do not dispute that authors should be rewarded for their work in their lifetimes, I believe that HR989 is weakening the Public Domain concept by extending protection far beyond the life of the author. Would Dickens be as widely available today if Dickens' heirs still controlled his copyrights? Would Shakespeare be performed as widely if Shakespeare's heirs still demanded payment for every performance?

In 1976 we added another 20 years of protection to the then current U.S. copyright laws. In 1995, HR989 would add yet another 20-25 years. Does this mean that 20 years from now, when the publishing houses who have made millions on Hemingway and Gershwin have their copyrights once more threatened with expiration, will we again see an effort to extend copyright even further "for the benefit of the artists and their heirs"? Will free and public access to our cultural heritage be forever delayed in favor of monetary interests, and will R.W. Chambers be forever condemned to copyright limbo?

My interest in this subject is personal. I am a member of a volunteer group which routinely places Public Domain texts on the Internet for free -- available to anyone who wants them, no strings attached. My interest is mostly in academic material, primarily Medieval and Classical literature; in short, the sort of works which do not make the best seller lists and are not likely to be reprinted. HR989 would seriously curtail our efforts to make available a wide ranging assortment of works to the public. We would be unable to post anything published after 1919 (the current threshold for Public Domain), and (because certain provisions of HR989 may revive previously expired copyrights) some of the items we have already posted would have to be withdrawn.

America is a country devoted to a free and open marketplace, of which the marketplace of ideas is probably the most important. Congress has already reached a fair compromise between the needs of authors to provide for themselves and their families and the needs of the people.

Sincerely yours,



Douglas B. Killings

NATIONAL COORDINATING COMMITTEE  
FOR THE PROMOTION OF HISTORY



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**Testimony of  
Michael Les Benedict,  
Professor of History at Ohio State University**

**Regarding H.R. 989,  
a bill to amend title 17, United States Code,  
with respect to the duration of copyright**

**Under Consideration by the  
Subcommittee on Courts and Intellectual Property  
of the House Judiciary Committee  
of the  
U.S. House of Representatives  
on  
July 13, 1995**

I am Michael Les Benedict, Professor of History at Ohio State University and President-Elect of the Society for the History of the Gilded Age and Progressive Era. The following statement is made on behalf of the National Coordinating Committee for the Promotion of History, a consortium of fifty historical and archival organizations which includes the American Historical Association, the Organization of American Historians, and the Society of American Archivists. The NCC is composed of scholars who have won major book prizes and represents over 250,000 historians and archivists who are users and caretakers of the nation's historical resources and who have an abiding concern for federal policy that will affect historical research.

There is a small portion of H.R. 989 that deals with unpublished works that historians and archivist believe will have a negative impact on historical research. To allay these concerns, the National Coordinating Committee for the Promotion of History urges the Subcommittee to modify H.R. 989 by eliminating item (1) in Section 2. (c) "Duration of Copyright: Works Created But Not Published or Copyrighted Before January 1, 1978 - Section 303 or Title 17, United States Code." Historians and archivist are thus recommending that the subcommittee reject the proposed amendment to 17 U.S.C. 303, which would replace the expiration date of December 31, 2002 with that of December 31, 2012 for copyright in works created but not published or copyrighted before January 1, 1978. We do not object to the extension of terms in item (2) of this section.

Under current law, copyright in work created but not published or copyrighted before January 1, 1978 expires on December 31, 2002 or fifty

years after the death of the creator, which ever comes later. This provision covers all unpublished manuscripts, diaries, correspondence, etc., no matter when created—even hundreds of years ago. It covers, for example, the correspondence of Thomas Jefferson and that of ordinary Americans who wrote to Jefferson.

The canons of scholarly research require responsible biographers, historians, and others engaged in historical research to draw upon and quote from unpublished primary source materials. They do so both to bring the past alive and to persuade readers and scholars that their reconstruction of the past is accurate. Congress has recognized the value of making such material available to scholars and the public by sponsoring its collection and publication by the National Historical Records and Publications Commission and other federal agencies.

When Congress extended statutory federal protection to such work in the Copyright Act of 1976, it reinforced historians' ability to quote such unpublished material by subjecting it to fair use. Previously, unpublished material was protected by "common-law copyright," which did not recognize fair use. Although historians quoted such material by longstanding custom, they and their publishers bore the remote risk that whoever owned the copyright might object.

Despite Congress's intention to subject unpublished work to the same fair-use criteria as published material under the Copyright Act of 1976 (see Senate Report No. 473, 94th Congress, 2d Session, 118-19; House Report No. 1476, 94th Congress, 2d Session, 134-36), the courts have narrowly restricted the fair use of such material, in an effort to protect the value of as-yet unpublished literary manuscripts such as President Ford's memoirs and J.D. Salinger's letters. [See *Harper & Row, Publishers v. Nation Enterprises*, 471 U.S. 539 (1985) and *Salinger v. Random House, Inc.* and *Ian Hamilton*, 811 F.2d 90 (2d Cir.)]. An unintended consequence has been to jeopardize the quotation of unpublished sources in historical works. Publishers have become increasingly nervous about adhering to the traditional custom of quoting such material. There is a danger that owners of unpublished material of little intrinsic value might seek statutory damages for unauthorized quotation. Such a development would have a disastrous effect on the ability of those engaged in historical scholarship to quote traditional unpublished sources, since it is impossible to secure permission to quote from all the possible heirs to the copyright in the unpublished correspondence, diaries, and similar productions of ordinary people long deceased.

Historians and the public can tolerate this anomalous situation for the relatively brief span of another seven and one-half years. However, extending this situation for a further ten years dramatically increases the risks. Therefore, we urge the Committee not to substitute December 31, 2012 for December 31, 2002. If other proposed changes to the Copyright Act are accepted, the Act would then provide protection for unpublished work until December 31, 2002 or seventy years after the death of the creator, whichever comes later. Adhering to the current alternative expiration date will not affect any living creator nor the heirs of any creator who has passed away in the last fifty-three years. Their copyrights will still be protected to December 31, 2012 or beyond. But adhering to the present alternative expiration date will secure the ability of historians and others doing historical research to continue to educate and entertain the American public according to the traditional canons of historical writing.

We thank you for this opportunity to present written testimony for your consideration.



THE LIBRARIAN OF CONGRESS  
WASHINGTON, D. C. 20540-1100

July 12, 1995

Dear Mr. Chairman:

As the subcommittee considers legislation to extend the basic term of U. S. copyright protection by 20 years, I thank you for inviting Marybeth Peters, the Register of Copyrights, to testify. I thank you also for joining us last Tuesday to mark the 125th anniversary of the statute that centralized our national copyright registration and deposit functions in the Library of Congress -- and has made it possible to amass unparalleled collections reflecting the astonishing range of America's creativity. Bringing copyright to the Library of Congress has enabled the Library to become the greatest repository of knowledge in the history of the world and has created a relationship between the Library and its Copyright Office that has been mutually beneficial.

I am writing to stress that the American library and education communities have a deep interest in copyright term extension. These institutions face special problems in confronting technological opportunities and understanding their implications for copyright protection. While not caused by term extension, these concerns are heightened by the prospect of an extension. I want to express the willingness of the Library of Congress and the Copyright Office, in particular, to work with these communities and with the Congress in trying to craft solutions to these problems.

Today the nation faces probably the greatest challenge ever in keeping our copyright laws and practices responsive to changing technologies. Our success in meeting these challenges will depend on whether we keep our focus on the broader social goal of copyright -- the promotion of the public interest through the furtherance of creativity and the dissemination of knowledge -- as well as on the need to protect intellectual property.

Technology now offers our hard-pressed libraries and educational institutions unprecedented new opportunities to allow the American people access to a wealth of information and unique historical material previously unreachable. For example, the Library of Congress's National Digital Library program is using new technology in an education-centered effort to bring the riches of our collection to users across the country and around the world.

As we take advantage of the new opportunities technology offers, we are committed to protecting copyrighted works. We have joined in several efforts to test new ways to protect copyrighted material in this new environment. For example:

- The Copyright Office Electronic Registration, Recordation and Deposit System, or CORDS, is a project that will develop and test a system for copyright registration with applications, copies of works, and copyright-related documents transmitted in digital form over communications networks such as the Internet. Digital works selected for the Library's collections will be available in accordance with authors' and other copyright owners' terms and conditions.
- Together with six other libraries, the Library of Congress is participating in a site licensing project sponsored by the Getty Art Museum whereby collections will be sent electronically to seven university campuses for use by students and professors. This effort is aimed at testing the legal and technical mechanisms needed to allow the full educational use of collections and to develop model licensing agreements.
- Working with the Association of American Publishers, the Library will select copyrighted multimedia American history materials and make them available electronically to schools and libraries, under a collective licensing agreement.

While efforts like these move forward, a more comprehensive understanding of the copyright issues involved with new technology is needed. Up to this point, the works we have made available electronically through the National Digital Library project are mainly those in the public domain: either works by the U.S. Government or those whose copyright term has expired. The proposed extension of the period of copyright protection means that material from the mid-twentieth century, which would otherwise have passed into the public domain and become available for use by libraries and other educational institutions, would not now be available to be freely shared with schools and librarians. This restriction very clearly would limit the range of historical coverage into the 20th century, from which schoolchildren will be able to learn.

One has to be concerned that too often today copyright is seen only as an economic concept, rather than as one which also fosters the growth of learning and culture for the public welfare. Our economic future clearly depends on the education and intellectual advancement of the American people which our copyright system seeks to advance; even as it seeks to reward authors and creators.

I understand the equity and foreign policy reasons for copyright extension; and I support the testimony the Register will give to the subcommittee this Thursday. At the same time, I believe that, in conjunction with this legislation, we should start to search for ways to ease the unintended negative impacts that this legislation in its present form would predictably have on libraries, educational institutions and archives.

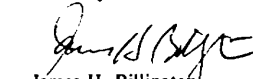
Over the past two centuries, our copyright system has been flexible enough to adapt to new technologies. This adaptation has been smoothest and most beneficial when all parties involved have agreed to work together toward solutions. In her testimony, the Register will offer the assistance of the Copyright Office in helping the committee to define

issues and identify possible solutions to preservation and fair use problems the library, educational and archival community now face and which could be intensified with term extension.

As it has done so well in the past, the Copyright Office can provide an orderly process for considering these issues through a broadened dialogue which leads towards solutions. As part of the legislative branch, the Copyright Office is in a position to give the Congress objective analyses of copyright issues. (Our present Register was herself a key participant in the consultative process the Copyright Office organized both at the time of the the reform act of 1978 and more recently with the 20-person ACCORD committee during 1993.) I believe this would be a very worthwhile effort; the Library is prepared to support it; and I am confident that the library, educational and archival communities across the country would participate in the Copyright Office's effort.

Thank you for your consideration of these concerns. My best wishes to you and the members of the subcommittee in continuing your important work.

Sincerely,



James H. Billington  
The Librarian of Congress

The Honorable  
Carlos J. Moorhead  
Chairman  
Subcommittee on Courts and Intellectual Property  
B351-A Rayburn House Office Building  
U.S. House of Representatives  
Washington, DC 20515

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28 June 1995

Mr. Jack J. Valenti  
President  
Motion Picture Association of America, Inc.  
1600 Eye Street, N.W.  
Washington, D.C. 20006

Re: Copyright Term Extension Act of 1995

Dear Mr. Valenti:

This letter responds to your request for an analysis of the pros and cons of S.483 and H.R.989, the Copyright Term Extension Act of 1995, which in general would extend the present term of copyright protection by twenty years.

The main arguments for and against copyright term extension center on its domestic effects on producers and users of copyrighted works, and on its impact on this country's balance of international copyright trade. This letter will assess only the economic impact of copyright extension upon purely domestic copyright activities.

Both the proponents and opponents of copyright term extension have raised important issues. But neither side has pursued the full domestic implications of term extension. Extension's opponents have properly questioned whether, after discounting future revenues to their present value, extension will increase incentives to produce copyrighted works; they have, however, failed to subject copyright extension's social costs to a comparable discount. Further, social discount aside, extension's opponents have overstated the social costs of copyright protection during an extended term and have understated or entirely ignored the social costs of disseminating public domain works. Finally, both opponents and proponents of extension have overlooked the significant issue of transaction costs that surrounds a lengthy copyright term generally.

1. Discounting Costs and Benefits. Opponents of copyright term extension observe that extending the term of copyright protection by twenty years will do little to increase private incentives to produce copyrighted works. On the universally accepted premise that, as measured by present value, a dollar to be received tomorrow is worth less than a dollar received today - and that a dollar to be received seventy-six years from now has a present value of pennies at most -- these opponents argue that, because the present value of a distant twenty-year stream of income will be so low, it cannot appreciably affect present incentives to create new literary and artistic works.

Thomas Babington Macaulay captured the effect of economic discounts on private copyright incentives when, in an 1841 House of Commons debate on whether to extend copyright from twenty-eight years to a term measured by sixty years from the author's death, he cited the example of Samuel Johnson. "Dr. Johnson died fifty-six years ago. If the law were what my honourable and learned friend wishes to make it, somebody would now have the monopoly of Dr. Johnson's works." But, Macaulay asked, "would the knowledge that this copyright would exist in 1841 have been a source of gratification to Johnson? Would it have stimulated his exertions? Would it have once drawn him out of his bed before noon?" While the added incentive to Johnson would be small, the added cost to readers would be high. "Considered as a reward to him, the difference between a twenty-years' term and sixty years' term of posthumous copyright would have been nothing or next to nothing. But is the difference nothing to us? I can buy Rasselas for sixpence; I might have had to give five shillings for it.... Do I grudge this to a man like Dr. Johnson? Not at all.... But what I do complain of is that my circumstances are to be worse, and Johnson's none the better; that I am to give five pounds for what to him was not worth a farthing."

This argument is valid, so far as it goes. But it does not go far enough. The beneficial effect of an extended copyright term on private incentives should be discounted to present value; but so should the social costs of extension. Taking the present as the starting point, it is necessary not only to discount monetary incentives to their present value, but it is also necessary to discount the future social costs -- whatever they may be -- to their present value. An extension to life plus sixty years would have been worth less than a farthing to Dr. Johnson; but so, properly discounted, would the present social cost of such an extended term.

In short, the error in comparing present -- and low -- incentive benefits with future -- and arguably high -- social costs is that it mixes apples with oranges. Presently valued private benefits can properly be compared only to presently valued social costs. In dollar terms, the result of that comparison is that the extension of copyright term is a standoff



for consumer welfare, the minimal effect of extension on private incentives cancelling out the similarly minimal effect on social costs.

The comparison of discounted private benefits and social costs becomes more complicated -- and important -- in the case of motion pictures. The great majority of motion pictures fail to repay their budgets and motion picture companies must rely on profits from blockbusters and even medium successes to balance these losses. By increasing the value of their libraries overall, term extension can give them revenues to produce new films during the extension period. Further, companies are more likely to invest resources in creating sequels or remakes of existing works if they know that the expiration of the copyright in the original work is more than twenty years in the future. If a work is about to fall into the public domain there is much less incentive to make a derivative work since any rights in underlying works will soon become -- in effect -- non-exclusive.

2. Effect of Extension on Public Access. Some opponents have argued that copyright term extension will diminish the future dissemination of copyrighted works. The more alarmist of these opponents speculate that copyright owners will suppress their works in the extended term. Opponents with a better grounding in economics argue that copyright during the extension period will result in higher prices for copyrighted works than consumers would otherwise have to pay. The first argument is plainly wrong; the second, though not inherently wrong, is more complicated than its supporters acknowledge.

a. The Suppression Fallacy. Copyright owners are by and large in business to make money. This means that if they are not exploiting a copyrighted work themselves, and someone else has an interest in doing so, they will happily license that use at a price. To be sure, copyright owners "suppress" dissemination over a short period in order to obtain the rewards of price discrimination. This is why a motion picture company will, for example, first release a film to movie theatres where the admission price is highest; six months later it will sell videocassettes to video stores where viewers can rent them for less; pay-per-view will come later and, as much as three years later, the film may appear "free" on network television. But, once this brief period of staged exploitation ends, the copyright owner will have every incentive to license uses that it chooses not itself to exploit. The few instances that these alarmists cite as evidence of suppression are the exceptions that prove the profit-maximizing rule.

b. Price and Quality Effects in the Extended Term. In theory, at least, opponents of copyright extension are correct to observe that the price charged consumers for a work will be higher if copyright subsists in the work than if the work is in

the public domain. But theory does not always prove true in practice, and it is entirely plausible that the exploitation of public domain works will result in comparable, or even higher, prices to consumers. First, while continued copyright protection may result in higher prices than would otherwise obtain, the real question is how much higher prices will be in the extended term. Second, the marketing investment devoted to the exploitation of public domain works will necessarily generate costs that are not generated in the exploitation of copyrighted works. Exploiters of the public domain will pass these costs on to consumers.

Unlike patented pharmaceuticals, copyrighted works are highly substitutable. A motion picture company that seeks to charge \$129.95 for a videocassette of a popular action-adventure film will quickly discover that most of its prospective buyers will choose a competitor's lower-price action-adventure film instead. To survive in the marketplace, the motion picture company will lower its price to meet the competition. The present migration of videocassette distribution from sales for rental by consumers to sales for purchase by consumers has been accompanied by a drop in retail prices of videocassettes from \$69.95 to \$14.95 -- clear evidence of competition's effects and consumer demand. In short, because copyright owners will be forced during an extended term to compete, not only with other copyrighted works -- including contemporary movies -- but with works in the public domain, they can be expected to set prices well below "extortionate" levels.

Nor is it clear that, during the proposed extended term, consumers will pay less for public domain works than they would if those same works remained in copyright. Motion picture copyright owners can be expected to retain -- or license -- the high quality master prints of their works and will be able to draw on the reputation for quality that has historically attached to such trademarks as Disney, MGM/UA, Paramount and Warner Bros. Even if exploiters of the public domain can match the quality achieved through master prints, they will need to invest in marketing programs that identify their products with high quality in the minds of consumers, and in differentiating their products from those of competing public domain products. As in the case of advertising expenditures generally, they will pass these costs on to consumers.

Whether or not exploiters of the public domain will charge lower prices for their product -- and they may not -- their products can be expected in many, if not most, cases to be qualitatively inferior to the original works they copy. The continuing print degradation of it's a Wonderful Life, as annually broadcast over television, was a salient example. Lower quality represents no less a social cost than higher prices. Further, as we move into a digital age that will facilitate high-quality copying, motion picture companies will have little

incentive to invest in converting their masters to digital format if they know that this will expose their works to unlicensed knockoffs.

3. Transaction Costs. Although the argument against copyright term extension finds little, if any, support in the economics of discounting or in price theory, it does draw some support from a third phenomenon, not addressed by either side: the problem of transaction costs. The longer a copyright term endures, the more difficult it will be for a prospective licensee to identify the copyright owner from whom it must obtain a license to exploit the work. The costs of seeking out these owners many years after the work was first published, and the increased risk that clearance has not been obtained from every interest holder, may well deter the exploitation of copyrighted works in the extended term; indeed it probably has that effect under the existing, Berne-mandated copyright term of the present law.

The ideal solution to the problem of transaction costs would be for the Copyright Act to borrow a technique that state legislatures have widely adopted for ancient real property interests through so-called marketable title acts. Marketable title acts address the transactions cost problem posed by the existence of real property interests that, created in the distant past, may have lost their value to their original owner but continue to impair transactions. Marketable title acts eliminate such valueless interests unless their owner periodically records a notice of its intention to preserve the interest, and identifies where the owner can be located for purposes of negotiation. As a consequence, only real property interests that retain their value will continue to exist.

Although the 1976 Copyright Act contains no provisions comparable to those of marketable title acts, two phenomena under the Act may approximate the effect of marketable title acts to preserve only those interests that have continued value and to facilitate identification of the parties with whom prospective licensees must negotiate. First, very few copyrighted works will continue to enjoy popular appeal more than seventy-five years after they were first published. For the few works that retain economic value in the marketplace, the copyright owner will have every incentive to exploit the work during the extended term by itself, or through licenses, and can be counted on to make its interest known in the Copyright Office records.

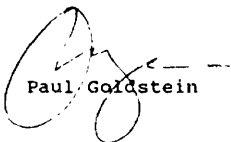
Second, and at least in the case of motion pictures, many if not most of those works that continue to enjoy a commercial market in the extended term will have been created as works for hire: the work's original corporate author can be easily identified through its initial registration or through subsequent recordation of copyright transfers in the Copyright Office. At

least in the case of these works, the costs of tracking down an author's heirs three generations after the author's death will not hobble prospective licenses.

In sum, and on balance, the case for extension of copyright term is stronger than the case against extension: (1) although copyright term extension will only minimally enhance private incentives to produce copyrightable works, extension's effects on public access will be comparably low; (2) private and social discounts aside, the increased present revenues that copyright libraries would generate from foreign sales can be expected to increase the domestic production of new works; (3) the argument that consumers will pay less for works if copyright is not extended is equivocal at best; (4) extension of copyright seems likely to ensure consumers access to high quality copies of older works at prices comparable to those of other works in the marketplace; and (5) the problem of transaction costs -- endemic to any copyright term that spans more than a single generation -- although far from trivial, may be at least partially resolved by the economic incentives that owners of valuable works will have to keep their works easily accessible for exploitation in the marketplace.

If anything in this letter requires clarification or amplification, please do not hesitate to call on me.

Cordially yours,



Paul Goldstein

**THE CATHOLIC UNIVERSITY OF AMERICA**

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**M E M O R A N D U M**

**TO:** Jack Valenti  
**FROM:** Shira Perlmutter  
**RE:** Proposed Extension of Copyright Term  
**DATE:** July 10, 1995

This memo evaluates and responds to the arguments of opponents of the proposed 20-year extension of the U.S. copyright term. I address both the arguments calling into question the benefits to the public from such an extension, and the arguments setting forth the perceived negatives.<sup>1</sup> In doing so, I examine the impact of the extension in the case of motion pictures. In various respects, it appears that the benefits from extension would be particularly great, and the negatives would be relatively minor.

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<sup>1</sup> I do not address the issue of ownership--i.e., in whom the extended term of protection would vest. Since the current versions of the bill simply add 20 years to the existing copyright term, it appears that the extended term in existing works would belong to whoever owns the copyright on the date of enactment. If the author has assigned all rights, the grantee rather than the author would therefore be entitled to the extra 20 years. While arguments may be made on both policy and constitutional grounds that Congress should vest the extended term initially in the author, such a change in the legislation would have little effect on the motion picture industry. Motion pictures are generally created as works made for hire, making the studio the author and the initial copyright owner under U.S. law. See 17 U.S.C. § 101 (definition of "work made for hire"); § 201(b).

### The Proposed Legislation

Under current U.S. law, the duration of copyright protection varies depending on when the work is created and by whom, and when it is first published. Works already under federal copyright protection as of January 1, 1978, the effective date of the 1976 Act, are potentially entitled to a total term of 75 years from their year of first publication.<sup>2</sup> For all other works (excluding those that had fallen into the public domain before January 1, 1978), the basic terms are as follows: (1) for works created by an individual author, the author's life plus 50 years;<sup>3</sup> (2) for works made for hire, anonymous or pseudonymous works, the shorter of 75 years from first publication or 100 years from creation.

The Copyright Term Extension Act of 1995<sup>4</sup> would change all of these terms in the simplest manner possible: by adding 20 years to each number.<sup>5</sup> Thus, the basic term of copyright would be life plus 70; copyright in a work made for hire would endure for the shorter of 95 years from publication or 120 years from creation. The total potential term for works copyrighted before 1978 would be 95 years from first publication.

### Summary of Arguments of Opponents of Extension

Those opposing the term extension describe U.S. copyright law as a delicate balancing of authors' interests in protection with the public's interest in free use, and assert that the

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<sup>2</sup> 17 U.S.C. § 304. The total term is only "potential" because until 1992, entitlement to the last 47 years depended on the timely filing of an application with the U.S. Copyright Office. See 17 U.S.C. § 304 (1978), amended by Copyright Renewal Act of 1992, 106 Stat. 264, Pub. L. 102-307 (June 26, 1992).

<sup>3</sup> *Id.* §§ 302, 303. There are several complications to this basic term. For joint works created by more than one author, the term is calculated based on the life of the last surviving author. § 302(b). For works created but not yet published as of January 1978, the term is extended by two grace periods: the copyright will last at least through the year 2002, and if the work is published during that time, it will last at least through the year 2027. § 303.

<sup>4</sup> S. 483; H.R. 989.

<sup>5</sup> The single exception would be the addition of only 10 years to the first grace period in § 303, extending it from 2002 to 2012. See n. 3 above.

present balance should not be disturbed unless it is clear that the benefits to the public outweigh the costs.

Opponents acknowledge that some benefits may result from the proposed extension, but discount these benefits as insubstantial or speculative. They also note that many of the same benefits might be predicted from any extension of copyright term, whether for 20 years or 100. On the other side, they see significant negatives, and conclude that the potential benefits of the legislation have not been shown to outweigh its potential negatives.

The ultimate questions are the accuracy of this assessment of the relative strength of the benefits and costs, and the level of burden of proof that should be placed upon proponents of the legislation to show that the benefits outweigh the costs.

### Analysis

#### Benefits from extension of term

The direct economic impact of the proposed extension is clear: American copyright owners will receive income from any exploitation of their works for an additional 20 years. The income will come from exploitations abroad as well as within the United States; it is this international trade issue that drives the pending bills. As of July 1 of this year, the European Union requires all member countries to provide a basic copyright term of life plus 70.<sup>6</sup> Because members must apply the equivalent of the Berne Convention's rule of the shorter term,<sup>7</sup> however, the

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<sup>6</sup> See Council Directive 93/98/EEC of 29 October 1993. The Directive contains a special rule for cinematographic or audiovisual works, extending the term of protection to 70 years after the death of the last of the following persons to survive: the principal director, the author of the screenplay, the author of the dialogue, and the composer of music specifically created for use in the work. *Id.* Art. 2(2). *Cf.* Art. 7(2) of the Berne Convention for the Protection of Literary and Artistic Works, which allows members to provide a special term for cinematographic works instead of the ordinary minimum standard of life plus 50, consisting of 50 years from the date the work was made available to the public, or if it is not made public within 50 years, 50 years from its making.

<sup>7</sup> Under the "rule of the shorter term," an exception to Berne's general rule of national treatment, member countries are not required to provide a term of protection for any foreign work that is longer than the term provided by the work's country of

additional 20 years of protection will not be granted to works from countries that still adhere to a term of life plus 50. Accordingly, unless the United States extends its term of protection, U.S. works will lose 20 years of potential income that would otherwise be available from exploitation within the countries of the European Union.

The financial benefit for U.S. copyright owners is thus quite real. For those works that are still exploited more than 50 years after the author's death, or more than 75 years after publication, a stream of income will continue to flow. The volume of that stream will of course depend on the popularity of the work, and the extent to which it can compete in the market with works created in subsequent years. Those works most likely to have enduring commercial value at that point in their lives are probably classic motion pictures and musical works.

The opponents of the pending bills question the extent to which the benefit for copyright owners translates into a benefit for the public generally. They point out that the purpose of copyright in this country is not simply to reward authors for their creation, but to further the public interest by promoting the progress of knowledge and culture.<sup>8</sup>

There are several respects in which the public will benefit in turn from the benefit to copyright owners. Four primary benefits to the public can be identified, two domestic and two international: (1) the extended term will provide authors with a greater incentive to create new works; (2) copyright owners will have a greater incentive to disseminate their works in high-quality form; (3) the United States' balance of trade with Europe will improve; and (4) standardization of the term of protection will facilitate international commerce in copyrighted works.

#### 1. Incentives to create

The most obvious public benefit from extension of term is a direct furtherance of the purpose of copyright law: to spur the creation of more works of authorship, thereby promoting the progress of science and the arts. Authors will have a greater incentive to invest time and money in producing new works, since the opportunity for return from those works will be greater. Similarly, more funds received from the exploitation of existing works will be available to spend on producing new works.

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origin. Art. 7(8).

<sup>8</sup> See U.S. CONST., Art. I, § 8, cl. 8. Probably the most quoted citation for this well-established point is Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975).



Of course, the marginal difference in the value of any particular work may be small; many works exhaust their marketability in a relatively short period after creation and publication. Nevertheless, for enduringly successful works, the 20 years may make a real contribution to the copyright owner's total return. Motion pictures in particular may become classics, whether due to aesthetic merit, the appearance of film stars, or an evocative portrayal of an era. The video rental business has made this continuing value evident; every neighborhood video rental store stocks an entire section of old movies. These older works are becoming even more accessible to the public through emerging markets made possible by new digital technology, such as video on demand.

Moreover, focusing on the incremental value of the extension for any single work overlooks an important fact: many copyright owners own rights in multiple works, from the photographer with a voluminous portfolio, to the music publisher with a catalogue of songs, to the movie studio with an extensive film library. For these copyright owners, a small increase in profit margin for each of numerous works will cumulatively add up to a significant sum, which can be invested in further creation.

Those opposing term extension point out that the Copyright Act gives authors the ability to terminate transfers of copyright rights, and recapture those rights, 35 years after the transfer.<sup>9</sup> As a result, they argue, the additional 20 years will have no value to the author, since this extended portion of the term can be recaptured at the same time. They reason that this will make the 20-year longer grant worth no more to its purchaser than the current shorter one, and will mean that the author cannot obtain a higher price for a grant of rights for the extended term.

This argument has little validity. As a preliminary matter, for works made for hire such as commercially produced motion pictures, there is no termination right.<sup>10</sup> Even for other works, the extra 20 years will add some value. At the time the

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<sup>9</sup> 17 U.S.C. §§ 203. See also § 304(c) (allowing termination of transfers in works protected by federal copyright as of 1978 at the end of 56 years of the copyright term).

<sup>10</sup> See 17 U.S.C. §§ 203(a), 304(c). It should also be noted that termination rights will not always be available, even for works otherwise eligible. In the case of works already in existence, the 5-year window for termination may already have passed. *Id.* § 304(c)(3). As to future works, grants made by the author's heirs, rather than the author herself, cannot be terminated. § 203(a).

rights are purchased, no one knows whether the author or her heirs will end up exercising the termination right. If not, the grantee's property interest will be greater. A contingent property interest of 70 years, for example, is by definition worth more than a contingent property interest of 50 years.

Even more important is the enhanced value of the terminated interest in the event that the author or her heirs do terminate. The ability to renegotiate the sale of this longer potential interest should provide additional incentive to the author as well. While the present value of any of these termination rights may be a small proportion of the total value of the copyright, it may nevertheless be significant. If the enactment in 1976 of the termination right, not exercisable for 35 years in the future, was deemed sufficient to provide an incentive for creation, an additional 20 years does not seem too remote.

Opponents of the legislation make an additional argument with respect to extension of the terms of existing works. Because these works are already in existence, by definition, no additional incentive to create them can arise. Accordingly, opponents suggest that extending the term of existing works may be unconstitutional.

In response, it may be argued that extension will lead to increased creation through incentives not directly linked to each individual work. Authors will receive more money from the exploitation of their existing works, giving them greater wherewithal to create new ones. Moreover, as part of the implementation of an overall scheme that does provide adequate incentives, this particular application may not in itself have to do so. The Constitution should not be interpreted so as to block Congress from enacting a single rule applicable to all works, where the rule as a whole provides incentives to create.<sup>11</sup> This was the judgment made by Congress in the past, including in 1976, when it extended the total potential term of then-existing federal copyrights from 56 to 75 years in order to approximate the newly adopted basic term of life plus 50.<sup>12</sup>

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<sup>11</sup> The simplicity of a single rule is in itself a benefit to the public in determining when works are free to be used. The current system of differing terms, based on historical evolution, is complex; an across-the-board modification such as that proposed by the pending legislation would avoid adding to that complexity.

<sup>12</sup> See 17 U.S.C. § 304; COPYRIGHT LAW REVISION PART 6: SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW: 1965 REVISION BILL, 89th Cong., 1st Sess. 94 (House Comm. Print 1965).

## 2. Improved dissemination

The public will benefit in another meaningful respect from the extension of term for both existing and future works. During the extra 20 years, copyright owners will have a greater incentive to take whatever steps may be necessary to disseminate their works in high-quality form if they can retain control over reproduction and distribution, and exclude free riders from the market. The availability of more works of authorship in superior condition also furthers the progress of science and the arts. The grant of copyright in this country represents a legislative determination that copyright protection on balance benefits the public by fostering rather than inhibiting the dissemination of works of authorship.

Those opposing term extension characterize this benefit as based on anecdotes rather than actual evidence. They point out that multiple editions of novels and plays in the public domain are currently available, including some of high quality, and argue that copyrighted works do not require extensive investment in development like patents. The validity of this argument depends on the type of work involved. Where the work can be easily and inexpensively reproduced in satisfactory form, copyright protection may not increase its availability; market demand can be met by multiple competitors. Traditional literary works, for example, can be published in high volume, low cost paperback form. Other works require expensive or labor-intensive maintenance, restoration or distribution. For these works, continued copyright protection can induce owners to invest in making the work available to the public in high-quality form. This is particularly true when the cumulative impact of an increased return from numerous works is considered.

In the case of motion pictures in particular, an additional 20 years of protection would give studios a greater financial incentive to make the investments needed to restore these old works and to update them for use with modern technology. Technology continues to evolve, and physical copies of movies deteriorate. Substantial expenditures are necessary to digitize movies, or to add the equivalent of Dolby sound. For those old movies nearing the end of their copyright term that are not proven blockbusters, the investment may not be worthwhile. Extension of term should therefore result in the public having access to a greater variety of old movies in better and more easily accessible condition.

Opponents also note that even with copyright protection, works that have small markets may not be worth an investment in high quality reproduction or distribution. This may be true, but it does not undercut the fact that more works will be worth the investment with copyright than without it.

Finally, opponents describe the purpose of the public domain as allowing free access, so that copies may be made and distributed without limit, whether high or low in quality. This argument begs the question of whether increased dissemination of high-quality copies will in fact occur if copyright is extended, to the benefit of the public.

### 3. Balance of trade

The extension of copyright term should also improve the United States' balance of trade. Opponents assert that the effect of extension on the balance of trade is not clear, and needs to be further investigated. Today, however, the volume of U.S. copyrighted works exploited in Europe far outweighs the volume of European works exploited here. This has been true for decades, and there is no reason to believe that the situation will change in the foreseeable future. One can therefore predict that more income will flow into the U.S. from Europe during the extra 20 years of protection than will flow out to Europe. This is certainly true of motion pictures. The American movie industry has captured the imagination of the public around the world, and dominates the global motion picture market.

A positive balance of trade is good for the American public as a whole. Again, it may be seen as furthering the constitutional purpose of copyright in an indirect sense: more resources will be available to authors and other copyright owners for further creation (and without financial expense to the U.S. public). These resources from abroad can help to nourish a broad array of strong and flourishing domestic copyright industries.

### 4. International standardization

On an international level, the proposed extension will bring U.S. law into line with the law of many of our major trading partners, the members of the European Union. Opponents point out that life plus 70 is not yet the generally accepted international standard. Nevertheless, with the E.U. taking this major step, the longer term may prove to be the wave of the future.

Standardizing the term of copyright around the world would benefit the American public and further the fundamental purpose of copyright by facilitating international transactions in copyrighted works. With differing terms, the same work might be protected in one country and not in others, causing difficulties

for multiple transnational distribution.<sup>11</sup> This concern was an impetus for one of the major changes made in U.S. law by the 1976 Act: the move from a fixed term of protection of 28 or 56 years from publication, to the current basic term of life plus 50.<sup>14</sup> Similarly, the Council of the European Community has now chosen to harmonize the term of protection because it views consistent terms as critical to the smooth functioning of an international market.<sup>15</sup>

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<sup>13</sup> Application of Berne's rule of the shorter term could in theory alleviate this problem, assuming that each work would be protected in all Berne countries for the term offered in its country of origin. See above, n. 7 and accompanying text. But there are at least two reasons why inconsistent terms would still persist. First, Berne members outside the E.U. are not required to apply the rule of the shorter term, and not all have chosen to do so (the United States, for example, provides the same term of protection to non-U.S. Berne works as to all other works). Second, even under the rule of the shorter term, if the country of origin provides a longer term of protection than the country where protection is sought, the latter country may apply its own shorter term. This is the approach of the E.U. directive, under which member countries will apply the new term of life plus 70 to non-Community works whose country of origin exceeds that term. Council Directive 93/98/EEC of 29 October 1993, Art. 7. As a result, a given work will not enjoy the same term everywhere; it will be protected for a longer period in its country of origin than in the E.U.

In any event, from the perspective of transactional fluidity, standardization of term is preferable to application of the rule of the shorter term. The rule of the shorter term requires research into the domestic law of each work's country of origin to determine how long the copyright endures. If terms are standard everywhere, the ability to use a work without permission can be determined much more quickly and easily.

<sup>14</sup> See H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 133-36 (1976).

<sup>15</sup> The second paragraph of the preamble to the Directive states: "Whereas there are . . . differences between the national laws governing the terms of protection of copyright and related rights, which are liable to impede the free movement of goods and freedom to provide services, and to distort competition in the common market; whereas therefore with a view to the smooth operation of the internal market, the laws of the Member States should be harmonized so as to make terms of protection identical throughout the Community." Council Directive 93/98/EEC of 29 October 1993.

The problem of inconsistent terms has become even more pressing with the development of new digital technology. In the era of the Global Information Infrastructure, borders are entirely permeable, making it critical that works be protected at the same time everywhere.<sup>16</sup> The House Report to the 1976 Act in this respect was prophetic: "Copyrighted works move across national borders faster and more easily than virtually any other economic commodity, and with the techniques now in common use this movement has in many cases become instantaneous and effortless. The need to conform the duration of U.S. copyright to that prevalent throughout the rest of the world is increasingly pressing in order to provide certainty and simplicity in international business dealings."<sup>17</sup>

Opponents of the legislation argue that while harmonization of term may be desirable, it is not sufficient reason to change U.S. law. They urge that the United States should act as a leader in the international community, not a follower of the E.U.'s agenda. Since our copyright system has been so successful, they suggest that we should persuade Europe to adopt our approach to copyright. The choice of term, however, has little to do with any dichotomy between basic philosophies of copyright, such as natural rights versus economic incentives. The argument is also based on the premise that extending the copyright term would make the United States a follower, while refusing to do so would constitute leadership. But the United States could position itself as a leader in setting an international standard of life plus 70, working with the E.U. to persuade other countries to follow our example.

The more fundamental point is that harmonization of term provides a meaningful public benefit, and therefore should be factored into the overall balance of positives and negatives. If the balance of domestic policy is deemed to be uncertain, it would be appropriate to make the choice that achieves this beneficial international consistency.

##### 5. General arguments

Recognizing the theoretical existence of benefits from extension, opponents characterize them as merely speculative. Today there exists a body of works with ongoing commercial value, which are near the end of their copyright term. It is therefore

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<sup>16</sup> See Information Infrastructure Task Force, Intellectual Property and the National Information Infrastructure: A Preliminary Draft of the Report of the Working Group on Intellectual Property Rights 135 (July 1994).

<sup>17</sup> H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 135 (1976).

clear that real money will flow to copyright owners if the term is extended. Of course, it is impossible to predict the extent to which the overall creation and dissemination of works will increase. But this will always be the case with any proposal to broaden the protection of copyright--whether through a longer term or through a strengthening of rights. If proponents of change must prove to a certainty that a significant amount of new authorship will result, the copyright law will remain static forever.

Finally, opponents of the legislation note that the same domestic benefits could arise from any extension of term. By implication, they suggest that these benefits should not be taken into account, since there must be some limit to how long copyrights endure (as a matter of both policy and constitutionality). This does not mean, however, that the benefits are not real, or that the arguments in favor of extension are not valid. The question again is one of balance. The longer the term, the lesser the increased marginal incentives; are they still significant enough, when combined with the international benefits described above, to outweigh the increased marginal negatives?

#### Negative Consequences of Extension of Term

As with most of the arguments in favor of the legislation, the arguments in opposition could apply to any extension of term. Each one boils down to the point that all of the ordinary costs of copyright protection will last longer.

Two principal arguments are made as to why extension of term will have negative consequences: that the public will be barred from free use of copyrighted works for an additional 20 years, and that fewer new derivative works will be created. A less significant argument focuses on the prolonging of licensing problems.

##### 1. Narrowing the public domain

The argument with the most substance is based on the fact that copyrighted works will not enter the public domain for 20 more years. This negative can be seen as imposing two distinct costs on the public. The first cost is economic. In the aggregate, uses of works, whether through the purchase of copies, electronic transmission, or public performance, are likely to cost more if royalties must be paid to the copyright owners. Second is the availability cost, the risk that some works will be kept out of circulation entirely by the copyright owners.

The grant of copyright in current law already incorporates a balancing of these costs against the benefits to the public from protection. It reflects a judgment that the positive results of giving copyright owners exclusive rights outweigh the economic and availability costs. The question is whether this balance shifts during the final 20 years of an extended life plus 70 term. In other words, does the marginal increased cost to the public of waiting an additional 20 years for free access outweigh the marginal increased incentive to authors to create new works? This is not, as those opposing extension characterize it, a conflict between the interest of the public in a richer public domain and the economic interests of copyright owners; rather, it is a question of whether 20 more years of protection, which temporarily deprives the public domain of existing works, will in the long run lead to a richer public domain containing a greater number of works.

The extent of each type of cost to the public may vary depending on the nature of the work involved. As to the economic cost, it is not clear that the public always pays significantly less for works that have fallen into the public domain. Many of the costs of production will be the same regardless of the work's copyright status, and prices for copyrighted works are restrained by competition in the marketplace from other available works, including those in the public domain.

The economic cost will also be affected by the question of access. Copyright owners often own and control access to the original physical copies of their works, such as original artwork, master tapes or master prints. As a result, they may be able to require higher payment even if low quality copies are available from competing distributors. While a cheap reproduction will be an adequate substitute for some types of works, it will not be for others. Movies, for example, are markedly less enjoyable when the images and sounds are of poor fidelity.

As to the availability cost, the dimensions of the problem seem small. Copyright owners are generally interested in exploiting their works for money. Despite isolated anecdotes, situations where authors or their families seek to deny public access to works are unusual. They will be even less frequent during the extended term, more than 50 years after the author's death; strong personal feelings about a work's contents tend to diminish over time.

Censorship problems should be extremely rare in the case of motion pictures. Most movies are commercial vehicles, created as works made for hire. Thus, the copyright owners will not be censorious or privacy-conscious family members. As business entities, movie studios are unlikely to hold back potentially profitable works from public view.



A subsidiary argument made by opponents is that extension of term will cause disproportionate harm to valuable uses in the public interest: uses in the field of science and education, which draw upon older works for their content or historical significance. These are the types of uses most likely to be permitted without the copyright owner's consent, either under the fair use doctrine or under a specific exemption in the Copyright Act, as well as the most likely to be licensed at a low price. Thus, for example, noncommercial uses of reasonable portions of works for educational or scientific purposes in many circumstances will qualify as fair use.<sup>18</sup>

Motion pictures will relatively seldom be the subject of such uses. Old movies are typically used for entertainment value rather than for educational or scientific purposes. When educators wish to show movies to their students, they may be privileged to do so under the Copyright Act's specific exemption for classroom performances and displays.<sup>19</sup>

## 2. Creation of fewer derivative works

The second principal negative consequence identified by opponents is that fewer new derivative works will be created based on the works whose terms are extended. If second authors are not able freely to use these existing works during the 20 additional years of protection, but must secure consent and/or pay a fee, they may be chilled from creating. Opponents reason that the result may be a net reduction in the total creation of new works--i.e., that the decrease in creation of derivative works will surpass the increase in creation of entirely original works caused by the incentive of a longer term. This argument assumes that a significant number of second authors (1) wish to build on these older works; (2) will be either unable to get consent or unwilling to pay; and (3) will not create a different work instead (one that is entirely original, one that uses only small portions of the work, or one that builds on a public domain or more easily licensed work).

Again, the current copyright system is founded on the premise that more authorship will result from the incentive of copyright protection than will be lost from the inhibition on second authors. If more works are created than chilled during a term of life plus 50, it is unclear why that ratio would be reversed during the next 20 years. Although marginal incentives during that time period may be smaller, the need to use these

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<sup>18</sup> See 17 U.S.C. § 107; Campbell v. Acuff-Rose Music, Inc., 114 S. Ct. 1164 (1994).

<sup>19</sup> 17 U.S.C. § 110(1).

older works may also be less.

Moreover, in calculating the net effect of extension, opponents omit one critical fact from the balance: the additional incentive of an extended term inures to the benefit of these second authors as well. They will enjoy copyright in their own derivative works for a longer period of time, and may therefore be spurred to create more. This added incentive for the creation of derivative works may be particularly meaningful for derivative works that require extensive investment to produce.

Any potential loss to the public in the creation of derivative works seems particularly negligible with regard to motion pictures. Motion pictures (which are almost always derivative works themselves) seldom serve as the underlying material for new derivative works. Their only common derivative use is in remakes, sequels, dubbed or colorized versions, and parodies. As to parodies, a parody targeting the original without taking more than is necessary to achieve its parodic purpose should qualify as fair use.<sup>20</sup> As to remakes, sequels and dubbed or colorized versions, allowing continued control for 20 more years does not pose the same degree of harm as inhibiting the creation of other types of derivative works. Movie studios are actively engaged in producing such works whenever an audience exists, and the public does not seem in danger of deprivation. Indeed, more of these derivative works may be produced if the term is extended; a movie studio is unlikely to invest in a remake of a popular film when the copyright is close to expiring, leaving other studios free to produce their own remakes of the same film.

### 3. Licensing problems

Finally, opponents argue that the licensing of works often poses practical difficulties, and that 20 years of additional protection will prolong those difficulties. The problem may be particularly acute today in light of new technology, such as the creation of multimedia works, which require multiple licenses for the use of portions of numerous underlying works. But these difficulties are a function of the copyright system in general, and will continue however long the copyright continues. They are not exacerbated by a longer term of protection. In fact, it seems less likely that creators of modern multimedia works will wish to use works so old as to be in their final 20 years of a 95-year term. Moreover, the difficulties should be eased by the development of more voluntary collective licensing mechanisms as

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<sup>20</sup> See Campbell v. Acuff-Rose Music, Inc., 114 S. Ct. 1164 (1994).

well as technological solutions.

This problem too should be less serious in the context of motion pictures. These works are relatively painless to license. They are generally owned by movie studios, which are centralized in location, legally and financially sophisticated, and well equipped to handle licensing in an expeditious manner.

#### Conclusion

Extension of term, like any grant of copyright, will bring about both positive and negative consequences from the perspective of the public interest. U.S. copyright law reflects a judgment that the benefits to the public from protection outweigh the costs during the current copyright term, resulting in the progress of science and the arts. The question is whether this balance will shift when the increased marginal benefits and costs of an extra 20 years are added to both sides.

As a matter of domestic policy, the arguments on both sides of the debate could be made about any extension of term; the E.U. directive throws onto the positive side of the scales the weight of international considerations. In the past, weighing the pros and cons, Congress has repeatedly made the judgment that a longer period of protection was justified. The same concerns apply today, including the concern of the Congress that enacted the 1976 Act that consistent copyright terms are critical in a global marketplace.

While extension of term offers benefits for all copyrighted works, different categories of works may present benefits and drawbacks of differing degrees. In particular, the benefits to the public from extension of copyrights in motion pictures appear to be relatively high and the drawbacks relatively low. Because motion pictures are one of the categories of works most likely to retain value after the expiration of the current copyright term, this positive impact should be considered as a factor in the overall legislative balancing.

# Commentary

## Extending Copyrights Preserves U.S. Culture

■ BY ARTHUR R. MILLER

Beginning this summer, all member nations of the European Union will extend the length of copyright protection to the life of the author plus 70 years. Should we in America provide the same protection for our own writers, musicians, artists, computer programmers, and other creators of copyrighted items?

Some feel that we should not tamper with existing U.S. law, which provides copyright protection for life plus 50 years. But this status-quoism ignores some fundamental changes that have occurred in the 20th century.

One of the major reasons Congress originally adopted life-plus-50-years was to offer protection not only to the creator of the copyrighted works, but to his or her children and grandchildren—that is, to three generations in all. With people living longer today, an extension of the copyright term by 20 years would roughly correspond to the increase in longevity that has occurred during the 20th century.

In addition, Congress has already recognized the wisdom of extending copyright protection to match the terms guaranteed by other nations. That is exactly what Congress did in 1976 when it extended the copyright term to life-plus-50 years, in order to bring American law into line with the term then commonly recognized by other nations.

But beyond this, the main arguments for term extension are equity and economics.

If Congress does not extend to Americans the same copyright protection afforded Europeans, American creators will have 20 years less protection than their European counterparts—20 years during which Europeans will not be paying Americans for our copyrighted products. This situation would not only be unfair to creators of copyrighted works, but would be harmful economically to the country as a whole.

The export of intellectual property is growing at a tremendous rate because America dominates popular culture the world over. In 1990, America's "copyright industries" recorded \$34 billion in foreign sales of records, CDs, computer software, motion pictures, music, books, scientific journals, periodicals, photographs, de-

signs, and pictorial and sculptural works. Because the world is so eager for the products of America's copyright industries, they are one of the few bright spots in our balance-of-trade picture.

The question of copyright extension should be viewed in the larger context of bilateral and multilateral trade talks—including the Trade Related Intellectual Property Rights (TRIPS) negotiations under GATT. U.S. trade representatives have found that shortcomings in our own copyright law are used against us when we call for stronger protection for American works overseas. One can just hear the Europeans objecting in future negotiations: "How can you ask for better protection in Europe when you do not even grant the same term of protection we do?"

The need for strong copyright protection becomes more important every year as a weapon with which to fight the piracy of intellectual property. Overseas piracy of American copyrighted material has grown dramatically in recent years due to the availability of equipment that can make cheap copies of movies, videotapes, sound recordings, and computer programs. As more and more digital technology arrives on the scene, the problem will only become worse.

Indeed, China alone produced an esti-

### 'Copyright term extension makes economic sense.'

Arthur R. Miller is a professor of law at Harvard Law School.

mated \$2 billion worth of counterfeit recordings and computer discs last year. According to the International Federation of the Phonographic Industry, China now has as many as 26 factories capable of producing 62 million compact discs. China's domestic market accounts for only about 3 million discs, so the dimension of the loss to copyright owners is obvious. Unless Congress matches the copyright extension adopted by the European Union, we will lose 20 years of valuable protection against rip-off artists around the world.

It would not take long to see what harm can come from not changing our laws to

match those of Europeans. America may be a young nation, but we have the world's oldest popular culture. Many wonderful motion pictures and songs—including Irving Berlin's "Alexander's Rag Time Band"—already have lost their copyright protection. Dozens, if not hundreds, of other valuable songs and motion pictures—the legacy of American culture—also will lose their protection in the next few years. For example, if Congress does not act soon, such classics as "After You've Gone," "I'm Always Chasing Rainbows," "A Pretty Girl Is Like A Melody," "Swanee," and "The World Is Waiting For The Sunrise" will fall into the public domain, and that is only the beginning.

Commentary writer Professor Lewis Kuriantzick (Billboard, Oct. 29, 1994) asserted that when copyrighted works lose their protection, they become more widely available. At first blush, this appears logical. But, paradoxically, works of art become less available to the public when they enter the public domain—at least in a form that does credit to the original. This is because few businesses will invest the money necessary to reproduce and distribute products that have lost their copyright protection and can therefore be reproduced by anyone. The only products that do tend to be made available after a copyright expires are "down and dirty" reproductions of such poor quality that they degrade the original copyrighted work. And there is very little evidence that the consumer really benefits economically from works falling into the public domain.

Kuriantzick also denigrates the importance of long-term copyright protection by stating that "a dollar to be received 75 years from now is worth a small fraction of one cent." But he fails to see that the dollar value placed on future copyright advantages will increase more or less in proportion with the inflation rate. That is to say, if the dollar loses 90% of its value over the next 75 years, then the cost of goods and services will be roughly 90% higher in 75 years than it is today.

For all these reasons, it's clear why Congress should act. America can reap valuable benefits, at no cost to itself, if Congress enacts legislation to extend our copyright protection by 20 years. By harmonizing our laws with the EU, we can reduce our balance-of-trade deficit, encourage economic investment, strengthen our hand in dealing with intellectual piracy, and see to it that America's authors, composers, artists, and computer programmers receive the same level of protection afforded the creative people of other nations. Thus, copyright term extension makes economic sense, and it's equitable.

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JOINT STATEMENT OF THE COALITION OF  
CREATORS AND COPYRIGHT OWNERS IN SUPPORT  
OF H.R. 989, THE COPYRIGHT TERM EXTENSION ACT OF 1995

The undersigned parties, representing creators and copyright owners (collectively, the "Coalition of Creators and Copyright Owners" or the "Coalition") submit this Joint Statement in support of H.R. 989, The Copyright Term Extension Act of 1995.<sup>1/</sup> We express our gratitude to Chairman Carlos Moorhead, who has introduced this vital legislation, and to his co-sponsors. As we will show, H.R. 989 is necessary if our country is to maintain its pre-eminent position as the world's leading source of creativity, a position which gives the United States a significant trade surplus in the area of copyrights.

The current term of copyright is, for most works, life of the author plus 50 years. 17 U.S.C. § 302(a). The Copyright Term Extension Act of 1995 would extend the copyright term by 20 years for all works. We strongly support such an extension. We do so because it is

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<sup>1/</sup> We also express our support for S. 483, the companion bill to H.R. 989, and our gratitude to Senator Orrin Hatch and his co-sponsors for introducing this much-needed legislation. We are especially thankful to all the co-sponsors of both H.R. 989 and S. 483 for the broad Congressional support for copyright term extension.

necessary to protect fully United States works internationally, because doing so will enhance our nation's economy, because developments since the enactment of the 1976 Copyright Act warrant it and, most importantly, because our country should do all it can to encourage creativity generally and American creativity specifically.

#### I. THE COALITION

The Coalition of Creators and Copyright Owners represents those who create and own virtually every type of copyrighted work -- literature, drama, audiovisual works such as motion pictures and television programs, music, pictorial, graphic and sculptural works, photographs, computer software, sound recordings and architectural works. The Coalition includes commercial and noncommercial entities, for profit and non-profit enterprises, businesses and educational institutions. We would venture to say that a unanimity of view such as that we here espouse among such a broad-based group of creators and copyright owners has rarely been seen before. That unanimity of view bespeaks the importance of term extension.

#### II. BACKGROUND

The impetus for consideration in the United States of an extended copyright term was the recent adoption in the European Union ("EU") of a directive to harmonize the copyright term in all its member countries

for a duration equal to the life of the author plus 70 years. Discussions of a possible protocol to the Berne Convention have also considered the adoption of a life-plus-70-year term as a Berne-mandated minimum.

In light of these international developments, the Copyright Office undertook to study the possibility of copyright term extension in the United States. In September 1993, the Office solicited public comment and testimony.

That effort crystallized the arguments for the extension of copyright term. Early this year, Chairman Moorhead introduced H.R. 989, to extend the United States copyright term for all copyrighted works by 20 years.

III. UNITED STATES COPYRIGHT TERM  
SHOULD BE EXTENDED TO KEEP PACE  
WITH INTERNATIONAL DEVELOPMENTS

There are many compelling reasons for extending copyright term under United States law. We start with the international developments leading to a harmonized life-plus-70-years term in the EU.

A. The EU Life-Plus-70-Years Directive

One of the most significant economic developments of recent years has been the establishment of a single market in the European Union. The combined EU gross national product is about 28% of the world's gross national

product. "Viewpoints," New York Times, January 17, 1993, at Sec. 3, p. 13. The EU and the European Free Trade Area states collectively conduct about 40% of all world trade. Jehoram, Grelen and Smulders, The Law of the E.E.C. and Copyright, in Geller, International Copyright Law and Practice, § 1 at EEC-3 (1990). The EU established a single internal market effective January 1, 1993. Among the barriers to that single market -- barriers which must be eliminated -- were the different substantive provisions of each member state's copyright laws.

The most fundamental difference among those national copyright laws was the variation in copyright term. All EU members are also members of the Berne Convention, and so adhere to Berne's minimum required term of life of the author plus 50 years. But that term is only a minimum -- Berne members are free to adopt longer terms, and certain, but not all, EU members did so. Thus, for example, Belgium, Italy, Netherlands and the United Kingdom have a basic term of life-plus-50-years; Spain has a basic term of life-plus-60-years; and Germany has a basic term of life-plus-70-years. France protects most works for the basic term of life-plus-50-years, but musical works are accorded an extended post mortem term of 70 years.

These differences in term were seen to impede the free movement of goods and services, and to distort



competition in the common market. Hence, harmonization of copyright duration was necessary. That is to say, the copyright terms of all member states' national laws had to be made equivalent. That harmonization was accomplished through an E.C. Council Directive adopted by the member states on October 29, 1993 (the "EU Directive").

Obviously, the harmonized term could be of any duration as long as it met the Berne minimum. The EU chose the longest extant term, life-plus-70-years, for a number of reasons:

- The harmonized term should not have the effect of reducing anyone's current protection. EU Directive, Recital (9).
- A high level of protection was needed because the rights involved are fundamental to intellectual creation. Id., Recital (10).
- The resulting maintenance and development of creativity is in the interest of authors, cultural industries, consumers and society as a whole. Id.
- A life-plus-70-years term would meet the needs of the single internal market. Id. Recital (11).

- A life-plus-70-years term would establish a legal environment conducive to the harmonious development of literary and artistic creation in the EU.<sup>2</sup> Id.

We suggest that many, if not all, of these arguments apply with equal force internally in the United States (as we discuss below).

Thus, the EU Directive, as adopted, requires all member states to amend their national copyright laws to embody a basic copyright term of life-plus-70-years. EU Directive, Art. 1. They must do so by July 1, 1995. EU Directive, Art. 13.

B. Why the United States Should Not Lag Behind the Life-Plus-70-Years Standard

Copyright, of all types of property, transcends artificial boundaries. That is true within nations (as evinced by our Constitution's recognition of the necessity for Federal copyright protection to replace exclusively State protection). It is also true among nations.

Recent history has seen a true internationalization of the demand for and use of copyrighted materials. Copyrighted materials, whether

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<sup>2</sup> This appears to be a paraphrase of our nation's Constitutional purpose for copyright: to promote the progress of science and useful arts. U.S. Const., Art. I, Sec. 8, cl. 8.

movies, music, books, art or computer software, flow freely between nations. People around the world line up to see "Jurassic Park," buy the music of the Gershwins or Michael Jackson, see productions of "A Chorus Line," use Microsoft Windows, read the latest novel by John Grisham, and buy reproductions of Roy Lichtenstein's art. The massive growth in users of the Internet and the anticipated Global Information Infrastructure will result in a corresponding explosion of the availability of works available on-line, throughout the world. We truly inhabit a global village.

What is especially striking about this phenomenon is that the copyrighted works the world wants are overwhelmingly works created in the United States. Our country's culture now sets the standard for the world.

The consequence, of course, is not merely cultural, but economic. American copyrighted works are far more popular overseas than foreign works are here. Thus, foreign payments for the use of American works far exceed American payments for the use of foreign works. Indeed, intellectual property generally, and copyright in particular, are among the few bright spots in our balance of trade.

In February, 1988, when the United States was considering adherence to the Berne Convention, Commerce Secretary C. William Verity reported that "U.S. copyright

and information-related industries account for more than 5 percent of the gross national product and return a trade surplus of more than \$1 billion." BNA Int'l Trade Reporter, February 28, 1988. More recent estimates reveal that more than 5.5 million Americans work in all copyright industries, accounting for over 5 percent of United States employment, and that our nation's film industry alone contributed more than \$4 billion to the nation's balance of trade. Gephardt Bill Targets GATT, The Hollywood Reporter, May 5, 1993.

It is therefore not an exaggeration to say that adequate international protection of United States copyrights is a matter of the highest importance to our national economic security.

In light of the EU action, copyright term extension in the United States has now become an essential element in safeguarding that economic security. To understand why requires an explanation of some basic principles of international copyright.

1. The Principle of National Treatment

The basic principle of international copyright relations under the Berne Convention is the principle of national treatment. Berne Convention Art. 5(1). Each Berne member state is required to protect foreign nationals within its borders under its own substantive copyright law

(which must, of course, meet Berne's minimum standards for protection). Thus, a copyright owner who is a French national is protected in the United States under our substantive copyright law; and an American citizen who is a copyright owner is protected in France under French substantive copyright law.

If the principle of national protection, which applies generally, also applied to the duration of copyright protection, no term extension in the United States would be necessary for American creators and copyright owners to reap the benefit of the EU's term extension. Unfortunately, however, that is not the case, for there is an exception to the principle of national treatment which is directly relevant: the rule of the shorter term.

## 2. The Rule of the Shorter Term

The one significant area in which Berne provides for reciprocal, rather than national, treatment, is in the duration of copyright. Berne allows each member state to follow the rule of the shorter term. Berne Convention, Art. 7(8). That is, if the duration of protection in a foreign state is shorter than in a particular member state, that member state may limit the protection it gives the foreign state's nationals to the foreign state's shorter copyright term. For example, the United States' current

term is life-plus-50-years, while Germany's current term is life-plus-70-years. If the principle of national treatment applied, Germany would protect works of United States citizens for life-plus-70-years. But if Germany applies the rule of the shorter term, it need protect works of United States citizens only for life-plus-50-years -- 20 years less than the term it grants its own nationals.

Both the Berne Convention and the Universal Copyright Convention ("U.C.C.") include the rule of the shorter term.<sup>3/</sup> Authoritative commentators have stated that, under both conventions, unless internal law provides otherwise, the rule of the shorter term applies.<sup>4/</sup> The Paris text of Berne (Article 7(8)) makes clear that absent a contrary provision of domestic law, the rule of the shorter term applies.<sup>5/</sup>

According to Nimmer, "most of the countries that are significant for copyright purposes" follow the rule of

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<sup>3/</sup> 1 International Copyright Law and Practice § 5[2] at INT-150 (Nimmer and Geller eds. 1994); Berne Art. 7(2) (Rome, Brussels), Art. 7(8) (Paris); U.C.C. Art. IV(4) (Geneva, Paris).

<sup>4/</sup> Id.; but cf. 3 Nimmer on Copyright § 17.10[A] at 17-59. "The view has been expressed, however, that if a country's laws are silent on the issue, it should be presumed that the rule of the shorter term does not apply." (citation omitted).

<sup>5/</sup> See 3 Nimmer, § 17.10[A] at 17-59 n.20.

the shorter term.<sup>4</sup> In addition, the rule is usually applied by statute or other express statement of the Government.<sup>7</sup>

The following is a survey of some of the more significant countries, in terms of trade, that apply the rule of the shorter term, and the source of that application:

Australia -- by statute; the rule applies to works protected only by virtue of origin in a Berne or U.C.C. country, because Berne and U.C.C. follow the rule

Belgium -- by legislation

Brazil -- not expressed in 1973 Copyright Act, but applied by implication from 1912 Act and by protection of foreign works under treaties and conventions

Denmark -- by statute

Finland -- by statute or government decree

France -- by case law

Germany --- by statute (with limited exceptions)

Greece -- by statute

Hungary -- by statute

India -- by government decree /

Israel -- by statute or government order

Italy -- by statute or government decree

Japan -- by statute

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<sup>4</sup> Id. at 17-55.

<sup>7</sup> Id.

Netherlands -- by statute

Poland -- assumed by application of Berne and U.C.C.

Spain -- for works protected by Berne or U.C.C. (which are treated as self-executing treaties in Spain)

Sweden -- by Royal Decree

The following countries do not now apply the rule of the shorter term:

Austria

Canada

Hong Kong (applies pre-1989 U.K. law )

Switzerland

United Kingdom (as an EU member, must apply rule at the latest July 1, 1995)

United States

3. Invocation of the Rule of the Shorter Term in the EU Directive

The EU Directive requires all member states to adopt the rule of the shorter term. EU Directive, Art. 7. Thus, after the life-plus-70-year term goes into effect in the EU on July 1, 1995, if United States law remains unchanged, United States copyrights will be protected only for our applicable copyright term, and not for the longer life-plus-70-years term. American creators and copyright owners will enjoy 20 years less of protection in Europe than their European counterparts.



#### 4. The Negative Effect of Different Terms

If our copyright term is not harmonized with the EU term, the effect will be particularly harmful for our country in two ways.

First, as history has already shown, the EU nations will likely use our failure to provide commensurate protection as an argument against us when we seek better protection for our works in their countries, for example, as they did in GATT negotiations.

Second, we will be deprived of 20 years of valuable protection in one of the world's largest and most lucrative markets. That will have a most harmful effect on our balance of payments, cutting off a vital source of foreign revenues. The United States film and television industry alone has an estimated \$3.5 billion annual trade surplus with the EU. Valenti -- GATT May Hurt Hollywood Film and TV Exports, CNN transcript #344-2, August 16, 1993. Indeed, given that we can obtain those 20 years of protection in the EU at no cost to ourselves, simply by concomitantly extending our copyright term, the effect of not doing so can only be described as suicidal.

Logic and simple self-interest dictate that we extend our copyright term so as to take advantage of the opportunity which is being handed to us for extended protection in the lucrative EU market.

C. The Benefits of Term Extension  
in Trade Negotiations

In the 1980s, the increased importance of foreign markets to American copyrights made intellectual property a key agenda item for our trade representatives in their negotiations with other countries. Their experience, repeated many times, was that the shortcomings of our copyright law were used against us, to resist our calls for stronger protection for American works in foreign countries.

Certainly the most frequently used argument against us in the 1980s was that we were in no position to chastise other countries when our own law did not meet the minimal standards necessary for Berne membership. We negated that argument when we amended our copyright law and joined Berne in 1989, and subsequently increased our success in intellectual property trade negotiations.

Now, if history is any guide, we will face the same argument. How can we seek adequate protection in Europe, the argument will go, when we do not even grant the same term of protection granted by all EU members? But if we harmonize our term of protection with that of the EU, the same benefits we reaped when we joined Berne -- success in our intellectual property trade negotiations -- will follow.

IV. TERM EXTENSION MAKES SENSE AS  
A MATTER OF UNITED STATES LAW

The arguments for term extension are not new. They were valid and compelling when we revised our law and extended our copyright term in 1976, and remain so today.

A. The Arguments In Favor of Term  
Extension Expressed in the  
Legislative History of the 1976  
Act Are Still Compelling Today

When the effort to revise the 1909 Copyright Act, which ultimately led to enactment of the 1976 Copyright Act, began, it was clear that the 1909 Act's total term of 56 years (a 28 year initial term plus a 28 year renewal term) would be lengthened. The initial inquiry focussed on whether that longer term would be for a fixed term of years or would be based on the life of the author plus an additional period. Guinan, Duration of Copyright, in Studies on Copyright, Vol. 1, pp. 473-502 (The Copyright Society of the U.S.A. 1963); "Duration of Copyright," in Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law, in Studies on Copyright, Vol. 2, pp. 1247-1258 (The Copyright Society of the U.S.A. 1963). Almost immediately thereafter, a consensus on a life-plus-50-years term was reached.

Many sound arguments were advanced for lengthening the term of copyright (at that time, from the two-term total of 56 years to a single term of life-plus-

50-years). Some of those arguments are no longer relevant now that we have a basic duration of the author's life plus an additional period (e.g., the abolition of the confusing renewal system, or the benefits of having the copyrights in all works of a given author expire at the same time). But others remain compelling today -- indeed, may be seen as prescient -- and strongly argue for a 20 year term extension.

1. International harmonization

International harmonization of copyright duration (meaning bringing the United States term in line with the rest of the world, and particularly Europe) is a recurring -- indeed, the most common -- theme in the considerations of copyright duration found in the legislative history of the 1976 Copyright Act.

The principal international harmonization arguments made then in favor of the life-plus-50-year term are equally applicable to term extension now: 1) term extension is a matter of international comity and would bring the United States in line with other similar countries; 2) term extension would allow the United States to be a leader in international copyright, while failing to extend copyright duration would relegate the United States to second class status; 3) term extension would discourage retaliatory legislation and retaliatory trade postures; 4)

term extension would facilitate international trade; and 5) term extension would foster greater exchange of copyrighted property between countries. Representative comments early in the legislative history stressed the need for harmonization with the European copyright term, as follows:

- "There is no reason why the length of the copyright term should not be [the same] . . . as is the case in most European countries."<sup>1/</sup>
- "[I]n an age when works travel across boundaries in the twinkling of an eye, it is highly desirable to establish a uniform term internationally."<sup>2/</sup>
- "When it is considered that a sizeable proportion of American books, motion pictures, and musical compositions, for example, find their way into the European market, it is sometimes embarrassing to find that the term of protection has expired in the United States before it has expired in Europe. With the development of such

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<sup>1/</sup> Copyright Law Revision, 1965. Hearings Before Subcomm. 3 of the House of Reps. Comm. on the Judiciary, 89th Cong., 1st Sess., 27 (1965) (statement of Cong. John V. Lindsay).

<sup>2/</sup> Id. at 1866 (statement of Abraham L. Kaminstein, Register of Copyrights).

communications media as Telstar, many legal problems could also result from this discrepancy."<sup>10/</sup>

Other comments highlighted the trade value of a term equal to that of European nations: A United States term different from that of Europe "puts us at a disadvantage vis-a-vis other people in our export markets."<sup>11/</sup>

The 1967 House Report made an especially strong argument for the business and trade necessity of conforming United States copyright duration to that of significant export markets:

"A very large majority of the world's countries have adopted a copyright term of the life of the author and 50 years after his death. Since American authors are frequently protected longer in foreign countries than in the United States, the disparity in the duration of copyright has provoked considerable resentment . . . The need to conform the duration of U.S. copyright to that

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<sup>10/</sup> Id. at 32 (statement of George D. Cary, Deputy Register of Copyrights).

<sup>11/</sup> Copyright Law Revision: Hearings on S. 1006 Before the Subcomm. on Patents, Trademarks and Copyrights, 89th Cong., 1st Sess. 113 (1965) (statement of John Schulman for the American Bar Association Committee on Revision of the Copyright Law).

prevalent throughout the world is increasingly pressing in order to provide certainty and simplicity in international business dealings. Even more important, a change in the basis of our copyright term would place the United States in the forefront of the international copyright community, and would bring about a great and immediate improvement in our copyright relations."<sup>12/</sup>

These sentiments were echoed by Congressman Poff in a contemporaneous statement on the House floor: copyright term harmonization would have the benefits of "protect[ion] of American authors marketing their works abroad," and avoiding the rule of the shorter term which gives "an unfair advantage to a competing foreign work of the same age if the foreign statute provides a longer term."<sup>13/</sup>

Creators, too, directly expressed their concerns about the disadvantage they would suffer vis-a-vis their European colleagues if the United States term were shorter than the European term. As one creator's group said in a letter reprinted in the Congressional Record: "[T]here

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<sup>12/</sup> H.R. Rep. No. 83, 90th Cong., 1st Sess., 101-02 (1967).

<sup>13/</sup> 113 Cong. Rec. 8501-02 (1967).

seems to be no valid reason why an American should receive less protection than his European colleagues."<sup>14/</sup>

Congress even took note of the fact that terms longer than life-plus-50-years might become the norm. The 1974 Senate Report argued that the proposed life-plus-50-years term was necessary for adherence to Berne and continued: "It is worth noting that the 1965 revision of the copyright law of the Federal Republic of Germany adopted a term of life plus 70 years."<sup>15/</sup> Indeed, later in the revision process, Senator Hugh Scott remarked that life-plus-50-years was only a minimum duration, because "[s]ome countries have expanded their term to life plus 70 or more and other nations are considering similar actions."<sup>16/</sup>

Senator Scott's prediction has now come to pass. All the excellent reasons for extending United States copyright duration in the 1976 Copyright Act are equally valid and compelling today, and argue for a concomitant term extension.

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<sup>14/</sup> 114 Cong. Rec. S. 1703-04 (daily ed. May 1, 1968) (letter by Howard Hanson, Director, Institute of American Music, University of Rochester).

<sup>15/</sup> S. Rep. No. 983, 93d Cong., 2d Sess., 169 (1974).

<sup>16/</sup> 122 Cong. Rec. 3834 (1976).



One of the concerns expressed when the Copyright Office held hearings on term extension was the apprehension that the EU may deny United States works an extended term of copyright protection, even if we extend our term, justifying that denial of protection because of inconsistencies between United States and EU copyright law. We believe that the international treaty obligations of EU member nations require the EU countries to grant United States works an extended term if we do extend our term.<sup>17/</sup> If they do not abide by their treaty obligations, there are remedies available to us.

If we do not extend our term, it is certain that the works of American authors will receive 20 years less protection in the EU than the works of their European colleagues, because the EU Directive explicitly invokes the rule of the shorter term. EU Directive, Art. 7. By extending our term, we create the certain obligation, and therefore the strong potential, for comparable protection in the EU. We also strengthen the bargaining position of our trade negotiators. In the words of a state lottery

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<sup>17/</sup> The Berne Convention requires national treatment. Art. 5. Given that the exception to national treatment embodied in the rule of the shorter term would be inoperative if the United States' copyright term equals or exceeds that of the EU, EU member nations would therefore be bound to grant United States works the extended term of copyright which resulted from the EU Directive, as part of their Berne obligations.

promotion, "you have to be in it to win it." If we extend our term, we have an excellent basis for longer protection in the EU -- indeed, the force of law is on our side. If we do not, we have no chance at all. The choice is simple and obvious -- we should extend our term.

It is true that the proposed 20 year extension in the United States would afford protection for certain works in excess of that called for by the EU Directive. For example, collective works could receive longer protection in the United States, if we extend all terms by 20 years, than they will in the EU.

The reason for this is that we must remain true to the principles which govern our own copyright law. We do not distinguish between types of copyrighted works in the duration of copyright granted. Moreover, copyright must protect not only authors, but also those copyright owners who make substantial investments in the creation and distribution of copyrighted works. These investments enhance the availability of works to the public. They can result in benefits to individual authors and creators as well, thus providing the encouragement mandated by our Constitution.

We must not lose sight of the overriding fact: term extension is justified beyond question by the economic benefits to be realized by our country -- in jobs, in

trade, in our balance of payments -- as a result of the additional 20 years of protection that will be accorded in the EU. Term extension will accrue to the benefit of the public, as a whole, as well as to individual authors and copyright owners and their heirs.

Many of those who expressed opposition to term extension, when the Copyright Office was considering the issue, were interested in seeing motion pictures enter the public domain. They assume that if our copyright terms are extended, United States motion pictures will have a longer term of copyright (95 years) than works for which a legal person is the rightholder in the EU countries (70 years). See, EU Directive, Art. 1(4).

This argument is based on a faulty premise and is flatly wrong. Under the EU Directive, there is a special superseding provision for motion pictures: the term of copyright in motion pictures is based on the longest life of the four categories of "authors," plus 70 years.<sup>18/</sup> See, EU Directive, Art. 2(2). Thus, in the EU, a motion picture could easily be accorded a copyright term of 95 years if the youngest of any of the four persons designated

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<sup>18/</sup> The four categories are the director, the screenwriter (the author of the scenario), the scriptwriter (the author of the dialogue) and the composer of the music.

its "authors" is, for example, 45 years old and lives to the age of 70.

Failure to extend the copyright term for motion pictures could be especially harmful to the United States' national economic security. Motion pictures, after all, are one of our most lucrative trade exports. The loss of 20 years of protection for United States films in the EU would be particularly damaging economically.

Recent technological developments also strongly argue for term extension. With the development of the Global Information Infrastructure ("GII") -- the global electronic information super highway -- the traffic in copyrighted works respects no borders. A person in France signing onto the Internet may receive copyrighted works of United States origin, routed by way of a service located in the Netherlands. If our copyrighted works are to be protected in this new environment, the most important standard of protection -- the copyright term -- must be harmonized internationally. H.R. 989 does just that.

## 2. Authors' Longevity Has Increased

Another frequently voiced argument for term extension in the revision effort leading up to the 1976 Act was that authors' life spans had increased dramatically since 1909. As we have seen, this same reason is used by the EU to justify the current term extension.

Now certainly, there has been a minor increase in life expectancy in the United States since the duration provisions of the 1976 Act were proposed in the early 1960s, and enacted in 1976. (The life expectancy in 1964 was "somewhat over 70 years"<sup>19/</sup>; in 1976, 72.9 years<sup>20/</sup>; in 1990, 75.4 years<sup>21/</sup>; and projected for 1995, 76.3 years<sup>22/</sup>.)

But the relation of life expectancy to copyright term should not be made by comparing the life-plus-50-years term and life expectancy in 1976 or 1964 with a life-plus-70-years term and life expectancy in 1990 or 1995. Rather, we must realize that life-plus-50-years was the international norm at the beginning of this century. Thus, the increase in life expectancy over the 20th Century (from about 52 years in 1909-1911<sup>23/</sup> to about 76 years now) should be reflected in an increase from the international

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<sup>19/</sup> Hearings Before Subcomm. 3 of the House of Reps. Comm. on the Judiciary, 89th Cong., 1st Sess., 32 (1965) (statement of George D. Cary, Deputy Register of Copyrights).

<sup>20/</sup> Statistical Abstract of the United States 1992, at 76 (Dept. of Commerce).

<sup>21/</sup> Id.

<sup>22/</sup> Id.

<sup>23/</sup> Historical Statistics of the United States, Part 1, at 56. (Dept. of Commerce, 1976). The figure is an average of those given for white males and females.

life-plus-50-years norm at the beginning of the century to a life-plus-70-years term now.

Some note the fact that life expectancy has increased, but question whether this increase justifies a 20 year extension of copyright terms. After all, the argument goes, the increase in life expectancy increased the author's life span, and hence any total term of protection based upon the author's life.

But that fact is not dispositive for several reasons: Certainly, the increased life expectancy of an author will extend the term of copyright by a few years under the life-plus-fifty-years term currently applicable to post-1977 works in the United States. However, the life-plus term is also designed to protect the next two generations of the author's heirs. Extended copyright term is necessary to achieve adequate protection for the author's heirs, during the additional years they, too, are expected to live.

Moreover, in light of the modern trend toward having children later in life, after careers are established, the intended benefit to the author's heirs will be better achieved by the extension of copyright term for 20 years. And we must not lose sight of the fact that pre-1978 works are not protected in the United States for a life-plus term, but rather for a fixed term. Increased

life expectancy impacts on the author as well as the next two generations for these works.

Under the life-plus system, an author's later published works receive a shorter period of protection than do his or her earlier works. Similarly, the works of authors who die young receive a shorter term of protection than those who live to a ripe old age. Increasing the post-mortem term of copyright will not completely rectify this situation, but it will provide significant benefits to the heirs of those authors who create late in life or who untimely pass away.

The longevity issue is somewhat related to another concern expressed: will an additional 20 years of copyright protection produce administrative difficulties of recording and tracing a work's chain of title? We believe that such administrative "difficulties" are nonexistent. The current procedures and practices for keeping track of works are adequate even with an extended term. And if any such "difficulties" do exist, they are slight indeed compared to the vast economic rewards to be gained in the United States, and the public interest in fostering creativity and high quality distribution, by extending copyright terms.

### 3. Works Now Have Greater Value For Longer Periods

Modern technologies have increased the value of copyrighted works over longer periods of time. Indeed, early in the discussions of the first Copyright Office report on revision, term extension was advocated because new media made older works more exploitable. Panel Discussion and Comments on the 1961 Report, 86 (1963).

It was repeatedly noted that the value of "serious" works was often not fully recognized until well into the copyright term. Hearings Before Subcomm. 3 of the House of Reps. Comm. on the Judiciary, 89th Cong., 1st Sess. 82 (1965) (statement of Rex Stout for the Author's League of America); 122 Cong. Rec. 3834 (1976) (statement of Sen. Hugh Scott: "[a] short term is particularly discriminatory against serious works of music, literature, and art, whose value may not be recognized until after many years," referring to works of F. Scott Fitzgerald, Theodore Dreiser and Sinclair Lewis); 122 Cong. Rec. 31981 (1976) (statement of Cong. Hutchinson).

Similarly, term extension has a positive effect by guaranteeing a greater return on investment and thus encouraging investment by publishers and others. 113 Cong. Rec. 8501-02 (1967) (statement of Cong. Poff); 122 Cong. Rec. 31981 (1976) (statement of Cong. Hutchinson). Many



types of copyrighted works -- especially these most popular overseas, such as motion pictures -- require very significant investments, not merely in creation, but also in duplication and dissemination to the public. Granting copyright owners the economic return that term extension will entail will encourage that investment in duplication and dissemination, and of high-quality copies at that.

All these points have equal, if not greater, validity today: The march of technology has created new ways of using copyrighted works. These new media have a voracious appetite for works of all ages. Creators and copyright owners should benefit from these new opportunities.

4. Increased Copyright Protection  
is in the Public Interest

The Constitutional purpose of copyright is to promote the progress of science and useful arts. The means of doing so is by granting exclusive economic rights to creators and copyright owners. The better those incentives -- and term extension is one of the most significant incentives possible -- the more creativity will result, the greater the progress in science and useful arts, and the more the public interest will be served.

Some concern has been expressed that a bargain has already been struck, at the very least for works

already in existence, as to the duration of copyright protection. If the life-plus-fifty-years term enacted under the Copyright Act of 1976 struck an appropriate bargain, why should it be changed?

First, that argument flies in the face of precedent. If that reasoning had been followed, there would have been no cause to extend the 56-year total copyright term of the 1909 Act for then-existing works to 75 years when the 1976 Act was passed; nor would there have been any reason to do away with the renewal registration requirement for "old law" works in 1992.

Rather, we suggest, any such "bargain" must be re-evaluated as conditions change. Our copyright law must evolve. Adding twenty years to our current term of copyright is not only an incremental increase within the "limited times" for protection dictated by our Constitution, and fully consonant with the Constitutional provision, but also presents a golden opportunity for the United States to obtain an additional 20 years of protection and tremendous economic rewards in the lucrative EU market.

Moreover, our adoption of the life-plus-50 years term in 1976 was almost 70 years behind the times -- virtually every civilized country, except the United States, had gone to a life-plus-50-years term by the

ginning of the century. We should stop playing "catch-up" with the rest of the civilized world.

Another, related potential argument against term extension is that the public supposedly has an interest in the proliferation of derivative works based on works that fall into the public domain. But there is no evidence that availability of works in the public domain leads to significant exploitation of the works by way of derivative works.

Opponents of H.R. 989 argue that the public will be substantially deprived of access to works of any significance as a result of term extension. That argument rings hollow. Only a few exceptional examples of public domain works or derivatives thereof have been of high quality and are widely publicly available. There is, however, nothing to suggest that, for example, the new theatrical and film versions of Phantom of the Opera would not have been made but for its public domain status.

Indeed, the argument seems to work the other way: works protected by copyright are far more likely to be made widely available to the public in a form the public wants to enjoy than works in the public domain. The costs of high quality production, distribution and advertising, and changing technology, all require a major investment to exploit most works. Few are willing to make such

significant expenditures for the creation of derivative works if they will have to compete with other derivative works based on the same underlying work. Therefore, the public is more likely to see high caliber derivative works if they are based on copyrighted works and made under authorization from the copyright proprietor.

Nor is there any evidence that public domain works, or derivative works based on public domain works, are less expensive for the consumer. A quality modern edition of Shakespeare costs no less than copies of copyrighted works; movie theaters charge as much for movies based on public domain works as for those based on copyrighted works. The public is certainly not getting a break on Phantom of the Opera ticket prices as a result of its public domain origins.

This, too, is a reason why juridical entities, as well as individual authors, should be accorded an extended term of protection. Relatively few individual authors have the resources to exploit works in the commercial marketplace. Music and book publishers, motion picture companies and software firms are all necessary to produce, and bring to the public, copyrighted works in quality form. Extended copyright term will provide additional economic incentive to such copyright owners, and will finance future authorship, production and distribution.

The same rationale addresses other concerns raised by term extension. Although existing copyright protection was apparently adequate to encourage the initial creativity necessary for existing works, extended terms should apply to works already in being to encourage investment in those works. We must encourage not only initial creativity, but investment in new technology to maximize the dissemination of older works. And certainly, a longer copyright term will provide enhanced incentive to living authors.

We have not overlooked the concerns of the user community. Certainly, those copyright users who exploit works during the 20 year extension will have to pay for that right. There are at least two reasons why they should. First, if the works are of value to them, they should pay for them. Second, the benefits we will reap in the international arena -- benefits to our nation's economy, creating jobs and income -- far outweigh the costs to domestic users. The question is simply put: is the small price to be paid by the user community more important than the benefits term extension will provide to our national economic security? We suggest that the choice is clear.

Fair use issues should not be impacted at all. If certain uses are fair for life-plus-fifty-years, they

will be fair during the next twenty years of protection as well.

We do not urge an arbitrary or unreasonable (or perpetual, as some opposers may argue) extension of the term of copyright. Given the current circumstances, twenty years is an appropriate period of extension. It would reflect the importance of copyright to our society, it would recognize the domestic and international economic incentives for an expanded term, and it would more accurately achieve the desired goals of protecting the author and two generations of his or her heirs.

V. H.R. 989 SHOULD BE ENACTED

For all the reasons listed above, we urge the Congress to enact the extension of term for the benefit of all of America's creators and copyright owners, America's economy, and America's culture.

Respectfully submitted,

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## AMERICAN INTELLECTUAL PROPERTY LAW ASSOCIATION

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June 2, 1995

**The Honorable Carlos J. Moorhead**

**Chairman, Subcommittee on Courts  
and Intellectual Property  
Committee on the Judiciary  
House of Representatives  
Washington, D.C. 20515**

**Dear Congressman Moorhead:**

I am writing to express the support of the American Intellectual Property Law Association (AIPLA) for H.R. 989, the proposed legislation to extend the term of copyright protection in the United States.

The AIPLA is a professional association of more than 9,000 attorneys specializing in the practice of intellectual property law. One of the stated purposes for which the AIPLA was formed is to aid in the institution of improvements in the laws relating to patents, trademarks, copyrights, unfair competition and other fields of intellectual property, including the study of, and comments on, amendments to the relevant laws protecting such property rights. It is in the pursuit of this purpose that the association has reviewed the provisions of the proposed bill, and expresses its views on this legislation.

H.R. 989 provides for the extension of the term of copyright for an additional twenty years. This would make the term of copyright in most cases the life of the author plus 70 years.

When the Copyright Act of 1976 was passed, the term of copyright was extended in order to provide protection for the life of the author plus 50 years. Congress concluded that the United States should join the vast majority of other western nations in providing this longer term of protection. The international standard is now moving to life plus 70, and the motivation that influenced the United States to act in 1976 continues to exist today.

Extending the term of copyright will provide increased incentives for the creation of works of authorship. In addition to promoting American creativity, the United States will obtain important economic benefits if this legislation is passed. Copyrighted materials such as films, music, and books created by United States citizens and produced or published in the United States, are marketed throughout the

*Formerly AMERICAN PATENT LAW ASSOCIATION (APLA)*

*President*

ROBERT A. ARMITAGE

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*Executive Director*

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*Associate Executive Director*

MARTHA R. MORALES



world. Substantial revenues from these sales abroad could be jeopardized if the United States has a shorter term of copyright than other countries do. This is because the Berne Convention for the Protection of Literary and Artistic Works permits other member countries to reduce the term of their protection of U.S. works to the same term for which the United States protects such works, (the "rule of the shorter term"). As a result, U.S. copyright owners will not receive income from uses of their works during any additional years of protection in other Berne countries that choose to adopt this approach.

In this regard, it should be noted that the European Commission has issued a Directive setting a standard copyright term of life of the author plus 70 years for the member states of the European Union. Not only must this standard be incorporated into the national laws of the member states, but the Directive also requires the member states to implement the Berne Convention's rule of the shorter term. Thus, to ensure that our copyright owners will not be subject to this rule of the shorter term, it is important that the United States' copyright duration at least match the copyright duration granted in the European community.

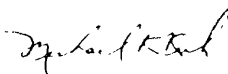
Accordingly, the American Intellectual Property Law Association has adopted the following resolution:

RESOLVED, that the American Intellectual Property Law Association favors in principle legislation to extend copyright duration by twenty years, which would prevent United States creators and copyright owners from losing twenty years of protection for works of United States origin in, and the concomitant trade surplus in copyrighted works from, the European Union; and

Specifically, favors H.R. 989, 104th Cong., 1st Sess. (Moorhead) and S. 433, 104th Cong., 1st Sess. (Hatch).

Your consideration of these comments is appreciated.

Sincerely,



Michael K. Kirk  
Executive Director

MKK/jac

The Honorable Carlos Moorhead  
Chairman, House Subcommittee on Courts  
and Intellectual Property  
House Committee on the Judiciary  
Room B-351A Rayburn House Office Building  
Washington, D.C. 20515

Dear Chairman Moorhead:

As the Subcommittee on Courts and Intellectual Property considers H.R. 989, the Copyright Term Extension Act of 1995, I ask that you please amend the bill to cure a serious, and no doubt unintended defect: the bill does not give the new 20 years of copyright to authors and songwriters. Instead, it gives the copyright to publishers. My son, Jimi Hendrix, was quite young when he signed contracts with record companies and music publishers. He did not understand copyright law and did not have experience in the business aspects of the music business. Sometimes, especially when he was first starting out, he was not even represented by a manager or lawyer. I have had to spend a great deal of money in lawsuits and years of my life trying to receive the proper royalties from Jimi's publishers and record companies.

Jimi's experience is not unusual; many musicians have not had the opportunity of being educated about copyright law, yet, their livelihood and that of their families depends on copyright. Music publishers and record companies, however, employ lawyers who do understand copyright law and who write the contracts that musicians such as Jimi are forced to sign. I'm not asking you to rewrite old contracts, but I do think it is only fair that if Congress is going to provide a new 20 year term of copyright that music publishers and record companies should have to pay songwriters what the value of the copyright is right now, and not what it was decades ago.

In order for songwriters or their families to be able to receive the value of the new 20 years, though, the bill must be changed so that the new copyright is given only to the songwriter or his family. Right now, the bill gives the copyright to the publishers and the record companies and forces the songwriters and their families to live with a contract that was written many years ago, at a time, in Jimi's case when he was in his early 20s and was not represented by anyone who could look out for his interests.

Mr. Chairman, I know you would not want such an unfair result.

Thank you for your consideration,

Sincerely yours,

*Al Hendrix*

Al Hendrix

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Chairman, House Subcommittee on Courts  
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House Committee on the Judiciary  
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Mr. Chairman, I know you would not want such an unfair result.

Thank you for your consideration,

Sincerely yours,



Al Hendrix

**The EC Term Directive, the Uruguay Round Agreements Act, and the Proposed  
U.S. Copyright Term Extension Act of 1995:**

**Recent Changes in U.S and European Laws Impact Duration of Copyright**

Lisa M. Brownlee

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**The EC Term Directive, the Uruguay Round Agreements Act, and the Proposed  
U.S. Copyright Term Extension Act of 1995:**

**Recent Changes in U.S and European Laws Impact Duration of Copyright**

Lisa M. Brownlee<sup>a</sup>

**I. INTRODUCTION**

The terms of copyright protection for all works of authorship are dramatically changing in both the European Union<sup>1</sup> (EU) and the U.S. Works that were previously in the public domain on both continents are being revived, the copyright terms will be extended 20 years in the EU, and copyright terms are proposed to be extended 20 years in the U.S.

Copyright terms in the Member States of the European Union will be harmonized (and increased, in most Member States) by the recently-adopted EC Directive on Harmonizing the Term of Protection of Copyright and Certain Related Rights<sup>2</sup> (hereinafter EC Term Directive). By July 1, 1995, Member States of the European Union are required to enact legislation implementing the EC Term Directive. The EC Term Directive extends the duration of copyright in works by individual or joint authors<sup>3</sup> in EU member states to 70 years after the death of the author<sup>4</sup> (known as post mortem auctoris--hereinafter p.m.a.). Works in which a legal person is designated as the rightholder (hereinafter "corporate works") will endure for 70 years after publication of the work.<sup>5</sup> Under this Directive, copyright in works that are still protected in one Member State will be revived on July 1,

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<sup>a</sup>© 1995 Lisa M. Brownlee. All rights reserved. Associate, Trenité Van Doorne, Amsterdam. Member of the Washington State Bar. The author gratefully acknowledges the comments and advice of David Nimmer, Professor J.H. Spoor, Vrij Universiteit, Amsterdam, and Professor H. Colien Jehoram, University of Amsterdam.

<sup>1</sup>Consisting of Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden, U.K.

<sup>2</sup>Council Directive 93/98/EEC, L 290 O.J. 24 November 1993 (hereinafter EC Term Directive). Thus far, only one country--Belgium--has implemented this Directive. Loi du 30/06/94, *moniteur belge* du 27/07/94, page 19297. For a discussion of proposed legislation in the U.K., see M. Henry, "Rental and Duration Directives: Issues Arising From Current EC Reforms," 12 EIPR 437 (1993).

<sup>3</sup>For jointly authored works, the term is calculated after the death of the last-surviving author.

<sup>4</sup>The term of 70 years p.m.a. does not apply to anonymous, pseudonymous or corporate works, the terms of which are also extended 20 years.

<sup>5</sup>This article discusses in detail only works created by individual and joint authors, and those which are owned by corporate entities under the U.S. work for hire provisions, or its European equivalents.

1995 in all Member States, and will endure for the full term specified in the Directive.<sup>6</sup> The provisions of this Directive, by virtue of the European Economic Treaty<sup>7</sup> must also be implemented by the European Free Trade Association (EFTA) countries.<sup>8</sup> Accordingly, in nearly all the countries of Europe, the term of 70 years after the death of the author will apply.

The current U.S. term of protection for individual or jointly-authored works created on or after January 1, 1978 is 50 years p.m.a.<sup>9</sup> However, European protection for works created on or after that date by EU nationals, and works that have an EU country of origin as a result of first publication in an EU country, will now be 20 years longer in the EU than in the U.S. as a result of the EC Term Directive. In the U.S., copyright term for works published or registered before January 1, 1978 is currently 75 years following publication of the work, often resulting in a term of protection shorter than the Berne minimum 50 years p.m.a.<sup>9</sup> Additionally, many pre-1978 works fell into the public domain in the U.S. as a result of improper copyright notice or failure to comply with renewal regulations.

Under the Uruguay Round Agreements Act<sup>10</sup> ("U.R.A.A."), effective January 1, 1996,<sup>11</sup> copyright protection will be restored in the U.S. for certain foreign-origin works that fell into the public domain as a result of failure to comply with statutory notice or renewal requirements. The proposed Copyright Term Extension Act of 1995,<sup>12</sup> introduced in the U.S. House and Senate this Spring, would make the U.S. term for works created, published or registered after January 1, 1978 equivalent to that of the EU term--70 years p.m.a. Works published or registered before 1978 would receive copyright protection for 95 years after publication; however works already in the public domain before the effective date of the Act would not be restored.

Despite adoption of the U.R.A.A., and even if the Extension Act is adopted, discrepancies

<sup>6</sup>See discussion at Sec. III.A.2 *infra* regarding the revival effect of the E.C. Term Directive. See generally H. Cohen Jehoram, "The EC Directives, Economics and Authors' Rights," 6 IIC #21 (1994) (discussing various EC cases and directives on copyright, including the EC Term Directive) [hereinafter Jehoram].

<sup>7</sup>OJ No L 1, 3 January 1994.

<sup>8</sup>Iceland, Liechtenstein, and Norway.

<sup>9</sup>See generally, D. Nimmer, "Nation, Duration, Violation, Harmonization," 55 LAW AND CONTEMPORARY PROBLEMS 211 (1992) [hereinafter "Nation"].

<sup>10</sup>17 U.S.C. § 104A, as amended by 5110 PL 103-465, 108 Stat. 4809 (Dec. 8, 1994).

<sup>11</sup>H. Doc. 103-316, Sept. 27, 1994, 60 FR 15845, 3/27/95. The effective date of January 1, 1996 was chosen by the Copyright Office and implemented by presidential proclamation. However, this choice has sparked debate among proponents of a January 1, 1995 effective date, who argue that the terms of GATT-TRIPS itself supports the earlier date. "Copyright Office Registration Reforms and Restoration Procedures are Aired," 50 P.T.C.J. 34 (May 11, 1995).

<sup>12</sup>H.R. 989, S. 483, 141 CONG. REC. S3390-02 (daily ed. March 2, 1995) [hereinafter C.T.E.A.].

will still exist when comparing EU duration with U.S. duration neither act retroactively revives works that are in the public domain as a result of expiration due to the U.S. anomalous calculation from date of publication for pre-1978 works, and the U.R.A.A. does not revive works of U.S. origin that fell into the public domain as a result of failure to comply with U.S. copyright law pre-1978 formalities. The Copyright Term Extension Act of 1995, if adopted, will eliminate those disparities as to works created on or after 1978, and should therefore be adopted. However, large discrepancies between the EU and the U.S. will still exist for works of both EU and U.S. origin, published or registered before January 1, 1978.

The changing rules pertaining to international copyright duration is of critical importance to the exploitation of all types of existing works. Many works that were previously in the public domain in the EU and/or U.S. will be revived and require licenses from the copyright holder to avoid infringement. Clearing the use of copyrights can be a difficult matter involving great expense, particularly when a large number of works is involved. The bifurcation of rights between the EU and the US complicates clearance of works, and makes world-wide marketing of products containing pre-existing works problematic. Understanding the new duration rules is essential to properly valuing and negotiating licenses to use all works of authorship.

The next section of this article provides background information on the Berne Convention<sup>13</sup> provisions, current EU and U.S. laws, and bilateral treaties pertaining to duration of copyright. Part III discusses the EC Term Directive as it affects duration of copyright in EU Member States, and further discusses U.S. law pertaining to duration of protection of works, including the effects of the recent implementation of the GATT-TRIPS treaty in the U.S.,<sup>14</sup> (the U.R.A.A.), and the proposed Copyright Term Extension Act of 1995. These issues are discussed in the context of both works of EU country origin and of U.S. origin.

## II. DURATION OF COPYRIGHT - BACKGROUND

Determining the duration of copyright protection for a given work in a specific country is a complicated matter involving a myriad of national laws and international conventions,

<sup>13</sup>Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 24 July 1971) [hereinafter Berne Convention].

<sup>14</sup>Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Annex 1C, Agreement on Trade Related Aspects of Intellectual Property (15 April 1994), implemented in the U.S. on December 8, 1994. PL-103-465 (1994) [hereinafter GATT-TRIPS].



treaties, directives and court decisions. First and foremost, the Berne Convention establishes certain foundations to which member countries must adhere--and which must be understood to place in context the changes effectuated by the recently-adopted and proposed legislation.<sup>15</sup> EU law is also reviewed in this section, including the effects of the recent Phil Collins<sup>16</sup> case of the European Court of Justice on calculation of duration. Current U.S. law is also briefly reviewed to provide the context for discussing the U.R.A.A. and the proposed U.S. Copyright Term Extension Act.

## A. Berne Convention

### I. General principles and rules

All fifteen countries of the EU are members of the Berne Convention, as is the United States and the EFTA countries.<sup>17</sup> The Berne Convention prescribes certain minimum standards of protection which Berne-signatory countries must accord works.

#### (a) Principle of national treatment.

One of the fundamental tenets of the Berne Convention is the principle of "national treatment." This principle provides that a member-country court must give works of other countries-of-origin the same treatment it accords works of its own nationals.<sup>18</sup> For example, the copyrights of a United States national author or owner will, in general, be treated as the copyrights of a national of the country in which the copyrights are sought to be enforced. The Berne Convention, while setting minimum standards for certain areas of copyright, did not *standardize* the copyright laws of the Convention members.<sup>19</sup> The Berne Convention contains certain exceptions to the principle of national treatment by permitting member countries to adopt their own laws to address certain issues, such as design protection and droit de suite (resale rights) and, notably, copyright duration. Therefore, the national laws of the country in which protection is sought apply to questions arising within the boundaries of that country.

<sup>15</sup>The Universal Copyright Convention is not discussed in this article, as all of the countries that are discussed are members of the Berne Convention and are obligated to apply the terms of that Convention. D. Nimmer, M. Nimmer, 3 NIMMER ON COPYRIGHT at § 17.01[B], p. 17-11 [hereinafter NIMMER]

<sup>16</sup>Judgement of 20 October 1993, joined cases C-92/92 and C-326/92, Phil Collins v. Imtrat Handelsgesellschaft mbH (1993) 3 C.M.L.R. 773, 791 (1993) [hereinafter Phil Collins]

<sup>17</sup>"Treaties in the Field of Copyright and Neighboring Rights Administered by WIPO, Berne Convention for the Protection of Literary and Artistic Works," COPYRIGHT, January 1994.

<sup>18</sup>Berne Convention, *supra* note 13 at Art. 3.

<sup>19</sup>Member countries are free to enter into treaties with provisions which grant to authors more extensive rights than those granted in the Berne Convention. Berne Convention, *supra* note 13 at Art. 20.

## (b) Rule of the shorter term

One exception to the principle of national treatment in the Berne Convention is the optional "comparison of terms" or "rule of the shorter term"<sup>20</sup> The rule of the shorter term permits Berne signatory countries to deny protection for works which have fallen into the public domain in their country of origin--even if the work would not be in the public domain under that country's duration rules.

Nearly all EU countries have adopted the rule of the shorter term;<sup>21</sup> however the U.S. has not. Thus, most EU countries discriminate based on nationality of the author and/or country of origin of a work. Therefore, works created by U.S. authors receive rule of the shorter term treatment in most EU countries unless the work was first published in a (non-U.S.) Berne-signatory country. By contrast, if a party is seeking to enforce copyright in a foreign work in the United States, the full term of U.S. duration will be granted to that foreign work, regardless of where the work was first published and regardless of the nationality of the author.

2 Determining the "country of origin"

To analyze the duration of protection a work will be accorded in non-U.S. Berne signatory countries, therefore, it is essential to determine the country of origin of a work. The rules for determining the country of origin are provided in the Berne Convention, and are based on whether a work has been "published."

Article 5 (4) of The Berne Convention defines the country of origin of a work as follows:

- (a) in the case of works first published in a country of the Union, that country, in the case of works published simultaneously in several countries of the Union which grant different terms of protection, the country whose legislation grants the shortest term of protection;
- (b) in the case of works published simultaneously in a country outside the Union and in a country of the Union, the latter country;

<sup>20</sup>Berne Convention, *supra* note 13 at Art. 7(8)

<sup>21</sup>COM (92) 33 final SYN 395, C 92/6 OJ at p. 30 (1992) [hereinafter COM (92)]

- (c) in the case of unpublished works or of works first published in a country outside the Union, without simultaneous publication in a country of the Union, the country of the Union of which the author is a national<sup>22</sup>

A work is considered to be simultaneously published in several countries if it has been published in two or more countries within 30 days of its first publication<sup>23</sup>. Therefore, if a work is published, the country or countries (and Berne status thereof) of publication determines the country of origin. If a work is unpublished, the nationality of the author dictates the country of origin.

### 3 Minimum duration established by Berne

The minimum term of protection granted by the Berne Convention for works created by individual authors (and not anonymously, pseudonymously or as a work made for hire) is 50 years following the death of the author.<sup>24</sup> As discussed above, these minimums may be exceeded by Berne signatory countries.<sup>25</sup> The Berne Convention does not specify a term of protection for corporate works. As discussed below, the U.S. violates the Berne obligation to provide a minimum 50 years p.m.a. due to certain pre-1978 terms of protection.<sup>26</sup>

## B. Duration of protection under national laws of EU Countries

### 1 Duration and Rule of the Shorter Term

Nearly all EU countries have a duration of protection of 50 years p.m.a. for works created by individual or joint authors.<sup>27</sup> Germany and Spain are exceptions, each providing terms of 70 years p.m.a. With respect to application of the rule of the shorter term, in brief summary, Belgium, Denmark, Finland, France, Germany, Italy, Spain, Sweden and the Netherlands apply the rule of the shorter term,<sup>28</sup> whereas the U.K. does not.<sup>29</sup> Arguably,

<sup>22</sup>Berne Convention, *supra* note 13 at Art. 5(4)(a).

<sup>23</sup>*Id.* at Art. 3(4). The concept of simultaneous publication was added to the Berne Convention during the Brussels revisions of 1948. Therefore, the status of works simultaneously published before 1948 is unclear.

<sup>24</sup>*Id.* at Art. 7(1).

<sup>25</sup>See *supra* at Sec. I A.

<sup>26</sup>See *infra* at Sec. I C.

<sup>27</sup>These terms do not include certain war-time extensions, which were implemented in France and Italy.

<sup>28</sup>COM (92), *supra* note 21 at p. 30.

<sup>29</sup>*Id.*

the rule of the shorter term also does not apply in Austria <sup>30</sup>

## 2. Phil Collins and the principle of nondiscrimination

In Phil Collins,<sup>31</sup> the European Court of Justice ruled that the general principle of non-discrimination by EU-Member countries against nationals of other EU countries applies to copyright and related rights.<sup>32</sup> The Phil Collins case involved an attempt by Phil Collins, a UK national, to enjoin distribution in Germany of a bootlegged recording of a concert performed in California. German law provided a cause of action for such infringements, but only for German nationals. The court held that German law was discriminatory and therefore violated Article 7(1) of the Treaty of Rome Establishing the European Economic Community (hereinafter EEC Treaty). Article 7(1) provides that "any discrimination on grounds of nationality shall be prohibited."<sup>33</sup> The Court acknowledged that in the absence of EU harmonization, Member States may adopt national laws to determine the conditions governing the grant of intellectual property rights. However, it further stated that such national laws could not "lay down discriminatory conditions for the grant of such rights."<sup>34</sup> German law provided to German nationals "protection attaching to copyright for all their works, irrespective of whether they have been published and whether publication may have taken place."<sup>35</sup> Thus, even if a work by a German national had a country of origin in a shorter term country and would therefore normally be subject to rule of the shorter term treatment, under German law it would receive the full term of German protection in Germany.

Foreign nationals have less extensive rights under German law. Under Phil Collins, these rights granted to German nationals, and denied to non-German nationals was held to be discriminatory and therefore a violation of the nondiscrimination principle set forth in the EEC Treaty. Therefore, if an EU Member country exempts from rule of the shorter term treatment works by its own nationals, it must also exempt other EC-national's works from rule of the shorter term treatment.

<sup>30</sup>*Id.* It should be noted that these duration and rule of the shorter term conclusions are based upon current laws, and certain exceptions may apply as to works governed by earlier laws and/or bilateral treaties.

<sup>31</sup>Phil Collins, *supra* note 16 at 791.

<sup>32</sup>*Id.* at 792.

<sup>33</sup>EEC Treaty, Art. 7, *reprinted in* V. Rose, ed., COMMON MARKET LAW OF COMPETITION (1993) at Appendix 2, p. 963.

<sup>34</sup>*Id.* at Phil Collins, *supra* note 16.

<sup>35</sup>Urheberrechtsgesetz (UrhG) § 120(1), cited in Phil Collins, *Id.* See also, Electrola GmbH v. Patricia Im- und Export [1989] ECR 79.

as regards the consequences of applying the principle of non-discrimination to copyright law in general and to the question of the term of protection, it may well be that Article 7 of the Treaty requires each member-State to grant to all community nationals the same term of protection as its own nationals, even though the latter receive a shorter term of protection in other member states<sup>36</sup>

Phil Collins does not pre-empt application of the rule of the shorter term analysis entirely. It merely states that if a country provides preferential treatment to its nationals, it must provide those preferences to nationals of other EU Member-States. However, insofar as the copyright laws of most EU countries provide for preferential treatment for nationals of their own countries regardless of the country of origin of their works, the rule of the shorter term analysis previously resulted in different copyright terms applying to works, depending upon the nationality of the author. After Phil Collins, and further upon implementation of the EC Term Directive, such differential treatment between EU nationals is prohibited. Differential treatment of non-EU nationals is still permitted.

### C. Duration of Protection Under Current U.S. Law

The Copyright Act of 1976 established duration guidelines for three categories of works, based upon whether the works were created before or on/after January 1, 1978, and based upon whether the works were created but not published or copyrighted (i.e. registered) before that date.

#### 1. Works Created Before January 1, 1978 with Subsisting Copyrights

Under the 1976 Act, the duration of protection for all works with subsisting statutory copyrights (e.g. published or registered works) created before January 1, 1978 is 75 years following the date of publication, or for unpublished works, following the date of registration.

To determine whether a work has "subsisting copyrights", one must consult the 1909 Copyright Act to analyze whether the work was published with proper copyright notice and whether other statutory formalities were met.<sup>37</sup> Under the 1909 Act, failure to publish

<sup>36</sup>Phil Collins, *supra* note 16 at 788

<sup>37</sup>In very brief summary, the formalities regarding copyright notice and renewal are dictated by the 1909 Act, the 1976 Act, the Berne Convention Implementation Act of 1988, and the Copyright Renewal Act of 1992 and are as follows:

Notice - works published between the dates

with proper notice automatically injected the work into the public domain. The 1976 Act provided for certain "curative" steps that could be taken by authors who first published the work without proper notice, however the notice requirements were not eliminated. The 1909 Act also dictated compliance with certain renewal requirements must have been met to avoid injection of works into the public domain. Works by foreign authors that are first published in the United States are not exempt from either the notice or renewal requirements.<sup>38</sup> Therefore, a large category of works--of both EU and U.S. origin-- are in the public domain in the U.S. due to failure to meet these formalities.

## 2. Works Created But Not Published or Copyrighted Before January 1, 1978

Works created but not published or copyrighted before January 1, 1978 are granted the same duration of copyright protection as those works created after January 1, 1978.<sup>39</sup> Thus, works created but not published or copyrighted before January 1, 1978 receive a duration of 50 years p.m.a.<sup>40</sup> In no case shall the term of copyright in such a work expire before December 31, 2002, and if the work is published on or before December 31, 2002, the term of copyright shall not expire on or before December 31, 2027.<sup>41</sup>

## 3. Works Created On or After January 1, 1978

Works created by individual authors on or after January 1, 1978 are entitled to copyright protection for a term of 50 years p.m.a.<sup>42</sup> Joint works which were not created for hire currently have a term of 50 years p.m.a. of the last-surviving author.<sup>43</sup> Copyright in works made for hire ("corporate works") endures for a term of 75 years from the year of first

1909-1978: proper notice required  
 1978-3/1/89: notice or "curative notice" required  
 3/1/89+: no notice required see 2 NIMMER, *supra* note 15 at § 7.02[C], pp 7-15 to 7-18.2 for a more detailed discussion of notice requirements

### Renewal - works created between the dates

pre-1964: renewal required during first 28-yr term  
 1964-1977: renewal required but can be filed any time during first or extension terms  
 1978+: renewal not required see *Id.* at § 9.05[B], pp 9-68 to 9-70 for a more detailed discussion of renewal requirements

<sup>38</sup>*Id.* at § 9.01[D] p 9-26 and § 9.05[F], p 9-96

<sup>39</sup>17 U.S.C. § 303

<sup>40</sup>17 U.S.C. § 303

<sup>41</sup>*Id.*

<sup>42</sup>17 U.S.C. § 302(a)

<sup>43</sup>17 U.S.C. § 302(b)

publication, or a term of 100 years from creation, whichever expires first<sup>44</sup>

#### 4. Works of foreign origin

Unpublished works of foreign origin currently receive copyright protection in the U.S. for the same length of time and under the same conditions as works created by U.S. authors, regardless of the nationality or domicile of the author<sup>45</sup> Similarly, published works of eligible countries, which in effect includes all EU country works, are provided the same protection as U.S. origin works. As discussed previously,<sup>46</sup> the U.S. does not adopt the rule of the shorter term permissible under the Berne Convention. Notably, when the U.S. joined the Berne Convention, the Copyright Act was amended to provide that

[n]o right or interest in a work eligible for protection under this title may be claimed by virtue of, or in reliance upon, the provisions of the Berne Convention, or the adherence of the United States thereto. Any rights in a work eligible for protection under this title that derive from this title, other Federal or State statutes, or the common law, shall not be expanded or reduced by virtue of, or in reliance upon, the provisions of the Berne Convention, or the adherence of the United States thereto.<sup>47</sup>

This language is significant, insofar as the United States falls short of its Berne Convention obligations--particularly in regard to copyright duration of pre-1978 works.<sup>48</sup> This provision makes it clear that Congress intended to retain the power to make any changes to U.S. law to remedy these deficiencies.

#### 5. Summary Deficiencies in Current U.S. Law

Current U.S. law is deficient in its copyright terms in two respects. First, as a result of calculation from publication for pre-1978 works, U.S. copyright duration for some works will be shorter than the 50 years p m a minimum required by Berne. Articles 18(1) and

<sup>44</sup>17 U.S.C. § 302 (c).

<sup>45</sup>Under 17 U.S.C. § 104, unpublished works are subject to protection under Title 17 without regard to the nationality or domicile of the author. Published works are subject to protection under Title 17 if: (1) on the date of first publication, one or more of the authors is a national or domiciliary of the United States, or is a national, domiciliary, or sovereign authority of a foreign nation that is a party to a copyright treaty to which the United States is also party, or is a stateless person, wherever that person may be domiciled; or (2) the works if first published in the United States or in a foreign nation that, on the date of first publication, is a party to the Universal Copyright Convention; or (3) the work is published by the United Nations or any of its specialized agencies, or by the Organization of American States; or (4) the work is a Berne Convention work; or (5) the work comes within the scope of a Presidential proclamation.

<sup>46</sup>See *supra* Sec. II.A.1.

<sup>47</sup>17 U.S.C. § 104(c).

<sup>48</sup>See "Nation" *supra* note 9.

(4) of the Berne Convention requires that Berne signatories protect works under Berne standards so long as such works have not fallen into the public domain in their country of origin. Moreover, the pre-1978 formalities, which are prohibited by Berne, resulted in lapse of copyrights which would have subsisted in the absence of such formalities. Even after the U.S. became a signatory to Berne, it made it clear that works that had fallen into the public domain would not be revived.<sup>49</sup> This failure to comply with Berne results in discrepancies between U.S. and EU terms of protection.

This potentially-wide discrepancy in terms is illustrated by Mondrian's early works. Mondrian died in 1944. His work, *Molen* was published in 1909.<sup>50</sup> In the U.S., protection for this work terminated on December 31, 1984 (75 years after publication). However, under Berne (and in most of the countries of Europe), his works, including *Molen*, were protected until January 1, 1994 (50 years after his death). Thus, the U.S. term represents a 10 year shortfall from the protection required under the Berne Convention, and at least a 10 year discrepancy from the term of protection granted in EU countries. By failing to protect pre-1978 works for the Berne 50 years p m a minimum, the U.S. is in breach of its treaty obligations.<sup>51</sup> The U.S. term of protection for this work will be 30 years shorter than the European terms after implementation of the EC Term Directive, discussed later.

The U.S. Copyright Office has recognized the detrimental effect of U.S. works receiving shorter protection in Europe.<sup>52</sup> In September 1993 the Copyright Office held hearings to consider whether the U.S. should, in view of the EC Term Directive, extend U.S. copyright protection by 20 years. The testimony reflecting the detrimental effects of the rule of the shorter term treatment of U.S. authors in the EU provided impetus for proposal of the Copyright Term Extension Act of 1995, discussed below.<sup>53</sup>

As discussed in the next section, new laws in the U.S. attempt to eliminate certain violations of the Berne Convention. New legislation in the EU, however, widens the

<sup>49</sup>Berne Convention Implementation Act, Sec. 12.

<sup>50</sup>Yve-Alain Bois, *PIET MONDRIAN, A RETROSPECTIVE*, 1994 at p. 389. It should be noted that for a work of art to be published, it must be reproduced in quantities sufficient to satisfy the reasonable requirements of the public. An exhibition of a work of art does not satisfy the "publication" requirements Berne Convention, *supra* note 13 at Art. 3(3), rather, the work must have been reproduced in, e.g., a catalogue, as was Mondrian's work in 1909.

<sup>51</sup>"Nation", *supra* note 9.

<sup>52</sup>"Copyright Office Hearing held on possible extension of copyright term," 46 BNA PATENT, TRADEMARK AND COPYRIGHT JOURNAL 466 (Sept. 30, 1993).

<sup>53</sup>CONG. REC. 2/16/95 at p. 497.



existing discrepancies of terms between the EU and the U.S. The proposed U.S. Copyright Term Extension Act attempts to eliminate, or minimize, this discrepancy.

#### D. Duration - Bilateral Treaties

When analyzing whether a specific work by an EU or U.S. national (or with EU or U.S. country of origin) is still protected under the copyright laws of a given country, U.S. bilateral treaties should be consulted. Many such treaties provide for national treatment of the other country's works or nationals.<sup>54</sup> The U.S. has entered into bilateral copyright treaties with virtually all EU countries.<sup>55</sup> Additionally, the U.S. has entered into many treaties of Friendship, Commerce and Navigation (FCN) with EU countries, which often contain provisions for national treatment of the intellectual or industrial property rights of nationals of the parties to the treaty. The language of these FCN treaties addressing intellectual property law varies,<sup>56</sup> and the specific applicability of many of these treaties to copyright law has not been ruled upon. Additionally, the effects of certain of these treaties may have been modified without actually repealing the treaty itself. However, because the Berne Convention explicitly permits continued enforceability of bilateral treaties (to the extent such treaties grant more extensive protection than the Berne Convention) these treaties should be investigated when attempting to clear the use of or enforce a copyright in a specific country.

### III. NEW LAWS AND PROPOSED LEGISLATION

In the context of the Berne Convention and existing EU and U.S. laws, the impact of the new and proposed laws on international duration of copyright protection can be readily seen. The EC Term Directive significantly increases the term of protection in all EU and EFTA Member States. The GATT-TRIPS Agreement influences copyright duration analysis in its signatory countries, which include the United States and all EU countries. Additionally, the U.R.A.A. revives U.S. copyrights in eligible foreign-origin works. As

<sup>54</sup>See generally, Ricketson, THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS: 1886-1986 at 680 [hereinafter Ricketson], M. Nimmer and P.E. Geller, INTERNATIONAL COPYRIGHT LAW AND PRACTICE at EC-18, and NIMMER *supra* note 15.

<sup>55</sup>Austria, Sept. 20, 1907, Belgium, July 1, 1891, Denmark, May 8, 1893, Finland, January 1, 1929, France July 1, 1891, Germany, April 16, 1892, Greece March 1, 1932, Ireland, October 1, 1929, Italy, October 31, 1892, Luxembourg, June 29, 1910, the Netherlands, November 20, 1899, Portugal, July 20, 1893, Spain, July 10, 1895, Sweden, June 1, 1911, United Kingdom, July 1, 1891. The U.S. also has a bilateral treaty with the EEA country of Norway, July 1, 1905. U.S. Copyright Office, "International Copyright Relations of the United States," Circular 38a, November 1994.

<sup>56</sup>Compare, the Taiwan FCN Treaty, which contains specific reference to copyright, to the Netherlands FCN Treaty, 40 TRACTATENBLAD VAN HET KONINKRIJK DER NEDERLANDEN p. 2 (1956) (refers more broadly to "industrial property").

will be seen, the cumulative effect of these laws, treaties and conventions results in a continued disharmony in copyright duration that prejudices the rights of U.S. authors vis à vis European authors, and that also creates disincentives for authors to publish -- or first publish-- their works in the United States

The proposed U.S. Copyright Term Extension Act would, if adopted, greatly increase the U.S. term of protection for both EC- and U.S.-origin works, and would thus eliminate or narrow many of the duration discrepancies between the U.S. and the EU. However, even if the U.S. adopts the Copyright Term Extension Act, terms of protection will not be fully harmonized

#### A. The EC Term Directive

By July 1, 1995, all member states of the European Union are required to have implemented the EC Term Directive.<sup>57</sup> The EC Term Directive will harmonize the copyright term of protection in EU Member States to 70 years p m a. for works by individual or joint authors, and to 70 years post-publication for works owned by corporate rightholders. It will also revive certain copyrights if they have fallen in the public domain in one Member State but are still subject to protection in another Member State.

##### 1. 70 years p m a. and related terms of protection.

The duration of protection in most EU Member States will substantially increase as a result of the EC Term Directive. Under the EC Term Directive, those rights will be harmonized at 70 years p m a., resulting in an additional 20 years of copyright protection in most Member States.

Article 1(1) of the Directive states:

<sup>57</sup>It is not unusual for member states to fail to implement a directive until long after the implementation deadline. For example, the EC Software Directive had an implementation deadline of January 1, 1993. However, 3 member states have not yet adopted the directive and 3 member states adopted the directive nearly a year late. CELEX No. 791L0250. Failure by a member state to timely implement directives can, under certain circumstances, subject the defaulting member state to damages caused to private parties by the state's failure. Francovich and Bonifazi v. Italian Republic, Cases C-6, C-9/90 [1992] I R L R. 84. The extent of member states' liability for such damages (including lost profits, expenses and exemplary damages) is presently under review by the European Court of Justice. Brasserie du Pêcheur SA v. Federal Republic of Germany, Case Nos. C-46/93 and C-48/93. A private party may not, however, rely in a national court on the provision of a directive as against another private party until that directive has been implemented into the national law in which enforcement is sought. Marshall v. Southampton and South West Hampshire Area Health Authority, Case 152/84 [1986] E C R 723.

[t]he rights of an author of a literary or artistic work within the meaning of the Berne Convention shall run for the life of the author and for 70 years after his death, irrespective of the date when the work is lawfully made available to the public.

If a work is not published until after 70 years following the date of the author's death, copyright endures for 25 years after the work is lawfully published or lawfully communicated to the public.<sup>58</sup> Copyright in a joint work will endure for 70 years after the death of the last-surviving author.<sup>59</sup> Copyright in corporate works will run for 70 years after the work was lawfully made available to the public.<sup>60</sup> All terms are to be "calculated from the first day of January of the year following the events which gives rise to them."<sup>61</sup>

## 2 Retroactivity, revival

The EC Term Directive applies retroactively to revive copyrights in works that may have expired in one EU country but had subsisting copyrights in another country. The Directive provides that "[t]he terms of protection provided for in this Directive shall apply to all works and subject matter which are protected in at least one Member State on July 1, 1995."<sup>62</sup> Because Germany has a term of protection of 70 years, works which expired under a 50 years p m a term but which would have otherwise enjoyed protection in Germany (that is, works created by authors who died between 1925 and 1945) would be revived. The potentially vast impact of this revival mechanism is illustrated by a brief list of artists whose works could be subject to revival under the EC Term Directive: Paul Klee, Kandinsky, Munch, Mondrian, Picasso, James Joyce, D.H. Lawrence, A. Conan Doyle. By operation of the mandatory rule of the shorter term, discussed below, works by U.S. nationals will not benefit from this revival mechanism

The Directive does not retroactively *shorten* the term of protection for works whose term of protection is longer than 70 years p m a prior to the effective date of the EC Term Directive.<sup>63</sup> However, as to works created in those countries after 1 July 1995, the term of protection will be 70 years p m a

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<sup>58</sup>Term Directive, *supra* note 2 at Art. 4

<sup>59</sup>*Id.* at Art. 1(2)

<sup>60</sup>*Id.* at Art. 1(3)

<sup>61</sup>*Id.* at Art. 8

<sup>62</sup>*Id.* at Art. 10(2)

<sup>63</sup>*Id.* at Art. 10(1)

### 3. Protection of "acquired rights" of third parties

The EC Term Directive states that it shall be without prejudice to any acts of exploitation performed prior to July 1, 1995.<sup>64</sup> Therefore, rights of third parties which were acquired before a work's term was extended or revived are mandated to be protected. However, the EC Term Directive provides no further guidance on how such acquired rights will be protected, mandating only that Member States "adopt necessary provisions to protect in particular acquired rights of third parties." Therefore, it remains to be seen how reliance parties, including those parties who incorporated a previously public domain work into a derivative work, will be treated.<sup>65</sup> Because the EC Term Directive does not specify the manner in which reliance parties must be accommodated, it is quite possible that implementing legislation in the various EU Member States will result in differing rights for reliance parties.<sup>66</sup>

### 4. Works of foreign origin.

Article 7 of the EC Term Directive states that:

[w]here the country of origin of a work, within the meaning of the Berne Convention, is a third country, and the author of the work is not a Community national, 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, but may not exceed the term laid down in Article 1.<sup>67</sup>

In accordance with this Article, works by nationals of EU countries will be exempt from rule of the shorter term treatment in EU countries, regardless of the country in which a work is first published. The EC Term Directive goes further than Phil Collins regarding the rights it grants to EU nationals. Whereas Phil Collins mandated that an EU country cannot apply rule of the shorter term treatment to works from another EU country on a discriminatory basis, the EC Term Directive provides that works of all EU nationals will receive the 70 years term provided in the Directive, *regardless of the country of origin of the work.*

With respect to protection under the Directive for "nationals" of EU countries, the Berne

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<sup>64</sup>*Id.* at Art. 10(3)

<sup>65</sup>*Id.*

<sup>66</sup>For a criticism of the complications arising from the ambiguity of this provision, see W. R. Cornish, "Intellectual Property," 13 Y.B. of Eur. L. 485, 496 (1993)

<sup>67</sup>Berne Convention, *supra* note 13 at Art. 7(1)

Convention mandates that if the author is not a national of the country of origin of the work for which he is protected under the Convention, he shall enjoy in that country the same rights as national authors.<sup>68</sup> Accordingly, under Berne, if a work is first published in an EU country (and not simultaneously published in another shorter-term Berne country, e.g., the U.S.) that author shall be entitled to the longer protection provided in the EC Term Directive.

However, if an author is not an EU national and the work is not first published in an EU country, the rule of the shorter term is mandatory.<sup>69</sup> This results in preferential treatment for EU nationals whose works may have otherwise received rule of the shorter term treatment in EU countries if the work had been first published in a shorter-term country, for example, the United States

The European Commission emphasized this discriminatory result when adopting the Directive. In the Explanatory Memorandum to the proposal for the Directive, the Commission stated its support for application of the rule of the shorter term against non-EU nationals and against works published outside the Community.

It is only natural that 'foreign' works and third country nationals should not be protected for a period longer than is considered appropriate by their own country. Moreover, since Community works and nationals are not protected for as long a period in those countries as they are in the Community, comparing terms of protection is a way of ensuring reciprocity.<sup>70</sup> If third countries are to be induced to improve their protection from the point of view of its duration, one should avoid granting them the long Community term unilaterally.<sup>71</sup>

As is evident, the Commission's goal in discriminating against non-EU nationals is to induce countries with deficient terms of protection--namely, the U.S.--to improve their protection. It should be noted, however, that despite this commentary, the text of the directive itself (as well as Berne) does not permit discrimination against non-EU nationals if the country of origin of the author's work is an EU country.

An additional note should be made regarding the nationality of the author. Under the Berne Convention, "authors who have their habitual residence in [one of the countries of the Berne Union] shall, for the purpose of this Convention, be assimilated to nationals of

<sup>68</sup>*Id.* at Art. 5(3)

<sup>69</sup>COM (92). *supra* note 21 at 9. See also, Jochoram *supra* note 6 at #24

<sup>70</sup>*Id.* at 8.

<sup>71</sup>*Id.* at 31

that country."<sup>72</sup> Therefore, a U.S. "national" (from a citizenship perspective) who has his or her habitual residence in an EU country can take advantage of the benefits of the EC Term Directive's longer terms. It should be noted that GATT-TRIPS defines "national" as "persons, natural or legal, who are domiciled or who have a real and effective industrial or commercial establishment in" the specific country.<sup>73</sup>

The U.S. clearly responded to the extended duration provided under the EC Term Directive. In introducing the House version of the Copyright Term Extension Act, discussed below, Rep. Moorhead commented that "once the EU Directive is implemented, U.S. works will continue to be granted the shorter life plus 50 year term before falling into the public domain. He further stated that if the Act is not adopted, "American creators will have 20 years less protection than their European counterparts--20 years during which Europeans will not be paying Americans for their copyrighted works."<sup>74</sup>

#### 5 Summary EU/US discrepancies widened

Consider again Mondrian's work *Molen*, the U.S. protection for which terminated on December 31, 1984. Whereas prior to the adoption of the EC Term Directive, the EU-U.S. discrepancy was 10 years, after adoption of the EC Term Directive, copyrights in the work will be revived and enforceable until January 1, 2014 -- a difference of 30 years. This huge discrepancy will not be eliminated by the Copyright Term Extension Act, discussed below, as such act applies only prospectively and does not eliminate the problems which arise from calculating U.S. duration for pre-1978 works from the date of publication or creation.

The effect of these disparities complicates the creation and marketing of products containing pre-existing works, such as multimedia products. Consider the effects of these disparity of protection for a hypothetical CD ROM encyclopaedia. Insofar as the U.S. does not fully comply with the Berne Convention minimum duration of protection and the EU does, a large discrepancy in rights for a given work can exist between the EU and the U.S. Imagine attempting to create and market a multimedia encyclopaedia containing works of authorship that are still subsisting or will be revived in the EU but are expired in the U.S., where the works could be individually copied and potentially not be subject to

<sup>72</sup>Berne Convention, *supra* note 13 at Art. 3(2)

<sup>73</sup>GATT-TRIPS, *supra* note 14 at Art. 1(3)

<sup>74</sup>Cong. Rec. 2/16/95, p. E379

suit for infringement?<sup>75</sup> Moreover, such works could be uploaded on the Internet in the U.S. and distributed to jurisdictions in which the copyright is still protected, resulting in copyright infringement in, e.g., Europe by a defendant that is difficult, if not impossible, to trace.<sup>76</sup> Further, EU rightsholders will most certainly suffer losses from more conventional means of importation of the products from the U.S. into the EU, where royalties should be paid. Will the U.S. companies employing U.S. prior works protect the EU rightsholders in these circumstances? Clearly the bifurcation of copyright duration between the EU and the U.S. creates problems, both for persons wishing to utilize in subsequent works pre-existing works, and for the rightsholders whose European rights may be diminished as a result of distribution of such works in the U.S.

As discussed in the introduction, all EU countries are required to implement the new 70 years p.m.a. duration provision of the EC Term Directive. Under Phil Collins, no EU country may discriminate against nationals of other EU countries. Moreover, under the EC Term Directive, no prejudice by application of the rule as between EU countries would result because the duration for all countries will be harmonized to 70 years p.m.a. Therefore, all works created by EU nationals, regardless of the country of first publication, will be accorded copyright duration of 70 years p.m.a. Works created by U.S. nationals that are first published (as defined in the Berne Convention) in an EU country and not published in the U.S. within 30 days of such publication would receive the 70 years p.m.a. term established in the EC Term Directive, as will works by U.S. citizens who are habitually residing (or domiciled) in an EU country, regardless of where the work was first published. However, works first published outside the EU, and works simultaneously published in an EU country and in the U.S. or other shorter-term Berne country that are created by U.S. nationals will receive rule of the shorter term treatment in EU countries. Therefore, those works will cease to be protected in the EU upon the expiration of their U.S. (or other shorter-term) copyright.

The result of the EC Term Directive is an exaggeration of the extant prejudice which

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<sup>75</sup>Individual copies of pre-existing works are not protected as derivative works unless such copy contains "originality." J. NIMMER, *supra* note 15 at § 2.08[C]. See also, G. Oppenheimer, "Originality in Art Reproductions: 'Variations' in Search of a Theme," 27 COPYRIGHT LAW SYMPOSIUM 207 (1982) (discussing variations from original works necessary to qualify art reproductions for separate copyright). Accordingly, if a public domain painting, for example, is reproduced in digital form on a CD-ROM, copying of such individual work may not be enjoined as a copyright infringement since the copy of the work is not a protectible work of authorship, and the original work on which the copy is based is in the public domain. Original work added to such compilations, such as commentary, interactive search programs, etc. would likely be protectible under copyright, as may the compilation as a whole.

<sup>76</sup>See generally, P. Samuelson, R. Glushko, "Intellectual Property Rights for Digital Library and Hypertext Publishing Systems," 6 HARV. J.L. & TECH. 237 (1993).

certain U.S. works receive abroad as a result of the deficiencies in U.S. duration provisions. Now that the U.S. is a member of the Berne Convention, U.S. authors cannot usefully avail themselves of the benefits of simultaneous publication. Before U.S. adherence to the Berne Convention, an author could first publish a work simultaneously in a Union country and in the U.S. and thus establish the origin of the work as a Berne work,<sup>77</sup> thus receiving the benefits of the longer terms provided as a result of the work being, e.g., a Netherlands-origin work. This procedure was known as "back door to Berne." However, now that the U.S. is a member of the Berne Convention, Article 5(a) dictates that a work first published in the U.S. will have the U.S. as its country of origin. Article 5 further dictates that if the work is first published simultaneously in Berne Union countries which have different terms, the country which grants the shorter term will be the country of origin. Therefore, U.S. authors can no longer escape the world-wide detriments of the U.S. shorter term by simultaneous publication in a longer-term country.

The only manners by which a U.S. author can currently obtain the benefits of the longer EU terms of protection is 1) by first publishing the work in an EU country, and delaying publishing it in the U.S. for 30 days after the non-U.S. publication date (for purposes of parallelism with prior terminology, I will term this "back door to EU"), or 2) habitually residing in an EU country.

This discrepancy, as discussed in more detail later, results in an incentive for authors to first publish a work in an EU country, and delay publication in the U.S. by 30 days. Note should be taken regarding the status of works that were simultaneously published in an EU country and the U.S. before the U.S. adhered to the Berne Convention. On first reading, one could conclude that such works would, under the Berne Convention, have an EU country origin and therefore benefit from the revival and extended term benefits of the EC Term Directive. Before the U.S. joined the Berne Convention, such work would have a country of origin of the EU country in which it was simultaneously published with the U.S.<sup>78</sup> However, since the U.S. implemented Berne, such works are considered to be U.S. origin works.<sup>79</sup> Thus, works that enjoyed "back door to Berne" through simultaneous publication in an EU country will not enter through the "back door to the EU," and will receive rule of the shorter term treatment in EU countries.

<sup>77</sup>Berne Convention, *supra* note 13 at Arts. 5 (a) and (b)

<sup>78</sup>*Id.* at Art. 5

<sup>79</sup>Ricketson, *supra* note 54 at § 5.78, page 218



## B. GATT-TRIPS and duration.

The TRIPS portion of GATT states that TRIPS members shall "comply with Articles 1 through 21 of the Berne Convention and the Appendix thereto."<sup>80</sup> While TRIPS provides for national treatment by signatory countries, it specifically permits the discriminations permitted under Berne.

Exempted from this obligation [of national treatment] are any advantage, favour, privilege or immunity accorded by a [TRIPS] Member . . . granted in accordance with the provisions of the Berne Convention (1971) or the Rome Convention authorizing that the treatment be a function not of national treatment of the treatment accorded in another country.<sup>81</sup>

TRIPS further provides that "Members shall accord the treatment provided for in this Agreement to the nationals of other Members "<sup>82</sup> Since Berne permits application of the rule of the shorter term, such treatment is still permissible as between TRIPS-signatory countries, subject to the EU national nondiscrimination principle dictated by the EC Term Directive and Phil Collins. Notably, TRIPS establishes the minimum term of protection, "*when such term is calculated on other than the life of the author*, at 50 years from the end of the calendar year of authorized publication or, failing such authorised publication within 50 years from the making of the work, 50 years from the end of the calendar year of making."<sup>83</sup> (emphasis added) Thus, even though TRIPS facially requires its signatory members to adhere to the Berne Convention, the 50 years p.m.a. duration of Berne is not mandatory under TRIPS, due to the shorter term of 50 years post-publication term permitted under TRIPS Article 12. Therefore, TRIPS may not enable non-U.S. countries to force the U.S. to adhere to the Berne 50 years p.m.a. as to pre-1978 works, because TRIPS itself permits a shorter term of protection than Berne.

## C. The Uruguay Round Agreements Act

### I. Main Provisions of the Act

The U.S. has enacted GATT-TRIPS implementing legislation under Section 514 of the Uruguay Round Agreements Act,<sup>84</sup> that will retroactively revive certain copyrights which

<sup>80</sup>GATT-TRIPS, *supra* note 14 at Art. 9(1) 6-bis of Berne, which provides moral rights, was expressly excluded from GATT-TRIPS

<sup>81</sup>*Id.* at Art. 4(b)

<sup>82</sup>*Id.* at Art. 11(3)

<sup>83</sup>*Id.* at Art. 12

<sup>84</sup>*Supra* note 10

have fallen into the public domain as a result of the copyright owner's failure to fulfill the pre-1978 Act copyright formalities of proper copyright notice and copyright renewal. The effective date of this Act is January 1, 1996.

Section 104A of Title 17 of the United States Code was amended by this Act to provide that U.S. copyrights may be restored in an original work of authorship that is not in the public domain in its "source country" through expiration of term of protection and is in the public domain in the United States due to: (i) noncompliance with formalities imposed at any time by United States copyright law, including failure of renewal, lack of proper notice, or failure to comply with any manufacturing requirements; (ii) lack of subject matter protection in the case of sound recordings fixed before February 15, 1972; or (iii) lack of national eligibility.<sup>85</sup> A restored work's "source country" is defined as follows:

- (A) a nation other than the United States;
- (B) in the case of an unpublished work--
  - (i) the eligible country in which the author or rightholder is a national or domiciliary, or, if a restored work has more than 1 author or rightholder, the majority of foreign authors or rightholders are nationals or domiciliaries of eligible countries, or
  - (ii) if the majority of authors or rightholders are not foreign, the national other than the United States which has the most significant contacts with the work, and
- (C) in the case of a published work--
  - (i) the eligible country in which the work is first published, or
  - (ii) if the restored work is published on the same day in 2 or more eligible countries, the eligible country which has the most significant contacts with the work.<sup>86</sup>

Thus, works first published in the U.S., or published in the U.S. within 30 days of publication in an "eligible country," and works by U.S. nationals or domiciliaries (unless such works are jointly authored by at least one national or domiciliary of an "eligible country") are excluded from these provisions.<sup>87</sup> "Eligible country" is defined as "a nation, other than the United States, that is a WTO member country, adheres to the Berne Convention, or is subject to a proclamation under 104A (g)"<sup>88</sup> by the President that such foreign nation extends restored copyright protection reciprocally to works by authors who are nationals or domiciliaries of the United States.<sup>89</sup>

<sup>85</sup> 17 U.S.C.A. § 104A (h)(6)

<sup>86</sup> 17 U.S.C.A. § 104A (h)(8)

<sup>87</sup> 17 U.S.C.A. § 104A (h)(6)(D)

<sup>88</sup> 17 U.S.C.A. § 104A (h)(3)

<sup>89</sup> 17 U.S.C.A. § 104A (g)

Unlike the EC Term Directive, the U.R.A.A. outlines in detail the manner in which the rights of "reliance parties" (e.g. third parties who are exploiting previously public-domain works prior to the effective date of restoration) must be protected. In order to enforce a restored copyright against a party who was exploiting the work while it was in the public domain (termed a "reliance party"), the copyright holder is required under amended Section 104A to file a claim of restoration of copyright with the U.S. Copyright Office or send actual notice to the reliance party during the 24-month period beginning on the date of restoration.<sup>90</sup> Reliance parties will have a 12-month grace period from receipt<sup>91</sup> or publication of notice<sup>92</sup> in which to continue to exploit the work. The grace period runs from the earlier of publication in the Federal Register or service of notice to the reliance party.<sup>93</sup> However, the grace period excludes the right to make new copies or phonorecords of the work after publication of intent to restore in the Federal Register or receipt by the reliance party of notice of intent to restore.<sup>94</sup>

The Copyright Office must establish procedures by October 1, 1995 for filing notices of intent to enforce restored copyrights,<sup>95</sup> and must keep a list of restored copyrights and publish such list in the Federal Register every four months for two years after the effective date of the Act.<sup>96</sup>

Special mandatory royalty provisions are provided to permit continued exploitation by reliance parties who have created derivative works based on previously public domain copyrights.<sup>97</sup> The Act provides that a reliance party may continue to exploit that work for the duration of the restored copyright if the reliance party pays to the owner of the restored copyright reasonable compensation for conduct which would be subject to a remedy for infringement but for the provisions of [the Act].<sup>98</sup> If the parties do not have an agreement regarding the compensation to be paid, "the amount of such compensation shall be determined by an action in United States district court, and shall reflect any harm

<sup>90</sup> 17 U.S.C.A. § 104A(d)(2)

<sup>91</sup> 17 U.S.C.A. § 104A(d)(2)(A)(i)(I)

<sup>92</sup> 17 U.S.C.A. § 104A(d)(2)(B)(i)(I)

<sup>93</sup> 17 U.S.C.A. § 104A(d)(2)(B)(i)(II)

<sup>94</sup> 17 U.S.C.A. § 104A(d)(2)(B)(i)(III)

<sup>95</sup> 17 U.S.C.A. § 104A(3)(1)(D)(i)

<sup>96</sup> 17 U.S.C.A. § 104A(3)(1)(B)(i)

<sup>97</sup> "Existing derivative works--(A) In the case of a derivative work that is based upon a restored work and is created--(i) before the date of enactment of the Uruguay Round Agreements Act, if the source country of the derivative work is an eligible country on such date, or (ii) before the date of adherence or proclamation, if the source country of the derivative work is not an eligible country on such date of enactment." 17 U.S.C.A. § 104A(d)(3)

<sup>98</sup> 17 U.S.C.A. § 104A(d)(3)(A)(ii)

to the actual or potential market or value of the restored work from the reliance party's continued exploitation of the work, as well as compensation for the relative contributions of expression of the author of the restored work and the reliance party to the derivative work.<sup>99</sup> To enforce the restored copyright against parties whose exploitation began after the restoration date of the restored work, no notice filing or mailing of intent to enforce is required.<sup>100</sup>

## 2. Summary.

Under the U.R.A.A., copyright in public domain works of foreign origin will be revived in the U.S. if their public domain status is a result of failure to comply with copyright formalities. The U.R.A.A. brings the U.S. into closer compliance with the Berne Convention, and provides an opportunity for foreign work owners to remedy the effects of earlier failure to fulfill U.S. copyright formalities. For foreign work owners wishing to enforce their works against "reliance parties" it is important to take note of the notice requirements under the Act, as well as the 24 month deadline for notice. The Copyright Office anticipates that it will receive thirty- to fifty-thousand Notices of Intent to Enforce restored copyrights (NIEs) annually.<sup>101</sup> The overall impact of the U.R.A.A. will be even greater than the NIE filings will evidence, as owners of previously public-domain works have a basis on which to recommence marketing and licensing programs to *non-reliance* third parties without the requirement of filing an NIE.

### D. Proposed U.S. Copyright Term Extension Act of 1995.

*"Monopolies may be allowed to persons for their own productions in literature, and their own inventions in the arts, for a term, not exceeding \_ \_ years, but for no longer term & for no other purpose."*

-proposed patent/copyright clause for the first U.S. Constitution, sent by Thomas Jefferson to James Madison<sup>102</sup>

The debate over the duration of monopoly to be granted to authors (and inventors) in the

<sup>99</sup>17 U.S.C.A. § 104A(d)(3)(B)

<sup>100</sup>17 U.S.C.A. § 104A(d)(1)

<sup>101</sup>Copyright Office Hearing on Restored Copyrights, March 20, 1995 (Statement of Copyright Office Acting General Counsel Marilyn Kretsinger) BNA-PATENT, COPYRIGHT AND TRADEMARK DAILY, March 29, 1995.

<sup>102</sup>cited in John Deere Co. v. Cook Chem. Co., 383 U.S. 1, 86 S. Ct. 684 (1965).

U.S. pre-dates the constitutional provision granting Congress authority to award such monopolies. Even Thomas Jefferson, a strong proponent of a copyright and patent clause in the Constitution, was not able to define the appropriate duration of protection, as is evident from the quotation above. Article I, Section 8, Clause 8 of the Constitution, passed unanimously,<sup>103</sup> provides that Congress has the power "to promote the progress of science and the useful arts, by securing for a limited time to authors and inventors the exclusive right to their respective writings and discoveries" [hereinafter Copyright Clause].<sup>104</sup>

The framers of the Constitution, thus, passed the decision regarding duration of protection to Congress, resulting in great debate regarding the term of duration in the Copyright Act.<sup>105</sup> What "limit" should be put on those "Times" of exclusivity is at the center of a renewed debate. The current debate is sparked by the proposed U.S. Copyright Term Extension Act (companion bills HR 989 and S 483), and has split the copyright academy into proponents and opponents of the Extension Act.<sup>106</sup>

This Extension Act, if adopted, would add 20 years to the current terms of protection for copyright in the U.S. This Act was proposed in direct response to the EC Term Directive. Unlike the EC Term Directive, however, the U.S. Extension Act would not revive public domain copyrights. Nonetheless, the proposed extension would lessen the existing term discrepancies as to pre-1978 works in which copyright still exists on the effective date of the Extension Act. Further, the Act represents a uniquely proactive step by the U.S. to keep its copyright laws current with international standards. As is argued in the summary to this section, the U.S. constitution supports adoption of the Act.

1) Works created before January 1, 1978 with Subsisting Copyrights

Sec. 304--pertaining to works with subsisting statutory copyrights (e.g. published or registered works) created before January 1, 1978--is amended to provide an extension of the renewal term: from 47 years to 67 years, resulting in a total term of duration for such works of 95 years following the date of publication, or for unpublished works, following

<sup>103</sup> Donner, "The Copyright Clause in the U.S. Constitution: Why did the Framers Include it with Unanimous Approval?" 36 AM. J. LEGAL HIST. 361 (1992)

<sup>104</sup> U.S. Const. Art. I, § 8 cl. 8

<sup>105</sup> See, P. Leval, L. Lewis, "Are Copyrights For Authors or Their Children?" 33 J. Copyright Soc'y U.S.A. 1 (1991)

<sup>106</sup> D. Kargala et al., "Comment of US Copyright Law Professors on the Copyright Office Term of Protection Study," reprinted in 12 EIPR 531 (1994) (hereinafter Comment) (arguing against adoption of the Extension Act); A. Miller, Billboard Magazine; D. Nimmer, "Nation," *supra* note 9 (arguing in favor of the Act); D. Nimmer, Billboard Magazine

the date of registration<sup>107</sup> However, the Copyright Term Extension Act does not revive copyrights that have fallen into the public domain<sup>108</sup>

Examples of Mondrian's works illustrate the limitations of the effects of the Copyright Term Extension Act. As discussed previously, the U.S. copyrights in *Molen* expired on December 31, 1984 under the existing U.S. term of protection applicable for such works--75 years following the publication date. Because the work is now in the public domain, the Copyright Term Extension Act will not operate to revive (or, extend) the copyright in such work.

2) Works created but not published or copyrighted before January 1, 1978

Amended Section 303--pertaining to works created but not published or copyrighted before January 1, 1978 would receive the extended term of protection provided in Section 302,<sup>109</sup> discussed below. The amendment further provides that in no event will such copyright expire before December 31, 2012, and if the work is published on or before December 31, 2012, the term of copyright will not expire before December 31, 2047.

3) Works created on or after January 1, 1978

If adopted, the legislation would amend 17 U.S.C. Section 302(a) and (b), such that works and joint works created on or after January 1, 1978 would receive a term of protection of 70 years after the death of the author<sup>110</sup>. Terms for corporate works (e.g. works made for hire provided in Section 302(c)) would also be extended 20 years, to 95 years after the work is published or 120 years from creation, whichever expires first.<sup>111</sup> This is an important extension for works created by corporate entities, and represents a 25 year longer term of protection than that provided such works in the EU. Proposed amendments to Section 302(e) would also extend each of the terms regarding presumptions as to author's death by 20 years.<sup>112</sup>

Finally, the legislation would extend the February 15, 2047 termination date of the Section

<sup>107</sup>C.T.E.A. § 2(d)

<sup>108</sup>The U.R.A.A. does, however, revive certain public domain copyrights. See discussion at Sec. C.

*supra*.

<sup>109</sup>C.T.E.A. § 2(c)

<sup>110</sup>C.T.E.A. § 2(b)(1)

<sup>111</sup>C.T.E.A. § 2(b)(2)

<sup>112</sup>C.T.E.A. § 2(b)(3)

301(c) exclusion from Copyright Act preemption for sound recordings made before February 15, 1972 to February 15, 2067. The amendment would also extend the exclusion from copyright protection for pre-February 15, 1972 sound recordings to February 15, 2067.

4) Summary: Arguments for Adoption of the Proposed Copyright Extension Act.

In analyzing the Copyright Clause in the Constitution, the Supreme Court emphasized that providing benefits to the public<sup>113</sup> and advancing the public welfare<sup>114</sup> are the rationales behind this clause in the Constitution. An extension to the U.S. copyright term would advance the public welfare: by creating incentives to produce derivative works, and by increasing public access to existing works. The revision would further eliminate the rule of the shorter term detriments arising from the U.S.-EU copyright term disharmonies, achieve a major step forward in bringing U.S. law current with international norms, and protect the U.S. economic trade dominance in copyright-based products.

(a) Increased incentive to distribute pre-existing works

The increased term would increase the incentive to distribute pre-existing works. If the Act is defeated, the *scope* of works actually accessible by the public could be lower as they fall into the public domain, without adequate protection against infringement, there is little economic incentive to distribute such works. It is well recognized that copyright provides incentives for distribution of works. Representatives from the Motion Picture Association of America deemed public domain works "essentially worthless."<sup>115</sup> Representatives of the National Music Publishers Association also cited the public domain status of a work as a disincentive to distribution.<sup>116</sup> If two of the major industries responsible for distributing copyrighted works -- films and music -- believe the public domain status creates disincentives to distribute, can be concluded that distribution of at least those types of works will decrease.

The example given previously regarding the multimedia encyclopaedia containing individual, public domain works of art, writings, and music is also a relevant example here. Suppose a company wishes to digitize an art collection contained in a museum. Producing

<sup>113</sup>Fox Film Corporation v. Doyal, 286 U.S. 123, 127 (1932)

<sup>114</sup>Mazer v. Stein, 437 U.S. 201 (1954)

<sup>115</sup>Copyright Office, "Hearings Held on Possible Extension of Copyright Term," 46 PTCJ 466 (1995)

<sup>116</sup>*Id.*

the highest-quality digital versions of the art will likely require accessing the collection (at a cost) and taking digital photographs of the works of art (also at a cost). If users of the encyclopaedia can copy an individual, public domain work of art from the encyclopaedia without risk of infringement, the economic incentive to include that work in the encyclopaedia is greatly reduced. Without sufficient economic incentive to distribute works (in the form of some guarantee of exclusivity), distribution of such works will decrease.

(b) Stimulation of the creation of derivative works

An author's incentive to create derivative works based upon pre-existing works is greatly increased if the underlying works are protectible. If a film company wishes to re-make and re-release a classic film, and invest the huge sums in production in marketing, its revenues could be jeopardized if theatre operators "piggy back" on the marketing of the re-make by wide-spread screening of the original. The film producer would lose revenues in the form of lost sales of tickets to the re-make, and would not be entitled to copyright royalties for the screenings of the original. Extended copyright terms would encourage the creation of all types of derivative works, such as films based on plays and books, derivative works of art, and music remakes. The release of re-makes create renewed public awareness and discourse about the work, as well as result in more choice. These are benefits which would be discouraged if the profit incentives to create derivative works is undermined by loss of copyright protection for the original.

Accordingly, an extended term of protection results in increased incentives to create new works of authorship, including derivative works. This increased incentive results in more works available to the public, and a concomitant fulfilment of the Constitution's mandate.

(c) Elimination of detriments from EU-U.S. disharmony

The U.S. public could be qualitatively (as well as quantitatively) disadvantaged by failure to adopt the Extension Act. By operation of the rule of the shorter term treatment in the EU, if the U.S. fails to adopt the extended term, authors will have a strong incentive to publish their works first in an EU country and delay publication for thirty days in the U.S. Because the EC Term Directive entitles works of EU country of origin to benefit from the directive's longer terms, authors will have a great incentive to first-publish in the EU.<sup>117</sup> The possible number of creators who will take advantage of this incentive could be

<sup>117</sup>See discussion at II A 3 *supra*.



estimated by observing the number of creators who utilized the "back door to Berne" method of simultaneously publishing a work in the U.S. and a Berne country.<sup>118</sup> Additionally, authors will be encouraged to delay their U.S. publication to avoid having a U.S. country of origin, with its resultant world-wide shorter copyright terms.<sup>119</sup>

The potentially real effects of this incentive should not be ignored. Any delay in U.S. access to works hinders the progress of the arts in the U.S.: lack of immediate access to new works would deprive the U.S. public of the ability to effectively participate in the world-wide discourse that shortly follows the introduction of important new creative works, reduce its ability to make ground-breaking independent judgements on the new works, and disadvantage its creation and marketing of new--equally copyrightable--works, such as news programs, parodies, commentary, etc.

(d) Increased U.S. economic dominance

It has also been argued that because the U.S. copyright system has resulted in a U.S. dominant economic position in copyright-based products, it should only be revised if adequately justified.<sup>120</sup> It is erroneous to attribute U.S. economic dominance in copyright-related trade solely to the copyright laws, and is further problematic to argue against a change based on a quantitative and not qualitative analysis of a new law's effect. In fact, the proposed change would protect the U.S. trade dominance in intellectual property-based products, while providing the advantage of qualitatively improving the works of authorship available to the public.

The U.S. is, economically, the undisputed world leader in the export of copyright-based products.<sup>121</sup> A large contribution to the positive trade balance is a result of export of films and computer software. However, the preeminence of the U.S. in the fields of literature and the visual arts has not been demonstrated. While it can be agreed that the European

<sup>118</sup>This of course would need to be adjusted for the fact that certain creators will not wish to delay U.S. publication and thus delay by 30 days the profits to be gained in the U.S. market.

<sup>119</sup>Admittedly, the EU will not apply the rule of the shorter term against its own nationals, however, it may against authors of other countries of origin. Moreover, EU authors may still wish to avoid a U.S. origin to avoid the shorter-term detriments in other countries. An alternative means for a U.S. to enter the "back door to EU" would be for the author to establish his or her habitual residence (or domicile) in an EU country. While the number of U.S. authors who would expatriate to Europe, and the resulting harm to the U.S. public may not be readily quantified, this effect of permitting the discrepancies in terms should be noted.

<sup>120</sup>Comment, *supra* note 106.

<sup>121</sup>Sen. Rep. 100-352 (1988)(comments by Sen. Byrd regarding the 1987 \$1.5 billion trade surplus in copyright-based products).

appetite is voracious for U.S. origin products, there are many factors which could contribute to the economic dominance in intellectual properties. One could envision that the economic dominance is partly attributable to the U.S. preeminence in marketing strategies. It could also be imagined that another factor supporting the economic advantage of U.S. over the EU is the world-renowned bi-lingual capabilities of the Europeans, and the equally renowned linguistic limitations of the U.S. public. Imputing the economic dominance of the U.S. solely to its copyright laws is an inadequate basis on which to justify maintenance of the status quo.

The U.S. Copyright Act cannot be cited as the source of incentive to create some of the very products that led to U.S. economic dominance--films and computer software. The protectability of computer software under copyright law was not an established fact during the period in which software was originally invented. Although the Copyright Office granted registrations for computer software as early as 1964, the validity of those registrations was only definitively decided by the courts in the early 1980s.<sup>122</sup> Similarly, the applicability of the Copyright Act to films was not established until the 1970s.<sup>123</sup> Thus, the early pioneers in the software and film industries could not be said to have been *motivated* by the Copyright Act. Therefore, the argument that U.S. economic dominance in intellectual properties markets is a result of the Copyright Act is questionable. Furthermore, because the Extension Act will increase the term of protection for U.S. works abroad, the U.S. economic dominance is protected.

Further, it is risky to justify maintenance of the status quo by demonstrating the economic, but not qualitative, preeminence of U.S. copyright industries over EU copyright industries. It has not been established that the U.S. has a positive trade balance in fine art and literature, nor could it be argued that the U.S. qualitatively produces artistic works of superior quality or diversity. The Constitution did not define "promoting the progress of science and the useful arts" as maximizing the U.S. balance of trade. If any Constitutional support can be found for that argument, it would be under the Commerce Clause.<sup>124</sup>

Nonetheless, the U.S. trade surplus in copyright-based products is an important consideration. The Act protects that surplus by resulting in 20 years longer protection in both the U.S. -- and the EU. This extended term results in longer royalty streams to the U.S. for all U.S. copyright-based products, such as films and music, for which copyright terms may be soon to expire, and computer software, for which profitable copyright terms

<sup>122</sup> NIMMER, *supra* note 15 at § 2.04[C], p. 2-52.3

<sup>123</sup> *Id.* at § 2.09[D], p. 2-157.

<sup>124</sup> *Id.* at § 2.04[C], p. 2-52.3

~~is~~ yet to be known. The extended term thus creates economic advantages for U.S. authors and ultimately protects the U.S. positive trade balance in copyright-based products

The Supreme Court, in construing the copyright clause, never ruled that profits were the most important form of "benefiting the public welfare". In revising the Copyright Act, the issue of U.S. *economic* dominance in the world-wide intellectual property marketplace should not overshadow an analysis of what revisions would most effectively *qualitatively* enhance the creative output of U.S. authors, and most effectively, *qualitatively* benefit the public welfare. As demonstrated earlier, failure to adopt the Extension Act could reduce the scope of works available to the U.S. public. Failure to adopt the act could also result in delayed U.S. access to new works, because authors have a strong incentive to first publish in the EU. Moreover, with added terms of protection, U.S. authors could justify added investment in works, therefore, in many instances, increasing the quality. In sum, failure to adopt the Act would harm the U.S. public welfare.

Changes that are made or rejected without consideration for what changes will provide incentives for U.S. authors to create works of the highest level of diversity and artistic quality, and will provide the U.S. public with the broadest access to works of the highest level and breadth of artistic quality are changes that ignore Constitutional mandate to promote the progress of arts and benefit the U.S. public. Failure to adopt the Extension Act would result in a net detriment to the U.S. public ~~would result~~. Because the Extension Act would result in increased incentives to produce new and derivative works, promote continued distribution of pre-existing works, and encourage first publication in the U.S., the Copyright Term Extension Act furthers the Constitutional goals of promoting the progress of the arts and benefits the public, all while protecting the U.S. copyright product trade surplus

#### IV. CONCLUSION.

The present interaction among the changed laws pertaining to copyright duration greatly benefits EU authors and holders of works of EU origin. EU authors and works will receive longer terms of protection and have copyrights in certain public domain works revived as a result of the EC Term Directive. The Phil Collins decision of the European Court of Justice ensures that EU nationals will not be harmed by application of the rule of the shorter term treatment, even if their works, by virtue of first publication in a non-EU, shorter term country, would have otherwise received rule of the shorter term treatment. The U.R.A.A. will revive U.S. copyrights in works of EU country origin and by EU

authors (if not first published in the U.S.) that have fallen into the public domain as a result of failure to fulfill copyright formalities

The benefits of the existing laws are much lower for U.S. authors and U.S.-origin works. U.S.- (and all other non-EU-) origin works, as well as works created by U.S. nationals (first published in a non-EU country) are excluded from the benefits of the EC Term Directive, and, under the Directive, are mandatorily subject to rule of the shorter term. The benefits of the Phil Collins case, basing its ruling on the principle of nondiscrimination against any EU national contained in the Treaty Establishing the European Economic Community will, by definition, not benefit U.S. nationals. The U.R.A.A., too, specifically excludes restoration of works first published in the U.S., as well as works by U.S. authors (unless such works are co-authored by at least one national or domiciliary of a non-U.S. "eligible country").

The only legislation that would directly benefit U.S. authors on a nondiscriminatory basis is the proposed Copyright Term Extension Act, which would, if adopted, result in increased protection for U.S. authors, result in a net qualitative and quantitative/economic benefit to the U.S. public, and achieve the worthy goal of harmonization with the EU.

Finally, the U.S. Acts have deficiencies which detriment EU and U.S. authors equally: neither the U.R.A.A. nor the proposed U.S. Copyright Term Extension Act revive pre-1978 works that fell into the public domain as a result of lapse of the anomalous U.S. pre-1978 term of duration based on the date of publication or registration of a work.

Despite these shortcomings, the recent laws affecting copyright duration collectively represent a major increase in European and U.S. copyright protection that must be heeded when entering into licensing transactions, conducting acquisition due diligence and valuations, and preparing derivative and collective works based on pre-existing (including previously public-domain) works. The U.S. Extension Act, should be adopted to facilitate the global exploitation of copyright-based products by harmonizing the U.S. terms with the new EU terms.

**CONSEQUENCES OF NEW LAWS AND PROPOSED LEGISLATION AFFECTING DURATION OF COPYRIGHTS**  
 Comparison of Effects on Rights Between EU and US Nationals/Works

<u>Law</u>	<u>Effects</u>	<u>Beneficiaries</u>	<u>Detriments</u>
<b>EC Term Directive</b> Implem. 1/7/95	<ul style="list-style-type: none"> <li>•Revives EU Cs<sup>1</sup></li> <li>•EU term indivd/joint works 70 yrs p m a</li> <li>•EU term for corporate works 70 yrs post-publ</li> <li>•r o s t impermissible ag EU nationals</li> </ul>	EU nationals	<ul style="list-style-type: none"> <li>•U S -origin works excluded (unless created by EC national)</li> <li>•mandatory r.o.s.t.<sup>2</sup> treatment of U.S. works</li> <li>•disincentive for first-publication in U.S.<sup>3</sup></li> <li>•incentive for "habitual residence" in E U</li> <li>•"acquired rights" of third parties not specified</li> </ul>
<b>Phil Collins</b> (Eur. Ct. Just.)	<ul style="list-style-type: none"> <li>•copyright term/r.o.s.t must be applied on nondiscrim basis</li> </ul>	EU nationals	<ul style="list-style-type: none"> <li>•U S. authors excluded</li> </ul>
<b>GATT-TRIPS</b>	<ul style="list-style-type: none"> <li>•requires non-Berne WTO members to adhere to Berne (EU/US=Berne)</li> </ul>	EU and US nationals (no effect on rts. in EU/US)	<ul style="list-style-type: none"> <li>•min term for calculation from publ. date is 50 years p m.a.</li> </ul>
<b>U.R.A.A.</b> (adopted-effect. 1/1/96)	<ul style="list-style-type: none"> <li>•Restores foreign Cs that lapsed from formalities<sup>4</sup></li> </ul>	Foreign nationals/works	<ul style="list-style-type: none"> <li>•U S -origin works excluded (unless created by EC national)</li> <li>•works by US nationals excluded</li> <li>•no revival of lapsed pre-1978 Cs</li> </ul>
<b>U.S. Extension Act</b> (proposed)	<ul style="list-style-type: none"> <li>•Extends US term to 70 years p.m.a (95 yrs after publ for corporate works)</li> </ul>	Foreign and US nationals	<ul style="list-style-type: none"> <li>•no revival of "lapsed" pre-1978 Cs</li> <li>•mitigates effect of pre-1978 post pub calc</li> <li>•mandatory notice to enforce ag. "reliance" parties</li> </ul>

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<sup>1</sup>Cs is an abbreviation for "copyrights"

<sup>2</sup>Abbreviation for "rule of the shorter term"

<sup>3</sup>Unless Extension Act is adopted.

<sup>4</sup>e.g., that lapsed as a result of failure to use proper copyright notice and/or renew copyrights.

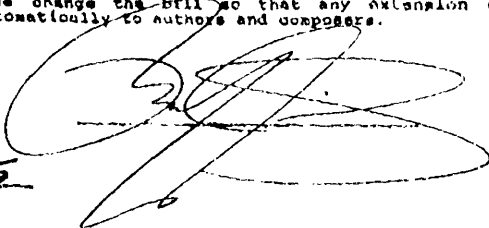
*Branford Marsalis*

Dear Member of Congress:

I make my living as a musician. My ability to provide for myself and my family depends on royalties I receive from ownership of copyright in the musical compositions I write. The Copyright Extension Act of 1995, H.R. 989, seeks to extend the length of copyright by 20 years. You might think that this would be a big help to songwriters. But the way the bill is drafted it isn't. Instead of giving this extra 20 years to songwriters, the bill gives the copyright to music publishers. In the past, many songwriters were forced into unfair contracts. Music publishers are trying to prevent songwriters from renegotiating these unfair contracts by having the copyright go to them, rather than the songwriters.

Copyright is supposed to benefit authors, not publishers. I ask you to please change the bill so that any extension of copyright goes automatically to authors and composers.

Dated:

6/30/95


## AMERICAN ASSOCIATION OF LAW LIBRARIES



## WASHINGTON AFFAIRS REPRESENTATIVE

**Robert L. Oakley**

*Director of the Law Library & Professor of Law  
Georgetown University Law Center*

July 11, 1995

The Honorable Carlos Moorhead  
Chairman, Intellectual Property Subcommittee  
House Judiciary Committee  
U.S. House of Representatives  
Washington, D.C. 20515

Dear Chairman Moorhead:

As representatives of four of the nation's principal library associations, with collective membership of almost 80,000 individuals and hundreds of institutions, we are writing with regard to the "Copyright Term Extension Act of 1995" (H.R. 989). While our organizations have not expressly opposed this legislation, the measure raises several serious concerns for libraries, students and scholars across the country that neither have been aired nor made part of the Subcommittee's record.

Please consider this correspondence, therefore, as a request for our coalition to work closely with you and your staff to craft the House's final version of H.R. 989. Our goal is to see legislation that meets the needs of both the creative community and its heirs and the millions of researchers, students and others who use libraries every day.

If enacted as presently written, H.R. 989 would have two serious but unintended effects:

- Extension of the copyright term could handicsp libraries' national preservation efforts, by denying ready access to a vast body of copyrighted works for two additional decades.

It has long been understood that the storage medium for works, such as paper and film, degenerate within the lifespan of current copyright protection. While the life expectancy of works in digital form is currently unknown, with changing technology, it would not be surprising to find these works disappearing in two decades or less.

One of the great public services American libraries perform is the preservation of creative works before they turn to dust. Congress has recognized this vital function and current copyright law provides some support for the preservation activities of libraries. See 17 U.S.C. Sections 107 and 108(c). However, the current law remains ambiguous at the periphery. While works in the public domain may be freely copied and therefore saved from deterioration, works under copyright protection are subject to

The Honorable Carlos Moorhead  
 July 11, 1995  
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statutory exemptions that are too restrictive to address the preservation problem.

Term extension exacerbates the problem libraries face when trying to decide if they may legally save a deteriorating work. Legislation that expands copyright protection for twenty years leaves preservationists exposed to claims of infringement for a longer period. That is unfair to the dedicated researchers in our nation's libraries and is contrary to the goal of maintaining the rich array of information accessible to our scholars, youths and others for education and research. A balance should be struck in this legislation which ensures that libraries may lawfully and cost-effectively protect important cultural resources, no matter the format in which they are stored or the period for which they are copyrighted.

- Extension of the copyright term would preclude access to material of little or no commercial value but of potentially critical importance to students and scholars.

Under current copyright law, nonprofit libraries are permitted to make certain copyrighted materials available to students and researchers without prior permission of the author or payment of a royalty. 17 U.S.C. Sections 107, 108 and 109. The number of copies that may be made and how they may be distributed between and among libraries, however, is narrowly circumscribed in statute.

Although institutions and researchers can seek out the authors of individual copyrighted works and negotiate for academic or other non-commercial use, that process is often prohibitively time consuming and expensive. Broad academic dissemination and use of works is thus dependent on inclusion of those works in the public domain. Term extension effectively restricts access to works for several decades, regardless of the commercial value of those materials.

While the intent of H.R. 989 is to grant economically viable copyrighted works additional time to earn value in the marketplace, it sweeps too broadly. We feel that a minimum that the bill should be modified to assure that students and scholars have unfettered access to research resources which are not being commercially exploited and which have no recognizable market value.

Clearly, Mr. Chairman, the genius of our copyright law is that it has succeeded in balancing the intellectual property rights of authors, publishers and owners with society's need for



The Honorable Carlos Moorhead  
 July 11, 1995  
 Page 3

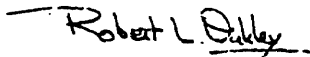
the free exchange of ideas. The law has its origin not in economic theory or the Commerce Clause, but in the Framers' fundamental intention to "promote the progress of Science and Useful Arts."

As Congress considers enhancing the economic rights of copyright owners by extending the term of grant of exclusive rights, we submit that the public's broad interest in education and research requires the needs and goals of the nation's libraries and their millions of users be carefully reconciled with these commercial interests. Although H.R. 989 fails to strike that critical balance as presently drafted, we are optimistic with your Subcommittee's longstanding respect for America's library community, final legislation will adequately protect these vital public interests.

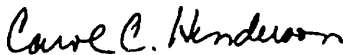
We look forward to further detailing our concerns and to working closely with House and Senate staffs to craft appropriate legislative solutions to the problems outlined.

Thank you for your consideration.

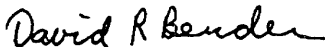
Sincerely,



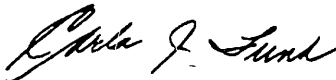
Robert Oakley  
 Washington Affairs  
 Representative  
 American Association of  
 Law Libraries



Carol C. Henderson  
 Executive Director,  
 Washington Office  
 American Library Association



David Bender  
 Executive Director  
 Special Libraries Association



Carla Funk  
 Executive Director  
 Medical Library Association

## ORGANIZATIONAL BIOGRAPHIES

**THE AMERICAN ASSOCIATION OF LAW LIBRARIES (AALL)** is a nonprofit educational organization with over 5,000 members dedicated to serving the legal information needs of legislators and other public officials, law professors and students, attorneys, and members of the general public.

**THE AMERICAN LIBRARY ASSOCIATION (ALA)** is a nonprofit educational organization of 55,000 librarians, library educators, information specialists, library trustees, and friends of libraries representing public, school, academic, state and specialized libraries dedicated to the improvement of library and information services. A new five-year initiative, ALA Goal 2000, aims to have ALA and librarianship be as closely associated with the public's right to a free and open information society - intellectual participation - as it is with the idea of intellectual freedom.

**THE MEDICAL LIBRARY ASSOCIATION (MLA)** is a professional organization of more than 5,000 individuals and institutions in the health sciences information field. MLA members serve society by developing new programs for health science information professionals and health information delivery systems, fostering educational and research programs for health sciences information professionals, and encouraging an enhanced public awareness of health care issues. Through its programs and publications, MLA encourages professional development in research, education and patient care.

**THE SPECIAL LIBRARIES ASSOCIATION (SLA)** is an international professional association serving more than 14,000 members of the information profession, including special librarians, information managers, brokers and consultants. The Association has 56 regional/state chapters in the U.S., Canada, Europe and the Arabian Gulf States and 28 divisions representing subject interests or specializations. Special libraries/information centers can be found in organizations with specialized or focused information needs, such as corporations, law firms, news organizations, government agencies, associations, colleges, museums and hospitals.



Sara L. Johnson

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Ten Strike  
Quelric Recordings  
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July 16, 1995

Hon. Carlos Moorhead, Chairman  
Courts and Intellectual Property Subcommittee  
B 351 A Rayburn  
Washington, DC 20515

Re: Copyright Term Extension Act of 1995 HR 989  
Subcommittee on Courts and Intellectual Property

Dear Mr. Moorhead:

I am writing to express my concerns over the above bill, HR 989. I operate a small business writing music books, recording, teaching and performing public domain, traditional music. I am also a member of several organizations involved independent recording, and with the preservation and performance of traditional (public domain) music.

Public domain is part of our cultural heritage, and is a valuable resource to me and to others in this field.

Currently, copyright protection extends for the life of the author plus 50 years, or, in the case of works subsisting in their renewal term or registered for renewal in 1976 or 1977, the term is 75 years (except for works restored under GATT legislation, where it may be even longer). In practical effect, US works published in 1919 or earlier are now in the public domain; and works published in 1920 will become so at the end of this year. I was looking forward to the ability to work freely with some of these works. (*Beautiful Ohio*, MacDonald & King pub. 1918, is now public domain; *Look for the Silver Lining* and *Margie*, both 1920, will become so next year unless HR 989 becomes law.)

HR 989 would increase copyright duration by 20 years. This would prevent 75 year old works from entering the public domain for another 20 years, and make it practically impossible for me to work with this music for another 20 years. Most material of this age is out of print. Material that is in print is often available only in keys or arrangements that are not suitable for my students. Although the compulsory license provisions of the



July 14, 1995  
Page 2

US Copyright Law (17 USC §115) allow for sound recordings, they do not apply to transcriptions, printed music, arrangements or copies of music for students, etc.

HR 989 would also amend 17 USC §304(b), *Copyrights in their renewal term or registered for renewal before January 1, 1978*, by changing the term of 75 years to 95 years. Section 2, subsection (d) refers to "Subsisting Copyrights", but there is no exception in 17 USC §304(b) as it would be amended by HR 989 for copyrights which will have expired at the date of enactment of HR 989, if it is enacted. 17 USC §304(b) applies to copyrights subsisting on January 1, 1978, with no exception for subsequently expired copyrights. The amended wording literally appears to revive expired copyrights on works between 1906 and 1919, with none of the safeguards of the GATT restoration (17 USC §104A). Copyrights on many of the works published between 1906 and 1919 were subsisting in their renewal terms in the time frame defined in 17 USC §304(b). (A copy of the text of 17 USC §304(b) is enclosed showing the effect of HR 989's proposed changes, with a list of some of the public domain and soon-to-be-public-domain works published between 1906 and 1924.) I am very concerned about the effects of HR 989 on possible revival of expired copyrights, and the potential for litigation or threats of litigation which will arise from the present wording of HR 989.

While HR 989 would provide a windfall for copyright owners and the music industry, it deprives the public of the expected benefit of having these works come into the public domain. The authors of the pre-1978 works did not need HR 989 as an incentive to create those works. Many of those authors are long dead. The terms of some of those copyrights have already been extended by as much as 19 years under past legislation.

I understand that several distinguished professors of law have opposed this legislation. I am attaching a copy of their remarks as received by me over the Internet. I agree with those remarks.

This legislation deprives me and the rest of the American public of our ability to build on the cultural legacy of the 75 year old past, and to continue to try to breathe new life into our common cultural heritage. I earnestly urge the committee to vote against it; and at the very least, to delete those portions of HR 989 which apply to pre-1978 works and any language in HR 989 which implies revival of expired copyrights.

Best regards,

Sara L. Johnson

## 17 U.S.C. 304(b)

## SHOWING THE EFFECT OF H.R.989

17 U.S.C. §304 (b) *Copyrights in Their Renewal Term or Registered for Renewal Before January 1, 1978.* - The duration of any copyright, the renewal term of which is subsisting at any time between December 31, 1976, and December 31, 1977, inclusive, or for which renewal registration is made between December 31, 1976, and December 31, 1977, inclusive, is extended to endure for a term of **seventy-five** 95 years from the date copyright was originally secured.

*Deletions proposed by HR989 shown in ~~strikeout~~; insertions in boldface type.*

*Currently, works published before 1920 would be in the public domain, since their copyrights have expired. Many, if not all, of the now-expired copyrights dating from between September 19, 1906 and 1919 would have been subsisting in their renewal terms in the time frame of 17 U.S.C. 304(b), due to a series of interim extension bills enacted previously. The amendment to 17 USC 304(b) proposed by HR989 makes no distinction between presently subsisting copyrights and copyrights which expire prior to the effective date.*

**Examples of Works Published 1906-1919 (Now Public Domain) and 1920-1924  
(Due to Become Public Domain in the Next Five Years)**

According to the Variety Music Cavalcade, Compiled by J. Manfield, Prentice-Hall, New York (1950), the following are some of the musical works published in the period 1906 - 1924:

The Glow-Worm	1907	Jos Stern Co.
Red Wing	1907	F A Mills
School Days	1907	Gus Edwards
Take Me Out to the Ball Game	1908	J Norwrth & A Von Tilzer
By the Light of the Silvery Moon	1909	Madden & Gus Edwards
Casey Jones	1909	T. L. Siebert & E. Newton
On Wisconsin	1909	W. T. Purdy
Washington & Lee Swing	1910	Allen (also 1920)
Alexander's Ragtime Band	1911	Irving Berlin
Daphnis & Chloe	1911	Maurice Ravel
Oh You Beautiful Doll	1911	A. S. Brown & N. D. Ayer
Memphis Blues	1912	W. C. Handy
My Melancholy Baby	1912	Norton & Burnett
When Irish Eyes Are Smiling	1912	Olcott, Graff & Ball

Ballin' the Jack	1913	Burnis & Smith
Danny Boy	1913	Weatherly
The Trail of the Lonesome Pine	1913	MacDonald & Carroll
Missouri Waltz	1914	Shannon & Logan
St. Louis Blues	1914	W. C. Handy
Twelfth Street Rag	1914	music - words 1919
Memories	1915	Kahn & Van Alstyne
M-O-T-H-E-R	1915	Johnson & Morse
The Old Gray Mare	1915	Panella
Nola	1915/16	Arndt - Sam Fox Pub
Pretty Baby	1916	Kahn, Jackson, Van Alstyne
Bells of Saint Mary's	1917	Furber & Adams
Nobody Knows the Trouble I've Seen	1917	Burleigh arr.
Over There	1917	G. M. Cohan
Swing Low, Sweet Chariot	1917	Burleigh arr.
Tiger Rag	1917	Leo Feist Co.
Beautiful Ohio	1918	MacDonald & Earl
K-K-K-Katy	1918	O'Hara - Leo Feist Inc.
Carolina Sunshine	1919	Hirsch & Schmidt
Swanee	1919	Caesar & Gershwin
The World Is Waiting for the Sunrise	1919	Lockhart & Seitz
Look for the Silver Lining	1920	De Sylva & Kern
Margie	1920	Davis, Conrad & Robinson
O Little Town of Bethlehem	1920	Brooks, Scott
Whispering	1920	Schonberger & Schonberger
Ain't We Got Fun	1921	Whiting
April Showers	1921	De Sylva & Silvers
Carolina in the Morning	1922	Kahn & Donaldson
Chicago (That Toddling Town)	1922	Fisher
Charleston	1923	Mack & Johnson
Yes! We Have No Bananas	1923	Silver & Cohn
California, Here I Come	1924	Jolson, De Sylva & Meyer
Fascinating Rhythm	1924	George & Ira Gershwin
Tea for Two	1924	Caesar & Yeomans

From the same source, some of the books published during the period 1906-1924 include:

Pragmatism	1907	William James
The Shepherd of the Hills	1907	Harold Bell Wright
The Trimmed Lamp	1907	O. Henry
Riders of the Purple Sage	1912	Zane Grey
General Booth Enters Into Heaven and Other poems	1913	Vachel Lindsay
A Boy's Will	1913	Robert Frost
Penrod	1914	Booth Tarkington
Trees and other Poems	1914	Joyce Kilmer
The Genius	1915	Theodore Dreiser
Spoon River Anthology	1915	Edgar Lee Masters
Chicago Poems	1916	Carl Sandberg
Heap o' Livin'	1916	Edgar Guest
A Book of Prefaces	1917	Henry Mencken
The Magnificent Ambersons	1918	Booth Tarkington
Twelve Men	1919	Theodore Dreiser
Main Street	1920	Sinclair Lewis
This Side of Paradise	1920	F. Scott Fitzgerald
The Big Town	1921	Ring Lardner
Eric Dorn	1921	Ben Hecht
Babbitt	1922	Sinclair Lewis
The Waste Land	1922	T. S. Eliot
New Hampshire (poems)	1923	Robert Frost
Streets of Night	1923	John Dos Passos
Autobiography (posthumous)	1924	Mark Twain
In Our Time	1924	Ernest Hemingway
So Big	1924	Edna Ferber

Those from 1906-1919 are in the public domain; those from 1920-1924 should become public domain over the next five years unless H.R. 989 changes the law.

Received on the Internet

**PROPOSED EXTENSION OF COPYRIGHT PROTECTION HARMS THE PUBLIC**

**\*The undersigned are all university professors who regularly teach or conduct legal research in the fields of copyright or intellectual property\*.**

United States copyright law is designed to stimulate creativity by affording authors exclusive rights to important uses of their works (such as publication or public performance). As provided in the Constitution, Congress may afford these rights only for limited times. The current copyright system strikes an inspired balance between protecting new works and allowing authors to draw on earlier works that constitute their cultural heritage. Judged by the results, our law has been tremendously successful at stimulating creativity, and United States copyright industries lead the world in the production of popular works such as books, movies, and computer programs.

Legislation now before Congress (H.R. 989, S. 483), if passed, will upset this balance by tacking on an additional 20 years to the term of every copyright, including existing copyrights. Under current United States law, a copyright already remains valid for a period of 50 years after the death of the work's author, or for a period of 75 years after publication in the case of corporate authors (such as Disney or Microsoft). The proposals would extend these periods by another 20 years, that is, for 70 years after the death of individual authors and to a total of 95 years for corporate authors. Indeed, the protection period for unpublished works would go from 100 to 120 years after creation. Adoption of this legislation would impose severe costs on the American public without providing any public benefit. It would supply a windfall to the heirs and assignees of dead authors (i.e., whose works were first published around 1920) and deprive living authors of the ability to build on the cultural legacy of the past.

Intellectual property law rests on a careful balance of public and private interests. Our Constitution provides for the protection of intellectual property for a \*limited term\* to encourage the production of creative works. On the other hand, the longer exclusive rights last in a particular work, the more expensive it is for subsequent artists to create new works based on it. The most important goal in drawing this balance is to promote the creation and dissemination of information. This, in turn, depends on the existence of a rich \*public domain\*-- consisting of works on which contemporary authors can freely draw.

All authors, artists, and composers make use of the public domain in creating new works. Current composers rely on themes, concepts, and even actual melodies from classical or folk traditions, but eventually their music too will enter the public domain so that future composers can make further use of their contributions. When Disney makes a delightful animated film out of \*Snow White\* or \*Beauty and the Beast\*, the studio is not creating these works from scratch but rather is relying on old folk tales, on which the copyrights long ago expired. In turn, the Disney films themselves will eventually be available for reworking by other creative artists.

Basically, copyright is a "bargain" that the public makes with its authors. That bargain gives exclusive rights to authors, which result in higher prices to the public, but the public gets more works than would otherwise be available. The longer the exclusive rights last, however, the less each additional year of protection adds to today's incentives, while today's \*costs\* to the public remain the same (because the extension applies to existing works). We believe that the costs begin to exceed the incentive effects well before the copyright duration hits life + 70 years.

To see whether you agree, ask yourself the following question: How many authors would actually say, "Well, I might consider writing another novel if the protection period extended to my great-grandchildren 70 years after my death, but if the monopoly continues only to my grandchildren 50 years after I die, I guess I'll go do something else"? We suspect that few creative authors will be any more productive in response to a 20-year extension of an already long protection term. Furthermore, the likelihood that a work will remain economically valuable for the extra 20 years is very small. Disney, for example, is quite unlikely to be in-



duced to produce more popular films like "The Lion King" based on the speculative (and at best minimal) increase in present value of a revenue stream that might go on for 95 rather than 75 years. (Indeed, Disney might not have been so quick to create the Lion King and the Little Mermaid had it not been so worried about the imminent passage of Mickey Mouse into the public domain.) What is certain, however, is that such an extension of the copyright term would seriously hinder the creative activities of future as well as current authors. Consequently, the only reasonable conclusion is that the increased term would impose a heavy cost on the public--in the form of higher royalties and an impoverished public domain-- without any countervailing public benefit in the form of increased authorship incentives.

Indeed, if incentives to production were the basis for the proposed extension, there would be no point in applying it to copyrights in existing works. These works, by definition, have already been produced. Yet, if the extension were purely prospective (i.e., applicable only to new works), we could be certain that support for it would wither rapidly. Thus, the real issue is the continued protection of "old" works--not those that will enter the public domain 50 (or 70) years from now but rather those due to enter the public domain "today". These works were originally published in 1920 (works published before 1978 have a flat 75-year copyright rather than the current life + 50 for individual authors). At that time, the law afforded a maximum of 56 years of copyright protection. This period was expanded to 75 years in 1976, and now the descendants and assignees of these authors want yet another 20 years. The very small portion of these works that have retained economic value have been producing royalties for a full 75 years. In order to continue the royalty stream for those few copyright owners, the extension means that "all" works published after 1920 will remain outside the public domain for an extra 20 years. As a result, current authors who wish to make use of "any" work from this period, such as historians or biographers, will need to engage in complex negotiations to be able to do so. Faced with the complexities of tracking down and obtaining permission from all those who by now may have a partial interest in the copyright, a hapless historian will be tempted to pick a subject that poses fewer obstacles and annoyances.

One argument made in favor of the extended term is that it would track the countries of the European Union, which now have a life + 70 year term. It is true that retaining our current term of protection would deny some United States copyright owners (mainly companies rather than individuals) the financial benefit of this European windfall. But the mere fact that the European Union has adopted a bad idea does not mean that the United States should follow suit. France might elect in the future, for example, to give the works of Voltaire or Victor Hugo perpetual copyright protection, but that would be no reason for us to do the same with Mark Twain or Emily Dickinson. The European copyright tradition differs in important ways from that of the United States, primarily by treating copyright as a kind of natural entitlement rather than a source of public benefit. The European approach may on balance tend to discourage, rather than promote, new artistic creativity. We should not, therefore, assume that a policy giving a few United States firms and individuals an added financial windfall from works created long ago necessarily is one that promotes our long-term competitiveness in the production of new works.

The concept of a "limited" term of copyright protection is based on the notion that we "want" works to enter the public domain and become part of the common cultural heritage. We believe that the author's descendants have had enough time to enjoy the revenue flow still produced by the (relatively few) works that continue to have significant economic value 50 years after the author's death. And if these works should be freely available here, they should be freely available everywhere, so that creative artists throughout the world can base new works upon them for the benefit of the consuming public both in the United States and abroad. This, after all, is the goal of supplying copyright protection in the first place. In this context, the notion of international "harmonization" simply obfuscates the real issue: There is no tension here between Europe and the United States. The tension, rather, in both Europe and the United States, is between the heirs and assignees of copyrights in old works versus the interests of today's general public in lower prices and a greater supply of new works. The European Union has resolved the tension in favor of the owners of old copyrights. We should rather favor the general public.

Moreover, the bills pending before Congress are not really aimed at harmonizing United States and

European law. The bills, for example, extend the copyright period for corporate "authors" to 95 years (or 120 years if the work is unpublished). The European Union, by contrast, now offers corporate authors, for countries recognizing corporate "authorship," 70 years of protection, which is less than the 75 years we currently offer such authors. Consider also the works of Sir Arthur Conan Doyle, who died more than 50 years ago and whose works have for some time been in the public domain in England (and Europe). Yet, due to peculiarities of pre-1978 United States copyright law, his later works remain under United States copyright, delaying production in this country of public domain collections of his entire works, although Europeans may do so freely. The extension would continue this "disharmony" for another 20 years.

Why the music and book publishers and the motion picture industry are backing the proposed extended copyright period is obvious. Those few works that hold on to their popularity for a long time provide an easy stream of revenue, and no one on the receiving end likes to see the stream dry up. But we must remember that the current copyright term is already very long. The individual human beings whose efforts created these revenue streams have long since passed from the scene. Society recognized the copyright in the first place \*not\* so that the revenue stream would be perpetual but rather to encourage creation of the works. Once this purpose has been served, no justification exists to ask the public to continue to pay simply to keep the stream flowing. The costs to the public are not limited to the actual royalty dollars in the stream. They also include the unknown (and unknowable) but very real loss of desirable works that are \*not\* created because underlying works that would have served as a foundation remain under the control of a copyright owner.

This legislation is a bad idea for all but a few copyright owners and must be defeated.

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