FEDERAL COPYRIGHT LAW

THE LEGISLATIVE HISTORIES OF THE MAJOR ENACTMENTS OF THE 105th CONGRESS

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INTRODUCTION

Three major pieces of copyright legislation were passed by the 105th Congress. The first to be enacted was the No Electronic Theft (NET) Act, passed in response to a federal district court decision finding no criminal liability in the distribution of copyrighted software where there was no financial gain. Under the NET Act, liability is determined by the retail value of the work in question. Reproduction of works worth over $1,000 is a misdemeanor, while copying works valued over $2,500 ranks as a felony. Those convicted face fines and imprisonment of up to three years for the first offense, and up to six years for a second conviction. The act also extends the statute of limitations from three to five years and mandates "victim impact statements."

More controversial was the issue of copyright term extension. Opponents viewed such proposals as a move by major publishers and producers to deprive the public of access to copyrighted works soon to enter the public domain with the expiration of the old copyright term, most notably Disney's Mickey Mouse in 2002. Proponents claimed the extension of the copyright term by twenty years would promote creativity by offering artists and authors a greater return on their work, and would bring the United States into line with the copyright term in effect overseas.

Their views prevailed with the passage of the Sonny Bono Copyright Term Extension Act. Title I of the Act amends federal law so as to extend from fifty to seventy years the duration of copyrights. Most notably this includes copyrights on works created after Jan. 1, 1978, for which it extends the term to the life of the author plus seventy years. Section 104 of the Act provides an exception for libraries and archives, allowing reproduction for preservation, scholarship, or research during the last twenty years of the copyright term. This limited exception applies only if it can be determined that the work in question is not subject to normal commercial exploitation, cannot be obtained at a reasonable price, and the copyright holder has not provided notice that either of these conditions applies. Title II consists of the Fairness in Music Licensing Act of 1998. This provides that the use of transmission or retransmission of a non-dramatic musical work originated by a radio or television broadcast is not a copyright infringement if the establishment is a food service or drinking establishment, no direct charge was made to see or hear the

transmission, and such, and that the transmission or retransmission was licensed by the copyright holder.

The final and most important copyright enactment of the 105th Congress was the Digital Millennium Copyright Act. The most notable part of the legislation was Title I, the WIPO Copyright and Performances and Phonograms Treaties Implementation Act of 1998. This Act, which amends federal law to conform to these treaties, sparked controversy because of its "anti-circumvention" provisions which opponents claimed would render unlawful such legitimate activities as encryption research and reverse engineering. The remainder of the legislation includes:

Title II - the Online Copyright Infringement Liability Limitation Act which limits the liability for copyright infringement of Internet service providers;

Title III - the Computer Maintenance Competition Assurance Act providing that under certain conditions there is no copyright violation where copies of computer programs are made solely in conjunction with the repair of computer equipment;

Title IV - Miscellaneous Provisions;

Title V - Vessel Hull Design Protection Act which amends federal copyright law to protect original hull designs which make vessels distinctive or attractive.

Notably absent from the Act was any provision extending copyright protection to databases. Such a provision had been a last minute addition by the House to H.R. 2281, but was dropped from the final bill version by the Conference Committee.

This compilation includes the full text of all three enactments, prior bill versions, relevant congressional reports and hearings, *Congressional Record* references, and presidential statements. Also included are the full texts of the WIPO treaties.

William H. Manz
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June 1999

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VI. Congressional Record

Doc. No. 14 141 Cong. Rec. S14550 (daily ed. Sept. 28, 1995) (introduction of S. 1284 by Sen. Hatch and the text of the bill).

Doc. No. 15 141 Cong. Rec. E1892 (daily ed. Sept. 29, 1995) (remarks of Rep. Moorhead on the NII Copyright Protection Act of 1995).

Doc. No. 16 141 Cong. Rec. S19114 (daily ed. Dec. 21, 1995) (text of Title XIV, Computer Software Piracy, of the Crime Prevention Act of 1995).

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Doc. No. 33 H.R. 2589 - Copyright Term Extension Act. Reported with an amendment, 105th Cong., 2d Sess. (Mar. 18, 1998).

Doc. No. 34 H.R. 2589 - Sonny Bono Copyright Term Extension Act. Passed by the House, 105th Cong., 2d Sess. (Mar. 25, 1998).

Doc. No. 35 H.R. 2589 - Sonny Bono Copyright Term Extension Act. Received in the Senate, 105th Cong, 2d Sess. (Mar. 26, 1998).

III. Prior Bill Versions

Doc. No. 36 S. 483 - Copyright Term Extension Act of 1995. Introduced by Sen. Hatch and referred to the Committee on the Judiciary, 104th Cong., 1st Sess. (Mar. 2, 1995).

Doc. No. 37 S. 483 - Copyright Term Extension Act of 1996. Reported with an amendment, 104th Cong., 2d Sess. (July 10, 1996).

Doc. No. 38 H.R. 989 - Copyright Term Extension Act of 1995. Introduced and referred to the Committee on the Judiciary, 104th Cong., 1st Sess. (Feb. 16, 1995).

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Doc. No. 41 H.R. 4712 - Sonny Bono Copyright Term Extension Act. Introduced by Rep. and referred to the Committee on the Judiciary, 105th Cong., 2d Sess. (Oct. 7, 1998).

IV. Congressional Record

Doc. No. 42 141 Cong. Rec. E379 (daily ed. Feb. 16, 1995) (remarks of Rep. Moorhead on the Copyright Term Extension Act).

Doc. No. 43 141 Cong. Rec. S3390 (daily ed. Mar. 2, 1995) (introduction of S. 483 by Sen. Hatch, the text of the bill, remarks of Sen. Feinstein, and a reprint of Extending Copyright Preserves U.S. Culture by Prof. Arthur Miller).

Doc. No. 44 142 Cong. Rec. S3238 (daily ed. Mar. 29, 1996) (remarks of Sen. Boxer on the Copyright Term Extension Act),

Doc. No. 45 143 Cong. Rec. S6048 (daily ed. June 20, 1997) (remarks of Sen Abraham on the Copyright Term Extension Act of 1997).

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Doc. No. 50 144 Cong. Rec. 1456 (daily ed. Mar. 25, 1998) (H. Res. 390 and consideration of H.R. 2589).

Doc. No. 51 144 Cong. Rec. E484 (daily ed. Mar. 26, 1998) (remarks of Rep. Jackson-Lee on H.R. 2589).

Doc. No. 52 144 Cong. Rec. E753 (daily ed. May 5, 1998) (remarks of Rep. Coble on H.R. 2589).

Doc. No. 53 144 Cong. Rec. H9946 (daily ed. Oct. 7, 1998) (consideration of S. 505 and the text of the bill).

Doc. No. 54 144 Cong. Rec. S11672 (daily ed. Oct. 7, 1998) (consideration of S. 505).

Doc. No. 55 144 Cong. Rec. E1995 (daily ed. Oct. 7, 1998) (remarks of Rep. Conyers on H.R. 2589).

Doc. No. 56 144 Cong. Rec. 11794 (daily ed. Oct. 10, 1998) (Hatch Amendment No. 3782 to H.R. 2589).

Doc. No. 57 144 Cong. Rec. E2070 (daily ed. Oct. 11, 1998) (remarks of Rep. Gordon on S. 505).

Doc. No. 58 144 Cong. Rec. E2088 (daily ed. Oct. 11, 1998) (remarks of Rep. Scarborough on S. 505).

Doc. No. 59 144 Cong. Rec. S12434 (daily ed. Oct. 12, 1998) (consideration of S. 505).

Doc. No. 60 144 Cong. Rec. E2096 (daily ed. Oct. 12, 1998) (remarks of Rep. Clement on S. 505).

Doc. No. 61 144 Cong. Rec. S12377 (daily ed. Oct. 12, 1998) (remarks of Sen. Hatch on S. 505).

Doc. No. 62 144 Cong. Rec. E2255 (daily ed. Oct. 20, 1998) (remarks of Rep. Tanner on S. 505).

Doc. No. 63 144 Cong. Rec. E2308 (daily ed. Nov. 12, 1998) remarks of Rep. Conyers on S. 505).

V. Past Report

Doc. No. 64 Copyright Term Extension Act of 1996 - S. Rep. No. 104-315 on S. 483, 104th Cong., 2d Sess. (July 10, 1996).

VI. Past Hearings

Doc. No. 65 *Copyright Term, Film Labeling and Film Preservation Legislation: Hearings before the Subcommittee on Courts and Intellectual Property of the House Committee on the Judiciary on H.R. 989, H.R. 1248, and H.R. 1734,* 104th Cong., 1st Sess. (June 1 and July 13, 1995).

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Doc. No. 66 The Copyright Term Extension Act of 1995: Hearings before the Senate Committee on the Judiciary, 104th Cong., 1st Sess. (Sept. 20, 1995).

Doc. No. 67 *Pre-1978 Distribution of Recordings Containing Musical Compositions; Copyright Term Extension; and Copyright Per Program Licenses: Hearing before the Subcommittee on Courts and Intellectual Property of the House Committee on the Judiciary,* 105th Cong., 1st Sess. (June 27, 1997).

I. The Law as Enacted

Doc. No. 68 Digital Millennium Copyright Act of 1998, P.L. 105-304, 112 Stat. 2860.

II. Reports on the Law

Doc. No. 69 WIPO Copyright Treaties Implementation and On-Line Copyright Infringement Liability Limitation, H. Rep. No. 105-551, pt. I, 105th Cong., 2d Sess. (May 22, 1998).

Doc. No. 70 Digital Millennium Copyright Act of 1998, H. Rep. No.105-551, pt. II, 105th Cong., 2d Sess. (July22, 1998).

Doc. No. 71 Digital Millenium Copyright Act, H. Rep. No. 105-796 (105th Cong. 2d Sess. (Oct. 8, 1998).

III. Hearings on the Law

Doc. No. 72 *WIPO Copyright Treaties Implementation Act; and On-Line Copyright Liability Limitation Act: Hearings on H.R. 2281 and H.R. 2280 before the Subcommittee on Courts and Intellectual Property, House Committee on the Judiciary,* 105th Cong., 1st Sess. (Sept. 16 and 17, 1997).

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Doc. No. 73 *The WIPO Copyright Treaties Implementation Act: Hearing before the Subcommittee on Telecommunications, Trade, and Consumer Protection of the House*

Committee on Commerce, 2nd Session on H.R. 2281, 105th Cong., 2d Sess. (June 5, 1998).

III. Bill Versions

Doc. No. 74 H.R. 2281 - WIPO Copyright Treaties Implementation Act. Introduced by Rep. Coble and referred to the Committee on the Judiciary, 105th Cong., 1st Sess. (July 29, 1997).

Doc. No. 75 H.R. 2281 - WIPO Copyright Treaties Implementation Act. Reported in the House, 105th Cong., 2d Sess. (July 22, 1998).

Doc. No. 76 H.R. 2281 - Digital Millennium Copyright Act. Engrossed in the House, 105th Cong., (Aug. 4, 1998).

Doc. No. 77 H.R. 2281 - Digital Millennium Copyright Act of 1998. Engrossed Senate amendment, 105th Cong., 2d Sess. (Sept. 17, 1998).

Doc. No. 78 H.R. 2281 - Digital Millennium Copyright Act. Placed on the Senate calendar, 105th Cong., 2d Sess. (Aug. 31, 1998).

Doc. No. 79 H.R. 2281 - Digital Millennium Copyright Act. Enrolled bill sent to the President, 105th Cong., 2d Sess. (Jan. 27, 1998).

IV. Past Bill Versions

Doc. No. 80 H.R. 2180 - On-Line Copyright Liability Limitation Act. Introduced by Rep. Coble and referred to the Committee on the Judiciary, 105th Cong., 1st Sess. (July 17, 1997),

Doc. No. 81 S. 1121 - WIPO Copyright and Performances and Phonograms Treaty Implementation Act of 1997. Introduced by Sen. Hatch and referred to the Committee on the Judiciary, 105th Cong., 1st Sess. (July 31, 1997).

Doc. No. 82 S. 1146 - Digital Copyright Clarification and Technology Education Act of 1997. Introduced by Sen. Ashcroft and referred to the Committee on the Judiciary, 105th Cong, 1st Sess. (Sept. 3, 1997).

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Doc. No. 94 S. 2037 - Digital Millennium Copyright Act of 1998. Passed by the Senate, 105th Cong., 2d Sess. (May 14, 1998).

Doc. No. 95 S. 2291 - Collections of Information Antipiracy Act. Introduced by Rep. Grams and referred to the Committee on the Judiciary, 105th Cong., 2d Sess. (July 10, 1998).

Doc. No. 96 S. 2502 - Vessel Hull Design Protection Act. Introduced by Sen. Breaux and referred to the Committee on the Judiciary, 105th Cong., 2d Sess. (Sept. 21, 1998).

V. Presidential Statements

Doc. No. 97 Message From the President to the Senate on the WIPO Treaties (July 28, 1997).

Doc. No. 98 Statement by the President on the passage of H.R. 2281 (Oct. 12, 1998).

Doc. No. 99 Statement by the President on signing H.R. 2281 (Oct. 28, 1998).

VI. Congressional Record

Doc. No. 100 144 Cong. Rec. S8728 (daily ed. Sept. 3, 1997) (remarks of Sen. Ashcroft on H.R. 1146 and the text of the bill).

Doc. No. 101 143 Cong. Rec. S6726 (daily ed. June 27, 1997) (remarks of Sen. Hatch on the WIPO treaties).

Doc. No. 102 143 Cong. Rec. E1452 (daily ed. July 17, 1997) (introduction of the On-line Copyright Liability Limitation Act and the text of the bill).

Doc. No. 103 143 Cong. Rec. S8582 (daily ed. July 31, 1997) (introduction of S. 1121, the text of the bill, and remarks of Sens. Hatch, Leahy, Thompson, and Kohl).

Doc. No. 104 143 Cong. Rec. S8728 (daily ed. Sept. 3, 1997) (remarks of Sen. Ashcroft on H.R. 1146 and the text of the bill).

Doc. No. 105 144 Cong. Rec. S205 (daily ed. Jan. 29, 1998) (remarks of Sen. Leahy).

Doc. No. 121 144 Cong. Rec. 11887 (daily ed. Oct. 8, 1998) (consideration of the conference report on S. 2281).

Doc. No. 122 144 Cong. Rec. S12730 (daily ed. Oct. 10, 1998) (remarks of Sen. Leahy on H.R. 2281).

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Doc. No. 126 144 Cong. Rec. E2136, (daily ed. Oct. 13, 1998) (remarks of Rep. Bliley on the Digital Millennium Copyright Act).

Doc. No. 127 144 Cong. Rec. E2144 (daily ed. Oct. 13, 1998) (remarks of Rep. Tauzin on H.R. 2281).

Doc. No. 128 144 Cong. Rec. S12730 (daily ed. Oct. 20, 1998) (remarks of Sen. Leahy on H.R. 2281).

Doc. No. 129 144 Cong. Rec. S12972 (daily ed. Oct. 21, 1998) (consideration of the WIPO treaties).

Doc. No. 130 144 Cong. Rec. S12985 (daily ed. Nov. 12, 1998) (Resolution of Ratification of the Treaties).

VII. Related Reports

Doc. No. 131 Vessel Hull Design Protection Act, H. Rep. No. 105-436, 105th Cong., 2d Sess. (Mar. 11, 1998).

Doc. No. 132 Digital Millennium Copyright Act of 1998, S. Rep. No. 105-190, 105th Cong., 2d Sess. (May 11, 1998).

Doc. No. 133 Collections of Information Antipiracy Act, H. Rep. No. 525, 105th Cong., 2d Sess. (May 12, 1998).

Doc. No. 134 WIPO Copyright Treaty (WCT) (1996) and WIPO Performances and Phonograms Treaty (WPPT) (1996), Exec. Rep. No. 105-25, 105th Cong., 2d Sess. (Oct. 14, 1998).

VIII. Related Hearing

Doc. No. 135 *The Copyright Infringement Liability of On-Line and Internet Service Providers, Hearing before the Committee on the Judiciary on S. 1146,* 105th Cong., 1st Sess. (Sept. 4, 1997).

IX. WIPO Treaties and Documents

Doc. No. 136 WIPO Copyright Treaty adopted by the Diplomatic Conference on Dec. 20, 1996.

Doc. No. 137 WIPO Performances and Phonograms Treaty adopted by the Diplomatic Conference on Dec. 20, 1996.

Doc. No. 138 Resolution Concerning Audiovisual Performances (Dec. 2-20, 1996).

Doc. No. 139 Agreed Statements Concerning the WIPO Copyright Treaty (Dec. 20, 1996).

Doc. No. 140 Agreed Statements Concerning the WIPO Performances and Phonograms Treaty (Dec. 20, 1996).

LEGISLATIVE CHRONOLOGY

I. No Electronic Theft (NET) Act

House Actions

Jul. 25, 1997: Referred to the House Committee on the Judiciary.

Aug. 5, 1997: Referred to the Subcommittee on Courts and Intellectual Property.

Sep. 11, 1997: Subcommittee Hearings held.

Sep. 30, 1997: Subcommittee Consideration and Mark-up Session held.

Sep. 30, 1997: Forwarded by Subcommittee to Full Committee (Amended) by Voice Vote.

Oct. 7, 1997: Committee Consideration and Mark-up Session held.

Oct. 7, 1997: Ordered to be Reported (Amended) by voice vote.

Oct. 23, 1997: Reported to House (Amended) by House Committee on the Judiciary. H. Rep. No. 105-339.

Oct. 23, 1997: Placed on the Union Calendar, Calendar No. 198.

Nov. 4, 1997: Called up by House under suspension of the rules. Considered by House as unfinished business. Passed House (Amended) by voice vote.

Senate Actions

Nov. 5, 1997: Received in the Senate and read twice and referred to the Committee on the Judiciary.

Nov. 13, 1997: Passed Senate without amendment by unanimous consent.

Nov. 14, 1997: Message on Senate action sent to the House.

Executive Actions

Nov. 13, 1997: Cleared for White House.

Dec. 5, 1997: Presented to President.

Dec. 16, 1997: Signed by President. Became Public Law No: 105-147.

II. Sonny Bono Copyright Extension Act

Senate Actions

Mar. 20, 1997: S. 505 read twice and referred to the Committee on the Judiciary.

Mar. 26, 1998: H.R. 2589 received in the Senate and read twice and referred to the Committee on Judiciary.

Oct. 7, 1998: S. 505 discharged by Senate Committee on the Judiciary. Measure laid before the Senate by unanimous consent. Amendment SP 3782 proposed by Senator Lott for Senator Hatch agreed to in Senate by unanimous consent. Passed Senate with an amendment by unanimous consent. Message on Senate action sent to the House.

House Actions

Oct. 1, 1997: H.R. 2589 referred to the House Committee on the Judiciary.

Mar. 3, 1998: Committee Consideration and Mark-up Session held on H.R. 2589.

Mar. 4, 1998: H.R. 2589 ordered to be Reported (Amended) by voice vote.

Mar. 18, 1998: H.R. 2589 reported to House (Amended) by House Committee on Judiciary. H. Rep. No.105-452.

Mar. 18, 1998: H.R. 2589 placed on the Union Calendar, Calendar No. 258.

Mar. 24, 1998: H.R. 2589 reported to House.

Mar. 25, 1998: H.R. 2589 Amendments: HA 531 Amendment offered by Representative Coble, and ageed to by voice vote; HA 533 Amendment Offered by Representative McCollum, and failed by recorded vote: 150 - 259; HA 532 Amendment Offered by Representative Sensenbrenner, and agreed to by recorded vote: 297 - 112. Rule H. Res. 390 passed House. Called up by House under the provisions of rule H. Res. 390. The House

adopted the amendment in the nature of a substitute as agreed to by the Committee of the whole House on the state of the Union. H.R. 2589 passed House (Amended) by voice vote.

Oct. 7, 1998: S. 505 called up by House under suspension of the rules and passed by voice vote.

Executive Actions

Oct. 7, 1998: Cleared for White House.

Oct. 15, 1998: Presented to President.

Oct. 27, 1998: Signed by President. Became Public Law No: 105-298.

III. Digital Millennium Copyright Act

House Actions

July 29, 1997: Referred to the House Committee on the Judiciary.

Aug. 7, 1997: Referred to the Subcommittee on Courts and Intellectual Property.

Sep. 16, 1997: Subcommittee hearings held.

Apr. 1, 1998: Committee consideration and mark-up session held.

Apr. 1, 1998: Ordered to be Reported (Amended) by voice vote.

May 22, 1998: Reported to House (Amended) by House Committee on 105-551, Part I.

May 22, 1998: Referred jointly and sequentially to the House Committee on Commerce.

Jun. 5, 1998: Subcommittee hearings held.

Jun. 17, 1998: Subcommittee consideration and mark-up session held.

Jul. 17, 1998: Committee consideration and mark-up session held.

Jul. 17, 1998: Ordered to be Reported (Amended) by Yeas- Nay vote: 41 - 0.

Jul. 22, 1998: Reported to House (Amended) by House Committee on Commerce. H.Rep No. 105-551,Part II.

May 22, 1998: Referred jointly and sequentially to the House Committee on Ways and Means.

Jul. 22, 1998: House Committee on Ways and Means discharged. Placed on the Union Calendar, Calendar No. 362.

Aug. 4, 1998: Called up by the House under suspension of the rules. Passed House (Amended) by voice vote.

Senate Actions

Apr. 30, 1998: S. 2037 ordered to be reported by the Committee on Judiciary.

May 6, 1998: S. 2037 reported to Senate by Senator Hatch without a report, and is placed on Senate Legislative Calendar under General Orders. Calendar No. 358.

May 11, 1998: By Senator Hatch from Committee on Judiciary filed written report on S. 2037. Report No. 105-190. Additional views filed.

May 14, 1998: S. 2037 laid before Senate by unanimous consent. Amendment SP 2411 proposed by Senator Hatch, and agreed to in Senate by voice vote. Passed Senate with an amendment by Yea-Nay vote. 99-0.

Sep. 17, 1998: Senate incorporated S. 2037 in H.R. 2281 as an amendment. Senate passed companion measure H.R. 2281 in lieu of this measure by unanimous consent. Senate vitiated previous passage. Indefinitely postponed by Senate by unanimous consent.

Aug. 31, 1998: Received in the Senate. Read twice. Placed on Senate Legislative Calendar under General Orders. Calendar No. 535.

Sep. 17, 1998: Measure laid before Senate by unanimous consent. Senate struck all after the Enacting Clause and substituted the language of S. 2037 amended. Passed Senate in lieu of S. 2037 with an amendment by unanimous consent.

Sep. 18, 1998: Message on Senate action sent to the House.

Oct. 8, 1998: Conference papers: Senate report and managers' statement official papers held at the desk in Senate. Message on Senate action sent to the House.

Conference Actions

Sep. 17, 1998: Senate insists on its amendment asks for a conference and appoints as conferees Sens. Hatch; Thurmond and Leahy.

Sep. 23, 1998: On motion that the House disagree to the Senate amendment, and agree to a conference Agreed to without objection. The Speaker appoints as conferees Reps. Hyde, Coble, Goodlatte, Conyers, Berman Bliley, Tauzin, and Dingell..

Sep. 24, 1998: Conference held.

Oct. 8, 1998: Conference report H. Rep No. 105-796 filed in House. Senate agreed to conference report by unanimous consent. Conferees agreed to file conference report.

Oct. 12, 1998: House agreed to conference report by voice vote.

Executive Actions

Oct. 12, 1998: Cleared for White House.

Oct. 20, 1998: Presented to President.

Oct. 28, 1998: Signed by President. Became Public Law No: 105-304.

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THE COPYRIGHT TERM EXTENSION ACT OF 1995

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY UNITED STATES SENATE

ONE HUNDRED FOURTH CONGRESS

FIRST SESSION

ON

S. 483

A BILL TO AMEND THE PROVISIONS OF TITLE 17, UNITED STATES CODE, WITH RESPECT TO THE DURATION OF COPYRIGHT, AND FOR OTHER PURPOSES

SEPTEMBER 20, 1995

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THE COPYRIGHT TERM EXTENSION ACT OF 1995

WEDNESDAY, SEPTEMBER 20, 1995

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 10:04 a.m., in room SD–226, Dirksen Senate Office Building, Hon. Orrin G. Hatch (chairman of the committee), presiding.

Also present: Senators Grassley, Thompson, DeWine, Abraham, Leahy, Simon, and Feinstein.

OPENING STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

The CHAIRMAN. We are here today to discuss an important bill, S. 483, the Copyright Term Extension Act of 1995. The bill's legal effect is easy to state: it extends copyright protection as it now exists for an additional 20 years. But the implications of this simple change are manifold.

This bill is important to the United States in each of its many roles: as a creative and cultural community, as a world economic leader, as an international trader, and as a country that values basic fairness. This bill is important to strengthen economic incentives to our creators, to maintain our international trading position, to protect our investment in intellectual property, and to help to preserve our own culture.

The Constitution gives Congress the power to secure copyrights for the purpose of giving creators an incentive to advance knowledge and culture by allowing them to reap the economic benefits of their creations for a limited time. We must now consider whether our current copyright law is adequate to achieve this goal—the advancement of knowledge and culture—into the next century.

Our trading partners in Europe have recently established the goal to move the minimum copyright term from the life of the author plus 50 years to life plus 70. If we do not adopt the same rule, our creators will not reap the benefit of this new international standard, and I think other problems could result.

This is because the Berne Convention, which governs international copyright treatment, is based on reciprocity and allows nations to adopt the "rule of the shorter term." According to this rule, a European country can hold American works to the American term, now life-plus-50, while giving its own citizens 20 years more. This means that American works will fall into the public domain before those of our trading partners, undercutting our international

trading position and robbing our creators of two decades of income that they might otherwise have.

America exports more copyrights intellectual property than any country in the world, a huge percentage of it to the nations of the European Union. Intellectual property is, in fact, our second-largest export; it is an area in which we possess a large trade surplus. At a time when we face trade deficits in many other areas, we cannot afford to abandon 20 years' worth of valuable overseas protection. So in my opinion, we must adopt a life-plus-70-year term of copyright if we wish to improve our international balance.

It just makes plain common sense to ensure fair compensation for the American creators whose efforts fuel this important intellectual property sector of our economy by extending our copyright term to allow American copyright owners to benefit from foreign uses. By so doing, we guarantee that our trading partners do not get a free ride for their use of intellectual property.

While we may be accustomed to a substantial American balance-of-trade surplus with respect to trade in works of intellectual property, we cannot afford to take this condition for granted. In a world economy where copyrighted works flow through a fiber optic global information infrastructure, American competitiveness depends upon our demanding that we adapt our laws—and adapt them quickly—to provide the maximum advantage for our own creators.

Certainly one of the reasons why people exert themselves to earn money or acquire property is to leave a legacy to their children and grandchildren. Buildings, companies, farms, or other interests can stay in the family indefinitely. Only in intellectual property do we take the entire bundle of property rights from a property owner at a certain time to give a legacy to the culture at large, regardless of the wishes of the owner or his or heirs.

But in 18 years of working with artists on these issues, I have come to the conclusion that, like most property owners, the vast majority of authors expect their copyrights to be a potentially valuable resource to be passed on to their children and through them to the succeeding generation. I believe that they are reasonable in this expectation and that such a general expectation is what the Framers of the Constitution had in mind when they constrained the power of Congress to grant copyrights only with the very broad and flexible requirement that such rights be granted "for limited times."

When, however, we so often see copyrights expiring before even the first generation of an author's heirs have fully benefited from them, then I believe it is accurate to say that our term of copyright is too short and for too limited a time.

In the area of popular music alone, we can see the reason for the importance of this legislation to our creative community and its distinguished members. Songs that are still widely performed throughout the world are falling into the public domain every year.

Just last year songs such as "Swanee" by George Gershwin and Irving Caesar and "A Pretty Girl Is Like a Melody" by Irving Berlin fell into the public domain, outside of copyright protection. At the end of this year, the songs "Look for the Silver Lining" by Jerome Kern and Bud DeSylva and "Avalon" by Al Jolson, Bud DeSylva and Vincent Rose will also fall into the public domain.

And if this bill is not enacted soon, the following works will lose their copyright protection: "Rhapsody in Blue" by George Gershwin; "My Buddy" by Walter Donaldson and Gus Kahn; "What I'll Do" by Irving Berlin; "Georgia" by Walter Donaldson and Howard Johnson; "It Had To be You" by Isham Jones and Gus Kahn; "Showboat" by Jerome Kern and Oscar Hammerstein II. These songwriters and composers are still household names, and their works are still popular. Indeed, "Showboat" is back in theaters, nearly 70 years after its original premiere.

One could also cite demographic factors that point to the need for a longer term if copyright is truly to reflect the natural desire of authors to provide for their heirs. Principal among these would be increasing life span of the average American, as well as the increasing fact of children being born far later in marriages than in the last decades. Whatever the reason, the inescapable conclusion must be drawn that copyrights in valuable works are too often expiring before they have served their purpose of allowing any author to pass their benefits on to his or her heirs.

Finally, I believe that this term extension is necessary to aid in the preservation of our unique American culture.

Some critics of this bill suggest that works are more plentiful in the public domain. This is not necessarily the case as a matter of either theory or actual experience. Ownership of a work includes the incentive to exploit a work, and with that incentive goes the incentive to preserve a work in a high-quality form.

In addition to this proposition, we are now on the verge of a new digital revolution. Many works which are now preserved in perishable media, such as film or analog tape recordings, could be more permanently preserved—and more widely disseminated—in digital formats, using emerging technology. But if we want the substantial investment in digitizing these works to be made, we must choose to either have the taxpayer fund investment in public domain works or to give private parties the incentive to invest by allowing them to recoup their investment.

Extending the copyright for an additional two decades can provide this incentive for private funds to be invested in the preservation of artworks important to the American cultural heritage.

For all of these reasons, for our continued national economic health and strong trade status, and for the preservation and encouragement of our growing cultural body of work, and for basic fairness, I think this legislation merits our strong support.

I look forward to the testimony of our witnesses today. We have a distinguished set of experts on this issue from Government, industry, and academia, and I appreciate their taking time to be with us here today.

We will reserve the time for our distinguished ranking member when he arrives.

We are fortunate to be joined today by two panels of distinguished witnesses. As I mentioned, we will hear testimony from expert representatives of Government, academia, and industry on this proposed legislation. Our first panel consists of our governmental experts on intellectual property, so it is a pleasure for me to introduce our first witness, the Honorable Marybeth Peters, who is the Register of Copyright and Associate Librarian for Copyright

Services at the U.S. Copyright Office within the Library of Congress. Ms. Peters has been an outstanding resource for the committee on copyright issues. We personally appreciate her very much, and we welcome her testimony today.

We are also pleased to welcome the Honorable Bruce Lehman, Assistant Secretary of Commerce and Commissioner of Patents and Trademarks. Mr. Lehman has also appeared before the committee on a number of occasions, and we are always very appreciative and pleased to receive his valuable input with regard to intellectual property issues. And we look forward to hearing your and the administration's views today, Bruce, on the Copyright Term Extension Act, and we appreciate the work both of you are doing. We think you are doing great jobs.

So we will turn to you, Ms. Peters, for——

Senator FEINSTEIN. Mr. Chairman, before you proceed, may I just enter a statement in the record?

The CHAIRMAN. Sure. In fact, we will keep the record open for any statements that any member of the committee wants to enter.

[The prepared statement of Senator Feinstein follows:]

PREPARED STATEMENT OF HON. DIANNE FEINSTEIN, A U.S. SENATOR FROM THE STATE OF CALIFORNIA

The distinguished Chairman and Members of the Committee have spoken well as to why extending the basic term of copyright protection by 20 years is a step in the right direction. Now I will offer my thoughts.

Perhaps the most compelling reason for this legislation is the need for greater international harmonization of copyright terms. The 15 countries of the European Union formally adopted a "life plus 70" copyright term a few weeks ago, and countries currently awaiting admission to the Union ultimately will adopt this standard in the future. Several countries outside of the European Union also have turned to the "life plus 70" term, and many expect it to become the international standard.

By extending to "life plus 70 years," Congress will help ensure that American creators receive comparable protection in other countries. If we do not act, other nations will not be required to provide American authors and artists with any more protection than we offer them at home.

And, because the U.S. is the world's leader in the production of intellectual property, and because the State of California is home to many of the leading copyright industries, this issue is of great importance to me. We could be the net losers if we do not move toward greater harmonization.

As the protracted negotiations with China earlier this year underscored, intellectual property—the collective creative output of America's makers of movies, music, art and other works—is an enormous asset to the nation's economy and balance of trade.

The International Intellectual Property Alliance estimates that the core copyright industries contributed around $239 billion to the U.S. economy in 1993, approximately 3.7% of gross domestic product.

The Intellectual Property Alliance also has estimated that the U.S. exported around $46 billion in core copyright products in 1993. These products include records, CDs, computer software, motion pictures, music, books, and artwork. And growth rates are equally impressive. The 1993 figure represents an 11.7 percent gain since 1992.

It is no wonder that many other countries have preferred to appropriate and resell American film and music and computer programs—some of the great exports from my State of California—rather than license American works.

Indeed, according to the International Federation of the Phonographic Industry, China alone produced an estimated $2 billion worth of counterfeit recordings and computer discs in 1994.

The Intellectual Property Alliance has estimated that piracy of copyrighted materials cost U.S. companies roughly $7.8 billion dollars in 1994. This figure represents over 4 billion dollars in computer programs, over 2 billion dollars in musical recordings, and over 1 billion in motion pictures.

The U.S. suffers greatly from this illegal duplication of our work. Why, then, should we sit back and allow European companies to legally profit from the use of our works, without paying us in return?

As Professor Arthur Miller of Harvard Law School aptly, albeit bluntly, put it: "Unless Congress matches the copyright extension adopted by the European Union, we will lose 20 years of valuable protection against rip-off artists." Since America is the world's principal exporter of popular culture, extension of the basic copyright term is an important step in the right direction.

Harmonization of copyright protection becomes even more necessary in today's global information society, where computer networks span the continents, and intellectual property is shuttled around the world in seconds.

Speaking of computer networks, I would like to expand on the subject of new technologies more generally. Indeed, the world has changed dramatically since 1976, when Congress established the present copyright terms. Many copyrighted works have a much longer commercial life than they used to have.

Videocassettes, cable television, and new satellite delivery systems have extended the commercial life of movies and television series. New technologies not only have extended but also have expanded the market for creative content. Cable television, which promises hundreds of different channels, has vastly expanded this market. Networked computers add to the demand for content. Interactive television promises to do the same.

Multimedia productions, aided by the interactive capability of CD Roms, could increase demand exponentially. Why? Because a multimedia work can embody several different kinds of copyrighted works in a single medium such as the CD Rom. Beyond this, the interactive capability of CD Roms can allow users to pick and choose among various sounds and images. This creates a huge new marketplace for photographs, films, and sound recordings, old as well as new.

To illustrate how quickly technology has evolved, VCR's were not marketed to the general public until the mid 1970s, and didn't take off until the 1980s. CD's came into our lives in the late 1970s as did the Walkman. Digital audiotape arrived in the late 1980s. And the plate sized home satellite dishes are an even more recent arrival.

If our world has changed as rapidly as this since 1976, one can only imagine the spectacular changes that have occurred since the Founding Fathers, over 200 years ago, first articulated the concept of copyright protection. But in these 200 years, one thing has stayed the same—the fundamental purposes and principles of copyright law. Our forefathers recognized that the essential goal was to ensure that the nation's most creative individuals would retain sufficient economic incentives to craft the various elements of our cultural identity.

To address the commercial and technological developments I have mentioned, the "Copyright Term Extension Act of 1995" would uniformly extend the life of U.S. copyright protection by 20 years. Writers, artists, filmmakers, composers, photographers, sculptors and cartographers alike—and their children—will benefit from this adjustment. And, as the ultimate beneficiaries of the creativity that copyright protection is intended to assure, we will all benefit.

In closing, I want to acknowledge the extraordinary support for this legislation within the intellectual property community. Not only do movie and music companies strongly back this bill, but book publishers, songwriters, performing rights societies, and major software firms agree that Congress should pass this legislation.

I am very interested in hearing from our panelists today. And I intend to listen carefully to those who voice concerns, particularly those relating to public access.

I want to thank Chairman Hatch and his staff once again, for another—to my mind—successful collaboration to protect and encourage the production of American intellectual property.

I look forward to working with the Chairman and other members of the Judiciary Committee to help give authors the copyright protection they deserve, while at the same time protecting our ability to display, interact with, study, and preserve the works that help define us as a culture.

PANEL CONSISTING OF MARYBETH PETERS, REGISTER OF COPYRIGHT AND ASSOCIATE LIBRARIAN FOR COPYRIGHT SERVICES, U.S. COPYRIGHT OFFICE, LIBRARY OF CONGRESS; AND BRUCE A. LEHMAN, ASSISTANT SECRETARY OF COMMERCE AND COMMISSIONER OF PATENTS AND TRADEMARKS, PATENT AND TRADEMARK OFFICE, U.S. DEPARTMENT OF COMMERCE

STATEMENT OF MARYBETH PETERS

Ms. PETERS. Mr. Chairman, members of the committee, I am pleased to offer my comments on S. 483, 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 in part appears 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, by 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, that is, knowledge. 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. However, this control is to be for a limited time. After that 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 were 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 it violate the limited times provision of the Constitution?

In attempting to evaluate how extending the copyright term would stimulate creativity, it is difficult to see how moving from a term of life-plus-50 to life-plus-70 will encourage 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 benefit.

Mr Chairman, in your statement introducing this bill and in your opening remarks today, you emphasized the importance of bringing our law into conformity with the longer copyright terms enjoyed by authors of other nations. You also stressed the justice and fairness in giving American authors 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 advocated. In fact, when the copyright term was first extended in 1839, this

was the argument that was made. The rapidly expanding international market for copyrighted materials, especially in light of the global information superhighway, supports such an effort. Moreover, the reason for amending our law at this time to bring it into conformity with that of the European Union is important. Unless the United States extends its term, our authors and copyright owners will be denied money that they otherwise would be entitled to receive.

As I stated, the Copyright Office supports S. 483. We do this for two reasons:

First, in the global information society, there is a need to harmonize copyright terms throughout the world. Moreover, we believe that the life-plus-70 term will become the international norm.

Second, as a leader of creating copyrighted works, the United States should not wait until it is forced to increase its term; rather, it should set an example for other countries.

As I stated, we support this bill largely on international grounds. However, we are not unmindful of some of the negative impacts that this bill will have in the United States. Enactment of this bill will, in one stroke, freeze 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 projects. However, much of the unique materials are photographs, prints, manuscripts, letters, and cartoons. Determining the copyright status and the copyright of such works is difficult. Finding the copyright owner is almost impossible. The Library of Congress has spent many 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 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 anxiously been awaiting January 1, 2003, when these works are scheduled to enter the public domain.

In addition, libraries and archives have expressed concerns about preservation of materials and the ability to provide users with access to those materials. These concerns have been set forth in letters to Mr. Moorhead, chairman of the House subcommittee, and we would be glad to make those letters available to you if it would help you. These letters come from various library associations and one comes from Dr. Billington.

Libraries and archives play a critical 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 must be made available to our citizens. I believe their concerns should be addressed and urge the committee to encourage all interested parties

to work together to reach a mutually acceptable accommodation. And I hereby offer the services of the Copyright Office and the Library of Congress to assist the committee 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

S. 483 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, and 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 S. 483 satisfies the constitutional goal of fostering the creation and dissemination of intellectual works.

The Copyright Office generally supports S. 483; however, 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 believe that libraries, archives and nonprofit educational institutions have legitimate concerns that can be accommodated without endangering the rights of copyright owners or running afoul of the objectives of the sponsors of this legislation. We believe these concerns should be addressed, and we urge the Committee to encourage all interested parties to work together to reach a mutually acceptable accommodation.

Finally, we have made two suggestions: (1) concerning the problem of unlocatable copyright owners and (2) clarifying § 304.

Chairman Hatch introduced S. 483, on March 2, 1995.[1] 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.

In introducing S. 483, Senator Hatch noted that extending copyright in the United States brings our law into conformity with other nations: "By providing this across-the-board extension of copyright for an additional 20 years, I believe that authors will reap the full benefits to which they are entitled from the exploitation of their creative works. In addition, there are significant trade benefits to be obtained by extending copyright in the United States to bring our law into conformity with the longer copyright term enjoyed by authors in other nations."[2]

Chairman Moorhead introduced an identical bill, H.R. 989, on February 16, 1995.[3] Both S. 483 and H.R. 989, are in part, a response to a 1993 Directive of the European Union (EU) on harmonizing copyright term;[4] 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 countrieshaving

[1] Co-sponsors of the bill include Senators Feinstein, Thompson, Boxer and Abraham.

[2] 141 Cong. Rec. S3391 (daily ed. Mar. 21, 1995) (statement of Sen. Hatch).

[3] Co-sponsors of the bill included: Representatives Schroeder, Coble, Goodlatte, Bono, Gekas, Berman, Nadler, Clement, and Gallegly.

[4] Council Directive 93/98, 1993 O.J. (L 290/9), [hereinafter EU Directive on Term].

a shorter period of protection, will be limited to the term established by the country of origin.[5]

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 our copyright term with that of other countries is critical for U.S. rightsholders.

My statement briefly summarizes the background and history of copyright duration in the United States, analyzes the changes proposed in S. 483 in light of existing U.S. copyright law and the EU Directive, evaluates the major arguments for and against term extension in light of the considerations this Committee weighed when extending the copyright term in 1976, and raises certain questions and makes several recommendations to address these questions.

I. HISTORY OF DURATION OF COPYRIGHT TERM IN UNITED STATES LAW

When Congress adopted the first copyright law, it looked to the English common law system. England viewed copyright not only as a property right but also 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."[6] Early U.S. copyright statutes adopted English duration standards. In 1976, the United States adopted the Berne Convention[7] standard of life of the author plus 50 years;[8] most developed and industrialized countries with the exception of the United States already had adopted this term[9] as the appropriate copyright term.

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 to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[10] 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."[11]

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.[12] This term was the same as that found in the English Statute of Anne. In 1831, Congress increased the term to 28 years, with a renewal term of 14 years.[13] The purpose of increasing copyright duration was to place "authors in this country more nearly upon an equality with authors of other countries."[14] England had changed its term in 1814 to 28 years plus the life of the author if the author was still living at the end of the 28th year.

B. Significant 20th century revisions of copyright term

1. The 1909 Copyright Act

In 1909 Congress increased the copyright term to a term of 28 years measured from the date of first publication or registration if the work was unpublished, plus a renewal term of 28 years.[15] Early drafts of the 1909 legislation proposed that the basic copyright term be life of the author plus 50 years. Two arguments were made in support of the life plus 50 duration, (1) authors were increasingly outliving the copyright protection in their works and it was unfair for authors to lose their protec-

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[5] EU Directive on Term, art 7.

[6] 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).

[7] *See id.* at 324–326.

[8] *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].

[9] China and the Soviet Union were not members of Berne at that time either.

[10] U.S. Const. art. I, §8, cl. 8.

[11] Report of the 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, at page 5 (Comm. Print 1961) [hereinafter Copyright Law Revision Part 1].

[12] Even under the first copyright statute the renewal term was based on the author being living.

[13] 4 Stat. 436(1831).

[14] Report of the Committee on the Judiciary of the House of Representatives, 7 Register of Debates, appendix CXIX.

[15] 35 Stat. 1075, 17 U.S.C. §24. *See also* H.R. Rep. No. 2222, 60th Cong. 2d Sess. (1909).

tion in their old age, and (2) the life plus 50 standard was gaining increasing acceptance as the international standard of protection. Indeed, it already was the term required by the Berne Convention.

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 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 concerns that the term should be longer.

2. Copyright revision

Congress was finally willing to embrace the Berne 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."[16] the Register proposed a duration of 28 years from first public dissemination, coupled with a renewal term of 48 years. This would have brought the maximum term from 56 to 76 years.[17] The Report of the Register summarized 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."[18] The Register's proposal was widely criticized; the parties preferred a life plus 50 year standard.[19] By 1964, the working draft proposed a single copyright term, life plus 50 years for most works.[20]

3. 1976 Act

Congress reviewed all of the views expressed during the revision period when determining the appropriate term and ultimately opted for a basic term of life plus 50 years. The Senate Judiciary Committee noted seven reasons for changing the copyright term.[21] One of the major reasons given for adopting such a term in 1976 was set out in the Senate Report: "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 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:"[22]

II. ANALYSIS OF S. 483

Before one can compare the provisions of S. 483 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.

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[16] Copyright Law Part 1, at Preface, p.i.

[17] *Id.* at 50.

[18] *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.

[19] 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].

[20] 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].

[21] S. Rep. No. 473, 94th Cong., 1st Sess. 116–119 (1975).

[22] *Id.* at 118, *see also* H.R. Rep. No. 1476, 94th Cong., 2d Sess. 134–5 (1976).

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.[23]

B. The EU directive on term

When some European countries began to form what is now the European Union,[24] certain member countries already had longer terms than the Berne minimum or different terms for certain works.[25] 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.[26] 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.[27]

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 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,[28] 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.[29]

2. Comparison of specific EU provisions with U.S. law and S. 483

Although adoption of life plus 70 years 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 S. 483 proposals.

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.[30] Current U.S. law establishes a term of 75 years from first publication or 100 years from creation, whichever expires first.[31] S. 483 would increase this term to 95 years from first publication or 120 years from creation, whichever expires first.

b. *Legal entity as initial rightsholder.* Where a member state's 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.[32] The comparable provision in U.S. law is the works for hire one which establishes the term as 75 years from first pub-

[23] 17 U.S.C. §§ 302–305.

[24] We primarily use the term European Union rather than European Community.

[25] 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 extensions to compensate for war loss. Ricketson, *supra* note 5, at 336.

[26] Silke von Lewinski, *EC Proposal for Directive Harmonizing the Term of Protection of Copyright and Certain Related Rights*, 23 IIC 785, note 1.

[27] *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* COM. 92 (33) final—Syn 395, OJ EC No. C92/6.

[28] Protection of two succeeding generations is the standard goal recognized in Berne. *See* EU Directive on Term, Recital (5).

[29] EU Directive on Term, Recital (5) & (10); P. Wienand, *Copyright Term Harmonization in the European Union*, 40 Copyright World 24, 25 (May 1994).

[30] EU Directive on Term, art. 1, para. 3.

[31] 17 U.S.C. § 302(c).

[32] 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.

lication or 100 years from creation, whichever expires first.[33] S. 483 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.[34] 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 on audiovisual work."[35] The Directive's term for audiovisual works is, therefore, at least equivalent to and may be longer than existing law or the proposal in S. 483.[36]

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 publication or first communication to the public, whichever is first.[37] In the United States, where sound recordings are protected generally as works made for hire, the copyright term is at least 75 years. The Directive generally gives performers protection for 50 years from the date of the performance.[38] Finally, the Directive gives broadcasting organizations protection for 50 years from the date of first transmission.[39]

There is, however, some ambiguity with respect to how American motion pictures will be treated. The EU Directive also creates a separate term for film producers, which are denominated as related rights not copyright. Film, producers are essentially given a 50 year term of protection. In her testimony on H.R. 989, Ambassador Barshefsky opined that film companies would be considered transferees of the rights of directors and other authors and therefore entitled to the longer term.[40]

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.[41] 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 early publication.[42] 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. S. 483 also extends the term for these works. If such works are published by the end of 2012, 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 having a shorter term will limit the term established by the country of origin.[43] U.S. rightsholders' reaction to this was immediate: the United States had to increase its term of protection to a similar term to avoid imposition of the rule of the shorter term.

The Directive mandates that these changes should be made by July 1, 1995. That goal has not been met. Most countries are in the process, however, of amending their laws to comply.

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, the Czech Republic and Bulgaria. 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

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[33] 17 U.S.C. § 302(c).

[34] EU Directive on Term, art. 2, para. 1.

[35] *Id.* EU Directive on Term, art. 2, para. 2.

[36] 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 rightholder.

[37] *Id.*, art. 3, para. 2.

[38] *Id.*, art. 3, para. 1.

[39] *Id.*, art. 3, para. 4.

[40] Statement of Ambassador Charlene Barshefksy, Deputy U.S. Trade Representative, before the House Judiciary Committee, Subcommittee on Courts and Intellectual Property, July 13, 1995 page 4 (unpublished). *See also* D. Schrader, *Proposed U.S. Copyright Term Extension.* CRS IB 95–799 S at 11–12, August 21, 1995.

[41] 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.

[42] Lewinski, *supra* note 36 at 801, n. 65.

[43] EU Directive on Term, art. 7.

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 years.

C. Section by section analysis of S. 483

The approach taken by S. 483 is basically to amend the copyright provisions found in title 17 on term by adding 20 years to the date in the existing provision. The bill does not propose any changes to ownership of rights in the copyright of the extended term.

1. Duration of works created on or after January 1, 1978

Under S. 483, the basic copyright term would be extended from life of the author plus 50 years to life of the author plus 70 years. The term for works made for hire and 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. All transfers on works created and fixed after January 1, 1978, are subject to termination generally after 35 years;[44] therefore, the extended term could be reclaimed by the author or his or her heirs.[45] The extended term would vest in either the original author, or, if rights have been transferred, in the transferee.

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 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 renewal term by the 1976 Copyright Act was subject to a right of termination.[46]

In June, 1992, Congress amended the law to make copyright renewal registration optional.[47] As a result, works securing federal copyright protection between January 1, 1964, and December 31, 1977, will automatically be renewed on the last day of the 28th year unless the owner of the renewal right registers a renewal claim with the Copyright Office earlier in that year.

Under S. 483, the renewal term would consist of 67 years in place of the current 47 years. Where the time period for exercising termination under section 304 has already lapsed, i.e., works copyrighted before 1942, there would be no opportunity for authors or their heirs to terminate the transfer and reclaim the twenty years.

3. Sound recordings fixed 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

As noted earlier, there is a special duration provision for works that were in existence but not published or copyrighted on January 1, 1978.[48] These work were automatically given federal copyright protection beginning on January 1, 1978. The standard terms of life plus 50 years or 75 years from publication or 100 years from creation 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 such a work 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.

a. *S. 483.* Under S. 483, 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, S. 483 proposes extending the term another 35 years to December 31, 2047.

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[44] 17 U.S.C. §203. A work made for hire does not have a termination right.

[45] Currently, no transfers concerning works created and fixed on or after January 1, 1978, have passed the requisite 35 years necessary for them to be subject to termination.

[46] 17 U.S.C. §304(c).

[47] Public Law 102–307, 106 Stat. 264 (1992).

[48] 17 U.S.C. §303.

b. *Comment on proposed extension of section 303.* While the Copyright Office generally supports passage of S. 483, it does not endorse the proposed extension of 10 years guaranteed for unpublished works. These works already have a copyright term until at least December 31, 2002. Presently, the works covered by §303 are unpublished 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: 1) to protect an unpublished work for the same term as published works, and add no additional term if disclosure occurs subsequently or 2) 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 reduced if post-publication protection is relatively brief.[49] 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."[50]

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, none of these works have been published. Extending the term for those unpublished works will not benefit the copyright owners; there are, however, broad 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 in the public. For example, the Library of Congress has a unified collection on the American composer Edward A. MacDowell (1861–1908). The rights in all of the material in this collection except his correspondence, can be cleared; however, there is no way to locate the heirs of the letters sent to MacDowell. This collection is being prepared for distribution to the public in 2003; we believe nothing would be gained by restricting such dissemination until the year 2013.

For these reasons the Copyright Office proposes amending S. 483 be deleting the proposed extension to 303 found in Sec. 2(c)(1) of S. 483.

III. ARGUMENTS FOR AND AGAINST TERM EXTENSION

Although there was no pending legislation, the Copyright Office published 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.[51] The Copyright Office extended its comment period to ensure that all views, would be heard. Later other views were presented primarily by users of public domain pictures and law professors.[52] 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

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[49] Sam Ricketson, *The Copyright Term*, 23 IIC 776 (1992).

[50] *Id.* at 776.

[51] 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 (CCC) (Comment 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

[52] 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 internally 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]

be glad to provide a copy of the transcript of the hearing and comments should be Committee want them for the record.

Having reviewed the arguments presented to the Copyright Office in 1993 and those made at the hearings on H.R. 989, 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. 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.

A. Review of arguments based on considerations weighed in 1976

Four of the seven considerations that led this Committee to conclude that copyright terms should be extended in 1976 are still relevant today.[53] Each of them is discussed below with a brief summary and evaluation of 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.[54] S. 483 does not propose applying term extension retroactively to restore copyrights in works already in the public domain.[55] Opponents also argue that term extension provides the public with no benefits, imposes substantial costs,[56] 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.[57] Some opponents also assert that term extension would violate the "limited times" provision of the copyright clause of the constitution which authorizes Congress to give rights for "limited times."[58]

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.[59]

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. The 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,

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[53] *See* S. Rep. 473, 94th Cong., 1st Sess. 116–119 (1975).

[54] *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.*

[55] 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 S. 483 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.

[56] *See* Comments 85 and 97 at 8–9.

[57] *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.

[58] *See* Comment 19, at 10.

[59] *See, e.g.,* Comment 17 (John Belton, Member National Film Reservation 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 exploring 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.

when copyright terminates—the paperback book is evidence that copyright protection is not incompatible with mass circulation at low cost to the public."[60]

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.[61] 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."[62]

b. *Evaluation.* The constitutional mandate must be considered in evaluating any change to the copyright law. With respect to extending the copyright term, Congress should consider two principles: 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 copyrights, unlike patents, only protect expression not ideas or facts, and an author is free to use his or her own expression to create a work of public domain ideas or facts. It is only when an author appropriates the expression of the earlier author that considerations of copyright arise. Moreover, it has not been shown that the creation of derivative works decreased following term extension in 1978. 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 an authorized version of a more recent title such as the Broadway show, *How to Succeed in Business Without Really Trying.*[63]

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 copyright law has been amended on a number of occasions 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.[64] 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.[65]

(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.

The history of the United States and other countries' 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

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[60] Copyright Law Revision, part 2 at 316–317.

[61] *See, e.g.,* Comment 6 at p. 3 (George David Weiss, President, The Songwriters Guild of America).

[62] *See* Comment 23 (Wade Williams Productions).

[63] 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.

[64] 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.

[65] *See, e.g.,* Barbara A. Ringer, *The Demonology of Copyright,* Second of the R.R. Bowker Memorial Lectures New Series (New York 1974).

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 a different times. Another part of the equation is that there is a risk involved in publishing or producing work; successful ventures subsidize marginal works. Unfortunately, there are few relevant statistics to show on the average what a minimum term should 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.[66]

In earlier debates on the 1909 Act and 1976 Act, Congress appeared to conclude that copyright should benefit at least the author and one generation. The legislative histories refer 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 term should take care of his daughters.[67] 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, until 1992, a renewal claim had to be made in the 28th year of the first term for the full term to be enjoyed.

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 succeeding generation.

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.[68] 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.[69]

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 researches. Thus, if the term is lengthened, the concerns expressed from library associations in their July 11, 1995, letter to Mr. Carlos Moor-

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[66] *See generally* Ricketson, *supra* note at 320–1.

[67] *See* note *supra* at *Proposal to Amend and Consolidate the Acts Respecting Copyright, 1906: Hearings on S. 6330 and H.R. 19853 Before the Joint Committees on Patents,* 59th Cong., 1st Sess. 116 (1906) (statement of Samual L. Clemens, author).

[68] 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 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.

[69] 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 for 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 materials is to the public good because funds become available for the creation of new works. Some may disagree with the length of the copyright terms 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 believers consideration of term extension is well within the Constitutional powers of Congress.

head, Chairman of the House Subcommittee on Courts and Intellectual Property, must be addressed.[70] One way to address some of these concerns is to create an exemption during the extra 20 years for libraries, archives and nonprofit educational institutions to provide materials to scholars, researchers and similar users as long as these activities do not have an adverse impact on the value of the work.

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.[71] 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 that, therefore, there can be no public benefit without public access.[72] 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.[73]

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 international networks such as Internet, 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 of categories that do not require such lengthy protection.[74] 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 others countries, has never differentiated copyright term on the basis of the category of the work, and we are not advocating such an approach.

c. *Concerns about access to copyrighted works.* There is a critical need to improve American education. The Library of Congress through its National Digital Library efforts, is attempting to bring unique copyrighted materials to the American educational community.[75] The Library has been diligent in seeking copyright permissions for its Digital Library projects. However, it is exceedingly difficult to determine the 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

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[70] *See* Letter from Robert Oakley, Washington Affairs Representative, American Association of Law Libraries; Carol Henderson, Executive Director, Washington Office, American Library Associations; 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).

[71] Comment 19, at 4–6 (law professors); Comment 97, at 9–11 (CFPPA).

[72] Comment 97, at 10 (CFPPA).

[73] *See* Comment 6, at 2 (SGA).

[74] Ricketson *supra* note 60, at 770–1.

[75] For example, the Library in 1990 launched American Memory, a pioneering effort that made limited collections of digitized versions of the Library's unique resources, e.g., Civil War photographs, sound recordings of key American figures, African-American political pamphlets, available to 44 schools, libraries and universities across the country. This five-year pilot made clear that students, researchers and the public would use digitized materials, if only they had *access.*

a corporation, the task is somewhat easier but here too there are many assignments and occasionally bankruptcies with no clear title to works.

All libraries, archives and nonprofit educational institutions have similar goals and face similar problems. This bill could have some unintended consequences with respect to these institutions. The Copyright Office believes the legitimate needs of these institutions can be accommodated without endangering the rights of copyright owners or running afoul of the objectives of the sponsors of this legislation. These concerns should be addressed, and we urge the Committee to encourage all interested parties to work together to reach a mutually acceptable accommodation.

d. *Unlocatable copyright owner.* 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 and the license period, only covers use in Canada.[76] Japan and Hong Kong have similar provisions.[77]

Unless the United States comes up with a similar creative solution to make use of these works possible, especially in a digital age, all users including nonprofit ones will continue to face almost insurmountable difficulties in using older works to create new ones. The Office respectfully suggests that there be a congressional direction that the parties work together to come up with language to resolve this issue. We will be glad to serve as a facilitator of this process.

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 will benefit large corporations.[78] 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.[79]

Proponents argue that the existing term does not cover life expectancies and two generations[80] and that a longer term is needed to give authors and copyright owners a fair economic benefit.[81] 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.[82] They also urge that the term should be longer to allow a reasonable return on economic investments.[83]

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 re-

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[76] 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 works 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.

[77] *See e.g.,* art. 67 of the Japanese Copyright Code.

[78] 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.*

[79] *See e.g.,* Comment 18 at 1 (Reel Movie International).

[80] Comment 98 at 10 (CCCO Supplementary).

[81] *See generally* Comment 2 (MPAA); Comment 1 NMPA; Comment 3 (CCCO); Comment 4 (ICMP).

[82] Comment 1 at 4, 5 (NMPA).

[83] Comment 4 at 3 (ICMP).

cover costs on most of the works produced in these categories.[84] 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. * * *"[85]

b. *Evaluation.* Although it is clear that the existing term is only enough to take care of works that achieve commercial success early, some copyrighted 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. Many 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, S. 483 would provide additional money that could be used to invest in works by untried authors or serious works.

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.[86] 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.[87] They argue that the term should be 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, S. 483 does not completely harmonize our law with the Directive on Term. In some cases, the U.S. term would be longer; in others 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 rightsholder. 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?

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 region of the world except Europe. This is because foreign works would be protected in the United

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[84] *See* Comment 2 at 2.

[85] Statement of Michael Weller, Member of the Writers Guild of America, Los Angeles Hearing (June 1, 1995).

[86] Comment 19, at 13 (Law Professors).

[87] *See e.g,* Comment 99, at 7, 8 (NMPA).

States for the life of the 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 of copyright terms. Some, however, have recommended that the United States should adopt this rule; that, of course, is for you to decide.[88] The Coalition of Creators and Owners provided us with information in 1993 indicating that 16 countries applied the rule of the shorter term and that at least two more would have to apply it in the future.[89]

2. Beneficiaries of term extension

S. 483 would extend the term of copyright for 20 additional years without making any special provision for ownership of the additional years of protection. If enacted it would continue the transfer and termination of transfer provisions of the 1976 Copyright Act. The result would be that transferees of copyrights would be the beneficiaries of the additional 20 years of copyright protection unless the transferor made a timely termination of the transfer.

When enacting the 1976 Copyright Act, Congress was faced with a similar extension of the term of copyright; as stated earlier, the existing term of 56 years was extended by 19 years for a total of 75 years. There was considerable debate as to who should be the beneficiary of those extra 19 years, the author or the owner of a copyright that had been transferred. Congress chose not to vest the rights in those extra years in the authors where such authors had transferred their rights. Instead it created a mechanism by which authors could reclaim those rights from transferees—a right of termination. With respect to such works the Copyright Office has received and recorded notifications of termination from 1978 to the present.[90]

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 of renewal rights executed before January 1, 1978 and thus is limited to 1909 Act works whose term is measured from the date the copyright was secured. 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.[91] The possibility of termination under Section 304(c) began on January 1, 1978. Terminations of transfers under Section 203 cannot begin until January 1, 2013.

On balance, it seems that authors should be beneficiaries of the unexpected 20 additional years of copyright protection.[92] The question is how this should be effected. The bill could be amended to provide that the 20 additional years of protection vest automatically in the author except in the case of a work made for hire where the extra years could be given to the proprietor of such a work on the date such additional protection begins. The bill could be enacted as is, retaining the two

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[88] *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).

[89] *See* Comment 98, at 7, 8 (Joint Supplemental Comments of the Coalition of Creators and Copyright Owners).

[90] Only 566 notices of termination were recorded in the Copyright Office between November, 1993 and May 5, 1995. Of these, 551 were musical works.

[91] Section 304(c) provides that for any subsisting copyright, other than a work made for hire, the exclusive or nonexclusive grant of a transfer or license, or any right under it, executed before January 1, 1978 is subject to termination. Termination may be affected at any time during a period of five years beginning at the end of fifty-six years from the date the copyright was originally secured. A notice of termination must state the effective date of the termination which must fall within the five year period, and the notice must be served not less than two or more than ten years before the termination date. As a result, copyright owners who elected not to terminate a grant on subsisting copyrights secured this period, would have no new opportunity to reconsider the decision not to terminate. Moreover, copyright owners who elected to terminate and made a new transfer of the additional 19 year term, would be bound by the 35 year provision of section 303.

[92] 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.

termination of transfer provisions of the present Copyright Act which would automatically include the 20 additional years of protection in termination of a transfer. 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 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. If the bill stands as it is, Congress may wish to consider the possibility of creating a new right of termination for these works.

The Copyright Office strongly supports enactment of S. 483, but as indicated earlier, proposes several amendments based on concerns expressed at the hearings on H.R. 989. We also note below one area where change or clarification is desirable.

In testifying before the House Subcommittee on H.R. 989, law professor Dennis Karjala of Arizona State University stated that as drafted, H.R. 989 could arguably restore copyright in works which had passed into the public domain. As drafted, section 304(b) would be modified to provide for a copyright term of 95 years, rather than the current 75 years. If this modification were retroactively applied to copyrights in which the renewal term of 47 years had expired, then arguably the copyright would be restored from the public domain.

The Copyright Office agrees with Professor Karjala's statement that there is ambiguity regarding possible restoration of expired copyrights. It is our understanding that there is no congressional intention in S. 483 (or H.R. 989) to restore copyrights which have entered the public domain. In consultation with Professor Karjala, the Copyright Office suggests that following language be added to section 304(b): "Any copyright still in its renewal term at the time that the Copyright Term Extension Act of 1995 becomes effective shall enjoy a copyright term of ninety-five years from the date copyright was originally secured."

If this amendment is included in S. 483, the Senate report should explain that works whose renewal terms have expired do not receive any additional protection. If this bill is enacted in 1995, then works whose terms began on or before December 31, 1919, will be in the public domain, and remain so under the amending language.

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. Currently there are at least 15 European countries, i.e., the European Community, imposing the shorter term rule as of July 1, 1995, although 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, U.S. copyright owners will be denied European royalties 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 S. 483. 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 also 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 S. 483 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 force to increase the term, rather it should set an example for other countries.

The CHAIRMAN. Thank you, Ms. Peters. We appreciate your testimony.

Mr. Lehman.

STATEMENT OF BRUCE A. LEHMAN

Mr. LEHMAN. Thank you very much, Mr. Chairman and members of the committee. First, I have a statement for the record which we will introduce, and I will try to be very brief to save the committee's time.

The CHAIRMAN. Without objection, it will go in the record.

Mr. LEHMAN. Let me just make a few observations, and the first one that I would make is that I don't need to give extensive testimony because I think that the administration's views so parallel those of your own opening statement, Mr. Chairman, that, at least, you are certainly very familiar with this matter and don't need to be persuaded by our views on the subject. And there is a great deal of harmony with the views of the administration and the Copyright Office.

I am here to tell you that the administration supports S. 483, the Copyright Extension Term Act of 1995, and I would just like to make a few observations that perhaps will embellish what you have observed in your opening statement and what Ms. Peters has already referred to.

First of all, copyright term is something that has been increased in the past. This is not the first time that we have extended the copyright term. In the beginning, it was only 14 years. It is now life-plus-50, or 75 years in the case of works made for hire or works that were copyrighted prior to 1978.

It is interesting when you look at that last change in 1978 when copyright term was increased from a maximum of 56 years for most works made for hire to 75 years that, you know, there really wasn't anything terrible that happened. In fact, I am not sure that anybody even knew that it happened. There was hardly a blip. So I think that we can see from experience that there is very little negative consequence to this.

In fact, as far as the public and the consumer is concerned, I am not really certain, except for first edition bestsellers, that there is a great deal of difference in the cost of products which are either in the public domain or understand copyright. But what copyright does give is that it gives an incentive to get works out to the public, to publishers, to motion picture companies, to sound recording companies, to computer software companies, to put works in the public domain, and it has a very powerful effect in that regard.

Now, the primary reason for supporting this bill and for taking this action at this period of time is international harmonization, and I think you correctly observed, Mr. Chairman, that the Euro-

pean Union is proceeding to harmonize their law and go to a life-plus-70 term. And because the European Union uses the rule of the shorter term in their directive, if we want American works to be protected at this point, at least without some incredibly difficult and probably very hard to achieve trade negotiation, we are not going to get the benefit for U.S. works in the European market that has provided for that new term. And if one looks at 20th century works—and it is interesting—these are the very works now that we are talking about that would otherwise be going into the public domain also coincide with the period in which American culture and the American copyright-based industries started to develop worldwide prominence, and you referred to some of the works in your opening statement, Mr. Chairman.

What we concede is that, if we don't do this, we will basically be leaving increasingly a lot of dollars on the table for the U.S. economy that we will not be able to collect. Now, our figures indicate that that will not be a lot right at the very beginning, but every year that goes by, that will start to increase to a fairly substantial amount. And I don't think we are in the business of leaving money on the table that should go into the U.S. economy.

So when we looked at this overall picture in the administration, what we concluded is that there would be a significant benefit to U.S. information-based industries and the U.S. economy by being able to have access to these revenues on a global basis and that there would be very little downside to extending the copyright protection for this additional period, just as there appeared to be very little downside after the 1976 Copyright Act was passed.

For all of those reasons, we have decided to support S. 483, and I want to just say, Mr. Chairman, that I particularly want to thank you for your leadership in this area. We know that you are very busy as the chairman of the whole Senate Judiciary Committee. You have some of the most important issues, cosmic and high-profile issues confronting you and other members of the committee, and the fact that you have chosen to take leadership in this area in the intellectual property are a I think is something we are very grateful for, and I know that all intellectual property-based industries in America are as well.

Thank you for having us here today.

[The prepared statement of Mr. Lehman follows:]

PREPARED STATEMENT OF BRUCE A. LEHMAN

Mr. Chairman and Members of the Committee: Thank you for this opportunity to appear before the Committee to testify on S. 483, 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 S. 483 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 S. 483.

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 S. 483, 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 S. 483 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 S. 483, 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 S. 483 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 S. 483 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 S. 483 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 do-

main 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 it 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 form 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 S. 483 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 proposed in S. 483 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.

Similiar to the two performance rights bills, S. 483 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 S. 483.

The Copyright Term Extension Act of 1995, S. 483, proposes to extend the term of copyright protection in all copyrighted works that have not fallen into the public domain by twenty years. 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 (EU). If the United States extends the copyright term to life-plus-seventy years as proposed in S. 483, the EU Member States would be required to protect U.S. works for the entire life-plus-seventy years term in the European Union. Thus, and extension of the copyright term as proposed in S. 483 would serve the dual purpose of providing many 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.

Increasing the copyright term may 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. These increased rewards will increase the incentive to create new works for the public's benefit.

Granting a copyright term extension as proposed in S. 483 would also provide copyright owners with an additional twenty years in which to exploit their works in the United States. 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 American pubic to enjoy.

Based on the apparent short and long-term benefit for U.S. copyright interests, a copyright term increase as proposed in S. 483 may be warranted. Accordingly, we support the twenty-year extension of copyright protection as proposed in S. 483.

The CHAIRMAN. Well, thank you, Mr. Lehman. I appreciate your kind remarks. Germany currently has a copyright law of life-plus——

Mr. LEHMAN. Life-plus-70.

The CHAIRMAN. Plus-70, yes, and if the United States does not extend its copyright term, isn't it true that American works in Germany will be protected 20 years less than those in Germany?

Mr. LEHMAN. That is correct; yes.

The CHAIRMAN. The same in France. France hasn't adopted it yet, but it is going to, and so will most of the other European Union countries. That is where we export an awful lot of our copyrightable materials, so that is really what this is all about, in part economically, plus the desire on some of our part to protect creativity and to encourage it and incentivize it even more. But you have had extensive experience in negotiating international intellectual property agreements. You have participated internationally in a number of items. And since reciprocity is such an important principle in the international arena, how will this longer term help us to achieve more protection for American works abroad?

Mr. LEHMAN. Well, one of the most serious needs, Mr. Chairman, I think from the point of view of the U.S. information industry, particularly as we approach the digital era, is to harmonize the international systems so that U.S. works have maximum global protection. And right now I would say in negotiating in attempts to bring about that harmony, probably the most difficult problem that we confront is the longstanding differences between European law and American law. And, in fact, there are a lot of anomalies—I don't know if they are anomalies in America or Europe, but there are differences between the two systems. And we are working very diligently to try to iron those out. But obviously, with longstanding

different systems, it is very hard for us just to accept the European system or for them to accept our system. So we are going to have to agree to disagree on some points, but still protect works generally. And, in fact, we are going to have an international—we hope to have a diplomatic conference to prepare a protocol with the Berne Copyright Convention that will protect works in the digital environment next year.

One of the advantages of this bill is that it will take away one of the irritants. Every time we have a difference between the European system and the U.S. system, it is an irritant that we have to iron out when we try to harmonize the two systems. And we have enough differences in the system where it is going to be very difficult for us to harmonize with Europe, that if we can—this is perfectly justifiable. If we can harmonize at this level now on something like term, it will take an irritant off the table and enable us to make more progress in obtaining international protection and having a successful negotiation on other issues as we work to develop this new treaty.

The CHAIRMAN. Well, thank you.

Ms. Peters, I have limited time here, but your written testimony states that the Copyright Office does not endorse the extension for unpublished works, and particularly you stated that "Many institutions, including the Library of Congress, have photographs, letters, and manuscripts that can and will be made available to the public."

Now, in order to clarify the availability of unpublished works in library collections, does that fact that they are under copyright prevent physical access to these materials, or does it prevent the use of facts and ideas expressed in these works? For instance, does the doctrine of fair use apply to unpublished works?

Ms. PETERS. In an extremely limited way. Actually, this is a very narrow exception. When we went to a single Federal system in 1976 and did away with common-law perpetual copyright, we had to deal with works that had been created in 1820, 1840, and give them a reasonable term. We gave them 25 years, and if they were published in that 25 years, 25 more.

We think that is a great incentive to encourage people to publish this material and it doesn't become an issue for libraries. What we are saying here is extending that extra 10 years keeps libraries from making, disseminating—and I mean putting up on the Internet—that kind of material which could benefit everybody while at the same time not—basically encouraging publishers to come in and make that material available. If by 2002 the material is published by commercial publishers, it is not at issue, and those publishers would get 35 more years. We are not objecting to publishers getting an extra term if they actually take their time and effort to make it available. It is only when there is no commercial advantage.

The CHAIRMAN. All right. In your written testimony, you mentioned clearing the rights to the collection of the American composer Edward A. MacDowell. Is it not possible to clear the rights of other unpublished works in order to publish these works?

Ms. PETERS. The problem is that in many of these collections it is letters; letters that were written to the individual.

The CHAIRMAN. Isn't the problem more kind of a problem of the unlocatable owner?

Ms. PETERS. That is what I am talking about, yes, with regard to photographs which have no titles.

The CHAIRMAN. I don't mean to keep interrupting you, but wouldn't section 302(E) of this bill, which creates a presumption, as I understand it, of the author's death, wouldn't that help?

Ms. PETERS. Well, again, most of the works that we are talking about are these unpublished works that still have a guaranteed 25-year term of protection, and I think that what you find is, when you have a longer term, when companies go out of business, when people die, that there still is a significant problem getting permission from copyright owners, even for limited uses that libraries are trying to make. And we are just saying that in an era of multimedia, where people are putting together deals and can't find owners of photographs, this is probably something that it is time to address.

The CHAIRMAN. OK. We will turn to Senator Feinstein who is next on our list.

Senator FEINSTEIN. Thank you very much, Mr. Chairman.

The CHAIRMAN. We are going to limit it to 5 minutes, if we can, because we have six witnesses today. But we turn to you now, Senator Feinstein.

Senator FEINSTEIN. Ms. Peters, welcome. I think the nitty-gritty of this problem is earlier access to the public domain versus the value of international harmonization and the fact that we are now in a global economy and more and more the patents and copyright issues really have to be universal.

Could you give us some concrete examples of how a European company right now would be profiting from United States creative works without paying for them so people can more easily understand this?

Ms. PETERS. Well, let me give—I will try to make one up. For example, in Germany, where it is life-plus-70, if we had a motion picture that was protected for less than that period of time in the United States, which this would be the case, basically Germany could broadcast that motion picture without paying anyone. They obviously would have an advantage because they have advertising time, they have other things that have a value—Why are they broadcasting it?—but we would get nothing.

Senator FEINSTEIN. I would be interested in some specific examples, and maybe Mr. Valenti when he comes in later maybe could present some, because I think those are of interest.

Could a European television broadcaster derive advertising revenues from showing an American film that has gone into the public domain under our shorter term?

Ms. PETERS. Arguably, when that came up, the answer would be yes.

Senator FEINSTEIN. So essentially the thing to be weighed here is the value of having an earlier access to the public domain versus being able to have copyright remuneration that is fair and equal to the rest of the world. It is very hard for me to see how we could not have it fair and equal to the rest of the world and be fair to

our intellectual property industries. I take it you don't differ with that.

Ms. PETERS. No, no. The Copyright Office strongly supports S. 483, believes that American authors should be treated as well as, if not better than, authors throughout the world.

Senator FEINSTEIN. Any comment, Mr. Lehman?

Mr. LEHMAN. Well, I think you have hit it right on the head, Mrs. Feinstein. I think that is exactly why we support the bill. We think that there is great economic benefit to the United States, and as I indicated, I think there is a negotiating advantage to us because it takes away a difference and irritant that we can have off the table and then we can really work on the substantive differences between particularly the European system and the United States system as we try to harmonize and get a better shake for United States authors in Europe.

I know that Mr. Valenti and others will be testifying, and one of the most serious problems that we have and we did not fully resolve in the Uruguay round negotiations is that other countries, and particularly European countries, use the copyright system oftentimes to siphon off money that is obtained from the exploitation of United States works, where the rights granted in each country are not identical—for example, video rental rights and so on—and then they direct those revenues to European authors in the European system. So, in effect, they are getting paid for the exploitation of our works.

Our ability to harmonize here, in a very easy way, will enable us to really focus on that much more serious problem and hopefully to get the Europeans to change their system.

Senator FEINSTEIN. I am glad you mentioned the Uruguay round, because I think that has been a real stickler for many, particularly the entertainment industries, and the fact that they were left out is, as we all know, a major problem. So in a sense, this is helpful in that regard. So I thank you for your comments, both of you.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Feinstein. We appreciate it.

Senator Grassley, we will turn to you.

Senator GRASSLEY. Mr. Lehman, I believe it is true that many people incorporate public domain works into their original work, and I think they do this to increase the public awareness of their works. If you agree, wouldn't this extension have an adverse impact on those authors?

Mr. LEHMAN. My view, Mr. Grassley, is that it would not, and I will tell you why; that is, authors right now use other people's works all the time, and if you look at what is used, most of it, most quotations, most derivative works that re published today that is based on somebody's else's works, utilize already copyrighted works. And the marketplace works very well. It works very efficiently.

Copyright is not onerous. It is not difficult to get permission at a fair market price, in general, for the use of somebody else's work. When we are talking about putting out a collective work or derivative work such as a new kind of multimedia work, surely you may have some public domain stuff in that, but you are also going to almost certainly have lots of work that is already copyrighted

which you will want to use. You are going to have to get permission. The marketplace works quite well, and so I think as a practical matter there is going to be very little burden; it will be not onerous at all for people putting together derivative works and collective works to use the market system that is out there to obtain fair licenses.

Senator GRASSLEY. Is that a gut feeling of yours, or do you have some sort of a track record with existing law in that area?

Mr. LEHMAN. That is not a gut feeling. That is something that I can speak to from having been a lawyer working in this area in private practice before I came into the Government for 10 years, and I think that if you talk to some of the industry witnesses who will be appearing later on, they can probably provide you very specific examples of what is happening on a day-to-day basis there.

Senator GRASSLEY. On my next point, in my opening statement, which will be put in the record, it is easy to acknowledge the importance of harmonization. And I think as the chairman of the International Trade Subcommittee of Finance, I see a necessity for that in the work that I do in that subcommittee to a great extent. But let's suppose that we are doing that to our domestic law just because some other country does it, whether it is the European Community, which is the immediate reason we see for this legislation, or anything else. But as I pointed out in that statement, if we do something just because somebody else does it, and in this particular instance the European Community, if it would have the notion at some point of granting protection in perpetuity, then the economic arguments that you and others make I think would indicate that the United States would be required to follow suit.

So wouldn't this come up against the constitutional point that such protection shall be, in the words of the Constitution, "for limited times"?

Mr. LEHMAN. Senator, I don't think so because this is still a limited time.

Senator GRASSLEY. Yes, this is in this bill.

Mr. LEHMAN. That is right.

Senator GRASSLEY. Let's suppose in the future that they do it in perpetuity.

Mr. LEHMAN. I would suspect, although obviously we haven't discussed that inside the administration and haven't discussed it with the Justice Department, that particular hypothetical, and the U.S. Trade Representative, but I would suspect that in that situation we would not be here testifying that we should harmonize to the European system.

I think it is really important to recognize that thee are areas where we simply are not going to harmonize to the European system, and we are taking a very firm position. I mentioned some of them in the negotiations where the beauty of this is that this is an area where we believe we can agree. And obviously when you are trying to win your points where you are not going to agree and you don't have a common interest with European, it helps to be able to have something that you can agree on.

Senator GRASSLEY. OK. So then you would agree, at least from that standpoint of our Constitution and how it speaks to patents

and copyrights, that there is some limit, that we don't do things just because some foreign nation or foreign group——

Mr. LEHMAN. Absolutely, 100 percent.

Mr. CHAIRMAN. Thank you, Senator Grassley.

Senator GRASSLEY. Thank you, Mr. Chairman. I am done with my questioning.

[The prepared statement of Senator Grassley follows:]

PREPARED STATEMENT OF HON. CHARLES E. GRASSLEY, A U.S. SENATOR FROM THE STATE OF IOWA

I look forward to hearing the comments of our distinguished panelists today. I am undecided on the issue and want to hear the pros and cons about extending copyright protection for an additional 20 years.

I do have a couple of observations I would like to make.

A number of comments talk about global harmonization of intellectual property protection. The argument is that because the European Community has given additional protection, we must follow suit to demonstrate our commitment to intellectual property protection and to insure that our authors receive the same length of protection overseas as foreign nationals do.

But the logical extension of that argument is that if the European Community, based on its tradition of perceiving intellectual property as a natural right, decides to grant such protection in perpetuity, then the United States would have to grant similar protection.

But this would violate the Constitution's express language that such protection shall be "for limited times." I hope some of the witnesses can address this issue.

Another comment I would make concerns the arguments about incentives or disincentives that would flow from granting the 20-year extension. I doubt that when an author sits down to create something, he or she is thinking about the royalties that will go to their great-great grandchildren. Let's not forget that by the time this extension would take effect, the author will have been dead for at least 50 years.

There are good arguments on both sides of this issue, and I look forward to the testimony.

The CHAIRMAN. Senator Simon.

Senator SIMON. I thank you, Mr. Chairman. I am going to be in and out, Mr. Chairman. I hope I am here to hear my friend, Jack Valenti, but I may miss him.

In glancing through the testimony of future witnesses, I noticed that Mr. Menken quotes a Mr. Schoenberg, who quotes his grandfather in an essay. And his grandfather says, "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." Kind of an interesting observation.

Ms. Peters, in response to the chairman, you referred to the concerns of libraries, but just in a general way. Could you be more specific and give me an example of—you mentioned that they can be worked out.

Ms. PETERS. I believe that.

Senator SIMON. And I trust that they can because it seems to the concept of this bill is basically sound.

Ms. PETERS. Absolutely.

Senator SIMON. But in very specific terms, what are their concerns?

Ms. PETERS. They have voiced concerns about the ability to preserve materials. They have also voiced concerns about making material accessible to the public. That means that where the use that is requested would go beyond what is fair use or what is allowed today in 108 and the material is extremely old and it is not other-

wise on the market. They believe that there is no benefit in not making it available to private scholars, to researchers, and to educational institutions. And I believe that if the parties sat down, they could work out something where the libraries felt that they could perform the function that they believe that they are chartered to do and the copyright owners in no way would have any kind of an economic impact on them. But it is an access issue.

Senator SIMON. I do some writing occasionally.

Ms. PETERS. We know that.

Senator SIMON. You know, I have access to a lot of materials as I research, and I go over to the Library of Congress and other libraries. I don't see where this limits my ability as an author.

Ms. PETERS. For the people who can come to Library of Congress and who can use the reading room and can take notes, it doesn't. Increasingly, as we move into distance learning or we have an artifact that is in on institution and we have technology that is able to bring it electronically to somebody without having them come to that institution and the material is not otherwise available, I think that libraries are looking to the future and wanting to be able to provide that service.

Senator SIMON. And this in some way would limit that?

Ms. PETERS. They would have to find the copyright owner. They would have to write and ask permission. As somebody who has done——

Senator SIMON. Excuse me for interrupting. My wife tells me I am always doing that, and I should not do that. But they have to get that permission only if they want to reproduce. Right?

Ms. PETERS. Yes. But if they are going to not have the individual come to them, fly to Washington and use the Library of Congress, for example, then almost always you are involved in reproducing some part of the work, and it depends on what the scholar needs or wants.

In the Library of Congress example that I gave, it really had to do with taking unique images, and the example that I gave was basically political cartoons that would be used in a history class and basically bringing them to classrooms across the United States. Now, there is no way that they can do that without permission of the copyright owner.

Senator SIMON. OK. But you believe this can be worked out?

Ms. PETERS. I believe, I have a great deal of trust in library associations and copyright owners who basically need each other to sit down and reach some kind of an accommodation.

Senator SIMON. OK. Thank you.

The CHAIRMAN. Thank you, Senator Simon.

Senator Thompson.

Senator THOMPSON. Thank you, Mr Chairman.

It is kind of interesting to me to learn from listening to Senator Simon that gentleman who has published more than dozen books does "a little writing occasionally." he says.

Ms. PETERS. I know.

Senator THOMPSON. Apparently, there has been this trend of protection extension since, I guess, what, 1909. To what do you attribute that?

Ms. PETERS. I can basically say it really goes back to—the first term was 14 years and renewable for 14 more, and it was increased in 1831, and it has been increased over the years. One of the reasons that you increase the term is that there is commercial value that you believe that the person whose creative genius—but for that creative genius, you wouldn't have that work—should have economic reward and to encourage publishers to keep on making it available to the public, plus people have been living longer, there is new technical means of—let's say videocassettes, for example. They were not available before. There is a whole new market in videocassettes. Why shouldn't the creative artist get the money that is being generated by the sales of those videocassettes for the work that he or she did?

So it is kind of like people are living longer, there is a longer term of commercial exploitation, there is new technology that makes it possible to continue to bring it to the American people and the world, and we believe that authors, the people who are the base of the system, should see those rewards go to them.

Senator THOMPSON. Mr. Lehman, would you like to add to that?

Mr. LEHMAN. Yes, sir. I think it is pretty simple. Since 1790, the market for intellectual property has just vastly increased, and actually it is probably—the area is going to increase. It is probably going to be the majority of our gross national product in a very short period of time.

It is very hard to have a market where there is no property, if you think about it. And we are not just talking about the incentive to create. We are talking about the incentive to take already existing works and reuse them in new formats, new technologies and so on. And if you don't have any property rights there, it is going to be very difficult to get the market incentives to do that and to take advantage of all the wonderful new technologies there are to get products to the American people and to the world, who will benefit from it, and the creation of these new industries.

Senator THOMPSON. Those developments certainly speak to the issue of protection, but you are saying it also speaks to the issue of extending protection gradually over the years because of these developments.

Mr. LEHMAN. That is why copyright has been extended over the years. If you look at it, it is because since the United States was founded in 1790—in 1790 we had very few, very small copyright-based industries, publishing industries. But then as time went on, those industries grew. They began to be more a part of the American economy. There was more of a market, and, therefore, people realized there was a necessity to have property rights and to have those over a longer period of time.

Senator THOMPSON. Well, there certainly seems to be an economic argument that you have made very well. American-created works, of course, are the most popular in the world, and this is one of the few areas where we have actually a trade surplus. The question really becomes not whether or not objectively we think this is the correct number of years, but whether or not we want a shorter period of time than the people that we are competing and trading with. To me, the fairness to the creator certainly speaks for itself. Among other reasons, it hits late in life. People often have early

deaths and that sort of thing. But people make economic arguments. I mean, people make fairness-to-the public arguments on the other side. Some would way that having it go into the public domain earlier would make for cheaper prices to the average person and that sort of thing.

What does the research indicate on that score?

Mr. LEHMAN. Well, as I indicated in my opening statement, Senator, I think that when you look at these previous increases in term, particularly that which took place in 1976, which is a fairly significant increase, you do not see any kind of substantial negative consumer impact. In fact, I think if anything, what you see is a consumer benefit because you give to business the incentive to get these products out to the people.

Senator THOMPSON. But it doesn't go directly to the consumer. It goes to someone who sells it to the consumer. Right?

Mr. LEHMAN. That is correct, yes. The consumer cannot enjoy a public domain product that is stuffed away in the Library of Congress somewhere unless he gets on a plane and goes to do it. So maybe there will be a half a dozen people that like to do that, but if you really want to get works out to the public all over the country and all over the world, you have got to give business the incentive of the copyright so they have something to work with, the property right that they can protect, and then they will republish new editions of works. They will put them in videocassette form and audiocassette form and CD–ROM and multimedia and so on.

Senator THOMPSON. My time is up. Thank you.

The CHAIRMAN. Thank you, Senator.

We will go to Senator Leahy and then finally Senator DeWine.

Mr. LEAHY. Thank you, Mr. Chairman. I apologize for being late. I would ask for my full statement to be placed in the record.

Mr. CHAIRMAN. Without objection.

[The prepared statement of Senator Leahy follows:]

PREPARED STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

This legislative proposal raises some fundamental questions about the role of copyright in the next century. Recently Assistant Secretary Lehman and the Administration completed their review and released the long-awaited white paper on copyright protection in the electronic information age, "Intellectual Property and the National Information Infrastructure." The legislative future of the recommendations in that extraordinary undertaking and of this bill will go a long way toward creating the structure of copyright protection for decades to come.

Ours is a time of unprecedented challenge to copyright protection. Copyright has been the engine that has traditionally converted the energy of artistic creativity into publicly available art and entertainment. Historically, government's role has been to encourage creativity and innovation by protecting rights that create incentives for such activity through copyright.

I also believe that technological developments, such as the development of the Internet and remote computer information databases, are leading to important advancements in accessibility and affordability of information and entertainment services. We see opportunities to break through barriers previously facing those living in rural settings and those with physical disabilities. Democratic values can be served by making more information and services available.

The public interest requires the consideration and balancing of such interests. In the area of creative rights that balance has rested on encouraging creativity by ensuring rights that reward it while encouraging its public performance, distribution and display.

The Constitution speaks in terms of promoting 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. The first Congress set the copyright term at 14 years with a 14-year renewal period. It was doubled in the 1909 Copyright Act. With the Copyright Act of 1976 we significantly expanded the copyright term to the life of the author plus 50 years, in accordance with the Berne Convention.

Technological developments and the emergence of the Global Information Infrastructure hold enormous promise and opportunity for creators, artists, copyright industries and the public. There are methods of distribution emerging that dramatically affect the role of copyright and the accessibility of art, literature, music, film and information to all Americans.

I was pleased to work with Chairman Hatch and others earlier this year to craft a bill creating a performance right in sound recordings, a matter that had been a source of contention for more than 20 years. That bill has already passed the Senate and should soon be the law of the land.

I look forward to working with Chairman Hatch and Senators Kennedy, Feinstein, Brown, Thompson and others on these matters, as well. The question of the adequacy of the current term of copyright, life plus 50, to perform its historic function of spurring creativity and protecting authors is an important one and one that merits our time and attention.

We are fortunate to have with us today distinguished witnesses who can enlighten us with regard to the prevailing international situation, to the likely impact of such a change domestically and to the appropriate consideration of authors' interest and the public's interest in the accessibility of information.

Senator LEAHY. We have the foreign aid bill on the floor, and I am involved in managing that. But this is an area that I have spent years and years working on. With the quality of all the witnesses today, I want to be able to spend as much time as possible here.

Mr. Lehman, I appreciate the views that you express today. I compliment you, Terry Southwick, and all those who worked so hard and contributed so much to the report of the Working Group on Intellectual Property Rights of the Information Infrastructure Task Force. That is a mouthful, but it doesn't begin to reflect the enormous amount of work they did. I think that the report will help us a lot as we go into the digital electronic age and try to design our own legislation on that.

Last week at my request, the Judiciary Committee held off reporting to the Senate Budget Committee that it intended to extend and perpetuate the surcharge on patent applications. It is trying to look for an alternative to meet our reconciliation instructions so as not to burden inventors with the added burden from which they derive no benefit.

In the past few years, Congress chose to accumulate those patent application surcharges to help us balance the Federal Government's book. I think we have accumulated about $115 million—is that right?—in the nonappropriated account. My concern is if we perpetuate it, we add another $476 million, and then if we are giving serious consideration to spinning off the Patent and Trademark Office as a self-sufficient Government corporation, it would look to me like we are spinning off with a $500 million debt to begin with.

I wonder if you could comment on the effect of such a practice as charging patent application and examination fees that go for other uses other than your department.

Mr. LEHMAN. Yes, I would be happy to do that, Senator Leahy. Unlike the copyright system, where a copyright vests from the moment of the creation of the work, in the patent system you don't get a right in a patent which is the fundamental right, intellectual property right in technology until the Patent Office gives it to you. So if we make it impossible for the Patent Office to process patent

applications in a timely manner and identify the legal rights and give people those rights to trade in the marketplace, we find that the entire system of innovation in technology starts to break down. And so it is extremely critical that the Patent Office have the resources that are necessary to issue timely patents. And in 1990, Congress frankly bit the bullet and said we can't afford to subsidize this anymore with tax money, and so it set up a system whereby patent applicants would pay for this timely process of their patents so that they can get out into the commercial marketplace. They would pay the full freight.

Now what we see is a trend which you described in your question of diverting some of that money and treating it as if it were tax revenue. Sometimes there are good forms of taxation, and there are bad ones. A form of taxation on the patent system that causes us to have to delay the issuance of the most important developments in U.S. technology and not be able to vest the property rights that are absolutely necessary to go get the venture capital, the financing, and put those products into the world marketplace is an extremely dangerous thing for America. And we appreciate your interest in this, Senator Leahy, and your leadership and Senator Hatch's interest in it as well.

Senator LEAHY. Thank you. In your statement, you mentioned the European Union directive asking each member state to provide copyright protection for a term of life-plus-70 years by July 1st of this year. We have for the record a copy of the directive. I would also be interested in knowing if all EU members have actually adopted that. I would like to know just how it is being carried out. This becomes a major issue for us, but I am told that some have not adopted it. I would like to know how it is being implemented with respect to traditional copyright, neighboring rights such as the performance rights that you mentioned in your testimony for sound recording. So if we could have it for the record, I would appreciate that. Anything you want to add here, feel free.

Mr. LEHMAN. We will supply that to you, Senator.

[The information referred to was not available at presstime.]

Senator LEAHY. Ms. Peters, I received a very thoughtful letter from Professor Karen Burk LeFevre, a Vermonter who has written extensively on authorship and copyright. She expressed grave reservations about extending copyright terms. You mentioned your own experience as a researcher and author. And you note in your own testimony that unpublished works by authors who died before 1952 have social, educational, and historical significance, that they have not been published since enactment of the 1976 act and that no copyright owner would be benefited by extending the term. And you recommend the term for unpublished works not be extended. Is that correct?

Ms. PETERS. Yes. It is only those really old, unpublished works that were swept into the Federal law when common law was abolished.

Senator LEAHY. I will give you a copy of the professor's letter. I think you will find it interesting.

The CHAIRMAN. Thank you, Senator.

Senator DeWine.

Senator DEWINE. Ms. Peters, I wonder if you could give me an example of an unpublished work that you are referring to that would pose a difficulty. Just give me a typical example.

Ms. PETERS. Of one that poses a difficult problem to clear rights in?

Senator DEWINE. Yes, right.

Ms. PETERS. Photographs in general. Photographs have no title. Photographs are in basically collections of libraries throughout the world. And when you try to find who is the photographer, was it published, wasn't it published, and who currently owns the rights, it is a very, very difficult issue. And it's interesting. It is not only one that libraries are facing today. It is one that producers of multimedia material are facing today as the CD–ROM's can take many, many types of work and they want material, and photographs are one of the critical issues. Photographs are hard to search.

The photographers are doing wonderful things now. They are basically putting numbers on the work; they are building databases where you can find out who owns what photograph immediately. But for the older ones, it is very very difficult.

Senator DEWINE. Mr. Lehman, you mentioned something that I found very interesting. Your contention, both in your written testimony and in response to Senator Thompson's questions, was that going into public domain is really not necessarily to the benefit of the consumer, who we also are concerned about as well as the creator of the artistic work.

How far do you take that? Can you give me an example of where going into public domain did benefit the consumer? Does that in some cases benefit the consumer?

Mr. LEHMAN. Yes, I can give you probably an example. I think that sometimes you go to book stores, and you will see very old films that have fallen into the public domain. Generally speaking, the reason they fell into the public domain is because under the old system, when they were produced, we had a 28-year term, renewable for another 28-year term, and the film wasn't renewed. So it expired at 28 years, and some of those films you will see in a book store have been reissued and sold very cheaply as, you know, videocassettes maybe for $6 or $7 or something like that. That would be an advantage. But you have to balance that off by the fact that there are probably a lot more films that have been lost to the public forever and never reissued at all and made available because nobody had the economic incentive to do so.

Senator DEWINE. To preserve them.

Mr. LEHMAN. That is right, to preserve them and to put them out. And I would also just say, if you think of your own behavior, if you go into a book store, there are lots of books—you know, Shakespeare is not under copyright anymore. Do you really see a big difference in price between the public domain stuff and the nonpublic domain stuff? Does that even enter into your consciousness as a consumer?

Senator DEWINE. Good. Thank you. Thank you Mr. Chairman.

The CHAIRMAN Thank you, Senator DeWine.

We want to thank both of our distinguished witnesses here today, and we want to thank you for the long, hard hours you have

put in for our Government and for our people. We appreciate the testimony you both have given to us.

We are going to try to solve that one problem that you have raised, Ms. Peters, and I think we might be able to do that.

Ms. PETERS. Thank you.

The CHAIRMAN. Work with us on it, and let's see if we can't.

Ms. PETERS. Thank you.

The CHAIRMAN. We appreciate both of you very much. Thanks for being here.

Our second panel consists of distinguished members of the intellectual property industries and academia. To begin our second panel today, we will be pleased to hear from Mr. Jack Valenti, president and chief executive officer of the Motion Picture Association of America. Mr. Valenti has a long and distinguished career—we all know about it—in both Government and industry, and we consider it a privilege to have you here. And as leader of the Motion Picture Association, he has long fought to protect the rights of motion picture artists and our complete motion picture creative community, as well as other creative communities. So we appreciate having you here.

Our next witness will be Mr. Alan Menken, a composer, lyricist, and member of AmSong, Inc. Mr. Menken is widely recognized for his work on a variety of stage and film musicals, including "Little Shop of Horrors," "The Little Mermaid," "Beauty and the Beast," "Aladdin," and, most recently, "Pocahontas." Mr. Menken's work has received not only popular success, but has earned him much deserved critical acclaim and awards ranging from Oscars to Grammys. And we are honored to have you here as well, Mr. Menken.

Mr. MENKEN. Thank you, Senator.

The CHAIRMAN. Following Mr. Menken, we will hear from Mr. Patrick Alger, president of the Nashville Songwriters Association International. Mr. Alger has been a professional songwriter for 20 years. He was voted the Songwriter of the Year by the Nashville Songwriters Association International, in 1991, and the Country Songwriter of the Year by ASCAP in 1992. And for those of us who love your music, and I think those who haven't had the opportunity or who just plain have been narrow-minded, we welcome you on behalf of everybody.

Our final witness today will be Mr. Peter Jaszi professor of law at American University's Washington College of Law, a very distinguished teacher and scholar in the field of intellectual property. So, Professor Jaszi, we appreciate having your here today. We always look forward to your advice and counsel in these areas, and we will look forward to whatever you have to say here today.

We will start with our friend, Jack Valenti.

PANEL CONSISTING OF JACK VALENTI, PRESIDENT AND CHIEF EXECUTIVE OFFICER, MOTION PICTURE ASSOCIATION OF AMERICA; ALAN MENKEN, COMPOSER AND LYRICIST, AMSONG; PATRICK ALGER, PRESIDENT, NASHVILLE SONGWRITERS ASSOCIATION INTERNATIONAL; AND PETER A. JASZI, PROFESSOR, AMERICAN UNIVERSITY, WASHINGTON COLLEGE OF LAW

Mr. VALENTI. Thank you, Senator Hatch.

The CHAIRMAN. Now, we are going to try and limit you, if you can summarize. Is 5 minutes enough?

Mr. VALENTI. I had hoped I could take about 25, but it is all right.

The CHAIRMAN. That is why I started off saying 5 minutes, because—no, if you can, limit to somewhere near 5 minutes. I am not going to be harsh about it.

STATEMENT OF JACK VALENTI

Mr. VALENTI. Thank you Mr. Chairman. I just got off the redeye from California, so if my voice is blurred, you understand why.

Senator Feinstein, things are well. No mergers had been announced when I left last night at 10 o'clock.

I think of all the issues that you face in the Congress, some of them of numbing incomprehensibility, so difficult to fathom. This has a unique asset. It has clarity. It is simple, It has to do with America's economic interest.

Let me start by telling you that of all the products made, grown, or springing from some human's brainpan, every one of them can be duplicated, cloned, or matched by another country—Korean steel, Argentine wheat, German automobiles, Japanese electronics, you name it—except one. The American movie, to this hour, has not been duplicated by any country in the world. No other movie industry in the world can compete with us. We are unique. We are supreme.

That didn't come by accident. The free market system, the way our works for hire system, the allowability of forming capital and then enticing talented people, such as one of your sitting Senators right now, into our business, no matter where they come from. And that is why I think we ought to be looking at this, not in any legal way to get out from the thickets of all the arcane academic issues that float around this. We ought to look at it economically for jobs, because I will tell you this: The copyright industries in this country—that includes computer software and music and books, television, movies, and home video—do about $45 billion a year abroad. We have about 4 percent of the gross domestic product, and we are creating jobs at 4 times the rate of the national average of creating jobs. so I think that ought to concentrate the mind wonderfully as we look at this—and at a time, I must tell you, when our marketplace is being besieged by imports, at a time when the phrase "surplus balance of trade" is seldom heard in the corridors of this building, and at a time, I might add, when our ability to compete in the international marketplace is under siege everywhere in the world. And I may not know many things, but I am an old warrior in trade markets as they affect the intellectual property of this country.

Anything that extends and amplifies America's dexterity in foreign marketplaces is something that I think ought to capture the attention of the Congress. I won't repeat what Secretary Lehman and the Register of Copyrights said. They said it well, and everything they said I second and endorse because I think it is real. But let me just make two points very clearly.

One is that while the Berne Convention, to which all of us are signatories, while the Berne Convention says life of the author plus 50, Mr. Chairman, any nation can extend their copyright, as did the European Union because they understand the ferocity of the marketplace and they are going to make darn sure their works are protected, that nation has no need, no requirement, no compulsion to protect another nation's work beyond the term of that nation. so if we go into Europe with a 70-year works for hire and they are operating on 70 years plus the life of the author, which is 95 to 100 years, we are at a distinct disadvantage, and revenues that would come back to the American copyright owner now are truncated and are diverted into European and other hands.

I think that is very important to understand, and I am going to make one other statement, and then I hope to give you back some time, Mr. Chairman, which for me is unheard of. And that is about public domain works; if you go into public domain, you are going to go to the consumer and the consumer benefits. Mr. Chairman, if you do not own something, you are not going to protect it. The Library of Congress, the Librarian will tell you today that those prints in their possession which are soiled and haggard and need help are orphans, the ones that no one owns. They are public domain.

Therefore, I think it is important to understand that public domain means nobody really cares because nobody owns it.

I am rather fascinated by what I am saying here, but I think I will stop now. [Laughter.]

[The prepared statement of Mr. Valenti follows:]

PREPARED STATEMENT OF JACK VALENTI

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 marketplace arms is the European Union decision to lengthen its 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. copyright term has to be put on the same time span as our competitors in Europe: 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 verify 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, that nation does not have to protect other countries' creative works beyond what those other 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 revenues in the marketplace. The Commissioner of Patents & Trademarks, the U.S. authority on these issues has endorsed copyright term extension in testimony before the House Judiciary Committee's Subcommittee on Courts and Intellectual Property. So has Congress' own expert, the Register of Copyrights.

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

Third, American creative works are the most globally popular, the most patronized, and the most sought after by cinema audiences, television and home video views, world wide. Which is why U.S. moves/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 time 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. Which is why the United States Trade Representative has also endorsed the initiative.

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 owned is a work that no one protects and preserve. 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 something that anyone can offer for sale. 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. How does the consumer benefit from the steady decline of a film's quality? What academics offer in numbing detail are the arcane drudgeries of graphs and charts, all of which dwell in ivory tower 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 any harm to the consumers, 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, unmatchable trade prize: the American movie. In the global intellectual property world of tomorrow, competition will reach a ferocity even more brutal than it is 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 reach and their effectiveness. That is why it is in the economic best interest of this country to extend copyright term limits. Now.

The CHAIRMAN. I have to say I have been fascinated myself. I am worried about when these new rules kick in whether we can still see some of those first-line movies down there at MPAA. So we will have to work that out. And the big reason that I like to do it is, frankly, just to be able to say hello to you on a regular basis, because you are an institution in this town; and whether people agree or disagree with you, I think most everybody has tremendous respect for you. And they should.

Mr VALENTI. Thank you, Mr. Chairman.

The CHAIRMAN. Mr. Menken, we really are honored to have talented people like you and Mr. Alger here. We appreciate it, and we have a great respect for people who can do what you do. So we will listen to you.

STATEMENT OF ALAN MENKEN

Mr. MENKEN. Thank you. I have a prepared statement to read. I will try to read it as fast as I can to keep it to 5 minutes.

Good morning, Senator Hatch and members of the Senate Judiciary Committee. My name is Alan Menken. I am a songwriter and member of AmSong. Inc. I would like to thank you and the other members of the committee for your support of the Copyright Term Extension Act of 1995. 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, and Thelonius Monk, to America's finest contemporary songwriters such as Bob Dylan, Burt Bacharach, Billy Joel, Stephen Sondheim, Dave Brubeck, Carlos Santana, Quincy Jones, and Lionel Ritchie, 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 ensure that this country provides copyright protection for its citizens' creations for a fair and reasonable period of time. Several members of AmSong who were unable to testify this morning have prepared statements in support of S. 483. I will be placing into the record personal statements by a number of AmSong members, including Bob Dylan, Don Henley, Carlos Santana, Steven Sondheim, Mike Stoller, Ellen Donaldson, Shana Alexander, and Mrs. Henry Mancini.

AmSong is a member of the coalition of creators and copyright owners which represents virtually every genre of intellectual property: music, motion pictures, screenplays, theatrical plays, and graphic art, to name just a few. The other music industry members of the Copyright Coalition include ASCAP, BMI, SESAC, the National Songwriters Association, the Songwriters Guild, and the National Music Publishers Association. I know I can speak for the entire Copyright Coalition in voting our unanimous commitment to the enactment of S. 483.

I was born in 1949, and I literally grew up with music. From show music to rock and roll, from rhythm and blues to folk, from country to jazz, I played it all, I listened to it all, I loved it all. It was not surprising, then, when after entering NYU as a premed student I graduated with a degree in music. As a member of the baby boom generation, I believed the world was open to me. The world of American music was at my doorstep, and with the optimism of youth, I set out to claim its legacy.

As anyone who sets out in the music business knows, the path is neither smooth nor direct. My early years were spent not in concert halls, but in ballet classes, cabarets, and studios, where I earned my money as an accompanist while struggling for recognition as a songwriter. I often wondered if I would ever realize my dream of writing music that would be sung and loved by people the world over. But I never doubted if I did realize this dream that, as an American, I would be supported by a system of laws and rights that would secure my creations not only for me but for my children and their children after them.

On July 1, 1995, the countries making up the European Union implemented a uniform term of a copyright equals the life of the author plus 70 years. In addition, these countries have invoked the "rule of the shorter term." According to this rule, works created outside of the European Union will be protected for the shorter of life plus 70 years or the term of copyright in effect in the country where the work was created. This means that under the current laws American works will only be protected for 50 years after the death of the creator while the European counterparts will be protected for 70 years after the death of the creator. Thus, the works of the European authors will survive for an entire generation beyond the works of American authors.

The situation is even worse for American works created before January 1, 1978. These works are only afforded copyright protection for a total of 75 years from creation. Not only do these classic American works, such as George Gershwin's "Swanee," fall into the public domain while they are still commercially successful, but in all too many cases the author's spouse and children are still living. Moreover, in several instances, works such as Irving Berlin's "Alexander's Ragtime Band" have fallen into the public domain while the author is still living.

It is ironic that this great country which has spawned cultural treasures unsurpassed in the world should deny the creators of those treasures protections commensurate with those guaranteed to creators throughout Europe and virtually every other democratic country. The intent of our copyright laws is to encourage creativity by assuring the creator that his or her works will be protected during the lifetime of the creator and for two generations of this or her successors.

Implicit in the guaranteed protection of intellectual property, first enunciated in the Constitution of the United States, is the premise that American authors and their families will be afforded the best protection available. This intent is, in my opinion, not being met. Unless we change our laws by adopting S. 483 and its companion bill, H.R. 989, America will fall behind most of the world in the area of copyright protection. This is unjustifiable to all Americans, particularly at a time when we are positioning ourselves as a world leader on the global information superhighway. And this is unjustifiable to songwriters such as myself and to our children and grandchildren who will be deprived of their legacy unless we extend our term of copyright.

While it is impossible to ascertain exactly what inspires a person to become a composer rather than a surgeon, or a dentist in my case, it is the reality of life in the 1990's that one must work in order to support oneself and one's family. It is also the reality that we must support our children longer than ever, often into adulthood, and the costs of doing so are rising steadily. There comes a point in most people's lives when one must make a practical decision about the choice of a career. The continuing ability to provide for one's family both during and after one's lifetime would certainly be a factor. If it becomes clear that insufficient copyright protection is available to provide that support, there will be less incentive to try to make one's living as a creator.

Given the changes in demographics over the past two decades, it is obvious that a term of copyright of life plus 50 years does not guarantee protection for two generations of an author's successors. Many creative people begin creating early. Bob Dylan was only 21 when he wrote "Blowin' in the Wind." Paul Anka was only 16 when he wrote "Diana." By the age of 21, Irving Berlin had published over 20 songs, all 20 of which fell into the public domain 5 or more years before Mr. Berlin's death.

It is often many years, sometimes decades, before these authors begin their families. These families should certainly be afforded the same protection as the families of yesteryear born to parents in their early twenties. 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 not really the case.

This is "Moby Dick," written by Herman Melville in 1851. The book went into the public domain over a hundred years ago. This is "The Chamber," written by John Grisham in 1994. The price of "Moby Dick" is $12.95. The price of "The Chamber" is $7.50. The publisher of "Moby Dick" pays no royalty to the Melville estate, while John Grisham, of course, derived royalties from the sale of his book. However, no benefit is passed on to the consumer from the sale of "Moby Dick." Only the publisher benefits.

Similarly, this compact disc recording of the soundtrack of Garth Brooks' "No Fences" sells for $13.99. While it is $2 less than this recording of the Boston Baroque Orchestra performing Mozart's "Requiem in D Minor," the record company pays royalties to Garth Brooks, but obviously not Mozart—Mozart or his descendants. Yet no savings are passed on to the consumer.

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. Indeed, most of the estates represented by AmSong maintain extensive archives that are not only sources of information for scholars, but 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.

I know that I have been fortunate in my career as a songwriter to have written so many songs that have become so well known, but I am also aware there are many talented songwriters that support themselves and their families on the royalties earned from one or two songs before that first hit, and the hits may be few and far between. An extended term of copyright will make a tremendous difference in the quality of life for these artists and their families. One need only look to the blues and jazz writers such as Muddy Waters, Willie Dixon, and Duke Ellington who, early in their careers, were often required to enter into the agreements relinquishing ownership of their works. The 20-year term extension would give the families of these artists an opportunity to enjoy some of the benefits of ownership that were lost to the creators in the first 56 years of copyright.

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 deprived the owners of the works and their families the benefits of income, but diminishes the flow-back of taxable revenues generated from overseas sales.

AmSong has prepared a list of just some of the popular songs which will fall into the public domain in the next 10 years if S. 483 is not enacted. Included in the songs that will go into the public domain at the end of this year are: "I'll Be With You in Apple Blossom Time," "O, Little Town of Bethlehem," and "A Young Man's Fancy." Since the entire list is far too lengthy to read, I am offering it as part of the record and would like to give you copies to look over at your leisure.

[The list of songs that lose their copyright protection as of December 31, 1995, and AmSong's membership list follow:]

PREPARED STATEMENT OF MARY RODGERS, COMPOSER AND PRESIDENT OF AMSONG, INC., IN SUPPORT OF S. 483, THE COPYRIGHT TERM EXTENSION ACT OF 1995

My name is Mary Rodgers. I am a composer, the daughter of Richard Rodgers and president of AmSong, Inc., a rapidly growing songwriters' association. The AmSong members are committed to extending the term of copyright as set forth in S. 483. Compelling economic, as well as social, considerations support a 20 year extension of copyright term, not the least of which is the loss of foreign revenues if the extension is not implemented.

This is particularly striking for AmSong's members. As you will see from the enclosed membership list, AmSong represents an enormous number of America's most popular songwriters and their heirs. Most AmSong members represent works written prior to 1978 and many have already lost commercially viable copyrights to the public domain.

For over 65 years the United States lagged behind Europe and virtually every other domestic nation by maintaining a fixed term of copyright. This was corrected in 1976 when the term of copyright was changed to the life of the author plus 50 years, or an extended fixed term of 75 years for works written prior to 1978. Unfortunately, the changes were too late for many copyrights which had previously entered the public domain. We should not repeat this abandonment of the creators and their immediate heirs. Nor should we damage the American economy, by delaying the enactment of the Copyright Term Extension Act of 1995.

A headline last week informed us that the current trade deficit stands at $43 billion . . . the worst in history. We should not add to that deficit with the loss of valuable American copyrights from one of the healthiest, strongest sectors of our economy: the copyright industry. There is no benefit in virtually giving away 20 extra years to the world at our expense.

AmSong is not a collection society and therefore it is not possible for the organization to monitor the precise flow of revenues from foreign sources. However, a rough estimate of the performing rights income for the AmSong catalogues during 1994 exceeds 24 million dollars. This estimate does not include revenues from synchronization licenses, mechanical licenses, print licenses, grand rights or theatrical uses. The figure would be closer to $50 million if all of these other uses were included. Numbers aside, the list of popular songs, many of which were written by AmSong members, which will fall into the public domain over the next decade speaks for itself. I am annexing to this letter a list of *just some* of those songs, representing the broad spectrum of American music, whose continuing popularity is at least as great abroad as in this country.

As Robert Lissaur, one of America's foremost authorities on American popular music, explains: "What is popular music? It is the most familiar, renowned, and pop-

ular art form in America. I do not say 'arguably' because in my mind the question is not debatable. No matter in which part of the country we have been raised, songs have been a part of our lives. We have sung them, hummed them, whistled and played them. We have heard them in the mountains, on the levees, in the rivers, and on the streets; we have heard them on the radio and on records, in music stores, on the stage and on the screen, in elevators and in supermarkets, on television and in discotheques."—Lissauer's Encyclopedia of Popular Music in America 1888 to Present. Researched and Written by Robert Lissauer, ©1991 by Robert Lissauer.

These songs play a major role in promoting the favorable balance of trade which America currently enjoys in the area of intellectual property. The loss of this great body of work will be devastating, not only to the owners of the copyrights, but to the American economy and to our cultural heritage.

AMSONG, INC., MEMBERSHIP LIST

Catalogue	*Contact*
Adams, Lee	Kelly Wood Adams.
Adamson, Harold	Gretchen Adamson.
Anderson, Leroy	Eleanor Anderson.
Ager, Milton	Shana Alexander.
Ahlert, Fred	Fred Ahlert, Jr.
Allen, Steve	Same.
Altman, Arthur	Richard Altman.
Arlen, Harold	Samuel Arlen.
Bacharach, Burt	Same.
Berlin, Irving	Elizabeth I. Peters.
Bernstein, Leonard	Jamie Bernstein Thomas.
Brown, Nacio Herb	Nacio Herb Brown, Jr.
Brown, Lew	Arlyne Mulligan.
Brubeck, Dave	Derry Music Company.
Burke, Joe	Fred Ahlert Music Group.
Burke, Johnny	Mary Burke Kramer.
Byrd, Roland H., a/k/a Professor Longhair	Songbyrd, Inc.
Carmichael, Hoagy	Hoagy Bix Carmichael.
Charnin, Martin	Same.
Charlap, Morris I.	Sandy S. Charlap Triffon.
Coltrane, John and Alice	Jowcol Music.
Comden, Betty	Same.
Conley, Larry	Hope Conley Lang.
Copland, Aaron	Ellis J. Freedman.
Coslow, Sam	Frances Coslow.
De Nicola, John	Same.
Delange, Eddie	Stephanie DeLange Body.
Dixon, Mort	Fred Ahlert Music Group.
Donaldson, Walter	Ellen Donaldson.
Dubin, Al	Patricia Dubin McGuire.
Duke, Vernon	Kay Duke-Ingalls.
Duning, George W.	Same.
Durham, Eddie	Marsha Durham.
Dylan, Bob	Same.
Ebb, Fred	Morton Leary.
Elliot, Jack	Vicki Benet Elliot.
Evans, Ray	Same.
Farina, Mimi	Same.
Farina, Richard	Mimi Farina.
Fields, Dorothy	Sidney Aron.
Fisher, Fred	Fisher Music Corp.
Ford, Nancy	Same.
Forrest, George	Same.
Freedman, Len	Len Freedman Music.
Gershwin, Ira	Michael Strunsky.

Catalogue	*Contact*
Gershwin, George	Marc G. Gershwin.
Gilbert, Ray	Janis Paige Gilbert.
Gillespie, Haven	Audrey Gillespie.
Gordon, Mack	Jack Gordon.
Green, Adolph	Same.
Green, Johnny	Babbie Green.
Green, Wallace	Same.
Hall, Carol	Same.
Hammerstein II, Oscar	James Hammerstein.
Handman, Lou	Allison Caine.
Harburg, Yip	Ernest Harburg.
Harnick, Sheldon	Same.
Harris, Eddie	Sara E. Harris.
Hart, Lorenz	Frederic Ingraham.
Jazz Composers Service	Dean Pratt.
Joel, Billy	Same.
Johnston, Arthur J.	Veronica Johnston.
Jolson, Al	Eddie Cantor.
Jones, Quincy	Same.
Joplin, Janice	Laura Joplin.
Kahal, Irving	Fred Ahlert Music Group.
Kahn, Gus	Donald Kahn.
Kander, John	Same.
Kern, Jerome	Betty Kern Miller.
Koehler, Ted	Fred Ahlert Music Group.
Lawrence, Jack	Same.
Lee, Peggy	Same.
Leiber, Jerry	Same.
Leigh, Carolyn	June Silver.
Lewine, Richard	Same.
Livingston, Jay	Same.
Loeb, John Jacob	Fred Ahlert Music Group.
Loesser, Frank	Jo Sullivan Loeser.
Lombardo, Carmen	Fred Ahlert Music Group.
Mancini, Henry	Felice Mancini.
Marks, Gerald	Same.
Martin, Hugh	Same.
Matson, Alexander and Elizabeth	Same.
McCartney, Paul	Same.
McHugh, Jimmy	Lucille Meyers.
Meshel, Billy	Same.
Menken, Alan	Same.
Mercer, Johnny	Margaret Whiting.
Merrill, Bob	Suzanne Reynolds Merrill.
Monk, Thelonious	Thelonious Monk, Jr.
Orenstein, Larry	Same.
Pollack, Lew	Jim Pollack.
Porter, Cole	Robert Montgomery.
Rainger, Ralph	Connie Passamaneck.
Razaf, Andy	Alicia Razaf.
Ritchie, Lionel	Same.
Robin, Leo	Marcie Ora.
Rodgers, Richard	Mary Rodgers.
Rome, Harold	Florence Rome.
Rose, David	Betty Rose.
Ruby, Harry	William E. Garson.
Russell, Bob	Molly Hyman.
Santana, Carlos	Same.
Schifrin, Lalo	Same.

Catalogue	*Contact*
Schoenberg, Arnold	E. Randol Schoenberg.
Schwartz, Arthur	Paul Schwartz.
Segal, Jack	Same.
Sondheim, Stephen	Same.
Snyder, Ted	Ted Snyder Jr.
Spina, Harold	Same.
Stoller, Mike	Same.
Stravinsky, Igor	Denise Stravinsky.
Styne, Jule	Margaret Styne.
Thomson, Virgil	Ellis J. Freedman.
Warren, Harry	Julia J. Riva.
Webber, Andrew Lloyd	Same.
Webster, Paul Francis	Guy Webster.
Westover, Charles, p/k/a Del Shannon	Bug Music.
Whiting, Richard	Margaret Whiting.
Wright, Robert	Same.
Zappa, Frank	Gail Zappa.

1920 SONGS—COPYRIGHT PROTECTION ENDS DECEMBER 31, 1995

After You Get What You Want You Don't Want it—Irving Berlin.
All That I Want Is You—James Monaco and Joe Goodwin.
Alt Wein—Leopold Godowsky.
Aunt Hagar's Blues—W.C. Handy.
Angel Face—Victor Herbert and Robert B. Smith.
At The Moving Picture Ball—Joseph Santly and Howard Johnson.
Avalon—Vincent Rose, Al Jolson and Bud De Sylva.
Believe Me, Beloved—Efrem Zimbalist and Joseph Herbert.
Bright Eyes—Otto Motzan, M.K. Jerome and Harry B. Smith.
Broadway Rose—Martin Fried, Otis Spencer and Eugene West.
Chili Bean—Albert Von Tilzer and Lew Brown.
Daddy, You've Been A Mother To Me—Fred Fisher.
Deep In Your Eyes—Victor Jacobi and William Le Baron.
Down By The O-Hi-O—Abe Olman and Jack Yellin.
Every Once In A While—Will Skidmore and Marshall Walker.
Fly With Me—Richard Rodgers.
The Girls of My Dreams—Irving Berlin.
Hold Me—Art Hickman and Ben Black.
I Might Be Your Once-In-A-While—Victor Herbert and Robert B. Smith.
I Lost The Best Pal That I Had—Dick Thomas.
I Never Knew (I Could Love Anbody)—Tom Pitts, Raymond B. Egan and Roy K. Marsh.
I Used To Love You (But It's All Over Now)—Albert Von Tilzer and Lew Brown.
I'll Be With You In Apple Blossom Time—Albert Von Tilzer and Neville Fleeson.
I'll See You In C-U-B-A—Irving Berlin.
In A Persian Market—Albert W. Ketelbey.
It Might Have Been You—Sam Coslow.
The Japanese Sandman—Richard Whitting and Raymond Egan.
Jazz Babies' Ball—Maceo Pinkard and Charles Bayha.
La Veeda—John Alden and Nat Vincent.
Lady Raffles Behave—Lorenz Hart and Richard Rodgers.
Left All Alone Again Blues—Jerome Kern and Anne Caldwell.
Look For The Silver Lining—Jerome Kern and Bud De Sylva.
Love's Intense In Tents—Lorenz Hart and Richard Rodgers.
The Love Boat—Victor Herbert and Gene Buck.
The Love Nest—Louis Hirsch and Otto Harbach.
Love Will Call—Lorenz Hart and Richard Rodgers.
Margie—Con Conrad, J. Russel Robinson and Benny Davis.
Mary—Louis Hirsch and Otto Harbach.
Mary, Queen of Scots—Lorenz Hart and Richard Rodgers.
My Little Bimbo Down On The Bamboo Isle—Walter Donaldson and Grant Clarke.
My Mammy—Walter Donaldson, Sam Lewis and Joe Young.
O Little Town Of Bethlehem—Phillips Brooks and John P Scott.
Oh, How I Long For Someone—Efrem Zimbalist and Joseph Herbert.

Old Pal, Why Don't You Answer Me?—M.K. Jerome, Sam Lewis and Joe Young.
Palesteena—Con Conrad and J. Russel Robinson.
Pretty Kitty Kelly—Edward G. Nelson and Harry Pease.
Rose Of Washington Square—Ballard Mac Donald and James Hanley.
Singin' The Blues (Till My Daddy Comes Home)—Con Conrad, J. Russel Robinson, Sam Lewis and Joe Young.
So Long! Oo Long—Harry Ruby and Bert Kalmar.
Someone Like You—Victor Herbert and Robert B. Smith.
Syncopated Vamp, The—Irving Berlin.
Tell Me, Little Gypsy—Irving Berlin.
That Old Irish Mother Of Mine—Harry Von Tilzer and William Jerome.
Timbuctoo—Harry Ruby and Bert Kalmar.
Tripoli—Irving Weil, Paul Cunnigham and Al Dubin.
Waiting—Louis A. Hirsch and Otto Harbach.
What Happened Nobody Knows—Lorenz Hart and Richard Rodgers.
What-cha Gonna Do When There Ain't No Jazz?—Pete Wendling and Edgar Leslie.
When I'm gone I Won't Forget—Peter De Rose and Ivan Reid.
When I'm Gone You'll Soon Forget—E. Austin Keith.
When My Baby Smiles At Me—Andrew B. Sterling and Ted Lewis.
Whispering—Vincent Rose, Richard Coburn and John Schonberger.
Who Ate Napoleons With Josephine When Bonaparte Was Away—Alfred Bryan and E. Ray Goetz.
Whose Baby Are You?—Jerome Kern and Anne Caldwell.
Wild Rose—Jerome Kern and Clifford Grey.
You Can't Fool Your Dreams—Lorenz Hart and Richard Rodgers.
You'll Never Know—Richard Rodgers.
You Oughta See My Baby—Fred Ahlert and Roy Turk.
Young Man's Fancy, A—Milton Ager, John Murray and Jack Yellin.

1920 BROADWAY MUSICAL PRODUCTIONS—COPYRIGHT PROTECTION ENDS DECEMBER 31, 1995

Afgar
Book: Frederick Thompson and Worten David
Music: Charles Cuciller
Lyrics: Douglas Furber
Addt' Music: Harry Tierney, Joseph McCarthy, James V. Monaco
Always You
Book and Lyrics: Oscar Hammerstein II
Music: Herbert Stothart
Lyrics: Douglas Furber
Addt'l Music: Harry Tierney, Joseph McCarthy, James V. Monaco
Always You
Book and Lyrics: Oscar Hammerstein II
Music: Herbert Stothart
Angel Face
Book: Harry B. Smith
Music: Victor Herbert
Lyrics: Robert B. Smith
As You Were
Book: Arthur Wimperis and Glen MacDonough
Lyrics: Vincent Bryan and Arthur Wimperis
Music: E. Ray Goetz
Betty Be Good
Book and Lyrics: Harry B. Smith
Music: Hugo Reisenfeld
Broadway Brevities Of 1920
Book: Blair Traynor and Archie Gottler
Music and Lyrics: Arthur Jackson, George Gershwin, Irving Berlin, Harry Ruby, Bert Kalmar, Francis DeWitt, Robin Hood Bowers
Century Revenue
Book: Howard E. Rogers
Lyrics: Alfred Bryan
Music: Jean Schwartz
Cinderella On Broadway
Book and Lyrics: Harold Atteridge
Music: Al Goodman, Bert Grant
Ed Wynn's Carnival

Book: Ed Wynn
Music and Lyrics: Grant Clarke, George Gershwin and Louis Paley

Frivolities of 1920
Book and Lyrics: William A. McGuire
Music: W.B. Friedlander

George White's Scandals Of 1920
Book: Andy Rice, George White
Lyrics: Arthur Jackson
Music: George Gershwin

The Girl In the Spotlight
Book and Lyrics: Richard Bruce (Robert B. Smith)
Music: Victor Herbert

The Girl In the Spotlight
Book and Lyrics: Richard Bruce (Robert B. Smith)
Music: Victor Herbert

Greenwich Village Follies Of 1920
Book: Thomas J. Gray
Lyrics: John Murray Anderson, Arthur Swanstrom
Music: A. Baldwin Sloane
Addt'l Music: Louis Silvers, Bud De Sylva, James F. Hanley, Joe Goodwin, Murray Roth

The Half Moon
Book and Lyrics: William Le Baron
Music: Victor Jacobi

Hitchy Koo of 1920
Book and Lyrics: Glen McDonough, Anne Caldwell
Music: Jerome Kern

Honeydew
Book and Lyrics: Joseph Herbert
Music: Efrem Zimbalist

Jim Jam Jems
Book and Lyrics: Harry L. Cort and George E. Stoddard
Music: James F. Hanley

Jimmie
Book: Otto Harbach, Oscar Hammerstein II and Frank Mandel
Lyrics: Otto Harback and Oscar Hammerstein II
Music: Herbert Stothart

Kissing Time
Book: George V. Hobart
Lyrics: Philander Johnson, Irving Caesar and Clifford Grey
Music: Ivan Caryll
Addt'l Music: Fred Fisher, Alfred Bryan and Joseph McCarthy

Mary
Book: Otto Harbach and Frank Mandel
Lyrics: Otto Harbach
Music: Louis A. Hirsch

Mecca
Book and Lyrics: Oscar Asche
Music: Percy E. Fletcher

Midnight Rounders Of 1920
Book: Howard E. Rogers
Lyrics: Alfred Bryan
Music: Jean Schwartz

Morris Gest's Midnight Whirl
Lyrics: Irving Caesar and John H. Mears
Music: George Gershwin

My Golden Girl
Book and Lyrics: Frederic A. Kummer
Music: Victor Herbert

The Night Boat
Book and Lyrics: Anne Caldwell
Music: Jerome Kern

Pitter Patter
Book: Will M. Hough
Lyrics and Music: W.B. Friedlander

Poor Little Ritz Girl
Book: George Campbell, Lew Fields
Lyrics: Alex Gerber and Lorenz Hart

Music: Sigmund Romberg and Richard Rodgers
Sally
Book: Guy Bolton
Lyrics: Clifford Grey and Bud De Sylva
Music: Jerome Kern
Silks And Satins
Book: Thomas Duggan
Lyrics: Louis Weslyn
Music: Leon Rosebrook
Addt'l Music: Oliver G. Wallace, Arthur Freed, Walter Donaldson and Grant Clarke
The Sweetheart Shop
Book and Lyrics: Anne Caldwell
Music: Hugo Felix
Addt'l Music: George Gershwin and Irving Caesar
Three Showers
Book: William Cary Duncan
Lyrics: Henry Creamer
Music: Turner Layton
Tickle Me
Book: Otto Harbach, Oscar Hammerstein II and Frank Mandel
Lyrics: Otto Harbach and Oscar Hammerstein II
Music: Herbert Stothart
Tip Top
Book and Lyrics: R.H. Burnside and Anne Caldwell
Music: Ivan Caryll
What's In A Name?
Book: John Murray Anderson
Lyrics: Jack Yellin
Music: Milton Ager
Ziegfeld Follies Of 1920
Book: W.C. Fields, George V. Hobart and James Montgomery
Music and Lyrics: Irving Berlin, Harry Ruby, Bert Kalmar, Dave Stamper, Gene Buck, Victor Herbert, Harry Carroll, Ballard MacDonald, Harry Tierney, Joseph McCarthy, Milton Ager, Grant Clarke
Ziegfeld Girls Of 1920 (also known as Ziegfeld's 9 O'Clock Revue)
Lyrics: Gene Buck
Music: Dave Stamper
Addt'l Music: Irving Berlin
Ziegfeld Midnight Frolic
Lyrics: Gene Buck
Music: Dave Stamper
Addt'l Music: Irving Berlin, James F. Hanley, Ballard MacDonald

[The list of popular songs that will fall into the public domain in the next 10 years is on file with the committee.]

Mr. MENKEN. AmSong is not a collection agency. Therefore, it is difficult for us to calculate the total income received by AmSong members from foreign sources. However, a rough and conservative estimate of the performing rights revenues for the AmSong catalogue during 1994 exceed $24 million. You must remember that this figure represents performing rights royalties only and does not include revenues form synchronization licenses, mechanical licenses, sheet music sales, grand rights, or theatrical uses. The figure would be closer to $50 million if all of these other uses were included.

You must further understand that these revenues cover only the works of AmSong members. The amounts of foreign revenues will rise to the multi-billion-dollar range if foreign revenues of the entire body of American intellectual property were to be included. 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.

My songs are my legacy to my children. The protection of this legacy is America's obligation to the families of all American creators. As Americans, we owe it to the children of all our creators to guarantee them the greatest possible copyright protection, and we owe it to our country to protect our great cultural heritage and ensure that we will not be compromised by our copyright laws when dealing in the world marketplace.

For the foregoing reasons, it is imperative that we extend the term of copyright in the United States for 20 years. I commend you, Chairman Hatch, for introducing S. 483 and for being a leader in the effort to enact copyright term extension legislation. I urge each member of the Senate Judiciary Committee and every Member of Congress to support this bill and vote S. 483 into law this year.

[The prepared statement of Mr. Menken follows:]

PREPARED STATEMENT OF ALAN MENKEN

Good morning, Senator Hatch and members of the Senate Judiciary Committee. My name is Alan Menken. I am a songwriter and a member of AmSong, Inc. I would like to thank you and the other members of the Committee for your support of the Copyright Term Extension Act of 1995.

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 and Thelonious Monk to America's finest contemporary songwriters such as Bob Dylan, Burt Bacharach, Billy Joel, Stephen Sondheim, Dave Brubeck, Carlos Santana, Quincy Jones and Lionel Ritchie, 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 S. 483. I will be placing into the record personal statements by a number of AmSong members including Bob Dylan, Don Henley, Carlos Santana, Stephen Sondheim, Mike Stoller, Ellen Donaldson, Shana Alexander and Mrs. Henry Mancini.

AmSong is a member of the Coalition of Creators and Copyright owners which represents virtually every genre of intellectual property—music, motion pictures, screenplays, theatrical plays and graphic art—to name just a few. The other music industry members of the Copyright Coalition include ASCAP, BMI, SESAC, The Nashville Songwriters' Association, the Songwriters' Guild and the National Music Publishers Association. I know I can speak for the entire Copyright Coalition in voicing our unanimous commitment to the enactment of S. 483.

I was born in 1949 and I literally grew up with music. From show music to rock and roll, from rhythm and blues to folk, from country to jazz—I played it all, I listened to it all, I loved it all. It was not surprising then when, after entering NYU as a pre-med student, I graduated with a degree in music. As a member of the baby boom generation, I believed the world was open to me. The world of American music was at my doorstep and with the optimism of youth I set out to claim its legacy.

As anyone who sets out in the music business knows, the path is neither smooth nor direct. My early years were spent not in concert halls but in ballet class rooms, where I earned my money as an accompanist while struggling for recognition as a songwriter. I often wondered if I would ever realize my dream of writing music that would be sung and loved by people the world over. But I never doubted if I did realize this dream that, as an American, I would be supported by a system of laws and rights that would secure my creations not only for me, but for my children and their children after them.

On July 1, 1995, the countries making up the European Union implemented a uniform term of copyright equal to the life of the author plus 70 years. In addition, these countries have invoked the "rule of the shorter term." According to this rule, works created outside of the European Union will be protected for the shorter of life plus 70 years or the term of copyright in effect in the country where the work was

created. This means that under the current laws, American works will only be protected for 50 years after the death of the creator while their European counterparts will be protected for 70 years after the death of the creator. Thus the works of European authors will survive for an entire generation beyond the works of American authors.

The situation is even worse for American works created before January 1, 1978. These works are only afforded copyright protection for a total of 75 years from creation. Not only do these classic American works, such as George Gershwin's Swanee, fall into the public domain while they are still commercially successful, but in all too many cases, the author's spouse and children are still living. Moreover, in several instances works, such as Irving Berlin's Alexander's Ragtime Band, have fallen into the public domain while the author is still living.

It is ironic that this great country which has spawned cultural treasures unsurpassed in the world should deny the creators of those treasures protections commensurate with those guaranteed to creators throughout Europe and virtually every other democratic country. The intent of our copyright laws is to encourage creativity by assuring the creator that his or her works will be protected during the lifetime of the creator and for two generations of his or her successors. Implicit in the guaranteed protection of intellectual property first enunciated in the Constitution of the United States is the premise that American authors and their families will be afforded the best protection available.

This intent is, in my opinion, not being met. Unless we change our laws by adopting S. 483, and its companion Bill H.R. 989, America will fall behind most of the world in the area of copyright protection. This is unjustifiable to all Americans—particularly at a time when we are positioning ourselves as a world leader on the global information superhighway. And this is unjustifiable to songwriters such as myself, and to our children and grandchildren who will be deprived of their legacy unless we extend our term of copyright.

While it is impossible to ascertain exactly what inspires a person to become a composer rather than a surgeon, it is the reality of life in the 1990's that one must work in order to support oneself and one's family. It is also a reality that we must support our children longer than ever—often into adulthood—and that the costs of doing so are rising steadily. There comes a point in most people's lives when one must make practical decisions about the choice of a career. The continuing ability to provide for one's family, both during and after one's lifetime, would certainly be a factor. If it becomes clear that insufficient copyright protection is available to provide that support, there will be less incentive to try to make one's living as a creator.

Given the changes in demographics over the past two decades, it is obvious that a term of copyright of life plus 50 years does not guarantee protection for two generations of an author's successors. Many creative people begin creating early—Bob Dylan was only 21 when he wrote Blowin' in the Wind. Paul Anka was only 16 when he wrote Diana. By the age of 21, Irving Berlin had published over 20 songs (all 20 of which fell into the public domain 5 or more years before Mr. Berlin's death). It is often many years—sometimes decades—before these authors begin their families. These families should certainly be afforded the same protection as the families of yesteryear born to parents in their early twenties.

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. This is Moby Dick, written by Herman Melville in 1851. This book went into the public domain over 100 years ago. This is The Chamber, written by John Grishman in 1994. The price of Moby Dick is twelve dollars and ninety-five cents. The price of The Chamber is seven dollars and fifty cents. The publisher of Moby Dick pays no royalties to the Melville Estate, while John Grisham of course, derives royalties from the sale of his book. However, no benefit is passed on to the consumer from the sale of Moby Dick—only the publisher benefits.

Similarly, this compact disc recording of the soundtrack of Garth Brooks "No Fences" sells for $13.99, which is two dollars less than this recording of the Boston/Baroque orchestra performing Mozart's Requiem in D Minor. The record company pays royalties to Garth Brooks but obviously not Mozart's descendants. Yet no savings are passed on to the consumer.

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. Indeed, 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 terms puts the archives of these master songwriters out of business.

I know that I have been fortunate in my career as a songwriter to have written so many songs that have become so well known. But I am all too aware that there are many talented songwriters who support themselves and their families on the royalties earned from one or two songs before that first hit and the hits may be few and far between. An extended term of copyright will make a tremendous difference in the quality of life for these artists and their families. One need only look to the blues and jazz writers such as Muddy Waters, Willie Dixon and Duke Ellington, who, early in their careers, were often required to enter into the agreements relinquishing ownership of their works. The 20 year term extension would give the families of these artists an opportunity to enjoy some of the benefits of ownership that were lost to the creators in the first 56 years of copyright.

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 owners of the works and their families the benefits of income, but diminishes the flow-back of taxable revenues generated from overseas sales. AmSong has prepared a list of just some of the popular songs which will fall into the public domain over the next 10 years if S. 483 is not enacted. Since the list is far too lengthy to read, I am offering it as part of the record and would like to give you copies to look over at your leisure.

AmSong is not a collection agency, therefore it is difficult for us to calculate the total income received by AmSong members from foreign sources. However a rough—and conservative—estimate of the performing rights revenues for the AmSong catalogues during 1994 exceeds 24 million dollars. You must remember that this figure represents performing rights royalties only—and does not include revenues from synchronization licenses, mechanical licenses, sheet music sales, grand rights or theatrical uses. The figure would be closer to 50 million dollars if all of these other uses were included. You must further understand that these figures cover only the works of AmSong members. The amounts of foreign revenues will rise to the multi-billion dollar range if foreign revenues of the entire body of American intellectual property were to be included. 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.

My songs are my legacy to my children. The protection of this legacy is America's obligation to the families of all American creators.

As Americans we owe it to the children of all our creators to guarantee them the greatest possible copyright protection. And we owe it to our country to protect our great cultural heritage and insure that we will not be compromised by our copyright laws when dealing in the would marketplace.

For the foregoing reasons, it is imperative that we extend the term of copyright in the United States by 20 years. I commend you, Chairman Hatch, for introducing S. 483 and for being a leader in the efforts to enact copyright term extension legislation. I urge each member of the Senate Judiciary Committee and every member of Congress to support this Bill and vote S. 483 into law this year.

Prepared Statement of Bob Dylan in Support of S. 483 the Copyright Term Extension Act of 1995

My name is Bob Dylan and songwriting 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 S. 483 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 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 S. 483 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 S. 483, and its companion bill H.R. 989 this year.

Respectfully submitted,

BOB DYLAN.

SHERMAN OAKS, CA, *September 11, 1995.*

DEAR CHAIRMAN HATCH, MEMBERS OF THE SENATE JUDICIARY COMMITTEE, 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 S. 483, 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 Untied 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 form 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 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 S. 483, 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,

DON HENLEY.

PREPARED STATEMENT OF CARLOS SANTANA, SONGWRITER, IN SUPPORT OF S. 483, THE COPYRIGHT TERM EXTENSION ACT OF 1995

My name is Carlos Santana. I am a songwriter and a member of AmSong, Inc. I regret that my current tour prevents me from being at the Hearing on September 20, 1995, but I wanted to express my strong commitment to the Copyright Term Extension Act of 1995.

I began writing music in 1968. At that time I was a young man, with no children. Since then, I have written over 200 songs, married, and am fortunate to have three children, now aged 12, 10 and 5.

When I began my career as a songwriter, I believed that I was building a business that would not only bring enjoyment to people throughout the world, but would also give my children a secure base from which they could, in turn, build their own lives. It never occurred to me that because of the application of our copyright laws, my songs would not be sufficiently protected. Yet this is exactly what will happen if S. 483 is not enacted.

In July of this year, the countries of the European Union adopted a term of copyright of life of the author plus 70 years. This term is much more beneficial to authors than the term currently provided for under United States law. Under our law, the works which I wrote prior to 1978 are only protected for a term of 75 years from creation. It is likely that many of these works, including Samba Pa Ti and Europa will fall into the public domain during the lifetime of my children. The songs which I wrote from January 1, 1978 on will be protected for a term of my life plus 50 years—again, a significantly shorter term than is guaranteed to European authors.

Moreover, because of the implementation in the European Union of the "rule of the shorter term", American works will not get the benefit of the longer term in Europe.

The discrepancy between the duration of copyright protection in America versus Europe is troubling on several grounds. First, as an American I am not assured that my creative works will be secure for the lifetimes of my children, to say nothing of my grandchildren.

Second, as an American songwriter whose works are performed throughout the world, I find it unacceptable that I am accorded inferior copyright protection, in the world marketplace.

Finally, as an American citizen I am extremely disturbed by the negative impact we will sustain in our balance of trade in the area of intellectual property if we do not extend our term of copyright protection by an additional 20 years.

I commend you, Chairman Hatch, for introducing S. 483, and I would like to urge all the members of the Senate Judiciary Committee to lend their support to the Copyright Term Extension Act of 1995, and to vote the Bill into law this year.

Respectfully submitted,

CARLOS SANTANA.

September 13, 1995.

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 September 20, 1995 Hearing to voice my support for S. 483.

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. S. 483 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 everything possible to encourage American creativity. A modest 20-year term extension will further this purpose.

I applaud Chairman Hatch for introducing S. 483 and urge Congress to enact the Bill this year.

Respectfully submitted,

STEPHEN SONDHEIM.

PREPARED STATEMENT OF MIKE STOLLER, SONGWRITER AND MEMBER OF AMSONG, INC.

Along with my partner, Jerry Leiber, I have been a professional songwriter for 45 years. Among the over 400 songs we have written are "Jailhouse Rock", "Stand By Me," "On Broadway," "Kansas City," "Charlie Brown," "Yakety Yak," and "Is That all There is"?

Our songs have been recorded by Elvis Presley, The Beatles, The Coasters, The Beach Boys, The Drifters, Peggy Lee, Little Richard, The Rolling Stones, Barbara Streisand, Neil Diamond, B.B. King, Eric Clapton, and many others. Our Broadway show, "Smokey Joe's Cafe: The Songs of Leiber & Stoller," was recently nominated for 7 Tony Awards.

Songwriting has been my profession since I was 17 years old. In the ensuing 4½ decades, I have paid close attention to the changes in U.S. copyright law. In 1955, the Copyright Office began studies in preparation for a major revision of the then antiquated Copyright Act of 1909.

Over 20 years later, when the Copyright Act of 1976 was finally enacted, it was a major improvement over the 1909 Act. In fact, many of the changes implemented by the 1976 Act had been created in an attempt to help the United States "catch up" with European copyright law.

Unfortunately, it had taken so long to bring about the 1976 Act that the rest of the industrialized world was already way ahead of us.

In 1989, when the U.S. adherence to the Berne Convention took effect, we were once "catching up" with the member nations of the Berne Union. By the time the U.S. got on board, there were already 79 other nations which had proceeded us.

And now, once more, we are playing "catch up" with the European Union. In July of this year, they adopted a uniform term of copyright equal to the life of the author plus 70 years.

The European community has enacted this policy for its own copyright proprietors. If S. 483 is not enacted, Europe will not recognize the "life plus 70" rule for our copyrights which are used in their countries.

I believe that our copyright law must be the kind of law that encourages creativity. I believe that a simple 20-year term extension will further this purpose. And, I believe that without it, the U.S. creative community will continually be playing "catch up" with the rest of the world for the foreseeable future.

I want to commend the efforts of Senator Orrin Hatch regarding this legislation. On behalf of all American songwriters, I thank him for introducing S. 483, and I encourage all of the members of the Senate Judiciary Committee to support the enactment of this Bill.

PREPARED STATEMENT OF MRS. HENRY MANCINI, WIDOW OF HENRY MANCINI

I regret that I am unable to attend today's Hearing on S. 483.

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 Hatch 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 S. 483, and its companion Bill H.R. 989, and to implement this legislation now.

Respectfully submitted,

Mrs. HENRY MANCINI.

PREPARED STATEMENT OF ELLEN DONALDSON, DONALDSON PUBLISHING CO., VICE PRESIDENT, AMSONG

I welcome the opportunity to express my strong support for S. 483, 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 Orrin Hatch for introducing S. 483. I also thank the co-sponsors of this legislation, Senators Feinstein, Thompson, Simpson and Boxer.

On March 10, 1994, I wrote a letter to then Acting Register of Copyrights, Barbara Ringer expressing my deep concerns and strong support of 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 simply to pay the rent. There are many more writers and families who do not share in publishing income at all and who 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 the 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 a parent's most productive 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 world-wide. If we fall behind in protecting our own works at home, our domestic short sightedness will lead to dramatic 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 the Senate 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 revenue 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.
Respectfully submitted,

ELLEN DONALDSON.

LOS ANGELES, CA, *March 10, 1994.*

MS. BARBARA RINGER,
Acting Register of Copyrights,
The Library of Congress, Washington, DC.

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.)

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.

Or 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 Paree)", 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 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 reissued 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 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 a 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 ⅓ 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.

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 the 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 striving 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 reconsidered; yet another reason for a much needed moratorium until a final decision is made an 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 for 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 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 1949; 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 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 Pubic 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 according 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.

My greatest fear is that the intent of the 1976 Copyright Law has now become muddied 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 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.

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 "Whoopee", 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.)

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 four children ranging in age from 18 to 50. At that time, my father had three grandchildren ranging in age from 1 to 18.

I am a divorced parent of two young daughters. I received 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 educational 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 the century, was often at the mercy of unscrupulous advisers, causing 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 version of "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", "Swingin' The Blues", "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 Hatch for introducing S. 483 and to urge Congress to enact the Bill this year.

Respectfully submitted,

MARSHA DURHAM.

PREPARED STATEMENT OF ROBERT LISSAUER

This is being written with great apprehension regarding the future of one of America's great assets, the popular song.

May I take a moment to state my background and its basis for my stand on this most import issue. I have spent my life in the world of music, going from the Julliard School of Music to a brief spell in the music publishing industry, to enlisting in the army in World War II. I became NCO in charge of the music division of Irving Berlin's all soldier-show "This Is The Army," which raised millions of dollars for Army Emergency Relief. At the end of the war and other duties in the Pacific theater of operations, I resumed my musical studies in composition at New York University and at the completion of a nine-semester course, was asked to join the faculty. At the same time, I taught theory, history of music, etc. at two conservatories, Eastern and Newark. My eventual credits in music publishing and record production include over one thousand songs, the position of General Manager of The Vincent Youmans Company for twenty-one years, at times in conjunction with my own companies. I have been associated with numerous Broadway and off-Broadway musicals. After selling my companies in the mid-70's, I wrote many articles and lectured extensively on the world of popular music. In 1991, Paragon House published my 1700 page work, "Lissauer's Encyclopedia of Popular Music in America—1888 to the present." This award-winning book has become the definitive reference source in its field. The second edition (in 3 volumes) will be published by Facts on File in February, 1996.

I have such strong feelings about the life and place of the popular song in America, that I feel it pertinent to include a short paragraph from the introduction that appears in both editions of my book:

"What is popular music? It is the most familiar, renowned, and popular art form in America. I do not say "arguably" because in my mind the question is not debatable. No matter in which part of the country we have been raised, songs have been a part of our lives. We have sung them, hummed them, whistled and played them. We have heard them in the mountains, on the levees, on the rivers, and on the streets; we have heard them on the radio and on records, in music stores, on the stage and on the screen, in elevators, and in supermarkets, on television, and in discotheques. Songs have seen us off to war, helped us elect presidents, made us laugh and made us cry, pervaded our sleep, and perhaps most importantly, have given us memories."

By not extending the archaic present copyright law, we are giving the international community a 20-year free ride on our heritage, and at our expense! There is much talk in Congress about protecting the American family. How about the families of the creators who will receive nothing? Culturally and financially, this would be disastrous. This writer implores you to act on S. 483 favorable—and expeditiously. Thank you.

ROBERT LISSAUER.

PREPARED STATEMENT OF SHANA ALEXANDER, WRITER & DAUGHTER OF MILTON AGER, SONGWRITER

My father Milton Ager, a lifelong songwriter, well understood the importance of copyright. His first compositions were copyrighted in 1910, before he finished high school, and his last in 1979, the year of his death at age 85. But his most fertile period was the jazz age, the few years, between the end of World War I and the stock market crash of 1929—the year, incidentally, in which he wrote "Happy Days Are Here Again." Although all members of Ager's immediate family—my sister and myself and our late mother—are or were professional writers, our total combined lifelong income has been far less than the income from Ager's songs.

Ager's first hit song, Everything is Peaches Down in Georgia, was introduced at the Winter Garden by Al Jolson in the spring of 1918, and bore three copyrights—May 23, July 19, and July 17. These already have passed into the public domain.

His next two hits, A Young Man's Fancy and My Bridal Veil—songs which incidentally were his own two favorites among everything he wrote—will pass into public domain on December 31 of this year. Both tunes were from the score of his first hit Broadway show, "What's In A Name?" The following year, 1996, our lost copyrights will include I'm Nobody's Baby.

In a family such as our own, intellectual property is the only property. In the nation as a whole, it is—I am told—the second-largest export. Hence failure properly to protect our intellectual property in the international marketplace will result in an unfavorable trade balance for the United States. Furthermore, it appears to me

monstrously unfair that other recognized forms of property—lands, businesses, and so on—can be handed down indefinitely, so long as proper taxes are paid, whereas the value of intellectual property under our present copyright laws arbitrarily is cut off 75 years after it was created.

I am well aware of the longtime concern of Senator Orrin G. Hatch of Utah with the values of creative endeavor and intellectual property rights. I commend him for introducing the current term extension legislation, and urge all members of the Senate Judiciary Committee to support enactment of the Bill.

PREPARED STATEMENT OF MR. E. RANDOL SCHOENBERG

I apologize for not being able to attend today's hearing on S. 483, 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.

Respectfully submitted,

E. RANDOL SCHOENBERG,
Los Angeles, California.

STYLE AND IDEA

SELECTED WRITINGS OF

ARNOLD SCHOENBERG

EDITED BY LEONARD STEIN

with translations by
Leo Black

UNIVERSITY OF CALIFORNIA PRESS
Berkeley and Los Angeles

2

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 profits 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

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 CHAIRMAN. Thank you, Mr. Menken. We appreciate it.
Mr. Alger, we will turn to you.

STATEMENT OF PATRICK ALGER

Mr. ALGER. Yes. As Senator Hatch mentioned, I have been a professional songwriter for 20 years, and I am the coauthor of two of the songs on that Garth Brooks album he held up there, which is the largest selling country album of all time.

I would like to thank you for the opportunity to be here to very briefly testify today, you will be relieved to know. I am currently president of a group called the Nashville Songwriters Association International [NSAI], and I would like to tell you a little bit about what we do. NSAI is a not-for-profit trade association serving a membership of over 4,600 songwriters in all 50 States and 17 countries. Presently, we have 68 workshops which function basically as chapters for members who wish to meet monthly in their respective cities.

The 500-member professional division accounts for the vast majority of popular country music written and performed today by such stars as Garth Brooks, Reba McEntire, Alan Jackson, Clint Black, and many others. We also count among our members many of today's pop, adult contemporary, and contemporary Christian writers. Our primary mission is to foster and protect professional songwriting.

As creators of contemporary popular music, our works will be directly affected by S. 483, the Copyright Term Extension Act of 1995. Our position on this bill is the result of ongoing discussions between NSAI and other members of our Coalition of Creators and Copyright Owners which include songwriters, music publishers, performing rights organizations, to name a few.

As our works continue to be more valuable due to expanding technology and global accessibility, extending the term of copyright to life-plus-70 guarantees us a higher level of protection and in our opinion will serve as an even greater creative incentive. In its present form, S. 483 ensures that NSAI's goal of extending the term of copyright protection will be realized. Thus, NSAI supports the language of S. 483 as it is currently written.

It has been suggested that the bill could be further amended to vest the proposed extra 20 years of copyright protection automatically in authors or their heirs. Instead, NSAI has chosen to rely on the termination of transfer provisions as currently guaranteed in sections 302 and 304 of the Copyright Act to protect its members' ability to recapture their copyrighted works. To this end, NSAI continues to actively educate its membership concerning those rights.

In sum, so long as present rights of authors and creators are not eroded, NSAI wholeheartedly supports the passage of S. 483. Since the original Copyright Act of 1790, Congress has time and again been the champion of the rights of creators and authors. Passage of S. 483 in its present form will continue that tradition.

Thank you.

The CHAIRMAN. Thank you so much. We appreciate your testimony and we appreciate having your point of view here today.

Mr. Jaszi, we will turn to you.

STATEMENT OF PETER A. JASZI

Mr. JASZI. In may academic wanderings through the legislative history of American copyright, I have been struck by how seldom and how little the Congress has heard from the users of public domain material, a loose community that is both more numerous and more diverse than one might expect. So I want to thank the chairman and the committee for the chance to appear today as a sort of proxy, however imperfect, for all the readers, writers, teachers, students, historians, biographers, film makers, film scholars and conservationists, specialized reprint publishers, archivists, multimedia producers, video distributors and, yes, even lawyers who depend on reliable access to a robust and constantly reinvigorated public domain, access which this legislation puts at risk.

For, make no mistake about it, the public domain, that informational commons free to all uses and users, has real social and cultural value. It is a creation of the very first copyright law, the statute of Ann of 1710. And its importance is reflected in the limited times language of the copyright clause of the U.S. Constitution.

Discussions of the public domain, which center on whether high-quality reprints of classics cost more or less than cheaply produced, mass-market paperbacks trivialize the concept of the public domain by overlooking its more central function as the source of which the creative men and woman of each generation turn for the materials they refashion into new and newly valuable works of imagination.

In considering the current drive to extract additional royalties from the countries of the European Union, even at the expense of delaying or denying the entry of works into the domestic public domain, we should not lose sight of the fact that it is the uniqueness of American copyright law, our attention of the work-for-hire doctrine, our rejection of broadly applicable moral rights and our special devotion over time to the maintenance of the public domain that helps to account for the extraordinary competitive success of American works in the international marketplace.

The United States has wisely rejected the natural rights approach to copyright law, which has, in some degree, retarded the growth of Europe's cultural industries in modern times. Thus, the benefits which particular individuals and companies, no matter how sympathic, would reap from the proposed legislation cannot justify the incursion on the public domain which it would represent, nor does the legislation promise the sorts of incentives to create and disseminate works to which the Congress and the courts traditionally have looked to justify new limitations on public access to information.

Obviously, extending protection for works already in existence cannot function as an incentive to their creation, neither as a practical matter can it add much to existing incentives to dissemination. No firm is likely to cease distributing popular works because they no longer are protected by copyright. And no firm is likely to recommence distributing unpopular ones merely because the copyrights in them have been extended.

Extending the term of protection for works made after the effective date of the legislation might produce some theoretical, highly-attenuated effect on the creative practices of individuals. I say might because I cannot imagine the instance in which a writer, for

example, would be swayed to undertake a project by the mere possibility of 20 more years of posthumous royalties available only in the highly unlikely event that the work retains popularity among generations of readers yet unborn.

In any event, adding 20 years to the already generous term of protection for works made for hire would be highly unlikely to provide any measurable economic incentive to the corporate creation of new works. And prospective term extension would be just as unlikely to affect the practices of firms which distribute copyrighted works. No rational business makes economic decisions about present investment based on the mere possibility of income 75 or 100 years in the future. To my mind, this does not add up to an overwhelming or even a colorable case for term extension, either as a matter of copyright policy or as one of constitutional law.

This morning, there have been several suggestions that there are no strong economic incentives to preserve or reuse works in the public domain. To the contrary, the opportunity to claim a new copyright and the resulting derivative work, be it a new addition of a literary text, a digitized preservation copy of a motion picture or an adaptation of an old work into a new medium is the strongest economic incentive to undertake such efforts.

By contrast, I am not sure that, for example, many film archivists would agree with Mr. Valenti's suggestion that there is a strong positive correlation between the copyright ownership status of motion pictures on the one hand and the interest which the film industry has shown in their preservation on the other.

Nineteen years ago, the Copyright Act of 1976 added 19 years to the life of then-subsisting renewal copyrights. The current legislation would add 20 more years. A cynical observer might be forgiven the suspicion that it represents a downpayment on perpetual copyright on the installment plan, thus raising obvious and substantial constitutional issues; nor does the legislation, in its present form, appear to satisfy the constitutional mandate to promote science and the useful arts.

But even if these constitutional concerns are put to one side, the legislation, as it stands, cannot be justified within the framework of the sound approach to evaluating copyright reforms proposals, which has served Congress so well for more than two centuries.

Thank you.

[The prepared statement of Mr. Jaszi follows:]

PREPARED STATEMENT OF PETER A. JASZI

Attached to this statement is a copy of one I signed in July 1995, in opposition to H.R. 989, the companion to S. 483; it was presented by Professor Dennis Karjala to the House of Representatives Judiciary Subcommittee on Courts and Intellectual Property on behalf of 45 copyright and intellectual property professors. Today, however, I will be speaking for myself, and attempting (somewhat presumptuously) to give voice to the interests of the larger community of users of "public domain" materials—interests which will be adversely affected by any copyright term extension. This community is more numerous and diverse than might immediately appear, including teachers, students, historians, biographers, writers, filmmakers, reprint publishers, video distributors, film scholars, multimedia producers and even lawyers.

Since much of what follows is concerned with the "public domain," it may be well to begin with a brief exposition of that concept, drawing heavily on the work on sev-

eral of my colleagues.[1] The public domain has various components, but most relevantly for present purposes, it includes the sum total of all those works which are formerly might have been but no longer are (for whatever reason) eligible for copyright protection. It is an informational commons which is free (at least insofar as copyright law is concerned) to all users and all uses. Among other things, it is the source to which creators of each generation turn for the materials which they refashion into new—and newly valuable—works of imagination.

The public domain is a source of real social value, and incursions on it should not be undertaken lightly. Scattered through the record of the current debate on copyright term extension are suggestions that the importance of the public domain has somehow been overstated, and that (in particular) the entry of a work into the public domain will not promote its public availability, since in these circumstances information distributors will lack any incentive to invest capital in making it available.[2] This line of argument, however, has two shortcomings. First, it addresses only a small part of the full range of values represented by the pubic domain; whether or not public domain status tends to encourage reprinting, it does encourage a wide range of other new uses, including translation, adaptation to new media, and scholarly commentary. Second, it overlooks the fact that public domain status does give some works a new lease on popularity: One illustration is the motion picture "It's a Wonderful Life," which became a "classic" only after its injection into the public domain made in generally available for television broadcast during the holiday season. In the same vein, a visit to any large bookstore quickly reveals that publishers do compete to offer new editions of popular public domain works—from Sherlock Holmes stories to children's classics like "The Velveteen Rabbit"—often competing as well to include "value added" (such as new introductions, notes, or illustrations) which will distinguish particular reprint editions and permit the assertion of copyright in them as "derivative works." The most vivid instance of this last phenomenon is that of Shakespeare's works, with literally dozens of editions available in print, catering to the preferences of every consumer group, from the ultra-scholarly to the price-conscious.

The social and cultural benefits of the public domain flow from an operation of the principle of limitation of term which expresses the implicit "social bargain" central to the design of Anglo-American copyright law: that, in exchange for the benefit of a period of strong and effective legal protection for a work, the copyright owner abandons further claims of exclusivity.[3] This principle finds expression in the Copyright Clause of the United States Constitution, with its reference to "limited times," but its origins are in the Statute of Anne of 1710, which safeguarded public interest by limiting the term of the new statutory copyright which the publishers of that day had sought. Since then, at various times, efforts to establish perpetual copyright have been rebuffed by courts and legislators.[4]

In the United States, modest legislative additions to term of copyright have occurred only at infrequent intervals, and usually in connection with a general revision of the copyright statute.[5] Now, only 19 years after the 1976 Act added 19 years to the duration of protection for works already covered by copyright when that law took effect, Congress is considering a further term extension of (in most instances) 20 years, delaying for that long the entry of most old and new works into the public domain. Whatever its merits, this proposal represents much more than a technical adjustment; to those who rely on the existence of a robust, constantly invigorated public domain, it looks like a deviation from the basic principle of limitation of term: the beginning, as it were, of "perpetual copyright on the installment plan."

Were this the case, the project of copyright term extension would face close constitutional scrutiny. Even if this alarm is unjustified, proponents of the current term

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[1] *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).

[2] These arguments appear to stem, at least in part, from comments made by Irwin Karp during legislative hearings leading up to the enactment of the Copyright Act of 1976. *See* 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, at 316–17.

[3] *See* Peter Jaszi, *When Works Collide, Derivative Motion Pictures, Underlying Rights, and the Public Interest,* 28 U.C.L.A. L.Rev. 715, 804–805 (1981).

[4] Most notably in the case of *Donaldson* v. *Becket,* 4 Burr. 2048, 98 Eng. Rep. 257 (H.L. 1774), discussed in John Feather, Publishing, Piracy and Politics (1994) at 89–94.

[5] A 14 year increment to the original term of copyright in 1831, 14 more added to the renewal term in 1909 (for a maximum potential 56 years), and in 1976, a general change in the formula of calculation which yielded the current general term of the life of the author and 50 years after his or her death, and (as a kind of legislative byproduct) the extension of the renewal term for works existing as of January 1, 1978, from 28 to 47 years.

extension proposal have a heavy burden of justification—one which, I suspect, cannot be successfully discharged. Unlike the countries of continental Europe, the United States does not consider copyright as a "natural right," but as a means to achieving social benefit, based on "the conviction that encouragement of individuals effort by personal gain is the best way to advance the public welfare.* * *"[6] The recent "White Paper" on intellectual property of the Information Infrastructure Task Force spells out the proposition: As a result of the economic incentives offered by copyright, "the public receives the benefit of literature, music and other creative works that might not otherwise be created or disseminated. The public also benefits from the limited scope and duration of the rights granted."[7] The enrichment of the public domain through the expiration of the term of protection is one of benefits for which we look to the institution of copyright. When a proposal for statutory reform, such as the one contained in the Copyright Term Extension Act of 1995, so obviously impinges on that the public's enjoyment of that benefit, it is fair to ask whether that impingement can be otherwise justified in terms of the incentive rationale which animates the copyright system.

As I understand it, the primary claim made for the importance of the proposed extension is that it would permit American copyright owners to benefit financially from the extension of the basic copyright term in the European Union to the life of the author and seventy years after his or her death, through the operation of the new European Union "Directive on Harmonizing the Term of Protection of Copyright and Certain Related Rights."[8] Although it should be recognized that the additional earnings generated by U.S. works in Europe may, over time, be partly offset by the additional years of royalties American companies and consumers will be required to pay to use popular works of foreign origin, the projection that copyright extension will bring extra income to the owners of some internationally popular domestic works seems to be well-founded. Likewise, a secondary claimed advantage of term extension is that even those copyright owners which would not profit from term extension in the European market would enjoy an additional period of exclusivity in the United States.

Unfortunately, neither the primary nor the secondary claim has any obvious place in the analytic framework outlined above with its emphasis on copyright as a means of achieving general social benefits. No matter how superficially appealing the suggestion that copyright owners, individual and corporate, are somehow entitled to additional protection as a matter of "justice," and no matter how appropriate such a suggestion might be in the context of other national legal traditions, it can have no bearing on copyright policy-making in our own.[9] Nor can the suggestion that providing opportunities for U.S. copyright owners to earn additional royalties for foreign exploitation of their works would positively effect our balance of trade with Europe and the rest of the world. Attractive as this outcome might be, it has nothing whatever to do with the provision of incentives to the creation and dissemination of cre-

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[6] *Mazer* v. *Stein*, 347 U.S. 201, 219 (1954).

[7] Intellectual Property and the National Information Infrastructure: Report of the Working Group on Intellectual Property Rights at 23.

[8] Council Directive 93/98, 1993 O.J. (L 290/9). Since the directive requires countries of the Union to apply to "rule of the shorter term" to works originating outside the Union, U.S. copyright owners could enjoy these additional rights only if the United States conformed its provisions on copyright term with those of the Union.

[9] Nor can copyright owners plausibly claim that term extension is justified because increasing life expectancies have defeated a justified expectation that present or prior U.S. copyright laws would provide a legacy for two generations of an author's descendants. First and foremost, there is simply no evidence that—whatever the position of European law—the United States has ever embraced the "two generation" principle; to the contrary, the legislative history of the 1976 Copyright Act, by means of which the United States first embraced the "life plus fifty" term, indicates only a concern with the possibility that a 56-year terms "is not long enough to insure an author and his dependants the fair economic benefits from his works." H.R. Report 94–1976, 94th Cong., 2d Sess., Copyright Law Revision, at 134. Nor, despite the opinions of some European commentators, is it clear that the "two generation" principle is inherent in the provisions of the Berne Convention. Sam Ricketson, the distinguished scholar of the Berne, recently has argued that shorter rather than longer terms may be in order, stating that "there are good reasons to doubt that [even] the 50-year really does embody the desirable national or international norm." *The Copyright Term, 23* IIC 753, 786 (1992). *See also* Sam Ricketson, The Berne Convention for the Protection of Literary and Artistic Works: 1886–1986 320 (1987) ("The fundamental assumption here seems to be that the author and his immediate family [i.e. spouse and children] should have the prospect of earning some return for his work.") And in any event, it is not clear that in a copyright system where term is calculated on the basis of an author's life, contemporary trends in longevity operate to deprive authors' descendants of benefits they formerly would have enjoyed; the fact that as an actuarial matter tomorrow's children and grandchildren will tend to live longer is canceled, at least in part, by the fact the today's authors will do so as well.

ative works. But if the prospect of greater foreign and domestic earnings by copyright owners is not in itself a justification for term extension, it remains to ask whether it may operate as a means to bring about social benefits of the sort which our copyright system is design to promote.

In exploring that question in the paragraphs that follow, I will first address the provisions of the legislation which deal with the extension of the term of copyright in works already in existence. Under those provisions, there would be additional protection provided for works created before January 1, 1978 and now in their renewal terms of copyright, through the addition of 20 years to the 47-year renewal term provided in 17 U.S.C. Sec. 304. Works unpublished as of January 1, 1978, and still unpublished when the proposed legislation took effect, would receive ten—or in some circumstances 20—additional years of protection. Likewise, there would be 20 years of additional protection for works created between January 1, 1978 and the effective date of the legislation, accomplished by extending the general term of protection provided in Sec. 302(a) to include a period of 70 years following the death of the author, and by adding 20 years to the terms provided in Sec. 302(c) for certain special works, including works made for hire, extending those terms to 95 years from publication or 120 years from creation, whichever is less.

Obviously, justifications based on the provision of incentives to creativity are irrelevant where the works subject to terms extension are already in being. Indeed, such an extension can only serve to as a disincentive to new creativity, in that it must to some extent tend to discourage the making of new works derivative of those for which protection has been extended, which would otherwise be in the public domain. It could be argued, nevertheless, that term extension for existing works may provide significant public benefits by encouraging dissemination of those works by publishers and other information distributors. The fallacy of this suggestion, however, is readily apparent. No rational economic actor will cease distributing a still-popular work when it ceases to be protected by copyright, merely because it may now face competition in the marketplace; if anything, such a firm is more likely to respond buy improving the version of the work it offers in order to compete more effectively—and to be able to claim a derivative work copyright. By the same token, no firm motivated by a desire for profit will begin distributing a still-unpopular work merely because it retains copyright protection. And where a formerly unpopular work is deemed ripe for commercial revival, the absence of copyright protection (associated with lower production costs for the reissue) actually may operate as an incentive to a firm interested in bringing it to market. In short, there is no reason to believe that increased terms of copyright protection for existing works, which represent an obvious and significant incursion on the public domain, will produce incentives leading to any measurable countervailing social benefit.[10]

Where the provisions of the proposed legislation relating to the term of copyright in works created after its coming into effect are concerned, it is at least theoretically possible that individual authors might be marginally more likely to devote "sacrificial days" to creative endeavors if they expected the resulting works to be protected for 70 rather than merely 50 years after their deaths. As a practical matter, it is difficult to imagine that the potential of income to a remote unknown descendant or other successor in the distant future could do much to motivate a writer, painter, or computer programmer in the present—especially when that potential is discounted to reflect the unlikeliness of any work created today retaining significant market appeal 75 years or a century from now. If our goal were to provide individuals with greater incentives to create, there are other means available—such as subsidies or tax benefits—which would be both more effective and better calculated to preserve the social and cultur5al values inherent in the public domain.

Nor will increasing the term of protection for new individually-authored works provide any incentive to their dissemination by information distributors to today's information consumers. The financial calculations on the basis of which business decisions about investment in the distribution of new books, movies or software programs are made may project potential revenue months or years into the future, but no responsible management would base such decisions on forecasts or earnings decades or generations into the future. The same, of course, is true of business deci-

[10] The case of works unpublished prior to January 1, 1978 is a particularly poignant one. The 1976 Copyright Act having provided such works with protection through at least 2002, and offered a 25-year "bonus" of protection for those works, the proposed legislation would both increase the "bonus" and *extend through 2012 the protection for even those works which their copyright owners chose not to publish.* This feature of the legislation cannot be justified in therms of incentives to creation or dissemination, especially as the effect would be to (among other things) to defer the entry into the public domain of copyrighted archival materials which are not now generally available for scholarly use.

sions about whether to invest directly in the creation (and initial dissemination) of new works. Although the proposed legislation extends the maximum term of protection for works made for hire to a remarkable 95 (or 120) years, it seems apparent that where such works of corporate authorship are concerned, the extension of the copyright term cannot be rationalized, even in theory, as providing any significant additional incentive to engage in socially beneficial conduct.[11]

If any benefit term extension offers in the form of new incentives to the creation or dissemination of works are non-existent or trivial, the costs it imposes are very real indeed. Among these costs are some which are far more important in cultural terms than any marginal increase which term extension may bring in the price of paperbacks or classical CD's to the consumer. The "hidden" costs of term extension, so to speak, are those which could only be measured in an accounting of the new creative or intellectual projects not commenced or completed because of copyright complicaiton—the teaching material not compiled, the biographies not written, the videos and multimedia CD's not issued, the new critical editions or volumes of scholarship forgone.

The rights of the copyright owner include not only the right to profit from the exploitation of the work, but also the right to withhold that work, even where a profit could be earned from its exploitation. Sometimes, it is rational for the copyright owner to withhold permission because the new exposure of an old work might interfere with the market prospects of a new one.[12] Nor will a copyright owner who is successful marketing an imperfect edition of a older work have any incentive to license others to create a better edition to compete with it. For this reason, as a distinguished publishing historian has pointed out (in the context over the debate over British implementation of the EU Directive on Term), "good editions of great works coincide with the end of copyright protection."[13] On still other occasions, the copyright owner may choose to withhold permission for use merely because the fees a particular would-be user can afford to pay are too small to justify engaging in a licensing transaction. From my days as an exhibitor of "classic motion picutres" at a smaller theater in a college town, I vividly recollect this sort negotiating impasse and the effect it had on my programming efforts. Today, film scholars report similar clearance problems where attempts to license the use of still and "frame enlargement" for critical books in the field of cinema studies are concerned.[14]

Sometimes, however, copyright owners refuse to license their works—even those which have little current commercial value—for other, non-economic reasons. It is in the very nature of copyright that during its limited term, it is a charter for "private censorship," and copyright owners routinely exercise the authority the law gives them to control the content of the uses other make of their works. This risk was pointed out fifty years ago by copyright scholar Zechariah Chafee, who pointed to examples in which the veto power of copyright in an author's descendants deprived the public of valuable works.[15] More recently, the Pulitzer Prize-winning historian David Garrow reports that there is a "fairly long list" of "scholars [who have] been forced to truncate their biographies or works of history because of their inability to quote form unpublished letters or other documents without running the risk of litigation."[16] And press coverage of the current drive for revision of the law relating to copyright term makes it clear that the extension of control over the manner in which old works are used in new contexts is among the explicit goals of that movement.[17]

In light of the foregoing, it seems clear that while term extension may enhance the earning power of some individual copyright owners in the European market (as well as in the domestic one), it will do nothing to enhance the overall "competitiveness" of American cultural industries with their counterparts abroad. To the contrary, our book, film, music and software industries have proved to be the most suc-

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[11] *See* Ricketson, note 9 *supra,* at 763–66 (expressing skepticism that "publishers and other initial exploiters of works base their present investment decisions on prospects of exploitations that may only arise in the distant future.")

[12] *See* Jaszi, note 3 *supra,* at 740, n.67, discussing the practice of coordinating the release of motion picture "remakes" with the suppression of prior versions.

[13] John Sutherland, *The Great Copyright Disaster, London Review of Books,* Jan. 12, 1995, at 3.

[14] *See* Krisitn Thompson, *Report of the Ad Hoc Committee of the Society for Cinema Studies, "Fair Usage Publication of Film Stills, "* 32 *Cinema Journal,* Winter 1992, at 3.

[15] *Reflecitons on the Law of Copyright II,* 45 *Colum. L. Rev.* 719 (1945).

[16] *Quoted in Martha Woodmansee and Peter Jaszi, The Law of Texts: Copyright in the Academy,* forthcoming in *College English,* Nov. 1995.

[17] Ralph Blumentha, *Heirs Fight to Extend Protection of Songs, New York Times,* Feb. 23, 1995, at B1 (describing efforts of musical composers' descendants to "police" current productions of their works for "authenticity.")

cessful the world has ever known in part because American copyright has been relatively more hospitable than many others to the creation of new works based on preexisting ones. Ours in a legal and creative climate in which, as Jessica Litman points out, "Composers recombine sounds they have heard before, playwrights base their characters on bits and pieces drawn from real human beings and other playwrights' characters; novelists draw their plots from lives and other plots within their experience; software writers use the logic they find in other software; lawyers transform old arguments to fit new facts; cinematographers, actors, choreographers, architects, and sculptors all engage in the process of shaping, transforming and recombining what is already 'out there' in some other form. This is not parasitism; it is the essence of authorship, and in the absence of a vigorous public domain, much of it would be illegal.[18]"

Various unique and characteristic features of American copyright law contribute to this climate, among them our doctrine of "fair use," our insistence on the maintenance of the "idea/expression" distinction, our rejection of the any wholesale reception of "moral rights"—and the limitation of copyright term. Nor are these the only special features of our domestic law which have produced a competitive advantage for American works in the world marketplace.

Another example is the work for hire doctrine, so generally criticized by European advocates of the "author's right" as a natural law entitlement. In fact, this doctrine has proven to be a powerful engine driving corporate investment in the creation and dissemination of new works. Just as I hope the United States will not be too quick to "harmonize" our law of "moral rights" with the full-strength European versions of that concept, or to abandon the work for hire doctrine in favor of European notions of copyright ownership, so I hope we will look skeptically at claims that "harmonization" of the American law of copyright term with that of the European Union is a desirable end in itself. To the contrary, uncritical pursuit of the elusive goal of "harmonization" may end by depriving American law of its special genius as a mechanism of cultural and economic policy, if it brings about a relaxation of our traditional skepticism about "natural rights" claims in the field of copyright.[19]

In conclusion, it is my opinion that for across-the-board copyright term extension of the sort proposed in S. 483 may well constitute a violation of the "limited times" provision of Article I, Section 8, Clause 8 of the Constitution, and that even if it does not, a persuasive case remains to be made that such an extension further the overall objectives of copyright enshrined in that constitutional clause. Until that case is made we would do best to keep faith with the fundamental premises of a copyright system that has helped to make our entertainment and information industries among the world's most successful. According to those premises, the only version of term extension which could be justified, even in theoretical terms, would be one which is (1) strictly prospective in operation and (2) accrues only with respect to works created by individuals (as distinct from works made for hire). Even then, I have the gravest doubts about whether the social benefits such as limited term extension initiative might yield could begin to outweigh the costs to the public domain which is inevitably would entail.

To this conclusion, however, I would like to add a postscript. To this point, I have argued that any term extension that applies to existing works—even those of individual authorship—cannot be justified by reference to the traditional view of the copyright as a system of incentives to the creation and dissemination of creative works. Enactment of term extension applicable to existing works would be, in effect, an endorsement of an alternative vision, more familiar in Europe than in the United States—that of copyright as a "natural right" of the author. And convinced as I am

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[18] Litman, note 1 *supra*, at 966–96 (footnotes omitted).

[19] That the goal of harmonization is an elusive one was a point emphasized in J.H. Reichman's recent testimony on term extension legislation in the House of Representatives, *The Duration of Copyrights and the Limits of Cultural Policy*, Statement concerning H.R. 989 before the Subcommittee on Courts and Intellectual Property, Committee of the Judiciary, 13 July 1995, at 23. The special terms provided in European law for corporate works are considerably shorter than those afforded by U.S. law (and remain so even under the EU term directive). Thus, for example, Professor Reichman notes that "by prolonging the basic term of protection afforded works made for hire under U.S. law from seventy-five to ninety-five years, [the Copyright Term Extension Act] would compound pre-existing differences and destabilize any de facto harmonization that may already have occurred in the context of U.S.-EU relations." He also points out that a U.S. move to extended copyright term, whatever its effects on American-European legal relations, will do nothing to promote harmonization between U.S. law and the laws of developing countries, which will have few natural incentives to prolong copyright terms under their domestic laws. This state of affairs, Professor Reichman suggests, "would undoubtedly subject developing countries to new trade pressures attempting to elicit higher levels of protection. Yet the hard truth is that such pressure will only generate countervailing demands for further trade concessions to offset the social costs of more intellectual property protection."

that the best way to preserve the special genius of the American copyright system is to resist the seductive appeal of term extension, I also must admit to being moved by stories of the hardships suffered by individual musicians and other creative artists who sold their copyrights cheap early in their careers, and later found themselves unable to benefit from the success of their works. As it stands, however, S. 483 is not fully consistent with a "natural rights" vision of copyright, in that it does not guarantee that the additional terms of protection it provides would actually accrue to the descendants of authors, rather than to the individuals or firms to whom their predecessors assigned their rights.[20] If we are to abandon the historical premises of American copyright law, we should at least do so with the courage of our new convictions, and provide that the 20 additional years of protection afforded by term extension legislation should accrue directly to authors and their successors as a "new estate."

I would like to thank the Chairman and the committee for affording me this opportunity to express my views.

PREPARED STATEMENT OF DENNIS S. KARJALA, SUBCOMMITTEE ON COURTS AND INTELLECTUAL PROPERTY HEARINGS ON H.R. 989, JULY 13, 1995

SUMMARY

The special genius of the United States copyright system has been its emphasis on an appropriate balance of 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 music, movies, and computer software. This is shown by our current dominant position in international trade in these areas. It may be worth noting here that our dominance is truly in current products of authorship, all of which were possible because of the rich and vibrant public domain passed down to us from earlier authors.

The extension legislation would prematurely and without demonstrated compensating benefit abandon our traditional balance in favor of a stronger emphasis on private interests.

Europeans have long followed a different copyright philosophy, based more on notions of private, 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 of every kind—such as film makers, novelists, historians, photographers, multimedia producers, composers, biographers, and graphic artists.

The proposed extension would supply no additional incentive to the creation of new works—and it obviously supplies no incentive to the creation of works already in existence. 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 that life + 50 years is insufficient to sustain a revenue stream through two generations. 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 "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 still economically valuable copyrights over the interests of the general public in a rich public domain. It is not "unfair" that a work enter the public domain 50 years after the death of its author. Rather, that is an integral part of the social bargain on which our highly successful system has always been based. After supplying a royalty stream for such a long time, these old works should be available as bases on which current authors can continue to create culturally and economically valuable new product.

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[20] Rather, it would merely continue the operation of the "Termination of Transfer" provisions of 17 U.S.C. Secs. 203 and 304(c), which require timely service of notice in order to claim a limited reversion of previously alienated rights—precisely the sort of action that unsophisticated, uncounseled authors and/or their successors may be unable, in practice, to undertake. The pitfalls of the termination provisions, as they relate to term extension, were extensively explored in the "Statement of Professor William Patry on H.R. 989," to the House Judiciary Subcommittee on Courts and Intellectual Property, July 13, 1995.

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 cost 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 secure a fair return for an 'author's' creative labor. But the ultimate aim is, by the incentive, to stimulate artistic creativity for the general public good." [1]

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.[2] We do not recognize new 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

[1] Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1995) (footnotes omitted).
[2] 1 P. Goldstein, Copyright 1.1, at 6–7.

so. Yet, the public cost in the form of a diminished public domain is obvious.[3] 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 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 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.[4] 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. Con-

[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 Especial interests whose voices are loudest, must seek to maintain an appropriate balance by very carefully weighing the costs against the purported benefits.

[4] H.R. Rep. No. 94–1476, 94th Cong., 2d Sess. 133 (1976).

sequently, any claim that the public pays the same for public domain works as for protected works is implausible, at least in general.[5] Educational and scientific uses would also seem to be large markets for public domain 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.[6]

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 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 work can be absolutely prohibited by copyright owners who have no creative relationship with the work at 11. 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.[7] 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

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[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 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 of 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).

[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 *Forword* by former Congressman Kastenmeier.

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.[8] 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 development 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 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 simple 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. * * *"[9]

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.[10] The existence of these inalienable termination rights in individual United States authors makes it even more unlikely that anyone would pay more to exploit a work under the extended term than would be paid under the current life + 50 period.[11] The extension, therefore, holds little promise of financial benefit to individual authors.

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[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* not 6, at 739–40.

[9] 8 Macaulay, Works (Trevelyan ed. 1879) 199, *quoted* in Chafee, *Reflections on the Law of Copyright: II*, 45 Colum. L. Rev. 719 (1945), *requoted* in R. Gorman & Ginsburg, Copyright for the Nineties 307 (4th ed. 1993).

[10] 17 U.S.C.A. §203.

[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 even begin. An exception is the right to continued

Continued

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 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.

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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 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.

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.[12] 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.

[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.

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,[13] 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 year to life + 50 years, without any mention of a "two generation" goal.[14] 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 benefit 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.

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 Unit-

[13] Council Directive 93/98/EEC (Oct. 29, 1993).
[14] H.R. Rep. No. 94–1476, 94th Cong., 2d Sess. 133–34 (1976).

ed 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,[15] that standard could then accurately be denominated international[16] 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 to 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,[17] 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 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 terms 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 copyrights 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

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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 Palace* was published on March 5, 1927. Robert Burt de Waal, The World Biography of Sherlock Holmes and Dr. Watson 12, 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.

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 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.

The undersigned are all university professors who regularly teach or conduct legal research in the fields of copyright or intellectual property.

Howard B. Abrams, University of Detroit Mercy School of Law.
Martin J. Adelman, Wayne State University Law School.
Howard C. Anawalt, Santa Clara University School of Law.
Stephen R. Barnett, University of California at Berkeley School of Law.
Margreth Barrett, University of California Hastings College of the Law.
Mary Sarah Bilder, Boston College Law School.
Dan L. Burk, Seton Hall School of Law.
Amy B. Cohen, Western New England College School of Law.
Kenneth D. Crews, Indiana University School of Law-Indianapolis.
Robert C. Denicola, University of Nebraska-Lincoln College of Law.
Jay Dratler, Jr., University of Hawaii William S. Richardson School of Law.
Rochelle C. Dreyfuss, New York University School of Law.
Rebecca Eisenberg, University of Michigan Law School.
John G. Fleming, University of California at Berkeley School of Law.
Laura N. Gasaway, University of North Carolina School of Law.
Dean M. Hashimoto, Boston College Law School.
Paul J. Heald, University of Georgia School of Law.
Peter A. Jaszi, American University, Washington College of Law.
Mary Brandt Jensen, University of Mississippi School of Law.
Beryl R. Jones, Brooklyn Law School.
Dennis S. Karjala, Arizona State University College of Law.
John A. Kidwell, University of Wisconsin Law School.
Edmund W. Kitch, University of Virginia School of Law.
Robert A. Kreiss, University of Dayton School of Law.
Robert Rosenthal Kwall, DePaul University College of Law.
William M. Landes, University of Chicago Law School.
David L. Lange, Duke University School of Law.
Marshall Leaffer, University of Toledo College of Law.
Mark Lemley, University of Texas School of Law.
Jessica Litman, Wayne State University Law School.
Peter S. Menell, University of California at Berkeley School of Law.
Robert L. Oakley, Georgetown University Law Center.
Harvey Perlman, University of Nebraska College of Law.
L. Ray Patterson, University of Georgia School of Law.
Leo J. Raskind, Brooklyn Law School.
David A. Rice, Rutgers-Newark School of Law.
Pamela Samuelson, University of Pittsburgh School of Law.
David J. Seipp, Boston University School of Law.
David E. Shipley, University of Kentucky College of Law.
Robert E. Suggs, University of Maryland School of Law.
Eugene Volokh, University of California at Los Angeles School of Law.

Lloyd L. Weinreb, Harvard University Law School.
Sarah K. Wiant, Washington Lee University School of Law.
Alfred C. Yen, Boston College Law School.
Diane L. Zimmerman, New York University School of Law.

The undersigned is in agreement with the conclusions of this Written Testimony for substantially the reasons given.

Wendy J. Gordon, Boston University School of Law.

The CHAIRMAN. Well, thank you, Mr. Jaszi. We will limit our questions to 5 minutes. Let me must start with Mr. Valenti. Some critics of the bill, Mr. Valenti, have suggested that the term of works-for-hire should not be extended because no real, live person benefits from the longer term and, therefore, no new works will be spurred or incentivized by a longer term.

Could you outline for us, in your opinion, what benefits would immure to creators of films from the longer term that might possible spur greater creativity in film making?

Mr. VALENTI. Well, I deal in the real world, Mr. Chairman. And the real world says as follows: The great advantage the American film industry has over the rest of the world is its ability to form capital, for the most expensive piece of art today is a motion picture. Of the 161 films last year, produced and distributed by the major film companies of the United States, the negative cost was $34.2 million. The average marketing cost of this was $16 million. To distribute, to publicize, to promote, $50 million, average.

One of the great secrets of the American dominance in the world is their ability to pour into a film enormous resources. The most talented people in the world cost money. To do a film on location, like "Lawrence of Arabia" or the "Star Wars" films, or all things with special effects, cost enormous amounts of money. Unless we are able to protect what we own in our libraries, we will be unable in the future, in the year 2010 and thereabouts, when the new technology has avalanched through this whole landscape, not in this country, but around the world, then we are doing a terrible economic injustice to the Treasury of the United States.

As I started out my presentation, I swept away all legalisms, all academic theories, in dealing in what we have to face in the challenges of the world. And that is to make sure that the American film companies continue to have this huge advantage of capital formation, based on their libraries, where they keep refurbishing and renovating and making sure that the preservation of what they have is at the highest possible quality levels.

Therefore, I think it is very much relevant. It has nothing to do with making sure you are going to do something tomorrow. But if you do not have the fiscal sinew to operate in this unbelievably ferocious world of motion pictures, you will disintegrate. That is the great advantage of the Americans.

The CHAIRMAN. Other critics of the bill suggest that film and television works need to be treated differently from other works in order to allow preservation, archival, educational and documentary reproduction efforts to go forward using public domain works, while others believe that it is unfair to those who wish to make new multimedia works, to keep film and video works from going into the public domain. Do you believe that owners of copyrighted film and video works have a greater or lesser incentive to preserve their

works than public domain users? And could you comment on the availability of such works for educational purposes?

Mr. VALENTI. I am not quite sure I totally understand that question. I hear a lot about the public domain, Mr. Chairman. But I am not aware that anybody in the public domain is spending millions and millions and millions of dollars to preserve films. And remember, copyright is a narrow authority. It does not protect the underlying idea. It protects the presentation of an idea.

For example, last year there were two films in operation. One was "Tombstone," about Wyatt Earp. And one was Kevin Costner's picture, "Wyatt Earp," both based on the same material, the same story. But they were told differently. So each of them has a copyright. There is nothing to prevent anybody from making a motion picture or anything else from a work already out there. He does a derivative work of it, so long as he leaps off the idea and does not duplicate what had been presented before.

The CHAIRMAN. All right. I only have time for one more question. Mr. Alger, let me just ask you this. I really wish I had time to ask each of you a number of questions. As you mentioned in your testimony, some have argued that the benefit of extension should go to the descendants of the original creators rather than to the current copyright owners.

The Register of Copyrights has testified that the termination provisions that you mentioned, sections 203 and 304 of the Copyright Act, are only a partial answer to this argument, since the time for exercising the power of termination has passed for the descendants of some songwriters. Do you favor giving the descendants of songwriters and of other individual authors another chance to exercise the power of termination, as suggested by the Register?

Mr. ALGER. Well, really, the position we were taking, as referring to 203 and 304, was really relating to mostly our membership, which is crating post-1978 copyrights. So we have not spent a tremendous amount of time talking about that. I believe if you are able, as an author, to exercise your right of termination, then I think that solves that problem. If you are not, then I think that is something we had not really considered, to be honest with you.

The CHAIRMAN. OK. Well, thank you. Senator Brown wanted to be here today. Unfortunately, he is tied up on the floor with foreign operations appropriations. But he is going to send written questions to each of you, everybody who has testified here today. And he had some very strong feelings about this. So we will keep the record open for him to do that.

[The questions by Senator Brown can be found in the appendix.]

The CHAIRMAN. Senator Feinstein, Senator Leahy does need to get back to the floor. We should go to you next. But is it possible for me to go to Senator Leahy?

Senator FEINSTEIN. Surely.

The CHAIRMAN. Why not go to Senator Leahy?

Senator LEAHY. I appreciate that. I have to be back on the floor on the same bill that, unfortunately, Senator Brown is, and I thank my good friend from California for that.

Mr. Menken, I appreciate your testimony. And I was pleased to work with the songwriters concerning the digital performance rights in the sound recordings bill earlier this year. And as you

know, as I have told you and Hal David and others, I want you to be compensated for it. I would just note one thing. I suspect that you, Hal, and others would keep on writing songs because you love doing that, no matter what.

But, I would just want to know one thing, on "Moby Dick" versus "The Chamber." I would expect that far more people today have gotten through at least the first chapter of "The Chamber" than have got beyond, "Call Me Ishmael," in "Moby Dick." And a book like that, to print the first copy, to set up the type, everything else, probably costs $100,000 to $150,000 for the first copy. Then it goes down with each additional one. That may have something to do with the difference in the cost, a lot more "Chamber" than "Moby Dick" was sold.

And I love Mozart's "Requiem in D." And I enjoy Garth Brooks. But I suspect that more Garth Brooks CD's are sold than Mozart's. But I would ask that, as Ms. Peters noted in her testimony, in order to fulfill its constitutional purpose, the extension of the copyright term requires that the copyright owners benefited take the increased income and use it for the public benefit, such as in the creation of new works.

Do you have any idea how Congress can provide that the public does benefit from the lengthened copyright term by ensuring that copyright extension profits are invested in additional creativity and innovation? Does anybody want to take a try at that?

Mr. Menken.

Mr. MENKEN. Well, are you referring to the NEA?

Senator LEAHY. Well, or anything. She just said whatever might be the way. Ms. Peters said that if they are going to fulfill their constitutional purpose, they have got to use some of that increased income for public benefit. I mean, do you have any idea what could be done? You mentioned NEA, or anything. Go ahead.

Mr. MENKEN. I am a songwriter and not really an expert on these issues. I would be glad to answer in writing. My feeling is that as a writer who has watched his work find its own path and its own value in the marketplace, I feel that each author is entitled to the full compensations for their work for the full term of their copyright term. And if their works generate that income, that the author should receive that. I do not know if I——

Senator LEAHY. No. That is OK; I was just curious.

Mr. Alger.

Mr. ALGER. Well, making it mandatory to donate that income to some fund to fund the arts, would be a little difficult to rationalize for myself. I think one thing that maybe the Register of Copyrights did mention is that we constantly issue gratis licenses all the time for the public good. I have songs that have been used to raise money for the March of Dimes that, basically, the March of Dimes has made 100 times more money off that song than I ever did.

And I think you have to rely somewhat on the integrity of the creator to donate that money voluntarily. Other than that, I do not have any brainstorm. If it is for the public good, I believe the whole public should invest some of their time and money in the arts, as well.

Senator LEAHY. Thank you, Mr. Alger.

Mr. Valenti.

Mr. VALENTI. Well, I think that we do a lot for the public. First, we create jobs, which allows families to flourish. And the more movies we make, the more television programs we make, the more people we employ and the more revenues we bring back from foreign markets, that more solid becomes our fiscal foundation.

And second, we provide something else, Senator Leahy. We provide, for 2 hours, for people to escape the tedium of their lives and to come into a darkened theater and for about $3 an hour, which is about the cheapest bargain price I know——

Senator LEAHY. Out of a complete sense of altruism, are you suggesting? [Laughter.]

I mean, I hear the violin strings. [Laughter.]

They are going way beyond Mozart's requiem here. [Laughter.]

Mr. VALENTI. You know good and well that after 2 days of debate on the Senate floor, you go into a theater and you feel a hell of a lot better when you come out, Senator. [Laughter.]

Senator LEAHY. No. I am ready to do it after 15 minutes. [Laughter.]

Mr. Jaszi may want to answer this.

Mr. VALENTI. But I am serious. I think that is a real benefit. And I do not think that is anything esoteric or flaky or shadowy. It is real. And it is palpable.

Senator LEAHY. Mr. Jaszi.

Mr. JASZI. Twenty more years of revenue may well promote the financial well-being of companies which own copyrights. But this sort of benefit to corporations should not be confused with the kind of incentives to creation and distribution to which the Constitution looks. In this age of corporate merger, there is nothing about a measure that merely guarantees copyright-owning businesses more revenues. The promise is that they will be invested in the cultural sector rather than in, say, real estate purchases or unrelated business acquisitions.

In my view, this aspect of the legislation is simply insufficiently targeted to the constitutional purpose of promoting science and the useful arts to be justifiable within the constitutional clause.

Senator LEAHY. Thank you. Mr. Chairman, I appreciate your and Senator Feinstein's courtesy on this. And I will submit my other questions for the record.

[The questions by Senator Leahy were not available at presstime.]

Senator LEAHY. I also understand that Senator Dodd, who has taken, as you know, a long interest in this, has a statement for the record. And I would ask unanimous consent that be included in the record, also.

The CHAIRMAN. It will be placed in the record.

[The prepared statement of Senator Dodd follows:]

PREPARED STATEMENT OF HON. CHRISTOPHER J. DODD, A U.S. SENATOR FROM THE STATE OF CONNECTICUT

Mr. Chairman, thank you for providing me with this opportunity to share my thoughts on the legislation you have introduced to extend U.S. copyright protections for an additional 20 years.

The Constitution states that the purpose of copyright law is to encourage intellectual pursuits by providing authors and artists with exclusive rights to their works. Since the first days of our nation, the protections copyright laws have offered have added greatly to the economic and cultural strength of our country. In addition,

copyright law also holds the potential to advance the public good more directly. For several years, I have explored the idea of using a further extension of copyright to fund a true endowment for the National Endowments for the Arts and the Humanities.

A unique relationship exists between the Endowments and copyright. Through art outreach activities, school programs, fellowships and other activities, the Endowments promote and support the next generation of artists before they are commercially viable or successful. Copyright revenues are the proceeds from successful creative works. Tapping copyright would provide a way for today's art to support tomorrow's, at a time when the federal commitment to the arts is at risk.

For the past decade, federal funding for the arts has suffered through numerous cuts and controversies. Most recently in this year's Interior Appropriations bill, funding for the Endowments was slashed by 40 percent. Yet, I believe national support for the arts is crucial. Not only do the arts add substantially to the quality of our lives and the lives of all of our communities, but they also contribute billions to the economy annually. Just in my state of Connecticut, it is estimated that the arts contribute nearly $500 million to the economy each year.

But we cannot fool ourselves about federal resources. They are limited. Renewing our commitment to the arts requires creative thinking about new ways for us to accomplish this goal. My goal is to ensure a commitment to the arts and to the cultural future of the country. I believe a good way to accomplish this goal is through the creation of a true endowment, which would provide supplemental funding for the NEA and NEH and could be funded in ways that would not further burden taxpayers.

With strong bipartisan support, the Labor Committee adopted an amendment to the reauthorization for NEA and NEH (S. 856), to provide for a study of the feasibility of creating a true endowment. My amendment specified that the study look at various funding sources, including private fundraising, the extension of copyright beyond current term, and recapture of grants that prove commercially successful. The study will answer some of the basic but vital questions about creating a true endowment: most important, how it should be funded. The study will also look at how much could be raised from various sources and what kind of income would be generated. This study is to be completed in one year.

Creative works remain not only one of the strongest sectors of our economy, but also one of our strongest overseas exports. For this reason, I share your deep interest in addressing the current imbalance that exists between U.S. copyright law and that of the European Community. American artists are being hurt overseas, and we should clearly redress that situation. As we move forward on copyright legislation, I look forward to working with you and others to ensure that we find a way to protect copyrights while also creating a true endowment.

Thank you for your time.

The CHAIRMAN. Thank you, Senator Leahy. In fact, we will keep the record open for 2 weeks to allow for submission of written testimony from anybody who cares to assist us in this matter. And you can augment your testimony, if you desire.

Senator Thompson. And then we will finish with Senator Feinstein.

Senator THOMPSON. Thank you, Mr. Chairman. And I hope Senator Leahy can keep Senator Brown on the floor for at least another 30 or 45 minutes. [Laughter.]

The CHAIRMAN. You can see, Mr. Alger, that you have a fairly substantial person on this committee who has really taken Nashville to heart, is all I can say.

Mr. ALGER. Absolutely.

The CHAIRMAN. In more ways than one, I might add.

Senator THOMPSON. Well, that is true, as a matter of fact. [Laughter.]

The CHAIRMAN. Excuse me, Senator. I also have to compliment Senator Feinstein for her work. She takes a very solid interest in this committee. I am really pleased to have these two folks on this committee, because they both take interest and they both are spending a lot of time on it and, I think, are both adding a great

deal to the committee. So it is just really a privilege to have both of them here. Go ahead. I am sorry.

Senator THOMPSON. Thank you, Mr. Chairman. And it is a pleasure to be here with my good friend, Patrick Alger, who is one of the leading songwriters in the country and has done so much work for the cause.

Patrick, I have got good news to report. Not only do most of these folks I deal with up here listen to country music; most of them have gotten to where they admit it. [Laughter.]

Mr. ALGER. That is a revolutionary change.

Senator THOMPSON. So, we are making progress.

Mr. ALGER. I am glad to see that in the record. Thank you. [Laughter.]

Senator THOMPSON. We have heard a lot of discussions about the big corporations and so forth, and the larger entities and all. But from the standpoint of the average songwriter, I believe you have about 4,600 members in your organization? What does this copyright protection, and specifically, this legislation, mean to the average songwriter who perhaps has not sold so many multimillion-dollar records?

Mr. ALGER. Are you asking me?

Senator THOMPSON. Yes, sir.

Mr. ALGER. I was just thinking, when the Register of Copyrights was talking about unpublished works, that in the Library of Congress is a big stack of Pat Alger unpublished works; that when I wrote my first batch of songs in the 1960's——

The CHAIRMAN. We had better go back over those. [Laughter.]

Mr. ALGER. Well, you know, that is a good point. There might be some ideas there. I am running out of ideas, actually.

When I got that first batch of about 10 songs, I sent them to a copyist. And they came back. And they were on sheet music. I do not read sheet music. But they really looked fantastic, I have to tell you. [Laughter.]

But I was looking at them. And I was kind of going, "What is wrong with it? It does not look exactly right."

And I realized that the big C with the circle had not been put on this by the copyist. When I added that in my own hand, the C with the circle, "1969, Patrick Alger," I thought I had become a songwriter. And to me, still, the armor of copyright is the incentive to be a songwriter. It is the thing that is going to guarantee that my son, if he is interested in continuing publishing my music, and his grandson, my grandson, will have an opportunity to do that.

I think, adding 20 years to it gives me, as an average writer, creative incentive. I do. I think any time you can strengthen the copyright law, I think the average writer—we get more letters from amateur songwriters about these bills than we do from professional songwriters, to be absolutely honest. They are the most interested in what is going to happen to copyright because they are the future professional songwriters. They are very concerned.

Senator THOMPSON. That is very interesting. I think most people would not have thought that. I certainly would not have. It is kind of interesting to me, in this whole area, that if someone creates something in any other aspect of life, it is theirs. If they create something in this aspect, we get together here in Congress and di-

vide it up, and decide how much of it you can keep and for how long. And there are reasons for that. But I think it is good that we always keep that in mind, that it has some similarities with other creations.

Mr. Valenti, if you can come up with a figure on this, basically what do moviemakers look for in terms of recouping or generating gross revenues in terms of the international markets nowadays? Is there a figure that they try to look for the in terms of what they will get in the international movie market?

Mr. VALENTI. Yes, Senator; this is. Right now, as of 1994, 42 percent of all the revenues in television, home video, and movies that were gathered in by American companies came from international markets. And indeed, if the international markets diminish, I do not know that we can survive as a healthy, viable industry. Fifty-five percent of all of our revenues comes from Europe itself, where the Europeans are now extending their copyright.

So there is danger ahead if we do not match competitively what our competitors are doing all over the world in the area of copyright.

Senator THOMPSON. Thank you very much.

The CHAIRMAN. Well, thank you, Senator Thompson. Senator Feinstein, we will end with you.

Senator FEINSTEIN. Thank you very much, Mr. Chairman. I wanted to address my questions to Mr. Valenti. The American Association of Law Libraries wrote to the House of Representatives in July. And I thought they made two very good points. And this thing has sort of been going along sweetness-in-life. And yet, I think there are a couple of points that need to be raided in terms of equity.

One of the points is that extension of the copyright term could handicap libraries' national preservation efforts by denying ready access to a vast body of copyrighted works for two additional decades. And it goes on to say how American libraries preserve creative works before they turn to dust and it is a vital function. And there some support for preservation support in the present language. And then it goes on to say that term extension exacerbates the problem libraries face when trying to decide if they might legally save a deteriorating work.

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. Would you respond to that last comment, please?

Mr. VALENTI. I am not quite sure in my hometown of Houston—are you suggesting that the Houston Public Library, which is always strapped for funds, and I still contribute to it, is actually rehabilitating films? I can't believe they are. I don't believe they have the money to do it. It is a very expensive proposition. And we are about to enter, Senator Feinstein, as well you know, into a new age of digitizing films, which is enormously expensive. Dr. Billington will tell you, as the Librarian of Congress, which has the largest repository of film works anywhere in the world, that the biggest problem he has with the preservation of films are those films that nobody owns, that is, public domain films.

So I am puzzled, though, about whether local libraries are actually spending the money to renovate, refurbish a 35-millimeter film, and if they are looking at it in a cassette form, there is no sense in—you can't deal with a cassette. It is a copy. So I an not quite sure what the librarians mean when they say it hampers them.

Senator FEINSTEIN. Yes. Well, what I am going to do is, I will get the figure from the Library of Congress.

Mr. VALENTI. I would like to respond to them.

Senator FEINSTEIN. They are, in fact, doing this, and so we will get the figures and get a response.

Mr. VALENTI. And I would be glad to respond to it.

Senator FEINSTEIN. My second question is: Extension of the copyright term, according to the Law Association, would preclude access to material of little or no commercial value, but of potential critical importance to students and scholars. And it goes on to say 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 fell at 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.

Would you respond to that, please?

Mr. VALENTI. Well, can you give me an example of what you mean by no recognizable market value? I am not quite sure I understand, Senator.

Senator FEINSTEIN. Well, these are largely technical works that are used by students and scholars that probably don't have——

Mr. VALENTI. Are you talking about film?

Senator FEINSTEIN [continuing]. A great value——

Mr. VALENTI. Are you talking about film?

Senator FEINSTEIN. Well, the law library doesn't make clear in this, exactly what they are talking about, but I will find out. It could be either film or it could not be film. But I think the point is a valid one, and we are going through this on another subject, and that is access by scholars, some special access by scholars. And, you know, you had pointed out to me how there is a use whereby classrooms and scholars can take certain parts—I think you used Shakespeare as an example—and utilize it for teaching materials.

Mr. VALENTI. That is true, and it is called the doctrine of fair use, which scholars use in classrooms where portions of a film are used. As a matter of fact, I just saw, just last week, a new interactive television done by one of the Silicon Valley people in which they are using excerpts from film, the great speech of Henry V at Agincourt and so forth, as part of the teaching materials, and they are taking advantage of the fair-use elements within the copyright law to be able to make that available. I think that kind of access——

Senator FEINSTEIN. Well, I am an original cosponsor of this bill, and I think it is a good bill. I also want to make sure that extension of this copyright doesn't make it more difficult for scholars and technical people to have the ability to gain some access, and then, second, that the preservation efforts, particularly of the Library of

Congress, which, I think, is a worthwhile thing—and I would think your industry would think that, too——

Mr. VALENTI. Absolutely.

Senator FEINSTEIN [continuing]. Are not hurt. So I will be looking at those two points.

Mr. VALENTI. I would like to, if there is any specific questions you can give me, I promise you I will answer them swiftly. You will have them in 24 hours.

Senator FEINSTEIN. Excellent. Good. Thank you.

The CHAIRMAN. Well, thank you, Senator Feinstein.

I just want to ask one or two more questions. Mr. Jaszi, we haven't meant to ignore you. It is just a matter of time. We do appreciate your alternative point of view. It is important that we have that.

In your testimony, you state that "The projection that copyright extension will bring extra income to the owners of some internationally popular domestic works seems to be well founded." If that is true, won't the prospect of extra income tend to spur new creativity?

Mr. JASZI. I think not, Senator Hatch.

The CHAIRMAN. You don't think so?

Mr. JASZI. As far as I can tell, it certainly is not going to spur new creativity insofar as the works involved are works already protected at the time the legislation takes effect. And with respect to those works that might be created after the effective date of the legislation, I have to say that I am profoundly unpersuaded by the notion that additional income accruing 75 to 100 years in the future, discounted significantly for the large risks of failure in the cultural marketplace, is going to represent a significant motivation toward individual decisions as to creation and noncreation. I am positive that it will represent no significant contribution to corporate incentives.

The CHAIRMAN. Well, don't you think that individual creators benefit from extended royalties under currently existing licenses?

Mr. JASZI. I want to make a distinction, if I can, between those situations in which individual creators, or corporate creators for that matter, benefit on the one hand and those situations in which the benefits constitute measurable, identifiable incentives to creativity or dissemination on the other.

There is no question that there would be benefits to both firms and individuals, not only in terms of revenue derived in Europe, but also in terms of revenue derived domestically from copyright term extension. But as I indicated in my remarks, unlike the countries of the European Union, we have not subscribed in this country to a natural rights thesis of justification for the law of copyright. We have over two centuries tied our decision making about copyright reform to the format which is prescribed in the constitutional clause, that is, a format which directs us to look for connections between the benefits received by authors on the one hand and the incentives that are generated on the other. It is an instrumental view of the system rather than one founded in notions of natural entitlement.

The CHAIRMAN. Well, let me go to Mr. Menken just for a second. You are a creator.

Mr. MENKEN. Right.

The CHAIRMAN. You are a songwriter. Also, Mr. Alger, if you care to chip in on this. If you have a copyright extension, how will that affect you? Will the extra income be——

Mr. MENKEN. It is more than just income. It is, in fact, controlling the artistic future of our work.

The CHAIRMAN. You mentioned your kids, and this is your legacy.

Mr. MENKEN. Well, sure. And in a way, each song is our children and we bring them into the world and they begin to toddle and then they begin to walk. Sometimes they start to run pretty fast. But there are many—there is a lot of my work that I don't expect will maybe reach fruition until maybe after my life, work may be rediscovered. I would like that work protected. I would like my children and their children and my children's children to be able to keep an archive to protect the use of my work, to see to it that it, the estate, is being treated fairly. That is an incentive. It is important. You build a career as a composer and a songwriter. You are not just starting a business. This is very attached to your heart.

The CHAIRMAN. Thank you.

Mr. ALGER. There are several reasons why the protection is valuable to me. I am a successful songwriter, and I have only been successful about 20 of the time, if you take my whole catalog. Sometimes a song I have written takes 10 years to be recorded. I have several songs like that. It wouldn't be unusual for me to pass on to the next step and then leave those songs for my son to exploit. The value of that catalog to him, for another 20 years, will be enormous if he wants to keep it or sell it.

The CHAIRMAN. I see. Mr. Valenti, just one last question. You mentioned digital, the digital revolution, and many people think that the problems of the film industry can be solved by transferring such perishable works to digital formats, which, of course, under digital, can be preserved indefinitely compared to the way we have done it up until now.

Now, do you believe the digital revolution more likely to reach films in the public domain or in the hands of copyright owners?

Mr. VALENTI. Well, I will answer that by asking a question. Who is going to digitize the 20,000 to 30,000 titles?

The CHAIRMAN. What does it cost to digitize a film?

Mr. VALENTI. The cost of digital is very, very expensive, in the thousands and thousands of dollars.

The CHAIRMAN. You don't see anybody in the public domain doing that?

Mr. VALENTI. I beg your pardon?

The CHAIRMAN. You don't see anybody in the public domain doing that?

Mr. VALENTI. Why would they, because they don't own it.

The CHAIRMAN. They don't get any benefits out of it.

Mr. VALENTI. But the point is if you don't own a material, anybody else can digitize it and put it in another format. Then what do you gain from it? The point is that unless you own something, you don't have any lasting asset value. Therefore, the only people who are going to preserve in digital from their titles are the people who own those titles. And I think that is an act of marketplace

faith, and no amount of theorizing is ever going to repeal that kind of marketplace truth, because you are dealing with lots of money.

I want to just say one thing about the professor's saying that we have not used the natural rights of code droit morale. I presume that is what you were referring to, moral rights in Europe?

Mr. JASZI. Not precisely.

Mr. VALENTI. At any rate, the point is that the cinemas of Europe are in decline. I am going to be spending a lot of time in Europe—in Madrid, in Lisbon, in Paris, and in London—in October. Doing what? Trying to help revitalize the European cinema, and we are spending a lot of time because it is in decline. The only healthy, robust cinema in the world today, Mr. Chairman, is the American cinema. And it is because of several things, one of which is our copyright laws, our work-for-hire concept, and the availability, as I said—I hate to keep repeating myself, but it is important—the availability of capital to constantly refurbish the marketplace with new material.

The CHAIRMAN. And the availability of Europe to take the products.

Mr. VALENTI. Correct.

The CHAIRMAN. I didn't realize it was 55 percent. I am really amazed at that.

Well, this has been a very interesting hearing for me, and I want to compliment each of you and our two prior witnesses for the efforts that you have made to be here and to enlighten us and help us. We will keep the record open for comments from anybody. We want to do what is right here. I think the bill does need some help, and we are going to continue to try and refine it. So we appreciate any help we can get.

With that, we will recess until further notice.

[Whereupon, at 12:03 p.m., the committee was adjourned.]

APPENDIX

PROPOSED LEGISLATION II

Calendar No. 491

104TH CONGRESS
2D SESSION

S. 483

[Report No. 104–315]

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

IN THE SENATE OF THE UNITED STATES

MARCH 2 (legislative day, FEBRUARY 22), 1995

Mr. HATCH (for himself, Mrs. FEINSTEIN, Mr. THOMPSON, Mr. SIMPSON, Mrs. BOXER, Mr. ABRAHAM, Mr. HEFLIN, and Mr. LEAHY) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

JULY 10, 1996

Reported by Mr. HATCH, with an amendment

[Strike out all after the enacting clause and insert the part printed in italic]

A BILL

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

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Copyright Term Extension Act of 1995".

SEC. 2. DURATION OF COPYRIGHT PROVISIONS.

(a) PREEMPTION WITH RESPECT TO OTHER LAWS.—Section 301(c) of title 17, United States Code, is amended by striking out "February 15, 2047" in each place it appears and inserting "February 15, 2067" in each such place.

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

(1) in subsection (a) by striking out "fifty" and inserting in lieu thereof "seventy";

(2) in subsection (b) by striking out "fifty" and inserting in lieu thereof "seventy";

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

(A) by striking out "seventy-five" and inserting in lieu thereof "ninety-five"; and

(B) by striking out "one hundred" and inserting in lieu thereof "one hundred and twenty"; and

(4) in subsection (c) in the first sentence—

(A) by striking out "seventy-five" and inserting in lieu thereof "ninety-five";

(B) by striking out "one hundred" and inserting in lieu thereof "one hundred and twenty"; and

(C) by striking out "fifty" in each place it appears and inserting "seventy" in each such place.

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

(1) by striking out "December 31, 2002" in each place it appears and inserting "December 31, 2012" in each such place; and

(2) by striking out "December 31, 2027" and inserting in lieu thereof "December 31, 2047".

(d) DURATION OF COPYRIGHT: SUBSISTING COPYRIGHTS.—

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

(A) in subsection (a)—

(i) in paragraph (1)—

(I) in subparagraph (B) by striking out "47" and inserting in lieu thereof "67"; and

(III) in subparagraph (C) by striking out "47" and inserting in lieu thereof "67";

(ii) in paragraph (2)—

(I) in subparagraph (A) by striking out "47" and inserting in lieu thereof "67"; and

(II) in subparagraph (B) by striking out "47 and inserting in lieu thereof "67"; and

(iii) in paragraph (3)—

(I) in subparagraph (A)(i) by striking out "47" and inserting in lieu thereof "67"; and

(II) in subparagraph (B) by striking out "47" and inserting in lieu thereof "67"; and

(B) in subsection (b) by striking out "seventy-five" and inserting in lieu thereof "ninety-five".

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

(A) in subsection (c)—

~~(i) by striking out "47" and inserting in lieu thereof "67";~~

~~(ii) by striking out "(as amended by subsection (a) of this section)"; and~~

~~(iii) by striking out "effective date of this section" each place it appears and inserting in each such place "effective date of the Copyright Term Extension Act of 1995"; and~~

~~(B) in subsection (g)(2) in the second sentence by inserting before the period the following: ", except each reference to forty-seven years in such provisions shall be deemed to be sixty-seven years".~~

~~SEC. 3. EFFECTIVE DATE.~~

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

SECTION 1. SHORT TITLE.

This Act may be cited as the "Copyright Term Extension Act of 1996".

SEC. 2. DURATION OF COPYRIGHT PROVISIONS.

(a) CLARIFICATION OF LIBRARY EXEMPTION OF EXCLUSIVE RIGHTS.—

Section 108 of title 17, United States Code, is amended—

(1) by redesignating subsection (h) as subsection (i); and

(2) by inserting after subsection (g) the following:

"(h)(1) Notwithstanding any other limitation in this title, for purposes of this section, during the last 20 years of any term of a copyright of a published work, a library, archives, or nonprofit educational institution may reproduce or distribute a copy or a phonorecord of such work, or portions thereof, for purposes of preservation, scholarship, teaching, or research, if the library, archives or nonprofit educational institution has first determined, on the basis of a reasonable investigation of reasonably available sources, that the work—

"(A) is not subject to normal commercial exploitation; and

"(B) cannot be obtained at a reasonable price.

"(2) No reproduction or distribution under this subsection is authorized if the copyright owner or its agent provides notice to the Copyright Office that the condition in paragraph (1)(A) or the condition in paragraph (1)(B) does not apply.".

(b) PREEMPTION WITH RESPECT TO OTHER LAWS.—Section 301(c) of title 17, United States Code, is amended

by striking "February 15, 2047" each place it appears and inserting "February 15, 2067".

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

(1) in subsection (a) by striking "fifty" and inserting "70";

(2) in subsection (b) by striking "fifty" and inserting "70";

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

(A) by striking "seventy-five" and inserting "95"; and

(B) by striking "one hundred" and inserting "120"; and

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

(A) by striking "seventy-five" and inserting "95";

(B) by striking "one hundred" and inserting "120"; and

(C) by striking "fifty" each place it appears and inserting "70".

(d) DURATION OF COPYRIGHT: WORKS CREATED BUT NOT PUBLISHED OR COPYRIGHTED BEFORE JANUARY 1, 1978.—Section 303 of title 17, United States Code, is

amended in the second sentence by striking "December 31, 2027" and inserting "December 31, 2047".

(e) DURATION OF COPYRIGHT: SUBSISTING COPYRIGHTS.—

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

(A) in subsection (a)—

(i) in paragraph (1)—

(I) in subparagraph (B) by striking "47" and inserting "67"; and

(II) in subparagraph (C) by striking "47" and inserting "67";

(ii) in paragraph (2)—

(I) in subparagraph (A) by striking "47" and inserting "67"; and

(II) in subparagraph (B) by striking "47" and inserting "67"; and

(iii) in paragraph (3)—

(I) in subparagraph (A)(i) by striking "47" and inserting "67"; and

(II) in subparagraph (B) by striking "47" and inserting "67";

(B) by amending subsection (b) to read as follows:

"(b) COPYRIGHTS IN THEIR RENEWAL TERM AT THE TIME OF THE EFFECTIVE DATE OF THE COPYRIGHT TERM EXTENSION ACT OF 1996.—Any copyright still in its renewal term at the time that the Copyright Term Extension Act of 1996 becomes effective shall have a copyright term of 95 years from the date copyright was originally secured.";

(C) in subsection (c)(4)(A) in the first sentence by inserting "or, in the case of a termination under subsection (d), within the five-year period specified by subsection (d)(2)," after "specified by clause (3) of this subsection,"; and

(D) by adding at the end the following new subsection:

"(d) TERMINATION RIGHTS PROVIDED IN SUBSECTION (c) WHICH HAVE EXPIRED ON OR BEFORE THE EFFECTIVE DATE OF THE COPYRIGHT TERM EXTENSION ACT OF 1996.—In the case of any copyright other than a work made for hire, subsisting in its renewal term on the effective date of the Copyright Term Extension Act of 1996 for which the termination right provided in subsection (c) has expired by such date, where the author or owner of the termination right has not previously exercised such termination right, the exclusive or nonexclusive grant of a transfer or license of the renewal copyright or any right under it, executed

before January 1, 1978, by any of the persons designated in subsection (a)(1)(C) of this section, other than by will, is subject to termination under the following conditions:

"(1) The conditions specified in subsection (c) (1), (2), (4), (5), and (6) of this section apply to terminations of the last 20 years of copyright term as provided by the amendments made by the Copyright Term Extension Act of 1996.

"(2) Termination of the grant may be effected at any time during a period of 5 years beginning at the end of 75 years from the date copyright was originally secured.".

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

(A) in subsection (c)—

(i) by striking "47" and inserting "67";

(ii) by striking "(as amended by subsection (a) of this section)"; and

(iii) by striking "effective date of this section" each place it appears and inserting "effective date of the Copyright Term Extension Act of 1995"; and

(B) in subsection (g)(2) in the second sentence by inserting before the period the following: ", except each reference to forty-seven years in such provisions shall be deemed to be 67 years".

SEC. 3. EFFECTIVE DATE.

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

QUESTIONS AND ANSWERS

RESPONSE TO QUESTION FROM SENATOR HATCH TO MARYBETH PETERS

Dear Senator Hatch: I am pleased to provide the following answers to the questions raised by you and Senator Brown with respect to the Copyright Term Extension Act of 1995. I hope that you will find them helpful.

Question. In your testimony, you voiced concern over the proposed extension of copyright protection for unpublished works under § 303 of the Copyright Act. You raised specific concerns with respect to the difficulty faced by libraries, archives, and nonprofit educational institutions in obtaining copyright permissions or even ascertaining the copyright status of many works, including correspondence, photographs, prints, and labels. Would you support extending the presumptive death provisions of § 302(e) of the Copyright Act to all works as a means of addressing this type of problem?

Answer. Although this question focuses on section 303 and the unpublished works covered by that section, it may also touch on the concerns I expressed about not being able to locate copyright owners.

In my testimony I was referring to unpublished works that were in existence and protected by the common law until January 1, 1978, the effective date of the present law. On January 1, 1978, these works came under the then new federal copyright law and were generally given the same term as new works. However, in many cases the authors of these works died more than 50 years before 1978; therefore a guaranteed minimum term of protection was included. Section 303 currently provides that there must be a copyright term of at least 25 years (i.e., until December 31, 2002), and then to encourage publication of those works for the benefit of the American public, another 25 years of protection is granted if a work is published before the end of 2002.

My concern is with works such as letters, manuscripts, photographs and the like whose authors died many years ago and which, in the 17 years since the effective date of the current law, have not been published. I was advocating that the guaranteed minimum term not be extended by 10 years. I have, however, no objection to adding an additional 10 or even 20 years to the term guaranteed for works that are published before the end of 2002. By not increasing the guaranteed term for an unpublished work, but providing an increased term for those that are published, there is an incentive to publish these works before the year 2003. We would all benefit from this. However, merely extending the guaranteed term for unpublished works until 2013 does not increase the incentive to publish quickly and it will delay libraries, archives and historical societies in disseminating the vast riches that are currently in their collections.

Since section 303 provides that all copyright terms are governed by section 302, I believe that section 302(e) is already available to section 303 works. However, I do not believe that section 302 currently applies to works covered by the mandatory minimum term afforded by section 303, nor should it. I believe that applying the 302(e) presumption to these works would undermine Congress' intent of guaranteeing works at least 25 years of protection.

With respect to unlocatable copyright owners, reliance on an amended § 302(e) would not be an effective solution. This is a problem that currently exists. In my testimony I explained that while the problem is not caused by this bill, it would be exacerbated by it. The issue can arise at any time, e.g., where a company goes into bankruptcy and there is no record of the new copyright owner. Waiting 120 years from creation or 95 years from publication is not an effective remedy. A specially crafted legislative solution is required, and we are currently attempting to provide you with draft language that would address the problem.

RESPONSES TO QUESTIONS FROM SENATOR BROWN TO MARYBETH PETERS

Question 1. Article I section 8 of the Constitution gives 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." Our founding fathers made a conscious decision to vest copyrights with the creators of works rather than the owners of such works. The bill before the Committee, however, would extend copyright 20 years to the benefit of copyright owners. How can we alter the bill to reflect the intentions of the Constitution and pass along the ben-

efit of a term extension to the creators of works, rather than the consumers of their labors? Would you support such a change?

Answer 1. There are several ways in which the benefit of a term extension could be provided to creators of works rather than current copyright owners. It should be noted that this issue arises only for already-created works; as to works created after enactment of the term extension, the copyright will initially vest in the author (who will then be free to transfer rights in all or part of the entire term in return for whatever remuneration he or she wishes).

One possibility would be to vest the additional 20 years of protection initially in the author of the work. Under this approach, it would make sense to limit the class of eligible authors to individual creators. Returning control to the original author in a work-made-for-hire situation would not benefit creators, since the law deems the hiring party to be the "author." Moreover, this approach would interfere with legitimate commercial understandings and agreements. Rights in works made for hire for business entities, such as motion pictures, often change hands many times. The entity that paid for the creation of the work may not exist anymore, with mergers, acquisitions and bankruptcies common in the corporate works. Even more important, the initial hiring party in many cases will have transferred rights to another entity, which may in turn have transferred them again. Undoing these complex corporate restructurings and chains of transfers would serve no purpose and upset settled business expectations. The same distinction is drawn in the Copyright Act in the provision dealing with renewals, which vest automatically in the author if the author is an individual, but in the copyright owner if the work is a work made for hire.

Another mechanism for giving the benefits of the extended term to individual creators would be to provide for a termination right. Under this approach, current ownership of rights would continue when the term is extended. But individual authors would have the right to terminate prior transfers at the end of the existing term, thereby vesting in themselves the additional 20 years. Precedent for such a termination right can also be found in the 1976 Act; when an additional 19 years was added to the renewal term of already-copyrighted works, individual authors were given the right to terminate prior transfers and gain the extra 19 years for themselves. For reasons similar to those set forth above, this termination right was given only to individual creators, with works made for hire explicitly excepted.

The Copyright Office would support such a change in the term extension legislation, assuming that works made for hire are not included. As to the mechanism to be used, an automatic vesting in authors would be preferable to a termination right. The latter places the burden of taking action on authors, and experience has shown that many authors are not knowledgeable or sophisticated enough to exercise termination rights.

Question 2. The Constitution authorizes Congress to grant copyright protection to authors for a limited time. In 1976, Congress extended the copyright term by nineteen years. Now, nineteen years later, S. 483 would grant owners another twenty years. Doesn't the practice of continually extending copyright terms run afoul of the concept of "a limited time?"

Answer 2. The drafters of the Copyright Clause of the Constitution provided no guidance as to how long a term they had in mind in using the phrase "limited times." Certainly they intended that copyrighted works would enter the public domain at some point, enabling them to be freely used. Probably they intended this to occur soon enough that the works could still be of interest to the public—not so far in the future that they would have lost all conceivable value. Of course, at some point the term of protection could become so long that it would be meaningless to say it was "limited." But if a term of the life of the author plus 50 years could pass Constitutional muster, as Congress determined in 1976, it is difficult to see why a term of life plus 70 would cross the line. (Indeed, in the leading case questioning the "limited times" phrase, *United Christian Scientists* v. *Christian Science Bd. of Directors,* 829 F.2d 1152 (D.C. Cir. 1987), the Court declined to address whether a term of approximately 150 years violated the phrase and instead held the private law unconstitutional under the Establishment Clause.)

Thus, whether or not Congress determines that granting an extra 20 years of protection is a good idea as a matter of policy, it seems unlikely that it is foreclosed from doing so by the Constitution.

Question 3. When copyright purchasers negotiate a contract, the agreement is for the use of a work for a definite amount of time. The "property" involved is the use of that work. If Congress wants to extend copyright protection by twenty years, then Congress is, in essence, creating new property. Have past copyright contracts taken into account possible changes in the copyright laws? Why should purchasers of copy-

right, rather than the actual creators of the works, receive the benefits of this new property—something they neither expected nor bargained for?

Answer 3. Some contracts for the use of copyrighted works specify a definite period of time. These contracts would not, of course, be affected by an extension of the copyright term; the rights will cease upon the expiration of the period of time specified. It is common, however, for a contract to state that the license or transfer is to last for the entire duration of the copyright, including any renewals or extensions. Unless the legislation explicitly vests the extended term in the author, it is likely that such a contract will be interpreted to continue in effect during the additional 20 years.

If an extra 20 years of protection is granted by Congress, either the author or the transferee will receive an unanticipated benefit. The question is which one should get the windfall. It is the Copyright Office's position that the benefit should go to the author—the party who has been responsible for the act of creation, and for whom the copyright system is designed to provide incentives. While publishers and producers also benefit the public by investing in making works widely available, it is reasonably to ask them to pay for an additional term during which they can make an additional profit. They have already determined the price they are willing to pay for rights through the current copyright term, and are in a position to make the economic calculation as to an appropriate price for the additional 20 years.

Question 4. The argument has been made that the United States should follow the lead of the European Union in extending copyright protections. But all that the European Union has done is issue a Directive. This Directive is not self-executing. It must be individually implemented in each member nation through domestic legislation. This could take as long as two years. How many nations have passed implementing legislation? How does the sparse implementation of the Directive argue for reciprocating legislation in the United States?

Answer 4. As of one month ago, it appears that only the United Kingdom and Germany provided a copyright term of life plus seventy. The United Kingdom had at that time notified the Commission of the European Union that it had implemented the Directive; German law already offered the longer term. It is likely that other E.U. members are in the process of implementation, and we will provide you with updated information as soon as possible.

The sparse implementation of the Directive to date reflects the difficulty of passing legislation in any country, regardless of the resolve by officials at the highest levels. Delays in implementation of a year or two are not uncommon, and are pursued vigorously by the Commission of the European Union. For example, the EC Directive on the legal protection of computer programs was to be implemented before January 1, 1993, but only three member states met the deadline. The Commission notified the other member states that they were not in compliance, and subsequently commenced proceedings against them. These proceedings were terminated against four of the member states in 1993, when those states notified the Commission that they had enacted the requisite measures. Four other member states acted by 1994, with Luxembourg remaining the only member state in default. The Commission then decided to refer Luxembourg's case to the European Court of Justice.

Moreover, as of July 1, 1995, a country failing to meet the terms of the Directive could be sued by another member state.

In sum, the Directive has a real legal impact today, and will surely become the law domestically in the individual member states within the next year or two. The United States therefore should not focus on a snapshot of current implementation; rather, it should make decisions based on the reality that a term of life plus seventy is the new law of the European Union.

LIBRARY OF CONGRESS,
THE REGISTER OF COPYRIGHTS,
Washington, DC, October 12, 1995.

Hon. ORRIN G. HATCH,
Chairman, Committee on the Judiciary, Senate Dirksen Office Building, Washington, DC.

DEAR SENATOR HATCH: This letter serves to expand and correct our answer to Senator Brown's question #4 asked in connection with S. 483. We have received information from the European Commission that four countries, namely, Belgium, Ireland, Germany, and Denmark have implemented the EC Council Directive harmonizing the term of protection of copyright and certain related rights. It also appears that Italy has implemented the directive though the European Commission has not yet been formally notified.

Contrary to what we reported in our previous letter, the United Kingdom has not implemented the directive; the U.K. is working on legislation to implement the di-

rective by the end of this year. Holland, Spain, and the Nordic Countries are all working quickly to implement the directive. It is possible that in the next six weeks or so more countries will have implemented the directive. I will keep you informed of any new developments.

Sincerely,

MARYBETH PETERS,
Register of Copyrights.

Question 5. S. 483 is not reciprocal. No other nation is required to follow the United States in extending its copyright protections. The bill would grant a term of life of the author plus 70 years to the works of any foreign author, but it does not require the foreign country to grant the same term to U.S. authors. The works of U.S. authors in Japan, for example, would only receive copyright protection for the life of the author plus 50 years, while Japanese works would be protected for life plus 70 years. If this bill is motivated by a desire to reciprocate with the E.U. Directive, why is it not reciprocal?

Answer 5. Congress could decide to condition extension of term on reciprocity without violating the United States' international obligations under the Berne Convention. As an exception to the general principle of national treatment, Berne explicitly provides for application of the "rule of the shorter term," allowing each member country to limit the term of protection for foreign work to the term provided by the work's country of origin. The European Union has chosen to adopt this approach in its Directive.

One could argue that the United States should not feel obliged to do more, limiting its harmonization effort to the minimum required in order to gain the benefit of income from exploitation of U.S. works in Europe during the additional 20 years of protection. The economics are appealing: we would thereby avoid paying for an extra 20 years of exploitation in the United States of works from countries that do not do the same for United States works. It would also put pressure on other countries to extend their copyright terms to life plus 70 in order to get the benefits of the extended U.S. term.

On the other hand, the international copyright policy of the United States has long been based on the principle that national treatment is the appropriate rule for all copyrights rights. Following this principle, the United States has chosen not to adopt the rule of the shorter term, but has offered to foreign works the same duration of protection enjoyed by U.S. works.

In recent years, the United States has opposed the European Union's choice to condition the provision of new rights not explicitly listed in Berne on reciprocity. The result of the E.U.'s approach has been the withholding of substantial European income from U.S. copyright owners for those exploitations of works that are not within the copyright owner's right under U.S. law. In connection with the two proposed multilateral treaties currently under discussion in the World Intellectual Property Organization, the United States has taken the position that national treatment is essential for all rights to be granted. Conditioning the extension of term on reciprocity could undermine these efforts in the international arena. Congress must make the judgment call whether this will in the long run hurt the U.S. economy significantly more than it benefits it.

Question 6. The argument is made that the public domain generates little of value. What is your opinion of this argument? Please give examples if possible.

Answer 6. The Copyright Office believes that the public domain does generate substantial value. In evaluating the pending legislation, however, this value cannot be examined in the abstract, but must be measured according to the incremental addition to the public domain from a short term, and considered in relation to the value generated by copyright protection.

The public clearly benefits when works are freely available, without the need to obtain permission or pay a royalty. It also benefits when new works are created based on existing works in the public domain. But many works may be more readily available the public, and in better and more usable condition, when they are still protected by copyright. Copyright protection gives publishers and producers an incentive to invest in the expensive and time-consuming activities that may be required to preserve, update and restore older works.

The ultimate question is not whether the public domain has value, since all works will eventually fall into the public domain. It is instead whether the value to the public of works falling into the public domain 20 years earlier outweighs the value of the incentives provided by an additional 20 years of copyright.

If you or any other members of the Judiciary Committee would like any additional information, I would be pleased to provide it.

Sincerely,

MARYBETH PETERS,
Register of Copyrights.

UNITED STATES DEPARTMENT OF COMMERCE,
PATENT AND TRADEMARK OFFICE,
Washington, DC, October 23, 1995.

RESPONSE TO QUESTION FROM SENATOR HATCH TO BRUCE LEHMAN

Hon. ORRIN G. HATCH,
Chairman, Committee on the Judiciary, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: Enclosed are the responses to your questions submitted to the U.S. Patent and Trademark Office for the inclusion in the record of the hearing on the Copyright Term Extension Act held on September 20, 1995. We have been advised by the Office of Management and Budget that there is no objection to the submission of this report to the Congress from the standpoint of the Administration's program.

Sincerely,

BRUCE A. LEHMAN,
Assistant Secretary of Commerce and Commissioner of Patents and Trademarks.

Question. In her testimony, Ms. Peters voiced concern over the proposed extension of copyright protection for unpublished works under § 303 of the Copyright Act. She raised specific concerns with respect to the difficulty faced by libraries, archives, and nonprofit educational institutions in obtaining copyright permissions or even ascertaining the copyright status of many works, including correspondence, photographs, prints, and labels. Would you support extending the presumptive death provisions of § 302(e) of the Copyright Act to all works as a means of addressing this type of problem?

Answer. The Administration would support extending the time periods in the presumptive death provisions of Section 302(e) of the Copyright Act. Section 302(e) states that after a work has been published for at least 75 years or created for at least 100, whichever occurs sooner, there is a presumption that the author has been dead for 50 years and that the work has entered the public domain. The Administration would support an amendment to Section 302(e) to provide that the presumption could not take effect until a work has been published for at least 95 years or created for at least 120, whichever is longer. According to the House Report on the 1976 Copyright Act, the 50-, 75- and 100-year terms purposely correspond to the terms of protection established in Section 302. Changing Section 302(e) in this manner would comport with the Congress' intent that the presumptive death provisions correspond to the term provisions.

In regard to the issue of whether the presumptive death provisions of Section 302(e) of the Copyright Act should apply to all works, including unpublished works, governed by Section 303, as a means of addressing problems that may be faced by libraries, archives, and nonprofit educational institutions in obtaining copyright permissions and in ascertaining the copyright status of many works, the Administration does not believe any change is needed or warranted. Section 302(e) already allows for a presumption of death more than 50 years ago of an author for an unpublished work created at least 100 years ago. The Administration finds no justification for treating unpublished works created before January 1, 1978 (which are governed by Section 303) differently from unpublished works created after that date (which are governed by Section 302).

The Administration believes that, consistent with the proposed term extension, the time periods for the presumption allowed in Section 302(e) should be extended by 20 years and should apply to all works. Thus, after a period of 95 years from the year of first publication of a work or a period of 120 years from the year of creation of a work (published or unpublished, prior to 1978 or subsequent to 1978), whichever expires first, any person who obtains from the Copyright Office a certified report that the records provided in Section 302(d) disclose nothing to indicate that the author is living or dead less than 70 years before, should be entitled to the benefit of a presumption that the author has been dead for at least 70 years.

RESPONSES TO QUESTIONS FROM SENATOR BROWN TO BRUCE LEHMAN

Question 1. Article I section 8 of the Constitution gives 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." Our founding fathers made a conscious decision to vest copyrights with the creators of works rather than the owners of such works. The bill before the Committee, however, would extend copyright 20 years to the benefit of copyright owners. How can we alter the bill to reflect the intentions of the Constitution and pass along the benefit of a term extension to the creators of works, rather than the consumers of their labors? Would you support such a change?

Answer 1. As you noted, the intention of our founding fathers was to vest copyright with the creators of copyrighted works. S. 483 does not forsake that intent. Copyright protection will continue to vest with the authors of copyrighted works. S. 483 merely grants an extension of the copyright term to the person or entity that owns the copyright in a work. In many instances, the owner of the copyright will be the author, while in others it will be the author's heirs or assignees. In all cases, the beneficiary of the copyright term extension will be the author or a person or entity the author has chosen to benefit from the copyright term through the terms of a contract or will. Therefore, S. 483 does not contradict the intent of the Constitution.

The Administration does not support amending S. 483 to "pass along the benefit of a term extension to the creators of works." We view the contemplated amendment as unwarranted. For virtually all pre-1978 works and all post-1978 works (other than works made for hire) the creators of works will have long been dead when the additional twenty-year copyright period begins. Thus, the actual beneficiaries of the twenty-year extension would not be the author, but rather the author's heirs.

Question 2. The Constitution authorizes Congress to grant copyright protection to authors for a limited time. In 1976, Congress extended the copyright term by nineteen years. Now, nineteen years later, S. 483 would grant owners another twenty years. Doesn't the practice of continually extending copyright terms run afoul of the concept of "a limited time?"

Answer 2. No. Although there is some point at which a copyright term may encroach upon the "limited time" requirement specified in the Constitution, we do not believe that the copyright term extension in S. 483 runs afoul of this requirement. The copyright term under the present Copyright Act is life-plus-fifty years. Since the date of enactment of the 1976 Copyright Act, the copyright term has not been held to be unlimited or unconstitutional. As the life-plus-fifty-year term is "limited," it is difficult to understand why the life-plus-seventy-year term, a mere twenty-year difference, would be considered "unlimited."

Question 3. When copyright purchasers negotiate a contract, the agreement is for the use of a work for a definite amount of time. The "property" involved is the use of that work. If Congress wants to extend copyright protection by twenty years, then Congress is, in essence, creating new property. Have past copyright contracts taken into account possible changes in the copyright laws?

Answer 3. As the Administration has no specific information on the individual licensing practices of any copyright industry or segment thereof, the question may be better directed to parties to such agreements.

Question 3A. Why should purchasers of copyright, rather than the actual creators of the works, receive the benefits of this new property—something they neither expected nor bargained for?

Answer 3A. Without examining contracts in existence it is impossible to ascertain whether in fact any possible extension of the copyright term was expected or bargained for. The legislation, as introduced, merely respects the term of existing contractual agreements with regard to term.

Question 4. The argument has been made that the United States should follow the lead of the European Union in extending copyright protections. But all that the European Union has done is issue a Directive. This Directive is not self-executing. It must be individually implemented in each member nation through domestic legislation. This could take as long as two years. How many nations have passed implementing legislation?

Answer 4. Of the fifteen EU Member States, five Member States—Germany, Greece, Denmark, Belgium and Ireland—have passed implementing legislation, and we have reports that Italy also has passed legislation, although we have not yet seen precise language. Six other Member States have legislation pending. Of these six, it is expected that the draft legislation of four countries—Sweden, Portugal, Finland and the Netherlands—will pass shortly; in two Member States—Spain and the United Kingdom—the draft legislation has run into problems that are being ad-

dressed within their legislative bodies. We have no information in the remaining three EU Member States—Luxembourg, Austria and France (France presently has a term of life-plus-seventy years for musical works only).

Question 4A. How does the sparse implementation of the Directive argue for reciprocating legislation the United States?

Answer 4A. The United States has been and continues to be a leader in the development of international copyright norms. We have attained this position 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. The success of our copyright industries did not occur merely by following the lead of the EU and others, but rather by making changes in our copyright policies and practices only after careful consideration of all the factors.

Furthermore, although many of the EU Member States have yet to enact national legislation to implement the EU Term Directive, it is our understanding that the EU Member States will be required to give their domestic laws retroactive effect to July 1, 1995, the effective date of the directive, when they do so, and that failure to comply with the EU Term Directive would be actionable in the EU Court of Justice. Considering all of these points, the fact that the EU Term Directive has to date been implemented by only some of the EU Member States does not argue for reciprocity-based legislation in the United States.

Question 5. S. 483 is not reciprocal. No other nation is required to follow the United States in extending its copyright protections. The bill would grant a term of life of the author plus seventy years to the works of any foreign author, but it does not require the foreign country to grant the same term to U.S. authors. The works of U.S. authors in Japan, for example, would only receive copyright protection for the life of the author plus fifty years, while Japanese works would be protected for life plus 70 years. If this bill is motivated by a desire to reciprocate with the EU Directive, why is it not reciprocal?

Answer 5. The United States strongly advocates national treatment for all copyrighted subject matter, rights and benefits. Our experience has been that a policy of reciprocity is not an incentive for other countries to improve their level of intellectual property protection. Rather it tends to erode the level of protection provided.

As a result of the strong protection afforded by our copyright law, the U.S. copyright industries have become one of the largest and fastest growing parts of the U.S. economy. The U.S. copyright industries comprise almost four percent of the Nation's Gross Domestic Product and contributes approximately $40 billion in foreign sales to the U.S. economy. Accordingly, U.S. copyright owners have much to gain by other countries granting U.S. copyright owners national treatment and have a tremendous amount to lose if our trading partners grant rights under a policy of reciprocity. By increasing the level of intellectual property protection, as envisioned by S. 483, without implementing the so-called "rule of the shorter term,"we hope to set an example that other countries will follow, not just in regard to term of protection, but in regard to all aspects of intellectual property protection.

Question 6. The argument is made that the public domain generates little value. What is your opinion of this argument? Please give examples if possible.

Answer 6. I agree with the argument. In fact, this argument was one of the reasons cited in the House Report for increasing the term of protection to life plus fifty years in 1978.

The public frequently pays the same for works in the public domain as it does for copyrighted works. For instance, the public would not pay any less for one of the Shakespeare fine works than for one of John Grisham's novels. In fact, in all likelihood, they would pay more for Shakespeare—despite its public domain status. The reason that public domain works are often the same or higher priced than comparable copyrighted works is that since there is no exclusive right to publish a public domain work, the entity that does publish has only a limited time to recoup its investment before others saturate the market. To recoup this investment, often a higher price is charged. Therefore, the public does not benefit from a shorter term.

While not directly relevant to the length of copyright term, it is worth noting that the ease and reduced costs associated with dissemination copyrighted works in the electronic environment has caused content providers to experiment with a variety of different business models. Some of these models may result in some content providers disseminating their works to the public through a network without enforcing some or all of their rights in the copyrighted work or donating their works to the public domain before expiration of the copyright term. To the extent that the public domain is enriched through one or more of these models, the value of the public domain will increase.

RESPONSE TO QUESTION FROM SENATOR HATCH TO JACK VALENTI

MOTION PICTURE ASSOCIATION OF AMERICA, INC.,
Washington, DC.

[Memorandum]

To: Ed Damich and Shawn Bentley.
From: Matt Gerson.
Date: October 19, 1995.

Attached please find Jack Valenti's responses to the written questions on copyright term extension that the Committee sent following the hearing.

Best wishes.

Answer. As far as I can tell, after speaking with attorneys for the studios, this question does not impact the film industry. Having said that, these questions have come up during discussions surrounding NII. I would hope that you would allow me to comment if those discussions cause us to feel differently on the question.

RESPONSES TO QUESTIONS FROM SENATOR BROWN TO JACK VALENTI

Answer 1. The essence of your question is whether the consumer will benefit from copyright term extension. As we enter the digital age, someone is going to have to make an investment to transfer a film to digital. That costs money. While the Casablanca's of the world may be fortunate enough to have many people willing to invest in making the film available in the new digital media, the vast majority of the tens of thousands of films in the market will find few willing investors. Why should someone preserve, restore, and digitize a less valuable, less marketable work if the work is about to fall into the public domain? Copyright owners have contributed to the value of the work through preservation and investment in supplementary markets. Their doing so will be a great benefit for consumers in that works will be made available in attractive formats and will be adequately advertised and promoted.

Answer 2. Even if S. 483 term becomes law and extends the term of copyright protection, copyright owners will still only be protected for a "limited time." In my view, there is no magic to any particular number. The question that the Congress should focus on is whether on balance the policy would serve America's best interest. The answer is an unequivocal "yes." 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 the 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.

Answer 3. Few creative works have the magic to sell themselves. Copyright owners—be they the original creator, the publisher or some other distributor—usually have to add value to the "finished" work. Sometimes they do it when a work is first created, other times they do it later in the work's life. The work has a certain value not only by virtue of its existence but because of what the publisher has done to package and market the work to the public.

History is replete with examples of works that lay dormant, undisturbed and undiscovered until being picked up and adopted by an owner who recognizes its value—or potential value. The discoverer then puts up the money to try to find an audience for the work. Sometimes it works—sometimes it doesn't. But if it does, the author of the underlying works is a great beneficiary. And neither party may have envisioned, expected or bargained for the many different benefits that come from the new, revitalized property.

Answer 4. The E.U. Directive requires each E.U. country to enact a law that will cause it to come up to the seventy year standard first established by Germany. Belgium, Denmark, Ireland and Italy have already done so. Draft laws are pending in the Netherlands, Portugal, United Kingdom, Sweden and Finland. When all EU countries complete the process, it will be a great benefit to U.S. creators.

Even more benefits and opportunities will result if the Eastern European countries, the former Soviet Republics, and the emerging economies in Asia follow suit. There is an enormous potential market for consumers around the globe who have never seen authorized, top quality copies of some of the great films of our time. U.S.

leadership in the area of copyright term can reap extraordinary benefits for U.S. creators. And one thing is certain—we will export many more older U.S. works to foreign markets than we will import from overseas.

Answer 5. The best way for the U.S. to fight for advances in foreign copyright laws is to have the strongest possible laws on the books in this country. Then, we will have "clean hands" when we go to foreign governments and say, "we do not ask for any greater protection in your country then we provide to your works in our country." That has proven to be a fruitful negotiating tact. It will continue to be effective in the future.

Answer 6. I do not agree that the public domain generates little of value. First of all, many movies are made from PD works. But PD is by no means a panacea for consumers or creators. As one witness at the hearing demonstrated clearly and concisely, Tolstoy's War and Peace in paperback is more expensive than one of Clancy's latest novels. And more than that, the fact that a work is PD and available to consumers does not make it accessible to them. Having it available in fact is much more important than having it available by law. To make it truly accessible, someone has to incur the expenses of marketing, distributing, and making a work accessible.

History teaches that whatever film is not protected by copyright is a film 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 film is frequently an orphan. That is what the Library of Congress found in the Film Preservation Report that it prepared at Congress' request. No one is responsible for an orphan film's life. Then people exploit it until 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." That's the reality of the marketplace.

Response to Question From Senator Hatch to Alan Menken

Alan Menken,
North Salem, NY, October 6, 1995.

Hon. Orrin G. Hatch,
U.S. Senate, Committee on the Judiciary, Washington, DC

Dear Senator Hatch: Thank you, again, for introducing the Copyright Term Extension Act of 1995, and for giving me the opportunity to testify in support of the Bill at the September 20, 1995 Hearing.

The following are my responses to the questions which you have submitted to me for written response:

Answer 1. I am sympathetic to the concern expressed by Marybeth Peters with respect to the proposed extension of copyright protection for unpublished works under Section 303 of the Copyright Act. I understand that Ms. Peters is preparing recommended language to address this concern and I would like to reserve responding to this question until I review her recommendations.

Responses to Questions From Senator Brown to Alan Menken

Answer 1. With respect to works created on or after January 1, 1978, Section 203 of the Copyright Act affords the creator of a work, or the statutory heirs of the creator, the opportunity to terminate transfers of rights in the work as of a date 35–40 years after the execution of the grant. Upon the effective date of the termination, the creator of his or her heirs will recapture all rights in the copyrighted work for the balance of the term of copyright. Under existing law, that term will continue for 50 years after the death of the creator. If S. 483 is adopted, the creator's heirs will continue to enjoy the benefits of the creator's work for an additional 20 years. Section 203 reflects a fair and equitable balance between the interests of the author of the work and the interests of the assignee of rights in the work. The 20 year extension of copyright term set forth in S. 483 does not diminish the rights of the creator as guaranteed by the Constitution and bolstered by Section 203 of the Copyright Act. The bill, as drafted, grants the benefit of the extended term to the creators of works or their families.

With respect to works created before January 1, 1978, the creators or their statutory heirs are similarly afforded the right to terminate transfers of rights in their works and to recapture the copyright ownership. This right is set forth in Section 304 of the Copyright Act. Under Section 304, creators or their heirs may exercise

their termination right and recapture their work 56 years after copyright in the work was secured. Under existing law, the creator or his or her heirs would then have the full benefit of the last 19 years of copyright. S. 483 does not deny the creator the benefits of recapturing his or her work. Indeed, under the bill as drafted the creator will enjoy the benefits of the recaptured work for 39 years (20 years longer than under existing law.)

As for works created before 1940 for which the termination and recapture period has expired, many creators, or their heirs, have recaptured their rights. Having done so, they will be entitled to enjoy their recaptured rights for the full length of the copyright term then in effect. While it is true that some creators did not recapture their works, their heirs and the organizations such as AmSong and the performing rights societies which represent the creators, recognize that as a political matter any tampering with the existing termination rights would endanger the unanimity in the copyright community in support of the proposed legislation. Accordingly, many copyright owner who would have the most to gain from a "new" termination right for the 20 year extension period—such as the heirs of songwriters whose works are now past the 56th year of copyright—are among the strongest and most passionate supporters of S. 483.

For the foregoing reasons, I do not believe that S. 483 need be altered. The bill, as drafted, will greatly benefit the creators of works, and their heirs.

Answer 2. S. 483 seeks to extend the term of copyright protection, not to further a practice of "continually extending copyright terms" but rather to further the purpose of copyright protection first set forth in our Constitution. The Constitution of the United States grants protection for intellectual property in order to foster the creative process by guaranteeing the creator protection for his or her work. The legislative history indicates that the time period of copyright protection should cover the author plus two generations of his or her successors. Due to increased lifespans, as well as the tendency of Americans to start families later in life, works are too often falling out of copyright during the lifetime of the creator's spouse or children. Indeed, in several instances works have fallen into the public domain while the author is still living! This clearly justifies a further extension of the term of copyright protection.

Moreover, in order to encourage Americans to contribute to the creative heritage of this country we must accord our creators the greatest possible copyright protection. If we are to lag behind Europe and many other democratic nations by providing for a substantial term of copyright we will not only deprive our creators and their families of the economic benefits of their works in the world marketplace, but we will be responsible for diminishing the flow-back of taxable revenues generated by the overseas sales of American works. This would certainly have a negative impact on those American citizens deciding whether to pursue a career as a creator, and a long-term detrimental impact on creativity.

Answer 3. In many contracts for the grant of rights in a copyrighted work, the term of the grant is limited to a specific period of time. These specific time periods would not be extended by S. 483. Where a contract provides that rights in a work are being conveyed for the term of copyright in the work, as opposed to a specific period of time, the creator or his or her heirs can nonetheless terminate the grant and recapture the rights in the work pursuant to Section 203 or Section 304 of the Copyright Act. Accordingly, S. 483 does not constitute a windfall to the purchaser of rights in a work. Rather, the bill extends benefits to the creator of the work or his or her heirs.

Answer 4. While the Directive adopted by the European Union is not self-executing, all the nations comprising the European Union have committed to implementing the provisions of the Directive. At this point five (5) European nations have already implemented the Directive (Germany, Belgium, Italy, Ireland and Denmark). It is my understanding that the United Kingdom will enact implementing legislation by the end of this year that legislation is close to enactment in the remaining members of the EU. While the members of the European Union have the option of making the implementing retroactive, the retroactive protection will not be afforded to American works. It is therefor in our interests to have our legislation in place by the time that the remainder of the EU enacts the implementing legislation.

Moreover, it is important for America to foster its role as a leader in the world marketplace, particularly in the area of intellectual property, by taking the role as a leader rather than a follower in the area of copyright protection. We should strive to have term extension legislation in place even before the balance of the European nations.

Answer 5. The Berne Convention currently provides for a minimum term of copyright of life of the author plus 50 years. Individual countries are entitled to provide for a longer term of copyright, and, in such event, may either apply the longer term

to works of foreign origin, or apply the "rule of the shorter term." The European nations have elected to apply the rule of the shorter term in lieu of national treatment. The United States has always been a national treatment country. Despite that fact, I would have no objection to our making this bill reciprocal. Alternatively, we could enact S. 483 as drafted and support an amendment of the Berne Convention to provide for a minimum term of copyright in each member country of life of the author plus 70 years.

Answer 6. I have always felt that the term "public domain" is a misnomer. Any savings in costs in connection with public domain works is usually enjoyed by the distributor of the works, such as the record company or book publisher, rather than the consumer. The cost to the public of quality domain works is often no less than the cost of works still protected by copyright. Indeed, in many instances the cost of the public domain work may be higher than the copyrighted work. I gave several examples of this at the September 20, 1995 Hearing on S. 483. I presented at the Hearing a copy of Moby Dick, written by Herman Melville in 1851 and a copy of The Chamber, written by John Grisham in 1994. The price of Moby Dick is $12.95. The price of The Chamber is $7.50. The publisher of Moby Dick pays no royalties to the Melville estate, while John Grisham derives royalties from the sale of his book. Yet no benefit is passed on to the consumer from the sale of Moby Dick. Only the publisher benefits.

Similarly, I presented at the Hearing a compact disc recording of Garth Brooks' No Fences and a recording of the Boston/Baronque Orchestra performing Mozart's Requiem in D Minor. The price of No Fences is $13.99. The price of Mozart's Requiem is $15.99. Again, the record company, not the consumer, benefits from the public domain status of the Mozart recording.

While there are undoubtedly examples of public domain works which are offered for sale to the public at reduced prices, the quality of these works is in most instances inferior to the quality of works still protected by copyright. The reason is simple—the distributor of public domain works does not have the incentive to pay what it takes to maintain the quality of these goods, because the distributor does not have the exclusive right to distribute the works.

Just as significantly, the heirs of the creator of public domain works have no incentive to maintain the works in a format that is useful to the public. Many estates maintain extensive archives of the creator's works which are sources of information for scholars and cultural resource centers for the public. It is the public who will wind up losing if an unreasonable short copyright term puts these archives out of business.

I hope that the foregoing responses are helpful, and I am happy to provide any further information you may require.

Very Truly Yours,

ALAN MENKEN.

RESPONSE TO QUESTION FROM SENATOR HATCH TO PATRICK ALGER

NASHVILLE SONGWRITERS ASSOCIATION INTERNATIONAL,
Nashville, TN, October 9, 1995.

Hon. ORRIN G. HATCH,
U.S. Senate, Committee on the Judiciary, Washington, DC.

DEAR SENATOR HATCH: Thank you for the opportunity to participate in the Judiciary Committee hearing on S. 483, the Copyright Term Extension Act of 1995. On behalf of all the members of the Nashville Songwriters Association International, I would like to express our appreciation of your continuing work in the field of intellectual property protection.

I will attempt to respond to your questions to the best of my ability.

Answer. Ms. Peters' concerns have been duly noted by NSAI. In general NSAI would not be opposed to a presumption of death provision, the terms of which would be measured by life of the author plus 70 years. Until we actually see her proposal though, it would be difficult to comment further.

RESPONSE TO QUESTIONS FROM SENATOR BROWN TO PATRICK ALGER

Answer 1. For works created on or after January 1, 1978, Section 203 of the Copyright Act guarantees the creator, or his or her heirs, the right to terminate any transfer of rights on a date between 35–40 years after the grant was executed. When the rights to the work are recaptured, the creators, or his or her heirs, then enjoy the full term of copyright protection: life of the author plus 50 years. If S. 483

is adopted, the heirs will benefit from the work for another 20 years. This will insure that the immediate families of creators will be protected for their lifetimes.

Similarly, for works created before January 1, 1978, the creators, or their heirs, can recapture their works by exercising their termination rights guaranteed in Section 304 of the Copyright Act, 56 years after the copyright was secured. Again S. 483 would provide the heirs with an additional 20 years of benefits.

In short, as long as our existing termination rights in Sections 203 and 304 of the Copyright Act are not eroded, we feel that S. 483 will be extremely beneficial to creators and their heirs.

Answer 2. S. 483 is responding to certain realities in the realm of copyright protection. Our reality is the increased lifespan of authors and creators as well as the tendency to have children a little later in life. I personally did not have a child until I was 35 years old and did not create a major work until I was nearly 40. The other reality is the changing global marketplace which makes our works more valuable for a longer period of time. Extending the term of copyright to life of the author plus 70 addresses both of these realities and still provides for a "limited time" as required by the constitution. The armor of copyright protection provides the creative incentive for people who have chosen creativity as a career. Making that armor stronger will only benefit everyone.

Answer 3. Historically, contracts between creators and music publishers have taken into account any changes in the Copyright Law that might occur, with benefits usually going to the publisher. However, because of the Sections 203 and 304 of the Copyright Act we can terminate the grant and regain control of our rights. Therefore, S. 483 would still extend the term of copyright 20 years to the heirs of the creators.

Answer 4. To my knowledge, Germany, Italy, Ireland, Belgium and Denmark have already implemented the European Union's Directive. Other Countries such as England will be working on this by the end of the year. Because America is the leading exporter of music in the world, we need to be a leader in the world of copyright protection.

Answer 5. Reciprocity should be a goal of term extension, but it probably should be dealt with by amending the Berne Convention to provide life of the author plus 70 in each member country. Even though the United States is the leading exporter of music in the world, we are still the largest user of our own music. Therefore, additional copyright protection here at home is very valuable to creators and their heirs regardless of reciprocity.

Answer 6. The notion of public domain is a troublesome one for creators, because we are the only property owners who are required to give up our property after a certain time. When a work goes into the public domain, the two parties (namely the music publisher and the author) that had the most interest in exploiting that work no longer participate in the revenue flow. What generally happens is that works become harder to find and works that were marginally popular disappear altogether.

When public domain works are recorded or published often the price for those works goes up rather than down. Most of the CD's that my songs are recorded on sell for $12.99 or $13.99 while most classical CD's of public domain material sell for $15.99 to $16.99.

Thank you for the opportunity to respond to your questions. I will be happy to further help you in any way I can.

Sincerely,

PATRICK ALGER,
President.

RESPONSE TO QUESTION FROM SENATOR HATCH TO PETER JASZI

THE AMERICAN UNIVERSITY,
Washington, DC, October 9, 1995.

Hon. ORRIN G. HATCH,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, DC.

DEAR SENATOR HATCH: It is my pleasure to attempt to respond to the questions propounded in your letter of September 29 concerning the Copyright Term Extension Act of 1995. After addressing the specific issues which you and Senator Brown raise, I would also like to take this opportunity to add a few additional comments about one point which was touched on in the September 20 hearings.

First, in response to your question about the utility of extending the presumptive death provisions of Sec. 302(e) to unpublished works, I should say that it is my view

that this would not do much to offset the immediate negative consequences for libraries and similar institutions which the extension of copyright in pre-1978 unpublished works, as contemplated in S. 483, would bring about. For one thing, the authors of materials in archival collections sometimes are unknown, making the application of Sec. 302(e) impossible. More crucially, since the term of the copyright provided in Sec. 303 isn't tied to the life of the author, applying the presumptive death provisions to the authors of pre-1978 unpublished works would not affect the duration of rights in those works. Libraries, archives, and other institutions would still be faced with the problem of trying to clear rights or—failing that—forgoing use. Obviously, I think the best solution would be simply to abandon the term extension project entirely. At the very least, Sec. 303 could be maintained in its present form rather than amended.

RESPONSES TO QUESTIONS FROM SENATOR BROWN TO PETER JASZI

In what follows, I will take up Senator Brown's questions, in the order posed:

Answer 1. I suspect that the framers of the United States Constitution, like the British Parliamentarians who had enacted the first copyright statute in 1710, understood that although rights in works were to be vested in "authors" in the first instance, the enjoyment of those rights often would devolve to others. Specifically, given eighteenth century publishing practices, they must have understood that authors' rights would be routinely assigned, often for a single, lump-sum payment, to publishers who would exploit the copyright thereafter. Indeed, it seems most likely that the framers felt that copyright protection was needed as much to promote the welfare of infant publishing businesses as that of individual authors. See Cathy Davidson, Revolution and the Word: The Rise of the Novel in America 15–37 (1985).

In The Federalist No. 43, Madison provides the best basis for an argument that individual authors (rather than publishers) were the objects of special solicitude on the part of the framers, when he states that "[t]he copyright of authors has been solemnly adjudged, in Great Britain, to be a right of common law." Even so, I am not certain that a compelling constitutional argument can be made for modifying S. 483 to give the benefits of extended protection to individual authors rather than firms which own copyrights by virtue of purchase.

Having said this, I do agree that if the term of protection in existing works is to be extended, there would be a certain justice in allowing individual authors (or, more accurately, their successors) at least a share of the windfall. There are several means by which this might be accomplished, of which the most straightforward might be to clarify (and if necessary, strengthen) the application of the Sec. 203 and Sec. 304(c) "termination of transfer" provisions to the additional copyright term. A more radical solution would be to cause the additional term of protection to vest directly in the authors' successors.

I should emphasize, however, that neither of these suggestions goes to what I regard (as I indicated in my testimony) to be the principle constitutional infirmity of this legislation. The main thrust of the Copyright Clause of the Constitution is toward the promotion of public culture: "the progress of science and useful arts" which constitutes the "public good" to which Madison refers in The Federalist No. 43. No matter which private parties enjoy its fruits, term extension of the sort contemplated in S. 483 does not tend to fulfill the public function of copyright. Rather, it imposes costs on the public without rendering back any compensating benefit.

Answer 2. In my testimony, I refer to S. 483 as potentially representing a "down payment on perpetual copyright on the installment plan." The question of how often, and under what circumstances, Congress would have to extend subsisting copyrights in order to run afoul of the "limited times" language of the Copyright Clause is an interesting one, which would be likely to be litigated seriously were this term extension measure to become law. The claim that S. 483 itself goes too far is certainly non-frivolous. Were I arguing the case, I would stress that the effect of this legislation (unlike, for example, that of the term-related provisions of the Copyright Act of 1976) is to create a complete 20-year hiatus in works entering the public domain through the operation of law—a result which is (in my view, at least) altogether beyond what the framers might have had in contemplation.

Answer 3. Some copyright contracts do specify a set period during which the rights which are being granted may be exploited by the assignee or licensee. Such contracts would not be materially affected by term extension. Many other agreements contain language granting rights for the entire duration of the copyright in the work, and frequently include references such as "and any extensions thereof." Generally speaking, the benefit of later-occurring term extensions can be said to have been "bargained for" in such a contract—although one suspects that such bar-

gains seldom entail any additional consideration. As a matter of contract law, strictly speaking, such agreements probably are enforceable; as a matter of copyright policy, they are most questionable.

It is for this reason that when the 19-year extension of the copyright renewal term was enacted in the 1976 Copyright Act, the Congress also provided a "termination of transfer" provision in Sec. 304(c) that allows authors and their successors to recapture some previously alienated rights in the extended renewal term. As I suggested above, in my response to question (1), I think that if further copyright term extension is enacted, the applicability of the law's termination provisions to the new extended term should be made clear beyond peradventure.

Answer 4. I do not have a reliable, up-to-date "scorecard" on implementation of the European Union's Term Extension Directive. As of late 1994, when the last update on implementation was published by the Commission of the European Communities, only Belgium had enacted any new legislation. Although the July 1995, deadline for implementation has passed, press reports indicate that in several countries of the Union it is unlikely to occur before 1996. As yet, the benefits that our copyright owners might enjoy in Europe are, for the most part, still in the future. Certainly, this suggests that it is less than urgent that the U.S. move immediately, rather than deliberating further on whether (and if so, how) to enact term extension.

I believe that there may be another reason to proceed cautiously as well. It is my understanding that S. 483 is not designed to have any retroactive effect—that, in other words, the term extension it contemplates would be available only to works which are protected by copyright at the time the legislation takes effect. The European Union Directive, by contrast, would restore protection throughout the Union for any work which—although public domain in some nations—was subject to protection anywhere in the Union on July 1, 1995; this could amount to a significant number of works, given the fact that Germany has had a copyright term of life plus 70 years p.m.a. in place since 1965. In recent years, we have discovered that the countries of Europe are sometimes grudging in their willingness to acknowledge the principle of "national treatment," insisting instead on "material reciprocity" as the basis for extending newly created benefits under their copyright national laws to American copyright owners. At the very minimum, we must assure ourselves that after we have incurred the costs of domestic term extension, American copyright owners will not continue to be denied the benefits of the additional 20 years of protection provided under the European Union Directive on the grounds that our failure to enact retroactive legislation falls short of fulfilling the criterion of "material reciprocity."

Furthermore, before incurring the domestic costs of copyright term extension in order to obtain benefits for U.S. copyright owners in Europe, we should be certain that this step is really essential to achieving the desired end; in fact, developments within the World Trade Organization under the new GATT Agreement may conceivably render it unnecessary. As Professor Jerome Reichman pointed out in his testimony on H.R. 989 to the House Judiciary Subcommittee on Courts and Intellectual Property, "if * * * the rule of the shorter term should fail to survive an attack based on Article 4 of the TRIPS Agreement [the "Most-Favored-Nation" provision] * * * 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." Although this is by no means a certain—or even a likely—outcome, the possibility cannot be discounted at this time. Until the issue has been resolved, it would seem premature to enact domestic term extension legislation as a means of gaining additional royalties abroad.

Answer 5. As a general matter, I do not believe that the international copyright relations of the United States, or the availability of protection for U.S. works abroad, will be enhanced by derogations from the principle of "national treatment." Although we are one of the relatively few major copyright exporting countries which does not apply the "rule of the shorter term,' I am convinced that, over time, we have earned more in international goodwill than we have lost in royalty payments by extending protection under U.S. law to foreign works on essentially identical terms to those which apply where domestic works are concerned. By contrast, were the United States to adopt the "rule of the shorter term" in its general international copyright relations, the resulting strain on our relations with the countries of the developing world might be considerable.

However, if we do choose to extend the basic domestic terms of protection for various classes of copyrighted works by 20 years, the impulse to link this extension with a move toward reciprocity in our international copyright relations would seem almost irresistible, as the question suggests. Moreover, under the EU Directive, European countries which protect software as a corporate work would be required to

extend protection for American computer programs for only 70 years from the time of creation, while under S. 483 those same works—and their European counterparts—would be protected in the United States for 95 years from the date of publication. Again, the only way to address this glaring 25-year disparity would be to adopt the "rule of the shorter term." For myself, I would be sorry to see the United States driven to making this important choice, with so many long term implications for international relations in the field of intellectual property law, as the largely unconsidered by-product of an effort to extract some additional years of royalties from the countries of the European Union.

Answer 6. The challenge of proving the claim that the "public domain" is a valuable factor in American public culture is somewhat like that of proving the hypothesis that oxygen is important to the survival of a laboratory animal. The only way to make a conclusive demonstration is to shut off the supply and observe the results. Unfortunately, by the time the hypothesis is proved correct, the experimental subject may already be beyond saving.

From 1790 onward, the United States has always had a copyright law which brought about a continuous influx of formerly-protected works into the public domain, and although it is impossible to demonstrate to a certainty that this is one reason why the United States now enjoys an enviable competitive position in the international cultural marketplace, we should not be too quick to dismiss the possibility of a connection. Certainly, the claim that a robust public domain has helped to make American arts and cultural industries successful seems more plausible than the alternative assertion that our traditional copyright system, with its emphasis on the enrichment of the public domain as a important public end, has somehow inhibited our cultural or economic development.

I hesitate to offer illustrations of the value of the public domain because any set of examples is subject, standing alone, to the criticism that even cumulatively, it adds up to only a trivial public benefit. In order for the true value of the public domain to be fairly assessed, it would be necessary not only to cumulate all the known and unknown instances in which consumers and creators have enjoyed easier access to works which could have been, but in fact were not, protected by copyright; it would also be essential to find some reliable way of assigning dollar values to such access. But how could one even count the volumes of history and biography that have been written because the journals and letters of their subjects were no longer subject to copyright, or (in a very different vein) the cases in which modern popular composers have used an identifiable portion of a classical composition or traditional tune in creating a new song? And how can one attach a dollar value to the availability of public domain archival photographs for documentary series like The Civil War or Baseball, or estimate the true value of the benefits which have flowed to readers and moviegoers as a result of the availability of classical literary characters (as old as those of Shakespeare and as new as those of Conan Doyle) to new authors.

And how can one know with any certainty what might have happened to various properties and projects in the absence of the public domain? Walt Disney might have chosen to make his animated films Alice in Wonderland and Pinocchio even if the works of Lewis Carroll and Carlo Lorenzini had not been in the U.S. public domain, but we will never be certain. Nor can we be sure whether the motion picture It's a Wonderful Life would have acquired its acknowledged status as a Christmas classic were it not for the fact that its public domain status made it widely available for holiday broadcasts.

It is equally difficult to put a value on activities which focus on the preservation of cultural heritage. One thing, however, seems clear: Were it not for public domain status, there might actually be fewer, rather than more, incentives to engage in such activities. Far from impeding the efforts of film archives, other non-profit institutions, and small for-profit companies, the public domain status of American motion pictures dating from before 1920 may actually have contributed to the efforts through which many such works have been assembled and restored, by eliminating any issues of rights clearances which might otherwise have interfered with the conservation process. Similarly, as I indicated in my testimony, one historian of publishing has indicated that "good editions of great works coincide with the end of copyright protection;" only then, it seems, does the prospect of securing a new, "derivative work" copyright in the edited version seem like an incentive worth a publisher's while to pursue.

In sum, the "value" of the public domain is difficult to catalogue, and the costs of legislative initiatives which impinge on the public domain may be more difficult to measure than the benefits—in terms of additional royalties—which those initiatives may produce. But it is not the case that this "value" or those "costs" are merely trivial. To the contrary, they are simply different in kind—and potentially more significant in the long term.

In conclusion, I would like to comment on one theme in your questioning the witnesses at the September 20 hearing. Then, you raised the issue of film restoration and conservation by means of digital transfer, and asked whether anyone would have an economic motivation to go to such significant extent when the motion picture in question was in the public domain. Today, I would like to suggest that the answer is almost certainly "yes." This is for exactly the same reason that publishers have an economic incentive to make good new editions of literary classics—because the "value added" contributed by the firm or individual who improves on a work in the public domain generally constitutes the sort of new "authorship" which is required to qualify the resulting product for protection as a "derivative work." Of course, such a copyright gives the editor or restorer no rights in the original, public domain original—but it does give him or her an exclusive right to the improved, and more marketable, new version. Indeed, the way in which this legal dynamic encourages re-use of public domain material is one of the principle justifications for the extensive protection available for "derivative works" under United States copyright. To return to the specific instance, I have no doubt that the skilled choices involved in digital transfer of a motion picture, like those required in performing film conservation activities in general, would ordinarily be found to involve the elements of "selection and arrangement" and the "minimal level of creativity" that the Supreme Court has stated [in *Feist Publications, Inc.* v. *Rural Telephone Service Co., Inc.,* 499 U.S. 340 (1992)] are needed to sustain a valid copyright.

If I were to generalize from this example, it would be to say that far from being "cultural orphans," lonely and uncared for in a harsh world where the iron law of the market rules, works in the public domain—be they movies, books, photographs, or paintings—have several potential "homes." They may find shelter in the libraries, non-profit archives and other institutions which exist, among other things, to safeguard our accumulated cultural heritage. Or, thanks to the operation of the copyright law, they may find themselves "adopted" by large or small companies which see the possibility of a return on the investment which would be required to make a new "derivative work" using the public domain original—whether the new work is an adaptation to a new medium, or a faithful restoration. There could be no better demonstration of the special qualities of our copyright system. And like the public domain itself, those qualities are worth preserving. Thank you for the opportunity to respond to the committee's questions. Please let me know if I can be of further assistance.

Sincerely,

PETER JASZI,
Professor of Law.

ADDITIONAL SUBMISSIONS FOR THE RECORD

JOINT PREPARED STATEMENT OF THE COALITION OF CREATORS AND COPYRIGHT OWNERS IN SUPPORT OF S. 483, 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 S. 483, The Copyright Term Extension Act of 1995.[1] We express our gratitude to Chairman Orrin Hatch, who has introduced this vital legislation, and to his co-sponsors. As we will show, S. 483 is necessary if our country is to maintain its preeminent 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 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 Hatch introduced S. 483, 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

[1] We also express our support for H.R. 989, the companion bill to S. 483, and our gratitude to Congressman Carlos Moorhead and his co-sponsors for introducing this much-needed legislation. We are especially thankful to all the co-sponsors of both S. 483 and H.R. 989 for the broad Congressional support for copyright term extension.

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, the 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.[2] 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 the use of copyrighted materials. Copyrighted materials, whether 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 by 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

[2]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.

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 or 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.[3] Authoritative commentators. have stated that, under both conventions, unless internal law provides otherwise, the rule of the shorter term applies.[4] 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.[5]

According to Nimmer, "most of the countries that are significant for copyright purposes" follow the rule of the shorter term.[6] In addition, the rule is usually applied by statute or other express statement of the Government.[7]

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

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[3] 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).

[4] 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)).

[5] See 3 Nimmer, § 17.10[A] at 17–49 n.29.

[6] *Id.* at 17–55

[7] *Id.*

Hungary—by statute
India—by government decree
Israel—by statute or government order
Italy—by statute or government decree
Japan—by statute
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."[8]

"[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."[9]

"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 communications media as Telstar, many legal problems could also result from this discrepancy."[10]

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 export markets."[11]

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 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

[8] 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).

[9] Id. at 1866 (statement of Abraham L. Kaminstein, Register of Copyrights).

[10] Id. at 32 (statement of George D. Cary, Deputy Register of Copyrights).

[11] 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).

international copyright community, and would bring about a great and immediate improvement in our copyright relations."[12]

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."[13]

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 seems to be no valid reason why an American should receive less protection than his European colleagues."[14]

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."[15] 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."[16]

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.

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.[17] 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 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.

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[12] H.R. Rep. No. 83, 90th Cong., 1st Sess., 101–02 (1967).

[13] 113 Cong. Rec. 8501–02 (1967).

[14] 114 Cong. Rec. S. 1703–04 (daily ed. May 1, 1968) (letter by Howard Hanson, Director, Institute of American Music, University of Rochester).

[15] S. Rep. No. 983, 93d Cong., 2d Sess., 169 (1974).

[16] 122 Cong. Rec. 3834 (1976).

[17] 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.

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.[18] 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 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. S. 483 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";[19] in 1976, 72.9 years;[20] in 1990, 75.4 years;[21] and projected for 1995, 76.3 years.[22])

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[23] to about 76 years now) should be reflected in an increase from the international 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-

[18] 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.

[19] 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).

[20] Statistical Abstract of the United States 1992, at 76 (Dept. of Commerce).

[21] Id.

[22] Id.

[23] 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.

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 those 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 beginning 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 S. 483 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 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. S. 483 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.

American Music Center, Inc., 30 West 26th Street, Suite 3001, New York, NY 10010, (212) 366–5260.
American Society of Composers Authors and Publishers (ASCAP), One Lincoln Plaza, New York, NY 10023, (212) 621–6000.
AmSong, Inc., 545 Madison Avenue, 4th Floor, New York, NY 10019, (212) 355–0800.
Artists Rights Society (ARS), 65 Bleecker Street, 9th Floor, New York, NY 10012, (212) 420–9160.
Association of Independent Music Publishers (AIMP), P.O. Box 1561, Burbank, CA 91507–1561, (818) 842–6257.
Broadcast Music Inc. (BMI), 320 West 57th Street, New York, NY 10019, (212) 586–2000.
Dramatists Guild, Inc., 234 West 44th Street, New York, New York 10036, (212) 398–9366.
Dramatists Play Service, 440 Park Avenue South, New York, NY 10016, (212) 683–8960.
Graphic Artists Guild, 11 West 20th Street, New York, NY 10011–3740, (212) 463–7730.
Motion Picture Association of America, Inc., 1600 Eye Street, N.W., Washington, D.C. 20006, (202) 293–1966.
Music Theatre International, 545 Eighth Avenue, New York, NY 10018, (212) 868–6668.
Nashville Songwriters Association International, 15 Music Square West, Nashville, Tennessee 37203, (615) 256–3354.
National Academy of Songwriters, 6381 Hollywood Boulevard, Suite 780, Hollywood, CA 90028, (213) 463–7178.
National Writers Union, 873 Broadway, Suite 203, New York, NY 10003, (212) 254–0279.
Screen Actors Guild (SAG), 1515 Broadway, New York, New York 10036, (212) 944–1030.
SESAC, Inc., 421 West 54th Street, New York, NY 10019, (212) 586–3450.
Songwriters Guild of America, 1500 Harbor Boulevard, Weehawken, NJ 07087, (201) 867–7603.
Visual Artists and Galleries Association, Inc. (VAGA), 521 Fifth Avenue, Suite 800, New York, NY 10175, (212) 808–0616.
Volunteer Lawyers for the Arts (VLA), 1 East 53rd Street, 6th Floor, New York, NY 10022, (212) 319–2787.
Writers Guild of America, East, 555 West 57th Street, New York, NY 10019, (212) 767–7800.

PREPARED STATEMENT OF THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS

Mr. Chairman, you have led the way in recognizing the importance of copyright term extension, as you have led the way on so many issues vital to America's creators and copyright owners. ASCAP is grateful to you and your co-sponsors, Senators Thompson and Feinstein, for introducing S. 483, the Copyright Term Extension Act of 1995.

ASCAP exists as a one-step clearinghouse for the licensing of nondramatic public performances of the copyrighted music written and owned by our more than 65,000 composer, lyricist and music publisher members. An important part of our function is to serve as an administrative convenience for music users, enabling them to use our members' intellectual property easily and for a reasonable fee. All too often users fail to recognize the service ASCAP provides to them in this regard.

ASCAP distributes the license fees it collects as royalties to its members. These royalties are the largest single source of income to songwriters. In its simplest terms, these royalties are the mainstay of our members' lives, enabling them to work in their creative careers, feed their families, and create the music that so enriches our nation's culture and economy. We wish to focus on the economic ramifications of S. 483, for your bill will undeniably bring economic benefits to the United States.

We will address those economic benefits in the context of the music business. But, as you well know, we are but one of many copyright industries, of great economic significance to the United States, which have an interest in seeing this legislation enacted. For all of those industries, passage of S. 483 will help the U.S. economy, while failure to pass it will harm the U.S. economy.

The use of copyrighted works is not limited by national boundaries. The international market for copyrighted works is immense and growing. The development of the electronic information superhighway will only increase that demand. As S. 227—the digital performing rights in sound recordings legislation which you sponsored and shepherded through Senate passage earlier this year—demonstrates, we must strengthen rights in our nation's intellectual property to moot this challenge. And, because music is truly the international language, music may be taken as a good example of why S. 483 is so necessary.

The happy fact is that the creativity the world demands—the copyrighted works the world will pay for—is overwhelmingly our country's copyrighted works. United States popular culture sets a competitive standard for the world. And, therefore, our balance of trade from domestic copyright industries is to our overwhelming advantage. Indeed, imagine what our economy would be like of our entire balance of trade mirrored that in copyrights.

For example, last year ASCAP sent $27 million overseas for performance of foreign music here, but ASCAP songwriters and publishers received $103 million for performances of American music abroad. And if the amounts received for such performances by foreign subsidiaries of American music publishers were counted, the total would be about $200 million. All that money went to American writers and publishers—American entrepreneurs.

Now, we are faced with a unique opportunity to strengthen this benefit to the U.S. economy. As you know, the European Union has adopted a Directive, effective this year, 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," EU countries will not protect American works for those 20 years unless our copyright term is lengthened by 20 years.

Without enactment of your bill, American songwriters and music publishers, including the surviving spouses and children of American writers, will have less protection than our European counterparts. What is worse, we and our country will lose the 20 years of royalties which we would otherwise earn if our country's copyright terms were equal to that of the EU's.

ASCAP has estimated that the loss of performing rights revenues earned in Europe by ASCAP writers and music publishers for the oldest 20 years of copyrighted music—the revenues that would be lost to our country if S. 483 is not enacted—would amount to about $14 million annually. When we add the revenues received by other U.S. performing rights societies, and for the licensing of mechanical rights, the total is about $30 million. And those figures grow exponentially when we consider revenues to record companies, and other copyright industries such as motion pictures, television and book publishing.

The loss of these foreign revenues would not be fair to those who work so hard to create America's music, nor to those who invest considerable sums to bring that music to the public, nor to our fellow-citizens who rely on a strong United States economy. Our country needs all of the trade surplus which American creative talent can generate, and enactment of S. 483 will ensure that we do not lose a significant portion of the trade surplus in intellectual property which we receive from Europe.

It is for these reasons, among many others, that the Register of Copyrights, the U.S. Commissioner of Patents and Trademarks, and the United States Trade Representative, have all strongly supported this legislation.

Mr. Chairman, some critics have concluded that this legislation may not directly benefit authors, and especially not songwriters, because the proposed 20 year extension of copyright protection may not necessarily go directly to them. This is simply a misunderstanding of the impact of this amendment on existing U.S. Copyright Laws which currently protect works first published in 1920 or thereafter. For every work of a natural author published from 1940 onward, the 20 year extension will become the property of the author or the author's heirs if they so elect, under the existing termination rights provisions in the law. For every work of a natural author published after 1920 but before 1940, the author or the author's heirs have already had an opportunity to recapture any extensions to the copyright term. If the copyrights had any value to them, they have already made their election under the law and will benefit from the 20 year extension.

Mr. Chairman, all of the many authors' groups who strongly support this legislation believe that the agreement on termination rights embodied in the 1976 Act adequately protects us in terms of the 20-year extension. If we tamper with it to make it more "pro-author," it could easily be argued that it should be changed in other ways and directions. Your bill now protects authors, and is supported by all elements of the copyright community. We want copyright term extension enacted, and we believe the only practical way to achieve this objective is to pass S. 483, without

significantly amending the terms of the U.S. copyright industry consensus amendment.

Mr. Chairman, 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 fail to act promptly, many great American creative properties will cease to generate revenues abroad for an additional 20 years. Freely available foreign exchange earnings, which would serve the economic benefit of our country and our citizens, will simply vanish.

Mr. Chairman, thank you, again, for introducing this vital legislation and for providing the opportunity for ASCAP to voice its strong support for S. 483.

AMERICAN BAR ASSOCIATION,
SECTION OF INTELLECTUAL PROPERTY LAW,
Chicago, IL, November 6, 1995.

Hon. ORRIN HATCH,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: At our Summer Conference in June of this year, the Section of Intellectual Property Law of the American Bar Association adopted a resolution favoring the enactment of S. 483, the "Copyright Term Extension Act of 1995," which you introduced on March 2.

Attached is a copy of our resolution and report in support of S. 483. We ask that it be made a part of the record of your proceedings on the bill.

The views expressed in the resolution and report represent those of the Section of Intellectual Property Law. They have not been approved by the House of Delegates or Board of Governors of the American Bar Association, and, accordingly, should not be construed as representing the position of the Association.

Sincerely,

DONALD R. DUNNER.

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 seem to impede the free movement of gods 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. Only country's culture now sets the standard for the world.

The consequences, 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 Berme 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 principal 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 benefits 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.

THE SONGWRITERS GUILD OF AMERICA,
Weehawken, NJ, September 27, 1995.

Hon. ORRIN G. HATCH,
Chairman, Senate Committee on the Judiciary, Dirksen Senate Office Building, Washington, DC.

DEAR CHAIRMAN HATCH: On behalf of the more than 5,000 members of The Songwriters Guild of America, I am pleased to enclose a statement strongly supporting S. 483, "The Copyright Term Extension Act of 1995." American creators deeply appreciate your leadership in introducing this important legislation and holding last week's hearing.

I would respectfully request that my statement be included in the hearing record on S. 483.

Thank you again for all your efforts on behalf of American songwriters.

With warm regards.

Sincerely,

GEORGE DAVID WEISS, *President.*

PREPARED STATEMENT OF GEORGE DAVID WEISS, PRESIDENT, THE SONGWRITERS GUILD OF AMERICA

On behalf of the more than 5,000 creators of American music who are members of The Songwriters Guild of America (SGA), I appreciate the opportunity to share with the Judiciary Committee our views on S. 483, "The Copyright Term Extension Act of 1995." Our position is straightforward. SGA, along with our colleague organizations in the coalition of Creators and Copyright Owners—which represents owners of all types of copyrighted works—enthusiastically supports S. 483. As a matter of equity, economic self-interest and cultural self-preservation, this important legislation should be enacted promptly.

SGA is a voluntary membership organization that represents songwriters throughout the United States and the estates of deceased SGA members. SGA provides a host of benefits to our members, including contract advice, royalty collection and audit services, and catalog administration. SGA and its Songwriters Guild Foundation are also committed to aiding and educating beginning songwriters through scholarships, grants and specialized Guild programs. For more than a dozen years I have been the nonsalaried President of SGA.

I am a working songwriter and my entire life has been devoted exclusively to my craft. You may have heard some of my music. I collaborated on the Elvis Presley hit "Can't Help Falling in Love." I also wrote "What a Wonderful World," recorded by, among others, the great Louis Armstrong, and "That Sunday, That Summer," originally recorded by Nat King Cole and featured on his daughter Natalie's album "Unforgettable." Another of my songs, "The Lion Sleeps Tonight," recorded over 30 years ago by the Tokens, thankfully is still popular today. You may also know "Lullaby of Birdland," "Mr. Wonderful," and "Stay with Me," a Bette Midler hit.

Term extension has been an issue of paramount importance to those of us committed to the protection of American composers and intellectual property generally for some time. In fact, this is the second time I have submitted testimony in favor of an extension on behalf of SGA. In 1993, prior to the introduction of legislation, I offered strong support for an extension in a proceeding conducted by the Copyright Office. The arguments I made then are still valid today, but developments internationally have made the need to pass S. 483 even more pressing. We are gratified that Chairman Hatch has taken the lead in the Senate in introducing term extension legislation and in moving promptly to hold hearings. We also appreciate the support already given to S. 483 by others on this Committee, notably Senators Feinstein, Thompson, and Abraham, as well as Senator Boxer.

Most importantly, a change in the copyright term in Europe has made the U.S. "out of tune" internationally. On July 1, 1995, in line with a 1993 Directive, the European Union harmonized the copyright term in all its member countries at a minimum of life of the author plus 70 years. This same EU Directive explicitly required that all member states adopt the "rule of the shorter term" with respect to the duration of copyright protection for foreign works in their countries. This means that if S. 483 is not enacted and the current U.S. term of life of the author plus 50 years is not extended, EU countries need not provide copyright protection to American

works beyond life-plus 50 years. American songwriters and other rights holders will thus have 20 years less protection in Europe than our European counterparts.

This is not only unfair to the writers I represent, and to other American rights holders, but it is unwise as a matter of economic self-interest and international trade policy. Let me explain.

It has been said many times that the whole world loves American music. The fact is that American intellectual property generally is the most sought after abroad and is one of the few bright spots in our balance of trade picture. The core copyright industries—musical recordings, movies and home videos, television programs, books, and computer software—represent a cornucopia of foreign sales, totalling over $40 billion. The equation is simple: we are a net exporter of intellectual property products to the EU; if we increase our copyright term to life-plus 70, we will gain an additional 20 years of foreign revenues from the EU and our trade balance will improve in the long term.

As Chairman Hatch has said, we cannot afford to abandon 20 years worth of valuable overseas copyright protection at a time when we face severe trade deficits in so many other areas. This is particularly so when the increased protection abroad will cost taxpayers and consumers at home absolutely nothing.

Beyond the need to protect our writers in international markets and the importance of the concomitant revenues, there are additional trade-based reasons to increase our copyright term. In negotiations with foreign countries on intellectual property matters, U.S. representatives have frequently been confronted with the argument that our own law does not provide the highest level of copyright protection. This argument has been used to resist U.S. calls for better protection for American works in foreign countries. If we do not now harmonize our term with the life-plus 70 term of the EU, it is all but certain that U.S. negotiators will be faced with similar claims. If the U.S. is to remain a leader in international copyright and discourage retaliatory trade practices, we must extend our copyright term.

There are other important reasons that passage of S. 483 is in the public interest. If we are to foster creativity we must make certain that writers are treated fairly and have the incentive to create new works. By assuring that creators can provide a legacy for their heirs, S. 483 will help on this score as well.

One of the principal reasons that Congress has previously extended the copyright term was to protect not only the creator but his or her children and grandchildren—that is, three generations. To some, the current term of protection in the U.S.—life plus 50 years for post-1978 works and a flat 75 year period for most pre-1978 works—must seem like a long enough time to meet this goal. But things have changed, even since the last term extension in 1976.

Like everyone, songwriters are now living longer, and increasingly many are blessed with children later in life. Particularly with respect to older works, these facts strongly militate in favor of a 20-year extension—if the desired goal of protecting three generations is to be realized. Today, unfortunately, copyrights often expire before even one generation of a composer's heirs has benefited. SGA has many estate members, the inheritors of the genius of a spouse or parent; they are particularly vulnerable without an extension.

There are innumerable composers whose works never reach their pinnacle of public recognition until after their death. Huerman Hupfeld ("As Time Goes By"), Vincent Youmans, and Charles Ives are just three examples. Whether it is because their music is avant-garde—or out of synch with what is currently popular—such artists toil in obscurity for most of their creative days. And suddenly, after their death, public recognition and financial rewards abound. Too late for the creator, but in time to nourish their heirs. Is it fair to penalize the heirs by shorter duration of protection? What was lost to the creator should not be also lost to his or her heirs.

And I can tell you from personal experience that it is impossible to predict when in a writer's life (or after it) a song will become a hit, if at all. Often a song can languish for decades before it gets recognition.

Some 28 years ago I wrote "What a Wonderful World" for Louis Armstrong. For over 18 years, the song was not a major or even recognizable hit in America. It never reached the charts of Hit Records; it did not enter the Hall of Hits licensed by my performing rights society; it was not used in any television show or motion picture. However, it was one of my most cherished copyrights because I so idolized Louis Armstrong. I only hoped that one day it would receive some public recognition.

Finally, eight years ago, the song suddenly achieved wide popularity in a major motion picture, "Good Morning Viet Nam," starring Robin Williams. As a juxtaposition to the devastation depicted by the movie's screenplay, "What a Wonderful World" was sung by Louis Armstrong, creating the counterpoint to the movie's

theme. After 18 years, the song finally became a recognized hit—in the recording world, as a major motion picture theme, and in my performing rights society.

If we are to encourage creativity, at a minimum we must offer to the thousands of my colleagues who struggle to earn a living the reasonable prospect that they can leave a legacy to their children and grandchildren—even if their compositions do not become commercially viable for many years. An additional 20 year term of protection will help guarantee that incentive.

There is yet another, related reason why a 20 year extension is important to creators. Technological developments over the last two decades have greatly increased the commercial life and value of copyrighted works, even those that are older. The CD and the VCR are obvious examples of new technologies that have and will increase creators' rewards. Moreover, expanded cable television, satellite services, and the "information superhighway" all will require programming—music and video. Creators and their heirs should benefit from these technological advances.

In closing, let me just address one argument that has been advanced against term extension—that by postponing the time when works enter the public domain, a longer term would frustrate the goals of wider availability and lower prices. Common sense would suggest just the opposite. Why would a music publisher or anyone controlling a copyrighted work invest funds to exploit—or restore—a public domain work when there is no assurance that they will be able to recoup their investment or turn a profit? The esteemed Harvard Law Professor Arthur Miller made this point cogently in a column in Billboard earlier this year:

"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. 'Extending Copyright Preserves U.S. Culture,' Billboard, January 14, 1995."

When a copyright enters the public domain, in the main there are no gainers; only losers. The marketplace, whether for books, records, movies, or any of the other performing arts, does not pass on to the public any savings supposedly achieved by using or adapting a public domain work. Theoretically, the use of a public domain song, book, drama or work of art should result in a lower price paid by the general public. But ask yourself: Is any book, movie or recording sold to the public at a reduced price because its subject matter has entered the public domain? In my experience, the answer is no. The price remains the same; only the creator loses—the payment for his or her labor.

S. 483 is good for American creators, American consumers, and the American economy. In short, it represents good public policy. SGA urges its prompt passage.

Thank you.

AUTHOR SERVICES, INC.,
October 4, 1995.

U.S. Senate,
Committee on the Judiciary, Washington, DC.
RE: Copyright Term Extension Act of 1995 (S. 483)

DEAR SIRS: Recently we attended the September 20th hearing concerning the above bill to show our support for this very important piece of legislation and we wish to file a statement with the Judiciary Committee in support of it.

This bill is very important to the intellectual property community and the US industry which relies upon copyrights for its income.

Our firm represents Mr. L. Ron Hubbard who has hundreds of works to his credit in many different genres, not only literary materials but also screen plays, written and recorded music, recorded lectures and motion pictures.

As Mr. Hubbard's literary agent, we understand the importance of the continued protection of copyrights. We work with a large number of other writers and artists who also support the passage of this bill.

I will not reiterate the supporting arguments at the hearing since you will have all this in the record, other than to say we fully agree with those statements.

We have addressed a number of concerns that were raised at the hearing in our letter to Senator Brown, a copy of which is enclosed.

The Copyright Term Extension Act is very important to authors, copyright owners and our overall economy as well as harmonization with the European Union. We appreciate your review of this matter.

Sincerely,

ALISON FINE,
Copyright Director.

AUTHOR SERVICES, INC.,
October 4, 1995.

Senator HANK BROWN
U.S. Senate, Washington, DC.
RE: Copyright Term Extension Act of 1995 (S. 483)

DEAR SENATOR BROWN: Recently we attended the September 20th hearing in Washington, DC which addressed the Copyright Term Extension Act of 1995 (S. 483) and were hoping we would have the pleasure of meeting you in person however we understand you were unable to attend due to other pressing matters.

After the hearing, we dropped by your office and discussed our views on S. 483 with your assistant, Carlos Retureta and left with him some information on Author Services to pass on to you. Author Services is a literary agency representing Mr. L. Ron Hubbard who wrote hundreds of works throughout his 50 year career as a writer as well as screenplays, film scripts, poetry and music. We are very supportive of S. 483 and seeing that it is passed into law as soon as possible.

We understand that you are possibly going to tack this bill onto the so-called Tavern bill (S. 1137) and that you have a few concerns.

We don't agree that the Tavern bill should be attached to this legislation. It would not be fair to hold up this important legislation that is the concern of many copyright owners nationwide for another bill that pertains to a completely separate issue.

To date, Belgium, Germany and Ireland have implemented the life plus 70 term while legislation to adopt the term is in progress in Denmark, Italy, Netherlands, Sweden and Finland. It is mandatory for the EU countries to implement this legislation and those remaining will be adopting the new term in the near future.

It would not be fair for European copyright owners to profit from their works in the US, while US copyright owners works would be freely used in the European Union countries without compensation.

For this reason it is even more urgent that the US not only keep in step but set an example of leadership to other countries in this respect.

I understand that you have concern that if the US adopts the life plus 70 term, we will be obligated to grant this longer term to authors of countries that have shorter terms. However there are also countries with longer terms such as Colombia (life plus 80) and Ivory Coast (life plus 99). The trend is towards the life plus 70 term and there will be more and more countries adopting this term with the major countries of the world leading the way. This will also be adopted back into the Berne protocol once the term passes into law here in the U.S., where it will eventually become part of the minimum standards of the Berne Convention itself. Congress could also choose to adopt the "rule of the shorter term" where the term would then be based on reciprocity.

I understand that you also had concern that the additional 20 years should go to the author rather than the copyright owner. This concern pertains to authors who assigned their rights to their work not being able to benefit from the extra 20 years of protection. The copyright act has built into it a termination clause which allows the author to terminate rights he signed over earlier should he wish to do this. Except for works published prior to 1933, this termination option is still available and therefore authors do have the option of benefiting from the extra 20 years of protection. This is covered in more detail in the testimony from the Register of Copyrights.

This also covers another concern that constitutionally the rights should go to the author rather than a copyright owner. However, an author is entitled to assign his rights and even after assigned, he has the option to terminate that agreement through the termination clause included in the copyright act as covered above.

Additionally I understand you were concerned with the question of how the 20 years relates to the constitutional reference to a limited time. It is only fair that an author and his heirs should be able to benefit from the copyrighted works. There have been cases where the copyrights expired within the lifetime of the creator. We feel that the term of copyright should extend for at least two generations.

The Copyright Term Extension Act is very important to authors, copyright owners and our overall economy as well as harmonization with the European Union. We urge you to support the passage of this bill into law.

Sincerely,

ALISON FINE,
Copyright Director.

MIDWEST TRAVEL WRITERS ASSOCIATION,
Kansas City, MO, October 3, 1995.

SENATOR HATCH: I understand that S. 483 is now under consideration, and that it and H.R. 989 would extend copyright from life of the author plus 50, to life of the author plus 70. This is an important step in protecting the works of U.S. writers here and abroad. On behalf of the Midwest Travel Writers Association I am writing to express support of this legislation, and urge you to do the same. Thank you.

Sincerely,

KATHRYN USITALO,
President, MTWA.

GRAPHIC ARTISTS GUILD,
New York, NY, September 26, 1995.

Ed Damich,
Special Counsel, Senate Judiciary Committee, Washington, DC.

DEAR MR. DAMICH: Enclosed is a submission for the record for the recent hearings on S. 483, the Copyright Term Extension Act.

Thank you for your attention.

Sincerely,

DANIEL ABRAHAM,
Vice President for Legislation.

PREPARED STATEMENT OF DANIEL ABRAHAM, VICE PRESIDENT FOR LEGISLATION, GRAPHIC ARTISTS GUILD

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 over 2,700 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 because 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?

WINDFALL PROFITS IN SUBSISTING COPYRIGHTS

As drafted, S. 483 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, manufacturers, distributors, etc., who are able to exploit 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, allowing the creator, or his or her heirs, to reshuffle the deck after thirty-five years.

Simply adding 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 the 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.

WORKS MADE FOR HIRE

American copyright law is unique in that it equates two classes of creators; creators-in-fact, and purchasers of works made for hire, or creators-at-law. Although all creative work is done by creators-in-fact, 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.

Creative work done as work made for hire benefits the creator-at-law at the expense of the creator-in-fact. 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 additional uses of his or her work. Work made for hire does not offer incentives to the creator-in-fact.

Copyrights held by creators-in-fact benefit both those creators and the licensees with whom they do business. In contrast, copyrights held by creators-at-law over the long run benefit the purchaser to the exclusion of the creator-in-fact. To encourage creativity, the term of works made for hire should not be extended, but should remain at seventy-five years. As there is no equivalent to American work for hire in the European copyright community, it is not necessary to extend the work for hire term to bring American law in line with European practice.

Granting term extension only to those copyrights held by creators-in-fact will encourage commercial entities seeking to profit from the longest possible copyright term to allow creators-in-fact to retain their copyrights, and to share to a larger extent in the profits derived from his or her work. Encouraging the retention of copyrights by creators-in-fact and their heirs will assure that the greatest number of people benefit from American creativity.

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 creators-in-fact, and deprives them of the ability to bargain effectively for either immediate benefit or for the benefit of their 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 become 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.

NATIONAL WRITERS UNION,
October 2, 1995.

Hon. ORRIN HATCH,
Chairman, Committee on the Judiciary, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The National Writers Union (NWU)—an affiliate of United Auto Workers representing more than 4,000 freelance writers in all genres—asks the record of the Senate Judiciary Committee to reflect our support of the Copyright Term Extension Act of 1995 (S. 483).

This support is tempered by concerns over two specific aspects of the current form of the legislation. The first is the amendment allowing the 20-year extension to vest with the party that controls the work at the end of the 50-year period. If an author's work is still valuable 50 years after his or her death, then the author's family, and not just the original publisher, should share in the benefits. Therefore, in connection with this bill, we would have liked to have seen the rights revert automatically to authors' heirs at the expiration of 50 years. Indeed, we regret that the timing of the public testimony on term extension did not allow for the NWU and others creators' representatives to participate.

Our second major concern is the informal proposal by some publishers that authors' unilateral termination rights under the copyright act also be extended by 20 years—a provision that would defeat the very purpose of term extension. To the extent that such an amendment might come up again, please note that the NWU, and our allies in the fields of art and photography, stand opposed. Above all else, copyright law must reflect the policy that authors be paid equitable remuneration for their creative works; disallowing the opportunity to renegotiate after 50 years would clearly deprive authors of that right.

The overriding issue in term extension, in our view, is the importance of global harmonization in the current copyright environment. This need was underscored by the European Union's adoption in 1993 of a single copyright term of life-plus-70. The current term under United States law, life-plus-50, is the shortest possible term under the Berne Convention, which adopted its minimum at a time when life expectancy was approximately 52 years. Today, with life expectancy averaging 76 years, life-plus-50 simply does not allow an author's heirs to enjoy the economic benefit of a work. Thus, even though implementing the 20-year extension will have the effect of delaying the trigger date at which some works will go into the public domain, we believe the advantages of international harmonization outweigh this inconvenience.

Finally, the NWU wishes to reaffirm its longstanding commitment to the principles of fair use. Like our friends in the library and academic communities, our members benefit from those principles in their own research. We note that under term extension, fair use will also simply extend an additional 20 years. It would be a mistake to commingle fair use with the debate over term extension.

Respectfully submitted,

JONATHAN TASINI, *President.*

ARIZONA STATE UNIVERSITY,
COLLEGE OF LAW,
Tempe, AZ, October 2, 1995.

Hon. ORRIN HATCH,
Senate Judiciary Committee, Washington, DC.
Attn: Mr. Shaun Bentley

HEARINGS RECORD ON S. 483 (COPYRIGHT EXTENSION)

DEAR SENATOR HATCH: I write with the request that you include this letter, the accompanying release signed by 50 United States copyright law professors, and my Written Testimony to the House Subcommittee on the copyright extension proposals be included in the record for the hearings you held on September 20 on S. 483.

I believe that very serious public costs will follow from adoption of the proposed copyright extension legislation.

This bill is not the "no lose" proposition that the special interests who are supporting it have claimed. It imposes a serious direct financial cost on the American public and represents an even more serious hindrance to the creation of new works necessary to maintain the United States leadership in international intellectual property exchanges.

I enclose a statement signed by some 50 copyright law professors against the extension, as well as my own testimony on behalf of most of these same professors before the House. These academics have nothing personally to gain or lose from this legislation, but they are desperately trying to bring into open debate the costs associated with it that will be borne by the public in money and in a diminished cultural heritage.

The supporters of this extension are no longer seriously arguing that 20 years tacked onto an already very long term will increase creation incentives (although I refute such claims explicitly in the accompanying House Written Testimony). I will focus here on the supposed international benefits of an extended term.

The claims of witnesses like Mr. Valenti should be scrutinized very carefully. He testified at the hearings that our copyright industries do about $45 billion in business each year abroad, a figure that I will assume is correct. What that figure does not say, however, is how much of that $45 billion is from current works, like "The Lion King," which in any event have some 75 years of copyright protection before them, and how much is from works from the 1920's that, absent extension, are due to enter the public domain in the next few years. Nobody has presented evidence before any Committee of Congress showing that international trade in works from the early decades of this century even favors the United States. Nor, even if it does favor the United States, has anyone demonstrated that it represents more than an infinitesimal fraction of our overall trade in copyright-protected works. Yet these old works are the real subject of the bill—nobody seriously maintains that the extra 20 years adds any incentives to authors for the creation of new works, because the present value of a speculative sum so far in the future is virtually zero.

In order to obtain revenues from Europe for U.S. copyright owners of old works—the great tree of money that is supposedly just waiting to be picked—the supporters of the extension have not pointed out that the U.S. public will have to pay as well, and not just to U.S. copyright owners but also to European copyright owners. Congress should at least do a study to determine just how great these costs will be before rushing forward to impose them on the American public. Please do not forget that the copyright owners on these old works have already been collecting royalty payments on them for a full 75 years. That's long enough for a fair return from their social contribution!

Moreover, tying up most of our cultural heritage in ever longer copyright means that current authors have fewer building blocks on which to base the new works that now constitute the huge preponderance of our international trade. It is not a coincidence that the international trade leader in current works—the United States—is also the country that has always most jealously guarded its public domain, keeping it alive and vibrant so that new authors have both the incentive and the tools necessary to create new works. The onset of the digital age is not the time blindly to follow the competition-choking philosophies of Europe just to put some royalty money into the pockets of a few U.S. owners of old copyrights.

I predict that even companies like Disney as well as the individual songwriters listed by ASCAP will come to regret their support for this legislation (at least those of them that are still creating). They are thinking only of what they have already created rather than looking to the future to see what they will be able to create from a diminished public domain. Many Disney works, like "Snow White," "The Little Mermaid," and "Pocahontas," are based on public domain characters and stories. Works that are not created because of licensing or transaction costs represent an incalculable loss to both economic and cultural development.

And in any event, it is clear that the "little guy" who creates and markets works on his or her own will be hindered by transaction costs from preserving and enhancing old works and creating new ones in the process. Many small writers, archivists, historians, biographers, teachers, film makers, and multimedia producers will simply find something else to do rather than try to negotiate copyright licenses from multiple owners so many years after the creative authors' deaths. These owners have benefited from the copyright for 75 years—now it's time that they pay their constitutional dues by letting the work go into the public domain.

This legislation benefits only special interests at a heavy cost to the American public.

Please feel free to call or contact me if I can be of any assistance whatsoever in this matter.

Sincerely yours,

DENNIS S. KARJALA,
Professor of Law.

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 an additional 20 years onto 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 time 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 a 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 induced 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 toady. 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 pro-

ducing 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 publics 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). 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.

Howard B. Abrams, University of Detroit Mercy School of Law.
Martin J. Adelman, Wayne State University Law School.
Howard C. Anawalt, Santa Clara University School of Law.

Stephen R. Barnett, University of California at Berkeley School of Law.
Margreth Barrett, University of California Hastings College of the Law.
Mary Sarah Bilder, Boston College Law School.
Robert G. Bone, Boston University School of Law.
Ralph S. Brown, Yale Law School.
Dan L. Burk, Seton Hall School of Law.
Amy B. Cohen, Western New England College School of Law.
Kenneth D. Crews, Indiana University School of Law—Indianapolis.
Robert C. Denicola, University of Nebraska-Lincoln College of Law.
Jay Dratler, Jr., University of Hawaii William S. Richardson School of Law.
Rochelle C. Dreyfuss, New York University School of Law.
Rebecca Eisenberg, University of Michigan Law School.
John G. Fleming, University of California at Berkeley School of Law.
Laura N. Gasaway, University of North Carolina School of Law.
Wendy J. Gordon, Boston University School of Law.
Dean M. Hashimoto, Boston College Law School.
Paul J. Heald, University of Georgia School of Law.
Peter A. Jaszi, American University, Washington College of Law.
Mary Brandt Jensen, University of Mississippi School of Law.
Beryl R. Jones, Brooklyn Law School.
Dennis S. Karjala, Arizona State University College of Law.
John A. Kidwell, University of Wisconsin Law School.
Edmund W. Kitch, University of Virginia School of Law.
Robert A. Kreiss, University of Dayton School of Law.
Leslie A. Kurtz, University of California at Davis School of Law.
Roberta Rosenthal Kwall, DePaul University College of Law.
William M. Landes, University of Chicago Law School.
David L. Lange, Duke University School of Law.
Marshall Leaffer, University of Toledo College of Law.
Mark Lemley, University of Texas School of Law.
Jessica Litman, Wayne State University Law School.
Peter S. Menell, University of California at Berkeley School of Law.
Robert L. Oakley, Georgetown University Law Center.
Harvey Perlman, University of Nebraska College of Law.
L. Ray Patterson, University of Georgia School of Law.
David G. Post, Georgetown University Law Center.
Leo J. Raskind, Brooklyn Law School.
David A. Rice, Rutgers-Newark School of Law.
Pamela Samuelson, University of Pittsburgh School of Law.
David J. Seipp, Boston University School of Law.
David E. Shipley, University of Kentucky College of Law.
Robert E. Suggs, University of Maryland School of Law.
Eugene Volokh, University of California at Los Angeles School of Law.
Lloyd L. Weinreb, Harvard University Law School.
Sarah K. Wiant, Washington & Lee University School of Law.
Alfred C. Yen, Boston College Law School.
Diane K. Zimmerman, New York University School of Law.

AMERICAN LIBRARY ASSOCIATION,
Washington, DC, October 5, 1995.

Hon. ORRIN G. HATCH,
Chairman, U.S. Senate, Committee on the Judiciary, Dirksen Senate Office Building, Washington, DC.

DEAR MR. CHAIRMAN: As representatives of five of the nation's principal library associations, with a collective membership of almost 80,000 individuals and hundreds of institutions, we wish to thank you for the invitation to supplement the record of the Senate Judiciary Committee's September 20th hearing on S. 483, the "Copyright Term Extension Act of 1995." Specifically, we are concerned that—by extending the term of copyright by 20 years for virtually all works and all purposes—S. 483 in its present form will adversely affect both libraries' preservation efforts and scholars' access to works, both published and unpublished, often at the core of their research and educational activities.

Accordingly, while our organizations have not expressly opposed this legislation we feel strongly that—for the reasons detailed for the Committee by Register of Copyrights Marybeth Peters—it should and can be modified to permit libraries, students, scholars and preservationists, to use copyrighted works for noncommercial

purposes during the last 20 years of the proposed term without impinging on either existing or future markets for such works. The reasons in favor of so modifying S. 483, we respectfully submit, are clear.

PRESERVATION

Works in the public domain may be freely copied—and thus preserved from deterioration for future generations—by whatever technological means best lends itself to the task. Copyrighted material, by contrast, may be copied for preservation purposes only by the means and in the quantities specified in Section 108 of Title 17 of the United States Code, or in keeping with the case-by-case doctrine of "fair use" codified at Section 107 of the statute.

Ambiguities in the current statute, however, have had a chilling effect on the preservation activities of libraries and other preservation-oriented institutions. Rather than risk costly and time-consuming litigation should they misstep in a "gray area," such institutions often defer preservation (or investment in costly digital preservation technology) until works enter the public domain.

Extending the term of copyright as proposed will thus, in many cases, push the legally "safe" preservation dates of copyrighted works past the point of effective preservation or leave libraries and others with works of substantially poorer quality to preserve. Such a result is neither necessary nor fair to those dedicated to the preservation of America's cultural heritage in all media, or to future generations of scholars and students who will reap the benefit of their labors.

ACCESS TO UNPUBLISHED AND OTHER COPYRIGHTED WORKS

Under current law, nonprofit libraries and archives are permitted to make certain copyrighted materials available to students and researchers without the prior permission of the author or payment of a royalty. The extent to which copying or excerpting is permitted, and how such material may be distributed between and among libraries, however, is narrowly circumscribed in statute.

Although institutions and researchers can, in theory, seek out the authors of individual copyrighted works and negotiate for their academic or other noncommercial use, that process is extremely time consuming and expensive. The broad academic dissemination and use of works, in practice, is thus dependent under current law on inclusion of those works in the public domain.

As written, S. 483 would defer by decades the entry into the public domain of works which have had no commercial value and, indeed, for which a market may never develop. To that extent, the legislation sweeps far more broadly in its effect than necessary to accomplish its aim of extending the time during which commercially valuable works may generate revenues for their creators or owners.

In sum, Mr. Chairman, the genius of American copyright law is that it has succeeded in balancing the intellectual property rights of authors, publishers and other copyright owners with society's overarching need—as enshrined in the Copyright Clause of the Constitution—to "promote the progress of Science and useful Arts." Accordingly, in keeping with the Framers' intent, past congressional precedent, and the most recent recommendations of the Register of Copyrights and Librarian of Congress, we urge you and your colleagues on the Judiciary committee to assure that S. 483 be narrowly amended to preclude the inadvertent and unnecessary consequences for the public described above.

We thank you again for this opportunity to articulate the public's need, as met by the nation's libraries and archives, and look forward to working closely with you, other members of the Committee, and representatives of all affected industries to craft appropriate legislative solutions to these most serious issues. To that end, we respectfully request the opportunity to meet with you as soon after the Senate reconvenes as possible to discuss that text of a potential amendment to S. 483 and the status of our ongoing negotiations with the option picture, music, publishing and information industries.

Sincerely,

ROBERT OAKLEY,
Washington Affairs Representative,
American Association of Law Libraries.

CAROL C. HENDERSON,
Executive Director-Washington Office,
American Library Association.

DUANE WEBSTER,
Executive Director,
Association of Research Libraries.

CARLA FUNK,
Executive Director,
Medical Libraries Association.
DAVID BENDER,
Executive Director,
Special Libraries 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 Association of Research Libraries [ARL] is a not-for-profit organization representing 119 research libraries in the United States and Canada. Its mission is to identify and influence forces affecting the future of research libraries in the process of scholarly communication. ARL programs and services promote equitable access to, and effective use of, recorded knowledge in support of teaching, research, scholarship, and community service.

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 sciences 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.

AMERICAN FILM HERITAGE ASSOCIATION,
Orland Park, IL, October 2, 1995.

Re statement on S. 483 for the record.

Hon. ORRIN HATCH,
Senate Judiciary Committee,
Dirksen Senate Office Building, Washington, DC.

DEAR SENATOR HATCH: Enclosed you will find a press release from the Coalition of Copyright Professors, opposing the copyright extension as described in S. 483. The American Film Heritage Association is in complete agreement with the position of the Coalition. The effects of the extension of the term of copyright have not been fully assessed.

The Coalition also wrote a commentary to the U.S. Copyright Office on the term extension. In that report, Professor Dennis Karjala of Arizona State University wrote and I quote:

"The gist of (our) Comment is that copyright protection is a balance between an incentive for authors to create desirable new works and the public interest in a large and vibrant public domain from which later authors can extract materials for new creative works. It is implausible that an additional twenty years of protection—already life of author plus 50 years—will provide any further incentive than the current term. Consequently, the proposed extension would bring about a reduction of the public domain without a corresponding public benefit."

There is an important industry in the United States, dependent on film in the public domain. Past copyright legislation has reduced the number of motion pictures in public domain considerably, causing hardship for this industry. Commercial film archiving and film preservation has already stopped for works created after 1962 thanks to "automatic renewal." This extension will further hamper commercial archives.

It will also stop the release of silent films from the 1920's, painstakingly and with great expense restored by commercial archives. Some of these early works were restored with public funds at the Library of Congress. These works should be allowed to be in the public domain after 75 years, not held from distribution because of an extension in copyright. After all, our tax dollars paid for the restoration! Film makers and new authors who produce historical film documentaries will lose a great deal of valuable public domain footage through copyright extension. Creativity will suffer with this extension, by virtue of its unpredicted economic consequences. The preservation of "Orphan Works" as recognized in "Redefining Film Preservation: A National Plan. Recommendations of the Librarian of Congress, in consultation with the National Film Preservation Board August 1994" will be adversely affected.

Orphan works were defined and recognized in the National Plan of the National Film Preservation Board, Recommendations of the Librarian of Congress. Films from the 1920's could contain as much as 75 percent of motion picture works no longer owned by anyone, with no traceable lineage, called Orphan works. The studios own a very small portion of films produced in this period. Orphan films comprise the bulk of this film era. Those Orphan films now owned by defunct companies and under copyright are ready for preservation by commercial archives. Commercial archives preserve orphan works at no cost to the public, in exchange for the right to market the works through public domain. Those non-studio Orphan films presently preserved by commercial archives will be abandoned because public domain allowed the economic incentive to preserve them.

The "blanket" 20 year extension goes beyond the bounds of copyright law overseas. Harmonization with foreign copyright law was never part of the purpose of the Constitution. With works for hire, U.S. copyright owners now enjoy superior coverage compared to their European counterparts. Where is the benefit for the public with an extension for works for hire to 95 years?

If this legislation would apply to new works only, there will be minimal effects on present commercial film preservation efforts. Yet the issue of public domain constriction would not be addressed. H.R. 989 simply makes it more difficult for new authors and other creators to flourish, all to create a favorable economic future for a minority of owners of intellectual property.

Examine the concerns of the Coalition of Copyright Law Professors, 44 prominent law professors all in agreement in their opposition to the extension. These professors have no special economic interest in S. 483. Instead, they are only guilty of encouraging the best copyright law in the United States, benefiting all of the citizens, not just a well-financed and well-connected minority.

Fundamentally, the term extension will cost the public billions of dollars over the course of the next two decades in royalty payments alone. This money will come from the pockets of ordinary consumers, who can little afford further erosion of their economic conditions. The public depends on its elected representatives to make educated decisions, with the best evidence on hand before voting for major changes that would affect their day-to-day existence. There are other groups and parties that will be hurt financially such as libraries. Again, I would ask: Where is the public benefit?

There are some questions and concerns Congress must address in S. 483.

If this is a bill to benefit authors, then shouldn't the extension revert to the authors or descendants, and not remain in the hands of the corporate copyright owner or other transferee?

Copyright owners in this century have worked within a rich public domain and our United States copyright laws have fostered the greatest creativity in the world. Those same copyright owners now seek an extension in a new copyright environment. This is at the expense of new authors because of the diminished public domain the extension creates. Doesn't this bill favor old authors and copyright owners, vs. our NEW authors in this country?

There is a constitutional issue here. Regular extensions of copyright (the last extension was in 1976) does not fit within the definition of limited term.

Copyright protection is a balance between an incentive for authors to create desirable new works and the public interest in a large and vibrant public domain from which later authors can extract materials for new creative works. Would the additional twenty years of protection—already life of author plus 50 years—provide any

further incentive than the current term? The proposed extension will bring about a reduction of the public domain without a corresponding public benefit.

If this legislation would apply to new works only, there would be minimal effects on new authors. S. 483 creates a favorable economic future for a minority of owners of intellectual property. The issue of public domain constriction simply makes it more difficult for new authors and other creators to flourish.

What studies have been made to evaluate the economic costs of this extension for the American people? How much will they pay over 20 years? Will not royalties be paid for 20 additional years by all American citizens for music, films, books, clearance costs, and all other performances of copyrighted works be a huge expense to the average American? The revenues from 1920's works overseas will not overshadow what Americans will pay in additional royalties. Americans will also be paying royalties longer for all foreign copyrights with the extension.

Should producers of new works, i.e. aspiring film makers and documentarians, be burdened with 20 years of additional costs for music clearances, clip clearances, book clearances, and other rights? These additional costs hamper creativity, and the purpose of copyright.

These questions must be answered as soon as possible before S. 483 moves further in the process towards codification.

There is also an unintentional restoration provision in the bill. Paragraph 17USC304(b) which, with the changes described in S. 483, appears to restore copyrights to items that have already fallen into the public domain. The intent of this bill is not to restore the public domain. Replace the existing section 304(b) with the following: "Any copyright still in its renewal term at the time that the Copyright Term Extension Act of 1995 becomes effective shall enjoy a copyright term of ninety-five years from the date copyright was originally secured."

I've enclosed relevant papers on this issue for the record. The study of the Coalition of Copyright Professors, the Testimony of Professor Karjala at the House hearing on H.R. 989, and my personal submission to the Film Preservation Study of 1993 regarding copyright and the constriction of the Public Domain. We also include some amendments to the bill, but this is a "band aid" approach to this issue.

We oppose this legislation in its entirety due to the problems raised in this letter,

Sincerely,

LARRY URBANSKI, *Chairman.*

PROPOSED AMENDMENT TO H.R. 989

DESCRIPTION OF PROPOSED AMENDMENT

The proposed amendment would allow the extended term for individual authors but would not extend the term of works made for hire.

TEXT OF PROPOSED AMENDMENT

Delete Section 2(A) of the bill (relating to section 301(c) of the Act).

Delete Section 2(B)(3) of the bill (relating to section 302(c) of the Act).

Delete Section 2(D)(1)(A)(I)(I) (relating to section 304(a)(1)(B) of the Act.

Delete Section 2(D)(1)(A)(II)(I) (relating to section 304(a)(2)(A) of the Act).

Amend Section 2(D)(1)(A)(III) (relating to sections 304(a)(3) of the Act) to read: In paragraph (3)—

(I) In subparagraph (a)(I) by striking "47 years" and inserting "47 or 67 years, as the case may be"; and

(II) In subparagraph (b) by striking "47 years" and inserting "47 or 67 years, as the case may be ".

Amend Section 2(D)(2) relating to the Copyright Renewal Act of 1992) to read:

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

(A) In subsection (c)—

(I) By striking "47" and inserting "47 or 67";

(II) By striking "(as amended by subsection (a) of this section)"; and

(III) By striking "effective date of this section" and inserting "effective date of the Copyright Term Extension Act of 1995"; and

(B) In subsection (g)(2) in the second sentence by inserting before the period the following: ", Except each reference to forty-seven years in such provisions shall be deemed to be 47 or 67 years in accordance with the Copyright Term Extension Act of 1995".

EXPLANATION OF REASONS FOR PROPOSED AMENDMENT

Corporate authors make investment plans based on periods considerably shorter than even the current 75-year period of protection, much less on a 95-year period. Neither the "natural rights" nor the "two generations of descendants" arguments have any application to corporate authors nor has there been any showing that international trade in works made for hire from the early part of this century (the works that would most benefit from the extension) is favorable to the United States.

DESCRIPTION OF THE PROPOSED AMENDMENT

The proposed amendment would institute a "no injunction" regime in the extra 20-year periods that are added by this legislation to the copyright terms of protection. During this period, copyright owners whose works have been used without a license would continue to have the right to seek judicial damages (essentially a court-determined license fee) but the court would not have the power to enjoin the new work off the market. As a necessary incident thereto, criminal penalties, impoundments, and statutory damages during the extra 20-year periods would also be unavailable.

TEXT OF PROPOSED AMENDMENT

Section 3 ("Effective Date") of the bill should be renumbered as "Section 4" and the following Section 3 added to the proposed bill:

SEC. 3. REMEDIES DURING EXTENSION PERIODS.

(a) Subsection (a) of section 502 of title 17, United States Code is amended by inserting before the period the following: ", Except that this section 502 shall be inapplicable to any action brought after the date on which the copyright would have expired under the law in effect prior to the effective date of the Copyright Term Extension Act of 1995".

(b) Subsection (a) of section 503 of title 17, United States Code, is amended by inserting before the period the following: ", Except that this section 503 shall be inapplicable to any action brought after the date on which the copyright would have expired under the law in effect prior to the effective date of the Copyright Term Extension Act of 1995".

(c) Section 504 of title 17, United States Code is amended—

(A) In subsection (a), paragraph (2), by inserting before the period the following: ", except that no statutory damages shall be awarded with respect to any infringements taking place after the date on which the copyright would have expired under the law in effect prior to the effective date of the Copyright Term Extension Act of 1995".

(B) In subsection (b), by adding the following sentence at the end: "Notwithstanding the foregoing, damages for any infringement taking place after the date on which the copyright would have expired under the law in effect prior to the effective date of the Copyright Term Extension Act of 1995 shall be limited to that portion of the infringer's profits that the value of the use of the infringed work in the infringer's work bears to the value of the infringer's work as a whole."

(d) Section 506 of title 17, United States Code, is amended by inserting before the period the following: ", Except that this section 506 shall be inapplicable to any infringements taking place after the date on which the copyright would have expired under the law in effect prior to the effective date of the Copyright Term Extension Act of 1995".

EXPLANATION OF REASONS FOR PROPOSED AMENDMENT

As currently written, the proposed legislation would generate substantial costs. These costs consist of two distinct parts. The first is the economic wealth transfer from the consuming public to the owners of old copyrights on works that have retained economic value. The second is the cost of a diminished public domain that provides less fertile ground for current creative authors to cultivate new works. This impoverishment of the public domain that would result from an extension of the term is far greater than necessary to supply a continued revenue flow to the owners of those relatively few economically valuable copyrights that will otherwise expire in the next few years. Rather, all works published after 1920 will remain out of the public domain for an extra 20 years, including that vast majority that no longer have economic value (if, indeed, they ever did).

The longer copyright term exacerbates the problems even of those current authors who wish only to make use of old works that lack economic value. The problem of locating and securing permissions from multiple owned copyrights so long after the author's death is itself a disincentive to making use of the work, even if permission

can generally be expected when the copyright owner is located. An even more serious problem is that a requisite number of the multiple owners often cannot be located. If the current author goes ahead and uses the work on the assumption that permission would have been granted, the powerful remedies of copyright, such as impoundments and absolute injunctions against use, can be used by the copyright owner to hold the new work hostage, after much time, energy, and money has been invested into its creation. Rather than take this risk, current authors and publishers must refrain from using even material of only nominal economic value in their new works unless they can expressly obtain permission from the copyright owners.

This situation could be alleviated significantly if current authors knew they would not be enjoined from publication of their new works but would only have to pay a court-determined royalty based on the value contributed by the work used to the new work. Consequently, rather than flatly extending the full copyright period for all works about to enter the public domain, it would be much better to institute a "no injunction" regime, effective with respect to works 50 years after the death of the author and continuing for 20 years. Such a scheme would provide a continuing royalty to the owners of copyrights in economically valuable works, which represents a significant cost to the public, but will at least permit current and future authors to use these old works, 50 years after the authors death, in creating new works.

As a practical matter, it is unlikely that this limitation on remedy in the extra 20-year period will have any effect on works with ongoing economic value. For such works, whose copyright owners can be identified, it is almost always be cheaper and easier for the current user to negotiate a license rather than bear the costs of the litigation that is certain to ensure from an unlicensed use. The practical effect will therefore be seen with respect to so-called "orphan works," whose copyright owners are unknown or cannot located. Most of these works have little or no economic value (which is the reason the copyright ownership has faded into obscurity). Current and future authors seeking wishing to make use of such works could do so with the knowledge that if the copyright owner eventually does step forward, the often heavy investment in the new work will not be fully lost. Yet, that copyright owner will receive his or her share of the value of the work used.

It should be noted that, although in general the Berne Convention prohibits compulsory licensing schemes under copyright, this proposal would not be in violation of Berne. Berne only requires protection for 50 years after the death of the author, and the suggested "no injunction" scheme would not go into effect until the full Berne period had expired. Berne permits giving no protection whatsoever 50 years after the author's death. It cannot violate Berne to give some protection, although less than the full panoply of exclusive rights and remedies of copyright, to works that are older.

FILM PRESERVATION 1993: A STUDY OF THE CURRENT STATE OF AMERICAN FILM PRESERVATION

VOLUME 4: SUBMISSIONS—JUNE 1993

REPORT OF THE LIBRARIAN OF CONGRESS

MOVIECRAFT, INC.,
TV'S MAGIC MEMORIES. HOME VIDEO,
Orland Park, IL, January 19, 1993.

STEVE LEGGETT,
Library of Congress, Washington, DC.
National Film Preservation Board, Library of Congress

DEAR BOARD MEMBERS: My archive, Moviecraft, is a commercial archive located in the midwest. As chairman of the Film and Image Preservationists Against Automatic Copyright Renewal the sentiments I state here are felt by hundreds of businesses, archives, film makers, and individuals involved in commercial archiving and film preservation.

Moviecraft's collection is approximately 10 million ft. of film, primarily 16mm, with a small percentage of 35mm. Our subject matter covers abandoned educational, industrial, commercial, features, television, early short subjects—literally anything in motion pictures. Most of this type of material are discards—films of historical relevance, but outdated and no longer of use to the original maker.

We employ two people full time and some part time help. No external funds for preservation are used. We are a business. We look to the sale of footage to film mak-

ers, as well as our home video line, to support our efforts. Priorities are on more salable footage, but this does not hinder the archiving of more obscure industrial or educational films. Viewing copies are made on video. Original elements are usually lost in these types of films, so prints in some cases are pieced together from positive prints. We have converted approx. 100 reels of Nitrate 35MM that was refused by the National Archives due to lack of funds for transfer to safety in the 80's. These included parts of Tiffany features, World War I footage, and Buffalo Bill Wild West Show footage. We presently have the reals on 16MM negative.

Our collection is available to researchers for study. We are in the process of entering the collection on data base. For a nominal charge ($40 per hour) we offer our films on VHS viewing cassette. Material in our home video line also allows for public access. The material in our library, covering 1900 to 1964, is primarily in the public domain. We use independent researchers, reference books, and the Library of Congress to verify the works are abandoned.

The most pressing preservation problems we face are the changes the copyright law through Public Law 102–307.

This new law causes extreme, if not insurmountable problems in the areas of film archiving and preservation for abandoned works covering the years 1964 to 1978.

Registered works are now automatically renewed. In abandoned motion pictures, this is devastating. Abandoned motion pictures, which compromise approximately 50% of registered works (according to our study of 1950–1959 motion pictures), are now protected through copyright for 50 more years. Although abandoned, there is a potential lawsuit for anyone using this material. This includes all remedies under copyright law, i.e. costs and attorney fees, statutory damages, damages and profits, impounding of infringing articles (negatives and prints), irreparable injury, and injunctions. Try offering this material to a film maker or stock footage user while disclosing these facts!

Unregistered works are also automatically renewed, but the remedies of statutory damages and attorney fees are not available for any acts of innocent infringement that occur before registration of claim to copyright. All other remedies are still applicable.

The new copyright law includes a "prima facie" renewal that should still be registered by the copyright holder to validate their copyright. However, they still can claim copyright after the renewal period, putting any food faith user in peril of a lawsuit.

The new law has successfully eliminated public domain in our lifetimes, and will cause commercial archives to stop their collections with 1963 works. These businesses need a commercial application for the works they are preserving. There is no incentive to preserve if the new law allows for only the most trivial of uses of abandoned motion pictures after 1963.

The Association of Moving Image Archivists states there will be problems in three principal areas. Exhibition to groups on archive premises. Reproduction and sale for broadcast or other re-use. Distribution for loans or rentals.

We have been preserving important films that show the history of America and the world. The Miltons At the 1939 World Fair, Industry on Parade (circa. 1950), Fun & Facts About America (1940's Harding College), Encyclopedia Britannica, Coronet, McGraw Hill, Young American and commercial and industrial films made by various companies comprise a sampling of our collection. These films, with limited life spans for the original producer, show a particular time period, and when outdated, are abandoned. They no longer have use by the original producer, but they should be preserved. They are a treasure of film history.

The new law must be changed. There must be recognition of the importance of public domain archiving by the Copyright Office and the National Film Board. Those who supported the copyright change ignored the affect on our industry. Those lobbying for the new law primarily represented the publishing and music industry. The Copyright Office should have supported public domain to preserve abandoned motion pictures, but this problem was ignored in favor of some authors who were not astute enough to understand the copyright laws, and lost their copyright.

The copyright provisions for abandoned works must include a reasonable period for motion pictures to fall into public domain. Why the discrepancy between copyrights and other intellectual properties? Trademarks must be renewed in 6 years. Patents are for a term of 16 years. The terms for motion pictures are 75 years including renewal—too long to allow for abandoned motion pictures, since an author can claim a copyright under the new law at any time during this term. These motion pictures are "discards" now—they must be given clearances to be saved. Commercial archives cannot afford the luxury to keep them. There are not enough resources for government archives to keep them either.

We still contend there should be a limit on registered and unregistered works that is reasonable, and if a motion picture author does not register a "prima facie" renewal, or initial copyright—there must be a reasonable period to allow motion pictures to enter the public domain, say 3 to 5 years. Otherwise, there is no hope for the archiving and preservation of abandoned films in the 1964–1978 period.

The Copyright Office must support a "healthy public domain" climate in motion pictures. The current attitude is to avoid public domain at any cost. This serves the needs of special groups of copyright users, while missing the "big picture" of film preservation. Authors who want assurances that they may claim the copyright, even if there is no effort to maintain the copyright, are affecting the archiving and preservation of abandoned works. There should not be the option for 50 years to claim a copyright. It is just unfair. The Copyright Office must support that public domain is needed in this instance in a reasonable time period. Congress looks to the Copyright Office for guidance. A "healthy public domain" is a prerequisite for film preservation of abandoned works. The narrow class of motion pictures, 1964 to 1978, is all we are concerned with. We cannot archive this period under present copyright law.

Of course, these abandoned works cannot be cleared under the new law because the authors cannot be found. They are out of business, dead, or indifferent. The bulk of abandoned films were released by "corporate authors" who were dissolved long ago.

The National Film Preservation Board is preserving many films for future generations. So are the commercial archives, without a cent of taxpayers money. Our archiving—for free—has been stopped in works from 1964–1978, because authors who were careless, indifferent, or claiming ignorance have changed the laws over our objections. Those authors who pushed for this change in copyright were authors of books, music, etc., and not motion picture authors.

We cannot have automatic renewal and abandoned film archiving side by side. We will lose a large part of film history because of the complainers. The Copyright Office has gone overboard with authors rights, and neglected the "good" public domain does in film preservation. We must have a "window" for renewal or claiming of an unregistered work, say 3 years, so abandoned works can be preserved and used by the public. Let the commercial archives continue to preserve abandoned works. Public Law 102–307 must be changed, even if it is just for motion pictures.

We are not supported by public funds. What incentive do we have to preserve abandoned works now? Business economics dictates we cannot use our funds to preserve films we cannot offer to the public freely through public domain. Some sacrifice is needed by authors who "want it all" with this excessive 50 year open window for claiming of copyright. Three years is fair for renewal, or claim of an unregistered work. If we cannot get your support on this, the National Film Board is more academic than realistic—and abandoned works from 1964 to 1978, those films really lost and in need of archiving and preservation, will be gone forever.

Sincerely,

LARRY URBANSKI,
President, Moviecraft, Chairman, FAIPAACR.

MOVIECRAFT, INC.,
TV'S MAGIC MEMORIES. HOME VIDEO,
Orland Park, IL, October 3, 1994.

Mr. STEVE LEGGETT,
Library of Congress, Washington, DC.
RE: Response to the National Film Preservation Plan

Redefining Film Preservation: A National Plan is a well needed recognition of many of the problems in film preservation in the 1990's. I am grateful to those who participated and organized this worthwhile effort.

I feel copyright issues plaguing both private and public archives should be addressed in depth in this National Plan. The Film Preservation 1993 report contains many letters of concern over recent copyright law changes which adversely affect film preservation efforts.

I applaud the recognition of Orphan Films. Although public funding for these works should be implemented, the "natural" privately funded preservation of these works in commercial/private archives was not mentioned. A large percentage of existing Orphan Films are in private archives. The public domain status of these works in essence preserves them. There is no harm to copyright holders regarding Orphan Films, because they are of no interest to the original maker. The public domain status of Orphan Films must be maintained, both for preservation and the

commercial viability to archives. New and previous copyright legislation must be augmented to accommodate Orphan Films, and to maintain access through public domain. Ironically, the GATT copyright legislation presently being proposed does not recognize or accommodate Orphan Films, and their privately funded preservation in public archives is at risk due to the wording of the legislation.

As a National plan, the Film Preservation Plan must not work separately from Congress. At present there is no obligation for the legislators who form the copyright laws to include the archives, both public and private, in new copyright legislation. Congress is not obliged to read the report. There should be members of Congress from the house/senate side of the Subcommittee on Intellectual Property included in all aspects of the plan, which should include copyright reform for the benefit of film preservation. The subcommittee on Intellectual Property should have a "preservation expert" who would represent this National Plan. This "preservation expert" would be aware of various aspects of usage by archives. Why have a National Plan if legislation is counterproductive to preservation? To date, archives have been forced to try to change legislation that harms their preservation efforts after the legislation is introduced. Archives must be given the opportunity to offer input in the planning process of legislation. The National Plan for Film Preservation should include this structure. The National Plan must create an archive copyright committee to inform Congress of the needs of the archival community when new legislation is proposed.

A study of some changes in copyright law to accommodate "Orphan Films" and "Abandoned Works" through public domain is in order. This is an issue of access. The 1992 legislation containing "automatic renewal of copyrights" stopped the natural preservation of Orphan Films through public domain. The new GATT legislation will also stop "natural" preservation of Orphan Films because it has "automatic restoration" instead of a fixed time period for restoration.

The National Plan suggests the release by public archives of public domain works, which creates needed dollars to support the archive and preservation efforts. Archives cannot be passive if legislation proposed by Congress affects these revenue creating works. Film preservation must have a voice in all future copyright legislation.

In conclusion, the National plan should recommend a special archive copyright committee to work in conjunction with Congress to address the requirements of public and private archives in all future copyright legislation. If this study accomplishes anything it should give all archives representation in Congress so film preservation concerns are addressed and implemented in future legislation.

I hope the above suggestions are helpful.

Sincerely,

LARRY URBANSKI.

Brooklyn, NY, October 3, 1995.

To: Troy Dow, Judiciary Committee
From: John Belton, Society for Cinema Studies
Re: Copyright Term Extension Act

I have just seen a transcript of the September 20th hearings on copyright term extension. I believe that there are one or two points that need some clarification. I hope you can add these clarifications to the record. All of my comments concern motion pictures and are in response to Mr. Valenti's testimony.

On page 17, Mr. Valenti states that films that go into the public domain are not protected or preserved because they have no owner and thus there is no financial incentive to preserve them. Thousands of films have already fallen into the public domain and been preserved. Some films, like the paper print collection of the Library of Congress, have been preserved with public funds purely because of the historical, artistic, and cultural value these films possess. D.W. Griffith's films, both those in the public domain and those under copyright, have been preserved at public and private expense by the Museum of Modern Art, largely because of the films' historical and artistic value. Other films, such as the short films Charles Chaplin made for Keystone, Essanay, and Mutual between 1914 and 1917, have been preserved and reissued by for-profit companies (such as Blackhawk Films) and have been the source of considerable revenue to those companies. Sound features such as Jean Renoir's The Southerner, Orson Welles' The Stranger, Fritz Lang's Scarlet Street, and Frank Capra's It's a Wonderful Life were neglected by their original copyright owners who permitted them to fall into the public domain. Luckily these films have been preserved and marketed by commercial distributors. In other words, films that

enter the public domain are regularly preserved and protected because they possess either historical or commercial value.

Scholars and educators are concerned with preservation and access. If films are preserved and made available by their copyright owners, we would be delighted. However, copyright owners have not done this in past. Only 20 per cent of American films made before 1929 survive; only 50 percent of those made before 1950 survive. Will copyright holders preserve and provide access to all the films that benefit from this proposed copyright term extension? Or just to that small percentage of them that are deemed marketable? Preservation is expensive. So far, public archives have taken the lead in preserving films whose value is more historical, cultural, and artistic than commercial. Will copyright owners do this as well, especially if there is no foreseeable commercial benefit to them? Given past history, we believe that public interest would be better served if all films fell into the public domain 75 years from their original publication.

There is the additional question of what will happen to the hundreds of films already preserved by the public archives, often at public expense, that are currently about to enter the public domain (films of the 1920's). At the moment, access to these films is restricted. Even those films preserved at public expense cannot be seen by the public—except for on-site researchers. If another 20 years of copyright protection is granted, these titles will remain unavailable for two more decades.

On page 30, Mr. Valenti states that he does not believe that libraries have spent the hundreds of thousands of dollars necessary to preserve 35mm film. Between 1979 and 1992, public archives—our public film libraries—have spent over $5 million of AFI–NEA grant money on film preservation. Most of this $5 million was matched by an additional $5 million of private funds. These figures do not include the Library of Congress which funds its film preservation efforts out of its own budget. During this same period, the Library spent approximately $6.7 million on film preservation. A significant portion of this money has been spent to preserve copyrighted works. Is the public, which paid the bills for this preservation, going to be denied access to these films for another 20 years? Yes, if the proposed copyright term extension for works for hire is approved.

This proposed legislation needs to be reconsidered in terms of the impact it will have on film preservation and access. Unless all works affected by this legislation are preserved and made available to the public, public interest will not be well served.

Sincerely,

JOHN BELTON,
Society for Cinema Studies.

LAWRENCE, KS, *October 3, 1995.*

SIR. In respect to Senate Bill #483 I am opposed to it.

I am a traditional acoustic musician that uses public domain music. I perform music in cafes, coffee houses, concerts and music festivals. To increase the copyright expiration time from 75-years to 95-years will take away from me much of the music I use and play.

Please Do Not vote yes or support Senate Bill #483.

Thank You,

LAWRENCE L. CHAPMAN.

ASHLAND, OH, *October 2, 1995.*

Hon. ORRIN HATCH,
Senate Judiciary Committee,
Dirksen Senate Office Building,
Washington, DC.

Re S483 The Copyright Extension Act of 1995.

HONORABLE SIRS: I am extremely opposed to paragraph 17USC304(b) which, with the changes described in S483, appears to restore copyrights to items that have already fallen into the public domain.

Manufacturers, educators, and publishers have already integrated items from the public domain through 1919 into derivative works such as educational materials, toys and games, media productions, etc. with the assumption that permission need not be obtained and royalties need not be paid. Their marketing plans and profits depend on not having these additional costs, let alone the court costs which would surely accompany any legal recourse from a simple cease and desist order to litiga-

tion to recover accumulated royalties which the owner of the restored copyright might use to collect these newly available royalties. The problems that would ensue if items which have fallen into the public domain were copyrighted would result in significant business investments being lost. Entire companies could fail. This is not just a problem for a few itinerant ragtime pi-anna players. If you need specific examples, please contact me at my e-mail address and I will supply you with a long list of individuals and businesses whose losses would certainly be evident on their tax returns.

Recopyrighting items from the public domain places in jeopardy two just and reasonable verities that have always been dependable in U.S. law. Since I am not a lawyer, I will paraphrase them in simple terms. (1) No item which falls into the public domain can be copyrighted. (2) An act which is legal when committed cannot be prosecuted if the law changes later. I believe there is also something in there somewhere about it being a legal error for Congress to make a law that is in opposition to existing law. The changes in 304(b) proposed by S483 would put that paragraph in opposition to existing law.

Marilyn Kretsinger, Acting General Counsel to the Copyright Office and Doctor Dennis Karjala, Professor of copyright law at Arizona State University have suggested several excellent alternatives for "fixing" 304(b). My personal preference is for the simplest and most straightforward of those:

Replace existing section 304(b) with the following: "Any copyright still in its renewal term as the time that the Copyright Term Extension Act of 1995 becomes effective shall enjoy a copyright term of ninety-five years from the date copyright was originally secured.".

Though the above is my personal choice, I would be most grateful to see the recopyrighting provision of 304(b) removed by whatever means the committee sees as practical and effective.

Sincerely yours,

MARJI HAZEN.

PREPARED STATEMENT OF EDWARD P. MURPHY, PRESIDENT AND CHIEF EXECUTIVE OFFICER, NATIONAL MUSIC PUBLISHERS' ASSOCIATION, INC.

Good morning Mr. Chairman and members of the Committee. 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 S. 483, 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 Tennessee, California, Alabama, 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 counselor in the overall development of the creator's career. For all 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 copyright 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 on the duration of copyright 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 S. 483 to become law.

NMPA has indicated its support for the passage of S. 483, without amendment. However, if it becomes likely that unrelated provisions will be included in this legislation, then I would strongly encourage the Committee to address an urgent problem that threatens the validity of currently enforced copyrights for hundreds of thousands of musical works: the Ninth Circuit's ruling in *La Cienega Music Co.* v. *ZZ Top,* 53 F.3d 950 (9th Cir. 1995), cert. denied, —— S. Ct. —— (1995).

Many aspects of copyright protection for works created before January 1, 1978 are subject to the Copyright Act of 1909. In 1909, Congress did not state with clarity whether the distribution of a phonorecord constituted a publication of the musical work embodied in the phonorecord. However, the music industry came to rely upon the interpretation of a majority of the copyright bar that such distribution did *not* constitute publication, the Copyright Office shared this interpretation, and this reliance was confirmed by the Second Circuit in *Rosette* v. *Rainbo Record Mfg. Corp.,* 546 F.2d 461 (2d Cir. 1976). For nearly twenty years, it has been viewed as a settled issue that musical works distributed in phonorecords prior to January 1, 1978 were *not* published by this distribution, and that any distribution did not resultingly thrust the musical work into the public domain.

The *La Cienega* decision, decided earlier this year, reaches the opposite conclusion of *Rosette* and could thrust hundreds of thousands of pre-1978 musical works into the public domain. It would effectively reopen an issue that the industry has considered resolved for decades, and would give effect to certain copyright formalities (notice upon publication, renewal) that are now no longer required. In fact, these formalities are directly contrary to accepted copyright law principles, under which we today reject the invalidation of copyright simply because of failure to comply with certain formalities in a timely manner.

I strongly urge Congress to reject *La Cienega's* invitation to abuse existing copyrights through the nonpayment of royalties or the willful failure to obtain licenses when utilizing pre-1978 musical works. Copyright owners took certain actions many decades ago in the full belief that they would not create negative copyright consequences. *La Cienega* now penalizes them for those acts. If no action is taken to reverse *La Cienega* and to reaffirm the original rule, the creators of musical works will be substantially and irreparably damaged. 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 loose 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 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, Mrs. Feinstein and Mr. Thompson for their sponsorship of this legislation and to all members of the Committee for their consideration of this important matter.

STATEMENT OF PROFESSOR WILLIAM PATRY
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THE COPYRIGHT TERM EXTENSION ACT OF 1995
SEPTEMBER 20, 1995

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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, S. 483 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.

Who are these purchasers? A very few corporations like Time Warner, who own through acquisition hundreds of thousands of song copyrights. An article in the September 16, 1995 reviews the music publishers' most recent survey of worldwide revenues, which totaled $1.10 billion, an increase of 6% from the previous year. Of this figure, $126.36 million came from interest and investment income. Despite this very healthy income, music publishers apparently have let it be known they would oppose any bill that gives the copyright to authors. This assertion, if true, demonstrates how far S. 483 as drafted departs from the constitutional goal of protecting authors.

As I detail below,[1] the history of the ancient contracts under which these large corporations will wrest copyrights away from authors 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.[2] S. 483 has the

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[1] See page 16.

[2] 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 an to said musical compositions covered by this agreement, for such extended or longer