



Copyright Term Extensions and the Public Domain

Introduction

A central problem with many international intellectual property initiatives has been provisions seeking to expand the term of protection for copyrighted works, i.e., the duration of the copyright restrictions that apply to creative works. After the expiration of the term of protection, copyrighted works enter the public domain.

The public domain is the name given to the set of creative works that are not protected by copyright law—either because they are no longer covered by the limited terms of copyright law, because their creators did not comply with various formal requirements in the past, or because their creators deliberately donated to the public the rights that they might have asserted. Once a work is in the public domain, anyone may copy, reuse, or share the work as they wish.

In practice, lengthy copyright terms tilt the traditional copyright balance between the rights of copyright owners and the rights of the public firmly in favor of the former. They force the public to pay a heavy price, in the form of both continued royalty fees for content use and impediments to our ability to access and build-on existing works. What is worse, there is little empirical evidence that extending copyright terms does anything to encourage new creativity.

Nonetheless, lengthy terms continue to be imposed on countries around the world through bilateral, regional, or multilateral trade agreements and other international treaties.

Policy Background

The primary objective of copyright is not to reward the labor of authors, but to promote the progress of science and useful arts. To this end, copyright law assures authors the right to their original expression for a certain period of time, but encourages others to build freely upon the ideas and information conveyed by a work. Limited copyright terms are essential to obtaining this objective, because they ensure that copyrighted works will eventually enter the public domain.

The length of protection is one of the most contentious issues of copyright, frequently justified on the grounds that longer protection leads to more royalties for copyright owners, encouraging authors to invest time and money in creating new works. In some countries the term can last as long as 120 years,¹ although the main international IP agreement, the Trade-

¹ In the US, the copyright term of protection was expanded in 1998 with the [Sonny Bono Copyright Term Extension Act](#) (or the "[Mickey Mouse Act](#)" as it was called due to Disney's heavy lobbying), which effectively



Related Aspects of Intellectual Property Rights (TRIPS), mandates only a 50-year term. Economists and law scholars who have studied this rationale have found that the optimal length of copyright is 14 years.² Long copyright terms are a poor recipe for compensating many creators. The cost of creation is decreasing rapidly, as the tools of creation are radically democratized and the number of creators increases. Lengthy copyright terms do, however, benefit large, entrenched media companies.

The incorporation of international copyright obligations into national law has little to do with the question of whether a given term is “economically, culturally, or socially desirable.” Rather, efforts to lengthen national terms are a kind of race to the bottom, as entertainment industries seek to expand their ability to control uses of the works they own around the world, and then lobby in their home countries for matching legislation.

TPP for example, seeks to extend the internationally agreed copyright term far beyond what is required by international standards set out in the Berne Convention (WIPO) and TRIPS. According to a leaked chapter of TPP, the US proposal would require countries to enact much longer copyright terms than exist in most of the signatory countries. The TPP seeks to propagate the excessive copyright terms currently found in US copyright legislation.

Examples: How Excessive Copyright Terms Affect the Public

- *Locked down culture:*
 - Millions of audio recordings, music compositions, works of art, etc., remain inaccessible or lost due to copyright terms that extend beyond the lifespan of creators.
 - Countless copyrighted books that are out of print are hard to find, but if found, it would be illegal for unauthorized publishers to reprint them to make them available to the public once again.
- *Orphan works:* One of the most troubling effects of the exceptionally long copyright term has been the increasing number of “orphan works,” also known as “hostage works.” These are works that are presumably still protected by copyright but the copyright owner cannot be found. The copyright owner may have died, and it may be unclear who inherited the copyright. In some cases the copyright owner may not even realize he or she has rights.
 - Down stream users—such as libraries that wish to make their collections available online, or documentary filmmakers who wish to use photographs and letters found in an attic—will hesitate to do so for fear the copyright owner will

"froze" the advancement date of the [public domain in the United States](#) for works covered by the older fixed term copyright rules.

² Rufus Pollock's calculations on optimal copyright term lengths:

http://www.rufuspollock.org/economics/papers/optimal_copyright.pdf



emerge and sue them for damages. As a result, millions of books, films, songs, and even scientific and medical research papers are rendered effectively inaccessible and unusable.

- *Overseas royalty payments:* Even under the current terms, millions of dollars are sent overseas per year for royalty payments. Each year of copyright extension may represent a huge transfer of funds from developing countries to the developed countries that serve as home bases for the big entertainment industries.³

EFF's Position

Copyright term extensions are one of the areas where international law has been exploited to dramatically expand the scope of copyright, limiting the public's ability to access and use our cultural commons. That limit might be defensible if lengthy copyright terms, extending far beyond the life of the author (or even, in many cases, his or her children) were needed to incentivize creativity. But they are not. In fact may inhibit creativity to the extent that the public domain serves as source from which authors learn and create. Copyright law and policy, including copyright terms, should respect the traditional copyright balance between the interests of authors and the general public. Accordingly, it should protect the public domain, not strive to shrink it.

Resources

<http://www.thepublicdomain.org>

http://en.wikipedia.org/wiki/List_of_countries'_copyright_length

<http://law.duke.edu/pd/papers/boyle.pdf>

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=908998

³ A study estimated the cost for Australia, for instance, would be 88 million USD per year of extension.
http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=freetrade_ctte/rel_links/index.htm