

COPYRIGHT LAW REVISION

STUDIES

PREPARED FOR THE

SUBCOMMITTEE ON
PATENTS, TRADEMARKS, AND COPYRIGHTS

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
EIGHTY-SIXTH CONGRESS, SECOND SESSION

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STUDIES 29-31

30. Duration of Copyright



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¹ The late Hon. Thomas C. Hennings, Jr., while a member of this committee, died on Sept. 18, 1960.

FOREWORD

This committee print is the tenth of a series of such prints of studies on Copyright Law Revision published by the Committee on the Judiciary Subcommittee on Patents, Trademarks, and Copyrights. The studies have been prepared under the supervision of the Copyright Office of the Library of Congress with a view to considering a general revision of the copyright law (title 17, U.S. Code).

Provisions of the present copyright law are essentially the same as those of the statute enacted in 1909, though that statute was codified in 1947 and has been amended in a number of relatively minor respects. In the half century since 1909 far-reaching changes have occurred in the techniques and methods of reproducing and disseminating the various categories of literary, musical, dramatic, artistic, and other works that are subject to copyright; new uses of these productions and new methods for their dissemination have grown up; and industries that produce or utilize such works have undergone great changes. For some time there has been widespread sentiment that the present copyright law should be reexamined comprehensively with a view to its general revision in the light of present-day conditions.

Beginning in 1955, the Copyright Office of the Library of Congress, pursuant to appropriations by Congress for that purpose, has been conducting a program of studies of the copyright law and practices. The subcommittee believes that these studies will be a valuable contribution to the literature on copyright law and practice, that they will be useful in considering the problems involved in proposals to revise the copyright law, and that their publication and distribution will serve the public interest.

The present committee print contains the following three studies: No. 29, "Protection of Unpublished Works," by William S. Strauss, Attorney-Adviser of the Copyright Office; No. 30, "Duration of Copyright," by James J. Guinan, an attorney formerly on the staff of the Copyright Office; and No. 31, "Renewal of Copyright," by Barbara A. Ringer, Assistant Chief of the Examining Division, Copyright Office. The preceding 28 studies appearing in earlier committee prints are listed below.

The Copyright Office invited the members of an advisory panel and others to whom it circulated these studies to submit their views on the issues. The views, which are appended to the studies, are those of individuals affiliated with groups or industries whose private interests may be affected by copyright laws, as well as some independent scholars of copyright problems.

It should be clearly understood that in publishing these studies the subcommittee does not signify its acceptance or approval of any statements therein. The views expressed in the studies are entirely those of the authors.

JOSEPH C. O'MAHONEY,
*Chairman, Subcommittee on Patents, Trademarks, and Copy-
rights, Committee on the Judiciary, U.S. Senate.*

COPYRIGHT OFFICE NOTE

The studies presented herein are part of a series of studies prepared for the Copyright Office of the Library of Congress under a program for the comprehensive reexamination of the copyright law (title 17 of the United States Code) with a view to its general revision.

The Copyright Office has supervised the preparation of the studies in regard to their general subject matter and scope, and has sought to assure their objectivity and general accuracy. However, any views expressed in the studies are those of the authors and not of the Copyright Office.

Each of the studies herein was first submitted in draft form to an advisory panel of specialists appointed by the Librarian of Congress, for their review and comment. The panel members, who are broadly representative of the various industry and scholarly groups concerned with copyright, were also asked to submit their views on the issues presented in the studies. Thereafter each study, as then revised in the light of the panel's comments, was made available to other interested persons who were invited to submit their views on the issues. The views submitted by the panel and others are appended to the studies. These are, of course, the views of the writers alone, some of whom are affiliated with groups or industries whose private interests may be affected, while others are independent scholars of copyright problems.

ABE A. GOLDMAN,
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ARTHUR FISHER,
*Register of Copyrights,
Library of Congress.*

L. QUINCY MUMFORD,
Librarian of Congress.

STUDIES IN EARLIER COMMITTEE PRINTS

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1. The History of U.S.A. Copyright Law Revision from 1901 to 1954.
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3. The Meaning of "Writings" in the Copyright Clause of the Constitution.
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5. The Compulsory License Provisions of the U.S. Copyright Law.
6. The Economic Aspects of the Compulsory License.

Third print :

7. Notice of Copyright.
8. Commercial Use of the Copyright Notice.
9. Use of the Copyright Notice by Libraries.
10. False Use of Copyright Notice.

Fourth print :

11. Divisibility of Copyrights.
12. Joint Ownership of Copyrights.
13. Works Made for Hire and on Commission.

Fifth print :

14. Fair Use of Copyrighted Works.
15. Photoduplication of Copyrighted Material by Libraries.
16. Limitations on Performing Rights.

Sixth print :

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18. Authority of the Register of Copyrights to Reject Applications for Registrations.
19. The Recordation of Copyright Assignments and Licenses.

Seventh print :

20. Deposit of Copyrighted Works.
21. The Catalog of Copyright Entries.

Eighth print :

22. The Damage Provisions of the Copyright Law.
23. The Operation of the Damage Provision of the Copyright Law: An Exploratory Study.
24. Remedies Other Than Damages for Copyright Infringement.
25. Liability of Innocent Infringers of Copyright.

Ninth print :

26. The Unauthorized Duplication of Sound Recordings.
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STUDY NO. 30
DURATION OF COPYRIGHT
By JAMES J. GUINAN, JR.
January 1957

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DURATION OF COPYRIGHT

I. HISTORY OF DURATION OF COPYRIGHT IN THE UNITED STATES

The origin of the provisions concerning duration of copyright in the various copyright statutes in the United States is the Statute of Anne,¹ enacted in England in 1709. That statute granted to the author and his assigns an original term of 14 years from the date of publication plus a second term of 14 years should the author be living at the expiration of the first term. Of statutes enacted between 1783 and 1786 by 12 of the Original 13 States,² 6 followed the pattern of the Statute of Anne as did the first Federal statute³ enacted by Congress in 1790.

Thereafter the English and United States laws took divergent courses. The United States held to the original pattern, with amendments to be noted below, while the English law was changed, in 1814, to a term of 28 years plus the remainder of the author's natural life should he be living at the expiration of the first term,⁴ in 1842 to 42 years or the life of the author plus 7 years whichever should be longer,⁵ and in 1911 to the life of the author plus 50 years.⁶

The English law thus eliminated the problems which arise in connection with a system which incorporates two or more terms. These problems are still with us in the United States and will be discussed later to the extent that they are a part of the problem of duration. For the present we will discuss duration without regard to the renewal problem.

Three States, Connecticut, Massachusetts, and Maryland enacted copyright laws in 1783 prior to any concerted action on the part of the States on this subject. All stated the purpose of the legislation to be the encouragement of authors and the benefit to the public. Massachusetts provided for a single term of 21 years from the date of publication,⁷ while the other two followed the Statute of Anne and provided for a first term of 14 years from the date of publication followed by a second term of 14 years should the author be living at the expiration of the first term.⁸

In 1783 the Continental Congress recommended to the States that legislation be adopted for the protection of authors or publishers.⁹ A term of not less than 14 years from the date of publication, plus a second term of 14 years should the author be living at the expiration of the first term, was suggested. Nine of the remaining ten States

¹ 8 Anne, c. 19, 1709.

² Candler, Colonial Records of Georgia (1911), Vol. XIX, pp. 485-89; Green, Maryland Laws (1783), ch. 34; Collins, Acts of the General Assembly of New Jersey (1783), ch. 21; Laws of New York (1786), ch. 54; Bradford, Laws of Pennsylvania (1748), ch. 125; Green, Acts and Laws of Connecticut (1783), pp. 617-19.

³ 1 Stat. 124.

⁴ 54 Geo. III, ch. 156.

⁵ 5 & 6 Vict., ch. 45.

⁶ 1 & 2 Geo. V, ch. 34.

⁷ Edes, Acts and Laws of Massachusetts (1783), p. 236.

⁸ *Supra*, note 2.

⁹ Journals of the Continental Congress, 1774-89, (1922), Vol. XXIV, pp. 326-7.

subsequently adopted copyright legislation between the years 1783 and 1786. North and South Carolina adopted a single term of 14 years,¹⁰ New Hampshire a single term of 20 years,¹¹ Rhode Island and Virginia a single term of 21 years,¹² and New Jersey, Pennsylvania, Georgia and New York¹³ followed the Statute of Anne,¹⁴ and the recommendation of the Continental Congress,¹⁵ adopting a first term of 14 years, to be followed by a second term of 14 years should the author be living at the expiration of the first term.

In 1790, under the power granted by Article I, Section 8 of the Constitution, Congress enacted the first Federal copyright statute,¹⁶ and copyright legislation in the United States was thereafter an undertaking of the Federal government rather than of the individual States. The constitutional provision grants 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." The provision of the first Federal statute of 1790 regarding duration followed the Statute of Anne and the legislation in six of the States, in providing "That * * * the author * * * shall have the sole right and liberty of printing, reprinting, publishing and vending * * * for the term of 14 years * * *. And if, at the expiration of said term, the author * * * be living * * * the same exclusive right shall be continued to him * * * for the further term of 14 years * * *." However, recording of the title of the work in the office of the clerk of the District Court prior to publication was required to secure copyright, and the term was measured from the date of recording the title, rather than from the date of publication as in the Statute of Anne and earlier State legislation.

In 1831 the length of the original term was extended to 28 years while the second term of 14 years was retained.¹⁷ The stated purpose of this amendment was "to enlarge the period for the enjoyment of copyright, and thereby to place authors in this country more nearly upon an equality with authors of other countries."¹⁸

In 1909 the present statute was enacted,¹⁹ Section 23 (now 24) of that statute extends the second term of copyright to 28 years, and it also returns to the date of publication, rather than the recording of the title, as the starting point. Under Section 9 (now 10) copyright is secured by publication of the work with the required notice, and registration is a subsequent act. Section 23 (now 24) provides: "The copyright * * * shall endure for 28 years from the date of first publication * * * and * * * the author shall be entitled to a renewal * * * of the copyright * * * for a further term of twenty-eight years."²⁰

¹⁰ Laws of North Carolina (1785), ch. 24; Miller, South Carolina Acts, Ordinances and Resolves (1784), pp. 49-51.

¹¹ Melcher, Laws of New Hampshire (1789), pp. 161-62.

¹² Carter, Rhode Island Acts and Resolves (1788), pp. 6-7; Dunlap & Hayes, Virginia Acts (1785), pp. 8-9.

¹³ *Supra*, note 2.

¹⁴ *Supra*, note 1.

¹⁵ *Supra*, note 9.

¹⁶ *Supra*, note 3.

¹⁷ 4 Stat. 436.

¹⁸ Report of the Committee on the Judiciary of the House of Representatives, 7 Register of Debates, appendix CXIX.

¹⁹ 35 Stat. 1075, Title 17, U.S.C.

²⁰ Sec. 23 contains also detailed provisions as to who shall be entitled to secure the second term of 28 years.

Under Section 11 (now 12) copyright in certain classes of unpublished works may be secured by deposit and registration in the Copyright Office. For other classes of unpublished works not mentioned in that section statutory copyright is not available before publication. There is no specific provision in the present law as to the term of copyright for those unpublished works for which Federal statutory copyright is available. It has been held, however, that the term is 28 years from the date of deposit in the Copyright Office, plus a 28 year renewal, the second term to be secured in the same manner as in the case of published works.²¹

II. SUMMARY OF PROVISIONS CONCERNING DURATION IN THE LAWS OF OTHER COUNTRIES AND IN INTERNATIONAL CONVENTIONS

A. NATIONAL LAWS

No country in the world has adopted provisions on duration precisely like those found in the United States law, and, with the exception of the Philippine Islands, none has adopted anything similar.

In the Philippine Islands the term is 30 years measured from the date of registration, plus a second term of 30 years.²² The second term is granted to the proprietor, his assigns, or heirs upon filing an application during the last year of the first term.

In almost all countries of the world which accord copyright protection the term endures, in the case of works authored by natural persons who are identified, for the life of the author plus a stated number of years after his death. The term for works of authors who are not natural persons, in the laws which explicitly cover such situations, and for anonymous and pseudonymous works is usually a stated number of years from the date the work is published or is made public in some other manner as by public performance. In many laws special provisions, which differ from the general provisions on duration, are included for some particular classes of works.

In more than half of the countries in which copyright protection is available the term for works by identified persons is the life of the author plus 50 years. In this group are Australia, Austria, Belgium, Canada, Chile, Costa Rica, Czechoslovakia, Denmark, Ecuador, Finland, France, Germany, Great Britain, Greece, Guatemala, Hungary, Iceland, Eire, Italy, Lebanon, Luxembourg, Monaco, Netherlands, New Zealand, Norway, Paraguay, Switzerland, Syria, Turkey, Union of South Africa, and the Vatican.

Some countries have adopted a longer term: perpetuity in Nicaragua and Portugal; life plus 80 years in Colombia, Cuba, Panama and Spain; and life plus 60 years in Brazil.

Other countries have adopted a shorter term: life plus 40 years in Uruguay; life plus 30 years in Argentina, Bolivia, China, Dominican Republic, Japan, Rumania, Sweden, Thailand, and Venezuela; life plus 25 years in El Salvador; life plus 20 years in Mexico, Peru and Poland; and life plus 15 years in the U.S.S.R.

²¹ Marx v. United States, 96 F. 2d 204 (9th Cir. 1938).

²² UNESCO, Copyright Laws and Treaties of the World, UNESCO and Bureau of National Affairs, Inc. (1956). This compilation is the source of all the information herein contained on the laws of the individual countries other than the United States, and on the provisions of the three international treaties discussed below.

In Bulgaria, Haiti and Yugoslavia the term after the death of the author is determined by the life of the surviving spouse and a term to the children for a period of years (20 years in Haiti) or until they reach a certain age (their majority in Bulgaria, the age of 25 in Yugoslavia).

It should be noted that in some countries the term after death is qualified in whole or in part. Without attempting to enumerate these provisions some examples are: a compulsory license arrangement during the last 25 years of the 50 year term in Great Britain under the Act of 1911 (eliminated in the Act of 1956); provisions in Spain, Colombia, Cuba and Panama that only the first 25 year portion of the 80 year term may go to assigns, the remaining 55 years being reserved for the author's heirs; and provisions in Argentina and Colombia that if there are neither heirs nor assigns the publisher will receive a term, fifteen years in Argentina, twenty years in Colombia.

Almost all countries which have adopted a term of life plus a term of years measure the term after death, in the case of joint authors, from the death of the survivor; but Australia, Ireland, New Zealand and the Union of South Africa protect the work for 50 years after the death of the first to die or for the life of the survivor, whichever results in the longer term.

In countries which have legislated generally on duration for works which are not authored by natural persons, the term is usually the same number of years which the particular country has adopted following the author's death, but the term is measured from the date the work is published or otherwise made public. For example, in the Netherlands the term is 50 years from the date of publication for the works of public institutions, associations, foundations or partnerships. The same provision is usually applied to anonymous and pseudonymous works. Most of the countries which are members of the Berne Union have not adopted separate provisions for works of private organizations or employers for hire because they do not recognize any but individual authorship.

Many countries have special provisions concerning the duration of protection for photographs,²³ some for motion pictures,²⁴ and a few for sound recordings.²⁵ Several countries have a special term of protection for translations²⁶ or for translation rights.²⁷

In the case of photographs some of these countries measure the term from the date the photograph is made²⁸ and some from the date of publication.²⁹ The terms range in the case of photographs from 5 years in Bulgaria, Russia, and Yugoslavia to 50 years in the Netherlands and most of the English speaking countries of the British Commonwealth.

²³ Argentina, Austria, Bulgaria, China, Czechoslovakia, Denmark, Dominican Republic, Egypt, Finland, Germany, Hungary, Italy, Japan, Norway, Paraguay, Poland, Sweden, Turkey, U.S.S.R., Venezuela and Yugoslavia.

²⁴ Austria, Bulgaria, China, Czechoslovakia, Dominican Republic, Egypt, Germany, Poland and Turkey.

²⁵ Austria and Thailand.

²⁶ Burma, China, Ecuador, and Spain.

²⁷ Egypt, India, Japan, Mexico, and Turkey.

²⁸ Austria, Italy and Japan.

²⁹ Argentina, Bulgaria, China, Czechoslovakia, Dominican Republic, Finland, Germany, Hungary, Norway, Paraguay, Poland, Sweden, Turkey, the U.S.S.R. and Yugoslavia.

In the case of motion pictures, the terms range from 10 years in China and Russia to 50 years in Great Britain and the Netherlands, measured in some cases from the date of making of the film,³⁰ and in others from the date the film is made public.³¹

In the case of sound recordings the term is measured from the date of manufacture³² or from the date of compliance with some formality,³³ and the terms range from 30 years in Austria and Spain to 50 years in Australia, Canada, Great Britain, Eire, New Zealand and the Union of South Africa.

In the case of translations several countries which have been primarily importers of intellectual materials either limit the term of protection for translations—e.g., 20 years in China, 50 years in Ecuador, from publication of the translation; or they provide for termination of the translation right if no translation is made within a specified term, ranging from 3 years in Mexico to 10 years in India, Japan and Turkey.

B. INTERNATIONAL CONVENTIONS

Three multilateral copyright agreements are significant in discussing duration: the Berne Convention of 1886,³⁴ subsequently revised at Berlin in 1908, Rome in 1928, and Brussels in 1948; the Buenos Aires Convention of 1910; and the Universal Copyright Convention of 1952.

The Berne Convention and its revisions are in reality several different conventions rather than one uniform convention. Only those countries which adhered to a particular revision are bound by that revision. The latest revision (Brussels, 1948) provides in Art. 7 for a term of the life of the author plus 50 years. Countries bound by earlier revisions may apply a shorter term. Term was left to domestic law under the original convention and the Berlin and Rome revisions.

The Brussels revision contains exceptions for cinematographic and photographic works (the term to be governed by domestic law), anonymous and pseudonymous works (50 years from the date of publication), and posthumous works (50 years from the date of death of the author). Here again previous revisions allow various terms in different countries under domestic law. There is no separate provision in any of the revisions dealing with works which, in the United States, would be considered authored by organizations or employers for hire.

Though there is no exception in the Brussels revision for translation rights, there were exceptions in earlier revisions and these may permit a shorter term for translation rights. In the Berlin revision of 1908, for example, it was provided that the right to authorize a translation might expire after ten years if no translation had been made or if, a translation having been made, it was out of print.

Under Art. 6 of the Buenos Aires Convention term is governed by domestic law with the limitation that the term will not be allowed

³⁰ Thailand and the countries of the British Commonwealth.

³¹ Argentina, Bulgaria, Austria, China, Czechoslovakia, Dominican Republic, Germany, Italy, Japan, Poland, Turkey and the U.S.S.R.

³² Australia, Austria, Canada, Great Britain, New Zealand, Eire, Thailand and the Union of South Africa.

³³ Italy and Spain.

³⁴ International Union for the Protection of Literary and Artistic Works.

to exceed the term granted in the country of origin. No minimum term is specified.

The Universal Copyright Convention, in Art. IV, provides that term shall be governed by domestic law on the basis of national treatment, but then proceeds to enumerate three alternative minima, one of which must be met if a country wishes to adhere to the convention. The first is that the term be not less than the life of the author plus 25 years after his death. The others are that the term be not less than 25 years from the date of publication or from the date of registration prior to publication.

Since the United States adheres to the Universal Copyright Convention, one of these minima must be provided for in the U.S. law for foreign works entitled to protection under the U.C.C.

In addition to these general provisions the Universal Copyright Convention makes exceptions for photographic works and works of applied art (a minimum of 10 years if these classes of works are to be protected at all), and has special provisions for translation rights (a minimum of 7 years and a compulsory license arrangement thereafter if a translation has not been published during the 7 year period.)

III. PROPOSALS SINCE 1909 FOR REVISION OF PRESENT LAW

In 1922 efforts were begun in Congress to make it possible for the United States to become a party to the International [Berne] Union for the Protection of Literary and Artistic Works. The latest revision of the Berne Convention at that time was the Berlin revision of 1908. That convention permitted reservations on the part of adhering countries and it was thought by some that the United States should become a party, adopting the minimum number of necessary changes in domestic law. Some of the changes would, of necessity, have been substantial and in conflict with previous copyright theory in the United States.

A series of bills was introduced in both houses of Congress in the years 1922, 1923 and 1924 to accomplish this purpose.⁵⁵ These bills would have made little change in the provisions concerning duration, providing that duration would be governed by Section 23 (now 24) of the law, and adding only that no foreign author would be entitled to a longer term than he received in the country of which he was a national, a feature which was also incorporated in several subsequent bills.

In 1924 Rep. Dallinger introduced a bill⁵⁶ also designed to make possible United States adherence to the Berne Convention. This bill, however, was a general revision bill and included changes which were not required for the purpose of adhering to Berne. The duration provisions of this bill were contained in Sections 22 and 23. The term for works by individual authors was to be the life of the author plus 50 years; for works of corporations and partnerships, 50 years from the date of "production"; and for works by joint individual authors, either the life of the author who died plus 50 years, or the life of the author who survived, whichever should be longer. The bill provided

⁵⁵ H.R. 11476 and S. 4101, 67th Cong., 1922; H.R. 18676 and H.R. 14035, 67th Cong., 1923; H.R. 578, H.R. 2663, H.R. 2704 and S. 74, 68th Cong., 1923.

⁵⁶ H.R. 8177 and H.R. 9137, 68th Cong., 1924.

also that no assignment or transfer, except by will, would be operative beyond 25 years after the death of the author, with a reversionary interest in the surviving spouse or heirs at law in the last 25 years of the term. No extensive hearings were held on this bill.

In 1925 another general revision bill³⁷ was introduced by Rep. Perkins. This bill also had as one of its objectives adherence of the United States to the Berne Union. Sections 20, 21, 22 and 23 contained the duration provisions. The term was to be the life of the author plus 50 years in the case of individual works; in the case of works of individual joint authors, the life of the author to die first plus 50 years, or the life of the last survivor, whichever should be longer; in the case of posthumous works, works of an employer for hire, composite or cyclopaedic works, compilations, abridgments, adaptations or arrangements, 50 years from first publication; in the case of newspapers, 50 years from the date of publication, but the life of the author plus 50 years for individually authored contributions to newspapers; and in the case of motion pictures, sound recordings and piano rolls, 50 years, from the date of first sale or exhibition in the case of motion pictures, from the date of first sale, offer of sale, or other public distribution in the case of recordings or rolls.

At the hearings³⁸ on the Perkins bill there was little discussion of duration. That the problem had not been considered thoroughly by at least one member of the committee is indicated by the opinion expressed by Rep. Reid that a term of life plus 50 years would be shorter on the average than a term of 56 years from the date of publication.

J. G. Paine, speaking for the Victor Talking Machine Co., expressed the opinion that the renewal feature of the 1909 Act should be retained to give the author or his family a second chance in the event of a lump sum assignment.

Arthur Weil, representing Motion Picture Producers and Distributors of America, Inc., proposed that the term for corporate works (50 years in the bill) run from the date of creation rather than from the date of sale or distribution. He expressed the opinion that the former would give certainty to the term whereas the latter would cause problems in ascertaining the starting point and would not provide for unpublished motion pictures.

Hearings and subsequent discussions on the Perkins bill resulted in a new general revision bill,³⁹ introduced in 1926 by Rep. Vestal. The provisions concerning duration were contained in Sections 13 and 14. The term for works authored by individuals was to be the life of the author plus 50 years; for works authored by other than individuals, 50 years from the date of completion of creation; for individual joint works, the life of the survivor plus 50 years; for works based on other works which latter had a longer term, 50 years or the duration of the copyright of the basic work, whichever should be longer; and for posthumous works, 50 years from the death of the author.

This bill, as subsequently revised in other respects⁴⁰ but containing the duration provisions described above with one insignificant amend-

³⁷ H.R. 12258, 68th Cong., 1925.

³⁸ *Hearings Held Before the Committee on Patents, House of Representatives, on H.R. 11258, 68th Cong., 1925.*

³⁹ H.R. 10484, 69th Cong., 1926.

⁴⁰ H.R. 8912, 70th Cong. 1929 and H.B. 6990 and 12549, 71st Cong., 1930.

ment, passed the House of Representatives in 1931. Sen. Hébert introduced the Senate version⁴¹ which provided for a single term of 60 years "from and after creation." The Senate bill was reported out by the Committee on Patents of the Senate,⁴² but the Senate adjourned before a vote was taken.

At the 1926 hearings⁴³ on the Vestal bill, the Authors' League of America supported the term of life plus 50 years on the theory that a longer term was necessary and just for authors and that the author's life was the natural measure of the term, insuring care for his family after death.

J. D. Phillips, representing Houghton Mifflin & Co., supported life plus 50 years as an advantage to both authors and publishers. He said that from the publisher's standpoint two terms are undesirable because the proprietor of the second term might choose a different publisher and the plates of the first publisher would be wasted, particularly in the case of textbooks.

M. S. Raney of the American Library Association expressed the opinion that life plus 30 years would be enough to take care of the author's family and that there ought to be a break somewhere in the term to give the author and his family a second chance.

Karl Fenning of the American Patent Law Association advocated a term with definite starting and ending dates to prevent uncertainty in ascertaining the date of death of the author and the holder of the rights after his death.

At the 1930 hearings before the House Committee on Patents⁴⁴ and the 1931 hearings before the Senate Committee on Patents,⁴⁵ both of which were again considering the Vestal Bill, the Authors' League of America advocated life plus 50 years because under the 1909 statute an author who produced his best work at an early age would not be protected in his old age; because the norm in other countries was life plus 50 years; because the author's return was usually not large and therefore the term should be long to compensate for the small return; and because authors want to be responsible citizens, educate their children, etc.

The Committee on Publication for the Mother Church favored life plus 50 years because it would extend the term for the works of Mary Baker Eddy.

Several witnesses opposed the term of life plus 50 years on the ground, *inter alia*, that it would be difficult or impossible in many cases to determine the date of death of the author, and, consequently, the date at which the work would fall into the public domain, as well as with whom to deal when it could not be ascertained whether the author was alive or dead. These witnesses represented the John C. Winston Co., Radio Protective Association, National Association

⁴¹ S. 176, 72d Cong., 1931.

⁴² S. REPT. NO. 1732, 71st Cong., 1931.

⁴³ *Hearings Held Before the Committee on Patents, House of Representatives*, 69th Cong., 1st Sess., on H.R. 10434, a bill to amend and consolidate the acts respecting copyright and to permit the United States to enter the international copyright union. (1926).

⁴⁴ *Hearings Held Before the Committee on Patents, House of Representatives*, 71st Cong., 2d Sess., on H.R. 6990, a bill to amend and consolidate the acts respecting copyright and to permit the United States to enter the international copyright union. (1930).

⁴⁵ *Hearings Held Before the Committee on Patents, United States Senate*, 71st Cong., 3d Sess., on H.R. 12549, a bill to amend and consolidate the acts respecting copyright and to permit the United States to enter the convention of Berne for the protection of literary and artistic works. (1931).

of Broadcasters, Victor Talking Machine Co., and the American Book Co. Also taking this position were Karl Fenning and Charles Shepard, patent attorneys.

John W. Ziegler, speaking for the John C. Winston Co., also argued that the term of life plus 50 years was unfair to the older author because he would receive a shorter term, and to the public which would be deprived of cheap editions for an additional thirty years on the average.

Karl Fenning and Charles Shepard argued also that the term of life plus 50 years was too long in that it would benefit grandchildren, great-grandchildren or more remote heirs in addition to the author's immediate family.

Another bill⁴⁶ was introduced in the Senate in 1931 by Sen. King. This bill would have amended Sec. 23 (now 24) of the 1909 Act to provide a single term of 17 years for all copyrightable works. This bill was limited to amending Sections 23 and 28 and repealing Section 24 and was not designed to permit United States adherence to the Berne Union. No hearings were held.

In 1932 Sen. Dill introduced a bill⁴⁷ which provided for a term of 56 years from the date of completion of the work. No hearings were held.

1932 also marked the beginning of a strenuous effort (strenuous, at least, as to the number of bills introduced) by Rep. Sirovich, who in that year succeeded Rep. Vestal as chairman of the Committee on Patents, to produce an acceptable general revision bill which would also make it possible for the United States to join the Berne Union.

The first Sirovich bill⁴⁸ provided for a term running from creation of the work until 56 years after the first public presentation. Five additional versions of this bill were subsequently introduced by Rep. Sirovich. As to duration, the third⁴⁹ and fifth⁵⁰ versions contained some changes, while the second,⁵¹ fourth⁵² and sixth⁵³ versions were identical with the bill immediately preceding.

The third and fourth versions contained some additional provisions, no doubt because it had been pointed out that many works would not be publicly presented and the resulting gap in the original version had to be filled. It was therefore provided in the third and fourth versions, in addition to protection from creation and for 56 years from the date of first public presentation, that, if the work was not publicly presented, protection would continue for three years after the death of the author, or after the death of the survivor of joint authors. It was also provided that, in the case of corporate authors, protection would continue for three years from the date of creation if the work was not presented publicly. Finally, it was provided that registration of a claim in the Copyright Office was to be deemed a public presentation.

⁴⁶ S. 5687, 71st Cong., 1931.

⁴⁷ S. 3985, 72d Cong., 1932.

⁴⁸ H.R. 10364, 72d Cong., 1932.

⁴⁹ H.R. 10976, 72d Cong., 1932.

⁵⁰ H.R. 12094, 72d Cong., 1932.

⁵¹ H.R. 10740, 72d Cong., 1932.

⁵² H.R. 11948, 72d Cong., 1932.

⁵³ H.R. 12425, 72d Cong., 1932.

The fifth and sixth versions of the bill were identical with the third and fourth versions in regard to duration except for special provisions for dramatic and dramatico-musical compositions. It was provided that, in the case of works in these two categories, an assignment would be effective for only 28 years or less. After 28 years there would be a reversion of the copyright to the author, to those named in his will, or to those named in the applicable statute of succession in the event of intestacy.

Rep. Sirovich began hearings prior to introducing any specific legislation, stating his purpose to be to discover what those interested in copyright wished to have incorporated in the legislation. The hearings⁶⁴ continued on and off through the period during which the six versions of the Sirovich bill were introduced.

The testimony, at hearings on the previous bills mentioned above, that a term of life plus 50 years would lead to uncertainty, Senator Dill's opinion that such a term would require the United States government to keep records of author's deaths, families, etc., and testimony that such a term was not necessary in order to adhere to the Berlin or Rome revisions of the Berne Convention, led Rep. Sirovich to suggest initially a single term of 60 years from the first public presentation.

Miss Sillcox, Secretary of the Authors' League of America, and other representatives of the League stated that this term would be satisfactory to the League if other provisions which they supported were adopted.

The proposed single term of 60 years was reduced to 56 years after testimony of Thorvald Solberg that the additional four years for subsisting copyrights would result in more disadvantages than advantages. Mr. Solberg also argued in favor of a term of life plus 50 years, citing the following arguments: uniformity with other countries; the term would endure for life in all cases; the term would end on the same date for all works of the same author; there would be only one date to be determined for all the works of each author, i.e., the date of his death, rather than at least one for each work, i.e., the date of registration, publication or public presentation. Mr. Solberg expressed the opinion that the difficulty of determining the date of death had been greatly exaggerated at the hearings and that the greatest criticism of the existing term was in regard to the renewal provisions.

Nathan Burkan, representing the American Society of Composers, Authors and Publishers, presented an argument that abolition of common law rights (a feature incorporated in the earlier versions of the Sirovich bill) was unconstitutional. This resulted in amendments to the bill to retain common law rights and also the provision, mentioned above, that if the work were not publicly presented the term would expire three years after the author's death.

⁶⁴ *Hearings Held Before the Committee on Patents, House of Representatives, on General Revision of the Copyright Laws, 72d Cong., 1st Sess., Feb. and Mar. 1932; Hearings Held Before the Committee on Patents, House of Representatives, 72d Cong., 1st Sess., on H.R. 10976, a bill to amend and consolidate the acts respecting copyright and to codify and amend common-law rights of authors and their writings. (Mar. 1932); Hearings Held Before the Committee on Patents, House of Representatives, 72d Cong., 1st Sess., on H.R. 10976. (May 1932); and Hearings Held Before the Committee on Patents, House of Representatives, 72d Cong., 1st Sess., on H.R. 11948, a bill to amend and consolidate the acts respecting copyright and to codify and amend common-law rights of authors and their writings. (1932).*

Mr. Burkan also wished to retain the renewal feature of the law to protect "improvident authors," pointing out that under all of the versions of the Sirovich bill the author could assign his rights for a lump sum and have no second chance, a fact of which the Committee was apparently not aware. The result of this testimony was a limit of 28 years on assignments in the case of musical and musico-dramatic works in the final version of the Sirovich bill. The Authors' League had previously favored abolition of renewals as a result of the erroneous belief that the earlier versions of the bill would somehow change the 1909 law with regard to lump sum assignments.

Although there were hearings and considerable discussion of these various bills, they suffered the same fate as the earlier bills mentioned above and those which were to succeed them. All died at one stage or another of the legislative process and none became law.

Also in 1932 a bill⁵⁵ was introduced in the Senate by Sen. Dill which provided for a single term of 56 years from the date of completion of the work. No hearings were held.

In 1933 Sen. Cutting and Rep. Luce introduced identical bills⁵⁶ in the Senate and House with the stated purpose of making it possible for the United States to join the Berne Union. The bills were limited to this purpose and did not purport to be general revision bills. It had then become impossible for the U.S. to join the Berne Union with reservations. The 1928 Rome revision of the Berne Convention which was in force created more problems for some interests in the U.S. than the earlier 1908 Berlin revision. Under the Cutting-Luce bill protection was to be from creation without formalities, but duration was to be governed by Sec. 23 (now 24) of the 1909 Act. The term for unpublished works would presumably have run from creation until 28 years from the date of registration of a claim in the Copyright Office.

In 1934 the President submitted the 1928 Rome revision of the Berne Convention to the Senate for possible ratification.⁵⁷ After hearings⁵⁸ and discussion of the Convention and the Cutting-Luce bill, a new bill⁵⁹ was drafted and introduced in the Senate by Sen. Duffy in 1935. The Senate ratified the Convention prematurely in 1935 before the necessary legislation had been passed, but on reconsideration the Convention was returned to the executive calendar pending further consideration of the Duffy bill.

The Duffy bill provided for a term of 28 years from the date of publication for published works, and 28 years from the date of creation for unpublished works. In both cases a second term of 28 years was permitted under substantially the same provisions as in the 1909 Act.

In 1936 Reps. Daly and Sirovich introduced bills⁶⁰ in the House. Both of these bills and a slightly revised version of the Duffy bill contained provisions which would have made it impossible for the U.S. to adhere to the Berne Convention.

⁵⁵ S. 3985, 72d Cong., 1932.

⁵⁶ H.R. 585 and S. 1928, 73d Cong., 1933.

⁵⁷ Executive B., 73d Cong., 1934.

⁵⁸ *Hearings Held Before the Committee on Foreign Relations, United States Senate, 73d Cong., 2d Sess., on S. 1928.* (Mar. 1934).

⁵⁹ S. 2465, 74th Cong., 1935 and H.R. 10632, 75th Cong., 1936.

⁶⁰ H.R. 11420, 74th Cong., 1935 and H.R. 10632, 75th Cong., 1936.

The Daly bill provided for a single term of 56 years from the date of creation for unpublished works, from the date of publication for published works. The Sirovich bill provided for a single term of 56 years from the date of publication or registration, whichever should be first. Hearings and discussions were held on all three bills but none was passed, nor was any further action taken when the bills were again introduced in later sessions.

Hearings⁶¹ were held jointly on the Duffy, Daly and Sirovich bills. Most of the discussion with regard to duration, and there was very little, was concerned with the renewal problem.

Gene Buck, speaking for the American Society of Composers, Authors and Publishers, favored the provisions of the existing law, stating that a second chance for the author was necessary.

Mary Greer Conklin of the Authors League of America favored a longer term, asking why, if copyright was to be forfeited after 28 or 56 years, other property should not be treated in the same manner.

Sydney Kaye and Louis G. Caldwell, representing the National Association of Broadcasters, favored the abolition of renewals and no limit on assignments, arguing that such provisions may be to the disadvantage of authors who will be prevented from selling what they wish to sell when purchasers are willing to pay. Both favored a single term of 56 years.

William Arms Fisher, representing the Boston Music Publishers Association, expressed the opinion that a single term of 56 years would be better than 28 plus a 28 year renewal because it would do away with the renewal problem, but argued for a term of life plus 50 years.

Edwin P. Kilroe, speaking for 20th Century Fox Film Corporation and the Hays Organization, favored life plus 50 years, but, if that were not possible, favored a single term which would vest immediately so that the entire commercial value would be available at once.

R. S. Ould, a patent attorney, favored retention of renewal for the benefit of the author and his family.

In 1940 Sen. Thomas introduced a bill⁶² in the Senate which represents the last effort to date to achieve a general revision of the law, and at the same time incorporate provisions which would make it possible for the U.S. to adhere to the Berne Union. The bill was known as the Shotwell bill, named for the chairman of the committee which drafted it. In Section 6 it was provided that protection should exist from and after creation; that the term for works created by natural persons should be the life of the author plus 50 years; for works of individual joint authors, the life of the first to die plus 50 years or the life of the survivor, whichever should be longer; for works by authors who were not natural persons, 50 years from creation; for anonymous and pseudonymous works, 50 years from publication unless the name of the author were recorded in the Copyright Office; and for foreign works, the same provisions, except that protection should be no longer than that afforded to the author by the country of which he was a national.

⁶¹ *Hearings Held Before the Committee on Patents, House of Representatives, 74th Cong., 2d Sess. (Feb., Mar. and Apr., 1936).*

⁶² S. 3043, 76th Cong., 1940.

The bill also provided that an assignment would be effective for no more than 25 years unless accompanied by a continuing royalty agreement, in which case the assignment could be for as much as the full term. In the event of an assignment for a lump sum the rights would revert to the author or his successors after the 25 year period. No hearings were held on the Shotwell bill.

The Shotwell Committee had solicited opinions from various interests which were concerned with copyright before drafting its bill. In a summary of the suggestions of these interested groups the Committee stated that the book publishers and the Authors' League of America favored a term of the life of the author plus 50 years, and the motion picture industry any term so long as the beginning and end of the term might be easily ascertained. The radio broadcasters, American Society of Composers, Authors and Publishers, the periodical publishers and the group known as Scholarship and Materials for Research were the remaining interests invited to comment but they apparently made no specific recommendations as to duration.

In a comparison of drafted proposals⁶³ prepared later for the Committee it is stated that the book publishers and radio broadcasters proposed a single term of 56 years from publication for published works, and from creation for unpublished works; ASCAP, a 28 year term, plus a 28 year renewal term, based on publication for published works and creation for unpublished works; the Authors' League of America, life of the author plus 50 years; and the motion picture industry, 56 years from public presentation for works publicly presented, life plus a short term of years for individual works not publicly presented, and a short term of years after creation for corporate works not publicly presented.

Some general conclusions in regard to duration may be drawn from the provisions in the various bills described above, and the hearings conducted in connection with them. Perhaps the most significant is that there was comparatively little controversy over the various provisions on duration. Discussion of them occupies only a minor portion of the hearings. Heated debate occurred on such subjects as formalities, the manufacturing clause, statutory damages, divisible copyright, compulsory license, and innocent infringers. The various bills seem to have failed because of the failure to compromise conflicting interests on one or more of these issues rather than on the issue of duration. The Vestal bill might well have become law had the Senate remained in session. That bill provided for a term of the life of the author plus 50 years, in the version which passed the House, the provision on which there was more controversy than any other proposed provision on duration. It might be concluded, therefore, that if other problems had been solved, a bill containing any one of the proposed terms, with the exception of Senator King's 17 year proposal, would have been acceptable to the different groups concerned.

Generally speaking, the individual creators and their publishers supported a longer term and favored the life of the author plus 50 years, although they were willing to agree to a term of 60 or 56 years from creation or publication if some of their other aims could be

⁶³ Sargoy, Comparison of drafted proposals of the various interested groups submitted to the Committee for the Study of Copyright in respect of proposed amendments to the Copyright Law of the United States. (1938).

achieved. The authors, with some exceptions, seemed to favor the abolition of renewals but, apparently, under the misapprehension that the lump sum assignment problem would be overcome by the proposed legislation. The only proposals which might have had this result were the limitation in time placed upon lump sum assignments in the Shotwell bill and the similar provision for musical and dramatico-musical works in one of the Sirovich bills. The publishers favored the abolition of renewals.

On the other side, favoring no extension of the term, were such users as radio broadcasters and record manufacturers. They also favored abolition of the renewal feature of the existing law.

IV. ANALYSIS OF BASIC ISSUES

A. DATE FROM WHICH THE TERM IS TO BE MEASURED

1. *Present law*

At the present time the duration of statutory copyright in the United States is measured, in the case of published works, from the date of publication and, in the case of unpublished works which qualify for statutory protection, from the date of registration of a claim to copyright in the Copyright Office.

There are several arguments, based for the most part on continuity, in favor of retaining the date of publication as the starting point of the term for published works. Even though the law is cloudy with regard to what constitutes publication, there is a considerable amount of case law upon which to rely, and it may be argued that to abandon the concept now might result in creating more problems than it would solve. Also, publication as a basis may be unavoidable for some kinds of works such as works authored by organizations and anonymous and pseudonymous works.

Also important is the connection between the date of publication and formalities under the present law.

The primary objections to the date of publication as a starting point are two: first, it is difficult in many situations to determine whether or when publication occurred; second, because of the interpretation which has been placed upon the word "publication" by the courts, the word does not include many types of disseminations which, as a practical matter, have the same effect as publication.

It is not within the scope of this paper to explore in detail the problems of what constitutes publication. Some examples will illustrate the problems. No one knows at this time just what is the status, in regard to publication, of works first disseminated by means of sound recordings.⁶⁴ Works which are performed for millions through the medium of radio and television are thought to be unpublished in the copyright sense if no copies through which the work can be visually perceived have been distributed.⁶⁵ It is not clear whether a somewhat limited distribution which precedes a general distribution may or should be considered to constitute publication. Some courts have held that a quite limited distribution constitutes publication which will

⁶⁴ See Kaplan, *Publication in Copyright Law: The Question of Phonograph Records*, 108 PA. L. REV. 489 (1955).

⁶⁵ *Ferris v. Frohman*, 228 U.S. 424, 32 Sup. Ct. 268 (1912); *Uproar Co. v. National Broadcasting Co.*, 8 F. Supp. 858 (D. Mass. 1934) *modified*, 81 F. 2d 873 (C.C.A. 1936); and see Kaplan, *supra*, note 64.

serve to start the running of the statutory term.⁶⁶ Other courts have held that a quite substantial distribution does not serve to terminate common law rights, or to forfeit protection once it has been secured.⁶⁷ The word "publication" is not defined in the statute, and this apparently by design with the intention to leave definition to the courts. The date of publication is defined in the statute as the date on which copies were first placed on sale, sold or publicly distributed.⁶⁸ It does not appear that the courts have adopted this definition for publication itself.⁶⁹

Because of the uncertainties as to what constitutes publication, it may be argued that term should be divorced as far as possible from the concept of publication, thereby eliminating or minimizing the problems raised by the concept. Some suggestions for doing so will be discussed below.

Returning to registration of a claim to copyright as the starting point for the term of copyright in an unpublished work under the present law, it will be seen that there is a lapse of time between creation and registration during which the work is deprived of the procedural benefits of the statute and reliance must be placed upon the common law of the individual States. This means, for example, that should infringement occur prior to publication there will be no prima facie evidence, no statutory damages, and possible divergent rules among the States. The disadvantages of common law protection are, of course, offset to some extent by the fact that it is perpetual. Also, as long as this starting point is available only to unpublished works, the problem of what constitutes publication is introduced in this area also.

2. Date of creation

One of the several possibilities which might be adopted for a starting point is the date of creation of the work. This would eliminate the gap between creation and registration, avoid the uncertainties as to what constitutes publication, and make it possible to bring all copyright protection (for unpublished as well as published works) under a Federal statute. The latter result may be desirable from the standpoint of providing the same procedural advantages for all works, of uniformity by eliminating the possibility of conflicting decisions under the common law of the various States, and of limiting the term for unpublished works.⁷⁰

However, a serious difficulty would be presented by adoption of the date of creation as the starting point if a fixed term running from that date is used. It would be impossible to determine, in many cases, the precise date from which the term would be measured, particularly in the case of a work which is created over a considerable period of time and perhaps goes through several revisions. If the date the

⁶⁶ *Atlantic Monthly Co. v. Post Publishing Co.*, 27 F. 2d 556 (1928).

⁶⁷ *Shellberg v. Empringham*, 86 F. 2d 991 (1929).

⁶⁸ 17 U.S.C., Sec. 26.

⁶⁹ *Patterson v. Century Productions*, 93 F. 2d 489, cert. denied, 58 Sup. Ct. 759, 303 U.S. 655.

⁷⁰ At the hearings preceding the Stovrich bills in 1932, Nathan Burkan argued that the abolition of common law rights would violate the due process clause of the Federal Constitution. See *supra*, p. 66. Although some problems might arise in connection with common law rights in subsisting works, there should be no difficulty with the prospective operation of such a provision. The power over authors' rights is expressly granted to the Federal government by the Constitution, and it would seem that if the Federal government should occupy the field the States would be excluded.

work is begun is selected, the author might be deprived of several years of exploitation if the work requires considerable time to complete. Furthermore there would be nothing to which the copyright could attach until all or some of the work was in existence.

If the date the work is completed is selected, there is a gap in statutory protection between the date the work is begun and the date it is completed, raising the same procedural difficulties mentioned above. Also it would be difficult, in many cases, to determine the date of completion. Authors are frequently dissatisfied with their writings, which, as a result, go through many revisions and usually, in the case of books for example, many editorial changes.

If it is decided that the term for each copyrightable part of the work is to start as that part comes into existence it would not be possible to have a single copyright term for the work as a whole.

It would seem, therefore, that in spite of some advantages, it would not be practical to adopt the date of creation as a starting point, at least in connection with a fixed term of years measured from the date of creation.

Another disadvantage of a term of years running from creation is that such a term would not appear to assure protection for any of the minimum periods required by the Universal Copyright Convention (see *supra*, p. 62). Hence, a minimum period running from the death of the author or from publication or registration prior to publication would have to be provided, at least for foreign works entitled to protection under the U.C.C.

It would, of course, be possible to provide that the work will be protected from creation but measure the term from a different point. So, for example, works might be protected from creation until X number of years after publication, or after public dissemination, or after the death of the author. Protection from creation of the work in connection with a term based on the life of the author will be discussed below.

3. Date of first public dissemination

The word "dissemination" is used here in the sense of making the work known to others by whatever means its nature permits. Thus, for example, in addition to the distribution of copies from which the work may be visually perceived, dissemination would include distribution of sound recordings, public performance or exhibition, etc. This concept might be thought more logical than publication and would solve some of the problems created by the narrow interpretation given to that word.

For example, it would serve to limit the term for works which though publicly disseminated are now considered unpublished and are given protection for an unlimited time under the common law. But the problem of determining what constitutes a dissemination would remain, as would the gap between creation and dissemination. This concept might also raise an entirely new set of problems concerning formalities, particularly notice. It may be that notice would need to be required only in the case of copies which can be visually

perceived, or that oral notice might be adopted for performances, but those questions are outside the scope of this discussion.

It might be questioned whether a term of years running from public dissemination would assure protection for any of the minimum periods required by the U.C.C. (see *supra*, pp. 62, 72).

4. *Date of registration*

If the date of registration of a claim to copyright is selected as the starting point for all works, as it is now for those unpublished works which come within the statute, the problem of the certainty of the starting point would be solved. However, the gap between creation and registration would remain, and some system of compulsory registration within a limited time would seem to be necessary.

Under the present statute and court decisions the law seems to be that registration is required in the case of published works only upon the demand of the Register of Copyrights⁷¹ or as a prerequisite to an action for damages for infringement,⁷² and with respect to the former the statute does not state explicitly that registration is required in the case of demand. An attempt to adopt a strict system of compulsory registration as a condition of copyright might meet with considerable opposition.

5. *Life of the author*

As previously noted, most of the countries of the world, which have copyright legislation, have adopted a term based upon the life of the author. The most common provision is a term consisting of the life of the author plus fifty years.

Under such a provision, insofar as it can be applied, some of the difficulties mentioned in connection with other terms would be avoided. Each of the works of an author could be protected as it came into existence, without the necessity of determining the date of creation, publication, or public dissemination. Copyright protection for all works, whether or not published or otherwise disseminated, could be brought under the Federal statute for the same period of protection.

The date from which the term of years would be measured would be the author's death, a single date to be determined for all the works of each author, rather than a date for each work. The author would be assured protection during his lifetime and a term thereafter during which his family might benefit. This term would have the additional advantages of bringing copyright legislation in the United States closer to that in most other countries, and of having all of an author's works fall into the public domain on the same date.

Against the adoption of a term of the life of the author plus a term of years it has been argued that it would create too much uncertainty as to the date of death, or would require that the date of death be recorded in records to be kept by the U.S. Government. We have found no published reports of difficulty (although some may exist) in Western Europe where this term has been almost universally adopted.

⁷¹ 17 U.S.C., Secs. 13 and 14; *Pearson v. Washingtonian Publishing Co.*, 306 U.S. 30, 40 U.S.P.Q. 190 (1930).

⁷² 17 U.S.C., Sec. 13.

As pointed out above, there would be only one date to be determined in connection with each author, rather than many as is the case with publication as the starting point. Further, it may be argued that most of the works which one might desire to use after the expiration of a considerable number of years would be works of lasting value, the works of authors sufficiently well-known that the dates of their deaths would usually be ascertainable in libraries, newspaper files, public records kept in connection with the distribution of decedents' estates, and other sources.

In those countries which have adopted such a term, the term is generally measured from the last day of the calendar year in which the author died, or the first day of the succeeding year, thus making it necessary to know only the year in which he died rather than the exact date. It might be worth considering this latter provision in connection with this or any of the other possible starting points for the term.

It must be borne in mind that a term of life plus a period of years could not be applied to works of authors other than individuals, such as the large number of works which under the present law are authored by corporations or other organizations or groups.* Nor could it be applied to anonymous and pseudonymous works. The date of publication, creation, dissemination or registration would have to be adopted as the starting point for such works, even if the term of life plus a term of years were adopted in the case of individual works. Such a combination of different terms is found in a number of other countries.

B. LENGTH OF TERM

We will here be concerned with a shorter versus a longer term generally. The problem of more than one term and the possibility of different terms for different types of works will be discussed below.

In considering the length of the term it is necessary to return to the basic purpose of copyright protection. That purpose is stated in the Constitution to be "to promote the Progress of Science and useful Arts * * *." The Constitution also restricts protection " * * * for limited Times * * *." The basic consideration, therefore, is to determine what duration of limited time will best promote the progress of science and useful arts.

The term should be long enough to provide an incentive for the author, i.e. to encourage him to create by giving him the assurance that, if successful, his economic reward will be adequate. It is no doubt true that there are some who will create regardless of protection. But it is also true that some will be drawn more readily into the literary or artistic professions and will be able to devote their time to creative activity if they are afforded an adequate economic return for successful efforts. It is not only the author who must be considered but also the members of his immediate family whom he may be obliged to support. Further, it is to the author's advantage, and to the advantage of the public, to provide an adequate term of protection to make it commercially feasible for publishers and other distributors to aid him in exploiting his work. The period of protection should be sufficient to provide an adequate economic return

* See Copyright Office Note, Appendix A, at p. 81.

to all of these interests, if it is true, as seems to be assumed in the Constitution, that it is to the benefit of the public to promote the creation and dissemination of intellectual works.

There have been from the beginning of copyright legislation some who favored perpetual copyright. It is clear that this was not intended as a possibility under the Constitution. After the author, his family, and the distributors, have had a fair economic return, there appears no logical reason to restrict the public's free access to the work by continuing the benefit to remote heirs, or to the distributors or his successors. It is generally believed to be to the benefit of the public that once the work has been created, and the author protected for a sufficient time to have produced the original incentive, the work should become available to be freely used by all. There is believed to be a greater probability of more varied editions of works of lasting value, and a wider opportunity to distribute existing works competitively, and use them as the basis for new creation, if they are freely available. It is basic to our economic system that profits in this area should be gained by more efficient manufacture, better distribution and the like, rather than by perpetual protection, once the purpose of the protection for a limited time has been achieved.

It would be impossible to determine precisely what term would best carry out the Constitutional purpose. Few people, if any, would consider a term of seventeen years, as proposed in the bill⁷³ introduced by Sen. King, to be sufficient. It is true that the greatest returns on some works, such, for example, as popular novels, are received in the first two or three years after publication. However, there are many other factors to be considered. An author may create several unsuccessful works for each successful one, and the possibility of a long-continuing return for the latter may be necessary to provide an incentive to continue his creative efforts. In many cases an author remains obscure until he achieves one popular success. At that time he is often able to return to his earlier works, the merits of which will be recognized in the light of his new status, and even earlier works lacking merit will often enjoy some popularity.

It has been argued for many years that, in those relatively few cases in which a work is of lasting value, a short term would deprive the author during his later years, and perhaps his children during their minority, of the benefit of royalties at the time when they might be more necessary than at any other. This point was made in the House Committee Report⁷⁴ in 1909 when the renewal term was extended from 14 to 28 years. Whether a term of 56 years is sufficient to fulfill this need may be debated, for it is apparent that it is quite possible under this term that some of an author's earlier works may fall into the public domain while he is living. This is one of the arguments made in favor of a term based on the life of the author which would, of course, prevent the above mentioned situation entirely.

⁷³ *Supra*, note 46.

⁷⁴ H.R. REP. NO. 2222, 60th Cong., 1909.

At the opposite end of the scale it could probably be said that a term of 150 years, to select an arbitrary figure, would be too long. This would result in benefiting remote heirs who could hardly be connected with the author's incentive, and probably also in benefiting the publisher long after an adequate opportunity to derive a fair return had been afforded him. This seems so even if it is assumed that it is desirable to encourage the publication of intellectually important works which promise little or no economic return, and that the best way to accomplish this end is to provide a substantial return to the publisher in the case of an economically successful work. Moreover, after so long a time it would often be difficult to trace the remote heirs of the author or other claimants of the copyright.

In view of the above it might be argued that, if the term is to be measured on a basis other than the life of the author, a term of 80 years would accomplish the desired result in almost all cases. If the life of the author is to be used, a term of perhaps 30 years after his death might be considered the minimum necessary to assure protection for the benefit of his dependents.

As will be seen from the testimony at the hearings described above, the arguments against a longer term are usually presented by users of copyrighted materials, such as radio and television broadcasters and manufacturers of sound recordings. They believe it in their interest to have the intellectual materials which form the basis of their products, as distinct from the products themselves, free to be used by all. This is sometimes stated to be in the public interest also. Against these arguments it is contended that the public interest lies in assuring an adequate incentive for the author, and that only when this purpose has been achieved should the work fall into the public domain. If the incentive is not provided, fewer intellectual materials will be produced. If this latter argument is valid in regard to the public, it is probably also valid in regard to users.

It was estimated in 1930 by the use of mortality tables that a term of life plus 50 years would result in protecting works, on the average, for about 76 to 86 years from the date of creation. This figure would probably be slightly increased now as life expectancy has increased during the last 20 years. This does not seem such an extension of the length of the term as to conflict with the constitutional purpose. Of course, if the term is based on the life of the author, some works would be protected for a considerably longer period and some for a shorter period, and this has been raised as an objection to such a term. Others have argued that it is the author's interest, not the individual work, that should be given protection, and that there is no reason why each work must be protected for an equal period.

If a term based on the author's life is adopted for works authored by individuals, it would be necessary to select a different term for the works of corporations and other organizations and groups, and for anonymous and pseudonymous works. The usual practice in countries in which such works are specifically provided for is to adopt the same term for these works as that which follows the author's death (usually 50 years) and to measure the term from the date of publication or dissemination. This would still leave the question of duration

for such works if not published or disseminated; perhaps for such works the period could run from creation or registration. The consideration of the author's old age and his family obligations are not present in such cases. Perhaps the term of 50 years provided in a number of other countries, or the term of 56 years available under the present U.S. law, would be ample time to allow for exploitation of the work in terms of incentive for the corporate or other like author.

C. SINGLE VERSUS RENEWABLE TERM

A provision for two successive copyright terms has been a part of each Federal statute on copyright in the United States since the Constitution was adopted. In the first statute⁷⁵ the successive terms were for 14 years each and the second term was granted to the author, his executors, administrators or assigns, if the author should be living at the expiration of the first term.

In 1831 the act was amended⁷⁶ to increase the first term to 28 years and to provide that if the author be dead at the expiration of the first term the second term of 14 years should go to the widow and child or children.

In 1909 the statute was amended⁷⁷ to increase the second term to 28 years and to provide that if the author be dead the second term should go to "the widow, widower, or children * * * executors, * * * or * * * his next of kin." There are also provisions which permit the proprietor to renew under some circumstances.

The Report of the House Committee on Patents⁷⁸ states that the purpose of retaining the renewal provision in the 1909 Act, after considering single term of life plus 50 years, was, in effect, to give the author, or his successors listed in the Act, a second chance to benefit in the case of a lump sum assignment of the first term.

In addition to benefiting the author who has assigned for a lump sum, a second argument advanced⁷⁹ in favor of retaining the renewal feature of the statute is that the work will fall sooner into the public domain if the claim to copyright is not renewed.* It might be contended in reply to this argument that most of those works in which the claim is not renewed will be valueless; no one will wish to use them, and it therefore is immaterial whether they are in the public domain.

A third argument has also been advanced⁸⁰ for the renewal feature, namely that the record of copyright ownership is thereby brought up to date at the end of the first term. This last may have some merit although, as has been pointed out,⁸¹ the benefit of an up-to-date record of ownership could be obtained without resorting to a second term if there is a system of recording transfers of ownership.

⁷⁵ *Supra*, note 3.

⁷⁶ *Supra*, note 17.

⁷⁷ *Supra*, note 19.

⁷⁸ *Supra*, note 74.

⁷⁹ See Chafee, *Reflections on the Law of Copyright*, 45 COLUM. L. REV. (1945).

⁸⁰ *Id.*

⁸¹ *Id.*

* See Copyright Office Note, Appendix B, at p. 82.

With regard to the second chance for the author or his successors, the statute has not fully accomplished the purpose stated by the Committee, except perhaps in the case of the author who has a strong bargaining position, either because of his success or because of his membership in an organization, and who is well advised on the intricacies of the law of copyright. In *Fisher v. Witmark*,⁸² the Supreme Court held that the author's expectancy of the second term could be assigned. Thus, an author whose bargaining position is not strong, or who is not well informed, may assign his expectancy in order to secure a publisher, and the publisher, though demanding such as assignment, will not be willing to pay any substantial sum for the expectancy because it is only an expectancy, the author's right to the second term being contingent upon his survival to the renewal date. The result may be that the author is in a less fortunate position than if he had a completely assignable single term, although it can be argued that the publisher would pay little more for a single term of 56 years than for a first term of 28 years.

If the renewal provision is to be retained and is to accomplish the purpose stated by the Committee in 1909, it would seem necessary to make the second term unassignable until renewal is secured. In that event, some provision might be considered to give the assignee of the initial term an option to meet the best offer for the renewal term.

At the hearings held on the various bills proposed since 1909 there was adverse criticism of the renewal feature from most of the interests concerned. The users were against it, as well as the publishers, because their investment in the exploitation of a work might become valueless at the end of the first term, particularly if a second term unassignable in advance were provided. Many authors were in favor of abolishing the split term because of the chance of losing the second term for failure to comply with the renewal formalities. The Authors' League of America favored a single term of life plus 50 years although willing to compromise on a single term of 56 years under some circumstances, including solution of the lump sum assignment problem.

Although it is probably true that there are some assignments which incorporate an inadequate royalty agreement, the crux of the problem seems to be the lump sum assignment. Perhaps it is unnecessary to burden the law with complex renewal provisions to solve that limited problem. The Shotwell bill offered one solution which eliminated the split term and attempted to remedy the lump sum assignment problem at the same time, i.e., a limit on the duration of lump sum assignments with a reversion to the author or his family at the expiration of the assignment. A provision along the lines of the Shotwell bill⁸³ would, perhaps, be an advance, but the problem of the jeopardized investment of the user or publisher would still be present, and there would be no assurance that an inadequate royalty agreement would not be used to defeat the spirit of the provision. A provision which incorporated a single term, a royalty agreement in all cases, and a minimum royalty requirement might be considered.

The "second chance" theory of the split term, or of a limitation on assignments, would seem to have no application to works authored

⁸² 818 U.S. 648, 87 U.S.P.Q. 50 (1948).

⁸³ *Supra*, note 62.

by corporations and like organizations. Hence, the renewal provisions, if any, might be limited to works by individual authors.

The problem of the renewal system, and particularly the lump sum assignment problem, may well deserve a separate study.*

D. DIFFERENT TERMS FOR DIFFERENT KINDS OF WORKS

There are two aspects to the question whether different works should be granted different terms: first, whether differentiation should be made because of the nature of authorship; second, whether differentiation should be made because of the nature of the work.

The aspect of differentiation because of the nature of authorship has been discussed above in connection with a term of life plus 50 years. If such a term is adopted it could logically apply only to works of individual authors. It would be necessary to adopt another measure for works of corporations and other organizations and for anonymous and pseudonymous works. This has been done in Great Britain and several other countries.

In some countries the nature of the work has been used to justify, for some kinds of works, a shorter term than that generally granted in the country in question. The most typical example is photographs. The theory seems to be that a photograph, or at least most photographs, do not rise to the same level of creative dignity as other works. But the aesthetic value of a great part of the protected works is meager.

An argument is also made for varying the term according to the nature of the work on the basis of the commercial life of some types of works. In addition to photographs, in connection with which this argument is also used to justify a shorter term, it has been used in limiting the term for "applied art" or "industrial design" in some countries. It has been introduced in discussions of possible short-term protection in the United States for designs, and for performances as distinguished from the work performed.

The long commercial life of some musical compositions has been mentioned as an argument for extending the term for musical compositions. Thus it has been argued that, since some musical works continue to be performed commercially beyond the period of the present copyright term, musical works in particular should be given a longer term of protection.

Against granting a longer term, because of commercial life, to works in some categories, such as music, it may be argued that this would be contrary to the purpose of copyright legislation found in the Constitution, i.e., to create incentive for authors by protecting their works for limited times, after which the work should be in the public domain. One of Professor Chafee's proposed six principles of copyright legislation⁸⁴ is that the term of protection should not exceed the purpose of protection. This seems a sound explanation of the limited times provision of the Constitution. The term should be as long as is necessary to create an adequate incentive. If the term meets this requirement it seems questionable whether it should be extended merely because the work has commercial value at the end of the term. Such an extension would not benefit the author, but rather would benefit remote heirs or

⁸⁴ *Supra*, note 79.

* Ringer, *Renewal of Copyright* [Study No. 81 in the present committee print.]

assignees, including, for example, in the case of most music, members of performing rights societies, long after the purpose of the protection had been achieved.

It may be asked what significance the concept of the public domain would have if works were protected for as long as they had commercial value. The logical extreme of such an approach would be to protect all works as long as they had commercial value, without regard to classification. Some works (e.g., Mozart's or Shakespeare's) would be protected perpetually, some briefly or not at all.

The theory of the Constitution seems to be that after a period of protection sufficient to provide incentive by assuring to the successful authors and distributors an economic return adequate to take care of their legitimate interests, it is to the benefit of the public to have the work fall into the public domain.

It can be argued that if commercial value is significant in regard to the length of term, it leads to a conclusion against, rather than for, a longer term. The argument might be stated as follows:

It is of little significance to the public at large what happens to works which have no commercial value at the end of the term. Few will wish to use them. Such works will not be exploited in a variety of editions, recordings, productions or the like. It is the works which still have commercial value which should fall into the public domain as soon as the constitutional purpose has been achieved (rather than continuing protection for the benefit of remote heirs), for it is the works which still have commercial value from which the public will benefit in the form of more numerous and varied editions, recordings and productions.

It might be concluded from the foregoing that the procedure to be followed in determining the length of the term should be to decide what maximum term will achieve the constitutional purpose, and to adopt that term without regard to the continuing commercial value of some works in some categories.

At the opposite end of the scale, i.e., a shorter term for some works because their commercial value may be quite limited in time, the situation may be different. If no work in a particular class would have commercial value after ten years, for example, it would certainly not increase the author's incentive to protect the work beyond a ten-year period, and so, perhaps, a shorter term would be justified. Whether this is true of any particular class of works is another question. In the case of photographs, for example, there may often be sufficient artistic merit and a long enough commercial life to justify equality of treatment between this class and works of art generally. And even in the case of news photographs, not created primarily as art, the historical value of particular photographs may give them a considerable commercial life.

Recognition of variances in term for different kinds of works would present new problems of demarcation between classes and complexities not found in the present law.

V. SUMMARY OF BASIC ISSUES*

There are three basic issues to be considered in connection with duration: the starting point of the term, the length of the term, and whether there should be a single term or two or more successive terms.

* See Copyright Office Note, Appendix C, at p. 83.

A. DATE FROM WHICH THE TERM IS TO BE MEASURED

The term is now measured from the date of publication in the case of published works, and from the date of registration of a claim to copyright in the Copyright Office in the case of unpublished works.

In addition to the date of publication there are at least four possible starting points for measuring the term of years for published works: The date of registration; the date of first dissemination (which, if adopted, would include not only published works but works which are publicly disclosed in some manner other than the distribution of copies); the date of creation; or the death of the author (where the author is an individual).

In the case of unpublished works (or "undisseminated works" if the date of first dissemination is chosen for disseminated works), there are at least two possible choices: the date of registration, or the date of creation, the latter in connection with either the life of the author plus a term of years or a fixed term.

B. LENGTH OF TERM

Under the present law the term is 28 years plus a second term of 28 years. It would be possible to retain this term, shorten it, or lengthen it.

C. UNQUALIFIED SINGLE TERM, QUALIFIED SINGLE TERM, OR SUCCESSIVE TERMS

The present law provides for two successive terms with the stated purpose of ⁸⁸ giving the author or his family a second chance in cases in which he assigns the first term for a lump sum.

It would be possible to retain two successive terms, with or without a provision that the author's expectancy of the second term could not be assigned; or to adopt a single term, with a restriction on the duration of assignments and a reversion to the author or his heirs, and/or a requirement for royalty agreements in all cases; or to adopt a single term without restrictions on assignments.

 APPENDIXES

APPENDIX A

COPYRIGHT OFFICE NOTE ON CLASSIFICATION OF COPYRIGHT REGISTRATIONS
ACCORDING TO INDIVIDUAL OR CORPORATE AUTHORSHIP

The Copyright Office has made a sample analysis of all copyright claims registered during the six months period from January through June, 1955, as listed in the Catalog of Copyrights Entries, Vol. 9, to ascertain the relative numbers of works by individual authors and works by corporate or other groups as entities.

This analysis shows that of the total of 108,467 registrations made during that period of six months, 61.2% were for works by individual authors, and 38.8% were for works by corporate or other groups as entities.

The figures by classes of works are shown in the following table.

These figures reflect only the number of works registered in each category. No figures have been compiled on the basis of the estimated commercial importance of the various classes of works. Motion pictures, for example, numbered only 1,396, or about 1.24% of the total of 108,467 works registered, but their relative commercial importance is undoubtedly much greater than their

⁸⁸ *Supra*, note 74.

numerical proportion of all registered works. In view of the relative commercial importance of periodicals and motion pictures, it seems likely that works of corporate authorship (numerically 38.8% of all registered works) would represent more than 50% of the commercial value of all registered works.

Copyright Registrations, January-June 1955

Class of work	Number of works in class	Works by individual authors		Works by corporate or other entities	
		Number	Percent	Number	Percent
A (Books and pamphlets).....	30,972	24,622	79.5	6,350	20.5
B (Periodicals).....	30,532	1,924	6.3	28,608	93.7
C and D (Works for oral delivery, and dramas).....	2,220	2,026	91.3	194	8.7
E Pub. (Published music).....	10,237	9,776	95.5	461	4.5
E Unp. (Unpublished music).....	20,831	20,790	99.8	41	0.2
F (Maps and atlases).....	1,112	521	46.6	591	53.4
G-K (Works of art, etc.).....	5,758	4,393	76.3	1,365	23.7
KK (Commercial prints and labels).....	5,409	2,114	39.1	3,295	60.9
L and M (Motion pictures).....	1,396	111	8.0	1,285	92.0
Total, all classes.....	108,467	66,277	61.2	42,190	38.8

APPENDIX B

COPYRIGHT OFFICE NOTE ON PERCENTAGE OF ORIGINAL COPYRIGHT REGISTRATIONS FOR WHICH RENEWALS ARE EFFECTED

In order to estimate the percentage of original copyrights (renewable in their 28th year) that are actually renewed, the Copyright Office has made a comparative tabulation, by classes of works, of the number of renewals made during the fiscal year 1954 and the number of original copyright claims registered during the fiscal year 1927.

It may be noted that the original copyrights for which claims are registered during a particular fiscal year (1927) do not correspond precisely with those renewable during the 28th fiscal year thereafter (1954). However, the correspondence seems sufficiently close that the number of original copyright registrations made during 1927 is a reliable approximation of the number of original copyrights renewable during 1954.

As shown in the following table, the total number of renewals during 1954 was about 9.5% of the total number of original copyright registrations during 1927. The figures by classes of works are given in the table.

Renewals in Proportion to Original Copyright Registrations

Class of work	Original Registrations, 1927	Renewals, 1954	Percent of Renewals to Original Registrations
A (Books, pamphlets, etc.).....	*75,780	3,126	4.1
B (Periodicals).....	41,475	2,219	5.4
C (Lectures, etc.).....	302	4	1.3
D (Drama).....	4,475	690	15.4
E Pub. (Published music).....	17,251	7,761	45.0
E Unp. (Unpublished music).....	8,031	1,685	21.0
F (Maps).....	2,677	910	34.0
G and H (Works of art).....	2,575	27	1.1
I (Technical drawings, etc.).....	1,229	2	0.2
J (Photographs).....	7,415	20	0.3
K (Prints, etc.).....	14,883	227	1.5
KK (Commercial prints).....	2,856	76	2.7
L (Motion picture photoplays).....	1,271	556	43.7
M (Motion pictures, not photoplays).....	644	1	0.2
Total, all classes.....	180,864	**17,304	9.5

*Excludes ad interim registrations.

**In addition, there were 1,204 renewals in 1954 for contributions to periodicals for which no separate registrations as contributions had been made originally.

APPENDIX C

COPYRIGHT OFFICE NOTE ON QUESTIONS AS TO POSSIBLE ALTERNATIVE SOLUTIONS OF BASIC ISSUES

The following is a recapitulation of the basic issues discussed in the accompanying study by Mr. Guinan on the duration of copyright and of the possible alternative solutions of those basic issues.

I. AS TO THE BASIS FOR COMPUTING THE TERM

What combination of the following alternative bases for computing the copyright term should be adopted?

1. A term of years running from first publication, i.e., the issuance of visual copies.

Works not published would then be dealt with under some combination of alternatives 3(b), 4(b), 5(b), and 6.

2. A term of years running from first public dissemination, i.e., the issuance of visual copies, the issuance of sound recordings, or public performance or exhibition.*

Works not publicly disseminated would then be dealt with under some combination of alternatives 3(b), 4(b), 5(b), and 6.

3. A term of years running from creation of the work.*

(a) This term could be applied to all works whether or not published or publicly disseminated; or

(b) This term could be applied, in conjunction with alternative 1 or 2, to works not published or not publicly disseminated during the specified term of years after creation.

4. A term of years running from registration.

(a) This term could be applied to all works—whether or not published or publicly disseminated—for which registration within a specified time is made compulsory.

(b) This term could be applied, in conjunction with alternative 1 or 2, to unpublished or undissemated works registered voluntarily, as under section 12 of the present statute; and unpublished or undissemated works not registered would then be dealt with under alternative 3 or 6.

5. The life of the author and a term of years after his death.

This term could be applied only to works authored by identified natural persons. It could be applied (a) to all works so authored, whether or not published or publicly disseminated, or (b) in conjunction with alternative 1 or 2, to works so authored which are not published or publicly disseminated during the life of the author and the term of years after his death.

Works by corporate organizations or other groups—such as works made for hire and composite works—and anonymous and pseudonymous works, would have to be dealt with under some combination of alternatives 1, 2, 3, 4, and 6.

6. In conjunction with alternatives 1 and 4(b), or with alternative 2 and 4(b), unpublished works or undissemated works, if not voluntarily registered could be left to common law protection until published or until publicly disseminated.

II. AS TO THE LENGTH OF THE TERM

1. For what number of years should the term run after publication, public dissemination, creation, registration, or the death of the author?

2. Should a shorter or a longer term of years be fixed for any particular classes of works? If so, for what classes and what should the term be?

* Article IV, par. 2 of the U.C.C. requires that the term of protection be "not less than" one of the following: (1) "the life of the author and 25 years after his death"; (2) "25 years from the date of first publication"; (3) "25 years . . . from its registration prior to publication." A term of years running from first public dissemination, or from creation of the work, would not assure protection for any of the minimum terms required by the U.C.C. Thus, if alternative 2 or 3 were adopted, a supplemental term would have to be provided, at least for foreign works entitled to protection under the U.C.C.

8. Should the term of years be computed from the end of the year in which the event that starts the term running has occurred?

III. AS TO A SINGLE OR RENEWABLE TERM*

1. Should the term be a single or a renewable one?
2. If a single term is provided for: (a) Should a time limit be placed on the duration of (1) all assignments, or (2) assignments for a lump sum? Or (b) should a minimum royalty be prescribed?

* NOTE.—The question of a single or renewable term is discussed in Study No. 81 in the present committee print.

COMMENTS AND VIEWS SUBMITTED TO THE
COPYRIGHT OFFICE
ON
DURATION OF COPYRIGHT

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COMMENTS AND VIEWS SUBMITTED TO THE COPY-
RIGHT OFFICE ON DURATION OF COPYRIGHT

By *Herman Finkelstein*

FEBRUARY 11, 1957.

Thank you for your letter of the 4th enclosing Mr. James J. Guinan Jr.'s study on the subject of duration.

My own views are set forth in the enclosed reprint of "The Copyright Law—A Reappraisal," 104 U. Pa. L. Rev. 1025, 1042-54. [Excerpts from that article, with slight modifications, and with footnotes omitted, are attached at the request of Mr. Finkelstein.]

I favor a term of life and 50 years for the reasons which are set forth in that article.

Referring specifically to the questions in your Appendix C, I favor No. 5 of Item I—basis for computing the term.

In the case of works which have not been published or publicly disseminated during the lifetime of the author, a term of 50 years after first publication or public dissemination would seem desirable.

Works by corporate organizations or other groups and anonymous and pseudonymous works could have a term of 50 years from the date of publication or first public dissemination.

With respect to Item II—the length of the term, I have already indicated my preference for a period of 50 years after death.

There may be a shorter term for photographs.

As to subdivision 3 of Item II, I think the term of years should be computed from the end of the year in which the event that starts the term has occurred.

With respect to Item III, subdivision 1, I think the term should be a single one and not one that is renewable.

As to subdivision 2 of Item III, I should like to refrain from expressing an opinion at this time.

HERMAN FINKELSTEIN.

By *Herman Finkelstein*

[Excerpts from article in 104 U. Pa. L. Rev. 1025, with slight modifications and with footnotes omitted.]

DURATION OF COPYRIGHT TERM

THE PRINCIPLES INVOLVED

The idea of a term of copyright measured in multiples of fourteen years was a vestige of the time when privileges were granted as a means of encouraging printers. * * *

The fourteen-year term was then logical, being long enough to train two sets of apprentices in the new art. In an ideal system of law, the duration of an author's property rights in literary works would probably have some relation to the duration of other property rights. It is too late to urge that authors should have *perpetual* rights in their works; that was settled to the contrary by a closely-divided English court in 1774 and by our Constitutional mandate that exclusive rights of authors in their works may be granted by Congress only "for limited Times."

Some of our greatest legal and literary minds have urged that, in principle, authors are entitled to enjoy their property rights for the same period as land-owners. * * *

Our ideal term of copyright must be for a limited period of time, but should be as long as is commensurate with the public interest. The great public interest behind the enactment of copyright laws is the encouragement of authors by giving them the opportunity of obtaining fair rewards for their labors. It is submitted that the test should be, not how little may be vouchsafed to the author as a means of such encouragement, but rather, what should the public consider as a fair reward for the contributions made by authorship to society? Our answer must depend on (a) the scope of the rights given, (b) the periods of protection in other fields of human endeavor, (c) historical considerations, (d) experience in other countries and (e) our national interest in both its domestic and international aspects.

What have been the arguments pro and con over the years? What validity do those arguments have today? Perhaps the most eloquent and certainly the most effective argument against extending the term of copyright was made by Lord Macaulay more than a century ago, at a time when the term of copyright was twenty-eight years from the date of publication but not less than the life of the author. Sergeant Talfourd proposed a term of life plus sixty years. Macaulay's opposition centered on five points: (1) No rights of property should survive death except to the extent that parliament deems proper. (2) Except for a system of patronage, which is undesirable, copyright is the only known means of encouraging professional authors, but copyright is a monopoly and monopolies are evil. "For the sake of the good we must submit to the evil; but the evil ought not to last a day longer than is necessary for the purpose of securing the good." (3) Copyright laws impose "a tax on readers for the purpose of giving a bounty to writers. The tax is an exceedingly bad one; it is a tax on one of the most innocent and most salutary of human pleasures; and never let us forget, that a tax on innocent pleasures is a premium on vicious pleasures." (4) A publisher will pay little more for a copyright having a duration of life plus sixty years than for one of life plus twenty-five years. "From the very nature of literary property it will almost always pass away from an author's family; and * * * the price given for it to the family will bear a very small proportion to the tax which the purchaser, if his speculation turns out well, will in the course of a long series of years levy on the public." (5) If the copyright does not fall in the hands of booksellers, but remains in the family, it may produce an even greater evil—"many valuable works will be either totally suppressed or grievously mutilated."

These arguments must be examined in the light of both experiences and logic. * * *

TERMS IN OTHER COUNTRIES AT THE TIME OF ENACTMENT OF 1909 LAW AND AT PRESENT

By the time our 1909 law was enacted, every major country of the world except the United States and Holland (including the Dutch East Indies) granted protection to the author at least for the period of his life. At the present time, 38 of the 60 countries having copyright laws provide for a term of life and fifty years or longer. The countries having the shortest terms at present are Russia (life and fifteen years) and the United States (twenty-eight years from publication plus an additional term of twenty-eight years). No country today has a term shorter than life and fifteen years, except Bulgaria and Yugoslavia where the rights terminate upon the author's death if he does not leave a widow or children under twenty-one (Bulgaria) or twenty-five (Yugoslavia). (A chart showing the period of copyright in the several countries throughout the world in 1909 and at present is given in 104 U. Pa. L. Rev. 1025, 1046-49.)

The trend toward standardizing the period of copyright protection at life and fifty years accords with the period prescribed in the Berne Convention, as modified at Brussels in 1948. Such a term protects the author's widow and children or other beneficiaries for a reasonable period beyond the author's death. In an age and country where all are conscious of the importance of life insurance, this is not too generous a gesture to authors.

Macaulay's argument that no property rights should survive death in the absence of express statute cannot command much sympathy in our day. Opponents of a longer term of copyright have reiterated Macaulay's argument that a copyright is a monopoly; that monopolies are odious and that therefore "the evil [monopoly] ought not to last a day longer than is necessary for the purpose of securing the good [encouraging professional authors]." This assumes that a copyright confers a monopoly in the sense that a patent does—that is, that

the whole world is excluded from the field covered by the copyright even though another author may arrive at the same result independently. This is true in the case of patents but not as to copyrights. Two cases in which opinions were written by the most outstanding judges of the century illustrate this important difference. In the first, *Arnstein v. Edward B. Marks Music Corp.*, 82 F. 2d 275 (2d Cir. 1936), Judge Learned Hand observed that "independent reproduction of a copyrighted musical work is not infringement," and that therefore it is "contrary to the very foundation of copyright law" to assert that "copyrights, like patents, are monopolies of the contents of the work." In other words, copyrights, unlike patents, do not confer such a monopoly.

Turning now to a patent case, in which there had been a race between four distinguished inventors working independently on the important radio feedback circuit, Lee DeForest was held to have had the good fortune to arrive before the others. In announcing this decision, Justice Cardozo could not help but lament the plight of those who failed, remarking, "The prize of an exclusive patent falls to the one who had the fortune to be first. * * * The others gain nothing for all their toil and talents." *Radio Corporation of America v. Radio Engineering Laboratories, Inc.*, 293 U.S. 1, 3 (1934).

The decision would have been otherwise if the issue had been between four authors rather than between four inventors; as Judge Hand pointed out, if several authors independently create substantially the same play or other literary or musical work, each may secure a copyright without infringing on the other's rights.

The remaining argument advanced by Macaulay and his successors against extending the term of copyright is that it would benefit publishers rather than writers and their families. This may have been a valid argument in the days when authors sold all their rights to publishers outright for a lump sum. But that is rarely done today. In any event, the writer's family may be protected, if that is desirable. It could be provided that no assignment by an author should be valid for more than a given period unless the basis of payment is a royalty commensurate with the prevailing scale or a statutory scale. It might also be provided that no rights should continue beyond the present fifty-six year period unless the author has a widow or children or other prescribed next of kin surviving, or has bequeathed the rights to a charitable, religious or educational institution.

ADVANTAGES OF COMPUTING TERM ON BASIS OF LIFE OF AUTHOR PLUS PERIOD OF YEARS

The copyright laws have contributed greatly to the development of the literary profession. The resulting financial independence of the writing fraternity has helped to supply innocent pursuits for the leisure hours made available in our machine age. In fact, the product of the present-day author, as we may see nightly on television programs, helps to sell automobiles, refrigerators, washing machines, cigarettes, soap, perfumes, beer, etc.

There was a time when extension of the term of copyright was considered a tax on the public, who were the purchasers of books—the main outlet for authorship. Today's consumer is largely the motion picture producer (who is both creator and user of the output of authorship), manufacturers of goods advertised on radio and television, and the theatre-goer who pays \$8.80 for a seat at a Broadway musical and finally, of course, the relatively diminishing number of readers. Without authors, there would likely be no radio and television programs and no great industries manufacturing the remarkable apparatus for such mass communication.

Authors receive only a small fraction of the amount spent for entertainment in our time. The annual royalties paid to all authors probably do not equal the yearly payments for broadcast advertising by a single large advertiser.

Lord Macaulay's argument that a long term of copyright—indeed any term after death—was no inducement to authorship is not valid today. We can only speculate upon the extent to which Macaulay may have been influenced by the fact that "he had no wife, nor child, nor even a dog." The question, however, is not whether a given term of copyright will serve as an inducement to the creation of new works, but rather, whether fairness to authors does not demand that their rights be vouchsafed for as long a period as is consonant with the mores of modern society. Today, authors do not turn over all their rights to the booksellers for a lump sum. Their concern for their own future and that of

their families is just as great as that of the industrial executive who carefully provides for a substantial pension in the winter of life and sufficient life insurance to take care of his loved ones after his death.

The typical agreement between composers of music and their publishers provides that all rights "shall revert to the writer upon expiration of the original term of the United States copyright or at the end of twenty-eight years from the date of publication in the United States, whichever period shall be shorter." Grants of dramatic rights to stage managers or producers are usually for even a shorter period. In fact, they are not grants, but mere "leases." The author reserves all rights not expressly leased to the manager. This method of dealing with theatrical properties would have shocked the managers of Macaulay's era, for the copyright law did not give any protection whatsoever to dramatic rights (i.e., the right of stage presentation) until Bulwer Lytton's Act of 1833 (3 and 4 Will. 4, c. 15).

If it is fair that an author should be able to leave to his loved ones the right to receive income from the works created by him, then the author should be given as long a term of copyright as experience has shown practical. Our sister democracies have found a term of life and fifty years to be a reasonable period. Great Britain was apparently not so convinced in 1911, when the present law was enacted: Parliament then provided for a compulsory license during the last twenty-five years of the copyright term. But no one has found it necessary to demand such a license, and Parliament did away with it in the 1956 Revision. (4 and 5 Eliz. 2, c. 74.) * * *

In addition to these considerations, we may briefly note the following advantages of a term measured by the author's life plus a period of years:

1. It avoids the necessity of distinguishing between "published" and "unpublished" works.
2. A copyright notice is unnecessary. Therefore forfeitures will be avoided
 - (a) In case of improper notice of copyright, or
 - (b) In case of failure to file a timely application for renewal.
3. It protects the living author and his dependents against a form of unfair competition to which they are now exposed in cases where some of an author's works have fallen into the public domain but others are still protected. In such cases, users are inclined to resort to the author's royalty-free works, thus discriminating against and discouraging the use of those that are still entitled to copyright protection.
4. It would eliminate one of the greatest fields of controversy, the question of who is entitled to the renewal term of copyright for the second twenty-eight period.
5. It would promote international understanding by bringing our views in line with leading democracies.

This last item—promoting international understanding—must not be minimized. The storm of protest that arises whenever a great foreign work is appropriated in America (before copyright expires at home) is well illustrated in an article in a recent issue of *Revue Internationale Du Droit D'Auteur* (July 1955), entitled "Twilight of the Classics" by Olaf Lid, Secretary-General of Norwegian Radio-diffusion. Pointing out that Edvard Grieg died in 1908, and that his works will fall into the public domain in 1958, Mr. Lid recommended a further extension of copyright for a period equal to the war years, as has already been done in France and Italy. In insisting that, as regards the works of foreign nationals, this should be conditioned on reciprocity, he pointed an accusing finger at the United States with respect to *The Song of Norway*.

Considering the present international situation and the necessity of strengthening the leadership which we are now taking in world culture, a reappraisal of the period of protection of authors' rights in the light of developments abroad would be most timely. This would be particularly significant as a sequel to our approval of the Universal Copyright Convention.

HERMAN FINKELSTEIN.

By John Schulman

FEBRUARY 11, 1957.

The discussion of Duration of Copyright by Mr. Guinan is most interesting. I believe we should adopt the pattern which is prevalent throughout the world, namely, a term which will extend to 50 years beyond the date of death.

Manifestly, if we do so it will be necessary to deal with the variations referred to in the second paragraph of subdivision 5 of Appendix C.

Incidentally, the charts concerning renewals are very enlightening. To me they indicate that the material which has a value is renewed, that which no one wants to use dies out. This supports my belief that the formula of "life and 50 years" is a sound one from the viewpoint both of the author and of the public interest.

JOHN SCHULMAN.

By Horace S. Manges

MARCH 27, 1957.

In connection with the fine memorandum issued by your office concerning duration of term, I had a further conference on that subject yesterday with the Copyright Committee of the American Book Publishers Council.

It was the consensus of opinion of the members of the Committee that I recommend to you that the term of copyright be a single continuous term, the duration of which shall be, preferably, the life of the author plus 50 years, or, as a second preference, simply 56 years.

HORACE S. MANGES.

By Horace S. Manges

APRIL 23, 1957.

You have asked for the reasons pertaining to my recommendations concerning Duration of Copyright. They are as follows:

The most important improvement would be a single term of copyright. Life of the author plus a 50 year term would have certain advantages, among them that the whole body of an author's work (including revisions) would go out of copyright at the same time and that there would be a uniformity with the system utilized in leading European countries.

In referring to "simply 56 years", [in second paragraph of letter of March 27, 1957], I mean 56 years from the date of publication.

HORACE S. MANGES.

By George E. Frost

APRIL 20, 1957.

(Re: Study on Duration of Copyright)

* * * * *

1. Considering the piece as a whole, I am left with a feeling that there are some who seek to go to something along the lines of the British copyright term, although this point is not specifically brought up on pages eighty and eighty-one. My own personal opinion is that it would be quite unwise to press for a change of this kind because it strikes me as most controversial and in terms of either numbers of copyrights or the value of the rights is a relatively unimportant matter. Perhaps I misread the piece and there is no intention of getting into this matter, but if there is any effort along this line I would be against it.

2. It seems to me that the renewal arrangement based on rights to the author and his family as distinguished from the assignee of the first term rights is fundamentally inconsistent with the law in general and unnecessarily provocative of controversy. The law includes essentially no protection against the deliberate and sane distribution of property by a person, no matter how sad the consequences in terms of the persons to whom most of us would think the bounty should go. Why have a different rule as to the renewal term of a copyright? All the equitable arguments that can be made (and I think Mr. Guinan has done a very good job of setting the matter down in an unemotional fashion) in the case of copyright renewal terms can be made in other fields. What would

you think of a rearrangement of the patent term to have an initial eight year term, which could be absolutely assigned by the inventor, followed by a nine year term like that of the present copyright laws? This would assure that penniless inventors would not be taken advantage of; would preserve to their wife (or wives, or one of them, depending on the outcome of litigation) and to their legitimate and illegitimate children (again dependent on the outcome of litigation determined in part by state law) some rights to these inventions; and would seem to do everything that the present copyright arrangement does. In the patent case it seems obviously unsound—I am not persuaded that the copyright case really justifies any different approach.

3. As to the starting date of the term it seems to me that both history and logic justify use of the publication date on published works and date of registration on unpublished works. The real trouble here is one of providing a meaningful and realistic definition of publication—and I assume that this will be taken up separately.

4. Finally, it strikes me that we are not being very realistic to split hairs on copyright term. On the one hand—with the very limited economic power associated with the copyright grant—there is no reason why copyright cannot exist for a very long term. On the other hand, very few works have any economic value after 56 years so that with few exceptions the present term might just as well be perpetual. The field is open for endless argument. I cannot see how the economics of the situation is really altered one way or another by any reasonable variation from the present. However, I do see (I think very vividly) how an effort to vary the term will lead to endless controversy and stand in the way of more meaningful and important changes. Incidentally, a rather good illustration of the absurdities that one can get into by indulging on this general subject, I suggest that the White article beginning at page 839 of Volume 38 of the Journal of the Patent Office Society be reviewed.

In summary (and I think this answers the questions really raised) it is my feeling that (a) no variation should be contemplated from the present 28-year renewable term, (b) the right to renew should be freely assignable, and (c) "publication" should be the measure of the term but should be adequately and realistically defined.

GEORGE E. FROST.

By Joseph S. Dubin

MAY 1, 1957.

* * * * *

I am, of course, in favor of a term of protection running from the death of the author, but feel that a period of 50 years after death is too long, and would suggest a term of protection of 30 years after death, which is a more realistic period of time. This, then, would do away with the debatable renewal term, and afford protection to both the creator and the user of the property.

JOSEPH S. DUBIN.

By Joseph S. Dubin

MAY 13, 1957.

* * * * *

In connection with my thought regarding the term to run 30 years after death, rather than 50, I believe that this period of time would be more workable, taking into consideration the productive years of an author. Fifty years after death would extend the period of protection to an unreasonable length of time.

In connection with the term of protection to be afforded corporate bodies, I suggest the term run from creation, manufacture or publication, as the case may be, and that the rule in effect in most European countries be followed as far as anonymous or pseudonymous works are concerned, namely, a period of years after publication, but if the author is declared before expiration, then for a term of years after death.

* * * * *

JOSEPH S. DUBIN.

By Ralph S. Brown, Jr.

MAY 9, 1957.

* * * The fact that copyrights on very few books and periodicals are renewed is obviously advantageous from the standpoint of the scholar. Even if it is true that works which are not renewed have no *commercial* value, it does not follow that the persistence of copyright in these works of no commercial interest is not a hindrance to research. Of course, one cannot assume that the copyright on some learned work was not renewed; consequently the possibility of a renewal term requires a search to be made. These are among the considerations that make it difficult to express a policy preference between an extended single term, and a renewal term which, for scholarly works, will infrequently be utilized.

Referring now to the questions put in the appendix of Mr. Guinan's study * * * the starting point of the term seems to me inextricably bound up with the policies to be pursued for the creation of copyright. I personally would be in favor of a unified system, as suggested by Item I.2 of Appendix C, in which the first public dissemination of works would be the formal starting-point of copyright. This implies, of course, the extension of copyright beyond visual copies to sound recordings, public performances, and public exhibition. However, in view of the awkwardness that this would create with respect to the U.C.C., and in view of the probable political difficulty of eliminating the present common law copyright for performances, I suppose that the date of the first publication is the most plausible starting point. I would argue that to use either the date of creation or the date of registration would be an unnecessary departure from present concepts.

As regards a single term versus a renewal system, I have some leaning toward a system like the present one, which allows a great many works to fall into the public domain when they are not renewed. However, the advantages in simplicity of administration and of public comprehension that inhere in a single term are on balance more persuasive.

To the extent that the renewal term was intended to reserve to the author the fruits of a long-lived commercial success, free of assignments, it has fairly obviously failed. I hope that, if there is any practical case for making part of the copyright term non-assignable, it will be brought forward in your studies. On the present evidence, I do not favor time limits on assignments. The way for authors to protect themselves against the overreaching of publishers and other users is by organization and the promulgation of minimum standards, not by seeking from the legislature a sheltered status analogous to that of sailors, children, and accident victims.

As for the length of the term, I would favor, for natural persons, a term of life plus 25 to 30 years. This takes care of a normal widowhood, and the minority of the author's children, and satisfies the U.C.C. I have never been able to understand either the theoretical or practical case for the European term of life plus 50 years. For corporate and similar works, a term of years—probably 50—would seem ample. I would be inclined to make this term no longer than that following the death of a natural person; but since I note that the percentage of renewals has a high correlation with the classes of works most frequently registered by corporations (maps and motion pictures; cf. periodicals), it may not be feasible to attempt much reduction in the present term for corporate registrants.

The only class of work for which an exceptional term seems desirable is for industrial designs, where there seems to be considerable agreement that a short term—probably the 10 years suggested by the U.C.C.—is appropriate.

Certainly for simplicity the term should be computed from a year's end, and not from a precise date, e.g. that of publication.

* * * If the renewal system were eliminated, I would suggest the practicality of shifting all existing copyrights to the new term, with a proviso that in no case would the duration of protection be less than that of the existing term (either the first or the second). I would then leave ownership of existing copyrights undisturbed. Contracts or assignments now in force should be left to run for the same number of years as before, with the full ownership reverting to the author if there should be any time left in the new term. Contracts to assign a renewal expectancy could be left in force under a somewhat artificial arrangement as follows: if in the 28th year of the old term conditions exist which would have required an assignment of the renewal, then the remainder of the

new single term should be so assigned. Such solutions would perhaps result in a quarter century of some confusion, but they would more nearly approach equitable arrangements between assignors and assignees than would a more drastic solution.

RALPH S. BROWN, JR.

By J. A. Gerardi

MAY 9, 1957.

* * * * *

With reference to item No. 3—"Duration", I have no particular fault to find with the present period of duration of copyrights.

J. A. GERARDI.

By Sidney W. Wattenberg

MAY 10, 1957.

* * * * *

I now want to advise you that the Board of Directors of the Music Publishers' Protective Association Inc. met this week and I asked for their views on three subjects, namely, the Compulsory License Provision, the Minimum Damage Clause and the Term of Copyright.

* * * * *

As to the Term of Copyright, the Directors present at the aforementioned meeting were unanimous in the feeling that instead of there being a twenty-eight year term with a right of renewal for an additional twenty-eight years, there should be a single term equivalent to the life of the author and a period of fifty years after his death. The thought was also expressed that in the case of a collaboration the fifty year period should start to run with the death of the last surviving collaborator.

As a member of the Committee I share the feeling that there should be this single term in lieu of a renewal provision. There no longer seems to be any need for protecting authors against themselves. Today authors, through Associations and Societies and their attorneys, are well represented and adequately advised, and no longer need the protection of Congress against their entering into improvident or unwise business transactions.

The great number of cases involving renewals of copyrights is only one indication of the uncertainties which arise by reason of the renewal copyright provision of the law. Furthermore, if the single life plus fifty year term were provided for, authors, by contract, could, if they so desired, limit the duration of any assignment or other grant which they might make. In other words, an author could provide for a reversion of all rights to him or his estate at the expiration of a term of years less than the full term of copyright. Such a provision for a similar reversion is in use today in the current so-called Revised SPA Contract wherein foreign rights revert to the author at the end of twenty-eight years even though the full term of foreign copyright may be for a very much longer period.

* * * * *

SIDNEY W. WATTENBERG.

By Harry G. Henn

MAY 14, 1957.

As requested I have reviewed the study entitled "Duration of Copyright" by James J. Guinan. I understand that problems relating to renewal have been reserved for a separate study.

Anyone who has struggled with our present statutory renewal provisions can hardly favor their continuation in their present form. See Brown, "Renewal Rights in Copyright", 28 *Cornell L. Q.*, 460-82 (1943); Kupferman, "Renewal of Copyright—Section 23 of the Copyright Act of 1909", 44 *Colum. L. Rev.* 712-35 (1944); Bricker, "Renewal and Extension of Copyright", 29 *So. Calif. L. Rev.* 23-46 (1955).

While the ambiguities in the provisions could no doubt be clarified to some extent, I seriously question whether the renewal concept has served its intended purpose, and therefore would favor its complete elimination. I would deplore any indirect approach, such as by way of statutory time limitations on either all assignments or assignments for a lump sum or of statutory minimum royalties. I would much prefer a simple, clear copyright statute which the lay author and his attorney (even if a general practitioner as distinguished from a copyright specialist) could reasonably comprehend as a means of protecting our authors.

On the theory that all works (regardless of nature of work or of author) should be entitled to the same duration of protection, I am against the foreign "life-plus-stated-years" term. The plausible attractiveness of the latter disappears in the case of works by plural authors, anonymous or pseudonymous authors, and corporate authors (which, according to your statistics, probably represent more than 50 percent of the commercial value of all registered works).

Of the alternative suggestions, and especially in view of our commitments under the Universal Copyright Convention, I would favor retention of our present system of computing the term from the earlier date as between registration and publication. The nature of any protection prior to such date obviously is beyond the scope of this comment.

So far as the length of term is concerned, I favor 50 years. It is a round figure, approximates our present maximum of 56 years, and is well in advance of the present average period of protection of slightly more than 30 years. Even those who favor a term of life-plus-50-years could hardly object to the fairness of 50 years, since they presumably feel that such term is fair for anonymous, pseudonymous and corporate works.

HARRY G. HENN.

By Edward A. Sargoy

MAY 21, 1957.

(Re: "Duration of Copyright"—paper by James J. Guinan, Jr.)

I have read with interest the above paper, with its history of the subject in the United States, comparative provisions in the laws of other countries and international conventions, proposals since 1909 for revision of the present law, and discussion of the basic issues involved.

In response to your request, these are my present reactions to the various questions involved.

I recently indicated in general terms my personal views as to renewal and duration, in the Report which I drew for our ABA Committee on Program for Revision of the Copyright Law, a printed copy of which will be presented at the annual meeting of the Section of Patent, Trademark and Copyright Law in New York this coming July.

As you will have noted, under Item 5 at pages 14-16 of such Report, I indicated that under the system there suggested, predicated upon such underlying concepts as exclusive automatic Federal statutory protection from creation, for works in their unpublished as well as published states, and based on encouraging permissive formalities rather than requiring mandatory ones, with full divisibility and a strong system of deposit, registration and Federal recordation, I felt (a) the concept of a renewal term could now well be abolished and (b) that as to duration of protection, the following could be provided, if publication with notice of statutory copyright were no longer mandatory. As to individual authors I would protect the work from creation throughout the life of the author plus a stated period of years from the end of the calendar year in which the author died. As to works created by corporations, through hired authors, and works created by wholly anonymous and pseudonymous authors, the work might be protected from creation until fifty years from the end of the calendar year in which a publication, public presentation, or a registration first took place.

Some reasons for such views are given in the discussion in the above Report.

Concerning the various issues raised in the Guinan paper, my present reactions would be along the following lines:

Under an exclusive Federal statutory system of protection, from creation, we might run into the Constitutional disability against a perpetual or indefinite term, if Federal protection were to be afforded from creation, and the work was to be withheld from publication, public dissemination, or registration during and after the life of the individual author, or held on the shelf after creation

by corporate, anonymous or pseudonymous authors. This may not be a problem in Great Britain, under its new 1956 Act providing, for example, that the term of fifty years for sound recordings and cinematographic works (Secs. 13, 14) continues only from publication or registration, and in the case of authors of literary, dramatic or musical works who die before publication, from performance in public, broadcasting, publication, or the offer for sale to the public of recordings, for fifty years from the end of the calendar year in which any such event first took place (Sec. 2). But in the United States, under our Constitutional time limitation for copyright protection to be afforded by Act of Congress, this could well pose a problem.

Accordingly, I toss in suggestions for consideration along the following lines:

I. AS TO THE BASIS FOR COMPUTING THE TERM

A. *Individual authors*

Copyright shall subsist and protection shall be afforded from the time of creation, until a stated period of years (preferably fifty) from the end of the calendar year in which the author dies, if the work is publicly disseminated, or registered and deposited in the Copyright Office, during the author's life; otherwise, for fifty years following the end of the calendar year in which the work is first publicly presented, or registered and deposited, after the author's death, but in no event to exceed sixty years following the end of the calendar year in which the author dies.

(I would be inclined toward "fifty years" because of like provisions in the laws of major countries and in International Conventions, although I would have no real objection to the period of life plus thirty years suggested by Joe Dubin).

B. *As to corporate, anonymous and pseudonymous authors, and composite works*

Copyright shall subsist and be protected from the time of creation until fifty years after the end of the calendar year in which first public presentation or a registration and deposit in the Copyright Office takes place, but in no event to exceed sixty years from the date of creation if the work is not publicly presented, or registered and deposited, during the first ten years after creation. For these purposes, works ascribed to two or more authors shall not be deemed pseudonymous, unless all such names are pseudonymous; further, if within such fifty year period, a copy of the work is deposited in the Copyright Office, and a recordation there made of the true name of the author, his address, the title of the work, and the pseudonym under which published, the duration of protection shall be that specified for individual authors.

C. *Public presentation*

For the above purpose, "first public presentation" might be deemed to be the performance, rendition, exhibition, delivery or other dissemination of the work in public, regardless of the medium by which accomplished, the offer for sale or other distribution to the public of copies of the work or sound recordings thereof, or any other form of publication or public exploitation, or the registration and deposit of the work in the Copyright Office, whichever takes place first.

D. *Joint authorship*

Copyright could subsist in the works of joint authors during the life of the author who dies first and for fifty years after such death, or during the life of the author who dies last, whichever period is longer (Thomas Bill, S. 3043, sec. 6a).

II. AS TO THE LENGTH OF THE TERM

I would not be inclined to distinguish between different classes of work. My preference is for the use of the above "fifty year" measurement, running from the end of the calendar year in which death or first public presentation takes place.

III. AS TO A SINGLE OR RENEWABLE TERM

Under a system with underlying concepts as indicated in the ABA Report, I feel the term should be a single one, without renewal provisions. Neither do I think that a statutory time limit should be placed on the duration of all assignments of the balance of the term, or such assignments for a lump sum;

nor shall minimum royalties be prescribed. My feeling is that in this day and age, with authors' societies, and competent counsel to advise authors, these are matters which the parties can best work out contractually, and the statute should not attempt to provide limitations on such contractual matters.

I think I have covered substantially the issues raised by the Guinan paper, and would be interested in seeing how these problems are otherwise approached for solution.

EDWARD A. SARGOY.

By Ernest S. Meyers

AUGUST 29, 1957.

You have asked for my views on the excellent analysis that Mr. Guinan has given to the subject, "Duration of Copyright".

It seems to me that lengthening the protected period from 56 years can only be accomplished at the expense of the public interest. There is in this country a well settled policy against monopoly. For the reasons set forth in the Constitution, copyright is a limited exception to that policy. The chief aim in copyright legislation is benefit to the public, and only incidentally benefit to the author.

In my opinion, there has been no clear showing that the present period of protection is inadequate as regards benefits to authors. The fact that other countries employ a life plus 50 years period of protection may be explained by their domestic economic policies. It is my view that our well settled policy against monopoly as embodied in our federal and state antitrust laws would militate against adopting the lengthier periods used by other countries taking a more lenient view of monopoly.

Regarding the date from which the term should be measured, I would favor that date which would provide the least difficulty of ascertainment. As the copyright law is really an island within our dominant antitrust framework, it should be strictly bounded. Confusion as to the exact termination day of the protected term, which would flow from uncertainty over its inception date, can very readily hold up the passing of a work into the public domain. In addition, the author or commercial user of the protected work is entitled to have assurance of the precise duration of his interest to enable him properly to evaluate his business activities.

The date of creation is too vague, being the author's prerogative to withhold his work from the public until he deems it ready. However, when the author disseminates his work amongst the general public, that they may perceive it through sight or sound, a readily ascertainable date is provided. It is this date which may be used as the basis for computing the protected term. Such a date would throw all disseminated but technically unpublished works under statutory copyright protection and would eliminate inequitable over-protection in those cases where 56 years has been tacked on to an already substantial base of common law protection.

As for the renewal question, it is my view that the uncertain and possible theoretical advantages of a divided renewable term to the author or his family is far outweighed by the real and practical problems faced by commercial users in exploiting the works after the author's demise. I favor a single term. It may be that a single 56-year term with a minimum royalty would eliminate much uncertainty, annoyance, and unfairness: An author will have more to sell and the user's rights will be well-defined.

Thank you for the opportunity of expressing my views on this subject.

ERNEST S. MEYERS.

By Samuel W. Tannenbaum

SEPTEMBER 11, 1957.

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In the case of stories, books, plays, music and literary properties generally, under Sec. 5 subdivisions (a) through (e), and (l) and (m), it might be advantageous to have the term measured by the life of the author plus say 50 years. While in the case of maps, works of art and the like subdivisions (f)

through (k) the term might commence a number of years from the creation (or possible completion) or publication (to be defined) of the work.

* * * * *

While it is true that the existence of an initial term plus a renewable term, has been for some time an integral part of our copyright statutes, its continuance would be an anachronism and not in harmony with the present problems arising from the phenomenal increase in the uses of copyrighted material.

The troublesome renewal provisions in the present law (only partially solved by *Ballantine v. DeSylva*) would be eliminated.

Under a single term, many copyrights would not fall into the public domain. Under the present Act, through the inadvertence of the author or his legal successors in failing to file applications for renewal within the period, and in the manner, prescribed by the present act, many valuable copyrights have been forfeited.

There are many catastrophic instances where a copyright was duly obtained on an important work first published in serial form, followed by its republication in book form which was also copyrighted. In most instances, the book publication was merely a republication of the serial publication with a preface or biographical matter. The renewal was only entered for the book copyright, while the application for the renewal of the copyright of the original serial publication (which was the basis for the copyright) was never filed.

The enactment of a single term would also eliminate another serious problem which has yet to be judiciously clarified and which is constantly haunting the author and the magazine copyright proprietor.

There are many instances where a contribution to a magazine is copyrighted by the magazine publisher and not by the author. The magazine, as a whole, is renewed by the publisher. The author omits to renew. The question arises whether the proprietor or the author, etc. may renew; or whether the author, etc. alone may renew.

Further confusion arises, where the story (of which the magazine publisher is not the author) was conveyed by the publisher to the author. In such a case, it would appear that the author either as a proprietor under the first proviso of the Section or as the author under the second proviso would be entitled to renew for himself.

The various conflicting views have, by no means, been clarified, either by the cases or by copyright commentators. (See "Magazine Rights"—A Division of Indivisible Copyright by Harry G. Henn, Cornell Law Quarterly, Spring 1955, pages 411, 466 et seq. and cases cited; "Renewal of Copyright" by Theodore R. Kupferman, 44 Col. Law Rev. 712, 716; "Renewal and Extension of Copyright" by Seymour M. Bricker, 29 So. Cal. Law Rev. 23, 38 et seq.)

The ambiguity caused by the provision with respect to the renewal by the next of kin "in the absence of a will" raised by *Silverman v. Sunrise Pictures Corp.*, 290 F. 804 (CCA 1923) cert. den. 262 U.S. 759 (1923) would also be eliminated by the enactment of a single term of copyright. (See 7 Copyright Problems Analyzed pages 12-13).

Another question still vexing the Copyright Bar is whether an administrator with the will annexed has a right to renew. Is he in the same class as an administrator who has no right to renew? (Report of House Committee No. 2222).

Where an administrator with the will annexed is appointed, a will must actually exist. Yet, under the *Silverman* case *supra*, the next of kin is held to be the only proper party to renew on the theory that there is "an absence of a will".

The decision in the *Silverman* case actually prevents the persons who are the objects of the testator's bounty from acquiring the renewal.

SAMUEL W. TANNENBAUM.

By *Sydney M. Kaye*

SEPTEMBER 12, 1957.

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Despite the fact that I am aware that authors feel that a renewal term is in their interest, I have already stated that I would, on balance, regard a 56-year term as preferable from the authors' standpoint. It is my view that an author who has sufficient bargaining power to withhold a grant for the renewal term

would have similar power to withhold a grant for the last half of a single term. If this is true, a renewal right has potential of usefulness to authors only in those cases in which (a) the author has transferred his renewal rights at the time of the original contract and (b) has died before the renewal came into being. Even in these cases, the renewal will not advantage the author unless the disposition made under the statute is similar to the disposition which he would wish to make if he had testamentary powers.

I have also stated that it is my view that perpetual common law copyright has grave disadvantages, particularly from the aspect of scholarship and research.

Whether 56 years is precisely the correct term does not seem to me the core of the problem. Fifty-six years was, of course, arrived at by history rather than by any scientific exactitude. There is no more reason for saying that 56 years is precisely right than for saying that some other term was precisely right. All that we can say is that our present term of copyright appears amply to have encouraged authorship.

It seems to me that utilizing the date of creation for fixing the commencement of a copyright term would lead to many practical difficulties. I shall not, therefore, attempt to discuss this. Neither will I discuss the utilization of date of registration as the commencement of the copyright term for unpublished works which are statutorily copyrighted. This does not seem to me to be a crucial question.

The key problem seems to be whether the copyright should commence (a) on the date of publication, as the courts presently define publication, (b) on the date of first public dissemination, regarding any general dissemination to the public as a type of publication, or (c) from the date of the author's death, where the author is an individual. The pressure of authorship today is for a term measured by life and fifty years. I do not see why authors feel that so long a term is necessary for their well being. The normal ambition of an individual today is to provide for himself and his spouse during their old age and to educate his children. I question the social utility of contributing to the support of even a posthumous child until he is forty-nine years old. I also question whether a term of this length would convey additional incentives to authorship which outweigh the disadvantages of protecting a work for, in some cases, over a hundred years.

I would not therefore try to equate our copyright term with the European term. Once the desire for uniformity is removed, I see other reasons for viewing with reserve a term of copyright measured from the death-date of the individual author. One of the great advantages of our present system, it seems to me, is that it requires at least the statement upon publication of a desire to reserve rights. Where such desire is not expressed, we are entitled to believe that the rights are not wanted. If no reservation of rights were required, however, there might be many cases in which the rights were not wanted in which a waiver of rights would not be imprinted in the work. Where the rights are not wanted, no incentive to authorship is needed, and wholly automatic copyright, which seems to be associated with dating the copyright from the death-date of the author, forbids the public to use the work, even where incentive was not needed.

In our country, many important copyright works, such as motion pictures and encyclopedias, have their authorship so diffused among many persons, a large percentage of them employees, that the concept of individual authorship tends to break down. I see no reason why the corporate copyright proprietor of even the most useful work created by cooperative efforts should have a shorter potential term than is given to the works of individual authors.

Also, while I recognize that the death-dates of authors of the first rank would readily be available, many obscure works have continuing usefulness, including value for historical and other purposes. Here the difficulty of ascertaining the date of the author's death will, in many cases, be material.

On balance, therefore, I do not favor taking the date of death of the author as the commencement date of the term.

On occasion I have turned over in my mind the desirability of providing that any general public dissemination of a work would constitute a publication and start the running of the term. Such a law would probably require that the first embodiment of the work in copies would require a notice with a statement of the year of first dissemination and of the year of first production of copies. This would limit common law copyright to only those instances in which the

author truly kept the work in his desk. I recognize that this thought involves complexities which I have not thoroughly considered.

I point out that the term of copyright is, to some extent, connected with damage provisions. When in France use is made of material that is over one hundred years old and the authorship of which is obscure, a suit based on such use would probably result in the traditional two sous damages. For this reason, uncertainty of duration does not have an impact similar to that which it would have in the United States.

On the whole, I would say that our present term of copyright does not appear to have failed in giving an incentive to authors. We do not, in the United States, normally look more than fifty-six years ahead. I think that even our corporate publishing enterprises expect to realize their investments and profits within, at the most, a few decades from publication. I therefore doubt whether having a term longer than fifty-six years would encourage that creativity which our constitution expects.

I am conscious that, even after this long passage of time, I have given you only random and undigested thoughts. This is a complex problem on which I am trying to keep a reasonably open mind.

SYDNEY M. KAYE.

By Irwin Karp

SEPTEMBER 18, 1957.

Here are my comments on the monograph "Duration of Copyright."

I believe that the term of copyright should be measured by the life of the author, plus a period of years; and, for corporate proprietors, either (1) from the date of first publication and/or first public dissemination; or (2) from the date of registration.

The principal purpose of the Act, to encourage creative activity, would be best served by providing for the longest term possible; fifty years after death, at the very least.

It would unduly complicate matters to vary the term for separate classes. However, consideration should be given to varying the term of protection, depending on the use to which others would put the work.

If copyright protection is to be limited to insure the public's "free access" after the author (and heirs) have had an opportunity to earn a fair return, it would seem reasonable that consideration should be given to whether or not non-paying and unlicensed uses—after termination—actually give that "free access" to the public.

For example, a play might be presented—after expiration of its copyright—by a professional producer or by amateur groups. The first type of presentation constitutes an exploitation for personal gain, at cost to the public. The second method of presentation would ordinarily make the work available to the public cost free; in any event, the motive is not the personal aggrandizement of the producer.

After copyright expiration, the professional producer (or motion picture company or book publisher) is in effect permitted to profit by the exploitation of the author's property, without paying for that privilege; there is no moral or practical reason why such uses should not be prohibited for a longer period than uses made for non-profit purposes. The public interest would not be injured, since the extended term would not deny the benefits of "free access"—these would not be made available by a profit-motivated private production. In any event, if the possibility of profit exists, it can be assumed that productions would be licensed by the author during the longer term.

An author is one of the few creators of property who is compelled, for reasons of policy, to donate his property for the common good. I am suggesting that this donation should be delayed as long as possible when it might be taken advantage of for the personal gain of someone else. Protection could be terminated after a fixed period against uses made for non-profit purposes, without charge, but continued for a longer period against anyone who would use the work for his personal gain and who would charge the audience for seeing the work or hearing it or obtaining a copy of it. Such a system would make for a more reasonable adjustment between the author's property rights and the public interest.

I favor a single term of copyright without any limitation as to the manner in which the author could dispose of partial or complete interest in his copyright, i.e., whether by lump sum payment, royalty agreement, or otherwise. Authors are entitled to complete freedom to use and dispose of their property; and there is no basis for assuming that they are less capable of protecting their economic interests than other groups.

That authors can secure advantageous terms by their own efforts is amply demonstrated by the improved conditions of licensing which prevail in many media, e.g., the theatre and book publishing. In these areas, authors started at the turn of the century with an unfavorable bargaining position, and have gradually and greatly improved their position and the return from dispositions of interests in their work. The existence of the renewal right had little to do with this improvement. Indeed, in the early years, the assignment of renewal was frequently exacted as a condition of the grant. It is only through better bargaining that the scope of the grant has been restricted. With a single term, equally favorable contracts could be negotiated.

If a single long term were provided, licenses could be, as they now frequently are, limited to a term of years; or their duration could be conditioned upon minimum annual royalties or upon the continued working of the copyright. The latter condition is now imposed within the period of original copyright in the case of book publishing contracts (in print clauses), and play production contracts (where the duration of the first class production rights are related to continued performances).

One of the difficulties in limiting, by statute, the manner in which authors may dispose of their property is that conditions do, and will continue to, vary from one medium and one period to another. While statutory requirements for conditions of licensing might at a given time be desirable for certain individuals in particular media, conditions may change drastically so that an author might be handicapped if he were prohibited from making an outright assignment or from making a contract combining various methods of payment, lump sum plus percentage.

Also, there are so many types of contractual provisions, differing widely from one medium to another, that statutory prescriptions would either become unduly complex, or downright harmful. It is not clear whether these proposed statutory conditions would apply only to authors or also to their heirs and next-of-kin; and whether these would prohibit an author during his lifetime from making gifts of copyrights to his children or wife.

The danger of prescribing contractual terms by statute is illustrated by the compulsory license provision. Once a method of licensing is imbedded in the statute, it becomes almost impossible to change—vested interests can exert great pressure to protect their favored position under the statute and the creator is helpless, even though conditions have changed and made the statutory provisions unreasonable or unnecessary.

A single term would also eliminate complications arising upon the death of an author, and would eliminate the undesirable and unnecessary restrictions, now contained in Section 24, upon the author's right to dispose of his (renewal) copyrights after death as he chooses.

IRWIN KARP.

By Vincent T. Wasilewski

JUNE 9, 1958.

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 As to the issue concerning duration of copyright, I believe it would be highly advisable to retain a time certain, rather than a term tied in with the death date of the author. I would think that the present term for copyright and renewal has not been a source of tremendous aggravation in our country, and that it would be a wise course of action to leave this particular matter remain as it is.

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 VINCENT T. WASILEWSKI.

By Robert Gibbon

(The Curtis Publishing Company)

OCTOBER 24, 1958.

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Duration of Copyright. Our concern over the duration of copyright is for the benefit of our writers. It is to our advantage to have these people realize maximum financial gain for their work. Toward this end, we would not want to see the term of copyright shortened. We favor a copyright term of a fixed number of years starting at publication, because of its simplicity. Also, there is no problem with termination in the event that the date of the death of the author is unknown. The need for a precise definition of publication is too obvious for comment.

We do not agree that the advantage in having two consecutive copyright periods outweigh the complications of renewal. Admittedly, these complications and pure oversight place some material in the public domain more quickly than would happen if there were a single fifty-six year term. If this is a benefit, technicalities could be expanded to assure non-compliance.

If consecutive periods are to be continued, the requirements for renewal should be simple and clear. There should be no doubt that the publisher of a periodical or composite work can, by a single renewal, protect the interests of all contributors.

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ROBERT GIBBON.