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COPYRIGHT TERM EXTENSION ACT OF 1996

JULY 10, 1996.—Ordered to be printed

Mr. HATCH, from the Committee on the Judiciary, submitted the following

REPORT

together with

ADDITIONAL AND MINORITY VIEWS

[To accompany S. 483]

The Committee on the Judiciary, to which was referred the bill (S. 483) to amend the provisions of title 17, United States Code, with respect to the duration of copyright, and for other purposes, having considered the same, reports favorably thereon, with an amendment in the nature of a substitute, and recommends that the bill, as amended, do pass.

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The amendment is as follows:

Strike all after the enacting clause and insert in lieu thereof the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Copyright Term Extension Act of 1996".

SEC. 2. DURATION OF COPYRIGHT PROVISIONS.

(a) CLARIFICATION OF LIBRARY EXEMPTION OF EXCLUSIVE RIGHTS.—Section 108 of title 17, United States Code, is amended—

(1) by redesignating subsection (h) as subsection (i); and

(2) by inserting after subsection (g) the following:

"(h)(1) Notwithstanding any other limitation in this title, for purposes of this section, during the last 20 years of any term of a copyright of a published work, a library, archives, or nonprofit educational institution may reproduce or distribute a copy or a phonorecord of such work, or portions thereof, for purposes of preservation, scholarship, teaching, or research, if the library, archives or nonprofit educational institution has first determined, on the basis of a reasonable investigation of reasonably available sources, that the work—

"(A) is not subject to normal commercial exploitation; and

"(B) cannot be obtained at a reasonable price.

"(2) No reproduction or distribution under this subsection is authorized if the copyright owner or its agent provides notice to the Copyright Office that the condition in paragraph (1)(A) or the condition in paragraph (1)(B) does not apply.".

(b) PREEMPTION WITH RESPECT TO OTHER LAWS.—Section 301(c) of title 17, United States Code, is amended by striking "February 15, 2047" each place it appears and inserting "February 15, 2067".

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

(1) in subsection (a) by striking "fifty" and inserting "70";

(2) in subsection (b) by striking "fifty" and inserting "70";

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

(A) by striking "seventy-five" and inserting "95"; and

(B) by striking "one hundred" and inserting "120"; and

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

(A) by striking "seventy-five" and inserting "95";

(B) by striking "one hundred" and inserting "120"; and

(C) by striking "fifty" each place it appears and inserting "70".

(d) DURATION OF COPYRIGHT: WORKS CREATED BUT NOT PUBLISHED OR COPYRIGHTED BEFORE JANUARY 1, 1978.—Section 303 of title 17, United States Code, is amended in the second sentence by striking "December 31, 2027" and inserting "December 31, 2047".

(e) DURATION OF COPYRIGHT: SUBSISTING COPYRIGHTS.—

(1) Section 304 of title 17, United States Coded, is amended—

(A) in subsection (a)—

(i) in paragraph (1)—

(I) in subparagraph (B) by striking "47" and inserting "67"; and

(II) in subparagraph (C) by striking "47" and inserting "67";

(ii) in paragraph (2)—

(I) in subparagraph (A) by striking "47" and inserting "67"; and

(II) in subparagraph (B) by striking "47" and inserting "67" and

(iii) in paragraph (3)—

(I) in subparagraph (A)(i) by striking "47" and inserting "67"; and

(II) in subparagraph (B) by striking "47" and inserting "67".

(B) by amending subsection (b) to read as follows:

"(b) COPYRIGHTS IN THEIR RENEWAL TERM AT THE TIME OF THE EFFECTIVE DATE OF THE COPYRIGHT TERM EXTENSION ACT OF 1996.—Any copyright still in its renewal term at the time that the Copyright Term Extension Act of 1996 becomes effective shall have a copyright term of 95 years from the date copyright was originally secured.";

(C) in subsection (c)(4)(A) in the first sentence by inserting "or, in the case of a termination under subsection (d), within the five-year period specified by subsection (d)(2)," after "specified by clause (3) of this subsection," and

(D) by adding at the end the following new subsection:

"(d) TERMINATION RIGHTS PROVIDED IN SUBSECTION (c) WHICH HAVE EXPIRED ON OR BEFORE THE EFFECTIVE DATE OF THE COPYRIGHT TERM EXTENSION ACT OF 1996.—In the case of any copyright other than a work made for hire, subsisting in its renewal term on the effective date of the Copyright Term Extension Act of 1996 for which the termination right provided in subsection (c) has expired by such date, where the author or owner of the termination right has not previously exercised such termination right, the exclusive or nonexclusive grant of a transfer or license

of the renewal copyright or any right under it, executed before January 1, 1978, by any of the persons designated in subsection (a)(1)(C) of this section, other than by will, is subject to termination under the following conditions:

"(1) The conditions specified in subsection (c)(1), (2), (4), (5), and (6) of this section apply to terminations of the last 20 years of copyright term as provided by the amendments made by the Copyright Term Extension Act of 1996.

"(2) Termination of the grant may be effected at any time during a period of 5 years beginning at the end of 75 years from the date copyright was originally secured.".

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

(A) in subsection (c)—

(i) by striking "47" and inserting "67";

(ii) by striking "(as amended by subsection (a) of this section)"; and

(iii) by striking "effective date of this section" each place it appears and inserting "effective date of the Copyright Term Extension Act of 1995"; and

(B) in subsection (g)(2) in the second sentence by inserting before the period the following: ", except each reference to forty-seven years in such provisions shall be deemed to be 67 years".

SEC. 3. EFFECTIVE DATE.

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

I. PURPOSE

The purpose of the bill is to ensure adequate copyright protection for American works in foreign nations and the continued economic benefits of a healthy surplus balance of trade in the exploitation of copyrighted works. The bill accomplishes these goals by extending the current U.S. copyright term for an additional 20 years. Such an extension will provide significant trade benefits by substantially harmonizing U.S. copyright law to that of the European Union while ensuring fair compensation for American creators who deserve to benefit fully from the exploitation of their works. Moreover, by stimulating the creation of new works and providing enhanced economic incentives to preserve existing works, such an extension will enhance the long-term volume, vitality, and accessibility of the public domain.

II. LEGISLATIVE HISTORY

The basis for protection of creative works under our current copyright law is rooted in the U.S. Constitution, which explicitly 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."[1] Pursuant to this authority, the First Congress enacted the first Copyright Act in 1790,[2] which established a fixed term of copyright protection for published works based on the date the author filed with the clerk of the U.S. District Court and, under later versions of the statute, with the Library of Congress. This fixed term of protection formed the foundation of our Nation's copyright law for nearly two centuries, surviving comprehensive revisions of the Copyright Act in 1831, 1870, and 1909. In each of these revisions, Congress has incrementally extended the basic term of copyright protection to

[1] U.S. CONST. art. I, sec. 8, cl. 8.
[2] Act of May 31, 1790, 1st Cong., 2d sess., 1 Stat. 124.

ensure that American authors and their dependents receive the fair economic benefits from their works.[3]

Early drafts of the 1909 legislation proposed the adoption of a term of protection based on the life of the author, rather than a fixed term of years. A basic term of protection equal to the life of the author plus 50 years was recommended for the members of the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention) in the Act of Berlin of November 13, 1908, and quickly gained favor internationally. As international acceptance of the life-plus-50 term grew, efforts to reform the U.S. term of protection intensified and, by 1964, the working drafts of copyright revision legislation had adopted a basic term of life-plus-50 for most works.[4]

Ultimately, with the enactment of the Copyright Act of 1976,[5] Congress fundamentally altered the way in which the term of protection was calculated. Citing the inadequacy of the then-current 56-year copyright term to provide meaningful assurance of a fair economic return for authors and their dependents, the need for a clear, discernable method for measurement of copyright term, the advantages of uniformity with a majority of foreign laws, and the possibility of future U.S. adherence to the Berne Convention, Congress adopted a basic term of copyright protection equal to the life of the author plus 50 years.[6] Works created prior to January 1, 1978 (the date the Act went into effect), were protected for a maximum of 75 years from the date of publication or 100 years from creation, whichever is less.

As noted, the standard adopted in the 1976 Act was the then prevailing international standard of protection. It became mandatory for members of the Berne Convention with the adoption of the Act of Brussels of June 26, 1948, and by 1976 had been adopted by a substantial majority of foreign nations.[7] The standard is also now applicable to the members of the World Trade Organization through the implementation of the Agreement on the Trade Related Aspects of Intellectual Property Rights (TRIP's).[8]

On October 29, 1993, the European Union (EU) issued a directive to its member states to harmonize their copyright laws by adopting a term of protection equal to the life of the author plus 70 years.[9] Under the EU Directive, member states are to apply the "rule of the shorter term" to countries outside the EU.[10] Thus, copyrighted works from nonmember countries will enjoy only the protection

[3] In 1790, the basic term of protection was 14 years from the date of filing, with the possibility of renewal for an additional 14 years. *Id.* In 1831, Congress extended the initial period of protection to 28 years, thereby providing for a maximum term of protection of 42 years. Act of Feb. 3, 1831, 21st Cong., 2d sess., 4 Stat. 436. In 1909, the renewal term was extended to 28 years, and the critical date from which the term was measured was changed to the date of publication, thus creating a maximum term of protection of 56 years from publication. Act of Mar. 4, 1909, 60th Cong., 2d sess., 35 Stat. 1075.

[4] PRELIMINARY DRAFT FOR REVISED U.S. COPYRIGHT LAW: DISCUSSIONS AND COMMENTS ON THE DRAFT, HOUSE COMMITTEE ON THE JUDICIARY, 88TH CONG., 2D SESS., COPYRIGHT LAW REVISION PART 3, 19–20 (Committee Print 1964).

[5] Public Law 94–553, 94th Cong., 2d sess., 90 Stat. 2541.

[6] *See* H. Rept. 1476, 94th Cong., 2d sess., at 135 (1976).

[7] S. Rept. 473, 94th Cong., 1st Sess. 116–119 (1975).

[8] Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Annex 1C, Agreement on Trade Related Aspects of Intellectual Property, art. 9(1) (15 Apr. 1994). The TRIP's agreement was implemented in the U.S. on Dec. 8, 1994. Uruguay Round Agreements Act, Public Law 103–465, 108 Stat. 4809 (1994).

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

[10] *Id.*, at art. 7.

granted under the domestic laws of those countries if their respective terms of protection are less than the life-plus-70 standard adopted by the EU. In other words, works copyrighted in the United States would remain protected only for the lifetime of the author plus 50 years.

In order to safeguard the Nation's economic interests and those of America's creators in the protection of copyrighted works abroad, Senator Hatch, Senator Feinstein and Senator Thompson introduced the Copyright Term Extension Act of 1995, S. 483, on March 2, 1995, in the 104th Congress.[11] The Committee held hearings on September 20, 1995. Bruce A. Lehman, Assistant Secretary of Commerce and Commissioner of Patents and Trademarks, and Marybeth Peters, Register of Copyrights and Associate Librarian of Congress for Copyright Services, testified on behalf of the Administration. The Committee also heard testimony from Jack Valenti, president and chief executive officer, Motion Picture Association of America; Alan Menken, composer, lyricist, and representative of AmSong; Patrick Alger, president, Nashville Songwriters Association; and Prof. Peter A. Jaszi, American University, Washington College of Law. In addition, written statements were received for the record from Senator Christopher J. Dodd, the American Society of Composers, Authors and Publishers (ASCAP), the National Music Publishing Association Inc. (NMPA), the Songwriters Guild of America, the Graphic Artists Guild, the National Writers Union, the Coalition of Creators and Copyright Owners, Author Services Inc., the Midwest Travel Writers Association, Donaldson Publishing Co., the American Library Association, the American Film Heritage Association, the Society for Cinema Studies, Lawrence Technology, Bob Dylan Jr., Don Henley, Carlos Santana, Stephen Sondheim, Mike Stoller, E. Randol Schoenberg, Ginny Mancini, Lisa M. Brownlee, Prof. William Patry, and Prof. Dennis Karjala, writing on behalf of 45 intellectual property law professors.

On May 16 and May 23, 1996, the Judiciary Committee met in executive session to consider the bill. An amendment was offered by Senator Brown and Senator Thurmond on music licensing. After extended debate on the amendment, the Chairman reiterated his desire to pass the bill without nongermane amendments and promised to address the music licensing issue on its own merits at a later time. A motion by the Chairman to table the Brown-Thurmond amendment was then adopted by a rollcall vote of 12 yeas to 6 nays. A second amendment by Senator Brown to deny any extension of copyright term to corporate copyright owners was defeated by a rollcall vote of 4 yeas to 12 nays. The Committee then approved the bill, with an amendment in the nature of a substitute, proposed by Senator Hatch, by a rollcall vote of 15 yeas to 3 nays. Embodied in the substitute amendment were four changes to the original text of the bill. The first was the elimination of a provision that would have extended for an additional 10 years the 25-year minimum term of statutory protection guaranteed by section 303 of the Copyright Act for works created, but not published,

[11] S. 483, 104th Cong., 1st sess. (1995). Senators Alan Simpson, Barbara Boxer, Spencer Abraham, and Howell Heflin joined as cosponsors of the bill. Senator Leahy subsequently joined as a cosponsor of the amended version of S. 483, as adopted by the full Committee on May 23, 1996.

before January 1, 1978. The second was the addition of an amendment to section 304(c) of the Copyright Act to provide a limited revived power of termination for original creators whose right to terminate prior copyright transfers under that section has expired. The third was the addition of a provision to amend section 108 of the Copyright Act to create a narrow exemption from copyright infringement during the extended term for qualified libraries, archives and nonprofit educational institutions engaged in specified activities. The final change was the addition of an additional amendment to section 304(b) of the Copyright Act to clarify that the extended term would apply only to works currently under copyright and is not intended to revive copyright protection for works already in the public domain.

III. Discussion

BACKGROUND

With the adoption of the 1976 Copyright Act, Congress fundamentally altered the way in which the U.S. calculates its term of copyright protection by adopting a basic term of protection equal to the life of the author plus 50 years. As indicated in the foregoing discussion on the legislative history of the bill, this term represented the prevailing international standard of copyright protection, mandated by the Berne Copyright Union since 1948 and adopted by a large majority of nations worldwide. The adoption of a minimum term of protection based on the life of the author was one of the principal changes in U.S. copyright law that paved the way for the United States' adherence to the Berne Convention in 1989. Among the reasons stated for the adoption of the life-plus-50 term were the need to conform the U.S. copyright term with the prevailing worldwide standard, the insufficiency of the then-current term to ensure a fair economic return for authors and their dependents, and the failure of the U.S. copyright term to keep pace with the substantially increased commercial life of creative works resulting from the tremendous growth in communications media.[12]

In the 20 years since the passage of the 1976 Copyright Act, developments on both the domestic and international fronts have led to further consideration of the sufficiency of the life-plus-50 term. Among these developments is the effect of demographic trends (such as the increasing life-span of the average American and the trend toward rearing children later in life) on the effectiveness of the current copyright term in affording adequate protection for America's creators and their heirs. In addition, unprecedented growth in technology, including the advent of digital media and the development of the National Information Infrastructure (NII) and the Global Information Infrastructure (GII), have dramatically enhanced the marketable life of creative works, as well as the potential for increased incentives to preserve existing works. Perhaps most importantly, however, is the international movement towards extending copyright protection for an additional 20 years, including the adoption of the EU Directive in October 1993, which requires member countries to adopt a term of protection equal to life of the

[12] H. Rept. 1476, *supra* note 6, at 135.

author plus 70 years.[13] Failure on the part of the United States to provide equal protection for works in the United States will result in a loss for American creators and the economy of the benefits of 20 years of international copyright protection that they might otherwise have. In light of these considerations, the Committee believes the current U.S. copyright term of protection is no longer sufficient to protect adequately our Nation's economic interests in copyrighted works, and more importantly, the interests of American authors and their families.

INTERNATIONAL DEVELOPMENTS IN COPYRIGHT TERM EXTENSION

Thirty five years ago, the Permanent Committee of the Berne Union began to reexamine the sufficiency of the life-plus-50-year term of protection. In the intervening years, the inadequacy of the life-plus-50-year term to protect creators in an increasingly competitive global marketplace has become more apparent, leading to actions by several nations to increase the duration of copyright. Most significantly, the nations of the European Union issued a directive from the Council of the European Communities in 1993, committing the member countries to implement a term of protection equal to the life of the author plus 70 years by July 1, 1995.[14]

To date, Belgium, Denmark, Finland, Germany, Greece, Ireland, Italy, Spain, Sweden, and the United Kingdom have all complied with the EU Directive. Furthermore, Portugal has recognized a perpetual term of protection for much of this century. Other countries are currently in the process of bringing their laws into compliance. In addition, as the Register of Copyrights, Marybeth Peters, testified before the Committee, countries seeking to join the EU, such as Poland, Hungary, Turkey, the Czech Republic, and Bulgaria, are likely to amend their copyright laws to comply with the EU Directive.[15] Ms. Peters also stated that there is some indication that other countries adopting new copyright laws will adopt a term of life-plus-70, as Slovenia has recently done.[16]

The Committee has long recognized the value of uniformity of international copyright protection and the United States' role as a leader in the world market for copyrighted works. In its report on the 1976 Copyright Act, the Committee noted:

> Copyrighted works move across national borders faster and more easily than virtually any other economic commodity, and with the techniques now in common use this movement has in many cases become instantaneous and effortless. The need to conform the duration of U.S. copyright to that prevalent throughout the rest of the world is increasingly pressing in order to provide certainty and simplicity in international business dealings. Even more important, a change in the basis of our copyright term

[13] EU Directive on Term, *supra* note 9.
[14] *Id.*
[15] Statement of Marybeth Peters, Register of Copyrights and Associate Librarian of Congress for Copyright Services, hearings on S. 483 before the Senate Committee on the Judiciary, 104th Cong., 1st sess. 11 (1995).
[16] *Id,* at 11–12.

> would place the United States in the forefront of the international copyright community.[17]

This statement is equally appropriate in the Committee's consideration of S. 483, as reflected in Ms. Peter's testimony before the Committee in 1995:

> The Copyright Office believes harmonization of the world's copyright laws is imperative if there is to be an orderly exploitation of copyrighted works. In the past, copyright owners refrained from entering certain markets where their works were not protected. In the age of the information society, markets are global and harmonization of national copyright laws is, therefore, crucial. There has been a distinctive trend towards harmonization over the last two decades; however, the development of the global information infrastructure makes it possible to transmit copyrighted works directly to individuals throughout the world and has increased pressure for more rapid harmonization. * * * It does appear that at some point in the future the standard will be life plus 70. The question is at what point does the United States move to this term. * * * As a leading creator and exporter of copyrighted works, the United States should not wait until it is forced to increase the term, rather it should set an example for other countries.[18]

Bruce Lehman, Assistant Secretary of Commerce and Commissioner of Patents and Trademarks, expressed the Administration's view that "[i]ncreasing the copyright term may also help to reaffirm the role of the United States as a world leader in copyright protection."[19]

The Committee recognizes the increasingly global nature of the market for U.S. copyrighted works. Uniformity of copyright laws is enormously important to facilitate the free flow of copyrighted works between markets and to ensure the greatest possible exploitation of the commercial value of these works in world markets for the benefit of U.S. copyright owners and their dependents. Indeed, in an age where the information superhighway offers widespread distribution of copyrighted works to almost anywhere in the world at limited costs, harmonization of copyright laws is imperative to the international protection of those works and to the assurance of their continued availability. Accordingly, the Committee agrees that the United States should assert its position as a world leader in the protection of intellectual property by adopting what is increasingly becoming viewed as the future standard of international copyright protection.

THE BERNE CONVENTION AND THE RULE OF THE SHORTER TERM

Equally important as the move toward harmonization of our copyright laws with those of our trading partners are the economic

[17] S. Rept. 473, *supra* note 7, at 118.
[18] Statement of Marybeth Peters, *supra* note 15, at 29, 35.
[19] Statement of Bruce A. Lehman, Assistant Secretary of Commerce and Commissioner of Patents and Trademarks, hearings on S. 483 before the Senate Committee on the Judiciary, 104th Cong., 1st sess. 6 (1995).

implications of an extension of the U.S. copyright term. As members of the Berne Convention, the United States and all EU countries are required to provide a minimum term of copyright protection equal to the life of the author plus 50 years. Any country, however, may elect to provide a longer term of protection, as Belgium, Denmark, Finland, Germany, Greece, Ireland, Italy, Spain, Sweden, the United Kingdom, and others have already done, and as all other EU member countries are required to do under the EU Directive. Of critical importance to American creators, however, is the fact that the EU Directive mandates the application of the "rule of the shorter term"[20] as allowed by the Berne Convention.[21] This rule permits countries with longer terms to limit protection of foreign works to the shorter term of protection granted in the country of origin.

America exports more copyrighted intellectual property than any country in the world, a huge percentage of it to nations of the European Union. In fact, intellectual property is our second largest export, with U.S. copyright industries accounting for roughly $40 billion in foreign sales in 1994.[22] For nearly a decade, U.S. copyright industries have grown at twice the rate of the overall economy. And, according to 1993 estimates, copyright industries account for some 5.7 percent of the total gross domestic product. Furthermore, copyright industries are creating American jobs at twice the rate of other industries, with the number of U.S. workers employed by core copyright industries more than doubling between 1977 and 1993. Today, these core copyright industries contribute more to the economy and employ more workers than any single manufacturing sector, accounting for more than 5 percent of the total U.S. workforce.[23]

Largely, the stellar performance of U.S. copyright industries is the result of strong intellectual property protection. Moreover, well-founded agreements with our international trading partners have helped to secure the dominance of U.S. copyrighted works in the global market. The United States stands to lose a significant part of its international trading advantage if our copyright laws do not keep pace with emerging international standards. Given the mandated application of the "rule of the shorter term" under the EU Directive, American works will fall into the public domain 20 years before those of our European trading partners, undercutting our international trading position and depriving copyright owners of two decades of income they might otherwise have. Similar consequences will result in those countries with longer terms outside the European Union that choose to exercise the "rule of the shorter term" under the Berne Convention and the Universal Copyright Convention. Enactment of S. 483 will ensure fair compensation for the American creators whose efforts fuel the intellectual property sector of our economy by allowing American copyright owners to benefit to the fullest extent from foreign uses and will, at the same

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[20] EU Directive on Term, *supra* note 9, at art. 7.

[21] Berne Convention for the Protection of Literary and Artistic Works (Sept. 9, 1886, revised in 1908, 1928, 1948, 1967, 1971) art. 7(8) (Paris text) [hereinafter Berne Convention].

[22] Statement of Bruce Lehman, *supra* note 19, at 4.

[23] STEPHEN E. SIWEK & HAROLD FURCHTGOTT-ROTH, ECONOMISTS INCORPORATED, COPYRIGHT INDUSTRIES IN THE U.S. ECONOMY: 1977–1993 iv (1995).

time, ensure that our trading partners do not get a free ride from their use of our intellectual property.

PROTECTING COPYRIGHT FOR AUTHORS AND THEIR HEIRS

The copyright status of an author's work is by no means solely an academic issue, or one related simply to our trade balance with Europe. Rather, such a creative work is of legitimate proprietary interest to the families of the authors. This proprietary interest in copyrighted works is provided for by the Copyright Act, pursuant to the Constitution, for the purpose of giving creators an incentive to advance knowledge and culture by allowing them to reap the economic benefit of their creations for "limited times."[24] The question of exactly what term of protection most appropriately reflects a "limited time" as envisioned by the Founders has been debated since the enactment of the first Copyright Act in 1790, and is likely to continue to be debated into the foreseeable future. Congress has long accepted the general principal, however, that copyright should protect the author and at least one generation of heirs. Indeed, among the justifications the Committee cited for adopting the life-plus-50 term in 1976 was the insufficiency of the 56-year fixed term to ensure fair economic returns for American creators and their dependents.[25] Furthermore, both the Berne Convention and the EU Directive have accepted the standard that copyright should protect the author and two succeeding generations.[26] Based on the numerous viewpoints presented to the Committee as it has considered these issues, the Committee concludes that the majority of American creators anticipate that their copyrights will serve as important sources of income for their children and through them into the succeeding generation. The Committee believes that this general anticipation of familial benefit is consistent with both the role of copyrights in promoting creativity and the constitutionally based constraint that such rights be conferred for "limited times."

Among the primary justifications asserted for the adoption of the life-plus-70 term under the EU Directive was the conclusion that the life-plus-50 term is no longer sufficient to protect two generations of an author's heirs.[27] In the United States, where works created before January 1, 1978, are still afforded a fixed term of protection for 75 years from the date of publication, the current term has proven increasingly inadequate to protect some works for even one generation of heirs as parents are living longer and having children later in life. For example, the famous American composer Irving Berlin, who wrote such famous musical works as "A Pretty Girl is Like a Melody," "What I Will Do," and "Alexander's Rag Time Band," began publishing in 1907, and died in 1989, at an age of 101. Not only did he survive the 75-year fixed term of protection in some of his own works, even for his most famous works, his heirs will benefit from only a few years of protection. In an increasing number of cases, widows and widowers of American authors are

[24] U.S. CONST. art. I, sec. 8, cl. 8.
[25] S. Rept. 473, *supra* note 7, at 117.
[26] Statement of Marybeth Peters, *supra* note 15, at 21. *See also* WIPO, Guide to the Berne Convention sec. 7.4 (1978) ("It is not merely by chance that fifty years was chosen. Most countries have felt it fair and right that the average lifetime of an author and his direct descendants should be covered, i.e., three generations.").
[27] EU Directive on Term, *supra* note 9, at Recital (5).

outliving the 75-year term of copyright protection in their spouses' works.

The Register of Copyrights informed the Committee that even for post-1978 works, which are afforded the basic life-plus-50 term of protection, the current term has proven insufficient in many cases to protect a single generation of heirs.[28] For example, Walter Donaldson, who will forever be linked via his songs to the extraordinary success of the 1927 film "The Jazz Singer," composed many of his most famous works when he was in his twenties and died in 1947 while in his fifties. Were the current life-plus-50 term applied at that time, all of his works would fall into the public domain at the end of 1997. Nevertheless, Ellen Donaldson, the composer's daughter, remains extremely active in publishing and exploiting her father's music and in protecting his copyrights. Like the children of composers such as Richard Rogers, Irving Berlin, Richard Whiting, Hoagy Carmichael, and many others, her legitimate interest in her father's copyrights can be expected to continue for decades, and most certainly for the next 20 years.

In order to reflect more accurately Congress' intent and the expectation of America's creators that the copyright term will provide protection for the lifetime of the author and at least one generation of heirs, the bill extends copyright protection for an additional 20 years for both existing and future works.

The Committee is aware of the criticism of the proposed extension by those who suggest that it marks a step down the road of perpetual copyright protection. The Committee is unswayed by this argument for three reasons. First, the greatest obstacle to a perpetual term of copyright protection is the U.S. Constitution, which clearly precludes Congress from granting unlimited protection for copyrighted works. Second, the emerging international standard, to which the bill purports to adhere, and the movement of international copyright law in general are not toward perpetual protection, but to a fixed term of protection based on the death of the author. Third, the principal behind the U.S. copyright term—that it protect the author and at least one generation of heirs—remains unchanged by the bill. The 20-year extension proposed by the bill merely modifies the length of protection in nominal terms to reflect the scientific and demographic changes that have rendered the life-plus-50 term insufficient to meet this aim.

PRESERVING CREATIVE INCENTIVES

As the foregoing discussion indicates, the primary purpose of a proprietary interest in copyrighted works that is descendible from authors to their children and even grandchildren is to form a strong creative incentive for the advancement of knowledge and culture in the United States. The nature of copyright requires that these proprietary interests be balanced with the interests of the public at large in accessing and building upon those works. For this reason, intellectual property is the only form of property whose ownership rights are limited to a period of years, after which the entire bundle of rights is given as a legacy to the public at large.

[28] Testimony of Marybeth Peters, *supra* note 15, at 22 ("With respect to works created on or after January 1, 1978, a longer term may be necessary to safeguard even one succeeding generation").

In balancing these competing interests, Congress has sought to ensure that creators are afforded ample opportunity to exploit their works throughout the course of the works' marketable lives, thus maximizing the return on creative investment and strengthening incentives to creativity. Accordingly, among the primary reasons noted by the Committee for the extension of copyright term under the 1976 Copyright Act was the fact that "[t]he tremendous growth in communications media has substantially lengthened the commercial life of a great many works."[29] Since 1976, the likelihood that a work will remain highly profitable beyond the current term of copyright protection has increased significantly as the rate of technological advancement in communications and electronic media has continued to accelerate, particularly with the advent of digital media and the explosive growth of the National Information Infrastructure (NII) and the Global Information Infrastructure (GII). As the Register of Copyrights noted before the Committee in 1995:

> Technological developments clearly have extended the commercial life of copyrighted works. Examples include video cassettes, which have given new life to movies and television series, expanded cable television, satellite delivery, which promise up to 500 channels thereby creating a demand for content, the advent of multimedia, which also is creating a demand for content, and international networks such as Internet, i.e., the global information highway. The question is who should benefit from these increased commercial uses?[30]

By extending the copyright term for an additional 20 years for all existing and future works, the bill allows American authors to benefit from these increased opportunities for commercial exploitation of their works. The Committee believes that the basic functions of copyright protection are best served by the accrual of the benefits of increased commercial life to the creator for two reasons. First, the promise of additional income will increase existing incentives to create new and derivative works. The fact that the promise of additional income is not realized for many years down the road does not diminish this increased creative incentive. One of the reasons why people exert themselves to earn money or acquire property is to leave a legacy to their children and grandchildren. Furthermore, it is common for authors to choose to exploit their works by transferring their rights in whole or in part to someone else. In so doing, they are able to bargain for the present value of the projected income from commercial exploitation of the work over the course of the entire copyright term. The additional value of a longer term will, therefore, be reflected in the money received by the author for the transfer of his or her copyright, leading again to increased incentives to create.

Second, extended protection for existing works will provide added income with which to subsidize the creation of new works. This is particularly important in the case of corporate copyright owners, such as motion picture studios and publishers, who rely on the income from enduring works to finance the production of marginal

[29] S. Rept. 473, *supra* note 7, at 117.
[30] Statement of Marybeth Peters, *supra* note 15, at 24.

works and those involving greater risks (i.e., works by young or emerging authors). In either case, whether the benefit accrues to individual creators or corporate copyright owners, the ultimate beneficiary is the public domain, which will be greatly enriched by the added influx of creative works over the long term.

PRESERVATION OF EXISTING WORKS

In addition to strengthening existing incentives to create new and derivative works, the 20-year extension of copyright protection will provide the important collateral benefit of creating incentives to preserve existing works. Until now, copyrighted works have been fixed in perishable media, such as records, film, audiotape, paper, or canvas. Copies or reproductions of these works usually suffer significant degradation of quality. The digital revolution offers a solution to the difficulties of film, video, and audio preservation, and offers exciting possibilities for storage and dissemination of other types of works as well. However, to transfer such works into a digital format costs a great deal of money—money which must come either from public or private sources.

Many of the works we wish to preserve, including the motion pictures and musical works from the 1920's and 1930's that form such an extraordinary part of our Nation's cultural heritage, will soon fall into the public domain. Once in the public domain, the exclusive right to reproduce these works will no longer be protected. Because digital formatting enables the creation of perfect reproductions at little or no cost, there is a tremendous disincentive to investing the huge sums of money necessary to transfer these works to a digital format, absent some assurance of an adequate return on that investment. By extending the current copyright term for works that have not yet fallen into the public domain, including the term for works-made-for-hire (e.g., motion pictures), the bill will create such an assurance by providing copyright owners at least 20 years to recoup their investment. More important, the American public will benefit from having these cultural treasures available in an easily reproducible and indelible format.

ANONYMOUS AND PSEUDONYMOUS WORKS

The bill also amends current law to grant an additional 20 years of protection to anonymous and pseudonymous works. While such works currently have a copyright term that endures for 75 years from the year of first publication, or for 100 years from the year of creation, whichever expires first, the bill extends that protection to 95 and 120 years respectively.

In addition to providing the benefits of increased creative incentives and greater protection for authors and their heirs, the Committee notes that extending the current copyright term for anonymous and pseudonymous works also advances our ongoing efforts to fulfill our obligations under the Berne Convention. Article 7(3) of the Berne Convention mandates that such works be protected for at least 50 years after they are first made lawfully available to the public. Since the Stockholm Act of July 14, 1967, however, the Berne Convention has recognized the need for an outer limit on the protection of anonymous and pseudonymous works by providing that, "the countries of the Union shall not be required to protect

anonymous or pseudonymous works in respect of which it is reasonable to presume that their author has been dead for fifty years."[31] It has been argued that the American provision setting an outer limit of 100 years of protection for these works is in violation of the Berne Convention, at least with respect to works whose country of origin is not the United States.[32] By increasing the maximum protection from its current 100 years to a period of 120 years, the bill will at least serve to reduce greatly the number of potential situations in which our law may operate in violation of the Berne Convention. This for the reason that it is far more reasonable to presume that an author who created a work 120 years ago may have been deceased for 50 years, than it is to presume that the author of a work created only 100 years ago may have been deceased for at least 50 years.

UNPUBLISHED WORKS

With the adoption of the 1976 Copyright Act, Congress for the first time limited copyright protection for unpublished works. Section 302 of the Copyright Act provides that unpublished works will be afforded a basic term of protection equal to the life of the author plus 50 years for most works and a maximum term of 100 years from the date the work is created for anonymous works, pseudonymous works, and works made for hire. For works created, but not published or fallen into the public domain prior to January 1, 1978, however, section 303 guarantees a minimum term of protection of 25 years. For such works, copyright subsists beginning on January 1, 1978, and will in no case expire before December 31, 2002. As an incentive to publication, those works that are subsequently published on or before that date are protected for an additional 25 years, or until December 31, 2027, for a minimum of 50 years of Federal copyright protection.

As originally introduced, the bill proposed extending the minimum term of protection for unpublished works created on or before January 1, 1978, for an additional 10 years. The Committee subsequently received testimony from the Register of Copyrights[33] and additional input from scholars and library representatives that many of these works exist in the forms of letters, photographs, diaries, manuscripts, and similar materials. Because unpublished works were afforded perpetual copyright protection by common law until 1978, many date back to the 1800's or even earlier. As the creators' heirs are often difficult to identify and nearly impossible to locate—even for more modern works—clearing the rights in these works is extraordinarily cumbersome. As a result, many of these works are being stored, out of the public's reach, by libraries, archives, and historical societies who are preparing to make them available to the public when they enter the public domain in 2003.

The Committee agrees with the Register and those from other libraries, archives, and historical societies that the public will not realize sufficient benefit from extended protection for these older unpublished works to justify precluding public access to those works beyond 2003. Accordingly, the bill, as reported, maintains

[31] Berne Convention, art. 7(3).
[32] *See* MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT sec. 9.01[D] (1989).
[33] *See* Statement of Marybeth Peters, *supra* note 15, at 25.

the current 25-year minimum term of protection for unpublished works created before 1978. In order to strengthen current incentives to make these works publicly available, however, the bill extends copyright protection for an additional 20 years, if the works are published before December 31, 2002. Therefore, for works created, but not published before January 1, 1978, which are subsequently published on or before December 31, 2002, copyright protection would be guaranteed until December 31, 2047, a minimum of 70 years.

WORKS MADE FOR HIRE

Section 302(c) of the Copyright Act protects works made for hire for 75 years from first publication or 100 years from creation, whichever is less. The bill extends this term of protection by 20 years, to the shorter of 95 years from publication or 120 years from creation. The Committee has heard criticism from some who have suggested that extending the term of protection for works made for hire is not necessary to harmonize the U.S. term with that of the European Union because the European term of protection for works made for hire is 70 years, 5 years shorter than the existing U.S. term. They argue that a 20-year extension for works made for hire would only serve to exacerbate further the discrepancies between the American and European terms.

The Committee believes this argument to be fundamentally flawed for two reasons. First, with few exceptions, the countries of the European Union do not recognize the work-made-for-hire doctrine. The closest corollary is the European doctrine of "collective works or works created by a legal person," which generally affords protection for 70 years from the date a work is made publicly available, or 70 years from creation if the work is never made publicly available.[34] However, in many, if not most cases, this category does not include works that U.S. law protects as works made for hire. For example, in Germany, which has implemented the EU Directive[35] and which does not recognize the work-made-for-hire doctrine, the basic term of life-plus-70 applies to newspaper, magazine, and journal articles where the author is identified, regardless of whether the article was prepared in the scope of the author's employment.[36] Similar protection is applied to books and musical works. Where these works are prepared as works made for hire, they are protected in the United States for the shorter of 75 years from publication or 100 years from creation. In many such cases, the European life-plus-70 term would provide greater protection than the fixed 75-year term in the United States. Thus, the application of the rule of the shorter term will result in less protection

[34] *See* EU Directive on Term, supra note 9, at art. 1.4.

[35] Third law modifying the law on authors' rights of June 23, 1995, Bundesgesetzblatt 1995, Teil I, Nr. 32.

[36] This is consistent with Articles 1.1–1.4 of the EU Directive, which collectively provide authority for adoption of a term of 70 years from publication for collective works and works made by a legal person, but provide for a life-plus-70 term where the natural author is identified in the versions of the work made publicly available.

for these works in the countries of the European Union than they might otherwise have.[37]

Even in the one instance in which Germany does recognize the work-made-for-hire doctrine (computer programs), the term of copyright protection is equal to 70 years from the death of the employee-author if that author is identifiable.[38] Once again, the 95-year term proposed by the bill will likely compare more favorably with the current German term for such works and will lead to greater protection of U.S. works. This is extremely important considering that American-produced software accounts for 70 percent of the world market and that exports constitute half of the software industry's total annual output.[39]

The provisions of the EU Directive regarding motion pictures are based on French law, which also does not recognize the work-made-for-hire doctrine. Under the EU Directive, "cinematographic or audiovisual works" are to be protected for 70 years after the death of the last of four principal contributors—the principal director, the author of the screenplay, the author of the dialogue, and the composer of the music created specifically for the work.[40] Assuming this term is applied by the countries of the European Union to American motion pictures, this term would be significantly longer than the 75-year term of protection provided in the United States for works made for hire. In fact, because it is pegged to the life of the longest living of four individuals, the European term is arguably longer than the basic life-plus-70 term.

Once again, intellectual property is among our Nation's largest export sectors, with the European Union forming one of our most prolific markets. Many of our most successful works are protected in the United States as works made for hire, such as motion pictures, TV programs, and home video, which alone provide a surplus balance of trade of more than $4 billion.[41] As illustrated by the previous examples, these works will often be protected by the general life-plus-70 or similar term prescribed by the EU Directive. By extending the 20-year term to works made for hire, the bill ensures the fullest protection for these works abroad and the greatest available return on investment for the U.S. economy and American creators.

The second flaw in the argument that an extension of copyright protection for works made for hire is unnecessary for harmonization purposes is the fact that it fails to recognize the additional justifications for extending the copyright term. As discussed above, technological developments have significantly lengthened the com-

[37] For example, where a 50-year-old author publishes an article written in the scope of her employment and subsequently dies at age 75, the EU term of protection would be 95-years (life-plus-50 years). However, in applying the "rule of the shorter term," Germany will apply the U.S. term of 75 years, providing 20 years less protection than would otherwise be available. Those authors whose works are published at a younger age or who live longer will face an even greater loss of copyright protection under the "rule of the shorter term." In either case, the 95-year term of protection proposed by the bill will compare more favorably with the longer European copyright term and will lead to increased protection for American works.

[38] Law on Copyright and Neighboring Rights of Sept. 9, 1965, as amended through 1995, art. 69b, art. 66(1).

[39] Business Software Alliance, 1996.

[40] EU Directive on Term, *supra* note 9, at art 2.

[41] Statement of Jack Valenti, president and chief executive officer, Motion Picture Association of America, hearings on S. 483 before the Senate Committee on the Judiciary, 104th Cong., 1st sess. 3 (1995).

mercial life of creative works. This is particularly true for many of the works protected in the United States as works made for hire. For reasons already stated, the Committee believes the Nation's interests are best served by allowing the creators of these works, whether they be individuals or a so-called "corporate authors," to receive the benefit of the increased marketability of their creations.

Some who oppose the extension of copyright term for "corporate authors," and more precisely for corporate copyright owners in general, suggest that a portion of the additional revenue generated for these copyright owners by virtue of the extended term should be used to subsidize public funding for the arts. The Committee notes that some members of the Committee have signed a letter requesting that the Register of Copyrights and the Director of Congressional Research of the Library of Congress identify ways to raise money, by way of the copyright process, for a Federal fund to benefit the public arts and humanities communities.

TERMINATION RIGHTS

Section 304(c) of the Copyright Act sets forth several conditions for the termination of the grant of a transfer or license of the renewal copyright or any right under it, with respect to copyrights subsisting in either its first or renewal term on January 1, 1978, other than a copyright in a work made for hire. One of those conditions is that termination be effected by the serving of advance written notice upon the grantee or the grantee's successor in title. Such notice must state the effective date of termination, which must be either within 5 years after January 1, 1978, or within a period of 5 years beginning 56 years from the date the copyright was originally secured, whichever is later. This so-called "power of termination" was created by the 1976 Copyright Act to allow original creators the opportunity to bargain for the benefit of the additional 19 years of copyright protection provided by that Act.

Termination rights are a limited exception to the general principle embodied in the Copyright Act that copyrights are fully assignable by contract. Just as such an exception was appropriate to allow original creators to benefit from the newly created property right under the 1976 Act, the Committee believes that original authors or their dependents should have the opportunity to bargain for the rights provided by the 20-year copyright term extension in the bill. For most authors, this result will be realized under the current termination provisions of 17 U.S.C. section 304(c). This is true because termination may be effected under section 304(c) at any time within a 5-year window, beginning 56 years from the date of publication. For the authors of the vast majority of works, this 5-year window of opportunity has not yet passed, leaving them free to bargain for the benefit of both the 19-year extension under the 1976 Act and the 20-year extension under S. 483. However, for authors of a much smaller number of works (i.e., works published between 1921 and 1934) this window has already closed. Some of these authors exercised their termination right while the window was still open. According to the Copyright Office, however, the ac-

tual number of authors who did so is relatively small.[42] Therefore, the Committee believes that the creation of a revived power of termination for individuals who did not previously exercise their now-expired termination right under section 304(c) is both consistent with the intent of the 1976 Act and appropriate as a matter of basic fairness to the individual creators who our copyright law purports to protect.

Accordingly, the bill adds a new subsection (d) to section 304, which provides that in the case of a subsisting copyright, other than a work made for hire, where the termination right has expired and the author/owner of the termination right has not exercised such right prior to the effective date of this Act, the author/owner may still achieve termination during a 5-year period commencing at the end of 75 years from the date the copyright was originally secured. With the exception of the period in which the termination may be effected, such a termination is subject to the same terms and conditions as a termination under section 304(c).

LIMITED EXEMPTIONS FOR LIBRARIES AND OTHER NON-PROFIT INSTITUTIONS

The Committee is not unaware of the concern that a 20-year term extension may not take into account those institutions that depend on legal, noncommercial use of protected copyright material. Current law permits libraries and archives to make limited copies or phonorecords of a work under certain circumstances, such as for preservation purposes, or for limited nonsystematic uses for patrons, when the "reproduction or distribution is made without any purpose of direct or indirect commercial advantage."[43]

The Committee is also cognizant, however, of the competing concern of copyright owners, who have expressed their belief that noncommercial users often bypass acquiring such works through readily available commercial means or can compete with the copyright owner's uses. The Committee sought to address both of these concerns by amending current copyright law to permit qualified libraries, archives, and nonprofit educational institutions to reproduce or distribute a copy of a protected work in the last 20 years of its term for limited noncommercial purposes, that is, for purposes of presentation, scholarship, teaching or research, and under certain conditions, including a reasonable investigation that a work is neither subject to normal commercial exploitation nor obtainable at a reasonable price. Furthermore, the legislation provides copyright owners an opportunity to notify the Copyright Office when these conditions are not met. The Committee recognizes the fact that representatives of copyright owners and the nonprofit institutions covered by this provision are in the process of negotiating mutually agreeable terms that may differ from those adopted by the Committee. Should further agreement be reached by these parties, it is the intent of the Committee that the precise terms of this provision be subject to further modification in light of such an agreement.

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[42] According to the Copyright Office, only 566 notices of termination were recorded between November 1993 and May 1995. All but five of these notices were for musical works. Statement of Marybeth Peters, *supra* note 15, 31 n.90.

[43] 17 U.S.C. 108(a)(1) (1992).

NONRESTORATION OF COPYRIGHT

Several individuals, including the Register of Copyrights, suggested to the Committee that the bill, as originally introduced, was somewhat ambiguous as to whether an extension of copyright term would serve to restore copyright protection to works that have recently entered the public domain. It is not the Committee's intent that copyright be restored to public domain works, and the bill, as reported, is amended to clarify this point.

IV. VOTE OF THE COMMITTEE

Pursuant to paragraph 7 of rule XXVI of the Standing Rules of the Senate, each Committee is to announce the results of rollcall votes taken in any meeting of the Committee on any measure or amendment. The Senate Judiciary Committee, with a quorum present, met on Thursday, May 23, 1996, at 10 a.m., to mark up S. 483. The following rollcall votes occurred on amendments proposed thereto:

(1) Motion to table the Brown-Thurmond amendment on music licensing. The motion was agreed to by a rollcall vote of 12 yeas to 6 nays.

YEAS	NAYS
Simpson (by proxy)	Thurmond
Thompson	Grassley
DeWine	Specter (by proxy)
Biden (by proxy)	Brown
Kennedy (by proxy)	Kyl
Leahy	Abraham (by proxy)
Heflin (by proxy)	
Simon (by proxy)	
Kohl (by proxy)	
Feinstein	
Feingold	
Hatch	

(2) Vote on the Brown amendment denying extension to "corporate" copyright owners. Amendment was defeated by a rollcall vote of 4 yeas to 12 nays.

YEAS	NAYS
Thurmond	Simpson (by proxy)
Grassley	Thompson
Brown	DeWine (by proxy)
Kyl	Abraham (by proxy)
	Biden (by proxy)
	Kennedy (by proxy)
	Leahy
	Heflin (by proxy)
	Simon (by proxy)
	Feinstein
	Feingold
	Hatch

(3) Motion to favorably report the bill, with an amendment in the nature of a substitute. The motion was adopted by a rollcall vote of 15 yeas to 3 nays.

YEAS	NAYS
Thurmond	Brown
Simpson (by proxy)	Kyl
Grassley	Kohl (by proxy)
Specter (by proxy)	
Thompson	
DeWine	
Abraham (by proxy)	
Biden (by proxy)	
Kennedy (by proxy)	
Leahy	
Heflin (by proxy)	
Simon (by proxy)	
Feinstein	
Feingold	
Hatch	

V. SECTION-BY-SECTION ANALYSIS

SECTION 1. SHORT TITLE

The proposed legislation is entitled the Copyright Term Extension Act of 1996.

SECTION 2. DURATION OF COPYRIGHT PROVISIONS

Section 2(a)—Clarification of library exemption of exclusive rights

This subsection amends section 108 of the Copyright Act, governing limited exemptions from copyright infringement for libraries and archives, by redesignating subsection (h) as subsection (i) and inserting a new subsection (h). The new subsection (h)(1) will allow libraries, archives, and nonprofit educational institutions to reproduce and distribute copies of works for preservation, scholarship, teaching and research during the last 20 years of copyright, if the works are not being commercially exploited and cannot be obtained at a reasonable price. The new subsection (h)(2) provides that the limited exemption does not apply where the copyright owner provides notice to the Copyright Office that the conditions regarding commercial exploitation and reasonable availability have not been met.

Section 2(b)—Preemption with respect to other laws

This subsection amends section 301(c) of the Copyright Act to extend for an additional 20 years the application of common law and State statutory protection for sound recordings fixed before February 15, 1972. Under section 301, the Federal law generally preempts all State and common-law protection of copyright with several exceptions, including one for sound recordings fixed before February 15, 1972 (the effective date of the statute extending Federal copyright protection to sound recordings). Because Federal copyright protection applies only to sound recordings fixed on or after that date, Federal preemption of State statutory and common-

law protection of sound recordings fixed before February 15, 1972, would result in all of these works falling into the public domain. The section 301 exception was enacted to ensure a 75-year minimum term of copyright protection for these works. By delaying the date of Federal Copyright Act preemption of State statutory and common-law protection of pre-February 15, 1972, sound recordings until February 15, 2067, this subsection extends the minimum term of protection for these works by 20 years.

Section 2(c)—Duration of copyright: Works created on or after January 1, 1978

This subsection amends section 302 of the Copyright Act to extend the U.S. term of copyright protection by 20 years for all works created on or after January 1, 1978. For works in general, which currently enjoy protection for the life of the author plus 50 additional years under section 301(a), this section creates a term equal to the life of the author plus 70 years. Likewise, for joint works under section 302(b), this section extends the current term of protection to the life of the last surviving author plus 70 years. For anonymous works, pseudonymous works, and works made for hire, which are protected the shorter of 75 years from publication or 100 years from creation under section 302(c), this subsection extends the term to the shorter of 95 years from publication or 120 years from the date the work is created.

This subsection also amends section 302(e) of the Copyright Act to extend by 20 years the various dates relating to the presumptive death of the author as a complete defense against copyright infringement. Whereas current copyright protection is generally tied to the life of the author, it is sometimes not possible to ascertain whether the author of a work is still living, or even to identify the year of death if the author is deceased. Section 302(e) provides a complete defense against copyright infringement when the work is used more than 75 years after publication or 100 years after creation, whichever is less, provided the user obtains a certificate from the Copyright Office indicating that it has no record to indicate whether that person is living or died less than 50 years before. This subsection would extend protection of such works for an additional 20 years—95 years from publication and 120 years from creation—as well as base the presumptive death of the author on certification by the Copyright Office that it has no record to indicate whether the person is living or died less than 70 years before, which is 20 years longer than the 50 years currently provided for in section 302(e).

Section 2(d)—Duration of copyright: Works created but not published or copyrighted before January 1, 1978

This subsection amends section 303 of the Copyright Act to extend the minimum term of copyright protection by 20 years for works created but not copyrighted before January 1, 1978, provided they are published prior to December 31, 2002. Prior to 1978, unpublished works enjoyed perpetual copyright protection. Beginning in 1978, however, copyright protection for unpublished works was limited to the life of the author plus 50 years, or 100 years from creation for anonymous works, pseudonymous works, and

works made for hire. Under section 303, however, works created but not published before January 1, 1978, are guaranteed protection until at least December 31, 2002. Works subsequently published before that date are guaranteed further protection until December 31, 2027. This subsection provides an additional 20 years of protection for these subsequently published works by ensuring that copyright protection will not expire before December 31, 2047.

Section 2(e)(1)(A)—Duration of copyright: Copyrights in their first term on January 1, 1978

This subsection amends section 304(a) of the Copyright Act to extend the term of protection for works in their first term on January 1, 1978, by extending the renewal term from 47 years to 67 years. The effect of this amendment is to provide a composite term of protection of 95 years from the date of publication.

Section 2(e)(1)(B)—Duration of copyright: Copyrights in their renewal term or registered for renewal before January 1, 1978

This subsection amends section 304(b) of the Copyright Act to extend the copyright term of pre-1978 works currently in their renewal term from 75 years to 95 years. As amended, this section clarifies that the extension applies only to works that are currently under copyright protection and is not intended to restore copyright protection to works already in the public domain.

Section 2(e)(1) (C) and (D)—Termination of transfers and licenses

These subsections amend section 304(c) of the Copyright Act and create a new subsection (d) to provide a revived power of termination for individual authors whose right to terminate prior transfers and licenses of copyright under section 304(c) has expired, provided the author has not previously exercised that right. Under section 304(c), an author may terminate a prior transfer or license of copyright for any work, other than a work made for hire, by serving advance written notice upon the grantee or the grantee's successor at least 2, but not more than 10, years prior to the effective date of the termination. Such termination may be effected at any time within 5 years beginning at the end of 56 years from the date of publication. The purpose of this termination provision was to afford the individual creator the opportunity to bargain for the benefit of the 19-year extension provided by the 1976 Copyright Act.

For most individual creators, the existing power of termination under section 304(c) will allow them to terminate prior transfers and to bargain for the benefit of both the extension under the 1976 Copyright Act and the extension under the Copyright Term Extension Act of 1996. For a much smaller group of individuals, the 5-year window in which to terminate prior transfers under section 304(c) has already expired. Thus, these creators are denied the opportunity to reap the benefits of the extended term, while the current copyright owners are given a 20-year windfall. This subsection amends the existing termination provisions under section 304(c) of Copyright Act to create a revived window, beginning at the end of the current 75-year copyright term, in which individual creators or their heirs who did not terminate previous transfers or grants prior

to the expiration of their right of termination under section 304(c) may bargain for the benefit of the extended term.

Section 2(e)(2)—Copyright Renewal Act revisions

This subsection makes corresponding amendments to section 102 of the Copyright Renewal Act of 1992 (Public Law 102–307, 106 Stat. 266) to reflect the changes made by the Copyright Term Extension Act.

SECTION 3. EFFECTIVE DATE

This Act and the amendments made thereby shall be effective on the date of enactment.

VI. COST ESTIMATE

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, June 17, 1996.

Hon. ORRIN G. HATCH,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed S. 483, the Copyright Term Extension Act of 1996, as ordered reported by the Senate Committee on the Judiciary on May 23, 1996. CBO estimates that enacting S. 483 would result in no significant cost to the Federal Government. Because enactment of this bill would not affect direct spending or receipts, pay-as-you-go procedures would not apply.

S. 483 would extend the copyright term for works created on or after January 1, 1978, from life of the author plus 50 years after the author's death to life of the author plus 70 years after death. The bill would extend most other current copyrights for an additional 20 years, including copyrights for works by anonymous authors and copyrights for works created before January 1, 1978. The original creator of a work often sells his or her copyrighted material to other individuals or firms. S. 483 would provide the original creator of a work, or his or her descendants, with the power to renegotiate the terms of a sale to receive compensation for the additional 20 years of copyright protection granted under this bill. Finally, the bill would authorize libraries and other nonprofit institutions to reproduce a copyrighted work for certain purposes and would delay the preemption of certain State and common laws.

If S. 483 were enacted, the Copyright Office would have to update its printed materials to reflect the changes in the copyright law. The office would insert flyers with the changes into most materials and would not need to reprint the materials immediately. Based on information from the Copyright Office, CBO estimates that updating the printed material would cost less than $500,000 over the 1997–2002 period, assuming appropriation of the necessary funds. We expect that the bill would have no other budgetary impact.

S. 483 contains no intergovernmental or private-sector mandates as defined in Public Law 104–4, and would impose no direct costs on state, local, or tribal governments.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Rachel Forward.

Sincerely,

JUNE E. O'NEILL, *Director.*

VII. REGULATORY IMPACT STATEMENT

In compliance with paragraph 11(b)(1), rule XXVI of the Standing Rules of the Senate, the Committee, after due consideration, concludes that S. 483 will have no significant regulatory impact.

VIII. ADDITIONAL VIEWS OF MR. LEAHY

I was not an original sponsor of S. 483 and raised a number of questions and concerns that I had with the bill as originally introduced at the Judiciary Committee hearing in September 1995.

I spoke of a letter I had received from Prof. Karen Burke Lefevre of Vermont and the Rensselaer Polytechnic Institute. She expressed reservations, as a researcher and author, that Congress not extend the term for unpublished works beyond the term set by the 1976 Act. This category of materials is set to have its copyrights expire in 2002. They include anonymous works and unpublished works of interest to scholars. The substitute accommodates these interests and preserves the public availability of these materials in 2003. I want to thank Marybeth Peters, our Register of Copyrights, for supporting this improvement in the bill.

I also feel strongly that the extension of the copyright term should include public benefit, such as the creation of new works or benefit to public arts. Senator Dodd, Senator Kennedy, and I have been concerned about finding an appropriate way to benefit the public from this extension and continue to do so. Along these lines, I am delighted that Senators Simpson and Brown joined with us in a request to the Copyright Office to examine how the extension in this bill will benefit copyright industries, authors and the public.

I am concerned about libraries, educational institutions and nonprofits being able to access materials and provide access in turn for research, archival, preservation and other purposes. The substitute is a step in that direction. The copyright industry representatives and library representatives have narrowed their differences. I ask for their continued help in crafting the best balance possible to create public access for noncommercial purposes during the extension period without undercutting the value of the copyrights.

At the hearing I also raised the notion of a new right of termination for works where the period of termination in current law has already passed and the 20-year extension inures to the benefit of a copyright transferee. The substitute creates such a right of termination.

Finally, I frankly admitted at our hearing that I was still considering whether there was sufficient justification for extending the copyright term for an additional 20 years. At our hearing we considered the recent European Union Directive to its member countries to provide copyright protection for a term of life plus 70 years by July 1, 1995. While many of our trading partners did not extend their terms by that date, they have acted to do so in the past year.

I recently received a letter from Bruce A. Lehman, the Assistant Secretary of Commerce and Commissioner of Patents and Trademarks, in which he reports that Austria, Germany, Greece, France, Denmark, Belgium, Ireland, Spain, Italy, and the United Kingdom have now complied with the EU Directive on Copyright Term. Swe-

den, Portugal, Finland and the Netherlands apparently have legislation pending, as well. With so many of our trading partners moving to the longer term but preparing to recognize American works for only the shorter term, I believe it is time for us to act.

Given the changes made in S. 483 to accommodate the concerns that I raised with the original language and the changes in the international setting, I cosponsored the Committee substitute at our Judiciary Committee Executive Business session.

PATRICK LEAHY.

IX. ADDITIONAL VIEWS OF MESSRS. SIMON AND KENNEDY

We support the goals of S. 483. The harmonization of the U.S. copyright term with that of the European Union will yield significant economic benefits to our Nation generally and to our creators in particular—benefits which, in turn, will stimulate future creativity and eventually lead to a broader and richer public domain.

At the same time, it is important to bear in mind that Congress has consistently ensured that the benefits of copyright protection flow both to information owners and users. In light of these dual policy goals, we continue to be concerned about the effects this legislation will have on libraries, archives, and other entities engaged in the preservation and provision of existing noncommercial works. Just as an extended copyright term enriches our creative process, so too does continued access by scholars, researchers, and teachers to materials that are not being commercially exploited. These are the raw materials from which spring the commercial works that will generate profits and receive protection in the future: the ignored author of today may become the Jane Austen or Louisa May Alcott of tomorrow. Thus, libraries and other preservationists have a vital role in the creative process—a role that in fact *stands to benefit* copyright holders and that must be maintained.

S. 483 takes substantial steps toward affording such protection, creating a so-called "library exemption" that allows libraries and archives to continue reproducing and distributing noncommercial works for purposes of "preservation, scholarship, teaching, or research" during the 20-year period added to the copyright term by this legislation. This exemption, included in S. 483 after extended (but thus far unsuccessful) negotiations between the copyright holding community and the libraries, is a step in the right direction, but only one step, and, as suggested in the Committee Report, not a final product that the Committee sought to write into S. 483 as reported.

Indeed, there is a real question whether S. 483's exemption goes far enough in protecting the important efforts of our libraries and archives. Certainly those institutions themselves do not think so. For example, they argue that because the legislation *does not* protect libraries' and others' ability to *display* or *perform* noncommercial works during the additional 20-year term, scholars' computerized access to creative—and it must be repeated, noncommercial—works in the new digital universe will be cut off, and educators will be unable to promote noncommercial works through public performances.

One disinterested and expert observer—the Register of Copyrights—agrees with them, and has offered her own compromise proposal that also would exempt from coverage under the additional 20-year term the display and performance of noncommercial works by libraries, archives, and schools acting as such reposi-

tories. The Register was tasked by the chairman of the House Subcommittee on Courts and Intellectual Property with moderating and overseeing the negotiations discussed above, and with making an independent recommendation if the negotiations proved fruitless. She has heard the arguments supporting all positions. Her already expert opinion on intellectual property matters should be given particular weight in light of this background.

There is time before S. 483 reaches the Senate floor for a compromise satisfactory to all parties to be reached on the library issue. To his credit, the Chairman of the Judiciary Committee, Senator Hatch, has expressed a desire to see this issue resolved by the parties and has indicated his intention to incorporate into S. 483 any agreement that can be reached as to the scope of a library exemption, so long as that agreement comports with the basic goals of our national copyright policy discussed above. We are optimistic that the libraries and the copyright community—with an eye toward the recommendations of the Register—will reach such an accord. If no such accord can be reached, however, we believe the Register of Copyright's proposal should be substituted for the "placeholder" provision that is currently in S. 483. If the parties' own or the Register's version of a "library exemption" is ultimately presented to the full Senate, we will be able to fully support a bill that already has much to recommend it.

TED KENNEDY.
PAUL SIMON.

X. MINORITY VIEWS OF MR. BROWN

The current length of copyright term protection is the life of the author plus 50 years. To suggest that the monopoly use of copyrights for the creator's life plus 50 years after his death is not an adequate incentive to create is absurd. Denying open public access to copyrighted works for another 20 years will harm academicians, historians, students, musicians, writers, and other creators who are inspired by the great creative works of the past.

Copyright law relies on a delicate balance between rewarding creators and disseminating works for the public benefit. The creators' reward is significant and nearly absolute. Creators are granted the rights to monopolize the exploitation of their work. However, "[t]he primary purpose of copyright is not to reward the author, but is rather to secure 'the general benefits derived by the public from the labors of the authors.'"[1] In the words of the Supreme Court, "[c]reative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and other arts. The immediate effect of our copyright law is to secure a fair return for an author's creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good."[2]

Before we extend the term of copyright for the fourth time,[3] we bear the burden of justifying any change to that delicate balance. In my view, since the reasons which are offered for extending the copyright term are both unconvincing and unrelated to the public benefit, we have not carried our burden to justify the extension.

S. 483, COPYRIGHT TERM EXTENSION ACT

This bill proposes a copyright term of life of the author plus 70 years. That means the proposed term would be the current term—life of the author plus 50 years—plus an additional 20 years. Put another way, the monopoly grant could extend for six or seven generations. After the author's life, he likely would have children and grandchildren. Adding 50 years to that likely would mean that the author's grandchildren are then either parents or grandparents.

[1] Melville B. Nimmer and David Nimmer, *Nimmer on Copyright* 1.03[A](1996) (quoting *Fox Film Corp.* v. *Doyal,* 286 U.S. 123, 127 (1932)).

[2] *Twentieth Century Music Corp.* v. *Aiken,* 422 U.S. 151, 156 (1975).

[3] The original copyright law of 1790 gave 14 years of protection, plus a 14-year term of renewal for a total of 28 years of protection. In 1831, the copyright term was changed to 28 years, plus the 14-year renewal term, totaling 42 years of protection. In 1908, the term was extended again to 28 years plus a 28-year renewal term, for a total of 56 years of protection. In the 1960's, when valuable works from the early part of the century were moving into the public domain, there were repeated term extensions, carrying copyrights over from year to year until a complete extension was passed in 1976. The 1976 Act (effective in 1978) extended the "old act" term (for works governed by the 1908 Act) another 19 years to make the term 75 years. The 1976 Act also extended protection to new works created after 1976 for a period of life-plus-50 years for individual authors and 75 years for corporate creators. Not surprisingly, that 19-year extension was 18 years ago. Now, we are back to add another twenty years. Congress, at the behest of copyright holders, seems willing to increase copyright terms ad infinitum.

Adding another 20 years to that would likely mean that the grandchildren's children or grandchildren have children of high school or college age.

To understand how this would apply to current works, look at what life-plus-70 years would mean for the next Irving Berlin. He wrote "Alexander's Ragtime Band" in 1915. He lived until 1989. If the proposed new standard of life-plus-70 years applied to Berlin, his song, "Alexander's Ragtime Band" would not be freely available to the public until 2059. The length of Berlin's copyright term or monopoly grant would be from 1915 to 2059, or 144 years from creation. We would thus be denying seven generations of Americans the right to freely use the song.[4]

Duke Ellington's works from 1921 and later would not be freely available to the public until 2016 or later. "East St. Louis Toodle-O," written in 1927, would not come out in 2022. "Mood Indigo," written in 1930, would not see the light of day, so to speak, until 2025. George Gershwin's "Rhapsody in Blue," written in 1924, would not come out until 2019. "I Got Rhythm," written in 1930, would not come out until 2025.

The majority report tries to justify extending the term of copyright for another 20 years on two general grounds: the international standard for copyright law and the economic incentive to stimulate creativity. The Committee report reveals another motivation behind this legislation when it states,

> The additional value of a longer term will, therefore, be reflected in the money received by the author for the transfer of her copyright, leading again to increased incentives to create. * * * [E]xtended protection for existing works will provide added income with which to subsidize the creation of new works. This is particularly important in the case of corporate copyright owners, such as motion picture studios and publishers. * * *

Yet, because this bill vests the extra 20 years of copyright protections with the copyright owner instead of the creator, the creators do not necessarily receive the money—copyright owners (often corporate owners) do. The owners' rights are based on contractual transfers that were executed under the 1908 or 1976 Acts, so when the creators signed away their rights, there was no expectation of the extra 20 years. We must ask the question: Why we are providing such a corporate windfall?

THE PURPORTED NEED TO HARMONIZE

Supporters of the bill claim we need to harmonize our copyright law with the European standard. The majority report states that the purpose of copyright term extension is "to ensure adequate pro-

[4] It is worth mentioning in the context of extending the monopoly for copyrighted works that the scope of copyright protection is already more expansive than most Americans may think. Prior to the 1978 Act, the concept of exclusive rights to copyright were defined in terms of use for profit. After the 1978 Act, the concept of exclusive use includes any public performance of a work, regardless of whether it is for profit. Going from a concept of for profit to one of public display or performance, and then going from 56 years to life-plus-50-years to life-plus-70 years is a startling capture of creative work in a short period of time. To illustrate, "Happy Birthday" was copyrighted in 1935 and renewed in 1963 for a monopoly grant through 2010; further, a group of waiters singing "Happy Birthday" to a restaurant patron would constitute a public performance.

tection for American works in foreign nations and the continued economic benefits of a healthy surplus balance of trade in the exploitation of copyrighted works * * * by substantially harmonizing U.S. copyright law to that of the European Union." However, this stated purpose is dubious, since we are fully protected in Europe under current law.

The hue and cry to "harmonize" our copyright term would have us amend our domestic laws to meet the standards of the European Union. We are not a member of the European Union. The European Union does not determine our treaty obligations.

Interestingly, the EU employs the "rule of the shorter term," which means that any country that employs a term of protection less than the EU term will not enjoy the longer protection in EU member-countries.[5] The EU rule of the shorter term seems inconsistent with the spirit of the Berne Convention to promote international cooperation in copyright protection. The Berne Convention encourages national treatment—that is, treating foreign creators the same as national creators.[6] The United States does not follow the rule of the shorter term with its discriminatory effect on other nations since it is such an objectionable trade policy. The United States should not be intimidated into changing its own copyright laws.

Furthermore, even if we did adopt the life-plus-70 years standard, we would not be harmonizing our laws with international standards. In fact, our international copyright obligations are contained in the Berne Convention and the United States is in full compliance. The Berne Convention only requires life-plus-50 years, which is our current standard.[7]

Contrary to the majority report, if we passed this bill, we would be further distancing our laws from EU laws, not harmonizing them. To begin with, as the majority report acknowledges, not all EU countries have adopted the life-plus-70 years standard. Second, most EU countries do not recognize corporate copyright ownership—that is, works not owned by individuals. We do recognize corporate copyright ownership in the United States. Those EU countries that do recognize corporate copyright ownership provide less protection (70 years) than the United States does under current law (75 years). Yet this bill would extend these terms another 20 years to provide 95 years of copyright protection. Rather than harmonizing American and European copyright terms, this bill would widen the differences.

Harmonization, as a justification for term extension, lost much of its force when the Judiciary Committee rejected my amendment which proposed harmonizing American and European copyright law with respect to corporate ownership.

Moreover, this bill does not harmonize the American concept of copyrights with that of European countries. They typically view a copyright as a moral right which gives creators a near perpetual monopoly in their work. The American view of copyright is much

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[5] Council Directive 7831/93 of 13 July 1993 on Harmonizing the Term of Protection of Copyright and Certain Related Rights.

[6] Berne Convention for the Protection of Literary and Artistic Work, Paris Text of 1971, art. 5.

[7] Berne Convention, art. 7.

different: we provide creators with a bundle of exclusive rights to exploit their work, but only for a limited time as required by the U.S. Constitution. Thus, our copyright system is more limited, and, if gauged by the trade surplus, much more successful.

The U.S. Copyright and Intellectual Property Law professors had this to say about harmonizing our laws with those of Europe:

> There is no tension here between Europe and the United States. The tension, rather, in both Europe and the United States, is between the heirs and assignees of copyrights in old works versus the interests of today's general public in lower prices and a greater supply of new works. The European Union has resolved the tension in favor of the owners of old copyrights. We should rather favor the general public.

THE PURPORTED INCENTIVE TO CREATE

The majority report offers a second justification for term extension, contending that the extra 20 years provides an incentive to create. The real incentive here is for corporate owners that bought copyrights to lobby Congress for another 20 years of revenue—not for creators who will be long dead once this term extension takes hold.

Do you know any creator that would fail to create if the monopoly grant ran out at life-plus-50 years of protection rather than life-plus-70 years? Would Hemingway have produced another work if he were guaranteed another 20 years of copyright protection? Would Wyeth have painted more? Would Sinatra have sang more? This suggestion is ludicrous.

Second, as much as we may want to, we cannot provide an incentive to create something that has already been created! This bill would retroactively apply term extension to add 20 years of protection for works already in existence. Furthermore, many of the creators of these prior works are dead. No grant of additional time will help them create, but it will give the current owners—often corporations—an enormous windfall at the expense of consumers.

Third, in part, the incentive to create comes from the public domain works which can inspire, be borrowed from, and improved upon. We do not necessarily provide an incentive to create by reducing the public domain. This bill puts a 20-year moratorium on the public domain. Researchers, academics, librarians, historians, and creators rely on the public domain. By draining the public domain, we will restrict a portion of creativity.

Fourth, there is no evidence that the current monopoly grant of life-plus-50 years is an insufficient incentive. There is nothing in the hearing record that suggests extending the copyright term will result in more works or higher quality works. Indeed, our success as a nation of creators suggests the opposite. The majority report observes that copyright term extension may provide an incentive to create for corporate creators: another 20 years of revenue from current works might, for example, subsidize new motion pictures. However, this is more a corporate subsidy than an incentive to create.

Finally, if the purpose of this bill were to reward creators as an incentive to create, then the bill should vest the extended term to the creator. This bill does not do that. It vests the extra 20 years in the copyright owner.

Extending the term of copyright is inconsistent with the American tradition of balancing the interests of creators with those of the public—a tradition that has produced perhaps the best body of artistic work on earth. But that system, and American creators, rely on a rich, prosperous public domain. Those who rely on the public domain—like historians, students and future creators will be harmed. Walt Disney took the Grimm brothers' *Snow White* out of the public domain and turned it into a wonderful movie that generated millions of dollars and retold the message of Snow White to many more people all over the world. This bill throws a bucket of cold water on such recreation.

OUR CONSTITUTIONAL CHARGE

The Constitution charges Congress to strike a balance between creators and the public benefit when it says: "The Congress shall have [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."[8]

The Constitution erects at least three boundaries around copyright policy: First, the duration of the copyright term must be "limited;" second, Congress must secure the right to authors; third, the copyright policy must promote the "useful arts." In 1984, the Supreme Court highlighted this special charge when it noted that, "[a]s the text of the Constitution makes plain, it is Congress that has been assigned the task of defining the scope of the limited monopoly that should be granted to authors or to inventors in order to give the public appropriate access to their work product."[9] Congress may fail that task by passing copyright term extension since it seems to run afoul of all three constitutional limitations on copyright policy.

LIMITED TIMES

The phrase "limited times" has never been defined by the courts. Both the Register of Copyrights and the Commissioner of Patents and Trademarks argue that life-plus-70 years is a limited time. The Register of Copyrights suggests it is within the discretion of Congress to determine what constitutes a limited time. We do have an idea of what "limited times" meant to the drafters of the Constitution: the original grants of copyright extended for a time far shorter than the extreme position taken in this bill. The length of the term is so long that it invites a court review.

SECURE TO AUTHORS

The Constitution authorizes Congress to secure copyrights *to authors.* S. 483, the Copyright Term Extension Act, does not secure the copyrights to authors. Instead it secures the extended monopoly grant to the current owners of the copyright. Congress may exceed

[8] U.S. Const., art. I, sec. 8, cl. 8 (emphasis added).
[9] *Sony Corp.* v. *Universal City Studios, Inc.,* 464 U.S. 417, 429 (1984).

its constitutional authority in granting copyrights to owners instead of authors.

FOR THE PUBLIC BENEFIT

The Constitution empowers Congress to "promote science and useful arts," an undertaking that benefits the public at large, not merely artists. The Constitution empowers Congress to accomplish that task by "securing for limited times to authors and inventors the exclusive right to their writings and discoveries." Nowhere is there evidence in the hearing record of how the proposed copyright term extension will increase the number or quality of works for the public benefit. On the other hand, there is clear evidence of public harm when the public is denied open access to these works for another twenty years.

BALANCING THE PUBLIC DOMAIN

Hearings and debate on this issue focused on giving creators another 20 years of copyright protection, apparently suggesting that such an extension would not harm anyone. I think that is wrong. The copyright term extension will harm Americans. The public is clearly benefitted by having unrestricted access to previously copyrighted works that are now in the public domain.

Several examples illustrate the value of the public domain. In 1993, Willa Cather's *My Antonia* went into the public domain. In 1994, seven new editions appeared costing from $2 to $24, thereby making the story available to many more people. Increasing public access to stories and ideas is the value of the public domain.

Bantam Books conducted a study on so-called classics. They determined the following:

- more than 23 million classics are sold each year;
- over half of all classics go to high schools and colleges.

Now, assume royalties are about 10 percent of the cover price, assume the price of those books is $15.00, and assume all works are copyrighted (which is unlikely since many are public domain works). If these facts remain constant for 20 years, that means the public pays out $345 million in royalties, just for these books just in high school and college, over a 20-year period. That is $345 million that could go elsewhere in education. Saving valuable resources or allocating more for education is the value of the public domain.

Snow White, Pinocchio, Beauty and the Beast, Little Mermaid and the music for *Fantasia* are all enormously successful creations that have one thing in common: they came from works in the public domain. Providing inspiration for new works and disseminating old ones is the value of the public domain.

Forty-five copyright law professors wrote the Committee urging us to oppose S. 483 because it will harm the public. They state that "[t]his legislation is a bad idea for all but a few copyright owners and must be defeated." They also noted that the proposed bill harms the public because it limits the "supply of new works" and it increases the cost of existing works.

The Constitution mandates that we consider balance when we consider copyright. We have a balanced copyright system that fa-

vors creators but that holds out a promise that sometime in the distant future the public will have unfettered access to creators" works. Extending the term another 20 years upsets that balance and threatens to dry up the public domain, which is a major source of creativity.

THE ANTICOMPETITIVENESS OF A LONGER MONOPOLY GRANT

Granting this monopoly for another 20 years is anti-competitive. Instead of allowing open public access to these works, this bill preserves the limited access, the single seller, and the artificially high prices and limited supply that characterize a monopoly market.

One of the most significant problems associated with a monopoly is the artificial suppression of supply in order to increase the price. In the context of copyright, that means that the owner of a particular copyright may refuse to disseminate works as widely as the market would dictate. This unnatural scarcity forces consumers to pay higher prices. Even worse, there are notable examples of a copyright owner deciding not to exploit and disseminate works at all. For example, the owners of copyrights to songs written by famous artists may refuse to market unknown songs and deny others access to them in order to protect or maximize their financial returns on other, popular songs. Such anti-competitive practices severely harm other creators who might be inspired by the works as well as the general public who are denied the enjoyment of the works.

THE MUSIC LICENSING AMENDMENT

Being concerned about the anticompetitive nature of copyright law, Senator Thurmond and I offered an amendment that would have provided some balance to the licensing of copyrighted music. Under current practices, merely turning on a radio in a public place may subject some Americans to lawsuit for copyright infringement. For those who wish to play music and are well informed about music licensing may obtain a license to play music for hundreds of dollars. Only three organizations, ASCAP, BMI, or SESAC, sell such a license. Unfortunately, under the current system, it is impossible to choose only one: virtually anyone who chooses to play music in public will have to purchase a license from two if not three music licensing organizations. Since there are only three music licensing organizations, there is no real price competition available to consumers.

Until recently, someone who wanted to license the music could not obtain a list of songs they were allowed to play. Therefore, another licensor could come along and claim they too were owed a fee for a musical performance from their list of songs. To date, providing a list or repertoire of songs is still not required by law.

After being sued for antitrust violations, two of the three bodies that provide music licenses are now governed by antitrust consent decrees. The Department of Justice actively reviews these consent decrees. Under the terms of the consent decrees, music users who wish to challenge the fee structure must do so in Federal court in New York City. This provision of the consent decree has the unfor-

tunate result of denying real relief for smaller music users who cannot afford to pursue such a challenge.

The consent decrees also require that the music licensing organizations provide not only a blanket license to broadcasters (to broadcast music all day long) but also a per program license (to broadcast music only part of the day) that is a genuine economic alternative. Unfortunately, the cost of the per program license is not a genuine economic alternative. Instead, it is three or four times as expensive as the blanket license on an hour-by-hour comparison.

These music licensing societies may even charge for playing music in a church service that is broadcast to the public. They may charge a restaurant when waiters and waitresses gather around a table to sing "Happy Birthday." They may charge a Girl Scout camp to sing "Edelweiss."

Our amendment would have remedied some of this unfairness by requiring local arbitration of licensing disputes. It would have required music licensing organizations to publish their repertoire and make it available to the public. It would have exempted the nonprofit broadcast of church services. Our amendment would have required some rough proportionality between the cost of the blanket license and that of the per program license. Finally, it would have clarified and expanded the current exemption for playing music in small commercial establishments.

Unfortunately, our amendment was defeated. As a consequence, we are left with a bill that favors only one side of the equation: the owners of copyright. We have neglected to insert some protection for the public, some protection against anticompetitiveness, or some guarantee of fairness for current and future creators.

CONCLUSION

This bill grants the additional 20 years of copyright monopoly to the copyright holder, thus providing a contractual windfall at the expense of the public. Why should a work, created 70 years ago, sold to a corporation 25 years ago, be dedicated to that corporate buyer for another 20 years? The public should have access to that work as a means of providing incentive to new creators, disseminating these works to more students, historians, writers, and other Americans, and generally improving the public arts. In effect, we are taking 20 years of wealth generation and transferring it to a small group of people—often corporate owners that did not create the works in the first place. The public is significantly harmed by that transfer of wealth.

"A fundamental goal of copyright law is to promote the public interest and knowledge." [10] If we pass copyright term extension, we fail this fundamental goal. This bill reduces competition and primarily rewards those who lobby Congress rather than those who create.

HANK BROWN.

[10] U.S. Congress, Office of Technology Assessment, *Copyright and Home Copying: Technology Challenges the Law,* OTA–CIT–422 (Washington, DC: U.S. Government Printing Office, October 1989).

XI. MINORITY VIEWS OF MR. KOHL

The Constitution grants Congress the power to "secur[e] for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. Const. Art. I, Sec. 8, Cl. 8. Congress is given this power "[t]o promote the Progress of Science and useful Arts." *Id.*

Congress was not given this power for the sole purpose of ensuring that the heirs of copyrighted works can enjoy an unfettered income stream from a monopoly—or even for the purpose of improving the balance of trade with Europe. Yet, the Copyright Term Extension Act of 1996 is justified upon precisely these bases. And it has been recommended to the full Senate by the Judiciary Committee without a persuasive demonstration that adding 20 years to the current copyright term is necessary to promote scientific or artistic creativity.

A copyright is a limited monopoly. It operates in derogation of the first amendment and consumer interests. As a result, extension of copyright term should not be lightly made or without great justification. In *Fox Film Corp.* v. *Doyal,* the Supreme Court observed that "[t]he sole interest of the United States and the primary object in conferring the [copyright] monopoly lie in the general benefits derived by the public from the labors of authors." 286 U.S. 123, 127 (1932). Congress has recognized this as well. Copyrights are given "[n]ot primarily for the benefit of the author, but primarily for the benefit of the public." H. Rept. 2222, 60th Cong., 2d sess. 7 (1909).

The practical consequences of extending any monopoly—whether oil, telephones, or copyrights—are increased prices for consumers. Take, for example, Scribners' books. For many years, during the first half of the century, Scribners was a great publishing house. Its stable of authors included Ernest Hemingway, F. Scott Fitzgerald and Thomas Wolfe, among others. But eventually Scribners went downhill: it failed to bring in new talent. And during the last years of its existence, Scribners (before it was eventually purchased by Simon & Schuster) survived by raking in profits based on high-priced Hemingway works. As a result, consumers—and schools and libraries—have had to pay more for *The Sun Also Rises, For Whom the Bell Tolls* and *A Farewell to Arms.* Once the copyright expires on these works, though, they will become much more affordable to the average consumer. Or take, for example, our great American musicals. Some of these musicals, including works by Rodgers and Hammerstein, are not being performed today in regional theater because the producers cannot afford the 10-percent licensing fee. We forget all too often that consumers are injured as a result of the monopoly granted by copyrights.

We need to ask—more carefully I think—whether the benefits of extending this monopoly an additional 20 years outweighs these costs. A few people have argued that a copyright term extension

will make the creative community more dynamic. But Congress has increased the copyright term repeatedly—to 56 years in 1909 and, as recently as 1976, to the-life-of-the-artist-plus-50-years. And no one has convincingly argued that since 1976 the creative community has languished. The American creative community is already the most vibrant in the world—it is hard to see how increasing the copyright term from 50 years *after death* to 70 years *after death* will encourage the individual creator to greater heights of creativity.

Congress has recognized the legitimate need and desire of an artist to leave a legacy to his heirs. However, it is not and cannot be a first order justification for the extension of copyright term. Of course, some of the people who would benefit from this measure—like the heirs of the American composers whose copyrights are about to expire—are decent and hardworking. But just because they are decent people does not mean that they should continue to receive royalties for an extra 20 years for work they did not create and at the expense of the American consumer.

Finally, I do recognize that this measure may help improve our balance of trade: there is clearly some power to this argument. But we still have no idea of the magnitude of this windfall or who would enjoy its benefits: should it be the authors; the creators; the studios; or the artistic community in general, which has been devastated by Federal funding cuts?

The Constitution only contemplated copyrights for limited terms. And unless we pay due consideration to the reasons for limiting copyrights, we risk ignoring the Founding Fathers" wisdom and damaging the public interest. In order to respect the Constitution's requirement, Congress must strike a balance between encouraging creativity and protecting consumers from monopoly power. Like all monopolists, copyright holders are loathe to give up their power. But once the main purpose of the copyright has been served and creativity has been adequately encouraged, the monopoly power must bow to the public interest. Sadly, with this proposal, it is not clear that we have adequately balanced these competing interests.

HERB KOHL.

XII. CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by S. 483, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, and existing law in which no change is proposed is shown in roman):

UNITED STATES CODE

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TITLE 17—COPYRIGHTS

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CHAPTER 1—SUBJECT MATTER AND SCOPE OF COPYRIGHT

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§ 108. Limitations on exclusive rights: Reproduction by libraries and archives

(a) Notwithstanding the provisions of section 106, it is not an infringement of copyright for a library or archives, or any of its employees acting within the scope of their employment, to reproduce no more than one copy or phonorecord of a work, or to distribute such copy or phonorecord, under the condition specified by this section, if—

* * * * * * *

(g) The rights of reproduction and distribution under this section extend to the isolated and unrelated reproduction or distribution of a single copy or phonorecord of the same material on separate occasions, but do not extend to cases where the library or archives, or its employee—

* * * * * * *

(h)(1) Notwithstanding any other limitation in this title, for purposes of this section, during the last 20 years of any term of a copyright of a published work, a library, archives, or nonprofit educational institution may reproduce or distribute a copy or a phonorecord of such work, or portions thereof, for purposes of preservation, scholarship, teaching, or research, if the library, archives or non-profit educational institution has first determined, on the basis of a reasonable investigation of reasonably available sources, that the work—

(A) is not subject to normal commercial exploitation; and

(B) cannot be obtained at a reasonable price.

(2) No reproduction or distribution under this subsection is authorized if the copyright owner or its agent provides notice to the Copyright Office that the condition in paragraph (1)(A) or the condition in paragraph (1)(B) does not apply.

[h]*(i) The rights of reproduction and distribution under this section do not apply to a musical work, a pictorial, graphic or sculptural work, or a motion picture or other audiovisual work other than an audiovisual work dealing with news, except that no such limitation shall apply with respect to rights granted by subsection (b) and (c), or with respect to pictorial or graphic works published as illustrations, diagrams, or similar adjuncts to works of which copies are reproduced or distributed in accordance with subsections (d) and (e).*

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CHAPTER 3—DURATION OF COPYRIGHT

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§ 301. Preemption with respect to other laws

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(c) With respect to sound recordings fixed before February 15, 1972, any rights or remedies under the common law or statutes of any State shall not be annulled or limited by this title until [February 15, 2047] *February 15, 2067.* The preemptive provisions of subsection (a) shall apply to any such rights and remedies pertaining to any cause of action arising from undertakings commenced on and after [February 15, 2047] *February 15, 2067.* Notwithstanding the provisions of section 303, no sound recording fixed before February 15, 1972, shall be subject to copyright under this title before, on, or after [February 15, 2047] *February 15, 2067.*

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§ 302. Duration of copyright: Works created on or after January 1, 1978

(a) IN GENERAL.—Copyright in a work created on or after January 1, 1978, subsists from its creation and, except as provided by the following subsections, endures for a term consisting of the life of the author and [fifty] *70* years after the author's death.

(b) JOINT WORKS.—In the case of a joint work prepared by two or more authors who did not work for hire, the copyright endures for a term consisting of the life of the last surviving author and [fifty] *70* years after such last surviving author's death.

(c) ANONYMOUS WORKS, PSEUDONYMOUS WORKS, AND WORKS MADE FOR HIRE.—In the case of an anonymous work, a pseudonymous work, or a work made for hire, the copyright endures for a term of [seventy-five] *95* years from the year of its first publication, or a term of [one hundred] *120* years from the year of its creation, whichever expires first. If, before the end of such term, the identity of one or more of the authors of an anonymous or pseudonymous work is revealed in the records of a registration made for that work under subsections (a) or (d) of section 408, or in the

records provided by this subsection, the copyright in the work endures for the term specified by subsection (a) or (b), based on the life of the author or authors whose identity has been revealed. Any person having an interest in the copyright in an anonymous or pseudonymous work may at any time record, in records to be maintained by the Copyright Office for that purpose, a statement identifying one or more authors of the work; the statement shall also identify the person filing it, the nature of that person's interest, the source of the information recorded, and the particular work affected, and shall comply in form and content with requirements that the Register of Copyrights shall prescribe by regulation.

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(e) PRESUMPTION AS TO AUTHOR'S DEATH.—After a period of [seventy-five] *95* years from the year of first publication of a work, or a period of [one hundred] *120* years from the year of its creation, whichever expires first, any person who obtains from the Copyright Office a certified report that the records provided by subsection (d) disclose nothing to indicate that the author of the work is living, or died less than [fifty] *70* years before, is entitled to the benefit of a presumption that the author has been dead for at least [fifty] *70* years. Reliance in good faith upon this presumption shall be a complete defense to any action for infringement under this title.

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§ 303. Duration of copyright: Works created but not published or copyrighted before January 1, 1978

Copyright in a work created before January 1, 1978, but not theretofore in the public domain or copyrighted, subsists from January 1, 1978, and endures for the term provided by section 302. In no case, however, shall the term of copyright in such a work expire before December 31, 2002; and, if the work is published on or before December 31, 2002, the term of copyright shall not expire before [December 31, 2027] *December 31, 2047.*

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§ 304. Duration of copyright: Subsisting copyrights

(a) COPYRIGHTS IN THEIR FIRST TERM ON JANUARY 1, 1978.—(1)(A) Any copyright, the first term of which is subsisting on January 1, 1978, shall endure for 28 years from the date it was originally secured.

(B) In the case of—

(i) any posthumous work or of any periodical, cyclopedic, or other composite work upon which the copyright was originally secured by the proprietor thereof, or

(ii) any work copyrighted by a corporate body (otherwise than as assignee or licensee of the individual author) or by an employer for whom such work is made for hire,

the proprietor of such copyright shall be entitled to a renewal and extension of the copyright in such work for the further term of [47] *67* years.

(C) In the case of any other copyrighted work, including a contribution by an individual author to a periodical or to a cyclopedic or other composite work—

(i) the author of such work, if the author is still living,

(ii) the widow, widower, or children of the author, if the author is not living,

(iii) the author's executors, if such author, widow, widower, or children are not living, or

(iv) the author's next of kin, in the absence of a will of the author,

shall be entitled to a renewal and extension of the copyright in such work for a further term of [47] *67* years.

(2)(A) At the expiration of the original term of copyright in a work specified in paragraph (1)(B) of this subsection, the copyright shall endure for a renewed and extended further term of [47] *67* years, which—

(i) if an application to register a claim to such further term has been made to the Copyright Office within 1 year before the expiration of the original term of copyright, and the claim is registered, shall vest, upon the beginning of such further term, in the proprietor of the copyright who is entitled to claim the renewal of copyright at the time the application is made; or

(ii) if no such application is made or the claim pursuant to such application is not registered, shall vest, upon the beginning of such further term, in the person or entity that was the proprietor of the copyright as of the last day of the original term of copyright.

(B) At the expiration of the original term of copyright in a work specified in paragraph (1)(C) of this subsection, the copyright shall endure for a renewed and extended further term of [47] *67* years, which—

(i) If an application to register a claim to such further term has been made to the Copyright Office within 1 year before the expiration of the original term of copyright, and the claim is registered, shall vest, upon the beginning of such further term, in any person who is entitled under paragraph (1)(C) to the renewal and extension of the copyright at the time the application is made; or

(ii) if no such application is made or the claim pursuant to such application is not registered, shall vest, upon the beginning of such further term, in any person entitled under paragraph (1)(C), as of the last day of the original term of copyright, to the renewal and extension of the copyright.

(3)(A) An application to register a claim to the renewed and extended term of copyright in a work may be made to the Copyright Office—

(i) within 1 year before the expiration of the original term of copyright by any person entitled under paragraph (1)(B) or (C) to such further term of [47] *67* years; and

(ii) at any time during the renewed and extended term by any person in whom such further term vested, under paragraph (2)(A) or (B), or by any successor or assign of such person, if the application is made in the name of such person.

(B) Such an application is not a condition of the renewal and extension of the copyright in a work for a further term of [47] *67* years.

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[(b) COPYRIGHTS IN THEIR RENEWAL TERM OR REGISTERED FOR RENEWAL BEFORE JANUARY 1, 1978.—The duration of any copyright, the renewal term of which is subsisting at any time between December 31, 1976, and December 31, 1977, inclusive, or for which renewal registration is made between December 31, 1976, and December 31, 1977, inclusive, is extended to endure for a term of seventy-five years from the date copyright was originally secured.]

(b) COPYRIGHTS IN THEIR RENEWAL TERM AT THE TIME OF THE EFFECTIVE DATE OF THE COPYRIGHT TERM EXTENSION ACT OF 1996.—Any copyright still in its renewal term at the time that the Copyright Term Extension Act of 1996 becomes effective shall have a copyright term of 95 years from the date copyright was originally secured.

(c) TERMINATION OF TRANSFERS AND LICENSES COVERING EXTENDED RENEWAL TERM.—In the case of any copyright subsisting in either its first or renewal term on January 1, 1978, other than a copyright in a work made for hire, the exclusive or nonexclusive grant of a transfer or license of the renewal copyright or any right under it, executed before January 1, 1978, by any of the persons designated by the second proviso of subsection (a) of this section, otherwise than by will, is subject to termination under the following conditions:

(1) * * *

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(4) * * *

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(A) The notice shall state the effective date of the termination, which shall fall within the five-year period specified by clause (3) of this subsection, *or, in the case of a termination under subsection (d), within the five-year period specified by subsection (d)(2),* and the notice shall be served not less than two or more than ten years before that date. A copy of the notice shall be recorded in the Copyright Office before the effective date of termination, as a condition to its taking effect.

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(d) TERMINATION RIGHTS PROVIDED IN SUBSECTION (c) WHICH HAVE EXPIRED ON OR BEFORE THE EFFECTIVE DATE OF THE COPYRIGHT TERM EXTENSION ACT OF 1996.—In the case of any copyright other than a work made for hire, subsisting in its renewal term on the effective date of the Copyright Term Extension Act of 1996 for which the termination right provided in subsection (c) has expired by such date, where the author or owner of the termination right has not previously exercised such termination right, the exclusive or nonexclusive grant of a transfer or license of the renewal copyright or any right under it, executed before January 1, 1978, by any of the persons designated in subsection (a)(1)(C) of this section, other

than by will, is subject to termination under the following conditions:

(1) The conditions specified in subsection (c) (1), (2), (4), (5), and (6) of this section apply to terminations of the last 20 years of copyright term as provided by the amendments made by the Copyright Term Extension Act of 1996.

(2) Termination of the grant may be effected at any time during a period of 5 years beginning at the end of 75 years from the date copyright was originally secured.

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(Public Law 102–307—June 26, 1992)

COPYRIGHT RENEWAL ACT OF 1992

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TITLE I—RENEWAL OF COPYRIGHT

SEC. 101. SHORT TITLE.

This title may be referred to as the "Copyright Renewal Act of 1992".

SEC. 102. COPYRIGHT RENEWAL PROVISIONS.

(a) DURATION OF COPYRIGHT: SUBSISTING COPYRIGHTS.—Section 304(a) of title 17, United States Code, is amended to read as follows:

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(c) LEGAL EFFECT OF RENEWAL OF COPYRIGHT UNCHANGED.—The renewal and extension of a copyright for a further term of [47] *67* years provided for under paragraphs (1) and (2) of section 304(a) of title 17, United States Code [(as amended by subsection (a) of this section)] shall have the same effect with respect to any grant, before the [effective date of this section] *effective date of the Copyright Term Extension Act of 1995*, of a transfer or license of the further term as did the renewal of a copyright before the [effective date of this section] *effective date of the Copyright Term Extension Act of 1995* under the law in effect at the time of such grant.

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(g) EFFECTIVE DATE; COPYRIGHTS AFFECTED BY AMENDMENT.—(1) Subject to paragraphs (2) and (3), this section and the amendments made by this section shall take effect on the date of the enactment of this Act.

(2) The amendments made by this section shall apply only to those copyrights secured between January 1, 1964, and December 31, 1977. Copyrights secured before January 1, 1964, shall be governed by the provisions of section 304(a) of title 17, United States Code, as in effect on the day before the effective date of this sec-

tion, *except each reference to forty-seven years in such provisions shall be deemed to be 67 years.*

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