

Just Say No to Term Extension - Why More is Less

(EFF Briefing re TPP)

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(views are personal and not necessarily those of my firm or clients)



Disclaimer & Disclosure:

- Acknowledgments
- No legal opinions – nothing I say is legal advice

What I will talk about today:

- Why copyright is good but more is not necessarily better
- History of term extension
- Why the USA has erred and wants to drag everyone else down
- What might term extension actually mean?
- Why “more is less” ?
- How it’s possible to “just say no” to USA

Some Things That Are
Good but Don't Get
Better When Done to
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SOME MILESTONES IN THE HISTORY OF TERM EXTENSION

- Statute of Anne 1709 - 14 years + 14 year renewal
- First US Copyright Act 1790 - 14 years + 14 year renewal if author still living
- Berne Convention 1886 - life + 50 with no formalities
- US Copyright Act 1909 - 28 + 28 renewal term WITH formalities
- Germany extends to life + 70 in 1965 (note that Brahms died in 1897, Richard Strauss in 1949)
- Beginning in 1962, USA enacts various term extension renewal band aids over the years providing up to 75 years of protection before going to life + 50 in 1976 revision
- USA joins Berne in 1988 but is silent about “rule of shorter term”
- EU harmonized term at life + 70 (1993) and extends to 70 years for sound recordings in 2011 (but note mandatory application of rule of shorter term)
- Phil Collins EU decision 1993

- USA Uruguay Round Agreements Act (URAA) in 1994
- USA enacts CTEA in 1998 - life + 70. For works made for hire and anonymous and pseudonymous works, the duration of copyright is 95 years from first publication or 120 years from creation (unless the author's identity is later revealed in Copyright Office records, in which case the term becomes the author's life plus 70 years).
- *Eldred v. Ashcroft* 537 U.S. 186 (2003)
- Canada tries but fails to enact stealth term extension legislation in 2003
- Australia capitulates to US demand of life + 70 in FTA (2004)
- EU extends term to 70 years for sound recordings in 2011 *Golan v. Holder* 132 S.Ct. 873 (2012)
- CETA - Canada holds the line on term extension with Fortress Europe life + 70 regime (October 2013)
- Canada negotiates FTA with Korea - no term extension (June, 2014)

WHAT ARE THE ADVANTAGES OF TERM EXTENSION?

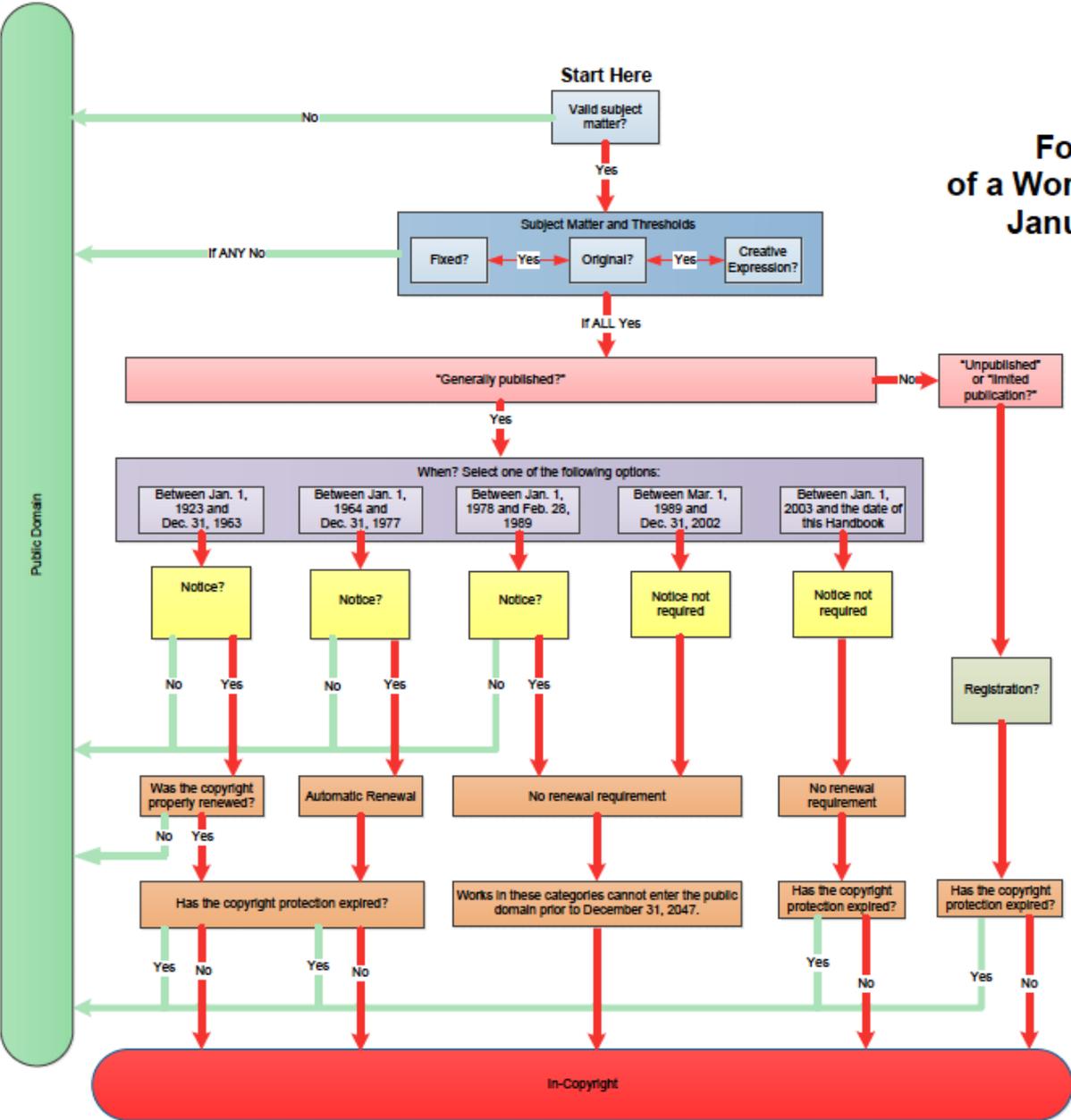
- Incentive to create? (see F.M. Scherer, *Quarter Notes and Bank Notes*, Princeton, 2004)
- Longer lives of authors?
- Incentive to disseminate?
- Incentive to invest in creation?
- Harmonization?

WHAT ARE THE DISADVANTAGES OF TERM EXTENSION?

- Dearth and death of the public domain
- Orphan works problems greatly exacerbated
- Access to knowledge and history greatly diminished
- Incentive to create may actually diminish due to reliance on commercially successful old works
- Net loss of consumer welfare
- Incredible complexity resulting from transitional provisions and application of Berne Articles 5, 18, etc. Just look at USA and EU.
- Re USA, see recent Berkeley 47 page guide “Is it in the Public Domain?” <http://goo.gl/KURAsa>

MASTER FLOWCHART

For Evaluating the Copyright Status of a Work Created in the United States Between January 1, 1923 and December 31, 1977



Legend

Chapter 1: Subject Matter and Thresholds	Blue box
Chapter 2: Publication Status	Red box
Chapter 3: Date of General Publication	Purple box
Chapter 4: Notice Requirement for Generally Published Works	Yellow box
Chapter 5: Registration Status of Unpublished Works	Light Green box
Chapter 6: Duration and Renewal	Orange box

For more detailed information, please refer to the flowchart of each color-coded step and the corresponding Chapter in the accompanying Handbook.

- Do we really want “DOS” and similar early computer programs protected until the 22nd century?
- “Zombie” copyrights? (e.g. Puccini in EU?)
- The “one way ratchet” problem
- The U.S. “takings” and Fifth Amendment problem
- The danger of investor-state challenges if any aspect of extended term is ever cut back
- Are we moving inexorably to “forever less a day”?

SOME KEY BERNE PROVISIONS

- Article 5 - National Treatment “golden rule”
- Article 7 - Rule of the Shorter Term
- Article 18 - Application to existing works

WHAT IS THE RULE OF THE SHORTER TERM (“COMPARISON OF TERMS”)

- Berne Convention Article 7:

(1) The term of protection granted by this Convention shall be the life of the author and fifty years after his death.

...

8) In any case, the term shall be governed by the legislation of the country where protection is claimed; however, **unless the legislation of that country otherwise provides**, the term shall not exceed the term fixed in the country of origin of the work.

(emphasis added)

Note that treaties are no self-executing in countries such as USA and Canada.

USA, EU & RULE OF THE SHORTER TERM

- USA does NOT use rule of the shorter term
- EU DOES require use of rule re countries outside of EU
- So, Canadians are now getting life +70 in USA but not in EU
- Why not?
- US Senate Judiciary Committee Report uses EU adoption of “rule of shorter term” as a justification of CTEA, e.g. large export market in EU
- If USA deployed rule of shorter term & life + 70, it could have its cake and eat it too
- But Congress may have drunk too much of its own Kool-Aid or for once is engaging in “do as we say AND as we do” in pushing for maxing out term protection in terms of length and avoidance of rule of shorter term
- Great concern for orphan works issues in USA and rule of shorter term would clear much of the deadwood

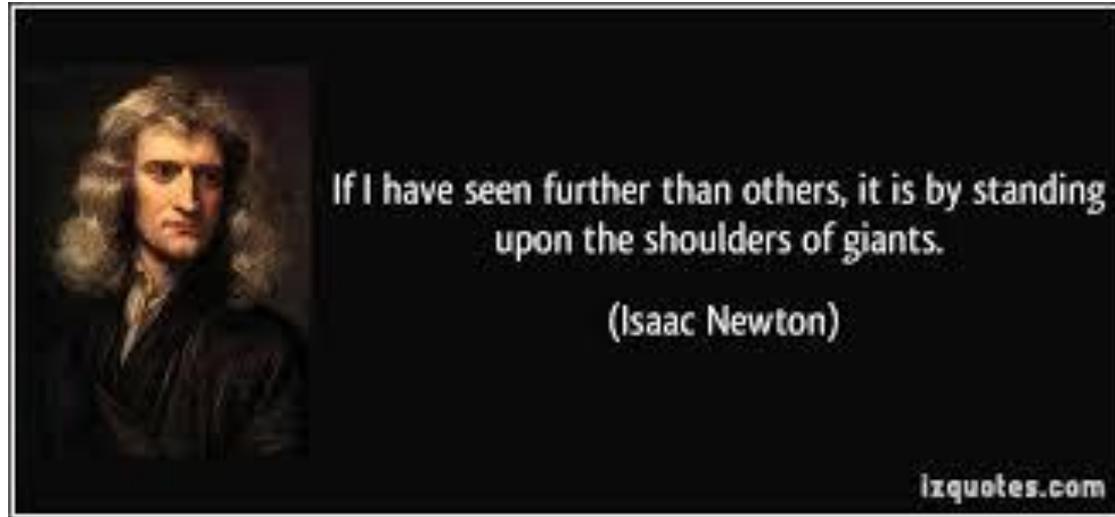
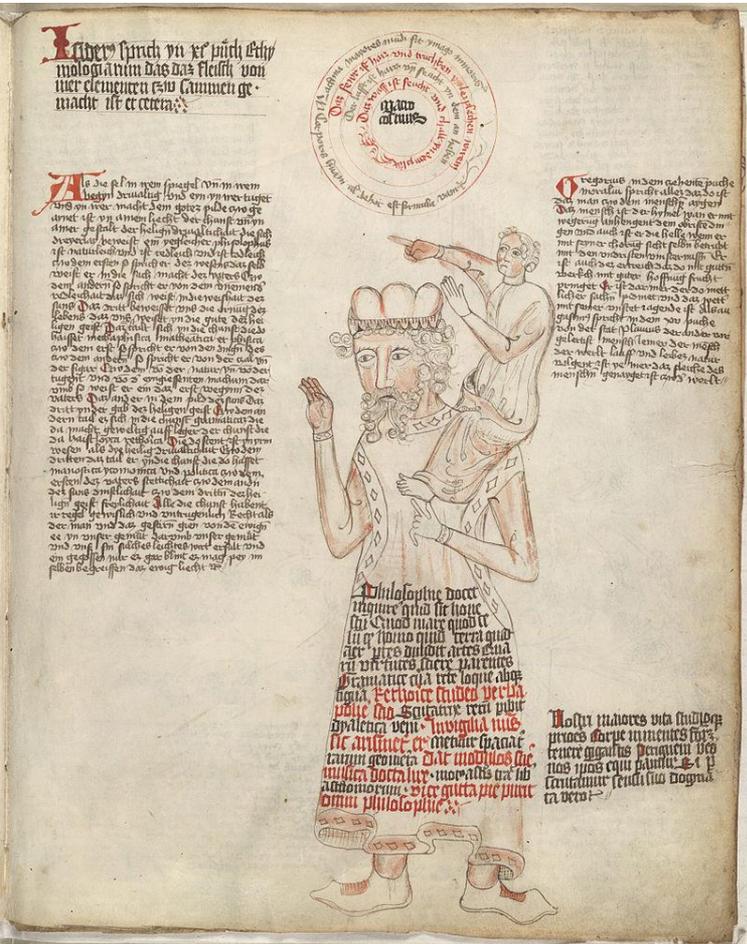
WHY WOULD USA WOUND ITSELF WITH TERM EXTENSION?

- Hollywood & music industry wants the extra rents from EU's love of Jerry Lewis and Terminator movies and American pop music , and doesn't care about the downside overall for US consumer welfare - Hatch's Committee report from 1996 seems to confirm this
- Copyrights are not “natural rights” - may not even be “property”
- By giving away free candy to shorter term countries like Canada, USA sets the stage for a "fairness and reciprocity" grab of the whole household - e.g. Canadian copyright term
- What's good for Hollywood & music industry is still bad for US economy
- The Democrats' love affair with Hollywood
- Congress has convinced itself that longer terms are better

Negotiating Strategy?

- The answer from Canada and others to USA on term extension should be "No" and if USA thinks other countries are taking advantage from the lack of Rule of the Shorter Term in the USA, then put it in place under Berne - and, by the way, fix up a major part of the USA orphan works mess in the process
- Remember USA hypocrisy on other copyright issues, such as parallel imports, §110, moral rights, compulsory licenses, etc.
- The “Scotty Greenwood” linkage play
- Canada stood up to USA in recent Copyright Modernization Act (Bill C-11) enacted in 2012

Above all, why impede “progress” and innovation?



Thought experiment on some creators who died between 1945 and 1970 and what if we had a life + 70 regime in place that “protected” them?

Anne Frank (d. 1945)



Adolph Hitler (d. 1945)



H. G. Wells (d. 1946)



Al Capone (d. 1947)



Orville Wright (d. 1948)



D.W. Griffith (d. 1948)



F.D.R. (d. 1945)



Others

- Richard Strauss (d. 1949)
- George Orwell (d. 1950)
- George Bernard Shaw (d. 1950)
- William Randolph Hearst (d. 1951)
- Eva (aka “Evita”) Peron (d. 1952)
- Joseph Stalin (d. 1953)

Albert Einstein (1955)

- Albert Einstein (d. 1955)
- Wikisource:



Some or all works by this author are in the [public domain](#) in the United States because they were published before January 1, 1923.

The author died in 1955, so works by this author are also in the public domain in countries and areas where the [copyright term](#) is the author's life plus 50 years or less. Works by this author may also be in the public domain in countries and areas with longer native copyright terms that apply the [rule of the shorter term](#) to foreign works.

Some works by this author are in the [public domain](#) in the United States because they were [legally published](#) within the United States (or the United Nations Headquarters in New York subject to Section 7 of the [United States Headquarters Agreement](#)) between 1923 and 1977 (inclusive) without a copyright notice.

The author died in 1955, so works by this author are also in the public domain in countries and areas where the [copyright term](#) is the author's life plus 50 years or less. Works by this author may also be in the public domain in countries and areas with longer native copyright terms that apply the [rule of the shorter term](#) to foreign works.

J.F.K. (d.1963)



Churchill (d. 1965)



Walt Disney (d. 1966)



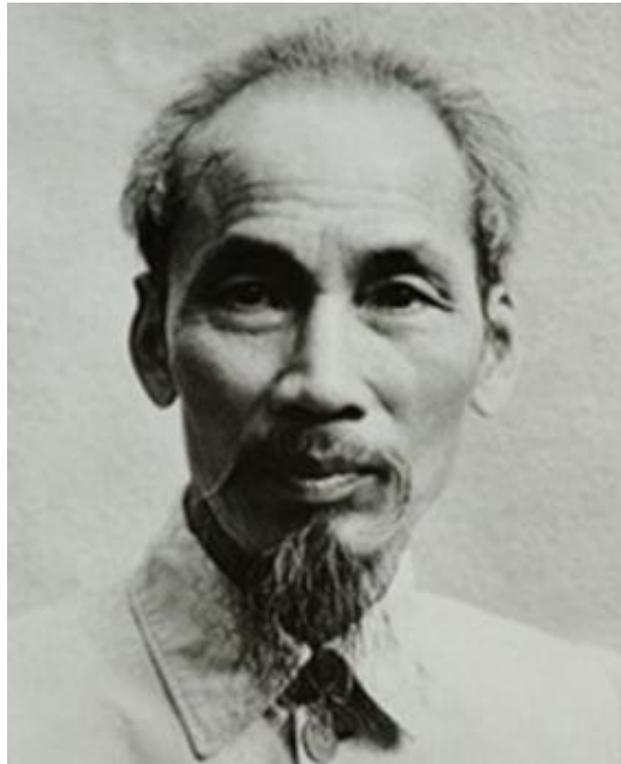
Dorothy Parker (d. 1967)



Martin Luther King (d. 1968)



Ho Chi Minh (d. 1970)



SOURCES OF MORE INFO

- Eldred v. Ashcroft case, especially Nobel Prize winning economists including Milton Friedman, Ronald Coase
<http://bit.ly/1mcn0s3>
- Golan v. Holder case
<http://bit.ly/ocn4sG>
- Scholars, mainly Dennis Karjala
<http://bit.ly/1k2yl3T>
- Opposing copyright term extension
<http://goo.gl/KURAsa>

Conclusion



*"Did Yogi Berra ever say anything besides
'It ain't over till it's over'?"*