COPYRIGHT AND THE LEGISLATIVE PROCESS: A PERSONAL PERSPECTIVE

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I'd like to begin in an unorthodox way, by reciting a few excerpts from a March 12 *Washington Post* article on the House of Representatives majority whip Tom DeLay, Republican of Texas.[1] On March 31, 1995, the *New York Times* published a somewhat similar article on the Senate Judiciary Committee,[2] but it lacks the candor that makes the *Washington Post* piece so useful.

The *Washington Post* article is entitled *Rep. DeLay Makes Companies Full Partners in the [GOP] Movement*,[3] and was obviously written with his cooperation. It details his efforts, in conjunction with business lobbyists, to pass a moratorium on new federal regulations. Although the bill passed the House,[4] the Senate substantially revised it before passing it on March 29, 1995.[5] The Senate is being viewed with increasing fondness by House Democrats, and perhaps by some moderate Republicans. This is quite a switch. A few years ago, when the Democrats controlled both the House and the Senate, a Democratic congressman remarked about House Republicans, "they may be the opposition, but the Senate is the enemy." This is no longer the case.

Here is the first quote:

> [A]lthough several provisions of the "Contract with America" adopted by Republican House candidates last fall take specific aim at rolling back federal regulations, the moratorium was not part of that. In fact, as outlined . . . *in* DeLay's office by Gordon Gooch, an oversized, folksy lobbyist for energy and petrochemi-

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This article was adapted from a speech given on Apr. 3, 1995, at the Benjamin N. Cardozo School of Law, Yeshiva University, and sponsored by the *Cardozo Arts & Entertainment Law Journal* and the Cardozo Intellectual Property Law Program. The author wishes to thank Dean Frank J. Macchiarola and Professor Marci Hamilton, for the honor of being selected as the Tenzer Distinguished Lecturer for 1995.

[1] Michael Weisskopf & David Maraniss, *Forging an Alliance for Deregulation; Rep. DeLay Makes Companies Full Partners in the Movement*, WASH. POST, Mar. 12, 1995, at A1 (This article was part of a series entitled *Inside The Revolution: Business and the House Republicans*).

[2] Stephen Engelberg, *Business Leaves the Lobby And Sits at Congress's Table*, N.Y. TIMES, Mar. 31, 1995, at A1.

[3] Weisskopf & Maraniss, *supra* note 1, at A1.

[4] H.R. 450, 104th Cong., 1st Sess. § 3(a) (1995).

[5] S. 219, 104th Cong., 1st Sess. § 3(a) (1995).

> cal interests who served as the congressman's initial legislative ghost writer, the first draft of the bill called for a limited, 100-day moratorium on rule-making while the House pushed through the more comprehensive anti-regulatory plank in the Contract. But his fellow lobbyists in the inner circle argued that was too timid, according to participants in the meeting. Over the next few days, several drafts were exchanged by the corporate agents. Each new version sharpened and expanded the moratorium bill, often with the interests of clients in mind—one provision favoring California motor fleets, another protecting industrial consumers of natural gas, and a third keeping alive Union Carbide Corp.'s hopes for altering a labor department requirement. As the measure progressed, the roles of legislator and lobbyist blurred. DeLay and his assistants guided industry supporters in an ad hoc group whose name, Project Relief, sounded more like a Third World humanitarian aid effort than a corporate alliance with a half-million-dollar communications budget. On key amendments, the coalition provided the draftsman. And once the bill and the debate moved to the House floor, lobbyists hovered nearby, tapping out talking points on a laptop computer for delivery to Republican floor leaders . . . . Turning to business lobbyists to draft legislation makes sense, according to DeLay, because "they have the expertise."[6]

The word "expertise" is a misnomer in this case. The lobbyists were not information providers, explaining the meaning of technically difficult regulations. Instead, their "expertise" was in drafting a bill that took care of their clients. Mr. Gooch, the over-sized lobbyist, is quoted in the article as saying: "I'm not claiming to be a Boy Scout . . . . No question I thought what I was doing was in the best interests of my clients."[7] Students of the legislative process will recognize this as an excellent example of public choice theory.[8]

The *Washington Post* article also puts forth a reason other than "expertise" that may have caused Mr. DeLay to turn to business lobbyists. When he decided to run for the leadership position of majority whip (at a time when the Democrats were still in the majority), Mr. DeLay, who has been in the House for ten years, knew that a very effective way to get support for his bid was to raise money for fellow Republicans running for the first time—not his

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[6] Weisskopf & Maraniss, *supra* note 1, at A1.

[7] *Id.*

[8] For a review of public choice theory, see generally DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION (1991).

own money, of course, but that of the lobbyists. A short quote from the same *Washington Post* article:

> [T]he large number of open congressional seats and collection of strong Republican challengers offered [DeLay] an unusual opportunity. He turned to his network of business friends and lobbyists. "I sometimes overly prevailed on" these allies, DeLay said. In the 1994 elections, he was the second-leading fund-raiser for House Republican candidates, behind only [Newt] Gingrich [Speaker of the House]. In adding up contributions he had solicited for others, DeLay said, he lost count at about $2 million.[9]

That the lobbyists know how the system works is revealed in the final passage I'll quote:

> "[w]e'd rustle up checks for the guy and make sure Tom [DeLay] got the credit," said . . . [a] beer lobbyist. "So when new members voted for majority whip, they'd say, I wouldn't be here if it wasn't for Tom DeLay."[10]

Is the Tom DeLay story relevant to copyright legislation? Do liberal copyright lawyers and lobbyists engage in the same type of activity hoping to have the same impact as conservative business lobbyists?

Yes, you bet they do. Copyright interest groups hold fund raisers for members of Congress, write campaign songs, invite members of Congress (and their staff) to private movie screenings or sold-out concerts, and draft legislation they expect Congress to pass without any changes. In the 104th Congress, they are drafting the committee reports and haggling among themselves about what needs to be in the report. In my experience, some copyright lawyers and lobbyists actually resent members of Congress and staff interfering with what they view as *their* legislation and *their* committee report. With the 104th Congress we have, I believe, reached a point where legislative history *must* be ignored because not even the hands of congressional staff have touched committee reports.

The House Intellectual Property Subcommittee under the chairmanship of my then-boss, Representative William Hughes,[11] was once described to me by a lobbyist as a "Ford operation"—"we've got a better idea." I think this characterization reveals resentment that Mr. Hughes, or any member of the subcommittee, would have *any* idea of his own, or else disgust that Mr. Hughes

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9 Weisskopf & Maraniss, *supra* note 1.
10 Weisskopf & Maraniss, *supra* note 1.
11 Rep. William Hughes (D-N.J.) served in Congress between 1975 and 1995.

mistook his role as a member of Congress as actually involving making policy. Undoubtedly to those who agree with the Ford characterization, one of Mr. Hughes's sins was the introduction of the Copyright Reform Act of 1993[12] without, as one copyright lawyer put it in an article in the *New York Law Journal*, getting sage advice from the "gray beards" of the copyright bar.[13] It was indeed a shocking display of congressional independence: just the kind of independence copyright lawyers would applaud if the legislation involved civil rights or crime.

But Mr. Hughes's greatest sin may have been the opposite type of independence: rejecting an industry draft. While Mr. Hughes welcomed suggestions for legislation and criticism of his own initiatives, he strongly believed that Congress, not industry, should draft legislation. On May 11, 1994, the music industry gave Mr. Hughes an unsolicited "industry consensus" draft bill *to replace* a bill Mr. Hughes had drafted and introduced to extend digital performance rights to sound recordings.[14] Congressman Hughes rejected the draft on policy grounds, although he tried to incorporate some of its features in a revised version of his bill.[15]

In March 1995, at a hearing before the Senate Judiciary Committee on new digital performance rights legislation, a number of witnesses repeated, mantra-like, the position that Congress should enact the May 11, 1994 industry draft.[16] The message at the hearing was "we drafted it, the best thing for you to do is to enact it down to the commas." The Committee did just that on June 29, 1995, favorably reporting a revised bill drafted entirely by the industry.[17] You can guess who drafted the committee report. On July 27, my old House Subcommittee on Intellectual Property & Judicial Administration marked-up the Senate version, with one member of the subcommittee saluting the chairman for insisting that the parties work things out for themselves. How times have changed.

You might ask, especially if you are a lawyer representing the industry, isn't that what matters?

No, that isn't all that matters. It isn't even close to being the

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12 H.R. 897, 103d Cong., 1st Sess. (1993).

13 Alan J. Hartnick, *Gray Beards & The Copyright Reform Act of 1993*, N.Y.L.J., May 21, 1993, at 5.

14 *See Senators Endorse Limited Digital Music Performance Bill*, AUDIO WEEK, Mar. 13, 1995, at 10.

15 H.R. 2576, 103d Cong., 1st Sess. (1993).

16 *The Performance Rights in Sound Recordings Act of 1995: Hearing on S. 227 Before the Senate Comm. on the Judiciary*, 104th Cong., 1st Sess. (1995).

17 SENATE COMM. ON THE JUDICIARY, DIGITAL PERFORMANCE RIGHTS IN SOUND RECORDINGS ACT OF 1995, S. REP. NO. 128, 104th Cong., 1st Sess. (1995).

most important consideration. The most important consideration is whether a proposal, anyone's proposal, represents good policy; a decision—along with the drafting—that should only be made by Congress.

Don't get me wrong. Industry must be involved in the legislative process. Legislation regulates industry and those who are regulated must have the opportunity to fully present their views on how or if such regulation should occur. Industry understands far better than Congress the "real world" of how its businesses work.

This does not mean, however, that Congress should let industry regulate itself by writing legislation or determining its content. Enacting turn-key industry bills is not legislating. It is letting those who had a seat at the private sector table divvy up the spoils among themselves. And, as philosopher Isaiah Berlin said, "when the wolves get their liberty, the lambs lose their lives."[18]

The lambs in the copyright system are usually individual authors, although even corporations can get carved up if they are not at the table. For example, the Digital Performance Rights Act[19] will currently affect only one company, DMEX. Yet, to the best of my knowledge, the industry never invited DMEX to participate in its meetings, even though DMEX is the only party that will be required to pay royalties under the bill. Those who will receive the royalties and those who piggishly insisted on exemptions were all well represented.

My greatest concern, though, is with how well the Copyright Act[20] currently protects and will in the future protect the interests of individual authors. I am not talking only about technological innovations, the information superhighway, work-made-for-hire abuses, or a trend toward corporate authorship. Instead, the concern is with classic copyright, traditional cases where a work, such as a musical composition or a novel, is created by an individual who subsequently enters into a contract with a publisher to exploit that work. The current bills in the House and Senate to extend the term of protection, Senate Bill 483 and House Bill 989, illustrate the point because there is still an opportunity to influence the outcome of these bills.[21]

First, though, a review of some of the important forces helping

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[18] ISAIAH BERLIN, FOUR ESSAYS ON LIBERTY (1969).

[19] Act of Nov. 1, 1995, Pub. L. No. 104-39, 109 Stat. 336 (1995).

[20] Copyright Act of 1976, 90 Stat. 2541 (1976) (codified as amended at 17 U.S.C. §§ 101-803 (1994), 18 U.S.C. § 2319 (1994)).

[21] Copyright Term Extension Act of 1995, S. 483, 104th Cong., 1st Sess. (1995); H.R. 989, 104th Cong., 1st Sess. (1995).

to shape any copyright legislation, including the current term extension bills before both houses of Congress.

I. Copyright Legislation is Discretionary

Unlike appropriations bills, copyright bills are almost always discretionary: if a bill does not pass one Congress, it can be taken up by the next Congress. This fact typically leads to a relatively long gestation period for copyright legislation, which may, in individual cases, be a good thing. But the discretionary nature of copyright legislation also leads to an unfortunate unwillingness to take up controversial issues.

II. Congress Lacks Copyright Expertise

A. *Congressmen as Generalists*

Members of Congress are generalists; they are not and cannot be specialists in copyright. Utah Republican Senator Orrin Hatch, for example, as chairman of the Judiciary Committee and an important national figure, has been involved in tremendously important issues, including: the Balanced Budget Amendment,[22] crime legislation, term limits, the line-item veto, welfare reform, tort reform, judicial nominations, and foreign policy, along with constituent matters, and Republican party issues. On many of the bills, he was or will be the floor manager. Some may recall that the Senate spent over thirty days debating the Balanced Budget Amendment, compared with just two days in the House.[23] As the floor manager, Senator Hatch had to spend most of those thirty days on the floor. Not surprisingly, he hit the roof when it didn't pass.[24]

B. *Congressional Staff Cuts*

Senator Hatch genuinely wants to make good copyright policy, but he simply has too little time to devote to copyright issues. If he does not have an expert staff, who will understand the issues and thereby help him make the policy? Senator Hatch's staff is spread thin due to a one-third committee staff cut imposed this Congress,[25] a reduction that came on top of the often forgotten but still substantial cuts imposed during the last Congress.

This point is directly related to the *Washington Post* article on

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22 H.R.J. Res. 1, 104th Cong., 1st Sess. (1995).

23 *Id.*

24 *See* Karen Hosler, *Democrats Sack Balanced Budget Amendment*, Baltimore Sun, Mar. 3, 1995, at 1A.

25 H.R.J. Res. 6, 104th Cong., 1st Sess. § 101(a) (1995).

majority whip DeLay.[26] While the one-third reduction in committee staffs for this Congress was depicted by Republicans as a symbol of their willingness to reduce the size of government, the reduction was also designed to impact seriously on Democrats' ability to oppose Republican initiatives. The number of Republican committee staff substantially *increased* (as did their pay), while there were no cuts at all in members' personal staff, which outnumbered committee staff even before the one-third cuts. My former committee, the House Judiciary Committee, is an example. In the last Congress, the 103d, there were approximately seventy-five staff, fifty Democrats and twenty-five Republicans. This Congress, the 104th, staff was cut one-third, to approximately fifty, of which thirty-four are Republicans and sixteen are Democrats. Thus, the Republican staff increased from twenty-five to thirty-four, while the Democrats' decreased from fifty to sixteen.

C. *A Legislative Power Shift to the Private Sector*

Less obvious to those outside the Washington, D.C. beltway, the committee staff reductions shifted power away from Congress to the private sector. With fewer committee staff and more legislation to be accomplished in a very short, arbitrarily imposed time-limit—100 days in the case of the Contract For America—someone has to do the work. With a Republican Congress and a Democratic Administration, the Republican majority party in Congress is certainly not going to rely on the Clinton Administration for drafting assistance. As the DeLay story and the Digital Performance Rights legislation shows, it is the private sector who will do the drafting.

III. Why Copyright Legislation is Unique

Almost alone among the issues faced by the judiciary committees, copyright legislation is not about politics as is crime or abortion legislation. Copyright legislation is economic legislation. It is, in other words, about money and not principles. As a result, those with the most money are the best organized and represented, and therefore, have the greatest opportunity to succeed. The interests of individual authors, who are rarely well-organized, get trampled in the process. It is a vicious circle: members of Congress, even those who might be sympathetic to the plight of individual authors, only hear from industry groups and thus, in the absence of input

[26] Weisskopf & Maraniss, *supra* note 1, at A1.

from individual authors, come to the understandable conclusion that individual authors don't object to the proposal.

IV. Copyright Debate Occurs Outside the View of the Public

A. *The House of Representatives*

Unlike important social and political issues, where the critical debates and votes take place at the floor level for all to watch on C-SPAN, the "real" action on copyright bills takes place at a very low level: in the House of Representatives, at the subcommittee level. Copyright bills are usually rubber-stamped by the full House Judiciary Committee, and pass on the floor on the suspension calendar, under which no amendments are permitted. The low level of deliberation in the House results in decisions being made by a very small group of people.

B. *The Senate*

On the Senate side, there is no copyright subcommittee, and at the floor level, copyright legislation is considered under unanimous consent agreements, which causes one of two undesirable results.

Under the first option, the legislation is "dumbed down": made so innocuous or limited that one may well ask whether it is worth the trouble. The Digital Performance Rights Act for sound recordings is an excellent example of a *really* dumbed down bill.[27] It has been so dumbed down that even in the form in which it was introduced, it would have failed to accomplish important United States objectives, such as obtaining reciprocal foreign royalties and letting the United States participate in a proposed new multilateral treaty for sound recordings.[28] Notwithstanding its anemic condition on introduction, the process of running the legislative gauntlet of every piggish private sector roadblock drained it of all life and logic.

Second, if a bill isn't dumbed down, perhaps because a senator irrationally decides to take a principled stand, he or she will be confronted with what might be called the "Darth Vader" or the "dark side" principle: any single senator can effectively block any copyright bill from reaching the floor by merely placing a hold on

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[27] S. 227, 104th Cong., 1st Sess. (1995).

[28] *See, e.g., Committee of Experts on a Possible Instrument for the Protection of the Rights of Performers and Producers of Phonograms*, First Sess. (June 28 - July 2, 1993), World Intellectual Property Organization Doc. No. /NR/CE/I/2.

it. Since copyright legislation does not command enough importance to be called up on the Senate floor in regular order for debate and a majority vote, it has to be brought up by unanimous consent, and I mean unanimous. *Any* one senator can object to the bill's even being considered by placing a "hold" on it.

Amazingly, at least for those outside the Senate, holds are secret. You may remember recent efforts at congressional reform. One proposal was to require senators placing holds to come to the floor and do so in public. The proposal was so offensive to a majority of the Senate that it never stood a chance of passage.

Even more amazingly, sponsors of bills can't find out which senator has placed the hold. Holds do not even have to be related to an objection to the content of the bill. Frequently, holds act as a form of log-rolling: "I'll lift my hold if you'll agree to add an unrelated piece of legislation."

In 1993, for example, the House passed a bill to abolish the Copyright Royalty Tribunal ("CRT").[29] A companion bill was sponsored by Senators DeConcini and Hatch.[30] When the bill was "hotwired," that is, pre-cleared for unanimous consent consideration, the Republican cloakroom[31] indicated that there was a Republican hold on the bill. Senator Hatch's staff tried to find out who put the hold on, to no avail. Senator Hatch himself then went to the cloakroom, also to no avail. The cloakroom did agree to tell the hold-placing senator that Senator Hatch wanted to talk to him. Days went by with no word, and this was at the end of the session, when hours can mean the difference between a bill passing or not.

Finally, Senator Alan Simpson, Republican of Wyoming, called Senator Hatch and said he had placed the hold. When asked why, Senator Simpson stated that he was sending a message to Congressman Hughes about Hughes's failure to move a House bill on film labelling. How a Democratic House member was supposed to get such a message from a secret hold put on an unrelated bill by a Republican senator mad about the failure to move a *House* bill—Simpson had his own bill in the Senate—was a mystery, but Mr. Hughes called Simpson, stroked him, and got the hold removed.

In the meantime, though, a second hold had been placed, this

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29 Copyright Royalty Tribunal Act of 1993, Pub. L. No. 103-198, 107 Stat. 2304 (1993).

30 S. 1346, 103d Cong., 1st Sess. (1993).

31 Both the House of Representatives and the Senate have cloakrooms for the Democrats and the Republicans. The cloakrooms monitor floor activity and inform their party's members about any on-going floor debate. Members retire from the floor to take calls and argue out important votes outside the view of reporters and C-SPAN. *See* Benjamin Sheffner, *How to Follow the Floor Show—Know These Rules: No Cheering, No Electronic Gadgets. And What's a One-Minute, Anyway?*, ROLL CALL, Apr. 17, 1995.

time by Senator Ted Stevens, a Republican from Alaska. Senator Stevens wanted to tack on to the CRT legislation an amendment to benefit Alaska longshoremen. Since the House bill was not co-sponsored by a Republican, *I* had to convince House Republicans to agree to a Senate Republican amendment to benefit the Alaskan fishing industry. The bill was finally passed, but not before a third hold had been placed by Kansas Republican Senator Robert Dole at the request of religious broadcasters.

Sometimes, though, you cannot work things out because you do not have anything to trade. In these circumstances, the unanimous consent requirement gives enormous, destructive power to defeat the majority's will, including bills that passed the House without a negative vote, and which would overwhelmingly pass the Senate if they could make it to a vote. It is one thing for Republican Senator Mark Hatfield of Oregon to be the single vote that brought down the Balanced Budget Amendment,[32] but at least the amendment was put to a vote. It is quite another for one senator to be able to prevent a bill from *ever* being voted on. However, this is the sad truth about the way the system currently works for copyright legislation.

V. The Effects on Current Copyright Legislation

Let's tie all this together to legislation currently pending to extend the term of copyright protection, House Bill 989 and Senate Bill 483.[33] These bills are sometimes referred to as the "life plus seventy" bills, because one section would extend the current copyright term for works by individuals created on or after January 1, 1978[34] from the life of the author plus fifty years to the life of the author plus seventy years.[35] Advocates of the bills are using the European Union's term directive as the bill's rallying flag. The European Union, as of July 1, 1995, went from a term of "life plus fifty" to "life plus seventy" years, but foreign works will be granted this extra twenty years of copyright protection only on a reciprocal basis.[36] Thus, according to some, United States copyright owners will be deprived of protection and money in Europe unless the United States also goes to a "life plus seventy" year term. Of course, as with

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[32] 141 Cong. Rec. S3314 (daily ed. Mar. 2, 1995) (vote on the Balanced Budget Amendment).

[33] S. 483; H.R. 989.

[34] Jan. 1, 1978 is the effective date of the Copyright Act of 1976.

[35] S. 483; H.R. 989.

[36] Eur. Ecn. Council (Oct. 29, 1993). Council Directive 93/98, harmonizing the Term of Protection of Copyright and Certain Related Rights, 1993 J.O. (L 290) art. 1, 7.

most European Union efforts, members have been slow to actually implement this directive.

But the bill really isn't motivated by the "life plus seventy" term, or even getting European royalties. Instead, the bill is actually concerned with "old act works"—specifically, musical compositions published in the 1920s and 30s. Many of you probably saw the February 23, 1995 article in the *New York Times* describing AMSONG, a group of the children of famous composers and lyricists.[37] The article focused less on European and more on domestic royalties (which are bound to be more substantial than foreign royalties), and on preventing uses that we ordinarily consider violations of moral rights. For example, Frank Loesser's daughter talks about having made it her task to police her father's artistic legacy for authenticity.[38]

My purpose is not to debate the merits of how long copyright should last, or whether the children of famous composers should have moral rights. At the same time, the Constitution mandates that copyright must cease at some point.[39] The arguments of some of these heirs that the term of copyright must be extended because the music is still generating royalties is not very persuasive. The parade has to stop some time, and fifty years after your father died doesn't seem terribly stingy.

What should be talked about is how the bill fails to help individual authors or their children nearly as much as it could. The *New York Times* article on the AMSONG group makes much of the fact that a few composers outlived some of their copyrights under the 1909 Act and that some of the composers' children may also outlive that same term.[40] The 1909 Act, of course, had a term of protection measured from the date of publication rather than by the life of the author.[41]

If Congress really wants to solve the problem of authors outliving their copyrights or being unable to provide for their children as long as the children would like, the best solution is to go to a term of life of the author plus fifty or seventy years for *old act works.* Old act works that were unpublished works on January 1, 1978, the effective date of the 1976 Act, were granted a minimum term of life

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37 Ralph Blumenthal, *A Rights Movement with Song at Its Heart*, N.Y. TIMES, Feb. 23, 1995, at C13.

38 *Id.*

39 U.S. CONST. art. I, § 8, cl. 8 ("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." (emphasis added)).

40 Act of Mar. 4, 1909, ch. 320, 35 Stat. 1075 (1909).

41 Act of Mar. 4, 1909, ch. 320, § 23, 35 Stat. at 1080.

plus fifty years.[42] So this is hardly a new solution.

Congress did consider giving published old act works a life plus fifty term in the 1976 Act, but declined to do so, persuaded by the argument that this would be unfair to transferees who had purchased both the original and renewal terms from authors, and who would, therefore, be deprived of the full benefit of their bargain. As a result, for old act works the 1976 Act continued the old act's structure of an initial term of twenty-eight years from publication plus an additional twenty-eight year renewal term.[43] At the same time, Congress added nineteen years to the renewal term, for a total of seventy-five years.[44]

Who got these extra nineteen years? In a constitutional system that gives Congress the power to grant copyright only to authors, one would think the authors. There could be no argument that giving the nineteen years to authors would deprive transferees of the full benefit of their bargain, since they had bargained only for fifty-six years, and the nineteen years were tacked on after those fifty-six years had expired. But *no*, the extra nineteen years did not go to authors where the author had transferred his or her rights. The extra nineteen years were instead granted to the transferee, even though the transferee had not bargained for it at the making of the contract.[45]

It is true that in section 304, Congress gave authors the right to terminate the transfer for the extra nineteen years.[46] But what Congress gave with one hand, it virtually took away with the other, since it unfairly placed the burden on the individual author to terminate the transfer.[47] To make matters worse, only a five-year window was provided for authors to terminate.[48] This can hardly be described as a "pro-author" copyright law. The ineffectiveness of the termination of transfer provisions is amply borne out by the Copyright Office records, which reveal that only about 0.72% of the works renewed have been the subject of a recorded termination notice.[49]

This year, in House Bill 989 and Senate Bill 483, an additional twenty years is proposed to be tacked on to the renewal term, for a

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42 17 U.S.C. § 304.
43 Act of Mar. 4, 1909, ch. 320, §§ 23, 24, 35 Stat. at 1080; 17 U.S.C. § 304(a).
44 17 U.S.C. § 304.
45 *Id.*
46 *Id.* § 304(a).
47 *Id.* § 304(c).
48 *Id.* § 304(c)(3)-(c)(4).
49 These statistics have been provided to the author in his former capacity as Policy Planning Advisor to the Register of Copyrights, U.S. Copyright Office.

total of ninety-five years for old act works.[50] If Congress decides to grant this twenty years, who is going to get it? Do the additional twenty years vest automatically in the author? No they do not, notwithstanding the excellent precedent in the GATT legislation, which vested, as of January 1, 1995, and restored copyright in the author.[51] Congress rejected an industry draft that the GATT rights vest in transferees. I had hoped that the GATT retroactive provision might lead to a greater willingness to recognize the author as the principal beneficiary of copyright, but I was obviously wrong.

VI. No New Termination Right

Do House Bill 989 or Senate Bill 483 provide a termination right for the new extra twenty years? Will authors fare at least as poorly as they did under the 1976 Act? No, some of them will fare worse. There is no special termination of transfer right for the new twenty years. Instead, the bills will apply the existing termination right in section 304. Or will they? Because the time limits for termination have not been amended, for works first published between 1920 and 1933 (coincidentally important years for the AMSONG group), the five-year window for termination has already passed. These authors or their children, even if they want to, cannot terminate. And with each successive year, authors or their children will lose the ability to terminate for another year's works: in 1996, authors and their children will no longer be able to terminate for works first published in 1934.

Who will the copyright in the extra twenty years go to then? It will go to the transferee, without any opportunity for the author or children to get it back. Does this tell you anything about who is the real principal beneficiary of the bill? The answer is *not* authors or their children.

Music publishers, of course, will have to pay the composer according to the terms of the contract, so it is not as if they are trying to get the twenty years free and clear except, importantly, in cases where a lump sum payment was made for the copyright. But composers and their children do not have to and should not settle for such a raw deal. Indeed, far and away the best public policy is vesting all rights in the twenty-year extension in authors and making publishers renegotiate the contract. Under no circumstances, however, should a publisher be granted the twenty-year term without the author being able to terminate. There is no reason to deprive

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[50] S. 483; H.R. 989.

[51] Uruguay Round Agreements Act of 1994, 108 Stat. 4809 (1994).

authors or their heirs of the opportunity to renegotiate a contract that may have been written as long ago as 1920 in order to get the benefit of today's market value. After all, music publishers are going to charge users today's market value. Why the author or the author's heirs should have to settle for decades old market value is a mystery.

I would also throw the reversal of *Mills Music v. Snyder* into the mix,[52] since that decision deprived composers and other authors of much of the benefit of the paltry termination right.

I do not mean to suggest that publishers or other middlemen are doing anything unethical or wrong. They are just protecting their interests, which are not the same as the interests of authors or the larger public good. But this gets me back to my main theme: that industry-drafted bills, like the "life plus seventy" bills, do not look out for the public interest.

In the *Washington Post* on Sunday, April 2, 1995, there was an article about the fight over the Balanced Budget Amendment.[53] The article contained a short interview with former Senator James Abourezk,[54] who quit in disgust after one term in the 1970s. Abourezk is described as not having enjoyed his time in the Senate, but as appreciating the education in our system of government that he received: " 'I learned about my government,' he sa[id] . . . smiling impishly. 'I learned that very little gets done in the public interest. When it does, it's usually by accident.' "[55]

The content of the "life plus seventy" bills is not an accident. Your mission, as today's law students and tomorrow's intellectual property attorneys and legislators, is to make more "accidents" happen to better serve the public interest than the current copyright legislative process does.

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52 469 U.S. 153 (1985). In *Mills*, a frequently criticized decision, the Supreme Court held that an author's termination of an assignee's copyright license did not terminate the assignee's rights to share in royalties derived from any sub-licensed derivative works.

53 *The World's Greatest Talkative Body*, WASH. POST, Apr. 2, 1995 (magazine), at W30.

54 James George Abourezk was elected as a Democrat from South Dakota to the Ninety-Second Congress, serving for one term between 1972 and 1974. In 1978, Abourezk was elected to the Senate and served a single term, from 1974 to 1980.

55 *The World's Greatest Talkative Body*, *supra* note 53, at W31.