

THE DURATION OF COPYRIGHT AND THE LIMITS OF CULTURAL POLICY

BY J.H. REICHMAN*

I. INTRODUCTION

The following remarks attempt to evaluate pending proposals to extend the term of United States Copyright protection¹ in the light of this writer's larger concerns about the future evolution of intellectual property rights in an integrated world market.² My recent studies show that the conditions governing creativity and innovation at the end of the twentieth century differ significantly from those that gave rise to the Paris and Berne Conventions in the nineteenth century.³ These changed conditions require legislative attention to the limits of the classical patent and copyright paradigms and to the need for new and more limited forms of protection dealing with noncopyrightable, subpatentable forms of innovation.⁴ At the same time, legitimate concerns about the proper degree of incentives for new technologies and about the proper means of regulating new modalities of diffusion tend to obscure the enduring problems of this country's traditional artists

* © J.H. Reichman 1996. B.A. University of Chicago, 1958; J.D. Yale Law School, 1979. This article is based on the author's statement concerning H.R. 989, 104th Congress, 1st Session before the Subcommittee on Courts and Intellectual Property, Committee on the Judiciary, U.S. House of Representatives, July 13, 1995.

¹ See H.R. 989, 104th Cong., 1st Sess. (1995) [hereinafter H.R. 989]. See H.R. 989, 104th Cong., 1st Sess (1995) ("Copyright Term Extension Act of 1995") [hereinafter H.R. 989]; see also S. 483, 104th Cong., 2nd Sess., Version 2 (July 10, 1996) ("Copyright Term Extension Act of 1996") [hereinafter S. 483/2].

² See J.H. Reichman, *From Free Riders to Fail Followers: Global Competition Under the TRIPS Agreement*, — N.Y.U. J. INT'L L. & POL. — (forthcoming) [hereinafter Reichman, *Global Competition*]; J.H. Reichman, *Compliance with the TRIPS Agreement*, 29 VAND. J. TRANS-NAT'L J. 363 (1996) [hereinafter Reichman, *Compliance with TRIPS*]. See generally J.H. Reichman, *Universal Minimum Standards of Intellectual Property Protection Under the TRIPS Component of the WTO Agreement*, 29 INT'L LAW. 345 (1995) [hereinafter Reichman, *Universal Minimum Standards*].

³ See Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, as last revised, July 14, 1967, 21 U.S.T. 1583, 828 U.N.T.S. 305 [hereinafter Paris Convention]; Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as last revised July 24, 1971, 828 U.N.T.S. 221 [hereinafter Berne Convention].

⁴ See J.H. Reichman & Pamela Samuelson, *Intellectual Property Rights in Data?*, 50 VAND. L. REV. — (forthcoming 1997) [hereinafter Reichman & Samuelson, *Data Rights*]; Pamela Samuelson et al., *A Manifesto Concerning the Legal Protection of Computer Programs*, 94 COLUM. L. REV. 2308 (1994) [hereinafter Samuelson et al., *Manifesto*]. See generally J.H. Reichman, *Legal Hybrids Between the Patent and Copyright Paradigms*, 94 COLUM. L. REV. 2432 (1994) [hereinafter Reichman, *Legal Hybrids*]; J.H. Reichman, *Charting the Collapse of the Patent-Copyright Dichotomy: Premises for a Restructured International Intellectual Property System*, 13 CARDOZO ARTS & ENT. L.J. 475 (1995) [hereinafter Reichman, *Collapse of the Patent-Copyright Dichotomy*].

and creators, whose livelihoods and families literally depend on the cultural policies embodied primarily in our domestic copyright law.⁵ Balancing both sets of concerns in the long-term public interest of the United States will not be an easy task under the best of circumstances. My goal here is to try to shed some neutral light on these issues without engaging in the polemical debates of those whose immediate interests are at stake.

To this end, this article first establishes the extent to which current U.S. copyright law substantially complies with the elevated international minimum standards that issued from the latest round of multilateral trade negotiations.⁶ It then examines the pending U.S. proposal to emulate the Council of the European Communities' Directive on harmonizing the term of copyright and certain related rights.⁷ This analysis focuses on the drive for uniform standards of international copyright protection and on efforts to improve the condition of authors and artists in general.

The article finds that current proposals to extend the term of protection under U.S. law cannot be justified in terms of a drive for harmonization as such, nor do they appear socially desirable insofar as the protection of works made for hire and works by corporate authors in general are concerned. However, a better case can be made for prolonging the proprietary rights of traditional artists and authors on the grounds of cultural policy, provided that certain conditions and safeguards are observed. Among the most important of these safeguards is the need to ensure that creators and their heirs, rather than publishers, obtain real opportunities to benefit from any extension of the term of protection, lest the resulting social costs become an unjustifiable subsidy to cultural in-

⁵ See, e.g., H.R. REP. NO. 1476, 94th Cong., 2d Sess. 134 (1976) (stressing that a term of copyright protection lasting for an author's life plus 50 years was justified, in part, because the term under the 1909 Act was too short "to insure an author and his dependents the fair economic benefits from his works.").

⁶ See Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994 [hereinafter Final Act], reprinted in THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS—THE LEGAL TEXTS 2-3 (GATT Secretariat ed., 1994) [hereinafter RESULTS OF THE URUGUAY ROUND]; Marrakesh Agreement Establishing the World Trade Organization [hereinafter WTO Agreement], Annex 1C, Agreement on Trade Related Aspects of Intellectual Property Rights, Apr. 15, 1994 [hereinafter TRIPS Agreement], reprinted in RESULTS OF THE URUGUAY ROUND, *supra*, at 6-19, 365-403; Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 §§ 101-103 (1994) (authorizing President to accept Uruguay Round Agreements and implement WTO Agreement, *supra*, art. 8, but denying treaty status and domestic legal effect to Uruguay Round Agreements as such, and excluding private actions under those Agreements) [hereinafter Uruguay Round Agreements Act of 1994].

⁷ See Council Directive 93/98/EEC of Oct. 29, 1993 Harmonizing the Terms of Protection of Copyright and Certain Related Rights, 1993 O.J. (L 290) 9, reprinted in SWEET & MAXWELL'S E.C. INTELLECTUAL PROPERTY MATERIALS 29-35 (A. Boody & A. Horton eds., 1994) [hereinafter E.C. Directive 93/98].

dustries in the private sector. Moreover, both Congress and the courts should take steps to ensure that a lengthened term of protection and other measures designed to affect only the specialized market for literary and artistic works do not, in practice, disrupt competition on the general products market, and especially on those segments devoted to computer programs and other electronic information tools.⁸

II. SUBSTANTIAL COMPLIANCE WITH INTERNATIONAL MINIMUM STANDARDS

The proposal to extend the basic term of copyright protection from fifty to seventy years after an author's death,⁹ as triggered by the European Communities' ("E.C." and "E.C.'s") Directive to this effect,¹⁰ is not mandated by the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS Agreement"), as finalized in 1994.¹¹ The specific requirements of this agreement are reviewed below.

A. General Impact of the TRIPS Agreement

The TRIPS Agreement required all members of the World Trade Organization ("WTO")¹² to comply with the minimum terms of protection set out in the Berne Convention, as revised in 1971, whether or not these countries formally adhered to that Convention.¹³ The Berne Convention establishes a basic term of life plus fifty years.¹⁴ In addition, article 12 of the TRIPS Agreement imposed a minimum term of fifty years for copyrightable works treated as corporate creations in the domestic laws of member states.¹⁵ The TRIPS Agreement further required WTO member states: to protect computer programs and qualifying compilations for at least fifty years from publication;¹⁶ to protect the reproduc-

⁸ See generally J.H. Reichman, *Electronic Information Tools: The Outer Edge of World Intellectual Property Law*, 24 INT'L REV. OF INDUS. PROP. & COPYRIGHT [I.I.C.] 446 (1993) [hereinafter Reichman, *Electronic Information Tools*].

⁹ See H.R. 989, *supra* note 1, at 2.

¹⁰ See E.C. Directive 93/98, *supra* note 7, art. 1(1).

¹¹ See TRIPS Agreement, *supra* note 6, arts. 9-14.

¹² See WTO Agreement, *supra* note 6, arts. 11, 12.

¹³ See TRIPS Agreement, *supra* note 6, art. 9(1) (not applicable to moral rights under Berne Convention, *supra* note 3, art. 6bis); Reichman, *Universal Minimum Standards*, *supra* note 2, at 366-67.

¹⁴ See Berne Convention, *supra* note 3, art. 7(1).

¹⁵ See TRIPS Agreement, *supra* note 6, art. 12 (mandating minimum 50 year term whenever duration "is calculated on a basis other than the life of a natural person," but exempting photographs and works of applied art.).

¹⁶ See TRIPS Agreement, *supra* note 6, arts. 10(1), (2), 12 (applying life plus 50 term when the author is deemed to be a natural person and 50 year term from publication in all

tion rights of sound recording producers for at least fifty years; to protect the rights of broadcasting organizations to fix, reproduce, transmit, and televise their broadcasts for at least twenty years; and to protect performers against unauthorized fixation of their unfixed performances on sound recordings (and of the reproduction of such fixations) for at least fifty years from the date of authorized fixation.¹⁷

1. Conformity of U.S. Laws

United States copyright law, as amended in 1992, already protected computer programs for at least seventy-five years.¹⁸ Moreover, the United States does not relegate the producers of sound recordings and broadcasting organizations to neighboring rights laws, as do most European Union ("E.U.") countries.¹⁹ For this and other reasons, this country does not adhere to the International Convention for the Protection of Performers, Producers of Phonograms, and Broadcasting Organizations (known as the "Rome Convention").²⁰ Instead, the United States Copyright Act of 1976 treated both sound recordings and radio or television broadcasts as protectable works of authorship and afforded the relevant copyright owners seventy-five years of protection at least.²¹ In conformity with the TRIPS Agreement, Congress recently enacted legislation prohibiting "unauthorized fixation and trafficking in sound recordings and music videos" for an indefinite period of time.²² It also largely restored the rights of foreign (but not na-

other cases, except that a 50 year term from creation applies if no publication occurs). However, compilations not rising to the level of "intellectual creations" are excluded. See *id.* art. 10(2); cf. 17 U.S.C. §§ 102(a), 103 (1994); *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345-50 (1991); Reichman & Samuelson, *Data Rights*, *supra* note 4, at II.B.1 ("The Vulnerability of Publicly Distributed Electronic Databases").

¹⁷ See TRIPS Agreement, *supra* note 6, art. 14. See also Adrian Otten & Hannu Wager, *Compliance with TRIPS: The Emerging World View*, 29 VAND. J. TRANSNAT'L J. 391, 397-99 (1996) (explaining transitional periods for developing countries).

¹⁸ See 17 U.S.C. §§ 101, 102(a), 201, 302(a), (c), 304 (1994) as amended.

¹⁹ See, e.g., WORLD INTELLECTUAL PROPERTY ORGANIZATION, GUIDE TO THE ROME CONVENTION AND TO THE PHONOGRAMS CONVENTION 7-13 (1981) [hereinafter GUIDE TO THE ROME CONVENTION]; see also Paul E. Geller, *International Copyright: An Introduction*, in 1 INTERNATIONAL COPYRIGHT LAW AND PRACTICE, § 3[c] (Geller ed., 1996) [hereinafter Geller, *Introduction*]; Stephen M. Stewart & Hamish Hamilton, *Neighboring Rights*, in INTERNATIONAL COPYRIGHT AND NEIGHBORING RIGHTS 185, 188-91, 194-220 (S.M. Stewart & H. Sandison eds., 1989).

²⁰ See International Convention for the Protection of Performers, Producers of Phonograms, and Broadcasting Organizations, *opened for signature* Oct. 26, 1961, 496 U.N.T.S. 43 [hereinafter Rome Convention].

²¹ See 17 U.S.C. §§ 101, 102(a), 106, 114, 201, 302, 304 (1994).

²² Uruguay Round Agreements Act of 1994, Pub. L. No. 103-465, 108 Stat. 4809, 4974 §§ 512, 513 (codified at 17 U.S.C. § 1101 (1994)); see also MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT, ch. 8E (discussing rights against bootlegged musical per-

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tional) copyright owners, including producers of sound recordings, whose copyrights had been technically forfeited under specified conditions.²³

In sum, the trend established in the TRIPS Agreement clearly favors a minimum term of fifty years for most corporate productions (except broadcasts), whether they are governed by copyright or neighboring rights laws. The United States already exceeds this standard because its laws give seventy-five years of protection to all works made for hire.

Regarding other relevant requirements of the Berne Convention, respect for which is generally mandated by the TRIPS Agreement²⁴ (and thus subjected to the WTO's dispute-settlement machinery),²⁵ current United States copyright law appears no less compliant than it was prior to our entry into the WTO Agreement and substantially more compliant than in 1989, when this country first joined the Berne Union.²⁶ For example, the United States now protects architectural works.²⁷ It does not avail itself of the right to limit the terms of protection afforded photographers and the producers of cinematographic works to twenty-five²⁸ and fifty years,²⁹ respectively. Moreover, the treatment of applied art in do-

formances); PAUL GOLDSTEIN, *COPYRIGHT PRINCIPLES, LAW, AND PRACTICE*, §§ 15.4, 15.6 (2d ed. 1996).

²³ See TRIPS Agreement, *supra* note 6, arts. 14(6), 70(2), (3); Berne Convention, *supra* note 3, art. 18; Uruguay Round Agreements Act of 1994, § 514 (amending 17 U.S.C. § 104A (1993)). See generally WILLIAM F. PATRY, *COPYRIGHT AND THE GATT - AN INTERPRETATION AND LEGISLATIVE HISTORY OF THE URUGUAY ROUND AGREEMENTS ACT 7-20, 30-57* (1995).

²⁴ See *supra* note 13 and accompanying text.

²⁵ See TRIPS Agreement, *supra* note 6, arts. 64, 68; WTO Agreement, *supra* note 6, Annex 2, Understanding on Rules and Procedures Governing the Settlements of Disputes [hereinafter Settlement of Disputes]; Reichman, *Universal Minimum Standards*, *supra* note 2, at 385-88 (discussing the "Uncertainties of the Dispute-Settlement Process").

²⁶ See Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988); David Nimmer, *Nation, Duration, Violation, Harmonization: An International Copyright Proposal for the United States*, 55 *LAW & CONTEMP. PROBS.* 211, 218-35 (1992) [hereinafter Nimmer, *International Copyright Proposals*].

²⁷ See Berne Convention, *supra* note 3, art. 2(1); 17 U.S.C. §§ 101, 102(a)(8), as amended by Pub. L. 101-650, 104 Stat. 5089, 5133 (1990).

²⁸ See Berne Convention, *supra* note 3, art. 7(4) (allowing 25 year term of protection for photographic works). *But see* E.C. Directive 93/98, *supra* note 7, art. 6 (mandating life plus 70 years of protection for photographs amounting to an "author's own intellectual creation," notwithstanding Berne Convention).

²⁹ See Berne Convention, *supra* note 3, art. 7(2); SAM RICKETSON, *THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS: 1886-1986*, at 338 (1987) (noting that Berne countries may protect films either for the standard life plus 50 term or for 50 years from publication (or creation if no publication occurs)). E.C. Directive 93/98, *supra* note 7, art. 2, affords a copyright to the authors of cinematographic or audiovisual works (including the principal director, the author of a screenplay, the author of dialogue, and the composer of specially created music), which expires 70 years after the death of the last of these designated persons to survive. In article 3, the Directive also affords neighboring or related rights to the producers of films, and to broadcasting organizations, which

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mestic copyright law exceeds the twenty-five year minimum that the Berne Convention tolerates,³⁰ and the criterion of separability used to distinguish copyrightable works of applied art from noncopyrightable industrial designs remains firmly entrenched in long-standing state practice.³¹ However, the United States design patent law may not fully comply with the TRIPS provisions concerning the protection of industrial designs as such.³²

To be sure, American compliance with the relevant minimum standards under the Berne Convention arguably remains imperfect in some respects, notwithstanding recent congressional action rendering the renewals of pre-1978 copyrights automatic³³ and restoring foreign copyrights that had suffered technical forfeiture.³⁴ For example, American treatment of anonymous and pseudonymous works by foreign authors may still fall short of the Convention standard when such works are not published promptly upon creation.³⁵ Certain pre-1978 works by foreign authors may still receive less than life plus fifty years of protection if publication occurs too early relative to the author's death.³⁶ Moreover, the degree of American compliance with the moral rights provisions of the Convention, though improved since 1989, still falls short of the standards that state practice generally accepts.³⁷

last 50 years from publication, communication, or transmission to the public. See also GUY TRITTON, *INTELLECTUAL PROPERTY IN EUROPE* 198-99 (1996).

³⁰ See Berne Convention, *supra* note 3, art. 7(4); TRIPS Agreement, *supra* note 6, art. 12 (allowing this exception); 17 U.S.C. § 101 (stating the definition of pictorial, graphic, or sculptural works). See generally J.H. Reichman, *Design Protection and the New Technologies: The United States Experience in a Transnational Perspective*, 19 U. BALT. L. REV. 6, 56-81 (discussing copyright protection of applied art) [hereinafter Reichman, *Designs and New Technologies*].

³¹ See J.H. Reichman, *Design Protection in Domestic and Foreign Copyright Law: From the Berne Revision of 1948 to the Copyright Act of 1976*, 1983 DUKE L.J. 1143, 1153-74, 1249-64 [hereinafter Reichman, *Design Protection Before 1976*]; see also J.H. Reichman, *Design Protection After the Copyright Act of 1976: A Comparative View of the Emerging Interim Models*, 31 J. COPYRIGHT SOC'Y U.S.A. 267, 360-65 (1984) [hereinafter Reichman, *Design Protection After 1976*].

³² See TRIPS Agreement, *supra* note 6, art. 25 (1) (mandating the protection of "independently created industrial designs that are new or original"); Reichman, *Universal Minimum Standards*, *supra* note 2, at 375-77 (arguing that U.S. criterion of "nonobviousness" is inconsistent with TRIPS eligibility standard for designs).

³³ See 17 U.S.C. § 304, as amended by the Copyright Renewal Act of 1992, Pub. L. 102-307, 106 Stat. 264 (1992).

³⁴ See *supra* note 23 and accompanying text; see also NIMMER & NIMMER, *supra* note 22, ch. 9A (discussing copyrights restored from the public domain); GOLDSTEIN, *supra* note 22, § 2.5.4.3.

³⁵ See Berne Convention, *supra* note 3, arts. 7(3), 15(3); 17 U.S.C. 302(c) (1994); Nimmer, *International Copyright Proposals*, *supra* note 26, at 224-25.

³⁶ See Berne Convention, *supra* note 3, art. 7(1); 17 U.S.C. § 304 (as amended 1992); Nimmer, *International Copyright Proposals*, *supra* note 26, at 225-27.

³⁷ See Berne Convention, *supra* note 3, art. 6bis; 17 U.S.C. § 106A, as added by the Visual Artists Rights Act of 1990, Pub. L. 101-650, 140 Stat. 5128 (1990); see also RICKETSON, *supra* note 29, at 467-75. But see FINAL REPORT OF THE AD HOC WORKING GROUP ON U.S. ADHER-

Nevertheless, the proposals pending before Congress would only ameliorate the minor technical deficiencies noted above without necessarily curing them. As to moral rights, neither the Berne Convention nor state practice has established a norm governing the ultimate term of protection, although the basic principle does link the minimum term to the duration of the author's economic rights.³⁸ In any event, while pressure for greater U.S. compliance with the moral rights provisions of the Berne Convention appears inevitable, there is nothing in either the TRIPS Agreement or the E.C. Directive that requires Congress to take precipitous action in this regard.³⁹

2. Disharmonizing Proposals

A more substantial discrepancy between American copyright law and that of other Berne Union countries stems from the greater reliance of the former on the work-made-for-hire doctrine in general and on the principle of corporate authorship in particular.⁴⁰ On the whole, other Berne Union countries tend to relegate many creations of corporate entities to neighboring rights laws covered by the Rome Convention,⁴¹ to which the United States does not adhere. With some exceptions, they also confer the full life plus fifty term on copyrightable works created by identifiable employee authors.⁴² However, these tensions with American law were not considered a major irritant even in the 1980s, and recent ten-

ENCE TO THE BERNE CONVENTION, reprinted in 10 COLUM.-VLA J.L. & ARTS 513, 547 (1986) [hereinafter FINAL REPORT].

³⁸ See Berne Convention, *supra* note 3, art. 6bis(2); RICKETSON, *supra* note 29, at 473-75.

³⁹ See *supra*, note 13; E.C. Directive 93/98, *supra* note 7, art. 9 (excluding moral rights); see also Silke von Lewinski, *E.C. Proposal for a Council Directive Harmonizing the Term of Protection of Copyright and Certain Related Rights*, 23 I.I.C. 785, 801-03 (1992).

⁴⁰ See Berne Convention, *supra* note 3, art. 15(3); 17 U.S.C. §§ 201(b), 302(c), 304(a) (as amended 1992); FINAL REPORT, *supra* note 37, at 613-20 (stressing that the Convention "does not contain any general provision concerning works made for hire, and does not define the word 'author' (or the owner[ship] of copyright[s])" and that U.S. Law is not clearly incompatible in the context of actual state practice). *Id.* at 613. "The domestic copyright systems vary with respect to the requirement[s] of 'authorship,' to the treatment of employee-authors in general, and to the extent they attribute authorship in certain classes of works to persons other than the actual intellectual creators." J.H. Reichman, *Overlapping Proprietary Rights in University-Generated Research Products: The Case of Computer Programs*, 17 COLUM.-VLA J.L. & ARTS 51, 54-60 (1992) (citing authorities) [hereinafter Reichman, *Overlapping Proprietary Rights*]. For the view that these differences are diminishing as domestic courts take economic risk allocation into account, see JACQUELINE M.B. SEIGNETTE, CHALLENGES TO THE CREATOR DOCTRINE 83-95 (1994).

⁴¹ See *supra* note 20.

⁴² See, e.g., FINAL REPORT, *supra* note 37, at 614-20 (noting that Netherlands copyright law applies the work made for hire principle). See generally RICKETSON, *supra* note 29, at 158-59, 346-49; ALAIN STROWEL, DROIT D'AUTEUR ET COPYRIGHT—DIVERGENCES ET CONVERGENCES 323-89 (1993); Ghislain Roussel, *The Copyright of Salaried and Employed Authors — A Comparative Study of National Laws*, 26 COPYRIGHT 221 (W.I.P.O. ed., 1990).

dencies in the evolution of the European Union's intellectual property law have greatly reduced them.

For example, the E.C. Directive on computer programs, though purporting to treat eligible programs as copyrightable literary works, expressly recognized the principle of corporate creations and provided a minimum term of fifty years for this purpose.⁴³ The recently adopted E.C. Directive on databases and the proposed E.C. Directive on commercial designs also embrace the principle of corporate creation,⁴⁴ although in most cases this would occur under *sui generis* regimes operating outside the relevant copyright laws as such.⁴⁵ Above all, the E.C. Directive on harmonizing the term of protection of copyright and certain related rights expressly confers a seventy year term upon collective works and works whose rightholders under the domestic laws are deemed to be "legal persons." Concomitantly, this Directive extends the related rights conferred on performers, producers of sound recordings, films, and broadcasting organizations to a period of fifty years.⁴⁶

None of these provisions would, of course, necessarily resolve the difficulties that could continue to arise if American law attributed work-for-hire status to a given work and the relevant domestic law within the European Union continued to attribute the same work to an identifiable person, notwithstanding the Directive. In the case of a cinematographic work, these difficulties would be compounded by the "life plus seventy" term awarded film "authors" under the Directive, in contrast with the term of seventy-five years that U.S. law affords the owners of a film made for hire.⁴⁷

With the exception of computer programs, however, the Di-

⁴³ See Council Directive 91/250 of May 14, 1991 on the Legal Protection of Computer Programs, 1991 O.J. (L 122) 42, art. 2(3) [hereinafter E.C. Directive on Computer Programs]. For criticism of this approach see Jan Corbet, *Does Technological Development Imply a Change in the Notion of Author?*, 148 REVUE INTERNATIONALE DU DROIT D'AUTEUR [R.I.D.A.] 58 (1991); Herman Cohen Jehoram, *The E.C. Copyright Directives, Economics, and Authors' Rights*, 25 I.I.C. 821, 829-30 (1994).

⁴⁴ See Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the Legal Protection of Databases, 1996 O.J. (L 77) 20, art. 4(1) [hereinafter E.C. Directive on Databases]; Commission of the European Communities, Amended Proposal for a European Parliament and Council Directive on the Legal Protection of Designs, COM (96) 66 Final COD 464, art. 6 [hereinafter Proposed E.C. Directive on Designs]; see also Cohen Jehoram, *supra* note 43, at 829-31.

⁴⁵ See, e.g., E.C. Directive on Databases, *supra* note 44, arts. 4(1) (ownership of copyrightable databases), 7(1) (database maker's right under *sui generis* regime); Reichman & Samuelson, *Data Rights*, *supra* note 4, at III.B. ("The E.U.'s Final Product").

⁴⁶ See E.C. Directive 93/98, *supra* note 7, arts. 1(3), 1(4), 3; von Lewinski, *supra* note 39, at 790-94, 798-801. However, the "authors" of a film, as distinct from its "producer," will obtain a life-plus-seventy term of protection under E.C. Directive 93/98. See *supra* note 29.

⁴⁷ See *supra* note 29; 17 U.S.C. § 302(c) (1994).

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rective does tend to equalize the terms of protection in the United States and the European Union when the copyrightable works in question are attributed to legal entities under both jurisdictions. In such cases, the work would receive seventy-five years of protection in the U.S. and seventy years in the E.U.⁴⁸ Moreover, the disparities in the terms of protection that previously occurred when copyright law applied in one jurisdiction and related rights law applied in the other have been attenuated to the extent that related rightholders in the European Union (as well as corporate creators of computer programs) will now obtain a fifty year term rather than the twenty year term normally available under the Rome Convention.⁴⁹

In these respects, the pending U.S. legislation, if enacted, would unilaterally worsen the existing disparities by prolonging the term of protection for employer authors and corporate entities from seventy-five to ninety-five years. This would destabilize the *de facto* harmonization that has recently taken place, without addressing the underlying substantive issues.⁵⁰

B. *Uncertainties Affecting the Comparison of Terms*

The TRIPS Agreement allows WTO member states to "implement in their [domestic] law more extensive protection" than its minimum standards require.⁵¹ Article 7(6) of the Berne Convention expressly recognizes the same principle with respect to its minimum terms of protection.⁵² In the latter case, however, article 7(8) of the Berne Convention retains a residual material reciprocity clause, known as the rule of the shorter term.⁵³ This clause encourages states exceeding the agreed terms of protection to override the principle of national treatment by limiting the term in the country where protection is claimed "to the term fixed in the country of origin of the work."⁵⁴

⁴⁸ See *supra* notes 46-47.

⁴⁹ See Rome Convention, *supra* note 20, art. 14.

⁵⁰ See H.R. 989, *supra* note 1; S. 483/2, *supra* note 1.

⁵¹ See TRIPS Agreement, *supra* note 6, art. 1(1).

⁵² See Berne Convention, *supra* note 3, art. 7(6); see also *id.* art. 19 ("not precluding the making of a claim to the benefit of any greater protection which may be granted by legislation in a country of the Union").

⁵³ See *id.* art. 7(8).

⁵⁴ See *id.* arts. 5(1) (national treatment), 5(3) (protection in the country of origin to be governed by domestic law), 5(4) (defining the country of origin), 7(8) (comparison of terms). Article 7(8) encourages states to apply the rule of the shorter term by requiring their legislators affirmatively to waive it if they so desire, but the rule is not obligatory. See, e.g., WORLD INTELLECTUAL PROPERTY ORGANIZATION, GUIDE TO THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS (Paris Act of 1971) 50-51 (W.I.P.O. ed.

1. Mandatory Comparison of Terms Under the Directive

The E.C. Directive harmonizing the terms of protection goes one step farther by requiring European Union countries to apply the rule of the shorter term to authors and related rightholders whose works and productions originate from "third countries" and who are not E.U. nationals.⁵⁵ In principle, these provisions should prevent creators who are nationals of third countries from automatically obtaining the prolonged terms of protection in those European Union countries where protection is sought, notwithstanding the rule of national treatment set out in the Berne Convention,⁵⁶ absent a reciprocal provision on duration in the laws of the respective countries of origin. They also serve as "a means of persuading third countries to extend their terms of protection and thus to improve their levels of protection."⁵⁷

Logically, Congress should likewise consider enacting a domestic version of this same principle under article 7(8) of the Berne Convention. A domestic rule of the shorter term would avoid bestowing the benefits of our seventy-five-year terms for, say, employer-created computer programs, producers of sound recordings, and producers of television broadcasts upon rightholders originating in European Community countries that provided shorter periods of protection. Rightholders outside the European Community who adhered to the fifty-year minimum term for corporate productions under article 12 of the TRIPS Agreement would similarly obtain only fifty years of protection under an American rule of the shorter term.⁵⁸

However, some caution may be in order because article 4 of the TRIPS Agreement introduced a Most Favored Nation Clause ("MFN"),⁵⁹ long familiar in trade law,⁶⁰ into international intellectual property law for the first time.⁶¹ Some scholars have begun to

1978) [hereinafter GUIDE TO THE BERNE CONVENTION]; Geller, *Introduction*, *supra* note 19, at § 5[1], [2].

⁵⁵ See E.C. Directive 93/98, *supra* note 7, art. 7; see also W.R. CORNISH, *INTELLECTUAL PROPERTY; PATENTS, COPYRIGHT, TRADEMARKS, AND ALLIED RIGHTS* 356-57 (3rd ed. 1996); von Lewinski, *supra* note 39, at 803-04.

⁵⁶ See Berne Convention, *supra* note 3, art. 5(1).

⁵⁷ von Lewinski, *supra* note 39, at 803.

⁵⁸ See *supra* note 15 and accompanying text.

⁵⁹ See TRIPS Agreement, *supra* note 6, art. 4, which states: "With regard to the protection of intellectual property [as defined and limited by Art. 1(2)], any advantage, favour, privilege or immunity granted by a Member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other members."

⁶⁰ See, e.g., JOHN H. JACKSON, *WORLD TRADE AND THE LAW OF GATT* 249-72 (1969).

⁶¹ See, e.g., Wolfgang Fikentscher, *TRIPS and the Most Favored Nation Clause*, in *CURRENT ISSUES IN INTELLECTUAL PROPERTY, PROCEEDINGS OF THE ANNUAL CONFERENCE OF THE INTERNATIONAL ASSOCIATION FOR THE ADVANCEMENT OF TEACHING AND RESEARCH IN INTELLECTUAL*

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question the continued viability of even the Berne Convention's own comparison of terms clause on the grounds that it inherently conflicts with article 4 of the TRIPS Agreement,⁶² as might every bilateral (or even multilateral) arrangement in which one WTO member state affords a better "intellectual property" deal⁶³ to another member state without making that same deal available to the membership as a whole.⁶⁴ Even if the Berne Union's comparison of terms clause were rescued by express exceptions to article 4 of the TRIPS Agreement,⁶⁵ as I think likely, some authors contend that the E.C. Directive limiting the benefits of longer terms to Community members might nonetheless run afoul of the MFN clause of article 4.⁶⁶

2. Impact of the MFN Clause Under TRIPS

In a recent article on the TRIPS Agreement, I have interpreted article 4 in a manner that would not necessarily override the rule of the shorter term under the Berne Convention.⁶⁷ While it remains uncertain whether all of the relevant provisions will mesh

PROPERTY, July 11-13, 1994, at 137-39 (J. Straus ed., 1995) (stressing that, historically, "free trade is based upon a world principle and the protection of intellectual property upon national law and territoriality.").

⁶² See, e.g., Fikentscher, *supra* note 61, at 140; Cohen Jehoram, *supra* note 43, at 826-27.

⁶³ However, the term "intellectual property" appears expressly limited to the specific subject-matter categories covered by the TRIPS Agreement. See *supra* note 59; Reichman, *Universal Minimum Standards*, *supra* note 2, at 348-49.

⁶⁴ See, e.g., Fikentscher, *supra* note 61, at 138-39 (regretting this barrier to bilateral experimentation). Professor Fikentscher states:

It is a matter of logic that . . . [the] principle of [international] minimum protection and the principle of Most Favored Nation treatment stand to each other in opposition. For, wherever Most Favored Nation applies, it makes no sense to permit the members of the treaty to grant intellectual property protection which goes beyond the internationally stipulated minimum standard.

Id. at 139; see also Hanns Ullrich, *TRIPS: Adequate Protection, Inadequate Trade, Adequate Competition Policy*, 4 PAC. RIM L. & POL'Y J. 153, 182-83, 183 n.133 (1995) (stressing unclear meaning of MFN treatment in context of intellectual property and regretting that it constrains parties from making bilateral concessions).

⁶⁵ See, e.g., TRIPS Agreement, *supra* note 6, art. 4(b) (exempting privileges "granted in accordance with the provisions of the Berne Convention (1971) or the Rome Convention authorizing that the treatment accorded be a function not of national treatment but of the treatment accorded in another country"); see also *id.* art. 4(c) (exempting privileges and immunities "in respect of the rights of performers, producers of phonograms and broadcasting organization not provided under this Agreement"), and art. 4(d) (those "deriving from international agreements related to the protection of intellectual property which entered into force prior to the entry into force of the WTO Agreement"); see also *infra* text accompanying notes 67-74.

⁶⁶ See, e.g., Cohen Jehoram, *supra* note 43 at 826-27 (citing and analogizing the E.C.J.'s Decision of 20 Oct. 1993, Joined Cases C-92/92 and C-326/92 - Phil Collins v. Imrat Handelsgesellschaft mbH and Patricia Im - und Export Verwaltungsgesellschaft mbH v. EMI Electrola GmbH, 68 C.M.L.R. 21 at 773-99 (1993)) [hereinafter *Phil Collins*].

⁶⁷ See Reichman, *Universal Minimum Standards*, *supra* note 2, at 348-51.

precisely as I predict, the following overall framework appears more plausible.

First, international intellectual property treaties existing at the time that the TRIPS Agreement takes effect⁶⁸ are usually immune from the MFN clause (but not the national treatment clause, except as expressly provided) under a grandfather provision within the TRIPS Agreement, which only this Agreement can override.⁶⁹ Second, existing and future agreements establishing "customs unions and free-trade areas" of a regional character may, to varying degrees, be immunized from applying MFN treatment, and possibly national treatment, to non-TRIPS-mandated proprietary rights affecting intra-regional trade in intellectual property rights, at least insofar as past practice under article XXIV of the General Agreement on Tariffs and Trade is carried over to the WTO Agreement and applied to the proprietary rights in question.⁷⁰ Third, states otherwise contemplating unilateral measures to protect intellectual property in the future must generally weigh the costs and benefits of non-reciprocity with respect to other WTO member countries, unless the measures contemplated fall outside the seven categories of "intellectual property" recognized by the TRIPS Agreement⁷¹

⁶⁸ See Final Act, *supra* note 6, par. 3 (setting Jan. 1, 1995, as target date for entry into force); WTO Agreement, *supra* note 6, arts. VIII, XIV; see also Otten & Wager, *supra* note 17, at 407-09 (noting entry into force on Jan. 1, 1995 and discussing transitional arrangements).

⁶⁹ See TRIPS Agreement, *supra* note 6, art. 4(d) (with the proviso that immunized measures "not constitute an arbitrary or unjustifiable discrimination against nationals of other members"); see also *id.* art. 4(b) (exempting inconsistent provisions of Berne Convention, *supra* note 3, and Rome Convention, *supra* note 20); CORNISH, *supra* note 55, at 357, 357 n.9.

⁷⁰ See General Agreement on Tariffs and Trade of 1947 [hereinafter GATT 1947], art. XXIV, reprinted in RESULTS OF THE URUGUAY ROUND, *supra* note 6, at 485, 522-25; WTO Agreement, *supra* note 6, Annex IA, Multilateral Agreements on Trade in Goods—General Agreement on Tariffs and Trade 1994, art. 1, reprinted in RESULTS OF THE URUGUAY ROUND, *supra* note 6, at 20-21 [hereinafter GATT 1994] (incorporating by reference GATT 1947, *supra*, art. XXIV); see also GATT 1994, *supra*, Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994, reprinted in RESULTS OF THE URUGUAY ROUND, *supra* note 6, at 31-34. An analysis of Article XXIV lies beyond the scope of this article. Nevertheless, it suggests the possibility that advantages created under the North American Free Trade Agreement, ch. 17 (Intellectual Property), 32 I.L.M. 612, 670 [hereinafter NAFTA], which are not covered by TRIPS, need not always or automatically be granted to non-NAFTA countries that are parties of the WTO Agreement, *supra* note 6. See also CORNISH, *supra* note 55, at 357 (stating that "such an understanding [as that set out in the text] may need to be implied"); RICHARD E. NEFF & FRAN SMALLSON, NAFTA—PROTECTING AND ENFORCING INTELLECTUAL PROPERTY RIGHTS IN NORTH AMERICA 1-16 (1994). Naturally, the strongest case for avoiding MFN treatment arises when the proprietary rights in question fall outside the definition of "intellectual property" set out in article 1(2) of the TRIPS Agreement. For a further explanation, see *infra* notes 71-72 and accompanying text.

⁷¹ See *supra* note 59 and accompanying text. On this reading, the TRIPS Agreement would appear to override unilateral claims to material reciprocity like those incorporated into the United Kingdom's unregistered design right of 1988 (see Copyright, Designs and

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and outside the residual national treatment clauses of the Paris and Berne Conventions.⁷²

Whether any specific measures that were arguably not cognizable under existing conventions, such as the European Union's new regime to protect the contents of non-copyrightable databases or certain levies for private copying of audio and visual recordings (like those implemented in France), may escape the MFN and national treatment clauses of the TRIPS Agreement, will thus depend on a variety of factors. These include evolving state practice with respect to regional trade agreements and the extent to which decision makers interpret "intellectual property" as narrowly denoting the seven categories of subject matter to be protected, or as broadly connoting certain modalities of protection. It may also depend on who interprets these clauses, given the uncertain jurisdictional and substantive powers of the WTO panels to be established under binding dispute resolution procedures set forth in the TRIPS Agreement.⁷³

Nevertheless, the drafters of the TRIPS Agreement may themselves have been motivated by unresolved conflicts concerning the application of article 4,⁷⁴ and the extent to which prior respect for regional arrangements in GATT practice will be carried over to intellectual property cannot accurately be foretold.⁷⁵ If for these or other reasons, the rule of the shorter term—whatever its legal foundation—should fail to survive an attack based on article 4 of the TRIPS Agreement (an unlikely result in my opinion), then the position of U.S. creators vis-à-vis their E.U. counterparts would become particularly advantageous in the absence of amendments like those contained in the legislation pending before Congress.⁷⁶

Patents Act, 1988, ch. 48, §§ 213-264) [hereinafter English Copyright Act]; see also MICHAEL F. FLINT ET AL., INTELLECTUAL PROPERTY — THE NEW LAW 151 (1989) (construing English Copyright Act, *supra*, § 256 to require material reciprocity) and The United States' Semiconductor Chip Protection Act of 1984 (SCPA), Pub. L. No. 98-620, 98 Stat. 3335, 3347 (1984) (codified at 17 U.S.C. §§ 901, 902(a)(1)(A)-(C), 913, 914 (1988)). This follows because industrial designs and integrated circuit designs fall within the operative definition of intellectual property. In practice, the need for reciprocity under the SCPA was largely obviated by TRIPS Agreement, *supra* note 6, arts. 35-38, which harmonizes the protection of integrated circuit designs.

⁷² See TRIPS Agreement, *supra* note 6, arts. 2(1), 9(1), respectively, (incorporating by reference Paris Convention, *supra* note 3, art. 2(1) and Berne Convention, *supra* note 3, art. 5(1)); see also André Kerever, *Le GATT et le Droit d'Auteur International*, 47 REVUE TRIMESTRIELLE DE DROIT COMMERCIAL [R.I.D. COMM.] 629, 641 (1994).

⁷³ See Reichman, *Universal Minimum Standards*, *supra* note 2, at 349-50; see also Paul E. Geller, *Intellectual Property in the Global Marketplace: Impact of TRIPS Dispute Settlement?*, 29 INT'L LAW. 99, 104-07 (1995).

⁷⁴ See, e.g., Fikentscher, *supra* note 61, at 140 n.2 (reporting differences between representatives of the European Community, the United States, and Switzerland).

⁷⁵ See, e.g., CORNISH, *supra* note 55, at 357; Cohen Jehoram, *supra* note 43, at 826-27.

⁷⁶ See H.R. 989 and S. 483/2, *supra* note 1.

In that case, U.S. creators would obtain all the benefits of the longer terms of protection under the E.C. Directive without having to extend similar benefits to E.U. creators under the Copyright Act of 1976. To the extent that longer terms abroad might result in overprotection of cultural goods yielding economic disutilities, as critics fear,⁷⁷ American firms operating under more rigorous conditions at home might supply more competitive products abroad. Conversely, foreigners operating under an overly protective regime at home might find their products less competitive on the relevant market segments in this country.⁷⁸

If, instead, the European Community continues to apply its comparison of terms clause against U.S. creations notwithstanding article 4 of the TRIPS Agreement, then Congress should proceed defensively and enact a domestic version of that same rule, as suggested above. It would also justify further investigation of the desirability of enacting amendments like those pending before Congress, in response to the European Union's use of "the comparison of terms as a means of persuading third countries to extend their terms of protection and thus improve their level of protection."⁷⁹

III. THE TERM OF COPYRIGHT AS CULTURAL POLICY

The pros and cons of extending the term of copyright protection have been amply expounded in the literature, and I will not exhaustively review them here.⁸⁰ In the rest of this article, I will selectively focus on those considerations that seem particularly relevant to an even-handed assessment on the merits of the bills pending before Congress.⁸¹

⁷⁷ See, e.g., CORNISH, *supra* note 55, at 317-21; Dennis S. Karjala, *Comment of U.S. Copyright Law Professors on the Copyright Office Term of Protection Study*, 16 EUR. INTELL. PROP. REV. [E.I.P.R.] 531, 532-38 (1994).

⁷⁸ Cf. J.H. Reichman, *Intellectual Property in International Trade: Opportunities and Risks of a GATT Connection*, 22 VAND. J. TRANSNAT'L L. 747, 844-48 (1989) (discussing functional implications of non-reciprocity) [hereinafter Reichman, *GATT Connection*].

⁷⁹ von Lewinski, *supra* note 39, at 803.

⁸⁰ See, e.g., *The Copyright Term Extension Act of 1995: Hearings on H.R. 989 Before the Subcommittee on Courts and Intellectual Property*, 104th Cong. 1st Sess. 161-203 (1995) (statement of Marybeth Peters, Register of Copyright and Associate Librarian) [hereinafter *Hearings on H.R. 989*]; *id.* at 316-49 (Statement of Professor William F. Patry); see also STROWEL, *supra* note 42, at 595-627; Kanwal Puri, *The Term of Copyright Protection - Is It Too Long in the Wake of New Technologies?*, 12 E.I.P.R. 14-17 (1990) (summarizing arguments for and against longer terms of protection); Sam Ricketson, *Copyright Term*, 23 I.I.C. 753 (1992); Karjala, *supra* note 77.

⁸¹ See *supra* note 1.

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A. *The Unattainable Goal of Uniform Law*

Even the opponents of the legislative proposals to prolong the term of copyright protection concede that an overall reduction in transaction costs might bolster the case for conforming U.S. copyright law to the E.C. Directive,⁸² despite the fact that international intellectual property law does not mandate this result.⁸³ The foregoing analysis of the divergent conceptual approaches to authors' rights suggests, however, that uniformity with respect to the term of copyright protection remains an unrealistic goal even as between the United States and the European Union, which otherwise share a common concern for high levels of protection for cultural goods. When the rest of the world is factored into the calculus, the goals of greater uniformity and harmonization than that which occurred under the TRIPS Agreement become chimerical, indeed.⁸⁴

In principle, of course, the current proposals would harmonize the basic term of copyright protection applicable to traditional literary and artistic works as between two major trading blocks, the European Union and the United States, and this could, perhaps, pave the way for its adoption in the North American Free Trade ("NAFTA") context as well. In terms of economic effects as distinct from conceptual formalism, however, this apparent uniformity is offset by the divergent terms of protection that the United States and European Union would continue to afford rightholders in sound recordings, cinematographic and audiovisual productions, computer programs, and in the bulk of all works made for hire (including those within the categories listed above, whether employee-authored or merely deemed the products of corporate legal responsibility).⁸⁵ The E.C. Directive on databases could further deepen these differences, in the absence of a harmonizing international treaty.⁸⁶

In a larger perspective, a true harmonization exercise requires "horizontal leveling" between participating states to reduce the substantive legal and philosophical differences that are directly or

⁸² See, e.g., Karjala, *supra* note 77, at 532.

⁸³ See *supra* text accompanying notes 11-50.

⁸⁴ See generally Reichman, *Global Competition*, *supra* note 2 (contending that developing countries should implement pro-competitive interpretations of TRIPS standards).

⁸⁵ See *supra* text accompanying notes 18-23, 40-50. For the view that the works-made-for-hire category has greatly expanded under the Copyright Act of 1976 and that this undermines the classical assumptions of the Berne Convention, see Marci A. Hamilton, *Appropriation Art and the Imminent Decline in Authorial Control Over Copyrighted Works*, 42 J. COPYRIGHT Soc'y 93, 98-110 (1994).

⁸⁶ See *supra* note 44; Reichman & Samuelson, *Data Rights*, *supra* note 4 (discussing E.U., U.S. and pending international initiatives).

indirectly tied to the issue of duration.⁸⁷ For example, the European Commission has doggedly pursued this path with respect to the criterion of originality used to determine eligibility in the domestic copyright laws of the Community.⁸⁸ To do otherwise would saddle the Community with hidden barriers to trade and disregard the views of the European Court of Justice, as most recently manifested in the *Phil Collins* decision.⁸⁹

Absent such leveling with respect to the divergent national traditions of the participating states, however, a superficial alignment of selected terms of duration alone produces illogical and contradictory results. By prolonging the basic term of protection afforded works made for hire under U.S. law from seventy-five to ninety-five years, the current bills⁹⁰ would only compound pre-existing differences and destabilize the degree of harmonization already underway in the context of U.S.-E.U. copyright relations.⁹¹

By the same token, a greater degree of harmonization could result from selective U.S. adoption of foreign "authors' rights" concepts. For example, if the U.S. film industry promoted a "life plus seventy" term for the "authors" of cinematographic works, including the principal director, the author of the screenplay, the author of the dialogue, and the composer of specially created music, it might harmonize the U.S. position with that of the E.C. Directive in this regard.⁹² It could, however, also lessen the film studios' ownership and control of their products. Because the U.S. studios appear unwilling to accept that result, it becomes disharmonizing to extend the work-made-for-hire copyright in films to ninety-five years when, under the E.C. Directive, European legal entities will obtain seventy years of copyright protection and European film producers will obtain fifty years of protection in the domestic neighboring rights laws.⁹³ A mere subsidy to the film industry that excludes film artists and authors seems hard to justify in either cultural or economic terms, especially in the absence of any international understanding about a "paying public domain" (*domaine public payant*).⁹⁴

Moreover, developing countries already struggling to defray

⁸⁷ See, e.g., Cohen Jehoram, *supra* note 43, at 827-31.

⁸⁸ See, e.g., *id.* at 828-30.

⁸⁹ See *id.* at 825-27; *supra* note 66 and accompanying text.

⁹⁰ See *supra* note 1.

⁹¹ See *supra* text accompanying notes 30-50.

⁹² See *supra* note 29.

⁹³ See *supra* notes 1, 29, 43-46 and accompanying text.

⁹⁴ See, e.g., CORNISH, *supra* note 55, at 317-21, 324-25 (advocating public fund into which royalties for use of works would be paid for some years after the expiration of normal copyright protection in order to generate funds to support new authors and producers).

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the costs of imported cultural and technological goods will hardly welcome lengthened terms of copyright protection, any more than the United States did at earlier stages of its own economic development. On the contrary, these countries would normally stand on their rights under the Berne Convention, except when expressly overridden by the TRIPS Agreement,⁹⁵ or, perhaps, when longer terms happened to benefit economically significant local interests. As noted, the TRIPS Agreement requires a minimum term of fifty years for most literary and artistic productions that are attributed to corporate entities.⁹⁶

Subject to this proviso, the Berne Convention, together with the neighboring rights provisions of the Rome Convention and of the TRIPS Agreement, allows member countries to maintain shorter terms of protection for sound recordings, cinematographic or audiovisual works, fixations of performers' renditions, photographic works, works of applied art, anonymous or pseudonymous works, joint works, and works made for hire in general (including computer programs) than those that might be operative in either the European Union (under the E.C. Directive harmonizing the term of protection) or in the United States (if Congress enacts the pending legislation).⁹⁷ Moreover, the developing countries would continue to retain their shorter, basic term of life plus fifty years for traditional literary and artistic works by individual authors,⁹⁸ although most of these same countries have inexplicably allowed their rights to invoke compulsory licenses for the use of certain scientific and educational works to lapse.⁹⁹ For the foreseeable future, the developing countries have no reason to diminish their own competitive prospects or otherwise to burden their trade balances by exceeding the minimum international standards under the relevant treaties.

Unless third countries were prodded into entering a harmonized E.U.-U.S. framework or a supplementary version of the Berne and Rome Conventions, the MFN and national treatment provisions of the TRIPS Agreement could tend progressively to render their cultural and technical products more competitive in

⁹⁵ See *supra* notes 13-17 and accompanying text.

⁹⁶ See *supra* notes 15-17 and accompanying text.

⁹⁷ See TRIPS Agreement, *supra* note 6, arts. 9, 10, 12, 14; Berne Convention, *supra* note 3, arts. 2(7), 7, 7bis; Rome Convention, *supra* note 20, art. 14; *supra* text accompanying notes 11-50 (describing effects of E.C. Directive 93/98 and H.R. 989).

⁹⁸ See Berne Convention, *supra* note 3, art. 7(1); TRIPS Agreement, *supra* note 6, art. 9(1).

⁹⁹ See Berne Convention, *supra* note 3, art. 21 and Appendix art. I(2)(a); GUIDE TO THE BERNE CONVENTION, *supra* note 54, at 105, 149-50.

the international market than corresponding goods produced in territories that had succumbed to higher levels of protection. To the extent that overly strong and long forms of protection in developed countries actually triggered the disutilities that economists attribute to anti-competitive practices in general, the benefits accruing to more competitively manufactured products in developing countries would further increase once the learning curve and other built-in disabilities afflicting producers in these countries were overcome.¹⁰⁰

This course of conduct would undoubtedly subject developing countries to new trade pressures attempting to elicit still higher levels of international intellectual property protection. Yet, the hard truth is that such pressures will also generate countervailing demands for further trade concessions to offset the social costs of more intellectual property protection.¹⁰¹ Until it becomes possible to evaluate the costs and benefits of the Uruguay Round as a whole, these demands for greater market access would almost certainly exceed the technical and political capabilities of developed countries to grant them.

For these and other reasons, the current U.S. proposals to prolong the term of copyright protection cannot be justified as an exercise in harmonization. Their justification in terms of cultural policy remains to be assessed.

B. *The Logic of Cultural Policy: More Than Utility, Less Than Natural Law*

According to Professor Ricketson, generally a most ardent and distinguished supporter of authors' rights, "one is hard pressed to find reasoned justifications for the move for longer terms of protection," which culminated internationally in the life plus fifty standard adopted at the Brussels Revision of the Berne Convention in 1948.¹⁰² The explanation lies in the

strong emphasis that has always been placed on the natural property rights of the author in his work. In this respect, ideology has replaced critical inquiry, and has led to a long period of protection . . . becoming enshrined as an absolute value that has

¹⁰⁰ See also Reichman, *Global Competition*, *supra* note 2, at 11 ("A Pro-competitive Strategy for Implementing the TRIPS Agreement").

¹⁰¹ See Reichman, *Universal Minimum Standards*, *supra* note 2, at 382-85 (discussing compensation as the key to future concessions). The end result also depends on the outcome of multilateral negotiations at the Diplomatic Conference on Certain Copyright and Neighboring Rights Questions, Geneva, Switzerland, December 2 to 20, 1996.

¹⁰² Ricketson, *supra* note 80, at 778, 783.

seldom been challenged, except where there have been moves for its further extension.¹⁰³

In practice, a life-plus-fifty standard deviates from both the natural property rights thesis, which argues for perpetual protection on a par with the treatment of tangible property, and from the incentive rationale for copyright protection, which posits that free competition should only be curtailed for the minimum period needed to overcome the public goods problem inherent in intellectual creations generally.¹⁰⁴ Among the various justifications for this standard that have been advanced, the most generally accepted and least controversial is that an author should have the possibility of providing for himself during his own lifetime and then for his immediate dependents.¹⁰⁵ Thereafter, the balance tips in favor of free access to the public domain for later authors who benefit from those who preceded them.¹⁰⁶

In other words, despite the persistent claims of lawmakers, administrators, courts, and commentators that United States copyright law rests on the utilitarian theory of protection, that theory will no more account for all the peculiarities of developed copyright systems (our own included) than natural rights thinking and the protection-of-personality principle still prevalent in Europe:

For example, incentive theory cannot explain the moral rights . . . that prevent even one who has paid to commercialize an author's work from doing so in a manner that could prejudice the author's honor or reputation.¹⁰⁷ Nor will incentive theory adequately explain such paternalistic measures in American copyright law as the right to terminate transfers¹⁰⁸ or even the long period of protection, which enables living authors and their immediate heirs to partake of revenues generated many

¹⁰³ RICKETSON, *supra* note 29, at 323; see also STROWEL, *supra* note 42, at 623-24; CORNISH, *supra* note 55, at 324-25.

¹⁰⁴ See, e.g., Ricketson, *supra* note 80, at 754-56, 763-67; Reichman, *Collapse of the Patent-Copyright Dichotomy*, *supra* note 4, at 485-87; see also William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325 (1989); Wendy J. Gordon, *An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory*, 41 STAN. L. REV. 1343, 1351, 1413-63 (1989).

¹⁰⁵ See, e.g., Ricketson, *supra* note 80, at 761-62 (noting that the 50 year term rests on anecdotal but not scientific evidence); see also Theodore Limberg, *Duration of Copyright Protection*, 103 R.I.D.A. 53, 68-69, 72-77 (1980); Zecharia Chafee, Jr., *Reflections on the Law of Copyright I*, 45 COLUM. L. REV. 503, 507-08 (1945).

¹⁰⁶ See, e.g., Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965 (1990); David Lange, *Recognizing the Public Domain*, 44 LAW & CONTEMP. PROBS. 147 (1981); see also R. Anthony Reese, *Reflections on the Intellectual Commons: Two Perspectives on Copyright Duration and Reversion*, 47 STAN. L. REV. 707, 717-19 (1995) (discussing tensions in Copyright Act of 1976).

¹⁰⁷ See, e.g., 17 U.S.C. § 106(A), as amended by the Visual Artists Rights Act of 1990, Pub. L. 101-650, 104 Stat. 5128 (1990); see also CORNISH, *supra* note 55, at 386-99.

¹⁰⁸ See 17 U.S.C. §§ 203, 304(c) (1994).

years after the creation of their works. The incentive theory of copyright protection thus tends to underestimate the extent to which all states, to varying degrees, have deliberately subordinated efficiency to other cultural policy goals in the market for traditional literary and artistic works.¹⁰⁹

Acknowledging that copyright laws represent cultural policy does not lessen their importance as providers of incentives to create. Indeed, even the possibility such laws afford authors to provide for their heirs and dependents can, in part, be rationalized as an incentive to create.¹¹⁰ Nor does it mean that copyright laws disregard, or should disregard, concerns of economic efficiency.¹¹¹ Rather:

any efficiencies that copyright law produces in the market for literary and artistic works are an integral part of the larger cultural policy this body of law seeks to implement. By the same token, the most fundamental of all the negative economic premises underlying the mature copyright paradigm is that the peculiar mix of cultural and economic policies it implements in the market for artistic works *should not disrupt competition in the general products market as regulated by the mature patent paradigm.*¹¹²

The social costs attributable to the relevant cultural policies remain tolerable only so long as the peculiar and specialized market for literary and artistic productions remains insulated from the general products market, where industrial property laws traditionally tip the balance toward free competition rather than legal incentives to create.¹¹³ It follows that the limits of cultural policy must be taken into account in any effort to expand the rewards and benefits flowing from the exclusive rights that copyright law bestows on authors and artists.¹¹⁴

¹⁰⁹ J.H. Reichman, *Goldstein on Copyright Law: A Realist's Approach to a Technological Age*, 43 STAN. L. REV. 943, 947-48 (1991) (footnotes omitted) [hereinafter Reichman, *Realist's Approach*]; see also CORNISH, *supra* note 55, at 321 (long term of protection generated by "special admiration for aesthetic creativity" and by "moral desire to give creators their due"); Hamilton, *supra* note 85, at 98-109.

¹¹⁰ See e.g., Ricketson, *supra* note 80, at 761.

¹¹¹ See Glynn S. Lunney, Jr., *Reexamining Copyright's Incentives—Access Paradigm*, 49 VAND. L. REV. 483 (1996) (criticizing traditional calculus of economic costs and benefits).

¹¹² Reichman, *Collapse of the Patent-Copyright Dichotomy*, *supra* note 4, at 495.

¹¹³ See, e.g., 17 U.S.C. § 102(b); *Baker v. Selden*, 101 U.S. 99 (1879); *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 151, 156-60 (1989); *Feist*, 499 U.S. 340. For the breakdown of the historical line of demarcation separating artistic from industrial property law, see Reichman, *Collapse of the Patent-Copyright Dichotomy*, *supra* note 4, at 496-512.

¹¹⁴ See, e.g., Reichman, *Realist's Approach*, *supra* note 109, at 34 (stressing that this "need becomes imperative at a time when manufacturers of computer programs and other industrial products increasingly avoid competition by masquerading as providers of cultural goods entitled to copyright protection on a par with literary and artistic works"); see also Reese, *supra* note 106, at 715-47.

Once proposals to extend the term of copyright protection are viewed through the lens of cultural policy, one can reach different conclusions depending on whether the beneficiaries are the authors and artists themselves or merely the publishers and corporate entities that invest in the exploitation and dissemination of cultural goods.¹¹⁵ In this connection, the case for extending the protection of works made for hire appears particularly weak, while the case for extending the basic term of authors' rights as such merits further consideration.

1. Works Made for Hire

Disregarding the rewards to authors and their heirs as the primary beneficiaries of cultural policy, copyright protection also functions as an incentive to publishers, who must overcome the high degree of risk aversion that affects decisions to invest in the dissemination of literary and artistic productions.¹¹⁶ I am not one of those who underestimates either the difficulties of prospecting the public's taste¹¹⁷ or the degree of risk aversion that publishers must overcome. Nor do I believe that the level of investment in cultural industries would remain adequate if publishers were forced to depend solely on natural lead time.¹¹⁸ To the contrary, my studies demonstrate that a contraction of natural lead time, with its attendant risks of market failure,¹¹⁹ afflicts all industries engaged in information technologies and other cutting-edge, innovative pursuits. As a result, I believe that in the twenty-first century new types of intellectual property regimes—rooted in refined liability principles—will be needed to cope with subpatentable innovations of all kinds.¹²⁰

This said, the existing term of protection afforded publishers of works made for hire under domestic law already appears overly

¹¹⁵ See, e.g., *Hearings on H.R. 989*, *supra* note 80, at 316-55 (Statement of Prof. William F. Patry).

¹¹⁶ See, e.g., Ricketson, *supra* note 80, at 756-60.

¹¹⁷ Cf. Edmund W. Kitch, *The Nature and Function of the Patent System*, 20 J.L. & ECON. 265 (1977) (prospecting function of the patent system).

¹¹⁸ But see Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281, 325 (1970) (marshaling no scientifically valid data for the opposite thesis); Lunney, *supra* note 111 (in-depth economic analysis showing that incentive theory justifies only limited copyright protection).

¹¹⁹ See generally Wendy J. Gordon, *Asymmetrical Market Failure and Prisoner's Dilemma in Intellectual Property*, 17 U. DAYTON L. REV. 853, 854-59 (1992) (discussing conditions for market failure in context of intellectual property rights).

¹²⁰ See generally Reichman, *Legal Hybrids*, *supra* note 4; Samuelson et al., *Manifesto*, *supra* note 4, at 2332-65 (predicting cycles of under- and over-protection with regard to computer programs); see also Reichman, *Collapse of the Patent-Copyright Dichotomy*, *supra* note 4, at 512-20; Reichman & Samuelson, *Data Rights*, *supra* note 4, at part V (criticizing exclusive property rights approach to the protection of electronic databases).

long and empirically unjustified when viewed either as the product of a pure incentive rationale or, more generously, through the lens of cultural policy.¹²¹ To be sure, some subject matter categories will be less indulged than others. For example, creators and producers of classical music and other "serious" or high-brow works may require a longer period of time in which to recoup their losses from unsuccessful ventures and to post a profit from those that do succeed.¹²² As regards the great bulk of copyrightable productions, now including computer programs and other electronic information tools, however, the existing term of protection afforded publishers of works made for hire appears too long.¹²³

Evidence further suggests that still longer periods of protection would not elicit significantly greater investment in the copyright industries than already occurs, and would instead simply add to the social costs of monopoly that users of the copyrighted culture must already endure.¹²⁴ To accord more protection without hard evidence that the benefits outweigh the costs would thus amount to an indefensible subsidy at a time when the cause of regulatory reform dictates more, not less, emphasis on competition. Other industries could hardly be blamed for seeking comparable protectionist cushions of their own.

Contrary to the facile predictions of some,¹²⁵ moreover, I believe that protecting corporate productions for ninety-five years could have uncertain, and possibly negative, effects on the long-term balance of trade. True, some domestic publishers whose employee-produced works became subject to the rule of the shorter term in foreign markets might benefit from the longer term at home because application of that rule turns in part on the continued existence of copyright protection in the country of origin.¹²⁶ It remains equally true, however, that most U.S. works made for hire (including computer programs) that are treated as corporate productions rather than as the works of discrete, individual authors and artists in the European Union, whether under copyright or the

¹²¹ See, e.g., CORNISH, *supra* note 55, at 321, 324 (discounting incentive effects of long duration on investment decisions); Ricketson, *supra* note 80, at 763-66 (finding it "hard to believe that publishers and other initial exploiters of works base their present investment decisions on prospects of exploitation that may only arise in the distant future"); Reese, *supra* note 106, at 719-27.

¹²² See, e.g., Puri, *supra* note 80, at 15.

¹²³ See, e.g., *id.* at 17-20 (citing authorities); see also CORNISH, *supra* note 55, at 320-21; Ricketson, *supra* note 80, at 763-69.

¹²⁴ See, e.g., Karjala, *supra* note 77, at 532-33; *supra* note 123.

¹²⁵ See, e.g., *Hearings on H.R. 989*, *supra* note 80, at 205-12 (statement of Ambassador Charlene Barshefsky, Deputy U.S. Trade Representative).

¹²⁶ See *supra* text accompanying notes 53-57.

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neighboring rights laws, would themselves become subject to the E.C. Directive's own rule of the shorter term, based on either a fifty or seventy year duration.¹²⁷

More generally, short-term efforts to rig international intellectual property relations so that they favor a particular country or group of countries run the risk of disfavoring that same country or group of countries in a medium or long-term perspective. Copyright law is like a lottery that produces a winner-take-all sweepstakes award. Unlike other lotteries, however, the copyright paradigm is constructed in such a way that when some authors or artists score lucky strikes it does not necessarily preclude similar strikes by others working in the same creative vein.¹²⁸

No one can predict the public's fancy more than a year or two in advance, if that. While consumers worldwide display unabated appetites for American films, music, and computer programs, there is no reason to doubt that European, and increasingly, Asian and Latin American producers will not periodically mount serious challenges in the future. One has only to recall the prominence of the English musical group known as the Beatles (and of English fashion designs as well) over a period of two decades to rein in the hubris of our present-day cultural exponents. To the extent that longer terms of protection are enacted, they augment the tribute that must be paid to successful foreign creators. They also augment the concomitant risk that foreign firms operating in less protected environments will ultimately become more competitive in the world market than our over-protected domestic contestants.¹²⁹

Indeed, given the tendency toward more rapid exploitation of cultural goods in a digitized universe, a good case can be made for shortening the seventy-five year term of protection already afforded corporate creators, at least with respect to some subject-matter categories.¹³⁰ Efforts to further extend that term in the absence of hard evidence showing that the resulting social benefits

¹²⁷ See *supra* text accompanying notes 18-21, 40-46. However, U.S. film "authors," as defined in E.C. Directive 93/98, *supra* note 7, art. 2, might try to claim at least 95 years of protection in the European Union, in contrast with the life-plus-seventy term afforded E.U. film authors.

¹²⁸ See also Reichman, *Collapse of the Patent-Copyright Dichotomy*, *supra* note 4, at 492-96.

¹²⁹ See also Reichman, *Global Competition*, *supra* note 2. In this connection, it is well to recall that the French delegation to the Paris Convention in 1863 was reviled as traitorous at home because it was thought that they had opened French markets to too much foreign competition. It may well be that the heroes of today's multilateral trade initiatives, especially the TRIPS Agreement, will suffer a similar fate down the road.

¹³⁰ See, e.g., Puri, *supra* note 80, at 17-18; Karjala, *supra* note 77, at 533; see also S.J. Liebowitz, *Copyright Law, Photocopying, and Price Discrimination*, 8 RES. L. & ECON. 189, 198 (1986).

would outweigh the palpable social costs appears to be mere rent-seeking by powerful special interests.¹³¹

2. True Authors and Artists

The drafters of the E.C. Directive claim that their primary motive in adopting a basic term of life plus seventy years for traditional literary and artistic works was the need to reconcile copyright law with the longer lives that authors and artists now expect to lead.¹³² This apparently innocuous declaration has been met with almost uniform skepticism even by those commentators who otherwise congratulate the E.C. Commissioners on the success of their Directive.¹³³ Their derision stems in part from the realization that an extension of an author's own life automatically tends to offset some of the need for longer protection after death.¹³⁴ Mainly, it stems from a nearly unanimous conviction that, despite the lofty position of authors in Continental copyright theory, it is their publishers who would particularly expect to benefit from the lengthened term of protection in practice, as transferees of the authors' copyright interests.¹³⁵

The real motive for the Council's Directive, and the reason it has elicited grudging approval, is that it reconciles the goal of rapidly eliminating trade distortions arising from different levels of protection in the European Union at large without curtailing rights previously acquired under the most deviant domestic laws.¹³⁶ Once Germany, and to a lesser extent, France, had haphazardly moved to longer periods of protection,¹³⁷ the technical ground rules of market integration thus led to an upward harmonization, despite widespread recognition that, on the merits alone, the Ger-

¹³¹ See, e.g., CORNISH, *supra* note 55, at 318, 324-25 (criticizing E.C.'s arguments for term extension, which "cannot justify whatever step pleases interest groups"); see also Jessica Litman, *The Exclusive Right to Read*, 13 CARDOZO ARTS & ENT. L.J. 29 (1994).

¹³² See, e.g., E.C. Directive 93/98, *supra* note 7, preamble, item 5 ("average lifespan in the Community has grown longer, to the point where [the standard] term [of life-plus-50] is no longer sufficient to cover two generations"); von Lewinski, *supra* note 39, at 788-89.

¹³³ See, e.g., von Lewinski, *supra* note 39, at 788-90, 807; Cohen Jehoram, *supra* note 43, at 834-35 ("This argument is far from convincing.")

¹³⁴ See *supra* note 133; CORNISH, *supra* note 55, at 325 (noting possibility that authors may be having children later in life).

¹³⁵ See, e.g., von Lewinski, *supra* note 39, at 788 ("Usually, assignment or transfer of copyright goes to an exploiting enterprise for the entire duration of protection."); see also Ricketson, *supra* note 80, at 768-69; Puri, *supra* note 80, at 17 ("The usual pattern is that the author seldom retains the copyright.")

¹³⁶ See, e.g., E.C. Directive 93/98, *supra* note 7, preamble, items 9, 18; Cohen Jehoram, *supra* note 43, at 834-35 (explaining that choice of 70 years p.m.a. was "justified . . . by the aim of all the harmonizing effort, namely the realization of the internal market"); von Lewinski, *supra* note 39, at 834-36.

¹³⁷ See generally STROWEL, *supra* note 42, at 600-05, 623-27.

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¹³⁸ See, e.g., note 55, at 32.

¹³⁹ See, e.g., but noting that see also Ricketson note 115.

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respect to the proposed additional term of twenty years.¹⁴⁴

This line of investigation presupposes, however, that Congress should deem it advisable to strengthen and further safeguard authors' termination rights in the context of an adjustment to the term of protection. At the least, a technical reexamination of the termination right should be undertaken, with a view to eliminating its weaknesses, and to closing loopholes through which publishers might otherwise capture the extended period of protection.¹⁴⁵

For example, section 203 may already authorize multiple terminations at successive thirty-five year intervals,¹⁴⁶ but no harm would be done if Congress clarified the issue. Errant judicial opinions applying the termination right under existing law also need correction,¹⁴⁷ while the wholesale exemption of derivative works from termination under sections 203 and 304(c) should be reassessed.¹⁴⁸ At present, the derivative rights holder may expect to continue to exploit a derivative work under an initial transfer, without periodically subjecting the payment structure to scrutiny on equitable grounds, even though he or she may not produce a new derivative work once the initial grant has been terminated.¹⁴⁹ Because most derivative rightholders are corporate entities, a failure to reexamine this provision could effectively deny authors, as distinct from publishers, many of the benefits to be expected from prolonging the basic term of protection.

Radical measures to solve this problem are undesirable, however, because it might prove unfair to expose publishers who had invested heavily in derivative works, and who had paid authors handsomely for the privilege, to the full rigors of the termination right.¹⁵⁰ It suffices to oblige the derivative rightholders periodically to renegotiate the rate at which royalties are paid in light of changed circumstances, if any, in return for the grantee's right to pacific enjoyment of the derivative work even during the years that might be added to the existing life-plus-fifty term. In this regard, the treatment of existing derivative works under the restoration of copyright provisions, enacted in connection with the TRIPS Agreement, could be emulated with respect to transfers of the right to

¹⁴⁴ See S. 483/2 *supra* note 1, § 2E (amending 17 U.S.C. § 304 (1994)).

¹⁴⁵ See also Statement of Patry, *supra* note 80.

¹⁴⁶ Professor Karjala, for one, reads the statute this way.

¹⁴⁷ See *Mills Music, Inc. v. Snyder*, 469 U.S. 153 (1985); Howard B. Abrams, *Who's Sorry Now? Termination Rights and the Derivative Works Exception*, 62 U. DET. L. REV. 181 (1985).

¹⁴⁸ See 17 U.S.C. §§ 106(2), 203(a), (b)(1), 304(c) (1994); Reese, *supra* note 106, at 733-35, 740-41.

¹⁴⁹ See 17 U.S.C. § 203(b)(1).

¹⁵⁰ See, e.g., GOLDSTEIN, *supra* note 22, § 4.9.3.2.

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prepare derivative works in general.¹⁵¹

C. *The Limits of Cultural Policy*

If, after further study, Congress opted to combine an extension of the basic life-plus-fifty term, with a strengthened right of termination, as outlined above, it should consider undertaking to clarify the frontier between copyright law and other intellectual property laws, with a view to limiting trade distortions in the general products market. While this opens a topic that this article cannot cover in depth, there are two closely related phenomena that require attention in this regard. One is a short-term need to reinforce the crumbling line of demarcation that historically separated artistic from industrial property, pending the formulation of new approaches to the protection of borderline subject matters that fit imperfectly within the classical patent and copyright paradigms. The other is the long-term need to develop these new approaches, with a view to reducing the pressure on the world's intellectual property systems while increasing the level of investment in routine, unpatentable innovation.¹⁵²

Fortunately, the federal appellate courts have facilitated the first task by reinvestigating the rule of *Baker v. Selden*¹⁵³ as a barrier to copyright protection for functionally dictated matter of all kinds.¹⁵⁴ These issues are poorly understood even among experts, however, and there is always the risk that courts may backslide, especially in cases where they perceive elements of gross misappropriation not otherwise actionable in unfair competition law.¹⁵⁵ In other words, efforts to avoid overprotecting borderline subject matter in copyright law, such as computer programs and commercial

¹⁵¹ See Uruguay Round Agreements Act of 1994, Pub. L. No. 103-465, 108 Stat. 4809 § 514 (amending 17 U.S.C. § 104A(a)(3)).

¹⁵² See generally, Reichman, *Legal Hybrids*, *supra* note 4, at 2500-57; see also Reichman & Samuelson, *Data Rights*, *supra* note 4, at part V ("Recalculating the Balance of Private and Public Interests").

¹⁵³ 101 U.S. 99 (1879).

¹⁵⁴ See, e.g., Reichman, *Realist's Approach*, *supra* note 109, at 970-76; Pamela Samuelson, *Computer Programs, User Interfaces, and Section 102(b) of the Copyright Act of 1976: A Critique of Lotus v. Paperback*, 55 LAW & CONTEMP. PROBS. 311 (1992); see also Jessica Litman, *Copyright and Information Policy*, 55 LAW & CONTEMP. PROBS. 185 (1992).

¹⁵⁵ See, e.g., *Whelan Assoc. Inc. v. Jaslow Dental Lab., Inc.*, 797 F.2d 1222 (3d Cir. 1986), *cert. denied*, 479 U.S. 1031 (1987) (affording broad copyright protection for elements of structure, sequence, and organization in computer programs); Reichman, *Electronic Information Tools*, *supra* note 8, at 455-61; see also Reichman, *Designs and New Technologies*, *supra* note 30, at 81-123 (criticizing use of Lanham Act, Pub. L. No. 100-667, 102 Stat. 3946 § 43(a) (1946) (codified as amended 15 U.S.C. § 1125 (1994 & Supp. II 1996) to protect unpatentable, noncopyrightable industrial designs); Graeme B. Dinwoodie, *Reconceptualizing the Inherent Distinctiveness of Product Design Trade Dress*, 75 N. CAR. L. REV. — (forthcoming).

designs, readily give way over time to countervailing decisions that offset the resulting state of underprotection with a renewed risk of overprotection.¹⁵⁶ History shows, indeed, that any protracted inability to deal with a market failure affecting borderline subject matter that eludes the classical patent and copyright paradigms routinely triggers recurring cycles of over- and underprotection.¹⁵⁷

In this context, the difficulties encountered in formulating a proper regulatory framework for computer programs, industrial designs, integrated circuit designs, and most recently for the contents of databases, do not constitute some isolated, transitory phenomenon, but rather two facets of an ongoing technological revolution affecting electronic information tools, biogenetic information, and other cutting-edge technical pursuits.¹⁵⁸ The problem is that these and other design-dependent forms of unpatentable innovation do not fit within the classical intellectual property paradigms. The further inability of classical trade secret law to protect the applications of scientific know-how most valuable to industry today then tends to generate a progressive contraction of natural lead time under present-day conditions.¹⁵⁹

Without further delving into these complex matters, my point is that unless Congress begins actively to investigate these problems, the odds are high that the winds of overprotection blowing from the European Union—as evidenced by one economically unsound intellectual property Directive after another—will lead to a proliferation of equally ill-conceived legislative initiatives here.¹⁶⁰ This, in turn, could yield cumulative protectionist restraints on both the practice of reverse engineering and the principle of free competition that might irreparably harm the small and medium-sized firms largely responsible for this country's continued technological superiority. To forestall future misadventures of this kind, Congress should begin to investigate the need for a new intellectual property regime that is, for a general purpose innovation law not rooted in the exclusive rights model typical of the patent and copyright paradigms, even as it struggles to perfect these same par-

¹⁵⁶ See, e.g., Samuelson et al., *Manifesto*, *supra* note 4, at 2342-57 (case of computer programs); See, e.g., J.H. Reichman, *Design Protection and the Legislative Agenda*, 55 LAW & CONTEMP. PROBS. 281, 287-90 (1992) (case of industrial designs).

¹⁵⁷ See generally Reichman, *Legal Hybrids*, *supra* note 4, at 2504-19.

¹⁵⁸ See, e.g., Reichman & Samuelson, *Data Rights*, *supra* note 4, at Part II.B. ("Destabilizing Trends in the Information Age").

¹⁵⁹ See generally Reichman, *Legal Hybrids*, *supra* note 4, at 2434-52, 2504-19.

¹⁶⁰ See, e.g., Database Investment and Intellectual Property Antipiracy Act of 1996, H.R. REP. NO. 3531, 104th Cong., 2d Sess. (1996); Reichman & Samuelson, *Data Rights*, *supra* note 4, at III.C. ("The U.S. and International Models" of database protection).

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¹⁶¹ See Reichman & Samuelson, *Data Rights*, *supra* note 4, at Part II.B. ("Destabilizing Trends in the Information Age").

¹⁶² See also Reichman & Samuelson, *Data Rights*, *supra* note 4, at Part II.B. ("Destabilizing Trends in the Information Age").

¹⁶³ See U.S. CONG. H. REP. NO. 3531, 104th Cong., 2d Sess. (1996).

adigms with respect to their traditional objects of protection.¹⁶¹

Any decision to increase the term of copyright protection based on cultural policy should thus trigger a searching investigation into the limits of cultural policy in an Information Age.¹⁶² If this investigation then leads to the elaboration of new protective schemes that can cure market failure without erecting legal barriers to entry, it would ultimately free U.S. innovation law from the grip of unelected foreign bureaucrats who have surrendered to sectoral protectionist demands. This, in turn, could help to ensure that our domestic property law continues to help American innovators to lead the way into a complex technological future, in keeping with the enlightenment spirit of the constitutional mandate to advance science and the useful arts.¹⁶³

IV. SPECIFIC RECOMMENDATIONS

The foregoing analysis suggests that enactment of the pending legislative proposals concerning the duration of copyrights in their present form would be premature and counterproductive. Proposals to lengthen the term of protection for works made for hire seem particularly inopportune, although Congress should give further study to the possibility of prolonging the basic term of life plus fifty years for individual artists and authors.

Whether or not specific action is taken on these proposals, Congress should enact an American version of the rule of the shorter term to limit some of the adverse effects of recent initiatives in the European Union. At the same time, Congress should monitor the evolution of the TRIPS Agreement, with a view to ensuring the continuing compatibility of such a rule with the MFN clause of that Agreement.

If Congress decides to extend the basic term of protection for true literary and artistic creations as a matter of cultural policy, it should take steps to strengthen the author's termination rights under existing law. This is necessary to ensure that authors, rather than publishers, reap the benefits of such a policy. The potential benefits and disadvantages of a "paying public domain" also deserve study. However, the term of protection currently afforded works made for hire should not be further extended, lest U.S. law

¹⁶¹ See Reichman & Samuelson, *Date Rights*, *supra* note 4, at Part V; Reichman, *Legal Hybrids*, *supra* note 4, at 2519-58 (discussing default liability regime for unpatented applications of know-how to industry, especially to information goods).

¹⁶² See also JAMES BOYLE, SHAMANS, SOFTWARE AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY ix-xvi, 1-10 (1996).

¹⁶³ See U.S. CONST. art. I, § 8, cl. 8.

become overly protective in comparison with the relevant foreign laws.

Looking to the future, it seems clear that Congress will have to investigate the limits of cultural policy in at least two dimensions. Pressures for greater American compliance with moral rights will certainly grow, and Congress may wish to consider measures to preserve the domestic cultural heritage as a possible counterweight to demands for exorbitant protection of such rights.

More importantly, Congress should lose no time in investigating the inability of the classical copyright and patent paradigms to adequately protect new technologies that develop through small, incremental improvements in design and know-how, rather than through major inventive steps. Timely action is needed to deal with borderline subject matter that falls into the growing penumbra between these paradigms. Absent such action, ill-considered legislative attempts to further strengthen copyright law or to multiply *sui generis* intellectual property rights could boomerang against some of this country's long-term trade interests, which the pending proposals are nominally supposed to advance.

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