THE DURATION OF COPYRIGHT AND THE LIMITS OF CULTURAL POLICY

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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

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and creators, whose livelihoods and families literally depend on the cultural policies embodied primarily in our domestic copyright law. 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. 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. 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-

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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 work").


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.\footnote{See generally J.H. Reichman, \textit{Electronic Information Tools: The Outer Edge of World Intellectual Property Law}, 24 INT'L. REV. OF INDUS. PROP. & COPYRIGHT [L.L.C.] 446 (1995) (hereinafter Reichman, \textit{Electronic Information Tools}).}

II. \textbf{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,\footnote{See H.R. 989, supra note 1, at 2.} as triggered by the European Communities' ("E.C." and "E.C.'s") Directive to this effect,\footnote{See E.C. Directive 93/98, supra note 7, art. 1(1).} is not mandated by the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS Agreement"), as finalized in 1994.\footnote{See TRIPS Agreement, supra note 6, arts. 9-14.} The specific requirements of this agreement are reviewed below.

A. \textit{General Impact of the TRIPS Agreement}

The TRIPS Agreement required all members of the World Trade Organization ("WTO")\footnote{See WTO Agreement, supra note 6, arts. 11, 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.\footnote{See TRIPS Agreement, supra note 6, art. 9(1) (not applicable to moral rights under Berne Convention, supra note 3, art. 6bis); Reichman, \textit{Universal Minimum Standards, supra note 2, at 366-67.}} The Berne Convention establishes a basic term of life plus fifty years.\footnote{See Berne Convention, supra note 3, art. 7(1).} 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.\footnote{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.)} The TRIPS Agreement further required WTO member states: to protect computer programs and qualifying compilations for at least fifty years from publication;\footnote{See TRIPS Agreement, supra note 6, arts. 10(1), (2), 12 (applying life plus 50 year 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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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").\textsuperscript{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.\textsuperscript{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.\textsuperscript{22} It also largely restored the rights of foreign (but not na-
tional) copyright owners, including producers of sound recordings, whose copyrights had been technically forfeited under specified conditions.

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 Agreement and thus subjected to the WTO’s dispute-settlement machinery, 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. For example, the United States now protects architectural works. It does not avail itself of the right to limit the terms of protection afforded photographers and the producers of cinematographic works to twenty-five and fifty years, respectively. Moreover, the treatment of applied art in do-


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”).


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...
mestic copyright law exceeds the twenty-five year minimum that the Berne Convention tolerates, 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. However, the United States design patent law may not fully comply with the TRIPS provisions concerning the protection of industrial designs as such.

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 automatic and restoring foreign copyrights that had suffered technical forfeiture. 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. 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. 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.


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].


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).


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.

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.

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.

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. 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.

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. On the whole, other Berne Union countries tend to relegate many creations of corporate entities to neighboring rights laws covered by the Rome Convention, 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. However, these tensions with American law were not considered a major irritant even in the 1980s, and recent ten-

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38 See Berne Convention, supra note 3, at 6(b)(2); Ricketson, supra note 29, at 473-75.  
40 See Berne Convention, supra note 3, at 15(3); 17 U.S.C. §§ 201(b), 302(b), 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 ownership 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.  
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-

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\(^{45}\) 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 95/98, 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 95/98. See supra note 29.

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(8) (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.\textsuperscript{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,\textsuperscript{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."\textsuperscript{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.\textsuperscript{58}

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

\textsuperscript{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.

\textsuperscript{56} See Berne Convention, supra note 3, art. 5(1).

\textsuperscript{57} von Lewinski, supra note 39, at 803.

\textsuperscript{58} See supra note 15 and accompanying text.

\textsuperscript{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."


\textsuperscript{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
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, as might every bilateral (or even multilateral) arrangement in which one WTO member state affords a better "intellectual property" deal to another member state without making that same deal available to the membership as a whole. Even if the Berne Union’s comparison of terms clause were rescued by express exceptions to article 4 of the TRIPS Agreement, 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.

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. While it remains uncertain whether all of the relevant provisions will mesh

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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 548-49.
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.


67 See Reichman, Universal Minimum Standards, supra note 2, at 548-51.
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 effect 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. 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. 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 Agreement.

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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 1A, 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
and outside the residual national treatment clauses of the Paris and Berne Conventions.\footnote{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 TRIMESTRE DE DROIT COMMERCIAL 629, 641 (1994).}

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.\footnote{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).}

Nevertheless, the drafters of the TRIPS Agreement may themselves have been motivated by unresolved conflicts concerning the application of article 4,\footnote{See, e.g., Fikentscher, supra note 61, at 140 n.2 (reporting differences between representatives of the European Community, the United States, and Switzerland).} and the extent to which prior respect for regional arrangements in GATT practice will be carried over to intellectual property cannot accurately be foretold.\footnote{See H.R. 989 and S. 485/2, supra note 1.} 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.\footnote{See Cornish, supra note 55, at 357; Cohen Jehoram, supra note 43, at 826-27.}
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, 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.

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.”

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. 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.

79 von Lewinski, supra note 39, at 803.
81 See supra note 1.
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 Marcia A. Hamilton, Appropriation Art and the Imminent Decline in Authorial Control Over Copyrighted Works, 42 J. COPYRIGHT SOC'y 95, 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.  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.  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.

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 bills would only compound pre-existing differences and destabilize the degree of harmonization already underway in the context of U.S.-E.U. copyright relations.

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.  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.  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).

Moreover, developing countries already struggling to defray

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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 917-21, 924-25 (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).
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, 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.

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). 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, 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. 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 95/98 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 II ("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-fivey 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 transfers 108 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.
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 Limpberg, 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. 505, 507-08 (1945).
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.\footnote{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.\footnote{110} Nor does it mean that copyright laws disregard, or should disregard, concerns of economic efficiency.\footnote{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.\footnote{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.\footnote{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.\footnote{114}

\footnote{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.

\footnote{110} See e.g., Rickeston, supra note 80, at 761.


\footnote{112} Reichman, Collapse of the Patent-Copyright Dichotomy, supra note 4, at 495.

\footnote{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.

\footnote{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. 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. I am not one of those who underestimates either the difficulties of prospecting the public's taste 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. To the contrary, my studies demonstrate that a contraction of natural lead time, with its attendant risks of market failure, 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.

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

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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., Rickerson, supra note 80, at 756-60.


118 But see Stephen Breyer, The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs, 84 HARV. L. REV. 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).


120 See generally Reichman, Legal Hybrids, supra note 4; Samuelson et al., Manifesto, supra note 4, at 2392-65 (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. 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. 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.

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. 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, 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. 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); Rickerson, supra note 80, at 765-66 (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; Rickerson, supra note 80, at 763-69.

124 See, e.g., Karjala, supra note 77, at 592-93; supra note 128.

125 See, e.g., Hearings on H.R. 989, supra note 80, at 203-12 (statement of Ambassador Charlene Barshesky, Deputy U.S. Trade Representative).

126 See supra text accompanying notes 53-57.
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.\footnote{See supra text accompanying notes 18-21, 40-46. However, U.S. film "authors," as
defined in E.C. Directive 95/98, 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.}

More generally, short-term efforts to rig international intellec-
tual 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. Copy-
right law is like a lottery that produces a winner-take-all sweep-
stakes 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.\footnote{See also Reichman, \textit{Collapse of the Patent-Copyright Dichotomy}, supra note 4, at 492-96.}

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 aug-
ment the concomitant risk that foreign firms operating in less pro-
tected environments will ultimately become more competitive in
the world market than our over-protected domestic contestans.\footnote{See also Reichman, \textit{Global Competition}, supra note 2. In this connection, it is well to recall that the French delegation to the Paris Convention in 1883 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, espe-
cially the TRIPS Agreement, will suffer a similar fate down the road.}

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 af-
forded corporate creators, at least with respect to some subject-
matter categories.\footnote{See, e.g., Puri, supra note 80, at 17-18; Kajala, supra note 77, at 533; see also S.J.
Liebowitz, \textit{Copyright Law, Photocopying, and Price Discrimination}, 8 Res. L. & Econ. 189, 198
(1986).} Efforts to further extend that term in the ab-
sence of hard evidence showing that the resulting social benefits
would outweigh the palpable social costs appears to be mere rent-seeking by powerful special interests.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{136} Once Germany, and to a lesser extent, France, had haphazardly moved to longer periods of protection,\textsuperscript{137} the technical ground rules of market integration thus led to an upward harmonization, despite widespread recognition that, on the merits alone, the Ger-

\textsuperscript{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).

\textsuperscript{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.

\textsuperscript{133} See, e.g., von Lewinski, supra note 39, at 788-90, 807; Cohen Jehoram, supra note 49, at 854-55 (“This argument is far from convincing.”).

\textsuperscript{134} See supra note 133; Cornish, supra note 55, at 325 (noting possibility that authors may be having children later in life).

\textsuperscript{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 Rickeson, supra note 80, at 768-69; Furi, supra note 80, at 17 (“The usual pattern is that the author seldom retains the copyright.”).

\textsuperscript{136} See, e.g., E.C. Directive 93/98, supra note 7, preamble, items 9, 18; Cohen Jehoram, supra note 43, at 854-55 (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 854-56.

\textsuperscript{137} See generally Strowel, supra note 42, at 600-05, 623-27.
man and French leads were examples of what not to do. Indeed, a more enlightened view might have installed an additional twenty-year *domaine public payant*, during which period users might have enjoyed free access to works that had otherwise entered the public domain on condition that they paid equitable compensation directly to authors, but not to publishers. Needless to say, the publishers’ lobby defeated this sensible proposal and beat back a last minute push to retain the life-plus-fifty formula as well.

Given this background, Congress might plausibly reach the same conclusion, on this specific question, as the drafters of the E.C. Directive did, with less contorted reasoning. The claim that the existing term accounts inadequately for the greater longevity of authors and their heirs under present-day conditions often rings true, even though the magnitude of the problem is held in check by the possibility that the original author’s own longer lifespan will reduce the burden on his or her dependents. We see this often in Nashville, where families literally depend on royalties from country music that continues to be exploited long after the composer’s or lyricist’s death. The prospect that people in no way connected with the creation or promotion of such works might continue to exploit them without payment to the authors’ direct heirs raises concerns of fairness and equity that are properly viewed as a matter of cultural policy.

Under the Copyright Act of 1976, moreover, authors and their dependents expressly retain the right to terminate at least one transfer of their exclusive rights, and possibly others after thirty-five years from the date such grants were made. To the extent that domestic law otherwise inhibits publishers from circumventing this termination right, the chances that a lengthened basic term of protection would actually benefit authors, artists, and their immediate families, rather than publishers, are higher in the United States than in Europe. This makes such a proposal worthy of further study as a matter of cultural policy, and the latest legislative proposal takes a small step in this direction by subjecting some copyrighted works still in their renewal term to a termination right with

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139 See, e.g., von Lewinski, *supra* note 39, at 789-90, 790 n.23 (approving this proposal, but noting that the Commission’s earlier proposal to this effect in 1980 had been rejected); *see also* Ricketsen, *supra* note 80, at 784 (endorsing this scheme); Statement of Paity, *supra* note 115.
140 See, e.g., Cornish, *supra* note 55, at 924-25.
142 See 17 U.S.C. §§ 203, 304(c) (1994). For simplicity, only § 203 is considered here.
143 See, e.g., Reese, *supra* note 106, at 792-95.
respect to the proposed additional term of twenty years.\textsuperscript{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.\textsuperscript{145}

For example, section 203 may already authorize multiple terminations at successive thirty-five year intervals,\textsuperscript{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,\textsuperscript{147} while the wholesale exemption of derivative works from termination under sections 203 and 304(c) should be reassessed.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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

\textsuperscript{144} See S. 483/2 supra note 1, § 2E (amending 17 U.S.C. § 904 (1994)).
\textsuperscript{145} See also Statement of Pairy, supra note 80.
\textsuperscript{146} Professor Kartala, for one, reads the statute this way.
\textsuperscript{148} See 17 U.S.C. §§ 106(2), 203(a), (b) (1), 304(c) (1994); Reese, supra note 106, at 733-35, 740-41.
\textsuperscript{149} See 17 U.S.C. § 203(b)(1).
\textsuperscript{150} See, e.g., Goldstein, supra note 22, § 4.9.3.2.
prepare derivative works in general.  

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.  

Fortunately, the federal appellate courts have facilitated the first task by reinvigorating the rule of Baker v. Selden as a barrier to copyright protection for functionally dictated matter of all kinds. 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. In other words, efforts to avoid overprotecting borderline subject matter in copyright law, such as computer programs and commercial

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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).
designs, readily give way over time to countervailing decisions that offset the resulting state of underprotection with a renewed risk of overprotection.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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-

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\textsuperscript{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).
\textsuperscript{157} See generally Reichman, Legal Hybrids, supra note 4, at 2504-19.
\textsuperscript{158} See, e.g., Reichman & Samuelson, Data Rights, supra note 4, at Part II.B. ("Destabilizing Trends in the Information Age").
\textsuperscript{159} See generally Reichman, Legal Hybrids, supra note 4, at 2434-52, 2504-19.
\end{flushright}
adigns with respect to their traditional objects of protection.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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

\textsuperscript{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).

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

\textsuperscript{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 pre-
serve the domestic cultural heritage as a possible counterweight to
demands for exorbitant protection of such rights.

More importantly, Congress should lose no time in investigat-
ing 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 penum-
bra between these paradigms. Absent such action, ill-considered
legislative attempts to further strengthen copyright law or to multi-
ply 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.