

A STUDY ON THE TERM OF COPYRIGHT PROTECTION

By

Byoung-il Oh

THESIS

Submitted to
KDI School of Public Policy and Management
in partial fulfillment of the requirements
for the degree of

MASTER OF PUBLIC POLICY

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Supervisor Jong-il You _____

ABSTRACT

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The term of copyright protection is the duration during which exclusive rights of authors are protected, and after which copyrighted materials become parts of public domain that anyone can access to and use freely for commercial or non-commercial purposes.

The goal of copyright is not to protect authors, but to promote cultural development of the society. The goal of copyright can be achieved through the balance between private interest of authors and public interest, i.e effective use of creative works. To limit the terms of copyright protection is a very important means for the purpose. The economically optimal copyright term is where marginal benefit just equals marginal cost.

The Berne Convention is an international agreement about copyright, which provide the life of the author and fifty years after his death as the term of protection. EU adopted 'the Directive on harmonizing the term of copyright protection' in 1993, which provides the term of 70 years after the death of the author. In U.S., the Copyright Term Extension Act of 1998(CTEA), which is alternatively known as the Sonny Bono Copyright Term Extension Act, extended copyright terms in the United States by 20 years, from the life of the author plus 50 years to 70 years, As for works for hire, 95 and 120 years respectively.

'Harmonization with European law' is the most important ground of CTEA. Supporters of CTEA argue that harmonization with the law of trading partner is very important for a trade balance. The purpose of CTEA is said to be to ensure adequate

copyright protection for American works in foreign nations and the continued economic benefits of a healthy surplus balance of trade in the exploitation of copyrighted works. Moreover, Supporters argue that the life-plus-50 term is not sufficient considering the effect of demographic trends, such as the increasing life-span of the average American and the trend toward rearing children later in life. They also argue that the additional potential revenue stream will act as an incentive and encourage the production of additional creative works.

On the contrary, Opponents argue that one of the costs of an extended copyright protection term is the economic transfer payment to copyright owners during the period of the extension from consumers or other producers who would otherwise have free use of works. Another cost of an extended copyright protection term is the cost to the public of works that are not produced because of the diminished public domain, because the creation of new works is dependent on a rich and vibrant public domain.

However, the real problem for policy-makers is that the debate about the costs and benefits of term extension is devoid of any reliable quantitative support. But, we can estimate economical life span of works through renewal registration process when author estimates value and cost of his work. According to empirical analysis of Lands

and Posner, the commercial life of the average copyrighted work was much lower than the statutory term of copyright. And average life span of works vary according to different category of works.

Most big problem of copyright system at present is to deal with all works equally regardless of economic value of works and various intentions of authors. To solve this problem, we should consider the introduction of registration and renewal system, as well as shorter term.

It's not easy task to introduce registration system and reduce the term of protection, because it requires the change of international treaties and national copyright law. However, now we have to start a discussion on the alternative system of copyright.

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TABLE OF CONTENTS

I. INTRODUCTION.....	1
1. THE PURPOSE AND MEANING OF THE STUDY.....	1
2. THE SCOPE AND METHOD OF THE STUDY.....	4
II. THE HISTORY AND THE PRESENT SITUATION OF THE TERM OF COPYRIGHT PROTECTION.....	5
1. COPYRIGHT AND THE TERM OF COPYRIGHT PROTECTION.....	5
2. ECONOMICS OF COPYRIGHT.....	8
3. BIRTH OF MODERN COPYRIGHT AND THE TERM OF COPYRIGHT PROTECTION.....	11
4. THE TERM OF COPYRIGHT PROTECTION IN THE INTERNATIONAL TREATIES.....	12
5. THE EXTENSION OF THE TERM OF COPYRIGHT PROTECTION..	16
(1) EU.....	16
(2) U.S.....	18
6. THE TERM OF COPYRIGHT PROTECTION IN EACH COUNTRIES	21
III. THE DEBATE ON THE EXTENSION OF THE TERM OF PROTECTION.....	24
1. ARGUMENTS FOR THE EXTENSION OF THE TERM.....	25
(1) Harmonization with European law.....	25
(2) Increasing life-span.....	29
(3) Incentives for the Creation of Works.....	31
2. ARGUMENTS AGAINST THE EXTENSION OF THE TERM.....	34
(1) Economic Costs and Transfer.....	34
(2) Cost of Diminished Public Domain.....	35

IV. THE EXPECTED SPAN OF LIFE OF WORKS AND THE TERM OF PROTECTION.....	38
1. COPYRIGHT REGISTRATION AND RENEWALS	41
2. DEPRECIATION AND THE ECONOMIC LIFE OF COPYRIGHTS	44
3. DEPRECIATION RATES FOR BOOKS, GRAPHIC ARTS, AND MUSIC	47
V. STUDY ON THE ALTERNATIVE SYSTEM OF COPYRIGHT.....	53
1. MORE FORMALITIES.....	54
2. SHORTER TERMS	57
3. CONSIDERATION OF THE CHARACTERISTICS OF WORKS	58
4. FREE LICENSE SYSTEM.....	59
VI. CONCLUSION AND RECOMMENDATION.....	61
BIBLIOGRAPHY	63

LIST OF FIGURES

Figure 1 The Optimal Copyright Term.....	11
Figure 2 Copyright Registrations (Excluding Renewals).....	41
Figure 3 Renewals in Year T	42
Figure 4 Ratio of Renewals in T to Registration in T-28.....	43
Figure 5 Annual Depreciation of Registered Copyrights	45
Figure 6 Registration of All Copyrights, Books, Music, and Graphic Arts....	48
Figure 7 Separate Registrations for Books, Music, and Graphic Arts.....	49
Figure 8 The Ratio of Renewals in T to Registrations in T-28.....	50
Figure 9 Depreciation in T of Registrations in T-28.....	50

I. INTRODUCTION

1. THE PURPOSE AND MEANING OF THE STUDY

The goal of copyright is to promote cultural development of the society by means of the balance between the protection of authors and the exploitation of works. For the purpose, copyright law grants exclusive right to authors of cultural and artistic works to induce and compensate for their creation. At the same time, it restricts exclusive right under some conditions for the effective use of knowledge. One of the two main methods to restrict exclusive right is to protect the right only for a limited period of time, and the other is fair use that allows limited use of copyrighted material without requiring permission from the right holders. After some period of time, the copyrighted materials become parts of public domain that anyone can access to and use freely for commercial or non-commercial purposes.

Intellectual works protected by copyright law have different characteristics from corporeal entity that is the object of property right. Most of all creative works owe to

other creative works in the sense that new creative works are produced through mixing, transforming and exploitation of other works. The creation could be promoted not only by granting exclusive rights to authors, but also by furthering the exploitation of works. Moreover, intellectual works remains to me even after they were copied and transferred to others unlike corporeal entity. So, the more intellectual works are copied, transferred and re-used, the more overall social values are increased.

The goal of copyright can be achieved through the balance between private interest of authors and public interest, i.e effective use of creative works. To limit the terms of copyright protection is a very important means for the purpose. Therefore, it's very important to protect copyright for the reasonable period of time for copyright to achieve its goal.

Then, is present term of protection reasonable? The term of protection in Korea is 'life of the author plus 50 years' according to the Berne Convention, international treaty related to copyright. In EU and U.S., the term of protection was extended to 'life of the author plus 70 years'. The statute of Ann, which was the first, modern copyright law in the United Kingdom in 1709, limited the terms of protection to 28

years. After the statute of Ann, the term of protection had been extended several times.

There was little debate on the term of protection in Korea, because copyright law of Korea had been subject to external condition such as trade pressure of U.S. or reflection of international treaties. In the case of U.S., There was hot debate between pros and cons on ‘Sonny Bono Copyright Term Extension Act’ of 1998. However, there is no answer yet whether how long period of time is reasonable for the term of copyright protection. There are just conflicting opinions according to interest of each party, i.e copyright holders and users or civil society groups.

It seems almost impossible to reduce the terms of protection on our own in Korea, because of international treaties that we are member of. On the contrary, we can expect the term of protection will be expended to ‘life of the author plus 70 years’ as a result of Korea-U.S. FTA. Nevertheless, if we don’t want to be bossed by external condition in the future, it will be meaningful to begin the study on the meaning of the term of protection and what is the reasonable term for us.

2. THE SCOPE AND METHOD OF THE STUDY

To estimate whether the term of copyright protection is reasonable or not, first, I investigated the history and the meaning of the term of copyright protection in chapter II. And then, I presented situation of the term of protection in the international treaties and each countries.

Then, I will examine the debate on the extension of the term of protection in U.S. in chapter III, which will show various perspectives on the impact of the term of protection to the development of culture. In the next place, I investigated the expected span of life of various works like music, movie and novel in chapter IV, which can be the important data to judge the reasonability of present term of protection.

Under the examination above, I examined what is the proper copyright policy about the term of protection in chapter V.

For the study, I investigated books, papers, legal cases and related material on copyright and the term of protection written inside and outside of the country.

II. THE HISTORY AND THE PRESENT SITUATION OF THE TERM OF COPYRIGHT PROTECTION

1. COPYRIGHT AND THE TERM OF COPYRIGHT PROTECTION

Copyright is a set of exclusive rights regulating the use of a particular expression of an idea or information. Copyright grants to authors exclusive rights to prohibit reproduction, public performance, broadcasting, exhibition, distribution, the production of derivative works etc, of their works without permission, and infringement of moral rights.¹

Intellectual works protected by copyright law have different characteristics from corporeal entity that is the object of property right. First, much time, effort, and cost are required to create intellectual works. Second, other person can reproduce the works with much less time, effort, and cost than authors. Third, the use by one person does not prohibit another person also using the same works.²

¹ Seung Jong, Oh & Hae wan, Lee, Copyright Law, pakyoungsa, 2005, p. 3

² Id., p. 9

Because of these characteristics of intellectual works, the incentives to create new works will be diminished if exclusive rights are not granted to authors to exclude free-riders.

However, most of all creative works owe to other creative works in the sense that new creative works are produced through mixing, transforming and exploitation of other works. Intellectual heritage of the world is a base for the creation of new works today. Therefore, it is fair and reasonable to place a limit on the exclusive rights of authors. For the purpose, copyright has several means to limit the exclusive rights of authors, such as fair use³, compulsory license⁴, and the term of copyright protection.⁵

The term of copyright protection is the duration during which exclusive rights of authors are protected, and after which copyrighted materials become parts of public domain that anyone can access to and use freely for commercial or non-commercial

³ Fair use or fair dealing is to allow limited use of copyrighted material without requiring permission from the right holders. Copyright act of Korea embodies fair use by the provision of 'LIMITATIONS TO AUTHORS' PROPERTY RIGHTS' (Section 6 of copyright act of Korea), which include private copying for personal use or limited use for public purposes like research, criticism, news report etc.

⁴ A compulsory license is an exception to copyright, pursuant to which another party can exercise one or more of the copyright's exclusive rights without having to obtain the copyright holder's permission but will have to pay a licensing fee. Compulsory licenses are often justified as a governmental correction to market failure.

<http://en.wikipedia.org/wiki/Copyright>

⁵ Seung Jong, Oh & Hae wan, Lee, op.cit. , p. 12

purposes.⁶

The goal of copyright is not to protect authors, but to promote cultural development of the society. To protect authors is merely a tool for the purpose. The goal of copyright can be achieved through the balance between private interest of authors and public interest, i.e effective use of creative works.⁷ To limit the terms of copyright protection is a very important means for the purpose. Therefore, it's very important to establish the reasonable period of time for the copyright protection.

There can be various interpretations on the term of copyright protection according to copyright theories. According to 'natural right' theory, creative works are the products of personality as well as intellectual labor of authors. From the point of view, it can be asserted that the term of protection should be perpetual.⁸ On the other hand, 'encouragement theory' understands copyright as a tool to give economic incentives to authors necessary to create new works. According to encouragement theory, the appropriate term of protection is the duration at which benefits and costs

⁶ Id., p. 385

⁷ The copyright act of Korea also states it clearly in the article 1 (Purpose). "The purpose of this Act is to protect the rights of authors and the rights neighboring on them and to promote fair use of works in order to contribute to the improvement and development of culture."

⁸ Young Rok, Lee, A Study on the Constitutional Limits of the Term of Copyright Protection - Extension of the Term of Protection in U.S. and its Impact on Copyright Law of Korea, 2004, p. 9

of society are balanced.⁹ However, the copyright acts of modern societies are very similar, and have the limited term of protection, though the lengths are different depending on the nature of the works and different jurisdictions.

2. ECONOMICS OF COPYRIGHT

As said in the encouragement theory, we can understand copyright from the economic point of view as an economic tool that is designed to maximize efficiency.¹⁰

Creative product tend to have public good characteristics in that consumption by one person does not prohibit another person also using the same product (ie, the product is non-rivalrous), and people cannot easily be stopped from consuming the product (ie, the product is non-excludable). As a result, markets for these products tend to fail because once the products are produced it is difficult to prevent those who do not pay for them from consuming them.¹¹ Copyright is the tool for government to solve this market failure by protecting property rights of authors.

⁹ Id., p. 12

¹⁰ The Allen Consulting Group, Copyright Term Extension : Australian Benefits and Costs, 2003, p. 7

¹¹ Id., p. 7

However, copyright is different from property right of tangible property. Creative works don't evoke 'the tragedy of the commons' that is the basis for perpetual rights in tangible property. The tragedy of the commons is that failure to recognize perpetual and transferable property rights in tangible property leads inevitably to 'overgrazing', as soon as the item of property enters the public domain from which everyone may draw freely. Recognition of perpetual property rights leads to economic efficiency, because a rational owner will optimize the balance between present and future consumption.¹² However, there can be no overgrazing of creative works. If works would be created in optimal numbers without the incentive of copyright, economic theory tells us that the period of protection should be zero.¹³

Copyright grant monopoly right to authors as an incentive to create works, but the duration of monopoly should be limited. To grant perpetual property right for creative works results in economic inefficiency.

Then, how can we explain economically optimal copyright term? The manner in which these costs and benefits are affected by time can be explained in this

¹² Karjala Dennis S. , STATEMENT OF COPYRIGHT AND INTELLECTUAL PROPERTY LAW PROFESSORS IN OPPOSITION TO H.R. 604, H.R. 2589, AND S. 505 "THE COPYRIGHT TERM EXTENSION ACT" Submitted to the Committees on the Judiciary of United States Senate & United States House of Representative, January 28, 1998, p. 9

¹³ Id., p. 9

manner:¹⁴

- The marginal social benefit of increasing the copyright term is likely to decline with term length -- there are several reasons for this:
 - Most creators have a declining marginal utility for money, they receive less utility from each additional extension of the copyright term. As a result, term extensions have a diminishing positive impact on creation incentives;
 - Prospective creators discount future economic return to present value, the more temporally distant the return the less its marginal effect on *ex ante* incentives;
- There are costs to increasing the copyright term, including the cost of tracing copyrighted works (ie, the costs associated with ensuring that the creation and/or use of a property do not infringe someone else's legitimate property rights), which tend to increase as works get older.

¹⁴ The Allen Consulting Group, op. cit., p. 8

THE OPTIMAL COPYRIGHT TERM

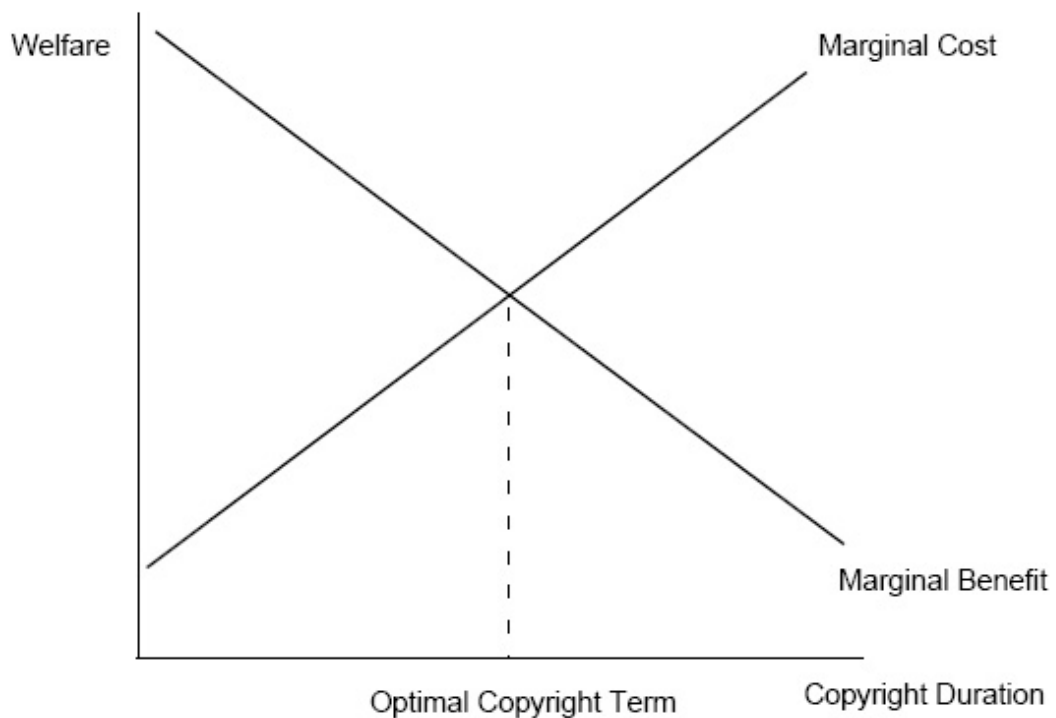


Figure 1 The Optimal Copyright Term¹⁵

The optimal copyright term is where marginal benefit just equals marginal cost. Then, how we can identify objectively this optimal term?

3. BIRTH OF MODERN COPYRIGHT AND THE TERM OF COPYRIGHT PROTECTION

The Statute of Anne¹⁶ is the first copyright law, which was enacted on January 11, 1709 and entering into force on April 10, 1710 in the United Kingdom. The statute

¹⁵ Id., p. 9

¹⁶ The long title of the statute of Anne is "An Act for the Encouragement of Learning, by vesting the Copies of Printed Books in the Authors or purchasers of such Copies, during the Times therein mentioned".

vests authors rather than printers with the monopoly on the reproduction of their works.¹⁷

It created a 21 years term for all works already in print at the time of its enactment instead of perpetual term. For the works published subsequently, it provided for an initial term of 14 years plus a renewal term of the same length, provided the author was still living at the end of the initial term.¹⁸

Each country has its own copyright law, which has different history and characteristics. As for the term of protection, it had been extended continuously in the most of countries. In general, the period of duration continues some time after the death of the author.¹⁹

4. THE TERM OF COPYRIGHT PROTECTION IN THE INTERNATIONAL TREATIES

The Berne Convention for the Protection of Literary and Artistic Works, usually known as the Berne Convention, is an international agreement about copyright, which was first adopted in Berne, Switzerland in 1886. Before the Berne Convention, works published in one country couldn't be protected in other countries, eg could be

¹⁷ Seung Jong, Oh & Hae wan, Lee, op.cit. , p. 14

¹⁸ Young Rok, Lee, op.cit., p. 20

¹⁹ Id., p. 22

copied and sold by anyone.

The term of protection granted by the Berne Convention is the life of the author and fifty years after his death²⁰. (Article 7(1)) However, in the case of cinematographic works and anonymous or pseudonymous works, the term of protection shall expire fifty years after the work has been lawfully made available to the public.

²⁰ COPYRIGHT DURATION IN THE BERNE CONVENTION, ARTICLE 7

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

(2) However, in the case of cinematographic works, the countries of the Union may provide that the term of protection shall expire fifty years after the work has been made available to the public with the consent of the author, or, failing such an event within fifty years from the making of such a work, fifty years after the making.

(3) In the case of anonymous or pseudonymous works, the term of protection granted by this Convention shall expire fifty years after the work has been lawfully made available to the public. However, when the pseudonym adopted by the author leaves no doubt as to his identity, the term of protection shall be that provided in paragraph (1). If the author of an anonymous or pseudonymous work discloses his identity during the above-mentioned period, the term of protection applicable shall be that provided in paragraph (1). The countries of the Union shall not be required to protect anonymous or pseudonymous works in respect of which it is reasonable to presume that their author has been dead for fifty years.

(4) It shall be a matter for legislation in the countries of the Union to determine the term of protection of photographic works and that of works of applied art in so far as they are protected as artistic works; however, this term shall last at least until the end of a period of twenty-five years from the making of such a work.

(5) The term of protection subsequent to the death of the author and the terms provided by paragraphs (2), (3) and (4), shall run from the date of death or of the event referred to in those paragraphs, but such terms shall always be deemed to begin on the 1st of January of the year following the death or such event.”

(6) The countries of the Union may grant a term of protection in excess of those provided by the preceding paragraphs.

(7) Those countries of the Union bound by the Rome Act of this Convention, which grant, in their national legislation in force at the time of signature of the present Act, shorter terms of protection than those provided for in the preceding paragraphs, shall have the right to maintain such terms when ratifying or acceding to the present Act.

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

Berne Convention For The Protection Of Literary And Artistic Works (Paris Text 1971)
<http://www.law-ref.org/BERN/article7.html>

The term of protection which was some period of author's life, was changed to author's life plus some time after his death by the Berne Convention. This change was claimed by some of members of the Berne Convention. However, there was not clear theoretical ground for such change.²¹ At the time when the Berne Convention was adopted in Berne, Switzerland in 1886, the minimum term of protection was not provided in the text because there was no consensus between member countries which provided different terms of protection. After that, they could reach an agreement on the term of the life of the author and fifty years after his death in the Berlin revision in 1908.²²

The Guide to the Berne Convention published by WIPO, World Intellectual Property Organization, explain the why such term of protection was chosen like this: It is not merely by chance that fifty years was chosen. Most countries have felt it fair and right that the average lifetime of an author and his direct descendants should be covered, i.e., three generations.²³ However, this can't be proper ground for whether the term of protection is appropriate, but just an explanation that most of countries agreed on the proposal.²⁴

²¹ Young Lok, Lee, op.cit., p. 6

²² Id., p. 27

²³ Senate Report NO. 104-315 - COPYRIGHT TERM EXTENSION ACT OF 1996, p. 10
[http://thomas.loc.gov/cgi-bin/cpquery/R?cp104:FLD010:@1\(sr315\)](http://thomas.loc.gov/cgi-bin/cpquery/R?cp104:FLD010:@1(sr315))

²⁴ Young Lok, Lee, op.cit., p. 28

The Berne Convention also allows countries to provide for protection longer than the defaults.²⁵²⁶ The provision we have to pay attention to is 'the rule of the shorter term', which is provided in Article 7(8). By this provision, the term shall not exceed the term fixed in the country of origin of the work, unless the legislation of that country otherwise provides. For example, if the term of protection of EU is 70 years after author's death and that of U.S. is 50 years after author's death, works published in U.S. can't enjoy the term of 70 years after author's death in EU. This provision incites each country to compete for extending the term of protection.

This international standard is also now applicable to the members of the World Trade Organization through the implementation of 'the Agreement on the Trade Related Aspects of Intellectual Property Rights (TRIPs)'.²⁷

²⁵ The Allen Consulting Group, op. cit., p. 3

²⁶ Article 7(6) (6) The countries of the Union may grant a term of protection in excess of those provided by the preceding paragraphs.

Article 19 The provisions of the Convention shall not preclude the making of a claim to the benefit of any greater protection which may be granted by legislation in a country of the Union

Article 20 The Governments of the countries of the Union reserve the right to enter into special agreements among themselves, in so far as such agreements grant to authors more extensive rights than those granted by the Convention, or contain other provisions not contrary to this Convention. The provisions of existing agreements which satisfy these conditions shall remain applicable.

²⁷ Senate Report, op.cit., p. 4

5. THE EXTENSION OF THE TERM OF COPYRIGHT PROTECTION

(1) EU

The Berne Convention and the Rome Convention for the protection of performers, producers of phonograms and broadcasting organizations lay down only minimum terms of protection of the rights they refer to, leaving the Contracting States free to grant longer terms. Certain Member States of EU have exercised this entitlement, and so have longer term of protection than 50 years after author's death. For example, the term of protection had lasted until 70 years after author's death in Germany, and 60 years after author's death in Spain. France provides the term of 70 years after author's death for the musical works.²⁸ There were consequently differences between the national laws governing the terms of protection of copyright and related rights, which were liable to impede the free movement of goods and freedom to provide services, and to distort competition in the market. With a view to the smooth operation of the internal market, the laws of the Member States should be harmonized so as to make terms of protection identical throughout the Community.²⁹

²⁸ Report on copyright issues of KORUS FTA, Ministry of Culture & Tourism, 2005, p. 64

²⁹ THE COUNCIL OF THE EUROPEAN COMMUNITIES, "COUNCIL DIRECTIVE 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights", p 1/6
http://europe.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=en&n

Therefore, EU adopted 'the Directive on harmonizing the term of copyright protection' (the formal title is 'Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights') in 1993.

The harmonization of the term of protection should take place on a long term basis, because a harmonization of the terms of protection cannot have the effect of reducing the protection currently enjoyed by right holders in the EU community. Therefore, the term of protection for copyright should be harmonized at the term of protection in Germany, 70 years after author's death or 70 years after the work is lawfully made available to the public.³⁰

The Directive also adopted the principle of 'the minimum term of protection', eg 'for works whose country of origin within the meaning of the Berne Convention is a third country and whose author is not a Community national, comparison of terms of protection should be applied, provided that the term accorded in the Community does not exceed the term laid down in this Directive'. (Article 7(1)) This mutual principle brought the extension of the term of protection in U.S.

umdoc=31993L0098&model=guichett

³⁰ Article 1 Duration of authors' rights

1. The rights of an author of a literary or artistic work within the meaning of Article 2 of the Berne Convention shall run for the life of the author and for 70 years after his death, irrespective of the date when the work is lawfully made available to the public.

(2) U.S.

The first federal copyright act was enacted in 1790 and provided for an initial term of 14 years plus a renewal term of the same length, provided the author was still living at the end of the initial term. The act is rooted in the U.S. Constitution, which explicitly grants Congress the power 'to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries'.³¹ The act followed the model of the statute of Anne in 1709, and so adopted the same system of the term of protection with it.³²

The initial term was lengthened to 28 years in 1831, and the renewal term to 28 years in 1909 and to 47 years beginning in 1962.³³ Early drafts of the 1909 legislation proposed the adoption of a term of protection based on the life of the author, rather than a fixed term of years. The Berne Convention provided the term of the life of the author plus 50 years in the act of Berlin of November 13, 1908.³⁴ Many authors including Mark Twain testified in the Congress that the term of protection should be extended.³⁵

³¹ Senate Report, op.cit., p. 3

³² Young Lok, Lee, op.cit., p. 35

³³ Landes, William M. & Posner, Richard A., *Indefinitely Renewable Copyright*, 2002, p. 2

³⁴ Senate Report, op.cit., p. 4

³⁵ Young Lok, Lee, op.cit., p. 38

Ultimately, with the enactment of the Copyright Act of 1976, Congress fundamentally altered the way in which the term of protection was calculated, from a fixed to a variable, but still limited, term equal to the life of the author plus 50 years. Works created prior to January 1, 1978 (the date the Act went into effect), were protected for a maximum of 75 years from the date of publication or 100 years from creation, whichever is less. Congress cited the inadequacy of the then-current 56-year copyright term to provide meaningful assurance of a fair economic return for authors and their dependents, the need for a clear, discernable method for measurement of copyright term, the advantages of uniformity with a majority of foreign laws, and the possibility of future U.S. adherence to the Berne Convention.³⁶ As for works for hire, the 1976 Act fixed a term of 75 years from publication or 100 years from creation, whichever expired first.

The Copyright Term Extension Act of 1998 (CTEA), which is alternatively known as the Sonny Bono Copyright Term Extension Act, extended copyright terms in the United States by 20 years, from the life of the author plus 50 years to 70 years, As for works for hire, 95 and 120 years respectively.³⁷

³⁶ Senate Report, *op.cit.*, p. 4

³⁷ Young Lok, Lee, *op.cit.*, p. 44

However, the act had engendered a lot of controversy. Congressman Sonny Bono, who introduced the act, thought that ownership of copyright should be like ownership of a house: it should last for perpetuity. Mary Bono, wife of Sonny Bono, said that "Sonny Bono wanted the term of copyright protection to last forever." Jack Valenti, who is the president of the Motion Picture Association of America, had suggested that the term should be "forever less one day", supporting the act.³⁸ Opponents of this act including publishers, librarians, civil society organization, and progressive law professors, criticised the act that "it would impose substantial costs on the United States general public without supplying any public benefit" and contradict to the U.S Constitution.³⁹

Opponents brought *Eldred v. Ashcroft* to obtain an injunction on enforcement of the act. The lead plaintiff, Eric Eldred, is a noncommercial internet publisher of public domain texts and derivative works. Oral arguments were heard by the U.S. Supreme Court on October 9, 2002, and on January 15, 2003 the court held the CTEA constitutional by a 7-2 decision. The plaintiffs in the Eldred case have as of 2003 begun to shift their effort toward the U.S. Congress in support of a bill called the

³⁸ Martin, Scott M., *The Mythology of the Public Domain: Exploring the Myths behind Attacks on the Duration of Copyright Protection*, 36 *Loy. L.A. L. Rev.* 253, 2000, p. 2

³⁹ Karjala Dennis S. , *op.cit.*, p. 1

Public Domain Enhancement Act that would make the provisions of the Bono Act apply only to copyrights that had been registered with the Library of Congress.⁴⁰

6. THE TERM OF COPYRIGHT PROTECTION IN EACH COUNTRIES

The copyright terms of various countries of the world are like this.⁴¹

- None (or minimal)

Afghanistan, Central African Republic and Kuwait

- Life plus 25 (total protection to be not more than 50 years)

Iraq

- Life plus 30

Iran

- Life plus 50

Angola, Australia, Bangladesh, Benin, Brunei Darussalam, Burkina Faso, Burundi,

⁴⁰ <http://eldred.cc/>

⁴¹ The Allen Consulting Group, op.cit., p4

Canada, Chile, China, Egypt, El Salvador, Hong Kong, Indonesia, Japan, Malaysia, Morocco, Nepal, New Zealand, Pakistan, Papua New Guinea, Philippines, Qatar, Republic of Korea, Saudi Arabia, South Africa, Sri Lanka, Taiwan, Thailand and United Arab Emirates

■ Life plus 60

India and Venezuela

■ Life plus 70

Albania, Argentina, Austria, Belgium, Bosnia and Herzegovina, Brazil, Bulgaria, Costa Rica, Croatia, Czech Republic, Denmark, Ecuador, Egypt, Finland, France, Germany, Ghana, Greece, Hungary, Iceland, Irish Republic, Israel, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Macedonia, Malta, Netherlands, New Caledonia, Nicaragua, Nigeria, Norway, Paraguay, Peru, Poland, Portugal, Romania, Singapore, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey, United Kingdom and United States

■ Life plus 75

Guatemala and Honduras

■ Life plus 80

Colombia and Guinea

■ Life plus 99

Ivory Coast

■ Life plus 100

Mexico

III. THE DEBATE ON THE EXTENSION OF THE TERM OF PROTECTION

Is present term of copyright protection appropriate? Is there any ground of the term provided by present international convention or copyright law of each country? As said before, the term of protection had been extended continuously. However, there had been arguments for and against the extension of the term. Senate Report NO. 104-315 said that "The question of exactly what term of protection most appropriately reflects a 'limited time' as envisioned by the Founders has been debated since the enactment of the first Copyright Act in 1790, and is likely to continue to be debated into the foreseeable future."⁴²

A matter of "is the extension of the term proper policy?" is different issue from that of "is present term of protection is appropriate?" However, examining the debate surrounding the extension of the protection term might be helpful to estimate the

⁴² Senate Report, op.cit., p. 10

appropriateness of present term of protection. In this chapter, I will examine the arguments for and against the extension of the term of protection, mainly in the United States.

1. ARGUMENTS FOR THE EXTENSION OF THE TERM

(1) Harmonization with European law

'Harmonization with European law' is not substantial reason to extend the term of protection, but most important ground of CTEA. Senate Report clearly stated the purpose of CTEA as that "The purpose of the bill is to ensure adequate copyright protection for American works in foreign nations and the continued economic benefits of a healthy surplus balance of trade in the exploitation of copyrighted works. The bill accomplishes these goals by extending the current U.S. copyright term for an additional 20 years. Such an extension will provide significant trade benefits by substantially harmonizing U.S. copyright law to that of the European Union while ensuring fair compensation for American creators who deserve to benefit fully from the exploitation of their works."⁴³

⁴³ Senate Report, op.cit., p. 3

Ms. Peter, chief of Copyright Office of U.S., also argued in the testimony before the Committee of Congress in 1995 that "There has been a distinctive trend towards harmonization over the last two decades; however, the development of the global information infrastructure makes it possible to transmit copyrighted works directly to individuals throughout the world and has increased pressure for more rapid harmonization. It does appear that at some point in the future the standard will be life plus 70. The question is at what point does the United States move to this term."⁴⁴

The reason why supporters of CTEA are concerned about trade unbalance is because of 'the rule of shorter term' of EU Directive. This rule permits countries with longer terms to limit protection of foreign works to the shorter term of protection granted in the country of origin. Hence, American works will fall into the public domain 20 years before those of European trading partners, undercutting international trading position of U.S. and depriving copyright owners of two decades of income they might otherwise have.⁴⁵

The importance of copyright industry for the economy of U.S. is emphasized. In the testimony before the Subcommittee on Courts and Intellectual Property Committee

⁴⁴ Senate Report, op.cit., p. 8

⁴⁵ Id., p. 9

on the Judiciary U.S. House of Representatives Hearing on Copyright Term Extension Act, Jack Valenti, President and Chief Executive Officer Motion Picture Association of America, argued that "American creative works are the most globally popular, the most patronized, and the most sought after by exhibitors in theaters, television and home video all over the world. Which is why U.S. movies/TV programs and home video are America's most wanted exports, delivering back to our country more than \$4 Billion in SURPLUS balance of trade. Intellectual property, consisting of the core copyright industries, movies, TV programs, home video, books, musical recordings and computer software comprise almost 4% of the nation's Gross Domestic Product, gather in some \$45 Billion in revenues abroad, and has grown its employment at a rate four times faster than the annual rate of growth of the overall U.S. economy."⁴⁶⁴⁷

Opponents of CTEA refute these arguments. They argue that EU Directive was not based on a careful analysis of the public costs and benefits of extending the term, possibly because of the European natural rights tradition.⁴⁸ If the harmonization with

⁴⁶ Testimony of Mr. Jack Valenti, President and Chief Executive Officer Motion Picture Association of America before the Subcommittee on Courts and Intellectual Property Committee on the Judiciary U.S. House of Representatives Hearing on Copyright Term Extension Act -- H.R. 989, 1995, <http://judiciary.house.gov/legacy/447.htm>

⁴⁷ At present, The market share of cultural industry of U.S. in the global market reached 42.6%. By Ministry of Culture & Tourism of Korea, "White paper on cultural industry 2005", 2005

⁴⁸ Karjala Dennis S. , op.cit., p. 14

European law means compromising the important principles, the philosophy of copyright in U.S., there is no need to seek uniformity, though harmonization can often be useful.⁴⁹ They argue that If the cost/benefit analysis required by our copyright tradition does not justify changing the social policy balances we have drawn, we would better use our influence to encourage the rest of the world to remain with our standard, and Europe to return to it.⁵⁰

Moreover, CTEA is not really aimed at harmonizing U.S. and European law. For example, it extended the copyright period for corporate 'authors' to 95 years (or 120 years if the work is unpublished). The European Union, by contrast, offers corporate authors, for countries recognizing corporate 'authorship', 70 years of protection, which is less than the 75 years U.S. originally offered such authors.⁵¹ For this criticism, the Senate Report refuted that "with few exceptions, the countries of the European Union do not recognize the work-made-for-hire doctrine. For example, in Germany, which has implemented the EU Directive and which does not recognize the work-made-for-hire doctrine, the basic term of life-plus-70 applies to newspaper, magazine, and journal articles where the author is identified, regardless of whether

⁴⁹ Id., p. 15

⁵⁰ Id., p. 15

⁵¹ Id., p. 16

the article was prepared in the scope of the author's employment."⁵² In such cases, the terms of protection for similar works between U.S. and EU become similar.

However, there are many other features of copyright law that are not 'harmonized' even within Europe, let alone between Europe and the United States, including moral rights and the important concept of fair use. Therefore, 'harmonization' is not in itself a valid ground for extending any of current copyright protection terms.⁵³

Criticizing the harmonization argument, Prof. Karjala emphasized that "the notion of international 'harmonization' simply obfuscates the real issue: There is no tension here between Europe and the United States. The tension, rather, is between the heirs and assignees of copyrights in old works versus the interests of today's general public in lower prices and a greater supply of new works."⁵⁴

(2) Increasing life-span

Supporters argue that the life-plus-50 term is not sufficient considering the effect of demographic trends, such as the increasing lifespan of the average American and the trend toward rearing children later in life. One of the reason which EU Directive

⁵² Senate Report, op.cit., p. 15

⁵³ Karjala Dennis S. , op.cit., p. 16

⁵⁴ Id., p. 19

provide to extend the term was "the average lifespan in the Community has grown longer, to the point where this term is no longer sufficient to cover two generations".⁵⁵

They argue that in the United States, where works created before January 1, 1978, are still afforded a fixed term of protection for 75 years from the date of publication, the current term has proven increasingly inadequate to protect some works for even one generation of heirs as parents are living longer and having children later in life.⁵⁶

The Register of Copyrights informed the Committee of Congress that even for post-1978 works, which are afforded the basic life-plus-50 term of protection, the current term has proven insufficient in many cases to protect a single generation of heirs.⁵⁷

Opponents raise an objection against these arguments: First, the longer life expectancy of the author automatically brings about a longer period of copyright protection. Second, copyright in a work that has been exploited and become popular often have been transferred by the author or his or her descendants. If sustenance to two generations of authorial descendants is really the goal, we should be considering prohibitions on transfers and/or stronger termination rights rather than a longer term of protection. Third, one must question the economic efficiency of a system that, as a

⁵⁵ THE COUNCIL OF THE EUROPEAN COMMUNITIES, *op.cit.*, p. 2/6

⁵⁶ Senate Report, *op.cit.*, p. 10

⁵⁷ *Id.*, p. 11

matter of policy, seeks to grant an easy flow of income to a group of people the majority of whom the actual author may never have known. Fourth, this claim is fundamentally at odds with basic United States copyright principles and the social bargain that places works in the public domain after the copyright has expired. Fifth, it provides no justification whatsoever for extending the term for corporate authors from 75 to 95 years.⁵⁸

(3) Incentives for the Creation of Works

Proponents of a longer copyright term argue that the additional potential revenue stream will act as an incentive and encourage the production of additional creative works. For example, due to the nature of large-scale copyright industries (eg, movie, music and book production), a copyright producer cannot be sure of the success of a new title, and most titles in fact do not cover costs. Increased copyright term affects this situation by increasing the profitability of the successful titles.⁵⁹

Opponents question whether lengthening an already very long term appreciably increases the creation incentives. There is necessarily a type of diminishing return associated with an ever-longer protection period, because the benefit to the author

⁵⁸ Karjala Dennis S. , op.cit., pp. 25-26

⁵⁹ The Allen Consulting Group, op.cit., p. 26

must be discounted to present value.⁶⁰ For example, consider an assured \$1,000 per year stream of income. At a discount rate of 10%, the present value of such a stream for 75 years is \$10,992, while the present value of a 95-year stream is \$10,999, a difference of less than 0.1%. Actually, no company will take the 'extra' 20 years into consideration in making a present decision to invest in the creation of a new work.⁶¹

The problem that opponents criticize most is to extend the term of existing works. It is obvious that extending the period for works already in existence cannot supply any incentive for their creation.⁶² On the contrary, it could hinder the creative activity of future as well as current authors by reduction of public domain.

Proponents argue that the 20-year extension of copyright protection will provide the important collateral benefit of creating incentives to preserve existing works.⁶³ A great deal of money should be invested for the management of works such as storage, restoration/preservation etc.⁶⁴ For example, until now, copyrighted works have been fixed in perishable media, such as records, film, audiotape, paper, or canvas. Copies or reproductions of these works usually suffer significant degradation of quality. The

⁶⁰ Karjala Dennis S. , op.cit., p 22

⁶¹ Id., p. 23

⁶² Karjala Dennis S. , op.cit., p. 21

⁶³ Senate Report, op.cit., p. 13

⁶⁴ The Allen Consulting Group, op.cit., pp. 32-33

digital revolution offers a solution to the difficulties of film, video, and audio preservation, and offers exciting possibilities for storage and dissemination of other types of works as well. However, to transfer such works into a digital format costs a great deal of money. Extending the term will provide the incentives for the right-holders to invest.⁶⁵

However, it is questionable that right-holders would invest for works which had not commercial values any more because of the term extension. And although right-holders don't manage their works any more, there is nothing consumers can do for works.

On the contrary, works in the public domain can often be restored or managed by public/private institution such as public libraries, collectors, art loves, and academics.⁶⁶ Commercial companies can provide these kinds of services. Internet company 'Google' started new service, Google Book Search,⁶⁷ on August 30, 2006, which provide books in PDF format allowing download and print. The works of which full-text is provided are the ones in the public domain. Rather, in this case, the obstacle to construct bigger databases is copyright.

⁶⁵ The Senate Report, op.cit., p. 13

⁶⁶ Young Lok, Lee, op.cit., p. 69

⁶⁷ <http://books.google.com/>

2. ARGUMENTS AGAINST THE EXTENSION OF THE TERM

(1) Economic Costs and Transfer

One of the costs of an extended copyright protection term is the economic transfer payment to copyright owners during the period of the extension from consumers or other producers who would otherwise have free use of works.⁶⁸ Proponents claim that they will miss out on the European windfall if the term is not extended, which shows that the costs of an extended copyright is substantial.

Proponents argue that assertion of opponent, which the consumer would be benefited because more public domain works would find wider circulation at cheaper prices, is a mistake. They say, in reality, while an American public domain work may be sold cheaper to exhibitors in many international markets, consumers are not granted cheaper prices. The theater ticket remains the same price. TV station, home video stores give no discounts to the public.⁶⁹

However, opponents don't agree on the argument. If the work is under copyright, the marginal cost of production would have to include the royalty owing to the copyright

⁶⁸ Karjala Dennis S. , op.cit., p. 10

⁶⁹ Testimony of Mr. Jack Valenti, op.cit.

owner. Consequently, any claim that the public pays the same for public domain works as for protected works is implausible, at least in general.⁷⁰

(2) Cost of Diminished Public Domain

The creation of new works is dependent on a rich and vibrant public domain.⁷¹

Another cost of an extended copyright protection term is the cost to the public of works that are not produced because of the diminished public domain.

Even where a given work wholly lacks economic value, the transaction costs involved in tracking down the copyright owner and obtaining the necessary permissions to use it in a new work constitute a deadweight cost that must be recovered by the creator of the new work. Therefore, it is argued that the higher transaction costs leading to the non-creation of works may be an even greater problem of term extension for the general public.⁷²

Proponents refuted that the argument of diminished public domain is significantly over-stated. First, they argue that the public domain is not a static concept. Landes and Posner notes that "it is a mistake to treat the public domain as some fixed supply

⁷⁰ Karjala Dennis S. , op.cit., p. 11

⁷¹ Id., p. 1

⁷² Id., p. 12

of works from which any enlargement of copyright protection subtracts. The size of the public domain is in part a positive function of the extent of copyright protection, since, as a first approximation anyway, the more extensive that protection is, the greater the incentive to create intellectual property some fraction of which will become a part of the public domain when the copyright expires".⁷³ But, the extension of the term diminishes the public domain in two ways, by delaying that works fall into the public domain, and by hindering the creation of new works. It's questionable how big is positive effect on the public domain by the extension of the term compared to negative effect.

Second, proponents argue that there is other means to access works, though works are not in public domain. In other words, the public domain is not the only way that people can freely access and use copyright material. They say that other exceptions and limits such as 'fair use' in copyright law are generally more important for balancing the interests of the copyright owner and those of users and the public than the term of protection.⁷⁴ It's right that exceptions and limits such as fair use is a very important means for public interest, but it can't be a reason to devaluate or ignore the importance of public domain. Moreover, copyright regulation in the digital network

⁷³ Landes, William M. & Posner, Richard A., *op.cit.*, p. 3

⁷⁴ The Allen Consulting Group, *op.cit.*, p. 13

become stronger. Each use (such as reading or listening in the network) is now subject to the copyright, because each use also makes a copy in the network⁷⁵.

Third, as for tracing costs, proponents argue that tracing costs may be reduced by technical development such as (digital) rights management system and effective centralized identification to help finding works. The implication, therefore, is that an increased copyright term will be feasible without imposing significant new tracing costs upon subsequent copyright creators and users.⁷⁶ However, there is a strong possibility for those technologies not to be applied for works that are not published and sold any more in the market.

⁷⁵ Lessig, Lawrence, *Free Culture*, The Penguin Press, 2004, p. 143

⁷⁶ The Allen Consulting Group, *op.cit.*, p. 19

IV. THE EXPECTED SPAN OF LIFE OF WORKS AND THE TERM OF PROTECTION

As noted earlier, the optimal copyright term is where marginal benefit just equals marginal cost. Then, how we can identify objectively this optimal term? There seems no empirical way to answer this question.

The Allen Consulting Group noted that "The real problem for policy-makers is that the debate about the costs and benefits of term extension is devoid of any reliable quantitative support", citing OECD notes that "one of the basic problems of intellectual property is to define a scope and term for this protection that offers a reasonable balance between the benefits of new products and works deriving from the incentive and the benefits of marginal cost pricing deriving from the freedom to copy.

... there is little rational basis for arguing that the current patent or copyright terms are too long or too short and it would be very difficult to devise a helpful empirical

study examining the value of longer or shorter terms in different sectors”.⁷⁷

Nonetheless, if we can measure economical life span of works, it could be a good ground to estimate the appropriate term of copyright protection. For this study, we need empirical data such as how long some works are sold in the market and how much profits are made from them. The most possible institutions which deal with this type of statistics data is copyright trust agencies.⁷⁸ However, it might be difficult to get this statistics data in reality. First, in fact, the data which copyright trust agency has are usually very limited. Second, they are usually protected as trade secret.

Another possible data for estimating the appropriate term of protection is the registration statistics of copyright office. However, most countries adopted the system of unitary term of protection without renewal term under the Berne Convention. Besides, copyright law doesn't require registration for granting the exclusive rights. It's impossible to know whether works are used or not in the society under the present copyright system.⁷⁹

⁷⁷ The Allen Consulting Group, *op.cit.*, p. 34

⁷⁸ Young Lok, Lee, *op.cit.*, p. 192

⁷⁹ *Id.*, p. 193

However, copyright law of U.S. had adopted registration and renewal system for a long time. Although the number of registrations is only a proxy for the number of copyrighted works because registration has always been optional, the 1909 and 1976 copyright acts created strong incentives to register a copyright and to register it promptly. Not only is registration (or, under the 1976 Act, an application to register) a prerequisite for filing a suit for infringement, but it must be done before the infringement (or within three months of first publication) if the copyright holder wants to recover statutory damages and attorney fees.⁸⁰ The reason why U.S. didn't join in the Berne Convention until 1988 is to preserve registration system.⁸¹

We can estimate economical life span of works through renewal registration process when author estimates value and cost of his work. An author has to pay registration fee and bear administration costs necessary to registration process. If an author estimates costs are bigger than value of works, he/she will give up renewal registration.⁸²

Lands and Posner provided empirical analysis of copyright registration and renewals in their paper. The U.S. Copyright Office publishes data on registrations and

⁸⁰ Landes, William M. & Posner, Richard A., op.cit., p. 22

⁸¹ Young Lok, Lee, op.cit., p. 193

⁸² Id., p. 196

renewals. To estimate the expected economic life of a copyright, we have to focus on renewal rates. But we need data on registration as well because the number of initial registrations determines the number of works that are potentially renewable 28 years later.⁸³

1. COPYRIGHT REGISTRATION AND RENEWALS

COPYRIGHT REGISTRATIONS (EXCLUDING RENEWALS)



Figure 2 Copyright Registrations (Excluding Renewals)

⁸³ Id., p. 196 Landes, William M. & Posner, Richard A., op.cit., p. 23

RENEWALS IN YEAR T

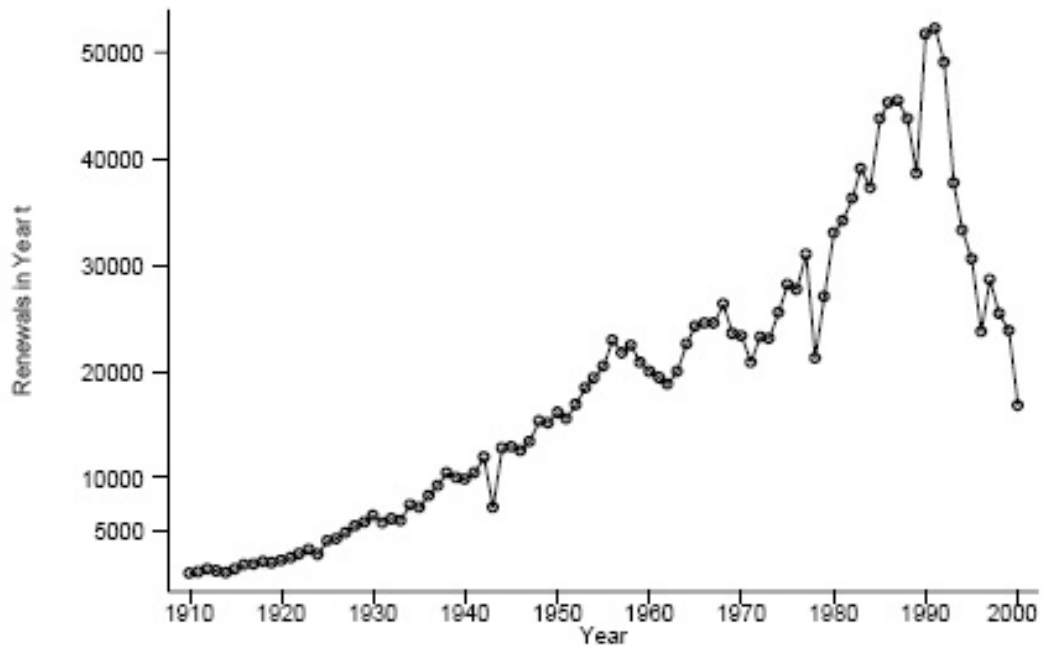


Figure 3 Renewals in Year T

Figures 2 and 3 reveal that copyright registrations and renewals rose rapidly in the twentieth century. Renewals began to decline in 1992, because they became automatic in the year. But, It's not decline to zero because there was still an incentive to file, mainly because a renewal registration is prima facie evidence of the validity of the copyright during its extended term and of the facts stated in the certificate of renewal.⁸⁴ The rise doubtless reflects an increase in the number of copyrightable works brought about by growth in the output of expressive activities, as well as reflecting changes in the copyright law.⁸⁵

⁸⁴ Id., p. 23

⁸⁵ Id., p. 24

Then, Why did both registrations and renewals peak in 1991, declining by almost 20 percent by 2000, with the decline concentrated in the last year? Lands and Posner pointed out the registration fee as the answer.

The registration fee was doubled in 1991, from \$10 to \$20, and increased again in 2000, to \$30, while the renewal fee was doubled to \$12 in 1991, rose to \$20 in 1993, and more than doubled, to \$45, in 2000.⁸⁶ These fees seem to be very small. However, these small fees, along with administration costs such as inconvenience of registering and complying with other requirements of registration, carry negative effect on both original and renewal registrations.

RATIO OF RENEWALS IN T TO REGISTRATIONS IN T – 28

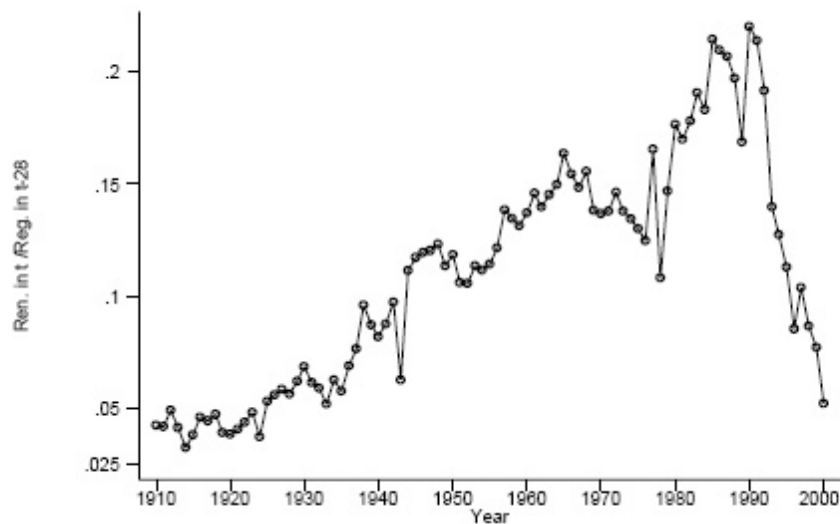


Figure 4 Ratio of Renewals in T to Registration in T-28

⁸⁶ Id., p. 24

As Figure 4 shows, prior to 1992, renewal rates ranged from a low of .03 in 1914 to a high of .22 in 1991. Although the full cost of renewal includes both a small renewal fee and the (probably small) administration costs, the fact that a small fraction of works is renewed implies that most copyrights have very little economic value after 28 years. Since only a small fraction of works are renewed, it follows that the expected economic value of the 80 percent or so of copyrighted works that are not renewed is less than the small cost of renewal.⁸⁷

2. DEPRECIATION AND THE ECONOMIC LIFE OF COPYRIGHTS

Depreciation rates of copyrighted material can be calculated from data on renewals and registrations. Initial registrations constitute one year's stock of copyrighted works. Renewal registrations of those works constitute a different, smaller stock of the same works 28 years later (renewals must be registered in the last year of the initial term). The annual rate at which the first stock shrinks to become the second is the depreciation rate of the first stock. That rate is given by $REN_t = (REG_{t-28})e^{-\delta t 28}$

⁸⁷ Id., p. 25

where REN_t denotes renewals in t of works registered 28 years earlier ($=REG_{t-28}$) and δ_t equals the annual average depreciation rate for copyrights registered in period $t-28$. Figure 5 depicts annual depreciation rates, measured in year t , of works registered 28 years earlier.⁸⁸

ANNUAL DEPRECIATION OF REGISTERED COPYRIGHTS



Figure 5 Annual Depreciation of Registered Copyrights

The higher the renewal ratio, of course, the lower the depreciation rate, since we are computing the depreciation rate from the fraction of copyrighted works that are renewed.

Figure 5 indicates that the average annual depreciation rate of copyrighted works has ranged from a low of 5.4 percent in 1990 to a high of 12.2 percent in 1914, the

⁸⁸ Id., p. 26

overall average being 8.3 percent. The long-term trend is toward lower depreciation, implying that copyrightable works have become more valuable. One possible reason for the decline in depreciation is that new technologies, such as long-playing records, stereo equipment, radio, and television, have extended the economic life of copyrights.⁸⁹

The reciprocal of depreciation is the average expected life of a copyrighted work. Although the statutory term of copyright works first published in the period 1881 through 1972 and renewed for a second term varied from 56 to 95 years, the commercial life ($=1/\delta$) of the average copyrighted work was much lower, ranging from 8.19 years to 18.5 years for works first registered in 1886 and 1962, respectively.⁹⁰ We can know that present term of protection is too long compared to the average expected life of works.

It is also possible to estimate how many works registered long ago retain commercial value today. For example, Let's choose works in 1934. The works first published then could be renewed for 47 years in 1962, and another 20 years were tacked on in 1998, so that a copyright first registered in 1934 need not enter the public domain

⁸⁹ Id., p. 27

⁹⁰ Id., p. 28

until 2029. Yet the estimated depreciation rate of works registered in 1934 is .07, implying that of the works registered that year 50 percent had fully depreciated by 1944, 90 percent by 1977, and 99 percent by 2000; fewer than 1 in 750 works registered in 1934 will have commercial value in 2030. Had renewals been permitted every five or ten years, then after an initial term of 20 or so years about 99 percent of the works registered in 1934 would have fallen into the public domain by the year 2000 because by then their commercial value had fallen below the cost and inconvenience of renewal.⁹¹

3. DEPRECIATION RATES FOR BOOKS, GRAPHIC ARTS, AND MUSIC

The Copyright Office publishes separate data on registrations and renewals for books (including pamphlets which indeed account for 80 percent of the category), music, and graphic arts (applied art, posters, fine arts, labels, photographs, technical drawings, and maps). As shown in Figure 6, the time trend of these three categories closely tracks the time trend of overall registrations (the correlation is .99). This is not surprising, because these categories account for 70 percent of all registrations.⁹²

⁹¹ Id., p. 28

⁹² Id., p. 29

REGISTRATIONS OF ALL COPYRIGHTS, BOOKS, MUSIC, AND GRAPHIC ARTS

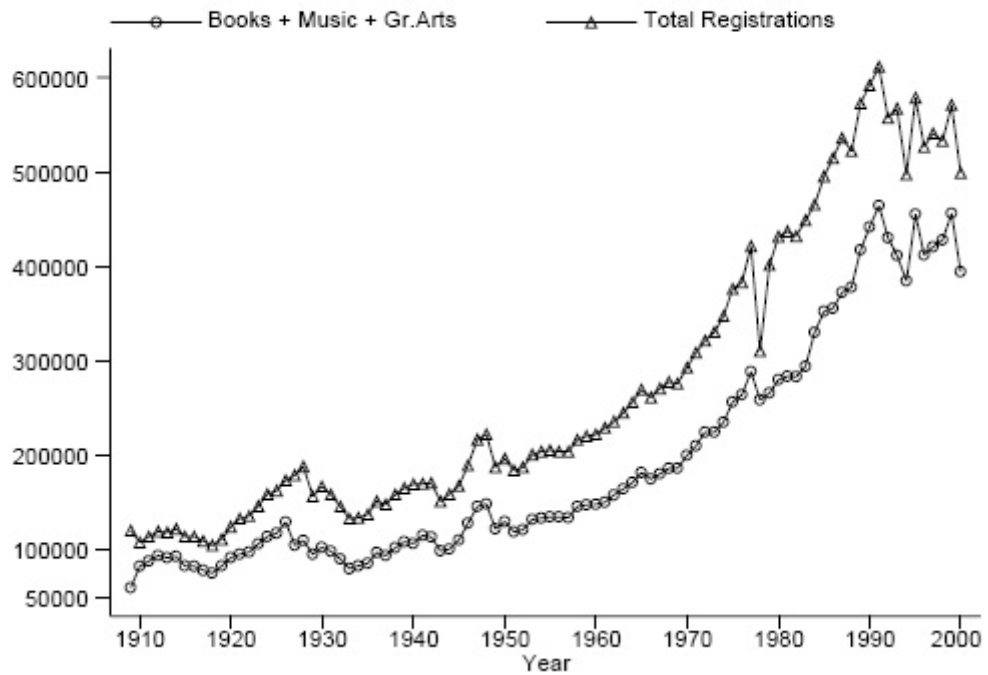


Figure 6 Registration of All Copyrights, Books, Music, and Graphic Arts

In Figure 7 we see that the number of musical copyrights has grown the fastest, the number of book copyrights the second fastest, and graphic arts the slowest.

SEPARATE REGISTRATIONS FOR BOOKS, MUSIC, AND GRAPHIC ARTS

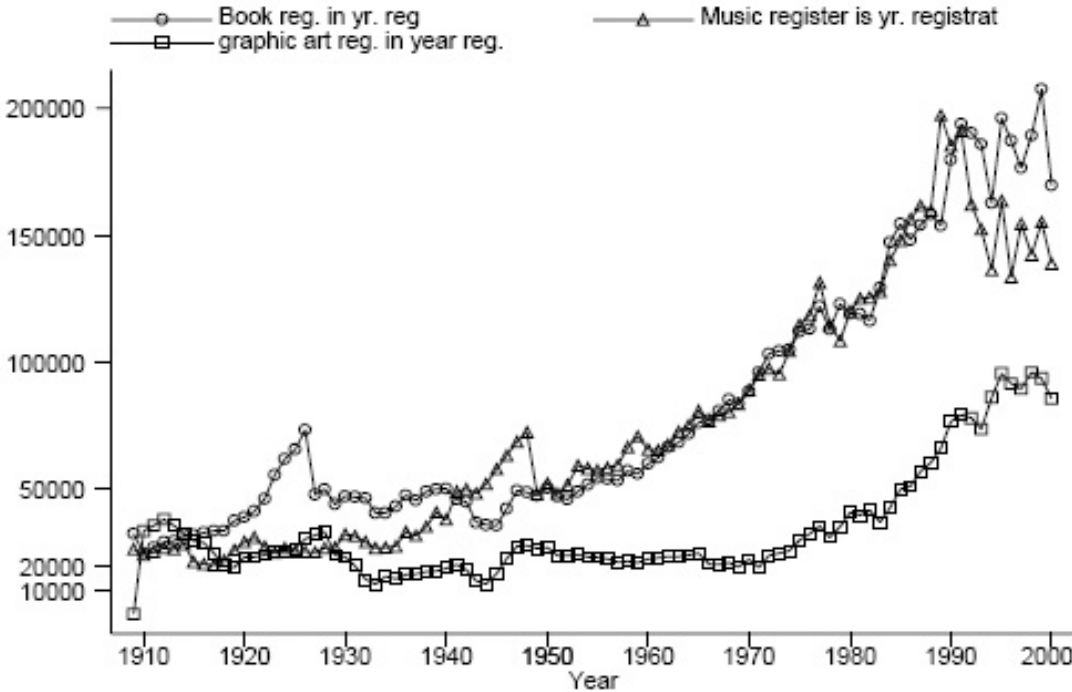


Figure 7 Separate Registrations for Books, Music, and Graphic Arts⁹³

We can also link up renewals with registrations for each of the three categories to estimate category-specific depreciation rates, though since the earliest category-specific registration data we have are for 1909, we can only use renewal data starting in 1937.⁹⁴

⁹³ Id., p. 29

⁹⁴ Id., p. 30

THE RATIO OF RENEWALS IN T TO REGISTRATIONS IN T-28

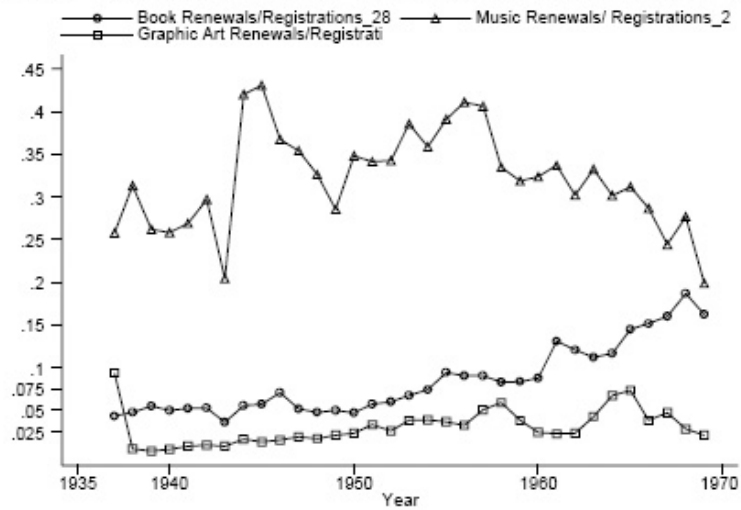


Figure 8 The Ratio of Renewals in T to Registrations in T-28

DEPRECIATION IN T OF REGISTRATIONS IN T-28

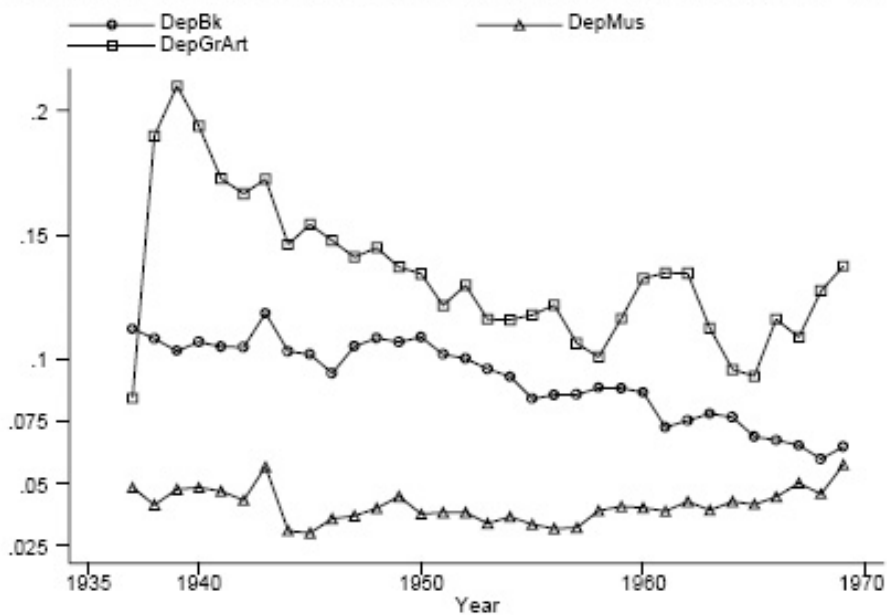


Figure 9 Depreciation in T of Registrations in T-28

Only about 3 percent of graphic-arts works were renewed after 28 years, compared to 8 percent for books and 32 percent for music that peaked at more than 40 percent

for works renewed in 1944 and 1956. Music renewal rates have been falling sharply since 1956, while book renewal rates have been rising during this period. By the same token, depreciation rates are highest for graphic arts (averaging about 14 percent) and lowest for music (about 4 percent), with books in the middle (above 9 percent). We also observe declining depreciation rates for both books and graphic arts, while depreciation of music began to increase in the mid-1950s and by 1969 was just slightly below that of books.⁹⁵

What explains these differences? The graphic-arts category is dominated by commercial art, such as advertising layouts and fabric designs for fashion items, the useful life of which tends to be no longer than the advertising campaign or latest fashion season. At the other extreme, music written for one use can have many other uses in the future. For example, a song written for a Broadway show might be recorded by many different artists over a long period of time or be used as background music in a movie or a television program.⁹⁶

Whatever the reasons for the differences in depreciation rates across these categories, we can say that average life span of works vary according to different category of

⁹⁵ Id., p. 31

⁹⁶ Id., p. 31

works. Moreover, we can criticize present copyright policy adopting same term of protection for all works regardless of different life span of works.⁹⁷

⁹⁷ Young Lok, Lee, *op.cit.*, p. 206

V. STUDY ON THE ALTERNATIVE SYSTEM OF COPYRIGHT

As seen before, the economic life span of works is different according to the category of works. Even in the same category, each work has different life span. For some works, present term of protection is too long, though it's too short for other works. Nevertheless, present copyright law provides same term of protection for all works regardless of different life span of works.

The intention to create a work is also different according to author. The novel sold in the market is a source of income for author. On the contrary, the diary written by a kid is just a record of him/her, usually non-commercial. Some authors want to earn the money from their works. There are also authors who want other persons to use their works freely, even without permission. Copyright law doesn't consider these differences.⁹⁸ Therefore, under present copyright system, authors have no way to present their intentions. On the contrary, from the point of view of users, it's not easy

⁹⁸ Jong su, Yun, share of intellectual works and problem to be solved Ver. 0.9, 2006, p. 15

for user to know author's intention. Users may want to use some work, but hesitate to use it for fear of copyright infringement, though author of the work don't have an intension to insist his/her exclusive right.

Most big problem of copyright system at present is to deal with all works equally regardless of economic value of works and various intentions of authors. For all works, 'all rights reserved' is applied.⁹⁹The rigid copyright system like this results in confusion and disorder, such as illegal copy in one side, orphan works in the other side.

If a user can identify the intention of an author easily, illegal use of works would be diminished. At the same time, the exploitation of works would be expanded. Therefore, copyright law should be more flexible to embrace various intentions of authors.¹⁰⁰

1. MORE FORMALITIES

We should consider the introduction of registration and renewal system. There are many formalities associated with property. If you buy a house, you have to record the sale in a deed. If you buy land upon which to build a house, you have to record the

⁹⁹ Id., p. 14

¹⁰⁰ Id., p. 16

purchase in a deed. If you buy a car, you get a bill of sale and register the car. If you buy an airplane ticket, it has your name on it.¹⁰¹

International treaties on copyright abolished formalities long ago, which was a good thing. In the world before digital technologies, formalities imposed a burden on copyright holders without much benefit. Thus, it was progress when the law relaxed the formal requirements that a copyright owner must bear to protect and secure his/her work.¹⁰²

However, as noted before, the world today without formalities is the world that burdens creativity.¹⁰³ We are necessary to introduce formalities again in the copyright system. But, we don't have to go back to the old system. We should establish a system that will create the incentives to minimize the burden of these formalities.¹⁰⁴

Prof. Lessig proposes the domain name registration system as a model of new copyright registration system. There are at least 32 million web sites registered

¹⁰¹ Lessig, Lawrence, *Free Culture*, The Penguin Press, 2004, p. 287

¹⁰² *Id.*, p. 288

¹⁰³ *Id.*, p. 288

¹⁰⁴ *Id.*, p. 288

around the world. Domain name owners for these web sites have to pay a fee to keep their registration alive. In the main top-level domains (.com, .org, .net), there is a central registry. The actual registrations are, however, performed by many competing registrars. That competition drives the cost of registering down, and more importantly, it drives the ease with which registration occurs up.¹⁰⁵

In the information age, the necessity of registration is getting bigger than before. In the past most of works in the market were produced by only a few professional authors or corporations. In the information age, most of people become creators by managing their blogs, taking a picture with their digital camera and uploading it, making a movie with their camcorder etc, though most of them do it generally for noncommercial purposes. These amateur creators usually don't want to restrict other persons to access and use their works if only their moral rights could be protected. Present copyright system impedes these works produced by amateur creators to be shared and used by each other.

Registration system can be helpful for professional authors and corporations as well as users who want to use their works. In the present copyright system, it's not easy

¹⁰⁵ Id., p. 289

task to find copyright holders to get permission from them, especially in the case that the works were published long time ago, or copyright was transferred to others, or there are many right holders. Registration databases can provide users with contact point to get permission.

2. SHORTER TERMS

As noted before, present term of copyright protection is too long for most of works.

With registration and renewal system, we can reduce the term of protection without damaging to authors who don't want shorter term of protection than present. For example, we can provide 20 years as an initial term, and ask renewal registration in every 10 years for the extension of the term, limiting maximum term to the present term of protection.¹⁰⁶

Prof. Lessig presents four principles that are important to keep in mind about copyright terms.

- Keep it short: The term should be as long as necessary to give incentives to create, but no longer.
- Keep it simple: The line between the public domain and protected content must be

¹⁰⁶ Id., pp. 292-293

kept clear. Abolish the fuzziness of “fair use,” and the distinction between “ideas” and “expression.”

- Keep it alive: Copyright should have to be renewed. Especially if the maximum term is long, the copyright owner should be required to signal periodically that he wants the protection continued. This need not be an onerous burden, but there is no reason this monopoly protection has to be granted for free.

- Keep it prospective: Whatever the term of copyright should be, the clearest lesson that economists teach is that a term once given should not be extended.

3. CONSIDERATION OF THE CHARACTERISTICS OF WORKS

As seen in chapter IV, the economic life span of works is different according to the category of works. When we set initial term of protection, we can apply different term considering the category of works. Moreover, it's necessary to re-consider the object of copyright protection.

Richard Stallman, who is the president of the Free Software Foundation¹⁰⁷, identified three broad categories of works. First is functional works such as computer program, cooking recipe, manual, encyclopedia, etc. Second, works that represent someone's

¹⁰⁷ <http://www.fsf.org>

thoughts such as thesis, article, etc. Third, aesthetic or entertaining works such as novel, music, movie, etc. Each category of works needs be handled separately.¹⁰⁸

For functional works, it can be improved by allowing anyone to modify it. Stallman argues that we should have the freedom to publish a modified version, and allow that publication to be commercial, to make the modified works widely and conveniently available. For the purpose, there should be no copyright for functional works or, as a compromise, copyright for functional works could last for very short period, for example 3 years.

For works that represent someone's views or experiences, modified versions would simply misrepresent where the person stood, and that's not socially useful. So we should only allow these to be copied verbatim, and there's no social reason why other people should have a right to commercially publish verbatim copies.

For aesthetic or entertaining works, modification can be an important means to create another works as we see many derivative works from Shakespeare's play.

4. FREE LICENSE SYSTEM

As seen before, current copyright system doesn't consider various intentions of authors. Registration system can be a solution to this problem. However, it's not easy

¹⁰⁸ Richard Stallman, COPYRIGHT REFORM - NEW ROADS TO FREEDOM, <http://dsl.cloh.org/sharing/copyright-reform.html>

to change the copyright system fundamentally in a short time, because it requires the change of international treaties and national copyright law.

Under current copyright system, author who let other persons use his/her works freely or under some conditions has to express his/her intention in advance in the works. Free License System is a means to help those authors by providing prototype agreement document to present author's various intentions.¹⁰⁹

The typical Free License System is GNU General Public License for computer program, developed by Free Software Foundation. According to GNU GPL, Anyone has a freedom to use, copy, distribute the program and make derivative works from it under the condition that derivative works should also adopt GPL.¹¹⁰

There occurred many Free License System influenced by GNU GPL. Creative Commons License¹¹¹, which was launched in the United States in 2001, is the most popular one today applied to ordinary works. In South Korea, IPLeft¹¹², a social movement group that is devoted to information sharing and criticizing intellectual property regime, developed Free Use License, which is similar to CCL, in 2004.¹¹³

¹⁰⁹ Jong su, Yun, share of intellectual works and problem to be solved Ver. 0.9, 2006, p. 20

¹¹⁰ What is Copyleft?, <http://www.gnu.org/copyleft/copyleft.html>

¹¹¹ <http://www.creativecommons.org>

¹¹² <http://ipleft.or.kr>

¹¹³ <http://www.freeuse.or.kr>

VI. CONCLUSION AND RECOMMENDATION

The term of copyright protection is the duration during which exclusive rights of authors are protected, and after which copyrighted materials become parts of public domain that anyone can access to and use freely for commercial or non-commercial purposes. To limit the terms of copyright protection is a very important means for the purpose of copyright, to promote cultural development of the society.

In theory, the optimal copyright term is where marginal benefit just equals marginal cost. However, it's almost impossible to estimate optimal copyright term in empirical way. Therefore, after the Statute of Anne, the first copyright law, there was continuous debate around the extension of the protection term. Proponents of the extension of the term emphasized incentives for the creation of works and harmonization with trading partners. On the contrary, opponents worried about the reduction of public domain.

Biggest problem of copyright system at present is to deal with all works equally regardless of economic value of works and various intentions of authors. Empirical study shows that the commercial life of the average copyrighted work was much lower than the statutory term. Besides, present copyright system doesn't consider different intention of authors.

It's time we need to study alternative copyright system. Some propose registration and renewal system, and shorter term of protections. Of course, it's not easy task to introduce registration system and reduce the term of protection, because it requires the change of international treaties and national copyright law. But, if present copyright system continues, the contradiction between private and public interest might increase. Therefore, now we have to start a discussion on the alternative system of copyright.

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