



Call for a shorter Copyright Term to foster faster creation

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¹ The views or arguments expressed in this article are that of the author and not the company. Please send your feedback to kalyan@brainleague.com

Introduction

Copyright law has been designed with an objective to promote the progress of useful arts for the benefit of mankind. It accomplishes this objective by providing exclusive rights to authors for a limited period of time in exchange for generating an original work for public benefit. After the expiry of the exclusive rights of the author (copyright term), his work falls into the public domain and the public is free to use the work in any way it pleases without destroying the moral rights of the author. As the number of copyrighted works increases, the information in the public domain increases on their expiry. The information that flows to the public domain is free for all and is the basis for further creation. The greater the information in the public domain the greater will be creation as access to existing information and knowledge is the key to creation of new and original information and knowledge.

There is an inverse relation between the existing copyrighted works and the size of public domain. As the size of public domain increases, the size of copyrighted works decreases. However, there is a direct relation between the public domain and future creation, which can also be termed as prospective copyrights. As the size of public domain increases, creation of new works increases because of increased access and perception. This doesn't mean that everything should be sent to the public domain in order to encourage creativity because in such a case there would be no incentive to create. The inflow of works into the public domain should be reasonably regulated to ensure that the incentive to create remains undisturbed. There should be a proper balance between the number of works in the copyright domain and the number of works in the public domain.

Today's copyright law favors the copyright owner more than the public, which means that the law gives predominance to the copyright domain over the public domain. Though the evolution of technology age promises to expand the limits of public domain, stringent laws are constricting its boundaries. The doctrine of fair use has been eroded,

the first sale doctrine has been destroyed and the copyright term has been ever expanding since the inception of copyright regime.

The copyright term, which was once only fourteen years under the Statute of Anne in 1710, has today been increased to life of the author plus seventy years or 120 or 95 years². Such arbitrary increase in the copyright term was the result of extensive lobbying by copyright owners who were and are still very keen at expanding the frontiers of their right in order to gain extended commercial benefit. Such undue expansion and grant of a long period of copyright term has a dwarfing affect on the public domain. A copyright protection that starves the public domain also limits the production of creative works by constraining authors' ability to draw on preexisting works³. The unduly long period of copyright makes the information available to the public very scarce. Such long period of protection decreases the incentive to create by providing overprotection to one work. Copyright should provide just enough incentive for production and dissemination, but no more⁴. Copyright term should extend only for such period sufficient to induce creative activity. Too much copyright protection would not only hurt the public domain, but would also discourage investment elsewhere⁵.

Under these circumstances, this paper makes an attempt to find that magic copyright term which would at the same time promote progress of useful arts and enrich the public domain. Part I discusses the international and national law on copyright term. Part II discusses the propriety of existing copyright term, Part III compares the viability of patent term to copyright law and Part IV concludes with a few remarks on balancing the relation between copyright domain and public domain.

² US Copyright Law, 35 USC Sec. 303, 304.

³ Brief for Petitioners at 31-32, *Eldred v. Ashcroft*, 537 U.S. 186, 65 U.S.P.Q.2d 1225 (No. 01-618) (2003).

⁴ *Eldred*, 537 U.S. at 199, 65 U.S.P.Q.2d at 1232.

⁵ *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921).

Part I: Law relating to Copyright term: International and National

A. Berne Convention for the Protection of Literary and Artistic Works.

Berne convention was adopted by the countries of the union for the protection of the rights of authors in their literary and artistic works⁶. The convention covers every production in the literary, scientific and artistic domain whatever be the mode or for expansion⁷. The Berne Convention provides the minimum standards that should be followed by member countries.

Article 7 of the Convention provides that the term of protection of copyright for literary and artistic works shall be the life of the author and fifty years after his death. However, in the case of cinematographic works, 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. In the case of anonymous or pseudonymous works, the convention states that the term of protection 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 or discloses his identity, the term of protection shall be life of the author plus fifty years. The Convention gives the member countries latitude to determine the term of protection for photographic works and works of applied art but mandates a minimum term of twenty-five years. Member countries are allowed to provide excess protection and the municipal law of each country shall govern the protection.

⁶ Article 1 of the BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS (Paris Text 1971).

⁷ Article 2 of the BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS (Paris Text 1971).

B. TRIPS Agreement

The Agreement on TRIPS is a part of the Marrakesh Agreement signed by various nations establishing the World Trade Organization. This agreement aims at bringing about uniformity and harmonizing intellectual property laws. Towards this end it mandates certain changes in the municipal laws of its member states. It also aims at providing adequate standards and principles concerning the availability, scope and use of trade-related intellectual property rights.

Article 12 of the TRIPS agreement provides that Whenever the term of protection of a work, other than a photographic work or a work of applied art, is calculated on a basis other than the life of a natural person, such term shall be no less than 50 years from the end of the calendar year of authorized publication, or, failing such authorized publication within 50 years from the making of the work, 50 years from the end of the calendar year of making.

C. India.

Chapter V of the Indian Copyright Act deals with the term of copyright. Indian copyright law is in consonance with all the provisions of the Berne Convention. Section 22 provides that the term of copyright in published literary, dramatic, musical and artistic works published within the lifetime of the author shall be life of author plus fifty years. Term of copyright in anonymous and pseudonymous works other than a photograph which are published anonymously or pseudonymously is fifty years from the year of first publication⁸. For a posthumous work the term of copyright shall be fifty years from the date of publication⁹. In the case of a photograph, cinematograph film, record, government work and work of an international organization, copyright subsists for fifty years from the year of publication¹⁰.

⁸ Section 23, Indian Copyright Act, 1957.

⁹ Section 24, Indian Copyright Act, 1957

¹⁰ Section 25, 26 27, 28 and 29, Indian Copyright Act, 1957.

D. United States of America.

Duration of Copyright under the United States Law is slightly complicated due to the extensions of term by the congress in 1978 and 1998. For works published and copyrighted prior to January 1st, 1978, the term of copyright shall be 95 years¹¹. For works created but not published or copyrighted prior to January 1st, 1978, which are not in the public domain, copyright term would be the longer of life plus 70 or 95 or unto December 31st, 2002¹². If, however, such a work is published on or before December 31, 2002, the work will gain additional copyright protection, which will not expire before December 31, 2047.

For works created on or after January 1st, 1978, the term of copyright shall be life of the author plus seventy years. The same shall apply for unpublished works; works published during the author's lifetime and works published posthumously. For anonymous works, pseudonymous works and works made for hire, the term of copyright shall be ninety years from publication or 120 years from creation, whichever is shorter. If the identity of the author is revealed, then the ordinary term of life plus seventy shall apply.

The Berne Convention mandates a minimum term of fifty years and the national laws of India and USA have granted a general protection of life plus fifty and life plus seventy. It can be easily understood from its complex law that the United States Congress has been succumbing to the lobbying of big corporations who own certain key copyrights.

Part II: Is the term too long?

Is the term too long? The answer to the question from a large percentage of the general public would be an 'YES'. The general public would always want a large amount of information at its access. However, the answer to the question by a copyright owner

¹¹ 17 USC Sec. 304.

¹² 17 USC Sec. 303(a).

would be a 'NO'. What in life would be more soothing for a copyright owner than easy revenue for more than a lifetime? Small copyright owners who barely get any royalty from their works would not benefit from such a long protection. It is the big copyright assignees who would want a long term of protection for a work, as that would facilitate nearly perpetual income.

The issue that springs up at this point is whether such a long-term protection is good for the objectives of copyright law. Copyright law strives to encourage creativity through exclusivity for a limited period. Though John Locke's natural rights theory, Herbert Spencer's moral rationale and personhood theories might advocate copyright protection, the most important rationales that really support the ends of copyright are the Utilitarian and the Economic rationales. Showing economic benefit as reward for creation of useful arts, which in turn benefits humanity is what really accomplishes the objective of copyright law.

What period of commercial benefit would be sufficient to promote progress of useful arts? This is a million dollar question, the answer for which is not easy. Lot of factors must be considered before this question could be answered. Some important factors that should be considered are:

a. The number of authors actually reaping the benefits of their works: This factor should be given primary importance because a very large percentage of the commercial benefit goes to copyright assignees rather than the original creators of works. Most of the commercial benefit doesn't act as an incentive to the original creators.

b. Types of works being created: The type of work created is another important factor because effort varies based on the type of work. Though sweat of the brow would not be considered while determining copyrightability, the effort necessary for creation is definitely a jurisprudential aspect that should be considered while determining the ideal term for copyright. The effort varies based on the type of work, while a literary or a dramatic work would require very little effort, a cinematographic or a musical work generally requires a Herculean effort.

c. Amount of investment going into the work: The third important factor that should be considered is the amount of money spent on creation of a work of authorship. Most of the time there is generally no investment or very little investment in certain types of works like literary or dramatic, while there is a huge amount of investment in other types of works like musical and cinematographic. The investment going into creation of a work should be seriously considered while determining the term of protection for a work.

The factors, commercial benefit, Investment and effort, play a major role in determining the ideal term that would suit copyright because creation depends on commercial benefit and the amount of commercial benefit depends on the term for which such benefit is available. Too longer or too shorter term of benefit is fatal for copyright law.

Part III: Ideal Copyright Term

It is difficult to mathematically determine the ideal copyright term because of the complexities involved in such a determination. It would be arbitrary to arrive at a number without a proper rationale. Term of protection given to similar types of Intellectual Property could be a good point to start the arduous task of finding the ideal copyright term. Since patent law works with an objective similar to that of copyright law, which is to promote the progress of science and technology, it would be a good idea to compare and contrast the copyright term with that of patent term.

Patent protection extends for only 20 years while copyright protection on the other hand extends to life plus fifty/seventy or ninety or one hundred and twenty years. The difference between the two terms cannot be rationally explained. Though there might be a few arguments justifying such a difference they would be largely inadequate to explain the disparity. The most rationale explanation that stands out is that copyright and patent laws evolved independently and therefore have different terms though the rationale for their protection is the same.

Patent term cannot obviously be as long as copyright protection because inventions in science and technology are too important to be kept out of the public domain. Inventions are comparatively more beneficial to the society than useful arts. Therefore, they should reach the society before useful arts. The argument sounds good but there is a basic problem with it. If the useful arts are not as important as inventions there is no justification for the lengthy term of exclusivity.

One of the reasons for the rapid progress of science and technology is the shorter patent term, which enriches the public domain and gives the public an opportunity to improve upon the existing science and technology. To facilitate such rapid progress of useful arts, it is essential to shorten the period of copyright protection also. The period should be less than or equal to twenty years, which is the term of protection offered to patents. As useful arts are not as important as inventions lesser term of protection than patents would be very reasonable.

It is advisable to give different terms of protection for various types of works of authorship based on the amount of protection offered to each type. As the amount of protection offered to literary and dramatic works is weak they should have a shorter period of protection when compared to musical and cinematographic works, which have a stronger protection. Though allocation of term based on the type of work might be slightly confusing, it is necessary for proper operation of copyright law.

Part IV: Conclusion

The existing copyright term is too long to help the cause of copyright law, which is to promote the progress of useful arts. It stretches the period of exclusive rights very extensively that the copyright owner is given predominance over the general public. Such lengthy exclusivity is stifling the progress of useful arts by narrowing the territory covered by the public domain. As prospective creation is directly proportional to the accessible information and knowledge in the public domain, the public domain should be enriched to promote rapid progress.

Shortening the term after which a copyrighted work would fall in it can enrich public domain. Though a shorter copyright term is advisable, it should be borne in mind that the duration should not be too short to divest the incentive to create. As it is not easy to arrive at a justifiable term, it is not a bad idea to limit the term to twenty years which is the term granted for patents. Instead of imposing a blanket copyright term to all types of works of authorship, it is necessary to have separate terms based on the intensity of protection granted to each type.

Though shortening of copyright term hasn't been given enough importance due to high level lobbying and public apathy, it is time to realize the importance of such an act. In order to reap the benefits of useful arts, the faith of authors in copyright law should be kept alive and that is possible only if lawmakers expedite the implementation of necessary reforms without any further delay. Useful arts make this world a better place and copyright law should be allowed to play a part in the betterment of this world.

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