COPYRIGHT TERM EXTENSION PROPOSAL IN INDIA

Working Paper

Prepared by

HRD Chair on IPR,
Centre for IPR Studies,
School of Legal Studies,
Cochin University of Science and Technology,
Kerala, Cochin – 682022.

July 2007

COPYRIGHT TERM EXTENSION PROPOSAL IN INDIA

Contents

Executive Summary

Indian Copyright Act, 1957 as amended in 1999 is in conformity with the international obligations we have under the Berne Convention and the TRIPS Agreement. Hence the current demand for term extension from the Indian film producers has to be examined from different perspectives before a final decision is taken. The most important is the larger national interest of the social and economic implication of extending the term of protection to foreign works (UK & US) in India. This is important in the context of India still being a major importer of foreign works for education in particular when compared to our export. As of now the term of protection of various works including cinematograph film is ten years more than the minimum stipulated by the Berne Convention. It is significant to note that as far as film is concerned unlike other countries the producer of the film is treated as the author of the film in India and the other contributors including the principal director has no independent right over the film. It is well understood that the negative impact of any term extension is the delay of works from falling into public domain and the restriction on free access to information. It is important to keep in mind the need for the free access to information to augment the fast growing nature of the Indian economy.

There are a number of new arguments for the extension of time such as harmonization, easy and fast copying due to new technology, extended commercial life of works, generational equity etc. The most significant being the need to bring our law in parity with other developed countries like UK and US so that the Indian works could enjoy the benefit of the term extension undertaken in these countries. An analysis of the UK law makes it clear that film is treated as a work of joint authorship and the producer and the principal director is considered as joint authors. But the term of protection is calculated based on the life of the contributors of the film like (a) the principal director, (b) the author of the screenplay, (c) the author of the dialogue, and (d) the composer of music specially created for and used in the film. In case these persons are not identifiable the term is only seventy years from the making of the film. In fact the producer is not considered as author for the purpose of the calculation of the term of the film and if in any case there is no persons mentioned above falling as authors the copyright expires at

the end of the period of 50 years from the end of the calendar year in which the film was made. This practically means that the life of the producer is not treated for calculating the term and in the absence of other others it is only fifty years. Regarding foreign works based on the rule of country of origin it is the term that is recognized for the author in the country of origin that is taken for protection in UK. This makes it very clear that a simple term extension in India to the producer of the film is not going to make the producer enjoy the benefit in UK and there needs to be further amendment at least to include the principal director as the author of the film and term calculated based on the life of other contributors to the film. Assuming that we are going to make these changes still we need clear evidence as to how many films India made before 60 years (let us say from 1947 to 1957) are going to get this immediate benefit.

The position in US is some what more complex since US become member of the Berne only in 1989. In US the motion picture is treated as a work for hire and the term after the Sonny Bono Act is 95 years from the date of publication or 120 years from the date of creation which ever expires first. The ownership of the film is on the person who commissions the work and is based on the terms of contractual relationship with the contributors to the film. Regarding foreign work it is based on the principles of publication if it is after 1-1-1978 and in case of works before 1-1-1978 this is subjected to the conditions laid down for restoration of works. This will also include the works of Berne members who have not complied with the publication and notice requirement to obtain copyright protection in US. This presupposes the proactive role required from the part of the Indian authors particularly film producers to safegruard their copyright in US. There is no evidence on record to show whether the Indian producers of the filim have statisfied these requirements to claim the benefit of this provision and the term extension in US. Thus it is not clear whether all the existing copyright Indian works produced before 1-1-1978 are entitled to this benefit in US. This is all the more important to films which were produced before 60 years (let us say from 1947 to 1957) which are going to be the immediate beneficiary of the term extension. If we have not complied with the US requirements the majority of our works whose term is going to expire now will lose out of the benefit of this provision. Hence we need a clear statistics from the Indian industry regarding the number of the works produced before 1-1-1978 that are going to enjoy the

term extension beneifit in US if India amends her law in tune with US. In addition to this we also need to findout the implication of term extension in other foreign markets. In the absence of such analysis the benefit of term extension is going to be for foreign works in India rather than Indian works in foreign countries. This will have adverse economic impact on the Indian economy.

The term extension for film will compel us to extent the term of protection for other works in India in the context of Article 14 of the Consititution. This will have foreaching consqueses particulary in case of books. For examples books of Bernard Shaw (d: 1950), Eugene O'Neill (d: 1953) and Thomas Mann (d: 1955) which are popular in India and going to be in public domain soon will continue with protection if we extent the term. At the same time we do not have many authors belonging to this period who still command much readership abroad to claim similar benefit from foreign market.

Recent studies on economic analysis of term extension like the amicus cure brief presented before the US Supreme Court in the case challenging the Sonny Bono Act and the Gowers' Report on Intellecctual Property in UK make it clear that shorter term of protection is much benefitial to the country particularly developing countries to protect the national economy and public interest of free access to information. There is no clear economic evidence to show that term extension will promote creativity and also protect the interest of the authors. Since the copyright in majoirty of the works that remains in the market for longer duration is with the industry the major beneficiary is going to be the industry rather than the real creators of the works. In the context of digital technology and internet transmission it is important to keep in mind the social implication of term extension. Based on this analysis of the following conclusions could be drawn:

1. Extension of term of protection for cinematograph film in India is not going to help the producers to get benefit of the extended term in UK and USA because of the difference in the law regarding authorship and ownership.
2. There need to be an amendment in the authorship of cinematograph film to include other creators particularly the director of the film to enjoy the benefit in UK.
3. There is also no statistical evident to show how many of the films produced before 60 years (let us say from 1947 to 1957) which is going to be the immediate

beneficiary in UK and US and how much revenue India is going to gain out of the term extension.

4. The extension of the term for film will compel India to do similar extension to other works particularly on literary works which will have a serious impact on the educational sector.
5. The term extension has the implication of extending the term of protection of foreign works in India. We have no evidence available as to the trade balance on works particularly of film. Unless we have evidence to show that term extension will increase our inflow of foreign exchange to the works that are going to public domain immediately when compared to the import and loss of foreign exchange it is not in larger national interest to extent the term of protection.
6. There is no economic analysis produced by the film industry to show the revenue flow from the film production and distribution to justify the term extension.
7. There is also no evidence produced by the film industry to show how revenue is shared with the creators of the works who contribute to the success of the film to justify term extension.
8. It is evident from the studies and latest report available that there is no clear proof of economic benefit or increase in creativity due to term extension.
9. It is also event from studies that the social cost involved in term extension is very high and given the social, educational and economic condition of India a term extension with out proper social and economic analysis is going to be disastrous.
10. In the absence of clear evidence to justify term extension it is strongly felt that the term extension will have negative social and economic impact for India particularly in the context of digital technology though it may help some individual Indian producers and large number of foreign producers to gain more economic benefits in India.
11. In the larger national interest it is recommended that as of now there is no justification for a term extension.

COPYRIGHT TERM EXTENSION PROPOSAL IN INDIA

Working Paper*

Introduction

India is a signatory to the Berne Convention (1883) for the protection of literary and artistic work and TRIPS Agreement under WTO. It may be noted at the outset that the Indian Copyright Act 1957 as amended in 1999 is in conformity with the obligations under these international instruments. Hence the proposal for copyright term extension for cinematograph film in India is not to satisfy any obligation under any international treaty to which India is a signatory. The member countries are free to provide or deny additional protection without claim or complaint from any other member nation. Consequently, any extension sought must logically ask for reasons and a thorough analysis of the ensuing cost and benefits must be undertaken. This calls for a detailed analysis of legal, economic and social implications. However before moving into further details, it would be interesting to examine the reasons for the proposal for extension and the problems it could cause to protect the wider public interest of access to information.

Obligations under Berne and TRIPS

Article 14bis of the Berne Convention provides independent protection for cinematographic work[1]. As per this Article the owner of the cinematographic work shall enjoy all the rights enjoyed by an author of an original work. It is interesting to note that unlike in other Articles conferring rights to literary and artistic works, the Convention used the words "owner" rather than "author" to confer rights in case of cinematograph works. This gives an impression that even legal persons could also be the owner and hence the author of the copyright. But the Convention left open for the countries to

* Prepared by Dr. N.S. Gopalakrishnan, Professor HRD Chair on IPR with the research support from Mr. Yogesh Pai, Researcher, Centre for IPR Studies, Cochin University of Science & Technology, Cochin – 682022

[1] Article 14bis (1) read: Without prejudice to the copyright in any work which may have been adapted or reproduced, a cinematographic work shall be protected as an original work. The owner of copyright in a cinematographic work shall enjoy the same rights as the author of an original work, including the rights referred to in the preceding Article".

determine the ownership of cinematograph work[2]. Thus it is possible for the countries to provide the ownership to the maker of the film alone or jointly to all the persons contributing to the creation of the film. It is made clear in the Convention that in case the contributors of the film is also included as owners of the film then they should not object to the reproduction, distribution, public performance, communication to the public by wire, broadcasting or any other communication to the public, or to the subtitling or dubbing of texts, of the work unless there is a contract to the contrary[3]. The determination of nature of the contractual relations is also left to the legislation of the countries[4]. It is further clarified in the Convention that this provision will not have any application to the authors of scenarios, dialogues and musical works created for the making of the film or to the principal director unless there is a provision to the contrary in the national legislation[5]. Thus it is clear that the countries have the freedom to determine the ownership but has an obligation to take care of the interest of the creators particularly that of the principal director.

Regarding the term of protection though the general rule is life of the author of the work and fifty years for cinematographic work it is fifty years from the making of the work available to the public with the consent of the author or failing such event fifty

[2] Article 14bis (2) *(a) read: "*Ownership of copyright in a cinematographic work shall be a matter for legislation in the country where protection is claimed".

[3] *(b)* However, in the countries of the Union which, by legislation, include among the owners of copyright in a cinematographic work authors who have brought contributions to the making of the work, such authors, if they have undertaken to bring such contributions, may not, in the absence of any contrary or special stipulation, object to the reproduction, distribution, public performance, communication to the public by wire, broadcasting or any other communication to the public, or to the subtitling or dubbing of texts, of the work.

[4] Article 14bis (2) (c) read*: "*The question whether or not the form of the undertaking referred to above should, for the application of the preceding subparagraph *(b)*, be in a written agreement or a written act of the same effect shall be a matter for the legislation of the country where the maker of the cinematographic work has his headquarters or habitual residence. However, it shall be a matter for the legislation of the country of the Union where protection is claimed to provide that the said undertaking shall be in a written agreement or a written act of the same effect. The countries whose legislation so provides shall notify the Director General by means of a written declaration, which will be immediately communicated by him to all the other countries of the Union".

(d) By "contrary or special stipulation" is meant any restrictive condition which is relevant to the aforesaid undertaking.

[5] Article 14bis (3) read: Unless the national legislation provides to the contrary, the provisions of paragraph (2)(b) above shall not be applicable to authors of scenarios, dialogues and musical works created for the making of the cinematographic work, or to the principal director thereof. However, those countries of the Union whose legislation does not contain rules providing for the application of the said paragraph (2)(b) to such director shall notify the Director General by means of a written declaration, which will be immediately communicated by him to all the other countries of the Union.

years after the making of the work[6]. Countries are free to provide more protection than the minimum stipulated in the Convention[7]. But the countries are not bound to provide this additional protection unless the same is available in the country of origin of the work. The obligation is only to provide the term enjoyed by the work in the country of origin[8]. TRIPS Agreement obligates the countries to follow only the term of protection provided under the Berne Convention[9].

Protection of Cinematograph Film under the Indian Law

Section 13(1)(b) of the Indian Copyright Act treat cinematograph film as a separate work and provide independent rights under section 14(d). Based on the flexibility available under the Berne Convention Indian law recognized the producer of the work as the author and first owner of the cinematograph film[10]. The Act also defined the producer as a person who takes the initiative and responsibility for making the film[11]. Thus it is clear that the producer need not be one who intellectually contribute to the creation of the film and could even be a legal person like corporations. It is also clear that all the intellectual contributors including the director of the film has no independent copyright over the film since they are not included as authors of the film. The director of the film do not have independent copyright for his creativity unlike other contributors of the film like the script writer, music composer, creator of scenarios etc who could claim authorship over their respective creative contributions. As per section 26[12] the term of

[6] Article 7(2) read: "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".
[7] Article (7)(6) read: "The countries of the Union may grant a term of protection in excess of those provided by the preceding paragraphs".
[8] Article (7)(8) read: "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".
[9] Article 9(1) of the TRIPS Agreement read: Members shall comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto. However, Members shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6*bis* of that Convention or of the rights derived there from".
[10] Section 2(d)(iv) read: "in relation to cinematograph film and sound recording the producer".
[11] Section 2(u) read: "producer', in relation to a cinematograph film or sound recording, means a person who takes the initiative and responsibility for making the work".
[12] Section 26 read: "In the case of a cinematograph film, copyright shall subsist until sixty years from the beginning of the calendar year next following the year in which the film is published.

protection is sixty years from the date of publication of the film. It was fifty years originally and become sixty when the term was extended in 1991.

There is an inherent reason in the producer not qualifying for a life term protection in addition to 60 years as in case of literary, dramatic musical or artistic works (other than a photograph). The reason being that, qualfying for a life time protection is necessarrily based on identification of minimum amount of creativity in the work by the author. Hence in case of producer recognised as the author in the film, there cannot be any creativity which can be identified as worth protecting under the category of life of author term. The other reason could be the possibility of legal personality being the producer and owning copyright as per the definition of producer under the Indian law. One neednot explain the practical difficulty of calculating the term in such cases. Hence asking for a life + term by the producer is inherently antithesis to the copyright jurisprudence.

Arguments for Copyright Term Extension

Owners of copyright all over the world today are not the actual creators of the works. Major copyright industries own the majority of works worth distributing for a long duration. These industries prefer to have longer duration of protection so as to have continued and if possible perpetual monopoly over the most popular works. It is the larger public interest of free access to information that keeps the policy makers conscious of the problem of term extension. The history of copyright debate has sufficient evidence to demonstrate this[13]. Even in India there were earlier attempts by other interest groups to extend the term of protection and the previous effort was rejected on the ground of larger national interest[14].

There are a number of new arguments for the extension of time such as harmonization, easy and fast copying due to new technology, extended commercial life of works, generational equity etc. Of this the harmonization of Indian copyright term with EU and USA and other countries seems to be the most pressed one. Currently the EU and

[13] For details see Ronan Deazley, *On the Origin of the Right to Copy: Charting the Movement of the Copyright Law in Eighteenth-Century Britain (1695-1775.)*

[14] There was an attempt in 1998-2001 to further extent the term in line with EU and US by Viwabharathi University when the copyright of the works of Ravindra Natha Tagore was about to expire. The 1991 amendment was in fact to protect his works.

USA, major producers and consumer markets for copyrighted goods have increased their copyright durations for life + 70 years (or 20 year increase in case of works for hire). Such additional protection is however accrued on the term of protection available in the country of origin. Hence there is an increasing argument that India may lose such markets due to corresponding lack of protection in the Indian scenario.

However an examination of the US and UK copyright provisions vis-à-vis the Indian copyright law, makes it evident that such harmonization is not possible in the right sense of the term since the basis of provision of rights and identification of authorship and ownership differ from country to country. An examination of the provisions of these countries and its comparison with Indian law will make this point clear.

Provisions in the UK CDPA 1988

The Copyright Designs and Patents Act, 1988 (CDPA) is the law governing copyright which is to a large degree constrained by EU law in respect of duration of copyright.[15] The UK CDPA, 1988 in its section 9 defines "authorship of work".[16] In the case of a film[17] the producer and the principal director constitute the author. Hence a film

[15] The term of copyright protection in Member States of the European Union was harmonized by Council Directive 93/98/EEC of 29 October 1993 (as amended by Council directive 2001/29/ EC of 22 May 2001).

[16] **Section 9: Authorship of work:** (1) In this Part "author", in relation to a work, means the person who creates it. (2) That person shall be taken to be – (aa) in the case of a sound recording, the producer; (***ab) in the case of a film, the producer and the principal director;*** (b) in the case of a broadcast, the person making the broadcast (see section 6(3)) or, in the case of a broadcast which relays another broadcast by reception and immediate re-transmission, the person making that other broadcast; [(c)]……(omitted authorship of cable programmes) (d) in the case of the typographical arrangement of a published edition, the publisher. (3) In the case of a literary, dramatic, musical or artistic work which is computer-generated, the author shall be taken to be the person by whom the arrangements necessary for the creation of the work are undertaken. (4) For the purposes of this Part a work is of "unknown authorship" if the identity of the author is unknown or, in the case of a work of joint authorship, if the identity of none of the authors is known. (5) For the purposes of this Part the identity of an author shall be regarded as unknown if it is not possible for a person to ascertain his identity by reasonable inquiry; but if his identity is once known it shall not subsequently be regarded as unknown.

[17] **Section 5B Films:** *(1)* ***In this Part "film" means a recording on any medium from which a moving image may by any means be produced.*** (2) The sound track accompanying a film shall be treated as part of the film for the purposes of this Part. (3) Without prejudice to the generality of subsection (2), where that subsection applies – (a) references in this Part to showing a film include playing the film sound track to accompany the film, and (b) references to playing a sound recording do not include playing the film sound track to accompany the film. (4) Copyright does not subsist in a film which is, or to the extent that it is, a copy taken from a previous film. (5) Nothing in this section affects any copyright subsisting in a film sound track as a sound recording.

is considered as a work of joint authorship within the meaning of the UK CDPA, 1998.[18] Section 11 also states that where in the case of a literary, dramatic, musical or artistic work or a film made in course of employment by an employee, the first owner shall be the employer, which comes as an exception to the general rule that the author of the work is the first owner of any copyright.[19]

The duration of copyright in films is spelt out in section 13B. It grants copyright in films for life of the last surviving among the authors plus a period of 70 years.[20] Four categories of authors identified for this purpose include (1) the principal director, (2) author of screen play, (3) the author of the dialogue, and (4) the composer of music

[18] **Section 10 Works of joint authorship:** (1) In this Part a "work of joint authorship" means a work produced by the collaboration of two or more authors in which the contribution of each author is not distinct from that of the other author or authors. ***(1A) A film shall be treated as a work of joint authorship unless the producer and the principal director are the same person.*** (2) A broadcast shall be treated as a work of joint authorship in any case where more than one person is to be taken as making the broadcast (see section 6(3)). (3) References in this Part to the author of a work shall, except as otherwise provided, be construed in relation to a work of joint authorship as references to all the authors of the work.

[19] **Section 11: First ownership of copyright:** ***(1) The author of a work is the first owner of any copyright in it, subject to the following provisions. (2) Where a literary, dramatic, musical or artistic work, or a film, is made by an employee in the course of his employment, his employer is the first owner of any copyright in the work subject to any agreement to the contrary.*** (3) This section does not apply to Crown copyright or Parliamentary copyright (see section 163 and 165) or to copyright which subsists by virtue of section 168 (copyright of certain international organisations).

[20] **Section 13B Duration of copyright in films:** (1) The following provisions have effect with respect to the duration of copyright in a film. ***(2) Copyright expires at the end of the period of 70 years from the end of the calendar year in which the death occurs of the last to die of the following persons – (a) the principal director, (b) the author of the screenplay, (c) the author of the dialogue, or (d) the composer of music specially created for and used in the film; subject as follows.*** (3) If the identity of one or more of the persons referred to in subsection (2)(a) to (d) is known and the identity of one or more others is not, the reference in that subsection to the death of the last of them to die shall be construed as a reference to the death of the last whose identity is known. (4) If the identity of the persons referred to in subsection (2)(a) to (d) is unknown, copyright expires at – (a) the end of the period of 70 years from the end of the calendar year in which the film was made, or (b) if during that period the film is made available to the public, at the end of the period of 70 years from the end of the calendar year in which it is first so made available. (5) Subsections (2) and (3) apply if the identity of any of those persons becomes known before the end of the period specified in paragraph (a) or (b) of subsection (4). (6) For the purposes of subsection (4) making available to the public includes – (a) showing in public, or (b) communicating to the public; but in determining generally for the purposes of that subsection whether a film has been made available to the public no account shall be taken of any unauthorised act. (7) Where the country of origin is not an EEA state and the author of the film is not a national of an EEA state, the duration of copyright is that to which the work is entitled in the country of origin, provided that does not exceed the period which would apply under subsections (2) to (6). (8) In relation to a film of which there are joint authors, the reference in subsection (7) to the author not being a national of an EEA state shall be construed as a reference to none of the authors being a national of an EEA state. ***(9) If in any case there is no person falling within paragraphs (a) to (d) of subsection (2), the above provisions do not apply and copyright expires at the end of the period of 50 years from the end of the calendar year in which the film was made.*** (10) For the purposes of this section the identity of any of the persons referred to in subsection 2(a) to (d) shall be regarded as unknown if it is not possible for a person to ascertain his identity by reasonable inquiry; but if the identity of any such person is once known it shall not subsequently be regarded as unknown.

specially created for and used in the film. More importantly, it should be noted that a producer who is recognised as an author for the purpose of determining authorship under section 9 of the CDPA is not included in section 13B as an author for the purpose of calculating the duration of the films. But as per subsection (4) incase the identity of the above four category of people recognised as authors under section 13B(2) for the purpose of calculating duration is not known, the copyright shall expire at the end of 70 years from the end of the calendar year in which the film is made. It is further made clear in subsection 9 that ***if in any case there is no person falling within paragraphs (a) to (d) of subsection (2), the above provisions do not apply and copyright expires at the end of the period of 50 years from the end of the calendar year in which the film was made.*** This clearly points out to a vital fact that even while the producer's identity may be known, his life is not taken for the purpose of calculating duration of copyright in films. Thus the duration of the copyright in film in respect of the producer tacitly remains only for 50 years from the year in which the film was made.

Further the protection for foreign authors in UK depends upon the protection of such authors in their country of origin. This comparison of terms provisions is akin to UK wherein the protection in country of origin forms the basis of gaining additional term protection in UK. Thus in case of films, if the work does not owe its origin to a EEA State and the author of the film is not an national of an EEA State, the duration of copyright shall be as per the country of origin provided it does not exceed the duration applicable to EEA works and authors.[21] There is also a section dedicated for defining the country of origin.[22]

[21] **Section 13B (7):** Where the country of origin is not an EEA state and the author of the film is not a national of an EEA state, the duration of copyright is that to which the work is entitled in the country of origin, provided that does not exceed the period which would apply under subsections (2) to (6).

[22] **Section 15A Meaning of country of origin:** (1) For the purposes of the provisions of this Part relating to the duration of copyright the country of origin of a work shall be determined as follows. (2) If the work is first published in a Berne Convention country and is not simultaneously published elsewhere, the country of origin is that country. (3) If the work is first published simultaneously in two or more countries only one of which is a Berne Convention country, the country of origin is that country. (4) If the work is first published simultaneously in two or more countries of which two or more are Berne Convention countries, then – (a) if any of those countries is an EEA state, the country of origin is that country; and (b) if none of those countries is an EEA state, the country of origin is the Berne Convention country which grants the shorter or shortest period of copyright protection. (5) If the work is unpublished or is first published in a country which is not a Berne Convention country (and is not simultaneously published in a Berne Convention country), the country of origin is – (a) if the work is a film and the maker of the film has his headquarters in, or is domiciled or resident in a Berne Convention country, that country; (b) if the work is –

This makes it clear that the simple extension of term of protection of film in India will not entitle the producer of the Indian film to claim the extended period of protection in UK. To enjoy the benefit of the term extension in UK the author of cinematograph film in India must also be amended to include at least the principal director of the film. In addition to this a new term of protection similar to other authors must be provided for the work of director of the film under the Indian law.

Provisions in the US Copyright Act, 1976

The structure of US copyright law is somewhat different to that of the UK. The Copyright Act 1976 (17 USC) confers copyright on the authors of any "original woks of authorship fixed in any tangible medium of expression".[23] The US Copyright Act although vest the initial ownership of copyright with the author, fails to define the term "author" or who constitutes author in a particular work. Thus the concept of ownership[24] is central to the copyright law in USA for determining rights and limitations and ensuing remedies. However, the authorship (especially for the purpose of determining duration) is possibly traced through the work's genesis (from whom does the work originate) or on the basis as to when and by whom the work was first "created".[25] It may be noted that for securing protection the work need to be fixed by or under the authority of the author. [26]

(i) a work of architecture constructed in a Berne Convention country, or (ii) an artistic work incorporated in a building or other structure situated in a Berne Convention country, that country; (c) in any other case, the country of which the author of the work is a national. (6) In this section – (a) a "Berne Convention country" means a country which is party to any Act of the International Convention for the Protection of Literary and Artistic Works signed at Berne on 9th September 1886; and (b) references to simultaneous publication are to publication within 30 days of first publication.

[23] § 102 (a).

[24] "Copyright owner", with respect to any one of the exclusive rights comprised in a copyright, refers to the owner of that particular right.

[25] A work is "created" when it is fixed in a copy or phonorecord for the first time; where a work is prepared over a period of time, the portion of it that has been fixed at any particular time constitutes the work as of that time, and where the work has been prepared in different versions, each version constitutes a separate work.

[26] A work is "fixed" in a tangible medium of expression when its embodiment in a copy or phonorecord, ***by or under the authority of the author***, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. A work consisting of sounds, images, or both, that are being transmitted, is "fixed" for purposes of this title if a fixation of the work is being made simultaneously with its transmission.

But what constitutes or includes "works of authorship" is specifically defined in the Act.[27]

Ownership in copyrighted works is recognized through the definition of the term "copyright owner". First ownership of copyright initially rests with the author or joint author[28] of the works.[29] In case of "work made for hire",[30] the employer or other person for whom the work was prepared is considered the author.[31] Thus for works made for hire, unless the parties have expressly agreed otherwise in a written instrument signed by them, the employer or other person for whom such work is prepared, owns all of the rights

---

[27] **§ 102. Subject matter of copyright**: In general (a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories: (1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) **motion pictures and other audiovisual works;** (7) sound recordings; and (8) architectural works. (b) In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.

[28] A **"joint work"** is a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.

[29] **§ 201. Ownership of copyright:** (a) Initial Ownership.-Copyright in a work protected under this title vests initially in the author or authors of the work. The authors of a joint work are co-owner of copyright in the work.

[30] A **"work made for hire"** is - (1) a work prepared by an employee within the scope of his or her employment; or ***(2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.*** For the purpose of the foregoing sentence, a "supplementary work" is a work prepared for publication as a secondary adjunct to a work by another author for the purpose of introducing, concluding, illustrating, explaining, revising, commenting upon, or assisting in the use of the other work, such as forewords, afterwords, pictorial illustrations, maps, charts, tables, editorial notes, musical arrangements, answer material for tests, bibliographies, appendixes, and indexes, and an "instructional text" is a literary, pictorial, or graphic work prepared for publication and with the purpose of use in systematic instructional activities. In determining whether any work is eligible to be considered a work made for hire under paragraph (2), neither the amendment contained in section 1011(d) of the Intellectual Property and Communications Omnibus Reform Act of 1999, as enacted by section 1000(a)(9) of Public Law 106-113, nor the deletion of the words added by that amendment -- (A) shall be considered or otherwise given any legal significance, or (B) shall be interpreted to indicate congressional approval or disapproval of, or acquiescence in, any judicial determination, by the courts or the Copyright Office. Paragraph (2) shall be interpreted as if both section 2(a)(1) of the Work Made For Hire and Copyright Corrections Act of 2000 and section 1011(d) of the Intellectual Property and Communications Omnibus Reform Act of 1999, as enacted by section 1000(a)(9) of Public Law 106-113, were never enacted, and without regard to any inaction or awareness by the Congress at any time of any judicial determinations.

[31] **§ 201. Ownership of copyright:** (b) Works Made for Hire - In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.

comprised in the copyright. It also defines ownership in case of collective works[32] vesting each separate copyright in contribution to the work distinct from the work as a whole.[33] In case of works like motion pictures[34] and audiovisual works, a work specially ordered or commissioned for use as a contribution can be considered as "works for hire" if the parties expressly agree in a written instrument signed by them that the work shall be so considered.[35] Hence for all purposes, the author in a motion picture has ownership of the same according to terms of contract and the works for hire doctrine. It is by operation of the works made for hire provisions that US film producers acquire the copyright in motion pictures, through their special contract with creative contributors to the film.

The US Copyright Act for all practical purposes defines the term duration in case of natural authorship as life + 70 years, which was increased from life + 50 years by the **Sonny Bono Copyright Term Extension Act of 1998**.[36] In case of corporate authorship

---

[32] A **"collective work"** is a work, such as a periodical issue, anthology, or encyclopedia, in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole.

[33] **§ 201. Ownership of copyright:** (c) Contributions to Collective Works - Copyright in each separate contribution to a collective work is distinct from copyright in the collective work as a whole, and vests initially in the author of the contribution. In the absence of an express transfer of the copyright or of any rights under it, the owner of copyright in the collective work is presumed to have acquired only the privilege of reproducing and distributing the contribution as part of that particular collective work, any revision of that collective work, and any later collective work in the same series.

[34] **"Motion pictures"** are audiovisual works consisting of a series of related images which, when shown in succession, impart an impression of motion, together with accompanying sounds, if any.

[35] A **"work made for hire"** is - (1) a work prepared by an employee within the scope of his or her employment; or (2) ***a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.*** For the purpose of the foregoing sentence, a "supplementary work" is …… purpose of use in systematic instructional activities.

[36] **§ 302. Duration of copyright**: **Works created on or after January 1, 1978:** (a) In General - Copyright in a work created on or after January 1, 1978, subsists from its creation and, except as provided by the following subsections, endures for a term consisting of the life of the author and 70 years after the author's death. (b) Joint Works - In the case of a joint work prepared by two or more authors who did not work for hire, the copyright endures for a term consisting of the life of the last surviving author and 70 years after such last surviving author's death. (c) Anonymous Works, Pseudonymous Works, and **Works Made for Hire** - In the case of an anonymous work, a pseudonymous work, or a ***work made for hire, the copyright endures for a term of 95 years from the year of its first publication, or a term of 120 years from the year of its creation, whichever expires first.*** If, before the end of such term, the identity of one or more of the authors of an anonymous or pseudonymous work is revealed in the records of a registration made for that work under subsections (a) or (d) of section 408, or in the records provided by this subsection, the copyright in the work endures for the term specified by subsection (a) or (b), based on the life of the author or authors whose identity has been revealed. Any person having an interest in the copyright in an anonymous or pseudonymous work may at any time record, in records to be maintained by the Copyright Office for that purpose, a statement identifying one or more authors of the work; the statement shall also

i.e. in case of works made for hire, the term is 95 years from the year of its first publication, or a term of 120 years from its creation, whichever expires first. The duration of U.S. copyright for works created before 1978 is a complex matter; however, works ***published before 1923*** are all in the public domain.[37] In case of works created before 1978 it is clear that to enjoy the term extension there must be request for the renewal of the term in the prescribed manner within one year by the persons entitled or else it will vest with the original proprietor[38].

---

identify the person filing it, the nature of that person's interest, the source of the information recorded, and the particular work affected, and shall comply in form and content with requirements that the Register of Copyrights shall prescribe by regulation. (d) Records Relating to Death of Authors.-Any person having an interest in a copyright may at any time record in the Copyright Office a statement of the date of death of the author of the copyrighted work, or a statement that the author is still living on a particular date. The statement shall identify the person filing it, the nature of that person's interest, and the source of the information recorded, and shall comply in form and content with requirements that the Register of Copyrights shall prescribe by regulation. The Register shall maintain current records of information relating to the death of authors of copyrighted works, based on such recorded statements and, to the extent the Register considers practicable, on data contained in any of the records of the Copyright Office or in other reference sources. (e) Presumption as to Author's Death - After a period of 95 years from the year of first publication of a work, or a period of 120 years from the year of its creation, whichever expires first, any person who obtains from the Copyright Office a certified report that the records provided by subsection (d) disclose nothing to indicate that the author of the work is living, or died less than 70 years before, is entitled to the benefit of a presumption that the author has been dead for at least 70 years. Reliance in good faith upon this presumption shall be a complete defense to any action for infringement under this title.

[37] **§ 303. Duration of copyright:** Works created but not published or copyrighted before January 1, 1978 (a) Copyright in a work created before January 1, 1978, but not theretofore in the public domain or copyrighted, subsists from January 1, 1978, and endures for the term provided by section 302. In no case, however, shall the term of copyright in such a work expire before December 31, 2002; and, if the work is published on or before December 31, 2002, the term of copyright shall not expire before December 31, 2047. (b) The distribution before January 1, 1978, of a phonorecord shall not for any purpose constitute a publication of the musical work embodied therein.

[38] **§ 304 · Duration of copyright: Subsisting copyrights**. (a) Copyrights in Their First Term on January 1, 1978 — (1)(A) Any copyright, in the first term of which is subsisting on January 1, 1978, shall endure for 28 years from the date it was originally secured. (B) In the case of — (i) any posthumous work or of any periodical, encyclopedia, or other composite work upon which the copyright was originally secured by the proprietor thereof, or (ii) any work copyrighted by a corporate body (otherwise than as assignee or licensee of the individual author) or by an employer for whom such work is made for hire, the proprietor of such copyright shall be entitled to a renewal and extension of the copyright in such work for the further term of 67 years. (C) ---------- (2)(A) At the expiration of the original term of copyright in a work specified in paragraph (1)(B) of this subsection, the copyright shall endure for a renewed and extended further term of 67 years, which— (i) if an application to register a claim to such further term has been made to the Copyright Office within 1 year before the expiration of the original term of copyright, and the claim is registered, shall vest, upon the beginning of such further term, in the proprietor of the copyright who is entitled to claim the renewal of copyright at the time the application is made; or (ii) if no such application is made or the claim pursuant to such application is not registered, shall vest, upon the beginning of such further term, in the person or entity that was the proprietor of the copyright as of the last day of the original term of copyright.

Regarding protection of foreign works in US it is evident that it is based on the principles of publication mentioned in section 104[39]. Section 104A deals with restoration of copyright of works in US by reason of US becoming party to international treaties like Berne and WTO[40]. The definition of 'restored work'[41] and the provision for filing of notice of intend[42] make it clear the conditions to be satisfied for the foreign works to enjoy the benefit of this provision. This presupposes the proactive role required from the part of the Indian authors particularly film producers to safegruard their copyright in US. There is no evidence on record to show whether the Indian producers of the filim has statisfied these requirements to claim the benefit of this provision and the term extension in US. Thus it is not clear whether all the existing copyright Indian works produced before 1-1-1978 are entitled to this benefit in US. This is all the more important to films

[39] **§ 104** (b) Published Works.—The works specified by sections 102 and 103, when published, are subject to protection under this title if— (1) on the date of first publication, one or more of the authors is a national or domiciliary of the United States, or is a national, domiciliary, or sovereign authority of a treaty party, or is a stateless person, wherever that person may be domiciled; or (2) the work is first published in the United States or in a foreign nation that, on the date of first publication, is a treaty party; or ------ (c) Effect of Berne Convention.— No right or interest in a work eligible for protection under this title may be claimed by virtue of, or in reliance upon, the provisions of the Berne Convention, or the adherence of the United States thereto. Any rights in a work eligible for protection under this title that derive from this title, other Federal or State statutes, or the common law, shall not be expanded or reduced by virtue of, or in reliance upon, the provisions of the Berne Convention, or the adherence of the United States thereto.

[40] **§ 104a · Copyright in restored works**: (a) Automatic Protection and Term.— (1) Term.— (A) Copyright subsists, in accordance with this section, in restored works, and vests automatically on the date of restoration. (B) Any work in which copyright is restored under this section shall subsist for the remainder of the term of copyright that the work would have otherwise been granted in the United States if the work never entered the public domain in the United States. --- (b) Ownership of Restored Copyright.— A restored work vests initially in the author or initial rightholder of the work as determined by the law of the source country of the work.

[41] **§ 104a** (6) The term "restored work" means an original work of authorship that— (A) is protected under subsection (a); (B) is not in the public domain in its source country through expiration of term of protection; (C) is in the public domain in the United States due to— (i) noncompliance with formalities imposed at any time by United States copyright law, including failure of renewal, lack of proper notice, or failure to comply with any manufacturing requirements; (ii) lack of subject matter protection in the case of sound recordings fixed before February 15, 1972; or (iii) lack of national eligibility; (D) has at least one author or rightholder who was, at the time the work was created, a national or domiciliary of an eligible country, and if published, was first published in an eligible country and not published in the United States during the 30-day period following publication in such eligible country; and (E) if the source country for the work is an eligible country solely by virtue of its adherence to the WIPO Performances and Phonograms Treaty, is a sound recording.

[42] **§ 104a** (c) Filing of Notice of Intent to Enforce Restored Copyright Against Reliance Parties. — On or after the date of restoration, any person who owns a copyright in a restored work or an exclusive right therein may file with the Copyright Office a notice of intent to enforce that person's copyright or exclusive right or may serve such a notice directly on a reliance party. Acceptance of a notice by the Copyright Office is effective as to any reliance parties but shall not create a presumption of the validity of any of the facts stated therein. Service on a reliance party is effective as to that reliance party and any other reliance parties with actual knowledge of such service and of the contents of that notice.

which were produced before 60 years (let us say from 1947 to 1957) which are going to be the immediate beneficiary of the term extension. If we have not complied with the US requirements the majority of our works whose term is going to expire now will lose out of the benefit of this provision. Hence we need a clear statistics from the Indian industry regarding the number of the works produced before 1-1-1978 that are going to enjoy the term extension beneifit in US if India amends her law in tune with US.

It is evident that there is substantial difference between the US law and Indian law regarding the ownership of film. As per the Indian law it is not treated as a work for hire. The producer is defined and intependent status is given for the purpose of copyright protection. It may be possible for one to argue that the producers of the Indian film may be entiled to claim the additional term of protection provided they satisisfy the provisions of the US law. It may also be important to note that eventhough registration is not mandatory for enjoying the copyright protection by Indian owners after US become the member of Berne Convention, there is not going to be any substantial benefit on the compensation for infringement unless the work is registered in US[43]. Thus it is highly debatable whether Indian film producers are going to have siginficant benefit from the term extension if Indian law is amended in line with US. On the contrary the US film producers are going to get full benefit given the liberal nature of the Indian Copyrigth Act towards foreign works.

Arguments against Copyright Term Extension

> *"It is good that authors should be remunerated; and the least exceptionable way of remunerating them is by a monopoly. Yet monopoly is an evil. For the sake of the good we must submit to the evil; but the evil ought not to last a day longer than is necessary for the purpose of securing the good".*

[43] **§ 412 · Registration as prerequisite to certain remedies for infringement**: In any action under this title, other than an action brought for a violation of the rights of the author under section 106A(a) or an action instituted under section 411(b), no award of statutory damages or of attorney's fees, as provided by sections 504 and 505, shall be made for— (1) any infringement of copyright in an unpublished work commenced before the effective date of its registration; or (2) any infringement of copyright commenced after first publication of the work and before the effective date of its registration, unless such registration is made within three months after the first publication of the work.

- Lord McCauley in 1841.[44]

The question in the current context is very plain and straight although complex in terms of finding out whether term extension would further the process of creativity for the purpose of which the copyright system exists. It is not in question whether or not term extension would create incentives and foster creativity by existing and future copyright holders, but it is precisely about the degree of incentives. The problem lies in articulating whether prolonged copyright would foster better creativity or early passing into the public domain would create the best incentives for future creativity. The argument in favour of early passage into public domain is hereby advanced thus opposing the proposal for copyright term extension in India.

Problems in International Harmonisation

The harmonisation of copyrght term initailly started in Europe as an attempt to bring parity among the member countries in the European Union.[45] But soon USA followed with the Sonny Bono Coyright Term Extension Act in 1998 with an aim to harmonise copyright terms with the EU directive. However there are serious questions raised about the degree of harmonisation achieved by US with EU. Commentators lament that harmonisation in true terms has not perfectly occurred due to variety of problems including identifications of auhtors, dfferent right holders, copyright owners, differences in length and breadth of rights, differences in fair use provision etc,. A certain set of problems may also arise in case India tries to harmonise its law with other countries internationally. The problems which may arise specifically with reference to UK/ EU law and US laws is hereby addressed.

In case of UK the term of life + 70 years is not based upon the life of producer, evenwhile he is regarded as an joint author along with pricipal director. The qualfying life term ensues due to presence to a special provision mentioning the principal director and three other classes of persons recognised for the purpose of calculation of life + term. The Indian situation on the other hand does not recognise cinematograph work as a work

[44] **A** speech delivered in the house of commons on the 5th of February 1841 opposing copyright term extension.
[45] EU copyright term directive preamble.

of joint authorship. Thus any increase in term protection will bring disparity inasmuch as for the purpose of the producer, the copyright protection in UK is still 50 years and life + term in India for the producer would thus be much more than what exists in UK. Ofcourse such a lacuna can only be remidied by recognising principal director as an author and thereby treating ciematograph works as joint works for the pupose of copyright. But even otherwise, the producer can get only an effective term of 50 years , which is the existing term in UK which is lesser than the term (60 years) the Indian producer now enjoyes in India.

In case of USA films producer does not enjoy an independent right but receives right from creative contributors to the film. Under the works for hire definition the motion picture or audiovisual work become part of a special category of works for hire (i.e. commissioned works) and in such cases separate contributions only become works for hire when the parties expressly agree in a written contract to treat the work as so. Contrary to this, the Indian copyright law recognises independent right of producer in a film, thus making him an author and initial copyright owner in a cinematogaph film. Since, the commissioned works situation is not envisaged in the Indian scenerio, the term of copyright in case of such works in US (i.e. 95 years from the year of its first publication or 120 years from its creation whichever is earlier) even if applicable are not going to be benificial given the other provisions of the US law. Thus harmonisation with US cannot be an efficient option if copyright term extension is taken in right sense.

Further, harmonisation should also consider, apart from issue of copyright term, the length and breadth of copyrights delivered through the grant of rights. Certain rights which are available to Indian copyright holders may not be available to US copyright holders. The best example is the moral rights given to the producers of Indian film which is not available in US. This creates an imbalance within the copyright regime especially when term extensions do not address such issues. A short but expanded notion of rights may be sometimes more better than narrow scope of rights although lasting longer.[46]

There is no evidence to indicate that the term of protection is so significant as to be the sole basis for changing copyright laws. This is revealed when we consider the

[46] Andrew Gowers, *Gowers Review of Intellectual Property*, Her Majesty's Stationery Office, December 2006. For details see *infra*.

scope of fair use prnciples and other exceptions which may vary from country to country.[47] The scope of fair use specifically depends upon timely interpretation by courts (for e.g in case of USA, where uses are not exhaustively specified) thus allowing a chance of either narrowing or broadening its scope, especially in the new digital context. To the contrary, term extensions are not suceptible to interpreations since their orbit is well defined by law. This skews the balance in copyrights from time to time making harmonisation not perfect in real terms.

Back in the indian situation, term extension for cinematograph film will also lead to term extensions in other catagories of work. This calls for greater justification as to why such harmonisation is needed in all catagories of works. Not allowing extensions on other catagories leads to a paradoxical situation and also lead to a constitutional challenge under the Equality clause (Article 14) of the Constitution of India. Further, consider the case of sound recordings, how would it be possible to justify harmonisation by increasing the term for sound recordings while protection for the same in UK lasts currently for 50 years with producer as the author. According to the rules of comparison, in case of sound recordings Indian auhtors are currently at loss due to shorter term in UK and Europe. However the same is not the position in US but attempting harmonisation with US in respect of sound recording is not free from dispute.[48]

The position is going to more serious in case of books. India is still a major importer of foreign (English) books particularly for higher educational purposes though recently we started exporting english works. We have already extended the term to the life of the author and sixty years a further extention is going to adversily affect us since it is going to have major impact on the current classics which we are now importing. On the contrary we are not going to have any benefit since this is not going to yield any benefit to the old Indian books. For example some of the literary authors whose works are popular in India and the term of copyright of their works will be extended by the proposed amendment are Bernard Shaw (d: 1950), Eugene O'Neill (d: 1953) and Thomas

[47] Michael Y. Yuan, Does drop in copying cost support copyright term extension? Available at: ieeexplore.ieee.org/iel5/9518/30166/01385602.pdf?arnumber=1385602.

[48] *Review of the Economic Evidence Relating to the Extension of the Term of Copyright in Sound Recordings,* Centre for Intellectual Property and Information Law, Cambridge University. Background paper for Gowers report.

Mann (d: 1955). We do not have many authors belonging to this period who still command much readership abroad. Many of our authors who have readership abroad, like R.K. Narayanan, are still alive and, therefore, their works will enjoy copyright protection for many decades to come. Further, many of our writers in English (the language which has an international readership) like Vikram Seth and Arundhati Roy, first publish their works in UK or USA and thus enjoy the protection of the law of those countries. Therefore, extension of the term of copyright in India will have no impact on them. It is needless to mention the impact our publishing industry is going to have in case of further term extension.

Economic Analysis

It is argued that without term extension by India, the EU law would apply the rule of shorter term and would thus not be paying for Indian works. This argument however more forcefully applies in the Indian context also where we would not be paying for the American and European works. Thus an analysis of India's copyright import and exports must be carried out to find out position in balance of trade. Further, the major markets for Indian copyright must be located properly based on statistical evidence and a thorough analysis must be carried on the basis of their existing copyright terms. (for e.g. countries in the middle east and south Asia may be good markets who might not be wanting to provide strong protection). Hence any position on copyright extension by considering only the EU and US, ignoring rest of the world may have its own economic consequences.

It is also important to note that among the member nations of the European Community there are no uniform standards, even with respect to the duration of copyright protection to be afforded. For e.g. some European nations, most notably France, vary copyright terms based upon the type of work involved. This commotion has basically arisen due to the civil and common law traditions of copyright followed by different countries in the EU for which the Directive has carved sufficient space. But inconsistencies as far as foreign works are concerned are even to stay for now.

An economic analysis carried as fallout of Sonny Bono CTEA in USA as a part of amicus curie brief to the Supreme Court of United states by 17 economists of whom 5 are

noble laureates reveals the following[49]. The report states "it is highly unlikely that the economic benefits from copyright extension under the CTEA outweigh the costs." There is a basic presumption that copyright essentially solves the problem of creation of new works. It solves the problem of possible market failures in creation of new works and hence should be limited only to the extent necessary for production of new works. The size of this incentive according to the report depends upon the "present value" of compensation, as anticipated by the author at the time of creation. The prospective and retrospective components of the term extension proposal differ widely in terms of its economic effect. It accepts that prima-facie longer copyright term ensue additional revenues for an author. However since such incentive occurs many decades in future, its present value is very small compared to the pre term extension duration. Hence the report concludes that such revenues, if any, provide only a small additional incentive for an author of new work. It also argues that such additional revenue makes no significant contribution to creativity since the relevant investment had already been made.

It states that term extension increases inefficiency by allowing the copyright holder to determine the quantity of the work to be produced and further mark above cost pricing. This according to the report with respect to the term extension for new works, the present value of the additional cost is small, just as the present value of incremental benefits is small. By contrast, the cost of term extension in existing works is much larger in terms of present value, especially for works which were soon due for expiry.

Other cost associated with term extension includes implications on derivative works and works built on part of existing works, which may now have to pay additional royalties. Transactional costs may increase for works which have to take permission from many existing copyright holders, thus raising costs and undermining creativity from new players.

Thus by term extension, the costs associated with it are not balanced with the improvement in incentives for creating new works. Consequently, consumer welfare is undermined if that is taken to be the criterion along with the argument of enhanced

[49] Akerlof, George A, et.al., "The Copyright Term Extension Act of 1998: An Economic Analysis", Washington DC: AEI-Brookings Joint Center for Regulatory Studies, 2002. Amicus Curiae Brief in support of petitioner in *Eldred v. Ashcroft*, 537 US 186 (2002).

efficiency, thereby leading to transfer of resources from consumers to copyright holders which is in the nature of pure wind fall.

Another recent report has considered the economic effect of providing term extensions in case of sound recordings.[50] A similar analogy is also quite possible in case of films. On a detailed examination of existing economic literature and analyses, the report concluded as follows:

- The basic trade-off argument suggests that benefits outweigh the cost inasmuch as the cost consist ***increased deadweight losses*** from restricted access to existing and future works while benefit consists of welfare from new works due to expected rise in incentives under longer term.
- Retrospective extension provides essentially no incentive to create new works. Once a work is created additional compensation to the producer is simply a windfall. Investment in current artists should be based upon the prospects of profits, not the availability of past ones. Therefore retrospective extension will have no effect upon the creation of new works.
- Even prospective extensions are justifiable as term extension will increase the net present value of revenues for new works only by 1% or less. There is nothing in empirical evidence to suggest that such small revenues may in some circumstances motivate the author in creating new works.
- The net effect argument suggests that given the small size of increase in revenues and the ensuing cost it as, the term extension will likely result in net loss to the UK society as a whole.
- The report accepts that there will be increase in revenues flowing to the record industry, but it suggests little as to how these revenues would be distributed among the various contributors/stake holders in the industry.
- There is plausible evidence to suggest that term extension would increase costs to consumers, while the immediate cost of prospective extension would be small, the immediate costs of retrospective term extension appears to be significant. This

[50] *Review of the Economic Evidence Relating to the Extension of the Term of Copyright in Sound Recordings,* Centre for Intellectual Property and Information Law, Cambridge University. The report was given as a background paper for the recent Gowers committee in UK for recommending not extending copyright protection for sound recordings in UK. For details of Gowers Report see infra.

conclusion is arrived especially in the context of digitalization of works and free availability through internet.

- The balance of trade argument suggests that UK consumers will be at significant loss in terms of access to foreign works even while the UK record industry may gain longer protection in important foreign markets (USA and Australia) without increasing the term domestically. Thus term extension may have ***negative balance of trade.***
- Increased additional costs are accrued due to extension in the form of transactional costs. This however may have strong implications on diverse creativity. But this lacks good empirical evidence.
- The argument that term extension would help preserve or archive old original works does not give sufficient justification for increase in duration. This is because the copyright holder might have already benefited by lead time and other related IPR's through which revenues could have already flowed in for such purposes. (It can also be seen that even without such extension, expired works are freely available on the internet making the archiving or preservation argument less strong).
- The effect on employment in the record industry is taken as a refuge for term extension but there is little benefit to be accrued by the small flows of revenues. However, factors such as impact on digitalization may have more profound effect on employment in the music industry.
- The cultural skew argument suggests that lack of domestic protection may increase the efforts of record industry to produce records based on taste of countries in which protection is higher. However, this should be considered with great caution especially when we know that the existing domestic market for UK records is larger than the rest of international markets.
- Due to the irreversible nature of term extension, any wrong policy choice without fully ascertaining the asymmetric effects will have larger implications. Even if term extension is realized as a mistake in future, it would be very difficult to correct the error by reducing the term back to its original level. Thus the report suggests that any decision to extend the copyright term duration must be

supported by strong evidence than to keep it to its current level. Inaction must be preferred to action in the instant case.

Growers Review of Intellectual Property: December 2006 (U.K)[51]

This current work has come out of the UK Government's decision to commission a Review in explicit recognition of both the growing importance of IP and of the challenges brought by the changing economic environment. In commissioning the Review, Mr. Andrew Gowers was asked to establish whether the system was fit for purpose in an era of globalisation, digitisation and increasing economic specialisation. The answer was a qualified 'yes'. Although the review does not think that the system is in need of radical overhaul but taking a holistic view of the system, the commission believes that there is scope for reform to serve better the interests of consumers and industry alike. According to the commission, ***"the ideal IP system creates incentives for innovation, without unduly limiting access for consumers and follow-on innovators. It must strike the right balance in a rapidly changing world so that innovators can see further by standing on the shoulders of giants"***. Although the report recognizes that some of its recommendations are beyond the purview of the UK government (which is bound by the EU law and international treaties), it also states that "***it has not shied away from making recommendations with the broader international import when they seemed necessary***". It has basically made 54 recommendations on various aspects of Patent and copyright laws. However recommendation 3 and 4 are important in the current context of copyright term extension. They are:

Recommendation 3: The European Commission should retain the length of protection on sound recordings and performers' rights at 50 years.

Recommendation 4: Policy makers should adopt the principle that the term and scope of protection for IP rights should not be altered retrospectively.

One of the observations made in the review is worth quoting:

> "…the term of protection depends on where a recording is played, not on where it was produced; therefore term extension would only be beneficial

[51] Andrew Gowers, *Gowers Review of Intellectual Property*, Her Majesty's Stationery Office, December 2006, available at http://www.hm-treasury.gov.uk/media/583/91/pbr06_gowers_report_755.pdf

to the balance of trade if UK copyright owners were able to benefit from longer terms in other countries. However, most countries outside Europe, including the largest foreign markets for international repertoire – the US and Australia – do not apply a 'comparison of terms' to the protection granted to sound recordings. This means that the term of protection offered in a foreign country is not dependent on the country of origin of the sound recording." [52]

Social Implications

The internet is a classic opportunity presented in the new technological context of creation and distribution of works more widely. In doing so it bypasses the traditional broadcast model by which content providers used to distribute their works to passive consumers. The internet with new technological models for wider access goes against the old business models of the copyright content industry. This, it is believed has coerced the content industries for seeking term extensions.

But in the context of wider access and consequent creation of new works it becomes highly inconsistent to strengthen the copyright scheme, that too by term extensions. In fact in the new internet context the traditional copyright philosophy of balancing of interest has to be maintained so that there is no unnecessary bias in favour of either the consumers or content industries. If this is not done, there is a possibility of collapse of the internet model itself in the sense that its ability for wider and fast distribution and enjoyment will be negated. Content providers must now look for better models in the internet situation rather than strengthening the copyright law which inherently creates barriers to access. There is also a hard headed conflict now been seen between the content industry and the technology industry which is introducing new and better means of access to copyrighted works.

Other social impacts of copyright term extensions include the shrinking of public domain. The result will be a smaller public domain, which is itself a cost, and indeed a

[52] The following observation is also interesting; "Given the variety of incentives that stimulate artistic endeavour, and the number of different classes of work that copyright protects, everything from paintings to musical scores, it is not possible to arrive at any definitive optimal length. Nevertheless, ***future increases, or decreases, to the length of copyright should certainly be dependent on economic evidence that such a change would be positive***".

diminished source of information for creators could prove to restrict future creativity as well.[53] This vital fact needs no economic analysis to know whether the public is really hurt by the term extension. The stronger the term, the slower the work reaches the public domain. The arguments for extension have not considered the loss of both revenue and culture represented by the absence of new works not created due to the fact that the underlying works which serves as a foundation remain under the control of copyright. Although, this cannot be measured in real terms, it is no less substantial.[54] Term extensions also have wider implications on systems of learning and education, especially in the context of books (literary works), thus suggesting a thorough socio-implication analysis very specifically in the Indian context.

There is a contention that the increase in technological innovation requires longer term of copyright protection based on the fear that since copyrighted material is able to be transmitted with ease, relative to times past (i.e. through the internet and related means), incidents of copyright infringement will increase, and thus more protection is needed. In a recent study[55] it has been found that increase in piracy cannot be a justifiable ground for term extension. It is found that decrease in reproduction and distribution cost and increase in demand for information products may call for shorter copyright duration. The results do not support the argument that technological changes, which decrease copying and distribution cost and extend marketable life of information products, require copyright term extension. The results are also in contrary to the suggestion in the literature that higher demand for information products calls for longer copyright protections.

There is also an argument for extension based on increased life expectancy. Those who support longer terms of copyright have overlooked an essential element of the current life plus sixty year term. Accepting as true the assertion that life expectancies have increased, so too will the life expectancies of authors. Since the sixty year period does not begin to run until the death of the author, longer life expectancies naturally bring about longer terms of copyright. It appears that the misconception about the author and

---

[53] Joseph A. Lavigne, "For Limited Times? Making Rich Kids Richer Via the Copyright Term Extension Act of 1996," 73 U. Det. Mercy L. Rev. 311

[54] *Ibid.*

[55] Michael Y. Yuan, Does drop in copying cost support copyright term extension? Available at: ieeexplore.ieee.org/iel5/9518/30166/01385602.pdf?arnumber=1385602

two succeeding generations stems from one of the stated justifications supporting the adoption of the EC Directive which have no specific justifications in the Indian law. Further economic efficiency does not allow such a justification for increase in the existing term[56]. The copyright Act is not an instrument for subsidizing the children and grandchildren of authors and has no rational basis under copyright law. Further, what must also be noted is that such revenue flow moves into the coffers of copyright owners, who need not necessarily be the author.

Conclusions

From the above analysis of the issue of term extension from international and national perspective the following conclusions could be drawn:

1. Extension of term of protection for cinematograph film in India is not going to help the producers to get benefit of the extended term in UK and US because of the difference in the law regarding authorship and ownership.
2. There need to be an amendment in the authorship of cinematograph film to include other creators particularly the director of the film to enjoy the benefit in UK.
3. There is also no statistical evident to show how many of the films produced before 60 years (let us say from 1947 to 1957) which is going to be the immediate beneficiary in UK and US and how much revenue India is going to gain out of the term extension.
4. The extension of the term for film will compel India to do similar extension to other works particularly on literary works which will have a serious impact on the educational sector.
5. The term extension has the implication of extending the term of protection of foreign works in India. We have no evidence available as to the trade balance on works particularly of film. Unless we have evidence to show that term extension will increase our inflow of foreign exchange to the works that are going to public

[56] Joseph A. Lavigne, "For Limited Times? Making Rich Kids Richer Via the Copyright Term Extension Act of 1996," 73 U. Det. Mercy L. Rev. 311

domain when compared to the import and loss of foreign exchange it is not in larger national interest to extent the term of protection.

6. There is no economic analysis produced by the film industry to show the revenue flow from the film production and distribution to justify the term extension.
7. There is also no evidence produced by the film industry to show how revenue is shared with the creators of the works who contribute to the success of the film to justify term extension.
8. It is evident from the studies and latest report available that there is no clear proof of economic benefit or increase in creativity due to term extension.
9. It is also event from studies that the social cost involved term extension is very high and given the social, educational and economic condition of India a term extension with out proper social and economic analysis is going to be disastrous.
10. In the absence of clear evidence to justify term extension it is strongly felt that the term extension will have negative social and economic impact for India particularly in the context of digital technology though it may help some individual Indian producers and large number of foreign producers to gain more economic benefits in India.
11. In the larger national interest it is recommended that as of now there is no justification for a term extension.

****