

Statement of

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Director of the Program on Information Justice and Intellectual Property,

American University Washington College of Law

and the Public Lead of Creative Commons USA

on “Moral Rights, Termination Rights, Resale Royalty, and Copyright Term”

Subcommittee on Courts, Intellectual Property, and the Internet

Committee on the Judiciary, U.S. House of Representatives

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Introduction

Chairman Coble, Ranking Member Nadler, Chairman Goodlatte, Ranking Member Conyers, and members of the Subcommittee, my name is Michael Carroll, and I am a member of the faculty at American University Washington College of Law, where I direct the Program on Information Justice and Intellectual Property and serve as the Public Lead for Creative Commons USA. Creative Commons USA is the United States’ project that works under the terms of an agreement with Creative Commons, Inc., a global non-profit corporation headquartered in California. Creative Commons has agreements with projects in more than 70 countries through which the local project is authorized to represent Creative Commons at the national

level. Creative Commons and Creative Commons USA have some experiences and legal tools that are relevant to the topics of today's hearing. Briefly, these are:

Creative Commons and Moral Rights

Creative Commons provides the public with a range of legal tools designed to promote the legal sharing and reuse of works of authorship. Creative Commons offers six standardized copyright licenses that a copyright owner can choose to grant the public permission for royalty-free use subject to a range of conditions. See <https://creativecommons.org/licenses/> and Appendix A.

These licenses are recognized as the global standard for sharing works and are used by Wikipedia, open access journal publishers, creators of open courseware and open educational resources, bloggers, photographers, musicians, filmmakers, and every other kind of creator imaginable. There are at least 500 million copyrighted works available under one of these Creative Commons licenses.

Users of Creative Commons licenses require attribution in exchange for permission to use their works of authorship, and this license term overlaps the moral right of attribution. The licensor waives the remainder of her moral rights to the extent allowed under national law. Originally, the suite of Creative Commons licenses treated attribution as an optional term. However, when data showed that more than 98% of license adopters opted for the attribution requirement, Creative Commons made attribution a required term of all six licenses. Other conditions that

can be imposed are restricting use to non-commercial use, requiring that any derivative works produced from the licensed work are licensed under the same terms (the “Share Alike” term), or that the work can be shared but not modified. A more detailed explanation of these licenses is attached as Appendix A.

In the experience of Creative Commons, creators have a strong interest in receiving attribution for their work, and this interest in some cases is more important to the creator than any interest in profit or compensation. If Congress were to consider creating an exclusive right of attribution, doing so would be more difficult than may appear at first glance. A quick summary of the kinds of issues that have arisen in the Creative Commons experience include what is the threshold creative contribution that must be made to receive an attribution right, how should attribution be given for works created in iterative and group settings, and must the attributing party specify who contributed what elements of the work of authorship when giving attribution? These issues suggest that as strong as the attribution interest is, proper attribution is a contextual matter.

Creative Commons and Copyright Term

Creative Commons also provides two tools directly related to the term of copyright. One is the CC0 (pronounced CC Zero) tool that enables copyright owners to effectively shorten the term of protection for their work by dedicating their copyright to the public domain. *See*

<http://creativecommons.org/publicdomain/zero/1.0/>. The other is the Public

Domain Mark, which is just a label that enables members of the public to mark works as having the full range of reuse freedom that comes when a work enters the public domain. See <http://creativecommons.org/publicdomain/mark/1.0/>

CC0 has been used in a number of contexts, such as by a repository of public domain clipart, by creators of scientific databases, and by public bodies in countries that extend copyright to government works.

Creative Commons and the Termination Right

Exercising the termination right is overly cumbersome and confusing to many authors and their heirs. Creative Commons created and hosts an Internet based tool still in its beta version that provides those with a potential termination right a means of assessing whether and when they may exercise their termination rights. See <http://labs.creativecommons.org/demos/termination/>

Creative Commons did this to aid authors or heirs seeking to reclaim their copyrights for the purpose of sharing their works through a CC license. In that regard, one obstacle is financial. Even after an author or heir has run the administrative gantlet, termination is not effective until they pay the Copyright Office recordation fee of a minimum of \$105 for one transaction and one title. See U.S. Copyright Office, Calculating Fees for Recording Documents and Notices of Termination in the Copyright Office at <http://www.copyright.gov/fls/sl4d.pdf>. While modest for economically valuable copyrights like those in a character such as

Superman, this recordation fee is potentially cost prohibitive for scholars, journalists, or others who have created and published many copyrighted works that they would like to share with the public through a Creative Commons license.

Creative Commons USA recommends that the Subcommittee consider a measure that would waive the recordation fee in cases in which the terminating party seeks to reclaim copyright for the purposes of making the work of authorship freely available over the Internet under the terms of an open license.

With this background, I now turn to the issue of copyright term that I was invited to address.

The Term of Copyright Is Too Long

From the public's perspective, copyright is a trade-off. It provides incentives for investors to supply funds for creative endeavors and for some professional creators to create new works. But, copyright restrains freedom of expression and serves as a tax on the cost of purchasing educational, entertainment, and related expressive works. As the English parliamentarian Thomas Macauley recognized long ago, lengthening the term of copyright is economically equivalent to passing a tax increase: "The principle of copyright is this. It is a tax on readers for the purpose of giving a bounty to writers."¹

¹ Thomas Babington Macauley, Speech of 5 February 1841, in MACAULAY, PROSE AND POETRY (G.M. Young, ed. Harvard U. Press 1967), *available at* <http://homepages.law.asu.edu/~dkarjala/opposingcopyrightextension/commentary/MacauleySpeeches.html>

Focusing on the economic effects of copyright, the issue of copyright term is a question of how long the public should have to pay the copyright tax for any given creative work. The general economic principle is that the term should be no longer than necessary to induce enough creators and enough investors to devote their efforts to creating and distributing new works of authorship. Recognizing this trade-off, the Founders, when granting Congress the power to create copyright law, also required that copyrights expire. Congress has specific power to enact copyright law for the purpose of “promot[ing] the progress of science and useful arts,” subject to the condition that the “exclusive right” that Congress gives to authors in their “writings” be only “for limited times.” U.S. Const., art. I, § 8, cl. 8.

Under current law, copyright lasts for the life of the author plus another 70 years, or in the case of works made for hire, 120 years from the date of creation or 95 years from the date of publication.² As a group of leading economists, including five Nobel laureates, have shown this term is too long to serve copyright’s purposes because for all intents and purposes it is virtually equivalent to a perpetual term.³ The proper time horizon for copyright is one that provides a meaningful incentive for creators and investors to create *new* works. As these economists explained, profits that might be had many decades after an author is deceased are worth less

² See 17 U.S.C. § 302; see also U.S. Copyright Office Circular 15A, Copyright Duration, <http://www.copyright.gov/circs/circ15a.pdf>.

³ See *Eldred v. Reno*, 537 U.S. 186 (2003), Brief for George A. Akerlof et al. as *amici curiae*; see also *id.* at 267-69 (Breyer, J., dissenting) (appendix setting forth detailed explanation for why a life+70 term is too long from an economic perspective).

than pennies on the dollar today and therefore cannot be said to be doing any work in promoting the progress of science and useful arts.

This is a problem. There are three kinds of actions that Congress should consider to remedy this problem, or at least, not make it worse:

- (1) Shorten the term
- (2) Refuse to lengthen the term any further
- (3) Require registration with the Copyright Office to enjoy the final 20 years of protection

A Shorter Term in the American Tradition

Ideally, Congress would reclaim the American tradition on copyright term and substantially reduce it, if the United States' international copyright relations were not an issue. A good benchmark for doing so would be to consider reverting copyright term back to what it was prior enactment of the Copyright Act of 1976: an initial term of 28 years that could be renewed for another 28 years.

This policy had two beneficial features. First, the term of protection was relatively easy to determine because it was based on a work's date of publication. Second, the renewal requirement acted as a beneficial filter. Works that retained economic value after the first 28 years of protection had their copyrights renewed. Those that did not – and this was the majority of registered copyrighted works – were not renewed and went into the public domain.

However, our international copyright relations are a valid consideration that influences policy on copyright term. Congress lengthened the term in the 1976 Act with an eye toward one day joining the Berne Convention, a treaty of European origin reflecting the European model that, among other things, measured the term of protection by the life of the author plus 50 years. Joining the Berne Convention would confer some benefits on some American authors, but it would do so by imposing an increase in the copyright tax on the American public. Congress then passed a copyright tax increase in 1998 when it enacted the Sonny Bono Copyright Term Extension Act of 1998, Tit. I, Pub. L. No. 105-298, 112 Stat. 2827 (Oct. 27, 1998), which extended the term of copyrights both prospectively and retrospectively for an additional 20 years.

Extending the term of existing copyrights was the basis for a constitutional challenge in the Supreme Court on the basis that doing so violated the free speech rights of the public and violated the principles of limited government because the Constitution authorizes Congress to grant copyrights only for “limited times,” and retrospective extensions of term are a means of granting, in the words of my colleague Peter Jaszi, a perpetual term “on the installment plan.” Over two vigorous dissents, the Court rejected this argument, deciding that Congress had the power to extend copyright’s term. *Eldred v. Ashcroft*, 537 U.S. 186 (2003).

No More Extensions

At a minimum, Congress should not lengthen the term of copyright any further. The Court in *Eldred* posed the constitutional question as whether Congress had a rational basis for extending the term of copyright for an additional 20 years. But even a rational basis does not make term extension good policy. For all of the reasons expressed in Justice Breyer's dissenting opinion in *Eldred*, 537 U.S. at 242, which I hereby incorporate by reference, extending the term of copyright imposes a series of harms on the public that are not justified by any offsetting benefits.

Specifically, there is no incentive based support for term extension. *See Eldred*, 537 U.S. at 256-57 (Breyer, J., dissenting). Term extension did not provide the claimed benefits of uniformity, and going forward this argument would be without basis because we already have acquiesced in the European version of copyright term. And, arguments about longer lifespans actually undermine the case for any term extension rather than supporting it. *See id.* at 263.

I should also note that the public has become much more aware of the costs of overly long copyrights than it was in 1998. The problem of orphan works has become exacerbated, and it frustrates the ability of those who would make older copyrighted works available over the Internet to do so. Were Congress to entertain proposals to extend the term of copyright, it should expect vigorous opposition. As evidence, consider the open letter that opposes the United States' proposal to include in the Trans Pacific Partnership Agreement a term requiring all parties to

extend their terms to life + 70. The letter was signed six days ago on July 9, 2014, by a broad coalition of creators and users of copyrighted works organized by the Electronic Frontier Foundation that was sent to negotiators working on the See https://www.eff.org/files/2014/07/08/copyrightterm_tppletter_print-fnl.pdf

A Middle Ground – the Public Domain Enhancement Act

As a middle ground between the American tradition of fixed copyright terms, and the European model of life of the author plus a number of years, I would support the reintroduction of the Public Domain Enhancement Act. First co-sponsored by Representative Lofgren and Doolittle in 2003, H.R. 2601, 108th Cong., and then reintroduced in 2005, H.R. 2408, 109th Cong., the bill in its last form would have required that for works first published in the United States, after the term of the life of the author plus 50 years had passed, the copyright owner seeking the next 10 years of protection up to the maximum term would have to renew the copyright by paying \$1 and filing the requisite paperwork with the U.S. Copyright Office. Register of Copyrights Maria Pallante spoke in favor of this proposal when she testified before this Subcommittee. This proposal complies with the United States' international obligations while also addressing the costs of an overly long copyright term by asking copyright owners to signal that they still value copyright protection by renewing it at a more than reasonable cost.

Thank you.

Appendix A

Creative Commons Licenses

License design and rationale

All Creative Commons licenses have many important features in common. Every license helps creators — we call them licensors if they use our tools — retain copyright while allowing others to copy, distribute, and make some uses of their work — at least non-commercially. Every Creative Commons license also ensures licensors get the credit for their work they deserve. Every Creative Commons license works around the world and lasts as long as applicable copyright lasts (because they are built on copyright). These common features serve as the baseline, on top of which licensors can choose to grant additional permissions when deciding how they want their work to be used.

A Creative Commons licensor answers a few simple questions on the path to choosing a license — first, do I want to allow commercial use or not, and then second, do I want to allow derivative works or not? If a licensor decides to allow derivative works, she may also choose to require that anyone who uses the work — we call them licensees — to make that new work available under the same license terms. We call this idea “ShareAlike” and it is one of the mechanisms that (if chosen) helps the digital commons grow over time. ShareAlike is inspired by the GNU General Public License, used by many free and open source software projects.

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Three “Layers” Of Licenses

Machine Readable

Human Readable

Legal Code

Our public copyright licenses incorporate a unique and innovative “three-layer” design. Each license begins as a traditional legal tool, in the kind of language and text formats that most lawyers know and love. We call this the Legal Code layer of each license.

But since most creators, educators, and scientists are not in fact lawyers, we also make the licenses available in a format that normal people can read — the Commons Deed (also known as the “human readable” version of the license). The Commons Deed is a handy reference for licensors and licensees, summarizing and expressing some of the most important terms and conditions. Think of the Commons Deed as a user-friendly interface to the Legal Code beneath, although the Deed itself is not a license, and its contents are not part of the Legal Code itself.

The final layer of the license design recognizes that software, from search engines to office productivity to music editing, plays an enormous role in the creation, copying, discovery, and distribution of works. In order to make it easy for the Web to know when a work is available under a Creative Commons license, we provide a “machine readable” version of the license — a summary of the key freedoms and obligations written into a format that software systems, search engines, and other kinds of technology can understand. We developed a standardized way to describe licenses that software can understand called [CC Rights Expression Language](#) (CC REL) to accomplish this.

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Taken together, these three layers of licenses ensure that the spectrum of rights isn’t just a legal concept. It’s something that the creators of works can understand, their users can understand, and even the Web itself can understand.

The Licenses



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