

and (3) violations of rights that are not equivalent to any of the exclusive rights under copyright.

The examples in clause (3), while not exhaustive, are intended to illustrate rights and remedies that are different in nature from the rights comprised in a copyright and that may continue to be protected under State common law or statute. The evolving common law rights of "privacy," "publicity," and trade secrets, and the general laws of defamation and fraud, would remain unaffected as long as the causes of action contain elements, such as an invasion of personal rights or a breach of trust or confidentiality, that are different in kind from copyright infringement. Nothing in the bill derogates from the rights of parties to contract with each other and to sue for breaches of contract; however, to the extent that the unfair competition concept known as "interference with contract relations" is merely the equivalent of copyright protection, it would be preempted.

The last example listed in clause (3)—"deceptive trade practices such as passing off and false representation"—represents an effort to distinguish between those causes of action known as "unfair competition" that the copyright statute is not intended to preempt and those that it is. Section 301 is not intended to preempt common law protection in cases involving activities such as false labeling, fraudulent representation, and passing off even where the subject matter involved comes within the scope of the copyright statute.

"Misappropriation" is not necessarily synonymous with copyright infringement, and thus a cause of action labeled as "misappropriation" is not preempted if it is fact based neither on a right within the general scope of copyright as specified by section 106 nor on a right equivalent thereto. For example, state law should have the flexibility to afford a remedy (under traditional principles of equity) against a consistent pattern of unauthorized appropriation by a competitor of the facts (i.e., not the literary expression) constituting "hot" news, whether in the traditional mold of *International News Service v. Associated Press*, 248 U.S. 215 (1918) [39 S.Ct. 68, 63 L.Ed. 211], or in the newer form of data updates from scientific, business, or financial data bases. Likewise, a person having no trust or other relationship with the proprietor of a computerized data base should not be immunized from sanctions against electronically or cryptographically breaching the proprietor's security arrangements and accessing the proprietor's data. The unauthorized data access which should be remediable might also be achieved by the intentional interception of data transmissions by wire, microwave or laser transmissions, or by the common unintentional means of "crossed" telephone lines occasioned by errors in switching.

The proprietor of data displayed on the cathode ray tube of a computer terminal should be afforded protection against unauthorized printouts by third parties (with or without improper access), even if the data are not copyrightable. For example, the data may not be copyrighted because they are not fixed in a tangible medium of expression (i.e., the data are not displayed for a period or not more than transitory duration).

Nothing contained in section 301 precludes the owner of a material embodiment of a copy or a phonorecord from enforcing a claim of conversion against one who takes possession of the copy or phonorecord without consent.

A unique and difficult problem is presented with respect to the status of sound recordings fixed before February 12, 1972, the effective date of the amendment bringing recordings fixed after that date under Federal copyright protection. In its testimony during the 1975 hearings, the Department of Justice pointed out that, under section 301 as then written:

This language could be read as abrogating the anti-piracy laws now existing in 29 states relating to pre-February 15, 1972, sound recordings on the grounds that these statutes proscribe activities violating rights equivalent to \* \* \* the exclusive rights within the general scope of copyright. \* \* \* Certainly such a

result cannot have been intended for it would likely effect the immediate resurgence of piracy of pre-February 15, 1972, sound recordings.

The Department recommended that section 301(b) be amended to exclude sound recordings fixed prior to February 15, 1972 from the effect of the preemption.

The Senate adopted this suggestion when it passed S. 22. The result of the Senate amendment would be to leave pre-1972 sound recordings as entitled to perpetual protection under State law, while post-1972 recordings would eventually fall into the public domain as provided in the bill.

The Committee recognizes that, under recent court decisions, pre-1972 recordings are protected by State statute or common law, and that should not all be thrown into the public domain instantly upon the coming into effect of the new law. However, it cannot agree that they should in effect be accorded perpetual protection, as under the Senate amendment, and it has therefore revised clause (4) to establish a future date for the pre-emption to take effect. The date chosen is February 15, 2047 which is 75 years from the effective date of the statute extending Federal protection to recordings.

Subsection (c) makes clear that nothing contained in Title 17 annuls or limits any rights or remedies under any other Federal statute.

#### REFERENCES IN TEXT

Section 610(a) of the Visual Artists Rights Act of 1990 [Pub. L. 101-650], referred to in subsec. (f)(1), (2)(A), is set out as an Effective Date note under section 106A of this title.

#### AMENDMENTS

1998—Subsec. (c). Pub. L. 105-298 substituted "2067" for "2047" wherever appearing.

1990—Subsec. (b)(4). Pub. L. 101-650, § 705, added par. (4).

Subsec. (f). Pub. L. 101-650, § 605, added subsec. (f).

1988—Subsec. (e). Pub. L. 100-568 added subsec. (e).

#### EFFECTIVE DATE OF 1990 AMENDMENT

Amendment by section 605 of Pub. L. 101-650 effective 6 months after Dec. 1, 1990, see section 610 of Pub. L. 101-650, set out as an Effective Date note under section 106A of this title.

Amendment by section 705 Pub. L. 101-650 applicable to any architectural work created on or after Dec. 1, 1990, and any architectural work, that, on Dec. 1, 1990, is unconstructed and embodied in unpublished plans or drawings, except that protection for such architectural work under this title terminates on Dec. 31, 2002, unless the work is constructed by that date, see section 706 of Pub. L. 101-650, set out as a note under section 101 of this title.

#### EFFECTIVE DATE OF 1988 AMENDMENT

Amendment by Pub. L. 100-568 effective Mar. 1, 1989, with any cause of action arising under this title before such date being governed by provisions in effect when cause of action arose, see section 13 of Pub. L. 100-568, set out as a note under section 101 of this title.

### § 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 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 benefits 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.

(Pub. L. 94-553, title I, § 101, Oct. 19, 1976, 90 Stat. 2572; Pub. L. 105-298, title I, § 102(b), Oct. 27, 1998, 112 Stat. 2827.)

#### HISTORICAL AND REVISION NOTES

HOUSE REPORT NO. 94-1476

**In General.** The debate over how long a copyright should last is as old as the oldest copyright statute and will doubtless continue as long as there is a copyright law. With certain exceptions, there appears to be

strong support for the principle, as embodied in the bill, of a copyright term consisting of the life of the author and 50 years after his death. In particular, the authors and their representatives stressed that the adoption of a life-plus-50 term was by far their most important legislative goal in copyright law revision. The Register of Copyrights now regards a life-plus-50 term as the foundation of the entire bill.

Under the present law statutory copyright protection begins on the date of publication (or on the date of registration in unpublished form) and continues for 28 years from that date; it may be renewed for a second 28 years, making a total potential term of 56 years in all cases. [Under Public Laws 87-668, 89-142, 90-141, 90-416, 91-147, 91-555, 92-170, 92-566, and 93-573, copyrights that were subsisting in their renewal term on September 19, 1962, and that were scheduled to expire before Dec. 31, 1976, have been extended to that later date, in anticipation that general revision legislation extending their terms still further will be enacted by then.] The principal elements of this system—a definite number of years, computed from either publication or registration, with a renewal feature—have been a part of the U.S. copyright law since the first statute in 1790. The arguments for changing this system to one based on the life of the author can be summarized as follows:

1. The present 56-year term is not long enough to insure an author and his dependents the fair economic benefits from his works. Life expectancy has increased substantially, and more and more authors are seeing their works fall into the public domain during their lifetimes, forcing later works to compete with their own early works in which copyright has expired.

2. The tremendous growth in communications media has substantially lengthened the commercial life of a great many works. A short term is particularly discriminatory against serious works of music, literature, and art, whose value may not be recognized until after many years.

3. Although limitations on the term of copyright are obviously necessary, too short a term harms the author without giving any substantial benefit to the public. The public frequently pays the same for works in the public domain as it does for copyrighted works, and the only result is a commercial windfall to certain users at the author's expense. In some cases the lack of copyright protection actually restrains dissemination of the work, since publishers and other users cannot risk investing in the work unless assured of exclusive rights.

4. A system based on the life of the author would go a long way toward clearing up the confusion and uncertainty involved in the vague concept of "publication," and would provide a much simpler, clearer method for computing the term. The death of the author is a definite, determinable event, and it would be the only date that a potential user would have to worry about. All of a particular author's works, including successive revisions of them, would fall into the public domain at the same time, thus avoiding the present problems of determining a multitude of publication dates and of distinguishing "old" and "new" matter in later editions. The bill answers the problems of determining when relatively obscure authors died, by establishing a registry of death dates and a system of presumptions.

5. One of the worst features of the present copyright law is the provision for renewal of copyright. A substantial burden and expense, this unclear and highly technical requirement results in incalculable amounts of unproductive work. In a number of cases it is the cause of inadvertent and unjust loss of copyright. Under a life-plus-50 system the renewal device would be inappropriate and unnecessary.

6. Under the preemption provisions of section 301 and the single Federal system they would establish, authors will be giving up perpetual, unlimited exclusive common law rights in their unpublished works, including works that have been widely disseminated

by means other than publication. A statutory term of life-plus-50 years is no more than a fair recompense for the loss of these perpetual rights.

7. A very large majority of the world's countries have adopted a copyright term of the life of the author and 50 years after the author's death. Since American authors are frequently protected longer in foreign countries than in the United States, the disparity in the duration of copyright has provoked considerable resentment and some proposals for retaliatory legislation. Copyrighted works move across national borders faster and more easily than virtually any other economic commodity, and with the techniques now in common use this movement has in many cases become instantaneous and effortless. The need to conform the duration of U.S. copyright to that prevalent throughout the rest of the world is increasingly pressing in order to provide certainty and simplicity in international business dealings. Even more important, a change in the basis of our copyright term would place the United States in the forefront of the international copyright community. Without this change, the possibility of future United States adherence to the Berne Copyright Union would evaporate, but with it would come a great and immediate improvement in our copyright relations. All of these benefits would accrue directly to American and foreign authors alike.

The need for a longer total term of copyright has been conclusively demonstrated. It is true that a major reason for the striking statistical increase in life expectancy since 1909 is the reduction in infant mortality, but this does not mean that the increase can be discounted. Although not nearly as great as the total increase in life expectancy, there has been a marked increase in longevity, and with medical discoveries and health programs for the elderly this trend shows every indication of continuing. If life expectancy in 1909, which was in the neighborhood of 56 years, offered a rough guide to the length of copyright protection, then life expectancy in the 1970's which is well over 70 years, should offer a similar guide; the Register's 1961 Report included statistics indicating that something between 70 and 76 years was then the average equivalent of life-plus-50 years. A copyright should extend beyond the author's lifetime, and judged by this standard the present term of 56 years is too short.

The arguments as to the benefits of uniformity with foreign laws, and the advantages of international community that would result from adoption of a life-plus-50 term, are also highly significant. The system has worked well in other countries, and on the whole it would appear to make computation of terms considerably simpler and easier. The registry of death dates and the system of presumptions established in section 302 would solve most of the problems in determining when an individual author died.

No country in the world has provisions on the duration of copyright like ours. Virtually every other copyright law in the world bases the term of protection for works by natural persons on the life of the author, and a substantial majority of these accord protection for 50 years after the author's death. This term is required for adherence to the Berne Convention. It is worth noting that the 1965 revision of the copyright law of the Federal Republic of Germany adopted a term of life plus 70 years.

A point that has concerned some educational groups arose from the possibility that, since a large majority (now about 85 percent) of all copyrighted works are not renewed, a life-plus-50 year term would tie up a substantial body of material that is probably of no commercial interest but that would be more readily available for scholarly use if free of copyright restrictions. A statistical study of renewal registrations made by the Copyright Office in 1966 supports the generalization that most material which is considered to be of continuing or potential commercial value is renewed. Of the remainder, a certain proportion is of practically no value to anyone, but there are a large number of un-

renewed works that have scholarly value to historians, archivists, and specialists in a variety of fields. This consideration lay behind the proposals for retaining the renewal device or for limiting the term for unpublished or unregistered works.

It is true that today's ephemera represent tomorrow's social history, and that works of scholarly value, which are now falling into the public domain after 28 years, would be protected much longer under the bill. Balanced against this are the burdens and expenses of renewals, the near impossibility of distinguishing between types of works in fixing a statutory term, and the extremely strong case in favor of a life-plus-50 system. Moreover, it is important to realize that the bill would not restrain scholars from using any work as source material or from making "fair use" of it; the restrictions would extend only to the unauthorized reproduction or distribution of copies of the work, its public performance, or some other use that would actually infringe the copyright owner's exclusive rights. The advantages of a basic term of copyright enduring for the life of the author and for 50 years after the author's death outweigh any possible disadvantages.

**Basic Copyright Term.** Under subsection (a) of section 302, a work "created" on or after the effective date of the revised statute [Jan. 1, 1978] would be protected by statutory copyright "from its creation" and, with exceptions to be noted below, "endures for a term consisting of the life of the author and 50 years after the author's death."

Under this provision, as a general rule, the life-plus-50 term would apply equally to unpublished works, to works published during the author's lifetime, and to works published posthumously.

The definition of "created" in section 101, which will be discussed in more detail in connection with section 302(c) below, makes clear that "creation" for this purpose means the first time the work is fixed in a copy or phonorecord; up to that point the work is not "created," and is subject to common law protection, even though it may exist in someone's mind and may have been communicated to others in unfixed form.

**Joint Works.** Since by definition a "joint work" has two or more authors, a statute basing the term of copyright on the life of the author must provide a special method of computing the term of "joint works." Under the system in effect in many foreign countries, the term of copyright is measured from the death of the last survivor of a group of joint authors, no matter how many there are. The bill adopts this system as the simplest and fairest of the alternatives for dealing with the problem.

**Anonymous Works, Pseudonymous Works, and Works Made for Hire.** Computing the term from the author's death also requires special provisions to deal with cases where the authorship is not revealed or where the "author" is not an individual. Section 302(c) therefore provides a special term for anonymous works, pseudonymous works, and works made for hire: 75 years from publication or 100 years from creation, whichever is shorter. The definitions in section 101 make the status of anonymous and pseudonymous works depend on what is revealed on the copies or phonorecords of a work; a work is "anonymous" if "no natural person is identified as author," and is "pseudonymous" if "the author is identified under a fictitious name."

Section 302(c) provides that the 75- and 100-year terms for an anonymous or pseudonymous work can be converted to the ordinary life-plus-50 term if "the identity of one or more authors \* \* \* is revealed" in special records maintained for this purpose in the Copyright Office. The term in such cases would be "based on the life of the author or authors whose identity has been revealed." Instead of forcing a user to search through countless Copyright Office records to determine if an author's identity has been revealed, the bill sets up a special registry for the purpose, with requirements concerning the filing of identifying statements that parallel those of the following subsection (d) with respect to statements of the date of an author's death.

The alternative terms established in section 302(c)—75 years from publication or 100 years from creation, whichever expires first—are necessary to set a time limit on protection of unpublished material. For example, copyright in a work created in 1978 and published in 1988 would expire in 2063 (75 years from publication). A question arises as to when the copyright should expire if the work is never published. Both the Constitution and the underlying purposes of the bill require the establishment of an alternative term for unpublished work and the only practicable basis for this alternative is “creation.” Under the bill a work created in 1980 but not published until after 2005 (or never published) would fall into the public domain in 2080 (100 years after creation).

The definition in section 101 provides that “creation” takes place when a work “is fixed in a copy or phonorecord for the first time.” Although the concept of “creation” is inherently lacking in precision, its adoption in the bill would, for example, enable a scholar to use an unpublished manuscript written anonymously, pseudonymously, or for hire, if he determines on the basis of internal or external evidence that the manuscript is at least 100 years old. In the case of works written over a period of time or in successive revised versions, the definition provides that the portion of the work “that has been fixed at any particular time constitutes the work as of that time,” and that, “where the work has been prepared in different versions, each version constitutes a separate work.” Thus, a scholar or other user, in attempting to determine whether a particular work is in the public domain, needs to look no further than the particular version he wishes to use.

Although “publication” would no longer play the central role assigned to it under the present law, the concept would still have substantial significance under provisions throughout the bill, including those on Federal preemption and duration. Under the definition in section 101, a work is “published” if one or more copies or phonorecords embodying it are distributed to the public—that is, generally to persons under no explicit or implicit restrictions with respect to disclosure of its contents—without regard to the manner in which the copies or phonorecords changed hands. The definition clears up the question of whether the sale of phonorecords constitutes publication, and it also makes plain that any form or dissemination in which a material object does not change hands—performances or displays on television, for example—is not a publication no matter how many people are exposed to the work. On the other hand, the definition also makes clear that, when copies or phonorecords are offered to a group of wholesalers, broadcasters, motion picture theaters, etc., publication takes place if the purpose is “further distribution, public performance, or public display.”

Although the periods of 75 or 100 years for anonymous and pseudonymous works and works made for hire seem to be longer than the equivalent term provided by foreign laws and the Berne Conventions, this difference is more apparent than real. In general, the terms in these special cases approximate, on the average, the term of the life of the author plus 50 years established for other works. The 100-year maximum term for unpublished works, although much more limited than the perpetual term now available under common law in the United States and under statute in some foreign countries, is sufficient to guard against unjustified invasions of privacy and to fulfill our obligations under the Universal Copyright Convention.

**Records and Presumption as to Author's Death.** Subsections (d) and (e) of section 302 together furnish an answer to the practical problems of how to discover the death dates of obscure or unknown authors. Subsection (d) provides a procedure for recording statements that an author died, or that he was still living, on a particular date, and also requires the Register of Copyrights to maintain obituary records on a current basis. Under subsection (e) anyone who, after a specified period, obtains certification from the Copyright Office that its records show nothing to indicate that the author is liv-

ing or died less than 50 years before, is entitled to rely upon a presumption that the author has been dead for more than 50 years. The period specified in subsection (e)—75 years from publication or 100 years from creation—is purposely uniform with the special term provided in subsection (c).

#### AMENDMENTS

1998—Subsecs. (a), (b), Pub. L. 105-298, §102(b)(1), (2), substituted “70” for “fifty”.

Subsec. (c), Pub. L. 105-298, §102(b)(3), in first sentence, substituted “95” for “seventy-five” and “120” for “one hundred”.

Subsec. (e), Pub. L. 105-298, §102(b)(4), in first sentence, substituted “95” for “seventy-five”, “120” for “one hundred”, and “70” for “fifty” in two places.

### § 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 any musical work, dramatic work, or literary work embodied therein.

(Pub. L. 94-553, title I, §101, Oct. 19, 1976, 90 Stat. 2573; Pub. L. 105-80, §11, Nov. 13, 1997, 111 Stat. 1534; Pub. L. 105-298, title I, §102(c), Oct. 27, 1998, 112 Stat. 2827; Pub. L. 111-295, §5(a), Dec. 9, 2010, 124 Stat. 3181.)

#### HISTORICAL AND REVISION NOTES

##### HOUSE REPORT NO. 94-1476

Theoretically, at least, the legal impact of section 303 would be far reaching. Under it, every “original work of authorship” fixed in tangible form that is in existence would be given statutory copyright protection as long as the work is not in the public domain in this country. The vast majority of these works consist of private material that no one is interested in protecting or infringing, but section 303 would still have practical effects for a prodigious body of material already in existence.

Looked at another way, however, section 303 would have a genuinely restrictive effect. Its basic purpose is to substitute statutory for common law copyright for everything now protected at common law, and to substitute reasonable time limits for the perpetual protection now available. In general, the substituted time limits are those applicable to works created after the effective date of the law [Jan. 1, 1978]; for example, an unpublished work written in 1945 whose author dies in 1980 would be protected under the statute from the effective date [Jan. 1, 1978] through 2030 (50 years after the author's death).

A special problem under this provision is what to do with works whose ordinary statutory terms will have expired or will be nearing expiration on the effective date [Jan. 1, 1978]. The committee believes that a provision taking away subsisting common law rights and substituting statutory rights for a reasonable period is fully in harmony with the constitutional requirements of due process, but it is necessary to fix a “reasonable period” for this purpose. Section 303 provides that under no circumstances would copyright protection expire before December 31, 2002, and also attempts to encourage publication by providing 25 years more protection (through 2027) if the work were published before the end of 2002.