

## COVER SHEET FOR RESPONSES

| Contact details of respondent |   |
|-------------------------------|---|
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Please indicate below which issues are covered by your response. Not all issues will be relevant to all respondents – please feel free to skip questions that are not relevant to you.

| General Questions covered:        |  |
|-----------------------------------|--|
| How IP is awarded                 |  |
| How IP is used                    |  |
| How IP is licensed and exchanged  |  |
| How IP is challenged and enforced |  |

| Specific Issues covered:  |   |
|---|---|
| Current term of protection on sound recordings and performers' rights | X |
| Copyright exceptions – fair use and fair dealing                      |   |
| Copyright – digital rights management                                 |   |
| Copyright – orphan works  |   |
| Copyright – licensing of public performances                          |   |
| Copyright – designated archive status                                 |   |
| Patents – utility patents   |   |
| Pharmaceutical Supplementary Protection Certificates (SPCs)           |   |
| Trade Marks – international issues                                    |   |
| Designs – registered designs and unregistered design rights           |   |
| Legal sanctions on IP infringement                                    |   |
| Parallel Imports / International Exhaustion                           |   |
| Coherence between competition policy and IP policy                    |   |

**Have you raised any other issues in your response? Y / N**

| Details of accompanying documents (Please continue on additional sheet if necessary) |
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## MEMORANDUM

21 April 2006

TO: The Gowers Review  
FROM: Lawrence Lessig  
RE: The Current Term of Copyright Protection on Sound Recordings and Performers' Rights

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You have asked for comments regarding the copyright term for sound recordings and performers' rights. Britain's current term for these rights is 50 years. Some are pressing to increase the term to match the term for corporate work in the United States — a term of 95 years. That demand has been resisted by many who argue that the current term is already longer than necessary to produce sufficient incentives to create. As United States Supreme Court Justice Stephen Breyer has explained in relation to a similar extension in the United States:

no one could reasonably conclude that copyright's traditional economic rationale applies here. The extension will not act as an economic spur encouraging authors to create new works.<sup>1</sup>

But there are two distinct questions that ought to be considered separately in determining the term of copyright: First, how long is necessary to create the incentives to induce the creation of new work? Second, should the term of existing copyrights ever be extended?

From the perspective of incentives, reasonable people might well dispute the first question. Most economists believe the existing term of copyright is already so long that any addition can't possibly increase ex ante incentives.<sup>2</sup> This argument has led Britain's *The Economist*, for example, to call for a 14 year copyright

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<sup>1</sup> Eldred v. Ashcroft, 537 U.S. 186, 254 (2003) (Breyer, dissenting).

<sup>2</sup> The best summary of this view is a brief filed in the United States Supreme Court "by a group of economists (including five Nobel prize winners), Brief for George A. Akerlof et al. as *Amicus Curiae*" *id.* at 255, available at <http://eldred.cc>.

term<sup>3</sup>— significantly shorter than the current term for sound recordings and performers' right.

Whatever the controversy about prospective terms, however, from the perspective of incentives there is no reasonable argument for extending the term of *existing* copyrights. Once a work is created, the public benefit sought by granting a copyright has already been secured. No further public benefit could be gained by increasing the incentives to create in the past. Incentives are, necessarily, prospective. No doubt the public continues to benefit from some of this work — just as Londoners continue to benefit from London Bridge and as the world continues to benefit from Shakespeare. But as the latter benefits do not justify further payments to the estates of the creators of either valuable work, so too does the former benefit not justify further payments to current copyright holders — at least if the measure of copyright is the incentives to create.

Nonetheless, despite this obvious economic distinction between extending terms prospectively and retrospectively, governments around the world face increasing pressure from existing copyright holders to extend terms retrospectively. This dynamic is readily understandable. While the present benefit of a prospective extension of copyright, given the currently long term, is tiny, the present benefit of an existing copyright is the full value of the royalties currently earned by that copyright. Obviously, 50 years after a work is published, the probability that it will continue to earn royalties is quite small. But for those works that do continue to enjoy royalties fifty years after creation, there is a very strong incentive to lobby governments to extend current terms.

This incentive has produced an obvious distortion in the term of copyright. Because terms have always been extended both prospectively and retrospectively, the pressure by existing copyright holders to extend the term has tended to distort the judgment of an optimal prospective term. The consequence is that much more remains protected by copyright than needs the benefit of copyright. And this in turn increases significantly the costs of preserving or securing access to a cultural past, as work remains under copyright long after anyone has any reasonable incentive properly to maintain ownership over that creative work. The result is orphaned works, access to which cannot easily be secured in a digital age.

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<sup>3</sup> “A Radical Rethink,” *Economist*, 366:8308 (25 January 2003).

There are two obvious solutions to this distorting dynamic. The first, and in my view, ideal solution would be for governments to adopt a principle that any changes in copyright term be applied prospectively only. Were that the rule, no present copyright holder would have any incentive to press to extend that term. Policymakers could thus evaluate an optimal term free of the very real pressures from existing copyright holders.

The second solution would not remove the incentives for existing copyright holders to press to extend existing terms. But it would mitigate the cost of such extensions. Under this proposal, for a domestic copyright holder to secure the benefit of an extended copyright term, the copyright holder would have to register the work and pay a nominal (£1) fee. As the vast majority of works have no continuing need for copyright protection, the majority would likely not register to receive any additional term. Those works would pass into the public domain. For those owners that do register, the proposal would make it easier to identify those owners, and thus make the market for such work more efficient. The proposal would thus minimize the costs of extending existing terms, while permitting existing copyright holders to continue to profit from still-popular creative work.

Some might worry that this second proposal would raise problems under Berne. I do not believe that concern is valid. First, any extension of terms in Britain would give copyright owners a term beyond Berne's minimum. If it is permissible under Berne to terminate the copyright, there should be no problem with conditioning a term beyond Berne's minimum upon a registration requirement. Second, as I've described the proposal, the requirement of registration would apply to domestic works only. Berne's rule against formalities is properly targeted against burdens imposed upon foreign copyright holders. As United States practice demonstrates, Berne does not limit a government's rules as applied domestically. Thus, while each government could impose a registration requirement on its citizens domestically, it would be improper to extend that burden beyond domestic copyright owners.

Again, in my view the better solution to this problem is simply not to extend copyright terms retrospectively at all. But if the terms of existing copyrights are to be extended, they ought to be extended in a way that minimizes the burden of any such extension with respect to the vast majority of work that would not benefit from any further copyright protection.

In either case, this Review would set an important precedent for governments around the world if it established a clear principle that minimized the burdens of extended copyright terms, either by removing any real incentive to extend terms, or by including a mechanism to filter the costs of any extended terms.