
July 2003

Report Commissioned
by the Motion Picture
Association,
and supported by:

- Australasian
Performing Right
Association;
- Copyright Agency
Limited; and
- Screenrights.

Copyright Term Extension

Australian Benefits and Costs

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Abbreviations

EU	European Union
IPCRC	Intellectual Property and Competition Review Committee
NPV	net present value
OECD	Organisation for Economic Co-operation and Development
TRIPS	<i>Agreement on Trade-Related Aspects of Intellectual Property Rights</i>
US	United States of America

Preface

This report has been prepared for the Motion Picture Association, the Australasian Performing Rights Association, the Australasian Performing Rights Association, Copyright Agency Limited and Screenrights. However, it represents the views of The Allen Consulting Group, and not necessarily the commissioning organisations.

Summary and Overview

The organisations commissioning this report — the Motion Picture Association, the Australasian Performing Right Association, Copyright Agency Limited and Screenrights — support the notion of copyright term extension. For most copyright works this would mean an increase in the term from ‘life plus 50 years’ to ‘life plus 70 years’, with movies effectively increasing from 50 years from the end of the year of first publication to 95 years from the end of the year of first publication. The Allen Consulting Group has been asked to identify the benefits, if any, for Australia resulting from term extension and to consider whether those benefits are outweighed by any demonstrable costs.

Copyright extension is a matter of much debate ...

In 1989 Puri noted that, “The term of copyright represents the single most important issue in copyright law but surprisingly it has provided little controversy in recent years.”¹ Presumably not to Puri’s surprise, the term of copyright is now a key issue of controversy following European Union (EU) and United States (US) extension of their copyright terms beyond the minimums mandated by the *Berne Convention*.² Subsequently, copyright industries have pushed for similar extensions of the Australian copyright term.³

... but much of the analysis is unnecessarily polarised and exaggerated

In large part, the controversy stems from the exaggerated claims of both those who support the extension of the copyright term, and those who support the existing copyright term (or even advocate a reduction in the term). This reflects the ongoing debate between what Goldstein calls ‘copyright optimists’ and ‘copyright pessimists’:

“On one side are lawyers who assert that copyright is rooted in natural justice, entitling authors to every last penny that other people will pay to obtain copies of their works. These are the copyright optimists: they view copyright’s cup of entitlement as always half-full, only waiting to be filled still further. On the other side of the debate are copyright pessimists, who see copyright’s cup as half empty: they accept that copyright owners should get some measure of control over copies as an incentive to produce creative works, but they would like copyright to extend only so far as an encroachment on the general freedom of everyone to write and say what they please.”⁴

There has been some scepticism about the merits of copyright term extension in Australia...

In the recent National Competition Policy review of Australia’s copyright laws the Intellectual Property and Competition Review Committee (IPCRC) concluded that, “The Committee is not convinced of the merit in proposals

¹ Kanwal Puri, “The Term of Copyright Protection: Is It Too Long in the Wake of New Technologies?,” *Copyright Bulletin* 23, no. 3 (1989): 19. See also Sam Ricketson, “The Copyright Term,” *International Review of Industrial Property and Copyright Law* 23, no. 6 (1992): 753.

² The issue has featured prominently in academic journals, legislative debates, online discussions and in a recent US Supreme Court case (*Eldred at Al v. Ashcroft* US SC 15 January 2003).

³ See Steven J Metalitz, “Re: Request for Comments ... Concerning Proposed United States-Australia Free Trade Agreement, 67 Fed. Reg. 76431 (Dec. 12, 2002),” (Washington DC: 2003).

⁴ Paul Goldstein, *Copyright’s Highway: From Gutenberg to the Celestial Jukebox* (New York: Hill and Wang, 1994) 15.

to extend the term of copyright protection, and recommends that the current term should not be extended.”⁵

... but acknowledge the need for a proper cost-benefit study

Given the apparent lack of supporting analysis provided to the IPCRC during its review,⁶ the IPCRC also suggested that before any extension of the copyright term, what is required is a comprehensive review of the costs and benefits of such a proposal. This is the aim of this report.

Background

Term extension reflects a trade-off between creation incentives and use restrictions

At its core, copyright law reflects a trade-off between the desire to provide an incentive for future creative effort and the public interest in providing greater access to copyright material. This trade-off is reflected in term extension — at its simplest, the debate about extension revolves around the degree to which parties believe that the additional copyright protection will:

- stimulate the creation of new copyright works, and the preservation and dissemination of existing works (a positive); and
- deny consumers access to copyright works that would have otherwise entered the public domain (ie, would no longer have copyright protection), and increase the costs of using copyright works (a negative).

Quantification of this trade-off is all but impossible ...

Determining whether the positive aspects outweigh the negative aspects, or *vice versa*, is a very complex task. Unfortunately, as the Organisation for Economic Co-operation and Development (OECD) acknowledges, quantification of the associated costs and benefits is all but impossible:

“one of the basic problems of intellectual property is to define a scope and term for this protection that offers a reasonable balance between the benefits of new products and works deriving from the incentive and the benefits of marginal cost pricing deriving from the freedom to copy.

Some aspects of this balance have relatively limited practical consequences — except in the case of a few specific products for example, there is little rational basis for arguing that the current patent or copyright terms are too long or too short and it would be very difficult to devise a helpful empirical study examining the value of longer or shorter terms in different sectors.”⁷

... and therefore analysis will be somewhat less than definitive

Given this difficulty in quantifying the costs and benefits of term extension, the costs and benefits need to be considered from ‘first principles’, using piecemeal data where it can be gathered. Unfortunately, this form of analysis is always open to differing interpretations.

Benefits and Costs of Term Extension

Benefits

Term extension will increase incentives to create copyright material ...

At its simplest, proponents of a longer copyright term argue that the additional potential revenue stream will act as an incentive and encourage the production, preservation and dissemination of additional creative works.

⁵ Intellectual Property and Competition Review Committee, *Review of Intellectual Property Legislation under Competition Principles Agreement: Final Report* (Canberra: 2000) 84.

⁶ See *Ibid.* 83.

⁷ Organisation for Economic Co-operation and Development, *Competition Policy and Intellectual Property Rights* (Paris: OECD, 1998) 297. We note, however, that it is more likely to be quantifiable in countries with a registration system — Edward Rappaport, *Copyright Term Extension: Estimating the Economic Values* (Washington: Congressional Research Service, 1998).

No commentator denies that longer copyright extension increases incentives; what is in dispute is the degree to which incentives increase.

... but critics claim that the net present value of the incentive is miniscule ...

Critics of term extension argue that the additional incentive created by a term extension is miniscule when the value of that extension is brought into present dollars.⁸ It is therefore argued that there is insufficient incentive to generate significant new creation.

... but this criticism does not take account of ...

A failure of this analysis is to make any allowance for a number of factors outside the traditional financial perspective. In particular, it fails to acknowledge:

... a number of psychological factors that may increase the desire to create under a longer copyright term ...

- that many copyright creators do not make decisions using purely 'rational' criteria. The field of 'behavioural economics' (a multi-disciplinary field involving psychology and economics) suggests a number of inter-related reasons why the pure critique of the incentive theory advanced by economists may be limited — that copyright extends for such a long period may reduce the *perception* of risk associated with creation of copyright works, and provide greater confidence to creators when undertaking their endeavours. Additionally, the 'bequest motive', whereby people undertake certain actions to benefit their descendents rather than themselves, also may explain why an extra 20 years fifty years after death may still provide extra motivation to create new copyright works; and

... and that a longer term might be necessary to maintain the current level of incentives

- that existing incentives may actually be falling, and that it may be necessary to extend the copyright term just to maintain them. In possibly the major theoretical contribution to the economic analysis of copyright,⁹ Landes and Posner suggest that as the cost of copying declines copyright protection should expand. Thus, in 1989 they noted that: "The current length of a copyright is the author's lifetime plus fifty years. This reflects a long trend toward lengthening the term of copyright ... This trend is consistent with the fact that the cost of copying has fallen over this period".¹⁰ Recent developments associated with digitisation and distribution over the Internet have dramatically reduced copying and distribution costs for many works and so there may be a case for a corresponding increase in the copyright term to preserve incentives.

Harmonisation of our copyright term with the US and EU will be beneficial for copyright owners ...

Harmonisation of Australia's copyright term with that of some of our major trading partners would be beneficial. It would allow a reduction in costs associated with management of intellectual property rights as portfolios would expire at the same time across our major markets. It is reasonable to assume that some of these cost savings will be passed on to consumers.

... and is necessary to continue to be an attractive investment option for mobile capital

It needs to be recognised that we compete in a world with increasingly mobile capital and that the strength of a country's intellectual property laws is a key determinant in attracting foreign investment across many sectors of the economy. Indeed, the Department of Foreign Affairs and Trade has noted that, "It is generally accepted that maintenance of such a regime has

⁸ For example, in the recent *Eldred* decision Breyer J (dissent) stated that a one percent likelihood of earning \$100 annually for 20 years, starting 75 years into the future, is worth less than seven cents today — *Eldred at Al v. Ashcroft* US SC 15 January 2003 at 14. See also George A Akerlof et al., "The Copyright Term Extension Act of 1998: An Economic Analysis," (Washington DC: AEI-Brookings Joint Center for Regulatory Studies, 2002); Intellectual Property and Competition Review Committee, *Review of Intellectual Property Legislation under Competition Principles Agreement: Final Report* (Canberra: 2000) 83.

⁹ William M Landes and Richard A Posner, "An Economic Analysis of Copyright Law," *Journal of Legal Studies* 18 (1989).

¹⁰ *Ibid.*: 363.

served to attract state-of-the-art technology and overseas copyright works,”¹¹ to Australia.

Costs

Term extension means that works will be delayed in entering the public domain ...

The public domain includes all works that anyone can freely copied (ie, are not protected by copyright). Critics of term extension emphasise that extension will reduce the size of the public domain by delaying each copyright’s entry.

... which will impose a deadweight cost

This delay is claimed to be costly because it means that people who would gain some benefit from using the works, but at a price below the prevailing commercial price, will be denied the use of the work and hence there will be a deadweight cost associated with the maintenance of the use restrictions. This cost arises because copyright works tend to have low marginal costs, and efficiency will be maximised (once production costs have been recouped) if the price is set equal to the marginal cost of close to zero.

This cost is not as significant as is often implied because ...

It is easy to claim that the costs associated with a reduced public domain are significant, but in fact its significance tends to be over-stated for a number of reasons:

... the extra incentives provided will enlarge the public domain ...

- as the public domain is a function of two things — the number of works and the time until copyright expires — over the longer term extension will increase the size of the public domain (ie, through the incentive effect) even though there will be a delay in the movement of works from protection to the public domain. It is difficult to say precisely whether this can therefore be considered a cost without empirical evidence;

...copyright law contains a number of exceptions and limitations that provide access to copyright works ...

- copyright law includes numerous exceptions, doctrines and limitations (eg, the idea/expression dichotomy, statutory licences, libraries and archive exceptions and fair dealing provisions) which are explicitly designed to reduce deadweight costs associated with reduced access to works because of copyright protection. These exceptions and limitations have been progressively expanded in Australia and now reach into the digital realm. These extensive exceptions and limitations reduce the need to be concerned about deadweight costs associated with changes to the public domain; and

... in some cases excessive use may impose costs

- in selected cases it is possible for works to be over-used, and hence a delay in their falling into the public domain will be welfare enhancing.¹²

Tracing costs will increase with term extension ...

Tracing costs are the costs associated with ensuring that the creation and/or use of a property do not infringe someone else’s legitimate property rights. Tracing costs are a feature of all property regimes, but are particularly significant with respect to intellectual property (and even more so with respect to copyright).¹³ It is generally assumed that tracing costs increase over time because it is harder to track the legitimacy of copyrights in particular works as time goes on (particularly after the death of an author).

¹¹ Department of Foreign Affairs and Trade, *Intellectual Property Rights: A Guide to the GATT Uruguay Round* (Canberra: 1990).

¹² William M Landes and Richard A Posner, "Indefinitely Renewable Copyright," *University of Chicago Law School*, John M. Olin Law & Economics Working Paper No.154 (2D series) 2002.

¹³ The tracing problem is more serious for copyrights than for patents; patent registration makes it feasible to identify the patents that a proposed new patent may infringe, but it is impossible to search through the entire body of copyrighted materials.

... but not as significantly as is often claimed

Whether this is true over the longer term is open to question given the development of private (digital) rights management systems, and the increasing sophistication of collecting societies and business models developed by industry. These developments do not imply that tracing costs will disappear, but rather, they suggest that tracing costs (at least for certain types of works) will likely be less significant in coming years. The implication, therefore, is that an increased copyright term will be feasible without imposing significant new tracing costs upon subsequent copyright creators and users.

Term extension provides an unjustified benefit to existing copyright owners

The most criticised element of copyright extension is that existing copyright owners will benefit from an additional 20 years copyright protection for works that already exist. The argument goes that term extension is designed to encourage the creation of new works, and that providing the extension to existing works is incompatible with copyright's incentive rationale. The consequence will be a transfer from consumers to copyright owners. While this is often considered to be a very significant cost, such considerations tend to forget that the commercial value of most copyright works decreases significantly with time.¹⁴ As a result, we estimate the transfer to existing rights holders to be in the vicinity of \$8 million in the 5th year after extension, \$16 million in the 10th year after extension, \$28 million in the 15th year after extension, and \$43 million in the 20th year after extension. Of course, these values will be significantly lower if brought into Net Present Value (NPV) terms.

Other often claimed costs are incorrect or trivial ...

There are a range of claimed costs associated with term extension that are largely unjustified or plain incorrect. The most significant of these include:

... Australia's trade balance should not be considered a cost of term extension ...

- Australia's external balance of payments position will worsen under term extension due to Australia's status as an overall net importer of copyrighted works — this is a mercantilist fallacy that denies the existence of benefits in trade. Australia's balance of trade position is an outcome of a myriad of policy issues, and should not be seen as a cost;

... term extension is unlikely to create a resource misallocation ...

- there will be a significant resource misallocation as funds will be diverted to copyright producing industries — the aim of intellectual property is to divert resources to creative industries. There is a logical inconsistency to argue, as critics of term extension do, that the incentives associated with term extension are minimal, and then to argue that this minimal impact is a source of a significant resource misallocation; and

... rent-seeking costs are unlikely to change with term extension

- rent-seeking costs will increase — as with all regulatory interventions, there are rent seeking (ie, lobbying) costs associated with copyright policy. It is unlikely that they would be higher under extension, and in fact may be lower.

Conclusion

It is impossible to quantify the net impact of copyright term extension ...

The real problem for policy-makers is that the debate about the costs and benefits of term extension is devoid of any reliable quantitative support.¹⁵ Indeed, Watt suggests that this is understandable given that:

¹⁴ However, the continued evolution and development of technology can result in revenue spikes as works are re-released in different formats. For example, with respect to motion pictures, there is evidence to suggest that digitisation has made such works more valuable through restoration, enhanced editing capabilities and the like.

¹⁵ See: Marci A Hamilton, *Copyright Duration Extension and the Dark Hart of Copyright* (14) (Cardozo Arts & Entertainment Law Journal, 1996 [cited 28 March 2003]); available from

“in the end, all arguments both for and against regulatory interventions in the form of copyright law must rely on some measure of social welfare, which is impossible to measure empirically”.¹⁶

... but it is clear that the impact is neither significantly negative nor positive

While no definitive quantitative assessment is possible, the analysis outlined above suggests that there is a barrier to reasonable discussion about the net impact of term extension:

- the advocates of term extension understate the costs; but correspondingly
- the opponents of term extension underplay the benefits.

This polarisation tends to leave potential policy-makers in a quandary.

Key points to note include ...

... term extension's impact will not be uniform across different types of copyright

However, some observations to be drawn from the analysis include:

- as copyright law has moved away from the technology-specific focus that it initially (and until recently) had, it is increasingly difficult for copyright law to provide socially optimal returns for each and every creator. Thus, when commentators give examples of possible over-compensation for particular works, this is to be expected, and needs to be balanced against the under-compensation provided to others;
- there is an apparent tendency to identify potential costs and suggest that by definition they must be hugely significant. In fact, many of the costs identified by critics of term extension are lessened by limitations and constraints built into copyright law, or are being addressed through technological developments (eg, reduced tracing costs); and
- text-book finance examples of the net present value of additional incentives fail to incorporate important developments in behavioural economics. The result is that the benefits of term extension is systematically understated.

... many of the costs are countered by legal or practical safeguards that are often overlooked

... creation incentives are more dynamic than is often suggested by critics of term extension

The net impact of term extension is likely to be neutral ...

Overall, the net financial impact of term extension in Australia is likely to be neutral; there are costs, and there are benefits, but to say that one is appreciably larger than the other lacks credibility.

... but two factors point towards supporting copyright term extension ...

While the costs and benefits are probably finely balanced, two key factors suggest that on the balance of probabilities Australia should move to extend the copyright term to match the EU and US terms:

... without term extension reduced and reducing reproduction costs will increasingly undermine future creation incentives ...

- technological development continues apace and, because of increased potential for copyright piracy — due to reduced copying and distribution costs — can significantly undermine the existing incentives provided by copyright law in major copyright industries (ie, movies, music and books).¹⁷ There is strong theoretical support for the view that in such an environment (ie, with a significantly differing industry risk profile) copyright protection must be strengthened to balance interests, so that term extension will support the maintenance of the required incentives; and

<http://www.law.asu.edu/HomePages/Karjala/OpposingCopyrightExtension/commentary/hamilton-art.html>; Organisation for Economic Co-operation and Development, *Competition Policy and Intellectual Property Rights* (Paris: OECD, 1998) 297; Richard A Posner, "The Law & Economics of Intellectual Property," *Daedalus*, no. Spring (2002): 12.

¹⁶ Richard Watt, *Copyright and Economic Theory: Fiends or Foes?* (Cheltenham: Edward Elgar, 2000) 123.

¹⁷ This affect likely outweighs any potential incentive benefits that may arise because of increased technological opportunities.

... harmonisation of Australia's copyright term with our major copyright trading partners will reduce costs for Australian industry

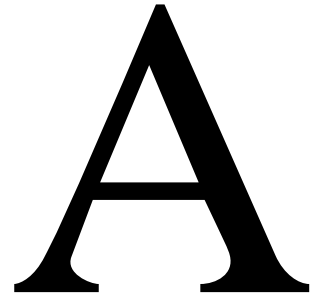
- the benefits of harmonisation with our major copyright trading partners are likely to be significant over the longer term. Already, 24 of Australia's 50 largest trading partners have provided extended terms of protection (and 54 countries in total have extended copyright protection), and this is set to increase. Australian businesses have always expressed concerns about the practical costs of Australian policy-makers adopting regulatory approaches different to our major trading partners, and this should be given significant weight in any consideration of copyright term extension.

These observations suggest that copyright term extension should be supported.

Report Structure

The remainder of this report is set out in the following manner:

- Part A (Chapters One and Two) provide brief overviews of the copyright term in Australia and overseas, as well as an introduction to the economic analysis of copyright;
- Part B (Chapters Three to Five) assesses the costs and benefits of extending the copyright term; and
- Part C considers some alternative extension approaches (Appendix A) and provides a list of sources referred to in this report (Appendix B).



Part A

Background

Chapter One

The Copyright Term

This chapter outlines the copyright term as it applies in Australia, under international treaties, and in some key overseas markets.

Copyright does not continue indefinitely; the law provides for a period of time, a duration, during which the rights of the copyright owner exist. The duration of copyright begins from the moment when the work has been created in a tangible form. The period of duration continues, in general, until some time after the death of the author.¹⁸

The *Berne Convention* imposes several obligations regarding minimum term of copyright protection that must be granted by member states (including Australia) — see Box 1.1.¹⁹

Box 1.1

COPYRIGHT DURATION IN THE *BERNE CONVENTION* — ARTICLE 7

“(1) The term of protection granted by this Convention shall be the life of the author and fifty years after his death.

(2) 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.

(3) In the case of anonymous or pseudonymous works, the term of protection granted by this Convention shall expire fifty years after the work has been lawfully made available to the public. However, when the pseudonym adopted by the author leaves no doubt as to his identity, the term of protection shall be that provided in paragraph (1). If the author of an anonymous or pseudonymous work discloses his identity during the above-mentioned period, the term of protection applicable shall be that provided in paragraph (1). The countries of the Union shall not be required to protect anonymous or pseudonymous works in respect of which it is reasonable to presume that their author has been dead for fifty years.

(4) It shall be a matter for legislation in the countries of the Union to determine the term of protection of photographic works and that of works of applied art in so far as they are protected as artistic works; however, this term shall last at least until the end of a period of twenty-five years from the making of such a work.

(5) The term of protection subsequent to the death of the author and the terms provided by paragraphs (2), (3) and (4), shall run from the date of death or of the event referred to in those paragraphs, but such terms shall always be deemed to begin on the 1 st of January of the year following the death or such event.”

Source: *Berne Convention For The Protection Of Literary And Artistic Works* (Paris Text 1971)

The duration of copyright protection under the *Copyright Act* varies according to the nature of the copyright material, and whether or not it has been published — for example, copyright:

¹⁸ The purpose of this provision in the law is to enable the author’s successors to benefit economically from exploitation of the work after the author’s death.

¹⁹ The duration of copyright protection is longer than any other form of intellectual property except trade mark protection (which may theoretically continue indefinitely as long as there is active use of the mark).

- for literary, dramatic, musical and artistic works generally lasts for 50 years from the year of the creator’s death;
- for post-1969 films and sound recordings lasts for 50 years from publication; and
- for broadcasts is 50 years from the year in which they were made.²⁰

Like regimes overseas, the Australian legislation differentiates between copyrights owned by individual authors and organisations. In essence, most protection of content owned by individuals is for the author’s lifetime plus x years. Content owned by organisations, in contrast, is protected for a flat period of x years. Where the duration period is measured by the author’s life, that period applies even if the author is not the copyright owner.

In addition to these standard terms, section 5 of the *Olympic Insignia Protection Act 1987* provides for indefinite copyright in the Olympic symbol. That Australia has this perpetual copyright term for the Olympic insignia is little understood.²¹

The *Berne Convention* also allows countries to provide for protection longer than the defaults set out in Box 1.1. The key provisions in this regard are:

- Article 7(6) — the countries of the Union may grant a term of protection in excess of those provided by the paragraphs outlined in Box 1.1.
- Article 19 — the provisions of the *Convention* shall not preclude the making of a claim to the benefit of any greater protection which may be granted by legislation in a country of the Union; and
- Article 20 — this allows for special agreements among countries of the Union to grant authors more extensive rights than the *Convention* or contain other provisions not contrary to the *Convention*.

Although the *Convention* sets out minimum terms, these provisions ensure that there is nothing stopping the extension of the term of copyright protection. Indeed, a number of major countries have relied on these provisions to provide for a longer term of copyright protection:

- the European Union — in 1995 the European Union (EU) extended the standard copyright term for its member states to the life of the author plus 70 years, and the term for audiovisual works to 70 years after the death of the principal director, screenplay author, dialogue author, or composer;²² and
- the United States — the *Sonny Bono Copyright Term Extension Act* was passed by the US Congress in 1998. Prior to its enactment the basic term of copyright protection for ‘works’ (which includes sound recordings) was 50 years after the death of the author, and 75 years from the publication of works made for hire. The *Copyright Term Extension Act* extends the general term of protection for copyright:

²⁰ For more detail see sections 33-34, 93-96, 180-181, 195AM, 212, & 233-234 of the *Copyright Act*.

²¹ Somewhat similarly as an aberration, section 301 of the UK *Copyright, Designs & Patent Act 1988* granted the Hospital for Sick Children an inalienable and perpetual right to receive royalties for, “the public performance, commercial publication, broadcasting or inclusion in a cable programming service,” of James Barrie’s play *Peter Pan* following expiry of copyright in the work on 31 December 1987.

²² Council Directive 93/98/EEC of October 29, 1993 harmonizing the term of protection of copyright and certain related rights, O.J.EC no. L 290/9 of November 24, 1993. The purpose of the *Directive* was to harmonise the laws of EU members, as national laws ranged from between life plus 50 years (the minimum *Berne* requirement), life plus 60 years (for example, Spain) and life plus 70 years (Germany). Rather than shifting down to the *Berne* standard, the *Directive* gravitated to the term adopted under German law

- in works (other than works made for hire) to the life of the author plus 70 years; and
- for works made for hire to the lesser of 95 years from publication or 120 years from creation (as this is considered to be the rough equivalent of 70 years from the creator’s death as is available in the EU). The extension to 95 years was made on the basis of actuarial advice that demonstrated that 95 years from publication is broadly equivalent to a period of protection to 70 years from the death of the author.

As shown in Tables 1.1 and 1.2, a number of other countries have now moved (or are moving) to the general US and EU copyright term.

Table 1.1

COMPARISON OF COPYRIGHT TERMS IN SELECTED COUNTRIES FOR LITERARY, DRAMATIC, MUSICAL AND ARTISTIC WORKS

Duration	Countries
Life plus 100	Mexico
Life plus 99	Ivory Coast
Life plus 80	Colombia and Guinea
Life plus 75	Guatemala and Honduras
Life plus 70	Albania, Argentina, Austria, Belgium, Bosnia and Herzegovina, Brazil, Bulgaria, Costa Rica, Croatia, Czech Republic, Denmark, Ecuador, Egypt, Finland, France, Germany, Ghana, Greece, Hungary, Iceland, Irish Republic, Israel, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Macedonia, Malta, Netherlands, New Caledonia, Nicaragua, Nigeria, Norway, Paraguay, Peru, Poland, Portugal, Romania, Singapore, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey, United Kingdom and United States
Life plus 60	India and Venezuela
Life plus 50	Angola, Australia, Bangladesh, Benin, Brunei Darussalam, Burkina Faso, Burundi, Canada, Chile, China, Egypt, El Salvador, Hong Kong, Indonesia, Japan, Malaysia, Morocco, Nepal, New Zealand, Pakistan, Papua New Guinea, Philippines, Qatar, Republic of Korea, Saudi Arabia, South Africa, Sri Lanka, Taiwan, Thailand and United Arab Emirates
Life plus 30	Iran
Life plus 25 (total protection to be not more than 50 years)	Iraq
None (or minimal)	Afghanistan, Central African Republic and Kuwait

Note 1: This table represents the standard copyright term; there are, of course, some idiosyncrasies in individual countries.

Note 2: Singapore has agreed to extend its term of protection to life plus 70 years as a result of its recent free trade agreement with the US.

Note 3: Mexico’s term extension legislation (extending the term from life plus 75) is not in effect yet.

Table 1.2

COMPARISON OF COPYRIGHT TERMS IN SELECTED COUNTRIES FOR AUDIOVISUAL WORKS

Duration	Countries
Life plus 75 years	Mexico
Life plus 70 years	Bosnia and Herzegovina, Bulgaria, Czech Republic, Israel, Latvia, Liechtenstein, Malta, Poland, Romania, Slovakia and Switzerland
For works made for hire, 95 years from publication or 120 years from creation	United States
99 years, following first publication	Ivory Coast
80 years, following first publication	Colombia and Guinea
75 years, following first publication	Guatemala and Honduras
70 years, following first publication	Albania, Brazil, Costa Rica, Croatia, Ghana, Hungary, Japan, Macedonia, Nicaragua, Paraguay, Peru, Poland, Singapore, Slovenia and Turkey
70 years, calculated as required under the EU <i>Copyright Term Directive</i>	Austria, Belgium, Denmark, Finland, France, Germany, Greece, Iceland, Irish Republic, Italy, Luxembourg, Netherlands, New Caledonia, Norway, Portugal, Spain, Sweden and United Kingdom
60 years, following first publication	India and Venezuela
Life plus 50 years	Argentina, Egypt and Papua New Guinea
50 years from making available to the public or first publication, whichever is latest	Fiji
50 years from the year in which the work was first made or communicated to the public	Sri Lanka
50 years, following first publication	Canada, China, Egypt, Hong Kong, Indonesia, Malaysia, New Zealand, Nigeria, Pakistan, Philippines, Qatar, Republic of Korea, South Africa, Taiwan, Thailand and United Arab Emirates
50 years from the year in which the work was first made	Brunei Darussalam
30 years, following first publication	Iran
Life plus 25 years, or 30 years from the first publication where author is a body corporate	Iraq
25 years, following first publication	Saudi Arabia
None (or minimal)	Afghanistan, Central African Republic and Kuwait

Note 1: This table represents the standard copyright term; there are, of course, some idiosyncrasies in individual countries.

Note 2: Singapore has agreed to extend its term of protection to 70 years as a result of its recent free trade agreement with the US.

Note 3: Under Art. 2(2) of the EU *Copyright Term Directive*, the term of copyright protection for audiovisual works expires 70 years following the death of the last survivor of the following persons: the principal director, the author of the screenplay, the author of the dialogue, and the composer of the music specifically created for the audiovisual work.

This policy issue now being considered is whether the general Australian copyright term should be brought into line with the general US and EU terms.

Chapter Two

A Very Brief Overview of the Economics of Copyright

This chapter briefly provides an overview as to why economics is important in framing copyright laws,²³ and how economics views the concept of copyright term.

While copyright is often conceived as a form of natural right, it is better understood as an economic tool that is designed to maximise efficiency.

As a general rule, efficiency is maximised when markets are allowed to operate unhindered. However, in certain circumstances some markets fail, creating a legitimate reason for government to step in and correct the ‘market failure’.²⁴

A market failure exists where the characteristics of a market are such that its unfettered operation will not lead to the most efficient outcome possible. There are four commonly accepted situations in which market failure exists (ie, natural monopoly, severe information asymmetries, public goods and externalities).

Absent copyright, there is likely to be a market failure because of the public good nature of much of the material that would have otherwise been protected by copyright. Public goods exist where provision for one person means the good or service is available to all people at no additional cost. Public goods are said to tend to have two main economic characteristics:

- they are said to be non-rivalrous — consumption by one person will not diminish consumption by others; and
- non-excludable — it is difficult to exclude anyone from benefiting from the good. This means that it is difficult, or costly, to prevent non-purchasers from consuming the goods.

Creative products tend to have public good characteristics in that consumption by one person does not prohibit another person also using the same product (ie, the product is non-rivalrous), and people cannot easily be stopped from consuming the product (ie, the product is non-excludable).

As a result, markets for these products tend to fail because, once the products are produced it is difficult to prevent those who do not pay for them from consuming them. In other words, there are incentives for consumers to become free-riders, obtaining the benefits of the good without incurring any of the costs.

²³ For more detail see The Allen Consulting Group, *Economic Perspectives on Copyright Law* (Sydney: Centre for Copyright Studies, 2003).

²⁴ Council of Australian Governments, *Report of Task Force on Other Issues in the Reform of Government Trading Enterprises, Released as Part of the First COAG Communiqué* (Canberra: 1991).

Thus, it can be said that copyright exists to correct market failures inherent in the production of intellectual and creative works, and hence facilitates the optimal level of creativity. It, “protects the property rights of authors, composers and artists as an incentive to creative activity ... and in terms of economics, gives the copyright owner a temporary monopoly on the original work”.²⁵

In this way, copyright also creates a tension in that, although encouraging the creation of new works (a positive outcome), it also tends to impede their dissemination (a negative outcome). Economists (and others) often talk of the need to balance these twin effects:

“Intellectual property laws must therefore involve some balance between the incentives to invest in creative effort and the incentives for disseminating material that is the subject of intellectual property protection. This balance turns on determining the appropriate scope of protection, in terms of the conditions under which protection is granted, the scope and effectiveness of the exclusive privileges provided by protection, and the duration of the protection given.”²⁶

Taking the concept that copyright has both costs and benefits, it is a short step for economists to suggest that there is likely to be a theoretical optimal fixed copyright term.²⁷ The manner in which these costs and benefits are affected by time can be explained in this manner:

- the marginal social benefit of increasing the copyright term is likely to decline with term length — there are several reasons for this:
 - most creators have a declining marginal utility for money, they receive less utility from each additional extension of the copyright term. As a result, term extensions have a diminishing positive impact on creation incentives;
 - prospective creators discount future economic return to present value, the more temporally distant the return the less its marginal effect on *ex ante* incentives;
- there are costs to increasing the copyright term, including the cost of tracing copyrighted works (ie, the costs associated with ensuring that the creation and/or use of a property do not infringe someone else’s legitimate property rights), which tend to increase as works get older (see section 3.2).

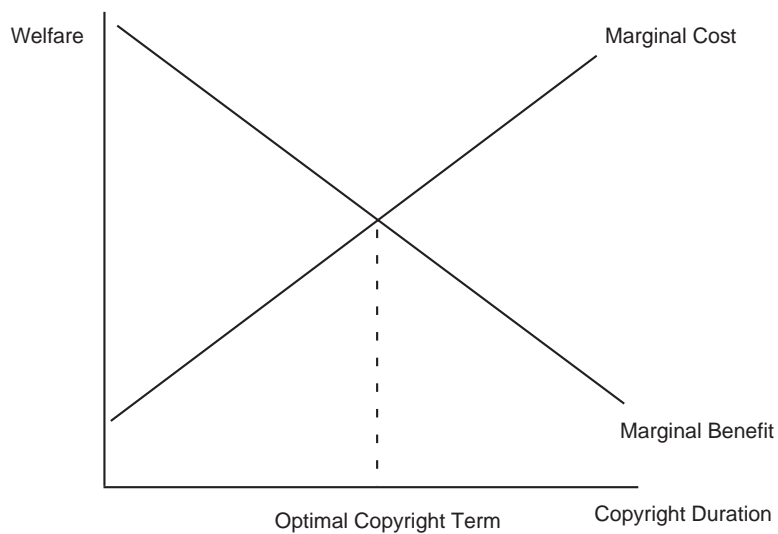
Figure 2.1 reflects these stylised costs and benefits, with an upward sloping marginal cost curve, and a downward sloping marginal benefit curve.

²⁵ Antony W Dnes, *The Economics of Law* (London: International Thomson Business Press, 1996) 33. In fact, in economic terms the market power provided is somewhat less than a monopoly.

²⁶ Intellectual Property and Competition Review Committee, *Review of Intellectual Property Legislation under Competition Principles Agreement: Final Report* (Canberra: 2000) 6.

²⁷ However, see William M Landes and Richard A Posner, "Indefinitely Renewable Copyright," *University of Chicago Law School*, John M. Olin Law & Economics Working Paper No.154 (2D series) 2002.

Figure 2.1

THE OPTIMAL COPYRIGHT TERM

The optimal copyright term is thus where marginal benefit just equals marginal cost; at this point an increase in the copyright term creates more costs and benefits, and a decrease in the copyright term forsakes possible net benefits. While an economic ideal rather than an objectively quantifiable task, the role for policy-makers is to identify this optimal term.

B

Part B

Extension of the Copyright Term

Chapter Three

The Costs of Extension

This chapter identifies a number of claimed costs associated with term extension, and assesses their validity.

3.1 Deadweight Costs

The most common criticism of term extension is that copyright law seeks to balance access and incentives, and that term extension denies the community access to the property within a reasonable time. The view is that works should be put into the public domain — in effect, the public domain constitutes the ‘leftovers’ after copyright has expired²⁸ — as soon as possible because copyright products tend to have public good aspects (see Chapter Two).

As a result of these characteristics it is argued that free consumption of the goods should be encouraged as soon as possible:

“The fundamental difference between tangible and intellectual property is that intellectual property is a nondepletable commons, while tangible property necessarily depletes with use. “The tragedy of the commons” is that failure to recognize perpetual and transferable property rights in tangible property leads inevitably to “overgrazing,” as soon as an item of property enters the public domain from which everyone may draw freely. Recognition of perpetual property rights leads to economic efficiency, because a rational owner will optimize the balance between present and future consumption.

There can be no overgrazing of intellectual property, however, because intellectual property is not destroyed or even diminished by consumption. Once a work is created, its intellectual content is infinitely multipliable.”²⁹

The consequence of this is that copyright owners enjoy the legislative market power provided by copyright (which may be significant or trivial, depending on the degree of competition in the market in which they operate), and that this may allow them to restrict the public’s use of the work by denying the public the ability to freely use the copyright the product.

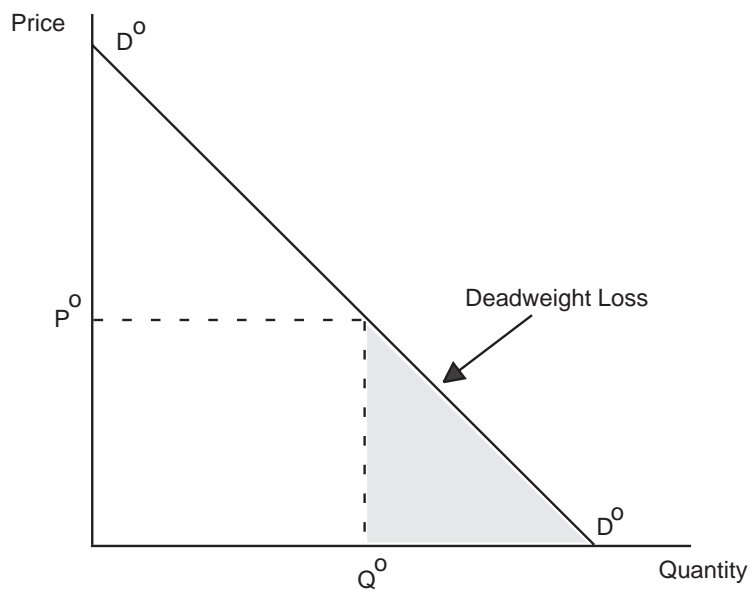
This deadweight cost can be explained diagrammatically. Figure 3.1 represents the initial state of affairs:

- D^0D^0 is the demand schedule in period t ; and
- the copyright holder chooses to supply at price equal to P^0 (even though the marginal cost is assumed to be zero) and as a result supplies Q^0 works.

²⁸ Louise Goebel, “The Role of History in Copyright Dilemmas,” *Journal of Law and Information Science* 9, no. 1 (1998): 43. For a description of the different meanings that have been ascribed to the term ‘public domain’ see: James Boyle, “The Second Enclosure Movement and the Construction of the Public Domain,” *Law and Contemporary Problems* 66, no. Winter/Spring (2003): 58-62.

²⁹ Denis S Karjala, “Statement of Copyright and Intellectual Property Law Professors in Opposition to H.R. 604, H.R. 2589, and S. 505, the Copyright Term Extension Act, Submitted to the Joint Committees of the Judiciary,” (Washington DC: 1998).

Figure 3.1

COPYRIGHT EXTERNALITIES AND COPYRIGHT TERM

Source: Landes and Posner, "Indefinitely Renewable Copyright," 2002 14

It is assumed that the work has been protected by copyright for so long that if the copyright expired today the expected return to the author would have been sufficient to induce its creation. As a result, copyright protection in period t and all future periods would have no effect on whether the work was initially created. Therefore, that the work is not in the public domain creates a deadweight cost equal to the shaded triangle $P^0Q^1Q^0$. Terminating the copyright term at year t will therefore reduce the identified deadweight loss to zero (ie, increase community welfare).

This criticism of term extension is correct (ie, term extension will reduce the volume of works in the public domain), but is significantly over-stated. The following sections address why this cost is less than may be acknowledged by many commentators.

3.1.1 The Public Domain is Not a Static Concept

Critics of term extension tend to see the public domain as a static 'thing', whose size is only determined by the time it takes a copyright to enter it. Thus, the longer that works take to enter the public domain, the smaller the public domain.

In fact, the public domain is determined most significantly by the number of works created. Extension merely delays copyright's movement to the public domain, but additional works actually enlarge the public domain. Landes and Posner note this important feature of the public domain:

"it is a mistake to treat the public domain as some fixed supply of works from which any enlargement of copyright protection subtracts. The size of the public domain is in part a positive function of the extent of copyright protection, since, as a first approximation anyway, the more extensive that protection is,

the greater the incentive to create intellectual property some fraction of which will become a part of the public domain when the copyright expires”.³⁰

Term extension will impose some temporary reduced level of access to works in the public domain, but this needs to be considered in light of the additional copyright works that will enter the public domain in the longer term.

3.1.2 Access is Provided Through Means Other Than Term Limits

There is also a tendency to view the public domain as the only way that people can freely access and use copyright material. This reflects a narrow view of copyright because it ignores the many copyright elements that are specifically designed to promote access:

“Although 50 years may seem a very long time for newer information products (such as computer software), whose commercial life may be very short, there are advantages in having one standardised term for the wide range of works and other subject matter that may exist. That said, *other exceptions and limits in copyright law are generally more important for balancing the interests of the copyright owner and those of users and the public than the term of protection.*”³¹

Spoor too has stressed the importance of the copyright exceptions (broadly defined) in achieving balance between the interests of creators and users:

“Far from being just a minor appendix to the copyright rule, let alone a mere blot on the copyright landscape, exceptions to copyright are an indispensable complement to the exclusive right. Together, they form an important balance between the author’s rights and the interests of the community.”³²

Indeed, of all the intellectual property rights, copyright is subject to the greatest restrictions and limitations because it protects the widest spectrum of ‘information’.³³

The exceptions and limits under Australian copyright law that promote access to copyright include:

- limitations such as statutory licences — there is a range of statutory licences that facilitate access to works at reasonable rates. The licences apply to: ‘ephemeral’ reproduction of a literary, dramatic, musical or artistic work or a sound recording for the purposes of broadcasting; the making of sound broadcasts of literary and dramatic works by holders of a print disability radio licence; recording of musical and literary works; ‘off air’ copying and communication of broadcasts by educational institutions and institutions assisting people with an intellectual disability; reproducing and communicating works and published editions etc. by educational institutions and institutions assisting people with a print or intellectual disability; retransmissions of free-to-air broadcasts; public performance and broadcast of sound recordings; and use of copyright material by the Crown; and

³⁰ William M Landes and Richard A Posner, “Indefinitely Renewable Copyright,” *University of Chicago Law School*, John M. Olin Law & Economics Working Paper No.154 (2D series) 2002, 3.

³¹ Megan Richardson et al., *The Benefits and Costs of Copyright: An Economic Perspective* (Sydney: Centre for Copyright Studies, 2000) 5. Emphasis added.

³² J H Spoor, “General Aspects of Exceptions and Limitations to Copyright: General Report,” in *The Boundaries of Copyright*, ed. L Baulch, M Green, and M Wyburn, *ALAI Study Days (University of Cambridge, 14-17 September 1998)* (Sydney: Australian Copyright Council, 1999), 29.

³³ William M Landes and Richard A Posner, “Trademark Law: An Economic Perspective,” *Journal of Law and Economics* 30 (1987): 267.

- exceptions such as:
 - library and archives exceptions — these exceptions to infringement allow libraries and archives to make reproductions of copyright material for library users for the purposes of research and study, and for other libraries for certain purposes.³⁴ Recent legislative reforms have extended the existing exceptions for library copying to the electronic reproduction and communication of copyright material.³⁵ McDonald argues that the Australian approach is out of step with overseas developments in providing more generous access to users.³⁶ This pro-user bias is echoed by the Copyright Law Review Committee:

“In contrast to overseas jurisdictions, in Australia there has been a distinct policy decision to include the library and archives provisions as royalty-free exceptions, rather than leave this type of copying to voluntary licensing or subject it to statutory licensing schemes.”³⁷

- fair dealing (which is similar to the US ‘fair use’ doctrine) — the *Copyright Act* specifies a number of factors and deeming provisions relating to instances of a fair dealing for research and study. For the remaining categories of fair dealing with works, that is, a fair dealing for criticism and review, reporting news and the giving of professional (legal or patent) advice, there is no such legislative guidance, and any assistance as to the circumstances when a dealing with a work for those purposes will be ‘fair’ must be gleaned from the common law.³⁸ Consistent with this approach, the IPCRC regards exceptions such as fair dealing as necessary to ensure access to copyright material:

“Intellectual property rights, like other property rights, are created subject to limitations, which are imposed for a range of social, political and economic reasons. One of the factors taken into account when providing for some limitations is the economic and social desirability of promoting access to, and wide dissemination of, information.”³⁹

These exceptions are considered to be considerable means (outside of the public domain) in ensuring access to copyright works.⁴⁰ Their strength should not be overlooked when considering the costs of extension of the copyright term.

³⁴ The exceptions are described in some detail in Ian McDonald, *A Comparative Study of Library Provisions: From Photocopying to Digital Communication* (Sydney: Centre for Copyright Studies, 2001).

³⁵ *Copyright Amendment (Digital Agenda) Act 2000*.

³⁶ Ian McDonald, “Proposed Changes to Australian Copyright Law” (paper presented at the APPA/CAL Conference, 3 June 1999).

³⁷ Copyright Law Review Committee, *Copyright and Contract* (Canberra: AusInfo, 2002) 25.

³⁸ See Peter Brudenall, *The Future of Fair Dealing in Australian Copyright Law* (The Journal of Information, Law and Technology, 1997 [cited 12 October 2001]); available from http://elj.warwick.ac.uk/jilt/copyright/97_1brud/. See also *University of New South Wales v Moorhouse* (1975) 133 CLR 1 per Gibbs CJ at 12.

³⁹ Intellectual Property and Competition Review Committee, *Review of Intellectual Property Legislation under Competition Principles Agreement: Final Report* (Canberra: 2000).

⁴⁰ See The Allen Consulting Group, *Economic Perspectives on Copyright Law* (Sydney: Centre for Copyright Studies, 2003).

3.1.3 'Excessive' Use May Impose Costs

The economic theory of property rights emphasises not only their incentive effects (ie, the investment that they encourage) but also their effect in optimising current uses of property.⁴¹

Without clearly defined rights there is a tendency for resources to be over-used (ie, used in a way that is inefficient). The classic example used to demonstrate this theory relates to the use of physical commons; in the absence of property rights the commons will be over-used by graziers because none of the graziers will take account of the cost that his use imposed on the other users by making their cattle graze more to obtain the same amount of food. Establishment of property rights provides the owner of the land that was previously commons with an incentive to maintain the land and to use it in an efficient manner.

In contrast, it is commonly assumed that because creative products tend to have the non-rivalrous characteristics (ie, consumption by one person does not prohibit another person also using the same product) then it is inconceivable that copyright could be over-used.

While copyright *tends* to have non-rivalrous *characteristics* there are some circumstances where rivalry may be an issue, and hence there is the potential for over-use. These circumstances may arise when there is a widespread use of a product in a way that was never intended, and this additional use degrades the manner in which the works were originally intended to be used. This is quite common in fields such as photography, where a photograph may have been taken for a particular purpose, but its subsequent widespread circulation debases the message and hence the work cannot be used in the manner intended so that the image might be next to worthless. Landes and Posner call such an impact a technological externality (ie, a spill-over effect where the actions of one party affect a party who is independent of the action, and wealth is destroyed rather than merely reallocated).⁴²

These concerns are most likely to arise in the protection of characters, or copyright material that has some symbolic meaning. Landes and Posner point to the example of how real an issue this is for organisations such as Walt Disney Company:

“To avoid overkill, Disney manages its character portfolio with care. It has hundreds of characters on its books, many of them just waiting to be called out of retirement...Disney practices good husbandry of its characters and extends the life of its brands by not overexposing them...They avoid debasing the currency.”⁴³

Landes and Posner explain how the impact of copyright externalities impact by reference to Figures 3.1 and 3.2.⁴⁴ They assume that the standard analysis presented in Figure 3.1 does not hold, and that additional use imposes costly technological externalities. As a result, and as shown in Figure 3.2,

⁴¹ See Megan Richardson, "Contracting Beyond Copyright: Some Efficiency Considerations," *Copyright reporter* 20, no. 2&3 (2002).

⁴² See William M Landes and Richard A Posner, "Indefinitely Renewable Copyright," *University of Chicago Law School, John M. Olin Law & Economics Working Paper No.154 (2D series) 2002.*

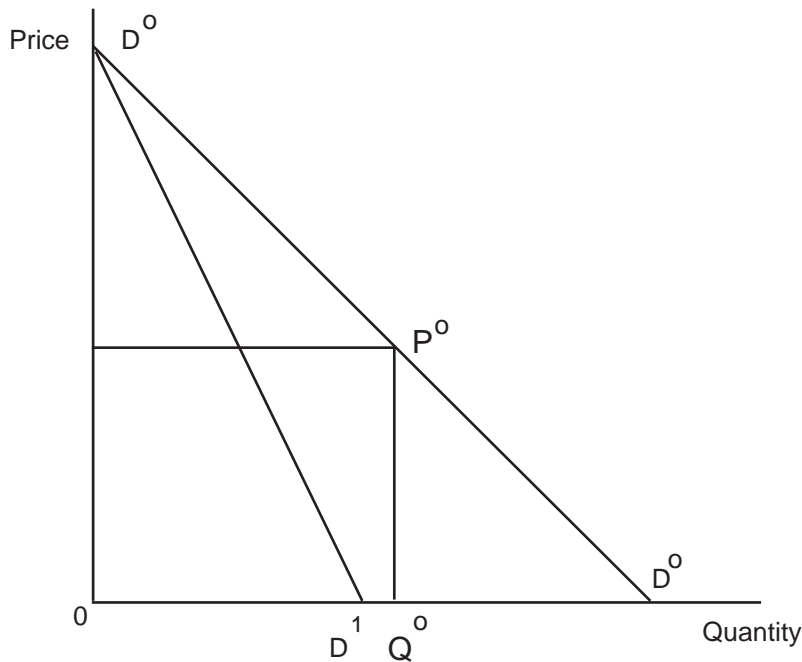
⁴³ Bill Britt, "International Marketing: Disney's Global Goals," *Marketing*, May 17, 1990, quoted in *Ibid.*, 13.

⁴⁴ *Ibid.*, 14.

terminating the copyright will lead not only to a movement along the demand curve but also to a downward shift (say to D^0D^1) in the overall demand. As a consequence, this will reduce value by an amount equal to the difference between the area under the original demand curve D^0D^0 (ie, the area $D^0P^0Q^0$) and the area new demand curve (ie. the area D^0D^10).

Figure 3.2

THE IMPOSITION OF TECHNOLOGICAL EXTERNALITIES



Source: Derived from Landes and Posner, "Indefinitely Renewable Copyright," 2002 14

As a result there are two possibilities:

- if the externalities are small (ie, D^0D^0 does not deviate much to D^0D^1), the difference between the two demand curves may be negative, so that terminating the copyright would increase value; or
- if the externalities are large (ie, D^0D^0 deviates significantly to D^0D^1), termination of copyright will result in a net loss in value.

The issue then becomes one of determining when, and to what degree, it is reasonable to consider that significant technological externalities can destroy value.

While many copyright products do have characteristics whereby their use by one person does not interfere with its use by any other, there may be exceptions to this generally accepted proposition. For example, where the copyright embodies an image that takes on the characteristics of celebrity/notoriety (eg, Bart Simpson, Mickey Mouse, etc)⁴⁵ unlimited reproduction of this work could prematurely exhaust the commercial value of the copyright. This is because if anyone is free to incorporate such copyright-protected elements in other works (eg, books, movies, songs, etc),

⁴⁵ As these examples suggest, this appears particularly with regard to copyrights on components of completed works rather than on the completed works themselves.

then the value of the character might fall significantly. This fall in value may be because of the combination of two inter-related factors:

- over-exposure — people may just tire of seeing the image; and
- inappropriate exposure — the copyright element may be used out of the context for which it was originally known, so that the element loses its ‘message’.

Landes and Posner suggests that examples where this have been known to occur include the *Mona Lisa*, the opening of Beethoven’s *Fifth Symphony*, and several of Van Gogh’s most popular paintings.⁴⁶ In a particularly Australian context, we can possibly see similar outcomes with respect to some Aboriginal dot paintings and the photographs of Max Dupain.

It is quite possible to argue that this form of costs is likely to be stronger in Australia than countries — such as the US, Europe and Canada — with developed bodies of laws giving specific protection to personality. For example, the American ‘right of publicity’ gives the celebrity personality an action against misappropriation of key aspects of their identity for unauthorised commercial use. While there has been considerable academic⁴⁷ and some judicial support for an American style right of publicity in Australia in recent years, such a principle was effectively rejected by the High Court of Australia when it confirmed in the 1984 *Moorgate Tobacco Case*,⁴⁸ and more recently in the *Nike Case*.⁴⁹

3.1.4 Revealed Demand for the Public Domain

Those who see themselves as the defender of the public domain (ie, the intellectual commons) tend to speak of the public domain as though it has exceptional consumer value (ie, the deadweight loss is significant). Revealed preferences of consumers, however, suggests that this is far from the case.

Consumers demand and enjoy copyrighted works as much if not more than works in the public domain:

- consumers spend significantly more on copyrighted works than on public domain works;
- public domain works do not dominate copyrighted works in any area; and
- with a few exceptions (eg, a limited number of ‘classic’ novels), there is not a long queue of consumers waiting for works to enter the public domain.⁵⁰

This suggests that the deadweight costs associated with extending term protection may not be as significant as often claimed.

⁴⁶ William M Landes and Richard A Posner, "Indefinitely Renewable Copyright," *University of Chicago Law School*, John M. Olin Law & Economics Working Paper No.154 (2D series) 2002, 15.

⁴⁷ Australian Law Reform Commission, *Unfair Publication: Defamation and Privacy*, Report No. 11 (Sydney: AGPS, 1979).

⁴⁸ *Moorgate Tobacco Co Ltd v Philip Morris Ltd (No 2)* (1984) 156 CLR 414.

⁴⁹ *Campomar Sociedad Limitada v Nike International Ltd* (2000) 169 ALR 677 at 679-690.

⁵⁰ Stephen E Siwek and Harold W Furchtgott-Roth, *An Economic Analysis of Copyright Extension Programs* (Washington DC: National Endowment for the Arts, 1991) 22.

3.1.5 Does the Public Domain Guarantee Cheaper Products?

It is often overlooked that copyright owners may also make available to consumers quality copies at a lower price than would be possible if a work were in the public domain.⁵¹ For example, for some works:

- the publication of a hardbound copy of the reissue of a book might be possible with copyright protection but would not be profitable if the work were in the public domain;
- the restoration of a movie, or its colourisation, is less likely if the original movie is in the public domain; and
- copyright owners may manage and develop derivative works from copyrighted material enjoyed by consumers more effectively than if the work were in the public domain.

The licensing arrangements put in place provide another reason why works in the public domain may not be cheaper than works protected by copyright. Collecting societies tend to offer blanket licences for certain categories of works. For example, the Copyright Tribunal has described a blanket licence in the context of music licensing as follows:

“It is a licence, which, in practical terms, authorises the broadcasting of all music, which is the subject of copyright ... In effect it means that the licensee (user) may confidently use all music available in the world, secure in the knowledge that in doing so, it will not infringe copyright.”⁵³

The fundamental advantage of a blanket licence is that once a user has a licence they can use all the works in the repertoire. It is most unlikely that the extension of the term of copyright would result in the cost of such licences increasing (particularly as many are determined by the Copyright Tribunal). Liebowitz describes the benefit of this arrangement in these terms:

“Blanket licenses have some very useful economic characteristics. First, since the cost of using another copyrighted item in the repertoire is zero, consumers who purchase the license use the optimal amount of these public goods. From an economic efficiency vantage, this is much better than selling the individual items in the repertoire one at a time (unless the seller were a perfect price discriminator).”⁵⁴

In effect, for works provided through blanket licences, extension is unlikely to have any effect on the price paid by consumers to use such works.

3.2 Tracing Costs

Tracing costs are the costs associated with ensuring that the creation and/or use of a property do not infringe upon someone else’s legitimate property rights. Tracing costs are a feature of all property regimes, but are

⁵¹ See Ian E Novos and Michael Waldman, “The Effects of Increased Copyright Protection: An Analytical Approach,” *Journal of Political Economy* 92, no. 2 (1984).

⁵² Stephen E Siwek and Harold W Furchtgott-Roth, *An Economic Analysis of Copyright Extension Programs* (Washington DC: National Endowment for the Arts, 1991) 22.

⁵³ *Re Australian Broadcasting Commission* (1985) 5 IPR 449 at 454.

⁵⁴ Stan J Liebowitz, *Copyright, Piracy and Fair Use in the Networked Age* (2001 [cited 2 August 2001]).

particularly significant with respect to intellectual property (and even more so with respect to copyright).⁵⁵

Tracing costs are best explained by comparison of rights in physical products and intellectual property. Items of physical property are visibly distinct; this is true even of adjacent parcels of land, once the boundary has been mapped and fenced. But one piece of intellectual property is not visibly distinct from others; it is identified only by comparison with others. Two copies of the same book are physically distinct, but the intellectual property contained in them is identical. Worse, two different books may be sufficiently similar to raise a question of whether the intellectual property in one was appropriated by the author of the other.⁵⁶

It is generally assumed that tracing costs increase over time because it is harder to track the legitimacy of copyrights in particular works as time goes on (particularly after the death of an author).⁵⁷

Whether this is true over the longer term is open to question given:

- the development of private (digital) rights management systems suggests that tracing costs may be reduced by the actions of individual copyright owners; and
- the increasing sophistication of collecting societies suggests that there will be more effective centralised identification for certain categories of works.

These developments do not imply that tracing costs will disappear, but rather, they suggest that tracing costs (at least for certain types of works) will likely be less significant in coming years. The implication, therefore, is that an increased copyright term will be feasible without imposing significant new tracing costs upon subsequent copyright creators and users.

Indeed, while it is easy to assert that there are additional tracing costs associated with term extension, no-one has ever provided any evidence that such costs are significant in practice. Indeed, Posner and Landers, who have written extensively on the concept of tracing costs, after a discussion of two sub-categories of tracing costs have concluded that, “neither is serious”.⁵⁸

3.3 Enforcement Costs

It is reasonable to assume that enforcement costs will increase as a result of term extension. This is because:

- there will be extra enforcement during the extension period;
- cost per enforcement may increase as time goes on (eg, because proof of creation may be harder as time goes on).

⁵⁵ The tracing problem is more serious for copyrights than for patents; patent registration makes it feasible to identify the patents that a proposed new patent may infringe, but it is impossible as yet to search through the entire body of copyrighted materials.

⁵⁶ See Richard A Posner, "The Law & Economics of Intellectual Property," *Daedalus*, no. Spring (2002): 8.

⁵⁷ See Ian Kilbey, "Copyright Duration? Too Long," *European Intellectual Property Review*, no. 3 (2003): 108.

⁵⁸ William M Landes and Richard A Posner, "An Economic Analysis of Copyright Law," *Journal of Legal Studies* 18 (1989): 361.

These points may tend to over-state the additional costs because:

- the Government has recently taken steps to reduce enforcement costs through ‘presumption’ provisions;
- the costs of copyright administration are being reduced by more effective practices of copyright collecting societies and the development of digital rights management systems. This suggests that the future transaction costs that commentators traditionally point to are likely to be less significant than previously thought; and
- enforcement costs are predominantly private, and hence will only be incurred voluntarily, and to the degree that each copyright owner feels that they are justified (ie, the benefits exceed the costs).

3.4 Transfers to Existing Rights Holders

A criticism of term extension in the US is that existing copyright owners will benefit from an additional 20 years copyright protection for works that already exist. Given that term extension is designed to encourage the creation of new works, providing the extension to existing works will only result in a transfer from consumers to copyright owners.

In 1998 the US Congressional Research Service undertook an independent study to estimate the value of royalties that would flow to existing copyright owners as a result of term extension.⁵⁹ This was made possible because of the US’s system of copyright registration, which allows some idea as to the number of copyrights that exist and which are considered commercially valuable. The estimate of the transfers to existing copyright owners from term extension in the US is shown in Table 3.1.

Table 3.1

FORECAST ADDITIONAL ANNUAL ROYALTIES ASSOCIATED WITH US TERM EXTENSION FOR EXISTING WORKS (1997 US\$ MILLION)

Initial Copyright Expiry	Books	Song Recordings	Movies
1998-2002	46	3.4	1.2
2003-2007	54	2.9	16
2008-2012	57	8.0	48
2013-2017	74	15.2	61

Source: Rappaport, "Copyright Term Extension: Estimating the Economic Values," 1998 8,12&15

While Table 3.1 shows the additional royalties paid for each year, the effect is actually cumulative (ie, royalties for works that would have expired in 1998 must be paid in addition to royalties for works that would have expired in 1999). Table 3.2 takes account of this (and the natural rate of depreciation in the value of works over time).

⁵⁹ Edward Rappaport, *Copyright Term Extension: Estimating the Economic Values* (Washington: Congressional Research Service, 1998).

Table 3.2

FORECAST TOTAL ANNUAL ROYALTIES FOR EXISTING COPYRIGHTS BENEFITING FROM US TERM EXTENSION (1997 US\$ MILLION)

Additional Copyright Royalties Incurred in ...	Books	Music	Movies
1998-2002	49	3	53
2003-2007	90	5	111
2008-2012	132	12	203
2013-2017	178	24	317

Source: Rappaport, "Copyright Term Extension: Estimating the Economic Values," 1998 16

Given the lack of an Australian registration system it is impossible to develop a costing comparable in rigour to that presented in Tables 3.1 and 3.2. However, a ballpark estimate can be drawn by adjusting the results in Table 3.2 for a range of factors such as:

- the exchange rate;
- inflation; and
- allowances for the respective sizes of the US and Australian industries/economies.

This estimate is presented in Table 3.3 using both sector-specific adjustments (ie, for books, music and movies) and economy-wide adjustments to develop upper and lower cost estimates.

Table 3.3

TOTAL ANNUAL ROYALTIES FOR EXISTING COPYRIGHTS BENEFITING FROM AUSTRALIAN TERM EXTENSION (2002 A\$ MILLION)

Additional Copyright Royalties Incurred in ...	Books	Music	Movies	Total
Year 5 after extension	2.7 – 3.7	0.2 – 0.4	4.0 – 5.5	8.0 – 8.6
Year 10 after extension	5.0 – 6.9	0.4 – 0.7	8.5 – 11.5	15.7 – 17.2
Year 15 after extension	7.3 – 10.1	0.9 – 1.8	15.5 – 21.0	26.5 – 30.0
Year 20 after extension	9.8 – 13.6	1.8 – 3.5	24.2 – 32.8	39.6 – 46.1

Source: Derived from Rappaport, "Copyright Term Extension: Estimating the Economic Values," 1998 16

The analysis underlying Table 3.3 does not do is take into account:

- the development profiles of the identified sectors (ie, is the Australian use of copyright in future likely to be stronger or weaker than in the US); and
- any impact that Australia's statutory licensing arrangements may have in restraining copyright prices for certain types of copyrights for certain types of users. Such statutory licensing arrangements should reduce the costs shown in Table 3.3 for users such as schools and universities.

As a result of these non-inclusions, Table 3.3 is likely to somewhat overstate the transfer to copyright owners.

While necessarily very crude, the results in Table 3.3 show that copyright extension in Australia would result in an additional payments by consumers to existing copyright owners of around \$40 million in the 20th year after term extension.

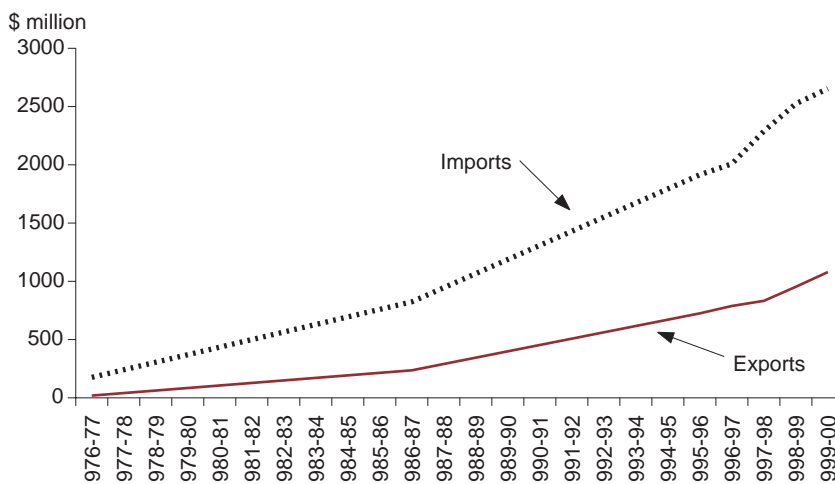
3.5 Other Claimed Costs

3.5.1 Balance of Trade Costs

Australia is a net importer of copyright — see Figure 3.3.

Figure 3.3

TRADE IN COPYRIGHT (\$1999–2000)



Source: The Allen Consulting Group, "The Economic Contribution of Australia's Copyright Industries," 2001 14

One view expressed by opponents of term extension is that longer copyright protection must be 'bad' because the trade imbalance shown in Figure 3.3 means that increased copyright protection must benefit foreigners at the expense of domestic stakeholders.

This view lacks credibility for a number of reasons:

- the goal of copyright protection must be to create an efficient market in Australia for the creation and dissemination of copyright works; the law, and the policy discussion about the law, should be agnostic as to who actually owns the rights; and
- to focus on the trade balance as a cost is incorrect; it is a consequence of the law, but not a cost. If we take this approach we miss the point that trade is about mutual gain. For example, such an approach would assume that we need to have a neutral trade balance with respect to rubber thongs, gold, wheat, professional services, and all other traded goods and services. This is clearly ridiculous.

In a lengthy but worthwhile rebuttable of the argument that we should lower copyright protection and free-ride on overseas creation, Richardson *et al* state that:

“The deeper economic issue at stake in these arguments is the benefits and costs of protectionism versus free trade, which TRIPs and WIPO have been so concerned to promote. Are these only or mainly for the benefit of the exporting nations? There are good economic reasons for Australia to support the direction being adopted. The supposed benefit of free-riding ... is misconstrued in at least two important respects. In the first place, it reveals the old mercantilist fallacy that exports are good and imports are bad which was roundly attacked by Adam Smith in his *Wealth of Nations* (1776). What Smith convincingly showed is that mercantilism provides a vehicle for subsidising the inefficient efforts of local producers, who seek to prevent competition from cheaper imports to the ultimate detriment of consumers.”

Conversely, Smith’s point was also that efficient local producers, who can effectively compete against the rest of the world, can only gain from a system that rewards their efforts (as ultimately can users, who stand to benefit from lower prices and greater choice). Economists have accepted for over 200 years that mercantilism is a fallacy when applied to industries such as textiles and shoes and meat. The logical and rational position with respect to copyright industries is exactly the same. Australia does (and, indeed, should) produce some specialist types of copyright material and import others. A copyright system which limits the scope of copyright protection in order to promote free-riding on the rest of the world runs the distinct risk of promoting the second at the expense of the first.”⁶⁰

In any case, it is incorrect to assume that a negative trade balance means that the copyright system provides the most significant rewards to foreign creators:

“One somewhat imperfect indicator of this (since not all copyright owners belong to collecting societies) is the percentages of the amounts collected and distributed by collecting societies that are remitted overseas. These show that on average less than 20% of total funds distributed are remitted overseas. The remainder is distributed to domestic producers of copyright material whose trade is in the domestic market. *A particular risk of seeking to free-ride on the rest of the world by reducing or not expanding the scope of copyright protection to meet the needs of new innovation practice is that this would come at a cost to domestic activities which economically, in the current climate, are far more important to Australia.*”⁶¹

3.5.2 Resource Allocation Costs

Another claimed cost of an increased copyright term is resource distortions. Bard and Kurlantzick explain this cost in these terms:

“A grant of rights which are too extensive ... may impose a significant social cost in addition to the limitation of access to resulting works by consumers and later authors. Such overprotection also raises the prospect of inefficiency across industrial sectors. That is, it would lead to overinvestment in and overproduction of goods in the copyright-based sectors of the economy, drawing resources into the production of additional copyrightable works when those resources would otherwise have been more valuably used elsewhere in the economy. Copyrighted works, after all, compete not only with other

⁶⁰ Megan Richardson et al., *The Benefits and Costs of Copyright: An Economic Perspective* (Sydney: Centre for Copyright Studies, 2000) 12.

⁶¹ Ibid. 12-13. Emphasis added.

copyrighted writings but also with all other products that might be produced with the same resources.”⁶²

It is true that copyright distorts the allocation of resources; this is precisely the intention:

“Every form of intellectual property right is a distortion of free-market principles. In the absence of intellectual property rights, one would be free to copy and market a patented invention or a copyrighted work, and the price of the work would become the marginal cost of the copying and production (a cost that, in the case of many information products, is tending to zero). We deliberately, however, prohibit such copying in order to permit an inventor or author to obtain a monopoly rent and thus create an incentive”.⁶³

The irony with respect to this claim that extension will result in the excessive allocation of resources to the copyright industries is logically inconsistent with the claim (also made by Bard and Kurlantzick) that the increased term provides no (or at least negligible) additional incentive for authors to create new works (see section 3.1). If there is no additional incentive to create additional works then there will be no shift of resources to the copyright sector and hence no resource allocation distortion.

3.5.3 Rent-Seeking Costs

Rent-seeking costs may include the cost incurred from duplicative creations. Such costs are likely to be higher for monopoly rights such as patents, rather than the weak market power provided by copyright. Thus, it is difficult to envisage that an extended copyright term would generate such costs.

3.5.4 Monopoly Concerns

In the IPCPR a number of submissions claimed (with the apparent support of the IPCPR) that extension of the copyright term would be “anti-competitive and monopolistic,” with all the attendant costs associated with monopoly and a reduction in competition.⁶⁴

This argument is fundamentally flawed.

There are a number of specific copyright doctrines that specifically safeguard against the creation of monopoly:⁶⁵

- the principle of independent creation — independent creation does not give rise to a breach; and
- the idea/expression dichotomy — copyright protects original expressions but does not protect the ideas, opinions, information or facts that underlie the expressions.⁶⁶ This distinction is best explained

⁶² Robert L Bard and Lewis Kurlantzick, *Copyright Duration: Duration, Term Extension, the European Union and the Making of Copyright Policy* (Lanham: Austin & Winfield, 1998) 43-44. See also Glynis S Lunney, “Reexamining Copyright’s Incentives–Access Paradigm,” *Vanderbilt Law Review* 49 (1996).

⁶³ Organisation for Economic Co-operation and Development, *Competition Policy and Intellectual Property Rights* (Paris: OECD, 1998) 297.

⁶⁴ See Intellectual Property and Competition Review Committee, *Review of Intellectual Property Legislation under Competition Principles Agreement: Final Report* (Canberra: 2000) 82.

⁶⁵ See The Allen Consulting Group, *Economic Perspectives on Copyright Law* (Sydney: Centre for Copyright Studies, 2003).

⁶⁶ Economists unfamiliar with the intricacies of copyright law often overlook the idea/expression dichotomy and incorrectly suggest that copyright protects ideas, and hence unnecessarily stifles innovation. See, for example: Michele Boldrin and David K Levine, *Perfectly Competitive Innovation, Research Department Staff Report 303* (Minneapolis: Federal Reserve Bank of Minneapolis, 2002).

through an example. If a person writes a book describing the process by which a spaceship can be built, the expression is how the author chooses to convey that process through words, diagrams, pictures and so on. It is this expression that copyright protects. Anyone reading the book is able to take the ideas contained in it (ie, how to build a spaceship), and use them to write their own book or to undertake the construction.⁶⁷ Even a Productivity Commission staff research paper reinforced the need to take account of the idea/expression dichotomy when considering the merits of term extension:

“Given that the market life of most copyright material does not exceed a few years, the standard copyright term lasting for 50 years after the death of the author may seem excessive. However, it should be borne in mind that only expression is protected, not concepts and ideas.”⁶⁸

It needs to also be recognised that because almost all collecting societies offer blanket licences, and because the price of individual works is only loosely related to the price of a blanket licence, it is unlikely that term extension will increase costs for blanket licence users.

Furthermore, Dam summarises why copyright protection cannot be said to create a monopoly:

“First, simple observation tells us that even patents (which create a legal right to exclude even in the case of independent creation) generate few monopolies in the market sense; large R&D-oriented firms generate hundreds of patents a year, and yet few such firms have monopolies in any economic market. If this is true of patents, it seems even clearer in the case of copyrights where no power to exclude is granted, where only the power to preclude copying is granted, and where independent creation by competitors is a complete defence.

Second, copyright protection does not permit the innovator to restrict production, the hallmark of monopoly. At most, the innovator will capture economic rent at the same level of output as existed in the market before the innovation, and, in the case of major innovations leading to sharply reduced costs, output may actually expand. In short, output will be the same or higher with the copyrighted innovation than without the innovation. To be sure, if we assume, as most of the literature assumes at least implicitly, that the innovation would have been made without the intellectual property right (or would have been made by someone else very soon), then it may make more sense to talk about monopoly and restriction of production.”⁶⁹

While the individual copyright owner has some control over the particular copyright work (although independent creation is nevertheless permitted), the power provided by the copyright protection can only be assessed in light of the market in which the copyright work competes. For example, it is naïve to suggest that ownership in the copyright of a movie provides a monopoly when that individual movie competes in the marketplace with the thousands of movies created each year (both in the past and in the future).

⁶⁷ Thus, there is nothing in copyright law that stops a later party borrowing an idea from an existing copyrighted work. This is often overlooked when people argue that term extension will reduce opportunities for such borrowing — see Chris Springman, *The Mouse That Ate the Public Domain: Disney, the Copyright Term Extension Act, and Eldred v. Ashcroft* (2002 [cited 30 March 2003]); available from http://writnews.findlaw.com/commentary/20020305_springman.html.

⁶⁸ John Revesz, *Trade-Related Aspects of Intellectual Property Rights, Staff Research Paper* (Canberra: AGPS, 1999) 36.

⁶⁹ Kenneth W Dam, "Some Economic Considerations in the Intellectual Property Protection of Software," *Journal of Legal Studies* 24 (1995): 336.

Chapter Four

The Benefits of Extension

This chapter identifies a number of claimed benefits associated with term extension, and assesses their validity.

4.1 Increased Incentive

At its simplest, proponents of a longer copyright term argue that the additional potential revenue stream will act as an incentive and encourage the production of additional creative works.

While there is a tendency to think of incentives in a very personal way (eg, a struggling author deciding to continue writing or take an ‘ordinary’ job), it is important to understand how increased incentives affect corporate copyright owners. Due to the nature of large-scale copyright industries (eg, movie, music and book production), a copyright producer cannot be sure of the success of a new title, and most titles in fact do not cover costs. This point has been made consistently by stakeholders:

- the Australian Film Commission notes that it is accepted that, “the production sector remains highly volatile and generally unprofitable”.⁷⁰ Indeed, it is estimated that between 67 and 75 percent of Australian films do not make a profit;⁷¹
- the Motion Picture Association of America notes that, “Contrary to popular belief that moviemaking is always profitable, in actuality, only one in ten films ever retrieves its investment from domestic exhibition. In fact, four out of ten movies **never** recoup the original investment.”⁷²
- the Record Industry Association of American notes that: “Eighty-five percent of recordings released don’t even generate enough revenue to cover their costs. Record companies depend heavily on the profitable fifteen percent of recordings to subsidize the less profitable types of music, to cover the costs of developing new artists, and to keep their businesses operational.”⁷³

In contrast to this widespread pattern of un-profitability, when a title is successful it can be quite profitable, and these profits subsidise losses from unsuccessful titles. Since a producer cannot know beforehand which new titles will be the successful ones, publishing has some aspects of a lottery (ie, in order to make money on the successful titles, the publisher has to take a chance on many different titles, most of which will be failures). Copyright, and the increased copyright term, affects this situation by increasing the

⁷⁰ Australian Film Commission and Australian Film Finance Corporation Limited, *Report on the Film and Television Production Industry: Prepared in Response to a Request by the Minister for the Arts and the Centenary of Federation, the Hon. Peter McGauran MP* (Sydney: 1999) 14.

⁷¹ Simon Molloy and Barry Burgan, *The Economics of Film and Television in Australia* (Sydney: Australian Film Commission, 1993) 107.

⁷² Motion Picture Association of America, *Anti-Piracy* ([cited 3 April 2003]); available from <http://www.mpa.org/anti-piracy/>. Emphasis in original.

⁷³ Record Industry Association of America, *Anti-Piracy: Effects* ([cited 3 April 2003]); available from <http://www.riaa.org/Protect-Campaign-3.cfm>.

profitability of the successful titles (ie, in terms of the lottery, copyright protection increases the ‘prize’ without affecting the risks involved). All else being equal, we expect that with equal risks, a larger prize will induce a player to buy more ‘tickets’; more titles will be published under an extended copyright system.

While this is a simple view of the benefits of term, the credibility of this claim is mired in some complexity.

The traditional economic argument against copyright extension is that the additional incentive created by a term extension is miniscule when the value of that extension is brought into present dollars. The IPCRC provided a typical example of this critique:

“The Committee notes that the Net Present Value of any change in the income that rights owners—currently deciding on the scale of their output—could expect to obtain as a result of the extension of term would be trivial. This is because it would be discounted at the relatively high private rate of time preference. It is highly questionable whether there would be a material supply response. However, as protection would be extended on the existing stock, the near-term infra-marginal transfers associated with extension would be significant. A substantial share of these transfers would flow overseas, and take the form of an effective deterioration in Australia’s terms of trade.¹⁴⁵ ...

¹⁴⁵ Additionally, while the supply response will depend on the NPV of the change in the income stream, discounted at the private rate of time preference, the net costs to society should be discounted at the lower, social rate of time preference.”⁷⁴

Similarly, in the *Eldred* decision Breyer J (dissent) argued that:

“any ... monetary incentive is diminished dramatically by the fact that the relevant royalties will not arrive until 75 years or more into the future, when, not the author, but distant heirs, or shareholders in a successor corporation, will receive them.

Using assumptions about the time value of money provided us by a group of economists (including five Nobel prize winners), Brief for George A. Akerlof et al. as *Amici Curiae* 5-7, it seems fair to say that, for example, a 1% likelihood of earning \$100 annually for 20 years, starting 75 years into the future, is worth less than seven cents today.”⁷⁵

It is difficult to accurately measure the value of any actual increased incentive effect. The only econometric analysis of the impact of incentives of copyright extension in the US suggest that the extension has not stimulated the production of additional works.⁷⁶ This analysis cannot, however, be treated as reliable because it:

- relies upon such a small sample (11 years), with only two after the extension; and
- ignores the significant lead time that movies require before production, and hence is likely to understate the incentives in the initial years after extension.

⁷⁴ Intellectual Property and Competition Review Committee, *Review of Intellectual Property Legislation under Competition Principles Agreement: Final Report* (Canberra: 2000) 83. See also George A Akerlof et al., “The Copyright Term Extension Act of 1998: An Economic Analysis,” (Washington DC: AEI-Brookings Joint Center for Regulatory Studies, 2002).

⁷⁵ *Eldred at Al v. Ashcroft* US SC 15 January 2003 at 13-14.

⁷⁶ Kai-Lung Hui and I P L Png, “On the Supply of Creative Work: Evidence from the Movies,” *American Economic Review* 92, no. 2 (2002).

The validity of this orthodox economic critique of the benefit of term extension is discussed from a number of perspectives in the following sections.

4.1.1 *The Landes and Posner Model*

Possibly the most accepted economic model for analysing the costs and benefits of copyright law is the Landes and Posner model.⁷⁷ Two inter-related implications of this model are that:

- if over time, growth in income and technological advances enlarge the size of the market for any given work, and the cost of copying declines, copyright protection should expand; and
- the optimal degree of copyright protection will be greater the smaller the difference in cost between that faced by the original author to produce extra units of the work and for a copier to produce units of the work.

As a result, Landes and Posner note that:

“The current length of a copyright is the author’s lifetime plus fifty years. This reflects a long trend toward lengthening the term of copyright ... This trend is consistent with the fact that the cost of copying has fallen over this period”.⁷⁸

As we are all now too aware, the advent of digitation has meant that the costs of reproduction (as well as distribution) are now significantly lower for many types of products (eg, books, software, movies, games, etc) than was the case ten (and even five) years ago. Indeed, the line between reproduction and use is even blurring:

“It used to be relatively *hard* to violate an intellectual property right. The technologies of reproduction or the activities necessary to infringe were largely, though not entirely, industrial. The person with the printing press who chooses to reproduce a book is a lot different from the person who lends the book to a friend or takes a chapter into class. The photocopier makes that distinction fuzzy, and the networked computer erases it altogether. In a networked society, copying is not only easy, it is a *sine qua non* of transmission, storage, caching, and, some would claim, even reading.”⁷⁹

This reduction in costs is likely to only increase, and with it, infringement will increase: “Infringement of copyright is likely to increase in the future. A large proportion of infringement is likely to occur through the Internet.”⁸⁰

As ongoing evidence of the problem, even one of Australia’s publicly funded radio broadcast networks has been caught out downloading and then broadcasting counterfeit music:

“ABC youth radio network Triple J has promised not to play any more pirated material from the upcoming Radiohead album after it became the first radio station in the world this week to download and air the unreleased song.”⁸¹

⁷⁷ William M Landes and Richard A Posner, “An Economic Analysis of Copyright Law,” *Journal of Legal Studies* 18 (1989).

⁷⁸ *Ibid.*: 363.

⁷⁹ James Boyle, “The Second Enclosure Movement and the Construction of the Public Domain,” *Law and Contemporary Problems* 66, no. Winter/Spring (2003): 40. Emphasis in original.

⁸⁰ House of Representatives Standing Committee on Legal and Constitutional Affairs, *Cracking Down on Copycats: Enforcement of Copyright in Australia* (Canberra: Commonwealth of Australia, 2000) 17.

⁸¹ Bernard Zuei, “EMI Says It’s Not OK, Computer,” *The Sydney Morning Herald*, 3 April 2003.

Given these market characteristics, application of the Landes/Posner model means that it is quite reasonable to suggest that copyright protection (ie, the copyright term duration) should increase.

4.1.2 A Behavioural Economics View

The traditional economic analysis is built upon the assumption that people always act ‘rationally’ and are self-interested. This is a useful starting point, but analysis should be willing to accept that these conditions are not always a reflection of the manner in which people actually make decisions (ie, whether or not to create extra work in light of the extra copyright protection):

“Economics traditionally conceptualizes a world populated by calculating, unemotional maximizers that have been dubbed Homo Economicus. In a sense, neo-classical economics has defined itself explicitly “anti-behavioral”. ... This unbehavioral economic agent has been defended on numerous grounds: some claim that the model was “right”; most others simply argued that the standard model was easier to formalize and practically more relevant. Behavioral economics blossomed with the realization that neither point of view was correct.”⁸²

That economists spend so much time explaining why a future benefit should be discounted to current dollars may suggest that the decision-making approach of the general population (and in particular, potential creators of copyrighted works) is different to that of economists.

Behavioural economics suggests a number of inter-related reasons why the pure critique of the incentive theory advanced by economists may be limited — the existence that copyright extends for such a long period may:

- reduce the *perception* of risk associated with creation of copyright works; and
- provide greater confidence to creators when undertaking their endeavours.⁸³

These reasons may reflect the fact, noted at the beginning of section 4.1, that investment in creative activity has many of the elements of a lottery. It is well-established that the motivation for buying lottery tickets is much less calculation of the chances of winning, than simply the magnitude of the top prize. People invariably look optimistically at their chances of winning, and extension may add to this impression and stimulate additional creative activity.

Together, these factors suggest that a longer term may somewhat increase the production of copyrighted works. This view is reinforced when one takes account of the bequest motive:

“The bequest motive is a modification of the life-cycle hypothesis that gives one explanation for why persons die with positive savings (Kotlikoff and Spivak, 1981; Kotlikoff 1988; Kotlikoff and Summers 1988). The two major theories of the bequest motive are exchange and altruism. Bernheim, Schleifer, and Summers (1985) proposed a model of strategic bequests that held that

⁸² Sendhil Mullainathan and Richard H Thaler, "Behavioral Economics" (Working Paper 7948, National Bureau of Economic Research, 2000) 3.

⁸³ See the discussion in W Fred van Raaij, "Information Processing and Decision Making Cognitive Aspects of Economic Behaviour," in *Handbook of Economic Psychology*, ed. W F van Raaij, G M van Veldhoven, and K E Wärmeryd (Dordrecht: Kluwer Academic Publishers, 1988), 77-80.

parents use bequeathable wealth to influence the behavior of their children. ... The types of exchange behavior envisioned included children visiting their parents and providing caregiving services. The Bernheim, Shleifer, and Summers model extended previous work by Becker (1974; 1981) primarily by positing that strategic behavior by parents was intentional and did not occur by happenstance. In contrast to exchange, altruism holds that parents care primarily about their children's utility and typically try to equalize their children's marginal utility of consumption by giving a larger bequest to the poorer children (see, for example, Wilhelm 1996; Altonji, Hayashi, and Kotlikoff 1992; Laitner and Ohlsson 2001)."⁸⁴

This concept has been understood in the context of copyright analysis:

"And we know that bequest motives play a role in people's decisions to work, save, and so on, and those motives depend on the altruistic feelings that people have, primarily for members of their family, including descendants."⁸⁵

There is empirical evidence that bequests may be important to people as a way of influencing the behaviour of potential heirs.⁸⁶ Indeed, a number of artists' own comments appear to support the concept. For example, before a hearing of the Senate Commission on the Judiciary, the songwriter Carlos Santana stated that:

"When I began my career as a songwriter, I believed that I was building a business that would not only bring enjoyment to people throughout the world, but would also give my children a secure base from which they could, in turn, build their own lives."⁸⁷

It is even reasonable to consider that there may be a 'corporate bequest motive' that applies to the creation of corporately owned intellectual property such as movies, where the work's copyright generally extends up to 95 years from publication (ie, people may wish to ensure that the legacy which is their work benefits the company many years after they have stopped working).

4.2 Harmonisation

4.2.1 The Copyright Owner's Perspective

From the copyright owner's perspective, harmonisation of Australia's copyright term with that of major trading partners allows a reduction in costs associated with management of their intellectual property portfolio as rights will expire at the same time in major markets. It is reasonable to assume that some of these cost savings will be passed on to consumers.

Furthermore, the *Berne Convention's* 'Rule of the Shorter Term' generally⁸⁸ denies Australian copyright owners the benefit of extended terms of

⁸⁴ Edward C. Norton and Donald H. Taylor, "Equal Division of Estates and the Exchange Motive" (Working Paper No. 3, Triangle Health Economics Working Paper Series, 2002) 1.

⁸⁵ William M Landes and Richard A Posner, "An Economic Analysis of Copyright Law," *Journal of Legal Studies* 18 (1989): 363.

⁸⁶ B D Bernheim, A Shleifer, and L Summers, "The Strategic Bequest Motive," *Journal of Political Economy* 93, no. 6 (1985). For more detail on the make-up of this motive see B D Bernheim, "How Strong Are Bequest Motives? Evidence Based Estimates of the Demand for Life Insurance and Annuities," *Journal of Political Economy* 99, no. 5 (1991); B D Bernheim and L Levin, "Social Security and Personal Saving: An Analysis of Expectations," *American Economic Review* 79, no. 2 (1989).

⁸⁷ *The Copyright Term Extension Act of 1995: Hearing on S. 483 Before the Senate Comm. on the Judiciary*, 104th Cong. 20, 23 (1995), at 57 (statement of Carlos Santana).

⁸⁸ As an exception, the US extension applied to works of all nationalities, without regard to the rule of the shorter term.

protection in foreign territories (see Tables 1.1 and 1.2) due to the shorter period of protection provided under Australian law, so that they ‘lose out’ in foreign territories if terms aren’t harmonised with Australia.

4.2.2 *The Copyright User’s Perspective*

Harmonisation across jurisdictions will reduce tracing costs (see section 3.2) for those people and organisations who want to use copyright works in subsequent works.

4.2.3 *The National Perspective*

While seeking to define copyright law by balancing the costs and benefits of alternative policy approaches has been the traditional analytical framework for thinking about particular copyright issues, in practice it has provided little guidance when seeking to frame the actual legal boundaries of the copyright system because such a domestically focused approach fails to adequately take into account the international forces at play.⁸⁹

The major issue is that Australia, like all other countries, needs an intellectual property regime that is competitive (ie, provides sufficient incentives to attract ‘footloose’ investment capital, and attracts the right type of investment arrangements).

Failure to have an adequate intellectual property regime was considered by Smarzynska when looking at the impact of intellectual property protection on transition countries:

“weak protection deters foreign investors in technology intensive sectors that rely heavily on intellectual property rights. Moreover, the results indicate that a weak intellectual property regime encourages investors to undertake projects focusing on distribution rather than local production. The latter effect is present in all sectors, not just those relying heavily on intellectual property protection.”⁹⁰

Of course, Australia is neither a transition country or a country with ‘weak’ intellectual property laws. Even so, it needs to be recognised that we compete in a world with increasingly mobile capital and that the strength of a country’s intellectual property laws is a key determinant in attracting foreign investment across many sectors of the economy.⁹¹ Indeed, Richardson *et al* note that:

“there are labour market implications for copyright industries which, being highly mobile industries, can easily move aspects of their operations offshore if better facilities are provided elsewhere. An internationally competitive system of copyright protection is now an important part of the infrastructure which Australia offers to copyright industries considering establishing or remaining here”.⁹²

⁸⁹ See Suzanne Scotchmer, “The Political Economy of Intellectual Property Treaties,” in *Working Paper No. CPC01-24*, ed. Competition Policy Center (University of California, Berkeley, 2001).

⁹⁰ Beata K Smarzynska, *Composition of Foreign Direct Investment and Protection of Intellectual Property Rights: Evidence from Transition Economies* (World Bank, 2002) i.

⁹¹ It is important to note, however, that on its own, intellectual property will not attract foreign capital; it must be part of a suite of policy responses — Keith E Maskus, “Intellectual Property Rights and Foreign Direct Investment” (Centre for International Economic Studies, Policy Discussion Paper No. 0022, 2000).

⁹² Megan Richardson *et al.*, *The Benefits and Costs of Copyright: An Economic Perspective* (Sydney: Centre for Copyright Studies, 2000) 11-12.

Similarly, the Department of Foreign Affairs and Trade has noted that, “It is generally accepted that maintenance of such a regime has served to attract state-of-the-art technology and overseas copyright works,”⁹³ to Australia.

A problem for policy-makers is that the need to provide a competitive investment environment means that there is reduced scope for any individual country to think of intellectual property in a country-specific sense:

“A small country will not be able to set a “socially optimal innovation rate” as a matter of public policy, any more than it can set traditional macro-economic variables such as interest rates. If Canada’s economy is to be competitive in general, its innovation rate must be competitive with that of other countries.”⁹⁴

Richardson *et al* reinforce this point: “It is simply not practically possible, if it ever was, to consider copyright law reform as an Australian issue divorced from considerations of what is happening in the rest of the world.”⁹⁵

The issue that Australia now faces is that the US, the EU, Singapore⁹⁶ and a number of other major countries (see Tables 1.1 and 1.2) all have copyright protection of a duration greater than Australia (ie, life plus 70 years protection for the majority of works). Given the acknowledged importance of having a copyright regime that is perceived to be competitive with these countries, there will undoubtedly be benefits in expanding Australia’s copyright term to match these major competitors for footloose investment.

4.3 Copyright Management

Consumers benefit from the management of creative works by copyright owners and their agents, which term extension would facilitate further still.

Many of the investments by publishers and distributors are more likely for works under copyright protection than for works in the public domain. These investments include:

- storage — copyright owners and their agents may manage the storage of some works more effectively than the public domain. That is, although consumers may have free access to copy a work in the public domain, consumers may find it more difficult to locate a version of some works, such as music, to copy;
- restoration and preservation — the cost of restoration and preservation can be very expensive for older works. For example, the US National Film Preservation Board estimates the *average* cost of restoring and preserving a colour feature film at between US\$50,000 to US\$ 300,000.⁹⁷ (The advantage of copyright term extension is that it enables copyright owners to defray the costs of restoration and preservation over the longer economic life of the work.) Indeed, without longer term

⁹³ Department of Foreign Affairs and Trade, *Intellectual Property Rights: A Guide to the GATT Uruguay Round* (Canberra: 1990).

⁹⁴ Randall Morck and Bernard Yeung, *The Corporate Response — Innovation in the Information Age (Canada in the 21st Century. III. Responding to the Challenges)* (Paper Number 10: Industry Canada, 1998) 38.

⁹⁵ Megan Richardson et al., *The Benefits and Costs of Copyright: An Economic Perspective* (Sydney: Centre for Copyright Studies, 2000) 12.

⁹⁶ Singapore has agreed to extend its term of copyright protection but has not yet done so.

⁹⁷ Doug Nye, “Old Films, Fading Fast,” *The State*, 8 July 2000, E3.

extension some investment in restoration and preservation may become uneconomic; and

- publicity and distribution — copyright owners and their agents may also provide better publicity and distribution for their works than for works in the public domain. Consumers may choose among countless creative works to enjoy. The selection among these works is aided by information and easy availability, of works under copyright protection.

The impact of these three factors is amply demonstrated by the history of Frank Capra's *It's a Wonderful Life* (1946):

“For a period, it was believed that “It’s A Wonderful Life” was in the public domain. During that period, no one invested in restoring and preserving it, and consequently the copies shown on television and released on videocassette were “horrid.” *Two Days of Christmas Classics*, Toronto Star, Dec. 24 2000, at E1. Only when the holder of the copyright in the musical score and the underlying story used those rights to regain control over distribution of the movie did the film get the preservation attention it required. At that time, the copyright holder invested the money needed to restore the film’s picture quality and to return it to its full length. the restored version, showing the “sharp, crisp production made by Capra in 1946,” Larry Bonko, “*Wonderful Life*” *Has become a TV Treasure*, Virginia-Pilot (Norfolk, VA), Dec. 24, 1999, at E2, is widely available on videocassette.”⁹⁸

That is not to say that there are not some examples where works in the public domain have been managed in an effective manner, although such examples are the exceptions that prove the rule. Indeed, many of the examples provided by critics where owners have demonstrated poor copyright husbandry tend to be dated and originate from a time when the value of back-catalogues were not fully appreciated.

4.4 Reduced Rent-Seeking Costs

Rent-seeking costs may include the resources expended by individuals and groups to lobby government for favourable regulation and specification of the property system.⁹⁹ It is clear that significant resources have been expended by copyright owners globally in an effort to encourage legislators to extend existing copyright terms. Failure to extend the copyright term in Australia now will likely result in increased costs until it is extended to overseas levels. Thus, term extension would likely reduce future rent-seeking costs.

⁹⁸ Motion Picture Association of America, “Brief for Amicus Curiae: Motion Picture Association of America in Support of Respondent,” in *Eric Eldred v. John D Ashcroft* (2001), 18-19.

⁹⁹ See Robert D Tollison, “Rent-Seeking: A Survey,” *Kyklos* 34 (1982).

Chapter Five

The Overall Impact of Term Extension

Drawing upon the analysis in the previous two chapters, this chapter outlines the likely net impact of copyright term extension.

Term extension is a subject that tends to evoke great passion from both its advocates and detractors.

The real problem for policy-makers is that the debate about the costs and benefits of term extension is devoid of any reliable quantitative support. This problem is acknowledged by many commentators and stakeholders. For example, referring to US copyright law (ie, its constitutional basis), the OECD notes that:

“one of the basic problems of intellectual property is to define a scope and term for this protection that offers a reasonable balance between the benefits of new products and works deriving from the incentive and the benefits of marginal cost pricing deriving from the freedom to copy.

... there is little rational basis for arguing that the current patent or copyright terms are too long or too short and it would be very difficult to devise a helpful empirical study examining the value of longer or shorter terms in different sectors”.¹⁰⁰

Similarly, Hamilton notes that:

“There is an embarrassing lack of empirical research on the issue of the mechanism by which copyright law furthers the end of the public welfare designated in the Constitution. There is much talk in the literature and the cases of the "incentive" nature of copyright law. But there is no factual study that shows how much incentive is enough to further creative activity, or what kinds of incentives work: money, control, or time. The fact is that we do not really know what difference twenty extra years would make.”¹⁰¹

Indeed, in a World Bank study on the merits of increasing copyright protection the observation is provided that, “current economic theory offers only equivocal results on the implications of copyright protection”.¹⁰²

Watt suggests that this is understandable given that:

¹⁰⁰ Organisation for Economic Co-operation and Development, *Competition Policy and Intellectual Property Rights* (Paris: OECD, 1998) 297.

¹⁰¹ Marci A Hamilton, *Copyright Duration Extension and the Dark Hart of Copyright* (14) (Cardozo Arts & Entertainment Law Journal, 1996 [cited 28 March 2003]); available from <http://www.law.asu.edu/HomePages/Karjala/OpposingCopyrightExtension/commentary/hamilton-art.html>. Similarly, Posner notes that, “Unfortunately, the empirical problems are acute—and little progress has been made as yet toward their solution. We urgently need more empirical evidence. The task is daunting, for it requires that we be able to estimate both the social gains from additional intellectual property of different types and the social costs of trying to induce the creation of the additional intellectual property by means of adjustments in the regime of intellectual property rights.” — Richard A Posner, “The Law & Economics of Intellectual Property,” *Daedalus*, no. Spring (2002): 12.

¹⁰² Carlos Alberto Primo Braga, “Guidance from Economic Theory,” in *Strengthening Protection of Intellectual Property in Developing Countries: A Survey of the Literature*, ed. Wolfgang E Siebeck, *World Bank Discussion Paper 112* (Washington DC: World Bank, 1990), 26.

“in the end, all arguments both for and against regulatory interventions in the form of copyright law must rely on some measure of social welfare, which is impossible to measure empirically”.¹⁰³

While no definitive quantitative assessment is possible (and hence there is a reliance on arguments constructed around simple economic principles and models), the analysis presented in the previous chapters suggests that there is no common understanding of the merits of term extension given that the advocates of term extension understate the costs, but correspondingly, the opponents of term extension underplay the benefits. This polarisation tends to leave potential policy-makers in a quandary.

Some observations to be drawn from the previous chapters are:

- any single copyright term applied across a range of copyright industries will be excessive for some, and inadequate for others. This is because copyright law has unfortunately moved away from the technology-specific focus that it initially (and until recently) had, which allowed copyright law to be more appropriately tailored to the circumstances of individual copyrights.¹⁰⁴ Thus, when commentators give examples of possible over-compensation for particular works, this is to be expected, and needs to be balanced against the under-compensation provided to others;
- the costs associated with copyright extension are so nebulous that their scale tends to be given less attention by critics. Thus, there is an apparent tendency to identify potential costs and suggest that by definition they must be hugely significant. In fact, many of the costs identified by critics of term extension are lessened by limitations and constraints built into copyright law (eg, the idea/expression dichotomy) or are being addressed through technological developments (eg, reduced tracing costs); and
- text-book finance examples of the net present value of additional incentives fail to incorporate important developments in behavioural economics. The result is that the benefits of term extension as systematically understated.

So where does this leave Australian policy-makers when thinking about the merits or otherwise of copyright term extension? While the costs and benefits are probably finely balanced, two key factors suggest that on the balance of probabilities Australia should move to extend the term of copyright protection to bring it into line with Australia’s major trading partners:

- technological development continues apace and is significantly undermining the existing incentives provided by copyright law in major copyright industries (ie, movies, music and books). There is strong theoretical support for the view that in such an environment copyright protection should be strengthened, and hence that term extension will support the maintenance of the required incentives; and
- the benefits of harmonisation with our major copyright trading partners (eg, the US and EU) are likely to be significant over the longer term. Already, 24 of Australia’s 50 largest trading partners have provided extended terms of protection (and 54 countries in total have extended

¹⁰³ Richard Watt, *Copyright and Economic Theory: Fiends or Foes?* (Cheltenham: Edward Elgar, 2000) 123.

¹⁰⁴ See Jeremy Thorpe and Stephen Rimmer, "An Economic Approach to Copyright Reform," *Australian Intellectual Property Law Bulletin* 8, no. 10 (1995).

copyright protection), and this is set to increase. Australian businesses have always expressed concerns about the practical costs of Australian policy-makers adopting regulatory approaches different to our major trading partners, and this should be given significant weight in any consideration of copyright term extension. Alternative options fail to provide the level of harmonisation that the proposed term extension does (see Appendix A).

Overall, the net financial impact of term extension in Australia is likely to be neutral; there are costs, and there are benefits, but to say that one is appreciably large than the other lacks credibility. The global trend to harmonisation around a longer copyright term suggests that there will be harmonisation benefits (ie, costs foregone) in similarly adopting a longer copyright term comparable with Australia's major copyright trading partners.

C

Part C

Appendices

Appendix A

Other Forms of Term Extension

Term extension is usually thought of just in terms of the form it has taken in the EU and the US. This appendix briefly considers whether there are forms of term extension which are compatible with international law and provide a stronger net benefit.

A1 ‘Opt In’ Copyright Extension

Another approach to term extension has been suggested by Landes and Posner.¹⁰⁵ They suggest a shorter initial copyright term and then the option of indefinite renewal upon payment of a fee.

The basis for this approach is that analysis of copyright registration and renewals for pre-1976 copyrights in the US shows that copyright registration and renewals are highly responsive to economic incentives; the shorter the expected life of a copyright and the higher the registration and renewal fees, the less likely are both registration and renewal.

As a result, Landes and Posner suggest that a relatively short initial copyright term and a right of indefinite renewal would:

- cause a large number of copyrighted works to be returned to the public domain quite soon after they were created. Of course, those would tend to be works of low average commercial value; otherwise the owner would have renewed;
- provide a more balanced policy outcome because:
 - more works will be in the public domain, thus minimising access, transaction, and administrative costs; and
 - those few copyrights that retain their value will remain in copyright protection indefinitely, with the economic advantages, involving investments in maintenance and the avoidance of congestion externalities;
- largely eliminate rent-seeking arising because copyright protection expires at a fixed date (ie, it takes away to the need to have future debates about term extension).

This approach is appealing, but is contrary to current practices in two fundamental ways:

- it would breach our international obligations with respect to the minimum copyright term. This could be addressed, however, by setting the minimum threshold at the current copyright terms; and
- it would change our regime into a partial registration system (akin to the US system before their 1976 amendments). Besides the psychological hurdle of being ‘different’, this has a number of consequences:

¹⁰⁵ William M Landes and Richard A Posner, "Indefinitely Renewable Copyright," *University of Chicago Law School*, John M. Olin Law & Economics Working Paper No.154 (2D series) 2002.

- there will be administrative costs for the Commonwealth — these can be covered out of the registration fee on a user-pays basis;¹⁰⁶
- there will be increased tracing costs for the public, although these will be reduced to the degree that the register is publicly available and easy to understand.

Any such scheme would also need to ensure that it did not violate the *Berne Convention*'s prohibition on formalities (Article 5) as a condition for protection (even if 'protection' refers only to the extended period), which could be difficult. This is particularly important because such a violation would equal a violation of *TRIPS*.

If there is still a lingering concern about the creation of deadweight loss associated with indefinite renewals, then a solution may be to have a defined number of possible copyright extensions (say two or three for ten years each, or annually for 20 years). This approach, of course, runs the risk of encouraging some rent seeking, although probably less than under the current arrangements.

Another issue that needs to be considered when assessing the merits of this approach is whether it provides functional harmonisation with the EU and US approaches, or whether it is too dissimilar to capture the benefits of harmonisation. Only industry consultation will be able to address this issue.

A2 Targeted Extension

Critics of term extension tend to point to the costs associated with a number of intellectual property areas (eg, computer software) which tend to have short income-earning lives.

One approach to address this would be to tailor the term extension so that either:

- it applies only to specific forms of copyrighted products; or
- it does not apply to specific forms of copyrighted products.

This approach would allow the copyright term to be tailored to address the particular market failures for specific types of works.

There are at least two major problems with such an approach:

- it runs counter to the thrust of recent copyright reform — one of the themes underlying recent copyright forms in Australia has been technological neutrality.¹⁰⁷ While this approach has been criticised by some economists,¹⁰⁸ technological neutrality is clearly an established reform principle and it is difficult to see a major reform programme that moves away from it;

¹⁰⁶ For principles to guide the setting of the fee see: Productivity Commission, *Cost Recovery by Government Agencies, Report No. 15* (Canberra: AusInfo, 2002).

¹⁰⁷ See *Digital Agenda Act*.

¹⁰⁸ See, for example: Office of Regulation Review, *An Economic Analysis of Copyright Reform, Submission to Copyright Law Review Committee's Review of the Copyright Act 1968 (Cth)* (Canberra: 1995); Jeremy Thorpe and Stephen Rimmer, "An Economic Approach to Copyright Reform," *Australian Intellectual Property Law Bulletin* 8, no. 10 (1995).

- it is likely to encourage significant resources to be put into rent seeking, both by proponents who want to have extension, and also by those who would argue against extension for particular products.

A3 Conclusion

Each of these alternative approaches have limitations in an Australian legal and policy context. As a result, the preferred approach remains copyright term extension to bring Australia's copyright term into line with the US and the EU.

Appendix B

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