

2012

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Recommended Citation

Jane C. Ginsburg, *Duration of Copyright in Audiovisual Works under US Copyright Law*, 2012-2 IRIS PLUS 31 (2012).

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Duration of Copyright in Audiovisual Works under US Copyright Law

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Calculating the duration of US copyright in audiovisual works can be a daunting task, complicated by issues of transitional law spanning the US Copyright Acts of 1909 and 1976 and the latter's subsequent amendments. Readers with an inclination for complexity will find their tastes amply satisfied when inquiry turns to the questions of private international law that also come into play when foreign audiovisual works are at issue. Gluttons for punishment will further relish addressing the relationship of the duration of copyright in an audiovisual work to the duration of copyright in the underlying literary work on which the film was based. Finally, in US copyright law, for works published before 1978, duration is closely linked to ownership because copyright in those works was divided into two terms with a reversion right to the authors at the advent of the second term.

This survey will summarize the rules pertaining to duration of copyright in an audiovisual work and then will turn to some questions regarding ownership of rights in an audiovisual work or in the underlying literary work on which the film was based. In an effort to simplify the discussion, I have drawn up a chart showing which periods of protection apply, depending on the date of publication of the film.

I. Duration: rules applicable over time and space

1. Duration of copyright in works created in or after 1978

Basic rule

The 1976 Copyright Act,¹ which has been in force since 1978, simplified the US copyright term, with respect to works created as of 1978, by installing a unitary period of protection calculated either 95 years from the date of publication, if the film was a "work made for hire," or, otherwise, 70 years from the death of the last surviving co-author.²

* Many thanks to my research assistants, Aerin Miller and Martha Rose, both Columbia Law School, class of 2012, and for editorial suggestions to Susanne Nikoltchev.

1) The complete and updated text of US copyright law, which is title 17 of the United States Codes, is available at: <http://www.copyright.gov/title17/>

2) See 17 U.S.C. sec. 302.

Private international law issues: works made for hire and joint works

Given the differences in terms of protection, it is important to ascertain whether the film at issue is a work for hire, or a joint work. Most US films are “works made for hire” because their creators either are employees, or, even if independent, will have signed an agreement characterizing their contributions to the film as “works made for hire.” The 1976 Copyright Act includes contributions to audiovisual works among the statutorily listed works subject to contractual designation as works made for hire.³

With respect to the characterization of a foreign work as a work for hire or a joint work, US courts’ prevailing approach has been to look to the work’s country of origin to ascertain whether that law initially vested rights in the employer (film producer) or in the creative contributors.⁴ Following that approach, it appears that US courts would deem films from the EU to be joint works, rather than works made for hire, although some might argue that where the EU countries of origin impose presumptions of transfer of rights to the film producer the films should be treated by US courts as the equivalent of works made for hire. Because the EU has, however, based the term of protection of audiovisual works on the lives of designated participants (whether or not their national law deems them co-authors),⁵ US courts should treat EU audiovisual works as joint works rather than works for hire, and calculate copyright term from the death of the last survivor of “the principal director, the author of the screenplay, the author of the dialogue and the composer of music specifically created for use in the cinematographic or audiovisual work.” Because both the US and the EU calculate the duration of joint works 70 years *post mortem auctoris*, the film’s copyright will have a common expiration date in the US and the EU if US courts count 70 years from the death of the last survivor of the same list of creative participants. This result should be preferred to two different terms in the US and the EU.⁶ As we will see, *infra*, it will not be possible to harmonize the terms of protection in the US and the EU with respect to works published before 1978.

2. Duration of copyright in audiovisual works published in the US before 1978

One rule is simple: if the work was published in the US before 1923, it is now in the public domain.

For the rest, the calculation of copyright term becomes more complicated for films published in the US before 1978 (but after 1922), because the transitional provisions of the 1976 Act retain the prior act’s two-term structure for the duration of copyright in works published before 1 January 1978, the 1976 Act’s effective date.⁷ Under the 1909 Act, federal copyright commenced upon publication of a work in the US with proper notice of copyright (in the absence of proper notice, the work fell into the public domain). It endured for 28 years, at the end of which the author or proprietor (in the case of a work made for hire) could renew the copyright registration of the work, for an additional 28 years of protection. (Failure to renew the registration resulted in expiration of copyright after the 28th year.) The transitional provisions of the 1976 Act added 19 years, for a total of 75 years from publication, and the 1998 Copyright Term Extension Act added yet another 20, for a total of 95 years from publication.

3) See 17 U.S.C. sec. 101.

4) See *Itar-Tass Russian News Agency v. Russian Kurier, Inc.* 153 F.3d 82 (2d Cir. 1998) (applying law of country of origin to determine whether copyright in newspaper articles by Russian journalists belonged initially to the journalists or to their employer-publisher).

5) See Art. 2(2) of the EU Directive 2006/116/EC on the term of protection of copyright and certain related rights.

6) I acknowledge that US courts could limit the holding of *Itar-Tass* to questions of copyright *ownership* and decline to extend the rule to issues of copyright *duration* or *authorship*. See *Saregama India Ltd. v. Mosley*, 635 F.3d 1284, 1292 (11th Cir. 2011) (noting that *Itar-Tass* considered only initial ownership of copyright and, while choosing to apply Indian law to a copyright assignment question because the result was the same under US and Indian copyright laws, declining to decide that the law of the country of origin governed anything more than initial copyright ownership).

7) See 17 U.S.C. sec. 304.

In 1992, Congress provided for the automatic renewal of works then in their first term of copyright. As a result, for films published in the US between 1964 and 1977, failure to renew did not terminate the copyright, and those works now will remain protected for the same duration as works whose copyright registration their authors or proprietors did renew, that is, for an additional 67 years after their initial 28-year term. Renewal registration thus is optional, but nonetheless encouraged: registration is *prima facie* evidence of valid ownership and of the other facts stated in the registration document.⁸ (Renewal term registration is desirable because it updates the information in the records of the Copyright Office, and thus facilitates title-searching for rightowners.) By contrast, if the film was first published between 1923 and 1963, and its copyright registration was not renewed, it will have fallen into the public domain in the US at the end of its first 28-year term, that is, between 1951 and 1991.

For audiovisual works whose countries of origin are within the European Union (and from other Berne Convention or World Trade Organization member states) and whose copyright registrations were not renewed, the rules are somewhat different because these works are no longer in the public domain and now endure for the full US copyright term of 95 years from publication. Amendments introduced in 2004, and effective on 1 January 2006, restored the copyrights in foreign works (including audiovisual works) still protected in their countries of origin, but which had fallen into the public domain in the US due to failure to comply with the notice and registration formalities.⁹ Thus, for example, a 1960 French film whose US copyright would have expired at the end of 1988 if its US copyright had not then been renewed, nonetheless retrieved protection in the US commencing in 2006. The US Supreme Court recently upheld the constitutionality of the statute restoring US copyright protection to qualifying foreign works.¹⁰ The 2004 legislation did not restore US copyright in domestic works, however; US films published without notice or whose copyrights were not renewed therefore remain in the public domain in the US.

3. Audiovisual works not yet published in the US on 1 January 1978

Under the prior Copyright Act, unpublished works were protected under state common law, not federal law. Common law copyright endured indefinitely, until publication. The 1976 Act substituted federal for state protection for any work created but not yet published in the US as of that act's effective date.¹¹ The term of copyright therefore will, for works made for hire, be the shorter of 95 years from publication (when that occurs) or 120 years from creation. (When the 1976 Act was enacted, these periods were the shorter of 100 years from creation or 75 from publication; the 1998 Copyright Term Extension Act added 20 years to the term.) For joint works, the term will be 70 years (originally 50) from the death of the last surviving co-author. In order to avoid the possible consequence that substitution of federal copyright terms for perpetual common law copyright would cast some works immediately into the public domain upon the effective date of the 1976 Act, Congress provided that in no event would the copyright expire before the end of 2002, and if the work was published by that date, its copyright would endure through 2027 (subsequently extended in 1998 to 2047).

While this provision primarily addresses literary and artistic works that may have languished for centuries in desk drawers and in trunks in attics, some narrow class of audiovisual works may be affected. Because the first film was created in 1895, no unpublished work for hire film would have been at risk of going into the public domain in 1978 on the basis of counting 100 years from its date of creation. By contrast, for films classified as joint works, it is possible that in 1978, all of the relevant creative contributors could have been dead for more than 50 years, in which case the films' copyrights would have endured through 2002, and if the films were published in the US by that date, the copyrights will survive through 2047.

8) See §304(a)(4)(B).

9) See 17 U.S.C. sec. 104A (codifying sec. 514 of the Uruguay Round Amendments Act).

10) See *Golan v. Holder*, 132 S.Ct. 873 (2012).

11) See 17 U.S.C. sec. 303.

II. Films based on pre-existing works: duration and ownership problems

In US copyright law issues of ownership can complicate both the practical calculus of duration when one work is based on a differently owned prior work, and, for works published before 1978, the exercise of rights during the renewal term.

1. Relationship of terms of protection of underlying and derivative works

Audiovisual works are often based on a pre-existing literary or dramatic work. Under section 103(b) of the 1976 Copyright Act, the copyright in a “derivative work” such as a film based on a prior novel, does not affect the subsistence or duration of the copyright in the underlying work. As a practical matter, this means that if the film’s copyright expires before the copyright in the underlying work, the film is in the public domain, but it cannot be exploited because the underlying copyright is still valid, and unauthorized exploitation of the film will violate the copyright in the pre-existing work.

This scenario most often transpired when the rightholder renewed the pre-1976 Act copyright in an underlying work, such as a novel or a play, but the copyright holder of the derivative work motion picture failed to renew the copyright in the derivative work. As a result, the motion picture would have fallen into the public domain, but the holder of the copyright in the underlying literary work could nonetheless bar third parties’ exploitation of the film because “a derivative copyright protects only the new material contained in the derivative work, not the matter derived from the underlying work.”¹² Thus, expiration of the derivative work’s copyright could not diminish the force of the copyright in the underlying work;¹³ accordingly, the exhibition or transmission of the motion picture violated the public performance rights in the underlying literary work, and the film would not be freely exploitable until the copyright in the underlying work expired as well.

The single term of copyright for 1976 Act works does not entirely eliminate the possibility that the copyright in an underlying work could survive the expiration of copyright in a derivative work, thus effectively blocking third-party exploitation of the derivative work despite its public domain status. Because duration now is calculated based on the death of the author, such will be the case if the author of the derivative work predeceases the author of the underlying work. This result will also obtain if the derivative work is “for hire,” as many US audiovisual works are, and if the author of the underlying work is still alive more than 25 years after the publication of the film. (The work for hire film’s copyright will endure for 95 years from publication; the copyright in the novel or play will endure 70 years from the death of its author.)

2. Reversion of rights in underlying works

From their inception in 1790, the US copyright laws have provided authors the opportunity to reclaim their rights from their grantees and to regrant those rights, presumably under terms more favorable to the author. From 1790 until the effective date of the 1976 Act, the advent of the second term of copyright (upon compliance with the renewal of copyright registration) triggered the author’s reversion right. Although the Supreme Court held that authors could validly assign their renewal term rights to the first term grantee (thus effectively eviscerating the reversion

12) See, e.g., *Russell v. Price*, 612 F.2d 1123, 1128 (9th Cir. 1979) (unauthorized televising of motion picture *Pygmalion*, whose copyright had not been renewed, violated rights in George Bernard Shaw’s eponymous play, which was still in its second term of US copyright).

13) *Accord, Stewart v. Abend*, 495 U.S. 207, 222-224, 230 (1990) (“Absent an explicit statement of congressional intent that the rights in the renewal term of an owner of a pre-existing work are extinguished upon incorporation of his work into [a derivative] work, it is not our role to alter the delicate balance Congress has labored to achieve.”).

right), the author's assignment did not bind her heirs, who took the renewal term free of prior assignments if the author did not survive past the first 28-year term.¹⁴

When authors (or heirs) of literary or dramatic works on which subsequent motion pictures were based did come into their renewal term rights, questions arose as to the scope of the author's reversion. A strict application of the principles of the renewal term would suggest that once the renewal copyright in the underlying novel "springs back" to the author or to the author's statutory successor, it does so free and clear of any licenses given during the initial term. Thus the continued exhibition or distribution of the film – which contains copyrightable elements from the novel – would constitute an infringement of copyright in the novel. The Supreme Court endorsed this approach in 1990 in a controversy involving the continued exhibition and distribution of the well-known Hitchcock film *Rear Window*,¹⁵ holding that not only would the novelist during the renewal term be able undeniably to license some other motion picture producer to base a new film on the novel, but he would also be entitled to renegotiate with the copyright owner of the first film for the right to continue its exploitation. This would, of course, deprive the producer or copyright owner of the first film of the fruits of its own copyrightable contributions, which may as a practical matter account far more for the film's success than do its borrowed elements from the novel.

Congress imposed a different solution regarding the continued exploitation of derivative works (notably motion pictures) with respect to two other statutory renewal provisions. When, as part of the 1976 Act's transitional measures governing works already in copyright, Congress extended the duration of the renewal term from 28 to 47 years (and in 1998 added another 20 years to the renewal term), Congress gave authors (or their heirs) an opportunity to terminate prior grants during the additional 19 (and then the subsequent additional 20) years of copyright, but exempted already-created derivative works from the scope of the reversion.¹⁶ Similarly, in 1992, in addition to providing for the future automatic renewal of works originally published beginning in 1964 through 1977, Congress sought to encourage "voluntary" renewals; one such incentive concerns the continued exploitation of derivative works. A person who voluntarily renews gets the benefits of the *Rear Window* rule that cuts off continued exploitation by others of derivative works they may have created during the initial term of an underlying work, while in the case of an automatic renewal, section 304(a)(4)(A) now provides that "a derivative work prepared under authority of a grant of a transfer or license of the copyright that is made before the expiration of the original term of copyright may continue to be used under the terms of the grant during the renewed and extended term of copyright without infringing the copyright."¹⁷

14) See *Fred Fisher Music Co. v. M. Witmark & Sons*, 318 U.S. 643 (1943) (upholding author's assignment); *Miller Music Corp. v. Charles N. Daniels, Inc.*, 362 U.S. 373 (1960) (author's assignment does not bind heirs).

15) *Stewart v. Abend*, 495 U.S. 207 (1990).

16) See 17 U.S.C. sec. 304(c) and (d).

17) Because works created in or after 1978 enjoy a single term of protection, there is no longer a renewal term to trigger authors' reversion rights. Reversion rights nonetheless apply to any contract executed in or after 1978, and vest 35 years after execution. The derivative works exception applies to this reversion right as well. See 17 U.S.C. sec. 203. Further discussion of the reversion right exceeds the scope of this summary, but for (considerably) more detail, see Lionel Bently and Jane C. Ginsburg, "The sole right shall return to the Author": Anglo-American Authors' Reversion Rights from the Statute of Anne to Contemporary U.S. Copyright, with Prof. Lionel Bently, 25 *Berkeley Technology Law Journal* 1475 (2011), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1663906.

III. US Term of Copyright Protection for Audiovisual Works

	When Protection Attaches in the US	First Term	Renewal Term
Film created (fixed in a tangible medium of expression from which it can be perceived, reproduced, or otherwise communicated) in 1978 or later	Upon creation	<p>If “work for hire” (or anonymous or pseudonymous work), unitary term of 95 years from publication, or 120 years from creation, whichever is first.</p> <p>If rights initially vested in author or co-authors, unitary term of 70 years from date of death of last surviving co-author.</p> <p>Law of country of origin determines (1) whether work is “for hire”; (2) who is an author or co-author, if rights initially vest in author(s). (For EU works, referent lives are those of the director, the author of the screenplay, the author of the dialogue and the composer.)</p>	N/A
Film published (released in US) 1964-1977, inclusive	<p>For US works – upon publication with proper notice; if without proper notice, work is in public domain.</p> <p>For Berne Convention and WTO foreign works – upon publication with notice.</p> <p>If published in the US without notice, work then fell into public domain, BUT copyright was restored as of 1 January 1996, so long as the work was still protected in its country of origin on the effective date of the Uruguay Round Amendments Act (17 USC § 104A) (1 Jan. 1996).</p>	28 years	<p>67 years, second term commenced automatically pursuant to the 1992 Automatic Renewal Amendment.</p> <p>Renewal registration is optional (although, per §304(a)(4) (B), registration is prima facie evidence of valid ownership).</p> <p>If renewal effected automatically, then notwithstanding possible reversion of film rights to the author of the underlying work on which the film was based (or to his/her heirs), the grantee may continue to exploit the derivative audiovisual work.</p>

	When Protection Attaches in the US	First Term	Renewal Term
Film published 1923-1963, inclusive	Same as for film published in 1964-1977.	28 years	<p>For US works – 67 years, if renewal was sought; if no renewal, work is in the public domain.</p> <p>For Berne Convention and WTO foreign works – 67 years even if renewal was not sought, so long as the work was still protected in its country of origin on the effective date of the Uruguay Round Amendments Act.</p> <p>If renewal sought, then possible reversion of film rights to the author of the underlying work on which the film was based (or to his/her heirs), and the grantee may NOT continue to exploit the derivative audiovisual work in US without new agreement from author or heirs.</p>
Film published before 1923	The audiovisual work is now in the public domain.	The audiovisual work is now in the public domain.	The audiovisual work is now in the public domain.
Film created, but not published before 1978	From 1 January 1978, when US federal copyright protection was extended to unpublished works.	<p>If film is a “work made for hire,” (or anonymous or pseudonymous work), unitary term of 95 years from publication, or 120 years from creation, whichever is first.</p> <p>If rights initially vested in author(s), unitary term of 70 years following death of last surviving co-author. (For EU works, referent lives are those of the director, the author of the screenplay, the author of the dialogue and the composer.)</p> <p>If, on 1 January 1978, the film’s authors had been dead for more than 50 years, the film’s copyright would nonetheless endure until 31 December 2002, and if the film was published before then, the film’s copyright will endure till 31 December 2047.</p>	N/A