

6-2010

United States Response to Questionnaire Concerning the *Terms of Protection in the Field of Copyright and Related Rights*

June M. Besek

Columbia Law School, Kernochan Center for Law, Media and the Arts

Jane C. Ginsburg

Columbia Law School, jane.ginsburg@law.columbia.edu

N. Orly Leventer

Columbia Law School

Joshua L. Simmons

Columbia Law School

Follow this and additional works at: https://scholarship.law.columbia.edu/faculty_scholarship



Part of the [Intellectual Property Law Commons](#)

Recommended Citation

June M. Besek, Jane C. Ginsburg, N. Orly Leventer & Joshua L. Simmons, *United States Response to Questionnaire Concerning the Terms of Protection in the Field of Copyright and Related Rights*, (2010). Available at: https://scholarship.law.columbia.edu/faculty_scholarship/3954

This Document is brought to you for free and open access by the Faculty Publications at Scholarship Archive. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Scholarship Archive. For more information, please contact scholarshiparchive@law.columbia.edu.

**United States Response to
Questionnaire Concerning the Terms of Protection
in the Field of Copyright and Related Rights**

ALAI 2010 Vienna

By June M. Besek, Jane C. Ginsburg, N. Orly Leventer and Joshua L. Simmons¹

Authors' Note: The U.S. Copyright Act is contained in Title 17 of the United States Code and is available on the Copyright Office website, <http://www.copyright.gov>. Statutory references in this response are to Title 17, unless otherwise indicated.

I. Authors' Rights

1. *What is the term of protection for the authors' economic rights? Please also give a short historical survey.*

Under U.S. law, the term of protection for copyrighted works created on or after January 1, 1978 is life of the author and 70 years thereafter.² For anonymous or pseudonymous works and works made for hire,³ the term is 95 years from publication of the work or 120 years from creation, whichever expires first.⁴

Sections 302 – 305 of the U.S. Copyright Act govern the duration of protection for economic rights in copyrighted works under U.S. law. The United States Copyright Act underwent a major revision in 1976, with the revised act becoming effective on January 1, 1978 (the “1976 Copyright Act”). Under the previous law (“the 1909 Act”), the term for copyright protection was 28 years from the publication of a work. Federal copyright protection would attach, and the term for protection would start, only once the author either published her work or registered it with the U.S. Copyright Office. The author was required to include a copyright notice with her work; if the work was published without such a notice, copyright protection would be lost. At the end of the 28-year term, the rights holder had the option to renew the term of protection for another 28 years. If she did not renew, copyright protection would cease once the initial 28-year term expired. However, if the rights holder filed for renewal, the term of protection under the 1909 Act would amount to a total of 56 years.

¹ June M. Besek is the Executive Director of the Kernochan Center for Law, Media and the Arts at Columbia Law School in New York City. Jane C. Ginsburg is the Morton L. Janklow Professor of Literary and Artistic Property Law at Columbia Law School. N. Orly Leventer (LL.M. 2009) and Joshua L. Simmons (J.D. 2010) are recent graduates of Columbia Law School. Research assistance from Elana Bensoul (Columbia Law School 2011) is gratefully acknowledged.

² § 302(a).

³ A work made for hire is “a work prepared by an employee within the scope of his or her employment,” or “a work specially ordered or commissioned for use” in certain types of works as provided for in § 101.

⁴ § 302(c).

The 1976 Copyright Act brought about several important changes. First, the term for copyright protection for works published after its effective date became the life of the author plus 50 years after her death. There was no need and no option for renewal. Second, the term of protection began automatically upon creation and fixation of the work. Publication and/or registration were no longer a prerequisite for copyright protection.⁵ Those changes were necessary steps towards U.S. compliance with the requirements of the Berne Convention, of which the United States became a signatory in 1988.

The 1976 Copyright Act also altered the term of protection for works already in existence when the new law went into effect. Works in their first 28-year term of copyright protection were entitled to a second term of 47 years (for a total of 75 years of protection), provided that the rights holder filed for renewal. Works that were in their second 28-year term of copyright protection on January 1, 1978 got an additional 19 years of protection, for a total term of 75 years from publication. Works created but not published or copyrighted *before* January 1, 1978, were given a term of protection of life of the author plus 50 years.

However, all works that were unpublished when the 1976 Copyright Act went into effect were given at least 25 years of protection, even if the author had died more than 50 years before. Those works were protected until December 31, 2002, and if they were published on or before December 31, 2002, they remain protected until December 31, 2047.

The Copyright Renewal Act of 1992⁶ made renewal registration automatic so that the copyright in the work would not enter the public domain for failure to renew. The automatic renewal applies only to works that were still in their first term of copyright at the time the amendment was enacted.⁷ Works whose first terms had already expired and whose registrations had not been renewed remained in the public domain. As a result, works first published between 1964-77 are automatically protected for a second term, which in 1992 endured for an additional 47 years (28+19), and now, with the 1998 Copyright Term Extension Act (see below) endures for 67 years, for a total of 95 years from publication.

In 1998 the United States enacted the Sonny Bono Copyright Term Extension Act (“CTEA”),⁸ which lengthened the term of copyright protection to life of the author plus 70 years. Works created under the 1909 Act that were still protected by copyright on the effective date of the CTEA had their renewal terms of protection extended by 20 years, to 67, years for a total of 95 years (28-year initial term + 67 year renewal term).

⁵ Registration of the work with the U.S. Copyright Office is, however, still a prerequisite to certain remedies for infringement. § 412.

⁶ Copyright Renewal Act of 1992, Pub. L. No. 102-307, 106 Stat. 264.

⁷ *Id.* § 102(a).

⁸ Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998).

The complexities of the U.S. terms of protection for copyrighted works are summarized in the chart contained in Appendix A hereto.

2. *What is the main point of attachment for the calculation of the term of protection (e.g., author's death)?*

For works created by an individual, copyright protection attaches automatically upon creation and fixation of the work and endures until 70 years following the author's death. The Act has two provisions to enhance clarity as to the date of an author's death. First, it provides for a registry of death dates. "Any person having an interest in a copyright may at any time record in the Copyright Office a statement of the date of death of the author of the copyrighted work, or a statement that the author is still living on a particular date."⁹ Second, after a period of 95 years from the first publication of the work, or 120 years from the year of the work's creation (whichever period expires first), any person who obtains from the Copyright Office a certified report that its records "disclose nothing to indicate that the author of the work is living, or died less than 70 years before, is entitled to the benefit of a presumption that the author has been dead for at least 70 years. Reliance in good faith upon this presumption shall be a complete defense to any action for infringement under [the U.S. Copyright Act]."¹⁰

For works created prior to January 1, 1978, the point of attachment as a general matter was the date of publication with copyright notice, as discussed in the response to Question I.1, above.

3. (a) *What is the point of attachment for the calculation of the term of protection as regards anonymous and pseudonymous works?*

The term of copyright protection for anonymous and pseudonymous works is 95 years from publication of the works or 120 years from creation, whichever expires first.¹¹

- (b) *How are anonymous and pseudonymous works defined in national law?*

Section 101 defines an anonymous work as "a work on the copies or phonorecords of which no natural person is identified as author."¹² A pseudonymous work is defined as "a work on the copies or phonorecords of which the author is identified under a fictitious name."¹³

- (c) *On what conditions does the anonym (pseudonym) leave no doubt as to the author's identity?*

⁹ § 302(d).

¹⁰ § 302(e).

¹¹ § 302(c).

¹² § 101.

¹³ § 101. The same term of protection applies also to "works made for hire." See *supra* note 3.

Under U.S. law the designation of a work as anonymous or pseudonymous does not depend on whether the real identity of the author is traceable. The wording of the definitions for those types of works reveals that U.S. law takes a rather formal approach to categorizing such works. When considering whether a work is an anonymous work, one must look at the records of the Copyright Office to see whether a natural person is identified as the author, or, as for a pseudonymous work, whether the author used a fictitious name.¹⁴ If the true identity of the author is not recorded with the Copyright Office, the work will be considered anonymous or pseudonymous.¹⁵

(d) How can the author's identity be disclosed? Is there a (specific) register provided for in national law with this regard?

Section 302(c) provides that “[a]ny person having an interest in the copyright in an anonymous or pseudonymous work may at any time record, in records to be maintained by the Copyright Office for that purpose, a statement identifying one or more authors of the work . . . ”¹⁶ in accordance with regulations prescribed by the Copyright Office. If at any time during the term of copyright protection (as provided for in section 302(c)¹⁷) the identity of one or more of the authors is revealed in Copyright Office records as described above, or in a registration (or supplemental registration) made for the work, the copyright term for the work reverts to the standard term specified by section 302(a) or (b).¹⁸

4. *How is joint authorship defined in national law as regards the calculation of the term of protection? Does joint authorship in particular presuppose that the contributions of several authors are inseparable?*

Copyright protection for a work of joint authorship lasts for 70 years after the death of the last surviving author.¹⁹

Section 101 defines a joint work as “a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.”²⁰ Contributions are considered to be interdependent “when they could stand alone but achieve a greater effect when combined.”²¹ A common example for an interdependent work is a song that consists of lyrics and the accompanying melody. Both

¹⁴ See § 101; § 302(c).

¹⁵ *Id.*; see also U.S. Copyright Office, Circular 15A, Duration of Copyright: Provisions of the Law Dealing with the Length of Copyright Protection 3 (2004), available at <http://www.copyright.gov/circs/circ15a.pdf>; U.S. Copyright Office, Factsheet 101, Pseudonyms (2009), <http://www.copyright.gov/fls/fl101.html>.

¹⁶ § 302(c).

¹⁷ See *supra*, response to question I.3(a).

¹⁸ § 302(c). For a discussion of the standard terms of protection see *supra*, response to question I.1 and *infra*, response to question I.4.

¹⁹ § 302(b).

²⁰ § 101.

²¹ Teresa Huang, Note, *Gaiman v. McFarlane: The Right Step in Determining Joint Authorship for Copyrighted Material*, 20 BERKELEY TECH. L.J. 673, 676 (2005) (citing H.R. REP. NO. 94-1476, at 120 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5736).

contributions (i.e., the lyrics and the melody) can exist separately but as elements of the song (i.e., the joint work) they become interdependent parts of it.

5. *Is there a specific rule regarding the term of protection provided for cinematographic works?*

No, U.S. law does not currently provide for such a rule.

6. (a) *Is there a specific rule regarding the term of protection provided for photographic works?*

No, U.S. law does not currently provide for such a rule.

- (b) *Does national law provide for a related rights protection of photographs (lacking originality)?*

No, U.S. law does not currently provide for such protection.

- (c) *If this is the case, can such related rights' protection be claimed in parallel to copyright protection?*

Not applicable.

7. *Does national law provide for a specific rule in regard of the term of protection in case of posthumous works (e.g., works published [within a certain period] prior or after the author's death)?*

No, U.S. law does not provide for such a rule.

8. (a) *Are moral rights provided for in national law?*

The only explicit provision for moral rights in national law is contained in section 106A. This provision, enacted by the Visual Artists Rights Act of 1990 ("VARA"),²² sets out a right of attribution and a right of integrity for certain works of visual art. Such works include paintings, drawings, prints, or sculptures, provided that they exist "in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author, or, in the case of a sculpture, in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author."²³ Also included in the definition are still photographic images that have been produced "for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author."²⁴ Nevertheless, VARA is applicable only to a relatively narrow category of works.

²² Visual Artists Rights Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089.

²³ § 101.

²⁴ *Id.* The definition further provides, however, that the following are not works of visual art:

The United States, in joining the Berne Convention, asserted that other aspects of its law considered together provide moral rights.²⁵ These include, for example, section 106(b) relating to derivative works; the Lanham Act (federal trademark law) relating to false designations of origin;²⁶ state and local laws relating to publicity, unfair competition and defamation; and state moral rights statutes.²⁷

(b) If so, is there a specific rule for the calculation of the term of protection?

The moral rights created by the VARA persist only during the lifetime of the author.²⁸ State common law and state statutes may provide for legal or equitable rights that endure beyond the lifetime of the author.²⁹

(c) Are there other specific rules provided for moral rights (e.g., a rule, according to which moral rights shall never end during the author's lifetime)?

There are no other specific rules that expressly provide for moral rights.

9. *Is the rule of comparison of terms of protection (Article 7(8) of the Berne Convention) to be applied under national law?*

No, Article 7(8) of the Berne Convention is not applied in U.S. law. When the United States became a signatory of the Berne Convention, Congress enacted the Berne Convention Implementation Act of 1988,³⁰ which became effective on March 1, 1989. The Berne Convention is not self-executing under U.S. law. The rule of comparison of terms as provided for in article 7(8) of the Berne Convention was not implemented in U.S. law and thus is inapplicable.

10. *Does or did national law provide for war-related extensions of the terms of protection?*

-
- (A) (i) any poster, map, globe, chart, technical drawing, diagram, model, applied art, motion picture or other audiovisual work, book, magazine, newspaper, periodical, data base, electronic information service, electronic publication, or similar publication;
 - (ii) any merchandising item or advertising, promotional, descriptive, covering, or packaging material or container;
 - (iii) any portion or part of any item described in clause (i) or (ii);
 - (B) any work made for hire; or
 - (C) any work not subject to copyright protection under this title.

Id.

²⁵ See H.R. REP. NO. 100-609 (1988), reprinted in 9 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT app. 32-34, -38 (2010).

²⁶ Lanham Act § 43(a), 15 U.S.C. § 1125(a)(2006). *But see* Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23 (2003).

²⁷ See, e.g., CAL. CIV. CODE § 987 (West 2010); N.Y. ARTS & CULT. AFF. LAW § 14.03 (McKinney 2010).
²⁸ § 106A(d).

²⁹ For example, California moral rights law provides for a duration of life of the author plus 50 years. CAL. CIV. CODE § 987(g)(1) (West 2010).

³⁰ Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853.

There are no ongoing war-related extensions, but in 1919 and 1941 war-related extensions were granted. The 1919 Act granted U.S. copyright protection to all works eligible for U.S. copyright that were first produced or published abroad after August 1, 1914 and before the U.S. President proclaimed peace, provided that the rights holder complied with the necessary copyright formalities within 15 months after the declaration of peace.³¹

The 1941 Act authorized the U.S. President to grant extensions of time to fulfil U.S. copyright formalities to rights holders of works first produced or published abroad and eligible for U.S. copyright, when the facilities to comply with formalities were disrupted or suspended.³²

11. (a) Has the term of protection been extended during the last decades (20th and 21st centuries)?

As discussed in the response to question I.1 above, the 1976 Copyright Act added 19 years to the duration of the second term for works already in their second term of copyright protection on January 1, 1978. (In the years during which the 1976 Copyright Act was under development, Congress granted several term extensions so that works that otherwise would have entered the public domain could enjoy the benefit of the longer term provided by the 1976 Act.³³) The CTEA subsequently added an additional 20 years to the term of all copyrighted works.

In addition, section 514(a) of the Uruguay Round Agreements Act (“URAA”)³⁴ added section 104A to the U.S. Copyright Act. That provision restores copyrights in works of authors from WTO and non-U.S. Berne Convention member states.³⁵ Works

³¹ Act of Dec. 18, 1919, Pub. L. No. 66-102, 41 Stat. 368 (“An Act to amend sections 8 and 21 of the Copyright Act, approved March 4, 1909.”).

³² Act of Sept. 25, 1941, Pub. L. No. 77-258, 55 Stat. 732 (“An Act to amend section 8 of the Copyright Act of March 4, 1909, as amended, so as to preserve the rights of authors during the present emergency and for other purposes.”).

³³ Between 1962 and 1974, while the Copyright Act of 1976 was being drafted by Congress, nine joint resolutions were passed briefly extending the renewal copyright term for works already in copyright. Act of Sept. 19, 1962, Pub. L. No. 87-688, 76 Stat. 555 (any work whose copyright subsisted at the time of the resolution’s approval that would expire prior to Dec. 31, 1965 is continued to that date); Act of Aug. 28, 1965, Pub. L. No. 89-142, 79 Stat. 581 (any work that would expire prior to Dec. 31, 1967, including if extended by the previous extension, is continued to that date); Act of Nov. 16, 1967, Pub. L. No. 90-141, 81 Stat. 464 (continued to Dec. 31, 1968); Act of July 23, 1968, Pub. L. No. 90-416, 82 Stat. 397 (continued to Dec. 31, 1969); Act of Dec., 16, 1969, Pub. L. No. 91-147, 83 Stat. 360 (continued to Dec. 31, 1970); Act of Dec. 17, 1970, Pub. L. No. 91-555, 84 Stat. 1441 (continued to Dec. 31, 1971); Act of Nov. 24, 1971, Pub. L. No. 92-170, 85 Stat. 490 (continued to Dec. 31, 1972); Act of Oct. 25, 1972, Pub. L. No. 92-566, 86 Stat. 1181 (continued to Dec. 31, 1974); Act of Dec. 31, 1974, Pub. L. No. 93-573 § 104, 88 Stat. 1873, 1873 (continued to Dec. 31, 1976). The continuation to December 31, 1977 is contained in the 1976 Copyright Act itself, which became effective on January 1, 1978. 1976 Copyright Act, Pub. L. No. 94-553, § 304(b), 90 Stat. 2541, 2574.

³⁴ Uruguay Round Agreements Act, Pub. L. No. 103-465 § 514(a), 108 Stat. 4809, 4976 (1994).

³⁵ § 104A(a).

restored under section 104A are those that, on the date of restoration,³⁶ (i) were in the public domain in the United States, for certain reasons including noncompliance with formalities (such as renewal),³⁷ and (ii) were not in the public domain in their source country due to term expiration.³⁸

(b) If any, to which works did the extension(s) apply? Did the prolongation only apply to works still protected or was there a revival of protection of works already in the public domain provided for?

Both the 1976 Copyright Act and the CTEA applied to all works that were in copyright when the acts were enacted.³⁹ Section 104A applies only to works of non-U.S. origin.⁴⁰

12. *Did or does national law set out rules of transitional law*

(a) as regards acts of exploitation carried out and/or investments made with a view to such (future) exploitation carried out prior to the entering into force of an extension of the term of protection

(i) in a work whose copyright had not yet expired?

The 1941 Act provided that no liability would attach for any otherwise lawful uses of works covered under the Act, (i) for uses made prior to the effective date of a U.S. Presidential proclamation of an extension to fulfill formalities, and (ii) in the case of activities that involved expenditure or contractual obligation,⁴¹ for a one-year grace period thereafter. Neither the 1976 Copyright Act nor the CTEA contained such a provision.

(ii) in a work whose copyright had expired, but was restored by virtue of domestic, regional, or international (treaty) law, e.g., Berne Convention Article 18?

Section 104A(d) of the Copyright Act, enacted by section 514 of the URAA, provides certain protections for “reliance parties” who have been exploiting works whose copyrights are restored under the Act. A reliance party is defined as any person who engages in acts that were legal before the work’s copyright restoration but that would be copyright violations after the copyright in the work had been restored⁴² (or a successor, assignee, or licensee of that person).⁴³

³⁶ The effective date of copyright restoration was January 1, 1996, if the particular nation was already a member of the World Trade Organization (WTO) or the Berne Convention. Otherwise, the effective date of restoration is the date of a particular nation’s adherence to the WTO or the Berne Convention.

³⁷ § 104A(h)(2).

³⁸ § 104A(h)(6).

³⁹ *Id.*

⁴⁰ The same is true for the resolutions passed between 1962 and 1974. *See supra* note 33.

⁴¹ § 104(h)(3).

⁴² 55 Stat. 732, 732.

⁴³ *See supra* note 36.

⁴⁴ § 104A(h)(4).

Enforcement against a reliance party cannot be made without filing a notice of intent to enforce with the Copyright Office within 24 months after restoration, or serving a notice of intent to enforce directly on the reliance party at any time. Infringement remedies are available for infringements that occur after a 12-month safe-harbor period from the point the notice of intent is filed or served. If the infringement commences during the 12-month period and continues afterward, remedies are available only for infringement occurring after the end of the safe harbor period.⁴⁴

Despite the forgoing, a reliance party may continue to exploit derivative works for the remainder of the copyright term if the reliance party “pays to the owner of the restored copyright reasonable compensation for conduct which would be subject to a remedy for infringement.”⁴⁵ If no agreement is reached, the amount of compensation is determined by a U.S. district court.⁴⁶

The constitutionality of the URAA was challenged in *Luck's Music Library, Inc. v. Gonzales*⁴⁷ and in *Golan v. Gonzales*.⁴⁸ In *Luck's Music*, the Court of Appeals for the District of Columbia Circuit held that the URAA does not violate the U.S. Constitution's intellectual property clause. The plaintiffs in the case were Luck's Music Library, “a corporation that rents and sells classical orchestral sheet music,” and Moviecraft, “a commercial film archive that preserves, restores, and sells old footage and films.” They had alleged that the URAA prevented them from freely distributing selected works in their portfolios, works that had been in the public domain prior to the URAA, and challenged the constitutionality of the URAA. In *Golan*, the Court of Appeals for the Tenth Circuit also held that the URAA satisfied the limitations inherent in the intellectual property clause, but it concluded that further proceedings were required to consider the URAA's compatibility with protections for free speech under the First Amendment. On remand, the Colorado federal district court determined that the municipal orchestra claimants in the case had a First Amendment interest in freely performing and recording the formerly public domain music at issue, and that § 514 was substantially broader than necessary to achieve the government's interest in complying with treaty obligations.⁴⁹ That case is currently under appeal.

(b) as regards contracts concluded prior to the entering into force of an extension of the term of protection

(i) in a work whose copyright had not yet expired?

U.S. copyright law provides certain circumstances in which authors, except when a work is made for hire, may terminate exclusive or nonexclusive grants of transfers or

⁴⁴ § 104A(d)(2).

⁴⁵ § 104A(d)(3).

⁴⁶ *Id.*

⁴⁷ *Luck's Music Library, Inc. v. Gonzales*, 407 F.3d 1262 (D.C. Cir. 2005).

⁴⁸ *Golan v. Gonzales*, 501 F.3d 1179 (10th Cir. 2007).

⁴⁹ 611 F. Supp. 2d 1165 (D. Colo. 2009).

licenses to others, even if they have entered into agreements to the contrary. For a general discussion, see the response to question I.13, below.

(ii) in a work whose copyright had expired, but was restored by virtue of domestic, regional, or international (treaty) law, e.g., Berne Convention Article 18?

Section 104A, discussed in the response to question I.12(a)(ii) above, also provides for certain immunities. Section 104A(f)(1) provides that any person who warrants that a work does not violate a copyright will not be held liable if the warranty is breached by the restoration of a copyright, provided the warranty was made before January 1, 1995. In addition, section 104A(f)(2) provides that a party is not required to perform an action that is made infringing by virtue of the restoration of a copyright if the obligation to perform was undertaken before January 1, 1995.

(c) Specifically, do the transitional measures define the class of users who relied on the expected or past public domain status of the work and who are entitled to transitional accommodations? Do they define the nature of the reliance for which accommodations will be made? Do these accommodations impose grace periods (for how long)? Compensation by the copyright owner to the prior user (how determined)? Special rules for derivative works? Do these or any other accommodations phase out over time, or do they continue for the life of the extended or restored copyright?

(i) in a work whose copyright had not yet expired?

See the responses to questions I.12(a)(i) and I.12(b)(i) above. In addition, section 108(h) provides that in the last 20 years of a work's copyright term, libraries and archives may make certain uses of works for preservation, scholarship or research.⁵⁰ These uses are not permitted if the work is subject to normal commercial exploitation, or obtainable at a reasonable price, or if the copyright owner has provided notice in accordance with the statute that either of the previous conditions applies.⁵¹

(ii) in a work whose copyright had expired, but was restored by virtue of domestic, regional, or international (treaty) law, e.g., Berne Convention Article 18?

See the responses to questions I.12(a)(ii) and I.12(b)(ii) above.

(d) in regard of any other issue of transitional law respecting either works whose entry into the public domain was delayed by extension of copyright term, or of works removed from the public domain?

No, not other than the provisions discussed above.

⁵⁰ § 108(h)(1), (3).

⁵¹ § 108(h)(2).

13. Does national law provide for a termination of contracts and/or a reversionary right? If this is the case, on what conditions such termination/reversionary right is set out in national law?

In the 1976 Copyright Act, Congress abandoned the two-term copyright scheme and adopted the then international standard of the life of the author plus 50 years. (In 1998, Congress extended the term of copyright to life plus 70 years.) Although the renewal term which had triggered the reversion right would no longer exist, Congress determined to retain a reversion right, and pegged it to the date of execution of a grant by the author of rights under copyright. The reversion right comes into effect from 35 to 40 years from that date, depending on the nature of the grant (subject to notification two to ten years prior to the termination).⁵²

In the 1976 Copyright Act, Congress extended the term of protection for works published before 1978 by 19 years, so that their 75-year duration would approximate that of works created under the aegis of the 1976 Copyright Act. Congress then created a termination right for the “extended renewal” term of 19 years, thus vesting the additional years in authors’ assignees but entitling authors of works not made for hire to terminate their ongoing grants, subject to a variety of rather complex conditions.⁵³

In 1998, when Congress under the CTEA added another 20 years to the terms of extant copyrights, it gave the authors (or heirs, as specified in the statute) of works published before 1978 another opportunity to terminate grants during the last 20 years of the term.⁵⁴ Termination is permitted if (a) the work was not made for hire, (b) the work was in copyright on the effective date of the 1976 Copyright Act, (c) the work was in its renewal term on the effective date of the CTEA, (d) the termination right provided by section 304(c) has expired, and (e) the author or termination right owner has not previously exercised such termination right.⁵⁵

Both sections 304(c) and 304(d) are subject to various conditions regarding the timing and contents of the notice of termination.⁵⁶

The termination rights carve out an exception for derivative works. The exception allows the continued exploitation of derivative works previously created under the authority of the terminated grant, but returns to the author or her heirs the exclusive rights to create new derivative works.⁵⁷ The 1976 Copyright Act termination right is subject to detailed provisions regarding notification of grantees.

⁵² § 203.

⁵³ § 304(c).

⁵⁴ § 304(d).

⁵⁵ *Id.*

⁵⁶ § 304(c)(1), (2), (3), (4), (6); § 304(d).

⁵⁷ *See* § 203(b)(1); § 304(c)(6)(A).

For grants of rights subject to termination, Congress specified that “[t]ermination of the grant may be effected notwithstanding any agreement to the contrary, including an agreement to make a will or to make any future grant.”⁵⁸ Thus, even if the author’s contract purported to renounce or forbear from exercising the termination right, neither the author nor her heirs would be bound to this contractual undertaking.

14. Please, indicate any other possible specific regulations in regard of the calculation of the terms of protection in national law.

All copyright terms run to the end of the calendar year in which they would otherwise expire.⁵⁹

In addition, because the copyright term for works created after January 1, 1978 (other than works made for hire) is based in part on the lifespan of the author, U.S. copyright law provides procedures for determining the death date of authors. See the response to question I.2, above.

II. Related Rights

- 1. Which related rights are recognized in national law and what is the term of protection provided for such related rights? Please indicate the term and the respective points of attachment (eg making available to the public, publication, carrying out of the respective activity).*

Performing artists (audio-visual artists included?)

Producers of phonograms

Broadcasting organizations

Producers of first fixations of films (moving images)

Photographers (in particular regarding photographs lacking originality)

Publishers (of published editions)

Publishers (editors) of scientific and critical publications

Publishers (editors) of posthumous works

Protection of databases in the sense of the European sui generis right (or similar protection)

Catalogues

Organizers of cultural events

Organizers of sporting events (droit d’arène)

Organizers of cultural events

Organizers of sporting events (droit d’arène)

any other related right provided for in national law (eg stage productions)

⁵⁸ § 203(a)(5); § 304(c)(5); § 304(d)(1) (applying § 304(c)(5)).

⁵⁹ § 305.

As a general matter, the United States does not have a separate regime for related rights. However, three aspects of U.S. law are worthy of mention.

The United States recognizes a right to prevent the unauthorized fixation and communication of live musical performances.⁶⁰ Section 1101 extends liability to those who, without consent, fix, transmit, or distribute sounds or images of a live musical performance in a copy or sound recording.⁶¹ This right is not considered a right under copyright under U.S. law as the right attaches to works not previously fixed in a tangible medium. The statute does not specify a duration for this right.

Second, federal law in the United States does not protect pre-1972 sound recordings (phonograms). Those recordings are protected by a patchwork of state statutes and common law rules until 2067 (at the latest), after which time state laws applicable to pre-1972 sound recordings will be pre-empted by the federal Copyright Act.⁶² Each individual state, however, may determine whether and how to protect such sound recordings, and for how long, within this time frame.

Third, chapter 12 of the U.S. Copyright Act addresses circumvention of technological protection attached to a work protected by copyright. Section 1201(a)(1)(A) prohibits the circumvention of a “technological measure that effectively controls access to a work” protected under Title 17. Protection thus is bounded by the duration of copyright (as well as other copyright-defining elements, such as originality). Section 1201(a)(2) prohibits manufacturing or trafficking in any device or service to circumvent access controls or rights controls attached to a copyrighted work if the device or service: (1) “is primarily designed or produced for the purpose of circumventing” the access or rights controls, (2) “has only limited commercially significant purpose or use other than to circumvent” such controls, or (3) is knowingly marketed for use in circumventing such controls. The statute provides for a number of exemptions.⁶³ (Chapter 12 is discussed at length in the U.S. Response to the Questionnaire for ALAI 2007 Congress in Punta del Este.)

2. *As regards performing artists and producers of phonograms, does national law provide for different terms depending upon whether the performance is fixed upon a sound carrier or not? If this is the case, how is the term ‘sound carrier’ (‘phonogram’) defined in this regard?*

No.

⁶⁰ See § 1101.

⁶¹ § 1101(a).

⁶² See § 301(c). In *Capitol Records, Inc. v. Naxos of America, Inc.*, 4 N.Y.3d 540 (N.Y. 2005), the New York Court of Appeals (the highest court in New York State) held that certain pre-1972 sound recordings that originated in England were protected by New York state law, even though they did not qualify for U.S. federal copyright protection. It declined to apply the rule of the shorter term – the works were already in the public domain in England – and decided that New York law could protect the works until 2067, the maximum term allowable under federal law.

⁶³ § 1201(d)-(j).

3. (a) *Are moral rights provided for related rights in national law?*

See the response to question I.8, above.

(b) *If so, is there a specific rule for the calculation of the term of protection of such moral rights?*

4. *Does or did national law provide for war-related extensions of the terms of protection as regards related rights?*

5. *Is the rule of comparison of terms of protection to be applied under national law as regards related rights?*

6. (a) *Has the term of protection been extended for related rights during the last decades (20th and 21st centuries)?*

(b) *If any, to which achievements did the extension(s) apply? Did the prolongation only apply to achievements still protected or was there a revival of protection of achievements already in the public domain provided for?*

7. *Did or does national law set out rules of transitional law (see point 12 above)*

(a) *as regards acts of exploitation carried out and/or investments made with a view to such (future) exploitation carried out prior the entering into force of an extension of the term of protection?*

(b) *as regards contracts concluded prior to the entering into force of an extension of the term of protection?*

(c) *in regard of any other issue of transitional law?*

8. *Does national law provide for a termination of contracts and/or a reversionary right? If this is the case, on what conditions such termination/reversionary right is set out in national law? (see point 13 above)*

9. *Please, indicate any other possible specific regulations in regard of the calculation of the terms of protection in national law.*

10. *More particularly for EU Member-States:* *Please indicate the pro- and contra-arguments that have been invoked in your country until now as far as the EU proposal to extend the duration of the related rights granted to performing artists and phonogram producers in their phonograms is concerned.*

III. *Domaine Public Payant* and equivalent regimes

1. *Does or did national law provide for a *Domaine Public Payant* or an equivalent regime?*

No, the United States has no such law.

2. *If this is or was the case, please briefly describe the main features and functioning of such system, in particular*
- *Term added to the regular term of protection*
 - *Scope of the Domaine Public Payant regime (copyright works, achievements under related rights protection)*
 - *Acts of exploitation subject to payment*
 - *Percentage of payments and proceeds subject to such payment*
 - *Persons or institutions benefiting from payments under Domaine Public Payant (living authors, holders of related rights, organizers of cultural events, avant-garde, social aspects etc)*
 - *Bodies administering the Domaine Public Payant (authors' societies, administrative bodies etc)*
 - *Functioning in practice*
 - *May foreign authors or other beneficiaries benefit from such Domaine Public Payant regime?*

Not applicable.

3. *If no Domaine Public Payant or equivalent regime is provided for, does national law provide for alternative solution (outside copyright) as eg cultural funds or the like?*

No, the United States has no such alternative.

4. *If this is or was the case, please briefly describe the main features and functioning of such alternative system, in particular*
- *Acts of exploitation or other points of attachment subject to payment as eg fees to be paid by certain industries (eg satellite dishes, cable distributors) or supplementary payments to be made by listeners and viewers of radio/TV jointly fees for receiving public radio/TV?*
 - *Persons or institutions benefiting from such alternatives (living authors, holders of related rights, organizers of cultural events, avant-garde, social aspects etc)*
 - *Bodies administering such cultural funds and the like (authors' societies, administrative bodies etc)*
 - *Functioning in practice*
 - *Does national law provide for social security in favour of freelancing authors, performing artists etc?*
 - *Is this is the case, how is such social security subsidized?*

May foreign authors or other beneficiaries benefit from such funds?

Not applicable.

New York, NY
8 June 2010

Appendix A
To the United States Response to the
Questionnaire Concerning the Terms of Protection
in the Field of Copyright and Related Rights

ALAI 2010 Vienna

The following table, adapted from Robert A. Gorman and Jane C. Ginsburg, COPYRIGHT: CASES AND MATERIALS 435 (7th edition 2006), summarizes the transition from the 1909 Act to the 1976 Copyright Act.

<u>Date of Work</u>	<u>When Protection Attaches</u>	<u>First Term</u>	<u>Renewal Term</u>
Created in 1978 or later	Upon being fixed in a tangible medium	Unitary term of life + 70 (or, if anonymous or pseudonymous work, or work for hire, 95 years from publication, or 120 years from creation, whichever is first)	
Published 1964–1977	Upon publication with notice	28 years	67 years, second term commenced automatically; renewal registration optional
Published between 1923 and 1963, inclusive	Upon publication with notice	28 years	67 years, if renewal was sought, otherwise these works are in the public domain (note that even as to works whose first terms expired after 1977, it remained necessary to effect a renewal registration)
Published before 1923	The work is now in the public domain		
Created, but not published , before 1978	On 1/1/1978, when federal copyright displaced state copyright.		Unitary term of at least life + 70, earliest expiration dates 12/31/2002 (if work remained unpublished) or 12/31/2047 (if work was published by the end of 2002)