

11: Term of Protection

Article 12 Term of Protection

Whenever the term of protection of a work, other than a photographic work or a work of applied art, is calculated on a basis other than the life of a natural person, such a term shall be no less than fifty years from the end of the calendar year of authorized publication, or, failing such authorized publication within fifty years from the making of the work, fifty years from the end of the calendar year of making.

1. Introduction: terminology, definition and scope

TRIPS suggests that there is no uniformly applicable term of protection for all categories of copyrighted works. Article 7(1) of the Berne Convention prescribes a minimum term of copyright protection which is the life of the author plus fifty years. This is incorporated in TRIPS Article 9.1 through reference to the Berne Convention. Article 12 addresses those cases where the life of a natural person is not the basis for measuring the term of protection. It is directed at works of corporate authorship or, to put it more directly, works where the identified author is not a natural person. Examples of such works include sound recordings and films under U.S. law, and collective works under French law.

2. History of the provision

2.1 Situation pre-TRIPS

Prior to TRIPS, the term of copyright duration was addressed in Article 7 of the Berne Convention, prescribing in paragraph (1) a minimum term of protection of the author's life plus fifty years. Even under the Berne Convention, however, the use of the life of the author as a basis for determining the length of copyright protection is not applicable to all categories of works. The key point is that for works where the life of a natural person is not the basis for measuring the term of copyright protection, other indicators must be used.

The provisions of the Berne Convention dealing with cinematographic works and pseudonymous and anonymous works provide good examples of such indicators. Article 7(2) of the Berne Convention provides that in the case of

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cinematographic works, countries “may” provide a term of protection that shall expire fifty years after the work has been made available to the public with the consent of the author. If the work is not made public with the consent of the author within fifty years after the work was first made, then the term of protection is simply fifty years calculated from when the work was made.

With regard to anonymous and pseudonymous works, Article 7(3) of the Berne Convention provides a term of protection for fifty years after the work has been lawfully made available to the public. However, if the author of the work discloses his or her identity, Article 7(3) provides a term of protection that is consistent with the general standard namely, life of the author plus fifty years. The same result occurs when the pseudonym of the author “leaves no doubts” as to the identity of the author. In such a case, the term of protection reverts to the standard term of life plus fifty years.

Berne Convention Article 7(4) provides that countries have the discretion to determine the term of protection for photographic works and works of applied art if such works are protected as “artistic works.” However, the minimum term of protection for these categories of works is twenty-five years from their making. As explicitly stated in Berne Convention Article 7(6), for all categories of works, countries are free to grant terms of protection greater than the minimum imposed.

Finally, the Berne Convention is silent on a specific term of protection for the works of non-natural (i.e., corporate) authors.

Although other copyright treaties such as the Universal Copyright Convention also established a minimum term of protection,¹⁴¹ Article 12 is a direct derivation from Berne Convention Article 7 as discussed above.

2.2 Negotiating history

2.2.1 The Anell Draft

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7A.1 The term of protection of a work whose author is a legal entity shall be no less than 50 years from the end of the year of authorised publication, or, failing such authorised publication within 50 years from the making of the work, 50 years from the end of the year of making.

7A.2 The term of protection of computer programs shall be no less than 50 years after the end of the year of creation.”

While this draft provision already provided the same term of protection as the current Article 12, it differs in two important aspects: first, it contained an extra paragraph on computer programs, which is not present in the current TRIPS text; second, it expressly referred, in its first paragraph, to “legal entities” as the author of the protected work.

With regard to the extra paragraph on computer programs, it has to be recalled that at the time of the Anell Draft, the protection of computer programs as literary

¹⁴¹ Life of the author plus twenty-five years. See Universal Copyright Convention, Paris Text, 1971, Article IV(2)(a).

works had not yet been agreed upon.¹⁴² The second paragraph of the above draft appears to represent some delegations' objective to ensure, for computer programs, the same term of protection as accorded to literary works under Article 7(1) of the Berne Convention, independently of their qualification as such works. Otherwise, computer programs, as not expressly considered "literary works", could have been interpreted by Members to qualify for "works of applied art" in the sense of Article 7(4) of the Berne Convention, for which the mandatory term of protection is only 25 years from the making. With the final acceptance, under Article 10.1 of TRIPS, of computer programs as literary works, this special term of protection for computer programs is no longer necessary: they either fall directly under Article 7(1) of the Berne Convention (in case the author of the software is a natural person), or they benefit from the term of protection provided for under Article 12 TRIPS (in case the author of the software is a corporate entity). In both cases, the term is 50 years (from the death of the natural author or from the authorized publication or the end of the calendar year of the making).

With regard to the second difference (i.e. the express reference to a "legal entity" as the author of the work), the 1990 draft reflects the desire of U.S. film producers for explicit recognition of corporate authors. U.S. film-makers, under the aegis of the Motion Picture Association of America (MPAA),¹⁴³ were concerned about discrimination in countries that only recognized natural "flesh and blood" authors. In countries generally identified with the author's rights tradition, non-natural persons are recognized as first right holders (as opposed to "authors") of a work. In these countries there is a preference for recognizing authorship only in natural persons. A U.S. proposal during the TRIPS negotiations to accomplish the goal of expressly recognizing corporate authorship was not successful. Article 12 affords an implicit recognition of the concept of a non-natural author, but, as opposed to the Anell Draft, it does not explicitly say so.

2.2.2 The Brussels Draft

The text of the Brussels Draft was essentially identical to the final version under TRIPS. The only difference was that under the Brussels Draft, there was a proposal to except computer programs from the mandatory term of 50 years, as is currently the case under TRIPS with respect to photographic works and works of applied art (Article 7(4), Berne Convention). This exemption of computer programs reflects the delegations' disagreement, at the time of the Brussels Draft, whether to protect computer programs as "literary works". Interestingly, the Brussels Draft thus adopted the opposite approach to computer programs *vis-à-vis* the earlier Anell Draft. The latter had proposed to secure a minimum protection of 50 years for software products, whereas the Brussels Draft proposed to except computer programs from the 50-year term.

With regard to the Anell Draft, the Brussels Draft had already eliminated the express reference to a "legal entity" as the author of the protected works.

¹⁴² See Chapter 8.

¹⁴³ This organization is now known as the Motion Picture Association (MPA).

3. Possible interpretations

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3. Possible interpretations

As stated earlier, Article 12 is very similar to Article 7(2) and 7(3) of the Berne Convention. Article 12 requires that where the life of a natural person is not the basis for calculating the copyright term, the minimum term of protection for a copyrighted work is fifty years from the end of the calendar year of authorized publication. In the absence of an authorized publication of the work within fifty years from its making, then the term of protection is fifty years from the end of the calendar year of its making. For example, if a work is authored by a non-natural person in 1999 and publication is authorized in the year 2000, the minimum term of protection for the work is fifty years. This means that the work is protected by copyright until the end of the year 2050. However, if there is no authorized publication between 1999 (the year of its making) and 2049 (fifty years from the year of its making), then the term of protection is calculated from the end of the year of its making (1999); thus copyright in the work would expire at the end of 2049.

It should be noted that the absence of authorized publication results in a term of protection that is one year less than the scenario where protection is authorized in the year 2000. Of course, if the work is created in 1999 *and* authorized for publication in 1999, then for all practical purposes the end result is the same as though there were no authorized publication. In other words, the copyright term of such a work will expire at the end of 2049.

The above analysis suggests that the later in time an authorized publication takes place, the longer the work may, for all practical purposes, be protected by copyright. For example, if a work created in 1999 is authorized for publication in 2030 (i.e., 31 years after creation), calculation of the copyright term will start at the end of the year 2030. Thus, the copyright term will not expire until the end of 2080. By conditioning the term of copyright protection on “authorized publication,” Article 12 changed the Berne Convention standard that required calculation of the term of copyright protection once the work is “made available to the public.”¹⁴⁴ The term “publication” is narrower than “making available to the public”. A work may be made available to the public in various ways, not only through publication. TRIPS does not define the term “publication” so it is most likely that the definition employed in the Berne Convention (Article 3(3)) will be used to interpret this language in TRIPS.¹⁴⁵ Thus, any of the acts excluded from the definition of “publication” under Article 3(3) of the Berne Convention constitute acts of “making available to the public”. This is the case referred to in the last part of Article 12 (“... or, failing such authorized publication...”). Therefore, the term

¹⁴⁴ See Berne Convention, Article 7(2) and 7(3).

¹⁴⁵ See Gervais, at 87. The incorporation of the Berne Convention into TRIPS lends support to this position. Article 3 (3) of the Berne Convention defines a “published work” as one in which copies have been manufactured with the consent of the author and that the copies are made available to satisfy the reasonable requirements of the public. This provision states that “the performance of a dramatic, dramatico-musical, cinematographic or musical work, the public recitation of a literary work, the communication by wire or the broadcasting of literary and artistic works, the exhibition of a work of art and the construction of a work of architecture shall not constitute publication.”

of protection would then be calculated on the basis of the calendar year of making (i.e. fifty years after the end of that year).

Finally, Article 12 retains the exceptions to copyright term that have been historic features of the Berne Convention. In effect, Article 12 does not extend to photographic works and works of applied art. The copyright term provided for such works remains the standard set in Article 7(4) of the Berne Convention, namely a minimum of 25 years.¹⁴⁶

4. WTO jurisprudence

There has been no WTO panel decision on this subject.

5. Relationship with other international instruments

5.1 WTO Agreements

5.2 Other international instruments

Article 12 simply establishes a minimum standard for the term of copyright protection with regard to works in which the measure of the term is not the life of a natural person. Outside of these works, the term of copyright protection is as provided in the Berne Convention. Thus, for a majority of copyrighted works, the provisions of Article 7 of the Berne Convention will remain the applicable law regarding duration of copyright protection. With regard to photographic works, the WCT provides that countries “shall not apply the provision of Article 7(4) of the Berne Convention” (i.e. a minimum duration of 25 years from the making of the work).¹⁴⁷ This suggests that the WCT mandates an upgrade of the term of protection for photographic works to the Berne Convention minimum of life of the author plus fifty years.¹⁴⁸

6. New developments

6.1 National laws

For most copyrighted works authored by individuals (natural persons), a majority of countries adhere to a specified period of time after the death of the author. Article 7(1) of the Berne Convention specifies the minimum term of protection as the life of the author plus fifty years and this standard has been incorporated into TRIPS. This term requirement is, however, merely a minimum; countries are free to adopt longer terms of protection and many countries have done so. The EC Term of Protection Directive¹⁴⁹ requires a term of protection for the life of the author plus seventy years (Art. 1(1)). In 1998, the United States followed the

¹⁴⁶ Note, however, that in respect of photographic works, this was modified by the 1996 WCT. See below, Section 5.2.

¹⁴⁷ See WCT, Article 9.

¹⁴⁸ See Goldstein, *International Copyright*, at 235 (2001). This is so because the exclusion by the WCT of Article 7(4) of the Berne Convention results in the applicability of Article 7(1) of the Berne Convention, providing the general term of protection of the life of the author plus fifty years.

¹⁴⁹ Council Directive 93/98 of 29 October 1993 Harmonizing the Term of Protection of Copyright and Certain Related Rights O.J. (L290) 9.

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European example and extended the general term of copyright to life of the author plus seventy years.¹⁵⁰ However, as far as copyrighted works of *corporate* authors are concerned, the same U.S. law extended the term of protection to 95 years, whereas the above mentioned EC legislation limits that term to 50 years only.

Several Latin American countries have extended the terms of copyright protection to higher standards than required under the Berne Convention, such as Mexico (life of the author plus 75 years), Brazil, Ecuador and Peru (life of the author plus 70 years).¹⁵¹

In a recent dispute involving big entertainment companies on the one hand and a coalition of Internet publishers on the other, the U.S. Supreme Court upheld the above U.S. law against allegations of unconstitutionality.¹⁵² Internet publishers seeking to publish, *inter alia*, early Mickey Mouse cartoons, jazz classics and novels of F. Scott Fitzgerald had argued that the extension of all copyright terms by 20 years violated a clause in Article I, Section 8 of the U.S. Constitution. According to this provision, copyrights may be issued “for limited times”. The principal argument of the opponents of copyright term extension was that the extension had the effect of delaying entry into the public domain of works created under a previous (shorter term) regime. Since the authors of existing copyrighted works were not being given any new incentive to create, the extension had the primary effect of limiting works in the public domain, and this was contrary to the objectives of the copyright clause of the Constitution.¹⁵³ In the opinion of the majority of the judges, Congressional power to grant copyright protection implies the right to extend the term of protection for all existing copyrights. As stated in the decision:

“History reveals an unbroken congressional practice of granting to authors of works with existing copyrights the benefit of term extensions so that all under copyright protection will be governed evenhandedly under the same regime.”¹⁵⁴

On the other hand, the 1998 U.S. legislation was severely criticized by the dissenting judges. They warned in particular that the extension of the term of

¹⁵⁰ The rules of duration in the United States are much more complex than this statement suggests. Indeed, the same is true for other countries such as the United Kingdom. This is because extensions of the copyright term can be retroactive. Thus, for works in existence and eligible for protection at the time of the extension, the calculation of the term of protection requires careful reading of the earlier statutes under which the work was protected and how the extension of term should be calculated. See e.g., 1976 U.S. Copyright Act § 302–§ 305; John N. Adams & Michael Edenborough, *The Duration of Copyright in the United Kingdom after the 1995 Regulations*, 11 E.I.P.R. 590 (1996).

¹⁵¹ See Roffe, Pedro (2004), *Bilateral Agreements and a TRIPS-plus World: the Chile – USA Free Trade Agreement*, TRIPS Issues Papers – No 4, Quaker International Affairs Programme, Ottawa, Section 3.3.1 [hereinafter Roffe, 2004]. In the cases of Brazil and Mexico, the author explains these extensions with those countries’ important cultural industries.

¹⁵² *Eldred v. Ashcroft*, 123 S. Ct. 769 (2003).

¹⁵³ The opponents of the above law also argued that the extension of the copyright term by 20 years amounted to a perpetual right, and not one for limited times. However, from a constitutional standpoint this was not the argument relied upon since the opponents tacitly acknowledged that the Supreme Court would find it difficult to interfere in the judgement of Congress whether 50 or 70 years after the death of the author was an appropriate copyright term. The decision was taken by a 7-to-2 majority.

¹⁵⁴ Majority opinion, written by Justice Ginsburg, 123 S. Ct. 769, 778.

protection would harm education and research, due to the impediments to access for copyrighted materials.¹⁵⁵

With regard to works authored by non-natural persons or, in some cases, particular categories of works, countries have enacted different laws. Thus with regard to copyright term under TRIPS, the requirements of the Berne Convention remain the standard with the exception of the changes introduced by Article 12. Other than the well-known term of protection for individually authored works, there is discretion under the Berne Convention with regard to the term for other categories of works. The chart in Annex 1 at the end of this Chapter depicts copyright terms with respect to different categories of works.

Finally, it is important to observe that countries do have some discretion in determining whether the term of protection will be based on the life of a natural person. For example, in the United States works made for hire are protected for 95 years from the year of the work's first publication, or 120 years from creation whichever expires first. This term applies whether the employer is a natural or corporate person. In the United Kingdom the copyright term in a computer-generated work lasts for fifty years from the end of the year in which the work was made.¹⁵⁶ The key issue is that where national legislation bases the copyright term on a measure other than the life of a natural person, then TRIPS Article 12 is implicated. The question of whether authorship is vested in a natural person is likely to be determined by the particular view of authorship that the country subscribes to.

6.2 International instruments

6.3 Regional and bilateral contexts

At the bilateral context, recent free trade agreements signed by the USA with a number of developing countries have adhered to the trend in developed countries, as outlined above, to expand the terms of protection for most works to 70 years compared to 50 under TRIPS.¹⁵⁷

7. Comments, including economic and social implications

Longer copyright terms prolong the author's control over the use and disposition of the copyrighted work. Accordingly, public policy issues are implicated each time the copyright term is extended. For example, the public domain is comprised of, among other things, expired copyrighted works. The longer the copyright term, the slower the growth of the public domain with respect to works in which the copyright term has expired. Concerns over the effect of longer copyright terms on the public interest prompted criticism in the United States over Congress's extension of the copyright term. Indeed, there have already been challenges to the constitutionality of this legislation. One important argument that has been put forth by critics of the extension in the United States is that retroactive application

¹⁵⁵ See the dissenting opinions of Justices Stephens and Breyer, 123 S. Ct. 769, 790 et seq.

¹⁵⁶ See § 12(3), United Kingdom, Copyright, Designs and Patents Act 1988.

¹⁵⁷ See Roffe, 2004.

Annex 1: copyright term under the TRIPS agreement

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of extension is not consistent with the goals of copyright given the fact that authors of existing works do not need the extra twenty years of protection as an incentive for these works. Consequently, the extension is more of a cost imposed on the public. What is important for any country is that the term of protection should provide sufficient time for authors to recoup their investments, while also preserving public interest by facilitating a sustained growth of the public domain.

Annex 1: Copyright term under the TRIPS Agreement

Category of work	Required minimum term of protection (incorporated from Berne Convention Article 7)
Traditional copyright work authored by a natural person	life of the author plus fifty years (Berne Convention, Art. 7(1)).
Collective works	life plus fifty years for each author's contribution. If the selection and organization of the contributions constitute an original expression, the collective work as a whole is also entitled to copyright protection for the life of the author (editor) plus fifty years.
Joint works	life plus fifty years, calculated from the death of the last surviving author.
Anonymous and pseudonymous works	fifty years after the work has been lawfully made available to the public. If the identity of the author is known (despite the pseudonym) or disclosed the term of protection reverts to life plus fifty. (Berne Convention, Art. 7(3)).
Cinematographic works	fifty years after the work has been made available to the public with the consent of the author OR if it is not made available to the public within fifty years of the making of the work, then the term of protection shall be fifty years after the making of the work. (Berne Convention Art. 7(2)).
Photographs and works of applied art	twenty-five years from the making of such a work. (Berne Convention, Art. 7(4)) ¹⁵⁸
Works whose term is calculated other than by the life of a natural person (TRIPS Art. 12)	fifty years from the end of the calendar year of authorized publication, OR if there is no authorized publication within fifty years that the work was made, then the term of protection shall be fifty years from the making of the work.

Note that each of these terms of protection is the minimum required by TRIPS; countries are free to establish longer terms of protection for any of these works.

¹⁵⁸ Recall that countries that are members of the WCT are effectively required to protect photographs for longer than the term in Article 7(4) of the Berne Convention. See WCT, Art. 9, rendering applicable the general term of protection under Article 7(1) of the Berne Convention (i.e. the life of the author plus fifty years). Note that the United States protects eligible photographs for life plus seventy years as does the EC.