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Forever Minus a Day: A Consideration of Copyright Term Extension in South Africa

Andrew Rens and Lawrence Lessig[1]

ABSTRACT: The European Union and the United States have extended their copyright terms from the life of the author plus 50 years to life plus 70 years. They now press a similar extension on developing nations. Term extension has significant costs, especially for developing nations. These costs require careful consideration. One way to significantly reduce these costs is to require registration for the benefit of term extension.

Introduction: Term extension tennis

The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), negotiated and enforced by the World Trade Organisation (WTO), sets the international norm for copyright terms. Article 9.1 requires compliance with the provisions of the Berne Convention, which in article 7.1 sets the life of the author plus 50 years as the general term for works protected under the Berne Convention, and provides for terms of 50 years for certain other categories of work. Article 12 of TRIPS sets 50 years as the minimum term of protection for all works where the term is not calculated based on the life of a natural person.[2]

This minimum threshold, however, does not prevent states from setting a longer term. In the 1990s, certain European jurisdictions extended their basic term, ostensibly to deal with the complications of World War II. Germany and Austria, for example, passed blanket 20-year extensions to all copyright terms, regardless of when the author dies. In 1998, the United States followed the European lead, extending its basic term to life plus 70. The motivation of the United States was said to be harmonisation with its European partners. That explanation is obviously incomplete, as the 1998 law actually increased disharmony in some of the most important categories of works.[3] A second motivation was to avoid the consequences of the

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2 See article 12 of *TRIPS*: "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 term shall be no less than 50 years from the end of the calendar 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 calendar year of making."

3 As the Register of Copyrights, Marybeth Peters testified, the Bill "does not completely harmonise our law with the [EU directive]. In some cases, the US term would be longer; in others the EU terms would be." See *Copyright Term, Film Labeling, and Film Preservation Legislation: Hearings on H.R. 989, H.R. 1248, and H.R. 1734 Before the Subcomm. on Courts and Intell. Prop. of the House Comm. on the Judiciary*, 104th Cong., 197 (1995). See also *id*. at 372 (statement of Prof. Reichman) (noting that CTEA would "unilaterally worsen the existing disparities").

European Union's (EU's) "rule of the shorter term", which, contrary to the non-discrimination principle of Berne, gives foreign copyright holders less protection in Europe than Europeans get if the term of protection in the foreign author's jurisdiction is shorter than the EU term.[4] Both reasons accord with the general view within the United States favouring intellectual property maximisation – the idea that if some intellectual property protection is good, then more and stronger intellectual property protection must be better.

Whatever the reason initially for its extension of terms, the United States has now taken the lead to push for the extension of terms globally. Australia, for example, recently agreed to increase its term from life plus 50 years to life plus 70 years as a consequence of the free trade agreement (FTA) with the US Trade Representative. The Australian Parliament had already dismissed a proposal from local industry interests to increase the term in 2000.[5] This decision was reversed not by Parliament but by government trade negotiators.[6]

South Africa, as part of the Southern African Customs Union (SACU), has recently been engaged in FTA negotiations with the United States (*Business Day*, 2005). The US has once again placed the term of copyright on the negotiating table. As the largest economy in SACU by several orders of magnitude, South Africa is the senior partner in SACU. South Africa has a responsibility to consider the impact of changes to its intellectual property law not only on the majority of previously disadvantaged persons within South Africa but also on the other developing countries in SACU – Botswana, Namibia, Lesotho and Swaziland.

Although Africa imports only a tiny proportion of the cultural goods (the subject of intellectual property rights) in the world, it exports even less.[7] Africa is a net importer of cultural goods, spending scarce foreign exchange resources on them. Extending copyright terms may tend to increase this imbalance. South Africa's economic role in Africa and leadership in the African Union (AU) raise a domestic decision to continental importance. South Africa is subject to economic pressure presciently predicted 10 years ago:

> *As the United States and members of the European Union are South Africa's most important trading partners, it may well be that South Africa will also eventually extend its copyright protection terms to 70 years from the death of the author (Wendland & Baillee, 1996: 167).*

While the FTA negotiations have been discontinued (*Business Day*, 2006), the same issues will arise in future rounds of talks, and South Africa will once again have to consider the US demand to increase terms. It will have to weigh carefully the cost of the American

4 See Goldstein, P (2001) *International copyright: Principles, law, and practice*, § 5.3 at 239.

5 See www.ipcr.gov.au/, accessed 15 October 2005.

6 See www.dfat.gov.au/trade/negotiations/us.html, accessed 15 October 2005.

7 According to UNESCO (2005), Africa imports only 1% of the cultural goods in the global market, but exports even less, 0.4%; from UNESCO (2005) *International flows of selected cultural goods and services, 1994-2003*, UNESCO Institute for Statistics, Montreal: Figure 5 on p. 23 and Figure 5 on p. 21.

proposal. Even if term extension cannot be avoided, there are obvious ways to minimise its cost. In this article, we introduce one such way.

The South African context

The current term of copyright in South Africa for literary, musical, and artistic works is the life of the author plus 50 years.[8] The term is 50 years for cinematographic films, photographs, computer programs, sound recordings, broadcasts, programme carrying signals, published editions, and anonymous and pseudonymous works.[9]

As Owen Dean, an intellectual property lawyer, writes, the term is already generous, particularly when compared to the terms for patents (20 years) and trademarks (15 years):

> *The period afforded to the owner of copyright in a work for controlling the use of his work and deriving remuneration from it – in other words the duration of copyright – is a very generous one (Dean, 2003).*[10]

Patents and trademarks, unlike copyright, also require registration for any intellectual property right to exist.

The rationale for intellectual property generally, and copyright in particular, is to increase the availability and quality of creative endeavours for the common good. Copyright and patent statutes create a set of exclusive rights that allow commercial exploitation of the creation for a limited period. These exclusive rights are intended to act as incentives to creativity, as a potential reward for works. They are also intended to operate as a mechanism that allows those engaged in creativity, whether musicians or inventors, to garner a livelihood from creativity, thus allowing them to devote themselves full-time to creative endeavour.

The objective of these statutory monopolies is that society benefits from the creative activity the statutes are meant to support. The statutory monopoly is notionally a limited monopoly, limited in scope and in duration. The scope of copyright is limited by fair dealing and the general exceptions.[11] What is not often realised is that the scope is also limited to the rights listed in the statute – other uses of the work are not regulated and anyone can do them freely. So no one requires permission to read a book, or to read a book aloud, or to write in the margins of her own book, or even to burn her own book. Also, the exclusive rights apply only to acts done to the whole or a substantial part of a work. For example, any copying which is of less than a substantial part of a work is not an infringement. It does not require a fair dealing exception. It is simply free.

8 Section 3(2)(a) of the *Copyright Act 98* of 1978. Works that are not available during the author's lifetime are subject to copyright for 50 years from publication (s 3(2)(b)).

9 *Copyright Act*, s 3(2) (b)- (f).

10 See Dean (2003: 1-31).

11 *Copyright Act*, ss 12-19B.

When the term of copyright expires, a work becomes part of the public domain. Anyone may then make any use of it without the author's permission. The public domain is the repository of the collective creative endeavours of humanity. Copyright exists to generate new work for the public domain.

Unlike patents and trademarks, the exclusive rights given by copyright arise as soon as an original work is created. This happens at any time that anyone makes any work that is "original" in any material form. Original in this context just means that it is the result of independent effort. Material form includes digital data.[12] So as soon as anyone makes something that is not a mere copy of someone else's work, an idle doodling on a page, for example, the law immediately gives that person a whole range of rights in that work, and prohibits other people from using the work. These extensive rights arise automatically and without any formalities. Some uses of the doodle could result in criminal penalties. Under the current system, if the doodle is made by someone who is 25 at the time the work is made, it will be protected until the creator's death, let us say at 75, and then another 50 years – an automatic 100-year monopoly.

How did South Africa, a developing country struggling with massive adult illiteracy (16% of the population, some seven million people, have had no schooling),[13] with profound unemployment and development issues to contend with, acquire its copyright regime, including the current extensive term? As with so many other largely unexamined aspects of South African society, South Africa was given its copyright regime by its colonial masters.

The first law to grant copyright in South Africa was a Batavian Republic statute in 1803 when the Dutch governed the Cape Colony. A little later the Transvaal and Free State Republics acquired their own instruments, copied from European precedents, as did the British colonies of the Cape and Natal.

In 1911, Britain passed a copyright statute – the Copyright Act of 1911, which became known as the Imperial Copyright Act, as it was passed, at least in part, to protect the rights of British authors in the colonies. The Act was also intended to enact the provisions of the Berne Treaty agreed at the Berlin Conference in 1907. This Act applied directly to the imperial Dominions including South Africa.

These imperial acts followed a long tradition of copyright in Britain. That tradition was initially motivated by a strong desire to limit the scope of publishing monopolies. The first copyright statute in England, the Statute of Anne of 1710, aimed to restrict the effective term of copyright. Before that statute, publishers believed they had a perpetual right to

12 *Copyright Act*, s 2(2).

13 A further 37% of South Africans have not completed secondary school (16 million people). See *Census 2001: Key results*, http://statsa.gov.za/census01, accessed 17 February 2005.

control the publication of their works. After the Statute of Anne, that control was to be limited. It took 64 years before the express limits within the Statute of Anne were confirmed by the House of Lords. But when they were, for the first time in British history, works entered a public domain.

Many of the provisions of the current South African legislation are ultimately descended from the 1911 British Copyright Act, which was formally incorporated into South African law by the South African Patent, Trademarks, Designs and Copyright Act 9 of 1916. Subsequently, the Copyright Act 63 of 1965 closely followed the Copyright Act 1956 in the United Kingdom. The current Copyright Act 98 of 1978 was passed by the apartheid government. Although it has been amended nine times, these amendments have been largely technical amendments, primarily in response to international developments.

The most astonishing feature of the current copyright regime in South Africa cannot be found anywhere in the text of the Act. The history and policy debates around the Act are utterly oblivious to the urgent issues of illiteracy, semi-literacy and unemployment which burden millions of South Africans.

In contrast to other former colonies, the United States, upon independence from Britain, did not grant copyright to works protected by the imperial power, or any other foreign power. The United States law instead protected only maps, charts, and books authored in the United States, and then only for a brief 14 years, with a possible 14-year extension.[14] This protection extended to works by Americans only. Until 1891, the United States did not extend copyright protection to foreign authors at all. In this sense, the United States was born a pirate nation. It justified its piracy on the basis of its status as a developing nation.

The costs of term extension

Copyright creates obvious benefits. By giving creators an exclusive right to exploit their creative work, copyright produces incentives to create that the market otherwise would not provide.

These incentives are fundamental to the growth and spread of culture. Obviously, many would create whether or not there was copyright protection. But equally obviously, some would not. Some creators require the opportunity economically to exploit their creative work – for without that opportunity, they could not afford the costs of creation. A filmmaker, for example, creating a US$2 million film ordinarily needs an opportunity economically to exploit that work, if only to cover the costs of producing that film. If competitors could simply take her creative work, copy it, and sell it, the creator's opportunity to recover costs would be reduced. Copyright is thus a promise to the creator to give her a chance to exploit her work, so as to give the creator an incentive to create.

Such incentives, however, obviously only operate prospectively. We cannot give an

14 See *Act* of 31 May 1790, § 1, 1 Stat. 124.

incentive today to produce creative work yesterday. Thus, any incentive-related gains from copyright are prospective only.

But copyright also creates cost. As with any monopoly right, copyright restricts the flow of information, and artificially elevates the cost of information and culture. The aim of any rational copyright policy must be to balance the costs against the benefits.

Term extension has its own mix of benefits and costs. These differ substantially depending upon whether the extension applies to existing copyrighted works or to future works only.

If the extension applies prospectively only, then both the present benefits and present costs are slight. This is because both the benefits and the costs will be borne many years in the future, and properly to reckon those benefits and costs, the costs and benefits must be discounted. In the current South African context, the United States is demanding that South Africa extend its term from life plus 50 years to life plus 70 years. The present benefit of that extension is the added incentive to create that the extension would produce.

That benefit is tiny. As Justice Stephen Breyer estimated in *Eldred v Ashcroft*,[15] "a 1% likelihood of earning [US]$100 annually for 20 years, starting 75 years into the future, is worth less than seven cents today." This is because the value of money in the future is less than the value of that money today. Likewise could we calculate the expected costs of the extension, but for our purposes, we will assume that those costs are zero.

If the extension applies to existing copyright, however, the calculus is very different. Again, in the current South African context, a term extension of existing works would reach back to 1956 at least. For works from that period that continue to be commercially available, the benefit to the copyright owner is simply the present value of those royalties for 20 years into the future. So, for example, at a 5% discount rate, a 20-year royalty of US$1,000 a year is worth about US$12,500 today.

The benefits from an extension of existing copyright (to the copyright owner, at least) are, therefore, quite substantial. So, too, are the costs. For in addition to taxing the public for the increased royalties that it otherwise would not have paid, term extension of existing copyright substantially inhibits access to works that are not currently commercially available. The vast majority of work created 50 years ago is no longer commercially accessible. Yet term extension would burden access to these works by requiring anyone who would use, or remix, these works to secure permission from the author. But again, because the work is not commercially available, it is extremely costly to locate the author (or, of course, her successor in title). So the vast majority of these works are "orphaned" by term extension.

There are obviously other costs as well. Term extension extends the monopoly over a particular creative work. Those monopolies keep the cost of such creativity above competitive prices. They also continue the need for expensive licensing of creative work.

They finally restrict the opportunity to produce competing editions, or versions, of popular creative works. As a quick visit to Amazon.com will attest, there are many editions of works in the public domain very competitively priced. Works still under copyright do not offer such range or savings.

These costs are particularly significant in the South African context. Term extension for existing works significantly interferes with the ability of society to make transformative use of works. A particular set of transformative use involves challenging hegemonic accounts of history and life through rewriting archetypal narratives. The genre of re-appropriative works is important to any open society but vitally important to a newly free society such as South Africa still struggling with the legacy of apartheid.

JM Coetzee's *Foe*, a rejoinder to Daniel Defoe's *Robinson Crusoe*, illustrates how this strategy engages the past. It subverts the colonial myth of the benevolent master and "Man Friday", an archetypal noble savage. In *Foe*, Friday's tongue is cut; he cannot speak and tell his own tale, symbolising the silencing of alternative discourses by the dominant colonial narrative. Coetzee could write the novel without fear of a copyright suit, as *Robinson Crusoe* was published in 1719, and Defoe died in 1731, long before current lengthy copyright terms.

There are, however, many works still under copyright which tinge colonialism and even life under apartheid with nostalgia. Rudyard Kipling and Rider Haggard manufactured archetypes of bold white adventurers and loyal native servants, a tradition continued by some writers still alive at present, such as the London-based South African author Wilbur Smith. How long will it be before contemporary works are available for appropriate rejoinder? Term extension threatens unduly to delay the urgent reworking of hegemonic discourses in a society still shaped by colonial and racist oppression. Critical engagement with the founding stories of society helps create a substantively democratic and egalitarian culture (Saint-Amour, 2003: 207-220).

This difference in the benefits and costs of prospective term extension, and the extension of existing terms, is a clue to the real motivation behind these extensions. In the United States, in particular, copyright holders for many old works pushed to extend the term of existing copyrights. By contrast, there was no one seriously arguing that extending terms prospectively would increase present incentives.

A compromise – renew only if register

Extending existing copyright terms benefits a small minority of existing copyright holders; it significantly burdens the rest of society. That burden invites policy makers to explore alternatives that might mitigate some of this harm. We propose a simple technique to minimise the harm from extending existing terms: the only works whose terms can be extended are those that register to secure the benefit of that extension.

Just such a compromise – that any extension should be limited to those copyright holders who take steps to claim the extension – is being debated by Westminster in the UK.[16]

Under this rule, authors of existing works seeking to benefit from an extension of term must take affirmative action to secure that benefit. A simple registration with a token fee would be enough to separate works needing the benefit of a longer term from works that do not. And as the vast majority of works have no continuing commercial life, there would be relatively few registrations to consider.

Such a proposal does not deprive authors of anything they otherwise would have had. In fact, the proposed extension would grant authors a 20-year term they otherwise would not have had. A simple registration is hardly a burden to demand in exchange for these additional 20 years. Nor would the proposal deprive future authors of any right, as it applies only to copyrights of works already in existence.

This slight modification would then significantly narrow the burden of term extension, while not depriving those who would otherwise benefit of any substantial right. It would also significantly expand the range of works in the public domain. In the United States, when re-registration was a requirement, up to 90% of certain kinds of works were never reregistered. For those works, the relatively trivial burden of registration was greater than the value of an extended copyright term.

This proposal raises a question under Berne, but we believe that question is easily answered. Berne forbids formalities operating as conditions to minimum copyright protection. The requirement of registration to get the benefits of an additional 20-year term might be thought to contradict that requirement. But this requirement applies to secure the benefit of copyright protection that is beyond the minimum required by TRIPS and Berne. The requirement could, therefore, not deprive any author of the minimum protection required by Berne. Alternatively, it is possible to except foreign works from the registration requirement. That would still enable a significant number of South African works to enter the public domain, without raising any question under international law.

Registration is not foreign to South African law. The 1916 Copyright Act, for example, had a registration provision. When a work was registered it created a presumption of notice that the work was under copyright. In any dispute about copyright, the person accused of infringement could claim that she did not know the work was subject to copyright, nor could she reasonably have known that. Registration prevented people from raising this defence, because they were presumed to have known. Since copyright was primarily aimed at potential re-printers of books rather than ordinary people, registration did not impose too heavy a burden on ordinary users of works.

16 See Lessig (2006) Those sensible British, *Lessig blog*, 18 May, www.lessig.org/blog/archives/003403.shtml

Recent statutes have also relied upon registration provisions. The Copyright in Cinematograph Films Act 62 of 1977 currently allows registration for the additional benefit of evidence – registration constitutes *prima facie* evidence that the registrant is the owner or licensee of copyright in the cinematograph film.[17] It does not require registration for the vesting of copyright but rather for the benefit of proof.

In both these instances, registration is required to obtain an additional benefit of protection. In the same vein, the registration requirement we have proposed would enable an author or her successors in title to secure a benefit beyond the benefit originally promised.

Such a registration system could exploit the efficiencies of digital technology to lower the burden of registration significantly. Just as the Internet's domain name system has created competing registrars who feed a single domain-name registry, a system of copyright registration could permit many different registrars to compete to provide low-cost registry services to authors. Some of these registrars could provide web-based registration services. Others could offer paper-based registration that would be aggregated electronically. In either case, the system should not be expensive, and in no case need it be complex.

Registration need not impose a significant burden either on limited government resources or on those with an interest in registering works for an extension of copyright term. An online registration process would reduce costs. CIPRO, the South African government agency that registers patents and trademarks, is already in the process of transition to an online registry. Registration of copyright for term extension would simply require another online register and a marginal increase in the costs.

One possible criticism of requiring registration for term extension is that it is precisely the most marginalised persons in South African society for whom even the barest formalities will pose the most significant barrier. The works that are due to expire, and thus are in need of registration, are most likely to be owned by corporations, especially international corporations. Due to the same historical processes which disadvantaged many South Africans, there are few instances in which previously disadvantaged people hold copyright in works due to expire. In those few instances where historically disadvantaged persons hold copyright about to expire, it can be argued that the works in question are of such cultural importance that available non-profit resources will ensure their protection.

Conclusion

Copyright is regulation. As with any regulation, it imposes costs. As with some, it creates benefits. But as with any regulation of speech, it is important that legislators narrowly tailor such regulation to avoid unnecessary burdens on speech.

17 *Copyright in Cinematograph Films Act* 62 of 1977, s 31

The push by the United States to secure longer terms for copyright in South Africa is driven primarily by the interests of American authors. Whether those interests are legitimate or not, we have proposed a simple qualification to term extension that would substantially reduce its burden.

Developing nations are particularly burdened by overly extended intellectual property laws. South Africa could provide an example to the world of a way to reduce this burden without blocking the objective of authors to secure a longer copyright term. ❑

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