

TACD

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Resolution on the Terms of Protection for Copyright and Related Rights, and Measures to Expand Access to Works not Exploited by Copyright Owners

Introduction

The members of the *Trans Atlantic Consumer Dialogue* (TACD) agree that policy makers should reject excessive terms of protection for copyright and related rights, and consider measures to mitigate or overcome harm from long terms of protection. The recommendations below concern the term of protection, as well as the use of systems of registration to limit the works subject to protection, and the role of exceptions to copyright and related rights to expand access to works that are not being actively exploited by copyright owners. A series of recommendations are presented, followed by an elaboration of the context and rationale for the recommendations:

RECOMMENDATIONS

1. The EU and the US should implement copyright and related rights with terms for protection that do not exceed that required by the WTO TRIPS Agreement.
2. In cases where the EU and the US consider terms of protection that exceed WTO TRIPS requirements, the evaluation must start with a thorough, objective, and peer reviewed assessment of the costs and benefits to society as a whole.
3. For countries that have previously extended terms of protection for works protected by Article 9-13 of the TRIPS agreement beyond the terms required by the TRIPS agreement, such protection should be converted to a supplementary system of protection. As a supplementary regime the extended term would not be constrained by the Berne or Rome Convention requirements concerning registration obligations or Berne, Rome or TRIPS three step tests. The features of the extended term will of course be constrained by domestic law, and possibly other obligations. In implementing extended terms as a supplementary protection regime, TACD recommends the following features be incorporated, to the extent that such features are consistent with domestic legal traditions and can be resolved through negotiations regarding non-TRIPS trade agreements, including but not limited to Europe Union Directives or bilateral or regional Free Trade Agreements.

Mandatory Features of the Supplementary Regime

- (a) The regime for the extended term shall include limitations and exceptions to rights that are at least as supportive of access to knowledge as exist for copyrighted and related rights works;
- (b) The regime for the extended term shall require that protection is based upon the registration of the work and the inclusion of a notice of an extended term of

protection, identifying the right owner and the date the work will enter the public domain.

(c) Works must be subject to an obligation for deposit in an archive in a format that will ensure public access after the expiration of the extended term of protection.

(d) The extended term of protection should have provisions allowing states to introduce appropriate non-voluntary remuneration schemes that advance innovative uses of knowledge goods in other areas.

(e) The regime for the extended term shall be subject to additional public interest measures that promote access to knowledge, including additional limitations and exceptions to rights, obligations to support public knowledge goods, or include special provisions to protect the rights of authors or performers.

Optional Features of a Supplementary Regime

(f) Among the specific measures for obligations, limitations or exceptions for protection of works in the extended term, or changes in modalities, taking into account also domestic legal constraints, TACD recommends consideration be given to the following optional features for the supplementary regime:

(i) Owners must actively exploit works.

(ii) Where works were created by individuals, the right to use the extended protection should revert back to the creative persons who authored or performed the work, or their heirs.

(iii) The extended term of protection would not apply to use in documentaries, education, non-profit archives, or scholarly use.

(iv) The extended term of protection should not apply retroactively, but only progressively for works whose term of protection has not expired.

(v) The extended term of protection should not be granted when the creator of a work is dead.

(vi) The extended term of protection would not apply for any work for which the individual authors have alienated all economic rights, such as works created as a work-for hire or as a corporate authorship, in countries where such systems exist.

(vii) The works subject to the extended term of protection that are commercially exploited shall be subject to requirements that rights holders contribute money to funds created to benefit authors or performers, support live performances of works, to acquire works or licenses to use works that can be dedicated to the public domain, or for other public interest purposes.

4. The EU and the US should undertake a study to examine the extent and ways that systems of copyright and related rights registration can be implemented within the current framework of WTO TRIPS obligations, and the benefits of doing so, in terms of expanding access to works not exploited by copyright owners.

5. For protected works that are not commercially exploited, the EU and the US should evaluate mechanisms to allow use without the permission of the right owners,

including uses that would be appropriate as an exception to exclusive rights under Articles 13, 14 or 40 of the TRIPS Agreement, or under the considerable flexibilities of TRIPS Articles 44.1 and 44.2, to limit remedies for unauthorized uses of works.

6. The EU and the US should not adopt provisions in ACTA or other trade agreements that reduce the flexibility of governments to permit uses of works without authorization from right owners. In this regard, in particular:

- (a) Provisions regarding the granting of injunctions for unauthorized uses should not undermine the current flexibilities in Article 44 of the TRIPS Agreement,
- (b) Provisions regarding damages should not undermine alternative systems of remuneration for copyright owners or measures to expand access to orphan works.

7. These recommendations are without prejudice to questions of moral rights.

BACKGROUND DOCUMENT

The following provides background and context of the TACD recommendations on the term of protection for copyright and related rights, and measures related to access to works not exploited by right owners.

Excessive Terms of Protection are Harmful

1. Excessive terms of protection for copyright and related rights shrink the public domain, threaten consumers' access to knowledge and hinder production and innovation by creative communities.
2. TACD notes that both the EU and the US have extended the term of copyright beyond that required by the WTO TRIPS Agreement or the 1996 WIPO Copyright Treaty, and that some members of the EU and the US have extended copyright or related rights terms beyond that required by the 1996 WIPO Performances and Phonograms Treaty. Moreover, there are proposals in the EU to further extend the terms of protection for sound recordings.
3. There is no economic justification for a term of protection that extends beyond the time necessary to provide incentives to create and distribute works. There are strong economic justifications to eliminate restrictions on uses of works when the owner ceases to exploit them.
4. Longer terms for protection are not self-evidently better protection, particularly when the social costs of extended terms far outweigh the benefits even to right owners. These social costs include the dead weight loss associated with high prices, the use of unnecessary, costly and inefficient distributions systems for protected works, barriers to accessing works that are out of print or not commercially exploited, restrictions of the re-use and re-purposing of works, and copyright related restrictions of speech and expression. These harms concern everyone, and retard development. The harm is more acute for lower income and socially vulnerable populations.
5. Extensions of terms of protection are an inefficient and harmful way to address the legitimate interests of creative communities regarding moral and material interests in works, particularly when compared to other options such as ensuring fair modalities for the transfer of rights, and the development of new business models to remunerate copyright owners.

Works Not Exploited by Copyright Owners

6. The vast majority of protected works are either not exploited by the owner, or are classified as orphaned works, where it is impossible to even locate the owner. Consumers and creative communities are both harmed by the lack of access to such works.

Registration of Works

7. Prior to the United States joining the Berne Convention, copyrighted works that were not registered with the U.S. Library of Congress entered the public domain. Many experts believe that it is a mistake to extend protection to all works, regardless of copyright registration, and that this practice has dramatically expanded the number of protected works to include countless works that are not actively exploited by copyright owners, including those for which it is difficult to establish ownership, or where it is difficult to know when terms of protection have expired.
8. Article 5 of the Berne Convention for the Protection of Literary and Artistic Works places certain restrictions on government obligations to comply with formalities. The Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, which has been adopted by the members of the EU, has no such restrictions.
9. The Berne restrictions on formalities do not rule out systems of registration for copyrighted works, as evidenced by the existence of a copyright registration system in the United States. The Berne restrictions do not apply to the term that exceeds that required in the Berne Convention for copyrighted works, if the extended period of protection is fashioned as a right that is separate from the rights created by the Berne Convention.¹

Remedies for Uses without Authorizations from Right Owners

10. TACD notes a US library of Congress Copyright Office report recommended a system of access to orphan works that was based in part upon limits to right owner remedies for unauthorized uses, including in particular limitations on the use of injunctions and compensation for unauthorized use.
11. TACD notes the neither the Berne Convention nor the Rome Convention provide specific obligations regarding the enforcement of rights.
12. TACD notes the WTO TRIPS Agreement sets standards for enforcement of copyright and related rights.
13. TACD notes the EU and the US are engaged in several non-transparent negotiations on intellectual property enforcement, including a proposed Anti-Counterfeiting Trade Agreement (ACTA), which deal extensively with the enforcement of copyright and related rights, including the specific areas that have been considered as part of a system for access to orphaned works.

¹ A useful analogy is the case in some countries for the period of extended protection that is given the pharmaceutical drugs that experience long delays in regulatory approval, or which benefit from *sui generis* forms of protection, such as the exclusive rights to rely upon drug registration data, or market exclusivity under the US or EU orphan drug legislation.