DEATH OF A COPYRIGHT

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The four primary bodies of intellectual property law—patent law, copyright law, trademark law, and the law of trade secrets—address the question of duration in different ways. Trade secrets have no fixed duration; the law protects against misappropriation as long as the relevant information remains secret.[1] Trademark protection lasts as long as the mark retains its capacity to distinguish the goods or services it is attached to.[2] In patent law—my primary area of scholarship—duration is fixed, finite, and generally straightforward to determine: you get twenty years from the date you file your patent application.[3] Copyright duration, by contrast, varies depending on the rather glum circumstance of when the author dies: under U.S. law, most copyrights expire seventy years after the author expires.[4]

Despite the different ways in which patent law and copyright law calculate duration, the legal rules in both areas share an affinity in that they are, arguably, arbitrary at best and misguided at worst. In patent law, the primary reason for the twenty-year term is to comply with the United States' obligations under the TRIPS Agreement.[5] But that term is probably too long for technologies that quickly become obsolete, particularly computer-related inventions.[6] It is, however, potentially too short for inventions that require massive upfront

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[1] *See* UNIF. TRADE SECRETS ACT § 1(4) (UNIF. LAW COMM'N 1979) (amended 1985) (defining "trade secret").

[2] *See* 15 U.S.C. § 1127 (2018) (defining "trademark").

[3] 35 U.S.C. § 154(a)(2) (2012).

[4] 17 U.S.C. § 302(a) (2018). Not *all* copyright terms turn on the length of the author's life. Most notably, the copyright on a work made for hire expires ninety-five years from first publication or 120 from creation, whichever is shorter. *Id.* § 302(c).

[5] *See* Agreement on Trade-Related Aspects of Intellectual Property Rights art. 33, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (mandating minimum term of twenty years from date inventor filed patent application). For U.S. patents with applications filed before June 8, 1995, some of which remain in force today, the term is either twenty years from filing or seventeen years from issue—whichever is longer. *See* 35 U.S.C. § 154(c)(1) (2012).

[6] *See* Pamela Samuelson et al., *A Manifesto Concerning the Legal Protection of Computer Programs*, 94 COLUM. L. REV. 2308, 2345 n.134 (1994).

investment or encounter regulatory delays in getting on the market, such as pharmaceuticals.[7]

As for copyright, the term lasted fourteen years under the English Statute of Anne (which was the template for the United States' first copyright statute), and it could be renewed for another fourteen years if the author was still alive. That fourteen-year term came from the first English *patent* statute, the Statute of Monopolies, which set a fourteen-year term, apparently because fourteen was double the traditional apprentice term of seven years.[8] Since then, because of aggressive lobbying by the content industries, the term of copyright has gradually increased to the life-plus-seventy model we have today.[9] But whatever the current duration, there is no reason to think that a fourteen-year term—as opposed to a seventy-year term, a hundred-year term, or maybe even no copyright law at all—is the socially optimal way to incentivize the creation of original works of authorship.[10]

The main objective of Abraham Drassinower's fascinating article on copyright duration, however, is not to determine the precise term of copyright that would maximize social welfare.[11] Given the constraints of a single law review article, this is a wise decision. In patent law, figuring out optimal duration is almost impossible in the abstract because of the different functions patents play in different technological industries.[12] A similar consideration holds in copyright, where incentives vary greatly among the different types of authors who might claim the benefits of copyright protection.[13] Drassinower's concern is instead conceptual: he examines the distinctive way in which copyright law determines duration—by tying it to the author's death—and considers what that tells us about copyright law as a "juridical order."[14] Put in my own words, Drassinower is asking whether death's key role in defining the temporal scope

[7] For this reason, Congress has created patent term extensions that at least partially offset delays in the Food and Drug Administration's approval process. *See* 35 U.S.C. § 156.

[8] Oren Bracha, *The Adventures of the Statute of Anne in the Land of Unlimited Possibilities: The Life of a Legal Transplant*, 25 BERKELEY TECH. L.J. 1427, 1466 (2010).

[9] *See* Jessica Litman, *Mickey Mouse Emeritus: Character Protection and the Public Domain*, 11 U. MIAMI ENT. & SPORTS L. REV. 429, 431 (1994).

[10] *Cf.* WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW 210 (2003) (suggesting copyright regime in which there is no set term but "short fixed terms renewable as many times as the copyright owner wants if he is willing to pay a renewal fee").

[11] *See generally* Abraham Drassinower, *Death in Copyright: Remarks on Duration*, 99 B.U. L. REV. 2559, 2561 (2019).

[12] *See* DAN L. BURK & MARK A. LEMLEY, THE PATENT CRISIS AND HOW THE COURTS CAN SOLVE IT 57 (2009).

[13] *See* Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281, 321 (1970); *see also* LANDES & POSNER, *supra* note 10, at 422 ("[T]here is no basis for confidence that the existing scope and duration of either patent or copyright protection are optimal.").

[14] Drassinower, *supra* note 11, at 2564.

of copyright as a matter of *doctrine* can illuminate the foundational *policy* values of the copyright system.

Drassinower thinks the answer to that question is plainly "yes," and he presents his argument in two steps. First, Drassinower asserts, "[T]he presence of death in duration evidences the *personal nature* of the link between author and work in copyright law . . . ."[15] Drassinower sees that intimate connection manifesting primarily in copyright law's originality requirement, which makes legal protection turn on whether the author has independently created a new work and bars protection for works that are merely copied from preexisting materials.[16] But you can also see the personal nature of copyright in the law of duration itself, particularly when contrasted with duration rules in patent law. Unlike in patent law, where every inventor gets the same fixed term,[17] copyright terms can vary by several decades from one work to another depending on a unique, personal attribute of the author: the author's date of death.

After establishing the personal link between author and work, Drassinower turns to the second—and more provocative—step of his argument: that the personal nature of the copyright "mandates that an author's copyright *end with [the author's] death*."[18] If this normative claim is correct, copyright laws all over the world would have to be rewritten—to say nothing of the foundational Berne Convention for the Protection of Literary and Artistic Works.[19] That agreement, to which over 150 nations are signatories, requires that copyrights extend for, at minimum, the life of the author plus fifty years for most works.[20]

Shortening the term of copyright protection is legally and politically infeasible, as I think Drassinower would readily acknowledge. But, as his article shows us, we can nevertheless learn a lot about the ontology of copyright from the crucial role death plays in determining duration. Appropriately for this symposium honoring the work of my colleague, Wendy Gordon, the jumping-off point for Drassinower's analysis is Gordon's seminal article, *A Property Right in Self-Expression*, which engages the writings of John Locke to develop a theory of copyright that simultaneously justifies and limits the author's

[15] *Id.* (emphasis added).

[16] *See id.* at 2564-65.

[17] There are, of course, ways for patentees to have their terms extended for delays in examination or regulatory approval for pharmaceutical drugs, but the twenty-year default term is the same for everyone. *See supra* note 7; *see also* ROBERT PATRICK MERGES & JOHN FITZGERALD DUFFY, PATENT LAW AND POLICY 69-70 (7th ed. 2017) (summarizing statutory mechanisms of patent term extension).

[18] Drassinower, *supra* note 11, at 2564 (emphasis added).

[19] *See* Berne Convention for the Protection of Literary and Artistic Works art. 7, Sept. 9, 1886, S. TREATY DOC. NO. 99-27, 1161 U.N.T.S. 3.

[20] *Id.* Two notable exceptions are that motion pictures need only be protected for a minimum of fifty years from publication and that photographic works need only be protected for a minimum of twenty-five years from creation. *Id.*

entitlement to exclusive rights.[21] Similarly, Drassinower, extending the argument of his recent book, *What's Wrong with Copying?*,[22] draws on the thinking of Immanuel Kant to develop a rights-minimalist theory of copyright duration that views a work of authorship not as a "thing" but as a communicative act that connects audience and author.[23]

Though Gordon's article mainly viewed copyright law through the lens of Lockean natural rights, her conclusion importantly observed that our law, particularly our copyright law, is animated by considerations of economic or utilitarian consequentialism in addition to natural rights.[24] Rereading Gordon's iconic article alongside Drassinower's new article, I wondered whether it would be useful for Drassinower to briefly engage with other analytical models that might assist in critiquing copyright duration. After all, there are numerous utilitarian reasons for extending copyright for at least some period beyond the author's death, if not for the fifty or seventy years that prevail in various countries today. For instance, extending the copyright term beyond death might provide important incentives for older authors. The author who knows that the copyright will not pass on to the author's heirs might not be nudged to write that final (perhaps great) work late in life.[25]

Another justification for extending copyright beyond death that sounds in economics or utilitarianism is predictability. Adding a post-death term ensures a minimum number of years of copyright duration for all works of authorship, rather than having copyright terms ranging from, say, a few days (for the author who is unfortunate enough to die shortly after the work is created) to several decades (for the particularly youthful author).[26]

Drassinower may well shake off these arguments; he is clearly challenging the entire, dominant notion that copyright law can be understood and justified only through empirical considerations about how legal rules affect social

[21] *See generally* Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533 (1993).

[22] ABRAHAM DRASSINOWER, WHAT'S WRONG WITH COPYING? 85 (2015).

[23] *See generally* Drassinower, *supra* note 11.

[24] *See* Gordon, *supra* note 21, at 1607-08.

[25] Two famous examples of authors whose breakout works were published very late in life are Frank McCourt, who published his first book, the memoir *Angela's Ashes*, when he was sixty-six years old (he died a decade later), and Anna Sewell, who died a mere five months after her only novel, *Black Beauty*, was published. All of this, of course, assumes that copyright does in fact provide an incentive to create new works and that the author is not motivated entirely by noneconomic incentives. Tackling that issue is beyond the scope of this short paper, but for a detailed analysis of the complex motivations of creative individuals, see JESSICA SILBEY, THE EUREKA MYTH: CREATORS, INNOVATORS, AND EVERYDAY INTELLECTUAL PROPERTY 36 (2015).

[26] Here's hoping that, under Drassinower's model, the copyright in this paper will last a long, long time.

welfare.[27] Still, sketching out the utilitarian calculus, as Gordon did in the conclusion of her article, would make Drassinower's argument in favor of limiting duration more persuasive to readers whose preferred methodology is not Lockean or Kantian, or who are not self-professed rights minimalists, as Drassinower acknowledges he is. Indeed, the incentive theory of copyright has been vigorously attacked in legal scholarship grounded in economics,[28] so engaging that literature would likely only strengthen Drassinower's contention that post-death copyright is unjustified.

Though Drassinower's normative argument for limiting copyright duration is the most provocative aspect of his article, his descriptive claim that death's role in determining duration creates a "personal link" between author and work merits reflection as well. There is a significant Hegelian personhood perspective in Drassinower's description of copyright as a "communicative act" that makes the author inseparable from the authored work.[29] Very briefly stated, Georg Hegel's theory of property suggests that individuals can become so "bound up" with things that the loss of those things can inflict more than economic damage.[30] Although Drassinower's article discusses Locke and Kant, it mentions Hegel only in passing.[31] Yet a closer analysis of Hegel's work might further support Drassinower's argument for limiting duration, as a Hegelian perspective would emphasize that legal protection is justified by the personal nature of the claimed right.[32] A corollary of that theory, as applied to copyright duration, might be that legal protection must *end* alongside *the person* claiming (or creating) that right.

In addition, although Drassinower makes a persuasive case that author and work are inseparably connected through many doctrines of copyright law, including originality and duration, there are numerous counterexamples that might be usefully engaged. For instance, federal law vests the copyright in works made for hire—that is, works made by an employee within the scope of employment—in the employer.[33] How inseparable is the connection between author and work, really, when the author is creating the work entirely at the behest of someone else? Tellingly, federal law does not tie the expiration of

[27] *See* Shyamkrishna Balganesh, *The Immanent Rationality of Copyright Law*, 115 MICH. L. REV. 1047, 1049 (2017) (reviewing DRASSINOWER, *supra* note 22).

[28] *See* Deven R. Desai, *The Life and Death of Copyright*, 2011 WIS. L. REV. 219, 255-58 (challenging notion that post-death term of copyright provides incentives to create or continue to develop works). Desai's work also cites scholarship challenging the incentive theory more broadly. *Id.*

[29] Drassinower, *supra* note 11, at 2573, 2579.

[30] *See generally* Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 1005 (1982).

[31] *See* Drassinower, *supra* note 11, at 2573.

[32] *See* Radin, *supra* note 30, at 1005 ("[I]f some object were so bound up with me that I would cease to be 'myself' if it were taken, then a government that must respect persons ought not to take it. If my kidney may be called my property, it is not property subject to condemnation for the general public welfare." (footnotes omitted)).

[33] 17 U.S.C. §§ 101, 201(b) (2018).

copyrights in works made for hire to the author's death, arguably severing any link between the person who created the work and the duration of the copyright.

Also, what about works published only posthumously? Under Drassinower's model, those works would receive no copyright protection at all because the author is already dead. Yet many works that authors refrain from publishing during their lifetimes, such as private letters and journals, are among the most intimate forms of expression that exist.[34] If copyright is inherently personal, then why deny protection to those intensely personal works?

None of these comments should be understood to detract from the important contribution of Drassinower's article. His scholarly approach—trying to understand, justify, and possibly reform copyright law through close readings of the doctrines themselves—is novel and engaging. By taking doctrine seriously, Drassinower's work leads to invigorating theoretical insights and presents normative challenges to basic legal rules that we often take for granted—here, that copyright should be descendible upon the author's death.

[34] For just two examples, see EMILY DICKINSON, SELECTED LETTERS (Thomas H. Johnson ed., 1971) and FRANZ KAFKA, LETTERS TO MILENA (Willi Haas ed., Tania & James Stern trans., 1953).