

It's alive! The public domain starts breathing again

[Baker Donelson - USA](#)
[E Scott Johnson](#)

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Until 1999, thousands of literary, artistic, dramatic and musical works fell into the public domain each year when their US copyrights expired. However, in 1998 the flow of works entering the public domain was halted by the Sonny Bono Copyright Term Extension Act 1998, which extended the duration of US copyrights by 20 years. That moratorium will end at midnight on December 31 2018, so that on January 1 2019, thousands of songs, books and other protected works first copyrighted in 1923 (and renewed) will enter the public domain. Each year thereafter, more works will enter the US public domain where they may be copied, distributed, performed, broadcast and transformed into new works without payment to their (former) copyright owner. No new legislation has been proposed to further extend the term of US copyright protection – and none is anticipated, given the lack of compelling reasons to do so.



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Songs that were scheduled to lose copyright protection at midnight on December 31 1998, but were 'saved' by the Sonny Bono Copyright Term Extension Act include Jimmy Cox's blues standard "Nobody Knows You When You're Down and Out" and "Who's Sorry Now", a 1923 hit made famous again by Connie Francis in 1957. George and Ira Gershwin's "Fascinating Rhythm", George Gershwin's "Rhapsody in Blue" and Marty Bloom, Ernest Brever and Billy Rose's "Does the Spearmint Lose its Flavour on the Bedpost Over Night" – all 1924 copyrights that would have expired on December 31 1999 – will enter the public domain at midnight on December 31 2019. The Sonny Bono Copyright Term Extension Act preserved each of these copyrights for an additional 20 years.

**BAKER
DONELSON**

Before 1978 the duration of US copyright protection was governed by the Copyright Act 1909, which provided an initial 28-year term, followed by a 28-year renewal term. The Copyright Act 1976 (effective 1978) extended the renewal term to 47 years, resulting in 75 years of copyright protection for properly renewed pre-1978 works. The Sonny Bono Copyright Term Extension Act extended that renewal term for pre-1978 works from 47 to 67 years, thereby extending copyright protection from 75 to 95 years. Other revisions to the Copyright Act 1976 provided that works created or first published in or after 1978 would be protected for the life of the author plus 50 years. The Sonny Bono Copyright Term Extension Act extended protection of these works from life of the author plus 50 years to life plus 70 years. For works made for hire, the copyright term was extended from 75 years from publication or 100 years from creation (whichever is shorter) to 95 years from publication or 120 years from creation.

In 1998 the most compelling argument in favour of the Sonny Bono Copyright Term Extension Act was the need to harmonise US copyright law with EU copyright laws, which had already adopted a basic copyright term of 'life of the author plus 70 years'. Harmonisation was intended to benefit US copyright owners that were unable to enforce their copyrights in foreign countries that follow the 'rule of the shorter term' (ie, countries that provide the benefits of national treatment to US copyright owners, but do not extend copyright protection to works that are out of copyright in the United States, even if the foreign country's copyright laws provide longer protection periods).

Individuals and companies that owned libraries of older, income-producing copyrighted works whose protection would have expired were the biggest beneficiaries of the change. Naturally, large content and media owners that owned older copyrights such as Disney and Time Warner were strong proponents of the legislation. Disney's "Steamboat Mickey" and "Winnie the Pooh" are among the important Disney properties that were scheduled to lose copyright protection – as was the case with Time Warner's many important older music copyrights, including the aforementioned George Gershwin music – will now enter the public domain on January 1 2020.

Because of the economic benefits to US copyright owners, opposition to the Sonny Bono Copyright Term Extension Act was relatively mild. Nevertheless, nearly 60 law professors signed a statement opposing copyright term extension. They argued that copyright protection was already long enough to provide sufficient incentives for the creation of new works and that term extension would be contrary to the public's interest in a "vibrant public domain", which is necessary to encourage new creations based on the free accessibility of out-of-copyright works. Critics of term extension argued that new uses of public domain works benefit the public, noting Disney's reliance on public domain stories as source material for its animated films. The Supreme Court ultimately rejected a constitutional challenge to the Sonny Bono Copyright Term Extension Act several years after its enactment in a seven-to-two decision. The two dissents largely echoed the critics' arguments, but the majority was persuaded by Congress's constitutional authority and the overwhelming benefit of harmonisation.



International reports

Today there would almost certainly be considerably more opposition to any effort to further extend the copyright term, and with no compelling reason, Congress is unlikely to take any action. Therefore, for at least a little longer, copyright owners can look at their catalogues of protected works and say, "I got you babe".

For further information please contact:

E Scott Johnson
Baker Donelson
www.bakerdonelson.com
Email: johnson@bakerdonelson.com
Tel: +1 410 685 1120

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