europeana
connect

Milestone 4.1.6

Decision trees for 6 additional jurisdictions and their availability for Public Domain Helper Tool;

Scope of legal certainty for Public Domain Helper Tool

co-funded by the European Union

The project is co-funded by the European Union, through the ***e*Content*plus*** programme

http://ec.europa.eu/econtentplus

Österreichische Nationalbibliothek

EuropeanaConnect is coordinated by the Austrian National Library

Distribution

Version	Date of sending	Name	Role in project
0.1	15.01.2011	Lucie Guibault	Task leader
1.0			

Approval

Version	Date of approval	Name	Role in project
1.0			

Revisions

Version	Status	Author	Date	Changes
0.1				
1.0				

Table of Contents

Part I : Scope of legal certainty for Public Domain Helper Tool

INTRODUCTION

By Christina Angelopoulos, Institute for Information Law, University of Amsterdam

As part of Europeana*Connect* Work Package 4 and in collaboration with Nederland Kennisland (KL), the Institute for Information Law (IViR) of the University of Amsterdam has prepared of a set of six Public Domain Helper Tools. The Tools are intended to assist users in the determination of whether or not a certain work or other subject matter vested with copyright or neighbouring rights (related rights) has fallen into the public domain and can therefore be freely copied or re-used, through functioning as a simple interface between the user and the often complex set of national rules governing the term of protection. The issue is of significance for Europeana, as the data provider agreements contain provisions that obligate the partners/providers to mark, whenever possible, the contents of their collection as public domain material, through the attachment of a Creative Commons Public Domain Mark.

There are currently six Public Domain Helper Tools, each one covering the copyright and neighbouring rights term of protection regime in one of six selected European Member States: the Czech Republic, France, Italy, the Netherlands, Spain and the United Kingdom. The backbone of the Tools are the six Decision Trees built by IViR, which reworked the relevant provisions of all six countries' copyright or neighbouring rights into the form of flowcharts. Subsequently, the flowcharts were translated into code by IViR's colleagues at Kennisland, the final step in the production process of the current set of six web-based Public Domain Helper Tools.

It should be noted from the onset that there is a limit to the extent to which an electronic tool can replace a case-by-case assessment of the public domain status of a copyrighted work or other protected subject matter in complicated legal situations. Obscure issues and rare complications can surface; the Tools are accordingly accompanied by a disclaimer to that effect, urging the user to contact a legal professional for reasonable legal certainly as to the duration of the protection of a specific information product that may possibly incorporate any copyright and related rights protected subject matter.

The construction of the Flowcharts required extensive research into the legal questions surrounding the duration of protection of subject matter in which copyright or neighbouring rights subsist in the six examined jurisdictions. It thus highlighted the main stumbling blocks to the determination of the exact duration of protection that arise from the ambiguities which are inbuilt in the standing legal provisions.

The first step involved in the production of the Flowcharts was the careful study of EU Directive 2006/116/EC on the term of protection of copyright and certain related rights (hereafter: Term Directive). The Directive attempts the harmonisation of rules across the board of EU Member States (and states party to the Agreement on the European Economic Area) on the term of protection of copyright and neighbouring rights.

The term of protection was one of the first issues in the area of copyright and related rights to be harmonised at the European level. The initial Term Directive was adopted in 1993, while a

subsequent amendment in 2001 lead to the adoption of a consolidated version in 2006. The Directive is “horizontal” in that it sets the term of protection for all copyright and related rights subject matter recognised by the European acquis and is intended, through the imposition of both maximum and minimum harmonisation, to leave no room for national deviations from the European norm. The general term of protection rule imposed by the Term Directive for works of copyright is 70 years after the death of the author (“70 years post mortem auctoris or p.m.a”). Further provisions govern situations where the death of the author is impossible to ascertain or where the work doesn’t have a single identifiable human author. So, for example, works of joint authorship are protected for a period of 70 years after the last of joint authors to survive. Anonymous or pseudonymous works are granted a term of protection of 70 years after the work is lawfully made available to the public, unless the pseudonym adopted by the author leaves no doubt as to his/her identity. If the author discloses his/her identity while the work is still receiving protection, the term reverts to the default rule of 70 years p.m.a. The term of protection for works whose right-holder is a legal person, as well as for collective works is also 70 years after the work is made available to the public. Finally, if the term of protection is not calculated from the death of the author(s) and the work is not lawfully made available to the public within 70 years from its creation, protection expires then. The term of protection of related rights under the Directive is 50 years after the triggering event that sets the time running.

Nevertheless, the desired harmonising effect has not been entirely achieved. This has been mainly due either to exceptions permitted by the Directive itself, such as those on critical and scientific publications or non-original photographs, or to the fact that concepts of substantive law that underly the rules on the duration of protection remain unharmonised on the European and international level. As a result, the way with which the rules prescribed by the Directive were incorporated into the pre-existing bodies of national legislation has differed from state to state. A single rule may be applicable across the EU in theory, but will result in drastically divergent terms of protection for the same information product depending on the jurisdiction within which protection is sought. It is these national peculiarities that have necessitated separate flowcharts adjusted to the particular situation of each individual Member State, as opposed to one single overarching European flowchart.

In addition, even where the rules governing the term of protection are harmonised and interpreted in a unified single consistent manner across the EU, difficulties in calculating the term of protection may nonetheless arise. Complicated provisions for example dictate the term of protection recognised within the EU to foreign subject matter. The relevant rules are particularly complex in the field of related rights. Furthermore, the term of protection of databases likewise poses challenges, particularly as concerns the distinction between the duration granted to original and non-original databases, as well as the possibility of perpetual protection for non-original databases which are consistently updated. Finally, transitional provisions introduced on either the Community or the national level to ease in the new – in most EU Member States extended – term of protection are also often convoluted and difficult to apply.

Below we will examine the precise instances in which the lack of harmonised substantive underpinnings for the Term Directive results in duration discrepancies across the EU Member States or even actual uncertainties as to the precise term of protection of information products under certain circumstances within each Member State. The first section is dedicated to the analysis of concepts in copyright and related rights that remain unharmonised under the current European rules. The second section then progresses to exceptions from the main rules encountered in the Member States, whether explicitly permitted by the European legislator or not.

Section 3 examines the protection afforded to foreign works under the Term Direction or the international obligations of the Member States, while section 4 deals with the term of protection for databases. Finally, Section 5 looks at the transitional provisions.

It should be noted that all terms of protection mentioned below should be taken as starting on the 1st January of the year following the event that set the term running.

1. Unharmonised Areas in European Copyright Law

A number of fundamental concepts integral to the interpretation of the rules on the term of protection remain undefined or loosely defined at the European level. As a result, the subject matter of protection and the conditions for that protection will be different depending of the individual rules of the country in which protection is sought. Below the definitions of the concepts of originality, work of joint authorship and collective work, as well as the rules established in the Directive and in national law for official documents, works whose author is a legal person, works made for hire, and previously unpublished public domain works are analysed. Any related concepts introduced to the legal order of the Member States are also examined.

1.1. Originality

A central, if somewhat elusive, concept in copyright law is that of originality. The requirement of originality is encountered in all European jurisdictions, although it may not always be explicitly referred to in the law. It is generally accepted that the notion of originality is implicit to the very term "work" in the meaning of the Berne Convention.[1] The Berne Convention does repeatedly refer to the protection offered to "original works", but offers not further guidance as to what the concept entails. On the European level, until the recent *Infopaq* case[2], it was widely assumed among scholars that the notion of originality, if increasingly convergent within Europe, was unharmonised. The greatest divide among the national definitions of the term was to be found between the UK and Ireland's permissive approach, according to which a work will qualify as original as long as it is not a copy of another work, and the comparatively stricter civil law approach, which requires some level of creativity and individuality.

A first attempt at reconciling these divergent legal traditions was made through the three similar originality standards devised by the European legislator for computer programmes, databases and original photographs. The Computer Programmes Directive[3] demands that a computer programme be "original in the sense that it is the author's intellectual creation" in order to recognise protection. The Database Directive[4] uses the exact same wording, which is generally accepted to mean that databases and computer programmes are subject to the same standard of protection. The Term Directive repeats this standard in Article 6 in relation to photographs, but in addition clarifies in Recital 16 that such an own intellectual creation must also reflect the author's personality. Thus, the European Directives achieved a vertical harmonisation of the concept of

[1] See entry on "original work" in M. Ficsor, *Guide to the Copyright and Related Rights Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms* (WIPO, Geneva 2003) 300.
[2] Case C-5/08, *Infopaq International A/S v Danske Dagblades Forening*, 16 July 2009.
[3] Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs, [1991] OJ L122/42 (hereafter: Computer Programs Directive), Article 1(3).
[4] Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases [1996] OJ L077/20 (hereafter: Database Directive), Article 3(1).

originality for the three types of works mentioned. Over time, a certain "rapprochement" between the copyright and author's rights countries' approach to originality can be observed as concerns other protected subject matter as well, at least in practical outcome if not in the conceptual tools employed to achieve it.[5]

In 2009 the ECJ aspired to give the finishing touch to this process of convergence. In the *Infopaq* case[6] the Court held that the need for a uniform application of Community law and the principle of equality require that, where no express reference to the law of the Member States is made, the provisions of Community law must receive an identical interpretation throughout the Community. It accordingly ruled that copyright in the European legal order is liable to apply only in relation to subject matter which is original in the sense that it is the author's own intellectual creation. It should be noted that this definition is quite vague and will require further elaboration by national courts in order that it may be applied in practice. This however is fully in keeping with the history of a dynamic term whose interpretation has not only been inconsistent across countries, but has also shifted through time within the case-law of each single Member State. Thus, although national variations in the handling of the term will probably to continue to arise, such divergences are likely to be slight and not cause significant trouble for the internal market.

1.2. Works with Multiple Contributors

As mentioned above, the Term Directive contains separate provisions on the term of protection of works of joint authorship and collective works: for the former, copyright expires 70 years after the death or the last surviving author (Article1(2)), whereas for the latter 70 years after the date of publication of the work (Article1(4)). The substantive law provisions defining what constitutes a work of joint authorship and a collective work have however not been harmonised on the European level; it is therefore up to the national laws and courts to decide when a work will be a collective work, when a work of joint authorship, when two or more separate works by different authors and whether additional categories of works involving multiple creators/contributors should be introduced. This results in diverging terms of protection for the same copyright work depending on its classification in the national jurisdiction within which protection is sought.

1.2.1. Works of Joint Authorship – Factual, Economic and Intellectual Indivisibility

How are these rules reflected in the national legislation of the six selected Member States and what divergences occur between them? All six states define joint authorship according to some variation of the simple formula of "collaboration + inseparability". The point of divergence occurs on the precise interpretation that is given to the notion of inseparability: factual inseparability, economic inseparability or intellectual inseparability. Where a work is considered to be a work of joint authorship the term of protection will be 70 years after the death of the last surviving from among the joint authors. Alternatively, the same work in another jurisdiction, which applies a different criterion for determining the existence of joint authorship, might be found to consist of two or more works, each with their own author and each with their own individual term of 70 years after his/her death.

[5] M. van Eechoud et al., *Harmonizing European Copyright Law – The Challenges of Better Lawmaking* (Kluwer Law International, 2009) 42.
[6] Case C-5/08, *Infopaq International A/S v Danske Dagblades Forening*, 16 July 2009.

In four of the examined jurisdictions the concept of inseparability has a factual denotation. According to Article 10 of the Italian Copyright Law, "if a work has been created by the indistinguishable and inseparable contributions of two or more persons, the copyright shall belong to all the joint authors in common." Similar definitions are given by Article 7 of the Spanish Intellectual Property Law and Article 10 of the UK's CDPA[7]. In the Netherlands, although no explicit definition of works of joint authorship is provided by the Dutch *Auteurswet*,[8] the case law *Hoge Raad* (Dutch High Court) has gone in the same direction.[9] Under this approach, a work will be considered to be a work of joint authorship where no one author is able to single out a distinct substantial part of the work as being solely the fruit of his or her own creative exertions with no input from other contributors.

The French and Czech lawmakers break this mould. Article 10(2) of the Czech Copyright Law defines a work of joint authorship as a work which have been produced until the time of its completion as a single work by the creative activity of two or more authors and where the individual contributions of the individual authors are (regardless of whether or not they can be distinguished from each other) not capable of being used independently. In the Czech example we therefore see that economic rather than factual indivisibility becomes the relevant criterion. A work will still qualify as a work of joint authorship if the components comprising it are separable, but are not suited for independent exploitation. The article goes on to stipulate that the individual contributions of the joint authors cannot take the form of mere assistance or advice of a technical, administrative or expert nature or the provision of documentation or technical material or of the impulse to generate the work.

The French *Code de la propriété intellectuelle* goes one step further; according to Article L113-2, a work of joint authorship (*oeuvre de collaboration*) should simply be understood in French law as "a work in the creation of which more than one natural person has participated." What is necessary for the application of the provision is that the work be the product of concerted creative effort, a community of inspiration and mutual control. A hierarchy in the collaboration or a division of tasks is not incompatible with the concept of joint authorship under French law; even corrective work can thus qualify its author for equal joint authorship rights, as long as it is not of a mere accessorial nature. More importantly however, as opposed to the rules of the five jurisdictions described above, the factual or economic divisibility of the contributions is not significant – it is the intellectual indivisibility that results in a work of joint authorship. In fact, Article L113-3 expressly allows joint authors, where the contribution of each is of a different kind, to separately exploit their own personal contribution to the work of joint authorship, provided this does not prejudice the exploitation of the whole work. The provision thus presumes that cases will arise where the contributions to a work of joint authorship are both factually clearly identifiable and economically individually exploitable. Works of joint authorship under French law do not presuppose that all different components be created in common by all co-authors.[10]

[7] Copyright, Designs and Patents Act, 1988.
[8] *Wet van 23 september 1912, houdende nieuwe regeling van het auteursrecht*, Official Journal 308.
[9] J.H. Spoor, D.W.F. Verkade, D.J.G. Visser, *Auteursrecht – Auteursrecht, naburige rechten en databankenrecht*, Kluwer, Deventer 2005, p. 32.
[10] A. Lucas and A.-J. Lucas, *Traité de la propriété littéraire et artistique* (2nd ed) Litec 2001, 178-183, p. 159-176.

In all of the examined jurisdictions the term of protection of works of joint authorship, whatever their definition, was indeed explicitly given as 70 years after the death of the last surviving co-author, in perfect line with the Term Directive.[11]

What stands out from the above analysis is that, although all six countries under examination incorporate a definition of joint authorship in their legislation and although these definitions might appear to be only slightly dissimilar, they may nonetheless result in drastically divergent terms of protection where a single work manages to cross the line set by one country for the qualification of the unified term of protection for works of joint authorship, but in another is separated into multiple works, each with their own term of protection, each dependent on their own author's date of death.

A good example of the complexities which can arise in the area of joint authorship is provided by co-written musical works. Depending on the jurisdiction, a co-written musical work may either be classified as a single work of joint authorship or as multiple (separate) works. A detailed analysis of the different models for joint authorship that apply has already been given by the Institute for Information Law in *Harmonizing European Copyright Law,*[12] but in brief the situation is as follows:

- In France, a co-written musical work is traditionally understood to be a work of joint authorship (*oeuvre de collaboration*) on the basis of the concerted creative collaboration towards a common goal or following a common plan that will have led to its production; The term of protection will be unitary for the entire ensemble of music and lyrics and will be calculated on the basis of the death of the longest-living author; Spain follows France's lead: co-written musical works are also viewed as works of joint authorship under Spanish law, with the term of protection likewise triggered from the death of the last author to survive;
- In the Netherlands and the UK, by contrast, a co-written musical work will be understood as being a combination of multiple separate works, each attracting its own individual term of protection due to the simple factual divisibility between the elements (music and lyrics) that comprise it. The Czech Republic follows a similar model, the only difference being that the divisibility of the work's parts will be established not on factual, but on economic grounds (i.e. the extent to which they are suited for independent exploitation);
- In Italy, most co-written musical works will be understood as being separate creations attracting their own individual term of protection. The only exception is introduced by express legislative intervention: according to Article 26 of the Italian Copyright Law, dramatico-musical works, alongside works of dumb show and choreographic works, although not in fact understood as constituting works of joint authorship are nevertheless exceptionally granted a term of protection starting from the death of the last contributing author to survive.

The result can be drastic inconsistencies across the EU in the duration of the rights subsisting in such works and/or their individual components. The works of George and Ira Gerschwin are often used as an example of the inconsistencies that can thus arise: in Member States where co-written musical works are considered to be works of joint authorship, the term of protection will be calculated from the death of Ira, the longest-living of the two, who died 46 years after his brother. In countries where music and lyrics are considered separable, copyright in the music expired in 2007, 70 years after the death of composer George, but will persist till 2033, 70 years after the

[11] Article 27(2) of the Czech Copyright Law, Article L 123-2 of the French *Code de la propriété intellectuelle*, Article 26 of the Italian Copyright Law, Article 37(2) of the Dutch *Auteurswet*, Article 7(1) of the Spanish Intellectual Property Law, s.12(8) CDPA.

[12] M. van Eechoud et al., *Harmonizing European Copyright Law – The Challenges of Better Lawmaking* (Kluwer Law International, 2009) 235-262.

death of Ira, the lyricist of the pair, for the lyrics. The same drastic disparity will occur with the works of musical duo, John Lennon and Paul McCartney.

Mindful of these conflicting regimes and of the practical difficulties and legal uncertainties in which they result, the European Commission proposed in 2008 the introduction of a rule for the calculated of the term of protection of co-written musical works that copies the rule currently in place under Article 2 of the Term Directive for cinematographic and audiovisual works.[13] The goal is to sidestep the drama of disparate joint authorship models and simply attach the term of protection to the death of the last from among a standard pre-designated set of persons. However, the judiciousness of such a move is questionable. Not only are co-written musical works not the only authored products which suffer from the term of protection consequences of uneven harmonisation, but, as we shall see below, the lack of a unified concept of works of joint authorship is not the only significant unharmonised area that obstructs the establishment of identical terms of protection throughout the EU.

1.2.2. Audiovisual Works

In the case of cinematographic and audiovisual works the main obstacle to term harmonisation was the sheer number of creative contributors participating in their creation. Divergent approaches among the Member States as to the authorship and first ownership of such works as well as to the legal presumptions granting the right to exercise the economic rights on the part of all contributors exacerbated this problem. Article 2 of the Term Directive found a solution in the harmonisation of the term of protection of cinematographic or audiovisual works at 70 years after the death of the last of the following persons to survive: the principle director, the author of the screenplay, the author of the dialogue and the composer of the music specifically created for use in the cinematographic or audiovisual work. If the screenplay or dialogue have more than one authors or the music more than one composer, presumably the last of these to survive should be the one taken into account, in analogy to the rule of Article 1(2) of the Term Directive. From among the directors, only the principle director is relevant for the calculation of the term of protection; assisting directors will not be taken into account, irrespective of their right-holder status. In any case, with the exception of the principle director of the work, whether these persons are designated as authors or not is not significant. The provision can be seen as a compromise between continental European tendency to recognise the director as the main creator of a film and the UK tradition of viewing films as entrepreneurial works the authorship of which lies with the producer.[14]

The provision is perhaps disingenuous to the extent that it connects the duration of the author's rights and those his/her successors to the lifespan of persons who may not have any claims to authorship under national law. However, the rule successfully avoids overstepping the subsidiarity boundaries to the permitted scope of EU legislative action and a clashing of horns with national lawmakers on the determination of the author of cinematographic and audiovisual works. Instead it gives a straightforward answer to the question of duration by connecting it to the lifespan of a pre-determined set of people irrespective of their authorial claims. What is significant in this context is that by these means it also manages to disentangle the term of protection of cinematographic and audiovisual works from the thorny issue of their nature as works of joint

[13] "Proposal for a European Parliament and Council Directive amending Directive 2006/116/EC of the European Parliament and of the Council on the term of protection of copyright and related rights Brussels", 16 July 2008, COM(2008) 464 final.
[14] P. Torremans, *Holyoak &Torremans Intellectual Property Law* (4th ed, OUP, New York 2005) 204.

authorship. Does it entirely eliminate the problem of jurisdictional fluctuations in the term of protection of cinematographic or audiovisual works? In the following section we will take a close look at the term of protection of films under British law and the term of protection implications that arose when fundamental copyright concepts were lost in translation.

1.2.2.1. The Protection of Films under British Law

The British implementation of the term of protection of rights in films illustrates the odd results that have come about as a result of the fitful attempts at European copyright harmonisation. From among the four rights covered by Article 3 of the Term Directive on the "Duration of related rights" only one – that of performers – is explicitly qualified as a 'related right' in UK law. Instead, s. 1 of the Copyright, Designs and Patent Act (CDPA) confers copyright as a property right over sound recordings, films and broadcasts, alongside original literary, dramatic, musical or artistic works, the difference being however that for these entrepreneurial works no requirement of originality is imposed. UK legislation was late to pick up the distinction made in the European law between audiovisual or cinematographic works and the first fixation of such works onto film. S. 5B CDPA defines the term 'film' as "a recording on any medium from which a moving image may by any means be produced". Under the 1956 Copyright, Designs and Patents Act, the definition of a "dramatic work" explicitly excluded cinematographic films as distinct from the scenario or script of said film.[15] This distinction was dropped by the 1988 Act however, while, according to currently standing UK Court of Appeal case law from 1997, a film which is "a work of action [that] is capable of being performed before an audience" [16] can indeed fall within the expression "dramatic work". The producer of a film and its principal director are considered to be joint authors of the film,[17] while the author of a film as a dramatic work will be its creator, i.e. the dramatist.[18] Under British law, this would include the author of the screenplay of dialogue and possibly the principle director, but would be highly unlikely to include the music composer.

Prior to the implementation of the Term Directive, under both the 1956 and 1988 Acts, films were granted a term of protection of 50 years, normally calculated from the year of release.[19] However, with the transposition of the Term Directive, UK law extended the term of protection of films to 70 years after the death of the last to die from among the principle director, the author of the screenplay, the authors of the dialogue and the composer of music specifically created for and used in the film whose identify is known.[20] Further provisions elaborate on the situation where these persons are unknown, identical to the provisions of the Term Directive on anonymous or pseudonymous works (70 years from making available to the public or, if the work is not make available within 70 years after its creation, 70 years from creation.[21]) Only when there is no person falling in the four listed categories does copyright in films expire 50 years from the end of the calendar year in which the film was created.[22] Films as dramatic works, on the other hand, will benefit from the regular term of 70 years after the death of the author, i.e. the dramatist.

---

[15] H. MacQueen, C. Waelde and G. Laurie, *Contemporary Intellectual Property – Law and Policy*, (OUP, Oxford 2008) 68.
[16] *Norowzian v. Arks (No.2)* [2000] *FSR 363.*
[17] S. 9(2)(ab), CDPA 1988.
[18] H. MacQueen, C. Waelde and G. Laurie, *Contemporary Intellectual Property – Law and Policy*, (OUP, Oxford 2008) 68.
[19] L. Bently and B. Sherman, *Intellectual Property Law* (3rd ed., OUP, Oxford 2009) 165.
[20] S.13B CDPA 1988.
[21] Compare, Article 1(3) and 1(6) Term Directive and s.13B(4) CDPA 1988.
[22] S.13B(9) CDPA 1988.

It has been argued that this approach is incompatible with the Term Directive.[23] However, this conclusion will depend on the meaning of the terms "cinematographic or audiovisual work" and "first fixation of a film". If, as is the current opinion of the UK courts, a cinematographic or audiovisual work is indeed understood as being a dramatic work[24], protectable by copyright, which may be fixated thus producing a film, protectable by the corresponding related right, then UK law indeed recognises an impermissibly long term of protection for the related right of the first fixation of a film and an impermissibly short term of protection for the cinematographic or audiovisual work thus imprinted. If however the first fixation of a cinematographic or audiovisual work were to be understood as being the work itself,[25] then the UK rules could be seen as conforming much more closely with the rules of the Term Directive: the notion of an original film under European and international norms can arguably be understood as corresponding to the notion of a film with a principle director, author of the screenplay, author of the dialogue and composer of music specifically created for and used in the film. Under this approach, the term of protection for original films under UK is correctly set at 70 years after the death of the last of these to die (Article 2 of the Term Directive). If a film lacks any of these persons however, its term of protection will be 50 years after production, in accordance with Article 3(3) Term Directive. In either case, if a dramatic work underlies the film, its protection will be independently calculated at 70 years p.m.a.

Section 66A and 57 adds an extra level of complexity not foreseen in the Term Directive, by permitting acts which would have infringed copyright in a film when done at a time when a) it is not possible by reasonable inquiry to ascertain the identity of the designated persons b) it would be reasonable to assume either that copyright has expired (presumably on the basis of the s. 13B(4) term of 70 years from creation or making available or that the last of the designated persons died at least 70 years earlier.

1.2.3. Collective Works

Article 1(3) of the Term Directive gives the term of protection of collective works as 70 years after the work is lawfully made available to the public. Article 1(4) exempts the situation where "the natural persons who have created the [collective] work are identified as such in the versions of the works which are made available to the public" from term calculation on the basis of the date of publication. In this case, the joint authorship rule kicks in and duration reverts to the rule of 70 years after the death of the last surviving co-author in accordance with Article1(2) Term Directive.[26] Likewise, Article 1(4) stipulates that the duration of the protection of a collective work as a whole is not intended to prejudice the rights of identified authors whose indefinable contributions are included in the collective work; in such a case, the term of protection of the collective work will be 70 years after it has been made available to the public, while (unless an exception applies) the term of protection for the identifiable contributions of identified authors will be 70 years after the death of (the last surviving co-)author. The recognition of collective works in

[23] L. Bently and B. Sherman, *Intellectual Property Law* (3rd ed., OUP, Oxford 2009) 166.
[24] This has been argued from example by LJ Buxton in *Norowzian v. Arks (No.2)* [2000] *FSR 36.3*
[25] See entry on "original work" in M. Ficsor, *Guide to the Copyright and Related Rights Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms* (WIPO, Geneva 2003) 290. Compare also with the definition of "film" in the Rental and Lending Rights Directive (Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property [2006] OJ L376/28), Article 2(c).
[26] D. Visser, "Term Directive" in T. Dreier and B. Hugenholtz (eds), *Concise European Copyright Law* (Kluwer Law International, Alphen aan den Rijn 2006) 294.

the jurisdictions of the Member States is not obligatory under the Directive, as is indicated by the qualification "where a Member State provides for particular provisions on copyright in respect of collective work" which opens Article 1(4).

Article L113-2 of the French Intellectual Property Code defines an *oeuvre collective* as "a work created at the initiative of a natural or legal person who edits it, publishes it and discloses it under his direction and name and in which the personal contributions of the various authors who participated in its production are merged in the overall work for which they were conceived, without it being possible to attribute to each author a separate right in the work as created." Thus, as opposed to the notion of joint authorship, collective works in France do not require that concerted effort and common execution be exerted by the contributors. Instead, the work must be created at the initiative and under the direction of an entrepreneur, be it a legal or natural person, who controls the creative process through the issue of instructions and harmonises the different contributions. As already explained above, the mere preeminent role of one of the contributors does not of itself necessarily disqualify a work from the category of joint authorship and delegate it to that of collective works; rather the decisive factor is the extent to which the contributors, other than the person who edits, publishes and discloses the work, have lost their creative independence, whatever the importance or merit of their contributions. Whether the contributors other than the work's *maître* are identified or anonymous is indifferent.[27] Having said this, the concept of *oeuvre collective* in France is highly complex and murky, having given rise to conflicting case law and scholarly opinions as to its precise application.[28] It is, in any case, unanimously agreed upon that the concept covers dictionaries, encyclopaedias and periodical works, such as newspapers or magazines.

The term of protection of collective works under French law is 70 years after the publication of the work.[29] Article L113-5 does provide for a possibility to prove that the author of a collective work is somebody other than that person under whose name it was disclosed, but the CPI does not foresee any change in the calculation of the term of protection in such cases in compliance with the provision of the Term Directive according to which if the natural persons who have created the work are identified as such in the version of the works which are made available to the public the term should be calculated according to the rules for joint authorship.[30] The CPI also does not specifically grant identified authors separate rights over their identifiable contributions. It should however be noted that, on the basis of Article L121-8 which permits the authors of works published as part of a collective work in a newspaper or periodical to maintain their right, unless otherwise stipulated, to have their contributions reproduced or to exploit them in any form whatsoever, on condition that such reproduction or exploitation is not such as to compete with the newspaper or periodical concerned, commentators have suggested that such a rule should be extended to all collective works in general, to the extent that identification is possible.[31]

The Czech, Spanish and Italian copyright laws follow suit, with slight variations. The Czech definition returns to the concept of economic indivisibility: in the Czech Republic, a collective work is understood as a work that is created with the participation of more than one authors at the initiative and under the management of a natural person or of a legal entity and made available to the public under that person's or entity's name and where the individual contributions involved in

[27] P. Sirinelli, S. Durrande and A. Latreille, *Code de la propriété intellectuelle Commenté*, (10th ed) Dalloz 2010, 70 and 73.
[28] A. Lucas and A.-J. Lucas, *Traité de la propriété littéraire et artistique* (2nd ed) Litec 2001, 178-183.
[29] Article L123-3, *Code de la propriété intellectuelle.*
[30] A. Lucas and A.-J. Lucas, *Traité de la propriété littéraire et artistique* (2nd ed) Litec 2001, p. 357.
[31] A. Lucas and A.-J. Lucas, *Traité de la propriété littéraire et artistique* (2nd ed) Litec 2001, p. 185.

the work are not capable of independent use. The term of protection is 70 years after the work was made available to the public.[32] No provisions specific to the identifiable contributions of identified authors or to the situation where the natural persons who created the work as identified as such are given. Arguably however, such identification would in any case be incompatible with the Czech conception of collective works, which rests on the very notion of (economic) indivisibility.

The Spanish and Italian approaches by contrast explicitly dissociate the concept of collective works from any type of indivisibility. Article 8 of the Spanish Intellectual Property Law defines a collective work as a work created on the initiative and under the direction of a person, whether natural person or legal entity, who edits it and publishes in under his/her name and which consists of the combination of contributions by various authors whose personal contributions are so integrated in the single, autonomous creation for which they have been made that it is not possible to ascribe to any one of them a separate right in the whole work. In the absence of an agreement to the contrary, the rights in the collective work shall vest in the person who publishes it and discloses it in his/her name. Article 28 grants collective works a duration of protection of 70 years following the lawful disclosure of the work. However, if the natural persons who created the work are identified as authors in the version of the work that are made accessible to the public, duration is calculated from the death of the (last surviving co-)author. In addition, the identifiable contributions of identified authors, according to Article 28 of the Spanish Intellectual Property Law, attract independent terms of protection, calculated (unless an exception applies) from the death of the (last surviving co-)author. Spain therefore seems to be the only country from among the examined jurisdictions which has adopted the Term Directive's collective works regime provision for provision.

Article 3 of the Italian Copyright Law defines collective works as works formed by "the assembling of works or parts of works possessing the character of a self-contained creation resulting from selection and coordination with a specific literary, scientific, didactic, religious, political or artistic aim, such as encyclopaedias, dictionaries, anthologies, magazines and newspapers". In the Italian system, copyright may also subsist in each of the individual constituent parts of a collective work, which may thus have their own self-standing term of protection. The term of protection of the collective work as a whole is 70 years from publication. An exception is provided in the case of magazines, newspapers and other periodical works, where for the purposes of term calculation each individual part or issue is granted an independent term. No provision is made for the case where the natural persons who created the work are named as such in the versions of the work which are made available to the public.

Dutch law drastically departs from the above model. In the Netherlands, Article 5 of the Dutch *Auteurswet* states that "if a literary, scientific or artistic work consists of separate works by two or more persons, the person under whose guidance and supervision the work as a whole has been made or, if there is no such person, the compiler of the various works, shall be deemed the author of the whole work, without prejudice to the copyright in each of the works separately" (*verzamelwerk)*. Examples of collective works under Dutch law would include anthologies, encyclopaedias, edited collections of essays, cds featuring selections of works by diverse artists or even databases. No provision in the Dutch law deals expressly with the term of protection of collective works. Instead, we are left to assume that the default rule of 70 year p.m.a is applicable. The collective work and its components should be treated as independent works,

[32] Article 27(4) Czech Copyright Law.

each attracting its own individual term of protection. In the case of the former this will be calculated from the death of the person under whose guidance and supervision the work as a whole has been made or the compiler, as appropriate, while in the case of the latter, the death of its individual author shall be the decisive date. The only situation in which the duration of protection of a collective work will be calculated from its date of publication under Dutch law will be that in which its author is a legal person (see below, Section 1.3). The provision of the Term Directive according to which when the natural persons who have created a collective work are identified as such in the versions of that work that have been made available to the public the term of protection of the collective work should be calculated from the death of the last surviving from among them does not find an equivalent in Dutch legislation. There remains uncertainty as to the compatibility of this arrangement with the provisions of the Term Directive. If a *verzamelwerk* is not considered to be the Dutch equivalent of a collective work, no incompatibility occurs, however.

In the UK, s. 178 of the CDPA defines a collective work very broadly as either "(a) a work of joint authorship or a work in which there are distinct contributions by different authors or in which works, or (b) parts of works of different authors are incorporated." Given however that no provision in the CDPA establishes an exception to the default rule of 70 years p.m.a. for collective works, the definition is entirely irrelevant to the term of protection of works that fall within its ambit.

In conclusion, we observe that, as with works of joint authorship, with collective works as well, the lack of a unified understanding of the precise content of the legal terms used in the Term Directive can lead to a fragmentation of what was intended to be a unified European term of protection regime. France, Italy, Spain and the Czech Republic have relatively similar notions of collective works and attach their term of protection to the date of publication of the work, although Spain does foresee a reversion to the default rule of 70 years after the death of the (last surviving co-)author should the natural persons who created the work be indentified as its authors in the versions of the work which are made available to the public. In the Netherlands, the content of the term is arguably close to that of the aforementioned countries, but the term of protection is detached from the qualification of a work as a collective one. In the UK both the definition of a collective work – whichever one is accepted – is unrelated to the concept familiar in civil law jurisdictions, while the term of protection is also unconcerned with the qualification of a work as a collective one. Finally, the six countries also differ in the extent to which they recognise that copyright might subsist in the individual constituent parts of the collective work: the Netherlands, Spain, the UK, and Italy all explicitly provide for such eventuality, while the Czech Republic and France do not.

Thus, for example, a bundle of academic essays published under the name of a single editor will attract the following terms of protection depending on the country within which protection is claimed:

1. In France the bundle will qualify as an *oeuvre collective* and will accordingly be granted 70 years of protection after the date of publication;
2. In the Netherlands, the Czech Republic, Spain and the UK, if the collection as a whole is found to be original enough to qualify for copyright protection the term of protection will be 70 years after the death of the compiler. The same will be true of the individual essays included in the collection: if they are found to be original enough to qualify for copyright protection, the term of each essay will be 70 years after the death of the essayist.
3. In Italy, as in France, the term of protection will be 70 years after the date publication for the collection as a whole. However, each of the individual essays may also, if sufficiently

original, qualify for protection, in which case the term for each will be 70 years after the death of the essayist;

1.3. Legal Person as Designated Right-Holder and Works Made for Hire

Article 1(4) Term Directive specifically provides for the situation where the designated right-holder is a legal person. According to the Directive in such cases copyright expires 70 years after the work is lawfully made available to the public. However, from the selected Member States examined for the purposes of this report, it is only in the Netherlands that this provision finds application. According to Article 38(2) of the Dutch Copyright Act, where a public institution, association, foundation or company is deemed to be the author of a work and the natural person who created the work is not indicated in or on copies of the work, the term of protection is 70 years after the first lawful communication to the public. Article 8 of the Dutch Copyright Act clarifies that a public institution, association, foundation or company may be the author of a work if it lawfully communicates a work to the public as its own, without naming any natural person as the author. If the natural author's identity is indicated on or in copies of the work which have been communicated to the public or is disclosed prior to the expiry of this period, the term of protection will be adjusted according to the general rule of 70 years p.m.a. A legal person may also be deemed to be the author of a work where it employs a person to carry out labour that consists in the making of certain literary, scientific or artistic works, unless otherwise agreed between the parties. In such cases, the term of protection will also be 70 years after the first lawful communication to the public,

In other jurisdictions a legal person may hold copyright in a work, but with no direct effect on the term of protection. In France the person under at the initiative of whom a collective work is created and under the direction and name of whom it is edited, published and disclosed will almost always be a legal person.[33] The provision is in fact of great significance to legal persons, as well as employers in general, as under French law it is only through the creation of a collective work that a legal person can be vested with an original title of ownership in a copyright work.[34] The same will be true in the Czech Republic, Italy and Spain. As the term of protection required by the Directive for the protection of collective works coincides with that set out for the works of legal persons, no express provision setting out the term of protection of works whose author is deemed to be a legal person in the law of these Member States is necessary. The rule on the term of protection of collective works is sufficient.

A similar effect is achieved through a slightly different route in the UK. Section 11 CDPA states that, where a literary, musical or artistic work is made by an employee in the course of his/her employment, the employer will be the first owner of the copyright in the work, subject to any agreement to the contrary. However, as in the case the concept of first ownership will not coincide with that of authorship of the work (which will remain according to s. 9 with the person who created the work) and given that the term of protection is calculated on the basis of the death of the author, as opposed to the first owner, the term of protection remains unaffected. Whether this provision is compatible with Article 1(4) of the Term Directive, which speaks of the term of protection for works for which a legal person is the right-holder, and not the author, is open to examination.

[33] A. Lucas and A.-J. Lucas, *Traité de la propriété littéraire et artistique* (2nd ed) Litec 2001, p.177.
[34] Article L111-1, *Code de la propriété intellectuelle.*

1.4. Other Related Concepts

In addition to the categories of works with multiple authors analysed above, additional concepts have been created or explicitly provided for in the legislation of the examined Member States. The French and Spanish provisions for example contain a definition of what constitutes a "composite work". In both jurisdictions the term is given as covering a work which incorporates a pre-existing work without the collaboration of the author of that work. In Italy, Article 4 Italian Copyright Law, states that, without prejudice to the rights subsisting in the original works, works of creative character derived from any such work, such as translation into another language, transformations into any other literary or artistic form, modifications and additions constituting a substantial remodelling or the original, adaptations, arrangements, abridgements and variations which do not constitute an original work, shall also be protected by copyright.

Two of the examined jurisdictions further explicitly define the notion of "collections". In Spain, a collection of the works of other people, such as an anthology, or of other elements or data, which by the selection or arrangement of its content constitutes an intellectual creation, is explicitly granted copyright protection. In such a case, both the individual contributions to the collection (if copyright subsists in them) and the collection as a whole should each be considered to be independent works, with separate terms of protection. In the Czech Republic, a collection like a journal, encyclopaedia, anthology, broadcast programme, exhibition or other database, which is a collection of independent works or other elements that by reason of their selection and of the arrangement of the content constitute a unique outcome of the creative activity of the author should be treated as an independent work. The Public Domain Helper Tool should be applied both to the work of collection and the independent components of that work.

In the UK, MacQueen, Waelde and Laurie, also cite compilations as works of copyright. The author of compilation is the compiler, even though there may be several different works by other authors represented in the compilation. Presumably the term of protection in this case is calculated from the date of death of the compiler. [35] It would seem that the UK notion of compilations would probably be closer to the French, Czech, Italian and Spanish concepts of a collective work, despite the divergent system of duration calculation.

Attention should also be paid to the distinction under Dutch law between collective works and works of joint authorship on the one hand and works of fictional authorship (*fictief makerschap)* on the other. Article 6 of the Dutch Copyright Act states that "if a work has been made according to the draft and under the guidance and supervision of another person, that person shall be deemed the author of the work." The provision is a Dutch idiosyncrasy with limited applicability, despite the close similarity of the definition to that of both works of joint authorship and of collective works. The rule is intended to cover cases where the intellectual and physical effort put into the creation of a work derive from different persons. The classic example used to illustrate the situation is that of the Dutch masters working in large workshops, retaining intellectual control and decision-making power over the final result, while delegating the mechanical execution of instructions to apprentices and students. This intellectual control is the decisive factor in determining the applicability of the article. Where either element of Article 6 is missing

[35] H. MacQueen, C. Waelde and G. Laurie, *Contemporary Intellectual Property – Law and Policy*, (OUP, Oxford 2008) 91.

(draft/guidance and supervision), the application of the rules on works of joint authorship, collective works or adaptations should be investigated.[36]

1.5. Official Documents

The treatment of public sector information is another concept which currently remains unharmonised under the European copyright directives. Article 2(4) of the Berne Convention likewise leaves it up to the Contracting Parties to determine the copyright protection to be granted to official texts of a legislative, administrative and legal nature, and to official translations of such texts. The same approach is taken to political speeches and speeches delivered in the course of legal proceedings (Article 2bis(1)). As a result, this is yet another area in which EU Member States are free to pursue their national idiosyncrasies without falling foul of EU or international law.

Of the selected states some grant no copyright protection at all to certain types of official documents. In the Netherlands, Article 11 of the *Auteurswet* excludes laws, decrees or ordinances issued by a public authority or in a judicial or administrative decision from copyright protection. Similarly, in Spain no copyright is granted to legal or regulatory provisions or drafts thereof, judgments of jurisdictional bodies, acts, agreements, deliberations or rulings of public bodies or official translations of all such texts, while in Italy no copyright subsists official acts of the State or of a public administrations, whether Italian or foreign.[37] The Czech Republic has a detailed list of excluded official material including the following: official works, such as legal regulations, decisions, public charters, publicly accessible registers and collections of their records, and also official drafts of official works and other preparatory official documentation including the official translation of such a work, Chamber of Deputies and Senate publications, memorial chronicles of municipalities (municipal chronicles), state symbols and symbols of regional self-governing units, and other such works where there is public interest in their exclusion from copyright protection. In the Czech Republic political speeches and addresses presented during official proceedings do also no receive copyright protection. In all the above cases, term of protection becomes irrelevant, as no copyright subsists in the first place.

In the UK detailed provisions rule the term of protection of official documents. S. 163 CDPA introduces the concept of Crown copyright, i.e. copyright that subsists in works made by Her Majesty or an officer or servant of the Crown acting in the course of his/her duties. Crown copyright lasts until the period of 50 years after its publication if such publication took place within the period of 70 years after its creation or, if no such publication takes place, until the end of the period of 125 years from the work's creation. If the an Act of Parliament, Act of the Scottish Parliament, Measure of the National Assembly for Wales, Act of the National Assembly for Wales, Act of the Northern Ireland Assembly or Measure of the General Synod of the Church of England, Crown copyright lasts for 50 years after the end of the year in which Royal Assent was given. According to s. 165, Parliamentary copyright subsists in works made by or under the direction or control of the House of Commons or the House of Lords, while, finally, if the work was created by an officer or employee of an international organisation, i.e. an organisation whose members include one or more states, the first owner of copyright is the organisation. In both cases, copyright lasts until 50 years from the end of the year in which the work was made. If the work is

[36] J.H. Spoor, D.W.F. Verkade, D.J.G. Visser, *Auteursrecht – Auteursrecht, naburige rechten en databankenrecht*, Kluwer, Deventer 2005, p. 28.
[37] Art 13 of the Spanish Intellectual Property Law, Article 5 of the Italian Copyright Law.

a Parliamentary Bill, a Bill of the Scottish Parliament, a Bill of the Northern Ireland Assembly, or a Bill of the National Assembly for Wales, copyright ceases with Royal Assent or, if the Bill does not receive Royal Assent, on the withdrawal or rejection of the Bill or the end of the Session.

In France, the Intellectual Property Code does not touch upon the question of official documents explicitly, but nevertheless it has traditionally been held in the case law that author's rights cannot be invoked in protection of legislative and regulatory texts, as well as judicial decisions, the reason for this being that by their vary nature the content of such works is intended to be widely distributed. Nevertheless, the exception is not applicable to compilation or commentaries of laws having added value.[38]

1.6. Moral Rights

The Term Directive does not harmonise the duration of protection of moral rights, as is explicitly stated in Article 9 and Recital 20. Thus the sole unifying agent among the EU Member States is found in the international treaties. Article 6bis(2) of the Berne Convention requires that Contracting Parties protect moral rights at least as long as economic rights, but then goes on to permit countries whose legislation at the moment of their ratification of or accession to the treaty did not provide for moral rights protection after the death of the author to maintain such rules. Wide divergences in the term of moral rights protection have thus resulted across the EU.

In the selected states examined for this report four countries recognise perpetual duration for at least some moral rights. In France according to ArticleL121-1 the author's moral right to the respect for his/her name, authorship and work is perpetual, while in Spain, the Czech Republic and Italy the rights of paternity and integrity likewise have no time limit.[39]

In the UK, moral rights (right to be identified as author or director, right to object to derogatory treatment of work and the right to privacy of certain photographs and films) continue to subsist as long as copyright subsists in the work. The right to object to false attribution however lasts only for 20 years after the death of the person to whom the work or film is false attributed.[40] In the Netherlands the situation is slightly more complicated. The Dutch Copyright Act does not *per se* set a limit to the duration of moral rights separate from that of the economic rights. Article 25(2) however confers moral rights after the death of the author to the person designated by the author for this purpose in his/her last will and testament or a codicil thereto. In this case moral rights expire along with the expiry of the economic rights of the author. Absent the designation of such a person by the author, moral rights may not be exercised even by the author's next of kin or other heirs.

The result is two separate regimes for the determination of the term of protection: an EU harmonised regime for economic rights and a domestic one for moral rights. The same work will thus attract widely divergent moral rights depending on the jurisdiction in which protection is sought.

It should be noted that Article 5 WPPT obliges contracting states to recognise a set of moral rights for performers as well. These must be maintained after the death of the performer at least

[38] A. Lucas and A.-J. Lucas, *Traité de la propriété littéraire et artistique* (2nd ed, Litec 2001), 101.
[39] Article 15(1) of the Spanish Intellectual Property Law, Article 11(5) of the Czech Copyright Law and Article 23 of the Italian Copyright Law.
[40] S. 86 CDPA.

until the expiry of the economic rights. As with the moral rights of authors, the duration of the moral rights of performers are likewise not harmonised under the Term Directive.

1.7. Previously Unpublished Works

Article 4 of the Term Directive obliges Member States to recognise protection equivalent to the economic rights of the author for the person who, after the expiry of copyright, takes the initiative to publish a previously unpublished work for the first time. The right is a specific neighbouring right, not to be confused with an extension of the term of copyright protection or with a parallel related right for the author's legal successors. The term of protection recognised for such rights is 25 years after the date of publication.

Divergences appear among the implementations of this provision in the national laws of the six examined states. For example, uncertainty seems to exist as to whether the phrase "after the expiry of copyright protection" covers works in which copyright never subsisted. A strict interpretation of the phrasing would seem to exclude that possibility. Most states have simply copied the text of the Directive; Spain explicitly includes any "unpublished work that is in the public domain" (Article 129, Spanish Intellectual Property Law) and the Netherlands likewise explicitly extends the reach of the right to works which never benefited from copyright protection at all, under the condition that the author died more than 70 years ago (Article 45o(3), Dutch Copyright Act). Divergences in implementation should however be seen as fully compatible with the Directive; even if a Member State sanctions a broader interpretation than that intended by the European legislator, Member States' freedom to introduce new related rights other than those foreseen in the Directive will catch the discrepancy.[41]

It is worth noting that in the UK, the implementation of the provision is for the time being only likely to find very small practical significance, limited to unpublished artistic works other than engravings. This is due to the interaction of the rule with the UK's recognition of copyright protection until the year 2039 for all works whose authors have died and which were unpublished before 1989 (see below Section 2.6.3.).[42]

2. Exceptions to Harmonisation

Recital 19 of the Term Directive clarifies that Member States are free to maintain or introduce new rights related to copyright, other than those mandatorily imposed on the European level. The Term Directive explicitly suggests, but does not limit Member States to, two such possibilities: the protection of critical and scientific publications and the protection of non-original photographs. The framework for the operation of such rights, including their term of protection, is placed entirely in the hands of national legislation, thus preventing harmonisation.

2.1. Critical and Scientific Publications

Under Article 5 of the Term Directive, Member States are offered the discretionary power to decide to offer protection to critical and scientific publications of works which have come into the

[41] It should of course be noted that Recital 19 and Article 11 of the Term Directive requires that such new related rights be notified to the Commission for reasons of transparency.
[42] L. Bently and B. Sherman, *Intellectual Property Law* (3rd ed., OUP, Oxford 2009) 167.

public domain. The express inclusion of this non-mandatory right in the Directive is due to the desire of the European legislator to avoid confusion with the closely-related Article 4 obligatory protection for previously unpublished works.[43] Since Article 5 provides little guidance, the precise modalities of the right, including the definition of "critical and scientific publications" and the determination of the initial owner or the right, are free to be determined on the national level.[44] In any case, critical and scientific publications should be distinguished from adaptations of underlying public domain works or independent critical and scientific works; although the two categories may overlap, if, for example, such an edition is accompanied by critical analysis, comments or annotations, the latter may, on condition of originality, qualify for independent copyright protection in the strict sense.[45] The right should likewise not be confused with the protection of typographical arrangements encountered in some Member States (see below 2.3.) or the protection of previously unpublished works (see above 1.7.).

Should a Member State decide to provide protection for critical and scientific publications, the Term Directive imposes no fixed rule as to the term of protection, but only upper limit of 30 years from the time when the publication was first lawfully published. From among the six examined states, only Italy has chosen to introduce such a right to its copyright law. The protection there for such editions is 20 years after the first lawful publication by any means or in any form.

2.2. Unoriginal Photographs

Recital 16 Term Directive notes that the protection of photographs is subject to varying regimes among the Member States. This is largely due to the wide margin of appreciation left to Berne Union members by the Berne Convention, Article 7(4) of which only guarantees a minimum term of 25 years from the making of photographic works.[46] In addition, the systems of protection differ widely among EU Member States, some sufficing themselves with regular copyright protection for original photographs and others instituting additional related rights protection for common photographs lacking originality.

The Term Directive does not introduce a comprehensive harmonisation of the protection of photographs, but instead imposes a single standard of originality for photographic works across the board of EU Member States. According to Recital 16, photographs are to be considered original if they are the author's own intellectual creation reflecting his/her personality, while no other criteria such as merit or purpose may be taken into consideration. A similar standard for originality is provided in the EU Copyright Directives for computer software and databases.[47] According to Article 6 Term Directive, original phonographs are mandatorily protected under the regular rules for copyright and receive the usual term of protection of 70 years p.m.a.

Article 6 of the Term Directive enables Member States to, in addition, offer protection to photographs that are not original, but imposes no rule or guidelines as to the term that such protection should have. Two countries from among the selected six have introduced specialised

---

[43] S. Von Lewinski and M.M. Walter, *European Copyright Law – A* Commentary (OUP, Oxford 2010), 581.
[44] D. Visser, "Rental and Lending Right Directive" in T. Dreier and B. Hugenholtz (eds), *Concise European Copyright Law* (Kluwer Law International, Alphen aan den Rijn 2006) 299.
[45] S. Von Lewinski and M.M. Walter, *European Copyright Law – A Commentary* (OUP, Oxford 2010), p. 580.
[46] It is worth noting that the WIPO Copyright Treaty requires Contracting Parties to abstain from applying Article7(4) Berne Convention. However, this Treaty was not adopted till 1996, three years after the adoption of the initial Term Directive (Directive 93/98/EC).
[47] Article 1(3) Computer Programs Directive and Article 3(1) Database Directive.

related rights protection for non-original photographs in their jurisdictions: Italy, where non-original photographs receive a term of protection of 20 years after their creation, and Spain, where the protection endures for 25 years after creation. In contrast with the critical and scientific publications, any protection of which is described by the Directive as necessarily constituting a related rights, non-original photographs may enjoy copyright protection. This is the case in the UK, where all photographs which are not copies from others enjoy copyright protection under a lax, in comparison with the civil law approach, threshold for originality.

2.3. Typographical Arrangement of a Published Edition

In the UK, under s.1(1)(c) and 9(2)(d)CDPA, a copyright is granted to the publisher of a typographical arrangement of a published edition. The right is quite limited as it only exists in relation to the published edition as a whole, i.e. the "product, generally between covers, which the publisher offers to the public". The right does not arise in relation to artistic works or to the extent that a typographical arrangement is simply a reproduction of the typographical arrangement of a previous edition.[48] The duration of protection for the typographical arrangement of a published edition is 25 years after the year of first publication. It should be noted that the word "edition" in this context should not be confused with the use of the word to denote a reprinting of e.g. a textbook, where each subsequent edition introduces changes to the actual content of the text thus published.[49] To this extent the right differs from the copyright that will normally arise even outside the UK where added value is provided through the arrangement, annotation, collection or other editorial work exacted on (copyrighted or not) content. The right should also not be confused with the publication right conferred on the publisher of a previously unpublished work.

A similar right exists in Spain, which, in Article 129(2) of its Copyright Act, grants to the publishers of works which are not protected by copyright or related rights the exclusive right to authorise the reproduction, distribution and communication to the public of their editions, provided that these can be distinguished by their typographical composition, layout and other editorial characteristics. The limitation to only public domain works distinguishes this right from the UK provision. Protection is conferred for a period of 25 years following publication.

2.4. Computer-Generated Works

In the UK, where a literary, dramatic, musical or artistic works is computer-generated in the sense that it is created by a computer in circumstances such that there is no human author of the work, the author is considered to be the person by whom the arrangements necessary for the creation of the work were undertaken.[50] This would probably include the person who operated the computer, as well as perhaps the person who provided or programmed it.[51] Computer-generated works should not be confused with computer-assisted works, i.e. works whose human author simply used the computer as a tool to aid him/her in the production of the final result. An example of a computer-generated work would be the text that resulted from the use of an automated translation programme or the result page generated by a search engine. In cases of computer-generated works, a special exception is introduced to the rules on duration to the effect that

[48] P. Torremans, *Holyoak &Torremans Intellectual Property Law* (4th ed, OUP, New York 2005) 196.
[49] H. MacQueen, C. Waelde and G. Laurie, *Contemporary Intellectual Property – Law and Policy*, (OUP, Oxford 2008) 81.
[50] S.9(3) CDPA.
[51] L. Bently and B. Sherman, *Intellectual Property Law* (3rd ed., OUP, Oxford 2009) 122.

protection lasts for a period of 50 years after the creation of the work.[52] The compatibility of this provision with the European rules on the term of protection is questionable. The answer would depend on the extent to which computer-generated works are considered to be original works of copyright in the sense of Article 1 Term Directive. If so, the UK provision is likely in violation of the rules of the Term Directive. Otherwise, if the UK is thus introducing a special *sui generis* right that exists independent of copyright protection *stricto sensu*, then it is entirely free to settle on a shorter term of protection.

2.5. Artistic Works Used in Designs in the UK

In the UK, copyright may be used as an additional level of protection for designs. Thus, copyright may subsist in artistic works which have been used, with the license of the copyright owner, as the basis of designs which have been exploited through the making or marketing of industrially produced articles falling to be treated as copies of that work. An article is considered to be made by an industrial process if more than 50 articles are made, all of which are copies.[53] The term of protection for such works is 25 years from the year in which such articles were first legally marketed. After the end of this period, the work may be copied by making products of any kind to the design, or doing anything for the purpose of making products of any kind, and anything may be done in relation to products so made, without infringing copyright in the underlying work. Thus, if an artistic work has been applied to vases, 25 years after the marketing of the vases, it will no longer be an infringement of copyright to apply the same work to coasters.

The Copyright (Industrial Process, etc) Order 1989[54] excludes the following three sets of articles of "essentially literary and artistic character" from the reach of the 25 year term of protection rule:

- works of sculpture, other than casts or models used or intended to be used as models or patterns to be multiplied by any industrial process;
- wall plaques, medals and medallions; and
- printed matter primarily of a literary or artistic character, including book jackets, calendars, certificates, coupons, dress-making patterns, greeting cards, labels, leaflets, maps, plans, playing cards, postcards, stamps, trade advertisements, trade forms and cards, transfers and similar articles.

Such works, even if mass-produced, retain the full copyright term of 70-year post mortem auctoris.[55]

On the international level, although Article 2(1) of the Berne Convention includes works of applied art in its non-exhaustive list of copyrightable works, Articles 2(7) leaves it to the legislation of the countries of the Berne Union to determine whether or not, and under which conditions, their copyright laws will apply to such works. To the extend that such works are protected at all within the national jurisdiction, Article 7(4) of the Berne Convention, merely imposes a minimum term of protection of at least 25 years from production. Likewise, within the EU, Article 17 of the Design Directive of 1998[56] permits but does not oblige Member States to confer copyright protection to designs already protected by a design right. The determination of the extent to which, and the

[52] S 12(7) CDPA.
[53] Copyright (Industrial Process and Excluded Articles) (No.2) Order 1989 (SI 1989/1070).
[54] See also, CDPA, s. 52(4)(b).
[55] L. Bently and B. Sherman, *Intellectual Property Law* (3rd ed., OUP, Oxford 2009) 678-685.
[56] Directive 98/71/EC of the European Parliament and of the Council of 13 October 1998 on the legal protection of designs [1998] OJ L289/28.

conditions under which, such a protection will be conferred, including the level of originality required, is left to the Member States. Thus, EU Member States are permitted to abstain from copyright protection for works of applied art, but to the extent that they do protect them, the duration of such protection must be 70 years after the death of the author under Article 1 of the Term Directive, which references Article 2 of the Berne Convention, but not Article 7. The UK system for artistic works used in designs would appear to be comparable in its conception to the regimes in place in Italy and Spain for the protection of original and non-original photographs. Under this understanding of the provision, the protection conferred on artistic works used in designs of non-excluded articles falls within the ambit of Recital 19 of the Term Directive on the permissibility of the introduction of other rights related to copyright than those foreseen in the Directive.

2.6. Longer Terms of Protection

According to Article 10(1) Term Directive, "where a term of protection which is longer than the corresponding term provided for by [the Directive] was already running in a Member State on 1 July 1995, this Directive shall not have the effect of shortening that term of protection in that Member State." The longer term is protected as a duly acquired right.[57] The longer term of protection will apply for all works and subject matter protected in at least one Member State (Article 10(2)), but only within the Member State in which the term was in force prior to the entry into force of the Term Directive.[58] From among the six states under examination, three (France, Spain and the UK) have provisions that stand out in connection to this rule.

It is worth noting that whether an already running term of protection is longer than the term granted by the Term Directive will not always be self-evident. This will especially be the case in related to works of joint authorship. In countries for example in which films prior to the transposition of the Directive were protected from the death of the longest living author, as opposed to the designated four of Article 2 Term Directive, there will be no way of knowing which of the multiple persons involved will prove to be the longest living prior to the demise of all.[59] This is, for example, currently the situation in the Netherlands.[60]

Can a Member State opt to adopt legislation that shortens a previously longer term of protection in order to bring it into line with the rules of the Term Directive? The neutral language of Article10(1) itself seemingly leaves that possibility open, but the Recital 10 demand for due regard for established rights as one of the general principle's of law of the Community legal order speaks against such an assumption.

2.6.1. France and War-Related Term Extensions

In France, the Intellectual Property Code contains three provisions extending the term of protection for works published during WWI /WWII or whose authors died for France during the wars.

---

[57] Recital 10, Term Directive.
[58] D. Visser, "Rental and Lending Right Directive" in T. Dreier and B. Hugenholtz (eds), *Concise European Copyright Law* (Kluwer Law International, Alphen aan den Rijn 2006) 302.
[59] S. Von Lewinski and M.M. Walter, *European Copyright Law – A Commentary* (OUP, Oxford 2010), p. 617.
[60] J.H. Spoor, D.W.F. Verkade, D.J.G. Visser, *Auteursrecht – Auteursrecht, naburige rechten en databankenrecht*, Kluwer, Deventer 2005, p. 560.

To compensate the loss and difficulties of commercial exploitation of the works during WWI and WWII, the Parliament added, in 1919 (introduced by the Law of 3 February 1919) and in 1951 (introduced by Law of 21 September 1951), two extensions of the term of protection:

- Under Article **L. 123-8** of the CPI, the rights vested in the heirs and successors of authors, composers and artists shall be extended for a period of **6 years and 152 days** for works published before the Signature of the Versailles Treaty and which did not fall into the public domain on 3 February 1919.
- Under Article **L. 123-9** of the CPI, the rights vested in the heirs and successors of authors, composers and artists shall be extended for a period of **8 years and 120 days** for works published before 1 January 1948 and which did not fall into the public domain on 13 August 1941.

  The starting point of these extensions is not the author's death but the publication of his work. It should be noted that the two extensions can be added for a work published during WWI, which can benefit then of an extension up to 14 years and 272 days. The provision is particularly interesting in that it can conceivably result in different terms of protection for works of the same author, even in if they would otherwise fall under term of protection provisions that connect the duration of protection with the death of the author.

To compensate the 'premature' death of an author who died for France, the Parliament also added in 1951 (introduced by Law of 21 September 1951) a third extension of term of protection:

- Under Article L. **123-10** of the CPI, works of authors, composers and artists who died for France during WWI or WWII should benefit from an extra protection of **30 years**.

These articles were not repealed by the Parliament when it implemented Directive 93/98/EEC into French law. However, in two decisions of 27 February 2007 concerning non-musical works, the Court of Cassation excluded the application of Article L. 123-8 and Article L. 123-9 by interpreting them in the light of Directive 93/98/EEC. The Court ruled that the new harmonised term (**70 years p.m.a**. instead of 50 years p.m.a.) absorbed the 'extensions due to wars', without shortening longer terms of protection that would have started before 1 July 1995. The Court of Cassation applied Article 10 (1) of the Directive providing the respect of established rights ("Where a term of protection which is longer than the corresponding term provided for by this Directive was already running in a Member State on 1 July 1995, this Directive shall not have the effect of shortening that term of protection in that Member State").

Taking into account the fact that **musical works** benefitted from a term of protection of ***70 years p.m.a.*** and **non-musical works** from a term of protection of ***50 years p.m.a***. before 1 July 1995, commentators have concluded that:

- extensions due to wars are absorbed in the longer term of protection for **non-musical works**:

  Under the previous regime, a work published during WWI would benefit from a term of protection of 64 years and 272 days (50 years p.m.a. + 14 years and 272 days); a work published during WWI would benefit from a term of protection of 58 years and 120 days (50 years p.m.a. + 8 years and 120 days).

  →These two terms of protection are lower than the new harmonised term (70 years p.m.a). Therefore, only the term of **70 years p.m.a**. will apply.

- extensions due to wars subsist for **musical works** since they benefitted from a longer term of protection before 1 July 1995:

  Under the previous regime, a work published during WWI would benefit from a term of protection of **84 years and 272 days** (70 years p.m.a. + 14 years and 272 days); a work published during WWII, would benefit from a term of protection of **78 years and 120 days** (70 years p.m.a + 8 years and 120 days).

  →These terms of protection are higher than the new harmonised term (70 years p.m.a) and should continue to subsist.

In the two decisions of 27 February 2007, the Court of Cassation did not have to rule on the fate of Article L. 123-10 of the CPI, which provides for an extra extension of term of 30 years if the author died for France during WWI or WWII. A legal uncertainty regarding the application and interpretation of Article L.123-10 thus remains:

- In case of **musical works** whose authors died for France, the term of protection should be 70 years p.m.a + 30 years i.e. 100 years. In the event the musical work was published during WWI, an extra extension of 14 years and 272 days should be added. The term of protection of a musical work published during WWI and whose author died for France is therefore **114 years and 272 days**. It should be noted that if the musical work has been published during WWII, the extra extension is 8 years and 120 days and the total term of protection **108 years and 120 days**.

  This interpretation is in line with Article 10(1) of Directive 93/98/EEC and the ruling of the Court of Cassation on the longer term of protection existing before 1 July 1995.

- In case of **non-musical works** whose authors died for France, commentators are divided on how to calculate the term of protection:

  (a) Some consider that the extensions due to wars are not applicable as they are absorbed in the new harmonised term of protection. As a consequence, only the extension due to the circumstance of the death of the author (30 years) should apply.

  Therefore, a **non-musical work**, whether published or not during WWI or WWII, and whose author died for France will benefit from a term of protection of 70 years p.m.a. + 30 years i.e. **100 years.**

  (b) Whereas others consider that the calculation should be made as if the situation occurred on 1 July 1995 i.e. under the previous regime since the total term of protection would be higher than 70 years p.m.a.

  As a consequence, a non-musical work whose author died for France would benefit from a term of protection of 80 years (i.e. 50 years p.m.a. + 30 years); for a work published during WWI, 14 years and 272 days are added (i.e. 94 days and 272 days) and for a work published during WWI, 8 years and 120 days are added (i.e. 88 years and 120 days).

In the French Decision Tree, as a precautionary measure, we have opted for a term of protection of 100 years for non-musical works whose authors died for France, whether the works were published during WWI/WWII or not.

The case of a non-musical work published during WWI or WWII and written by an author who died for France is not hypothetical. Several famous authors belong to this category (e.g. Antoine de Saint-Exupéry, Guillaume Appolinaire, Charles Péguy).

It should be noted that, prior to the implementation of the Term Directive, Italy also provided for a 6-year term extension for wartime for works by Italian authors published prior to 17 August 1945. This was abolished with the transposition of the Term Directive in 1996.[61] In addition, under the Treaty of Peace Italy signed in 1947, copyrights that were still effective on the date World War II started and that still belonged at that time to nationals of the other treaty parties, were extended from that date till 25 December 1947. It is unclear whether the new Term Directive terms also absorb the latter extension.

2.6.2. Spain's 80 Year p.m.a. Rule

In Spain the term of protection under the 1897 Law on Intellectual Property was 80 years after the death of the author. Following the legislative curtailment of this term by 20 years in 1987 to a total of 60 years after the death of the author, transitional provisions were introduced in the benefit of works whose authors died before 7 December 1987.[62] For such cases, the term of protection remains 80 years p.m.a. In accordance with the principle of non-discrimination and the provisions of the Term Directive, the 80-year p.m.a. rule applies in Spain to all copyright works whose country of origin is an EU Member State or whose author is a Community national if said author died before 7 December 1987.

2.6.3. Unpublished Works in the UK

Under the 1911 Copyright Act in the UK, unpublished literary, dramatic and musical works, as well as engravings, were protected for 50 years from the date of publication. This in effect bestowed perpetual copyright on the owners of such works, as long as they refrained from publication. This excessively indulgent rule was revoked with the 1988 Act, which capped the term of protection of copyright works, whether published or not, at 50 years after the death of the author. Works which were unpublished at the time of the author's death and remained that way until 1 August 1989 were to receive copyright protection for 50 years from 1 January 1990, i.e. until 31 December 2039.[63] With the increase of the duration of protection to 70 years p.m.a. brought about by the Term Directive however, the term of protection of such works should be considered to be extended till 31 December 2059. In accordance with the principle of non-discrimination and the provisions of the Term Directive, the provision applies to all copyright works which were protected in at least one Member State on 1 July 1995.[64]

2.6.4. Sir James Matthew Barrie's *Peter Pan*

Although not technically a term of protection extension as such, it is necessary to mention that special status enjoyed by *Peter Pan* under UK law. As a special concession to the Great Ormond

---

[61] Proposal for a Council Directive harmonizing the term of protection of copyright and certain related rights, COM(92) 33 final – SYN 395, Brussels, 23 March 1992; A. Musso and M. Fabiani, "Italy" in P.E. Geller and M. B. Nimmer (eds.), *International Copyright Law and Practice* (Lexis Nexis 2009) §§ 3[2][b], 3[3][b].
[62] See Spanish Intellectual Property Act, 4th Transitional Provision.
[63] CDPA, Schedule 1, para. 12(4); L. Bently and B. Sherman, *Intellectual Property Law* (3rd ed., OUP, Oxford 2009) 165.
[64] The Duration of Copyright and Rights in Performances Regulations 1995 (No. 3297), reg. 16(d).

Street Hospital for Sick Children in London, to which JM Barrie donated his copyright in the play, at the very last stage of the Parliamentary progress of the CDPA 1988, a *sui generis* right was created exclusively for the protection of that play and any adaptation of that work. Under section 301 and Schedsule 6 CDPA, the Hospital trustees have been granted a right to a royalty without limit of time in respect of any public performance, commercial publication or communication to the public, notwithstanding the expiry of copyright in the play on 31 December 1987. The right may not be assigned and will cease to exist if the trustees purport to assign or charge or if the Hospital ceases to have a separate identity or ceases to have purposes which include the care of sick children.[65]

3. Protection Vis-à-Vis Third Countries

3.1. Copyright

The Term Directive introduces the rule of comparison of terms to the Community legal order: according to Article 7, where the country of origin of the work is not an EU Member State and the author of the work is not a Community national, the protection granted by Member States will last as long as it would in the country of origin of the work, but may not exceed the term laid down in the Directive. This is in conformity with the international rule of comparison of terms, as established in Article 7(8) of the Berne Convention. As a result, if a work is protected for 50 years post mortem auctoris in its (non-EU) country of origin, that will be the term of protection in all EU Member States as well. If however the (non-EU) country of origin of the work grants authors protection for 80 years after their death, the term of protection within the EU will be limited to 70 years post mortem auctoris.

The country of origin is determined on the basis of Article 3(4) and 5(4) of the Berne Convention. A Community national is a person or entity with the nationality of an EU Member State. The reference to Community nationals in the Directive should be taken as also including the nationals of contracting states to the European Economic Area Agreement. A mere resident is not considered to be a national. Confusion may arise in cases where the country of origin of the work is not immediately apparent, such as, for example, in the case of several joint authors with different nationality, where the author has dual or multiple nationality or where the author's nationality changes during his/her lifetime. Likewise, the term of protection in cases where several countries of origin exist, one or all of which have, during the time when the work is protected, reduced or extended their term of protection. Von Lewinski and Walter suggest that in all such cases of uncertainly the author's interests must prevail and the country providing the longest term should be decided upon as being the country of origin for purposes of term calculation.[66] Although different opinions are also held among scholars, in the construction of the Decision Trees this has been the interpretation followed in the benefit of erring on the side of caution. Finally, difficulties may also arise where a new EU Member State, before joining the EU, had a term of protection shorter than that imposed by the Term Directive. Transitional provisions may solve this issue internally, but whether other EU Member States, which would prior to accession

[65] D.I. Bainbridge, *Intellectual Property* (7th ed., Pearson Education Ltd, Edinburgh 2009) 76. See also, Peter Pan FAQ, Great Ormond Street Hospital, available at: http://www.gosh.org/peterpan/copyright/faq/#Copyright.
[66] S. Von Lewinski and M.M. Walter, *European Copyright Law – A* Commentary (OUP, Oxford 2010), p. 596.

would have applied the rule of comparison of terms, are obliged to recognise longer protection for works whose authors have already died or for which protection has already lapsed is unclear.[67]

Article 7 of the Term Directive does not establish a complete EU regime for the treatment of aliens in the field of copyright and related rights; instead it presupposes the existence of further national rules and international, regional or bilateral treaties. Whereas this approach is explicitly stated in Article 7(2) with regard to related rights, an equivalent concept should be assumed with regard to copyright.[68] In any case, Article 7(3) permits Member States to abide by existing international obligations towards non-EU Member States which impose longer terms of protection, such as bilateral or regional treaties, barring the conclusion of international agreements on the term of protection of copyright or related rights. If the author of the work is not a national or resident of a country party to the international copyright treaties (namely, the Berne Convention, WCT, TRIPS Agreement and Universal Copyright Convention) and if the work was not first published in such a state or simultaneously published in such a state and a state not party to any of these treaties, then the work shall be considered to be in the public domain within all EU jurisdictions. It should be noted however that this is a very rare possibility.

3.2. Neighbouring or Related Rights

As with copyright, the Term Directive also prescribes reciprocity with regard to related rights. Thus, Article 7(2) stipulates that the term of protection granted by an EU Member State shall expire no later than the date of expiry of the protection granted in the country of which the right-holder is a national, but may not exceed the term laid down in the Directive. Thus, the Term Directive hinges the comparison regime solely on the criterion of nationality of the right-holder, side-stepping points of attachment that might be set forth in the relevant international treaties. Nevertheless, the rule is explicitly without prejudice to the international obligations taken on by the Member States. As a result, given that the main international treaties on related rights do not all depend protection on the nationality of the right-holder, other parameters, such as the territory in which the performance, recording or broadcast took place, might also come into play.

The reluctance with regard to related rights is due to the relatively undeveloped condition of international related rights protection in comparison to that of copyright at the time when the Term Directive was adopted. Since then, international convergence in this field has been greatly improved by means of the WPPT and TRIPS Agreement.[69] The freedom left to the Member States continues to carry particular weight as regards the protection of the first fixation of films, for which no international treaty currently regulates questions of international recognition.

As is stated explicitly in an information box accompanying each of the Decision Trees, in relation to neighbouring or related rights (i.e. rights over performances, phonograms, the first fixation of a film and broadcast) the Public Domain Helper Tool only applies when at least one of the right-holders is a national of an EEA state. The decision to exclude international situations from the application of the flowcharts was taken in view of the extraordinarily complex legal assessments that are involved in the mere recognition of, as well as the calculation of the term of, protection in this area.

---

[67] D. Visser, "Term Directive" in T. Dreier and B. Hugenholtz (eds), *Concise European Copyright Law* (Kluwer Law International, Alphen aan den Rijn 2006) 300.
[68] S. Von Lewinski and M.M. Walter, *European Copyright Law – A* Commentary (OUP, Oxford 2010), p 591.
[69] S. Von Lewinski and M.M. Walter, *European Copyright Law – A* Commentary (OUP, Oxford 2010), p 599.

Of the main international treaties pertaining to related rights:

- The Rome Convention grants a minimum term of protection of 20 years from when (a) the fixation was made, for phonograms and the performance incorporated therein; (b) the performance took place, for performances not incorporated in phonograms and (c) the broadcast took place, for broadcasts (Article 14);
- The WPPT recognises a term of protection for performers of 50 years from (a) when the performance was fixated in a phonogram, for performers and (b) the phonogram was published or, failing such publication, the fixation was made, for the producers of phonograms (Article 17);
- The TRIPS Agreement sets a term of protection of (a) 50 years from when the fixation was made or the performance took place, for performers and phonogram producers and (b) 20 years from when the broadcast took place, for broadcasting organisations (Article 14(5));
- For phonogram producers, the Geneva Phonograms Convention, to the extent that contracting states decide to regulate the duration of protection, sets a minimum of 20 years from when the phonogram was first fixated or first published (Article 4);
- Currently, no international treaty covers the provision of protection to film producers.

Article 4 and 5 Rome Convention oblige contracting states to grant national treatment to foreign performers and phonogram producers connected, in at least one of the ways listed in the article, to another signatory of the convention. Article 2(2) explains that ,"[n]ational treatment shall be subject to the protection specifically guaranteed, and the limitations specifically provided for, in this Convention." Disagreement has arisen between legal writers as to the correct interpretation of this provision. Some commentators have expressed the opinion that the sentence has the effect of limiting the obligation to grant national treatment under the condition that the minimum standards set by the Convention are met. Others conclude however that the article is intended to act as a guarantee that these standards are abided by, regardless of the treatment afforded to nationals. The second opinion has the advantage of seeming to be confirmed by the records of the Rome Convention.

By contrast, the WPPT, TRIPS Agreement and Geneva Convention do not impose national treatment obligations, satisfying themselves with the observance of the protection they explicitly define. Higher domestic standards need not be met for foreign right-holders. As a result, any contracting state is free to impose a comparison of terms rule or to arbitrarily offer a lower standard of protection, provided the rules set out in each instrument are respected.[70]

Another significant difference between the international norms on copyright and those dealing with related rights involves the number of signatory states the relevant treaties have attracted. The Rome Convention, the most popular related rights treaty, has a total of 91 contracting parties. The WPPT is a close second with 86 signatory states, while the Geneva Convention has been signed by a mere 77 countries. By contrast, the Berne Convention has 164 contracting parties (compare to a total of 192 United Nations Member States).[71] The newer WCT only has 88 contracting states, but the membership of TRIPS, which makes adhesion to Berne mandatory, coincides with that of the World Trade Organisation (WTO) and comes up to 153 states.

[70] M. van Eechoud et al., *Harmonizing European Copyright Law – The Challenges of Better Lawmaking* (Kluwer Law International, 2009) 220-221.

[71] See, WIPO-Administered Treaties, WIPO website, at: http://www.wipo.int/treaties/en/; "Members and Observers", WTO website, at: http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm and "Growth in United Nations Membership, 1945-present", United Nations website, at: http://www.un.org/en/members/growth.shtml#2000.

With regard to related rights, Article7 of the Term Directive limits itself to the rights dealt with in Article 3, i.e. those of performers, producers of phonograms, broadcasting organisations and producers of first fixations of films. The protection of the third country owners of other related rights will thus depend exclusively on the rules of the domestic law of the Member States or their international obligations. This will be the case for example as regards the protection of the publisher of a previously unpublished public domain work (Article 4 Term Directive), critical and scientific publications (Article 5 Term Directive), non-original photographs (Article 6 Term Directive), or other related rights recognised in the legislation of the individual Member States (e.g. related rights protection for typographical arrangements or sporting events). In cases such as that of the protection of acrobats, musicians and circus or vaudeville artists, Member States will be bound by the provisions of the international treaties.

4. Term of Protection for Databases

The term of protection for original databases is governed by the regular rules on the term of protection of works of copyright as set out in the Term Directive. An original database is defined by the Database Directive as a database which, by reason of the selection or arrangement of its contents, constitutes the author's own intellectual creation (Article 3, Database Directive), i.e. the standard for originality is the same as that imposed by the Term Directive for original photographs. Both this term of protection and the originality standard are in conformity with the international rules set out in Article 2(5) of the Berne Convention, Article 5 of the WCT and Article 10 of the TRIPS Agreement.

Article 7 of the Database Directive further obliges Member States to extend a *sui generis* intellectual property right to the makers of non-original databases which, however, show that there has been, qualitatively and/or quantitatively, a substantial investment in either the obtaining, verification or presentation of the contents to prevent extraction and/or re-utilisation of the whole or of a substantial part, evaluated qualitatively and/or quantitatively, of the contents of that database. The term of protection of such non-original databases is set in Article 10 of the Database Directive, according to which the sui generis right shall expire 15 years from the data of completion of the database or, if the database is made available to the public in whatever way before the end of this period, 15 years after it was thus made available. Importantly, any substantial change, to the contents of the database which could result in the database being considered to be a substantial new investment, qualifies the resulting new database for its own term of protection. As a result, the term of protection for dynamic, i.e. regularly updated, databases can be extended ad infinitum, resulting in perpetual protection. However, it should be noted that it is not clear whether such substantial changes simply qualify the pre-existing database for extended protection or whether a series of databases is thus created each one of which is granted its own individual term of protection, each term commencing with the substantial change which signalled the creation of the new database.

With regard to the international reach of the sui generis right, Article 11 of the Database Directive limits application to databases whose makers or right-holders are nationals or residents of an EU Member State and to companies or firms formed in accordance with the law of a Member State which have their registered office, central administration of principle place of business within the Community. If the company or firm is not formed in accordance with the law of a Member State, but only has its registered office in the territory of the Community, its operation must be genuinely linked in an ongoing basis with the economy of a Member State. Pursuant to the EEA Agreement, this rule is expanded to include all EEA countries which are not EU members as well. This

territorial limitation was possible, as the sui generis right is not covered by an international treaty, meaning that the rule of national treatment does not apply. Nevertheless, paragraph 3 of Article 11 does leave open the possibility of the Council, acting on a proposal of the Commission, to conclude international agreements extending the sui generis right to otherwise non-protected third country databases. In such as case Recital 56 of the Database Directive makes clear that material reciprocity would be required.

5. Transitional Provisions

Article 10(2) of the Term Directive, stipulates that the terms of protection laid down in the Directive apply to all works and subject matter which were protected in at least one Member State on the 1 July 1995. This is in conformity with the general prohibition of discrimination on the basis of nationality within the EU under Article 12 EC Treaty. A series of ECJ case law has elaborated on the correct interpretation of this rule. In *Ricordi*[72], the Court held that the prohibition of discrimination holds true to cases where the author died before the EC Treaty came into force, while in *Tod's*[73] the ECJ clarified that discrimination on the basis of the country of origin is also forbidden. In *Bob Dylan*[74] the Court clarified that it suffices that protection was recognised on 1 July 1995 in any Member State, regardless of whether that is the state in which protection is sought. Whether the person claiming protection is a Community national or not is not relevant. Finally, as has already been mentioned, it is uncertain what the legal situation is for works whose term of protection lapsed in all Member States due to comparison of terms prior to that state's acceding to the EU, where the term of 70 years is still running.

The transition from a 50-year to a 70-year term that the transposition of the Term Directive meant for the majority of EU Member States resulted in widespread resuscitation of expired copyrights. For example, the works of Virginia Woolf came out of copyright in the UK on 1 January 1992, under the old UK term of 50 years after the death of the author, but were subsequently revived from 1 January 1996 till 31 December 2011. This rule applies across the EU and will occur as long as the work was (or ought to have been pursuant to the principle of non-discrimination) protected in at least one Member State on 1 July 1995. While this no doubt was a boon for right-holders, it put those who had exploited works they thought were out of copyright in a strange position. Article 10(3) of the Term Directive sought to smooth the transition by guaranteeing the legitimacy of acts of exploitation performed before 1 July 1995 and safeguarding the acquired rights of third parties. This means that no royalty is due for any editions of the works of Virginia Woolf published between 1992 and 1996 without license from the copyright owner, while such existing editions may also continue to be sold even past 1996.[75]

In some cases more dramatic results ensue, particularly where the provisions of the Term Directive intersect with existing transitional provisions meant to bridge the gap between two or more older versions of the national rules on the term of protection. Complicated questions of transitional provisions have already been mentioned in passing in the sections above, as concerns, e.g. the 80-years term of protection for works of Copyright in Spain or the UK extension of protection for unpublished works whose author had died before 1 August 1989 (see above Sections 2.6.2 and 2.6.3.)

---

[72] Case C-360/00, Land Hessen v G. Ricordi & Co. Bühnen- und Musikverlag GmbH, 6 June 2002.
[73] Case C-28/04, Tod's SpA, Tod's France SARL v Heyraud SA, 30 June 2005.
[74] Case C-240/07, *Sony Music Entertainment (Germany) GmbH v Falcon Neue Medien Vertrieb GmbH*, 20 January 2009.
[75] Copyright and Related Rights Regulations 1996 (No. 2967), Part III.

In one case, the Term Directive includes a very specific transitional provision. With the amendment of the Term Directive in 2001 the term of protection for phonogram producers whose phonograms were communicated to the public before being published was expanded. According to Article 3(2), in such cases, if the rights of phonogram producers had expired under the old rules before 22 December 2002, but would have benefited from longer protection under the new rules, are nevertheless not protected anew.

CONCLUSION

Although the Term Directive aspired to establish a harmonised term of protection for works of copyright and related rights across the EU, in practice unharmonised pockets persist: national idiosyncrasies thus survive into the post-harmonisation era either by means of divergent interpretations given on the national level to terms used in the Directive, either due to exceptions to the harmonised rule. In some cases there can be doubt as to whether such national divergences are in compliance with EU law, but for the most part they are inbred into the Directive itself. Further harmonisation or the introduction of provisions that make the term of protection independent from substantive law terminology will have to be introduced before a truly unified term of protection applies across the EU. Some problems, such as those caused by transitional provisions or international obligations granting terms of protection longer than those foreseen in the Directive will not be eliminated for decades. The discrepancies between the term of protection law of the examined six Member States has necessitated the construction of a separate electronic Public Domain Helper Tool for each jurisdiction.

The differences encountered between laws of the Member States should be kept in mind when applying the Helper Tools to information products. The Tools are only as good as the information fed into them – if inaccurate information is provided, a correct term of protection will be impossible to calculate. So, for example, if the term of protection of a co-written piece of music is sought in France, the inclusion of such works within the French definition of work of joint authorship is important to remember. If, by contrast, the same information product is put through the UK Public Domain Tool, the fact that under UK law it will consist of two separate works, to each of which the Tool should be applied, should be taken into account.

On this note, another important consideration to keep in mind when using the Public Domain Helper Tools is that, as has been noted in the first Information Box in each of the Flowcharts, a single product may contain more than one copyright or neighbouring rights protected subject matter.[76] For example, a CD will often comprise four layers of rights: the music fixated onto it may be covered by copyright, as may any lyrics accompanying the music. At the same time, the performers (whether musicians and singers or of any other description) and the phonogram producer may be protected by related rights. If the CD is sold in a case, any text or pictures on or in that case may also receive copyright protection. Similarly, a book may consist of text and illustrations, both of which may be covered by copyright. If an illustration in the book consists of a photograph of a painting, a third layer of protection may be added. Finally, depending on the jurisdiction, the typographical arrangement of the lettering might also be receive protection. The advent of the information society has propagated the combination of different content forms, particularly through the use of digital technology, complicating the entanglement of multiple rights in one and only multimedia product. All rights involved in a single information product should be

[76] H. MacQueen, C. Waelde and G. Laurie, *Contemporary Intellectual Property – Law and Policy*, (OUP, Oxford 2008) 44.

correctly identified and the flowchart should be applied to each individually, if a correct conclusion is to be reached as to whether the item as a whole is in the Public Domain or not.

Finally, the need for regular updates of the Flowcharts and the corresponding online calculators in accordance with any future changes in international, European and ultimately national law should be considered. It should, for example, be kept in mind that the European Commission has proposed amending the Term Directive to extend the length of related rights in sound recordings from 50 years to 95 years. Currently, after an amendment by the European Parliament bringing the proposed duration down to 70 years, the proposal has stalled before the European Council. It is conceivable however that this or other modifications be adopted in the future, resulting in the need for small or extensive adjustments of the Flowcharts and consequently the Public Domain Helper Tools.

Part II: Decision trees for six additional jurisdictions

In order to investigate national rules on the duration of protection in the six jurisdictions examined for the current milestone, IViR composed a Questionnaire for National Experts. This was sent out to legal experts on copyright and related rights law in five countries, i.e. Denmark, Portugal Romania, Slovenia and Sweden. In-house expertise enabled IViR to investigate the relevant national rules in Greece, for which accordingly no questionnaire was sent out.

Questionnaire for National Experts

on the Implementation of the Term Directive in EU Member States

1. How have the exceptions of Article 1 of the Term Directive (Directive 2006/116/EC) in relation to works of joint authorship, collective works, anonymous and pseudonymous works and works published in parts, instalments, issues or episodes been implemented in your national legislation? Could you please cite the relevant provisions of your national act?
2. Is there a distinction made between works of joint authorship, collective works and compilations in your national jurisdiction? If so, what is the definition for each of these categories and how is the term of protection for such works calculated? Are co-written musical works considered to be works of joint authorship or collective works? What about cinematographic or audiovisual works? Can you think of other examples of works of joint authorship, collective works or compilations in your national act? Could you please cite the relevant provisions of your national act?
3. Are cinematographic or audiovisual works defined in your national legislation? Are other co-authors assigned to such a work, other than the principle director in accordance with Article 2 of the Term Directive? In whom is copyright of such a work vested in your national legislation (please see Article 14bis (2) Berne Convention)?
4. Has Article 3 of the Term Directive on the duration of related rights been implemented in your national legislation and, if so, what is the term of protection? Did situations corresponding to that described in Article 3(2) of the consolidated version of the Term Directive, involving phonograms that were not afforded protection under the Directive 93/98/EEC, but would have qualified under Directive 2001/29/EEC, arise in your jurisdiction? Was Article 3(2) of the consolidated version of the Term Directive implemented in your national legislation? Could you please cite the relevant provisions of your national act?
5. Has Article 4 of the Term Directive on the protection of previously unpublished works been implemented in your national legislation and, if so, what is the term of protection? Could you please cite the relevant provisions of your national act?
6. Has Article 5 of the Term Directive on critical and scientific publications been implemented in your national legislation and, if so, what is the term of protection? Could you please cite the relevant provisions of your national act?

7. Has Article 6 of the Term Directive on the protection of photographs been implemented in your national legislation and, if so, what is the term of protection? Could you please cite the relevant provisions of your national act? Are non-original photographs protected under your national legislation in addition to original ones?
8. How has Article 7 of the Term Directive on protection vis-à-vis third countries been implemented in your national legislation? Could you please cite the relevant provisions of your national act? Had your country prior to the adoption of the Term Directive accepted any international obligations granting a longer term of protection to non-Community nationals than that foreseen by Article 7(1) and (2)?
9. Are moral rights in your country perpetual? (Please see Article 9 Term Directive.) Could you please cite the relevant provision of your national act?
10. Please give the dates at which your national copyright act was changed so as to bring it into conformity with the Term Directive. Were any transitional provisions introduced? Were there any cases of previously expired rights over works in which copyright or related rights subsist being resuscitated? If so, for how long? Did your national act specify whose rights were being revived (e.g. those of the heirs of the author, the last right-holder to acquire the copyright prior to its termination through assignment or other transfer of rights, another party)? Did your national act take advantage of the latitude as to cinematographic or audiovisual works provided by Article 10 (4) Term Directive? Please cite the relevant provisions of your national act.
11. In Romania the term of protection varies according to the class of the beneficiary to whom copyright or related rights pass after the death of the right-holder (surviving spouse/ issue and other blood relatives/ the State via escheat etc.)? Is a similar distinction introduced by your national legislation? If so, could you please cite the relevant provisions of your national act?
12. In France an additional exception was introduced to the copyright act granting longer protection for works made during the First and Second World Wars (see Art. L123-8 and L123-9 of the French *Code de la propriété intellectuelle*). Are there any similar additional exceptions in your country? If so, could you please cite the relevant provisions of your national act?
13. Can you think of any instances where the term of protection provided by your national legislation was longer than that provided by the Term Directive, in a manner similar to that foreseen in Article 10 (1) of the Term Directive? Was your national legislation then amended in accordance with the Term Directive in a way that affected works created before 1 July 1995 or not? Could you please cite the relevant provisions of your national act?
14. Can you think of any other noteworthy divergence of your national act involving the term of protection of works of copyright and related rights from the standards set out in the Term Directive? If so, please elaborate, preferably citing the relevant provisions of your national act.

Completed Questionnaires

Denmark

Author: Thomas Riis, University of Copenhagen

1. Please cite the legal act which governs the term of protection of copyright and related rights in your country.

Consolidated Act on Copyright no. 202 of 27 February 2010

2. How have the exceptions of Article 1 of the Term Directive in relation to works of joint authorship, collective works, anonymous and pseudonymous works and works published in parts, instalments, issues or episodes been implemented in your national legislation? Could you please cite the relevant provisions of your national act?

Sect. 63, para. 1 of the Copyright Act:
"The copyright in a joint work shall last for 70 years after the year of death of the last surviving author. …."

Sect. 63, para. 2 of the Copyright Act:
"Where a work is made public without indication of the author's name, generally known pseudonym or signature, the copyright shall last for 70 years after the year in which the work was made public. Where a work consists of parts, volumes, instalments, issues or episodes a separate term of protection shall run for each item."

Sect. 63, para. 4 of the Copyright Act:
"Copyright in a work of unknown authorship that has not been made public shall last 70 years after the end of the year in which the work was created. "

3. Is there a distinction made between works of joint authorship, collective works and compilations in your national jurisdiction? If so, what is the definition for each of these categories and how is the term of protection for such works calculated? In particular, does joint authorship in particular presuppose that the contributions of several authors are inseparable? Could you please cite the relevant provisions of your national act?

Joint works are defined in Sect. 6 of the Copyright Act in the following way:
"If a work has two or more authors, without the individual contributions being separable as independent works, the copyright in the work shall be held jointly. Each of the authors, however, may bring an action for infringement."

If the individual contributions are separable as independent works the rule on 70 years p.m.a. applies to each work.

Compilations are defined in Sect. 5 in the following way:
"A person who, by combining works or parts of works, creates a composite literary or artistic work, shall have copyright therein, but the right shall be without prejudice to the rights in the individual works."

In respect of a compilation as such as well as each of the individual works in the compilation the rule on 70 years p.m.a. applies.

4. Are co-written musical works considered to be works of joint authorship or multiple separate works in your national jurisdiction? Can you think of other examples of works of joint authorship, collective works or compilations in your national act?

A musical composition and the lyrics for the composition are considered as being separable as independent works.

5. Can a legal person be the original author of a work of copyright in your country? If so, does this affect the term of protection of such works?

No.

6. Are other co-authors assigned to cinematographic or audiovisual works, other than the principle director in accordance with Article 2 of the Term Directive? What is the term of protection for such works in your national jurisdiction?

Sect. 63, para. 1 of the Copyright Act:
"…. With regard to cinematographic works the copyright, however, shall last for 70 years after the year of death of the last of the following persons to survive:
(i) the principal director;
(ii) the author of the script;
(iii) the author of the dialogue; and
(iv) the composer of music specifically created for use in the cinematographic work

7. Are official documents protected by copyright in your country? If so, what is the term of protection? Could you please cite the relevant provisions of your national act?

No, cf. Sect 9 of the Copyright Act:
"(1) Acts, administrative orders, legal decisions and similar official documents are not subject to copyright.
(2) The provision of subsection (1) shall not apply to works appearing as independent contributions in the documents mentioned in subsection (1). Such works may, however, be reproduced in connection with the document. The right to further use shall be subject to the provisions otherwise in force."

8. Has Article 3 of the Term Directive on the duration of related rights been implemented in your national legislation? If so, what is the term of protection? Could you please cite the relevant provisions of your national act?

Performing artists:
"Where a performance has been recorded…, it must not without the consent of the performing artist be copied or be made available to the public until 50 years after the end of the year in which the performance took place. However, if a recording of the performance is lawfully published or lawfully communicated to the public during this period, the rights shall expire 50 years from the date of the first such publication, or the first such communication, whichever is the earlier." (Sect. 65, para. 2 of the Copyright Act.)

Producers of sound recordings:
"Sound recordings may not without the consent of the producer be copied or made available to the public until 50 years have elapsed after the end of the year in which the recording was made. If a sound recording is published during this period the protection shall, however, last until 50 years have elapsed after the end of the year of the first publication. If a sound recording is not published but is made public in any other manner within the period mentioned in the first sentence, the protection shall, however, last until 50 years have elapsed after the end of the year in which it was made public." (Sect. 66, para. 1 of the Copyright Act.)

Producers of Recordings of Moving Pictures:
"Recordings of moving pictures may not without the consent of the producer be copied or made available to the public until 50 years have elapsed after the end of the year in which the recording was made. If a recording of a moving picture is published or made public during this period the protection shall, however, last until 50 years have elapsed after the end of the year in which it was first published or made public, whichever is the earlier." (Sect. 67, para. 1 of the Copyright Act.)

Broadcasters:
"Where a broadcast is photographed or recorded …, it must not without the consent of the broadcaster be copied or made available to the public until 50 years have elapsed after the end of the year in which the broadcast took place." (Sect. 69, para. 2 of the Copyright Act.)

9. Has Article 4 of the Term Directive on the protection of previously unpublished works been implemented in your national legislation? If so, what is the term of protection? Could you please cite the relevant provisions of your national act?

Yes, cf. Sect. 64 of the Copyright Act:
"Where a work has not been published previously, the person who lawfully makes the work public or publishes it for the first time after the expiry of copyright protection, shall have rights in the work equivalent to the economic rights attributed by the Act to the person creating a literary or artistic work. This protection shall last for 25 years after the end of the year in which the work was made public or published."

10. Are critical and scientific publications of works which have come into the public domain protected under your national legislation? If so, what is the term of protection? Could you please cite the relevant provisions of your national act?

No.

11. Are non-original photographs protected under your national legislation in addition to original ones? What is the term of protection for each of these types of photographs? Could you please cite the relevant provisions of your national act?

Original photographs are protected 70 years p.m.a., cf. Sect. 63, para. 1, compared with Sect. 1 of the Act.

Non-original photographs are protected until 50 years have elapsed from the end of the year in which the picture was taken, cf. Sect. 70, para. 2 of the Act.

12. What is the term of protection for original and unoriginal databases in your country? Please cite the relevant provisions of your national act.

Original databases are protected 70 years p.m.a., cf. Sect. 63, para. 1, compared with Sects. 1 and 5 of the Act.

Unoriginal databases are protected until 15 years have elapsed after the end of the year in which the product was produced. If a product of the said nature is made available to the public within this period of time, the protection shall, however, subsist until 15 years have elapsed after the end of the year in which the product was made available to the public for the first time, cf. Sect. 71, para. 4 of the Act.

13. Are any other categories of works given a different term of protection in your country (e.g. works of applied art) or are any additional related or sui generis rights in operation in your country which are subject to special rules as to the term of protection (e.g. in relation to computer-generated works, typographical arrangements, etc.)? If so, could you please cite the relevant provisions of your national act?

The definition of unoriginal databases in Sect. 71 is broader than the definition of a databases in the Database Directive and it covers also a catalogue and a table or the like, in which a great number of items of information has been compiled.

Otherwise the Act does not contain provisions of the sort referred to in question 13.

14. How has Article 7 of the Term Directive on protection vis-à-vis third countries been implemented in your national legislation? Could you please cite the relevant provisions of your national act? Had your country prior to the adoption of the Term Directive accepted any international obligations granting a longer term of protection to non-Community nationals than that foreseen by Article 7(1) and (2)?

Copyright protection vis-à-vis third countries is governed by the provisions of Regulation no. 218 of 9 March 2010 on the application of the act on copyright in relation to other countries.

To my best knowledge, prior to the adoption of the Term Directive, Denmark had not accepted any international obligations granting a longer term of protection to non-Community nationals than that foreseen by Article 7(1) and (2).

15. Are moral rights in your country perpetual? Could you please cite the relevant provisions of your national act?

In principle, parts of the moral rights are perpetual. In Sect. 75 of the Act it is thus stipulated that: "Although the copyright has expired a literary or artistic work may not be altered or made available to the public contrary to section 3(1) and (2) [the ordinary provision on moral rights] if cultural interests are thereby violated." Normally, it is assumed that Sect. 75 has no practical significance.

16. Please give the dates at which your national copyright act was changed so as to bring it into conformity with the Term Directive. Were any transitional provisions introduced? Were there any cases of previously expired rights being resuscitated? If so, for how long? Did your national act specify whose rights were being revived? Please cite the relevant provisions of your national act.

The Term Directive was implemented by Act No. 396 of 14 June 1995.
A number of previously expired rights were resuscitated – some of them for additional 20 years.
The Copyright Act did not specify whose rights were being revived.
Issues relating to resuscitation have to be dealt with by Sect. 90 of the Act:

"(1) This Act shall apply also to works and performances and productions, etc., made before the coming into force of this Act.
(2) This Act shall not apply to acts of exploitation concluded or rights acquired before the coming into force of this Act. Copies of works or of performances or productions etc. can still be distributed to the public and be exhibited in public if they have been lawfully made at a time when such distribution or exhibition was permitted. The provisions of section 19(2) and (3) [the rights of rental and lending of various works are not exhausted] shall, however, always apply to rental and lending carried out after the coming into force of this Act.

(3) If by application of the new provisions the term of protection for a work or a performance or a production etc. shall become shorter than according to the previous provisions those provisions shall apply. ... ”

17. In Romania the term of protection varies according to the class of the beneficiary to whom copyright or related rights pass after the death of the rightholder (surviving spouse/ issue and other blood relatives/ the State via escheat etc.)? Is a similar distinction introduced by your national legislation? If so, could you please cite the relevant provisions of your national act?

No.

18. In France an additional exception was introduced to the copyright act granting longer protection for works made during the First and Second World Wars (see Art. L123-8 and L123-9 of the French *Code de la propriété intellectuelle*). Are there any similar additional exceptions in your country? If so, could you please cite the relevant provisions of your national act?

No.

19. Can you think of any instances where the term of protection provided by your national legislation was longer than that provided by the Term Directive, in a manner similar to that foreseen in Article 10 (1) of the Term Directive? Was your national legislation then amended in accordance with the Term Directive in a way that affected works created before 1 July 1995 or not? Could you please cite the relevant provisions of your national act?

No.

20. Does your national law provide for a *Domaine Public Payant* or an equivalent regime? If so, please briefly describe the main features and functioning of the system.

No.

21. Can you think of any other noteworthy divergence of your national act involving the term of protection of works of copyright and related rights from the standards set out in the Term Directive? If so, please elaborate, preferably citing the relevant provisions of your national act.

No.

Portugal

Author: Alexandre L.D. Pereira*

1. Please cite the legal act which governs the term of protection of copyright and related rights in your country.

   The legal act which governs the term of protection of copyright and related rights is the Code of Author' Right and Related Rights (Código do Direito de Autor e dos Direitos Conexos) - brevis causa, Copyright Act -, Chapter IV (Articles 31 to 39 and Article 183) as amended by Decree-Law 334/97 of 27 November in order to implement Council Directive 93/98/CEE of 29 October (now repealed by EU Directive 2006/116/EC of 12 December 2006). The term of protection for databases is governed by the Database Act enacted by Decree-Law 122/2000 of 4 July which has implemented EU Directive 96/9/EC of 11 March. Hereinafter the Articles referred to belong to the Copyright Act, unless otherwise stated. The general term of protection is 70 years after the death of the intellectual creator even where the work has only been published *postmortem auctoris* (Art. 31). The term of protection occurs after January 1 of the year following the year in which the term has been completed (Art. 3 of DL 334/97).

2. How have the exceptions of Article 1 of the Term Directive in relation to works of joint authorship, collective works, anonymous and pseudonymous works and works published in parts, instalments, issues or episodes been implemented in your national legislation? Could you please cite the relevant provisions of your national act?

   In relation to works of joint authorship the term is 70 years after the death of the author who dies in the last place (Art. 32(1)). In relation to collective works, the term is 70 years after the first lawful publication or divulgation, unless the human persons who have created the work have been identified in the versions of the work made available to the public (Art. 32(2)). The term of copyright concerning individual and separable contributions to the collective work is the general term, i.e., 70 years after the death of the intellectual creator, even if the work has only been published postmortem (Art. 32(3) and Art. 31). In relation to anonymous and pseudonymous works, the term is 70 years after the publication or divulgation (Art. 33(1)), unless the pseudonymous used leaves no room for doubts concerning the identity of the author or in case he/she reveals it within such term, as the term will correspond to the term of works published or divulgated under his/her own name (Art. 33(2)). Concerning works published in parts, installments, issues or episodes, for each of them the term is separately calculated (Art. 35(1)). This applies also to parts or issues of periodical collective works such as newspapers and publications alike (Art. 35(2)).

3. Is there a distinction made between works of joint authorship, collective works and compilations in your national jurisdiction? If so, what is the definition for each of these categories and how is the term of protection for such works calculated? In particular, does joint authorship in particular presuppose that the contributions of several authors are inseparable? Could you please cite the relevant provisions of your national act?

   Portuguese copyright law distinguishes works of joint authorship (*obras em colaboração*) from collective works (*obras colectivas*). Compilations can be works equivalent to original works (Art. 3) and/or composite works (*obra compósita*).
   Works of joint authorship are defined as those which are a creation of a plurality of persons and are divulgated or published under the name of them or some of them, whether or not the individual

* JD, LL.M, PhD/SJD, University of Coimbra, Professor of Copyright and Information Law. Date: 24/11/2010.

contributions can be discriminated (Art. 16(1)(a)). So, joint authorship does not presuppose that the contributions of several authors are inseparable and each author may individually exercise the rights corresponding to his/her personal contribution, when it can be discriminated and without prejudice to the joint exploitation of the work of joint authorship (Art. 18(2)). The same applies, mutatis mutandis, to collective works (Art. 19(2)).

Collective works are defined as those which are a creation of a plurality of persons when it is organized by the initiative of a human or legal person and published under his/her/its own name (Art. 16(1)(b)). Compilations as composite works are those which incorporate, in whole or in part, a preexisting work with the authorization but without the collaboration of its author (Art. 20).

4. Are co-written musical works considered to be works of joint authorship or multiple separate works in your national jurisdiction? Can you think of other examples of works of joint authorship, collective works or compilations in your national act?

   Co-written musical works, as such, are considered to be, in principle, works of joint authorship. Several works are legally deemed to be works of joint authorship such as broadcasted works (Art. 21), cinematographic works (Art. 22) as well as phonographic and video works (Art. 24). Journals and other periodical publications are legally deemed to be collective works (Art. 19(3)), as well as computer programs and databases created within an enterprise (Decree-Law 252/94 of 20 October, Art. 3(2), and Decree-Law 122/2000 of 4 July, Art. 5(2)). Compilations include namely dictionaries, encyclopedias and anthologies (Art. 3(1)(b)(c)) which are also considered collective works.

5. Can a legal person be the original author of a work of copyright in your country? If so, does this affect the term of protection of such works?

   Portuguese copyright law belongs to the family of *droit d'auteur*. Article 29(1) of the Copyright Act apparently implies that a legal person can be the original author of a work. Moreover, some provisions seem to imply an original assignment of the copyright to legal persons, such as Art. 32(2), Art. 36 (computer programs), and Art. 6(2) of DL 122/2000 (databases). Those would be mainly the cases of works made for hire and collective works organized by and published under the name of a legal person. In short, author would be the original owner of copyright according to legal provisions. However, dogmatically, this derogation to the principle of authorship is rather controversial as legal persons are deprived of the capacity of intellectual creation, which is recognized only to human persons. Moreover, despite the dualistic system of Portuguese copyright law (meaning that economic rights can be independently disposed of by act *inter vivos*), it is also controversial whether the original owner of the copyright can be someone else but the creator as, according to well established jurisprudence, the originating fact of copyright is the act of creation itself.

6. Are other co-authors assigned to cinematographic or audiovisual works, other than the principle director in accordance with Article 2 of the Term Directive? What is the term of protection for such works in your national jurisdiction?

   Together with the director there are other co-authors assigned to cinematographic or audiovisual works namely the author of the script, the author of the dialogues, and the author of the musical composition (Art. 22). Similar co-authors are assigned for specific audiovisual works such as broadcasted and video works (Arts. 21(2) and 24). The term of protection is 70 years after the death of the last surviving person assigned as co-author (Art. 34). There is legal opinion holding that the typical creative input in cinematographic works is provided for by the director and the other persons are legally assigned as co-authors for reasons of convenience.

7. Are official documents protected by copyright in your country? If so, what is the term of protection? Could you please cite the relevant provisions of your national act?

Official documents (e.g. legal texts, court decisions) are not protected by copyright in Portugal (Art. 8(2) and Art. 3(1)(c)).

8. Has Article 3 of the Term Directive on the duration of related rights been implemented in your national legislation? If so, what is the term of protection? Could you please cite the relevant provisions of your national act?

   Article 3 of the Term Directive on the duration of related rights has been implemented into Article 183 of the Copyright Act by Decree-Law 334/97 of 27 November. According to Article 183(1), the term of protection of related rights is 50 years after: the performance by the interpreting or performing artist (a), the first fixation of phonogram, video or movie by the producer (b), the first emission by the broadcasting organization whether by means of wire or wireless, including cable or satellite (c). However, in case the fixation of the protected performance, phonogram, video or movie are legally published or publicly communicated within such period, the term of protection starts with these facts (Art. 183(2)). By movie it is understood a cinematographic or audiovisual work as well as any sequence of motion pictures (moving images) together or not with sound (Art. 183(3)). Owners of related rights whose country of origin is a non EU country are afforded the term of protection of their country of origin provided it does not exceed the above mentioned term of protection (Art. 183(4) and Art. 37).

9. Has Article 4 of the Term Directive on the protection of previously unpublished works been implemented in your national legislation? If so, what is the term of protection? Could you please cite the relevant provisions of your national act?

   Yes, the term of protection, limited to economic rights, is 25 years after the publication or divulgation of previously unpublished works which have come into the public domain (Art. 39(1)).

10. Are critical and scientific publications of works which have come into the public domain protected under your national legislation? If so, what is the term of protection? Could you please cite the relevant provisions of your national act?

    Critical and scientific publications of works which have come into the public domain are protected under Portuguese copyright law for a term of 25 years after lawful publication (Art. 39(2)).

11. Are non-original photographs protected under your national legislation in addition to original ones? What is the term of protection for each of these types of photographs? Could you please cite the relevant provisions of your national act?

    Non-original photographs are not protected under Portuguese copyright law (Art. 164), and no specific term of protection is provided for original ones.

12. What is the term of protection for original and unoriginal databases in your country? Please cite the relevant provisions of your national act.

    The term of protection for original databases is 70 years after the death of its intellectual creator (Art. 6(1) of DL 122/2000). In case protection is originally attributed to other entities (e.g. in case of databases created within an enterprise or made for hire) the term is for 70 years after its first publication or public divulgation (Art. 6(2) of DL 122/2000). The term of protection of the database producers' sui generis right is for 15 years after the conclusion of its production starting on the January 1st of the year following the year of its date of production (Art. 16(1) of DL 122/2000). Non-original databases can have only this term of protection. Each substantial modification to the content of a database which qualifies as a substantial investment gives rise to a term of protection of its own.

13. Are any other categories of works given a different term of protection in your country (e.g. works of applied art) or are any additional related or sui generis rights in operation in your country which

are subject to special rules as to the term of protection (e.g. in relation to computer-generated works, typographical arrangements, etc.)? If so, could you please cite the relevant provisions of your national act?

Broadcasting, reproducing in phonogram or video, filming or exhibiting of public performances of protected works is subject to authorization also of the promoter of the public show (Art. 117). However, no rule as to the term of protection is provided for this 'atypical' related right.

14. How has Article 7 of the Term Directive on protection vis-à-vis third countries been implemented in your national legislation? Could you please cite the relevant provisions of your national act? Had your country prior to the adoption of the Term Directive accepted any international obligations granting a longer term of protection to non-Community nationals than that foreseen by Article 7(1) and (2)?

    Works whose country of origin is a foreign non EU country and whose author is not a national of an EU country are afforded the term of protection of the legislation of the country of origin provided it does not exceed the term of protection established by the Copyright Act (Art. 37). Owners of related rights whose country of origin is a non EU country and who are not nationals of an EU country are afforded the term of protection of their country of origin provided it does not exceed the term of protection established by the Copyright Act (Art. 183(4) and Art. 37). No record has been found concerning the acceptance by Portugal, prior to the adoption of the Term Directive, of any international obligations granting a longer term of protection to non- Community nationals than that foreseen by Article 7(1) and (2) of the Term Directive.

15. Are moral rights in your country perpetual? Could you please cite the relevant provisions of your national act?

    In Portugal moral rights may be considered relatively perpetual as they are enjoyed by the author, regardless and even after the transmission or extinction of the economic rights (Art. 9(3)). Moreover, the 'moral right' is inalienable, has no term of protection and is perpetuated after the death of the author (Art. 56(1)), meaning that while it does not come into the public domain it is exercised by the heirs of the author (Art. 57(1)) and once into the public domain the protection of the integrity of the work is done by the State (Art. 57(2)). According to relevant copyright literature, this means that, once into the public domain, only the right of integrity seems to be perpetual but no longer as an author's right but rather as a right of the State concerning the protection of the country's cultural heritage.

16. Please give the dates at which your national copyright act was changed so as to bring it into conformity with the Term Directive. Were any transitional provisions introduced? Were there any cases of previously expired rights being resuscitated? If so, for how long? Did your national act specify whose rights were being revived? Please cite the relevant provisions of your national act.

    In order to implement the Term Directive (93/83/CEE) the Copyright Act has been amended by Decree-Law 334/97 of 27 November. The provisions of this Act became applicable since 1 July 1995 and to any work, performance or production protected on that date in any country of the European Union (Art. 5(1)). No transitional provisions have been introduced. There were cases of resuscitation because the heirs of the author enjoyed the reactivation of rights arising thereof (i.e., provided that protection existed on that date), but without prejudice to the acts of exploitation already practiced and rights acquired by third parties (Art. 5(2)).

17. In Romania the term of protection varies according to the class of the beneficiary to whom copyright or related rights pass after the death of the rightholder (surviving spouse/ issue and other blood relatives/ the State via escheat etc.)? Is a similar distinction introduced by your national legislation? If so, could you please cite the relevant provisions of your national act?

No, the term of protection does not vary according to the class of the beneficiary to whom the copyright or related rights pass after the death of the copyright holder, except in what concerns the perpetual 'right of integrity' which is conferred to the State (Art. 57(2)).

18. In France an additional exception was introduced to the copyright act granting longer protection for works made during the First and Second World Wars (see Art. L123-8 and L123-9 of the French *Code de la propriété intellectuelle*). Are there any similar additional exceptions in your country? If so, could you please cite the relevant provisions of your national act?

    No record found.

19. Can you think of any instances where the term of protection provided by your national legislation was longer than that provided by the Term Directive, in a manner similar to that foreseen in Article 10 (1) of the Term Directive? Was your national legislation then amended in accordance with the Term Directive in a way that affected works created before 1 July 1995 or not? Could you please cite the relevant provisions of your national act?

    No record found.

20. Does your national law provide for a *Domaine Public Payant* or an equivalent regime? If so, please briefly describe the main features and functioning of the system.

    Copyright law does not provide a *Domaine Public Payant*. There is however discussion whether legislation on access to and reuse of administrative documents as well as on the protection of cultural heritage could provide the foundations of such a regimen.

21. Can you think of any other noteworthy divergence of your national act involving the term of protection of works of copyright and related rights from the standards set out in the Term Directive? If so, please elaborate, preferably citing the relevant provisions of your national act.

    No record found.

Romania

Author: Bogdan Manolea – CC BY-NC-SA 3.0 Romania

1. How have the exceptions of Article 1 of the Term Directive (Directive 2006/116/EC) in relation to works of joint authorship, collective works, anonymous and pseudonymous works and works published in parts, installments, issues or episodes been implemented in your national legislation? Could you please cite the relevant provisions of your national act?

   The European acquis on IPR have been implemented in the Copyright Law no 8/1996 by the following normative acts:

   - Law no. 285/2004 on the modification and completion of Law no.8/1996 (the Official Gazette of Romania no.587/30.06.2004)
   - General Emergency Ordinance no.123/2005 on the modification and completion of Law no. 8/1996 (the Official Gazette of Romania no.843/19.09.2005)
   - Law no. 329/2006 (the Official Gazette of Romania no. 657/31.07.2006)

There is no explicit implementation of the Term Directive (Directive 2006/116/EC) in any national normative act. In fact the last modification of the Copyright Law was made before the Term Directive was published in the Official Journal of the EU. However, some of the provisions of the Term Directive are included in the national legislation.

The current text (from August 2010) of Romanian Copyright Law 8/1996[77] states the following:

Art. 26.—(1) The term of the economic rights in works legally disclosed to the public under a pseudonym or without a mention of the author's name shall be 70 years from the date on which they were disclosed to the public.

(2) Where the author's identity is revealed to the public before the term mentioned in paragraph (1) expires, or the pseudonym used by the author leaves no doubt about his identity, the provisions of Article 25 (1) shall apply.

Art. 27.—(1) The term of the economic rights in works of joint authorship shall be 70 years from the death of the last surviving co-author.

(2) Where the contributions of the co-authors are distinct, the term of the economic rights in each such contribution shall be 70 years from the death of the author thereof.

Art. 28.— The term of the economic rights in collective works shall be 70 years from the date of disclosure of the works. Where disclosure does not occur for 70 years following the creation of the works, the term of the economic rights shall expire 70 years after the said creation.

2. Is there a distinction made between works of joint authorship, collective works and compilations in your national jurisdiction? If so, what is the definition for each of these categories and how is the term of protection for such works calculated? Are co-written musical works considered to be works of joint authorship or collective works? What about cinematographic or audiovisual works? Can you think of other examples of works of joint authorship, collective works or compilations in your national act? Could you please cite the relevant provisions of your national act?

77 From here on mentioned just as Law 8/1996

The Law 8/1996 makes the following distinctions between different works of joint authorship and collective works:

Art. 5.—(1) A work of joint authorship shall be a work created by several co-authors in collaboration.

(2) The copyright in a work of joint authorship shall belong to the co-authors thereof, one of whom may be the main author as provided in this Law.

(3) Unless otherwise agreed, co-authors may only exploit the work by common consent. Refusal of consent by any one of the co-authors must be fully justified.

(4) Where each co-author's contribution is distinct, that contribution may be exploited separately, provided that it does not prejudice the exploitation of the joint work or the rights of the other co-authors.

(5) In the case of the utilization of a work of joint authorship, the remuneration shall accrue to the co-authors in the proportions they shall have agreed upon. Failing such agreement, the remuneration shall be divided in proportion to the share contributed by each author, or equally if such shares cannot be determined.

For the works of joint authorship, the term is calculated according with art. 27 of the same law (cited above) – 70 years from the death of the last surviving co-author or if the contributions of the co-authors are distinct, the term is 70 years from the death of the author of each contribution.

Art 6.—(1) A collective work shall be a work in which the personal contributions of the co-authors form a whole, without it being possible, in view of the nature of the work, to ascribe a distinct right to any one of the co-authors in the whole work so created.

> *(2) Unless otherwise agreed, the copyright in a collective work shall belong to the person, whether natural person or legal entity, on whose initiative and responsibility and under whose name the work was created.*

For the collective works, the term is calculated according with art. 28 of the same law – 70 years from the date of disclosure of the works.

There is no definition of compilations in the Law 8/1996, but they are considered as derivative works, as they are included in Art 8 para b.

Art. 8.— Without prejudice to the rights of the authors of the original work, copyright shall likewise subsist in derived works created on the basis of one or more pre-existing works, namely:

(...)

(b) collections of literary, artistic or scientific works, such as encyclopaedias, anthologies and collections and compilations of protected or unprotected material or data, including databases, which, by reason of the selection or arrangement of their subject matter constitute intellectual creations.

Also, if a compilation is a database, a sui-generis right on the database might exist according with Title II Chapter IV "Sui generis rights of the makers of databases" of the Romanian Copyright Law.

The audiovisual or cinematographic works are indirectly considered by law a work of joint authorship, by the reference made in Article 66 (which defines who are the authors in such a type of work) to Article 5 that defines the joint authorship work.

Art. 66.— The authors of an audiovisual work, as provided in Article 5 of this Law, are the director or maker, the author of the adaptation, the author of the screenplay, the author of the dialogue, the author of the musical score specially composed for the audiovisual work and the author of the graphic material of animated works or animated sequences, where these represent a substantial part of the work. In the contract between the producer and the director or maker of the audiovisual work, the parties may agree to include other creators who have contributed substantially to the creation of the work as authors thereof.

We need to point out that under the previous copyright law (Decree 321/1956), the cinematographic work, as well as radiofonic works were expressly (article 11) considered as collective works. (but there was no definition of collective work).

As regards co-written musical works, there isn't any clear provisions in the law, but it could fall mostly under the provisions of works of joint authorship. Some authors[78] consider that the essential criteria is the "community of inspiration" and that does not exclude even a "repartition of tasks" or "contributions of different works (such as text and music in a song"), while others[79] consider that a joint authorship work imply a unitary work. (therefore a painter that makes the illustration to a novel is not a co-author with the latter's author.)

As regards examples of collective works, Romanian doctrine[80] notes that those may be: encyclopaedias, dictionaries, newspapers or some types of computer programmes (operating systems).

3. Are cinematographic or audiovisual works defined in your national legislation? Are other co-authors assigned to such a work, other than the principle director in accordance with Article 2 of the Term Directive? In whom is copyright of such a work vested in your national legislation (please see Article 14bis (2) Berne Convention)?

The Audiovisual or cinematographic work is defined in article 64 of the Law 8/1996:

Art. 64.— An audiovisual work is a cinematographic work, a work expressed by a procedure similar to cinematography, or any other work which makes use of moving images, accompanied or not by sounds.

The roles of the director and producer are defined in art 65 of the same law:

Art. 65.—(1) The director or maker of an audiovisual work is the natural person which within the contract with the producer oversees the creation and production of the audiovisual work in the capacity of main author.

(2) The producer of an audiovisual work is the person, whether natural person or legal entity, who takes responsibility for the production of the work and in that capacity organizes the making of the work and provides the necessary technical and financial resources.

(3) The written form of a contract between the producer and the main author is compulsory for the performance of an audiovisual work.

78 V. Ros, D. Bogdan and O. Spineanu-Matei, Author Rights and Related Rights – Treaty, All Beck, Bucharest 2005, page 50

79 Y Eminescu, "Regarding the definitions of <<collective work>> and << joint authorship works>>" – New Justice, no 7/1964, page 69

80 V Ros, op cit, page 56

The other co-authors assigned to such a work are foreseen in art 66 (cited above).

As regards provision of the Article 14bis (2) Berne Convention, this has been implemented in the national legislation by Article 70

Art. 70.—(1) By the contracts concluded between the authors of the audiovisual work and the producer, unless otherwise provided, it shall be presumed that they assign to the producer, with the exception of the authors of the specially composed music, the exclusive rights with respect to the use of the work as a whole, provided for in Art. 13, as well as the right to authorize dubbing and subtitling, against an equitable remuneration.

(2) Unless otherwise provided, the authors of the audiovisual work as well as other authors of certain contributions to it shall retain all rights in the separate utilization of their own contributions, as well as the right to authorize and/or to prohibit utilizations other than that specific of the work, in whole or in part, like the use of excerpts from the cinematographic work for advertising, other than for the promotion of the work, subject to conditions of the present law.

4. Has Article 3 of the Term Directive on the duration of related rights been implemented in your national legislation and, if so, what is the term of protection? Did situations corresponding to that described in Article 3(2) of the consolidated version of the Term Directive, involving phonograms that were not afforded protection under the Directive 93/98/EEC, but would have qualified under Directive 2001/29/EEC, arise in your jurisdiction? Was Article 3(2) of the consolidated version of the Term Directive implemented in your national legislation? Could you please cite the relevant provisions of your national act?

The term of protection is 50 years. Article 3 of the Term Directive is implemented in the Law 8/1996 by the following articles:

Art. 102.—(1) Duration of the patrimonial rights of performers shall be of 50 years as from the date of performance. However, if the fixation of the performance throughout such duration makes the object of a lawful publishing or lawful communication to the public, the duration of the rights shall be of 50 years as from the date when whichever of them has taken place for the first time.

(2) Duration provided for under paragraph (1) shall be calculated as from the 1st of January of the year following the fact generating rights.

Art. 106.—(1) Duration of the patrimonial rights of producers of sound recordings shall be of 50 years as from the date of the first fixation. However, if the recording throughout such duration makes the object of a lawful publishing or lawful communication to the public, the duration of the rights shall be of 50 years as from the date when whichever of them has taken place for the first time.

(2) Duration provided for under paragraph (1) shall be calculated as from the 1st of January of the year following the fact generating rights.

Art. 1064.— (1) The duration of the economic rights of the producers of audiovisual recordings shall be 50 years as of the first of January of the calendar year following that in which the first fixation took place.

(2) Where the audiovisual recording is disclosed to the public during this period, the duration of the economic rights shall expire after 50 years as of the date on which it was disclosed to the public.

Situations corresponding to that described in Article 3(2) of the consolidated version of the Term Directive did not arise in Romania.

Article 3(2) of the consolidated version of the Term Directive was not implemented yes in the national legislation.

5. Has Article 4 of the Term Directive on the protection of previously unpublished works been implemented in your national legislation and, if so, what is the term of protection? Could you please cite the relevant provisions of your national act?

Article 4 of the Term Directive has been implemented in the national legislation by Article 25 para 2 of Law 8/1996. The term of protection is 25 years.

(2) The person who, after the copyright protection has expired, legally discloses for the first time a previously unpublished work to the public shall enjoy protection equivalent to that of the author's economic rights. The duration of the protection of those rights shall be 25 years, starting at the time of the first legal disclosure to the public.

6. Has Article 5 of the Term Directive on critical and scientific publications been implemented in your national legislation and, if so, what is the term of protection? Could you please cite the relevant provisions of your national act?

No, article 5 of the Term Directive has not been implemented in the national legislation.

7. Has Article 6 of the Term Directive on the protection of photographs been implemented in your national legislation and, if so, what is the term of protection? Could you please cite the relevant provisions of your national act? Are non-original photographs protected under your national legislation in addition to original ones?

The protection of photographs is included in the general definition of article 7 of the law 8/1996. The term of protection is the same as with any other work in article 7.

"Art. 7.— The subject matter of copyright shall be original works of intellectual creation in the literary, artistic, or scientific field, regardless of their manner of creation, specific form or mode of expression and independently of their merit and purpose, such as:

(...)

(f) photographic works and any other works expressed by a process analogous to photography;

(...)"

If a photo is not original, than one of the basic criteria of a work to be protected under this law is not met. Therefore a non-original does not fit into the description of Article 7 and is not subject to copyright protection.

An additional limitation to copyrighted works is set by Article 85 para 2 of Law 8/1996:

"(2) Photographs of letters, deeds, documents of any kind, technical drawings and other similar material do not qualify for legal protection by copyright."

Under the former copyright law – Decree 321/1956 the protection of photographs was limited to "artistic photographs" (Article 9) , therefore not all photographs were protected.

8. How has Article 7 of the Term Directive on protection vis-à-vis third countries been implemented in your national legislation? Could you please cite the relevant provisions of your national act? Had your

country prior to the adoption of the Term Directive accepted any international obligations granting a longer term of protection to non-Community nationals than that foreseen by Article 7(1) and (2) – What specific acts do you have in mind ??

The only reference to protection vis-a-vis third countries is foreseen in art. 147 of the Law 8/1996

Art. 147.— Foreign citizens or juridical persons, owners of copyright or neighbouring rights shall enjoy the protection provided by international conventions, treaties and agreements to which Romania is party, failing which they shall enjoy treatment equal to that accorded to Romanian citizens, on condition that the latter, in turn, are granted similar (national) treatment in the concerned countries.

According to information we've got, we don't think that Romania accepted any international obligations granting a longer term of protection than those foreseen by foreseen by Article 7(1) and (2) of the Term Directive. In fact Romania ratified the 1961 Roma Convention on performers protection and the 1971 Geneva Convention on Phonograms protection only in 1998. See also answer to Q14.

9. Are moral rights in your country perpetual? (Please see Article 9 Term Directive.) Could you please cite the relevant provision of your national act?

Yes, the moral rights are perpetual according to Law 8/1996 – Article 11

Art. 11.—(1) The moral rights may not be renounced or disposed of.

(2) After the author's death, the exercise of the rights provided for in Article 10 (a), (b) and (d) shall be transferred by inheritance, in keeping with civil legislation, for an unlimited period of time. If there are no heirs, the exercise of the said rights shall revert to the collective management organization that has managed the author's rights or, as the case may be, to the organization having the largest membership, in the field of creation concerned.

10. Please give the dates at which your national copyright act was changed so as to bring it into conformity with the Term Directive. Were any transitional provisions introduced? Were there any cases of previously expired rights over works in which copyright or related rights subsist being resuscitated? If so, for how long? Did your national act specify whose rights were being revived (e.g. those of the heirs of the author, the last rightholder to acquire the copyright prior to its termination through assignment or other transfer of rights, another party)? Did your national act take advantage of the latitude as to cinematographic or audiovisual works provided by Article 10 (4) Term Directive? Please cite the relevant provisions of your national act.

As explained to the answer first point there wasn't a specific date when the national copyright act was updated with the Term Directive. There were not any cases of copyrights being resuscitated or revived. Or any reference to the works provided by Article 10(4) of the Term Directive.

As regards transitional provisions between different laws, they are explained in the answer to question 14.

11. In Romania the term of protection varies according to the class of the beneficiary to whom copyright or related rights pass after the death of the rightholder (surviving spouse/ issue and other blood relatives/ the State via escheat etc.)? Is a similar distinction introduced by your national legislation? If so, could you please cite the relevant provisions of your national act?

No, there is no distinction in these cases in the current law. Article 25 para 1 of Law 8/1996 shall apply for transmitting the patrimonial rights after the death of the author.

Art. 25.—(1) The economic rights provided for in Articles 13 and 21 shall last for the author's lifetime, and after his death shall be transferred by inheritance, according to civil legislation, for a period of 70 years, regardless of the date on which the work was legally disclosed to the public. If there are no heirs, the exercise of these rights shall devolve upon the collective management organization mandated by the author during his lifetime or, failing a mandate, to the collective management organization with the largest membership in the area of creation concerned.

However, under the former law – Decree 321/1956[81]- article 6[82] the term of protection varied depending on its inheritors (established according with the common law – Civil Code) :

- for surviving spouse or its ascendants – for their entire lifetime
- descendants – for 50 years
- other inheritors – for maximum 15 years. If these other inheritors were minors, they could enjoy these patrimonial rights even after 15 years, until they reach 18 years old or finish their higher education, but not after they were 25 years old.

Also, if the copyright was owned by a legal person, the patrimonial author right was limited to 50 years from the work publication. (article 7 Para 3)

12. In France an additional exception was introduced to the copyright act granting longer protection for works made during the First and Second World Wars (see Art. L123-8 and L123-9 of the French Code de la propriété intellectuelle). Are there any similar additional exceptions in your country? If so, could you please cite the relevant provisions of your national act?

No such exceptions available.

However, according to some authors[83] a prolongation of copyright duration may appear in case of war.

13. Can you think of any instances where the term of protection provided by your national legislation was longer than that provided by the Term Directive, in a manner similar to that foreseen in Article 10 (1) of the Term Directive? Was your national legislation then amended in accordance with the Term Directive in a way that affected works created before 1 July 1995 or not? Could you please cite the relevant provisions of your national act?

---

81 Decree 321 from 18 June 1956 on author's rights – published in the Official Buletin no. 18/27 June 1956, text in Romanian available at http://www.legi-internet.ro/legislatie-itc/drept-de-autor/legea-dreptului-de-autor/decret-nr321-din-18-iunie-1956-privind-dreptul-de-autor.html

82 Original text in Romanian:

Art. 6. - La moartea autorului sau a vreunuia dintre coautori, drepturile patri moniale de autor se transmit prin mostenire, potrivit Codului Civil, insa numai pe urmatoarele termene:

a) sotului si ascendentilor autorului, pe tot timpul vietii fiecaruia;

b) descendentilor, pe timp de 50 ani;

c) celorlalti mostenitori, pe timp de 15 ani, fara ca in acest caz dreptul sa se poata transmite din nou prin mostenire.

Termenele prevazute la lit. b si c se socotesc de la 1 ianuarie al anului urmator mortii autorului.

Daca mostenitorii prevazuti la lit. c sint minori ei se vor bucura de aceste drepturi patrimoniale si dupa trecerea termenului prevazut mai sus, pina la dobindirea deplinei capacitati de exercitiu sau pina la terminarea studiilor superioare, dar numai pina la implinirea virstei de 25 ani.

83 Y. Eminescu, Authors' Right – Law 8 from 14 March 1996 commented, Ed. Lumina Lex, 1997, Page 209

No

14. Can you think of any other noteworthy divergence of your national act involving the term of protection of works of copyright and related rights from the standards set out in the Term Directive? If so, please elaborate, preferably citing the relevant provisions of your national act.

There are several problems regarding the application in time of the copyright laws adopted in Romania from 1862 onwards . The legislation applicable if the following

- Law of the Press – Official Monitor no 81 from 13 April 1862 – articles 1-11
- Law on literary and artistic property – no 126 from 28 June 1923 - Official Monitor from 28 June 1923
- Decree 321/1956 – cited above
- Law 8/1996 on author right and related rights - published in Official Monitor no 60 from 26 March 1996
- Law 285/2004 on modification of Law 8/1996 – published in Official Monitor no 587 from 30 June 2004

The following table might help understand the current issues:

Law from	1862	1923	1956	1996	2004
Covered works	Writings, Music Composers, Painters or Drawers	All intellectual works	All intellectual works	All intelectual works	All intelectual works
Duration of Protection	Life + 10 years	Life + 30 years	Life + a period (see answer to Q 11 above)	Life + 70 years	Same as in 1996
Exceptions for duration of protection	-	For common works – 30 years from the death of the last collaborator (art 40) Works published by State or Academy – protected for 20 years since the publication date	– encyclopaedias, dictionaries and collections – 20 years from publication – series of artistic photos – 10 years from publication – separate artistic photos – 5 years from publication If the work is owned by a legal person – 50 years from	See above answers to questions	Same as in 1996

Law from	1862	1923	1956	1996	2004
			publication date		
Limits for inheritors	-	Some limits for some inheritors (but not the duration) – see article 4	See above answer to Q11	None	Same as in 1996
If there are no inheritors	Public domain	Public domain	Public domain	Collective Society	Same as in 1996
Conflict of laws in time	-	No retroactive effect Inheritors rights prelonged to 30 years if the work is not in public domain	No retroactive rights. Inheritors rights prelonged if the work is not in the public domain	Art 149 Para 3 The duration of the exploitation rights in works created by authors deceased before the entry into force of this Law and for which the term of protection has expired shall be extended up to the limit of the term provided for in this Law. Such extension shall come into effect only on the entry into force of this Law.	Art 149 Para 3 The duration of the economic rights in works created by authors deceased before the entry into force of this Law and for which the term of protection,calculated according to the procedures of the prior legislation, has not expired shall be extended up to the limit of the term provided for in this Law. Such extension shall come into effect only since the entry into force of the present law.

A. As we may infer from above there are a series of works that have a very short protection in the law from 1923 (State owned works) or 1956 (collective works or photographies).

B. However, the text regarding the application in time from the law in 1996 (Article 149 Para 3) can be literally understood as a prolongation of copyright for the works that were previously in the public domain. However, the unanimous opinion of specialists[84], confirmed by the change of the law in 2004

84 See also E. Olteanu, "Legislative Technic mistakes in Romanian Copyright law" in Review of Intellectual Property Law, no 4/2007.

(see our text underlined and bolded) is that the solution from 1996 is wrong and the text misses the (essential) NOT – as a results of an omission.

From here the opinions diverge: (Personal comment: I actually didn't have enough time to go in depth with this analysis)

a. According to some authors [85] Art 149 Para 3 from Law 8/1996 might have legal effects and therefore the heirs of the copyrighted works that were into the public domain before the law from 1996 came into force (26 June 1996) may ask for its protection from the moment when the new law went into force.

b. According to other opinions[86] and to one case from Appeal Court[87] jurisprudence[88] the Article 149 Para 3 from law 8/1996 should be interpreted based on the "real will" of the legislator and therefore the text should be read as modified in 2004 : " **which the term of protection has NOT expired".** The latter argument, which we share, resides on the fact that a different interpretation would lead to a retro-activity of this law for legal situations already exhausted, which would be inadmissible according with Article 15 Para 2 of the Romanian Constitution.[89] Also using the word "extended" is essential in expressing the real will of the legislator in this case[90]

Therefore also the law from 1996 does not retroactivate the copyrights exhausted by March 1996.

C. An additional issue might appear with the International Conventions in the field of copyright signed or ratified by Romania that may have legal precedence before the national legislation.

Romania has ratified (with some reserves) the Bern Convention by Law 152 from 1926[91] in its form signed at BERNE on September 9, 1886, completed at PARIS on May 4, 1896, revised at BERLIN on November 13, 1908 and completed at BERNE on March 20, 1914. However the Article 7[92] in the text adopted by Romania did not imposed a period of protection if the national legislation was different.

Romania has also ratified that following acts of revision of the Bern Convention, such as the Stockholm Act, in its totality by the Decree 1175/1968 (published in the Official Bulletin no 1 from 6.01.1969). The Decree also included the declaration, conform aith Article 7 of the Bern convention, to

---

85 V Ros, op cit, page 297

86 Bogdan Manolea, What works are in the Public Domain ? 4.03.2006, available at http://legi-internet.ro/blogs/index.php/2006/03/04/ce_opere_sunt_in_domeniul_public

87 Bucharest Court of Appeal, Section IX Civil and Intelectual Property, Decision 248 A from 30 November 2006. The decision in this case has been confirmed by the Supreme Court – the High Court of Cassation and Justice – Decision 7606 from 26 October 2007.

88 Please not that the Romanian legal system is not jurisprudential and therefore the current case can't be used in a precedent.

89 See decision Bucharest Court of Appeal mentioned above

90 And not other words used to "revive" rights that were annuled – see for example on Law on terrain property 18/1991 where the word "re-constitutes" is used to for the property of the fields taken by the communist regime and given back to its lawfull owners

91 Published in the Official Monitor no 211from 22 September 1926

92 Article 7.

The term of protection granted by the present Convention shall include the life of the author and fifty years after his death.

Nevertheless, in case such term of protection should not be uniformly adopted by all the countries of the Union, the term shall be regulated by the law of the country where protection is claimed, and must not exceed the term fixed in the country of origin of the work. Consequently the contracting countries shall only be bound to apply the provisions of the preceding paragraph in so far as such provisions are consistent with their domestic laws.

maintain the national legislation for the duration of copyright protection. However, according to the Romanian authors, the Stockholm Act was never in force, not reaching the number of signatories for the articles up to Article 22.[93]

The final version of the Bern Convention (as modified in 1979) was adopted only in 1998 by Law 77/1998[94]

Also Romania ratified the 1961 Roma Convention on performers protection and the 1971 Geneva Convention on Phonograms protection only in 1998.

Therefore it seems that the International convention where Romania was a part of did not have too much effect on the national duration of copyright protection.

93 Y. Eminescu, Authors' Right – Law 8 from 14 March 1996 commented, Ed. Lumina Lex, 1997, Page 45

94 Published in the Official Monitor no 156 from 17.04.1998

Slovenia

Author: Dr. Maja Bogataj Jančič, LL. M, LL. M., Intellectual Property Institute (IPI)

Rok Jerovšek (IPI), Luka Virag (IPI),

1. Please cite the legal act which governs the term of protection of copyright and related rights in your country.

Copyright and Related Rights Act (CRRA, Official Gazette, No. 21/1995, 9/2001, 30/2001, 85/2001, 43/2004, 58/2004, 94/2004-UPB1, 17/2006, 44/2006-UPB2, 139/2006, 16/2007-UPB3, 68/2008, 85/2010), available at the website of the Slovenian Intellectual Property Office http://www.uil-sipo.si/fileadmin/upload_folder/zakonodaja/ZASP_EN_2007.pdf.

2. How have the exceptions of Article 1 of the Term Directive in relation to works of joint authorship, collective works, anonymous and pseudonymous works and works published in parts, instalments, issues or episodes been implemented in your national legislation? Could you please cite the relevant provisions of your national act?

The CRRA was adopted in 1995. It was published in the Official Gazette on 14 April 1995 and eventually came into force on 29 April 1995. During the drafting procedure, the relevant international copyright legislation was thoroughly examined. Although Slovenia was not a member of the European Union at the time and had no obligation to implement its directives, the CRRA was drafted *de facto* in accordance with the EU legislation in force at the time. Therefore, all the provisions regarding the term of protection in the CRRA were already then in accordance with the provisions of the council directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights. The mentioned directive was later amended with the adoption of the Term Directive. Due to the similarity of the provisions of the 93/98/EEC Directive and the Term Directive, the provisions of the CRRA are very similar or almost identical to those of the Term Directive.

Joint authorship is governed by Art. 60 CRRA (titled Co-authors): If the work was created by a number of authors, the term of protection mentioned in the foregoing Article (Art. 59: The copyright shall run for the life of the author and for 70 years after his death, unless otherwise provided by this Act), shall be calculated from the death of the last surviving co-author.

Collective works are governed by Art. 62 CRRA (titled Collective works): In case of collective works, the copyright shall run for 70 years after the lawful disclosure of the work.

Anonymous and pseudonymous works are governed by Art. 61 CRRA (titled Anonymous and pseudonymous works): Copyright in anonymous and pseudonymous works shall run for 70 years after the lawful disclosure of the work. When the pseudonym leaves no doubt as to the identity of

the author, or if the author discloses his identity during the period referred to in the foregoing paragraph, the term of protection shall be that laid down in Article 59 of this Act.

Works published in parts, instalments, issues or episodes are governed by Art. 64 (Serial works): When, according to this Act, the term of protection is calculated from the day of lawful disclosure of the work, and the work is disclosed over a period of time in volumes, parts, sequels, issues, or series, the term of protection shall be calculated for each of these components separately.

Certain undisclosed works are governed by Art. 63 CRRA (Special term for certain undisclosed works): When the term of protection under this Act does not run from the death of the author or authors, and the work was not lawfully disclosed within 70 years from its creation, the copyright shall terminate with the expiration of this term.

3. Is there a distinction made between works of joint authorship, collective works and compilations in your national jurisdiction? If so, what is the definition for each of these categories and how is the term of protection for such works calculated? In particular, does joint authorship in particular presuppose that the contributions of several authors are inseparable? Could you please cite the relevant provisions of your national act?

There are some differences in the definitions and legal aspects of works of joint authorship, collective works and compilations, however those terms are intertwined. The distinction between a work of joint authorship and a collective copyright work is primarily in the number of authors. According to legal doctrine, for a work to be deemed a collective work, at least 10-15 authors must participate. If the number of authors is smaller, the work is deemed to be a work of joint authorship. In works of joint authorship, the term of protection is calculated from the death of the last surviving co-author. In collective works, the term of protection is calculated from the date of publication of the work.

A compilation/collection, however, can be created by one author (e.g. a database) or various authors (e.g. an encyclopaedia). The term of protection is calculated accordingly.

Art. 8 CRRA stipulates that collections of works or of other material, such as encyclopaedias, anthologies, databases, collections of documents, etc., which, by virtue of selection, coordination or arrangement of their contents, are individual intellectual creations, shall be deemed independent works.

Art. 100 CRRA stipulates that collective copyright work is a work created on the initiative and under the organization of a natural person or a legal entity ordering it, by the collaboration of a large number of coauthors, which is published and used under the name of the person ordering it (e.g. encyclopaedias, anthologies). A special contract must be concluded for the purpose of creating a collective work. If the conditions mentioned in the foregoing paragraph are not met, such contract is null and void. It shall be deemed that the economic rights and other rights of the

authors to a collective work are exclusively and without limitations assigned to the person ordering the work, unless otherwise provided by contract.

Works of more than one author are governed by Art. 12 CRRA. It stipulates that if the work, created in collaboration of two or more persons, constitutes an inseparable whole, all co-authors of such work shall have a joint copyright in it. Deciding on the use of such work belongs jointly to all co-authors, however, an individual co-author may not oppose to it unreasonably or in bad faith. Co-authors' shares shall be determined in proportion to the extent of their respective contributions to the creation of the work, unless they are set otherwise by their agreement.

Compound works are governed by Art. 13 CRRA. It stipulates that provisions of Art. 12 shall apply mutatis mutandis, when several authors combine their works for the purpose of exploitation in common.

Duration of copyright on the abovementioned works is governed by Arts. 60, 62 and 65 CRRA.

Art. 60 CRRA stipulates that if the work was created by a number of authors, the term of protection mentioned in the foregoing Article, shall be calculated from the death of the last surviving co-author.

Art. 62 CRRA stipulates that in case of collective works, the copyright shall run for 70 years after the lawful disclosure of the work.

Art. 65 CRRA stipulates that insubstantial changes to the selection, adjustment or arrangement of the contents of a collection shall not extend the term of protection in that collection. "Insubstantial changes", within the meaning of the foregoing paragraph, are additions, deletions, or alterations to the selection or arrangement of the contents of a collection, which are necessary in order that this collection may continue to function in the way it was intended by its author.

4. Are co-written musical works considered to be works of joint authorship or multiple separate works in your national jurisdiction? Can you think of other examples of works of joint authorship, collective works or compilations in your national act?

According to legal doctrine, co-written musical works are considered to be compound works in the sense of Art. 13 CRRA, i.e. multiple separate works.

- Collective works: encyclopaedias, anthologies, etc.
- Compilations/collections: encyclopaedias, anthologies, databases, collections of documents, etc.
- Works of joint authorship: scholar articles, monographs, etc.

5. Can a legal person be the original author of a work of copyright in your country? If so, does this affect the term of protection of such works?

According to Art. 10, an author is a natural person who created the work. Legal doctrine in Slovenia established that a legal person can not be the author of a work.

6. Are other co-authors assigned to cinematographic or audiovisual works, other than the principle director in accordance with Article 2 of the Term Directive? What is the term of protection for such works in your national jurisdiction?

In relation to cinematographic or audiovisual works, the CRRA governs co-authors other than the principle director in Art. 105. It stipulates that as co-authors of an audiovisual work shall be considered: 1. the author of the adaptation; 2. the author of the screenplay; 3. the author of the dialogue; 4. the director of photography; 5. the principal director; 6. the composer of music specifically created for use in the audiovisual work. If animation represents an essential element of the audiovisual work, the principal animator shall be considered as co-author of that work.

The copyright protection for audiovisual works is governed by Arts. 59 and 60 CRRA. The copyright shall run for the life of the author and for 70 years after his death, unless otherwise provided by this Act. If the work was created by a number of authors, the mentioned term of protection shall be calculated from the death of the last surviving co author.

7. Are official documents protected by copyright in your country? If so, what is the term of protection? Could you please cite the relevant provisions of your national act?

No. According to Art. 9 CRRA, copyright protection shall not be afforded to official legislative, administrative and judicial texts.

8. Has Article 3 of the Term Directive on the duration of related rights been implemented in your national legislation? If so, what is the term of protection? Could you please cite the relevant provisions of your national act?

The CRRA contains provisions very similar to those in the Term Directive.

Art. 127 stipulates that rights of a performer shall run for 50 years after the date of the performance. If the fixation of performance was lawfully published or lawfully communicated to the public within this period, the rights of a performer shall run for 50 years from either the first publication or from the first communication, whichever occurred earlier.

Art. 132 stipulates that the rights of the producer of phonograms shall last for 50 years after the fixation is made. If the phonogram is lawfully published during this period, the rights shall last 50 years from such first publication. If no such publication has taken place, but the phonogram has

during this period been lawfully communicated to the public, the rights shall last 50 years from such first communication to the public.

However, there are no express provisions in the CRRA that would incorporate the provisions of Art 3/2 (2) of the Term Directive regarding expiry of the term of protection granted to the producers of phonograms pursuant to Art. 3 (2) of Directive 93/98/EEC in its version before amendment by Direcitve 2001/29/EEC.

Art. 136 stipulates that the rights of film producers shall run for 50 years from the time of the fixation. If a videogram is lawfully published or lawfully communicated to the public within this period, the rights of a film producer shall run for 50 years from the date of first publication or first communication to the public, whichever occurred earlier.

There is also no express definition of the term "film" which would directly correspond to the one contained in Art. 3 of the Term Directive. However, the term "audiovisual work" is defined in Art. 103 CRRA with the use of similar expressions. The mentioned article stipulates that audiovisual works according to this Act, are cinematographic films, television films, animated films, short music-videos, advertising films, documentaries and other audiovisual works, expressed by means of sequence of related moving images, with or without incorporated sound, irrespective of the nature of the medium in which the said works are embodied.

The term of protection of the rights of broadcasting organizations is governed by Art. 138 CRRA. It stipulates that said rights shall run for 50 years from the date of the first broadcast.

9. Has Article 4 of the Term Directive on the protection of previously unpublished works been implemented in your national legislation? If so, what is the term of protection? Could you please cite the relevant provisions of your national act?

The CRRA contains a very similar provision in Art. 140. The latter stipulates that a person who for the first time lawfully publishes or communicates to the public a previously unpublished work in which the copyright has expired, shall enjoy the legal protection equal to that granted by economic rights and other rights of the author under the CRRA. The mentioned rights shall run for 25 years from the date of the first lawful publication or communication to the public of the work.

10. Are critical and scientific publications of works which have come into the public domain protected under your national legislation? If so, what is the term of protection? Could you please cite the relevant provisions of your national act?

Yes. According to Art. 141 CRRA, a person who prepares the edition of a work in which the copyright has expired, which is the result of a scientific endeavours and which is essentially different from known editions of this work, shall enjoy the legal protection equal to that granted by economic rights and other rights of the author under this Act. The mentioned rights shall run for 30 years from the date of the first lawful publication of the work.

11. Are non-original photographs protected under your national legislation in addition to original ones? What is the term of protection for each of these types of photographs? Could you please cite the relevant provisions of your national act?

There are no specific provisions in the CRRA regarding this issue. Non-original photographs are protected as copyright works only if they are consistent with the conditions set out in Art. 5 CRRA. The latter stipulates that copyright works are individual intellectual creations in the domain of literature, science, and art, which are expressed in any mode, unless otherwise provided by the CRRA. As copyright works are considered in particular: 1. spoken works such as speeches, sermons, and lectures; 2. written works such as belletristic works, articles, manuals, studies, and computer programs; 3. musical works with or without words; 4. theatrical or theatrico-musical works, and works of puppetry; 5. choreographic works and works of pantomime; 6. photographic works and works produced by a process similar to photography; 7. audiovisual works; 8. works of fine art such as paintings, graphic works, and sculptures; 9. works of architecture such as sketches, plans, and built structures in the field of architecture, urban planning, and landscape architecture; 10. works of applied art and industrial design; 11. cartographic works; 12. presentations of a scientific, educational or technical nature (technical drawings, plans, sketches, tables, expert opinions, three-dimensional representations, and other works of similar nature).

The term of protection for photographs is governed by Art. 59 CRRA. It stipulates that the copyright shall run for the life of the author and for 70 years after his death.

12. What is the term of protection for original and unoriginal databases in your country? Please cite the relevant provisions of your national act.

According to Art. 59 CRRA and legal doctrine, the standard term of protection for original databases (which is a form of a collection) shall run for the life of the author and for 70 years after his death. Pursuant to Art. 59 CRRA insubstantial changes to the selection, adjustment or arrangement of the contents of a collection shall not extend the term of protection in that collection. "Insubstantial changes" are additions, deletions, or alterations to the selection or arrangement of the contents of a collection, which are necessary in order that this collection may continue to function in the way it was intended by its author.

According to Art. 141f CRRA the rights of a maker of unoriginal databases shall last for 15 years after the completion of the making of the database. If the database is lawfully disclosed within this period, the rights shall last 15 years from such first disclosure. Any qualitatively or quantitatively substantial change to the contents of a database, which results in a qualitatively or quantitatively substantial new investment, shall qualify the database resulting from that investment for a new term of protection. A substantial change of contents includes also the accumulation of successive additions, deletions or alterations of the database.

13. Are any other categories of works given a different term of protection in your country (e.g. works of applied art) or are any additional related or sui generis rights in operation in your country

which are subject to special rules as to the term of protection (e.g. in relation to computer-generated works, typographical arrangements, etc.)? If so, could you please cite the relevant provisions of your national act?

There are no such provisions in the CRRA. However, regarding sui generis rights, Slovenia has adopted the Protection of Topographies of Integrated Circuits Act (Official Gazette, No. 21/1995, 96/2002, 7/2003-UPB1, 60/2006, 81/2006-UPB2) available at the website of the World intellectual property organization http://www.wipo.int/wipolex/en/text.jsp?file_id=180849.

According to Art. 7 of the Protection of Topographies of Integrated Circuits Act, the exclusive rights shall cease application 10 years after the earlier of the following dates:

– the end of the calendar year in which the period ten years from the date the topography was first commercially exploited anywhere in the world expires; or

– the end of the calendar year following the expiry of the ten year period from the date a correct application was filed.

The exclusive rights shall expire before the period defined in the third paragraph of this Article if the respective fees are not paid or if the holder of the protected topography renounces protection in writing. Notwithstanding, if a topography has not been commercially exploited, the exclusive rights shall expire after 15 years from its fixation or encoding.

14. How has Article 7 of the Term Directive on protection vis-à-vis third countries been implemented in your national legislation? Could you please cite the relevant provisions of your national act? Had your country prior to the adoption of the Term Directive accepted any international obligations granting a longer term of protection to non-Community nationals than that foreseen by Article 7(1) and (2)?

As explained above, the Term Directive has not been explicitly implemented into Slovenian legislation.

Nevertheless, protection vis-à-vis third countries is governed by Art. 176 CRRA. The latter stipulates that the provisions of the CRRA shall protect the authors and holders of related rights who are citizens of the Republic of Slovenia or a European Union Member State, or have their residence or seat in the Republic of Slovenia. Other foreign natural persons or legal entities (foreigners) shall enjoy the same protection as the aforementioned persons if international convention or the CRRA so provides, or in case that factual reciprocity exists. Regardless of the provisions of Chapter VIII CRRA, foreigners shall enjoy the protection according to the CRRA: 1. with respect to moral rights - in any case; 2. with respect to resale right and the right to remuneration for private and other internal reproduction - only if factual reciprocity exists. Art. 176 CRRA additionally stipulates that reciprocity must be proved by the person basing his claims on it and that provisions of the CRRA relating to the European Union Member States shall apply also to the European Economic Area Member States.

Prior to the adoption of the Term Directive, Slovenia has not accepted any international obligations granting a longer term of protection to non-Community nationals than that foreseen by Article 7(1) and (2).

15. Are moral rights in your country perpetual? Could you please cite the relevant provisions of your national act?

No. According to Art. 15 CRRA, copyright is an indivisible right to a work, from which emanate exclusive personal powers (moral rights), exclusive economic powers (economic rights), and other powers of the author (other rights of the author). Art. 59 CRRA further stipulates, that the copyright shall run for the life of the author and for 70 years after his death, unless otherwise provided by this Act. Therefore, neither moral nor material rights are perpetual and expire after the time frame, provided in Art. 59.

16. Please give the dates at which your national copyright act was changed so as to bring it into conformity with the Term Directive. Were any transitional provisions introduced? Were there any cases of previously expired rights being resuscitated? If so, for how long? Did your national act specify whose rights were being revived? Please cite the relevant provisions of your national act.

As already noted above, the CRRA was adopted in 1995. It was published in the Official Gazette on 14 April 1995 and eventually came into force on 29 April 1995. All the provisions regarding the term of protection were already then in accordance with the provisions of the subsequently adopted Term Directive.

However, it may be noticed that the CRRA in 1995 prolonged the duration of rights as previously stipulated by the copyright legislation (e.g. the copyright protection expired 50 years after the author's death). Therefore, certain provisions were adopted in order to regulate the transition. Art. 193 CRRA stipulates in the first paragraph that the CRRA applies to all works and performances of performers that were enjoying protection according to the Copyright Act (Official Gazette of the SFRY, No.19/1978, 24/1986, 21/19 90), at the time of its enactment. In the second paragraph it is provided that the CRRA applies to phonograms of producers of phonograms, with respect to which the term of 20 years has not yet elapsed from the time of their first fixation to the enactment of the CRRA. Pursuant to the third paragraph of Art. 193 CRRA, the CRRA applies to videograms, broadcasts and publishers' editions, as subject matters of related rights, which were first fixed, broadcast or lawfully published after its enactment. Finally, the fourth paragraph of Art. 193 CRRA provides that the CRRA applies to databases as subject matter of related rights, the making of which was completed after 1 January 1983.

Additionally, a new transitional provision regarding certain resuscitation of rights was adopted in 2004 (Art. 24 of the Transitional and Final Provisions, CRRA-B, Official Gazette No. 43/2004 of 26 April 2004, the enforcement of Art. 24 was linked to Slovenia's accession to the EU which took place on 1 May 2004). Namely, first paragraph of Art. 24 CRRA-B stipulates that, as of the date of the accession of the Republic of Slovenia to the European Union, the terms of protection under the CRRA shall also be applicable to those copyright works and subject matters of related rights

that are not protected under Art. 193(1), (2) and (3) if they are protected on that date in at least one European Union Member State.

17. In Romania the term of protection varies according to the class of the beneficiary to whom copyright or related rights pass after the death of the rightholder (surviving spouse/ issue and other blood relatives/ the State via escheat etc.)? Is a similar distinction introduced by your national legislation? If so, could you please cite the relevant provisions of your national act?

No.

18. In France an additional exception was introduced to the copyright act granting longer protection for works made during the First and Second World Wars (see Art. L123-8 and L123-9 of the French *Code de la propriété intellectuelle*). Are there any similar additional exceptions in your country? If so, could you please cite the relevant provisions of your national act?

No.

19. Can you think of any instances where the term of protection provided by your national legislation was longer than that provided by the Term Directive, in a manner similar to that foreseen in Article 10 (1) of the Term Directive? Was your national legislation then amended in accordance with the Term Directive in a way that affected works created before 1 July 1995 or not? Could you please cite the relevant provisions of your national act?

No.

20. Does your national law provide for a *Domaine Public Payant* or an equivalent regime? If so, please briefly describe the main features and functioning of the system.

No.

21. Can you think of any other noteworthy divergence of your national act involving the term of protection of works of copyright and related rights from the standards set out in the Term Directive? If so, please elaborate, preferably citing the relevant provisions of your national act.

No.

Sweden

Author: Johan Axhamn, PhD candidate Stockholm University

1. Please cite the legal act which governs the term of protection of copyright and related rights in your country.
   - The Swedish Act (1960:729) on copyright in Literary and Artistic works, as amended. Hereafter referred to as SCA. (More specifically, the directive 93/98/EEC was implemented into Swedish law by Act 1995:1273 and related government bill (proposition) 1994/95:151 on amendments to the Act (1960:729) on copyright in literary and artistic works).

2. How have the exceptions of Article 1 of the Term Directive in relation to works of joint authorship, collective works, anonymous and pseudonymous works and works published in parts, instalments, issues or episodes been implemented in your national legislation? Could you please cite the relevant provisions of your national act?
   - If a work has two or more authors, whose contributions do not constitute independent works, the term of protection subsist until the end of the seventieth year after the year in which the last surviving author deceased.
   - In the case of anonymous or pseudonymous works, the term of protection subsist until the end of the seventieth year after the year in which the work was made public. If the work consists of two or more interconnected parts, the term shall be calculated separately for each part. If the author reveals his identity within this term, the "normal" rules on term of protection shall apply, i.e. the protection subsists until the end of the seventieth year after the year in which the author deceased.
   - For works which have not been made public and whose author is not known, the copyright subsists until the end of the seventieth year in which the work was created.

   The relevant provisions of the SCA are sections 43 and 44:

   Section 43

   Copyright in a work shall subsist until the end of the seventieth year after the year in which the author deceased or, in the case of a work referred to in Section 6, after the year in which the last surviving author deceased. However, copyright in a cinematographic work subsists, instead, to the end of the seventieth year after the death of the last deceased of one of the following persons, namely the principal director, the author of the screenplay, the author of the dialogue or the composer of the music specifically created for the work.

   Section 44

   In the case of a work which has been made public without mention of the author's name or generally known pseudonym or signature, the copyright shall subsist until the end of the seventieth year after the year in which the work was made public. If the work consists of two or more interconnected parts, the term shall be calculated separately for each part.

   If the author reveals his identity within the term mentioned in the first Paragraph, the provisions of Section 43 shall apply.

   For works which have not been made public and whose author is not known, the copyright subsists until the end of the seventieth year after the year in which the work was created.

3. Is there a distinction made between works of joint authorship, collective works and compilations in your national jurisdiction? If so, what is the definition for each of these categories and how is the

term of protection for such works calculated? In particular, does joint authorship in particular presuppose that the contributions of several authors are inseparable? Could you please cite the relevant provisions of your national act?

- No clear distinction is made between “works of joint authorship” and “collective works”. Section 6 of the SCA states that “If a work has two or more authors, whose contributions do not constitute independent works, the copyright shall belong to the authors jointly. However, each one of them is entitled to bring an action for infringement.” As regards compilations, section 5 of the SCA states that “A person who, by combining works or parts of works, creates a composite literary or artistic work shall have copyright therein, but his right shall be without prejudice to the rights in the individual works.”

4. Are co-written musical works considered to be works of joint authorship or multiple separate works in your national jurisdiction? Can you think of other examples of works of joint authorship, collective works or compilations in your national act?
   - This question cannot be given a general answer, but has to be decided on the circumstances of each case. For example, in a case from the Supreme court (case NJA 1975 s 679), the court held that the collaboration that had occurred between the writer (lyricist) and the composer could not be deemed to have been such that it resulted in of a work of joint authorship (collective work). Rather, the lyrics and the music were deemed to be separate (independent) works.

5. Can a legal person be the original author of a work of copyright in your country? If so, does this affect the term of protection of such works?
   - In general, only natural persons can be authors of works. This rule applies also to computer programs. However, the copyright in a computer program created by an employee as part of his tasks or following instructions by the employer is transferred to the employer unless otherwise agreed in contract. This provision does not affect the term of protection for computer programs.

6. Are other co-authors assigned to cinematographic or audiovisual works, other than the principle director in accordance with Article 2 of the Term Directive? What is the term of protection for such works in your national jurisdiction?
   - Cinematographic or audiovisual works are (normally) deemed to be works of joint authorship (collective works). Thus, anyone who has creatively contributed to an audiovisual work is deemed to be one of its authors. However, the term of protection for an audiovisual work subsist to the end of the seventieth year after the death of the last deceased of one of the following persons, namely the director, the author of the screenplay, the author of the dialogue or the composer of the music specifically created for the work. Thus, that there are also other persons who are deemed to be the author of the audiovisual work does not affect its term of protection.

7. Are official documents protected by copyright in your country? If so, what is the term of protection? Could you please cite the relevant provisions of your national act?
   - The provisions in the SCA on copyright protection for official documents are (very) complicated. In general, copyright does not subsist in i) laws and other regulations, ii) decisions by public authorities, ii) reports by Swedish public authorities, and iv) official translations of such texts. However, copyright subsists in works of the following kinds when they form part of a document just mentioned: i) maps, ii) works of drawing, painting or engraving, iii) musical works, or iv) works of poetry. There are, however, additional provisions regarding official documents. For clarification, I cite the relevant provisions of the SCA:

   Section 9

   Copyright does not subsist in

   1. laws and other regulations,
   2. decisions by public authorities,
   3. reports by Swedish public authorities,

4. official translations of texts mentioned under 1.- 3.

However, copyright subsists in works of the following kinds when they form part of a document mentioned in the first Paragraph:

1. maps,
2. works of drawing, painting or engraving,
3. musical works, or
4. works of poetry.

Section 26

Anyone is entitled to use oral or written statements

1. before public authorities,
2. in government or municipal representative bodies,
3. in public debates on public matters,
4. at public questionings on such matters.

However, in the application of the provisions in the first paragraph it shall be observed,

1. that writings cited as evidence, reports and similar works may be used only in connection with a report concerning the legal proceedings or case in which they have appeared and only to the extent necessary for the purpose of such a report,
2. that the author has an exclusive right to publish compilations of his statements, and
3. that what is stated during questionings as mentioned in the first Paragraph, item 4. must not be used, on the basis of that provision, in sound radio or television broadcasts.

Section 26 a

Anyone is entitled to use works which form part of the documents mentioned in Article 9, first paragraph, and which are of the kind mentioned in Section 9, second paragraph, items 2 to 4. The author is entitled to remuneration except when the use occurs in connection with

1. the activities of a public authority,
2. a report of a legal proceeding or a case in which the work appears and the work is used only to the extent necessary for the information purpose.

Anyone is entitled to use documents which are prepared by Swedish public authorities but which are not such as are mentioned in Section 9, first Paragraph.

The second Paragraph does not apply to

1. maps,
2. technical models,
3. computer programs,
4. works created for educational purposes,
5. works which are the result of scientific research,
6. works of drawing, painting or engraving,
7. musical works,
8. works of poetry, or
9. works copies of which are made available to the public through public authorities in connection with commercial activities.

Section 26 b

Notwithstanding copyright therein, official documents shall be made available to the public as prescribed in Chapter 2 of the Freedom of the Press Act.

Copyright does not prevent the use of a work in the interest of the administration of justice or of public security.

8. Has Article 3 of the Term Directive on the duration of related rights been implemented in your national legislation? If so, what is the term of protection? Could you please cite the relevant provisions of your national act?
   - The rights of performing artists are regulated in section 45 of the SCA. According to paragraph 2 of this section, the protection of a performance (of a literary or artistic work or of an expression of folklore) last until the expiry of the fiftieth year from the year when the performance took place or, if the fixation has been published or made public within fifty years from the performance, from the year when the fixation was first published or made public.
   - The rights of producers of recordings of sound and of images are regulated in section 46 of the SCA. According to paragraph 2 of this section, the rights to a such a recording last until fifty years have elapsed from the year in which the recording was made. If a sound recording has been published within this period, the rights last, instead, until the expiry of the fiftieth year from the year in which the sound recording was first published. If the sound recording is not published during the said period but is made public during the same period, the rights last, instead, until the expiry of the fiftieth year from the year in which the sound recording was first made public. If a recording of moving images has been published or made public within fifty years from the recording, the rights last until fifty years have expired from the year in which the recording of moving images was first published or made public.
   - The rights of sound radio and television organizations are regulated in section 48 of the SCA. According to paragraph 2 of this section, the rights to exploit a sound radio or television broadcast last until the expiry of the fiftieth year from the year in which the broadcast took place.

9. Has Article 4 of the Term Directive on the protection of previously unpublished works been implemented in your national legislation? If so, what is the term of protection? Could you please cite the relevant provisions of your national act?
   - The protection of previously unpublished works are regulated in section 44 a of the SCA. This provision makes reference to sections 43 and 44 of the SCA, which has been cited in the answer to question 2 above.

   Section 44 a

   Where a work has not been published within the term referred to in Section 43 or 44, the person who thereafter for the first time published or makes public the work shall benefit from such a right in the work which corresponds to the economic rights of the copyright. The right subsists until the end of the twenty-fifth year after the year in which the work was published or made public.

10. Are critical and scientific publications of works which have come into the public domain protected under your national legislation? If so, what is the term of protection? Could you please cite the relevant provisions of your national act?
    - The SCA has no special provision on critical and scientific works. Such works are normally protected as literary works and the same rules apply for their protection as for other categories of works (see sections 43, 44 and 44 a cited under questions 2 and 9 above).

11. Are non-original photographs protected under your national legislation in addition to original ones? What is the term of protection for each of these types of photographs? Could you please cite the relevant provisions of your national act?
    - Yes, non-original photographs are protected by the SCA. According to section 49 a of the SCA, anyone who has prepared a photographic picture has an exclusive right to make copies

of the picture and to make it available to the public. As a photographic picture is considered also a picture that has been prepared by a process analogous to photography.
- According to paragraph 3 of the said section, "the right last until fifty years have elapsed from the year in which the picture was prepared."

12. What is the term of protection for original and unoriginal databases in your country? Please cite the relevant provisions of your national act.
- The rights of producers of catalogues and databases – "a catalogue, a table or another similar product in which a large number of information items have been compiled or which is the result of a significant investment" – are regulated in section 49 of the SCA.
- According to paragraph 2 of this section, the term of protection of such rights lasts until fifteen years have elapsed from the year in which the product was completed. If the product has been made available to the public within fifteen years from the completion of the product, the right shall, however, last until fifteen years have elapses from the year in which the product was made available to the public.

13. Are any other categories of works given a different term of protection in your country (e.g. works of applied art) or are any additional related or sui generis rights in operation in your country which are subject to special rules as to the term of protection (e.g. in relation to computer-generated works, typographical arrangements, etc.)? If so, could you please cite the relevant provisions of your national act?

- No.

14. How has Article 7 of the Term Directive on protection vis-à-vis third countries been implemented in your national legislation? Could you please cite the relevant provisions of your national act? Had your country prior to the adoption of the Term Directive accepted any international obligations granting a longer term of protection to non-Community nationals than that foreseen by Article 7(1) and (2)?
- Article 7 of the directive did not result in any amendments of the Swedish law for the protection of works from third countries. Sweden does not give protection for a longer term than that given in the country of origin or the country where the performance first occurred.

15. Are moral rights in your country perpetual? Could you please cite the relevant provisions of your national act?
- Moral rights are not perpetual in Swedish law. Rather, the same term of protection applies to moral rights as for economic rights (see answer to questions 2 and 9 above).
- However, the SCA provides for a special provision for the perpetual protection of the "cultural interests". According to section 51 of the SCA, if a literary or artistic work is performed or reproduced in a manner which violates cultural interests, a court may, upon action by an authority appointed by the Government, issue an injunction prohibiting such use, under penalty of a fine. This provision does not apply during the lifetime of the author. This provision also applies to non-original photographs.

16. Please give the dates at which your national copyright act was changed so as to bring it into conformity with the Term Directive. Were any transitional provisions introduced? Were there any cases of previously expired rights being resuscitated? If so, for how long? Did your national act specify whose rights were being revived? Please cite the relevant provisions of your national act.

- The term of copyright was extended from 50 to 70 years on January 1, 1996, as a result of the implementation of the directive 93/98/EEC. At the same time, transitional provisions were issued addressing in particular the subject of revival of the protection for works for which the previous term of protection had expired. The transitional provisions are complex; however, as a general principle, amendments involving the extension of preexisting rights apply to works created before the new legislation came into force. Consequently, there is revival of the protection for works by Swedish authors deceased between 1925 and 1945. The same applies to works by nationals within the European Economic Area. With regard to nationals from outside the EEA, there is no revival if the protection in the country of origin has expired.
- Before 1 January 2006, the term of protection was calculated from the year in which the last surviving author died. A transitional provision from the amendment in 1995 by which the term of protection was extended from 50 to 70 years stipulates that if the term of protection for a specific audiovisual work becomes shorter than would have been the case if older provisions applied, the older provisions do indeed apply. The result is that an audiovisual work remains protected, even though 70 years have passed since the death of the persons listed in Section 43 of the SCA (see answer to question 2 above) provided that less than 50 years have passed since the death of some other recognized coauthor listed in that provision, e.g., the cinematographer.

  Transitional provisions

  Act 1995:1273 amending Act (1960:729) on amendments to the Act (1960:729) on copyright in literary and artistic works.

  1. This Act comes into force on 1 January 1996.
  2. The new rules apply also to works which have been created before the entry into force [of the new provisions, my comment].
  3. The new rules do not apply with regard to actions taken or rights acquired before the entry into force. The copies/reproductions of a work produced under the earlier provisions may be freely distributed and displayed. Section 19, second paragraph and section 26 j shall, however, still apply.
  4. If anyone before the end of copyright term of protection according to the previous rules but before the entry into force of the new rules have begun to dispose of a work by making copies of it or by making it available to the public, he may, notwithstanding the new provisions continue the planned activity as far as is necessary and to a usual/normal extent, however not after 1 January 2000. Anyone who has taken significant steps to reproduce the work or to make it available to the public has a similar right of disposal. The copies of a work produced under these rules may be freely distributed and displayed. Section 19, second paragraph and section 26 j shall, however, still apply.
  5. If, according to the new rules, the term of protection for a given work is shorter than it would have been according to the previous rules, the previous rules shall apply. The provisions in the third paragraph of section 44 shall, however, always apply.
  6. The provisions of paragraphs 2-5 shall also apply to performances and recordings mentioned in sections 45 and 46 of the SCA.

17. In Romania the term of protection varies according to the class of the beneficiary to whom copyright or related rights pass after the death of the rightholder (surviving spouse/ issue and other blood relatives/ the State via escheat etc.)? Is a similar distinction introduced by your national legislation? If so, could you please cite the relevant provisions of your national act?

- No. However, the author may, with binding effect for the surviving spouse and heirs, give directions in his will concerning the exercise of copyright or authorise somebody else to give such directions.

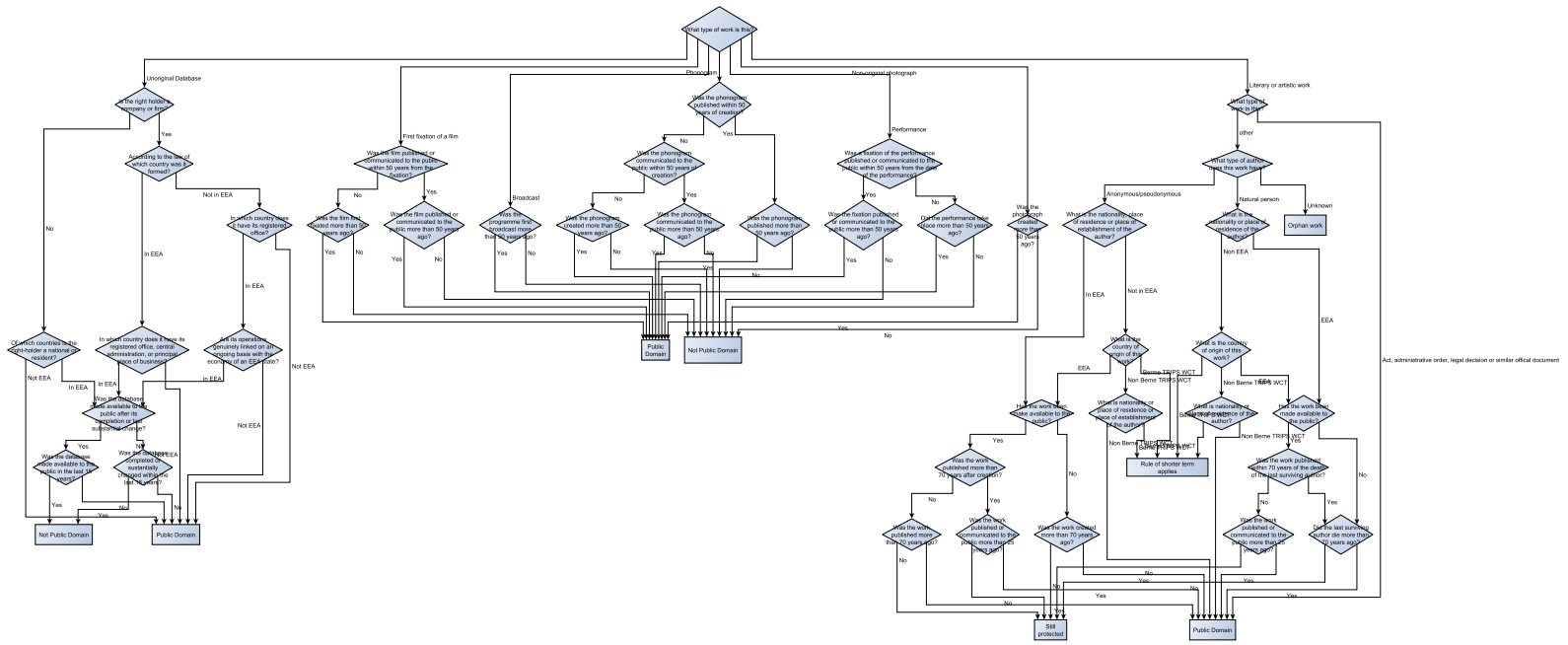
18. In France an additional exception was introduced to the copyright act granting longer protection for works made during the First and Second World Wars (see Art. L123-8 and L123-9 of the French *Code de la propriété intellectuelle*). Are there any similar additional exceptions in your country? If so, could you please cite the relevant provisions of your national act?
    - No, Sweden does not have similar provisions.

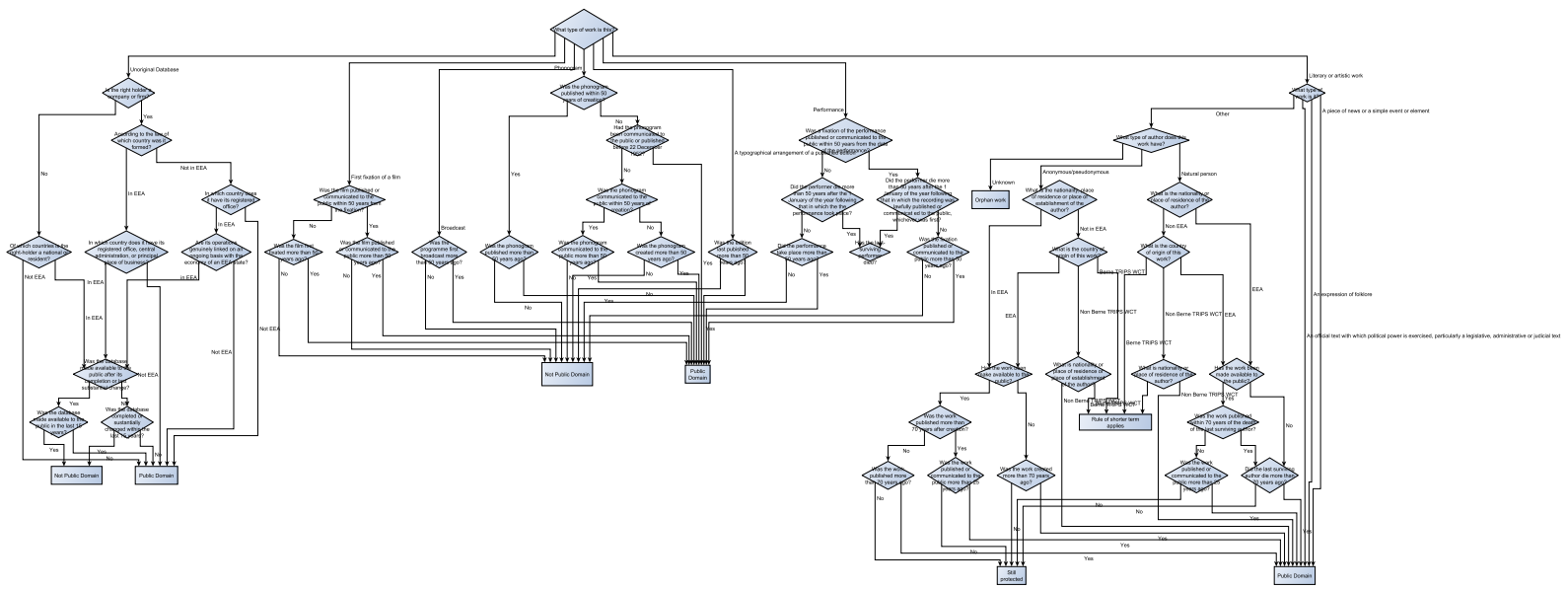
19. Can you think of any instances where the term of protection provided by your national legislation was longer than that provided by the Term Directive, in a manner similar to that foreseen in Article 10 (1) of the Term Directive? Was your national legislation then amended in accordance with the Term Directive in a way that affected works created before 1 July 1995 or not? Could you please cite the relevant provisions of your national act?
    - Please see answer to question 16.

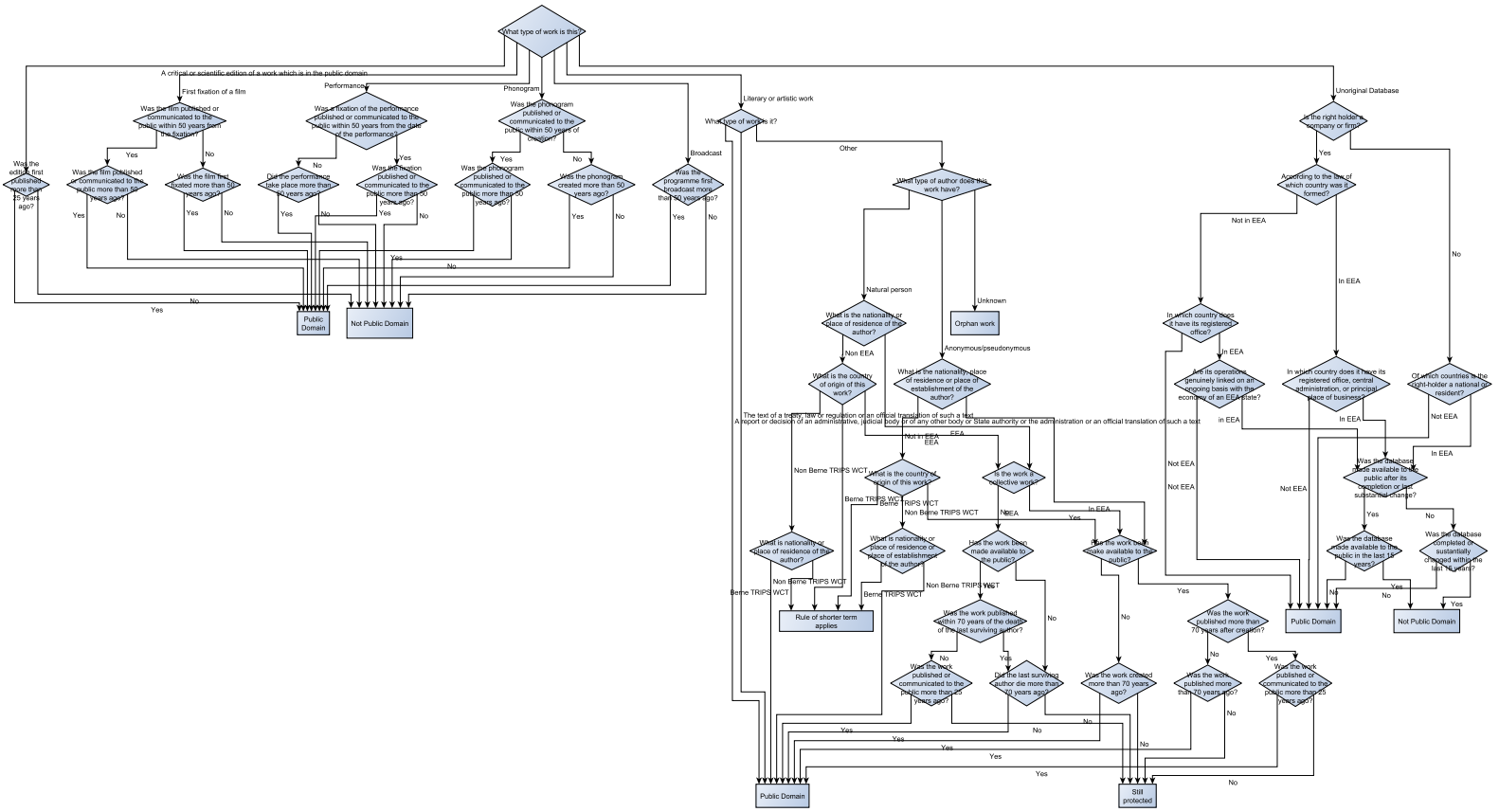
20. Does your national law provide for a *Domaine Public Payant* or an equivalent regime? If so, please briefly describe the main features and functioning of the system.
    - Swedish law does not provide for a *Domaine Public Payant* or an equivalent regime. However, Outside the copyright sphere, there is, a Regulation on the Swedish Author's Fund "Förordning om Sveriges Författarfond"). On behalf of the State, the Swedish Authors' Fund ("Sveriges författarfond") administers the Public Lending Remuneration ("Biblioteksersättning"). This scheme compensates authors, translators, and illustrators, inter alia, for the use of their books in Swedish public and school libraries in which the authors have no claims due to the doctrine of exhaustion. Compensation is paid to authors, translators, and illustrators in the form of individual remuneration corresponding to the lending frequency or in the form of guaranteed remuneration and grants, pensions etc.

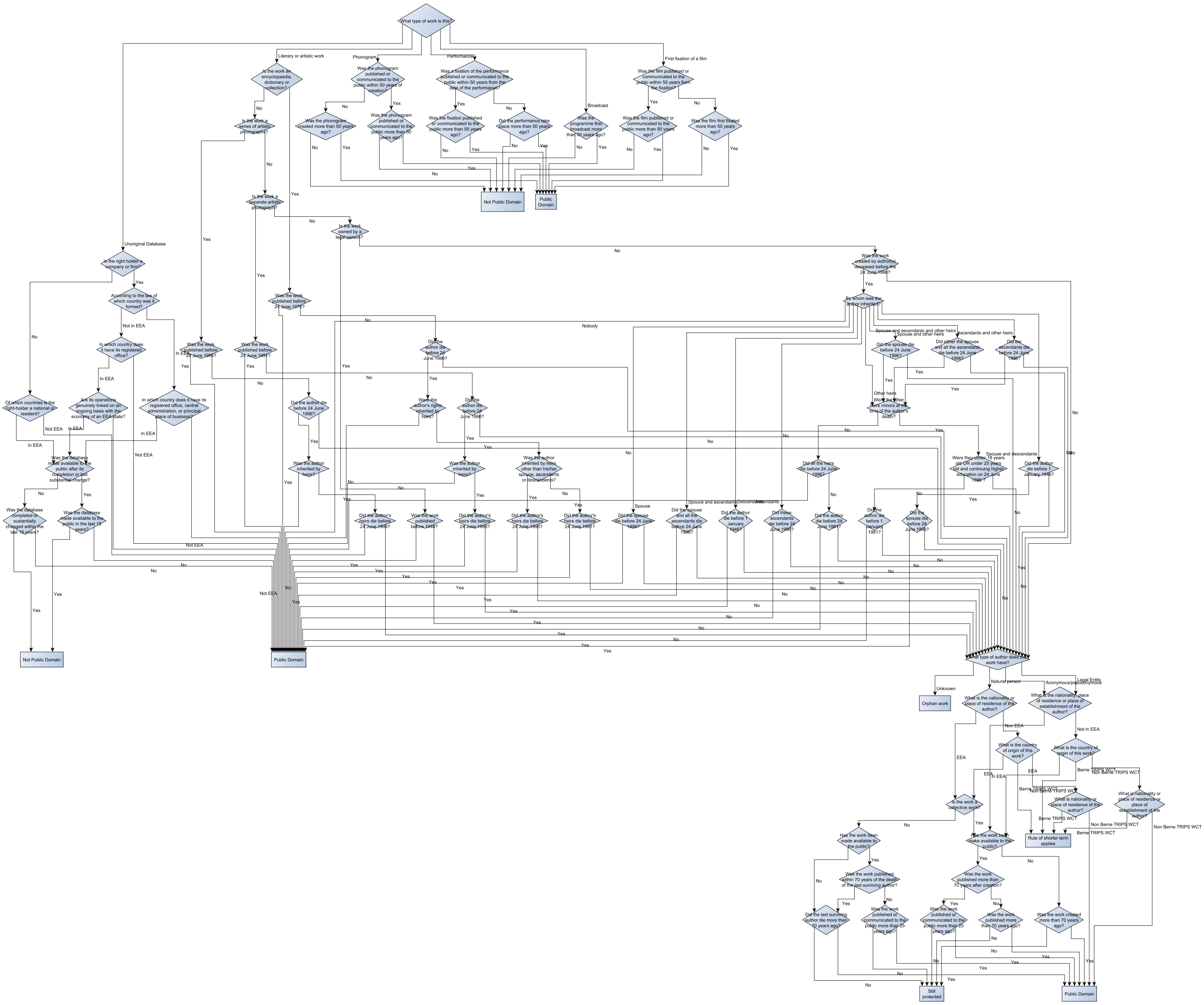
21. Can you think of any other noteworthy divergence of your national act involving the term of protection of works of copyright and related rights from the standards set out in the Term Directive? If so, please elaborate, preferably citing the relevant provisions of your national act.

    No

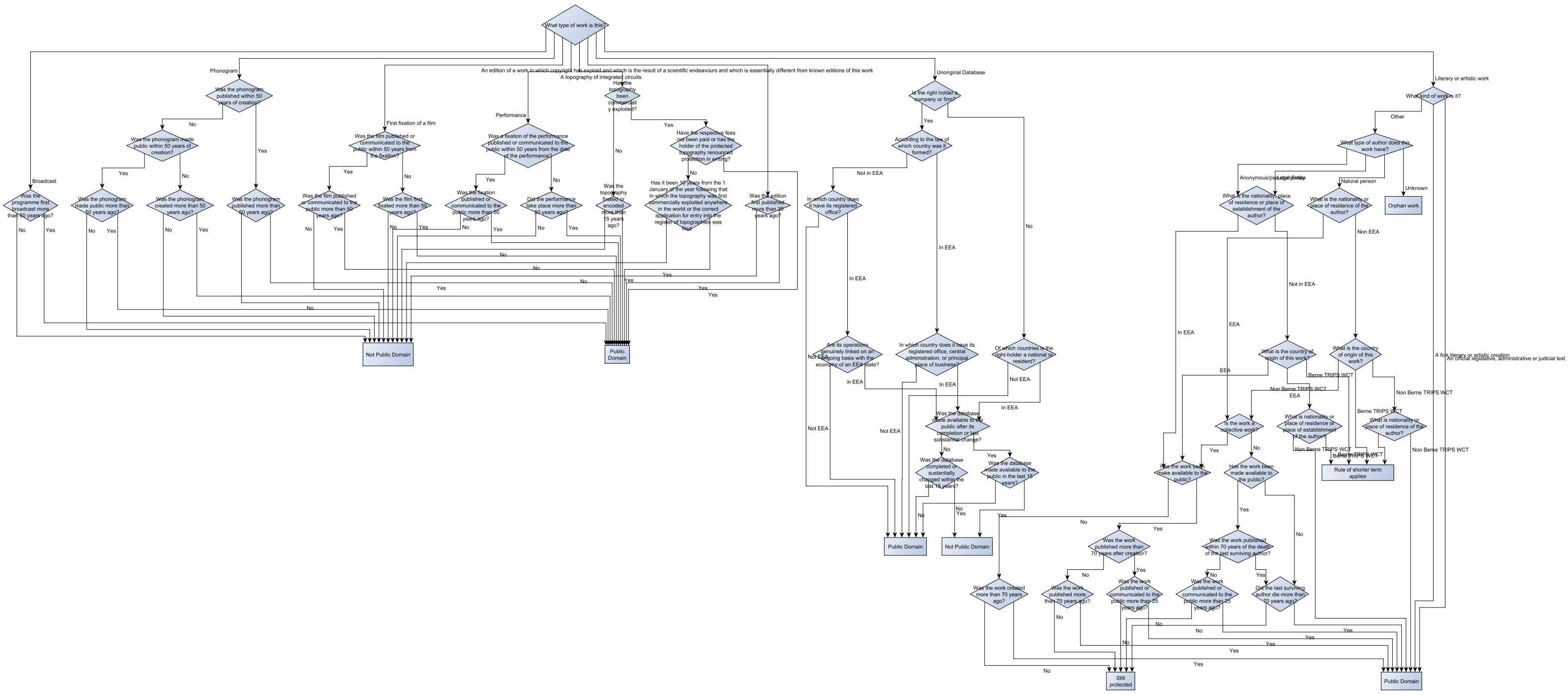

What type of work is this?
Unoriginal Database
Phonogram
Non-original photograph
Literary or artistic work
Is the right holder a company or legal person?
Was the phonogram published within 50 years of creation?
What type of work is this?
No
Yes
According to the law of which country was it formed?
First fixation of a film
Performance
other
What type of author filled this work here?
Was the film published or communicated to the public within 50 years from its creation?
Was a fixation of the performance published or communicated to the public within 50 years from the date of the performance?
Anonymous/pseudonymous
Natural person
Unknown
Not in EEA
In which country does it have its registered office?
Was the phonogram published more than 50 years ago?
What is the nationality or place of residence or place of establishment of the author?
What is the nationality or place of residence of the author?
Orphan work
Broadcast
Was the film first created more than 50 years ago?
Was the film published or communicated to the public more than 50 years ago?
Was the phonogram created more than 50 years ago?
Was the phonogram communicated to the public more than 50 years ago?
Was the phonogram published more than 50 years ago?
Was the fixation published or communicated to the public more than 50 years ago?
Did the performance take place more than 50 years ago?
Was the phonogram published more than 70 years ago?
Non EEA
In EEA
Not in EEA
EEA
Of which countries is the right-holder a national or resident?
In which country does it have its registered office, central administration, or principal place of business?
Are its operations genuinely linked on an ongoing basis with the economy of an EEA state?
What is the nationality of origin of the work?
What is the country of origin of the work?
What is nationality or place of residence of the author?
What is nationality or place of residence of the author?
Act, administrative order, legal decision or similar official document
Not EEA
In EEA
Not EEA
Berne TRIPS WCT
Non Berne TRIPS WCT
Berne TRIPS WCT
Non Berne TRIPS WCT
Was the database made available to the public after its completion or last substantial change?
Has the work been made available to the public?
Has the work been made available to the public?
Has the work been made available to the public?
Yes
No
Was the database made available to the public in the last 15 years?
Was the database completed or substantially changed within the last 15 years?
Was the work published more than 70 years after creation?
Rule of shorter term applies
Was the work published within 70 years of the death of the last surviving author?
Was the work published more than 70 years ago?
Was the work published or communicated to the public more than 15 years ago?
Was the work created more than 70 years ago?
Was the work published or communicated to the public more than 70 years ago?
Was the last surviving author die more than 70 years ago?
Public Domain
Not Public Domain
Still protected
Public Domain


What type of work is this?
Unoriginal Database
Is the right holder a company or body?
Yes
No
According to the laws of which country was it formed?
In EEA
Not in EEA
In which country does it have its registered office, central administration, or principal place of business?
In EEA
Not EEA
Is its operation genuinely linked on an ongoing basis with the economy of an EEA state?
In EEA
Not EEA
In which countries is the right holder a national or resident?
In EEA
Not EEA
Was the database made available to the public after its completion or substantial modification?
Yes
No
Was the database completed or substantially changed within the last 15 years?
Yes
No
Not Public Domain
Public Domain
Not Public Domain
Photograph
Was the photograph published within 50 years of creation?
Yes
No
Had the photograph been communicated to the public or published before 22 December 1995?
Yes
No
Was the photograph communicated to the public within 50 years of creation?
Yes
No
Was the photograph published more than 50 years ago?
Yes
No
Was the photograph communicated to the public more than 50 years ago?
Yes
No
Was the photograph created more than 50 years ago?
Yes
No
Was it published or communicated to the public more than 50 years ago?
Yes
No
Not Public Domain
Public Domain
First fixation of a film
Was the film produced or communicated to the public within 50 years from the creation?
Yes
No
Was the film published more than 50 years ago?
Yes
No
Was the film published or communicated to the public more than 50 years ago?
Yes
No
Not Public Domain
Public Domain
Broadcast
Was the programme first broadcast more than 50 years ago?
Yes
No
Was the programme published more than 50 years ago?
Yes
No
Not Public Domain
Public Domain
Performance
Was a fixation of the performance published or communicated to the public within 50 years from the date of the performance?
Yes
No
A typographical arrangement of a work published or communicated to the public
Did the performer die more than 50 years ago plus 1 full calendar year following that in which the first performance took place?
Yes
No
Did the performer die more than 70 years ago?
Yes
No
Was the fixation published or communicated to the public more than 50 years ago?
Yes
No
Did the recording die more than 50 years ago plus 1 full calendar year following that in which the recording was lawfully published or communicated to the public, where no such event has occurred?
Yes
No
Was the publication or communication established or communicated to the public more than 50 years ago?
Yes
No
Not Public Domain
Public Domain
Literary or artistic work
What type of work is this?
A piece of news or a simple event or element
Other
An official text with which political power is exercised, particularly a legislative, administrative or judicial text
Anonymous/pseudonymous
Unknown
Natural person
What type of author does the work have?
Orphan work
What is the nationality or place of residence or place of establishment of the author?
Not in EEA
In EEA
What is the nationality or place of residence of the author?
Non EEA
EEA
What is the country of origin of the work?
Berne TRIPS WCT
Non Berne TRIPS WCT
What is the country of origin of the work?
Non Berne TRIPS WCT
EEA
Berne TRIPS WCT
Was the work first made available to the public?
Yes
No
Was the work published more than 70 years after creation?
Yes
No
Was the work published or communicated to the public more than 70 years ago?
Yes
No
Was the work published more than 70 years ago?
Yes
No
What is nationality or place of residence or place of establishment of the author?
Non Berne TRIPS WCT
Berne TRIPS WCT
Rule of shorter term applies
What is nationality or place of residence of the author?
Non Berne TRIPS WCT
Berne TRIPS WCT
Was the work first made available to the public?
Yes
No
Was the work published within 70 years of the death of the last surviving author?
Yes
No
Was the work published or communicated to the public more than 70 years ago?
Yes
No
Did the last surviving author die more than 70 years ago?
Yes
No
Still protected
Public Domain

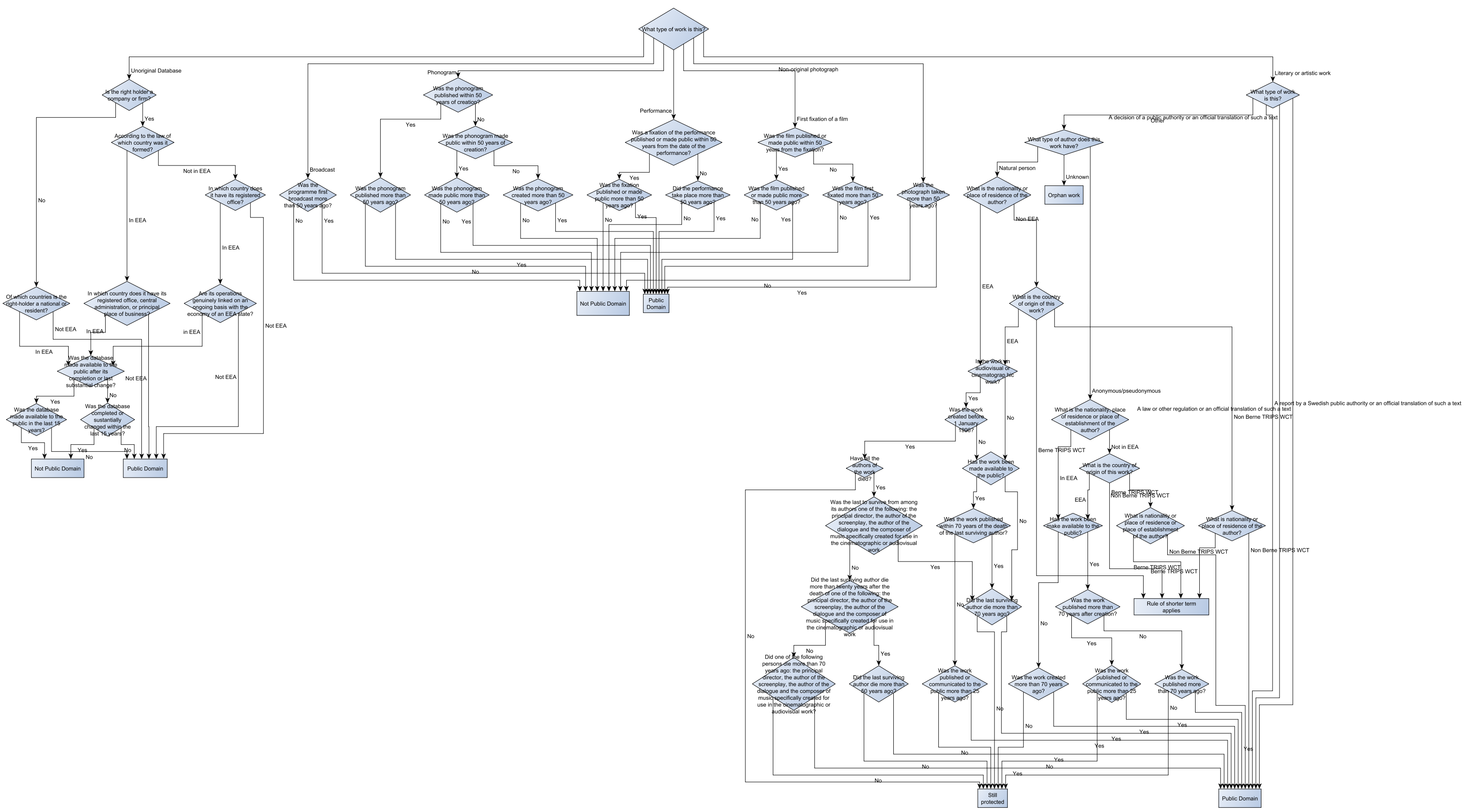

What type of work is this?
A critical or scientific edition of a work which is in the public domain
First fixation of a film
Performance
Phonogram
Literary or artistic work
Unoriginal Database
Was the film published or communicated to the public within 50 years from the making?
Was a fixation of the performance published or communicated to the public within 50 years from the date of the performance?
Was the phonogram published or communicated to the public within 50 years of creation?
What type of work is it?
Is the right holder a company or firm?
Broadcast
Other
Was the edition first published more than 25 years ago?
Was the film published or communicated to the public more than 50 years ago?
Was the film first created more than 50 years ago?
Did the performance take place more than 50 years ago?
Was the fixation published or communicated to the public more than 50 years ago?
Was the phonogram published or communicated to the public more than 50 years ago?
Was the phonogram created more than 50 years ago?
Was the programme first broadcast more than 50 years ago?
What type of author does this work have?
According to the law of which country was it formed?
Yes
No
Not in EEA
In EEA
Natural person
Unknown
Orphan work
Anonymous/pseudonymous
What is the nationality or place of residence of the author?
What is the nationality, place of residence or place of establishment of the author?
In which country does it have its registered office?
In which country does it have its registered office, central administration, or principal place of business?
Of which countries is the right-holder a national or resident?
Non EEA
What is the country of origin of this work?
Are its operations genuinely linked on an ongoing basis with the economy of an EEA state?
The text of a treaty, law or regulation or an official translation of such a text
A report or decision of an administrative, judicial body or of any other body or State authority or the administration or an official translation of such a text
Was the database made available to the public after its completion or last substantial change?
Was the database made available to the public in the last 15 years?
Was the database completed or sustantially changed within the last 15 years?
Non Berne TRIPS WCT
Berne TRIPS WCT
Is the work a collective work?
Has the work been made available to the public?
Was the work made available to the public?
What is nationality or place of residence of the author?
What is nationality or place of residence or place of establishment of the author?
Was the work published within 70 years of the death of the last surviving author?
Was the work published more than 70 years after creation?
Was the work published more than 70 years ago?
Was the work published or communicated to the public more than 25 years ago?
Was the work published or communicated to the public more than 50 years ago?
Did the last surviving author die more than 70 years ago?
Was the work created more than 70 years ago?
Rule of shorter term applies
Public Domain
Not Public Domain
Still protected



What type of work is this?
Literary or artistic work
Phonogram
Performance
Broadcast
First fixation of a film
Unoriginal Database
Is the work an encyclopaedia, dictionary or collection?
Was the phonogram published or communicated to the public within 50 years of creation?
Was a fixation of the performance published or communicated to the public within 50 years from the date of the performance?
Was the film published or communicated to the public within 50 years from the fixation?
Is the work a series of artistic photographs?
Was the phonogram created more than 50 years ago?
Was the phonogram published or communicated to the public more than 50 years ago?
Was the fixation published or communicated to the public more than 50 years ago?
Did the performance take place more than 50 years ago?
Was the programme first broadcast more than 50 years ago?
Was the film published or communicated to the public more than 50 years ago?
Was the film first fixated more than 50 years ago?
Not Public Domain
Public Domain
Is the work a separate artistic photograph?
Is the work owned by a legal person?
Was the work created by author(s) deceased before the 24 June 1996?
Is the right holder a company or firm?
According to the law of which country was it formed?
In which country does it have its registered office?
Are its operations genuinely linked on an ongoing basis with the economy of an EEA state?
In which country does it have its registered office, central administration, or principal place of business?
Of which countries is the right-holder a national or resident?
Was the database made available to the public after its completion or last substantial change?
Was the database completed or sustantially changed within the last 15 years?
Was the database made available to the public in the last 15 years?
Was the work published before 24 June 1996?
Was the work published before 24 June 1981?
By whom was the author inherited?
Nobody
Spouse and ascendants and other heirs
Spouse and other heirs
Ascendants and other heirs
Other heirs
Spouse and descendants
Spouse
Descendants
Ascendants
Did the spouse die before 24 June 1996?
Did either the spouse and all the ascendants die before 24 June 1996?
Did the ascendants die before 24 June 1996?
Were they under 18 years old OR under 25 years old and continuing higher education on 24 June 1996?
Did the author die before 24 June 1996?
Was the author's rights inherited by heirs?
Was the author inherited by heirs?
Was the author inherited by heirs other than his/her spouse, ascendants or descendants?
Did all the heirs die before 24 June 1996?
Did the author die before 1 January 1946?
Did the author's heirs die before 24 June 1996?
Was the work published before 1946?
Did the spouse die before 24 June 1996?
Did the spouse and all the ascendants die before 24 June 1996?
Did the author die before January 1946?
Did these ascendants die before 24 June 1996?
Did the author die before 24 June 1981?
Did the author die before 1 January 1981?
What type of author does the work have?
Unknown
Natural person
Anonymous/pseudonymous
Legal Entity
Orphan work
What is the nationality or place of residence of the author?
What is the nationality, place of residence or place of establishment of the author?
EEA
Non EEA
Not in EEA
In EEA
Not EEA
What is the country of origin of this work?
Berne TRIPS WCT
Non Berne TRIPS WCT
Is the work a collective work?
Rule of shorter term applies
Has the work been made available to the public?
Was the work been made available to the public?
Was the work published within 70 years of the death of the last surviving author?
Was the work published more than 70 years after creation?
Did the last surviving author die more than 70 years ago?
Was the work published or communicated to the public more than 25 years ago?
Was the work published more than 70 years ago?
Was the work created more than 70 years ago?
Still protected
Yes
No



What type of work is this?
Broadcast
Was the programme first broadcast more than 50 years ago?
Phonogram
Was the phonogram published within 50 years of creation?
Was the phonogram made public within 50 years of creation?
Was the phonogram made public more than 50 years ago?
Was the phonogram created more than 50 years ago?
Was the phonogram published more than 50 years ago?
First fixation of a film
Was the film published or communicated to the public within 50 years from the fixation?
Was the film published or communicated to the public more than 50 years ago?
Was the film first fixated more than 50 years ago?
Performance
Was a fixation of the performance published or communicated to the public within 50 years from the date of the performance?
Was the fixation published or communicated to the public more than 50 years ago?
Did the performance take place more than 50 years ago?
A topography of integrated circuits
Has the topography been commerciall y exploited?
Was the topography fixated or encoded more than 15 years ago?
Have the respective fees not been paid or has the holder of the protected topography renounced protection in writing?
Has it been 10 years from the 1 January of the year following that in which the topography was first commercially exploited anywhere in the world or the correct application for entry into the register of topographies was filed.
An edition of a work in which copyright has expired and which is the result of a scientific endeavours and which is essentially different from known editions of this work
Was the edition first published more than 30 years ago?
Not Public Domain
Public Domain
Unoriginal Database
Is the right holder a company or firm?
According to the law of which country was it formed?
In which country does it have its registered office?
Are its operations genuinely linked on an ongoing basis with the economy of an EEA state?
In which country does it have its registered office, central administration, or principal place of business?
Of which countries is the right-holder a national or resident?
Was the database made available to the public after its completion or last substantial change?
Was the database completed or sustantially changed within the last 15 years?
Was the database made available to the public in the last 15 years?
Public Domain
Not Public Domain
Literary or artistic work
What kind of work is it?
Other
A folk literary or artistic creation
An official legislative, administrative or judicial text
What type of author does this work have?
Anonymous/pseudonymous
Legal Entity
Natural person
Unknown
Orphan work
What is the nationality, place of residence or place of establishment of the author?
What is the nationality or place of residence of the author?
What is the country of origin of this work?
What is the country of origin of this work?
What is nationality or place of residence or place of establishment of the author?
What is nationality or place of residence of the author?
Is the work a collective work?
Rule of shorter term applies
Has the work been make available to the public?
Has the work been made available to the public?
Was the work published more than 70 years after creation?
Was the work published within 70 years of the death of the last surviving author?
Was the work created more than 70 years ago?
Was the work published more than 70 years ago?
Was the work published or communicated to the public more than 25 years ago?
Did the last surviving author die more than 70 years ago?
Still protected
Public Domain


What type of work is this?
Unoriginal Database
Phonogram
Non-original photograph
Literary or artistic work
Performance
Broadcast
First fixation of a film
Is the right holder a company or firm?
According to the law of which country was it formed?
Not in EEA
In EEA
In which country does it have its registered office?
Of which countries is the right-holder a national or resident?
In which country does it have its registered office, central administration, or principal place of business?
Are its operations genuinely linked on an ongoing basis with the economy of an EEA state?
Was the database made available to the public after its completion or last substantial change?
Was the database made available to the public in the last 15 years?
Was the database completed or sustantially changed within the last 15 years?
Not Public Domain
Public Domain
Was the phonogram published within 50 years of creation?
Was the phonogram made public within 50 years of creation?
Was the programme first broadcast more than 50 years ago?
Was the phonogram published more than 50 years ago?
Was the phonogram made public more than 50 years ago?
Was the phonogram created more than 50 years ago?
Was a fixation of the performance published or made public within 50 years from the date of the performance?
Was the fixation published or made public more than 50 years ago?
Did the performance take place more than 50 years ago?
Was the film published or made public within 50 years from the fixation?
Was the film published or made public more than 50 years ago?
Was the film first fixated more than 50 years ago?
Was the photograph taken more than 50 years ago?
What type of work is this?
A decision of a public authority or an official translation of such a text
Other
A law or other regulation or an official translation of such a text
A report by a Swedish public authority or an official translation of such a text
What type of author does this work have?
Natural person
Unknown
Anonymous/pseudonymous
Orphan work
What is the nationality or place of residence of the author?
EEA
Non EEA
What is the country of origin of this work?
Is the work an audiovisual or cinematographic work?
Was the work created before 1 January 1995?
Have all the authors of the work died?
Was the last to survive from among its authors one of the following: the principal director, the author of the screenplay, the author of the dialogue and the composer of music specifically created for use in the cinematographic or audiovisual work
Did the last surviving author die more than twenty years after the death of one of the following: the principal director, the author of the screenplay, the author of the dialogue and the composer of music specifically created for use in the cinematographic or audiovisual work
Did one of the following persons die more than 70 years ago: the principal director, the author of the screenplay, the author of the dialogue and the composer of music specifically created for use in the cinematographic or audiovisual work?
Did the last surviving author die more than 70 years ago?
Has the work been made available to the public?
Was the work published within 70 years of the death of the last surviving author?
Did the last surviving author die more than 70 years ago?
Was the work published or communicated to the public more than 25 years ago?
Was the work created more than 70 years ago?
What is the nationality, place of residence or place of establishment of the author?
Berne TRIPS WCT
Non Berne TRIPS WCT
Not in EEA
In EEA
What is the country of origin of this work?
Has the work been make available to the public?
What is nationality or place of residence or place of establishment of the author?
What is nationality or place of residence of the author?
Was the work published more than 70 years after creation?
Rule of shorter term applies
Was the work published or communicated to the public more than 25 years ago?
Was the work published more than 70 years ago?
Still protected
Public Domain
Yes
No