

Europeana Licensing Framework and Background Justification

Report on the Construction of Copyright and Neighbouring Rights Term of Protection Flowcharts for Six Jurisdictions: Lessons Learnt

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INTRODUCTION

As part of EuropeanaConnect Work Package 4 and in collaboration with Nederland Kennisland (KL), the Institute for Information Law (IViR) of the University of Amsterdam has prepared a set of Public Domain Calculators. The Calculators 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 CC Public Domain Mark.

There are currently thirty Public Domain Calculators, each one covering the copyright and neighbouring rights term of protection regime in a separate European jurisdiction. The countries thus covered are the following: Austria, Belgium, Bulgaria, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, Switzerland and the United Kingdom. The selection of countries was intended to cover all states belonging to the European Free Trade Association (with the exception of the very small Liechtenstein).

The work process followed in the preparation of the Calculators was as follows: (a) first a Questionnaire on the Term of Protection was completed by National Experts selected by IViR and representing each of the examined states; (b) subsequently the answers to the Questionnaire were reworked into National Flowcharts by IViR, one flowchart corresponding to each jurisdiction covered. Each flowchart was accompanied by a list of Information Boxes providing additional information intended to assist the user in the correct interpretation of the questions, where necessary; (c) finally, the Flowcharts and Information Boxes were translated into code by IViR's colleagues at Kennisland and uploaded in the form of Button-Based Calculators to a website created for that purpose. The website in question can be found at www.outofcopyright.eu.

It should be noted from the onset that there is a limit to the extent to which an electronic Calculator 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 Calculators are accordingly accompanied by a disclaimer to that effect, urging the user to contact a legal professional for reasonable legal certainty as to the duration of the protection of a specific information product incorporating copyright and/or related rights protected subject matter.

27 of the selected European countries are EU Member States; careful study of EU Directive 2006/116/EC on the term of protection of copyright and certain related rights (hereafter: Term Directive), which 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, was thus required.

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 led 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. 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 the substantive law terminology that underlies the rules on the duration of protection remains undefined in 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 EU Member State, as opposed to one single overarching European flowchart.

The construction of the Flowcharts 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. Below we will examine the precise instances in which the lack of harmonised substantive underpinnings for the Term Directive results in duration discrepancies or even actual uncertainties as to the precise term of protection of information products under certain circumstances across six European countries. The countries selected for this purpose are the Czech Republic, France, Italy, the Netherlands, Spain and the UK. 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 Directive and the international obligations undertaken by the examined countries, while section 4 deals with the term of protection for databases. Finally, Section 5 looks at the transitional provisions introduced by the Term Directive to ease in the new – in most EU Member States extended – term of protection.

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

1. Unharmonised Areas in European Copyright Law

A number of fundamental concepts of substantive copyright law 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, works of joint authorship and collective works, as well as the rules established in the Directive and in national law for official documents, corporate authorship, previously unpublished public domain works and moral rights are analysed.

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 concept of copyright within the construct of the Berne Convention, which repeatedly refers to the protection offered to “original works”, although abstaining from offering further guidance as to what the term entails.¹ On the European level, until the recent *Infopaq* case, it was widely assumed among scholars that the notion of originality, if increasingly convergent within Europe, was nevertheless unharmonised.

A first attempt at reconciling Europe’s divergent legal traditions with regard to originality was made through the three similar originality standards devised by the European legislator for computer programmes, databases and original photographs. The Computer Programmes Directive² demands that a computer programme be “original in the sense that it is the author’s intellectual creation” in order that protection might be recognised. The Database Directive³ uses the exact same wording. As a result, databases and computer programmes are generally accepted to be subject to the same standard of protection. The Term Directive repeats this standard in Article 6 in relation to photographs, although it also clarifies in Recital 16 that such an own intellectual creation must also reflect the author’s personality. Thus, the European Directives have imposed a vertical harmonisation of the concept of originality at least for these three types of works. Over time, it has been noted that a certain “rapprochement” between the copyright and author’s rights countries’ approach to originality can be observed in the assessment of the protection of other copyright works as well, at least in practical outcome if not in the conceptual tools employed to achieve it.⁴

In 2009 the ECJ aspired to give greater impetus to this process of convergence. In the *Infopaq* case⁵ 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 to 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

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 Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs, [1991] OJ L122/42, Article 1(3).

³ 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, Article 3(1).

⁴ M. van Echoud et al., *Harmonizing European Copyright Law – The Challenges of Better Lawmaking* (Kluwer Law International, 2009) 42.

⁵ Case C-5/08, *Infopaq International A/S v Danske Dagblades Forening*, 16 July 2009.

within the case-law of each individual Member State. The significance of the divergent originality standards further diminishes when one considers the additional related rights protection offered by many Member States expressly for unoriginal material, such as unoriginal photographs or typographical arrangements. Thus, it may be concluded that, although both national variations in and internal domestic disagreements on the interpretation of the originality test will probably continue to arise, such divergences are likely to be slight and will not, in themselves, 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 of the joint co-authors (Article 1(2)), whereas for the latter 70 years after the date of publication of the work (Article 1(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 work of joint authorship, when a collective work, when two or more separate works by different authors and when a national provision, unforeseen by the Term Directive, introducing an additional category of works involving multiple creators/contributors applies. The result is 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

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 test to determine 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.

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 CDPA⁶. In the **Netherlands**, although no explicit definition of works of joint authorship is provided by the **Dutch Auteurswet**,⁷ the case law of the *Hoge Raad* (Dutch High Court) has gone in the same direction.⁸ 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 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 accessory 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

⁶ Copyright, Designs and Patents Act, 1988.

⁷ *Wet van 23 september 1912, houdende nieuwe regeling van het auteursrecht*, Official Journal 308.

⁸ J.H. Spoor, D.W.F. Verkade, D.J.G. Visser, *Auteursrecht – Auteursrecht, naburige rechten en databankenrecht*, Kluwer, Deventer 2005, p. 32.

individually exploitable. Works of joint authorship under French law do not presuppose that all different components be created in common by all co-authors.⁹

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.¹⁰

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 for the unified term of protection for works of joint authorship, but in another is separated into multiple works, each with its own term of protection, commencing with its 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*,¹¹ 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 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.¹² 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.

⁹ A. Lucas and A.-J. Lucas, *Traité de la propriété littéraire et artistique* (2nd ed) Litec 2001, p. 159-176.

¹⁰ 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.

¹¹ M. van Eechoud et al., *Harmonizing European Copyright Law – The Challenges of Better Lawmaking* (Kluwer Law International, 2009) 235-262.

¹² "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.

1.2.2. Collective Works

Article 1(3) of the Term Directive sets the term of protection of collective works at 70 years after the work is lawfully made available to the public. The recognition of the concept of collective works in the jurisdictions of the Member States is not obligatory under the Directive.

The term of protection of collective works under **French** law is 70 years after the publication of the work.¹³ 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 *maitre* are identified or anonymous is indifferent.¹⁴ Having said this, the concept of *oeuvre collective* in France is highly complex and murky, giving rise to conflicting case law and scholarly opinions as to its precise application.¹⁵ It is at least unanimously agreed upon that the concept covers dictionaries, encyclopaedias and periodical works, such as newspapers or magazines.

The Czech, Spanish and Italian copyright laws follow suit, with slight variations. 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 the work are not capable of independent use. The term of protection is 70 years after the work was made available to the public.¹⁶

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. Article 28 grants collective works duration for 70 years following the lawful disclosure of the work.

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”. 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.

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 *verzamelwerken* 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 *verzamelwerk* and its components should be treated as independent works, 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 1.2.4.). The extent to which this arrangement can be viewed as compatible with the provisions of the Term Directive will depend on the correspondence of the notion of *versamelwerken* with that of collective works in the meaning of the Term Directive. If a *verzamelwerk* is not considered to be the Dutch equivalent of a collective work, no incompatibility occurs.

¹³ Article L123-3, *Code de la propriété intellectuelle*.

¹⁴ P. Sirinelli, S. Durrande and A. Latreille, *Code de la propriété intellectuelle Commenté*, (10th ed) Dalloz 2010, 70 and 73.

¹⁵ A. Lucas and A.-J. Lucas, *Traité de la propriété littéraire et artistique* (2nd ed) Litec 2001, 178-183.

¹⁶ Article 27(4) Czech Copyright Law.

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.

Article 1(4) of the Term Directive 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 such cases, the joint authorship rule kicks in and duration reverts to the rule of 70 years after the death of the last surviving from among the co-authors in accordance with Article 1(2) Term Directive.¹⁷ From among the six selected Member States, only Spain has expressly implemented this arrangement. While Article L113-5 of the French CPI 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, it does not foresee any change in the calculation of the term of protection in such cases.¹⁸ In countries such as the Czech Republic, where being made available under the compiler’s name is part of the definition of a collective work, or the Netherlands and the UK, where the concept of collective works in the meaning of the Term Directive does not exist, the issue obviously does not arise.

Article 1(4) Term Directive also 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; instead, the term of protection of the collective work as a whole is 70 years after it has been made available to the public, while the term of protection of each individual contribution is 70 years after the death of (the last surviving co-)author. This rule has been explicitly incorporated in Spanish¹⁹ and Italian²⁰ legislation. In the absence of any provision to the contrary, we can assume that, where the individual contribution merits copyright protection as an original work of authorship, the same applies in France and the Czech Republic, as well as in the Netherlands in relation to *verzamelwerken*.

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 foresees 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 notion of a *verzamelwerk* is arguably close to that of a collective work, but the term of protection is detached from the date of publication of the work and affixed to the death of the supervisor/compiler instead. In the UK the qualification of a work as a collective one is entirely decoupled from the term of protection – term of protection is instead always attached to the date of death of the author.

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, Italy and Spain, subject to jurisprudential interpretation, the bundle is likely to qualify as collective work and will accordingly be granted 70 years of protection after the date of publication. The biggest exception to this rule occur if the collection is published in Spain under the names of the contributors; in this case, the term of protection will be till 70 years after the death of the last surviving among them. If the individual essays included in the collection 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.
2. In the Netherlands 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,²¹ the term of each essay will be 70 years after the death of the essayist.
3. In the Czech Republic, a work will only qualify as a collective one if the contributions involved are not capable of independent use. Instead, the bundle of academic essays will more likely qualify as a work of collection. Accordingly, the term of protection scheme will likely be similar to that of the Netherlands and the UK: if the collection as a whole passes the originality test as an independent work, its protection will

¹⁷ D. Visser, “Term Directive” in T. Dreier and B. Hugenholtz (eds), *Concise European Copyright Law* (Kluwer Law International, Alphen aan den Rijn 2006) 294.

¹⁸ A. Lucas and A.-J. Lucas, *Traité de la propriété littéraire et artistique* (2nd ed) Litec 2001, p. 357.

¹⁹ Article 28 of the Spanish Intellectual Property Law.

²⁰ Article 26 of the Italian Intellectual Property Law.

²¹ Berne Convention, Art. 2(5).

last till 70 years after the death of the editor/compiler. The individual essays may also attract independent protection, enduring till 70 years after the death of their respective authors.²²

1.2.3. 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 in the rules on the authorship and first ownership of such works, as well as to the legal presumptions related to 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 a fixed list of persons: 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. The only obligate author under Article 2 is the principle director; whether the other listed contributors are designated as authors or not is immaterial to copyright duration. 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.²³

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 attaching it to the lifespan of a pre-determined set of persons 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 authorship.

1.2.4. Corporate Authorship

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. From the selected Member States examined for the purposes of this report, it is only in the Netherlands that this provision finds implementation. 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.

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.²⁴ 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.²⁵ 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.

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, according to s. 9, authorship of the work will remain with the person who created it. Accordingly, 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 by the corporate nature of the work. 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.

²² Czech Copyright Act, Art. 2(5) and 5(2).

²³ P. Torremans, *Holyoak & Torremans Intellectual Property Law* (4th ed, OUP, New York 2005) 204.

²⁴ A. Lucas and A.-J. Lucas, *Traité de la propriété littéraire et artistique* (2nd ed) Litec 2001, p.177.

²⁵ Article L111-1, *Code de la propriété intellectuelle*.

1.2.5. Other Related Concepts: Collections, Compilations and Fictional Authorship

The concepts of joint authorship and collective works should not be confused with other configurations that might attract independent copyright protection which are not specified in the Term Directive. According to Article 2 of the Berne Convention, for example, derivative works, such as translations, adaptations, arrangements of music and other alterations of a literary or artistic work, must be protected as original works without prejudice to the copyright in the original work. In addition, collections of literary or artistic works, such as encyclopaedias and anthologies, which, by reason of the selection and arrangement of their contents, constitute intellectual creations also constitute work of authorship and are protected as such, without prejudice to the copyright in each of the works forming part of such collections.

Attention should also be paid to the distinction under Dutch law between works of joint authorship, *verzamelwerken* and works of fictional authorship (*fictief makerschap*). 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. The rule is intended to cover cases where the intellectual and the 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 overseeing 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. If a work is one of fictional authorship, then the term of protection is calculated from the date of death of the supervisor.²⁶

1.3. 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 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 towards 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 in official acts of the State or of a public administration, whether Italian or foreign.²⁷ 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, 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 also receive no copyright protection. In all the above cases, the 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. Section 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 the work's publication, if such publication took place within the period of 70 years after creation, or, if no such publication takes place, until the end of the period of 125 years from the work's creation. If the document is 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 CDPA, 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 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.

²⁶ J.H. Spoor, D.W.F. Verkade, D.J.G. Visser, *Auteursrecht – Auteursrecht, naburige rechten en databankenrecht*, Kluwer, Deventer 2005, p. 28.

²⁷ Art 13 of the Spanish Intellectual Property Law, Article 5 of the Italian Copyright Law.

In France, the Intellectual Property Code does not touch upon the question of official documents explicitly; 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, as the very nature of such works intends them for wide distribution. The exception is not applicable to compilations or commentaries of laws providing added value.²⁸

1.4. 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 of publishing for the first time a previously unpublished work. 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), while 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.²⁹

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.).³⁰

1.5. Moral Rights

The Term Directive does not harmonise the duration of protection of moral rights, as is explicitly stated both in Article 9 and Recital 20. By contrast, Article 6bis(2) of the Berne Convention requires Contracting Parties to 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 Article L121-1 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.³¹ 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) endure 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.³² 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 until the expiry of the economic rights.

²⁸ A. Lucas and A.-J. Lucas, *Traité de la propriété littéraire et artistique* (2nd ed, Litec 2001), 101.

²⁹ It should of course be noted that Recital 19 of the Term Directive requires such new related rights to be notified to the Commission for reasons of transparency.

³⁰ L. Bently and B. Sherman, *Intellectual Property Law* (3rd ed., OUP, Oxford 2009) 167.

³¹ 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.

³² S. 86 CDPA.

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

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 inhibiting 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 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 obligatory protection for previously unpublished works under Article 4.³³ 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 of the right, are free to be determined on the national level.³⁴ 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.³⁵ 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 1.5.).

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

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 (see above Section 1.1.). 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.

Neighbouring rights protection for non-original photographs is left open under the Directive, which is also silent on the duration that such protection should attract. Two countries from among the selected six have introduced specialised 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. It should be noted that disparate originality thresholds may mean that photographs which are considered non-original in one jurisdiction will receive full copyright protection under the laxer standard of another.

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 limited as it only applies 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 that of a previous edition.³⁶ 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.³⁷ To this extent the right differs from the copyright that will normally arise even outside the UK, in countries which recognise related rights protection to critical and scientific publications, where added value is provided through the arrangement, annotation, collection or other

³³ Von Lewinski and Walter, p 581.

³⁴ 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.

³⁵ Von Lewinski and Walter, p 580.

³⁶ P. Torremans, *Holyoak & Torremans Intellectual Property Law* (4th ed, OUP, New York 2005) 196.

³⁷ H. MacQueen, C. Waelde and G. Laurie, *Contemporary Intellectual Property – Law and Policy*, (OUP, Oxford 2008) 81.

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, where Article 129(2) of the Copyright Act grants 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.³⁸ This would probably include the person who operated the computer, as well as perhaps the person who provided or programmed it.³⁹ Computer-generated works should not be confused with computer-assisted works, i.e. works whose human author simply used the computer as a Calculator 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 protection lasts for a period of 50 years after the creation of the work.⁴⁰

2.5. 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**.⁴¹ The longer term of protection will apply for all works and subject matter protected in at least one Member State on 1 July 1995 (see below Section 6), but only within the Member State in which the term was in force prior to the entry into force of the Term Directive.⁴² 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 relation to works of joint authorship. For example, in countries 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 persons 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.⁴³ This is, for example, currently the situation in the Netherlands.⁴⁴

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 Article 10(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.

2.5.1. 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.

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.

³⁸ S.9(3) CDPA.

³⁹ L. Bently and B. Sherman, *Intellectual Property Law* (3rd ed., OUP, Oxford 2009) 122.

⁴⁰ S 12(7) CDPA.

⁴¹ Recital 10, Term Directive.

⁴² 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.

⁴³ Von Lewinski and Walter, p. 617.

⁴⁴ J.H. Spoor, D.W.F. Verkade, D.J.G. Visser, *Auteursrecht – Auteursrecht, naburige rechten en databankenrecht*, Kluwer, Deventer 2005, p. 560.

- 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 the 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 WWII, 8 years and 120 days are added (i.e. 88 years and 120 days).

In the French Calculator, 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 Apollinaire, 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 1996.⁴⁵ 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.

2.5.2. 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 1987.⁴⁶ 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.

2.5.3. 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 2039.⁴⁷

2.5.4. 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 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 Schedule 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.⁴⁸

⁴⁵ 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].

⁴⁶ See Spanish Intellectual Property Act, 4th Transitional Provision.

⁴⁷ CDPA, Schedule 1, para. 12(4).

⁴⁸ 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>.

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 uncertainty 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.⁴⁹ 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 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.⁵⁰

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.⁵¹ 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.⁵² The freedom left to the Member States continues to carry particular weight as regards the protection

⁴⁹ Von Lewinski and Walter, p. 596.

⁵⁰ D. Visser, "Term Directive" in T. Dreier and B. Hugenholtz (eds), *Concise European Copyright Law* (Kluwer Law International, Alphen aan den Rijn 2006) 300.

⁵¹ Von Lewinski and Walter, p 591.

⁵² Von Lewinski and Walter, p 599.

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 Calculator 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.

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.⁵³

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).⁵⁴ 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.

With regard to related rights, Article 7 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.

⁵³ M. van Eechoud et al., *Harmonizing European Copyright Law – The Challenges of Better Lawmaking* (Kluwer Law International, 2009) 220-221.

⁵⁴ 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>.

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 date 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 or principal 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*⁵⁵, 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*⁵⁶ the ECJ clarified that discrimination on the basis of the country of origin is also forbidden. In *Bob Dylan*⁵⁷ the Court clarified that it suffices that protection is 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

⁵⁵ Case C-360/00, *Land Hessen v G. Ricordi & Co. Bühnen- und Musikverlag GmbH*, 6 June 2002.

⁵⁶ Case C-28/04, *Tod's SpA, Tod's France SARL v Heyraud SA*, 30 June 2005.

⁵⁷ Case C-240/07, *Sony Music Entertainment (Germany) GmbH v Falcon Neue Medien Vertrieb GmbH*, 20 January 2009.

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 1996.⁵⁸

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 extension of protection for unpublished works whose author had died before 1 August 1989 in the UK (see above Sections 2.6.2. and 2.6.3.)

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 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 rules of the examined six Member States has necessitated the construction of a separate electronic Public Domain Calculator for each jurisdiction.

The differences encountered between laws of the Member States should be kept in mind when applying the Calculators to information products. The Calculators are only as good as the information fed into them – if inaccurate information is provided, a correct term of protection is impossible to calculate. As a result, if, for example, the term of protection of a work of 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 Calculator, the fact that under UK law it will constitute two separate works, to each of which the Calculator should be applied, should be considered.

On this note, another important consideration to keep in mind when using the Public Domain Calculators is that, as has been noted in the first Information Box in each of the Flowcharts, a single product may contain more than one piece of copyright or neighbouring rights protected subject matter.⁵⁹ 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 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 Calculators.

⁵⁸ Copyright and Related Rights Regulations 1996 (No. 2967), Part III.

⁵⁹ H. MacQueen, C. Waelde and G. Laurie, *Contemporary Intellectual Property – Law and Policy*, (OUP, Oxford 2008) 44.