SUMMARY REPORT

Question 235

Term of copyright protection

by Thierry CALAME, Reporter General
Sarah MATHESON and John OSHA, Deputy Reporters General
Kazuhiko YOSHIDA, Sara ULFSDOTTER and Anne Marie VERSCHUUR
Assistants to the Reporter General

The purpose of this question is to study international and national law with respect to Term of copyright protection and to encourage proposals for further harmonisation.

National Groups from the following countries (in alphabetical order) have submitted reports: Argentina, Australia, Austria, Brazil, Bulgaria, Canada, China, Denmark, Egypt, Estonia, Finland, France, Germany, Hungary, India, Italy, Japan, Latvia, Malaysia, Mexico, the Netherlands, New Zealand, the Philippines, Poland, Portugal, Romania, Russia, Singapore, South Africa, Spain, Sweden, Switzerland, Trinidad and Tobago, Turkey, the UK and the United States. In total, there were 36 reports. Reports received after 15 June 2013 are listed above but their content is not included in the summary.

Many of the reports provide extensive reviews and very thorough analyses on case law and the interpretation of statutory provisions. Some of the Groups have also given detailed proposals for further harmonisation with respect to Terms of copyright protection.

This report summarises some of the issues discussed in the National Group Reports but does not attempt to fully describe the accounts of the different national laws made by the National Groups. For a detailed account of any particular answer please refer to the respective National Group Report at https://www.aippi.org/?sel=questions.

I. Analysis of current law and case law

Ratification of three treaties

1) Have the Berne Convention amended in 1979 (BC), TRIPS 1994 and the WIPO Copyright Treaty (WCT) been ratified by your countries? Please provide your answer in relation to each individual international instrument, and provide dates and details of ratification.

Almost all the reporting Groups (total 29 out of 33 Groups) report that they have ratified the Berne Convention amended in 1979 (BC), TRIPS 1994 and the WIPO Copyright Treaty (WCT). A few countries have ratified the BC and TRIPS but not the WCT (Brazil, Egypt, New Zealand and South Africa). For detailed information regarding national legislation, see each country report.

Minimal obligations imposed by these treaties

2) Have the minimal obligations in respect of Term of protection of copyright imposed by these international instruments been implemented in your countries' laws? By means of which legislation? Please respond in relation to each of BC, TRIPS and WCT.

a) If the answer is no please specify (i) which obligations have not been implemented (ii) give any reasons why this has not proved possible and (iii) whether there are any current proposals for their implementation.

Almost all the reporting Groups (total 32 out of 33 Groups) report that the minimal obligations with respect to the Term of protection of copyright imposed by these international instruments have been implemented in their countries' laws. For detailed information regarding national legislation, see each country report. The Argentinian Group reports that while the Term of protection for photographic works shall not be less than 25 years as from the date of making the work, article 34 of law 11.723 establishes a Term of 20 years as from the first publication of the work.

TRIPS + obligations

3) Do your laws provide for TRIPS + obligations with respect to the Term of protection? Please provide details of any legislation that imposes this, and specify whether it is Domestic or Regional legislation?

In almost all reporting Groups (total 28 out of 33 Groups: Argentina, Australia, Austria, Brazil, Bulgaria, Canada, China, Estonia, Finland, France, Germany, Hungary, Italy, Japan, Latvia, Mexico, the Netherlands, the Philippines, Poland, Russia, Singapore, South Africa, Spain, Sweden, Switzerland, Turkey, UK and the US), their national laws provide for TRIPS + obligations with respect to the Term of protection in some respects, while other Groups (e.g. Egypt, Malaysia and New Zealand) reply they do not.

The vast majority of the reporting Groups (total 23 Groups: Argentina, Australia, Austria, Brazil, Bulgaria, Finland, France, Germany, Hungary, Italy, Latvia, the Netherlands, Poland, Portugal, Romania, Russia, Singapore, Spain, Sweden, Switzerland, Turkey, UK, the US) report that they have 70 years post mortem auctoris (pma) as the Term of protection in general, which is clearly considered to be TRIPS + obligations**.** Namely, copyright protection shall subsist for 70 years after the death of the author or from the first of January of the year following his/her death or after the publication in the case of a legal entity[1], with some variations in the case of anonymous, collaborative or joint works. For anonymous works, the Term of copyright shall be 70 years from the time the work is lawfully made accessible to the public or the publication of the work or the creation of the work. For collaborative, collective or joint works, 70 years starts from the death of the last author or the year following the death of the last author. In the US, Copyrights last for 70 years after the death of the author of the work, or, for works for hire, the shorter of 120 years after creation or 95 years after publication.

In EU countries, under Directive 2006/116/EC of 12 December 2006 on the term of protection of copyright and certain related rights (formerly, Council Directive 93/98/EEC of the Council of the European Communities harmonizing the Term of protection of Copyright and certain related rights), the general rules are as follows:

1. The rights of an author of a literary or artistic work within the meaning of Article 2 of BC shall run for the life of the author and for 70 years after his death (or the death of the last surviving author in the case of a work of joint authorship).

2. In the case of anonymous or pseudonymous works, the Term of protection shall run for 70 years after the work is lawfully made available to the public. However, when the pseudonym adopted by the author leaves no doubt as to his identity, or if the author discloses his identity during the period referred to in the first sentence, the Term of protection applicable shall be that laid down in the above 1.

[1] To the extent a jurisdiction provides for a legal entity to qualify as author (or initial rightholder).

3. Where a Member State provides for particular provisions on copyright with respect to collective works or for a legal person to be designated as the rightholder, the Term of protection shall be calculated according to the above 2, except if the natural persons who have created the work are identified as such in the versions of the work which are made available to the public.

4. In the case of works for which the Term of protection is not calculated from the death of the author or authors and which have not been lawfully made available to the public within 70 years from their creation, the protection shall terminate.

5. The Term of protection of cinematographic or audiovisual works shall expire 70 years after the death of the last of the following persons to survive, whether or not these persons are designated as co-authors: the principal director, the author of the screenplay, the author of the dialogue and the composer of music specifically created for use in the cinematographic or audiovisual work.

6. The Terms laid down in the Directive shall be calculated from the first day of January of the year following the event which gives rise to them.

Thus, all reporting EU countries provide for TRIPS + obligations because they are so required by EU law. Some countries (e.g. Germany) had adopted that approach even before the enactment of Council Directive 93/98/EEC.

In Mexico, copyright subsists for 100 years after the death of the author.

In some countries (7 countries: Canada, China, Egypt, Japan, Malaysia, New Zealand and South Africa), the general rule is that copyright subsists for 50 years after the death of the author/the last surviving co-author or from the first of January of the year following the author's death, although the Term of copyright protection varies depending on the type of work. In the case of a legal entity, the Term is 50 years expiring December 31 of the fiftieth year after the first publication (or 50 years after the completion of its creation if it is not published) or 50 years after its creation. Among such countries, some (e.g. Canada, Japan, the Philippines) have adopted TRIPS + protection. In Canada, the Copyright Act introduces a “TRIPS +” standard of protection in relation to the term of copyright as applicable to “anonymous and pseudonymous works” and “anonymous and pseudonymous works of joint authorship”. In Japan, the Term of protection for cinematographic work is 70 years from when the work was made public. In some countries (e.g. Japan, the Philippines and South Africa), the Term of protection for photographic works is 50 years as compared to the 25 year minimum period provided under the BC and TRIPS Agreement.

Upward direction

4) Have the Terms moved in an upward direction with ensuing revisions of your domestic laws, or as a result of any obligations derived from regional laws? Please provide details. Are there any current proposals for continued increases in Term of protection generally, or in relation to any specified categories of work? Please specify.

[Past]

In most countries, the Terms of protection have been periodically increased as a result of domestic revisions of the laws.

In EU countries, 50 years pma have been generally increased to 70 years pma as a result of obligations derived from Council Directive 93/98/EEC and 2006/116EC/ of 12 December 2006 as mentioned above. In Spain, the Term of protection was reduced from 80 years to 60 years in 1987 and subsequently increased to 70 years to adapt its laws to Directive 93/98/EEC.

In some countries (5 countries: Argentina, Brazil, Russia, Switzerland and US), 50 years pma have been generally moved to 70 years pma with revisions of domestic laws without obligations resulting

from regional laws. In Brazil, this was realised in 1998. The US has been instrumental in driving the upward movement of copyright Terms both regionally and in its bilateral free trade agreements.

In some countries (e.g. Australia and Singapore), 50 years pma have been generally increased to 70 years pma with revisions of domestic laws being required by a free trade agreement with another country (e.g. the US).

In Japan, the Term of protection for cinematographic work was increased from 50 years to 70 years in 2003.

In Mexico, the last reform of the Mexican Copyright Law related to the Term entered into force on June 23, 2003, raising the Term of protection from 75 to 100 years.

The UK Group points out that while copyright Terms have mostly increased, driven in part by international norms (particularly in the years 1911 and 1956) and regional norms (1996, 2013), Terms have occasionally decreased. Some view the Statute of Anne as having limited the perpetual Term recognised by the Stationers, and others believe that the common law courts have reduced the Term of copyright protection (although the latter proposition remains contentious.) In *Millar v Taylor* (1769) the Court of King's Bench recognised a perpetual common law copyright, but the House of Lords reversed this in *Donaldson v Becket* (1774). Other examples of decrease relate to photographs (in 1911) and unpublished works (in 1988, and possibly in 2013, should there be legislative action).

Some Groups (e.g. Malaysia, New Zealand and South Africa) point out that that there were no substantive increases in Terms of protection in decades.

[Future]

Overall, there seems to be no country that has a specific proposal to further increase the Term of copyright protection in general, which would lead an amendment of the relevant law in the near future.

Some Groups (Argentina, Germany, Italy, Latvia, Mexico, the Netherlands, Portugal, Singapore, South Africa, Switzerland, US) are not aware of any current proposal for further increases.

Recently, the European Parliament issued Directive 2011/77/EU by the European Parliament and by the Council of 27 September 2011, amending Directive 2006/116/EC on the Term of protection of copyright and certain related rights, which shall be transposed into the national legal systems by 1 November 2013. Some countries are currently discussing the legal acts for implementation of this directive or have already implemented it. With this directive, the Term of protection for fixations of performances and for phonograms shall be extended up to 70 years after the fixation or phonogram was lawfully published or lawfully communicated to the public. This issue is, however, outside the scope of this question. Under EU law, fixations of performances or phonograms are as such not protected by a genuine copyright but by a so-called neighboring or related right. Also, pursuant to this EU Directive, all EU countries now have to provide a Term of protection with regards to musical works with lyrics in which the Term of protection is to be calculated from the end of the year of the death of the last surviving author, be it the composer or lyricist. In some countries (e.g. Finland, Germany), which have calculated the term separately for composer and lyricist, this means an increase in the Term of protection for such musical works.

In Japan, to start discussing the extension of Term of protection, a subcommittee set up in March 2007 by the Council for Culture in the Agency for Cultural Affairs held a large-scale public hearing by inviting interested parties from various fields. Out of these participants, those who actively supported the Term extension were largely limited to corporate right holders while a much larger

percentage of the participants opposed or expressed some concern about the extension. Based on these results, the Subcommittee made a report that concluded that "it is necessary to discuss the issue of Term extension in more depth in relation to the entire copyright system."

In the Philippines, during the committee hearings in Congress for recent amendments to the IP Code, measures to increase the Term of copyright protection were considered but were not pursued further after local copyright stakeholders expressed their position that the current Term was adequate and an increase was unnecessary.

In UK, in 2013 there have been proposals to increase the Term of protection for copyright in artistic works that are applied to articles which are mass-produced from 25 years to life-plus-70 (Enterprise and Regulatory Reform Act, giving effect to *Flos v Semararo*).

Rationale/justification, criticisms, etc.

5) What is the existing rationale/justification under your laws for the existing Terms of copyright protection? In particular, is the rationale/justification a merely economical one or are other reasons given? Have there been/is there currently any academic/judicial or general criticism of this rationale? Are you aware of any economical, sociological or other studies justifying or criticizing the current Term?

[Rationale/justification]

Many Groups (e.g. Australia, Austria, Brazil, China, Estonia, France and Romania) point out several factors as the rationale/justification for the existing Terms of copyright protection, such as economic interests of the author or incentive for creation by authors as well as the moral interests of the author and social benefit from such works.

In EU countries, as stated above, the Term of protection is based on the EU Directive on the Term of protection of copyright. The purpose of the Term of protection was to protect the author and his or her next two generations. The increase of the Term of protection to 70 years pma was justified by the argument that since the average lifetime has become longer, the former Term of protection was not long enough to protect the author and his or her next two generations. Also, increasing the Term of protection was justified to achieve the same level of protection in the whole EU and, thus, some Member States were required to increase their Term of protection to match with other Member States, whose national legislation already guaranteed copyrights with Term of protection of 70 years pma. Furthermore, when harmonising the Term of copyright protection in the European Union, it was necessary to ensure that harmonisation would not interfere with any existing rights protected under national and European law. To justify the increase of the Term of protection it was argued that it would reward the author for his or her creative work; as the author is often not able to receive adequate compensation for his or her work during his or her lifetime. Thus, the author would not have assets which his heirs could then inherit. Equally, it was argued that the longer Term of protection would provide an incentive for further creative activity.

Some Groups (e.g. Bulgaria, Canada, Egypt, Latvia, Malaysia, New Zealand, the Philippines, Romania and Sweden) point out that the main or at least some rationale/justification for the existing Term is the existing obligation for harmonisation with treaties or international influence.

In Mexico, the reform to raise the Term of protection from 75 to 100 years came as a result of a revision to the domestic law, under the influence of lobbyists from collecting societies, in order to protect the so called “golden age of Mexican cinema” film catalogue, which was in risk of falling into the public domain.

In Japan, the Term of protection for cinematographic works was extended from 50 to 70 years under the revised Copyright Act that entered into force on 1 January 2004. The main reasons for this extension were:
(1) Enhancement of the protection for video contents under the IP Strategy;
(2) Urgent need due to the fact that Terms of protection for cinematographic works produced during the post-war era were expiring at home and abroad;
(3) Elimination of a practical difference between Terms of protection for ordinary works (there is difference in practice in the duration of protection between 50 years pma and 50 years "after publication"); and
(4) Comparison with major legal frameworks (US, EU).

[Criticism, etc.]

Some Groups (e.g. China, Egypt) point out pressure from publishers and entertainment companies and other stakeholders who enjoy copyright protection to extend the Term of protection.

The Estonian Group points out that the general public would like to see the Term of protection reduced. However, the focus of the general public is to expand the free usage of copyrighted works in the digital world. Therefore, their true objective is not only to reduce the Terms of copyrights but rather seek more free usage exemptions or other similar relief.

The French Group reports on the situation in France in detail. There are many views on this issue. For example, in France, certain organizations campaign for freedom of access to culture and knowledge on the Internet. In August 2012 *La Quadrature du Net* [the Squaring of the Net] issued a series of proposals for reforming copyright at a French and European level, which were based around the sharing of culture and knowledge and freedom of expression, leading to the freedom to reappropriate and modify works on the Internet (remix). While many academics see the current Term as a fair compromise between the interests at play, certain commentators have objected to the constant lengthening of the Term of copyright over the centuries. Some point out that for certain creations, such as software, there is no justification for the current Term. These critics argue that it makes no sense to give 70 years of *post mortem* protection to software which is outdated after 20 years.

In Germany, a general criticism is voiced mainly by a new political party, the “Pirates party” (Piratenpartei). Their political programme includes a basic criticism of any protection for intellectual property as a monopoly which in their view is not adequate in a modern digital world and neglects the characteristics of digital media.

In Italy, some academics have expressed criticism against the current Term of copyright duration. One professor proposes that from a legal point of view the creation of a new kind of copyright (called Copyright 2.0) should apply by default if no notice is given by an author in order to claim the application of the old copyright form of protection (called Copyright 1.0). This new kind of copyright protection would give authors just one right: the right of attribution. Furthermore, from an economic point of view another professor has noted that in general copyright extensions have not led to an increase in the output of literary work and have small economic value for an author since the extra years of protection come far in the future during the life of the author.

In Japan, there is also some academic criticism of the current Term in general. One famous professor proposed that "[o]nly a few works can keep their economic value more than 50 years after death of the author. Such works may be considered as special ones that have already brought in sufficient profits and therefore, it does not seem necessary to allow them to obtain further profits...Looking from the viewpoint of the entire society, it has not been confirmed that such a long Term of protection gives an incentive for creative activities and makes a contribution to the wealth of information." Another famous professor is of the opinion that a reasonable Term would

be 10 years after the author's death, pointing out that in terms of an incentive to engage in creative activities after the author's death, the duration of copyright protection, whether it lasts for 30 years or 50 years, may not make much difference, and that if a copyright expires shortly after the author's death, there may be a problem related to an exclusive license for the rights or a transfer thereof.

The Dutch Group observes growing criticism among content users and particular groups of right holders/authors with regard to copyright. The long Term of protection that works enjoy automatically upon their creation creates problems for instance; (i) the protection of cultural heritage, (ii) the creation of digital libraries, and (iii) creative re-use of existing works. The criticism is inter alia the result of a lack of legal certainty for content users, while the fixed Term of protection is irrespective of (a) the wishes and interests of the author and (b) the commercial lifespan of the creation.

In Portugal, extending the Term of protection from 50 to 70 years for computer programs was subject to criticism. By the time these works reach the public domain, they will have become completely obsolete and will not raise any interest in the general public anymore.

In Spain, some authors have defended the idea of perpetual exploitation rights since copyright is primarily a property right, while others have reasoned that in today's information society the Terms of protection of exploitation rights should rather be shortened.

II. Proposals for harmonisation

Adequacy of current Terms

6) In your opinion do the current Terms of copyright protection provide "adequate" standards of protection? Is this protection adequate for all interested parties i.e. authors/commercial providers/consumers? Please give reasons for your answer.

(1) The majority of the reporting Groups (Total 22 : Argentina, Brazil, Canada, China, Estonia, Finland, France, Germany, Hungary, Italy, Japan, Latvia, Malaysia, Netherland, the Philippines, Portugal, Romania, Russia, Singapore, Spain, Sweden and Turkey) report that the current Terms of copyright protection in each country provide adequate standards of protection for all interested parties, i.e. authors/commercial providers/consumers. Some Groups (e.g. Austria, Finland and France) point out that the way of creating works and the lifetime of works has changed thoroughly in our fast-moving society ruled by technology and that it is, therefore, reasonable to discuss the adequacy of the Terms of protection in relation to the different types of works. Also, the French Group points out that for certain works (pure arts) the Term of protection may seem not long enough, and it must therefore be stated that the Term is sometimes too long and sometimes too short.

The Estonian Group points out that the Terms should be amended only in the course of comprehensive reform of copyright laws.

The Dutch Group points out that although the current Term of protection is suitable for a substantial part of creations currently protected under copyright laws, the copyright system is rather inflexible in that a creation is either protected or not and, if it is, its protection immediately covers the entire duration of copyright. *See 10) below.*

The Singaporean Group points out that there is insufficient detailed empirical study about the economic and social effects of the increase of the Term by 20 years to enable one to conclude whether the existing Term provide adequate standards of protection.

The Spanish Group points out that bearing in mind the wide variety of works in existence and even the divergence between economic rights and moral rights, it is difficult to give a single answer to

this question and provide detailed answers in respect of the different levels of protection

(2) On the other hand, some Groups (5 Groups: Australia, Mexico, Poland, South Africa and UK) are of the opinion that the current Terms of copyright protection are excessive.

The Australian Group points out that the Term may not be adequate in the digital environment and that there were some clear side effects from increasing the duration of copyright, including maintenance of royalty revenues for an additional 20 years, meaning a transfer to foreign copyright owners, at the expense of domestic consumers.

The Mexican Group is of the opinion that there should not be benefits for a second generation, and even less for a third generation of descendants that possibly did not even know the author.

The Polish Group points out that, nowadays, the vast majority of works are created in the course of employment or other commercial relationships, in which the legal person (for instance, a company as an employer) acquires the copyright protection, and the actual author most often loses it immediately after completion of the act of creating the work, and therefore there is no sense in reasoning that an extended Term of protection should allow the author (and the author's heirs – two generations of descendants) to satisfy their material needs.

The South African Group points out that the current Term may be too long from the point of view of the commercial product providers and the consumers (the public as users of the works) and that the Term of protection may be too long in respect of certain categories of works.

The UK Group is of the opinion that while a shorter Term would give consumers earlier access to copyright works, it is important that the Term should not be so short as to deter authors and commercial providers from creating or distributing copyright works

(3) The Egyptian Group is of the opinion that the current Term is not adequate. They point out that the only group pushing to maintain the current Term of protection is the pirates. Publishers are not considering translation to be a "financial burden" or an "obstacle" of dissemination of knowledge.

(4) The US Group is not convinced that sufficient consensus exists as to whether the current Terms of copyright protection are "adequate" or "inadequate" for all interested parties. The US Group has not taken a position on this issue.

Upper Limit

7) Do you think that there is a need for an upper limit on Term in international treaties? Please provide your reasons.

(1) Approximately half of the reporting Groups (16 Groups: Australia, Austria, Finland, France, Germany, Japan, Mexico, the Netherlands, the Philippines, Poland, Portugal, Russia, Singapore, South Africa, Sweden and UK) are favorable to setting an upper limit on Term in international treaties.

The reasons given by the Australian Group are that (1) lengthy copyright Terms are anti-competitive; (2) by extending the Term, which already favours the owner or creator, it is prejudicing the public interest in the reuse of the material, and (3) an extended Term exceeds the period for which it is commercially useful.

The Finnish Group points out that should the Term be longer there might be problems, e.g. in a digital environment it is possible that too long a Term of protection hinders innovation.

The French Group points out that (1) establishing an upper limit would firstly allow diverging interests to be reconciled in an optimal manner; (2) this would avoid excessively great divergences between States as far as the Term is concerned, thereby promoting the free circulation of works.

This perspective seems to be supported by other countries as well (e.g. Austria, Germany, Poland, Portugal, Russia and UK).

The Japanese Group points out that there is a tendency among countries with a strong contents industry to internally set a longer Term of copyright protection. Therefore, other countries have no choice but to follow suit for the purpose of protecting their domestic industries. To overcome this tendency, the Japanese Group states that it is important for the countries to discuss adequate Terms of protection.

The Mexican Group is of the opinion that an upper limit must be established in favour of the interests of the society and the enrichment of culture.

The Singaporean Group points out that a stronger stand in international treaty negotiations for ceilings on copyright protection is needed, including a mandatory limit on copyright duration, which would prevent competition between nations offering the strongest intellectual property protection.

The South African Group points out that the main reason for an upper limit would be to counteract the imposition of TRIPS+ obligations with respect to the Term of protection in Free Trade Agreements entered into between parties with unequal bargaining power.

The UK Group points out that setting an upper Term limit will prevent Terms of protection from gradually being pushed upwards by lobbying groups. Changes in Terms of protection ought to be evidence driven and based on a balanced assessment of the needs of all copyright users. Instead, all too often Terms of protection have increased due to pressure from lobby groups who campaign for changes on the basis of self-interest.

(2) Some Groups (e.g. Canada, China, Estonia, Hungary, Italy, Latvia, Malaysia, Romania and Turkey) consider it unnecessary to set an upper limit. The Chinese Group points out that the Term of copyright protection can reflect each country's specific national conditions. The Italian Group points out that an upper limit could discourage a competition among States towards further extensions.

(3) The AIPPI-US Division does not take the position that there is a need for an upper limit on Term and therefore does not currently advocate for an upper limit in international treaties.

Change of the Terms

8) Would you like to see the Terms of copyright protection changed? If yes should the changes take place within the confines of the existing international treaties? Please give your reasons.

(1) Some Groups (13 Groups: Brazil, Canada, China, Estonia, Germany, Hungary, Italy, Japan, Latvia, Malaysia, Romania, Russia and Spain) are averse to changing the Terms of copyright protection.

The Brazilian Group points out that existing international treaties are generally harmonised with respect to Terms of copyright protection and that broadening the uses of copyrighted materials should be through the relaxation of copyright exceptions. This relaxation should occur based on better understanding technological developments, and not through extending or decreasing the Term of protection.

The Canadian Group points out that there are other means of striking a balance between the rights of the creator and a healthy public domain, such as the "orphan" or "unlocatable works" regime, the "fair dealing" regime and other limitations on the exercise of copyright.

The Spanish Group notes that while generally speaking, the current Terms are appropriate, it will be necessary to assess whether they continue to be so in the future, particularly in view of the

proliferation of different kinds of works in the changing digital environment.

(2) Some Groups (9 Groups: Australia, Austria, Mexico, the Philippines, Poland, Portugal, Singapore, South Africa and UK) are of the opinion that the Terms of copyright protection should be shortened.

The Australian Group points out their reasons as follows:

1) Those who produce work protected by copyright are unlikely to consider the legislative protection before deciding to “create.”
2) Extended copyright Terms may limit, and not necessarily encourage, the circulation and impact of that work.
3) As time passes, it may become difficult to find the owner of copyright in aging work if you want to obtain the rights to reuse old material. This may result in uncertainty as to whether copyright work can be used and if so from whom consent should be obtained. In the case of works which might deteriorate over time, for example movies and sound recordings – there may be a reluctance to even preserve the works, as to do so may result in an infringement.
4) Nor does the advent of digital technology strengthen the case for extending the period of protection. Copyright protection is needed partly to cover the costs of creating and distributing works in physical form. Digital technology slashes such costs, and thus reduces the argument for protection.
5) A shorter copyright Term may allow copyright works to re-enter the public domain. This will potentially assist rather than detract from the promotion of creativity. Disney is put up as a good example of this. The conglomerate has been seen to benefit from using previous copyright works like Kipling's Jungle Book, Grimm's Little Snow White, Andersen's Little Mermaid, and Carroll's Alice in Wonderland.
6) In addition, extending the copyright Term of protection may not really assist authors, at least from an economic perspective. It seems, in general, that authors obtain most profits during the initial years post first publication, following which (in a large number of cases) the work is removed and replaced by other works by the publisher. Perhaps, therefore, that longer Terms or copyright protection benefit more the large franchises – like Disney. If a shorter copyright Term applied, perhaps copyright work which does not originally find a significant market (e.g. new forms of musical composition or painting) to enjoy protection at a later time when it achieves recognition, or is republished, and to give creative workers an estate which can be of value to their inheritors.
7) Considering the music industry, for example, a longer copyright Term may be more likely to benefit the record labels than the artists. In the UK, where the copyright duration was also extended to 70 years, it was predicted that 72 per cent of the financial benefits from Term extension will accrue to record labels. Of the 28 per cent that will go to artists, most of the money will go to superstar acts, with only 4 per cent benefiting those musicians mentioned in the European Council press release as facing an "income gap at the end of their life-times". This extension also keeps artists in contracts that are not always forward-looking, particularly given the changes in the new digital age and with new digital media.
8) For commercial producers, there are significant transaction costs involved when trying to obtain permission from copyright holders. The costs for the consumer and commercial producers are immediate and substantial.
9) A long copyright Term can also reduce the productive value of private collections of copyrighted works.
10) An extension of the copyright Term may also encourage "offshore production" of copyright works including the potential for an increase in the production of counterfeit and pirated copyright works

The Austrian Group points out that there should be discussion to adapt the copyright protection system also in other parts (e.g. the definition of the works) to the technological and social developments by finding a fair balance of the involved interests.

The Philippines Group proposes that a fixed copyright Term be provided for works that have been

assigned; for example, should the original author assign the copyright to his work, the Term shall be fixed at fifty (50) years from date of assignment.

The Portuguese Group and the Singaporean Group are of the opinion that it may be justifiable to discuss a possible reduction of the period of protection of some categories of works, in some technological areas such as computer programs.

The UK Group is of the opinion that copyright protection is too long for consumers and therefore ought to be reduced to life plus 50, which will not hinder creativity or discourage commercial providers since the Term life plus 50 was used in the UK from 1911 until the mid-1990s without any evidence of adverse consequence.

(3) The Argentinian Group is of the opinion that the terms of protection in international treaties should be extended to 70 years as of January 1st of the year following the death of the author since 50 years is a short and discriminatory term for the authors' property in comparison with other forms of property.

(4) The French Group notes that harmonisation of the Terms of protection in the various countries would be useful in order to prevent a work from being in the public domain in one country while it is still protected in another country. Such harmonisation would require the Terms of protection to be changed in a certain number of countries, and if this were to be the case this should be done with an upper limit and within the limits of the international treaties. This also seems to be supported by the Finnish Group, which points out that active international cooperation is needed, should the harmonisation take place within the confines of the existing international treaties.

(5) The Dutch Group proposes a totally different approach because the current Term of copyright protection seems to be too inflexible.

(6) The Swedish Group points out that it is hard to decide if the current Terms of protection are adequate because they are not based on empirical data.

(7) The Turkish Group points out that as there is currently a fixed Term for protection regardless of categories of works, the current system does not meet the necessities of all categories.

(8) The US Group is not convinced that sufficient consensus exists as to whether the current Terms of copyright protection are "adequate" or "inadequate" for all interested parties as set forth in Question 6, *supra*, and therefore does not take a position as to whether the Terms of copyright protection should be changed.

9) If your answer to 8 is yes and you would like to see the current Term of protection changed, please indicate whether changes should take place in relation to all categories of work, or only in relation to specific categories of work. If only in relation to specific categories of work, please specify which categories of work, and give your reasons for this choice.

(1) Some Groups (9 Groups: Argentina, Australia, Egypt, Finland, Mexico, the Netherlands, the Philippines, Sweden and UK) indicate that changes should take place in relation to all categories of work.

The Finnish Group points out that if the Term of protection could be harmonised globally, it could for simplicity's and clarity's sake cover all categories of work. Nevertheless, in different categories of works there could be different Terms of protection since the present Term of protection might sometimes be oversized e.g. in regard of software works and in general in the digital environment. The Finnish Group proposes that if the Term of protection were to cover all categories of works, it would also mean that there could be more limitations and exceptions to copyright in order to have a better balance between the right holders, commercial providers and users. The Mexican Group

states that software should be separated.

The UK Group is of the opinion that it would be preferable to have one Term applicable to all works, save for works of utility which ought to be governed by national legislation, noting that it would be too difficult to agree on a definition of 'works of utility' at an international level that would be satisfactory to all countries.

(2) Other Groups (6 Groups: Austria, Poland, Portugal, Singapore, South Africa and Turkey) propose that changes should take place only in relation to specific categories of work. (Finland and Mexico mentioned in the above (1) can also be classified into this group.)

The Austrian Group points out that in particular with regard to the digital information market, the protection of works, such as the layout of a website or icons, should be shortened. Some other Groups (e.g. Poland, Portugal, South Africa, Turkey) also are of the opinion that the Term of protection should be reduced for "modern" works, such as computer programs, because the current Term of protection is out of line with the economic lifetime (and thus the economic value) of "modern" works, and may actually impede development and progress in this economic sector.

The Singaporean Group is of the opinion that changes should take place in relation to unpublished authors' works, which could potentially enjoy an indefinite Term of protection.

(3) This Question has obviously not been answered by those Groups which would not like to change the current Terms.

Optimum Term(s)

10) Please list the factors or criteria that should in your view be used to arrive upon the optimum Term of copyright protection for any specific work, or in general. What in your opinions would this optimum Term(s) be?

(1) 70 years (13 Groups)

13 reporting Groups (Argentina, Brazil, Egypt, Estonia, Finland, France, Germany, Hungary, Italy, Latvia, Portugal, Romania and Russia) are of the opinion that the current general Term included in their national laws of 70 years pma is optimum or at least adequate as it shows a balance between the property right of the authors and the interests of third parties to freely use the works once they go into the public domain.

Each Group lists the factors and policy ideas they believe help determine an optimum Term of protection.

The German Group lists these ideas as follows:

1) The period until substantial commercial exploitation starts;
2) Persons who usually receive benefits should be familiar with the artist and his/her work and have an interest in the protection of the artistic achievements of their predecessor.
3) Availability of the successor entitled to the benefits, while efforts to find the entitled person should be kept within reasonable boundaries and should not be a barrier to the distribution of the work.
4) Musical compositions or works of literature, drawing, painting, architecture, sculpture, engraving and lithography and works of applied art which have a high level of originality should be available to a larger public as they become part of the cultural heritage of the country.
5) Works of applied art with (at least) artistic creativity should be distinguished from "ordinary" industrial designs.

The Italian Group points out the general Criteria as follows:

1) The spaces of creativity and whether the field of prior art is crowded. There are some sectors where the area of creativity is more reduced than others, for instance, software, databases,

designs.
2) The type of work and whether it is subject to rapid obsolescence which reduces the interest of the copyright holder to protect his creation. For works that have functional elements (such as software, databases, designs) the Term of protection could be reduced.
3) Cases in which finding an author after a certain amount of time requires high transaction costs, for instance, orphan works.
4) The duration of the Term could also be modeled according to the possibility given to an author to waive his or her rights. For instance, an author could be given the possibility of voluntary undertaking a unilateral obligation, thus having the legal effect of limiting the Term of protection.

Availability of creators and successors is a common concern for both the German and Italian Groups.

The Turkish Group states that the important factors are:
1) The life term of the author.
2) Economical reasons (common market).
3) Public Domain (Monopoly).
4) Incentive for creation.
5) Capability of unique reproducibility.

The Turkish Group considers these outcomes to arrive at an optimum Term of 70 years. However, like the Italian Group, the Turkish Group also indicates that Terms relating to software could be reasonably reduced.

Some Groups (e.g. Finland, Turkey) point out, as mentioned above in the preceding questions, that (i) the protection of software, etc. could be reassessed or (ii) the Term should be calculated from the publication of the work.

(2) 50 years (5 Groups)

Some Countries (e.g. China, Japan and Malaysia) report that the current Term included in their national laws of 50 years pma is optimum or adequate as it shows a balance between the property right of the authors and the interests of third parties to freely use the works once they go into the public domain. As the Canadian Group does not see a principled reason for adjusting the current Term, it can be classified into this group.

The Japanese Group indicates that any extension of Terms should be made in discussions with the affected sectors and by taking into account international harmonisation, international competition, contribution to cultural development, and economic impacts. In deciding to extend copyright Terms, there should be due care given to the increasing amount of orphan works. Proposed measures include creating archives of works and copyright holders to secure the possibility of using these works without fear of copyright infringement.

The UK reports that 50 years pma is balanced and optimum. The UK Group believes that the current Term is adequate to protect producers and authors. However, a 50 year pma Term would be better for consumers who would benefit from earlier, less restricted access to works.

(3) 20 years from the first publication (1 Group)

The Australian Group asserts that the optimum Term is 20 years from the date of first publication in general. Factors to consider are set forth in the above section 8.

(4) The author and first generation (1 Group)

The Mexican Group proposes that the Term should be to protect the author and the first generation to guarantee author's income and the economic security of his/her family in case of his demise.

(5) The Austrian Group is of the opinion that the Terms should be changed with regard to different types of works. Related to this proposal, the Austrian Group believes that it could be important to review the events that trigger the Term. Each type of work might have a different type of triggering event. For instance, with regard to the protection of a literary works that are only published online (in particular user generated content), it could make sense that the protection Term runs with the upload, and thus, with its first publication. This proposal could better protect the conflicting interests of authors and users.

(6) The Dutch Group reports that the Term of copyright protection should reflect a reasonable balance between conflicting interests of the public in enjoying freedom of information and the author in receiving a reward for the expression of his or her intellectual creations. What Term of protection can be regarded as "reasonable" depends on the circumstances of each specific situation such as:
1) the nature of the creation;
2) the degree of creativity vested in the creation;
3) the commercial or emotional value of the work; and
4) the economic lifespan of the creation.

As a result, the Dutch Group proposes that copyright (as in the current system) comes into existence upon creation of the work, but that, in order to maintain copyright protection, the creation (other than in the current system) needs registration within a specific period (20 years) from the time of creation, and subsequent renewal every ten years up to 7 times after the author has passed away with payment of multiannual taxes.

(7) Some Groups (e.g. the Philippines, Spain) point to many similar factors as those mentioned above:
1) Current life expectancy;
2) Public benefit in the creation of works;
3) Author's incentive;
4) Granting the author a livelihood and affording some kind of protection to his/her closest descendants, and
5) The nature of the work

However, these Groups regard a lack of sufficient data and the varying nature of the works as a challenge to proposed changes. Because of this, they indicate that they are not in a position to propose an optimum Term of protection. Applying the factors mentioned above given the lack of sufficient data would be overly ambitious in view of the very different situations and works. The Swedish Group also emphasizes the importance of empirical data when evaluating how national and international copyright environments and industries should work and be balanced with other interests of the society.

(8) The Polish Group points out that in the current situation, a complete change in how works are created and exploited cannot fail to impact how long a specific work is to be excluded from the public domain. It would appear that adoption of a basic period of 25 - 30 years Term would be a better solution.

(9) The Swiss Group points out the following factors:
1) Economic analysis: Which incentive is needed regarding the Term of protection in order to encourage authors to create and commercial providers to distribute a work?
2) Category of work
3) Level of originality of the work
4) Lifecycle of the work
5) Distribution channels- and distribution costs for the specific work

These factors are similar to those of the Swedish, Dutch, and Turkish Groups, but also incorporate the importance of empirical analysis that is important to the Groups from Sweden, Spain and the

Philippines.

(10) The US Group does not take a position on the issue of what the optimum Term might be, but points out these factors that can be useful in making a determination:
1) Economic value of the creative work
2) Social or public benefit of the creative work
3) Commercial life of the creative work
4) Costs of producing of the work
5) Uncertainty in the expected success of the work
6) The costs of distribution of the work
7) The value of the author's personal connection to the work
8) The value of the personal connection to the work after the life of the author
9) The incentive to create new work
10) The effect of copyright Term on the incentive to create new technologies

III. Conclusions

All the reporting Groups (33 Groups) have ratified the Berne Convention amended in 1979 (BC) and TRIPS 1994. Almost all Groups (32) report that they have implemented minimal obligations with regard to the Term of copyright protection imposed by BC and TRIPS in all respects. Almost all the reporting Groups (28) provide for TRIPS + obligations with respect to the Term of copyright protection in some respect. In almost all the reporting Groups (30), the Term of copyright protection in general is either 70 years pma (23) or 50 years pma (7). The Terms have moved in an upward direction with some relatively minor exceptions in almost all the reporting Groups. For many Groups, either 70 years pma or 50 years pma have been adopted as a result of obligations derived from treaties or regional laws. Although there are some criticisms against the current Terms, there seems to be no viable official movement to further increase the current Terms except that some countries may have to increase the current Term to conclude Free Trade Agreements with other countries. In general, the main rationale/justification for the current Terms is a natural property right for the author's personal creation, the reward to authors, incentive for creation by the authors or social benefit from such works (e.g. enjoying the works by the public, using/distributing the works by commercial companies and further creation by another author based on the works).

A majority of the Groups (22) are of the opinion that the current Term for each group is adequate, while other Groups (5) believe that it is excessive.

Approximately half of the Groups (16) view that an upper limit on Terms in international treaties is necessary because (i) too long of a Term would be detrimental to the public in general, and (ii) an upper limit would overcome the tendency of countries with strong content industries to set longer Terms, thus reducing the risk of other countries being forced to follow along because of unequal bargaining power. This issue is one to be discussed in the Working Committee.

Some Groups (9) are of the opinion that the Terms should be shortened while other Groups (13) are averse to changing the Terms; the latter would include Groups suggesting that assessment would be necessary in connection with modern works like computer software. 2 Groups note that further harmonisation of the Terms would be desirable, which would require the Terms of protection to be changed in a certain number of countries.

Some Groups (9) are of the opinion that changes should be made for all categories of work, while other Groups (6) view that change should take place only with respect to modern works like computer software.

With regard to the optimum Term in general, (i) 13 Groups favour 70 years pma; (ii) 5 Groups favour 50 years pma; (iii) 1 Group favours 20 years from the first publication; (iv) 1 Group favours protection of the author and his/her first generation; (v) 1 Group makes a proposal involving registration within 20 years from the creation; (vi) 1 Group favours a basic period of 25-30 years;

and (vii) 3 Groups point out that a general optimum Term is overly ambitious or difficult to decide due to lack of empirical data.

Given the above, among other things, the following should be debated in the Working Committee:

1) Whether Terms should be harmonised more; in particular, whether the upper limit should be provided for by international treaties;
2) If some changes should occur in connection with Terms in international treaties, whether such changes should take place in all categories of works or some specific works such as computer software;
3) If some changes should occur in connection with Terms in international treaties, which factors should be taken into consideration; and
4) Whether the optimum Term can be decided; and
5) What the optimum Term would be.

As the Term of copyright protection involves various interests of various kinds of people and industries, the discussion is expected to be lively and challenging.