WORKING GUIDELINES

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Q235

Term of copyright protection

Introduction

1) The limited term of copyright protection ("Term") is the most striking element which distinguishes copyright as an intellectual property right from a tangible property right. With the political discussion about copyright protection, ongoing, one of the issues raised is whether there should be a change to the Term. Some argue that the Term is currently too long, and that it no longer serves its purpose in that it stifles rather than encourages innovation. Others advocate an everlasting copyright and rely e.g. on equal treatment with tangible property and a natural everlasting right to one's own creation. Others favour the existing Term as balanced.

   For the avoidance of doubt, Q235 has been confined to Berne Convention copyright works, and has excluded related (neighbouring) rights and the various international instruments and EU Directives delineating this protected subject matter.

Previous Works of AIPPI

2) AIPPI has not previously studied Term of copyright protection as a stand-alone question, as it seeks to do in Q235. However this issue, as well as the broader issues of general copyright protection, have been considered in the context of Forum Session III 'Copyright and Digital Rights Management: Moving Beyond protection?' at the AIPPI Forum Singapore in 2007.

International obligations as minimum standards

3) The term of protection of copyright is governed by international treaties, which have set minimum standards of protection. These are the Berne Convention amended in 1979, TRIPS 1994 and the WIPO Copyright Treaty 1996. Any consideration of a reduction or extension of Term of protection of copyright therefore needs to be considered and debated within the framework of these international treaties and within the confines of the obligations that they impose. There are no international proscribed upper limits of Term of protection.

4) The Berne Convention 1979 (BC) only protects literary and artistic works as defined in Article 2(1) (Berne works) and does not protect related rights. Article 7(1) BC specifies a minimum Term of protection. This is two pronged: (1) a term based on the life of the author plus 50 years post mortem auctoris (pma) for the majority of works and (2) a fixed term of 50 years, in the case of entrepreneurial works and certain type of authorial work, or a minimum 25 years for photographic works and works of applied art.

5) TRIPS resulted from the recognition of a need to harmonise the different substantive and procedural laws relating to intellectual property rights existing in the GATT (General Agreement on Tariffs and Trade) Member States, and to ensure that "measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade". TRIPS incorporated the Berne Term of protection under the doctrine of 'incorporation by reference'; it was decided not to impair existing obligations of the BC but to add so-called 'plus elements' where a body of law to build on already exists. Therefore Article 9(1) TRIPS incorporated the Term of protection provisions of Article 2 BC. WTO members are to comply with these provisions even if not party to BC. Furthermore TRIPS added computer programs and databases to the list of protected works within the meaning of the BC for the protection of literary works.

6) TRIPS also introduced a specific provision in relation to Term of protection (Article 12). This left unchanged the Term based on the 'Life of Author' plus 50 years pma, and the Term of 25 years for photographic works and works of applied art. Article 12 however introduced a number of 'BERNE +' elements in that: it extended protection to juridical works, it made a fixed Term mandatory for cinematographic works, and in relation to anonymous and pseudonymous works, specified that the Term of 50 years was to be calculated from the arguably narrower, "publication" of the work instead of the date when the work is "made available to the public" (BC Art 7(2,3)).

7) The WIPO Copyright Treaty 1996 like TRIPS incorporates Berne Term as a basic standard (Article 1(4)). However unlike TRIPS it does not have a specific provision in relation to the Term of protection. Like TRIPS it adds computer programs and databases to the list of protected Berne works.

Term of Protection has moved in an upward direction

8) A brief analysis of the copyright laws of the UK, France, Germany and Brazil, reveals that domestically Term appears to have been adjusted in an upward direction. In the UK the Statute of Ann 1710 introduced a term for 'old' books of 21 years from publication, and for 'new' books 14 years. By 1988 term had been extended to Life of Author plus 50 years. In France the Law of 1793 introduced a Term of the Life of Author plus 10 years that became Life of Author plus 50 years by 1957. In Germany the move was from a term of Life of Author plus 30 years in 1871, to plus 70 years by 1965. In Brazil too the move has been from a Term of Life of Author plus 50, to plus 60 and is currently Life of Author plus 70.

9) It is of interest that even after the international treaties established normative standards in relation to Term, the EU and the US sought ways to obtain "TRIPS + " standards of protection for Term:

(1) EU Council Directive 2006/116/EC – increased term of protection for Berne works to Life of Author plus 70 years/70 years after the work is lawfully made available to the public; Nevertheless, for example in the UK a limitation on the term of protection for artistic works which have been exploited by an industrial process has limited the term of protection for copyright artistic works such as sculptures and works of artistic craftsmanship which have been industrially exploited to 25 years.

(2) The US Sono Bono Copyright Term Extension Act 1998 (CTEA) – retroactively increased (inter alia) Term to Life of Author plus 70 years, from 50 years. Furthermore leverage was applied through free trade negotiations to other countries to increase term.

10) Both instances sparked strong arguments against copyright term extension – in the latter case from a group of 17 very distinguished economists. The economists concluded that the CTEA's longer copyright for new works provided at most very small additional incentive for new creation.

11) Japan too has introduced "TRIPS +" standards of protection but only in relation to 'cinematographic works'. These have been increased from the Berne/TRIPS requirement of 50 years, to 70 years following the making public of the work or the creation thereof if the work has not been made public within 70 years following its creation. In relation to all other works Japan has maintained the Life of Author plus 50 years term. However the 'IP Strategic Program 2012' of the Headquarters for IP Strategy of the Government of Japan, provides for the possibility of studying an extension of Term and the adoption of any consequent measures, as a short or medium term issue.

12) It is therefore indeed justifiable for AIPPI to question whether this continued increase in Term of protection is correct/acceptable, and whether with no upper limits imposed by treaty obligations there is a concern that ever increasing Terms will continue to be unilaterally imposed.

Rationale of Protection – "Adequate" Standards of Protection

13) TRIPS established what the negotiating parties deemed "adequate" standards of protection in relation to IPRs, including in relation to the Term of copyright protection: "Recognising to this end, the need for new rules and disciplines concerning (…) (b) the provision of adequate standards and principles concerning the availability, scope and use of trade-related intellectual property rights". AIPPI is interested in exploring what "adequate standards" of protection are/should be in relation to Term of protection.

14) The Term of protection of the BC based on 'the Life Author plus 50 years pma' was intended to provide protection for the author, and to enable the first two generations of his or her descendants to benefit from the exploitation of the work. This rationale may be traced back to the strong influence of continental European copyright law regimes (so-called "droit d'auteur" systems), in which the personal creation of the author was regarded as crucial for copyright protection. In such systems, authors retain much greater and lasting ties to their work compared to the Commonwealth or the US copyright systems. For example, the French system provides authors with an inalienable minimum moral right against mutilations of the work. Outside Europe the Brazilian system too considers moral rights to be separate rights, distinguishing them from the economic rights of authors.

15) In respect of economic rights, copyright regimes like the German system guarantee the author a non-waivable right to an adequate remuneration for all economic rights used, which will usually result in a claim for the author to participate in the revenue generated by the exploitation of the work. In such author-centred copyright regimes, the calculation of the Term according to the person of the author (and not according to work related parameters such as publication or registration) seems a natural thing to do. Ricketson and Ginsburg in their authoritative work on the Berne Convention (International Copyright and Neighbouring Rights, 2nd edition 2006, 9.09) argue, however, that the drafters of BC never clearly justified why, and how the Term provisions came to be adopted, as not all the BC member states follow the aforementioned continental Europe approach. It is generally understood however

that the two bases of protection recognize the different interests and policy issues arising in relation to different categories of work. The EU Term increase imposed by the Directive 2006/116/EC was justified (inter alia) on the basis that the average lifespan in the Community has grown longer, to the point where 'Life of Author plus 50 years pma' is no longer sufficient to cover 'two generations'. Here, it seems that the continental rationale behind a calculation pma prevailed. The Court of Justice of the European Union (CJEU) has only recently held in *Luksan/van der Let* (Judgement of 9 February 2012, C-277/10; a case involving the rights of a principal film director in a movie) that "copyright protection was crucial to intellectual creation", thus following the "droit d'auteur" approach, which seeks to guarantee authors a high level of protection.

16) In Japan, the increase of Term solely in relation to cinematographic works, is a recognition of the industry's economic importance. The Report by the Copyright Section of the Council for Culture in the Agency for Cultural Affairs ("CS Report") states that the Japanese cinematographic works such as movie, animation, and game software, are popular in foreign countries and are expected to grow as industries in Japan and to expand as international businesses in the future. Cinematographic works hence have to be accorded commensurate level of protection as other Berne works.

17) However the CS Report outlines that it is as yet uncertain whether either the EU or the US rationales that has led to "TRIPS +" Term increases for other works, should be applicable to the Term of extension of copyright protection in Japan. The reasons given are that general Term extension has both merits and demerits for the development of culture, it is still uncertain whether the extension is and will be an international standard, and it is also uncertain whether international harmonisation in relation to Term is necessary.

18) As was considered by AIPPI in Q216 and Q216B (Exceptions to copyright protection and the permitted uses of copyright works in the hi-tech and digital sectors), in the Digital/ Information Age that we operate in today, there is an acknowledgment of the growing transiency of a considerable number of protected copyright works in certain areas. They are also less easy to define; many intellectual creations result from the efforts not of one 'author' but of several or even a multitude of authors (peer produced software, or mash-ups and other derivative-like works). It is arguable that therefore for such types of works we need time/technology age appropriate Terms of protection in order to enable the exploitation of the full potential that new technologies and the digital marketplace have to offer. But for other types of works, the parameters do not seem to have changed fundamentally. Still a lot of works have a strong personal link to the author(s), e.g. novels, theatre plays, fine art, movies, music; such strong ties of the author to his or her work may still justify a calculation of the term linked to the person of the author and not the work itself. This leads on to the question of how frequently these Terms should these be assessed and revised and what mechanisms should be introduced to enable this. Indeed in Japan it is felt that the Japanese copyright system generally should be adjusted to the digital and network era, before Term is adjusted.

19) There is a need to consider for whom the standards have to be adequate. Most copyright regimes accept copyright to be an (intellectual) property right, which is in general protected against expropriation. But the use of property may be regulated by law in so far as is necessary for the general interest. Traditionally, besides this property interest of the author/creator, an interest of the general public as the consumer of the copyright works has been recognized, which may limit copyright to a certain extent, also in respect of the Term. The emergence of the 'commercial providers' i.e. the new generation of international online providers and webcasters, emanating as a result of the development and convergence of web-based and online broadcasting platforms, is increasingly documented. What Term of

protection is adequate to incentivise them? Not a long term, as this arguably stifles the creation of new industries that generate wealth and added value, but one that is in line with the ubiquity of an on line service. In Q216 it was recognised that copyright protection requires a true balance between the legitimate interests of all parties involved.

20) Additionally in recognition of the augmenting economic importance of copyright works, there is an increasing need to take economic arguments/evidence into account when considering adequate standards. In relation to authors/creators there is a need to question whether there is a social and economic justification for extant Terms of protection, which delay the entry of an individual's personal creation into the public domain, without any clear benefits in terms of incentives or rewards. It is equally necessary to consider if any extant/increased Term (which boosts the income of authors and right holders) also increases the costs to commercial producers, not only by the additional payment but also by the costs of collection ("deadweight costs"). If commercial producers have fewer costs, the question has to be asked, if such cost savings are passed on to the consumers; tickets for a Shakespeare and an Arthur Miller play or the CD price for a Mozart or a Richard Strauss symphony do not differ in a lot of cases.

Finally, it has to be taken into account that an economic justification is not the sole driver of copyright protection and the Term. This is in particular true for all copyright systems which recognize the personal link between the author and his or her work to be crucial for copyright protection. This will justify a Term, while the author is alive. After the author's death, the very personal link to the works starts to fade away. But it can also serve as a justification for a protection for another two generations after him or her, because these generations usually can carry on the (fading) personal link, as they will still have known the author. From the third generation, the personal link seems to become more and more distant.

Nevertheless, some voices also advocate a perpetual copyright. The argument is mainly drawn from the right to equal treatment with tangible property, which has no limited term of protection. Others advocate at least a perpetual moral right (e.g. protection against mutilation, right to be named), as the work will then always have a sufficiently strong personal link to the author.

Reduction of Term of copyright protection

21) If a case is made that it is desirable to reduce extant Terms, one should consider how this can be achieved within the boundaries of the aforementioned international obligations. Would it be possible to 'carve out' from the main body of Berne works that are currently entitled to 'Life of the Author plus' Terms, works that will receive shorter duration of protection?

22) The creation of a shorter Term of protection is facilitated when one is creating a 'new' copyright work as can be evidenced by the proposed new German 'Ancillary copyright' for news publishers, providing them with the rights in published news material that they will be able to enforce independently of authors. It is proposed that the Term of protection of this ancillary copyright will be for 1 year following the publication of the news material in question (Section 87g (2) of the draft Bill).

23) If one were able to operate outside the boundaries of the international treaties, one could discuss abandoning the 'Life of Author plus' as an increasingly inappropriate basis for determining Term, and having instead a fixed term for all works. Several reasons are being

put forward to support this proposition. It is recognised that in this digital age, especially in relation to 'new works' in (computer generated works, peer-produced software, mash-ups and derivative-like works, wikis to name but a few) the 'Author' is difficult to identify, as is the Author's contribution. For other "classical" works, however, this problem does not exist. The internet and widespread availability of software for (re)creating digital content greatly increases the number of works in the public domain. We have entered an era in which mixing or mashing up become a normal way to interact with works/create new works, whether in the realms of fine arts or entertainment, for a large group of users. A different argument is based on the fact that the current regime serves to 'lock up' content; there is evidence that Authors' descendants are acting to suppress uses of works of which they disapprove, such as the heirs of James Joyce and Samuel Beckett. It should be discussed, if such user interests in freely using and accessing works should be fostered by significantly cutting down the Term or if the general property right of the author only justifies less drastic solutions, e.g. through exceptions and limitations. Another argument which was based on the fact that Authors are dead but their heirs or the owners of the copyright may be difficult or even impossible to identify or find, is to some extent now being addressed by Instruments in relation to 'Orphan Works' such as the EU Orphan Work Directive 2012/28/EU and Article 67 of the Japanese Copyright Act No.48 of 1970 re. licensing of Orphan Works.

24) The question is whether an optimum Term can be quantified, and if so whether this can be achieved by economic analysis alone. There have been several attempts over the years at arriving at an optimal figure for copyright Term, and all of them are heavily disputed. In 2007 Pollock estimated that a socially optimal copyright duration is about 15 years, when any increases are applied retroactively. To arrive at this figure Pollock traded off the social value of new works that a term extension would generate against the negative value of existing works that will fall into the public domain later. In November 2012 the Republican Study Committee (RSC) proposed a reduction of copyright term to 12 years for all new works, with various renewal periods but with an upper limit of 46 years of copyright protection. Interestingly, the day after the brief was published the RSC issued a statement retracting it with the statement: "Yesterday you received a Policy Brief on copyright law that was published without adequate review within the RSC and failed to meet that standard. Copyright Reform would have far-reaching impacts, so it is incredibly important that it be approached with all the facts and viewpoints in hand".

Commercial Consequences of a reduction of Term of protection

25) It is indeed important that any consideration of the reduction of Term of copyright protection is carried out within the confines of a commercial impact assessment and an evidence-based approach.

26) Whilst there is no doubt that copyright stimulates the creation of creative content such as software, books, newspapers and periodicals, scientific publications, music, films, photography, visual arts, video games or software - in today's world there is a potential for added-value industries on top of existing media. For example in a world where movies, television shows and books that are 30 + years old were available in the public domain, one is likely to see new industries crop up to offer a new experience on top of this media. Historically in the UK a reduction of Term provided a stimulus to increased productivity. When the Statute of Anne in 1710 provided the first and significant reduction of copyright term from perpetual copyright under common law to a fixed term, there was a development of a new low-cost and high-volume sales market as works that fell out of copyright became affordable for the first time to a whole new body of consumers. Interestingly here too there

was an instance of an increased production of work drawing upon the existing literary canon. In today's world, however, end of Term has not always meant lower consumer prices, as may be seen in the pricing of CDs.

In respect of the economic value of protection, it should also be noted that protections may incentivise authors and heirs, but in particular publishers and other exploiters to care and foster the work they own the rights for. As with tangible property, which is no longer owned by anybody, copyright works can get into a neglected status. Maintaining and caring for works can keep them alive for the public. For certain types of works, such as modern classical music, a long term seems to be necessary anyway, since building up the reputation of the work and/or the author may even take more than the author's lifetime.

Also, Ginsburg and Ricketson in their reflections about a correct Term point out that many publishers, for instance, work on a basis that their less successful works will be subsidized or offset by the more profitable ones (ibid 9.08). They may lose this culturally important option if cross-subsidies are no longer possible due to a shorter Term.
Finally, such economic considerations need to be balanced with the recognized property right of the author or right holder, not only in "droit d'auteur" countries. As Walter puts it: "In this context, it should be clearly kept in mind that the author, under normal circumstances, is not able to earn enough to make a considerable fortune during his lifetime, which he could bequeath to his heirs. … From this perspective, the source of income itself must be heritable at least for two generations of 35 years each." (Walter in Walter/von Lewinski, European Copyright Law, 2010, 8.1.11).

Extension of Term of copyright protection

The argument of in favour of a perpetual copyright is mainly drawn from the equation of copyright with tangible property. Authors have the right to be treated equally with property owners, which enjoy a perpetual right. It can be discussed if tangible rights and copyright are sufficiently comparable, in particular because the use of tangible property is mutually exclusive (no use possible by two parties at the same time), while copyright works may usually be used simultaneously by many. Other suggestions (e.g. Landes and Posner, 2002) favour a perpetual copyright, but with a short initial Term (20 years), linked to a system of renewed registrations in order to keep economic incentive alive for such renewed works of sufficient economic interest. This would return most of the works back to the public domain much earlier. Some copyright systems recognize a perpetual moral right, for example protection against mutilation or the right to be named). The underlying idea is that the work will always have a sufficiently strong personal link to the author. A perpetual copyright would require some kind of registration, as heirs will be more and more difficult to locate; thus, registers like for tracking title in land would seem to be necessary for such systems.

Questions

The purpose of Q235 is to explore the issues raised in relation to Term of protection. The Groups are invited to answer the following questions under their national laws:

I. Analysis of current law

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.

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 RBC, 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.

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?

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.

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?

II. Proposals for harmonisation

Groups are invited to put forward proposals for the adoption of harmonised rules in relation to Term of copyright protection. More specifically, the Groups are invited to answer the following questions:

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.

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

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.

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.

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?