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The myth of European term harmonisation: 27 public domains for the 27 Member States

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The Myth of European Term Harmonisation:
27 Public Domains for the 27 Member States

by Christina Angelopoulos^{*†}

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INTRODUCTION

For centuries, libraries, archives and museums have been preserving the world's cultural heritage. Now new digital technologies have created unprecedented possibilities for the communication of their holdings to the public, as well as for the creative re-use of such material by end-users. According to the European Commission's *Comité des Sages*' "New Renaissance" report on bringing Europe's cultural heritage online,¹ the digitisation of cultural heritage is not merely a technical option, but the moral obligation of its custodians. For practical and financial reasons, an obvious starting point for memory institutions is the digitisation of those items in their collections that pose fewer difficulties in terms of copyright clearance, i.e. primarily out-of-copyright works. As a result, the public domain is now being systematically digitised and deposited in electronically accessible digital portals for culture and knowledge. But, if cultural heritage institutions are to digitise and make accessible the public domain, legal certainty as to what precisely falls within its ambit and what is still protected by proprietary rights becomes of increased importance. Given that the public domain has been traditionally defined in opposition to copyright, as encompassing those materials which either never attracted copyright or related rights protection or for which such protection has lapsed, the rules on the term of protection of copyright and related rights (neighbouring rights) step into the spotlight.

Easily the most ambitious publicly funded digitisation project undertaken at the European scale is Europeana, the virtual European library, launched in 2008 to connect the digitisation efforts of heritage institutions from across Europe through a single centralised online access point. In order to facilitate Europeana's partner organisations in sorting their rights-protected subject matter from public domain material, the EuropeanaConnect project commissioned Nederland Kennisland (KL) and the Institute for Information Law (IViR) of the University of Amsterdam to investigate term of protection rules across European borders. The end result was the creation of an online set of European Public Domain Calculators.² 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 related rights has fallen into the public domain in selected European countries 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 construction of the Public Domain Calculators highlighted the main stumbling blocks to the determination of the exact duration of protection that arise from the ambiguities which are inbuilt in the standing legal provisions. The lack of proper harmonisation of the rules that govern the term of protection in EU jurisdictions emerged as a particular source of legal uncertainty. Although the EU has attempted to subdue term of protection discordance between its Member States with the adoption of the Term Directive,³ harmonisation lacunae persist in its term of protection legislation. As a result, the composition of the public domain will differ depending on the jurisdiction in which protection is sought, as works fall out of copyright on different dates in different EU countries.⁴ This effect was illustrated in the Public Domain Calculators by the need for separate electronic tools, giving on occasion very different results, for each of the 30 jurisdictions covered, including the 27, ostensibly harmonised, EU Member States.

Below, after a brief outlining of the EU's term of protection rules in Section 1, four identified gaps in the European harmonisation of the term of protection are examined: Section 2 analyses the effects of the lack of a harmonised European conceptual framework for copyright and related rights on the rules on the term of protection; Section 3 focuses on the exceptions to the harmonisation of the term of

¹ "The New Renaissance", Report of the 'Comité des Sages', Reflection Group on Bringing Europe's Cultural Heritage Online, 10 January 2011.

² Available at: www.outofcopyright.eu.

³ For the purposes of this article, the term "Term Directive" should be taken as referring to the codified version of 2006, i.e. Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights (codified version) [2006] OJ L372/12.

⁴ It should be noted that this article is assuming the application of *lex protectionis* as the conflict of laws rule in the area of copyright and related rights.

protection which are embedded in the Directive itself; Section 4 deals with the Directive's toleration of unharmonised related rights of domestically determined term; and finally, Section 5 examines instances of incorrect implementation of the Term Directive into national law.

The analysis is centred on the relevant rules in a selection of six European jurisdictions of different copyright traditions and from different parts of the Union: the Netherlands, the UK, France, Italy, Spain and the Czech Republic. All terms of protection mentioned below should be taken as starting on the 1 January of the year following the event that sets the term running.

1. The Term Directive's Limited Harmonising Effect

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 subsequent amendments followed in 2001 and 2011. 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 rules of the Term Directive often extend protection beyond the internationally agreed minimum standards, while also considerably elaborating on these, in an effort to bridge the gap between the terse provisions of the multilateral treaties and the often intricate national rules.

As is usual with the term of protection rules, the EU Term Directive starts with a simple core principle: the term of protection for works of copyright is 70 years after the death of the author (70 years post mortem auctoris or pma). The serviceability of this clear-cut rule is undermined by a complicated set of exceptions for specific categories of works. Further provisions thus 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 death of the last of the 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 pma. 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. 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. Special rules have been instituted with regard to cinematographic or audiovisual works, while various related and sui generis rights receive specialised treatment. Finally, transitional provisions and questions of cross-border protection add complexity. The result, as the assortment of questions comprising the button-based version of Public Domain Calculators and the elaborate underlying flowcharts illustrate, is a confusing entanglement of rules and exceptions that make the confident calculation of the term of protection surprisingly difficult.⁵

Despite these intricate provisions, careful examination of the rules reveals that the desired harmonising effect has not been entirely achieved. Instead, gaps in term of protection harmonisation rules undermine the entire undertaking. 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. Thus, the territorial nature of copyright undercuts harmonisation efforts forcing the public domain to contract and expand along the pattern set by national legislative quirks. Below, four main sources of duration diversity between EU Member States are analysed.

⁵ See S. Dusollier, "Scoping Study on Copyright and Related Rights and the Public Domain", WIPO, 7 May 2010, 26-31.

2. Gaps in Conceptual Harmonisation

The term of protection is only a secondary issue in copyright law. A harmonised application of term of protection rules rests on a unified understanding of the substantive law terminology employed in their formulation. But such terminology is often undefined or only loosely defined at the European level. Standardisation of the relevant fundamental copyright concepts is also lacking on the international level, on the harmonising effect of which the European legislator has heavily relied.⁶ As a result, the subject matter to which the EU term of protection rules are applied will vary in accordance with the national definitions given by the Member States.

Below the definitions of two types of works of copyright whose term of protection diverges from the default rule of 70 years pma – works of joint authorship and collective works – are analysed. Absent a harmonised European definition of the two terms, it is up to national laws and courts to decide when a work will be a work of joint authorship, when a collective work and when two or more separate works by different authors. When national interpretations diverge, the result is a fragmented conceptual framework that leads to different terms of protection for the same copyright work depending on its classification in the relevant national jurisdiction.

2.1. Works of Joint Authorship

Under Art. 1(2) of the Term Directive, where a work is considered to be a work of joint authorship, the term of protection is 70 years after the death of the last surviving from among the joint authors. All six of the examined states define joint authorship according to some variation of the simple formula of “collaboration + inseparability”. The point of divergence occurs with regard to the flavour preferred as to the second element: factual inseparability, economic inseparability or intellectual inseparability.

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 Act and Article 10 of the **UK**’s Copyright, Designs and Patents Act (CDPA).⁷ In the **Netherlands**, although no explicit definition of works of joint authorship is provided by the Dutch Copyright Law 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 Act defines a work of joint authorship as a work which has 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

⁶ M. van Echoud, P.B. Hugenholtz et al., *Harmonizing European Copyright Law – The Challenges of Better Lawmaking* (Kluwer Law International, 2009) 65-66.

⁷ H. MacQueen, C. Waelde and G. Laurie, *Contemporary Intellectual Property – Law and Policy*, (2nd ed., OUP, Oxford 2011) 91 and 112.

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

cannot take the form of mere assistance or advice of a technical, administrative or expert nature, of the provision of documentation or technical material or of the impulse to generate the work.⁹

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 accessorial nature. More importantly however, as opposed to the rules of the five jurisdictions described above, the factual or economic divisibility of the contributions is not significant – it is the intellectual indivisibility that designates the work as a work of joint authorship. In fact, Article L113-3 expressly allows joint authors, unless otherwise agreed, where the contribution of each is of a different kind, to separately exploit their own personal contribution to the work of joint authorship, provided this does not prejudice the exploitation of the whole work. The provision thus presumes that cases will arise where the contributions to a work of joint authorship are both factually clearly identifiable and economically individually exploitable. Works of joint authorship under French law do not presuppose that all different components be created in common by all co-authors.¹⁰

Although the definitions given by the selected countries to the concept of joint authorship might appear to be only slightly dissimilar, where a single work manages to cross the line set by one country for 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, commencing with its own author’s date of death, they may lead to drastic duration differences between European states. Consequently, the same work will be protected for a different length of time depending on the Member State within which protection is sought. An illustrative example is offered by French comic book writer and editor René Goscinny, who died in 1977 and was outlived by his collaborator, comic book artist Albert Uderzo (b. 1927), with whom he created the famous *Astérix* series. In countries where their partnership qualifies as joint authorship, each issue of *Astérix* will enjoy a single term of protection calculated from the death of Uderzo. In other European states, Goscinny’s writing will enjoy a term of protection at least 25 years shorter than that of the accompanying drawings. As a result of his relatively early death, split terms will also affect a lot of Goscinny’s other creations, such as *Lucky Luke*, illustrated by Maurice de Bevere (1923-2001), or *Iznogoud*, illustrated by Jean Tabary (1930-2011).

As the above analysis reveals, the absence of a harmonised definition of joint authorship has resulted in a lack of conceptual alignment of the relevant rules between EU jurisdictions. Without European guidance Member States instinctively follow their “homing” tendencies back to their own diverging traditional interpretations.¹¹ The result is disharmonisation contagion, with the unharmonised underlying provisions sending splinters through supposedly harmonised fields of law.

Special Cases? Audiovisual Works and Co-written Musical Works

The European Commission has addressed the problem of fragmented conceptual harmonisation with regard to two particular types of works of joint authorship. For the first of these, cinematographic and audiovisual works, European term of protection diversity was exacerbated by the Berne Convention’s¹² acceptance of terms of protection calculated from the date on which the work was

⁹ M. van Eechoud et al., *Harmonizing European Copyright Law – The Challenges of Better Lawmaking* (Kluwer Law International, 2009) 239.

¹⁰ A. Lucas and A.-J. Lucas, *Traité de la propriété littéraire et artistique* (2nd ed) Litec 2001, 159-176; P. Sirinelli, S. Durrande and A. Latreille, *Code de la propriété intellectuelle – Commenté*, (10th ed) Dalloz 2010, 70-71.

¹¹ See IViR Study on the Recasting of Copyright and Related Rights for the Knowledge Economy, report to the European Commission, DG Internal Market, November 2006.

¹² Berne Convention for the Protection of Literary and Artistic Works (adopted 9 September 1886, came into force 5 December 1887) S. Treaty Doc. No. 99-27, as amended (Berne Convention).

made available to the public or, failing such an event, from the creation of the work.¹³ The sheer number of creative contributors participating in their creation and the different approaches between countries to the assignment of authorship added complexity. Article 2 of the Term Directive found a solution in the disentangling of the term of protection from the determination of authorship. Instead, the term of protection of cinematographic or audiovisual works was set at 70 years after the death of the last from among a fixed list of persons: the principal 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. From the listed persons, the only obligate author under Article 2 is the principal director; whether the other contributors are designated as authors by national law or not is immaterial to copyright duration, while additional persons can also be granted protection without affecting the term of protection.¹⁴ All persons recognised by national legislation as authors of cinematographic or audiovisual works enjoy the term of protection established in Article 2.

The “split term” problem was also found to be acute in the case of co-written musical works;¹⁵ in some jurisdictions, such as France or Spain, a co-written musical work will be classified as a single work of joint authorship with a unitary term of protection, to be calculated in accordance with the Directive’s rule, from the death of the last surviving co-author. In others, such as the Netherlands or the UK, the lyrics and music will be viewed as constituting two separate works, each with its own individual term of protection running from the death of its own author. Finally, specialised national provisions may apply: in Italy, for example, under current rules, the separable parts of co-written musical works will be understood as being independent creations attracting their own individual term of protection. An exception covers dramatico-musical works (such as operas), works of dumb show and choreographic works, which, although not in fact understood as constituting works of joint authorship under Italian law, are nevertheless granted a term of protection starting from the date of death of the last contributing author to survive.¹⁶ A classic example is offered by the Gershwin brothers, who collaborated in the production of a numerous vocal and theatrical works. In countries where their partnership qualifies as joint authorship, their works will enjoy a single term of protection calculated from the death of Ira, the longest living of the two, in 1983. Otherwise, Ira’s works alone with benefit from his longevity, while George’s works will be protected as of his own death, giving them a term of protection 47 years shorter.

With the September 2011 amendment to the Term Directive¹⁷, the Article 2 disentangling approach was extended to co-written musical works (“musical compositions with words”), i.e. works the lyricist and composer of which are different persons. Under the new provisions, copyright in such works shall last for 70 years after the death of the last of the following persons to survive, regardless of whether they are designated as co-authors under national law: the author of the lyrics and the composer of the musical composition, provided that both contributions were specifically created for the co-written musical work.¹⁸

Although perhaps disingenuous to the extent that it connects the duration of protection to the lifespan of persons who may or may not have any claims to exercising the relevant rights under national law, this solution, by attaching the term of protection to a pre-determined set of persons, manages to give a straightforward and harmonised answer to the question of duration, while avoiding challenging the subsidiarity boundaries to the permitted scope of EU legislative action.¹⁹ Its advantage lies in its very

¹³ Berne Convention, Article 7(2). See also Proposal for a Council Directive harmonizing the term of protection of copyright and certain related rights, COM(92) 33 final, Brussels, 23 March 1992.

¹⁴ S. von Lewinski and M. Walter, *European Copyright Law – A Commentary* (OUP, 2010) 550.

¹⁵ M. van Eechoud et al., *Harmonizing European Copyright Law – The Challenges of Better Lawmaking* (Kluwer Law International, 2009) 235-262.

¹⁶ Italian Copyright Law, Article 26. See also M. van Eechoud et al., *Harmonizing European Copyright Law – The Challenges of Better Lawmaking* (Kluwer Law International, 2009) 242.

¹⁷ Directive 2011/77/EU of the European Parliament and of the Council of 27 September 2011 amending Directive 2006/116/EC on the term of protection of copyright and certain related rights [2011] OJL 265/1.

¹⁸ C. Angelopoulos, “Amended Directive Extends the Term of Protection for Performers and Sound Recordings”, *GRUR International*, 2011-11, p. 987-989.

¹⁹ S. von Lewinski and M. Walter, *European Copyright Law – A Commentary* (OUP, 2010) 506.

superficiality, as it sidesteps the need to harmonise the substantive underlying copyright norms, an ambitious and politically contentious aspiration.²⁰ At the same time however it raises the question of why musical and cinematographic works should be singled out for a significantly simpler calculation process when other types of work face the exact same intra-EU duration discrepancies. Musical and cinematographic works are classic types of creative products, the disparate treatment of which by domestic courts is well established in their case law. In the modern world of mash-ups and other multimedia works, other types of co-created information products are very likely to receive diverse classification across Member States and thus attract disparate terms of protection.²¹ Although stop-gap measures covering specific categories of works may alleviate part of the problem in the short term, the need for a harmonised definition of works of joint authorship remains.

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.²² Article L113-2 of the French Intellectual Property Code defines an *oeuvre collective* as “a work created at the initiative of a natural or legal person who edits it, publishes it and discloses it under his direction and name and in which the personal contributions of the various authors who participated in its production are merged in the overall work for which they were conceived, without it being possible to attribute to each author a separate right in the work as created.” Thus, as opposed to the notion of joint authorship, collective works in France do not require that concerted effort and common execution be exerted by the contributors. Instead, the work must be created at the initiative and under the direction of an entrepreneur, be it a legal or natural person, who controls the creative process through the issue of instructions and harmonises the different contributions. As already explained above, the mere preeminent role of one of the contributors does not of itself necessarily disqualify a work from the category of joint authorship and delegate it to that of collective works; rather the decisive factor is the extent to which the contributors, other than the person who edits, publishes and discloses the work, have lost their creative independence, whatever the importance or merit of their contributions. Whether the contributors other than the work’s *maître* are identified or anonymous is indifferent.²³ In any regard, 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.²⁴ 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** the issue of economic indivisibility once again raises its head: 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.²⁵

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

²⁰ See however L. Bently and B. Sherman, *Intellectual Property Law* (3rd ed., OUP, Oxford 2009) 165-166 and P. Torremans, *Holyoak & Torremans Intellectual Property Law* (4th ed., OUP, New York 2005) 204-206.

²¹ M. van Eechoud, P.B. Hugenholtz et al., *Harmonizing European Copyright Law – The Challenges of Better Lawmaking* (Kluwer Law International, 2009) 62.

²² French Code of Intellectual Property, Article L123-3.

²³ P. Sirinelli, S. Durrande and A. Latreille, *Code de la propriété intellectuelle – Commenté*, (10th ed., Dalloz 2010), 73.

²⁴ A. Lucas and A.-J. Lucas, *Traité de la propriété littéraire et artistique* (2nd ed) Litec 2001, 178-183.

²⁵ Czech Copyright Act, Article 27(4).

publishes it under his/her name and which consists of the combination of contributions by various authors where these are so integrated into 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 protection for 70 years following the lawful disclosure of the work.

Article 3 of the **Italian** Copyright Law defines collective works as 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 Copyright Law 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 and even databases.²⁶ 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 pma is applicable. Thus, 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.²⁷ 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. 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 *verzamelwerken* with the, as yet undefined, concept of collective works under the Term Directive, as well as the likelihood of a supervisor/compiler of a *verzamelwerk* not being a legal person.

In the **UK**, s. 178 of the CDPA defines a collective work very broadly as either “(a) a work of joint authorship or (b) a work in which there are distinct contributions by different authors or in which works or 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 pma for collective works, the definition is entirely irrelevant to the term of protection of works that fall within its ambit.²⁸

Adding complexity, the Term Directive establishes an exception to the rule establishing the expiry of the term of protection of collective works 70 years after the date of publication – itself an exception to the core principle of 70 years pma – 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”. 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 co-author in accordance with Article 1(2) Term Directive.²⁹ 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

²⁶ J.H. Spoor, D.W.F. Verkade, D.J.G. Visser, *Auteursrecht – Auteursrecht, naburige rechten en databankenrecht*, Kluwer, Deventer 2005, 35.

²⁷ J.H. Spoor, D.W.F. Verkade, D.J.G. Visser, *Auteursrecht – Auteursrecht, naburige rechten en databankenrecht*, Kluwer, Deventer 2005, 556.

²⁸ H. MacQueen, C. Waelde and G. Laurie, *Contemporary Intellectual Property – Law and Policy*, (2nd ed., OUP, Oxford 2011) 97.

²⁹ D. Visser, “Term Directive” in T. Dreier and B. Hugenholtz (eds), *Concise European Copyright Law* (Kluwer Law International, Alphen aan den Rijn 2006) 294.

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.³⁰ 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 identifiable 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 Spanish³¹ and Italian³² 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 will also apply in France.

Jurisdictions which do not know the legal mechanism of collective works, will instead often simply recognise the right of legal persons to enjoy original titles of ownership in copyright works.³³ Article 8 of the Dutch Copyright Law, for example, clarifies that a public institution, association, foundation or company may be the author of a work if it lawfully communicates it to the public as its own, without naming any natural person as the author. Given that Article 7 of the Dutch Copyright Law states that, if labour carried out by an employee consists of creating a certain literary, scientific or artistic work, the employer shall be deemed the author thereof, unless otherwise agreed between the parties, this might be the case where such an employer is a legal person. The term of protection provisions of Article 1(4) of the Term Directive also apply to such cases. Under Article 38(2) of the Dutch Copyright Law, 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. 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 pma.

In the UK section 11 of the 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. 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 thus remains unaffected. Whether this provision is compatible with Article 1(4) of the Term Directive, which speaks of the term of protection for works for which a legal person is the right-holder, and not the author, is open to examination.

To sum up the above: 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 only 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 identified 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 as defined in other European jurisdictions, but, unless the supervisor/compiler is a legal person, the term of protection is detached from the date of publication of the work and instead affixed to the death of the supervisor/compiler. In the UK both the qualification of a work as a collective one and its corporate identity are entirely decoupled from the term of protection, which is instead always dependent on the date of death of the author.

³⁰ A. Lucas and A.-J. Lucas, *Traité de la propriété littéraire et artistique* (2nd ed) Litec 2001, 357.

³¹ Spanish Intellectual Property Act, Article 28.

³² Italian Intellectual Property Law, Article 26.

³³ J.H. Spoor, D.W.F. Verkade, D.J.G. Visser, *Auteursrecht – Auteursrecht, naburige rechten en databankenrecht*, Kluwer, Deventer 2005, 557-558.

Bundles of Essays

To illustrate the consequences of these legislative inconsistencies, the term of protection of a bundle of academic essays published under the name of a single editor, at the initiative of whom and under whose direction the work was created, will be examined. Generally speaking, depending on the jurisdiction within which protection is sought, the following terms of protection will attach:

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 occurs if the collection is published in Spain under the names of the contributors; in this case, the term of protection will be 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,³⁴ the term of each essay will be 70 years after the death of the essayist. The only exception will occur if the author of the collection is a public institution, association, foundation or company and the natural person who created the work is not indicated in or on copies of the work, in which case the term of protection will be 70 years after the date of publication in the Netherlands.
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.³⁵ Accordingly, the term of protection scheme is likely to be similar to that of the Netherlands and the UK: if the collection as a whole qualifies for copyright protection, such protection will 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.

In conclusion, we observe that, as with works of joint authorship, the lack of a harmonised definition of collective and corporate works can lead to a fragmentation of what was intended to be a unitary European term of protection regime. What is important to understand is that these examples are indicative of a general problem of essential terminological differences between the Member States: in addition to the notion of authorship, variations in Member States' laws also extend to other basic copyright concepts relevant to the delineation of the public domain, such as the rules governing the subject matter of copyright and related rights protection³⁶ (for example, official governmental works may or may not benefit from copyright protection depending on the Member State examined) or the criteria for protection (for example, the originality threshold, although increasingly convergent is still not fully harmonised for most kinds of copyright works³⁷). If the EU wants to implement true term harmonisation, a more fundamental way of "debugging" the open-textured terminology of the Term

³⁴ Berne Convention, Art. 2(5).

³⁵ Works of collection are defined as "collections of independent works or other elements that by reason of their selection and of the arrangement of the content constitute a unique outcome of the creative activity of the author" by Article 2(5) of the Czech Copyright Act. Examples of works of collection include journals, encyclopaedias, anthologies, broadcast programmes, exhibitions or other databases. Under Article 5(2), the author of a collection in its entirety is the natural person who selected the components or arranged them in a creative manner, without prejudice to the rights of the authors of the works included in the collection.

³⁶ M. van Eechoud, P.B. Hugenholtz et al., *Harmonizing European Copyright Law – The Challenges of Better Lawmaking* (Kluwer Law International, 2009) 62.

³⁷ M. van Eechoud, P.B. Hugenholtz et al., *Harmonizing European Copyright Law – The Challenges of Better Lawmaking* (Kluwer Law International, 2009) 40-43.

Directive will be necessary.³⁸ In any case, conceptual inconsistencies aren't the only legislative omission poking holes in the harmonisation of the term of protection.

3. Exceptions to Harmonisation

Although they influence its effectiveness, undefined legal terms are only tangential to the question of term harmonisation. The Term Directive more directly undermines its purpose by introducing explicit exceptions to the harmonised term. These occur in three areas: transitional provisions preserving longer terms of protection already running in a Member State; moral rights, an area generally left untouched by European legislation; and the protection of non-EU subject matter, particularly in the area of related rights.

3.1. Longer Terms of Protection

According to Article 10(1) of the 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.³⁹ In accordance with the principle of non-discrimination and the provisions of the Term Directive, the longer term of protection will apply for all works and subject matter to all copyright works whose country of origin is an EU Member State or whose author is a Community national and which were protected in at least one Member State on 1 July 1995 (Article 10(2)), but only within the Member State in which the longer term was in force prior to that date.⁴⁰ Given that the term of protection generally starts running with the creation of the work,⁴¹ the result can be a delay, in some cases by decades, in the onset of the application of the harmonised rules until the expiry of the longer domestic term. 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 it will not always be self-evident whether an already running term of protection is longer than the term granted by the Term Directive. This will especially be the case in relation to works of joint authorship. For example, in countries in which cinematographic and audiovisual works prior to the transposition of the Directive were protected from the death of the last surviving author, there will be no way of knowing which rule should be applied prior to the demise of either a) all the specified contributors of Article 2; or b) all remaining authors.⁴² This is, for example, currently the situation in the Netherlands.⁴³

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 principles of law of the Community legal order speaks against such an assumption.

Spain: 80 Year PMA 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

³⁸ See also See COMMUNIA Policy Recommendations, Recommendation 4, available at: http://www.communia-association.org/wp-content/uploads/COMMUNIA_Final_Report.pdf.

³⁹ Term Directive, Recital 10.

⁴⁰ 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; P. Torremans, *Holyoak & Torremans Intellectual Property Law* (4th ed. OUP, New York 2005) 201-204.

⁴¹ D. Visser, “Term Directive” in T. Dreier and B. Hugenholtz (eds), *Concise European Copyright Law* (Kluwer Law International, Alphen aan den Rijn 2006) 302.

⁴² S. von Lewinski and M. Walter, *European Copyright Law – A Commentary* (OUP, 2010) 617.

⁴³ J.H. Spoor, D.W.F. Verkade, D.J.G. Visser, *Auteursrecht – Auteursrecht, naburige rechten en databankenrecht*, Kluwer, Deventer 2005, 560.

60 years after the death of the author, transitional provisions were introduced in the benefit of works whose authors died before 7 December 1987.⁴⁴ For such cases, the term of protection remains 80 years pma. As a result, a significant proportion of copyright protected works will receive protection in Spain for 10 years longer than in the rest of the EU. This does not only affect the works of Spanish authors, such as the Nobel prize winning poet Vicente Aleixandre, who died in 1984, or Pablo Picasso, who died in 1973, but also of other Europeans, such as René Magritte, Anne Frank or Albert Camus. By contrast the works of Salvador Dalí, who died in 1989, enjoy only the regular term of 70 years pma.

France: War-Related Term Extensions

In France, the Intellectual Property Code contains three provisions extending the term of protection for works which were in copyright during WWI and WWII or whose authors died for France. To compensate the loss and difficulties in the commercial exploitation of works during the two World Wars:

- (a) The rights of authors, composers and artists of works published before the signing of the Treaty of Versailles and which had not fallen into the public domain on 3 February 1919 were extended by **6 years and 152 days**;
- (b) The rights of authors, composers and artists of works published before 1 January 1948 and which had not fallen into the public domain on 13 August 1941 were extended by **8 years and 120 days**;
- (c) The rights of authors, composers and artists who died for France during WWI or WWII were extended by **30 years**.

It should be noted that the two first extensions can accumulate in cases of works published during WWI, which can then benefit from an extension of up to 14 years and 272 days.

These provisions were not repealed by the French Parliament when it implemented the Term Directive into national law. However, in two decisions of 27 February 2007 concerning non-musical works, the French Court of Cassation excluded the application of the first two extensions by interpreting them in light of the Directive. Given that prior to the adoption of the Directive, in France non-musical works were protected only for 50 years pma, the Court ruled that the new harmonised term absorbed the “extensions due to wars”. By contrast, commentators have concluded that musical works, which enjoyed a term of protection of 70 years pma all along, will continue to benefit from the extensions. This would bring the term of protection of musical works published during WWI up to 84 years and 272 days (70 years pma + 6 years and 152 days + 8 years and 120 days) and of musical works published during WWII up to 78 years and 120 days (70 years pma + 8 years and 120 days).

The fate of the 30-year extension in favour of authors who died for France has not been decided upon by the courts. If the provision remains valid, then depending on the applicability of the other extensions, the term of protection of a musical work whose author died for France may range from 100 years pma (70 years pma + 30 years) to 114 years and 272 days pma (70 years pma + 30 years + 6 years and 152 days + 8 years and 120 days). With regard to non-musical works, commentators are divided on whether the added mileage would salvage the other two extensions as well: some commentators consider that the extensions due to the wars remain absorbed by the new harmonised term of protection. In this case, a non-musical work whose author died for France, whether published during WWI or WWII or not, will benefit from a term of protection of 100 years pma (70 years pma + 30 years). Others argue that, given that the accumulated extensions will certainly result in a term longer than that of the Directive, the calculation should be made on the basis of the old 50 years pma rule. As a result, the term for non-musical works whose author died for France would vary between 80 years pma (50 years pma + 30 years) and 94 years and 272 days (50 years pma + 30 years + 6 years and 152 days + 8 years and 120 days), depending on the date of publication of the work.

⁴⁴ See Spanish Intellectual Property Act, 4th Transitional Provision.

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, including Antoine de Saint-Exupéry, Guillaume Appolinaire and Charles Péguy; uncertainty thus surrounds the term of protection of their works. For example, the entry of Antoine de Saint-Exupéry's famous novella *The Little Prince* into the public domain oscillates from 1 May 2033 to 1 January 2045, depending on the interpretation accepted.

France isn't the only EU Member State to have introduced war-related extensions of term. Prior to the implementation of the Term Directive, Italy also provided for a 6-year wartime extension for works by Italian authors published prior to 17 August 1945. This was abolished with the transposition of the Term Directive in 1996.⁴⁵ However, 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 of protection also absorb the latter extension in Italy. Unclear national rules not only fail to provide legal certainty for users, but also undermine the harmonisation of European term of protection legislation.

UK: Unpublished Works not in the Public Domain

Under the 1956 Copyright Act in the UK, literary, dramatic and musical works, as well as engravings and photographs, were protected for 50 years from the date of publication. As a result, perpetual copyright was in effect bestowed 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. Literary, dramatic and musical works and engravings which were unpublished at the time of the author's death and remained that way until 1 August 1989, as well as unpublished photographs taken on or after 1 June 1957, were granted copyright protection for 50 years from 1 January 1990, i.e. until 31 December 2039. If a work in these categories was published after the death of the author, but before 1 August 1989, then the longer term of protection available will prevail. Hence, if the author died less than 20 years prior to publication, the term of protection of 70 years pma applies. By contrast, if the author died more than 20 years before the work was published, the old 1956 rule of 50 years after publication will persist, as that offering the most enduring protection.

Literary, dramatic or musical works and engravings which were published before 1 August 1989 continue to receive protection for 50 years after that, in accordance with the 1956 rules, if the author died more than 20 years prior to publication. Otherwise, the longer term of 70 years pma prevails.

Anonymous or pseudonymous literary, dramatic, musical or artistic works (other than photographs) which were unpublished until 1 August 1989 are also protected until 31 December 2039, unless they were made available to the public before 1 January 1969 (i.e. twenty years prior to the 1989 amendments, the difference between the old copyright term of 50 years and the new harmonised term implemented in the UK in 1995), in which case copyright persists till 70 years after that.⁴⁶

Although unlikely to affect the term of protection of well-known masterpieces, these provisions could be of great relevance for the digitisation efforts of archives, libraries and other cultural heritage institutions interested in making available online works of historical or scientific value, such as unpublished vintage photographs, personal diaries or academic theses, all of which may potentially receive a longer term of protection in the UK than in the rest of the EU.

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 CDPA, Schedule 1, para. 12(2)(a), 12(3)(b) and 12(4) and the Duration of Copyright and Rights in Performances Regulations 1995 para.15(1). See also L. Bently and B. Sherman, *Intellectual Property Law* (3rd ed., OUP, Oxford 2009) 164-165 and T. Padfield, *Copyright for Archivists and Users of Archives* (2nd ed., Facet Publishing 2004).

3.2. After the Expiry of Economic 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. 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 six selected states 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 does not expire, while in Spain, the Czech Republic and Italy the rights of paternity and integrity likewise have no time limit.⁴⁷ In the UK, moral rights (the right to be identified as author or director, the 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 is falsely attributed.⁴⁸ In the Netherlands the situation is slightly more complicated: the Dutch Copyright Law does not set a limit on 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 on a successor designated by the author in his/her last will and testament for this purpose. 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.⁴⁹ The result is two separate regimes for the determination of the term of protection in Europe: an EU (quasi-)harmonised regime for economic rights and a patchwork of national provisions for moral rights.

It should be noted that Article 5 WPPT⁵⁰ 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. As with the moral rights of authors, the duration of the moral rights of performers is also not harmonised under the Term Directive.

Aside from moral rights, other unharmonised limitations on the reproduction or other re-use of public domain goods remain unaffected by the Directive. In Italy, for example, the re-use of cultural heritage goods, i.e. public domain material which shows artistic, historical, archaeological or ethno-anthropological interest, requires prior authorisation by the administration which is the custodian of the good and payment of the related fees. It must also be considered that certain EU countries apply a *Domaine Public Payant* regime, under which a contribution from the proceeds from the sale of copies of public domain works must be paid to state-controlled funds responsible for promoting creative productivity in society.

Exceptional instances of post-copyright protection may also apply. Special status is enjoyed, for example, by the work *Peter Pan* by JM Barrie under UK law. As a special concession to the Great Ormond Street Hospital for Sick Children in London, to which the author 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 the play and any adaptation which is based on it. Under section 301 and Schedule 6 CDPA, the Hospital trustees are granted a right to a royalty without limit of time in respect of any public performance, commercial publication or communication to the public,

⁴⁷ Article 15(1) of the Spanish Intellectual Property Act, Article 11(5) of the Czech Copyright Act and Article 23 of the Italian Copyright Law.

⁴⁸ CDPA, s. 86. See also, L. Bently and B. Sherman, *Intellectual Property Law* (3rd ed., OUP, Oxford 2009) 167 and H. MacQueen, C. Waelde and G. Laurie, *Contemporary Intellectual Property – Law and Policy*, (2nd ed., OUP, Oxford 2011) 111.

⁴⁹ J.H. Spoor, D.W.F. Verkade, D.J.G. Visser, *Auteursrecht – Auteursrecht, naburige rechten en databankenrecht*, Kluwer, Deventer 2005, 363-364.

⁵⁰ WIPO Performances and Phonograms Treaty (adopted 20 December 1996, entered into force 20 May 2002) S. Treaty Doc. No. 105-17 (1997).

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 it or if the Hospital ceases to have a separate identity or purposes which include the care of sick children.⁵¹

3.3. Protection for Non-EU Works

For the protection for foreign works of copyright, the Term Directive falls back on the rules instituted by the international treaties. According to Article 7 of the Term Directive, 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 pma 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 100 years after their death, the term of protection within the EU will be limited to 70 years pma. 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. Given the international popularity of the copyright conventions, this will be a very rare eventuality.

As with copyright, the Term Directive, following the lead of Article 7(8) of the Berne Convention, also prescribes reciprocity with regard to the term of protection of related rights whose owner is not a Community national. Article 7(2) of the Term Directive 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. As opposed to copyright however, this rule only applies if the Member States grant foreigners protection in their national law. The condition of material reciprocity in the area of the term of protection of related rights under the Term Directive is due to the relatively undeveloped condition of international related rights protection; in contrast to the largely well-coordinated and widely accepted international norms that govern copyright, in the area of related rights the existing multilateral treaties do not provide a sufficient back-drop of harmonisation. Not all Member States have acceded to the international treaties relevant to related rights (the Rome Convention, WPPT, TRIPS Agreement and Geneva Phonograms Convention), these treaties each grant a different term of protection triggered by a range of different events for the rights of performers, phonogram producers and broadcasters, while often the international minimum standards are optional in character.⁵² The result is a wide diversity in the term of protection granted to non-Community nationals in the jurisdictions of the Member States in the area of related rights, depending on the term of protection in the Member State and in the country of origin, as well as on the international treaties signed by both countries and the rules set therein.

Article 7 of the Term Directive limits itself to those related 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 domestic rules of the Member States and their international obligations. This will be the case 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). No international treaty currently regulates questions of recognition of the term of the first fixation of films, so the freedom left to the Member States will carry significant weight there as well.

⁵¹ D.I. Bainbridge, *Intellectual Property* (7th ed., Pearson Education Ltd, Edinburgh 2009) 76.

⁵² M. van Eechoud, P.B. Hugenholtz et al., *Harmonizing European Copyright Law – The Challenges of Better Lawmaking* (Kluwer Law International, 2009) 54.

In any case, in both the areas of copyright and related rights, the harmonisation of international protection finds its limits in bilateral or regional treaties. Article 7(3) of the Term Directive permits Member States to abide by existing international obligations towards non-EU Member States which grant more generous terms of protection, as long as no international agreements on the term of protection of copyright or related rights have been concluded. Although clearly in the service of the protection of acquired rights, the provision does not favour the easy calculation of term by prospective end-users or the institution of a harmonised term of protection across EU Member States.

4. Related Rights of Unharmonised Term

A further example of the Term Directive's permissive approach towards term harmonisation is its explicit acceptance of non-harmonised related rights. Recital 19 of the Term Directive declares that Member States are free to maintain or introduce new related rights other than those mandatorily imposed on the European level. The term of protection of such rights may be entirely free from EU interference or subject only to an upper limit. The Term Directive explicitly mentions but does not limit Member States to two such possibilities: the protection of critical and scientific publications and the protection of non-original photographs. As a result, a given information product may be free of any copyright or related rights protection in one EU Member State, but (still) protected for a certain period of time in another, thus inhibiting harmonisation. Below the term of protection of three such national, aberrant from the EU norm, related rights currently in operation in the six selected Member States are examined.

4.1. 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. Since Article 5 provides little guidance, the precise modalities of the right, including the definition of "critical and scientific publications", are free to be determined on the national level.

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 an upper limit of 30 years from the first lawful publication. From among the six examined states, only Italy has chosen to institute the right. The protection there lasts for 20 years after the first lawful publication by any means or in any form.

4.2. Non-Original Photographs

The Term Directive does not introduce a comprehensive harmonisation of the protection of photographs, but instead imposes a single European standard of originality for photographic works: photographs in the EU will be considered to be original if they are the author's own intellectual creation reflecting his/her personality. According to Article 6 Term Directive, photographs satisfying this standard receive mandatory copyright protection for the usual term of 70 years pma.

Neighbouring rights protection for non-original photographs is left open under the Directive, which is also silent on the duration that such a right should attract. Two countries from among the selected six have introduced specialised related rights protection for non-original photographs to their legislation: 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.

4.3. Typographical Arrangement of a Published Edition

In the UK, under s.1(1)(c) and 9(2)(d) of the 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.⁵³ The duration of protection for the typographical arrangement of a published edition is 25 years after the year of first publication.

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 public domain works only distinguishes the Spanish approach from the UK provision. Protection is conferred for a period of 25 years following publication.

4.4. 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.⁵⁴ This would probably include the person who operated the computer, as well as possibly the person who provided or programmed it.⁵⁵ Computer-generated works should not be confused with computer-assisted works, i.e. original works of copyright whose human author simply used the computer as a tool to aid in the production of the final result.⁵⁶ An example of a computer-generated work would be the text produced by use of an automated translation programme or the result page yielded by a search engine. Special *sui generis* protection for these, otherwise non-original works, exists in the UK for computer-generated works, with a term of protection fixed at 50 years after creation.⁵⁷

5. Incorrect Implementation

A final source of legislative variability in the term of protection may result from incorrect transposition into national legislation. Although this is obviously a risk run with any harmonising attempt, it should be pointed out that excessively intricate provisions will have particular difficulty finding a uniform implementation in all of the EU’s national jurisdictions. Already in Section 1.2 we saw how the elaborate combination of a standard rule accompanied by an exception and then exceptions to the exception has led to patchy implantation in the Member States of the Directive’s exact provisions on collective and corporate works. Another example is offered by the rules on the term of protection of related rights: Article 3(2) of the Directive sets the term of protection of the rights of phonogram producers at 70 years after the fixation is made, unless the recording is lawfully published within that period, in which case they shall last until 70 years from that date. If the recording is not published, but is communicated to the public within the same period, the rights persist till 70 years after the date of the first lawful communication to the public. However a number of Member States have chosen to replicate the “whichever is earlier” pattern of performers’ rights in the rules on the term of producers’ rights, making the term of protection for phonogram producers 70 years after the fixation is made, unless the recording is lawfully published or communicated to the public within that period, in which case they shall last until 70 years from the earliest of these two events. Although this might seem like a minor adjustment of the wording, it can result in differences of up to 50 years in the duration of the same rights between Member States.

⁵³ P. Torremans, *Holyoak & Torremans Intellectual Property Law* (4th ed, OUP, New York 2005) 196.

⁵⁴ CDPA, s.9(3).

⁵⁵ L. Bently and B. Sherman, *Intellectual Property Law* (3rd ed., OUP, Oxford 2009) 122.

⁵⁶ H. MacQueen, C. Waelde and G. Laurie, *Contemporary Intellectual Property – Law and Policy*, (2nd ed., OUP, Oxford 2011) 92.

⁵⁷ CDPA, s. 12(7).

Even the protection of previously unpublished works under Article 4 of the Term Directive, introduced into the legislation of most Member States for the first time with the implementation of the Directive, is not uniform. The provision obliges Member States to recognise protection equivalent to the economic rights of the author for a period of 25 years after the date of publication to the person who, after the expiry of copyright, takes the initiative of publishing for the first time a previously unpublished work. Divergences have emerged between the Member States as to the meaning of the phrase “after the expiry of copyright protection”, with some Member States extending the right to works in which copyright never subsisted. So, for example, Spain explicitly includes any “unpublished work that is in the public domain”,⁵⁸ while the Netherlands explicitly extends the reach of the right to works which never benefited from copyright protection, under the condition that the author died more than 70 years ago.⁵⁹ Although the compatibility of potentially over-broad national interpretations of the wording is covered by Member States’ freedom to introduce new related rights other than those foreseen in the Directive, such differences contribute to an inconsistent European legal framework of copyright protection, wherein a work may be protected in one Member State, while forming part of the public domain in another.

In cases of incorrect implementation, the Commission might initiate the appropriate infringement procedures to challenge the national rules, but, unless the (direct, indirect or incidental) effect⁶⁰ of the Term Directive can be established, only amendment of the relevant law will restore harmonisation.

CONCLUSION

Despite the Term Directive’s attempt to establish a harmonised term of protection for works of copyright and related rights across the EU, as shown above, unharmonised pockets in term of protection legislation persist. Four main sources of legislative variability can be identified: a) contagion from unharmonised areas of substantive copyright law; b) explicit exceptions to the harmonisation of the term of protection; c) national related rights of unharmonised term; and d) incorrect implementation of the provisions of the Term Directive into national law. National duration idiosyncrasies thus survive into the post-harmonisation era – a single European term of protection remains very much a chimera.

As mentioned above, it is for this reason that the Public Domain Calculators were obliged to create a separate calculation tool for each European jurisdiction covered. Without proper EU harmonisation of the term of protection the same subject matter might receive a drastically different term of protection depending on the country within which protection is sought, increasing the complexity of the calculation of the duration of copyright and related rights in Europe 27 times over. This fragmented state of affairs is maladjusted to the challenges of the digital world: although from a legal point of view the public domain may still be conceived of as multiple separate country-specific entities, with the advent of online exploitation the use of a work is envisaged as taking place simultaneously across borders.⁶¹ Territoriality, a cornerstone of traditional copyright law, does not tally with the look and feel of the internet.⁶²

Moreover, diverse national rules make the calculation of the term of protection excessively difficult. European cross-border digitisation projects such as Europeana may wish to signal the public domain status of holdings to their users, but which is the relevant public domain? If a work has no set copyright status, marking it online as definitively free to use becomes treacherous. Cultural institutions are likely to follow the term of protection rules of their own country, but this will not provide legal

⁵⁸ Article 129, Spanish Intellectual Property Act.

⁵⁹ Article 45o(3), Dutch Copyright Law.

⁶⁰ P. Craig & G. De Burca, “EU Law, Texts, Cases and Materials” (3rd ed) OUP, 178.

⁶¹ A. Taubman, “Introduction – International Governance and the Internet” in L. Edwards and C. Waelde, *Law and the Internet* (3rd ed., Hart Publishing, Oxford and Portland, Oregon 2009) 26; See also: S. Dusollier, “Scoping Study on Copyright and Related Rights and the Public Domain”, WIPO, 7 May 2010, 22-23.

⁶² M. van Eechoud et al., *Harmonizing European Copyright Law – The Challenges of Better Lawmaking* (Kluwer Law International, 2009) 307-325.

certainty for users situated elsewhere. Instead, individual term of protection calculations will have to be made for each European jurisdiction. Given the intricate nature of term of protection legislation and the number of EU Member States, this places too high a knowledge barrier on the determination of the public domain status of a work.⁶³

If the public domain is to be fully and freely digitised and exploited legal certainty must be provided as to exactly which cultural creations fall within its confines and which are still protected by proprietary rights. The semi-harmonisation achieved thus far has narrowed the autonomy of Member States in the area of the term of protection, providing some superficial approximation. The devil of disharmonisation however persists in the details of term harmonisation. If the EU wishes to establish a truly harmonised term of protection for copyright and related rights, a more committed and comprehensive approach will be a necessary. Some of the identified harmonisation gaps can be filled with a stricter European harmonisation policy intolerant of national oddities. Others, 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. However, disparities in the conceptual framework of copyright can only be overcome with the harmonisation of European substantive copyright law. In its recent Communication on a Single Market for Intellectual Property Rights⁶⁴ the Commission broached the idea of a far-reaching overhaul of copyright at the European level through the creation of a European Copyright Code. Challenging as the execution of this proposal might be politically, such a code would go a long way to ensuring legal certainty for European citizens.

⁶³ See COMMUNIA, Final Report, p. 115, available at: http://www.communia-association.org/wp-content/uploads/COMMUNIA_Final_Report.pdf.

⁶⁴ European Commission, “Communication on a Single Market for Intellectual Property Rights”, Brussels 24 May 2011, COM 2011 (287) final; see also the European Copyright Code of the Wittem Project, available at: <http://www.copyrightcode.eu/>.