

2012-2

# The Lifespan for Copyright of Audiovisual Works

## LEAD ARTICLE

### **Determining the Term of Protection for Films: When Does a Film Fall into the Public Domain in Europe?**

- The Term Directive: an overview
- The term of protection of cinematographic and audiovisual works
- Film-relevant related rights
- The term of protection vis-à-vis third countries
- Repossessing public domain content and other systems of protection

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- Duration: rules applicable over time and space
- Films based on pre-existing works: duration and ownership problems
- US term of copyright protection for audiovisual works

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# The Lifespan for Copyright of Audiovisual Works



## Foreword

Intellectual property rights are one of *the* tools, if not the tool for rewarding and stimulating creativity. They are attached to many assets which form part of our cultural heritage but which cannot be tagged physically as personal property, as could be, for example, paintings or sculptures. Thanks to intellectual property rights, authors and other rightsholders can cash in on their creative contributions to the making of tangible and intangible audiovisual products in the same way in which others derive money from selling the physical carrier of audiovisual works that they own.

A person's capacity to hold rights and own goods ends with death, as does their capacity to hold intellectual property rights. In the same way that rights to real estate, tangible goods or shares of a company pass on to the respective heirs, most intellectual property rights can be inherited. This is commonly the case for economic rights, which are the very rights which allow for the monetisation of intellectual products. However, given that intellectual property rights honour the creativity of persons, the question arises as to how long after their death their creativity should be protected.

The length of the term of copyright protection determines how long the use of a copyrighted audiovisual work requires licensing. Once it enters into the public domain, the work or parts of it can be digitised, reproduced or made available by everybody and for all uses – no further questions to be asked, no remuneration to be paid. Conversely, as long as the term of copyright protection for an audiovisual work runs, persons interested in using it must secure licences and governments must provide adequate legal frameworks to accommodate this "trading with copyrights". As long as a work is copyright protected, it can contribute to the economic well-being of the rightholders and their heirs.

The Lead Article of this IRIS *plus* examines the European legal framework for determining the length of intellectual property rights protection for cinematographic and audiovisual works as well as certain problems of its transposition into national law. The Lead Article is mirrored by the final Zoom chapter which undertakes the same task for the rules applied in the United States. Both chapters put into evidence the difficulties of defining the proper (and possibly different) time spans during which the various rights potentially attached to an audiovisual work may be protected. The fact that legislators on both sides of the Atlantic have intervened several times to address different generations or even genres of works further complicates the story. It may become quite tedious if the envisaged use of a film requires the investigation of the term-systems of several countries in Europe or, even worse, in Europe and the United States.

The Related Reporting Section of this IRIS *plus* goes beyond the issue of term protection and illustrates related legislative or policy projects that are currently in the European Union pipeline. Among them are the draft for an orphan works directive and the Recommendation on the Digitisation and Online Accessibility of Cultural Material and Digital Preservation.

Strasbourg, March 2012

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# Determining the Term of Protection for Films: When Does a Film Fall into the Public Domain in Europe?

by Christina Angelopoulos  
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## I. Introduction<sup>1 2</sup>

The digital shift has breathed new life into the cultural material of the past. Alongside the production of born digital subject matter, a strong push is underway to digitise the analogue content of our cultural heritage. In view of the fewer difficulties they pose in terms of rights clearance, a lot of the recent digitisation enthusiasm has centred on out-of-copyright works. To date, however, attention has focused primarily on text material. Currently, for instance, only 2% of Europeana's<sup>3</sup> digitised objects consist of sound or audiovisual subject matter. Given the relatively recent advent of film production technologies, this is not surprising. However, with 2024 marking 70 years from the death of the longest-living Lumière brother, 2035 70 years from the death of Stan Laurel and 2047 70 years from the death of Charlie Chaplin, as we head further into the 21<sup>st</sup> century, more and more film material will outgrow copyright and related rights (neighbouring rights) protection and fall into the public domain. Pinpointing exactly when that will happen can help ensure the conservation of early film stock, as well as its continued exploitation and reuse.

Below the rules governing the term of protection of works and other subject matter relevant to the determination of the expiry of the most common rights surrounding audiovisual productions will be examined. Following a brief overview of the provisions of the Term Directive in Section II, in Section III the harmonised term of protection of copyright in cinematographic and audiovisual

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1) This article is based on the research behind the Public Domain Calculators and the accompanying Term of Protection Report, currently available at [www.outofcopyright.eu](http://www.outofcopyright.eu). The Calculators were created in the context of the EuropeanaConnect project by Nederland Kennisland (KL) and the Institute for Information Law (IViR) of the University of Amsterdam in order to facilitate Europeana's partner organisations in sorting their rights-protected subject matter from public domain material. 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 reused, 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 obstacles to the confident determination of the exact duration of protection of copyright and related rights that arise from the ambiguities which are inbuilt in the standing legal provisions.

2) With many thanks to Lucie Guibault, Stef van Gompel and Maarten Zeinstra for many helpful discussions and comments. The author would also like to thank Catherine Jasserand, Tatiana Synodinou, Linda Scales, Ignasi Labastida and Timothy Padfield for their help with clarifying the rules governing the term of protection in their respective countries of France, Cyprus, Ireland, Spain and the UK.

3) Europeana, available at: [www.europeana.eu](http://www.europeana.eu)

works will be analysed. Section IV will focus on the terms of protection of three film-relevant harmonised related rights, while Section V reviews the rules on the term of protection within the EU for non-EU works. Finally, Section VI deals with the repossession of previously public domain material and other limitations to the free use of out-of-copyright content. Analysis will concentrate mainly on the harmonised European rules in the EU's Term Directive, with examples of national implementation intersected where relevant.

All terms of protection mentioned in this IRIS *plus* should be taken as starting on 1 January of the year following the event that sets the term running.

## II. The Term Directive: an overview

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, a consolidated version being adopted in 2006.<sup>4</sup> 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 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). This core rule is supplemented 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. Separate rules have been introduced with regard to certain related or sui generis rights, while transitional provisions and questions of cross-border protection add complexity. Cinematographic and audiovisual works are assigned their own special calculation process. The result is a confusing entanglement of rules and exceptions that make the confident calculation of the term of protection surprisingly difficult.<sup>5</sup>

The intricate rules of the Term Directive are further complicated by the possibility of the accumulation of more than one right around a single information product.<sup>6</sup> The expansion of traditional copyright law to previously unprotected subject matter, such as e.g. performances or film recordings, has aggravated this phenomenon.<sup>7</sup> As a result, what may appear to the uninitiated user as a single product may in fact be protected by multiple layers of overlapping rights, each with its own term of protection, potentially calculated according to disparate rules. The correct

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4) In this IRIS *plus*, 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.

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

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

7) P.B. Hugenoltz, M. van Eechoud, S.J. van Gompel et al., "The Recasting of Copyright & Related Rights for the Knowledge Economy", report to the European Commission, DG Internal Market, November 2006, 164.

calculation of the term of protection will accordingly depend on a thorough understanding of the vagaries of copyright, at least in the jurisdiction within which the copyright status of the work is being investigated.<sup>8</sup> The cumulation of multiple rights is particularly commonplace in the case of films.<sup>9</sup>

### III. The term of protection of cinematographic and audiovisual works

#### 1. The term of protection before the Term Directive

Prior to the adoption of the Term Directive, European diversity in the term of protection was particularly pronounced in the case of cinematographic and audiovisual works. This can in part be attributed to the provisions of the Berne Convention,<sup>10</sup> which did little to encourage harmonisation; although the Berne Convention is not directly applicable to domestic disputes within the jurisdictions of the individual signatory states, its considerable standing, as well as the reluctance of states to grant their own nationals shorter terms of protection than those afforded to foreigners, has given its provisions strong influence over the development of national term of protection rules.

The default term of protection under the Berne Convention is set by Article 7(1) at a minimum of 50 years pma. Under Article 7(2) however, in the case of cinematographic works, the countries of the Union are permitted to provide a term of protection of 50 years after the work has been made available to the public with the consent of the author, or, failing such an event within 50 years from the making of the work, 50 years after the making. In the early nineties, this was the approach taken in Ireland, Italy, Luxembourg, Portugal and the UK.<sup>11</sup> For states that do not choose this route, the default rule of Article 7(1) of the Berne Convention applies, giving cinematographic works protection until 50 years after the death of the author. Given that, in all likelihood, the production of a cinematographic work will require the involvement of multiple persons, Article 7 *bis* of the Berne Convention comes into effect, bringing the term of protection in such cases up to 50 years after the death of the last-surviving of all the joint authors. This was thus the rule in force in the remaining EU member states, with the exception of Spain (60 years after the death of the last-surviving joint author), Germany (70 years after the death of the last-surviving joint author) and, in respect of the music used in the soundtrack, France (70 years after the death of the last-surviving joint author).<sup>12</sup>

Given however that under Article 14 *bis* (2)(a) of the Berne Convention, the initial ownership of copyright in a cinematographic work is a matter for the legislation of the country of protection, even EU countries following the 50 years pma rule were not guaranteed to offer identical terms of protection. Setting aside Ireland, Luxembourg and the UK, which vested initial ownership of rights in a cinematographic or audiovisual work exclusively in the producer of the work,<sup>13</sup> most member states did consider the principal director to be one of the authors; however they disagreed as to the full list of co-authors, with some countries awarding author's rights to anybody who made a creative contribution to the production of the work (including, e.g. involvement in the design

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8) For the purposes of this IRIS *plus*, *lex protectionis* will be accepted as the conflict of laws rule in the area of copyright and related rights.

9) P. Kamina, *Film Copyright in the European Union* (Cambridge University Press, 2002), 85-86.

10) 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).

11) Proposal for a Council Directive harmonizing the term of protection of copyright and certain related rights, COM(92) 33 final, Brussels, 23 March 1992.

12) *Ibid.*

13) See Report of the European Commission to the Council, Parliament and Economic and Social Committee on authorship of cinematographic or audiovisual works, COM (2002) 691 final, Brussels, 6 December 2002.

of sets, costumes, sound, lighting, camera operation or film editing)<sup>14</sup> and others taking a more conservative approach. Disparities in national provisions on the authorship and first ownership of such works translated into lack of consensus as to the term of protection.<sup>15</sup> The sheer number of creative contributors participating in the production of the average cinematographic and audiovisual work accentuated the rifts between national term of protection rules. The result was wide diversity across the EU as to the term of protection of cinematographic and audiovisual works.

## 2. The harmonised term of protection

Under such circumstances, relying only on the standard rule of x years after the death of the last-surviving author for the calculation of the term of protection of works of joint authorship for cinematographic and audiovisual works in the EU rules on the term of protection would have done little to establish European harmonisation. Without a common understanding as to who is deemed to be the author, computing the term of protection of cinematographic and audiovisual works from the date of death of the last-surviving author would still have resulted in different terms of protection for the same work depending on the jurisdiction within which protection was sought. Article 2 of the Term Directive found a solution in the detachment 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 work. If the film's screenplay or dialogue have more than one author or the music more than one composer, presumably the last of these to survive should be the one taken into account.<sup>16</sup> From among the directors, only the principal director is relevant for the calculation of the term of protection; assisting directors will not be taken into account, irrespective of their right-holder status. Where none of the relevant authors in their traditional meaning exist at all – as might be the case for e.g. scientific films or home videos uploaded onto YouTube – the leading person in the creative process should be considered to be the principal director.<sup>17</sup> The only obligate author under the provision is the principal director; whether the other listed contributors are designated as co-authors is immaterial to copyright duration and up to national law to decide. All persons recognised by national legislation as authors of cinematographic or audiovisual works enjoy the term of protection established in Article 2.

The Term Directive avoided giving a definition to the notion of a cinematographic or audiovisual work. The term is generally understood as applying in the broad sense, covering original films of any kind, such as feature films, documentaries, music videos, films created for television purposes, video art and commercials; however regulation in detail is a matter for the legislation of the individual member states.<sup>18</sup>

The disentangling solution of Article 2 Term Directive is perhaps disingenuous to the extent that it connects the duration of the author's economic rights and those of his/her successors to the lifespan of persons who may or may not have any claims to exercising the relevant rights under national law. However, by rendering the harmonisation of the initial attribution of authorship in cinematographic works superfluous, the rule manages to give a straightforward unified answer to the question of duration, while successfully avoiding overstepping the subsidiarity boundaries to the permitted scope of EU legislative action. In addition, by limiting the persons relevant to the calculation of the term of protection, the provision avoids the need for keeping a "death watch"

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14) S. von Lewinski and M. Walter, *European Copyright Law – A Commentary* (OUP, 2010) 616 and M. van Echoud, P.B. Hugenholtz et al., *Harmonizing European Copyright Law – The Challenges of Better Lawmaking* (Kluwer Law International, 2009) 253.

15) See Report, *supra* FN 13; S. von Lewinski and M. Walter, *supra* FN 14, at 544 *et seq* and G. Dworkin, "The EC Directive on the Term of Protection of Copyright and Related Rights" in H. Cohen Jehoram et al. (eds.), *Audiovisual Media and Copyright in Europe* (Kluwer 1994) 33.

16) D. Visser, "Term Directive" in T. Dreier and B. Hugenholtz (eds), *Concise European Copyright Law* (Kluwer Law International, Alphen aan den Rijn 2006) 295.

17) S. von Lewinski and M. Walter, *supra* FN 14, at 554.

18) S. von Lewinski and M. Walter, *supra* FN 14, at 549 and D. Visser, *supra* FN16, at 294.

over a potentially long list of co-authors in order to determine the date of a work's entry into the public domain. At the same time, the provision does raise the question of why cinematographic works should be singled out for a significantly simpler calculation process when other works face the same intra-EU duration discrepancies.<sup>19</sup> Already in September 2011, amending Directive 2011/77/EU applied a comparable system to the calculation of the term of protection of co-written musical works, acknowledging that they are susceptible to similar term of protection disparities arising from classification dissensus.<sup>20</sup> In the modern world of mash-ups and multimedia works, it is very likely that other types of co-created information products will also receive diverse legal characterisation across member states and thus attract unequal terms of protection.

### 2.1. Exceptions to the harmonised term of protection

Does the Article 2 decoupling solution entirely eliminate the problem of jurisdictional fluctuations for the public domain with regard to cinematographic or audiovisual works? It is important to point out that the limited scope of term harmonisation skirts over more deep-rooted differences between European copyright traditions. The lack of a harmonised European definition for fundamental copyright concepts can lead to conceptual inconsistencies between the member states with consequences for the composition of the public domain. For example, the originality threshold, although increasingly convergent between European jurisdictions and despite the harmonising attempts of the Court of Justice,<sup>21</sup> remains only loosely defined on the European level.<sup>22</sup> Application in practice will require further elaboration by national courts and may result in works attracting protection for 70+ years in one jurisdiction, while being denied copyright entirely in another.

In addition, the Term Directive directly undermines its own harmonisation efforts by introducing explicit exceptions to the harmonised term. These occur in two main areas: moral rights, an area generally left untouched by European legislation, and transitional provisions preserving longer terms of protection already running in a member state. An additional source of disparity, concerning the protection of non-EU subject matter, particularly in the area of related rights, will be treated separately in Section V. The user interested in reusing a public domain work will have to be aware of the resultant differences between member states' term of protection rules and will be well-advised to make individual term calculations for each European jurisdiction.

#### 2.1.1. Moral rights in cinematographic and audiovisual works

The rule of Article 2 of the Term Directive applies exclusively to the duration of the economic rights. As is explicitly stated both in Article 9 and Recital 20, the Term Directive does not harmonise the duration of moral rights. As standardisation of moral rights is also lacking on the international level,<sup>23</sup> a motley of disparate rules has resulted among the member states in this area, from perpetual protection of moral rights in e.g. France, to no post-mortem moral rights protection at all unless specifically requested by the author in his/her last will and testament in the Netherlands.<sup>24</sup> 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. Given that, depending on the specifications of national rules, moral rights in a cinematographic or audiovisual work may translate into practical obligations concerning e.g. the provision of appropriate recognition for the authors or the permissible treatment (whether

19) M. van Echoud *et al.*, *supra* FN 14, at 62.

20) 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] OJ L265/1, Article 1(1).

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

22) M. van Echoud *et al.*, *supra* FN 14, at 42.

23) Berne Convention, Article 6bis(2).

24) Wet van 23 september 1912, houdende nieuwe regeling van het auteursrecht (Auteurswet 1912) (Dutch Copyright Act), Article 25(2). See also, J.H. Spoor, D.W.F. Verkade, D.J.G. Visser, *Auteursrecht – Auteursrecht, naburige rechten en databankenrecht*, Kluwer, Deventer 2005, 363-364.

modification, segmentation, improvement or distortion) of the work,<sup>25</sup> the result can be a very real fragmentation of the options open to users of out-of-copyright film works in Europe.

### 2.1.2. 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.<sup>26</sup> In accordance with the European principle of non-discrimination on the basis of nationality<sup>27</sup> and Article 10(2) of the Term Directive, the longer term of protection will apply for all works and subject matter 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, but only within the member state in which the term was in force prior to that date.<sup>28</sup> Given that the term of protection generally starts running with the creation of the work,<sup>29</sup> the result is 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. Below, three examples of such longer national terms of protection which can potentially affect the duration of copyright in certain cinematographic and audiovisual works, are examined.

It is worth noting that it is not always self-evident whether an already running term of protection is longer than the term granted by the Term Directive. In countries in which cinematographic and audiovisual works prior to the transposition of the Term Directive were protected from the death of the last-surviving author and which allowed for a wider class of term-relevant authors than those persons listed in Article 2, the term of protection under the old national rules may have been longer than that granted under the rule of Article 2 Term Directive.<sup>30</sup> Adding complexity, whether the old national term of protection or the new Article 2 rule grant longer protection will be impossible to calculate prior to the demise of either a) all the specified contributors of Article 2; or b) all remaining authors. This is, for example, currently the situation in the Netherlands.<sup>31</sup> Given that only the death of the last-surviving author is relevant to the term of protection, the result in effect corresponds to a persistence in the relevant jurisdiction of the old pre-harmonisation rules which hinge duration on the life-span of all authors for all cinematographic and audiovisual works created before 1995.

#### *French war-related extensions*

In France complicated war-related extensions of the term of protection awarded to works whose commercial exploitation was impeded by World Wars I and II add years of protection. The relevance of the provisions is limited, as recent French case law<sup>32</sup> has concluded that, as far as non-musical works are concerned, these “extensions due to the wars” have been absorbed by the transition from a term of protection of 50 to 70 years pma brought about by the implementation of the Term Directive (musical works by contrast already enjoyed 70 years of protection pma prior to the implementation of the Directive). As a result, the provision is not applicable to cinematographic and audiovisual works.

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25) For examples on how this can play out in practice for the users of film works, see: H. Miksche, “Commercial Breaks Infringe Moral Rights in Sweden”, IRIS 2008-6/27 and H. Hillerström, “Lack of credit to composers in TV-programmes considered as copyright infringement”, IRIS 1996-8/13.

26) Term Directive, Recital 10.

27) EC Treaty, Article 12.

28) D. Visser, *supra* FN16, at 302; P. Torremans, *Holyoak & Torremans Intellectual Property Law* (4<sup>th</sup> ed, OUP, New York 2005) 201-204.

29) D. Visser, *supra* FN16, at 302.

30) S. von Lewinski and M. Walter, *supra* FN 14, at 617.

31) J.H. Spoor *et al.*, *supra* FN 24, at 560.

32) The French *Cour de Cassation* has handed down two decisions on the extensions due to the wars and the term of protection of artistic works: Arrêt 281 du 27 février 2007, Première Chambre Civile, available at: <http://tinyurl.com/6ojgek9> and Arrêt 280 du 27 février 2007, Première Chambre Civile, available at: <http://tinyurl.com/2yncpp>

However, 30 additional years of protection have also been awarded to works whose authors died for France during World Wars I and II. On the basis of the rule preserving longer terms of protection, it can be assumed that the applicability of the provision to cinematographic or audiovisual works will be limited to those works whose last-surviving author either died for France him/herself or died less than 30 years after the death of the contributor who did so. However, this issue remains disputed among commentators. If, following the same logic applied by the courts to the above-mentioned extensions due to the wars, this extension too should be considered to have been (at least partly) absorbed by the implementation of the Term Directive, relevance would be further circumscribed to works whose last-surviving author either died for France or died less than 10 years after the contributor who did so. Absent case law on the issue, users would be best advised to err on the side of caution, abstaining from using a work until the longest term of protection conceivable has expired. The question is therefore an excellent illustration of the uncertainty that can still surround the ostensibly simple matter of the duration of copyright.

So, for example, French music composer Maurice Jaubert died of wounds sustained in battle in June 1940. He contributed the music score to the short film *Zero de Conduite* (1933), directed and written by Jean Vigo, who died at the early age of 29 in 1934. If we assume that 20 out of the 30 years of the extension have been cancelled out by the extension due to the Term Directive, the film should enjoy protection till 1 January 2021, 80 years after Jaubert's death. If the war-related extension remains fully valid however, protection will last 20 years more, till 1 January 2041. Jaubert also wrote the music for Vigo's famous *L'Atalante* (1934). If all 30 years of the war-related extension are granted to the film, its term of protection will also extend till 2041. Otherwise however, protection will expire two years earlier in 2039, 70 years after the death of the longest living of the term-relevant creators, writer Albert Riéra.

#### *Spanish 80 years 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 60 years after the death of the author, transitional provisions were introduced for the benefit of works whose authors died before 7 December 1987.<sup>33</sup> For such cases, the term of protection remains 80 years pma. In the case of cinematographic and audiovisual works, the preservation of already running longer terms of protection will mean that the extension shall apply only if at least one of the term-relevant authors of Article 2 of the Term Directive died before 1987 and the last-surviving author died at the latest 10 years after that. Thus, the iconic German expressionist silent film *Metropolis*, whose director Fritz Lang died in 1976, author of the screenplay and dialogue Thea von Harbou in 1954 and musical composer Gottfried Huppertz in 1937, will enjoy a term of protection in Spain 10 years longer than in the rest of the EU, until 1 January 2057.

#### *Crown copyright in the UK*

The treatment of public sector information currently remains unharmonised under the European copyright directives.<sup>34</sup> For the most part divergences in member state legislation in this area will be irrelevant from the perspective of film, as they mostly concern the treatment of text material.

An exception is the UK, where copyright in works made by Her Majesty or by an officer or servant of the Crown in the course of his/her duties rests with the monarch (Crown copyright). Such works

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33) See *Real Decreto Legislativo 1/1996, de 12 de abril, por el que se aprueba el Texto Refundido de la Ley de Propiedad Intelectual, regularizando, aclarando y armonizando las disposiciones legales vigentes sobre la materia* (Spanish Intellectual Property Act), 4<sup>th</sup> Transitional Provision.

34) Again, the international provisions do little to help bridge the gap between national laws in this area. Article 2(4) of the Berne Convention leaves the determination of the protection to be granted to official texts of a legislative, administrative and legal nature and their official translations up to the Contracting Parties. The same approach is taken to political speeches and speeches delivered in the course of legal proceedings (Article 2bis(1)). As a result, EU member states are free to pursue their national idiosyncrasies in this area without falling foul of EU or international law.

might include film material, such as public information films. The position of the Crown in such cases seems to be little different than that of any other employer, with the exception of the duration of protection: Crown copyright lasts until 50 years after the work's publication, if such publication took place within the period of 70 years after its creation, or, if no such publication takes place, until the end of the period of 125 years from the work's creation.<sup>35</sup> As a result, depending on the circumstances surrounding the film, its term of protection might be longer or shorter than that of films protected under the regular rules. To the extent that a) the special regime for the duration of Crown copyright persists in relation to works created after 1 July 1995; and b) it continues to apply to works whose term of protection was running on 1 July 1995, even where it equips works protected by Crown copyright with a shorter term of protection than what they would have under the EU rules, it arguably constitutes a breach of the provisions of the Term Directive.

### 3. Underlying and derivative works

It is important to understand that the term of protection rules analysed above apply only to the cinematographic or audiovisual work as such, not to any underlying work, such as e.g. the novel that inspired a film adaptation or the pre-existing music included in the cinematographic or audiovisual work. Such underlying works may attract independent copyright or neighbouring rights protection of their own, the term of which must be separately calculated according to the regular rules. The user interested in making free use of a cinematographic or audiovisual work must be aware that establishing the public domain status of a cinematographic or audiovisual work as such may not be enough. Ascertaining that all underlying works whose copyright might be breached by a reuse of the cinematographic work are also in the public domain is an important additional step.

It should be noted that depending on the jurisdiction, the three term-relevant contributors of Article 2 of the Term Directive other than the principal director may enjoy independent copyright in their contributions as self-standing works. So, for example, the composer of the music included in a cinematographic work may, depending on the national rules, a) only be granted a single right in the musical work; b) only be considered a co-author of the cinematographic work; or c) benefit from two complementary rights, one in the musical work itself and one in the cinematographic or audiovisual work. In any case, given the additional persons whose life span determines the term of copyright in the cinematographic work, this will always be either longer or as long as copyright in the music.<sup>36</sup>

If a cinematographic or audiovisual work is later adapted, the terms of protection must be calculated separately for the original and derivative works.<sup>37</sup> However, the term of protection of derivative works will not have any effect on the free use of the underlying cinematographic work which is already in the public domain.

## IV. Film-relevant related rights

The Term Directive provides harmonised rules for the calculation of the term of protection of three related rights of potential significance for the determination of the expiration of the complete set of rights surrounding a film: the rights of producers of the first fixation of a film, the rights of performers appearing in the film and the rights of broadcasting organisations emitting signals carrying the film.

It should be noted that the catalogue of related rights enumerated in the Term Directive is not exhaustive. Member states may grant further related rights, e.g. for the organisers of cultural or

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35) Copyright, Designs and Patents Act (ST 1988 c. 48) (CDPA 1988), s. 163.

36) S. von Lewinski and M. Walter, *supra* FN 14, at 550 *et seq.* and F. J. Cabrera Blázquez, "An Introduction to Music Rights for Film and Television Production", in *Music Rights in Audiovisual Works*, IRIS plus 2009-5.

37) Berne Convention, Article 2(3).



sporting events.<sup>38</sup> The term of protection of such additional related rights will be the exclusive domain of national legislation. If, however, relevant to establishment of the wholly public domain status of an audiovisual production, the term of protection of such additional related rights should also be considered.

## 1. The term of protection of producers' rights

Prior to the adoption of the Term Directive, a number of continental civil law countries, in addition to copyright protection for the authors of cinematographic and audiovisual works, conferred neighbouring rights to the producer of the film. Such rights, not being provided for in the Rome Convention, have not undergone international coordination. As a result, their terms of protection varied (50 years in France and Portugal, 40 years in Spain and 25 years in Germany), along with divergent trigger points setting the term running.<sup>39</sup> The tradition was picked up by the Rental Right Directive in 1992, with the Copyright Directive<sup>40</sup> following suit in 2001. Under Article 3(3) of the Term Directive, the related rights of the producers of the first fixation of a film expire 50 years after the fixation is made. If the film is lawfully published or communicated to the public in the meantime, the producers' rights expire 50 years after the publication or communication to the public, whichever comes earlier.

Article 3(3) specifies that the term "film" should be understood as designating "a cinematographic or audiovisual work or moving images, whether or not accompanied by sound". The definition is borrowed from the Rental Right Directive,<sup>41</sup> where it was included in view of the lack of international specifications. This description suggests a broad reach, in principle covering any film material, regardless of its copyright credentials. No originality is required for protection, while silent pictures are also explicitly included. So, for example, newsreels, amateur videos and even moving pictures from closed circuit security cameras are all probably covered.<sup>42</sup> The mere duplication of a film however will not attract protection, as protection is limited only to the "first fixation".<sup>43</sup>

The requirement that the publication or communication to the public be "lawful" should be interpreted as a nod to the condition under international law that such acts be performed "with the consent of the author". It has accordingly been suggested that a publication resting on a limitation or exception to copyright, which is i.e. technically "lawful", but lacks the consent of the author, should not be taken into account for the purposes of term calculation.<sup>44</sup>

The related rights protection of the producer is entirely independent of and supplementary to potential parallel protection under copyright law for any incorporated cinematographic or audiovisual work. In practice, in most continental European jurisdictions, cinematographic and audiovisual works will benefit as a rule from a second layer of neighbouring rights protection, this time awarded to the producer instead of the creative contributors, such as the director, enjoying copyright protection. Recordings not original enough to attract copyright protection will be protected only by the related right in the first fixation of the film. As we shall see below, a different system of protection applies in the UK.

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38) S. von Lewinski and M. Walter, *supra* FN 14, at 559.

39) Proposal for a Council Directive harmonizing the term of protection of copyright and certain related rights, COM(92) 33 final, Brussels, 23 March 1992.

40) Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society [2001] OJ L167/10 (Copyright Directive).

41) Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property [2006] OJ L376/28 (Rental Right Directive), Article 2(1).

42) D. Visser, *supra* FN16, at 297 and J. Krikke, "Rental and Lending Right Directive" in T. Dreier and B. Hugenholtz (eds), *Concise European Copyright Law* (Kluwer Law International, Alphen aan den Rijn 2006) 247.

43) S. von Lewinski and M. Walter, *supra* FN 14, at 561.

44) S. von Lewinski and M. Walter, *supra* FN 14, at 567.

*Film protection in the UK*

UK legislation has not picked up the distinction made in EU law between audiovisual or cinematographic works and the first fixation of a film. Instead, the UK Copyright, Designs and Patents Act (CDPA) amalgamates the copyright and related rights protection provided by continental jurisdictions into a single system of copyright for “films” as entrepreneurial works. No requirement of originality is imposed, protection instead being afforded to any film which is not a copy of a previous film.<sup>45</sup> This has placed the Term Directive’s carefully crafted distinction between the 70-year pma term of protection for the copyright of the authors of the original cinematographic or audiovisual work and the 50-year term of protection from the triggering event (whether fixation, publication or communication to the public) for the rights of the producers of the first recording of a film on shaky ground. The ensuing legislative manipulations performed by the British law-maker in order to ensure compliance with the European rules illustrate the odd results that transpire when fundamental copyright concepts are lost in translation.

Section 5B of the CDPA defines the term “film” as “a recording on any medium from which a moving image may by any means be produced”. The producer of a film and its principal director are considered to be joint authors of the film.<sup>46</sup> Until 1995, films in the UK were granted a term of protection of 50 years, normally calculated from the year of release.<sup>47</sup> However, with the transposition of the Term Directive, UK law extended the term of protection of films to 70 years after the death of the last to die from among the principal director, the author of the screenplay, the author of the dialogue and the composer of music specifically created for and used in the film whose identity is known.<sup>48</sup> Further provisions elaborate on the situation where these persons are unknown, identical to the provisions of the Term Directive on anonymous or pseudonymous works. (70 years from making available to the public or, if the work is not made available within 70 years after its creation, 70 years from creation.<sup>49</sup>) When there is no person falling in the four listed categories copyright in films expires 50 years from the end of the calendar year in which the film was created.<sup>50</sup>

Some discussion has surrounded the question of whether or not a film might also qualify for additional protection as a dramatic work.<sup>51</sup> According to currently standing UK Court of Appeal case law, a film, which is “a work of action [that] is capable of being performed before an audience”,<sup>52</sup> can indeed fall within the expression “dramatic work”. In this way the court has offered a form of dual protection for films, although the extent to which this corresponds to the EU system is debatable. Films as dramatic works will benefit from the regular term of 70 years after the death of the author, i.e. the dramatist.<sup>53</sup>

It has been argued that this approach is incompatible with EU law.<sup>54</sup> However, this conclusion will depend on the meaning of the terms “cinematographic or audiovisual work” and “first fixation of a film” in the Term Directive. Under one suggested interpretation, a cinematographic or audiovisual work must be understood as included in the notion of a dramatic work in UK law. This may be fixated to produce a film protectable by the rights of the producer.<sup>55</sup> In this case, in view of the fact that, under UK law, the author of a dramatic work might include the author of the screenplay or dialogue and possibly the principal director, but would be highly unlikely to include the music

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45) CDPA 1988, s. 5B(4).

46) CDPA 1988, s. 9(2)(ab).

47) L. Bently and B. Sherman, *Intellectual Property Law* (3<sup>rd</sup> ed., OUP, Oxford 2009) 165.

48) CDPA 1988, s. 13B.

49) Compare, Term Directive, Article 1(3) and 1(6) and CDPA 1988, s. 13B(4).

50) CDPA 1988, s. 13B(9).

51) I. Stamatoudi, “Joy’ for the Claimant: Can A Film Also Be Protected as a Dramatic Work?” [2000] 1 IPQ 117 and R. Arnold, “Joy: A Reply” [2001] 1 IPQ 10.

52) *Norowzian v. Arks (No.2)* [2000] FSR 363.

53) H. MacQueen *et al.*, *supra* FN6, at 68, FN 145.

54) L. Bently and B. Sherman, *supra* FN 47, at 166.

55) This has been argued from example by LJ Buxton in *Norowzian v. Arks (No.2)* [2000] FSR 363.

composer,<sup>56</sup> the provisions of the CDPA indeed recognise an impermissibly long term of protection for the related right of the first fixation of a film and an impermissibly short term of protection for the cinematographic or audiovisual work thus imprinted.

If, however, the first fixation of a cinematographic or audiovisual work is understood as constituting the work itself,<sup>57</sup> which is afforded under EU law dual protection in the form of a) copyright for the principal director and any other nationally designated authors and b) related rights for the producer of the first fixation, then the UK rules can be seen as conforming fully with the rules of the Term Directive. A film attracting only related rights under European norms, but no copyright protection (e.g. a film, which is not original enough for copyright, but nevertheless constitutes a first fixation and not a copy of a previously existing recording, such as security camera footage) can arguably also be described as a film lacking a principal director, author of the screenplay, author of the dialogue and composer of music specifically created for and used in the film. Therefore, under this interpretation, the term of protection for films which attract copyright protection as cinematographic works in civil law jurisdictions is correctly set in the UK at 70 years after the death of the last of the four term-relevant contributors to die in full compliance with Article 2(2) of the Term Directive. If a film lacks any of these persons however, its term of protection will be limited to 50 years after production, equal to the term of protection of the related rights of the producer in civil law jurisdictions in accordance with Article 3(3) of the Term Directive. Given that the producer is included among the beneficiaries of copyright protection in films under UK law, in cases where both systems of protection would apply under the scheme of the Term Directive, the lack of a separate shorter right in the recording is immaterial, given that the producer is anyway protected for the longer copyright term. In either case, any relevant dramatic work will constitute a separate underlying work, whose protection will be independently calculated at 70 years pma. Under this interpretation, the UK legislator has succeeded in achieving identical terms of protection to their European counterparts, while completely ignoring the concept of related rights for the producers of the first fixation of a film.

Other EU member states whose legal systems have been heavily influenced by that of the UK have been less successful in achieving this effect. So for example, in Ireland, protection in a film, defined as “a fixation on any medium from which a moving image may, by any means, be produced, perceived or communicated through a device”,<sup>58</sup> lasts for 70 years after the death of the last of the following persons: principal director, author of the screenplay, author of the dialogue, author of music specially composed for use in the film. However, where a film is first published during the period of 70 years following the death of the last of these, the term is 70 years after such publication.<sup>59</sup> Similarly, in Cyprus the term of protection for films is also 70 years from the death of the last to survive of the four Term Directive designated contributors, but no provision equivalent to that of the Term Directive giving a 50-year term of protection to films lacking originality is made.<sup>60</sup>

The user interested in establishing the public domain status of a film across European jurisdictions will have to be aware of the consequences of such basic divergences in protection schemes. When operating in a continental author's rights jurisdiction, such as France or the Netherlands, the user will have to investigate the term of protection of two separate rights: the term of protection rules for both cinematographic and audiovisual works and the producer's neighbouring rights will have to be applied. In the UK, by contrast, only the rules on the term of protection of the single system of protection for films apply. The user must be able to correctly identify the applicable rights and follow the corresponding national rules on the calculation of the term of protection for each.

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56) L. Bently and B. Sherman, *supra* FN 47, at 165.

57) See entry on “original work” in M. Ficsor, *Guide to the Copyright and Related Rights Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms* (WIPO, Geneva 2003) 290. Compare also with the definition of “film” in the Rental and Lending Rights Directive (Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property [2006] OJ L376/28), Article 2(c).

58) Irish Copyright and Related Rights Act, section 2(1).

59) *Ibid.*, s. 25.

60) Cypriot Act on the Protection of Copyright and Neighbouring Rights No. 59/1976, Articles 5 (1) and 11 (2).

## 2. The term of protection of performers' rights

Additional rights might accrue to any performers appearing in the film. The term of protection of performers' rights is set in Article 3(1) at 50 years after the date of the performance. However if a fixation of the performance is lawfully published or communicated to the public within this period, the rights shall expire 50 years from the date of the first such publication or communication to the public, whichever is first. The term "publication" should be taken as referring to the distribution of copies of a fixation of the performance. "Communication to the public" means any way of making the performance accessible to the public, whether through public performance, broadcasting, making available over the Internet or otherwise.<sup>61</sup> The term "lawfully" should be interpreted as in the case of producers' rights (see above Section IV.1). No definition of performers is given by the European Directives; the term of protection prescribed by the Directive applies to all performers protected under national law. It should be noted that this can have slight disharmonising effects, where a type of performer, e.g. circus or vaudeville artists, are protected in one member state but not in another.<sup>62</sup>

It should be noted that the rules on the term of protection of the rights of performers are identical to those on the term of protection of the rights of the producer of the first fixation of the film. As a consequence, the expiration of the latter will coincide with that of the former, meaning that, for the purposes of establishing the final entry of the film into the public domain, the investigation of the term of protection of performers will usually be redundant.<sup>63</sup> However, it should also be noted that Article 5 WPPT<sup>64</sup> 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.

## 3. The term of protection of the rights of broadcasting organisations

Under Article 3(4) of the Term Directive the rights of broadcasting organisations last until 50 years after the first transmission of the broadcast took place, whether it is transmitted by wire or over the air, including cable or satellite. No definition of broadcasting organisations is provided by the European *acquis*. The term of protection applies instead to all broadcasts protected under national law. As far as transmissions by wire are concerned, cable distributors are not covered where they merely retransmit by cable the broadcasts of broadcasting organisations. Protection is limited to the first transmission of a broadcast only – repeated emissions of a broadcast already once transmitted are irrelevant for the term of protection of the broadcast signal.

Unlike performers' rights, broadcasters' rights might arise in a film otherwise free of copyright and related rights. It is therefore important to examine broadcasters' rights in order to verify complete expiration of rights in a film. For example, if a broadcaster transmits a public domain film, in the sense of a film in which all other rights, whether of the authors, producer or performers have expired, the exclusive rights of the broadcaster to authorise or prohibit the rebroadcasting or communication to the public of that broadcast, will mean that the signal conveying the public domain work may not be freely retransmitted by another broadcaster or communicated to the public by being played in a pub, bar, restaurant or other public place charging an entrance fee. Likewise, the broadcaster's exclusive right over the making available to the public of the fixation of the broadcast will mean that the viewer will not be able to record said broadcast and distribute it by, e.g. uploading it to a video sharing platform without the broadcaster's authorisation.

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61) D. Visser, *supra* FN 16, at 296 and S. von Lewinski and M. Walter, *supra* FN 14, at 564.

62) S. von Lewinski and M. Walter, *supra* FN 14, at 559.

63) By contrast, this will not be the case for the term of protection of performers' rights and the rights of phonogram producers, see M. van Eechoud *et al.*, *supra* FN 14, at 64.

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

## V. The term of protection vis-à-vis third countries

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. In this way the Term Directive achieves harmonisation in both obliging member states to grant protection to foreign works and in requiring that that protection last for an identical term across the EU. This is in conformity with the international rule of comparison of terms (rule of shorter term), as established in Article 7(8) of the Berne Convention. So, for example, if a work is protected for 50 years pma in its (non-EU) country of origin, as is the case in Canada or Japan, that will be the term of protection in all EU member states as well. If however the country of origin is Mexico, where works are granted protection for 100 years after their author's death, the term of protection within the EU will be limited to 70 years pma.

More interesting results can transpire. In 2009 the French *Cour de cassation*<sup>65</sup> ruled on a case concerning the American film "His Girl Friday". Although only created in 1940, the film fell out of copyright in the US in 1968 due to non-compliance with the renewal registration formality applicable at the time under US law. However, the prohibition of formalities under Article 5(2) of the Berne Convention meant that the requirements for declining protection in France did not apply. To the contrary, France was obliged to comply with the minimum protection rules set out in Article 7(2) Berne Convention. The provisions of Article 18 of the Berne Convention proved central to this reasoning, as they only permit a Contracting State to opt out of protecting a work if its term of protection has expired in the country of origin and not if it has fallen out of copyright for other reasons.<sup>66</sup> The case is a good illustration of how a shorter term of protection can apply within a country of origin for a work attracting a much longer term of protection abroad.

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, WIPO Copyright Treaty (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) 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 and 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 for 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). Moreover, these treaties each grant a different term of protection triggered by a range of different events for the rights of performers and broadcasters, while often the international minimum standards are optional in character.<sup>67</sup> Given that no international treaty currently regulates questions of recognition of term of the first

65) *Soc. Eds. Montparnasse v. Columbia Tristar Home Vidéo*, Cour de cassation, chambre civile 1, 17 décembre 2009, Juris-Data No. 2009-050769.

66) J. Ginsburg, "Restoration of Copyright: An International Perspective", 18 August 2010, available at: [www.mediainstitute.org/IPI/2010/081810.php](http://www.mediainstitute.org/IPI/2010/081810.php)

67) M. van Echoud *et al.*, *supra* FN 14, at 54.

fixation of films, the freedom left to the member states will carry even greater weight in that area. 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.

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.

## VI. Repossessing public domain content and other systems of protection

As explained above, the transition to the new harmonised rules of the Term Directive resulted in a widespread resuscitation of expired copyrights. As mentioned above, Article 10(2) of the Term Directive stipulates that the terms of protection laid down in the Directive apply to all works and subject matter which were protected in at least one member state on 1 July 1995. The longest pre-harmonisation duration for copyright being 70 years pma, as granted by Germany, all EU works whose author died less than 70 years before 1 July 1995 found themselves enjoying a term of protection of 70 years pma in all EU member states, regardless of whether the work had previously entered the public domain in any given jurisdiction. As a result, in countries which, for example, prior to the implementation of the Term Directive granted cinematographic works a term of protection of 50 years after the work has been made available to the public, films such as Alfred Hitchcock's *The Lady Vanishes* (1938) or Martin Curtiz's *Casablanca* (1942) saw a restitution of rights in compliance with the new rules. While this was no doubt a boon for right-holders, it put those who had exploited works they thought were out of copyright in a strange position. Article 10(3) of the Term Directive sought to smooth the transition by guaranteeing the legitimacy of acts of exploitation performed before 1 July 1995 and instructing member states to safeguard the acquired rights of third parties.

Transitional provisions aren't the only way to remove content from the public domain. Article 4 of the Term Directive grants rights equivalent to the economic rights of the author to the person who first lawfully publishes or communicates to the public a previously unpublished work. The term of protection recognised for such rights is 25 years after the date of publication. The phrasing of the provision catches all unpublished works, even those which have previously been communicated to the public. As a result, if a cinematographic work was shown in a film festival while still in copyright, but published copies were never offered in sufficient quantity to the public, its publication after the expiry of the economic rights will result in its repossession and removal from the public domain. In this context, it is also worth mentioning the recent phenomenon of cultural institutions asserting rights over digitised public domain material. "The basis of such claims is not always solid", while the relevant legislation will differ from one member state to the other contributing to further fragmentation of the public domain.<sup>68</sup> The Commission has recently made clear that what is in the public domain should remain in the public domain after digitisation.<sup>69</sup>

It can be argued that the possibility of rights restitution imbibes copyright law with perpetual potential. If expired rights may at any point be revived, the public domain becomes unstable

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

69) Commission Recommendation of 27 October 2011 on the digitisation and online accessibility of cultural material and digital preservation, C(2011) 7579 final.

and users cannot simply rely on an old diagnosis of a work as being out-of-copyright. Instead, at least prior to the reuse of recent public domain recruits, users are best encouraged to re-examine copyright status in order to make sure that rights have not in the meantime been revived.

Finally, users should keep in mind that, aside from the copyright and related rights, a work may be protected by additional protection systems; as a result, national unharmonised limitations on the reuse of public domain works may apply. For example, possible intersections with rights granted by other systems of intellectual property, such as design or trademark rights, or other areas of law, such as privacy or image rights or property rights over the film frames should also be taken into account.<sup>70</sup> In certain EU countries a *Domaine Public Payant* regime is in operation, 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. Finally, exceptional instances of post-copyright protection may also apply. For example, 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, a right to a royalty without limit of time in respect of any public performance, commercial publication or communication to the public was granted over the work *Peter Pan* by JM Barrie or any adaptation of this work under UK law.<sup>71</sup>

## VII. Conclusion

The term of protection, conventionally understood as one of the most straightforward aspects of copyright law, hides a lot of devils in its details. The user interested in making free use of a film must accordingly be aware of the many lurking pitfalls to correct term calculation.

A first set of stumbling blocks is imposed by the incomplete nature of European term of protection rules. Despite the Term Directive's attempts at creating a level playing field, even in an area as intensely micromanaged as the term of protection of films, exceptions to the harmonised rules, as well as the sometimes innovative implementations of the European rules into national law, mean that the desired harmonising effect has not been entirely achieved; national legislative idiosyncrasies thus persist in the post-harmonisation era, poking holes in the edifice of a unified European term. Users should be aware of such residual fragmentation and make sure to examine the term of protection rules of all EU jurisdictions in which they are interested in making free use of film material.

In addition, the multiple variables currently involved in the determination of the duration of protection provide another source of complexity. The cluster of rights that converge around film productions mean that for a single film to be accurately diagnosed as fully public domain, all relevant rights must be correctly identified and their terms of protection individually determined. Users accustomed to thinking about films as art works rather than information products incorporating a mixture of different rights must readjust to a more copyright-mindful mind-set if correct calculation is to be achieved.

Finally, the intricacies of the term of protection rules themselves set a high knowledge barrier to the determination of the term of protection. The separate set of rules applicable to non-EU works and other subject matter, frequent revisions of the applicable law and the resultant transitional provisions and other exceptions to the standard rules make a strong grasp of the particularities of the applicable law necessary for a film production to be confidently diagnosed as fully free of copyright and related rights. Even then, other protection systems might apply, while the possibility of the repossession of previously public domain goods should also not be ignored.

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70) See S. Dusollier, *supra* FN 5.

71) D.I. Bainbridge, *Intellectual Property* (7<sup>th</sup> ed., Pearson Education Ltd, Edinburgh 2009) 76. See also, Peter Pan FAQ, Great Ormond Street Hospital, available at: <http://www.gosh.org/peterpan/copyright/faq/#Copyright>





## Free for Online Use?

The Lead Article and the final ZOOM section only answer the question as to when copyright protection expires for films or other audiovisual works. As complicated as the calculation of these deadlines might prove to be in practice, at least one thing is clear: works for which the deadline has passed are in the public domain and free for online use!

The European Union hopes to find answers as straightforward as this conclusion for other aspects of copyright in the online environment. The Commission has, for example, recently addressed the handling of orphan works and the perceived need for joint administration of intellectual property rights. Much of what is going on must be seen against the backdrop of the Europe 2020-strategy, for it is the strategy's declared goal that Europe become "a smart, sustainable and inclusive economy". To this end the Digital Single Market and, hence copyright regulation of the audiovisual sector, plays a major role.

Drawing on our IRIS newsletter reporting (<http://merlin.obs.coe.int/newsletter.php>) of the past 12 months, we can fill you in on the main European Union developments, starting with the Final Report of the *Comité des Sages* on Digitisation of European Cultural Heritage that touches, among others, on the issue of access to public domain works and the treatment of orphan works. Not surprisingly, the Report also stresses that the Europeana project is important for putting European cultural heritage on line. In line with this idea, Europeana's strategy for the 2011-2015 period is dealt with by the next article. Europeana is certainly among those projects that would benefit from a further harmonisation of EU copyright rules, the subject of the next report dealing with the Communication on a Single Market for Intellectual Property Rights. Some headway towards this market has been made thanks to the European Commission's Proposition for a Directive on Orphan Works, which is explained in the following article. What future steps need to be taken will possibly become clearer after the Public Consultation on Challenges and Opportunities for Audiovisual Media in the Online Age. Launched by the Commission with a Green Paper, the Public Consultation is discussed in the next article. As then reported by the final article, the Commission – with its Recommendation on the Digitisation and Online Accessibility of Cultural Material and Digital Preservation – has already issued some concrete guidance on at least one of the many aspects that have to be tackled.

## Final Report of the *Comité des Sages* on Digitisation of European Cultural Heritage

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On 10 January 2011 the *Comité des Sages*, a reflection group on bringing Europe's culture online, published its report entitled "The New Renaissance". The research, which started in April 2010, was carried out by order of Neelie Kroes (Vice President of the European Commission for the Digital Agenda) and Androulla Vassiliou (European Commissioner for Education, Culture, Multilingualism and Youth).

A focus point was to make recommendations for the digitisation, online accessibility and preservation of Europe's cultural heritage in the digital age, with special attention to the question of public-private partnerships for digitisation in Europe. The report aims to help the European Union and Member States to develop policy in these fields.

The *Comité* points at the new information technologies that have created incredible opportunities for bringing the European cultural heritage to the general public. Accessibility is a central aspect of the vision of the *Comité*. Consequently, one of its core missions is to ensure full access to the cultural expressions and knowledge of the past, the present and the future for the largest possible audience. With regard to recommendations concerning accessibility and use models, a distinction is made between public domain material and in-copyright material.

Many digitised works are not protected by copyright anymore and thus fall into the public domain. When their digitisation is funded with public money, the *Comité* feels that everyone should have free access to them for non-commercial purposes. Commercial re-use could be charged. The *Comité* also points at the EU Directive on the re-use of public sector information. Public institutions should comply with this when they make their information available for re-use, although the Directive does not currently apply to cultural institutions.

Since users are used to finding everything they want on the internet, they expect the same from cultural institutions. It is therefore important that these institutions digitise their collections. As concerns in-copyright material, rights have to be cleared. This costs much time and money given the size of the collections, which makes individual negotiations impracticable. Furthermore, the *Comité* points to the issues of out-of-distribution works and orphan works. The rightsholders of orphan works cannot be identified or located, as a result of which they form a barrier to mass digitisation projects.

Europeana is referred to as the platform for Europe's cultural heritage. It would be a problem if this digital library, archive and museum would lack 20th century works. The *Comité* recommends that a European legal instrument be adopted regarding the issue of orphan works. Such an instrument is in preparation by the Commission. The *Comité* sets out an 8-step test, which requires for example that the instrument cover all different sectors (audiovisual, text, visual arts, sound) and that it be in place in all the Member States. In addition, future orphan works should be avoided. In order to achieve this some form of registration could be considered; this would mean that the Berne Convention would have to be changed. Regarding out of distribution works, the *Comité* states that rightsholders should be the first to exploit them. However, when they do not do so, cultural institutions should be able to digitise these works. In this regard the *Comité* suggests collective licensing systems and a window of opportunity backed by legislation.

The *Comité* stresses the central role of Europeana in the strategy of bringing Europe's cultural heritage online. This requires its development from a portal into an application platform to which digitisation activities in the Member States are linked. In-copyright materials that private providers offer against payment should complement free offer. The *Comité* recommends that Europeana keep a digital copy of all digitised or born digital material with the aim of preservation. Furthermore, all Member States should ensure that their public domain masterpieces are made available by 2016. Finally, Europeana must actively be promoted among the general public and in schools.

The digitisation process demands large investments. Therefore, an important aspect of the report is the examination of sustainable financing for digitisation and Europeana. According to the Comité, this is primarily the responsibility of the public sector. Making digitised material available through Europeana should be a condition for all public funding for digitisation. Since public funding is scarce, cooperation with private partners should be encouraged as a complement. The Comité suggests basic conditions for these partnerships, such as respect for rightsholders, transparency and encouragement of free access for end users. Member States should also create favourable conditions for involving European players, for example by encouraging digitisation in new areas such as audiovisual material.

- Report of the Comité des Sages, "The New Renaissance"  
<http://merlin.obs.coe.int/redirect.php?id=15332>

IRIS 2011-3/5

## Europeana Sets out its Strategy for the Period 2011-2015

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On 14 January 2011 Europeana launched its Strategic Plan for the period 2011-2015. The plan can be seen "as a clear-sighted assessment of the route Europeana must take in order to fulfill its potential", Dr. Elisabeth Niggeman, Chair of the Europeana Foundation Board, states in her foreword.

Jill Cousins, Executive Director of Europeana, notes in her introduction to the Strategic Plan that it is Europeana's ambition "to provide new forms of access to culture, to inspire creativity and stimulate social and economic growth". However, while working towards the achievement of this ambition, several challenges have been encountered, for example intellectual property barriers to digitisation. To overcome these challenges, the Strategic Plan presents four tracks on which Europeana will focus in the coming five years. These tracks have been developed through consultation with stakeholders and analysis of the results. Amongst the stakeholders both users and policy makers were included.

The first track listed is named "Aggregate". Its goal is to build the open trusted source for European cultural heritage content. Several elements of the goal are mentioned in the plan: the source content must represent the diversity of European cultural heritage, the network of aggregators must be extended and the quality of metadata improved. The diversity-aspect, for example, will be addressed by covering content from under-represented cultures and countries. Another aim is to stimulate digitisation programmes to make sure that Europeana displays a proper level of visibility. Europeana especially aims to fill the lacuna that exists with regard to audiovisual and 20th/21st century content, making sure that it covers a range of formats from all domains. Where new types of cultural heritage develop, such as 3D visualisations, Europeana wants to ensure that these are included as well.

The second track, "Facilitate", aims for support for the cultural heritage sector through knowledge transfer, innovation and advocacy. Elements of this aim are the sharing of knowledge among cultural heritage professionals, fostering research and developments in digital heritage applications and the strengthening of Europeana's advocacy role. When it comes to the sharing of knowledge, Europeana plans to build on its previous achievements, while also seeking new platforms and methods to develop and reinforce digital competencies throughout the cultural heritage sector. It wants to promote dialogue and collaboration between parties such as librarians, curators, archivists and the creative sector to work together regarding interests they share. In addition, an online publishing

programme will be launched to spread best practice guidelines, standards and positioning papers on policy issues. Conferences and workshops to broadly distribute information will continue to be organised as well.

The third track, "Distribute", seeks to make cultural heritage available to users wherever they are and whenever they want it. In order to achieve this goal, the plan states that Europeana's portal must be upgraded, content put in the user's workflow and partnerships developed to deliver content in new ways. The portal Europeana.eu is the flagship for the content and services and will continue to be so, but it will be developed according to users' evolving needs and expectations. The content is aimed to be made as findable, understandable and reusable as possible. Also, Europeana wants to bring the content to the places that the users often visit, instead of depending on the users seeking out content, for example by using web services to put content in places like social networks, educational sites and cultural spaces.

The fourth track mentioned by the plan is "Engage", which aims to cultivate new ways for users to participate in their cultural heritage. This engagement should be realised through enhancing the user experience, extending Europeana's use of web 2.0 tools and social media programmes and arranging a new relationship between curators, content and users. As the plan states, by enhancing the user experience, a richer and more intuitive service will be created that maximises users' participation and interaction and increases usage of the content. It is believed that greater participation in the site will increase user interest and loyalty.

Lastly, the plan elaborates on the resources for Europeana in the period 2011-2015, including budget, cost allocation and Cost-Benefits.

- Europeana Strategic Plan 2011-2015  
<http://merlin.obs.coe.int/redirect.php?id=13059>

IRIS 2011-4/6

## Communication on a Single Market for Intellectual Property Rights

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On 24 May 2011, the European Commission adopted a Communication entitled "A Single Market for Intellectual Property Rights". The Communication's overall objective is to encapsulate its strategic vision for creating a true European IPR regime capable of releasing the full potential of European inventors and creators, thus fuelling economic growth. According to the Communication, a Single European Market for IPRs, by doing away with the current fragmentation of the EU's IPR landscape, would contribute significantly towards creating and maintaining the momentum of a virtuous IPR circle. Alongside sections on modernising the patent and trademark systems in Europe and the complimentary protection of intangible assets, the Communication also included an examination of current copyright-related issues.

The Communication heralds the submission by the Commission in 2011 of proposals for the creation of a legal framework for the collective management of copyright to enable multi-territorial, pan-European licensing, as well as the revisiting in 2012 of the 2001 Copyright Directive as part of the programme set out in the Digital Agenda for Europe. Along this vein, the Communication also discusses the possibility of a more far-reaching overhaul of copyright in the EU through the creation of a European Copyright Code consolidating the present body of EU directives on copyright and related rights, though for the time-being it stops short of proposing concrete steps in this direction.

The Communication announces the Commission's intention of further examining the question of User-Generated Content, noting the growing realisation of the necessity of instituting efficient and affordable permission systems through which end-users can lawfully re-use third-party copyright-protected content, in particular for non-commercial purposes. Similarly, the Communication promises the redoubling of efforts to kick-start, on the basis of the draft Memorandum of Understanding brokered in 2009, a stakeholder agreement on the conciliation of private copyright levies and the smooth cross-border trade in goods subject to such levies. Also on the Commission's agenda for 2011 is the implementation of a two-pronged approach to the promotion of the digitisation and making available of the collections in Europe's cultural institutions, consisting of (a) the institution of collective licensing schemes for out-of-commerce works and (b) the adoption of a European legislative framework to identify and release orphan works to the public (see IRIS 2011-7/5).

Specifically with regard to audiovisual works, the Commission declares its intention of launching in 2011, with a view to reporting in 2012, a consultation on the online distribution of audiovisual works, addressing copyright issues, video-on-demand services, their introduction into the media chronology, the cross-border licensing of broadcasting services, licensing efficiency and the promotion of European works. An audiovisual Green Paper will also address the status of audiovisual authors and their participation in the benefits of online revenue streams.

Finally, the Communication also makes mention of its plans to extend the term of protection of performers' and producers' rights in the music field. The adoption of the relevant proposal for a directive is expected in the very near future.

It should be noted that, according to the Communication, the development of a fair and unified IPR regime should be undertaken in such a way as to ensure the promotion and preservation of cultural and linguistic diversity, while the protection of rights over intellectual assets should go hand in hand with the promotion of access and the circulation and dissemination of goods and services.

- Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, "A Single Market for Intellectual Property Rights Boosting creativity and innovation to provide economic growth, high quality jobs and first class products and services in Europe" <http://merlin.obs.coe.int/redirect.php?id=13312>

IRIS 2011-7/4

## European Commission Proposes a Directive on Orphan Works

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On 24 May 2011, the European Commission adopted a proposal for a directive on certain permitted uses of orphan works, which is accompanied by an Impact Assessment and a summary. The objective of the proposal is to create a legal framework to ensure the lawful cross-border online access to orphan works contained in online digital libraries or archives and used in the pursuit of the public interest mission of specific cultural institutions.

Hence, the Commission does not adopt a generic approach to deal with the problem of orphan works in the proposal, but proposes a set of measures designed for specific situations in which the problem is considered to be particularly urgent, namely, in relation to mass digitisation projects. The proposal accordingly has a limited scope. It applies only to specific works contained in the collections of publicly accessible libraries, educational establishments, museums, archives

(i.e., works published in the form of books, journals, newspapers, magazines or other writings) or film heritage institutions (i.e., cinematographic or audiovisual works) or produced by public service broadcasting organisations before 31 December 2002 and contained in their archives (i.e., cinematographic, audio or audiovisual works). Furthermore, the scope of the proposal is explicitly limited to works first published or broadcast in a member state.

Pursuant to the proposal, member states must ensure that, once such works qualify as orphan works, cultural institutions are permitted to make them available to the public and to reproduce them. The works may not be used for purposes other than the public interest missions of preservation, restoration and the provision of cultural and educational access to works contained in the collections of the cultural heritage institutions. Member states may permit the use of orphan works for other purposes, but only on specific conditions. This includes the requirement of indicating, where possible, the rightsholder's name in any use of the work and of remunerating rightsholders that come forward claiming for the usage made. Claims for remuneration must be made within a fixed period not less than five years from the date of the act giving rise to the claim. In any case, cultural institutions must maintain records of their diligent search and publicly accessible records of their use of orphan works.

An "orphan work" is defined as a work the rightsholder of which is not identified or, if identified, has not been located after a diligent search has been carried out and recorded. A work shall not be considered to be an orphan work where it has multiple rightsholders and one of them has been identified and located. Rightsholders should be able to put an end to the orphan status of a work at any time.

The required "diligent search" is outlined in detail in the proposal and includes consultation of the appropriate sources for the category of works in question. What these are shall be determined by each member state, in consultation with rightsholders and users. They must include, as a minimum, the sources listed in the Annex to the proposal. The diligent search must be carried out in the member state of first publication or broadcast and the results of the executed search are to be recorded in a publicly accessible database in that member state.

Once a work, in accordance with these provisions, is considered an orphan work in one member state, it shall be recognized as an orphan work in the other member states. This means that a cultural institution that failed to identify or locate the rightsholder(s) of a work after a diligent search can use the work across the EU without the need to validate the orphan status of the work in each and every member state.

- Proposal for a Directive of the European Parliament and of the Council on certain permitted uses of orphan works, COM(2011) 289 final, Brussels, 24 May 2011  
<http://merlin.obs.coe.int/redirect.php?id=15326>
- Commission staff working paper, "Impact Assessment on the cross-border online access to orphan works accompanying the document Proposal for a Directive of the European Parliament and of the Council on certain permitted uses of orphan works", SEC(2011) 615 final, Brussels, 24 May 2011  
<http://merlin.obs.coe.int/redirect.php?id=13371>
- Commission staff working paper, Summary of the Impact Assessment on the cross-border online access to orphan works accompanying the document Proposal for a Directive of the European Parliament and of the Council on certain permitted uses of orphan works, SEC(2011) 616 final, Brussels, 24 May 2011  
<http://merlin.obs.coe.int/redirect.php?id=13372>

## Public Consultation on Challenges and Opportunities for Audiovisual Media in the Online Age

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In accordance with the Europe 2020 Strategy, the EU is aiming at becoming a smart, sustainable and inclusive economy. Since the cultural industries in Europe, including the audiovisual sector, contribute significantly to the EU economy and innovation, the European Commission has focused on this sector in the Europe 2020 and IPR Strategy. The goal is to create a digital single market wherein the Internet is borderless. For the time being, the online markets in the EU are still fragmented by multiple barriers.

Because of the shift from broadcasting over air, satellite or cable towards on-demand services, new digital platforms, social media and “cloud-based services”, new legal issues and business models have arisen. The European Commission has acknowledged the current developments by the publication of a consultation on the online distribution of audiovisual works in the European Union. Stakeholders are asked to comment and advise on how to best to seize the opportunities for TV and film in the online age.

The Green Paper assesses the impact of the advent of the internet on the audiovisual sector. It refers to new business models, more online services and better remuneration for rightsholders in the context of online distribution and exploitation as points of attention for creators, industry and consumers. The Green Paper also discusses the issue of rights clearance for films and television. Finally, special uses of audiovisual works are addressed, such as the preservation of film heritage and their online availability and the accessibility problems to cultural material that disabled persons experience.

Internal Market Commissioner Michel Barnier, who initiated the Green Paper, stated: “I want to ensure that Europeans can seize the opportunities offered by the Internet. It is important for me to hear the views of all stakeholders concerned – creators, performers, producers, distributors and consumers. The results of this consultation will provide a significant contribution to the initiatives I am preparing, including a legislative proposal on collective copyright licensing, an examination of the framework set by the 2001 Information Society Directive, and a review of the Intellectual Property Enforcement Directive.”

Replies can be submitted up until 18 November 2011.

- Green Paper on the online distribution of audiovisual works in the European Union: opportunities and challenges towards a digital single market, Brussels, 13 July 2011, COM(2011) 427 final <http://merlin.obs.coe.int/redirect.php?id=13407>

IRIS 2011-8/8

## Recommendation on the Digitisation and Online Accessibility of Cultural Material and Digital Preservation

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On 28 October 2011 the European Commission adopted a Recommendation on the digitisation and online accessibility of cultural material and digital preservation. The Recommendation follows

up on a similar Recommendation from 2006, updating for new developments such as the launch in 2008 of Europeana, the publication of the “New Renaissance” Report by the Comité des Sages and the adoption of the Commission’s proposal for a Directive on orphan works in May 2011. The Recommendation acknowledges the importance of digitisation for making Europe’s cultural productions more widely available and thereby boosting the growth of Europe’s creative industries. It accordingly challenges member states to step up their digitisation efforts.

On an organisational level, the Recommendation invites member states to set clear and quantitative targets for the digitisation of cultural material. To help manage the high costs of digitisation, public/private partnerships should be encouraged. The EU Structural Funds may also be used for this purpose.

In response to the recent trend among European cultural institutions to assert new rights over digitised versions of public domain works, not always with a solid legal basis, thus impeding their re-use, the Commission declares that material in the public domain should remain in the public domain after digitisation. Intrusive watermarks and other visual protection measures that reduce usability of digitised public domain material are also discouraged.

With regard to material that is still copyright-protected, the Commission concentrates on orphan and out-of-commerce works. It encourages the rapid and correct implementation of the Directive on orphan works as soon as that is adopted. It also promotes the creation of a legal framework conducive to licensing mechanisms that enable the large scale digitisation and cross-border accessibility of out-of-commerce works. Finally, it supports the development of European-level databases of rights information, such as ARROW, which contribute towards uncovering the information necessary to remedy the orphan status of a work or establish the expiry of copyrights.

Finally, the Recommendation addresses the question of digital preservation. As the Recitals point out, digital material has to be maintained otherwise files may become unreadable over time. Currently, no clear and comprehensive policies are in place on the preservation of digital content. Member states are therefore invited to reinforce national schemes for the long-term preservation of digital material and to exchange information with each other on strategies and action plans. Legal deposit and web-harvesting are suggested as ways of minimising the burden of collection for mandated institutions. Coordinating efforts between member states should be encouraged so as to avoid confusing national variations in the relevant rules.

The resultant digitised material, whether in-copyright or in the public domain, should be made available through Europeana, the European digital library. Although already home to over 19 million digitised objects, as the Recommendation points out, the ultimate success of Europeana will depend on its systematic enrichment with new digital content. The Recommendation sets a target of 30 million digitised objects to be added to Europeana by 2015, including all European public domain masterpieces. The free availability of metadata (i.e., descriptions of works) produced by cultural institutions should also be ensured.

- Recommendation on the digitisation and online accessibility of cultural material and digital preservation, C2011 7579 final  
<http://merlin.obs.coe.int/redirect.php?id=11391>



# Duration of Copyright in Audiovisual Works under US Copyright Law

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Calculating the duration of US copyright in audiovisual works can be a daunting task, complicated by issues of transitional law spanning the US Copyright Acts of 1909 and 1976 and the latter's subsequent amendments. Readers with an inclination for complexity will find their tastes amply satisfied when inquiry turns to the questions of private international law that also come into play when foreign audiovisual works are at issue. Gluttons for punishment will further relish addressing the relationship of the duration of copyright in an audiovisual work to the duration of copyright in the underlying literary work on which the film was based. Finally, in US copyright law, for works published before 1978, duration is closely linked to ownership because copyright in those works was divided into two terms with a reversion right to the authors at the advent of the second term.

This survey will summarize the rules pertaining to duration of copyright in an audiovisual work and then will turn to some questions regarding ownership of rights in an audiovisual work or in the underlying literary work on which the film was based. In an effort to simplify the discussion, I have drawn up a chart showing which periods of protection apply, depending on the date of publication of the film.

## **I. Duration: rules applicable over time and space**

### **1. Duration of copyright in works created in or after 1978**

#### *Basic rule*

The 1976 Copyright Act,<sup>1</sup> which has been in force since 1978, simplified the US copyright term, with respect to works created as of 1978, by installing a unitary period of protection calculated either 95 years from the date of publication, if the film was a "work made for hire," or, otherwise, 70 years from the death of the last surviving co-author.<sup>2</sup>

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\* Many thanks to my research assistants, Aerin Miller and Martha Rose, both Columbia Law School, class of 2012, and for editorial suggestions to Susanne Nikoltchev.

1) The complete and updated text of US copyright law, which is title 17 of the United States Codes, is available at: <http://www.copyright.gov/title17/>

2) See 17 U.S.C. sec. 302.

*Private international law issues: works made for hire and joint works*

Given the differences in terms of protection, it is important to ascertain whether the film at issue is a work for hire, or a joint work. Most US films are “works made for hire” because their creators either are employees, or, even if independent, will have signed an agreement characterizing their contributions to the film as “works made for hire.” The 1976 Copyright Act includes contributions to audiovisual works among the statutorily listed works subject to contractual designation as works made for hire.<sup>3</sup>

With respect to the characterization of a foreign work as a work for hire or a joint work, US courts’ prevailing approach has been to look to the work’s country of origin to ascertain whether that law initially vested rights in the employer (film producer) or in the creative contributors.<sup>4</sup> Following that approach, it appears that US courts would deem films from the EU to be joint works, rather than works made for hire, although some might argue that where the EU countries of origin impose presumptions of transfer of rights to the film producer the films should be treated by US courts as the equivalent of works made for hire. Because the EU has, however, based the term of protection of audiovisual works on the lives of designated participants (whether or not their national law deems them co-authors),<sup>5</sup> US courts should treat EU audiovisual works as joint works rather than works for hire, and calculate copyright term from the death of the last survivor of “the principal director, the author of the screenplay, the author of the dialogue and the composer of music specifically created for use in the cinematographic or audiovisual work.” Because both the US and the EU calculate the duration of joint works 70 years *post mortem auctoris*, the film’s copyright will have a common expiration date in the US and the EU if US courts count 70 years from the death of the last survivor of the same list of creative participants. This result should be preferred to two different terms in the US and the EU.<sup>6</sup> As we will see, *infra*, it will not be possible to harmonize the terms of protection in the US and the EU with respect to works published before 1978.

## **2. Duration of copyright in audiovisual works published in the US before 1978**

One rule is simple: if the work was published in the US before 1923, it is now in the public domain.

For the rest, the calculation of copyright term becomes more complicated for films published in the US before 1978 (but after 1922), because the transitional provisions of the 1976 Act retain the prior act’s two-term structure for the duration of copyright in works published before 1 January 1978, the 1976 Act’s effective date.<sup>7</sup> Under the 1909 Act, federal copyright commenced upon publication of a work in the US with proper notice of copyright (in the absence of proper notice, the work fell into the public domain). It endured for 28 years, at the end of which the author or proprietor (in the case of a work made for hire) could renew the copyright registration of the work, for an additional 28 years of protection. (Failure to renew the registration resulted in expiration of copyright after the 28th year.) The transitional provisions of the 1976 Act added 19 years, for a total of 75 years from publication, and the 1998 Copyright Term Extension Act added yet another 20, for a total of 95 years from publication.

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3) See 17 U.S.C. sec. 101.

4) See *Itar-Tass Russian News Agency v. Russian Kurier, Inc.* 153 F.3d 82 (2d Cir. 1998) (applying law of country of origin to determine whether copyright in newspaper articles by Russian journalists belonged initially to the journalists or to their employer-publisher).

5) See Art. 2(2) of the EU Directive 2006/116/EC on the term of protection of copyright and certain related rights.

6) I acknowledge that US courts could limit the holding of *Itar-Tass* to questions of copyright *ownership* and decline to extend the rule to issues of copyright *duration* or *authorship*. See *Saregama India Ltd. v. Mosley*, 635 F.3d 1284, 1292 (11th Cir. 2011) (noting that *Itar-Tass* considered only initial ownership of copyright and, while choosing to apply Indian law to a copyright assignment question because the result was the same under US and Indian copyright laws, declining to decide that the law of the country of origin governed anything more than initial copyright ownership).

7) See 17 U.S.C. sec. 304.

In 1992, Congress provided for the automatic renewal of works then in their first term of copyright. As a result, for films published in the US between 1964 and 1977, failure to renew did not terminate the copyright, and those works now will remain protected for the same duration as works whose copyright registration their authors or proprietors did renew, that is, for an additional 67 years after their initial 28-year term. Renewal registration thus is optional, but nonetheless encouraged: registration is *prima facie* evidence of valid ownership and of the other facts stated in the registration document.<sup>8</sup> (Renewal term registration is desirable because it updates the information in the records of the Copyright Office, and thus facilitates title-searching for rightowners.) By contrast, if the film was first published between 1923 and 1963, and its copyright registration was not renewed, it will have fallen into the public domain in the US at the end of its first 28-year term, that is, between 1951 and 1991.

For audiovisual works whose countries of origin are within the European Union (and from other Berne Convention or World Trade Organization member states) and whose copyright registrations were not renewed, the rules are somewhat different because these works are no longer in the public domain and now endure for the full US copyright term of 95 years from publication. Amendments introduced in 2004, and effective on 1 January 2006, restored the copyrights in foreign works (including audiovisual works) still protected in their countries of origin, but which had fallen into the public domain in the US due to failure to comply with the notice and registration formalities.<sup>9</sup> Thus, for example, a 1960 French film whose US copyright would have expired at the end of 1988 if its US copyright had not then been renewed, nonetheless retrieved protection in the US commencing in 2006. The US Supreme Court recently upheld the constitutionality of the statute restoring US copyright protection to qualifying foreign works.<sup>10</sup> The 2004 legislation did not restore US copyright in domestic works, however; US films published without notice or whose copyrights were not renewed therefore remain in the public domain in the US.

### 3. Audiovisual works not yet published in the US on 1 January 1978

Under the prior Copyright Act, unpublished works were protected under state common law, not federal law. Common law copyright endured indefinitely, until publication. The 1976 Act substituted federal for state protection for any work created but not yet published in the US as of that act's effective date.<sup>11</sup> The term of copyright therefore will, for works made for hire, be the shorter of 95 years from publication (when that occurs) or 120 years from creation. (When the 1976 Act was enacted, these periods were the shorter of 100 years from creation or 75 from publication; the 1998 Copyright Term Extension Act added 20 years to the term.) For joint works, the term will be 70 years (originally 50) from the death of the last surviving co-author. In order to avoid the possible consequence that substitution of federal copyright terms for perpetual common law copyright would cast some works immediately into the public domain upon the effective date of the 1976 Act, Congress provided that in no event would the copyright expire before the end of 2002, and if the work was published by that date, its copyright would endure through 2027 (subsequently extended in 1998 to 2047).

While this provision primarily addresses literary and artistic works that may have languished for centuries in desk drawers and in trunks in attics, some narrow class of audiovisual works may be affected. Because the first film was created in 1895, no unpublished work for hire film would have been at risk of going into the public domain in 1978 on the basis of counting 100 years from its date of creation. By contrast, for films classified as joint works, it is possible that in 1978, all of the relevant creative contributors could have been dead for more than 50 years, in which case the films' copyrights would have endured through 2002, and if the films were published in the US by that date, the copyrights will survive through 2047.

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8) See §304(a)(4)(B).

9) See 17 U.S.C. sec. 104A (codifying sec. 514 of the Uruguay Round Amendments Act).

10) See *Golan v. Holder*, 132 S.Ct. 873 (2012).

11) See 17 U.S.C. sec. 303.

## II. Films based on pre-existing works: duration and ownership problems

In US copyright law issues of ownership can complicate both the practical calculus of duration when one work is based on a differently owned prior work, and, for works published before 1978, the exercise of rights during the renewal term.

### 1. Relationship of terms of protection of underlying and derivative works

Audiovisual works are often based on a pre-existing literary or dramatic work. Under section 103(b) of the 1976 Copyright Act, the copyright in a “derivative work” such as a film based on a prior novel, does not affect the subsistence or duration of the copyright in the underlying work. As a practical matter, this means that if the film’s copyright expires before the copyright in the underlying work, the film is in the public domain, but it cannot be exploited because the underlying copyright is still valid, and unauthorized exploitation of the film will violate the copyright in the pre-existing work.

This scenario most often transpired when the rightholder renewed the pre-1976 Act copyright in an underlying work, such as a novel or a play, but the copyright holder of the derivative work motion picture failed to renew the copyright in the derivative work. As a result, the motion picture would have fallen into the public domain, but the holder of the copyright in the underlying literary work could nonetheless bar third parties’ exploitation of the film because “a derivative copyright protects only the new material contained in the derivative work, not the matter derived from the underlying work.”<sup>12</sup> Thus, expiration of the derivative work’s copyright could not diminish the force of the copyright in the underlying work;<sup>13</sup> accordingly, the exhibition or transmission of the motion picture violated the public performance rights in the underlying literary work, and the film would not be freely exploitable until the copyright in the underlying work expired as well.

The single term of copyright for 1976 Act works does not entirely eliminate the possibility that the copyright in an underlying work could survive the expiration of copyright in a derivative work, thus effectively blocking third-party exploitation of the derivative work despite its public domain status. Because duration now is calculated based on the death of the author, such will be the case if the author of the derivative work predeceases the author of the underlying work. This result will also obtain if the derivative work is “for hire,” as many US audiovisual works are, and if the author of the underlying work is still alive more than 25 years after the publication of the film. (The work for hire film’s copyright will endure for 95 years from publication; the copyright in the novel or play will endure 70 years from the death of its author.)

### 2. Reversion of rights in underlying works

From their inception in 1790, the US copyright laws have provided authors the opportunity to reclaim their rights from their grantees and to regrant those rights, presumably under terms more favorable to the author. From 1790 until the effective date of the 1976 Act, the advent of the second term of copyright (upon compliance with the renewal of copyright registration) triggered the author’s reversion right. Although the Supreme Court held that authors could validly assign their renewal term rights to the first term grantee (thus effectively eviscerating the reversion

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12) See, e.g., *Russell v. Price*, 612 F.2d 1123, 1128 (9<sup>th</sup> Cir. 1979) (unauthorized televising of motion picture *Pygmalion*, whose copyright had not been renewed, violated rights in George Bernard Shaw’s eponymous play, which was still in its second term of US copyright).

13) *Accord, Stewart v. Abend*, 495 U.S. 207, 222-224, 230 (1990) (“Absent an explicit statement of congressional intent that the rights in the renewal term of an owner of a pre-existing work are extinguished upon incorporation of his work into [a derivative] work, it is not our role to alter the delicate balance Congress has labored to achieve.”).

right), the author's assignment did not bind her heirs, who took the renewal term free of prior assignments if the author did not survive past the first 28-year term.<sup>14</sup>

When authors (or heirs) of literary or dramatic works on which subsequent motion pictures were based did come into their renewal term rights, questions arose as to the scope of the author's reversion. A strict application of the principles of the renewal term would suggest that once the renewal copyright in the underlying novel "springs back" to the author or to the author's statutory successor, it does so free and clear of any licenses given during the initial term. Thus the continued exhibition or distribution of the film – which contains copyrightable elements from the novel – would constitute an infringement of copyright in the novel. The Supreme Court endorsed this approach in 1990 in a controversy involving the continued exhibition and distribution of the well-known Hitchcock film *Rear Window*,<sup>15</sup> holding that not only would the novelist during the renewal term be able undeniably to license some other motion picture producer to base a new film on the novel, but he would also be entitled to renegotiate with the copyright owner of the first film for the right to continue its exploitation. This would, of course, deprive the producer or copyright owner of the first film of the fruits of its own copyrightable contributions, which may as a practical matter account far more for the film's success than do its borrowed elements from the novel.

Congress imposed a different solution regarding the continued exploitation of derivative works (notably motion pictures) with respect to two other statutory renewal provisions. When, as part of the 1976 Act's transitional measures governing works already in copyright, Congress extended the duration of the renewal term from 28 to 47 years (and in 1998 added another 20 years to the renewal term), Congress gave authors (or their heirs) an opportunity to terminate prior grants during the additional 19 (and then the subsequent additional 20) years of copyright, but exempted already-created derivative works from the scope of the reversion.<sup>16</sup> Similarly, in 1992, in addition to providing for the future automatic renewal of works originally published beginning in 1964 through 1977, Congress sought to encourage "voluntary" renewals; one such incentive concerns the continued exploitation of derivative works. A person who voluntarily renews gets the benefits of the *Rear Window* rule that cuts off continued exploitation by others of derivative works they may have created during the initial term of an underlying work, while in the case of an automatic renewal, section 304(a)(4)(A) now provides that "a derivative work prepared under authority of a grant of a transfer or license of the copyright that is made before the expiration of the original term of copyright may continue to be used under the terms of the grant during the renewed and extended term of copyright without infringing the copyright."<sup>17</sup>

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14) See *Fred Fisher Music Co. v. M. Witmark & Sons*, 318 U.S. 643 (1943) (upholding author's assignment); *Miller Music Corp. v. Charles N. Daniels, Inc.*, 362 U.S. 373 (1960) (author's assignment does not bind heirs).

15) *Stewart v. Abend*, 495 U.S. 207 (1990).

16) See 17 U.S.C. sec. 304(c) and (d).

17) Because works created in or after 1978 enjoy a single term of protection, there is no longer a renewal term to trigger authors' reversion rights. Reversion rights nonetheless apply to any contract executed in or after 1978, and vest 35 years after execution. The derivative works exception applies to this reversion right as well. See 17 U.S.C. sec. 203. Further discussion of the reversion right exceeds the scope of this summary, but for (considerably) more detail, see Lionel Bently and Jane C. Ginsburg, "The sole right shall return to the Author": Anglo-American Authors' Reversion Rights from the Statute of Anne to Contemporary U.S. Copyright, with Prof. Lionel Bently, 25 *Berkeley Technology Law Journal* 1475 (2011), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1663906](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1663906).

### III. US Term of Copyright Protection for Audiovisual Works

	When Protection Attaches in the US	First Term	Renewal Term
<b>Film created (fixed in a tangible medium of expression from which it can be perceived, reproduced, or otherwise communicated) in 1978 or later</b>	Upon creation	<p><b>If “work for hire”</b> (or anonymous or pseudonymous work), unitary term of <b>95 years from publication</b>, or 120 years from creation, whichever is first.</p> <p><b>If rights initially vested in author or co-authors</b>, unitary term of <b>70 years from date of death of last surviving co-author</b>.</p> <p>Law of country of origin determines (1) whether work is “for hire”; (2) who is an author or co-author, if rights initially vest in author(s). (For EU works, referent lives are those of the director, the author of the screenplay, the author of the dialogue and the composer.)</p>	N/A
<b>Film published (released in US) 1964-1977, inclusive</b>	<p>For <b>US works</b> – upon publication with proper notice; if without proper notice, work is in public domain.</p> <p>For Berne Convention and WTO <b>foreign works</b> – upon publication with notice.</p> <p>If published in the US without notice, work then fell into public domain, BUT copyright was restored as of 1 January 1996, so long as the work was still protected in its country of origin on the effective date of the Uruguay Round Amendments Act (17 USC § 104A) (1 Jan. 1996).</p>	<b>28 years</b>	<p><b>67 years</b>, second term commenced automatically pursuant to the 1992 Automatic Renewal Amendment.</p> <p>Renewal registration is optional (although, per §304(a)(4) (B), registration is prima facie evidence of valid ownership).</p> <p>If renewal effected automatically, then notwithstanding possible reversion of film rights to the author of the underlying work on which the film was based (or to his/her heirs), the grantee may continue to exploit the derivative audiovisual work.</p>

	When Protection Attaches in the US	First Term	Renewal Term
<b>Film published 1923-1963, inclusive</b>	Same as for film published in 1964-1977.	<b>28 years</b>	<p>For <b>US works – 67 years</b>, if renewal was sought; if no renewal, work is in the public domain.</p> <p>For Berne Convention and WTO <b>foreign works – 67 years</b> even if renewal was not sought, so long as the work was still protected in its country of origin on the effective date of the Uruguay Round Amendments Act.</p> <p>If renewal sought, then possible reversion of film rights to the author of the underlying work on which the film was based (or to his/her heirs), and the grantee may NOT continue to exploit the derivative audiovisual work in US without new agreement from author or heirs.</p>
<b>Film published before 1923</b>	The audiovisual work is now in the public domain.	The audiovisual work is now in the public domain.	The audiovisual work is now in the public domain.
<b>Film created, but not published before 1978</b>	From 1 January 1978, when US federal copyright protection was extended to unpublished works.	<p><b>If film is a “work made for hire,”</b> (or anonymous or pseudonymous work), unitary term of <b>95 years from publication</b>, or 120 years from creation, whichever is first.</p> <p><b>If rights initially vested in author(s)</b>, unitary term of <b>70 years following death of last surviving co-author</b>. (For EU works, referent lives are those of the director, the author of the screenplay, the author of the dialogue and the composer.)</p> <p>If, on 1 January 1978, the film’s authors had been dead for more than 50 years, the film’s copyright would nonetheless endure until 31 December 2002, and if the film was published before then, the film’s copyright will endure till <b>31 December 2047</b>.</p>	N/A











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