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Term of copyright protection (Q 235)

REPORT OF SWISS GROUP*

Questions

I. Analysis of current law

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

Treaty	Acceptance by Swiss Federal Assembly	Ratification	Entry into force	Remarks
BC (Paris Revision July 24, 1971) (SR 0.231.15)	June 4, 1992	June 25, 1993	September 25, 1993	No notifications or declarations
TRIPS 1994 (SR 0.632.20)	December 16, 1994	June 1, 1995	July 1, 1995	No notifications or declarations
WCT (SR 0.231.151)	October 5, 2007	March 31, 2008	July 1, 2008	Switzerland notified that it has opted to reject the criterion of first fixation in accordance with Art. 5 para. 3 and will apply the criterion of first publication. Switzerland notified that it shall not apply Art. 12 to phonograms of producers from countries other than a signatory state. Switzerland notified that (in accordance with Art. 16 para. 1 let. a nr. iv) it will reciprocate the scope and the term of protection granted by Art. 12 to producers from a foreign signatory state as such is provided by the signatory state to Swiss producers.
WPPT (SR 0.231.171.1)	October 5, 2007	March 31, 2008	July 1, 2008	Switzerland notified that it has opted to reject the criterion of first fixation in accordance with Art. 5 para. 3 and will apply the criterion of first publication.

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The relevant articles are Art. 29 to Art. 32 of the Federal Act on Copyright and Neighbouring Rights *(Urheberrechtsgesetz,* SR 231.1, *CA).*

a) Term of Protection in General:

The term of protection begins with creation of the work (Art. 29 para. 1 CA)and the duration of the protection period is defined as follows (Art. 29 para. 2 CA):

– 50 years after the death of the author *(p.m.a.)* for computer programs
– 70 years *p.m.a*. for any other works,
– if the date of death of a known[1] author is not known, but there is reasonable cause to believe that he or she has been dead for more than 50 or 70 years, respectively, then protection is deemed to have expired.

b) Term of Protection for Works Created by Two or More Persons (Joint Authorship) (Art. 30 CA)

For works in the creation of which two or more persons have been involved, the live of the last surviving co-author[2] decides, and the term expires

– for computer programmes, 50 years *p.m.* of the last surviving co-author,
– for other works, 70 years *p.m.* of the last surviving co-author

If, however, the work is comprised of components that can be exploited separately, the above terms of protection (Art. 29 para. 2 CA) apply for the individual parts (Art. 30 para. 2 CA), and the rule above (Art. 30 para. 1) applies for the combined work.

c) Unknown Author (Art. 31 CA)

If the creator or author of a work is unknown (anonymous work), the term of protection expires 70 years after first publication, or, if the work was published in instalments, 70 years after the last instalment. In the event the author or creator becomes known during this period, then the term of protection expires 50 years *p.m.a*. for computer programs, or 70 years *p.m.a.* for any other work. If an anonymous work is published posthumously, and there are reasons to assume when (or by when the latest) the author died, then protection expires 50 or 70 years, respectively, after that date (Art. 29 para. 3 CA).

d) Term of Protection for Related Intellectual Property Rights (Art. 39 CA)

The term of protection for related intellectual property rights (neighbouring rights) begins for performing arts and performances of folk art with the performance by the performing artists, for phonograms or videograms with their publication (or with their production if there is no publication), or for broadcasts upon their transmission, and for each of them ends 50 years thereafter.

The right to be recognized as a performing artist expires upon the artist's death, but not prior to the expiry of the term of protection outlined in the preceding paragraph (Art. 39 para. 1^{bis} CA).

e) Calculation

The term of protection is calculated commencing from December 31 of the year during which the relevant event took place (Art. 32, Art. 39 para. 2 CA).

[1] If the author is not known, Art. 31 is the main provision for limiting the duration of protection.
[2] Special rules apply for films and other audiovisual works, see lit. b to question 5 below.

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

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

RBC: The CA was revised to extend the term of protection from 30 years *p.m.a.* to 50 years *p.m.a*. to comply with the Brussels version of the RBC and entered into force on December 1, 1955. The adaptation to the Paris version of the RBC was implemented on September 25, 1993.

TRIPS 1994: Art. 1 para. 2 CA contains a general provision that allows international treaties to take precedence over Swiss legislation with regard to copyright issues for works with an international aspect (publication or creation in a foreign country, place of residence of a Swiss creator abroad, foreign national living in Switzerland). This provision could automatically lead to a longer term of protection than foreseen under Swiss law if mandated by an international treaty.

WCT: Already prior to the implementation of the WCT, Switzerland had extended the term of protection to comply with the term of protection of its neighbouring countries in 1992. Therefore, no adaption to the term of protection in the CA was required.

WPPT: See comments to WCT.

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

In Switzerland, there are no international contracts or treaties that would impose TRIPS+ rules regarding the term of protection.

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

The terms of protection under the CA have constantly moved in an upward direction over the last decades.

The first CA dated 23 April 1883 provided for a term of protection of 30 years *p.m.a*. (without adding the period until the next 31 December). This term remained unchanged in the revised CA dated 7 December 1922, although the Berne Convention (as amended after the Berlin conference 1908) already provided for a minimum (but not mandatory) term of protection of 50 years *p.m.a*.; pursuant to an exception of the CA of 1922, the term of protection of works made available to the public after the author's death did not end 30 years after the publication, but in any event 50 years after the author's death.

In 1955, the terms of protection of the CA were revised due to the amendments of the Berne Convention following the Brussels conference in 1948. The Berne Convention declared the 50 years *p.m.a.* as a mandatory minimum standard. Accordingly, the general term of protection of the CA was extended from 30 years *p.m.a*. to 50 years *p.m.a*. (counted from the next 31 December). Anonymous or pseudonymous works enjoyed a protection of 50 years, beginning from the publication of the work.

The fundamentally revised CA dated 9 October 1992 now provides for a term of protection of 50 years *p.m.a.* for computer programs and of 70 years *p.m.a*. for all other works (Article 29 CA), counted from the next 31 December.

The extension of the term of protection from 50 to 70 years *p.m.a*. in the CA 1992 was influenced by the legislation of neighbouring states, in particular Germany and Austria, and by the developments in the European Community, where the draft directive harmonized the term of protection at 70 years *p.m.a*. The general 70 years *p.m.a*. term was later implemented in the Copyright Term Directive 93/98/EEC dated 28 October 1993 (that led to an extension of the term of protection for software to 70

years *p.m.a.),* which was replaced by the Directive 2006/116/EC dated 12 December 2006, and amended by the Directive 2011/77/EU of 27 September 2011, providing for an extension of the term of protection for performers and sound recordings to 70 years, which both were not adopted into Swiss law.

Currently, there are no proposals for increases of the term of protection in Switzerland. In particular, the work group formed by the Federal Councillor Ms Sommaruga, head of the Department of Justice and Police, which discusses mainly limitations and exceptions to copyright, does not address the term of protection.

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

a) Main rationale

The main rationale for the extension of the general term of copyright in Swiss law from 50 to 70 years *p.m.a.*, by the CA of 1992 was bringing the term of protection in Switzerland in line with those in Germany and Austria and at that time planned for implementation in the rest of the EU (and subsequently introduced by Directive 93/98/EEC of 29 October 1993 harmonising the term of protection of copyright and certain related rights in the EU). The concern in Switzerland was that having terms shorter than those of neighbouring countries would lead to a distortion of competition. It was argued in the parliamentary debate in the National Council that a harmonised term was necessary to avoid further increasing the temptation for German-speaking Swiss authors to publish in Germany (votum FISCHER, Amtl. Bull. StR 1992 I, 44), what would have a negative impact on Swiss publishers.

Although the principal justification is thus an economic one, the internationally discussed other reasons for a general copyright term of 70 years *p.m.a.* are also referred to in Switzerland: Copyright is considered to be similar to a property right, and therefore should have a long duration. However, an unlimited right would make exercise of copyright extremely complicated after a few generations, so that works would no longer be disseminated. Therefore, a balance has to be found between the interests of an author's heirs, who would prefer an everlasting protection, and the interests of the general public in unrestricted access to works and thus in a limited term (A. TROLLER, Immaterialgüterrecht: Patentrecht, Markenrecht, Muster- und Modellrecht, Urheberrecht, Wettbewerbsrecht, Bd. I, Basel 1983, 127). As one important element of copyright is the protection of the author's personality, there is an argument that protection should continue for as long as the author's heirs remember him as a living person (M. REHBINDER, Schweizerisches Urheberrecht, 3rd ed., Bern 2000, N 65 ff.). This means that at least the children and grandchildren of the author should enjoy a return on his efforts. However, calculating the term on this basis in each individual case would produce widely differing term of protection for each author, some much shorter, some much longer than those for which the current legislation provides (B. MÜLLER/R. OERTLI, Urheberrechtsgesetz (URG), 2nd ed. Berne 2012. Preface to Art. 29–32 URG N 5); therefore a fixed number of years after the death of the author is a legislative compromise. As life expectancy has increased, so an extension of the main term from 50 to 70 years was considered appropriate (F. DESSEMONTET, Inhalt des Urheberrechts; Schutzdauer, in: VON R. Büren/L. David (Hg.), SIWR, Bd. II/1, 2nd ed., Basle 2006, 318).

The rationale for the term of protection for copyright in *computer programs* (50 years *p.m.* of the programmer) is also an economic one. Again, the aim was to harmonise Swiss law with the position in the EU. However, the position in the EU changed between Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs and the 1993 Copyright Duration Directive. The former piece of legislation provided for a term of 50 years *p.m.a.* of the programmer, the latter for a term of 70 years *p.m.a*. Switzerland had passed a new CA in the meantime (1992) and so Swiss law today does not reflect the current EU position in that regard.

Since the 1993 Copyright Duration Directive and the codified version that replaced it in 2006 (Directive 2006/116/EC of 12 December 2006 on the term of protection of copyright and certain related rights), containing a so-called "rule of the shorter term" (in both cases in Art. 7), the heirs of Swiss computer

programmers enjoy 20 years less protection in both Switzerland and the EU compared to the heirs of computer programmers from the EU.

b) Sound recordings and Audiovisual works

Sound recordings and audiovisual works (mainly films) are virtually always collective works. As a general rule, the death of the last author determines the term of protection of a collective work (Art. 30 para. 2 CA).

For films and other audiovisual works, however, the death of the director is decisive (Art. 30 para. 3 CA). The rationale for this was to ease the commercialisation of such works[3].

Regarding the term of protection for performers and sound recordings, Swiss law does not comply with EU law, since the Directive 2011/77/EU of 27 September 2011 has not been implemented.

c) Critizism

The current copyright term(s) and the rationale behind them were criticised already during the legislative debate on the 1992 CA. In the Council of States *(Ständerat)* it was pointed out by the spokesman for the minority that the extension was not recommended by the Federal Council *(Bundesrat)* because the majority of interested parties who commented in the course of the consultation process were against an extension of the term. Also, it was doubted that a Swiss copyright holder would go to a publisher in Germany just because of a longer term there. Finally it was noted that those who benefit from copyright protection are generally not the author and his children but rather distant heirs, and a term that is too long conflicts with the general interest in having the broadest access to a work (Amtl. Bull. 1991 S. 116). In the National Council *(Nationalrat),* MP SCHERRER spoke for what turned out to be the minority opinion against an increase in the term of protection, pointing out that it would mean at least the third and more likely the fourth generation after the author benefitting from his work. This was in his view unjustified in the absence of any contribution by the great, great grandchildren of the author (Amtl. Bull. 1992 N, 43 f.)[4].

Professor Reto Hilty describes the current lengths as “grotesque” (R. HILTY, Urheberrecht, Bern 2011, 179). His viewpoint is that there is no reasonable explanation, at least not from an economic standpoint, for the fact that the term of protection is related in such an unforeseeable way to the author’s person (in particular to the date of death) and points out that the economic benefit of copyright is anyway not generally enjoyed by the author or his heirs but rather by commercial providers of copyrighted works. In Professor Hilty’s view, it would be correct to define the term of copyright for each type of work so that it would give the necessary incentive to create new works without unnecessarily restricting free competition. Such term would almost certainly be shorter than the present ones. However, he considers it illusory to push for reform in this direction.

In relation to the term of protection for software there are also critical voices, some objecting to the fact that the term has not been harmonised with that applicable in the EU (DESSEMONTET, 321), other pointing out that the short lifecycle of software makes any discussion of a term based on ‘life of the author plus’ irrelevant or even absurd (M. BERGER, Schutz von Software – Überblick über die Rechtslage in der Schweiz, in: H. R. Trüeb (Hg.), Softwareverträge, Zürich 2004, 53; W. STRAUB, Softwareschutz, Urheberrecht, Patentrecht, Open Source, Zürich 2011, N 148, 61).

We are not aware of any economical, sociological or other studies specific to Switzerland that analyse the economic, social or other consequences of the current copyright term of protection.

[3] This is the only example remaining in the CA of 1992 of efforts to ease commercialisation of copyrighted works that had been proposed in the respective draft law (DESSEMONTET, 323 f.).

[4] The legislative process and its outcome are summarised in the decision of the Federal Supreme Court 124 III 266, cons. g “Der Snob”), in which the Court ruled that the extension of term did not revive protection for works that had fallen out of copyright before the 1992 CA was passed.

II. Proposals for harmonisation

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

All members of the Group agree that the present copyright regime regarding terms of protection gives reasons for criticism:

– The current (long) duration of protection in certain circumstances has a negative effect on the republication and other subsequent uses of works.

– Duration of protection is One-Size-Fits-All, but ultimately fits few. It does not give room for differentiating between works for which there is an ongoing interest of protection long after the author's death and works in which any interest has been abandoned either shortly after publication, or at least at any moment in time between creation and expiry of the term of protection[5].

– The rules of Swiss (and international) copyright on duration of protection do not allow for a balancing of interests, leading to unbalanced results in a large number of cases.

A majority of the members of the Group state that the different interests of authors/heirs, of the commercial providers and of the public do not seem to be adequately balanced in the digital age with respect to the term of protection.

Two members agree that it is questionable whether the initial rationale for the existing term of protection – to aliment two generations of heirs – does still hold, if it ever did. According to them, this rationale is illusory anyway in those cases where copyright has been fully assigned to commercial providers (editors, record labels, film studios), which do not share the royalties at all or at least not adequately with the heirs of the author. While commercial providers undoubtedly play an important role in order to make works available to the public and therefore have a legitimate interest in a long term of protection, it is questionable whether the current terms of protection are indeed necessary to incentivise commercial providers for acting as intermediaries between authors/heirs and the consumers.

According to these two members, it has also to be taken into account that the required level of originality/individuality for a work to be protected has constantly decreased over the last decades *("Schutz der kleinen Münze").* Today, works are protected under the CA which lack the typical character of an artistic or literary work as it was understood when the Berne Convention was agreed upon. At the same time, the term of protection constantly increased. As a result, more and more intellectual products are monopolized and excluded from the public domain. This is certainly not in the interest of the consumers, in particular if one takes into account that the economic life span of a work has become shorter and shorter due to cost efficient worldwide distribution models.

According to these members, a shorter period would allow business models/offerings that are not currently possible or viable under Swiss copyright law.

Consumers would benefit most from a shorter term of protection, giving easier access to works at an earlier point in time and, possibly, new ways of accessing works.

The Reporter of the Group disagrees with both purpose and rationale for an overall shortening of copyright protection, and one other member also disagrees at least with the conclusion drawn by the other two members therefrom. This for the following reasons:

– To pit distributors (publishers, record labels, film studios, etc.) against creators of works does not adequately reflect reality. Intermediaries play a critical role in the creative process, in fact most works would never be created, or never meet their public, without distributors.

– Authors that have created copyrighted works should be put on at least a comparable footing as entrepreneurs who have created a fortune of money or other intangible forms of property insofar as they can leave something of value to their heirs, or alternatively trade away rights that are going to last for an extended period of time

– Authors, distributors and consumers benefit from a uniform system of protection terms.

[5] Often, interest wanes or disappears after the death of the author.

These factors justify that authors and/or publishers are allowed to determine distribution and other use of a copyrighted work for the full duration of the statutory term of protection, including the right to prevent changes to the work, to prevent publication or re-publication altogether, and the right of the author to remain anonymous.

The term of protection for software (*50 years p.m.a*.) may be far longer than at all relevant, but it is not known that a shorter term of copyright protection for software (unless the term were shortened to a bare minimum) would have saved the economy from major problems.

If authors want to make their works freely accessible, under the present legal system, they have the right either to abandon their copyright in these works[6] or to publish their works under one of the standard open content/creative commons licenses.

That being said, there remain areas of uneasiness in particular the effect of the long term of copyright protection on the ability to use works with orphaned copyright.

The Reporter of the Group thus proposes to introduce into copyright a series of presumptions that address:

– works created without intention to subsequently assert copyright in them (lit. A)
– works with orphaned copyright (lit. B)
– collective works (lit. C)
– creative and otherwise justified use of works (lit. D)

A) Presumed Lack of Interest in Asserting Copyright

If a work has been published but has not been re-published (out of print, not available on data carriers or through the internet) for a certain period, such work is presumed to have been created without interest in asserting copyright, and any third party can re-publish it for free, unless the author or holder of rights has rebutted such presumption by marking the work as copyright-relevant (copyright sign, voluntary entry in a registry). If the author or rights holder later wants to rebut the presumption and prevent re-publication, he can do so (e.g. by subsequently republishing the work with the mark [copyright sign] or by entry in the registry[7]) and can prevent further re-publication, but has to allow the first re-publisher to recoup its costs.

It can be presumed that most unimportant (small coins) and ephemeral works would fall into that category.

B) General Orphan Works Rule

A work that has been published[8] but that is no longer publicly available (out of print, not available on data carriers or through the internet) and for which the authors or holders of rights (or some of the authors or rightsholders) are not known and cannot be located through reasonable efforts, is presumed orphan. Anybody is entitled to re-publish such an orphan work, even if there is no proof that copyright has expired or been abandoned, against payment of a remuneration in accordance with a tariff to a collecting society. Such remunerations[9] are distributed to benevolent organizations if the orphan status is not being lifted during a certain period. Search efforts need to be standardized, and the right can be exercised by anybody. Re-publication can occur in the original form (subject to technical adaptations) and for the creation of derivative works (subject to the preservation of specific personal interests of the author, such as preservation of politic and religious contexts, etc.). Different remuneration applies for unchanged re-publication and for the creation of derivative works (depending on the level of change). If the rightsholders, or some of the rightsholders make themselves known after re-publication, they can collect their portion of the remuneration from the collecting society and claim that

[6] Turning them into public domain works, e.g. “GEMA-free music”
[7] Note that registration would not be a basis for granting copyright protection (see only RBC Art. 5 para. 2 first sentence), but a means of overcoming the presumption that the authors or other rightsholders have given up their interest in works no longer publicly available.
[8] Presumably with the qualified copyright notice or entry in the registry pursuant to proposition A.
[9] After deducting the share of the collecting society.

no further re-publication occurs (but see proposition D), but they cannot stop the ongoing marketing as long as it is necessary for the re-publisher to recoup its costs.

If rightsholders want to prevent that their "out of print" works are considered orphan within the meaning of lit. B, they can register their name, or the name of a fiduciary, with their current address in a copyright registry. It then remains blocked for the full term of protection even if not re-published. Also in this proposition, registration would not be a basis for granting copyright protection, but a means of preventing that the rights in the works become orphan.

C) Presumed Agent for Extended Collective Works

For extended collective works (with a large number of actual or potential co-authors), there should be a presumption that one person, as the main artistic contributor (film or stage director) or main financial risk-bearer (usually the producer, theatre company etc.) acts as agent for all other co-authors. If other authors want to overcome the presumption and assert their rights individually, they have to enter into specific agreements with the main contributor (which they can voluntarily record in a public registry). If the agent for the rightsholders collects royalties without being able to prove actual assignments of copyright, it has to pay a certain portion of the remuneration to a collecting society, which treats these remunerations in the same way as remunerations for the use of orphan works.

This presumption and the consequences therefrom should apply also retroactively to works created before the rule has been introduced. It should apply to the monetary and personality rights of the other authors alike, which the presumed rightsholder has to exercise as an agent without mandate *(Geschäftsführer ohne Auftrag).* If a co-author who did not contribute the main portion of the work he cannot prevent re-use unless he has entered this right in the public register (but he can still participate in the remuneration).

If also the main contributor or financial risk-bearer cannot be found, presumption B should apply.

D) Extended Right of Legitimate Use

Even a work that has been published[10] and that is still publicly available (print on stock, available on data carriers or through the internet) and for which the authors or holders of rights are known and can be located, can be re-published by a third party if that party can assert a legitimate interest to do so. Similar to the right of citation, the republication has to serve a broader purpose (e.g., putting the work in a broader context of discussion, using the work for a derivative work without affecting specific moral rights of the author etc). This should be true even if entire works are being republished, the republished work is more important than the contribution of the citing person, and there is a likelihood that the republication affects the market for the original work[11], but can only be done against payment of a remuneration unless the more stringent test of a citation are being met.

This extended right of legitimate would basically correspond to the three-step-test and should allow for use of works in situations not covered by the narrowly worded limitations of copyright in the CA[12].

The right of legitimate use could only be exercised against payment. The amount due could be determined by usual rates charged by the rightsholder of that work, or in the absence of customary rates by a tariff. Payment could go directly to the rightsholder or, if this is not possible for some reasons, to a collecting society, which forwards it to the rightsholders.

All of these presumptions would have to be studied and their details worked out and publicly deliberated, what goes beyond the scope of this Q 235.

It should be noted that these proposals are not, or at least not fully supported within the Group. For example, to address the problems posed by orphan works (presumption A), one other Group member would favour concentrating on voluntary rights management information solutions and is opposed to further extending the powers of the collecting societies, at least without full consideration of the mechanisms and consequences involved (what goes beyond the scope of this Q 235).

[10] Presumably with the qualified copyright notice or entry in the registry pursuant to proposition A.
[11] But mere substitution should not be acceptable.
[12] E.g. they would allow re-pulication in a situation like in the "*Schweizerzeit"* decision (DFT 133 III 480), use of prior works in sampling, situations of criticism etc., but against payment of a remuneration.

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

Without an upper limit on term in international treaties, any country could in principle adopt a perpetual or extremely long term of copyright protection, whereas an upper limit on term in international treaties would prevent individual member states to provide for a perpetual copyright. Although it is difficult to imagine – given the current general debates on copyright – that an eternal copyright is politically feasible (in states where it is not already applied), an upper limit on term in international treaties is generally desirable to avoid a distortion of competition when the term of protection in other places are extended. Otherwise, there may well be a continual inflation of copyright term. This conclusion is not shared by the Chairman, who does not see any need for an upper limit of the term in international treaties.

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

One member of the Group claims that the term of copyright protection should be shortened (but agrees with the following conclusions).

All members agree that the term should be harmonized on an international level, and that any change should occur within the confines of the existing international treaties. A shortening of the term of protection is therefore rather illusionary.

All members of the Group agree that a further lengthening of the term of protection of copyright and neighbouring rights would not be justified.

The certainty of the current (largely harmonised) term of 70/50 years *p.m.a.* seems preferable to general reform. Commercial providers have the certainty of knowing how long protection is, and therefore how much time they have to exploit a work before protection lapses. 70/50 years *p.m.a.* is adequate for them.

A shorter term may be more attractive for the general public and for those interested in making currently protected works more accessible to the public, but these interests are not strong enough to warrant change. There is also the problem of depriving individuals of rights already granted. In order to respect constitutional property rights, term of protection could only be reduced for works created after the reform was implemented.

Any reform regarding copyright protection of software would be better evaluated as part of a more general consideration on whether software is appropriately protected by copyright at all.

Also the trends of the digital information age, such as transient online works and works created by multiple authors do not warrant a reform of the term of protection.

The Chairman is explicitly of the opinion that the uniform term of protection should be left as is, given the large investments individuals and organizations make into the creation of copyrighted works.

For accommodating special situations, it would suffice to open ways of using works for which no apparent interest in preventing re-use exists (proposition A), for which the authors or rightsholders are impossible to locate (proposition B), for which there is an apparent agent (agent with or without mandate, proposition C), or for which there is a legitimate interest of use (proposition D), although it would be unfair to leave the author or rightsholder without remuneration (propositions B through D).

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

According to the one member proposing a change changes should apply to each of the different categories. The new terms for the different categories of works should generally be shorter than the existing ones, in particular with regard to computer programs.

There are legitimate reasons for different terms for different categories of works. It seems that the existing terms follow a simply rule: the lower the level of artistic character of a work, the shorter the term of protection. This general rule shall be maintained.

It should also be considered whether there should be different term of protection for economic rights on the one hand and for the "droit moral" on the other hand (as is the case *e.g.* in French law).

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

The member proposing a change stipulates that, *inter alia*, the following criteria should be taken into consideration for determining the optimum term of protection:

– Economic analysis: Which incentive is needed regarding the term of protection in order to encourage authors to create and commercial providers to distribute a work?

– Category of work

– Level of originality of the work

– Lifecycle of the work

– Distribution channels- and distribution costs for the specific work

Summary

Switzerland has ratified all of the relevant international treaties (RBC, TRIPS, WCT, WPPT) and has implemented the respective requirements regarding term of protection in its CA: 70 years p.m.a. for copyrighted works other than software, 50 years p.m.a. for software, 50 years for neighbouring rights.

The terms of protection have constantly moved in an upward direction. Switzerland has not, however, followed EU law regarding the extension of the term of protection to 70 years for software pursuant to the Copyright Term Directive 93/98/EEC dated 28 October 1993), and for the rights of performers and sound recordings (pursuant to Directive 2011/77/EU of 27 September 2011).

The members of the group could not agree whether a shortening of the term of protection would be desirable, and whether an upper limit on the term of protection should be fixed in an international treaty.

Two members of the group explicitly militate for a general shortening of the term of protection.

The Reporter supports preserving the current term of protection but proposes to mitigate some of the resulting, undesired limitations of the use of works in specific circumstances through a series of presumptions (presumption of lack of interest in copyright for unimportant and ephemeral works, presumption of agency for major collective works) and limitations (general limitation of orphan works and extended right of legitimate use against payment of remuneration according to a new tariff).

Zusammenfassung

Die Schweiz ist allen einschlägigen internationalen Vereinbarungen (RBÜ, TRIPS, WIPO-Urheberrechtsvertrag, WIPO-Vertrag über Darbietungen und Tonträger) beigetreten und hat die entsprechenden Anforderungen betr. Schutzdauer im nationalen Recht (Urheberrechtsgesetz) erfüllt: 70 Jahre nach dem Tod des Autors für alle Werke ausser Computerprogramme, 50 Jahre nach dem Tod des Autors für Computerprogramme, 50 Jahre für verwandte Schutzrechte.

Die Schutzdauer hat sich konstant nach oben entwickelt (d.h. verlängert). Die Schweiz hat allerdings die Verlängerung der Schutzdauer in der EU auf 70 Jahre für das Urheberrecht an Software (durch die Schutzdauer-Richtlinie) und für die Rechte der ausübenden Künstler und Hersteller von Tonträgern (durch die Richtlinie 2011/77/EU vom 27. September 2011) nicht nachvollzogen.

Die Mitglieder der Gruppe konnten sich nicht darauf einigen, ob eine Verkürzung der Schutzdauer wünschbar sei, und ob eine Obergrenze für die Schutzdauer in einer internationalen Konvention festgelegt werden soll.

Zwei Mitglieder der Gruppe sprechen sich ausdrücklich für eine Verkürzung der Schutzdauer aus.

Der Vorsitzende der Gruppe unterstützt eine Beibehaltung der bisherigen Schutzdauer, aber schlägt zur Milderung von ungewollten Beschränkungen der Werknutzung unter bestimmten Umständen eine Reihe von Vermutungen (Vermutung, dass kein Interesse an der Geltendmachung von urheberrechtlichen Ansprüchen bei unbedeutenden und flüchtigen Werken besteht; Vermutung einer treuhänderischen Wahrnehmung von Urheberrechten bei grösseren kollektiven Werken) und Schranken (generelle Schranke für verwaiste Werke und erweiterte Schranke der legitimen Werknutzung gegen tarifgemässes Entgelt) vor.

Résumé

La Suisse a ratifié toutes les conventions internationales pertinentes (Convention de Berne, Accords ADPIC, Traité OMPI sur le droit d'auteur, Traité OMPI sur les interprétations et exécutions et les phonogrammes) et a transposé les exigences relatives à la durée des droits dans son droit national (loi sur le droit d'auteur): 70 ans après la mort de l'auteur pour toutes les œuvres sauf les programmes informatiques, 50 après la mort de l'auteur pour les programmes informatiques, 50 ans pour les droits voisins.

La durée de protection s'est constamment développée vers le haut (c'est-à-dire allongée). La Suisse n'a cependant pas repris l'allongement de la durée de protection dans l'UE à 70 pour le droit d'auteur relatif aux programmes informatiques (par la directive sur la durée de protection) et celui des artistes interprètes ou exécutants et des producteurs de phonogrammes (par la directive 2011/77/UE du 27 septembre 2011).

Les membres du groupe n'ont pas pu se mettre d'accord sur la question de savoir si un raccourcissement de la durée de protection est souhaitable et si une durée maximale de protection devrait être introduite dans une convention internationale.

Deux membres du groupe se prononcent expressément pour une réduction de la durée de protection.

Le président du groupe soutient une solution visant à conserver la durée actuelle de protection mais propose, pour atténuer les entraves non souhaitées à l'utilisation des œuvres dans certaines circonstances d'introduire plusieurs présomptions (présomption, qu'il n'y a pas d'intérêt à faire valoir des prétentions découlant du droit d'auteur pour des œuvres insignifiantes et éphémères, présomption d'une mise en œuvre à titre fiduciaire des droits d'auteur pour les grandes œuvres collectives) ainsi que des limites (limite générale pour les œuvres orphelines et limite élargie de l'usage légitime contre un dédommagement conforme à un nouveau tarif).