

Question Q235

National Group: The Swedish AIPPI Group

Title: **Term of copyright protection**

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Questions

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

I. Analysis of current law

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

BC entered into force in Sweden on August 1, 1904. All subsequent amendments to BC have also entered into force in Sweden through various Acts and other amending legislation; latest ratification took place in 1973.

The WTO agreement was signed by Sweden on April 15, 1994. Sweden has ratified the WTO agreement and it entered into force on January 1, 1995. The TRIPS Agreement entered into force in 1996.

WCT was ratified by Sweden on December 14, 2009.

- 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.
- 1.1.1 Berne Convention, Agreement on Trade-related Aspects of Intellectual Property Rights and the WIPO Copyright Treaty

The obligations in respect of the Term of protection of copyright provided in BC, TRIPS Agreement and WCT have been implemented by means of the Act on Copyright in Literary and Artistic Works (SFS 1960:729), with a number of subsequent amendments, hereinafter the Copyright Act.

Section 1 of the Copyright Act defines the subject matter of copyright as follows:

Any author who has created a literary or artistic work shall own the copyright to that work, regardless of whether it is:

1. a fictional or descriptive written or oral expression;
2. a computer program;
3. a musical or dramatic work;
4. a cinematographic work;
5. a photographic work or any other work of fine art;
6. an architectural work or applied art;
7. a work expressed in some other manner.

Maps and other works of a descriptive nature expressed as drawings, engravings, or in a three-dimensional form shall be deemed to constitute literary works.

The provisions of this Act relating to computer programs shall *mutatis mutandis* also apply to preparatory design material for computer programs. (SFS 1994:190).

Thus, the Copyright Act deals with the protection of literary and artistic works. These include, for instance, compositions in speech or in writing, computer programs, databases, musical and stage works, films, photographs and other pictorial art, architectural works, applied art and, generally, the products of all intellectual creativity regardless of the way in which they are expressed. Moreover, obligations in respect of the Term of protection of copyright have been implemented by means of Section 43-44a of the Copyright Act:

Section 43

Copyright in a work shall subsist until the end of the seventieth year after the year of death of the author or, in the case of a work referred to in section 6,¹ after the year of death of the last surviving author. However, copyright in a cinematographic work shall subsist until the end of the seventieth year after the

¹ Section 6 of the Copyright Act sets out the following: "If a work has two or more authors, whose contributions do not constitute independent works, the copyright shall belong to the authors jointly. However, each one of them is entitled to bring an action for infringement."

year of death of the last living of the following persons: the principal director, the author of the screenplay, the author of the dialogue or the composer of the music specifically created for the work. (SFS 1995:1273).

Section 44

In the case of a work which has been made public without stating the author's name or his or her known pseudonym or signature, the copyright shall subsist until the end of the seventieth year after the year in which the work was made public². If the work consists of two or more parts, the term shall be calculated separately for each part.

If the author reveals his identity within the term set forth in the first paragraph, section 43 shall apply.

For works which have not been made public and whose author is not known, the copyright subsists until the end of the seventieth year after the year in which the work was created. (SFS 1995:1273).

Section 44 a

Where a work has not been published within the term referred to in sections 43 or 44, the individual who subsequently initially publishes or makes the work available to the public shall benefit from such a right in the work which corresponds to the economic rights of the copyright. The right subsists until the end of the twenty-fifth year after the year in which the work was published or made available to the public. (SFS 1995:1273).

Thus, as a general rule the Term of protection granted by the Copyright Act for the majority of literary and artistic works (including photographic works and in relation to anonymous and pseudonymous works) is life of the author plus 70 years or 70 years after the work is lawfully made available to the public. Also, we note that the term of 70 years in relation to anonymous and pseudonymous works is to be calculated from the date the work was lawfully made available to the public, unlike the arguably narrower calculation from the date of "publication" of the work as specified in the TRIPS Agreement.

Consequently, in comparison with the BC, TRIPS Agreement and the WCT, the Copyright Act specifies an increased Term of protection for the majority of literary and artistic works.

- 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?

As described in Section 1.1.1 above, Sweden has signed the TRIPS Agreement and the Copyright Act specifies a minimum Term of protection for the majority of works to life of author plus 70 years or 70 years after the work is lawfully made available to the public. Also, we note that in accordance with the TRIPS Agreement (as well as the WCT), the Copyright Act adds computer programs and databases to the list of protected works within the meaning of the BC for the protection of literary works.

Accordingly, Swedish law provides for TRIPS+ obligations with respect to the Term of protection by means of domestic legislation.

² According to Section 8 of the Copyright Act a work is deemed to have been made public when it has "lawfully been made available to the public".

For the avoidance of doubt, please note that our answer in relation to question 1.2 and 1.3 above has excluded related (neighbouring) rights and the various international instruments and EU Directives delineating this protected subject matter.

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

In modern times, the term of copyright protection for literary and artistic works (Bern works) has moved in an upward direction. The first rudimentary copyright regulation in Sweden derives from 1810 and was part of the Freedom of Press Regulation in which copyright protection was not limited in time and could be inherited for all eternity. Term of protection was introduced in 1841 where the author's right could be inherited in 20-year periods. In the Act of 1877 the term was extended to 50 years after the death of the author and further on reduced to 30 years after the death of the author in the Act of 1919 followed by some temporary extensions of four years at a time. In the Act of 1960 the term of protection was again extended by international developments to 50 years after the death of the author or 50 years after publication for anonymous works. The last modification of term was done in 1996 in connection with the incorporation of EU Council Directive 93/98/EEC (replaced by Directive 2011/77/EU of 27 September 2011 amending Directive 2006/116/EC on the term of protection of copyright and certain related rights), increasing the Bern/TRIPS standard of 50 years to a) 70 years after the death of the author, b) 70 years after publication for anonymous works or c) 70 years after creation for unpublished anonymous works. Copyright to works of applied art was first introduced in 1926 with a term of 10 years after publication or 10 years after the death of the author for unpublished works. In 1970 the terms of protection to such works was extended to 50 years after the death of the author and to 70 years after the death of the author in 1996. Sweden makes no difference with regard to the term of protection of economic and moral rights.

In Sweden there is a legislative proposal to prolong the length of the term of protection of performers and sound recordings from 50 to 70 years after the performance or publication/communication to the public. These amendments will be made in the Copyright Act when implementing the provisions of Directive 2011/77/EU (see Ministry Publication Series Ds 2012:44). In addition to the issue of the length of the term, there is also a proposal in the same report series whereupon the protection of musical works with words shall be changed (see Directive 2011/77/EU). When a musical composition with words is created to be a musical work, the musical work should be protected 70 years from the death of the last surviving author of the composition and the author of the words (cf. joint authorship). Today the length of the term is calculated individually for the composition and the words to the composition.

These proposals will enter into force on November 1, 2013.

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

The existing rationale/justification in Sweden for the existing Term of copyright protection is among other to provide better conditions for literary and artistic creation. An adequate copyright protection, and with that an adequate Term of copyright protection, for authors is believed as benefitting the society at large. This because the economic and moral rights provided is perceived as ensuring the continued creation of literary and artistic works which in turn is regarded as benefitting the society's cultural growth. However, as stated above under section 4), the main influence for the extension of term of protection from 30 to 50 years in the Act of 1960 was international copyright development. The international influence as well as the situation in the Nordic neighbouring countries shall thus be regarded as being part of the rationale/justification in Sweden for the current Term of protection.

The rationale/justification in Sweden is not merely economical as the legislators believe – or at least in the past have believed - that only economical incentives for creation are not enough. An adequate copyright protection, and with that an adequate Term of copyright protection, for the authors' moral rights is regarded as equally important as the economical rights. The rationale as such has not been the main target for criticism but rather the term of copyright itself where both a shorter and a longer term of protection have been advocated.

Within traditional legal research in Sweden there is not any major study discussing the current term of protection.

In addition, with respect to Directive 2011/77/EU Sweden had strong reservations regarding the proposal to extend the term of protection for sound recordings. According to Sweden the proposed amendment were neither fair nor balanced, and could have a negative impact on the copyright system in the future. Therefore Sweden voted against the amendment of Directive 2006/116/EC (see further the Swedish declaration, Interinstitutional File 2008/0157 (COD), Brussels, 2 September 2011).

Nevertheless, when Directive 93/98/EEC harmonizing the term of protection of copyright and certain related rights was implemented in the Swedish Copyright Act the opinion of the legislator was that regardless of the directive, there existed valid reasons for longer protection because it would provide better incentives for the creation of literary and artistic works in Sweden. According to the legislator it was also important that economic and moral rights have the same longer protection because moral rights would become more relevant in the future since technology introduced completely new possibilities to change and to make available works (see Swedish Government Bill 1994/95:151 pp. 23-24).

II. Proposals for harmonisation

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

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

70 years after the author's death is sufficient, as is laid down in Directive 2011/77/EU amending Directive 2006/116/EC on the term of protection of copyright and certain related rights (see further 7-9 below).

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

As much as there are reasons for a lower limit, so are there strong reasons for an upper limit.

If protection would cease at the author's death, it would be too short, however it is no longer convincing that it should support the author's descendants. Moreover the descendants may subsequently use or limit the use in a way that does not conform to the author's will (an effect which does not favour a longer term of protection than 70 years).

A direct comparison to real property cannot be made because the consequences of a long term of protection of intellectual property are more substantial than of real property.

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

It is hard to decide if the current terms of protection are adequate because these are not based on empirical data. The opinion of the Swedish group is therefore that possible amendments, either extending or shortening the term, should be based on empirical studies and scientific results. Pressures and lobbying from different interest groups should not be decisive.

- 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.

The opinion of the Swedish group is that the same term of protection, irrespective of whether it is extended or shortened, should be applied for all categories.

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

1. Stronger support for changes based on empirical data and scientific studies.

2. Considerations evaluating how national and international copyright environments and industries should work and be balanced with other interests of the society.

3. Also important to revise and update limitations on copyright to create a balance with current and future terms of protection.

SUMMARY

Sweden has ratified and implemented the provisions of international agreements and treaties, such as the Berne Convention, WCT, TRIPS which makes the obligations contained therein applicable in the jurisdiction. However, Sweden's membership in the EU since 1995 has compelled it to complete the regulatory framework, which has resulted in an extension of

the term of protection to 70 years after the author's death to the majority of works. Legislative action has also recently been influenced by Directive 2011/77/EU Directive 2011/77/EU amending Directive 2006/116/EC on the term of protection of copyright and certain related rights.

The opinion of the Swedish group is that no separation should be made between types of works with respect to the term of protection, however the group believes that there should be an upper cap on the term. One problem with the existing framework is that there is no sufficiently reasonable motivation favouring longer protection and further amendments need to consider empirical data to maintain a balance in the society.

NOTE

It will be helpful and appreciated if the following points could be taken into consideration when editing the Group Report:

- kindly follow the order of the questions and use the questions and numbers for each answer
- if possible type your answers in a different colour
- please send in a word document
- in case images need to be included high resolution is required for good quality printing.