Questionnaire

on the Implementation of the Term Directive in EU Member States

Romania

Analysis by Bogdan Manolea – CC BY-NC-SA 3.0 Romania

1. How have the exceptions of Article 1 of the Term Directive (Directive 2006/116/EC) in relation to works of joint authorship, collective works, anonymous and pseudonymous works and works published in parts, instalments, issues or episodes been implemented in your national legislation? Could you please cite the relevant provisions of your national act?

1. The European acquis on IPR have been implemented in the Copyright Law no 8/1996 by the following normative acts:

- **Law no. 285/2004 on the modification and completion of Law no.8/1996 (the Official Gazette of Romania no.587/30.06.2004)**
- **General Emergency Ordinance no.123/2005 on the modification and completion of Law no. 8/1996 (the Official Gazette of Romania no.843/19.09.2005)**
- **Law no. 329/2006 (the Official Gazette of Romania no. 657/31.07.2006)**

There is no explicit implementation of the Term Directive (Directive 2006/116/EC) in any national normative act. In fact the last modification of the Copyright Law was made before the Term Directive was published in the Official Journal of the EU. However, some of the provisions of the Term Directive are included in the national legislation.

The current text (from August 2010) of Romanian Copyright Law 8/1996[1] states the following:

Art. 26.—(1) The term of the economic rights in works legally disclosed to the public under a pseudonym or without a mention of the author's name shall be 70 years from the date on which they were disclosed to the public.
(2) Where the author's identity is revealed to the public before the term mentioned in paragraph (1) expires, or the pseudonym used by the author leaves no doubt about his identity, the provisions of Article 25 (1) shall apply.

Art. 27.—(1) The term of the economic rights in works of joint authorship shall be 70 years from the death of the last surviving co-author.
(2) Where the contributions of the co-authors are distinct, the term of the economic rights in each such contribution shall be 70 years from the death of the author thereof.

Art. 28.— The term of the economic rights in collective works shall be 70 years from the date of disclosure of the works. Where disclosure does not occur for 70 years following the creation of the works, the term of the economic rights shall expire 70 years after the said creation.

1 From here on mentioned just as Law 8/1996

2. Is there a distinction made between works of joint authorship, collective works and compilations in your national jurisdiction? If so, what is the definition for each of these categories and how is the term of protection for such works calculated? Are co-written musical works considered to be works of joint authorship or collective works? What about cinematographic or audiovisual works? Can you think of other examples of works of joint authorship, collective works or compilations in your national act? Could you please cite the relevant provisions of your national act?

2. **The Law 8/1996 makes the following distinctions between different works of joint authorship and collective works:**

Art. 5.—(1) A work of joint authorship shall be a work created by several co-authors in collaboration.
(2) The copyright in a work of joint authorship shall belong to the co-authors thereof, one of whom may be the main author as provided in this Law.
(3) Unless otherwise agreed, co-authors may only exploit the work by common consent. Refusal of consent by any one of the co-authors must be fully justified.
(4) Where each co-author's contribution is distinct, that contribution may be exploited separately, provided that it does not prejudice the exploitation of the joint work or the rights of the other co-authors.
(5) In the case of the utilization of a work of joint authorship, the remuneration shall accrue to the co-authors in the proportions they shall have agreed upon. Failing such agreement, the remuneration shall be divided in proportion to the share contributed by each author, or equally if such shares cannot be determined.

For the works of joint authorship, the term is calculated according with art. 27 of the same law (cited above) – 70 years from the death of the last surviving co-author or if the contributions of the co-authors are distinct, the term is 70 years from the death of the author of each contribution.

Art 6.—(1) A collective work shall be a work in which the personal contributions of the co-authors form a whole, without it being possible, in view of the nature of the work, to ascribe a distinct right to any one of the co-authors in the whole work so created.
(2) Unless otherwise agreed, the copyright in a collective work shall belong to the person, whether natural person or legal entity, on whose initiative and responsibility and under whose name the work was created.

For the collective works, the term is calculated according with art. 28 of the same law – 70 years from the date of disclosure of the works.

There is no definition of compilations in the Law 8/1996, but they are considered as derivative works, as they are included in Art 8 para b.

Art. 8.— Without prejudice to the rights of the authors of the original work, copyright shall likewise subsist in derived works created on the basis of one or more pre-existing works, namely:
(...)
(b) collections of literary, artistic or scientific works, such as encyclopaedias, anthologies and collections and compilations of protected or unprotected material or data, including databases, which, by reason of the selection or arrangement of their subject matter constitute intellectual creations.

Also, if a compilation is a database, a sui-generis right on the database might exist according with Title II Chapter IV "Sui generis rights of the makers of databases" of the Romanian Copyright Law.

The audiovisual or cinematographic works are indirectly considered by law a work of joint authorship, by the reference made in Article 66 (which defines who are the authors in such a type of work) to Article 5 that defines the joint authorship work.

Art. 66.— The authors of an audiovisual work, as provided in Article 5 of this Law, are the director or maker, the author of the adaptation, the author of the screenplay, the author of the dialogue, the author of the musical score specially composed for the audiovisual work and the author of the graphic material of animated works or animated sequences, where these represent a substantial part of the work. In the contract between the producer and the director or maker of the audiovisual work, the parties may agree to include other creators who have contributed substantially to the creation of the work as authors thereof.

We need to point out that under the previous copyright law (Decree 321/1956), the cinematographic work, as well as radiofonic works were expressly (article 11) considered as collective works. (but there was no definition of collective work).

As regards co-written musical works, there isn't any clear provisions in the law, but it could fall mostly under the provisions of works of joint authorship. Some authors[2] consider that the essential criteria is the "community of inspiration" and that does not exclude even a "repartition of tasks" or "contributions of different works (such as text and music in a song"), while others[3] consider that a joint authorship work imply a unitary work. (therefore a painter that makes the illustration to a novel is not a co-author with the latter's author.)

As regards examples of collective works, Romanian doctrine[4] notes that those may be: encyclopaedias, dictionaries, newspapers or some types of computer programmes (operating systems).

3. Are cinematographic or audiovisual works defined in your national legislation? Are other co-authors assigned to such a work, other than the principle director in accordance with Article 2 of the Term Directive? In whom is copyright of such a work vested in your national legislation (please see Article 14bis (2) Berne Convention)?

The Audiovisual or cinematographic work is defined in article 64 of the Law 8/1996:

2 V. Ros, D. Bogdan and O. Spineanu-Matei, Author Rights and Related Rights – Treaty, All Beck, Bucharest 2005, page 50

3 Y Eminescu, "Regarding the definitions of <<collective work>> and << joint authorship works>>" – New Justice, no 7/1964, page 69

4 V Ros, op cit, page 56

Art. 64.— An audiovisual work is a cinematographic work, a work expressed by a procedure similar to cinematography, or any other work which makes use of moving images, accompanied or not by sounds.

The roles of the director and producer are defined in art 65 of the same law:

Art. 65.—(1) The director or maker of an audiovisual work is the natural person which within the contract with the producer oversees the creation and production of the audiovisual work in the capacity of main author.
(2) The producer of an audiovisual work is the person, whether natural person or legal entity, who takes responsibility for the production of the work and in that capacity organizes the making of the work and provides the necessary technical and financial resources.
(3) The written form of a contract between the producer and the main author is compulsory for the performance of an audiovisual work.

The other co-authors assigned to such a work are foreseen in art 66 (cited above).

As regards provision of the Article 14bis (2) Berne Convention, this has been implemented in the national legislation by Article 70

Art. 70.—(1) By the contracts concluded between the authors of the audiovisual work and the producer, unless otherwise provided, it shall be presumed that they assign to the producer, with the exception of the authors of the specially composed music, the exclusive rights with respect to the use of the work as a whole, provided for in Art. 13, as well as the right to authorize dubbing and subtitling, against an equitable remuneration.
(2) Unless otherwise provided, the authors of the audiovisual work as well as other authors of certain contributions to it shall retain all rights in the separate utilization of their own contributions, as well as the right to authorize and/or to prohibit utilizations other than that specific of the work, in whole or in part, like the use of excerpts from the cinematographic work for advertising, other than for the promotion of the work, subject to conditions of the present law.

4. Has Article 3 of the Term Directive on the duration of related rights been implemented in your national legislation and, if so, what is the term of protection? Did situations corresponding to that described in Article 3(2) of the consolidated version of the Term Directive, involving phonograms that were not afforded protection under the Directive 93/98/EEC, but would have qualified under Directive 2001/29/EEC, arise in your jurisdiction? Was Article 3(2) of the consolidated version of the Term Directive implemented in your national legislation? Could you please cite the relevant provisions of your national act?

The term of protection is 50 years. Article 3 of the Term Directive is implemented in the Law 8/1996 by the following articles:

Art. 102.—(1) Duration of the patrimonial rights of performers shall be of 50 years as from the date of performance. However, if the fixation of the performance throughout such duration makes the object of a lawful publishing or lawful communication to the

public, the duration of the rights shall be of 50 years as from the date when whichever of them has taken place for the first time.
(2) Duration provided for under paragraph (1) shall be calculated as from the 1st of January of the year following the fact generating rights.

Art. 106.—(1) Duration of the patrimonial rights of producers of sound recordings shall be of 50 years as from the date of the first fixation. However, if the recording throughout such duration makes the object of a lawful publishing or lawful communication to the public, the duration of the rights shall be of 50 years as from the date when whichever of them has taken place for the first time.
(2) Duration provided for under paragraph (1) shall be calculated as from the 1st of January of the year following the fact generating rights.

Art. 106[4].— (1) The duration of the economic rights of the producers of audiovisual recordings shall be 50 years as of the first of January of the calendar year following that in which the first fixation took place.
(2) Where the audiovisual recording is disclosed to the public during this period, the duration of the economic rights shall expire after 50 years as of the date on which it was disclosed to the public.

Situations corresponding to that described in Article 3(2) of the consolidated version of the Term Directive did not arise in Romania. Article 3(2) of the consolidated version of the Term Directive was not implemented yes in the national legislation.

5. Has Article 4 of the Term Directive on the protection of previously unpublished works been implemented in your national legislation and, if so, what is the term of protection? Could you please cite the relevant provisions of your national act?

Article 4 of the Term Directive has been implemented in the national legislation by Article 25 para 2 of Law 8/1996. The term of protection is 25 years.

(2) The person who, after the copyright protection has expired, legally discloses for the first time a previously unpublished work to the public shall enjoy protection equivalent to that of the author's economic rights. The duration of the protection of those rights shall be 25 years, starting at the time of the first legal disclosure to the public.

6. Has Article 5 of the Term Directive on critical and scientific publications been implemented in your national legislation and, if so, what is the term of protection? Could you please cite the relevant provisions of your national act?

No, article 5 of the Term Directive has not been implemented in the national legislation.

7. Has Article 6 of the Term Directive on the protection of photographs been implemented in your national legislation and, if so, what is the term of protection? Could you please cite the relevant provisions of your national act? Are non-

original photographs protected under your national legislation in addition to original ones?

The protection of photographs is included in the general definition of article 7 of the law 8/1996. The term of protection is the same as with any other work in article 7.

"Art. 7.— The subject matter of copyright shall be original works of intellectual creation in the literary, artistic, or scientific field, regardless of their manner of creation, specific form or mode of expression and independently of their merit and purpose, such as:
(...)
(f) photographic works and any other works expressed by a process analogous to photography;
(...)"

If a photo is not original, than one of the basic criteria of a work to be protected under this law is not met. Therefore a non-original does not fit into the description of Article 7 and is not subject to copyright protection.
An additional limitation to copyrighted works is set by Article 85 para 2 of Law 8/1996:
"(2) Photographs of letters, deeds, documents of any kind, technical drawings and other similar material do not qualify for legal protection by copyright."

Under the former copyright law – Decree 321/1956 the protection of photographs was limited to "artistic photographs" (Article 9) , therefore not all photographs were protected.

8. How has Article 7 of the Term Directive on protection vis-à-vis third countries been implemented in your national legislation? Could you please cite the relevant provisions of your national act? Had your country prior to the adoption of the Term Directive accepted any international obligations granting a longer term of protection to non-Community nationals than that foreseen by Article 7(1) and (2) – What specific acts do you have in mind ??

The only reference to protection vis-a-vis third countries is foreseen in art. 147 of the Law 8/1996

Art. 147.— Foreign citizens or juridical persons, owners of copyright or neighbouring rights shall enjoy the protection provided by international conventions, treaties and agreements to which Romania is party, failing which they shall enjoy treatment equal to that accorded to Romanian citizens, on condition that the latter, in turn, are granted similar (national) treatment in the concerned countries.

According to information we've got, we don't think that Romania accepted any international obligations granting a longer term of protection than those foreseen by foreseen by Article 7(1) and (2) of the Term Directive. In fact Romania ratified the 1961 Roma Convention on performers protection and the 1971 Geneva Convention on Phonograms protection only in 1998. See also answer to Q14.

9. Are moral rights in your country perpetual? (Please see Article 9 Term Directive.) Could you please cite the relevant provision of your national act?

Yes, the moral rights are perpetual according to Law 8/1996 – Article 11

Art. 11.—(1) The moral rights may not be renounced or disposed of.
(2) After the author's death, the exercise of the rights provided for in Article 10 (a), (b) and (d) shall be transferred by inheritance, in keeping with civil legislation, for an unlimited period of time. If there are no heirs, the exercise of the said rights shall revert to the collective management organization that has managed the author's rights or, as the case may be, to the organization having the largest membership, in the field of creation concerned.

10. Please give the dates at which your national copyright act was changed so as to bring it into conformity with the Term Directive. Were any transitional provisions introduced? Were there any cases of previously expired rights over works in which copyright or related rights subsist being resuscitated? If so, for how long? Did your national act specify whose rights were being revived (e.g. those of the heirs of the author, the last rightholder to acquire the copyright prior to its termination through assignment or other transfer of rights, another party)? Did your national act take advantage of the latitude as to cinematographic or audiovisual works provided by Article 10 (4) Term Directive? Please cite the relevant provisions of your national act.

As explained to the answer first point there wasn't a specific date when the national copyright act was updated with the Term Directive. There were not any cases of copyrights being resuscitated or revived. Or any reference to the works provided by Article 10(4) of the Term Directive.

As regards transitional provisions between different laws, they are explained in the answer to question 14.

11. In Romania the term of protection varies according to the class of the beneficiary to whom copyright or related rights pass after the death of the rightholder (surviving spouse/ issue and other blood relatives/ the State via escheat etc.)? Is a similar distinction introduced by your national legislation? If so, could you please cite the relevant provisions of your national act?

No, there is no distinction in these cases in the current law. Article 25 para 1 of Law 8/1996 shall apply for transmitting the patrimonial rights after the death of the author.

Art. 25.—(1) The economic rights provided for in Articles 13 and 21 shall last for the author's lifetime, and after his death shall be transferred by inheritance, according to civil legislation, for a period of 70 years, regardless of the date on which the work was legally disclosed to the public. If there are no heirs, the exercise of these rights shall devolve upon the collective management organization mandated by the author

during his lifetime or, failing a mandate, to the collective management organization with the largest membership in the area of creation concerned.

However, under the former law – Decree 321/1956[5]- article 6[6] the term of protection varied depending on its inheritors (established according with the common law – Civil Code) :

- **for surviving spouse or its ascendants – for their entire lifetime**
- **descendants – for 50 years**
- **other inheritors – for maximum 15 years. If these other inheritors were minors, they could enjoy these patrimonial rights even after 15 years, until they reach 18 years old or finish their higher education, but not after they were 25 years old.**

Also, if the copyright was owned by a legal person, the patrimonial author right was limited to 50 years from the work publication. (article 7 Para 3)

12. In France an additional exception was introduced to the copyright act granting longer protection for works made during the First and Second World Wars (see Art. L123-8 and L123-9 of the French *Code de la propriété intellectuelle*). Are there any similar additional exceptions in your country? If so, could you please cite the relevant provisions of your national act?

No such exceptions available.
However, according to some authors[7] a prolongation of copyright duration may appear in case of war.

13. Can you think of any instances where the term of protection provided by your national legislation was longer than that provided by the Term Directive, in a manner similar to that foreseen in Article 10 (1) of the Term Directive? Was your national legislation then amended in accordance with the Term Directive in a way that affected works created before 1 July 1995 or not? Could you please cite the relevant provisions of your national act?

No

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5 Decree 321 from 18 June 1956 on author's rights – published in the Official Buletin no. 18/27 June 1956, text in Romanian available at http://www.legi-internet.ro/legislatie-itc/drept-de-autor/legea-dreptului-de-autor/decret-nr321-din-18-iunie-1956-privind-dreptul-de-autor.html

6 Original text in Romanian:

Art. 6. - La moartea autorului sau a vreunuia dintre coautori, drepturile patri moniale de autor se transmit prin mostenire, potrivit Codului Civil, insa numai pe urmatoarele termene:

a) sotului si ascendentilor autorului, pe tot timpul vietii fiecaruia;

b) descendentilor, pe timp de 50 ani;

c) celorlalti mostenitori, pe timp de 15 ani, fara ca in acest caz dreptul sa se poata transmite din nou prin mostenire.

Termenele prevazute la lit. b si c se socotesc de la 1 ianuarie al anului urmator mortii autorului.

Daca mostenitorii prevazuti la lit. c sint minori ei se vor bucura de aceste drepturi patrimoniale si dupa trecerea termenului prevazut mai sus, pina la dobindirea deplinei capacitati de exercitiu sau pina la terminarea studiilor superioare, dar numai pina la implinirea virstei de 25 ani.

7 Y. Eminescu, Authors' Right – Law 8 from 14 March 1996 commented, Ed. Lumina Lex, 1997, Page 209

14. Can you think of any other noteworthy divergence of your national act involving the term of protection of works of copyright and related rights from the standards set out in the Term Directive? If so, please elaborate, preferably citing the relevant provisions of your national act.

There are several problems regarding the application in time of the copyright laws adopted in Romania from 1862 onwards . The legislation applicable if the following

- **Law of the Press – Official Monitor no 81 from 13 April 1862 – articles 1-11**
- **Law on literary and artistic property – no 126 from 28 June 1923 - Official Monitor from 28 June 1923**
- **Decree 321/1956 – cited above**
- **Law 8/1996 on author right and related rights - published in Official Monitor no 60 from 26 March 1996**
- **Law 285/2004 on modification of Law 8/1996 – published in Official Monitor no 587 from 30 June 2004**

The following table might help understand the current issues:

Law from	**1862**	**1923**	**1956**	**1996**	**2004**
Covered works	**Writings, Music Composers, Painters or Drawers**	**All intellectual works**	**All intellectual works**	**All intelectual works**	**All intelectual works**
Duration of Protection	**Life + 10 years**	**Life + 30 years**	**Life + a period (see answer to Q 11 above)**	**Life + 70 years**	**Same as in 1996**
Exceptions for duration of protection	**-**	**For common works – 30 years from the death of the last collaborator (art**	**– encyclopaedias, dictionaries and collections – 20 years from publication**	**See above answers to questions**	**Same as in 1996**

		40) Works published by State or Academy – protected for 20 years since the publication date	– series of artistic photos – 10 years from publication – separate artistic photos – 5 years from publication If the work is owned by a legal person – 50 years from publication date		
Limits for inheritors	-	Some limits for some inheritors (but not the duration) – see article 4	See above answer to Q11	None	Same as in 1996
If there are no inheritors	Public domain	Public domain	Public domain	Collective Society	Same as in 1996
Conflict of laws in time	-	No retroactive effect Inheritors rights prelonged to 30 years if the work is not in public domain	No retroactive rights. Inheritors rights prelonged if the work is not in the public domain	Art 149 Para 3 The duration of the exploitation rights in works created by authors deceased before the entry into force of this Law and for which the term of protection has expired shall be extended up to the limit of the	Art 149 Para 3 The duration of the economic rights in works created by authors deceased before the entry into force of this Law and for which the term of protection,calculated according to the procedures

				term provided for in this Law. Such extension shall come into effect only on the entry into force of this Law.	**of the prior legislation, has <u>not</u> expired shall be extended up to the limit of the term provided for in this Law. Such extension shall come into effect only since the entry into force of the present law.**

A. As we may infer from above there are a series of works that have a very short protection in the law from 1923 (State owned works) or 1956 (collective works or photographies).

B. However, the text regarding the application in time from the law in 1996 (Article 149 Para 3) can be literally understood as a prolongation of copyright for the works that were previously in the public domain. However, the unanimous opinion of specialists[8], confirmed by the change of the law in 2004 (see our text underlined and bolded) is that the solution from 1996 is wrong and the text misses the (essential) NOT – as a results of an omission.

From here the opinions diverge: (Personal comment: I actually didn't have enough time to go in depth with this analysis)
a. According to some authors [9] Art 149 Para 3 from Law 8/1996 might have legal effects and therefore the inheriters of the copyrighted works that were into the public domain before the law from 1996 came into force (26 June 1996) may ask for its protection from the moment when the new law went into force.
b. According to other opinions[10] and to one case from Appeal Court[11] jurisprudence[12] the Article 149 Para 3 from law 8/1996 should be interpreted based on the "real will" of the legislator and therefore the text should be read as modified in 2004 : " **which the term of protection has NOT expired".** The latter argument, which we share, resides on the fact that a different interpretation would lead to a retro-activity of this law for legal situations already exhausted, which would be inadmissible according

8 See also E. Olteanu, "Legislative Technic mistakes in Romanian Copyright law" in Review of Intellectual Property Law, no 4/2007.
9 V Ros, op cit, page 297
10 Bogdan Manolea, What works are in the Public Domain ? 4.03.2006, available at http://legi-internet.ro/blogs/index.php/2006/03/04/ce_opere_sunt_in_domeniul_public
11 Bucharest Court of Appeal, Section IX Civil and Intelectual Property, Decision 248 A from 30 November 2006. The decision in this case has been confirmed by the Supreme Court – the High Court of Cassation and Justice – Decision 7606 from 26 October 2007.
12 Please not that the Romanian legal system is not jurisprudential and therefore the current case can't be used in a precedent.

with Article 15 Para 2 of the Romanian Constitution.[13] Also using the word “extended” is essential in expressing the real will of the legislator in this case[14]

Therefore also the law from 1996 does not retroactivate the copyrights exhausted by March 1996.

C. An additional issue might appear with the International Conventions in the field of copyright signed or ratified by Romania that may have legal precedence before the national legislation.

Romania has ratified (with some reserves) the Bern Convention by Law 152 from 1926[15] in its form signed at BERNE on September 9, 1886, completed at PARIS on May 4, 1896, revised at BERLIN on November 13, 1908 and completed at BERNE on March 20, 1914. However the Article 7[16] in the text adopted by Romania did not imposed a period of protection if the national legislation was different.

Romania has also ratified that following acts of revision of the Bern Convention, such as the Stockholm Act, in its totality by the Decree 1175/1968 (published in the Official Bulletin no 1 from 6.01.1969). The Decree also included the declaration, conform aith Article 7 of the Bern convention, to maintain the national legislation for the duration of copyright protection. However, according to the Romanian authors, the Stockholm Act was never in force, not reaching the number of signatories for the articles up to Article 22.[17]

The final version of the Bern Convention (as modified in 1979) was adopted only in 1998 by Law 77/1998[18]

Also Romania ratified the 1961 Roma Convention on performers protection and the 1971 Geneva Convention on Phonograms protection only in 1998.

Therefore it seems that the International convention where Romania was a part of did not have too much effect on the national duration of copyright protection.

13 See decision Bucharest Court of Appeal mentioned above

14 And not other words used to “revive” rights that were annuled – see for example on Law on terrain property 18/1991 where the word “re-constitutes” is used to for the property of the fields taken by the communist regime and given back to its lawfull owners

15 Published in the Official Monitor no 211from 22 September 1926

16 Article 7.
The term of protection granted by the present Convention shall include the life of the author and fifty years after his death.
Nevertheless, in case such term of protection should not be uniformly adopted by all the countries of the Union, the term shall be regulated by the law of the country where protection is claimed, and must not exceed the term fixed in the country of origin of the work. Consequently the contracting countries shall only be bound to apply the provisions of the preceding paragraph in so far as such provisions are consistent with their domestic laws.

17 Y. Eminescu, Authors' Right – Law 8 from 14 March 1996 commented, Ed. Lumina Lex, 1997, Page 45

18 Published in the Official Monitor no 156 from 17.04.1998