

The Expiry of a Copyright's Term of Protection

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emphasizes the idea of a community of all artists, one that would in great measure be capable of financing itself, were the proceeds from the commercialization of artworks to be directed towards upholding and promoting art and creativity. In other words, and in “revolving” fashion, were the dead generation of artists to provide for the present generation of artists. Thereby, this largely self-financing mechanism of the cultural sector would end up in turn benefiting the culture industry and society in general, allowing them to use, enjoy and even make money on the intellectual works. Especially at a time when the differences in income levels are awakening the ire of the people, it has become

vital to find some means of putting a stop to this state of affairs. In the art world, the introduction of a fee-paying public domain would work against this tendency, and allow artists to share more equitably in the gains from the commerce of art.

¹ “Can you imagine anything more beautiful than this: that all the works that no longer have any direct heirs would fall into the fee-paying public domain, and that the proceeds would serve to encourage, invigorate and enrich the young! Could there be anything greater than such admirable assistance, such a noble legacy bequeathed by illustrious deceased writers to young writers full of life.

Here lies your independence, your fortune ... We are all one family, the dead belong to the living, the living are to be protected by the dead. Could you imagine more beautiful protection?”

Werner Stauffacher: The Expiry of a Copyright's Term of Protection

Every author of an artistic work, especially in the visual arts, knows how hard it is to end a work. Only the author can decide that it is finished. Yet once completed, the work remains as such, unless it is destroyed or otherwise perishes. And as long as it exists, it is of course protected by copyright.

Forever protected? Not quite, since there is a time limit on copyrights. The date on which the author of a work protected by copyright dies is not simultaneous with the time period's expiry. Protection continues, despite the fact that, basically, copyrights exist to protect the person who actually created a work. By comparison with property law (such as that governing the acquisition of an oil painting by a sales contract), a special feature of copyright protection is that, instead of being eternal, it lasts 70 years beyond the author's lifetime (Art. 29, § 2 letter b, Swiss Copyright Law, hereinafter SCL). Formerly the law stipulated a duration of 50 years, but this was changed to 70 to harmonize protection in Switzerland with the European Council's 1993 directive, which has now become the norm in Western Europe. Moreover, the life-plus-70 definition applies to protected works in several categories, including literature, music and art in general. (The only exception to this rule concerns computer programs, which still are covered for only 50 years.)

Upon the expiry of the 70-year period, the works fall into the public domain. In other words, no longer are any rights or protection attached to them; hence, one can do what one likes with them. They can be used to any ends indeed, they can even be changed and used in advertisements.

In this connection, from time to time the idea crops up for works no longer under copyright to be considered as belonging to the “fee-paying public domain.” According to this principle, it would be possible to charge a fee for works that have become generally available, with the proceeds – to be collected by the State – being used for purposes of cultural promotion. In actual practice, this idea has gained acceptance in very few countries.

Once the term of copyright has lapsed, individual rights to protection cease to exist. This means that those persons holding rights to a certain work – generally these will be the artist's heirs – also lose the right to oppose a publication omitting the artist's name, or to prevent a work from appearing in an advertisement. Interestingly, in Germany and Switzerland, this ruling school of thought remains moot. And in other countries, above all France, individual rights to protection for the entitled heirs explicitly continues to exist after the legal term of copyright has expired.

How is the term of copyright's expiry date calculated? To simplify matters, the law under Article 32 of the Swiss Copyright Law stipulates that the duration of protection is to be defined from December 31st of the year in which the decisive event – that is, the death of the author – occurred. This simplifies the calculation, since the expiration of the term of protection always falls at the end of a year, regardless of the exact date of the creator's death. In certain cases, moreover, the law encompasses other special features: for works produced jointly by several persons (called “co-authorship”), the term of protection runs for 70 years after the death of the last surviving author (Art.30, § 1

SCL). Films, which in a certain manner are obliged to fall under co-authorship, are based solely on the film director's lifetime (Art. 30, § 3 SCL).

In those cases where the creator is unknown, the 70-year term of protection runs from the date of the respective work's release/publication (Art. 31, § 1 SCL).

Even at worst, should neither the date of release/publication nor the author be known, a solution has been provided: the expiry date is set by law, to keep such works from being protected indefinitely.

Derivative works involve extra precautions: for instance, for translations and cinematographic works, but also in cases involving the authorized adoption of an existing visual artwork for purposes of producing a new work. Since all such examples involve two different works, at times the first work will already have fallen into the public domain while the derivative work is still under copyright. Such ambiguity also occurs when, for instance, a photographer captures a sculpture that is no longer under copyright and makes an independent work of it – namely the photograph – which in turn benefits from copyright protection.