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Autor: Weiss-Mariani, Roberta
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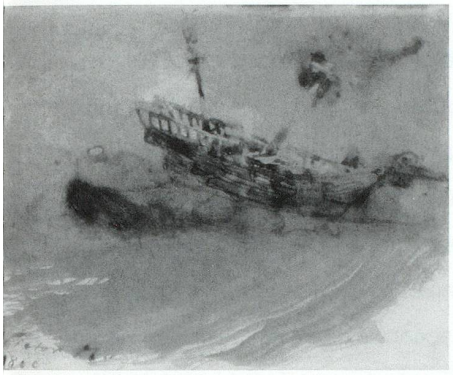
«Connaissez-vous rien de plus beau que ceci; toutes les œuvres qui n'ont plus d'héritiers directs tombent dans le domaine public payant, et le produit sert à encourager, à vivifier, à féconder les jeunes esprits! Y aurait-il rien de plus grand que ce secours admirable, que cet auguste héritage légué par les illustres écrivains morts aux jeunes écrivains vivants!

C'est là votre indépendance, votre fortune ... Nous sommes tous une famille, les morts appartiennent aux vivants, les vivants doivent être protégés par les morts. Quelle plus belle protection pourriez-vous souhaiter?»[1]

Victor Hugo



Upon the death of an artist, the rights to his or her works and estate are transmitted to the heirs. However, in contrast with a material estate, an "intellectual estate" is of limited duration. Upon expiry of the term of copyright (70 post mortem auctoris), the works fall into the public domain and can be freely used. This regulation became offensive because of an ever stronger realization that, in many cases, only long after a creator's death do his or her works take on real commercial value. The fact that the proceeds of a work's utilization tend to land in commercial wallets rather than those of the artists became a source of growing irritation to the latter. Van Gogh is often given as a glaring example: an artist unable to sell a single work during his lifetime, while now his works are worth millions on the auction block.

The idea that commercial utilizers of artistic public property should also pay for such utilization – a fee-paying public domain – and that the proceeds should go to the "artist family" (who take over the deceased artists' legacy so-to-speak), already arose in the 19th century. Victor Hugo (1802–1885) brought the theme up in his critique of society. As a deputy to the parliament in Paris, he was well-placed to put forward and defend his political ideas. Unfortunately, this led to his banishment three years later, under the Second Empire (1852). On the other hand, his considerations in the matter continued to spread, and his idea of a fee-paying public domain was taken up again, especially during the 1920s. Thus, in 1923, the Commission of "Intellectual Property" of the League of Nations passed a resolution on copyright succession rights stipulating that, among other things, once a copyright had lapsed, and for a certain period of time, the proceeds of any profit made on the work in question were to go to a national literature-and-art fund supervised by the countries of origin of such works, and devoted to community causes.

This resolution in turn inspired the "International Institute for Intellectual Collaboration" to recommend the introduction of the fee-paying public domain into the national legislation in 1928. Thereafter, several other international groups lent support to this "Copyright Law of Succession," and, finally, recommendation was made to the individual countries that they incorporate this law into their own legislation, "according to the conditions prevailing in the respective countries." A 1982 investigation by UNESCO revealed that this fee-paying public domain had become a law in different countries (in highly diversified forms). In many of these countries, however, only the commercial side of the question has been addressed, with the proceeds of a work's utilization often being fed into a very loosely-defined national fund. The uses to which such a fund is put are decided mainly by national groups rather than any representatives of the work's author. Be that as it may, the existing examples do show us that, basically, a fee-paying public domain is something that can be realized. This is so despite the fact that, undeniably, the idea must be more clearly defined in order to make sure that the proceeds actually do benefit the artists, thus achieving the original idea of a "contract between generations."

During the '60s, voices in favor of establishing the fee-paying public domain as a norm in Western Europe again became stronger; in the '90s, Germany came up with a specific model and drew up a government bill. The latter is based less on individual and property rights than on cultural and socio-political considerations. Concretely, it would contribute the proceeds to the national pension and welfare programs on the one hand and, on the other, to promoting art in general. The various documents focus more on the question of "a community of artists" than on the "copyright law of succession." The new terminology

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