

Kluwer Copyright Blog

Do most US authors still only enjoy a copyright term of life plus 50 in the EU?

Robert Brauneis (Professor of Law at the George Washington University School of Law) · Monday, January 27th, 2014



Both the US and the EU now have basic copyright terms of the life of the author plus 70 years. But when US authors simultaneously publish in Canada, they may end up truncating their term of copyright in the EU.

Moreover, simultaneous Canadian publication decades ago could have an immediate effect on works by US authors who died between 50 and 70 years ago – a list that includes Ernest Hemingway, William Faulkner, Edgar Rice Burroughs, Jerome Kern, W.C. Handy, Buddy Holly, Alfred Stieglitz, Frank Lloyd Wright. Here’s why, with a few twists and complications along the way.

In 1993, the EU directed its member states to set the basic term of copyright to life plus 70. Yet it contemplated that the term might be shorter for some non-EU authors. (That Directive – Directive [93/98/EEC](#) of 29 October 1993 – was replaced in 2006 by Directive [2006/116/EC](#) of 12 December 2006; in relevant respects, they are identical, and I will refer to them together as the “Copyright Term Directives.”) Article 7(1) of the Copyright Term Directives provides that “[w]here the country of origin of a work, within the meaning of the Berne Convention, is a third country, and the author of the work is not a Community national, the term of protection provided by the Member States shall expire on the date of expiry of the protection granted in the country of origin of the work [as long as it doesn’t exceed the term granted in the EU.]” Supporters of term extension in the United States argued that if a work’s country of origin were the US, the author were a US national, and the US only protected works for life plus 50, Article 7(1) would limit the work’s protection to life plus 50 in the EU. The EU Directives’ approach is explicitly sanctioned by Article 7(8) of the Berne Convention, which creates an exception to national treatment for copyright term – the so-called “Rule of the Shorter Term.”

In 1998, of course, the US did retroactively extend its term to life plus 70. Does that mean that US works all now get life plus 70 in the EU? Quite possibly not. How could that be? The short

answer: Berne Article 5(4)(a) and Canada. The Copyright Term Directives explicitly incorporate the Berne Convention's definition of "country of origin." Under Berne Article 5(4)(a), when a work is "published simultaneously in several countries of the Union which grant different terms of protection," the country of origin is deemed to be that "whose legislation grants the shortest term of protection." Canada has thus far resisted calls to lengthen the term of copyright beyond the Berne minimum of life plus 50. The upshot would appear to be that if a work is published simultaneously in the United States and Canada (and under Berne Article 3(4), "simultaneously" actually means "within thirty days"), its country of origin for purposes of Article 7(1) of the EU Directives and Article 7(8) of the Berne Convention is Canada, and the term of protection the work will get in the EU is Canada's term, life plus 50. The Copyright Term Directives explicitly protect authors who are EU nationals from this truncation of term, but US authors are not so protected.

Of course, US authors only lose that 20 years of EU copyright term if they publish simultaneously in Canada (or any of the other countries that still stick with the Berne minimum, like Turkmenistan and Tuvalu . . . but Canada is the important one). Yet I have not yet been able to find a commercially significant work by a US author that is not simultaneously published in the US and Canada. Comparative searches on Amazon.com and Amazon.ca reveal identical release dates for books and CDs. Software seems to follow a similar pattern: Microsoft Windows 8, for example, was released worldwide on a single date, October 26, 2012. Moreover, the practice of simultaneous publication in the US and Canada is not new. It actually started over a century ago, as a strategy of US publishers to gain Berne protection at a time when the US was not a member and Canada was (a strategy that gained the nickname of "back door" Berne protection). Thus, as mentioned above, many works by older US authors may also have their EU copyright life shortened.

The story is not quite over, however. How do EU member states actually implement the Copyright Term Directives? France seems to fall right in line: [Article L 123-12](#) of the Code de la propriété intellectuelle runs in perfect parallel to Article 7(1) of the Copyright Term Directives. UK law, however, includes an interesting twist. [Section 15A\(4\)](#) of the Copyright, Designs and Patents Act 1988 alters the Berne definition of "country of origin" by providing that if a work is simultaneously published in two or more countries and one of them is a member of the European Economic Area (which is the EU plus Iceland, Lichtenstein, and Norway), then the country of origin is that EEA member, regardless of whether another country of publication has a shorter term. That would mean that a work simultaneously published in the US, Canada and any EEA member state would be considered an EEA work, entitled to a full life plus 70, even if the work were that of a US author. That's good news for US authors who promptly publish in the EEA and seek enforcement in the UK, but it is unclear whether the UK provision complies with the EU Copyright Term Directives.

US authors may have some other obscure sources of good news: dusty bilateral treaties entered into by the US and various European countries around the turn of the 20th century. Some of them seem to provide for national treatment without any exception for term. In 2003, the [Oberlandesgericht Frankfurt am Main](#) held that a US work was still under copyright in Germany even though its copyright in the US had lapsed, because of a national treatment obligation Germany had undertaken in an 1892 treaty between the US and the German Empire. But there is still a great deal of uncertainty in this area: How should those treaties be interpreted? Is there legislation implementing them? And will courts be willing to apply the treaties in the absence of implementing legislation? The ultimate lesson may be that for US publishers, 30 days of Canadian sales in hand are worth more than 20 years in the future European bush.

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