

Kluwer Copyright Blog

Happy Public Domain Day

Emilie Kannekens (Institute for Information Law) · Tuesday, January 20th, 2015



When it comes to copyright it is a game of all or nothing. During the term that a copyright exists, the owner of a copyright has a monopoly on the work due to the exclusive rights of reproduction, distribution and communication to the public. When the copyright protection expires and the work enters the public domain, all exclusive rights vanish and the former copyright owner is left empty-handed.

On January 1st 2015, the works of the world-famous Dutch artist Piet Mondriaan (along with several other significant artists including Edvard Munch, best known for *'the scream'*) fell into the public domain. The colourful grid work paintings that Mondriaan is so well known for, can now, in principle, be reproduced and used for all sorts of (commercial) purposes without permission.

In the European Union, the rights of an author of a literary or artistic work run until 70 years after the author's death, irrespective of the date when the work is lawfully made available to the public (art. 1 [Directive 93/98/EEC](#)). Mondriaan left the earth in 1944, passing the copyrights of his oeuvre on to his heirs, now controlled by the Mondrian Trust. Mondriaan's work initially entered the public domain in the Netherlands in 1995, 50 years after the author's death, which was the term of copyright protection under the Berne Convention. However, term extension under Directive 93/98/EEC means that Mondriaan's copyright was reinstated in 1996, providing the heirs of Mondriaan with 19 more years' ownership of valuable rights.

Now that Mondriaan has been dead for over 70 years, can we finally assume that his work has fully entered the public domain and can be used by anyone without restrictions? Not according to the Mondrian Trust. Mondriaan's work is still popular and well-known and the exploitation of his work is still profitable; it is imaginable that the Mondrian Trust will try their best to keep their still-valuable rights for as long as possible. Copyright in many of Mondriaan's works has not yet expired in the United States. In the US, the term of copyright protection can be longer than 70 years after the death of the author depending on the registration, the date of publication, and the

country of publication. For these protected works, permission is still needed from the Mondrian Trust for reproductions which may be available in the US. It seems that 'the rule of the shorter term' from article 7(8) Berne Convention is not accepted in U.S law under 17 U.S.C. 104(c) and 17 U.S.C. §104A. Consequently, placing an image of a protected work on the internet would constitute infringement if the website can be accessed from the US (which is always the case unless geo-blocking is used).

Other approaches may also be used in order to try and extend the term of protection. An example is the discussion surrounding the copyright protection of Anne Frank's diary.

January 1st 2016 will be 70 years after Anne Frank's death. Anne Frank's Diary is seen by many as an iconic piece of Dutch cultural heritage. Much has already been said about Anne Frank's Diary entering the public domain. In 2012, the Anne Frank Fonds, the foundation that inherited all copyright of Anne and Otto Frank after Otto's death, appealed against the BBIE's (Benelux Office for Intellectual Property) refusal of the application for 'Het Dagboek van Anne Frank' (Anne Frank's Diary) as a trade mark. The Brussels Court of Appeal ruled that 'Het Dagboek van Anne Frank' lacked distinctive character and that granting a trade mark would provide the Anne Frank Fonds with an everlasting monopoly on a work that belongs to the universal cultural heritage ([2012/AR/2166](#)).

In November 2014, the Anne Frank Fonds made an announcement in which they stated that it is wrong to assume that Anne Frank's diary will fall into the public domain in 2016, 70 years after her death. Their lawyer asserted that the first publication of 'Het Achterhuis' (*the Diary of a Young Girl*) in 1947 was co-written by Otto Frank (which in my opinion is seriously debatable considering that Otto did not write the diary together with Anne, but edited the diary after Anne's death).

Copyright expires 70 years after the death of the longest living author of a work, meaning that, if Otto Frank co-wrote the diary, the diary would fall into the public domain in 2051. If Otto did not co-write the diary, but did add original changes to the diary, there is a copyright on the adaptation, without prejudice to the copyright in the original work. This means that parts from Anne's original diary, as published in 1947, would fall into the public domain 70 years after Anne's death (being 2016) and Otto's adaptations would fall into the public domain 70 years after Otto's death (being 2051). This construction would tear the diary apart, turning it into a complicated patchwork of protected and unprotected pieces.

The possibility of Anne Frank's diary not entering the public domain in 2016 makes me wonder if we are moving too far away from the original reasons for copyright protection of a work. Originally, the 70-year term meant to give copyright protection to the author of the work and two generations after the author. In both cases, Mondriaan and Anne Frank, the copyright protection is heavily defended by a Foundation or Trust. Understandably, a work entering the public domain is a painful moment for the copyright owners. If the term of protection is not extended by law, other approaches can be envisaged to try and avoid a work falling into the public domain. However, let's not forget that copyright is meant to be a temporary monopoly, not a perpetual right.

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