

When Is 1923 Going to Arrive and Other Complications of the U.S. Public Domain

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The best thing about copyright is that it expires. The Constitution gives Congress the power to grant the monopoly we call copyright if it wishes, but stipulates that it can only be for "limited times." Once copyright in a work expires (or if it never had it in the first place), the work returns to its natural state as part of the public domain. When works rise into the public domain, anyone is free to use, reuse, remix, and build upon them. Disney can make movies based on Snow White or Cinderella; John Gardner can rethink the Beowulf story in *Grendel*; and orchestras are free to play symphonies by Beethoven. None have to worry that a copyright owner may seek to limit or control what they can do with works in the public domain.¹

The public domain has always existed, but the rise of digital and networked technologies has made it particularly important. Our copyright laws represent an agreement among powerful publishing and media interests that is intended to work for their mutual benefit. As *The New York Times* noted at the time of the passage of the 1976 Copyright Act, "No firecrackers went off when the compromise bill was cleared Oct. 1 ..." Why? Because "this matter is simply too technical, complicated and cumbersome for anyone but specialists to get very excited" (David K. Rosenbaum, "Ford Due to Approve New Copyrights Law," *The New York Times*, Oct. 11, 1976, p. 11).

Thanks to digital technologies, today everyone can easily be a publisher and, just as easily, violate copyright laws that were written with the assumption that all publishers would have New York or Hollywood lawyers review their use of copyrighted works and, when appropriate, negotiate permission fees. The public domain can be an escape valve. By using public domain music, art, and texts in digital mashups, the general public can step outside of our public-unfriendly copyright regime. The public domain is a cultural commons on which we can all freely draw.

All copyrighted works must eventually enter the public domain, but determining when that happens is not easy. That is because over the years the rules regulating copyright have changed, usually for the worse. In response to requests from copyright owners and in the absence of any evidence suggesting that it fulfills copyright's purpose (i.e., the creation and distribution of new works), copyright terms have been arbitrarily lengthened, and the range of works protected by copyright has widened. Sometimes the changes are retroactive; others apply only to prospective works. As a result, a mish-mash

¹ For more on the importance of the public domain as a cultural commons, see James Boyle, *The Public Domain: Enclosing the Commons of the Mind* (New Haven: Yale Univ. Press, 2008). An excellent practical introduction to the public domain is Stephen Fishman, *The Public Domain: How to Find and Use Copyright-Free Writings, Music, Art and More*. 5th ed. (Berkeley, Calif.: NOLO Press, 2010).

of rules and regulations governing copyright duration and the scope of the public domain has arisen.

In order to determine if a work was in the public domain, I needed help. Thus the chart "Copyright Term and the Public Domain in the United States" [<http://copyright.cornell.edu.proxy.library.cornell.edu/resources/publicdomain.cfm>] was born. It seeks to explicate in simple chart form when a work enters the public domain in the United States.² In an effort to increase its utility, sections on new types of copyrighted works (sound recordings, architecture) have been added, and the explanation of the status of works published abroad has been refined.

The copyright chart was built to help bring order and certainty to what is otherwise a chaotic field, but looks can be deceiving. Hidden within the chart are a series of assumptions, omissions, and exceptions that continue to make determining public domain status an uncertain art rather than a concrete science. Even with the chart in hand, it is impossible to determine absolutely the scope of the public domain in the U.S. or to say with 100% certainty that a work has risen into the public domain. Here are seven reasons why:

1. The confusing case of government works

Some works are never protected by copyright and are in the public domain from their moment of creation. Because these works never had copyright, there is no copyright to expire, and these works are therefore not included in a chart delineating copyright term.

There is no authoritative list of works that are ineligible for copyright protection; whether any individual work is protected by copyright is a matter of judgment. One class of works without copyright protection is slavish reproductions of two-dimensional public domain works. It is easy, though, to find websites with copyright notices on such works in possible criminal violation of 17 U.S.C. § 506(c). Federal and state laws, regulations, and judicial decisions are normally considered to be in the public domain as well -- though that didn't stop Oregon from arguing a few years ago that it owned a copyright in the pagination and other aspects of its laws. (See <https://public.resource.org/oregon.gov/index.html> for background documents on the controversy, which ended with Oregon admitting that its statutes are in the public domain.)

An important component of the public domain in the U.S. are "works of the United States government." These works are not eligible for copyright protection in the U.S. (though they can be protected outside of the U.S.): See 17 U.S.C. § 105. But what constitutes a "work of the U.S. government"? The legislative history of this section tells us that the

² Others have taken other approaches, from a flow chart [www.sunsteinlaw.com/practices/copyright-portfolio-development/flowchart.htm] to a tree-view [<http://chart.copyrightdata.com/#top>]. Software implementations include the Public Domain Sherpa [www.publicdomainsherpa.com/calculator.html], the Copyright Genie [<http://librarycopyright.net/resources/genie>], and the Durationator (currently in beta test, at www.durationator.com).

guiding principle behind it is the conviction "that works produced for the U.S. Government by its officers and employees should not be subject to copyright," and the law itself states that "a 'work of the United States Government' is a work prepared by an officer or employee of the United States Government as part of that person's official duties" (17 U.S.C. . § 101).

Simple, right? But consider these complications:

* Are members of Congress "officers or employees of the United States government"? What about the president prior to the passage of the Presidential Records Act of 1978? I have never found a good answer. And even if their official records are in the public domain, many of the writings they produce will be political or private -- and hence protected by copyright.

* Public domain government works may include copyrighted works owned by others. Reproducing the entire unit could be an infringement of the copyrighted works included with the governmental work. For example, it was not an infringement for a court to include in its decision a color scan of the entire Superman story in Action Comics #1, but it might be an infringement if I were to reproduce and distribute the otherwise public-domain decision

[<http://court.cacd.uscourts.gov/CACD/RecentPubOp.nsf/ecc65f191f28f59b8825728f005ddf4e/d4d24ca39cb2bf3d8825741e00632755>].

* Government agencies may also own copyrights created by nongovernmental employees under contracts or grants.³

* Not all writings by government employees are in the public domain. If the work was written on the employee's own time, he or she may own a copyright in the work -- even if it relates directly to official duties.

* The U.S. Postal Service is not part of the government for copyright purposes. The U.S. Mint as well has special protections.

* NTIS (National Technical Information Service) can have a 5-year copyright term in documents it publishes.

2. Published versus unpublished

Most unpublished works have only been protected by federal copyright protection since 1978, and the same copyright duration on published and unpublished works only exists for works created since March 1, 1989. It is important, therefore, when determining copyright term to know if a work has been published.

³ CENDI's FAQ on copyright in government contracts and grants is the single best introduction to this topic: [www.cendi.gov/publications/04-8copy right.html#toc40](http://www.cendi.gov/publications/04-8copy%20right.html#toc40).

As an archivist, I thought I knew what unpublished meant. That was before I encountered copyright law, however. There was no definition of "publication" in the 1909 Copyright Act, but most commentators assume that it was something similar to the definition in the 1978 Act:

The distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending. The offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display, constitutes publication. A public performance or display of a work does not of itself constitute publication.

Straightforward, right? But then consider just two of the copyright cases that have hinged in part on whether a work was actually published:

* An allegedly infringed work reportedly has a title page stating that it was published. Furthermore, the defendants also claim that the work was distributed to more than 55,000 people. Nevertheless, the work is registered as an unpublished work with the Copyright Office. This is because the work was never offered to the public; instead, it was only to senior officials and leaders of the Mormon Church.⁴

* Television programs are broadcast to millions of people. But the definition above makes it explicit that merely broadcasting a program -- a public performance in copyright terms -- does not equal publication. Some television programs were "published" by offering copies to regional broadcasters for the purpose of "further ... public performance," but many more were only published at the time they were offered for sale to the public on VHS tapes. For example, the first episode of Star Trek was broadcast on Sept. 8, 1966, but it was only "published" according to the Copyright Office registration on Jan. 9, 1978. So its 95-year copyright term dates from 1978, not from 1966, when it was broadcast.

3. And what about 1923?

In January of each year, we release a new version of the copyright chart. The biggest change concerns the death date of authors of unpublished copyrighted works. In January of 2012, for example, the copyright in unpublished works written by authors who died in 1941 entered the public domain. That means any unpublished works by James Joyce, Virginia Woolf, and Louis Brandeis all rose into the U.S. public domain, since all died in 1941. But the date separating copyrighted and public domain published works never seems to be updated: it remains 1923. Works published before 1923 are, by and large, in the public domain (but see below); works published in 1923 and later may continue to be protected by copyright. Why doesn't this date change?

⁴ "LDS Church Sues Ministry," Salt Lake City Messenger #96 (Feb. 2001) [www.utlm.org/newsletters/no96.htm]. The copyright registration for the work in question in series TXu (for unpublished textual documents) can be found at http://cocatalog.loc.gov/cgi-bin/Pwebrecon.cgi?Search_Arg=TXu000779607&Search_Code=REGS&PID=6jv03L6_2ddy7Q0EDzocKYUi.

The cause of the delay is the Sonny Bono Copyright Term Extension Act. Prior to 1998, copyright in published works could last at most 75 years. That meant that on Jan. 1 1998, all works published in 1922 entered the public domain. (1922 plus 75 years equals 1997); all copyrights run through the calendar year. In 1998, the Sonny Bono Act extended the term of all existing copyrights by 20 years. Works already in the public domain (i.e., those published in 1922 and earlier) were unaffected, but those works from 1923 now had a 95-year term. These works will rise into the public domain on Jan. 1 2019 (1923 plus 95 years), and then each year thereafter, another year of published works will be added. This assumes, of course, that Congress does not elect in 2018 to extend once again the length of copyright.

And why, you might ask, did the Copyright Term Extension Act not affect the status of unpublished works? It did, by lengthening copyright terms by 20 years. But as part of the 1976 agreement that provided federal copyright protection to unpublished work, no unpublished work entered the public domain until Jan. 1, 2003, regardless of when its author died. On that date, unpublished works from authors who died before 1933 entered the public domain; without the term extension, it would have been authors who had died before 1953.

4. The myth of the pre-1923 public domain

Most people assume, and the copyright chart indicates, that works published before 1923 are in the public domain. But that isn't entirely true. Here is why.

For publication to have occurred, the work must be issued with the authorization of the copyright owner. A "pirated" copy of a work published in 1922 without the copyright owner's authorization is, for the purpose of copyright, considered to be unpublished. If a copyright owner subsequently authorized publication in, say, 1970, the work received a 95-year term starting on that date. Reproducing or otherwise using the 1922 work in a way that implicates one of the rights of copyright would infringe on the copyrights established by authorized publication in 1970.

There is one famous illustration of this problem: the song "Happy Birthday." In his justly praised essay, "Copyright and the World's Most Popular Song" (GWU Legal Studies Research Paper No. 1111624, Oct. 14, 2010; available at <http://ssrn.com.proxy.library.cornell.edu/abstract=1111624> or <http://dx.doi.org.proxy.library.cornell.edu/10.2139/ssrn.1111624>), Robert Brauneis notes that the lyrics to "Happy Birthday" were published in 1912 in *The Beginners' Book of Songs* and again in 1915 in *The Golden Book of Favorite Songs*. (The music is much older.) Yet according to the current owners of the presumed copyright in "Happy Birthday," these early publications were unauthorized. They argue that the first authorized publication of the lyrics to "Happy Birthday" occurred in 1935 and copyright runs from that date. Digitizing either the 1912 or 1915 volumes or singing the lyrics to "Happy Birthday" as found in the books would therefore infringe on the copyright first secured in 1935.

5. Even older copyrighted works

There are works even older than "Happy Birthday" still protected by copyright. These are works first published long after their creation but still with the authority of the copyright owner. Prior to 1978, an unpublished work had perpetual common law copyright protection; it never entered the federal public domain. When published with the authority of the copyright owner, however, it then received a federal copyright term the same as if it had been written just days before.

Probably the oldest work still protected by copyright in the U.S. is a letter from John Adams to Nathan Webb written on Sept. 1, 1755.⁵ Copyright in the Adams material was transferred to the Massachusetts Historical Society (MHS) in 1956. In that same year the MHS published a microfilm edition of the correspondence and registered the copyright with the Copyright Office. Copyright was renewed in 1984, which means that copyright in the Adams letter will expire on Jan. 1, 2052, almost 300 years after it was written.

6. The peculiar case of sound recordings

When the first copyright act was passed in 1790, it afforded copyright protection only to maps, charts, and books; other creative works such as music, painting, and illustrations were left unprotected. As new technologies enabling reproduction and distribution of content were developed and as specialized interest groups increased in influence, the scope of copyright protection was extended. For example, published music received protection in 1831, photographs in 1865, and motion pictures in 1912.

Sound recordings only became eligible for federal copyright protection starting on Feb. 15, 1972. U.S. sound recordings made before that date are still protected by state law. That means that all U.S. sound recordings made before 1972 are still protected; none have entered the public domain.⁶ Some states, including California, have statutory ("black letter") law on copyright; some, such as New York, have laws against bootlegging content; some rely totally on common law copyright protection. The common law approach applies judicial decisions and can differ not only state by state but judge by judge.

⁵ An online version of the letter can be found at www.masshist.org/publications/apde/portia.php?id=PJA01d003 as part of *Founding Families: Digital Editions of the Papers of the Winthrops and the Adamses*, ed. C. James Taylor. Boston: Historical Society, 2007 [www.masshist.org/ff].

⁶ The Edison company may have dedicated its copyright in some recordings to the public; see "The Messy, Messy Copyright Status of Edison Phonograph Recordings" [<http://blog.librarylaw.com/librarylaw/2008/07/themessymessy.html>]. In contradistinction, Sony has not given copyright in its earliest recordings to the government for the National Jukebox program, but instead has only granted "a gratis license to stream acoustical recordings." See www.loc.gov/jukebox/about.

Sound recordings in California are scheduled to enter the public domain on Feb. 15, 2047; all pre-1972 sound recordings will enter the public domain on Feb. 15, 2067.⁷ Note that the situation is different for foreign sound recordings, as described below.

Recently the Copyright Office recommended the federalization of pre-1972 sound recordings which would include the addition to the public domain of some sound recordings prior to 2067. (See the study and recommendations at <http://www.copyright.gov/docs/sound.>) The proposal has sparked controversy, and it is unclear whether any legislation introduced to implement the recommendations would succeed. For the time being, older U.S. sound recordings remain outside the public domain.

7. What about foreign works?

The situation with foreign works is in some ways simpler but also more complex. For most of its history, the U.S. expected foreign works to follow the same rules that U.S. works had to obey. In order to secure copyright protection, works first published between 1923 and March 1, 1989, had to follow a series of formalities. Failure to comply with the formalities (publication with copyright notice, renewal of copyright, manufacture of some works in the U.S., deposit of copies with the Copyright Office) could limit the copyright owner's rights or, in some cases, even end copyright protection. Few works published abroad complied with these requirements, and so it was assumed that most of them were in the public domain.

As part of its acceptance of the Berne Convention for the Protection of Literary and Artistic Works, the leading international copyright treaty, the U.S. "restored" copyrights in foreign works.⁸ Most works first published abroad are protected as if they had complied with all U.S. formalities. That means that most foreign works published since 1923 have been removed from the U.S. public domain and are now protected. Furthermore, pre-1972 foreign sound recordings are accorded federal copyright protection -- something U.S. sound recordings lack, as explained above.

In principle, the sweeping scope of copyright restoration makes the copyright status of foreign works simpler. If it is a foreign work published since 1922, there is a good chance that it is protected by copyright. Nevertheless, there are complications:

* What constitutes a foreign work? If a work was published in both a foreign country and in the U.S. within 30 days' time, the work is considered to be a U.S. work and would have needed to have followed U.S. formalities. One needs to know the bibliographic status of a work (was it published in multiple countries?) as well as its precise publishing history.

⁷ On California, see "Protection for Pre-1972 Sound Recordings Under State Law and Its Impact on Use by Nonprofit Institutions: A 10-State Analysis," CLIR Report #146 (Washington, D.C.: Council on Library and Information Resources, Sept. 2009:34). National termination of copyright is authorized by 17 U.S.C. § 301(c).

⁸ The provisions for copyright restoration are found in 17 U.S.C. § 104A. The constitutionality of the law was upheld by the Supreme Court in 2012 in its decision in *Golan v. Holder*.

* Similarly, if a work has been published in U.S., was it first published abroad more than 30 days before the U.S. publication? This would make it a "foreign work," and reproducing or distributing the U.S. edition that otherwise appeared to be in the public domain could be an infringement of the copyright in the original foreign edition. (See "Copyright Renewal, Copyright Restoration, and the Difficulty of Determining Copyright Status," DLib Magazine 14:7-8, July/August 2008 [<http://www.dlib.org/dlib/july08/hirtle/07hirtle.html>]).

* While most nations in the world belong to the Berne Convention or one of several other international copyright treaties specified in the law, not all countries are signatories. It is therefore necessary to know if one of the "special cases" in the copyright chart applies before concluding that copyright was restored.

* Copyright in a foreign work can also only be restored if the work itself was still protected by copyright in its home country on either Jan. 1, 1996 (if the country was already a signatory to one of the international copyright treaties), or on the date when it did accede to the agreement. That means that in order to determine the copyright status of the work in the U.S., one must know the copyright laws and, in particular, the copyright duration in the home country as of the relevant date.

* Sound recordings present a particular challenge. In many countries, sound recordings have only a 50-year copyright term. That would mean that sound recordings made in those countries before 1946 would not be eligible for copyright "restoration" and would not be protected by federal copyright law. One court, however, has concluded that these recordings are still protected by the state common law copyrights that govern U.S. recordings.

* While most observers have assumed that works published abroad which failed to comply with U.S. formalities were in the public domain, the Ninth Circuit Court that governs most western states has taken a different approach. It concluded that foreign works live in some sort of "copyright limbo" state of being neither in the public domain nor published. Under this court's reasoning, almost no foreign works would have had their copyright restored because few foreign works were actually in the public domain. In addition, works published prior to 1923 can still secure copyright protection, so long as their authors have died less than 70 years prior to the date when federal copyright is first secured. This actually happened in the case of *Société Civile Succession Richard Guino v. Renoir*, in which the court found that sculptures published in a book in France in 1917 were not in the public domain but could be registered for U.S. copyright in 1984. Anyone replicating that book today would therefore potentially be infringing the copyrights of the current copyright owner. Many hoped that the Supreme Court would address this issue in its recent decision on the constitutionality of removing works from the public domain, but unfortunately it failed to do so. (See, for example, the cogent arguments asking the Court to address the issue in the amicus brief filed by Google and found at <http://cyberlaw.stanford.edu/publications/golan-v-holder-google-inc-supremecourtamicus-brief-support-golan>.) In the Ninth Circuit Court states (Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington, and Guam

and the Northern Mariana Islands), only foreign works by authors who died more than 70 years ago (i.e., prior to 1942) are definitely in the public domain.

Summary

As the above examples indicate, it can be very difficult to determine the public domain status of a work in the U.S. even with the copyright chart in hand. A common adage is that if you ask a lawyer for advice, the answer is always, "It depends." The same is true for determining public domain status. Whether a work is in the public domain in the U.S. depends on a host of factors: its age, but also its publication history (if it even was published); the nationality of its author; and the circumstances of its creation. There are simple and clear-cut answers for many works, but a project that relies upon the public domain status of works still being exploited by a presumptive copyright owner would do well to consult with an intellectual property lawyer in order to assess accurately the risk faced in using our cultural commons as the Constitution authorizes.