Legally Speaking —
The Public Domain: Caution!

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reative works that are in the "pub-
lic domain" are not protected un-
der United States copyright law.
The objective of this article is to provide the reader with an understanding of the public domain and to make the reader aware of cer-
tain complexities involved in ascertaining whether a work is actually in the public do-
main. Determining whether a work is in the public domain may involve: (i) derivative
works, (ii) unpublished works, (iii) works in
the public domain in the United States that
are still protected by foreign copyright law,
(iv) works previously in the public domain that
have had copyright protection restored, and
(v) the duration of copyright protection and
statutory formalities under the Copyright Acts
of 1909 and 1976. This article will focus on
those creative works that enter the public do-
main when their statutory term of copyright
protection expires or through the failure of the
copyright owner to adhere to the statutory for-
malities of United States copyright law.

During the past twenty years the length of
copyright protection for creative works has
expanded through the passage and implemen-
tation of the 1976 Act, amendments effecting
renewal terms, and legislation involving the
restoration of particular foreign works that had
previously forfeited their copyright protection
in the United States. These legislative ac-
tions have saved creative works from being injected
into the public domain by continuing their
copyright protection and thereby preventing
them from falling into the public domain at
an earlier time. As a result of these actions,
the public domain has not expanded as rap-
idly as it had previously.

What is the public domain?
The public domain consists of creative
works that are not eligible for or are no longer
protected by United States copyright law.
Stated another way, this means that creative
works, such as textual material, artwork and
photographs, that are in the public domain are
not owned and controlled by a copyright
owner, but instead belong to the public at large.
When a work is in the public domain it may
be used in whole or in part by any member of
the public, without permission, payment for
such use and for any purpose. Public domain
materials are extremely important to print and
electronic publishers, whether profit or non-
profit, and academia. This is because the pub-
lic domain can provide an excellent source of
inexpensive content for new projects since the
user of such materials is not required to ob-
tain permission or make payment for the use
of public domain materials.

The 1976 Copyright Act, as well as its pre-
decessors, provides statutory copyright pro-
tection to copyright owners for original works
of authorship. Since the first Copyright Act
in 1790, which only permitted "maps, charts
and books" to be eligible for copyright pro-
tection, successive copyright acts and copy-
right office and judicial decisions have sig-
nificantly increased the types of creative works
protected by copyright law. International trea-
ties have also played a role in impacting copy-
right protection and the timing of when a cre-
ative work enters into the public domain; one
such example is that United States copyright
protection was recently restored to many for-
eign works that had previously fallen into the
public domain.

It is relatively easy to understand the con-
cept of the public domain; however, the ac-
tual determination of whether a particular
work or part of a work is in the public domain
is frequently more difficult. Therefore, one
must exercise caution before making use of a
public domain work in a new product or in
republishing a public domain work in its en-
tirety as a stand-alone product. The reason for
being cautious is that a publisher of public
domain material runs the risk of copyright
infringement liability if they mistakenly use a
work that is not in the public domain but is
instead still protected by copyright law.

Works that are automatically in the
public domain

Works that are not eligible for copyright
protection are automatically included in the
public domain as a matter of United States
copyright law. The 1976 Copyright Act states
that "[i]n no case does copyright protection
for an original work of authorship extend to
any idea, procedure, process, system, method
of operation, concept, principle, or discov-
ery..." Copyright protection is also not avail-
able for works that are not original, works that
are not fixed in a tangible medium of expres-
sion — such as conversations or speeches that
are not written or recorded, facts, utilitarian
objects, titles, plots, words and short phrases,
and works of the federal government. How-
ever, despite these restrictions, some of the
above-mentioned types of works may still be
protected by copyright law, such as a compila-
tion of facts, while others may be protected
by trademark, trade secrets or patent law.

Protected works that enter the public
domain

A work protected by copyright law will be
injected into the public domain when (i) statu-
tory copyright protection for the work expires,
(ii) copyright protection is abandoned by the
copyright owner, or (iii) copyright protection
is forfeited by the copyright owner's failure to
comply with statutory formalities.

Term of copyright protection

The curtailment of copyright protection in the
first instance depends on whether the creative
work is governed by the 1909 or 1976 Copy-
right Act.

1976 Copyright Act — Works created
after January 1, 1978

The 1976 Copyright Act, for the first time,
provided the same term of protection for pub-
lished and unpublished works. Previously,
unpublished works were protected by common
law copyright and such protection could be
perpetual unless the unpublished work was
eventually published. Today the statutory term
of protection is identical for published as well
as unpublished works. Furthermore, the 1976
Copyright Act abolished common law copy-
right protection with the effect that all creative
works are either protected by the 1976 Copy-
right Act or not copyright protected. Currently,
the statutory term of copyright protection is
as follows: (i) individual author — life of the
author plus 50 years, (ii) joint authors — 50
years from the death of the last to die.

<http://www.against-the-grain.com>
years after the death of the last surviving author; (iii) works made for hire — 75 years from publication or 100 years from date of creation; (iv) anonymous and pseudonymous works — 75 years from publication or 100 years from date of creation, however, this could be converted to the "life plus fifty" term under certain conditions. Therefore, under existing legislation, no creative work that was created under the 1976 Act will enter the public domain before the end of 2028. However, copyright legislation is currently pending, that if passed, will further extend the statutory term of copyright protection for most creative works by an additional twenty years.

1909 Copyright Act — Works created before January 1, 1978

Published Works

Works that were created before January 1, 1978 are those that are most likely to be in the public domain. Determining the public domain status of these works is complicated by a number of factors including: (i) a dual system of protection based on whether the work was published or unpublished, (ii) whether the initial 28 year copyright term of protection was renewed by the copyright owner in a timely manner, or (iii) whether the copyright was automatically renewed by a 1992 Amendment to the 1976 Copyright Act.

A published work will be in the public domain if its term of statutory protection has expired. Therefore, assuming a work was published more than 75 years ago — before January 1, 1923 — it will be in the public domain. To ascertain the public domain status of a work published subsequent to January 1, 1923, it is necessary to determine the specific date of publication, whether the work was copyright registered and if it was registered whether copyright protection was renewed following its initial protection term of 28 years. In the event the copyright owner failed to register the work or renew copyright protection for the renewal term, then the work would have passed into the public domain at publication or at the end of its initial 28-year term of copyright protection. On the other hand, if the copyright owner registered the work and renewed copyright protection in the work, then the work would be protected for a total term of 75 years. The formal necessity of renewing copyright protection was ended by a 1992 Amendment that granted automatic renewal for all works published after 1964; all post-1964 works have a 75 year term of copyright protection.

Unpublished Works

The 1976 Act also provided that any unpublished work that was created before January 1, 1978, would enjoy copyright protection for the life of the author plus 50 years, but that in no event would copyright protection expire for any unpublished work prior to December 31, 2002. Furthermore, in the event an unpublished work is published on or before December 31, 2002, the copyright law will then extend copyright protection through December 31, 2027.

Statutory Formalities

Failure by the copyright owner to place a copyright notice on the work was the statutory formality that most frequently caused injection of a work into the public domain. The 1909 Copyright Act was extremely harsh in this regard since it injected a work into the public domain if the work failed to include a copyright notice or contained a defective copyright notice. The courts, in an attempt to curtail such a draconian measure, adopted a distinction between "general" and "limited" publication by which they could prevent the owner of a creative work from losing both copyright protection and ownership of a work. General publication of a work meant that a particular work was published and available to the public as a whole, while limited publication meant that a work, when published, was only available to a limited class of persons and for a limited purpose. Through this distinction the courts prevented works of limited publication from being injected into the public domain and permitted the copyright owner to retain common law copyright protection of his/her creative work. Works of general publication were not as fortunate as they were injected into the public domain.

The 1976 Act significantly decreased the adverse consequences of publication without a copyright notice. This was accomplished by permitting the copyright owner to "cure" unintentional or relatively unimportant omissions of the copyright notice and those instances where relatively small quantities of the work were distributed to the public without notice. Publication without notice could have been cured if the copyright owner registered the work within five years from publication and if the copyright owner made reasonable efforts to add the copyright notice to all copies of the work previously distributed to the public. Today, under the Berne Convention Implementation Act, copyright notice is no longer mandatory for works published after March 1, 1989, and thus any works published after that date could no longer be injected into the public domain for failing to contain a copyright notice. However, even if the copyright notice is not a mandatory requirement, it is still advisable for a copyright owner to include the copyright notice on creative works.

What should one do when they think a work has been injected into the public domain because of the failure to place a copyright notice on the work? (1) Ascertain the date of publication and which copyright act controls the situation. (2) Investigate to be certain that the copy of the work you are looking at was not deemed to be one of "limited" publication. (3) Determine that the copyright owner did not cure the failure of omitting a copyright notice on the work.

Conclusion

The public domain is a complex issue with many nuances. Therefore, to preclude any liability for copyright infringement it is important for anyone wanting to use public domain materials to determine, with as much certainty as possible, that the work they want to use is "actually" in the public domain.

NB — This article is not legal advice. You should consult an attorney if you have legal questions that relate to your specific publishing issues and projects. Lloyd L. Rich is an attorney practicing publishing and intellectual property law. He can be reached at 1163 Vine Street, Denver, CO 80206. Phone: (303) 388-0291; Fax: (303) 388-0477; e-mail: rich@csn.net; Web Site: http://www.pulaw.com.