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LEGAL ISSUES

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Legally Speaking — The Public Domain: Caution!

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Creative works that are in the “public domain” are not protected under 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 certain complexities involved in ascertaining whether a work is actually in the public domain. Determining whether a work is in the public domain may involve: (i) derivative works, (ii) unpublished works, (iii) works in the public domain in the United States that are still protected by foreign copyright law, (iv) works previously in the public domain that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 domain when their statutory term of copyright protection expires or through the failure of the copyright owner to adhere to the statutory formalities of United States copyright law.

During the past twenty years the length of copyright protection for creative works has expanded through the passage and implementation 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 actions 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 rapidly 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 public domain can provide an excellent source of inexpensive content for new projects since the user of such materials is not required to obtain permission or make payment for the use of public domain materials.

The 1976 Copyright Act, as well as its predecessors, provides statutory copyright protection 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 protection, successive copyright acts and copyright office and judicial decisions have significantly increased the types of creative works protected by copyright law. International treaties have also played a role in impacting copyright protection and the timing of when a creative work enters into the public domain; one such example is that United States copyright protection was recently restored to many foreign works that had previously fallen into the public domain.

It is relatively easy to understand the concept of the public domain; however, the actual 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 entirety 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 discovery...” Copyright protection is also not available for works that are not original, works that are not fixed in a tangible medium of expression — 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. However, despite these restrictions, some of the above-mentioned types of works may still be protected by copyright law, such as a compilation 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) statutory 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 duration of copyright protection in the first instance depends on whether the creative work is governed by the 1909 or 1976 Copyright 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 published 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 copyright protection with the effect that all creative works are either protected by the 1976 Copyright 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

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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 that 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 this 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.publaw.com>.

Publication or Creation

Published between 1909 through 1922

Published between 1923 through 1963

Published between 1964 and 1978

Created on or after January 1, 1978

Created before 1978 but published on/after January 1, 1978

Copyright Duration

Initial term of copyright was 28 years and if renewed extended for an additional 28 years

Initial term of copyright was 28 years and if renewed copyright extended for additional 47 years

Initial term of copyright was 28 years and automatic renewal for additional 47 years

Sole Author — life of author plus 50 years

Joint Authors — life of longest surviving author plus 50 years

Work Made For Hire — 75 years from publication or 100 years from creation, whichever is less.

Anonymous/Pseudonymous — 75 years from publication or 100 years from creation, whichever is less. If name of author disclosed to Copyright Office then life of author plus 50 years.

Sole Author — life of author plus 50 years

Joint Authors — life of longest surviving author plus 50 years