April 2001

Copyright Corner-Importance of the Public Domain

Laura N. Gasaway

Law Library, University of North Carolina, laura_gasaway@unc.edu

Jack G. Montgomery

Western Kentucky University Libraries, jack.montgomery@wkyu.edu

Bruce Strauch

The Citadel, strauchb@earthlink.net

Bryan M. Carson

Western Kentucky University Libraries, bryan.m.carson@gmail.com

Follow this and additional works at: <https://docs.lib.purdue.edu/atg>

Part of the [Library and Information Science Commons](#)

Recommended Citation

Gasaway, Laura N.; Montgomery, Jack G.; Strauch, Bruce; and Carson, Bryan M. (2001) "Copyright Corner-Importance of the Public Domain," *Against the Grain*: Vol. 13: Iss. 2, Article 23.

DOI: <https://doi.org/10.7771/2380-176X.3463>

This document has been made available through Purdue e-Pubs, a service of the Purdue University Libraries. Please contact epubs@purdue.edu for additional information.

Where these groups diverge from the authors' position is on the issue of charging. The authors want a piece of the publishers' pie, but the database vendors and librarians want materials to be more readily accessible without the high cost of buying re-publication rights. This has especially pitted librarians against publishers. In fact, "Of all the dangerous and dot-complex problems that American publishers face in the near future -- economic downturns, competition for leisure time, piracy -- perhaps the most explosive one could be libraries. Publishers and librarians are squaring off for a battle royal over the way electronic books and journals are lent out from libraries and over what constitutes fair use of written material."²⁶

According to former Congresswoman **Pat Schroeder**, who is now the president of the **Association of American Publishers (AAP)**, "Publishers have to figure out a way to charge for electronic material [since] markets are limited. One library buys one of their journals. . . They give it to other libraries. They'll give it to others."²⁷ The **AAP** is concerned about such traditional library functions as inter-library loan, lending to patrons, and printing. Libraries respond by saying that printing an e-journal is not any different than photocopying a paper article. Ironically, some of the arguments that librarians use with publishers are the same ones that publishers used in *Tasini*.

According to **Nancy Kranich**, president of the **American Library Association**, "The reason we're in a bind is that the price of some of the materials has skyrocketed, without any explanation. . . The publishing community does not believe that the public should have the same

rights in the electronic world."²⁸ One example that Kranich used was the chemistry journal *Tetrahedron Letters*, which costs \$14,000 a year.²⁹ Computer databases can be even more expensive.

According to some, the publishers created their own problem when "they forced libraries to purchase online [subscriptions] for the public, keep the paper which still has to be processed and archived, and then had the gall to charge us more if we eliminated the paper copy."³⁰

At this point, it is clear that something needs to be done. The problem is to decide how to make changes that will be ac-

ceptable to everyone. Authors need to be paid. Publishers need to be able to re-publish their collective works. Database vendors need materials to present online, while libraries need publications and databases that are affordable and accessible. The U.S. Supreme Court will decide *Tasini*, but since this is only a request for summary judgment the case could drag on for years.

I don't have the answers, but hopefully we will find the solution soon. All of the players in the process are talking, and that is the best hope for resolution. After all, we all have a stake in keeping the Information Age going.

BUSCA, Inc.

P.O. Box 854, Ithaca, NY 14851
607-546-4247 (phone) / 607-546-4248 (fax)
email: info@buscainc.com

Mechanisms of High Temperature Superconductivity (HTSC)

By Peter Brusov

ISBN 5-7507-0774 (hardcover)

2 volumes, 1,389 total pages (English Language)
Rostov State University Publishing (Russia), 1999

\$199.00 (List Price)

BUSCA, Inc. is the U.S. distributor for this title

BUSCA supplies docs., grey lit., video, etc.

Our name means **SEARCH!**

Copyright Corner — Importance of the Public Domain

by **Laura N. Gasaway** (Director of the Law Library & Professor of Law, University of North Carolina, CB # 3385, Chapel Hill, NC 27599; Phone: 919-9621321, Fax: 919-962-1193) <laura_gasaway@unc.edu>
www.unc.edu/~unclng/gasaway.htm

What is the public domain and why is it important in copyright law? Nearly everyone has heard the term and has at least a vague notion of why it is important, but a deeper understanding of the value of the public domain is important for librarians, especially as copyright holders try to expand their rights.

A shorthand definition of a "public domain" work is that the work is the opposite of a copyrighted work. Works that are copyrighted have a bundle of rights associated with them. The owner of the copyright has the exclusive right to reproduce and distribute the work, adapt it, publicly perform and display

it and, if the work is a sound recording, to publicly perform it by digital means. If the work is within the public domain, there are no ownership rights associated with the work. It may be said that everyone and no one owns the work. Therefore, anyone may reproduce the work, distribute it, adapt it, etc.

The public domain is particularly important to scholars, researchers and librarians. There is no longer any need to seek permission for any uses of the work, so members of the public may freely use public domain works, not only for nonprofit educational and library purposes but also for research, scholarship and even to commercially exploit the

work. The statute does not define public domain. Instead, it details the conditions necessary for copyright protection, the types of works that are eligible for protection, the rights of copyright holders and the exceptions to these exclusive rights. Thus, a work not protected by copyright is necessarily a public domain work. One of the major complaints from the scholarly and research communities about term extension¹ was that adding an additional 20 years to the term of copyright for existing works delayed by two decades works passing into the public domain. In fact, it will be 2019 before any-

continued on page 64

Copyright Corner from page 63

thing else enters the public domain. When Congress enacted term extension, it made the provision retroactive for all works still under copyright. For example, at the end of 1998, all works from 1923 should have passed into the public domain; instead, they received an additional 20 years of copyright protection.

Many foreign published works which had been within the public domain in the United States have been restored to copyright status due to treaty obligations.² This amendment applies only to works that were not in the public domain in the country of publication. In other words, much of the world had a longer copyright term than did the United States, thus, foreign-published works were treated as having expired terms in this country but not in their country of publication. This amendment contains a number of protections for parties who relied on the public domain status of a work. Further, the restoration lasts only as long as the work would have been protected had it never entered the public domain (i.e., life of the author plus 50 or 70 years for most countries).

There are four large categories of works that are found within the public domain. First, the public domain is made up of works that do not meet the statutory requirements for copyright. Second, all works published in the United States on which the copyright has expired are no longer eligible for copyright protection. This represents the largest category of public domain works.

The third category is comprised of works in which the author never claimed copyright or which were dedicated to the public by being published without copyright notice prior to January 1, 1978. Prior to the current Act, publication without notice was a fatal flaw, and the author lost her rights. Since 1978, however, publication without notice does not destroy copyright protection, and the work is still protected.

United States documents comprise the fourth category. Section 105 of the Copyright Act simply states that works by the federal government are ineligible for copyright protection.³ This used to be an absolute, but around 1978 the National Science Foundation began to award grants to researchers that permitted them to hold personal copyright in works they would produce. These were predominantly NTIS documents. As the government has increasingly contracted with outside vendors to conduct studies, write reports, and the like, there are some government publications that appear with copyright notice – not a claim of government copyright but a claim from the private contractor that produced the work. Despite these anomalies, the huge majority of federal government publications are public domain. Because the Copyright Act

is a federal statute, it is silent as to state government publications. Thus, states are free to claim copyright in their documents if they so choose.

Many publishers and other producers of copyrighted works repackage federal government information and sell it commercially. Is this a problem? No, neither for the publisher/producer nor for the librarian and user of the information. The republisher of the government work does not get a copyright work in the public domain material. Any copyright claimed by such publisher is only for any new material added such as a preface, special index, or the like. Users of these works are free to reproduce the data or text as it appeared in the government document but not to reproduce the copyrighted material added by the republisher. In fact, for works that consist predominantly of federal government works, the notice of copyright should identify those portions of the work that embody works eligible for copyright protection.⁴ In other words, the government documents incorporated are not eligible for protection but any new material added may be, if it meets the requirements of originality and creativity.

Other publishers and producers do more than republish the work. They might prepare an adaptation from the government document. For example, if a publisher prepared a summary or condensation of a government report, that condensation is an adaptation, or if an artist took three government-produced photographs and created an artistic panel of those photographs, that is an adaptation. The adaptation would be eligible for copyright

protection if it meets the requirements for copyright. However, anyone else could still take the original government work and prepare his own adaptation.

Today it is difficult to place a work within the public domain. Since copyright automatically attaches when one creates a fixed, original work of authorship, how can one dedicate a work to the public? In reality, it may not be possible to do so. What one can do, however, is to include a note that appears on the work to the effect that the author makes no claim of copyright and hereby grants all users the right to make any use of the work.

There are several sources to locate various types of public domain works. A recently published work, *The Public Domain: How To Find & Use Copyright-free Writings, Music, Art & More* by **Stephen Fishman** details many of these sources.

Endnotes

1. In 1998, Congress passed the Sonny Bono Term Extension Act. See "Copyright Corner" in *Information Outlook*, January, 1999.
2. 17 U.S.C. § 104A (Supp. 1993).
3. The government may hold copyright in works by gift, bequest or assignment, however.
4. 17 U.S.C. § 403 (1992).

Cases of Note — Copyright - Implied Licenses

by **Bruce Strauch** (the Citadel) <strauchb@earthlink.net>

Website Wars! What happens when that friendly oral contract with the techies breaks down?

Holtzbrinck Publishing Holdings, L.P. v. Vyne Communications, Inc. 97 Civ. 1082 CKTDS; U.S. Dist. Ct. for SDNY, 2000; U.S. Dist. LEXIS 5444; Copy. L. Rep. (CCH) P 28, 081.

Holtzbrinck Publishing is the parent of **Scientific American** which in turn publishes the famous magazine as well as owning **W.H. Freeman**, publisher of college texts. **Vyne Communications** creates sites on the World Wide Web for third parties using content they provide.

Under an oral contract beginning in 1995, **Vyne** was hired to develop a website for **Freeman**. A year later, **Vyne**

transferred the site and all files to **Freeman's** computer without claiming any interest or ownership.

Also in 1995, **Holtzbrinck** negotiated another site for **Scientific American** to be serviced until it could be transferred in-house. **Vyne** was to do this for \$65,000 plus \$1,000 for the in-house transfer. The site was launched in April, 1996 on **Vyne's** computer. At the prompting of **Scientific American**, a copyright notice in the name of **SA** was put on the site.

The **SA** site became more complicated over time, and the parties decided to reduce the oral agreement to a writing.

That's lawyer talk. As you can imagine, the oral agreement swelled rather than reduced.

continued on page 65