

What's in the Public Domain

By Mark Litwak

Many people are confused about which works are in the public domain and which are not. Materials protected by copyright, such as books, articles, photos, videos and artwork, enter the public domain when their copyright term expires. At that time, material previously protected is free to use without seeking any permission.

It can be difficult to determine what is in the public domain. Just because material is posted on the internet, for example, does not place it in the public domain. Likewise, material that does not bear a copyright notice is not necessarily in the public domain. Furthermore, every country has its own copyright laws, and those laws vary, so material that is in the public domain in one country is not necessarily in the public domain in other countries. This has become an increasingly important concern as companies like Netflix often desire worldwide rights to enable them to distribute content across the globe.

Moreover, what is in the public domain has changed over the years as the U.S. Congress has repeatedly modified copyright law, usually increasing the term of protection and reducing what goes into the public domain. The major studios lobbied to extend copyright protection to protect their classic films even though many of them are based on fairy and folk tales, Shakespeare's plays and other public domain materials like the Bible that were freely available to them to make into movies without having to pay a dime for any underlying rights.

Under the 1909 Copyright Act, published works received a copyright term of 28 years, and that could be extended for another 28 years if the owner filed a timely renewal. Many copyright holders, however, forgot to file renewals and consequently copyright usually lasted no more than an average of thirty-two years¹ before the law was changed as of 1978 when the United States moved to a single term of copyright.² Compare that with the term of copyright protection since 1978

¹ Under the 1909 Copyright Act, published works received a maximum of two twenty-eight-year copyright terms, with the second term beginning only if the work was timely renewed. Since many works were never renewed, the average term for all published works was only thirty-two years. Lessig, *Free Culture*, 24 (2004).

² Likewise, works registered or first published in the United States published between 1924 and 1977 without a copyright notice are in the public domain.

which lasts for the lifetime of the author plus seventy years for individuals. Consequently, a 20-year-old author who lives to age 90, would have 140 years of protection. If a work is written by multiple authors and published today, the copyright will not expire until 70 years after the last surviving author dies. For an anonymous work, a pseudonymous work, or a work made for hire, the copyright endures for a term of 95 years from the year of its first publication or a term of 120 years from the year of its creation, whichever expires first.

On top of the already complex system of rules for determining how long copyright lasts, Congress decided as of 1996 to retroactively restore copyright protection to some foreign works that had fallen into the public domain under U.S. law. Under the provisions of the Uruguay Round Agreements Act (URAA), certain foreign works whose U.S. copyright protection had been lost because of the failure to comply with U.S. formalities like filing for renewal, were restored. The restoration is automatic, and the duration of the restored term is based on the term of protection the work would have otherwise had.

While determining what is in the public domain often requires considerable research and a deep understanding of copyright law, there are some general guidelines one can follow. As a general rule, as of 2019, United States copyright has expired for all works published in the United States before 1924. In other words, if the work was published in the United States in 1923 or earlier, you are allowed to use it in the United States without permission. As the years go by, more work will fall into the public domain. So next year, works published before 1925 will expire.

In the United States, works created by a federal government employee within the scope of their duties are in the public domain. Consequently, many government publications and films are available for use for the cost of duplication. There are numerous films made for the Army, EPA and other government agencies that are freely available. Perhaps one of the best bargains are the amazing images from JPL and NASA. However, not everything owned by the federal government is public domain. Works created by third parties and assigned to the United States Government can be protected under copyright. And the federal government is legally entitled to claim copyright for use for its works outside the United States depending on the laws of each foreign nation.³

³ Copyright and the Public Domain § 2.04

The National Archives has an extensive library of public-domain photos and footage. However, not everything in their collection is in the public domain. It is common practice for image libraries like Getty Images to provide access to public domain content and charge for it.

The copyright office provides a brochure about the duration of copyright:

<https://www.copyright.gov/circs/circ15a.pdf>

Cornell University publishes a chart that is useful in determining what material is in the public domain in the United States. <https://copyright.cornell.edu/publicdomain>

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