

COPYRIGHT, THE DURATION OF PROTECTION AND THE PUBLIC DOMAIN

Copyright and the public domain

Copyright gives legal protection to creators of “works of the mind” by granting an exclusive right to a creator to control production and use of the work by others. The creator has the right to control the reproduction (making copies), distribution of copies, public performance, broadcast and translation of their work. It covers literary, dramatic, musical or artistic works. To qualify for copyright protection, the work must be original and “fixed” in some tangible or material form e.g. written down or recorded.

In addition, a set of rights, known as related rights, subsist in sound recordings (for the person who undertakes the musical arrangements), in film and video (the film producer), in broadcasts and cable transmissions (the service provider), and in some countries in typographical arrangements of a published edition (the publisher).

Copyright is an economic property right, in other words, it is not a personal or human right. This means that copyright may be assigned or licensed to a third party e.g. an author may assign the copyright in a book they have written to a publisher in return for payment. The publisher then owns the copyright and controls the use of the book e.g. distribution and translation. Copyright can also be inherited by the heirs of a deceased author.

The purpose of copyright is to enable creators and entrepreneurs to receive financial reward for their works or for the works of others. This is an incentive to encourage further creativity and innovation and a thriving artistic and cultural environment which in turn benefits society. This purpose is borne out in the title of the world’s first copyright law, “An Act for the Encouragement of Learning” (1710), also known as the English Statute of Anne. The Statute of Anne also recognised another important principle; that the exclusive right given to creators should be limited in time (in this case, fourteen years from the date of first publication). After this time, the works were no longer protected by copyright and so fell into the public domain.

The public domain is considered to be part of the common cultural and intellectual heritage of humanity and can be a source of inspiration, imagination and discovery for creators. Works in the public domain are not subject to any restrictions and may be freely used without permission for commercial and non-commercial purposes. For example, a publisher can produce special low-cost editions of a book in the public domain, a songwriter can parody a well-known ballad without fear of being sued, a teacher can distribute copies of a poem for students in their class, a library can digitise a set of public domain photographs for their online local history exhibition.

The duration of copyright protection

The duration, or term, of copyright protection has been extended many times since the Statute of Anne. The international legal standard, as set out in the Berne Convention (1886) which establishes the ground rules for national copyright protection, is now life of the author plus fifty years after the death of the author. This duration also applies in the more recent WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (1995), known as TRIPS.

There are exceptions to this basic rule for certain categories of works. For film, the term is 50 years after the work has been made available to the public, or if it has not made available, then 50 years after the making of the film. These terms also generally apply to anonymous works or where the author or rights owner is not a “natural person” e.g. an institution or a

publisher. For photographs and works of applied art, the term of protection is 25 years from the making of the work.

However, under Berne, it is possible for a country to exceed the term of life of the author plus fifty years, and for members of the WTO bound by the TRIPS agreement, life plus fifty years is a *minimum* standard to which all countries must adhere. The majority of countries in the world adhere to the rules under Berne i.e. life of the author plus fifty years post mortem, followed by a large minority who have chosen to extend the term of protection to life of the author plus seventy years post mortem.

Practice: extending the term of protection

Life of the author plus fifty years after their death was considered in the Berne Convention and in TRIPS, both internationally negotiated treaties, to constitute a fair balance between the interests of authors and rights owners and the needs of society. It provided a monopoly right to most creators to benefit not only themselves during their lifetimes, but to benefit the heirs of their estate as well e.g. their children and grandchildren.

During the 1990's however, the term of protection was extended in many countries by a further twenty years i.e. to life of the author plus seventy years. This was accelerated by two of the world's two largest trading blocs, the European Union and the United States, who in the global economy both have influence beyond their shores. In 1993, the European Union (EU) "harmonised" the term of protection of copyright and related rights which meant that most EU member states were required to increase the term of protection to life of the author plus seventy years. In 1998, the Copyright Term Extension Act extended protection in the United States to match for general copyrights and to ninety-five years for works made for hire (related rights). As copyright came increasingly within the realm of trade agreements, and as trade agreements between the EU/US and third countries typically required the longer term, the dye was cast for many other countries around the world. (For more information, see Copyright and Trade Agreements).

Observers from many quarters think that life plus seventy years is excessive and that the original purpose of copyright, to provide an incentive to creators, has been lost sight of. One notable feature of the current policy-making environment is the presence of big business and the influence of the "copyright industry" on global and national copyright laws. In fact, the US Copyright Term Extension Act (1998) became known as the "Mickey Mouse Protection Act" while opponents, who launched a challenge to the Act in the US Supreme Court, adopted "Free the Mouse" as an unofficial slogan. The copyrights on Mickey Mouse, Donald Duck and their other Disney world-character friends were due to run out in the following years and they would have entered the public domain. The Walt Disney Company, ironically built on adaptations of public domain works such as Snow White, threw their weight behind the extension to protect their profitable business interests for another two decades. The result affected tens of thousands of works of all kinds which were poised to enter the public domain in the US, but instead remained under private ownership until at least 2019.

In the US, the extension was retroactive for all works still under copyright. In Europe, the extension was retroactive not only for works still in copyright, but also for works that had passed into the public domain within the previous twenty years. In other words, some works in the public domain were re-protected, representing a windfall for the estates of deceased creators. This led to a number of European court cases such as the dispute between a music publisher and a publicly funded theatre over performance rights in the Puccini masterpiece opera *La Bohème*¹, and famously, an emergency amendment to the Irish copyright act to

¹ *Hessen v G Ricordi & Co Buhnen- und Musikverlag GmbH* (C360/00), 2002 WL 30004, Celex No. 600C0360, EU: Case C-360/00, ECJ, Feb 28, 2002

ensure that "Rejoyce Dublin 2004", a festival to celebrate the centenary of Bloomsday, the day on which James Joyce's novel Ulysses was set, could go ahead as planned. Copyright in the works of James Joyce published during his lifetime had expired in 1991, fifty years after his death. For three and a half years, they were in the public domain. As a result of the 1993 European legislation, copyright was revived until 2011, leading one to ask how this can be an incentive for James Joyce, deceased since 1941, to create new works.

Policy issues for libraries

Libraries have long been concerned about the erosion of the public domain, which provides a fertile source of content upon which creators can build new works, as well as enabling libraries to provide public access to the world's great artistic and literary masterpieces e.g. through digitisation projects. However, the public domain must be nurtured and protected from encroachment. As custodians of the world's cultural and scientific heritage, librarians should be advocates for the public interest, should educate users on the value of the public domain and provide leadership to policy makers. This includes advising on the hidden costs to libraries of copyright protection such as extra fees for licensing and document supply, book and journal prices, equipment levies and the time consuming and frustrating process of copyright clearance, as well as the benefits of a rich public domain for education and society to flourish.

For developing and transition countries, where the issue of accessing information is a key determinant in their development, term extensions mean that information that traditionally belonged to everybody is removed from collective ownership with grave consequences for education and innovation. Furthermore, the extension of the term disproportionately benefits rights owners and their estates in developed nations, at the expense of users of information and potential new creators in developing countries, reflecting the information flows from North to South.

"A rich public domain and fair access to copyright protected material enhances creativity and the production of new works. It is often assumed that economic growth benefits from ever-stronger intellectual property rights while some concession must be made to copyright exceptions for purely social reasons. In fact this is a false dichotomy. Many industries require access to copyright material for the purposes of research and development, education, software or hardware interoperability. A lack of reasonable access can actually hurt economic growth." IFLA Committee on Copyright and other Legal Matters

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Note: sources listing the term of protection in different countries may not always be complete or accurate