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EDDL 5101
Educational Technology for Learning

Welcome to the Public Domain

The term “public domain” refers to creative materials that are not protected by intellectual property laws such as copyright, trademark, or patent laws. The public owns these works, not an individual author or artist. Anyone can use a public domain work without obtaining permission, but no one can ever own it.

An important wrinkle to understand about public domain material is that, while each work belongs to the public, collections of public domain works may be protected by copyright. If, for example, someone has collected public domain images in a book or on a website, the collection as a whole may be protectable even though individual images are not. You are free to copy and use individual images but copying and distributing the complete collection may infringe what is known as the “collective works” copyright. Collections of public domain material will be protected if the person who created it has used creativity in the choices and organization of the public domain material. This usually involves some unique selection process, for example, a poetry scholar compiling a book —*The Greatest Poems of e.e. cummings.*

There are four common ways that works arrive in the public domain:

On January 28, 2014, Stanford’s Program in Law, Science & Technology hosted the discussion, “Congratulations, you have an app – now what? App Development and Marketing from A-Z.” The discussion featured a panel of high level, experienced practitioner who provide tips, checklists and a road map for addressing legal considerations relating to mobile apps, including best practices for mobile TOU and Privacy Policies, platform considerations and much more.

- the copyright has expired
- the copyright owner failed to follow copyright renewal rules
- the copyright owner deliberately places it in the public domain, known as “dedication,” or
- copyright law does not protect this type of work.

The following section looks at each of these routes into the public domain more closely.

Contents

Expired Copyright

Copyright has expired for all works published in the United States before 1923. In other words, if the work was published in the U.S. before January 1, 1923, you are free to use it in the U.S. without permission. As an example, the graphic illustration of the man with mustache (below) was published sometime in the 19th century and is in the public domain, so no permission was required to include it within this book. These rules and dates apply regardless of whether the work was created by an individual author, a group of authors, or an employee (a work made for hire).

Because of legislation passed in 1998, no new works will fall into the public domain until 2019, when works published in 1923 will expire. In 2020, works published in 1924 will expire, and so on. For works published after 1977, if the work was written by a single author, the copyright will not expire until 70 years after the author's death. If a work was written by several authors and published after 1977, it will not expire until 70 years after the last surviving author dies.

Year-End Expiration of Copyright Terms

Copyright protection always expires at the end of the calendar year of the year it's set to expire. In other words, the last day of copyright protection for any work is December 31. For example, if an author of a work died on June 1, 2000, protection of the works would continue through December 31, 2070.

The Renewal Trapdoor

Thousands of works published in the United States before 1964 fell into the public domain because the copyright was not renewed in time under the law in effect then. If a work was first published before 1964, the owner had to file a renewal with the Copyright Office during the 28th year after publication. No renewal meant a loss of copyright.

If you plan on using a work that was published after 1922, but before 1964, you should research the records of the Copyright Office to determine if a renewal was filed. Chapter 13 describes methods of researching copyright status.

Dedicated Works

If, upon viewing a work, you see words such as, “This work is dedicated to the public domain,” then it is free for you to use. Sometimes an author deliberately chooses not to protect a work and dedicates the work to the public. This type of dedication is rare, and unless there is express authorization placing the work in the public domain, do not assume that the work is free to use.

An additional concern is whether the person making the dedication has the right to do so. Only the copyright owner can dedicate a work to the public domain. Sometimes, the creator of the work is not the copyright owner and does not have authority. If in doubt, contact the copyright owner to verify the dedication. Information about locating copyright owners is provided in Chapter 13.

Clip Art Compilations

Generally clip art is sold in books, digital bundles, or from websites, and is often offered as “copyright-free.” The term “copyright-free” is usually a misnomer that actually refers to either royalty-free artwork or work in the public domain. Keep in mind that much of the artwork advertised as copyright-free is actually royalty-free artwork, which is protected by copyright. Your rights and limitations to use such artwork are expressed in the artwork packaging or in the shrink-wrap agreement or license that accompanies the artwork. These principles are discussed in more detail in Chapter 3.

If the artwork is in the public domain, you are free to copy items without restriction. However, even if the artwork is in the public domain, the complete collection may not be reproduced and sold as a clip art collection because that may infringe the unique manner in which the art is collected

(known as a compilation or collective work copyright).

Copyright Does Not Protect Certain Works

There are some things that copyright law does not protect. Copyright law does not protect the titles of books or movies, nor does it protect short phrases such as, “Make my day.” Copyright protection also doesn’t cover facts, ideas, or theories. These things are free for all to use without authorization.

Short Phrases

Phrases such as, “Show me the money” or, “Beam me up” are not protected under copyright law. Short phrases, names, titles, or small groups of words are considered common idioms of the English language and are free for anyone to use. However, a short phrase used as an advertising slogan is protectable under trademark law. In that case, you could not use a similar phrase for the purpose of selling products or services. Subsequent chapters explain how this rule applies to specific types of works. For more information on trademarks, see Chapter 10.

Facts and Theories

A fact or a theory—for example, the fact that a comet will pass by the Earth in 2027—is not protected by copyright. If a scientist discovered this fact, anyone would be free to use it without asking for permission from the scientist. Similarly, if someone creates a theory that the comet can be destroyed by a nuclear device, anyone could use that theory to create a book or movie. However, the unique manner in which a fact is expressed may be protected. Therefore, if a filmmaker created a movie about destroying a comet with a nuclear device, the specific way he presented the ideas in the movie would be protected by copyright.

EXAMPLE

Neil Young wrote a song, “Ohio,” about the shooting of four college students during the Vietnam War. You are free to use

the facts surrounding the shooting, but you may not copy Mr. Young's unique expression of these facts without his permission.

In some cases, you are not free to copy a collection of facts because the collection of facts may be protectable as a compilation. For more information on how copyright applies to facts, refer to Chapter 2.

Dear Rich : Chapter Headings and Book Titles

Dear Rich: Dear Rich: I wrote a nonfiction book and it turns out that one of the chapters has the same title as a book on a similar subject. The person who wrote that book also has seminars and a DVD using the same title. I seem to remember that there's no copyright on titles—but don't know how to make sure. Am I infringing?

The short answer is "No." Copyright law won't protect the book title. Trademark law (with rare exceptions) only protects book titles when used on a series of books. (The author could federally register the title for her seminars but she hasn't done so, yet.) Even if the author could prove trademark rights, she would have to show a likelihood that purchasers would be confused or misled. Proving likelihood of confusion seems difficult since most consumers won't see your chapter heading until after they have purchased your book. All that said, the author or publisher may still fire off a C&D letter should they learn of your chapter title (and may even dredge up claims of unfair competition). If you're concerned about getting hassled, the Dear Rich Staff suggests that in the short term, avoid using the chapter heading in promotional materials for your book; and in the long term—assuming you do a second printing of your book—change the heading.

Are Local Laws in the Public Domain?

For decades, publishers of model codes—sample laws that a city or state could adopt—have claimed copyright. State and local laws and ordinances based on such codes often contain copyright notices in the publisher's name or some other indication the publisher claims the copyright. In a significant victory for public domain proponents, a federal appellate court found that model codes enter the public domain when they are enacted into law by local governments.

The case came about when Peter Veeck posted the local building codes of Anna and Savoy, two small towns in north Texas, on his website. Both towns had adopted a model building code published by Southern Building Code Congress International, Inc. (SBCCI). Veeck made a few attempts to inspect several towns' copies of the Building Code, but he was not able to locate them easily.

Eventually, Veeck purchased the model building codes directly from SBCCI; he paid $72 and received a copy of the codes on disc. Although the software licensing agreement and copyright notice indicated that the codes could not be copied and distributed, Veeck cut and pasted their text onto his website. Veeck's website identified the codes, correctly, as the building codes of Anna and Savoy, Texas.

SBCCI sued Veeck for copyright infringement. Veeck lost in the trial court, but ultimately won on appeal. The court held that:

- The law is always in the public domain, whether it consists of government statutes, ordinances, regulations, or judicial decisions.
- When a model code is enacted into law, it becomes a fact—the law of a particular local government. Indeed, the particular wording of a law is itself a fact, and that wording cannot be expressed in any other way. A fact itself is not copyrightable, nor is the way that the fact is expressed if there is only one way to express it. Since the legal code of a local government cannot

be expressed in any way but as it is actually written, the fact and expression merge, and the law is uncopyrightable.

(*Veeck v. Southern Building Code Congress International, Inc.*, 293 F.3d 791 (5th Cir. 2002).)

The Veeck decision's reasoning has the effect of placing every model code that has been adopted by a government entity in the public domain. Any person may reproduce such a code, as adopted, for any purpose, including placing it on a website. However, model codes that have not been adopted by any government body are protected by copyright.

Loss of Copyright From Lack of Copyright Notice

Under copyright laws that were in effect before 1978, a work that was published without copyright notice fell into the public domain. If the work did not include the word "Copyright" or a © (a "c" in a circle) and the name of the copyright owner, the work would enter the public domain. This rule was repealed; copyright notice is not required for works first published after March 1, 1989 (although works first published prior to that date must still include notice). Just because you find a copy of a book without a copyright notice doesn't mean that the work is in the public domain. It's possible that the copy you are viewing is unauthorized or that the notice has only been removed from a very small number of copies, both of which are excusable. It is also possible that the author followed a copyright law procedure for correcting the error. And, if you're using text from a journal, anthology, newsletter, or magazine published before March 1, 1989, check to see if there is a copyright notice either for the individual article or for the whole publication. Either type of notice will prevent the work from falling into the public domain.

Copyright law does not protect ideas; it only protects the particular

way an idea is expressed. What's the difference between an idea and its expression? In the case of a story or movie, the idea is really the plot in its most basic form. For example, the "idea" of the movie Contact is that a determined scientist, seeking to improve humankind, communicates with alien life forms. The same idea has been used in many motion pictures, books, and television shows including *The Day the Earth Stood Still*, *The Abyss*, and *Star Trek*. Many paintings, photographs, and songs contain similar ideas. You can always use the underlying idea or theme—such as communicating with aliens for the improvement of the world—but you cannot copy the unique manner in which the author expresses the idea. This unique expression may include literary devices such as dialog, characters, and subplots.

In a 2003 case, the producers of the television show *Survivor* claimed that their show was a "new genre" of television show with a unique format combining the elements of "voyeur verité, hostile environment in the deserted island sense, building of social alliances, challenges arising from the game show element, and serial elimination." They sued to prevent a similar reality-competition show called *Celebrity*.

The court found that this genre of television show was an unprotectable idea, as is any genre. In other words, anyone could produce a show based on the basic idea of contestants in a "reality" situation eliminating each other. *Celebrity* would infringe on *Survivor* only if it copied a substantial amount of the specific details of *Survivor*, which it did not do. There were many differences between the two shows—for example, the way the contestants were eliminated—and *Celebrity* had an audience participation element and a comedic tone, unlike the serious *Survivor*. (*CBS Broadcasting, Inc. v. ABC, Inc.*, 2003 U.S. Dist. LEXIS 20258 (S.D. N.Y. 2003).)

Dear Rich : Borrowing a Plot Line

Dear Rich: Dear Rich: I was going to write a book that partially borrows the plot of another book. My book will give credit to the original author and will refer to characters in the original book by name. Is

this okay or forbidden?

Let's start with a question: Forgetting about copyright for a moment, if you were the author of a book and someone "borrowed" your plot and characters in another book, how would you feel? And not only that, what if the person who copied your stuff credits you—as if you endorsed the whole thing. If you're like most authors, you'd probably be mad. You'd probably talk to a lawyer (or write to the Dear Rich Staff). The lawyer would tell you that it's probably an infringement, but no one can predict with certainty whether it is or isn't (or whether it's a fair use). Our guess is that you would be so mad that you would file a lawsuit.

Who will publish your book? Okay, so let's assume that the author files a lawsuit. Your publisher—assuming you were lucky enough to find one in these troublesome days of publishing—(or your publisher's insurer) would likely ask you to pay the costs of the lawsuit based on the indemnity provision in your contract. So even if you win the lawsuit—or you settle—you probably will have given up most of your royalties to pay the attorneys. And if you lose the lawsuit then you pay the attorneys, and your book goes unpublished.

Can you win the lawsuit? Okay, now for the fine print. Is it legally permissible to borrow? Maybe. Some plots—boy meets girl, boy loses girl, boy gets girl—and some characters —good cop, bad cop—are so stock, that they are considered merely "ideas," not original expressions. In other cases, the author may create something transformative that qualifies as a fair use. (Keep in mind these are issues raised at trial, so the attorney is billing as you prove your point.) There are many cases on the subject of borrowing plot and characters, and you may want to peruse a copyright treatise before penning your opus. And of course, as always, disregard all of the legal blather, above, if the book or character you are copying—for example, Sherlock Holmes—is in the public domain.

The Merger Doctrine

There is an exception to the principle that you cannot copy the unique expression of a fact or idea. If there are a limited number of ways to express the fact or idea, you are permitted to copy the expression. This is known as the "merger doctrine"—meaning the idea and the expression are merged or inseparable. For example, in the case of a map, there may be very few ways to express the symbol for an airport other than by using a small image of an airplane. In that case, you are free to use the airport symbol. Similarly, there may be a limited way of expressing a rule about the public domain, for example, the statement, "Works published in the U.S. before 1923 are in the public domain." The fact and the expression are inseparable so you are free to copy the expression. As you can imagine, this is a heavily litigated area, and many companies have butted heads to determine the boundaries of the merger doctrine. For example, Microsoft and Apple litigated over the right to use the trash pail icon as a symbol for deleting computer materials. A federal court of appeals ruled that design constraints made the trash can an unprotectable element of the graphic interface and that Apple could not claim infringement solely based on another company's use of a similar icon. (*Apple Computer, Inc. v. Microsoft Corp.*, 35 F.3d 1435 (9th Cir. 1994).)

U.S. Government Works

In the U.S., any work created by a federal government employee or officer is in the public domain, provided that the work was created in that person's official capacity. For example, during the 1980s, a songwriter used words from a speech by then-President Ronald Reagan as the basis for song lyrics. The words from the speech were in the public domain so the songwriter did not need permission from Ronald Reagan. Keep in mind that this rule applies only to works created by federal employees and not to works created by state or local government employees. However, state and local laws and court

decisions are in the public domain. (See "**Are Local Laws in the Public Domain?**" above.)

Some federal publications (or portions of them) are protected under copyright law, which is usually indicated on the title page or in the copyright notice. For example, the IRS may acquire permission to use a copyrighted chart in a federal tax booklet. The document may indicate that a certain chart is "Copyright Dr. Matt Polazzo." In that case, you could not copy the chart without permission from Dr. Polazzo.

Publishing Legal Cases and Pagination

As noted above, federal, state, and local laws and court decisions are in the public domain. (See "Are Local Laws in the Public Domain?" above.) However, legal publishers have attempted to get around the public domain status by claiming that unique page numbering systems are copyrightable. These publishers argued that you can copy and distribute a court decision, but you cannot copy the page numbering, which is crucial to the official citation system used by the courts. For many years, Lexis and other computerized legal research systems could not cite to the official page numbering system used by West publications. In a 1994 case, West Publishing Company sued when a legal publisher, Matthew Bender, incorporated West's page numbering system on a CD-ROM product. A court of appeals ruled that the use of West's pagination was not protectable and in any case, the page citation copying was permitted as a fair use. As a result of this ruling, you are free to copy a publisher's reproduction of court decisions and page numbering. (*Matthew Bender & Co. v. West Publishing Co.*, 158 F.3d 693 (2d Cir. 1998). But see also *West Publishing Company v. Mead Data*, 799 F.2d 1219 (1986).)

The table below may help you determine public domain status.

Table for Determining Public Domain Status

Works published in the U.S. before 1923	In the public domain
Works published in the U.S. after 1922 but before 1964	Initial term of 28 years. If not renewed during the 28th year, the work falls into the public domain.
Works published in the U.S. after 1922 but before March 1, 1989	Generally, if a work was published without copyright notice under the authorization of the copyright owner and the law does not provide an exception for the omission, the work is in the public domain

In this Section:

- **Copyright Overview (NOLO)**
  - **The Public Domain**
    - **Welcome to the Public Domain**

The content for the Copyright and Fair Use Overview section is from **NOLO**, with much of it taken from the book **Getting Permission** (October 2010) by **Richard Stim**. Thanks!

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Rich Stim
Attorney at law, Nolo Legal Editor, Blogger — Dear Rich: Nolo's Patent, Copyright and Trademark Blog, Author, Nolo Press

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