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6 The Public Domain and Libraries: History, Contexts, Threats and Opportunities

Abstract: This chapter provides an introduction to the history and philosophical justifications for the existence of the public domain in copyright legislation around the world, with a primary focus on common law jurisdictions. It discusses expanded definitions of the public domain that have been proposed in the literature and examines current and evolving threats to the public domain. The intersection of libraries with the public domain is examined, specifically libraries' roles in collecting, preserving, sharing, and defending the ever-expanding body of knowledge. Issues related to other types of organizations committed to upholding the public domain, all in the name of public interest, are explored. Some attention is given to Indigenous and traditional knowledge areas with the growing recognition that they have not been well served by copyright law.

Keywords: Public domain (Copyright law); Public interest

Introduction

For much of the world, the first day in January is not just the beginning of a new year, it is also Public Domain Day, the day when, in most countries, a new cohort of previously in-copyright works enter the public domain, the term used to describe the collective body of creative works for which intellectual property restrictions including copyright do not apply. The expiration of copyright in particular works enables a wide variety of creative activity: suddenly all the works that were protected by copyright can be used for any purpose, with potentially some exceptions in select jurisdictions where moral rights might extend beyond the duration of copyright. The impact of the change is enormous: plays and music can be adapted and publicly performed, books can be digitized and made available to all, and such activities are no longer limited to organizations with funds to pay for the rights.

In addition to works for which the period of copyright protection has lapsed, the public domain is also generally understood to include any intellectual content that is not protected by copyright either because it does not meet the originality threshold for copyright coverage, for example facts, data, words or names, or because it is exempted from copyright from the moment of creation as is the case with government publications in certain jurisdictions. Public Domain Day is celebrated in different ways including book readings and performances by

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a variety of organizations, such as Project Gutenberg, Communia, the Internet Archive, Creative Commons, and by libraries around the world.

In the United States, 2019 was a particularly significant year. Due to a copyright term extension enacted in 1998, 2019 marked the entry of works in the US into the public domain for the first time in over 20 years. In the years before 2019, the Center for the Study of the Public Domain at Duke University had been marking each Public Domain Day with gloomy posts on their website (web.law.duke.edu/cspd/) entitled "What Could Have Entered the Public Domain". The posts lamented the ever-increasing length of copyright in the United States, outlining what could have been open to reuse if the public domain had not been extended for an extra 20 years by the *Copyright Term Extension Act* (CTEA) of 1998. The CTEA extended the term of copyright in the US from 50 years after the year of death of the author to 70 years, resulting in a 20-year lull where not one work entered the public domain in the United States.

In contrast to earlier posts, the 2019 blog post for Public Domain Day on the Center for the Study of the Public Domain was jubilant and featured a long list of items that had become available in the public domain in the United States. Works included those by Malcolm X, Lucy Maud Montgomery, A.A. Milne, Virginia Woolfe, and many others, most of which were already in the public domain in other countries. Duke University and other organizations continue to publicise concerns about the length of copyright by posting details of works which would have been available if the term had not been extended. Through its activities, the Center for the Study of the Public Domain demonstrates the power of the public domain and the harm that can result if the term of copyright continues to be extended in countries around the world as it has in the United States.

This chapter explores the literature and presents a brief historical context around the public domain, with a primary focus on common law jurisdictions, and the related concepts of orphan works. The central role for libraries in defending the public domain is emphasised as they work to facilitate access to knowledge and speak out in defence of the public good in an increasingly digital world. Current threats to the public domain are identified and defined, such as legislated copyright term extensions that result in long stagnant periods where the public domain stops growing. Several current projects that seek to preserve and nurture the public domain are presented. Finally, possible measures to mitigate term extensions and strategies are suggested for libraries and librarians to help ensure a healthy and robust public domain in the years to come.

Rationale for Copyright and the Public Domain

Some of the common philosophical justifications that have been used for copyright law are outlined to demonstrate the relationship between the public domain and copyright.

According to Murray and Trosow, there are two main philosophical justifications for copyright law: rights-based theories and utilitarianism. Rights-based theory, as expounded by John Locke, holds "that each person has a natural entitlement to their person and to the fruits of their labour" (2013, 7). The theory, firmly rooted in the concept of individual ownership, could be claimed as a justification for perpetual copyright, in that a natural entitlement could be framed as lasting forever, but Murray and Trosow note that even Locke himself was not an advocate for perpetual rights. A stronger rationale for the existence of the public domain as it relates to copyright is reflected in the theory of utilitarianism. Utilitarianism, which is commonly associated with philosophers Jeremy Bentham and John Stuart Mill, is a school of thought that posits that all actions should be judged on their consequences; the ideal consequence is that the greatest possible happiness or benefit to society is produced. In copyright, the theory is most famously reflected in the clause in the US constitution that "empowers Congress to enact intellectual property laws as a tool for general benefit – that is, 'to promote the progress of science and the useful arts'" (Murray and Trosow 2013, 7). The public domain as the antithesis of copyright fits best within the utilitarian rationale, since works not protected by copyright become a public good to be used for any purpose. Public domain works become major drivers for knowledge creation resulting in significant benefits for society.

Another concept central to the utilitarian approach to copyright law and the public domain is the public good. In his book *Moral Panics and the Copyright Wars*, William Patry argues that "bad business models, failed economic ideologies, and the acceptance of inapposite metaphors have led to an unjustified expansion of our copyright laws", and that rectification of the problem requires a return to the guiding, utilitarian purposes of the law (2009, xvi). In the book's introduction, Patry uses the example of a UK parliamentary speech from 1841 by Sir Thomas Macaulay spoken in opposition to a bill in the British House of Commons to increase the term of copyright. Macaulay argued that the rights in question should only be granted if doing so would benefit the public good. "Copyright is a right that exists only by government decree, created for the public good, which must be regulated by the government to ensure that the public purpose is fulfilled" (Patry 2009, xvi–xvii). According to Patry, current conversations on copyright reform ought to focus on a question that is rarely considered: "Will the proposal actually serve the public good by promoting learning?" Such a conversation would present a strong argument against the ever-extending term

of copyright which damages the public good by delaying the entry of works into the public domain.

An important term related to public domain is the commons. The term refers to early English practices around shared land and is frequently used when describing the public domain, recognizing shared knowledge resources which belong to all for the benefit of the public good. The expression digital commons is used to describe data and information created and stored online and made available for wide use, sharing and development, optimising the Internet's ability to connect an immense collection of content with potential users.

Murray and Trosow (2013) note that a more modern rationale for copyright is economic. Copyright law provides economic incentives to encourage the creation of new works. The economic argument is commonly used to justify the ever-expanding term of protection for copyright by governments around the world. For example, in the review of the *Canadian Copyright Act* in 2018–2019, the argument was often cited, even to the point that the Standing Committee on Canadian Heritage was charged with undertaking a subsidiary study to the copyright review focused entirely on remuneration models for creators. One of the main themes in the final report issued by the Committee was a suggestion that there is a significant "value gap", or "disparity between the value of creative content enjoyed by consumers and the revenues that are received by artists and creative industries" and that one way to help fill that gap would be to extend the term of protection by 20 extra years (Dabrusin 2019, 22).

A key perspective on the economic rationale for copyright has been provided by Landes and Posner (1989). They present a detailed model arguing that the economics behind copyright law promote economic efficiency and describe the economic rationale as a balancing act between the benefits of protection and the drawbacks of limiting access:

> Copyright protection, the right of the copyright's owners to prevent others from making copies, trades off the cost to limiting access to a work against the benefits of providing incentives to create the work in the first place. Striking the correct balance between access and incentives is the central problem in copyright law. For copyright law to promote economic efficiency, its principal legal doctrines must, at least approximately, maximize the benefits from creating additional works minus the losses from limiting access and the costs of protection (Landes and Posner 1989, 326).

The economic model resembles the utilitarian model in postulating that there is no benefit to providing economic protection to works for which no market exists and can be used to justify limits on copyright owners' rights. However, due to the power dynamics and relationships that frequently drive policy change, the economic model is more often used by content owners to support the argument

that changes in favour of the copyright holders are needed. The use of economics has been particularly noticeable over the last few decades as publishers and creator groups lobby to "update an outmoded copyright regime for the digital age" (Trosow 2003, 222) to provide a solution for perceived reduced compensation.

Traditional and Indigenous Knowledges

It is worth noting that the rationales and concepts central to copyright and the public domain are based upon Western philosophies that do not align with many principles that underpin traditional and Indigenous knowledges. The World Intellectual Property Organization (WIPO) noted in 2010, for example, that within traditional knowledges "there are often social restrictions on who, if anyone, can use certain knowledge, and under what circumstances. Some knowledge is considered secret, sacred, and an inalienable part of indigenous cultural heritage from time immemorial to time unending" (WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore 2010, 2).

Trevor Reed describes how non-Indigenous uses of traditional knowledge through legal measures allowable under copyright exceptions parallel other abuses against Indigenous peoples, and remain problematic: "Thus, telling Indigenous peoples' stories for them, singing their songs, and publishing their oral histories without permission diminishes Indigenous sovereignty in the same ways dispossession of Indigenous lands and the assimilation of Indigenous peoples into the settler-state diminished that sovereignty" (Reed 2021, 18). The public domain has been used as a justification for the appropriation of traditional and Indigenous knowledges for centuries. Ruth Okediji provides the following example of how works purportedly in the public domain are exploited: "scientists, fashion designers and artists proceed on the assumption that these cultural knowledge goods and/or traditional knowledge are freely available for use. Given this background, developing countries and Indigenous groups justifiably perceive the quintessentially progressive concept of the public domain with deep hostility" (Okediji 2018, 4).

Okediji asserts that it is crucial to recognize the "importance of a public domain and to acknowledge that limits to traditional knowledge rights must be carefully circumscribed to advance clearly exceptional national goals" (Okediji 2018, 16). She proposes modification of the three-step test for Indigenous knowledge reuse, in conjunction with the use of specialized exceptions and limitations for copyright designed around a tiered approach to traditional knowledge, to help reconcile the conflict between copyright, the public domain and traditional knowledge.

A Limited Term Right

The concept of the public domain has been central to copyright from its origins. In England, the Statute of Anne in 1710 recognized that some works were free of rights and established the limited duration of copyright, despite not using the term public domain until later. Throughout the centuries following the Statute of Anne with its copyright term of fourteen years and an additional fourteen-year renewal option, the duration and scope of copyright protection expanded. By the 20th century, most countries had similar copyright terms referring to the "life of the author plus 50 years", that became the base for international copyright through the Berlin Act, the 1908 revision to the Berne Convention for the Protection of Literary and Artistic Works which was first accepted in 1876.

The Berne Convention was one of two major international intellectual property treaties negotiated in the late 19th century, the other being the Paris Convention for the Protection of Industrial Property. The Paris Convention covered patents, trademarks, designs, and unfair competition, while the Berne Convention covered author rights. The first signatories to the Berne Convention consisted primarily of European countries, with much of the rest of the world following over the next 100 years. One of the main advocates for the Berne Convention was Victor Hugo, the author of famous works such as *Les Misérables* and *Le bossu de Notre-Dame* and the founder of the Association littéraire et artistique internationale, the organization primarily credited with the creation of Berne. Hugo was a proponent of copyright as a limited right and an early supporter of a related concept, that of the *domain public payant*/paying public domain. As described in a 1949 UNESCO report, the paying public domain is a concept whereby, "when a work falls into the public domain, it cannot be freely used, as it could be in the case with the normal public domain. Instead, a user must pay a royalty, generally to the authors' societies, who utilize such funds for cultural purposes or to aid needy authors or their families" (UNESCO 1949, 1). Numerous countries adopted, and have since abolished, paying public domain systems. However, the system is still in place in some countries around the world, primarily in South America and Africa, for example Algeria, Kenya, Rwanda, and Paraguay (Dulong de Rosnay and Maurel 2018, 298).

The Berne Convention has undergone multiple revisions over the years, as summarized by the Association of Research Libraries:

> The treaty has been revised five times since 1886. Of note are the revisions in 1908 and 1928. In 1908, the Berlin Act set the duration of copyright at life of the author plus 50 years, expanded the scope of the act to include newer technologies, and prohibited formalities as a prerequisite of copyright protection (Association of Research Libraries n.d.).

The role that international treaties like the Berne Convention play in standardizing copyright around the world is a crucial piece of the public domain puzzle. Copyright laws are territorial, and the legislation and its contents will be different in each country. The term of copyright is a good example of how countries opt for different approaches: many countries set the term of copyright to 50 years after the year of death of the creator, the minimum term required by Berne, while others have terms that are life plus 60, 70, 80, 95, 99 and even 100 years. The size and nature of the public domain differs depending on the country where the work is being used. For example, works by Frida Kahlo have been in the public domain since 2004 in all countries with life plus 50-year terms, but will not enter the public domain in other countries like the US, Mexico, Japan, Brazil, and Russia until 2024 or later.

While laws and the term of copyright may differ, international treaties like the Berne Convention ensure that countries adhere to a set of basic principles and minimum protections in their national laws. Importantly, Berne requires that countries grant protection, as a rule, for 50 years after the author's death. Most countries around the world, as signatories of Berne, meet at least the base standard specified in the treaty. While the public domain is not the same in every country, there is standardization as a result of Berne and other treaties like the Universal Copyright Convention (UCC) and the Trade-Related Aspects of Intellectual Property Rights [hereinafter TRIPS] (World Trade Organization n.d.), an agreement administered by the World Trade Organization.

More recently, trade agreements, frequently those involving the United States, have required the inclusion of provisions relating to copyright, like the proposed, but never implemented, Anti-Counterfeiting Trade Agreement (ACTA), the Australia-United States Free Trade Agreement (AUSFTA), and the United States-Mexico-Canada Agreement (USMCA). Trade agreements like these are one of the major drivers behind the ever-lengthening term of copyright. For example, the original draft of the Trans-Pacific Partnership (TPP) and the USMCA required that any members of the agreement extend their minimum term of copyright to 70 years after the year of death of the creator. The inclusion of copyright in trade agreements is a notable shift in the evolution of copyright internationally. Trade agreements are less transparent than the public legislative process and involve negotiations often behind closed doors with the potential to undermine the standardization achieved by international instruments like Berne.

Trade agreements can be a way for governments and rights-holders from specific jurisdictions to ensure that their interests are reflected in the laws of other countries. For example, "One of the specific objectives for negotiating ACTA was to extend the existing international IP enforcement norms in the Agreement on Trade Related Aspects of Intellectual Property (TRIPS) to the online environment, and this is due to major US and EU copyright industry rightsholder groups

seeking stronger powers to enforce intellectual property rights across the world" (Electronic Frontier Federation 2017). Another example of the power of trade agreements is the term extension that was proposed in the TPP, which was clearly a requirement imposed by the US. The US withdrew on 3 January 2017, and the subsequent trade agreement (the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) no longer required members to extend their copyright terms. It is worth noting that international pressure can significantly influence copyright laws, including the term, outside of formal trade agreement negotiations, for example in the case of South Africa's recent, and now abandoned, copyright reform (Heald 2020).

While extending the term of copyright is often conflated with economic benefits for creators, there are significant costs for consumers of copyrighted works. A study commissioned by the New Zealand government in 2009 to consider the economic impact of expanding the term of copyright from 50 to 70 years as required at that point in the TPP found that the average yearly cost to expand the term of copyright would be 55 million dollars per year. The methodology used in this study "estimated the total cost for New Zealand of copyright term extension for books and recorded music in terms of net present value, that is, the equivalent amount of money that, if invested today, would cover all future costs for every year. The study considered a period of 70 years for recorded music (the extended copyright term, which is generally calculated from time of production) and 110 years for books. The study estimated a net present value of $208–239 million for recorded music and $263–300 million for books" (New Zealand. Ministry of Economic Development 2015).

Term extensions represent a major issue for libraries around the world. A longer term means that there are fewer works in the public domain, complicating library initiatives that relate to digitization and access, and exacerbating the issues that surround a class of materials that make up a significant portion of library collections: orphan works.

Commercial Availability, Orphan Works, and Lost Culture

In the first chapter of his book *The Public Domain: Enclosing the Commons of the Mind*, James Boyle uses the contents of the Library of Congress catalogue to demonstrate how the term of copyright extends well beyond the commercial viability of most works. In a search of the catalogue, Boyle finds that while it represents a vast repository of material, most titles, perhaps as much as 95 % in the case of books, are commercially unavailable, and many do not have locatable rightsholders:

> Much of this, in other words, is lost culture. No one is reprinting the books, screening the films, or playing the songs. No one is allowed to. In fact, we may not even know who holds the copyright.... These works – which are commercially unavailable and have no identifiable copyright holder – are called "orphan works". They make up a huge percentage of our great libraries' holdings (Boyle 2008, 9).

Orphan works make up a smaller percentage of library collections than those not commercially available, but the amount is significant enough to impact both libraries and other cultural institutions. The Orphan Works FAQ page on the European Commission website states that "orphan works represent a substantial part of the collections of Europe's cultural institutions and refers to "British Library estimates that 40 percent of its copyrighted collections – 150 million works in total – are orphan works". A snapshot of percentages and number of orphan works can be found in the UK Intellectual Property Office report *Copyrighted Works: Seeking the Lost*. The report categorises orphan works using evidence provided by the BBC, the British Library and consultation respondents, and provides a conservative estimate of 91 million orphan works (UK Intellectual Property Office 2014, 62–3).

Jurisdictions around the world have both licensing and legislative solutions to the orphan works issue. Two countries that employ licensing solutions are Canada (cb-cda.gc.ca/en/unlocatable-owners) and the UK (gov.uk/guidance/copyright-orphan-works). These systems allow individuals and organizations to apply and pay for a license to use orphan works after they have conducted a diligent search for the rightsholder. Another attempted solution has been undertaken through an EU directive, Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on Certain Permitted Uses of Orphan Works [hereinafter the Orphan Works Directive] (Directive 2012/27/EU 2012), which allows for some permitted uses of orphan works across the EU. An Orphan Works Database is available. A single publicly accessible online portal has been established by the European Union Intellectual Property Office (EUIPO), the EU Out-of-Commerce Works portal. Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on Copyright and Related Rights in the Digital Single Market [hereinafter the DSM Directive] (Directive (EU) 2019/790 2019), introduced a legal framework to support cultural heritage institutions in the digitisation and dissemination, including across borders, of out-of-commerce works.

Licensing systems are burdensome for libraries, as the processes in place for clearing permissions for orphan works around the world are complicated, expensive, and impractical for most digitization projects in galleries, libraries, archives, and museums. For example, "the BBC's Archive Trial reported that checking 1,000 hours [of programming] of the most straightforward content – factual programming – for rights clearance cost them 6,500 person hours. Extrapolating from avail-

able figures on clearance and the associated costs, the UK Intellectual Property Office has estimated that it would take between £6.6 billion (7.3 € billion) and £8.4 billion (9.3 € billion) to fully search and clear the content of the BBC archives and the British Library" (Giblin and Weatherall 2017, 227). Many institutions use both library-specific and general copyright exceptions like fair use and fair dealing to digitize and make orphan works available to their users, but the spectre of copyright restrictions looms large over any orphan-works-related projects and services.

Losing Control: Licensed Works and Digital Rights Management (DRM)

Another threat to the ability of libraries to provide access to works in the public domain is the shift from direct purchasing in the print environment to the licensing or renting of collections of digital works that has become the standard for libraries. Under the new model, works are hosted on password-protected external platforms and often locked down using Digital Rights Management (DRM), or digital locks. Artificial technological controls are imposed by publishers or aggregators, that control how users either access or copy digital works. Common library examples include allowing access to an ebook to one user at a time or limiting the amount of an ebook that users can print or download on a computer. The publishers exert control over use, including downloading and printing, but also searchability and indexing, and control the fate of items purchased by libraries into the future. Unlike libraries' own digitization projects, where the copyright status of works entering the public domain is carefully tracked and documented, collections of licensed works lack transparency, and make it difficult or even impossible to extract content and make it freely available when it does enter the public domain.

Complicating the issues, circumventing DRM is frequently prohibited under copyright law, thus limiting the ability of individuals to remove controls from copyright-protected works and preventing users from exercising rights like fair use or fair dealing, and other exceptions to copyright infringement. Legislation like the US 1998 *Digital Millennium Copyright Act* (DMCA) limits the upholding of DRM only in works that are covered by copyright. While DRM should not extend to public domain works, the problem remains that many works originally published with DRM may be trapped in perpetuity by technological controls. Publishers may also mix public domain and copyrighted works in one DRM-protected resource, compounding issues that relate to use and reuse.

James Neal argues in his paper "The Copyright Axis of Evil: The Academic Library Must Confront Threats to User Rights" that, in combination with other

factors, the "rampant licensing of information and new technological controls" are making it very difficult for libraries to serve their users. Neal poses the question: "Will licensing and contract supplant the role of copyright in governing access to information in our nation's libraries?" (Neal 2013, 120). With licensing comes a myriad of issues, but the main impact on the public domain is that libraries lose control over future uses of works. They are unable to provide free, unhindered access to works and cannot guarantee ongoing public access. Hence, even more works within the public domain may be lost for generations to come.

In addition to the threat to the public domain discussed in this section, the next section of this chapter will show that any erosion of exceptions and limitations to copyright can be seen as damaging to the public domain.

Shifting and Expanding the Definition of the Public Domain

The public domain has traditionally been expressed as a negative concept, characterized by the absence or expiration of copyright. Even in the Berne Convention it is mentioned only in the section relating to a work whose term has ended. In opposition, there has been a move in recent years to define the public domain from a more positive stance. James Boyle has suggested: "The public domain is not some gummy residue left behind when all the good stuff has been covered by property law. The public domain is the place we quarry the building blocks of our culture. It is, in fact, the *majority* of our culture" (Boyle 2018, 40–41).

The public domain is often discussed, like all aspects of intellectual property, in metaphorical terms. Expanding on Lyman Ray Patterson and the work of others in the early 90s proposing an expanded view of the public domain, Yochai Benkler characterized the traditional definition of the public domain as being an enclosed domain, and instead recommended a more functional definition: "The public domain is the range of uses of information that any person is privileged to make absent individualized facts that make a particular use by a particular person unprivileged" (Benkler 1999, 362). Samuelson further illustrated the expansion as a "contiguous terrain" to the public domain, which she described as "a penumbra of privileged uses under fair use, experimental use, and other copyright rules that permit unlicensed uses and sharing of information to take place" that are "outside the public domain in theory, but seemingly inside in effect" (Samuelson 2003, 149).

Similarly, the Public Domain Manifesto drafted by the organization Communia in 2010 and endorsed by over 3,500 individuals and organizations as of June 2021, recommends a more active defence of not only what it calls the "structural

public domain", the traditional definition, but the related area that includes "the voluntary commons and user prerogatives" embracing works for which rights are relinquished by the copyright holder and uses made under exceptions and limitations to copyright. A 2014 study by Andres Guadamuz for WIPO's Committee on Development and Intellectual Property found that in nine countries, creators can opt to choose to put content into the public domain. However, the study also found that "in four of them the law permits voluntary declarations leading to the inclusion of a work in the public domain, while in the other five, the question was open to interpretation, with varying degrees of certainty, whether negative or positive" (Guadamuz 2014, Annex 31). Rather than giving up copyright completely, creators around the world are more likely to choose to apply licences such as those developed by Creative Commons to ensure their works are free to be used by all, very much in the sense of the "voluntary commons" proposed by the Public Domain Manifesto. The legality of the approach is largely untested in the courts.

Treating the exercising of user rights as synonymous with uses of the public domain could enable a shift from the passive concept of a collection of works lying in wait for someone to access them to an active undertaking. Works would be pulled into the public domain through reliance on fair dealing, fair use, or other exceptions instead of merely falling into the public domain.

Libraries and Archives – Ensuring Access to the Public Domain

Libraries and archives have always sought to preserve and ensure access to the documentary heritage. In fact, early copyright legislation recognized and emphasized this important role (as discussed in Katz 2017). Long before digitization and the Internet, libraries were trusted access points for works in the public domain, whether they were early editions of classics with hundreds of subsequent reprints or fragile copies of works long out of print and unavailable elsewhere. Katz stresses that historical contexts "reiterate that copyright law was never intended to hinder librarying, and that the public interest in the various social and cultural interactions that libraries facilitate was preserved and etched into the copyright system from its very beginning" (Katz 2017, 87).

Victoria Owen points out in: "Who Safeguards the Public Interest in Copyright in Canada", that the Statute of Anne included the subtitle "An Act for the Encouragement of Learning by Vesting the Copies of Printed Books in the Authors or Purchasers of Such Copies, during the Times therein Mentioned" and suggests that libraries and educational institutions generally are entities specifically com-

mitted to the encouragement of learning. Owen further states that "librarians espouse a professional ethos on access" which is built on support for the public interest and that statements from library associations frequently "conflate the public interest with access to works and freedom of expression", a core tenet of librarianship (Owen 2012, 806–7).

While libraries once existed primarily to acquire and provide access to physical materials, digitization has provided an important avenue for connecting people to the public domain. Libraries are increasingly taking on the role of making rare and unavailable works available and accessible to all via the Internet, through digitization and the creation of digital collections, and increasingly, as publishers, as demonstrated by the existence of the Library Publishing Coalition.

The Internet and the Changing Nature of the Public Domain

The Internet both enables the dissemination of public domain works and provides a low-barrier publishing platform for billions of creators worldwide. Organizations around the world, like the Internet Archive, the Digital Public Library of America, Hathitrust, Google through the Google Books Library Project, Librivox, and Project Gutenberg, have made billions of public domain works available to library users and to the world. While galleries and museums are known for monetizing, limiting and selling access to digitized versions of public domain works in their collections, several are releasing content for free on the Internet, with the J. Paul Getty Museum in Los Angeles, the Rijksmuseum in Amsterdam, the National Gallery of Art in Washington, the Tate Modern in London, the Met in New York, the Museum of New Zealand, the Paris Musées/City of Paris' Museums and many others making vast digital repositories of images available.

National libraries have similarly opened up their collections, for example the Library of Congress in the US, the National Library of Bulgaria, the Biblioteca Nationala a Romaniei in Romania, while large-scale digital projects have also emerged, like Europeana, the Bibliotheca Alexandrina in Egypt, Google Arts & Culture, the GLAM – Wikimedia initiative by Wikipedia, and the Digital Library of the Caribbean. Libraries have developed focused digital collections, such as the British Library's various collections of historical maps and the New York Public Library's collection of Hebrew illuminated manuscripts. All these initiatives enable the searchability and reusability of images from a wide variety of sources and include many galleries, libraries, and museums. There are also independent specialized collections that focus on specific types of content, like the Petrucci

Music Library for musical scores. Finally, blogs like Open Culture help bring the public's attention to the collections. And this is just a tiny snapshot of the billions upon billions of public domain works that are now available in ever-growing collections across the internet.

The Internet has changed the context for copyright and the public domain. It provides a low-cost, accessible publishing and sharing platform available to anyone with a connection. The Internet derives value from sharing content and knowledge, and from building connections and relationships around that content (Lessig 2004). The Internet has created a new type of commons with similarities to the public domain, with massive numbers of new works being made available for free and licensed in ways that facilitate reuse. These works include open-source software, open access scholarly resources, open educational resources, and open data. All of this sharing is enabled by licences like the General Public License for software and Creative Commons licences for cultural goods, which produces a more fine-tuned copyright structure by replacing "all rights reserved" with "some rights reserved" for those who want to allow others to share and build upon their works (Boyle 2008).

Libraries and Like-Minded Organizations: Upholding and Defending the Public Domain

In addition to being an access point for materials, libraries play another important role regarding the public domain. Library associations have for decades made it part of their work to speak in defence of user rights and the public interest aspects of copyright and the public domain. This is not surprising, as the exceptions within copyright that shape users' rights are precisely the means for maintaining the importance of public interest within the balance of rights within copyright (Owen 2013). Boyle suggests that aside from librarians and some academics, until the 21st century there were few other groups taking up anything other than "an industry position" regarding the public domain (Boyle 2008, 243).

There are many examples of library advocacy. In 2012, the International Federation of Library Associations and Institutions (IFLA) and a number of other international library associations released a statement on the Trans-Pacific Partnership Agreement (TPPA) negotiations, expressing concern that "agreements like ACTA and the TPPA erode the fundamental balance in copyright law and do not seriously consider and protect the interest of the broader community in having equitable access to knowledge and cultural expression". Similarly, in response to the release of the text of the United States-Mexico-Canada Agreement (USMCA), now known in Canada as CUSMA, the Canadian Association of Research Libraries

(CARL) released a statement decrying the extension of Canada's copyright term from 50 years after the death of the creator to life plus 70.

There are fewer organizations committed to defending the user side of copyright than to upholding copyright holders' rights. Libraries must remain central in defending the benefits of the public domain for the sake of the public interest. It is not an easy task, as it depends largely on intangibles that are difficult to qualify and quantify but the role played by libraries in seeking to ensure that creators of tomorrow can continue to build on their predecessors' works through performance and adaptation is a vital one.

Traditional libraries are not alone in defending the public domain. There are research centres at universities worldwide that are committed to intellectual property and who weigh in during specific jurisdictions' copyright reviews to dispel the myth that extending the duration of copyright can produce greater economic benefits for creators. In recent years, other types of organizations have also made important contributions.

As with libraries, many of the organizations involved in both the dissemination of public domain works and the creation of new, openly licensed works on the Internet, such as the Internet Archive and Creative Commons, are actively involved in defending and advocating for both the maintenance and expansion of the public domain. They are joined by organizations like the Communia Project, the Open Knowledge Foundation, the Open Rights Group, La Quadrature du Net, Knowledge Ecology International, and the Electronic Frontier Foundation (EFF), and by scholarly initiatives like the *Center for the Study* of the Public Domain at the Duke Law School and the Public Domain Review as well as work by the Instituut voor Informatierecht/Institute for Information Law at the University of Amsterdam, the Centro Nexa su Internet & Società/Nexa Center for Internet & Society at the Politecnico di Torino/Polytechnic University of Turin and the Haifa Center of Law and Technology. This is just a sample of the many organizations around the world that help ensure that the public domain stays in the public eye by celebrating its virtues and protecting it through robust scholarship and sound policy.

What Does the Future of the Public Domain Look Like and What Can Be Done About It?

With looming copyright reforms and trade agreements always on the horizon, the public domain continues to be threatened. Nevertheless, the achievements in the digital realm are considerable, and there is optimism about the future. The

public domain has, inside and outside of libraries, legions of supporters, who are working tirelessly to ensure that the public domain continues to grow every year. Committed individuals and organizations are lobbying governments, creating resources, promoting tools like the CC0 "no rights reserved" dedication, and ensuring that works that have made it into the public domain are available and accessible to individuals around the world.

As stated in this chapter, the best way to maintain a robust public domain is to stop the expansion of the term of copyright, and to stay as close to the Berne minimum term as possible. However, there are other measures that countries can take to mitigate the harm of a longer term of copyright. The first would be to ensure that copyright users have a strong suite of exceptions and limitations available in their national laws, including open-ended exceptions like fair use. One positive development was the creation of the first user-rights-focused international treaty in 2013: the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled. The treaty establishes international norms that require countries to provide exceptions in their national laws to facilitate the availability of works in accessible formats, such as braille and audiobooks, for persons who are blind, visually impaired or print-disabled. Canada like other governments has adapted its existing legislation accordingly.

Hopefully, the Marrakesh Treaty will be one of many to address user rights. IFLA's "Treaty Proposal on Copyright Exceptions and Limitations for Libraries and Archives" includes many elements that would strengthen the public domain, such as exceptions that relate to the right to use orphan works and limitations on liability for libraries and archives. The proposal also includes elements that both disallow contracts and allow for the circumvention of technological protection measures in cases where such uses would be permitted using another exception or limitation to copyright. IFLA is seeking adoption of the proposal's inclusions by WIPO Member States.

Another action that could help libraries in an environment defined by an ever-lengthening term of copyright is a return to copyright registration (Boyle 2008). In the book chapter "Copyright Formalities: A Return to Registration", Dev Gangjee argues that the public interest may be served with a return to a registration system, as it would improve the quality of the ownership information available, foster licensing for registered works, and potentially help solve issues related to orphan works (Gangjee 2017). Depending on how a registration system were to be implemented, it could also be used to mitigate the harm caused by term extensions. For example, if a country decided to extend copyright, it could also require registration from a rightsholder for the ability to exploit the additional term of protection. This would leave most works in the public domain, while allowing rightsholders to exploit works if they were still commercially viable. Yet,

a return to registration is unlikely, as it would require a major re-examination of the international copyright system.

The public domain would benefit from giving creators more power over their works, specifically through rights reversion mechanisms. Rights reversion, if written into legislation, can allow creators or their estates to reacquire control over their works after a specific period of time, or if certain conditions are met. Rights reversion exists in the copyright law of many countries (Towse 2017, 487), and can bolster the public domain by giving creators more control over their works and allowing them to make works open access with a CC license or a public domain dedication. As articulated by the Authors Alliance, "society benefits from widespread access to scholarly works and the preservation of our cultural heritage. Public access to knowledge is restricted when works are out of print, undigitized, or otherwise unavailable. Reversions of rights can help authors remedy these problems and increase readers' access to their works" (Cabrera, Ostroff, and Schofield 2015, 9). Heald drew attention to benefits of such provisions, showing that US reversion rights enabled independent publishers to reproduce out-of-print books after rights had reverted to creators (Heald 2019).

There are many ways in which individual librarians, libraries, and library associations can contribute to ensuring a healthy future for the public domain in their countries and worldwide. They can make a point of celebrating and promoting Public Domain Day every January 1; they can sign onto and promote the Public Domain Manifesto; they can include education on the public domain in their copyright literacy instruction for both users and creators of content; they can provide responses to their governments' copyright reform consultations that speak to the benefits of a healthy public domain for the public good and for the creation of works that build on what has come before.

Finally, while it is essential to continue to defend and preserve the public domain, it is also important to consider those instances where unfettered use may not be in the public interest, notably when it comes to Indigenous and traditional knowledges. As the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore continues its work in the area, it is likely that nations will develop exceptions in their copyright systems in consultation with their local Indigenous communities and acknowledge the need for special considerations to safeguard Indigenous knowledge.

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