Why the Public Domain Is Not Just a Mickey Mouse Issue

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Let me begin with Mickey Mouse. As advocates for the public domain like to mention, Mickey Mouse, that beloved American icon, was due to come into the public domain in the year 2004. With the passage of the recent Copyright Term Extension Act, this event has now been pushed to the year 2024.

If Mickey Mouse has become a "poster rodent" for public domain advocates, it's probably because his delayed entry into the public domain focuses our attention on some important issues I would like to talk about, namely: 1) what is the public domain, 2) what is its value, 3) how is it eroding and what does this erosion mean for those who work in the cultural heritage sector?

Before I begin, the usual full disclosures: I'm not an attorney; rather, I'm a museum professional, with over a decade of experience working in museums and related organizations. (I currently work as a consultant for cultural heritage organizations.) My thoughts about the public domain reflect all the concerns I have from a museum professional's perspective, as well as all the biases that perspective brings.

A second disclosure: I'm a firm advocate for the public domain. I wish I could say it was because I am an altruistic person, but the truth is less lofty: The fact is, I am an ardent appropriator. I use ideas, facts, processes proposed or exposed by others all the time, and I want to be able to continue doing so. But I am the first to admit that this advocacy often runs right in the face of my work in the museum profession. Museums, like many cultural organizations, are both rightsholders and users, and in this dual role they have an interesting balance they must sustain, which I hope we will discuss today.

Let me start with the primary question I was asked to talk about today:

What is the Public Domain?

Until I was asked to speak here on the topic, I thought I could answer this question off the top of my head. But as I was pondering the issue and preparing for this meeting,

the concept became increasingly muddled in my mind. I started with, to quote Justice Potter Stewart, an "I know it when I see it" sensibility, but now feel more like that phrase in the Joni Mitchell song "you don't know what you've got 'til it's gone".

So I decided to look up some definitions, and I found that they run the gamut from philosophical and poetic to curt and succinct. In the former category is copyright historians Ray Patterson and Stanley Lindberg's definition of the public domain as a concept based on the belief that there are certain materials in the world not subject to private ownership such as air, sunlight, stars, ideas, words, cultural heritage, etc. [1] The latter category of definitions are more terse and are usually expressed by lawyers: sentiments such as "the public domain is whatever is left over when copyright expires, is lost, or never existed." I myself take a rather broad working definition: the public domain refers to all entities, information, and creative works that are available for use by anyone for any reason without restriction.

What kinds of materials do you find in the public domain?

This question also yields a variety of answers. Briefly they can be categorized into four areas:

1. Items thought to intrinsically belong to everyone and which can't be copyrighted.

Included in this category are entities such as facts, numbers, ideas, short phrases, blank forms, processes, and titles. While it is true that some of these items cannot be copyrighted, they are increasingly being teased out of the public domain by other intellectual property regimes, most notably trademark and patent. I'll talk more about this later.

2. Government documents and publications.

We have, as a matter of public policy, decided that work produced by the Federal government or its agents are in the public domain, which is why we can use federal documents without restriction. So if you want to, you can take the Constitution, the Declaration of Independence, even the copyright statute and set it to rap musicÉ.

3. Formerly copyrighted works.

There are three ways works fall out of copyright and into the public domain. First there are works which have lost their copyright. Before 1978, works that were

published without a valid copyright notice could lose their copyright protection. (As an related aside, an Arizona State University law student has argued that Mickey Mouse falls into this category because Walt Disney failed to attach the proper copyright notice to the earliest version of this venerable mouse. [2]) Second, there are works whose copyrights were not renewed. Under earlier versions of copyright law, copyright owners had to renew their works if they wished to enjoy additional years of protection offered under the statute. Filmmaker Frank Capra's movie, *It's a Wonderful Life*, fell out of copyright for failure to renew. And finally, there are those works whose copyright term has expired, i.e., the work's statutory term of protection (now the "life of the author plus 70 years for most works) has ended and the work enters the public domain.

4. Works "granted" to the public domain.

These are copyrightable works whose creators freely place the works in the public domain. There is some debate about whether a creator can legally place his/her own work in the public domain. Some argue that since there is no statutory regulations for doing so, what a creator is actually doing is simply granting an implicit "all rights" license to everyone. Whatever legal viewpoint is argued, the result is the same -- the work is made available for use by all without restriction.

Let me shift for a second to public domain's historical context in the U.S. How did the concept even arise?

The framers of the Constitution made copyright law federal -- i.e., they granted Congress the power to promote the "progress of science and the useful arts" and specifically stated that Congress can secure "for limited times" exclusive rights to creators for their respective writings or discoveries. It is important to remember that the notion of copyright was being developing in the U.S. at the time of the Enlightenment, when the nurturing and fostering of ideas was held in great esteem. Thomas Jefferson expressed the sentiments of many at the time when he stated that the products of human creativity "cannot, in nature, be a subject of property." Nonetheless he and the other Founding Fathers acknowledged that fostering these sentiments about the public good would require some incentives for creators.

The result is what intellectual property attorney Michael Shapiro has called the "cultural bargain," a belief that "our copyright law is based on the conviction that encouraging individual creativity by personal gain is the best way to advance the public welfare[3]." In effect, creators must have an incentive to create, to produce new

works that will enrich society. This incentive is the finite monopoly they are granted on the use of the works. However the Founding Fathers did not feel this monopoly could go on forever; if it did, creative works would never be available to society at large.

So copyright evolved in this country with its core philosophy being a balance of often opposing views: the balance between the economic rights of the creator and the public good.

What is the Value of the Public Domain?

Let me turn now to the value of the public domain in more concrete terms. We all base our creative works upon the earlier work of others - earlier knowledge, inventions, technologies. The richer our public domain, the more creative works we have available to us without restriction, the more "fodder" we have as a society for the creation of new works. The public domain is, in a very real sense, the catalyst for creativity and innovation. A wellspring. Where would Disney be without the Brothers Grimm, Victor Hugo, Hans Christian Anderson, Kipling, or classical mythology? (It would be short a couple of animated features.) Where would Aaron Copland have been without American folk songs? Picasso without African art? Even Duchamp without his urinal? Public domain appropriators, one and all.

There is another type of value associated with the public domain -- good old monetary value. Simply stated, works in the public domain cost less. The reason you can purchase *The Iliad* for a song is because no one owns it. No royalty costs need to be figured into the replication costs. Just as copyright offers an incentive to creators, so too the public domain, with its low costs, offer creators an economic incentive of a sort. It offers cheap content -- to be used, reformulated, recast in any way you want. *West Side Story* emerges from Shakespeare's *Romeo and Juliet*; *Amadeus* emerges from the music of Mozart and Salieri. I also suspect we underestimate another roundabout way that the public domain offers an economic incentive for creativity: When a publisher's best selling work (or a film studio's most famous mouse) enters the public domain, the publisher or film studio has to go shopping around for new creative work, or develop its own creative work to continue to generate the revenues it lost.

So there's a delicate interplay at work between copyright and the public domain which is much like a feedback system. Like all feedback systems, balance is important. And the balance in our copyright system between a creator's need for an economic return on his/her efforts, and society's need for free exchange of information, is shifting. The economic aspect of the copyright equation - giving creators a limited monopoly on

their works-- is receiving increasing emphasis at the expense of the other end of the equation -- the public good.

In other words, the feedback system is being threatened and the public domain is eroding because of these threats: works are not going in as fast nor as often, and more frighteningly, some public domain works are actually falling back into copyright. What is tilting the balance? What is eroding the public domain? I'd like to briefly discuss six factors that are taking their toll.

What is Eroding the Public Domain?

1. Term Extension

First, we have the various revisions to Copyright law which have extended the duration of copyright. Duration is important because it is the de facto demarcation line between individual property rights and the public domain.

In the first Copyright Act of 1790, copyright term was set at 14 years with a possibility of extension for another 14 years. With this short duration, chances were good that the public would see a healthy influx of works into the public domain during their lifetimes. But since that time the copyright statute has been revised, extending the duration steadily over time. With the most recent revision, the 1998 Sonny Bono Copyright Term Extension Act, we now have a copyright term of 95 years. The result is that only those of us with the constitution of Methuselah are likely see a work created during our lifetime actually enter the public domain in our lifetime.

2. The 1998 Copyright Term Extension Act

A second and related factor tilting the balance is that the 1998 Copyright Term Extension Act [see text of the Act] has effectively put a 20-year moratorium on new works that can enter the public domain. Prior to the implementation of this legislation, works published in 1923 were next in line for entry into the public domain. Their entry has now been delayed until January of 2019 because the Act extended their copyright protection another 20 years. The only exception to this moratorium (which I will talk about shortly) is unpublished historical works. But for all essential purposes, the public domain is entering a 20-year drought.

3. Unpublished Historical Works

A third factor to consider is the peculiar position that the law and its revisions have put cultural organizations into regarding unpublished historical works such as manuscripts, diaries, letters, personal papers. The 1976 Copyright Act gives these

materials federal protection, even old works (like the letters of George Washington) which you and I would intuitively believe are in the public domain. These types of unpublished historical works will enter the public domain on January 2003 if they are not published prior to that date. If they are published prior to this date, they are protected, under the new Term Extension Act, until 2047. Now here's a dilemma for cultural organizations to consider. Should these organizations, who often hold a wealth of unpublished papers in our archives, hold off on publishing these materials until January 2003 so they can enter the public domain? But what if your organization wants to use the materials in a way which could be construed as being "published" -- e.g., an exhibition catalogue, a public program, a Web site? Clearly there are ethical and policy issues involved here, in addition to the copyright issues. Cultural repositories will have to carefully consider and plan how their historical documents are to be used, for their own actions may result in delaying entry of materials into the public domain.

4. Uruguay Round Agreements Act

Another factor that contributes to the shrinking public domain is the Uruguay Round Agreements Act (URAA), an enormously complicated international agreement (which implemented, among other things, the General Agreement on Tariffs and Trade (GATT) and the World Trade Organization.) Intellectual property issues are among the many items the Act addresses, in particular copyright restoration. The Act restores copyright in foreign works that had entered the public domain in the U.S. (because of their failure to comply with certain requirements of U.S. copyright law.)

If you find term extension threatening because it slows the entry of works into the public domain, consider that the URAA actually removes works from the public domain. This is a frightening thought, and a scary precedent. For cultural organizations, you can imagine the nightmare scenarios this presents. Works they considered public domain -- and used freely as a result -- are now protected by copyright and their usage must cease or comply with the copyright holder's requirements.

What are some of the public domain properties that have had their copyright restored thus far under this Act? I looked at the Copyright Office's Web site, where the "notices of intent to enforce" copyright under this Act are published. With just a very cursory look, I noted works by writer Doris Lessing; by the documentary film maker Leni Riefenstahl, including her famous "Triumph of the Will" with its oft-shown footage of Hitler and the Nazi rally in Nuremberg; several hundred works (in all media) by Pablo Picasso; works by writer J.R.R. Tolkien, including "The Hobbit"; literally hundreds of foreign films; and alas, the rock group "Cream's" goodbye concert film footage.

5. Commodification of Culture

Let me bring up another threat to the public domain. Thus far I've talked about threats that are legislative in nature. But I think there are societal factors as well. More and more our society perceives and treats culture as a commodity, with ownership and economic aspects associated with commodities. For example, a cottage industry has cropped up around the works of Monet and his fellow Impressionists, fueled in large measure by museums capitalizing on the popularity of these artists in their museums stores and catalogues. And we all recognize that characters in children's books, movies, and television shows have become commodities to be purchased in various forms and media. (Can you think of a single children's character that doesn't have a product tie-in?) There are a lot of reasons why culture is increasingly commodified, but surely one of the prevailing ones is that as we become less reliant on industrial output we become more dependent on our intangible assets -- i.e., our intellectual property and not our physical property. What is the effect of this on our perceptions of the public domain? If we increasingly treat our intangible assets as commodities, how does that skew our sense of importance and entitlement to a public domain?

6. Expansion of Other Intellectual Property Regimes

A sixth factor that is cutting into, if not exactly eroding, the public domain, is the increasing use of other intellectual property regimes -- particularly trademark and patent -- to offer a measure of intellectual property protection to phrases, processes, and even ideas that we associate solidly with the public domain. For example, about a year ago, *The New York Times* had an article about the New York City skyline being trademarked [4]. (It seems that slowly, one by one, major buildings and landmarks of the city are applying for and receiving trademark status: the Chrysler Building Spire is trademarked, as is the Stock Exchange building, and Rockefeller Center has applied for trademark of its center building, its skating rink, Prometheus and Atlas.) Now trademark does not grant an exclusive monopoly on use; instead, it grants the trademark holder the right to use the trademarked item as a means of distinguishing its goods or services in a commercial marketplace. So you can freely use the Chrysler building spire as a source of inspiration for a work, just don't use it as your company logo, or in the example the *Times* offers, as a design on a popular line of dishware.

Patents are also pushing into the terrain of what was considered intuitively "the public domain". Hundreds of sequences of the human genome have been patented by individuals and commercial entities. (While these patents won't deprive you of your right to own your genes, they do prevent you from developing and selling commercial products based on the patented sequence.) And you may have heard about Amazon.com patenting their "one click" concept which allows customers to initiate a purchase with (literally) one click of their mouse button. My personal nominee for a

chutzpah award goes to a Web-based company who, last February, filed a patent for downloading files on the Web. My point here is that increasingly we see ideas, processes, and even natural phenomena being patented. Patents like these, referred to as "soft" patents, don't cover a physical invention -- which is what patent law was initially set up to do. They are pushing the envelope of this particular legal regime. But just as importantly, they are pushing into what has heretofore been considered some of the most sacred cows of the public domain.

There are other significant factors that affect the public domain, such as privacy and publicity laws, encryption technologies, anticircumvention legislation, etc., which I hope others will touch on today. I do hope that the thoughts I've discussed -- what the public domain is, its value, and the threats to it, -- provide some basic background for consideration and discussion as we move through today's Town Meeting. Thank you.

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1. L. Ray Patterson and Stanley W. Lindberg. *The Nature of Copyright: A Law of User's Rights.* (Athens: University of Georgia Press, 1991).

2. Lauren Vanpelt. "Mickey Mouse: A Truly Public Character." Spring 1999.

3. Michael Shapiro. "Not Control: Progress." *Museum News* 76, no. 5 (September/October 1997): 37-38.

4. Dunlap, David W. (1998) "What Next? A Fee for Looking?" *The New York Times*. Thursday, August 27, 1998. Section B1, B8.