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# A Defense of the Public Domain: A Scholarly Essay*

Laura N. Gasaway**

*Copyright law is of tremendous importance to librarians, faculty members, scholars, researchers and attorneys. Scholars have often written about the fair use doctrine not only as a defense to copyright infringement but also about using it affirmatively to support the use of copyrighted works in research, teaching, and law practice without seeking permission from the copyright owner. Less scholarly attention has been focused on the public domain, despite its importance both to users of creative works and to authors and publishers. This essay celebrates the public domain.*



## Introduction

¶1 Copyright law is of tremendous importance to librarians, faculty members, scholars, researchers, and attorneys. Articles and books about copyright and how it

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** Associate Dean for Academic Affairs & Professor of Law, University of North Carolina, Chapel Hill, North Carolina.

applies to libraries and their users are many, ranging from short one-volume works to multi-volume treatises. Likewise, scholars have often written about the fair use doctrine, not only as a defense to copyright infringement, but also about using it affirmatively to support the use of copyrighted works in research, teaching, and law practice without seeking permission from the copyright owner. Less scholarly attention has been focused on the public domain, despite its importance both to users of creative works and to authors and publishers. This essay celebrates the public domain.

¶2 The public domain may be defined as the common space where creative works not protected by copyright exist. Public domain should be the default condition for creative works rather than considered an unfortunate situation that occurs when a work loses copyright protection. If public domain is the norm, then copyright protection should be afforded only when certain conditions are met. This is the view that Professor J. Thomas McCarthy and his colleagues espouse for intellectual property—the public domain is the standard. Only by meeting certain conditions can a work, invention, or trademark move from the public domain to protection by federal statute.[1]

¶3 For the public, the primary advantage of a robust public domain is that individuals may use creative works for entertainment or study, or as the building blocks for other creative works without obtaining permission from an owner. Someone who wishes to use more than a fair use portion of a copyrighted work as a basis for a new work must obtain the owner's permission or be willing to advance a fair use defense should litigation for infringement follow. In the modern era of mashups, collages, and appropriation art, a vigorous public domain supports the development of new works based on earlier ones, and the general public benefits.

¶4 An obvious disadvantage of the public domain to publishers and producers is that works that lose protection no longer generate income for the original copyright holder. Because there is no longer any exclusivity, there is no requirement to seek permission or acquire a license to use a work that has entered the public domain. Publishers' income sources are thereby reduced. On the other hand, publishers often use for their own purposes public domain works that were previously owned by someone else. Thus, publishers can also benefit from the public domain. A strong and vibrant public domain can work alongside an effective copyright system to meet the goals of the U.S. copyright system.

## Why Copyright?

¶5 The primary basis for copyright law is grounded in the U.S. Constitution:

> The Congress shall have the power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Rights to their respective Writings and Discoveries.[2]

1. J. Thomas McCarthy et al., McCarthy's Desk Encyclopedia of Intellectual Property 489 (3d ed. 2004).
2. U.S. Const., art I, § 8, cl. 8.

Congress was given the power to enact laws to further learning in the new country, and it did so by enacting the Copyright Act of 1790.[3] The promotion of learning is the purpose of copyright, and this was to be accomplished by providing economic incentives to authors to create new works and make them available to the public. The incentives for authors are both economic and noneconomic: (1) royalties from publishers for sales of copies of an author's works; (2) license fees for the use of copyrighted works, including licenses to produce derivative works; (3) the sheer joy of having one's work read and enjoyed by others; and (4) increased acclaim or reputation for the author. Each of these incentives is important and helps copyright fulfill its goal of fostering the creation of new works that are made available to the public. Authors benefit, publishers and producers benefit, and so does the public. Moreover, these protected works will one day enter the public domain.

¶6 Today, users of copyrighted works often complain that publishers are getting wealthy but authors, performers, artists, etc. are not. They are frustrated by the fact that third parties, and not the creative individuals, are reaping the advantage of copyright. And yet many authors and other creators could not bring their works to the public's attention without the effort of publishers and producers. While the Internet may be changing this business model for some types of works, because authors can post their own works on a web site, it is unlikely that most traditional authors, movie companies, etc., will select the web as the direct publication medium for their works. It is expensive to manage web sites that can control access and manage fees for acquiring access. Thus, only those authors, photographers, and other creators who choose to make their works available free of charge and without security measures, or who merely request payment for use, are likely to make their works available on the web.[4] While many academic authors and other creators would produce their works regardless of the ability to receive compensation, and therefore post them on the Internet without access controls and with no expectation of payment, this is not true of all creators. The majority of authors who are interested in either economic incentives or protection of the work to ensure that the content remains unaltered will rely on a publisher or producer to reproduce and distribute their works.

## Copyright Term Expansion

¶7 From the time of the first copyright statute, the term of copyright has increased almost seven-fold. In 1790, Congress awarded copyright protection for a period of fourteen years; it could be renewed for a period of fourteen years, so the entire term did not exceed twenty-eight years.[5] By 1831 the term was twenty-eight years with a fourteen-year renewal term,[6] and in 1909 it was twenty-eight years with

3. Act of May 31, 1790, ch. 15, 1 Stat. 124.

4. The number of works distributed via the Internet may be increasing, due to developments such as YouTube. Creative Commons offers a variety of types of licenses that creators may adopt to claim less than the full panoply of rights provided under the copyright statute. *See infra* ¶ 23 for more information about Creative Commons licenses.

5. Act of May 31, 1790, § 1.

6. Act of Feb. 3, 1831, ch. 16, 4 Stat. 436.

a twenty-eight-year renewal term, for a total of fifty-six years.[7] Today, the term of copyright is the life of the author plus 70 years for works of personal authorship; for anonymous, pseudonymous, and corporate authorship works (i.e., works for hire), the term is 95 years after first publication or 120 years after creation, whichever comes first.[8] The major expansion of the term of copyright came in 1976, when the United States adopted the European scheme of copyright and changed the term to life of the author plus fifty years. At that time the statutory presumption was that the average author would live no more than twenty-five years after producing a work, so seventy-five years was considered to be the likely average term of copyright for works created after 1978.[9] This was expanded by twenty years in 1998.[10]

¶8 Not only was the term of copyright expanded in 1998, but it applied retroactively to all works still under copyright. The unfortunate result was to expand the term of copyright even for works that were no longer economically viable. A contemporaneous economic survey conducted by the Congressional Research Service found that term extension had no incentive effect on works already in existence.[11] For works published between 1939 and 1942, "only about 2% of works can expect to remain commercially viable at the end of 55 to 75 years."[12] So, for the benefit of the two percent of these works that remained viable, copyright was also extended by two decades for the other ninety-eight percent of works that did not. The result of term extension was that these works have not entered the public domain year by publication year from 1998 to the present.[13] Thus, these works are protected, although typically they are out of print with no plan to return them to availability. It will be the end of 2018 before any other currently copyrighted published work enters the public domain. By contrast, during the twenty-year period from 1998 to 2018, it is estimated that one million patents will enter the public domain.[14]

¶9 A number of unpublished works did enter the public domain at the end of 2002. Unpublished works were not eligible for federal copyright protection under the 1909 Copyright Act; they remained protected, if at all, by common law copyright. While common law copyright offered little protection, these works also never entered the public domain. The 1976 Act eliminated common law copyright for works produced after January 1, 1978.[15] Congress dealt with unpublished works that existed as of that date by establishing a date at which even unpublished works

7. Act of Mar. 4, 1909, ch. 320 § 23, 35 Stat. 1075, 1080.

8. 17 U.S.C. §§ 302(a) & (c) (2006).

9. 17 U.S.C. § 302(e) (1976) (containing the statutory presumption of the author's death seventy-five years after the work is published absent anything in the Copyright Office's records to the contrary).

10. Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298 § 102(b), 112 Stat. 2827, 2827 (1998).

11. Edward Rappaport, Copyright Term Extension: Estimating the Economic Values 4 (CRS Report No. 98-144E, 1998).

12. Eldred v. Ashcroft, 537 U.S. 186, 268 (2003) (appendix to opinion of Breyer, J., dissenting).

13. That is, at the end of 1998, all of the works published in 1923 should have entered the public domain; in 1999, all of the works published in 1924, etc.

14. Lawrence Lessig, Free Culture 134–35 (2004).

15. 17 U.S.C. § 301(b)(2) (2006).

would enter the public domain. If the unpublished work existed as of January 1, 1978, and remained unpublished through the end of 2002, it entered the public domain at the end of 2002 or the life of the author plus seventy years, whichever was greater. A work that existed as of January 1, 1978, but which was published between that date and December 31, 2002, will not enter the public domain until the end of 2047 or the life of the author plus seventy years, whichever is greater.[16]

¶10 The 1976 Copyright Act was responsible for many changes that determine which works are in the public domain. These include that: (1) it is now virtually impossible for a creator to place something in the public domain; (2) the term of copyright has been expanded to typically more than a century; (3) there is no requirement that the copyright owner actively renew the copyright—previously, works moved into the public domain after only twenty-eight years of protection if the owner failed to renew; and (4) there is no requirement that notice of copyright appear on the work to differentiate those that are protected from those that are in the public domain.

## Defining the Public Domain, as Contrasted with Copyright

¶11 The most straightforward definition of the public domain is works that are not protected by copyright. In a way, the public domain is the opposite of copyright. The public domain is the storehouse of the raw materials of creative expression, freely available to all. Anyone may draw heavily from a public domain work to produce a new work without the author's permission. Someone else may publish it in a new edition and yet another person may commercialize the work in another way. In other words, there is no longer any exclusivity attached to the work; in fact, several different publishers may produce new editions or reprints simultaneously.

¶12 There are many useful definitions of the public domain. In 1918 Justice Louis Brandeis talked about individual property in his dissent in *International News Service v. Associated Press*.[17] He discussed the primary attribute of private property as being the right to exclude others. With conceptions and ideas, after they have been voluntarily communicated to others, they became "free as the air to common use."[18] *Black's Law Dictionary* defines the public domain as "[t]he universe of inventions and creative works that are not protected by intellectual-property rights. . . ."[19] "Public domain is the rule; intellectual property is the exception."[20]

¶13 By contrast, originality is the keystone of copyright protection. It sets the boundaries of copyright. Where the work is based on existing sources, only the new material added receives new copyright protection.[21] Originality also defines the contours of what constitutes copyright infringement by limiting protection to original material and the original features of a work.

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16. *Id.* § 303(a).
17. 248 U.S. 215, 250 (1918) (Brandeis J., dissenting).
18. *Id.*
19. Black's Law Dictionary 1349 (9th ed. 2009).
20. McCarthy et al., *supra* note 1, at 489.
21. Jessica Litman, *The Public Domain*, 39 Emory L.J. 965, 974 (1990).

¶14 On the other hand, true originality is a myth for most types of works. Do all authors create works solely from their imaginations? Is anything truly original? Are authors and artists not influenced by movies and plays they have seen, music they have heard, or works of art they have experienced? Did world events inspire the novelist who wrote a novel about terrorism after 9/11? Did the death of his son inspire Eric Clapton's *Tears in Heaven*? Do authors create solely from their imaginations with no influence at all? Trends in art, music, and literature develop because of shared influences, and authors borrow from these trends, events, nature, and relationships, and everything that surrounds them.[22]

## Importance of the Public Domain

¶15 The importance of the public domain cannot be stressed enough. As mentioned earlier, anyone can freely copy public domain works without seeking permission or paying royalties. A large and robust public domain increases the number of works from which others may borrow without worry. Publishers can republish public domain works without seeking a license from the author or an earlier publisher. Works can be performed without paying performance royalties. Creative writers can adapt public domain works to create new content without obtaining a license. Web developers may use public domain works as free sources of content.

¶16 The public domain permits new works to be created from existing ones—e.g., to change the ending of a novel, to create the musical version of play, to make and sell prints of a work of art. The public domain makes it possible for publishers to produce low-cost editions of works because they do not have to seek permission or pay royalties to the copyright owner. Works of Shakespeare can be downloaded to iPhones. The public domain also promotes artistic freedom because the artist or her heirs cannot control how her work is to be displayed, altered, or shared. Scholars may use public domain materials as building blocks for their scholarly works, to quote long passages or to incorporate large sections in the works they are creating. The public domain facilitates teaching and learning because the materials may be freely reproduced and distributed to students both in print and electronically, and there is no requirement to seek permission or pay royalties. Moreover, the same material may be used again and again by the same teacher for the same course. The public domain encourages the repeated performance of beloved music, plays, and ballets, inspiring works that enjoy great popularity and that the public demands be made available to them repeatedly.[23]

### Importance of the Public Domain to Librarians

¶17 The public domain is also important to librarians. For the library itself, librarians may republish public domain works—for example, they may create digi-

22. Professor Litman characterizes authorship as "a combination of absorption, astigmatism, and amnesia." *Id.* at 1011. She further posits that this characterization does not diminish the creative process but merely describes how authors actually produce works.

23. *See* Stephen Fishman, The Public Domain: How to Find & Use Copyright-Free Writings, Music, Art & More, 4–5 (3d ed. 2006) (discussing the benefits of the public domain).

tal versions of these materials and post them on the web so that users around the globe may access, use, and appreciate them. Libraries may engage musicians to perform public domain music for various public festivals and events without having to pay performance royalties. Library users often ask librarians to help them determine what works they may freely reproduce, perform, display, etc., without asking permission. Faculty members seek materials that they can post on course management systems and ask librarians for help. A substantial and vibrant public domain gives librarians a wealth of works they can recommend to these users with no concern for permissions and royalties.

¶18 Further, librarians and their institutions are notably risk averse. They may avoid any recommendations or situations in which they could be seen as supporting infringing activities. A rich public domain provides an enormous repertory of materials that can be suggested by librarians without fear of misleading the patron.

## An Enlightened or Unfortunate State?

¶19 With these and other benefits the public domain provides to the general public and to other authors and producers, why have some adopted the phrase "the work fell into the public domain" as if this were an unfortunate accident? In reality, the author may have wanted to place his work in the public domain—something that could have been done pre-1978—or it may have been beneficial to all for the term of copyright to expire. A good example is the film *It's a Wonderful Life*, which enjoyed little success when it was protected by copyright; it really achieved its reputation only after it entered the public domain.[24] Those works published between 1923 and 1942 that received a twenty-year term extension, but which were not economically viable, might have actually benefitted from entering the public domain. They might have enjoyed a revival, but this now will not occur before the end of 2018. Further, many of these works are orphan works for which no owner can be identified or found.

¶20 The phrase "fell into the public domain" may have developed under earlier statutes, when some works could unintentionally enter the public domain because they were published without notice or because the copyright owner overlooked the need to renew the work at the end of its first term of copyright. But not all works that experienced publication without notice or a failure to renew were the product of an accident. The copyright owner may have intentionally dedicated the work to the public by publishing without notice or electing not to renew the copyright.

¶21 The preferred term should be "entered the public domain," which has more positive connotations. It denotes the date at which a work that has lost public interest will languish until rediscovered by someone who then may freely use it. Or it marks an end to copyright protection and entrance into another phase in which the work may enjoy even greater acclaim than it did while under copyright protection.

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24. *Id.* at 214.

## Characteristics of the Public Domain

### Public Domain Works

¶22 There are several types of works that are in the public domain. First, any work that does not qualify for copyright protection is in the public domain—concepts, facts, scientific principles, etc.[25] A more common understanding about the public domain often centers on copyrighted works that once were protected but for which the term has expired. This represents the largest category of public domain works. There are also some works on which the copyright was abandoned. It is not easy to abandon a copyright since, as with other forms of intellectual property, abandonment must have been intentional and manifested by overt acts. There are some cases, however, that have found copyright abandonment.[26] Added to this, there are also works that were published prior to the existence of copyright laws. Already mentioned are works that lost copyright protection because of failure to satisfy some of the formalities, whether intentionally or accidentally. Such works were said to have been "dedicated to the public." Since 1978, there are increasingly fewer and fewer of these works because formalities of copyright were eliminated by the 1976 Act.

¶23 In fact, today it may be impossible to dedicate a work to the public domain because copyright attaches automatically upon creation and fixation of an original work. Nevertheless, Creative Commons (CC) does offer a form that purports to do so.[27] The CC is a nonprofit corporation founded in 2001 by a group of law professors to offer alternatives for copyright owners who might wish to grant broader rights to the public to use their works than normally would exist under a claim of copyright. To this end, the CC developed a series of free licenses from which a copyright owner may select to grant rights.[28] There are also two public domain tools—one for authors to use on their own works (CC0) and one to certify other works the user believes are already in the public domain.[29] However, as of 2006, only slightly more than two percent of the works licensed under the CC carried the public domain dedication.[30] The reason that so few choose the public domain dedication may be that most people prefer copyright ownership with broad grants of rights to the public through other CC licenses. Another possibility is that few individuals understand the CC public domain dedication. Or it could mean that people do not care about the public domain. By contrast, it could mean that the public domain dedication is generally recognized to be ineffective because the Copyright Act appears to make it impossible to put works in the public domain.

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25. *See* 17 U.S.C. § 102(b) (2006).

26. *See e.g.*, Egner v. E.C. Schirmer Music Co., 48 F. Supp. 187, 189 (D. Mass. 1942), *aff'd* 139 F.2d 398 (1st Cir. 1943).

27. Creative Commons, Copyright-Only Dedication (based on United States law) or Public Domain Certification, http://creativecommons.org/licenses/publicdomain (last visited July 7, 2009).

28. Creative Commons, About, http://creativecommons.org/about (last visited July 7, 2009).

29. Creative Commons, Public Domain Tools, http://creativecommons.org/publicdomain (last visited July 7, 2009).

30. Creative Commons, License Statistics, http://wiki.creativecommons.org/License_statistics (last visited July 7, 2009).

¶24 Materials produced by the federal government are not eligible for copyright protection[31] and are often referred to as public domain works. Under earlier copyright statutes, all works by foreign nationals were considered to be public domain,[32] which not surprisingly resulted in some difficulties with foreign authors and some countries.[33]

¶25 Public domain works can be used in a variety of ways that represent a spectrum of use. (1) The entire public domain work is republished or used. This is a category of republished material that often reintroduces forgotten works to the public. These works contain no new material. (2) The entire work is republished with new material such as an introduction, preface, or index. The new material would be eligible for copyright protection. (3) Only a portion of the public domain work is incorporated into a new publication. For these works it would be very useful if the notice of copyright identified the portions of the work that are public domain. (4) Some public domain elements are incorporated into another work.

## Early U.S. Law on the Public Domain

¶26 The notion of statutory copyright carries with it the idea of the public domain. The shorter term in earlier copyright statutes embodies the idea that relatively soon after publication the author would no longer have exclusive rights to the work, and it would enter the public domain. Moreover, someone who creates a work should have the choice either to claim copyright protection or dedicate the work to the public. This was clear before 1978, when the dividing line between copyright and no protection was publication. Only published works were eligible for federal copyright protection, and then only if they met certain requirements such as publication with the notice of copyright and registration with the U.S. Copyright Office.[34] If the requirements were not met, the work was declared to be dedicated to the public domain. Additionally, certain things were preserved for the public domain: knowledge contained within books;[35] utilitarian works; facts, ideas, theories, processes, or systems.[36]

¶27 Early cases were not always consistent. Courts tended to invoke the public domain when to do otherwise threatened "to prevent many other authors from pursuing their craft."[37] Today, instead of referring to these works as public domain, courts may simply say that they are uncopyrightable.[38]

## Determining the Status of Works

¶28 Works without copyright protection do not automatically enter a no-man's land where no one can find them. In fact, a large number are still in print, including

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31. 17 U.S.C. § 105 (2006).
32. *See* Act of May 31, 1790, ch. 15 § 5, 1 Stat. 124, 125.
33. A dispute with Charles Dickens is one of the most famous. *See Boz in Egypt*, Ill. Heritage, July-Aug., 2007, at 8, 8.
34. Act of Mar. 4, 1909, ch. 320 § 9–10, 35 Stat. 1075, 1077–78.
35. Baker v. Selden, 101 U.S. 99 (1879).
36. This continues today. *See* 17 U.S.C. § 102(b) (2006).
37. Litman, *supra* note 21, at 992.
38. *Id*. at 995.

many with multiple editions and publishers. It is estimated that about fifteen percent of all books in libraries around the world are in the public domain.[39] Suppose that someone wants to use a work and believes that work to be in the public domain, how can she determine the status? The first step is to examine the date of the work and consider the death date of the author. The online registration records at the U.S. Copyright Office may have the answer if the work is still under copyright. The Copyright Office will search its registration records for a fee of $165 per hour,[40] and there are commercial search services that will search the Office's records.[41] One may contact the publisher or the author's heirs. There are some publications[42] and web sites[43] that list public domain works, although none of these contains a complete listing. Further, just because a work is public domain in the United States does not mean that the same type of work will not be copyrighted in another country. For example, U.S. government works are not copyrightable in this country, but works of the British parliament are copyrighted under Crown Copyright for a period of fifty years after first publication.[44]

## False Claims of Copyright

¶29 A fairly common problem for public domain works is false claims of ownership. This is especially true for new editions of the classics, compilations, and collective works. The publisher simply places a copyright notice on the work, and any user who sees the copyright notice assumes that the entire contents of the work are protected. In truth, only the new material such as a preface, foreword, or other editorial additions are protected, so publishers have a valid claim of copyright only for this new material. For anthologies that consist solely of compiled public domain works, it is possible that the selection and arrangement of these works may qualify for copyright protection, but not the individual contents. Works first published in the United States that are now in the public domain cannot return from the public domain to copyright protection.

¶30 It is unclear why there are such frequent false claims of ownership for republished works that contain no new material. It could be due to simple ignorance, because the publisher does not understand that it did nothing new in republishing a work. Or, over-claiming could be due to the quest for profits, if the publisher knows that it added no new material but believes that a false claim via a notice of copyright will deter users from reproducing and distributing the work. Museums sometimes claim copyright in exact photographic reproductions of pub-

39. Kevin Kelly, *Scan This Book!*, N.Y. TIMES, May 14, 2006, § 6 (Magazine), at 43.

40. *See* U.S. Copyright Office, Current Fees, http://www.copyright.gov/docs/fees.html (last visited July 7, 2009).

41. Examples include Copyright Resources, http://www.copyright-resources.com (last visited July 7, 2009) and I.P. Paralegal Services, http://gawain.membrane.com/paralegals/copyrights.html (last visited July 7, 2009).

42. FISHMAN, *supra* note 23, at 521 app.A (listing songs in the public domain).

43. Public Domain Information Project, Lists of Public Domain Songs, http://www.pdinfo.com/list.php (last visited July 7, 2009); Index of Public Domain Resources, http://banis-associates.com/pdlist (last updated Mar. 10, 1998); Public Domain Movies, http://www.desertislandfilms.com/clindex.html (last visited July 7, 2009).

44. Copyright, Designs and Patents Act, 1988 c. 48, § 165 (Eng.).

lic domain paintings in their collections, "a highly dubious claim, at best."[45] The museum owns the physical manifestation, the painting, but it likely never owned the copyright. Now the painting is in the public domain. Exact photo-reproductions of the painting add nothing new that is entitled to copyright protection.

¶31 False claims of copyright are a crime, but the penalties are relatively small ($2,500).[46] Moreover, false claims are rarely prosecuted since individuals cannot sue a claimant for spurious copyright claims, and the government rarely does so.[47]

¶32 The problem of false claims of copyright was addressed in 2007 by the Computer and Communications Industry Association (CCIA), an organization of information and communications companies such as Google, Microsoft, and Yahoo. They filed a complaint with the Federal Trade Commission (FTC) on behalf of consumers.[48] The complaint alleged that the copyright warning used by several book publishers, media companies, and sports leagues constituted a "systematic misrepresentation" of users' "rights to use legally acquired content."[49] Further, the companies alleged that some of the notices contained threats about civil and criminal penalties, which they labeled as a pattern of deceptive trade practices.[50] The FTC responded rather weakly in February 2008.[51] The CCIA characterized the response as "acknowledge[ing] the risks" to users, and the CCIA promised that it would continue to document these abuses to ensure that the FTC is aware of the problems caused by an imbalance in the intellectual property system.[52]

## Availability of Public Domain Works

¶33 Even though a work is in the public domain, the work may not be available free of charge or even freely available. The physical embodiment of the work may be owned by an entity such as a library or museum. For example, a library may own the original copy of a letter from a nineteenth-century poet to his publisher, which many years later was donated to the library by the publisher. The poet originally owned the copyright in the letter. The unpublished letter entered the public domain at the end of 2002. Must the library permit user access to the letter? No.

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45. Stephen Fishman, Copyright and the Public Domain § 102[2] (2009). *See* Bridgeman Art Library, Ltd. v. Corel Corp., 36 F. Supp. 2d 191 (S.D.N.Y. 1999) (holding that photographic reproductions of art works in the public domain were not covered by copyright under either U.S. or U.K. law). This applies only to two-dimensional works and not photographs of three-dimensional works such as sculpture.

46. 17 U.S.C. § 506(c) (2006).

47. Fishman, *supra* note 45, at § 102[2] (2009).

48. *See* Computer & Commun'ns Indus. Ass'n, CCIA Files FTC Complaint against NBC/Universal, MLB, the NFL and Others Alleging Years of Consumer Deception (Aug. 1, 2007), http://www.ccianet.org/artmanager/publish/news/FTC_copyright_complaint.shtml.

49. Computer & Commun'ns Indus. Ass'n, Request for Investigation and Complaint for Injunctive and Other Relief 2 (Aug. 1, 2007), *available at* http://www.ftc.gov/os/070801CCIA.pdf.

50. *Id.*

51. *See* Memorandum from Mary K. Engle, Assoc. Dir., Div. of Advertising Practices, Fed. Trade Comm'n to Edward J. Black & Matthew Schruers, Computer & Commun'ns Indus. Ass'n (Dec. 6, 2007), *available at* http://www.ftc.gov/os/closings/staff/071206ccia.pdf.

52. CCIA Monitors Copyright Overreaching, Posting to Tech Policy Central, http://community.techpolicycentral.com/_CCIA-Monitors-Copyright-Overreaching/blog/31332/11451.html (last visited Sept. 4, 2009) (quoting a Feb. 25, 2008 CCIA press release).

While the library still does not own the copyright, it owns the physical object or artifact. The literary work, the only copy of the letter, is in the public domain, but the library owns it as personal property. The library may choose to make the letter available to scholars or to restrict or even prohibit access to it. Access to the letter may be restricted by the institution for preservation, security, or other reasons, such as restrictions mandated by the letter's donor. If it does grant access to the letter, however, it cannot control the publication of the letter by the scholar under copyright law.

¶34 Similarly, a museum may own a sculpture that is in the public domain, but the institution still can control whether and under what conditions it is displayed, and whether a photographer is allowed to photograph the sculpture. The museum may charge admission fees to enter the museum, access fees to the exhibit that houses the sculpture, or even charge the photographer for the right to take the photographs. By contract, the museum also could ask for royalties on the sales of copies of the photograph that the photographer takes. Thus, the fact that a work is in the public domain does not require the owner of a copy to make that copy available to the public even if it is the only copy in existence.

## Is the Public Domain Shrinking? (And How to Stop It)

¶35 The quick answer to whether the public domain is shrinking is yes. Copyright term extension is one of the primary reasons. As the year 2018 approaches, the motion picture and recording industries may again lobby Congress to expand the term of copyright. It is possible, though, that Congress will understand the impact that such action has on the public, which it either did not understand or simply disregarded in 1998. Moreover, the opponents to term extension are more organized today than they were eleven years ago and may be counted upon to launch a vigorous opposition campaign to any further expansion of the term of copyright.

¶36 Another reason that the public domain has contracted is the change from a formalities-based copyright law to one that automatically extends protection to all authors who create an original work and fix it in a tangible medium of expression. Today, it is not even clear whether an author can place her work in the public domain, although it clearly offends sensibilities to force copyright protection upon an author who does not want it.[53]

¶37 It might be possible to create a system where copyright attaches automatically, as it does now, but that also gives authors the ability to reject copyright protection and place their works in the public domain. Congress pretty much has free reign to change the copyright law, and this change could be tremendously beneficial to both authors who do not wish to claim copyright as well as to the users of

53. Berkeley attorney Kate Spelman reported that at least in one instance she was able to place a work in the public domain for a client. It required registration of the work with the Copyright Office and the filing of a document recorded with the same office that expressly dedicates the work to the public domain. She said that although it was time-consuming, it could be done. E-mail from Kate Spelman to Laura Gasaway, May 5, 2009 (on file with author).

their works. Because of the strength of the exclusive rights provided by copyright, if the statute were so amended, the rejection of copyright likely would have to be irrevocable in order to avoid problems with reliance by third parties as well as for ease of administration. So that users would know if an author had rejected copyright, such an amendment would need to require that the author file a rejection form with the U.S. Copyright Office. That form could be available electronically, and once filed, would become part of the publicly accessible online records of the Copyright Office. Rejection of copyright might be an especially attractive alternative for user-driven content such as original videos found on YouTube or Facebook.

¶38 If a statutory method to reject copyright were adopted, it should appear near the beginning of the statute, perhaps immediately following the language currently found in section 102(a): "Copyright protection subsists . . . in original works of authorship. . . ." A new section 103 could set out how an author can reject copyright and what must be filed with the Copyright Office.

¶39 In the past, notice of copyright provided users with information about whether a work was protected or whether it was a public domain work. With elimination of the notice requirement in 1989,[54] there is no easy way to differentiate copyrighted works from those that are in the public domain. If authors can reject copyright, there must be some way for users to determine whether the work is copyrighted or not. A required filing that could be searched online would do this.

¶40 An author may be able to obtain nearly the same result by granting a nonexclusive license to everyone to use the work in any way; however, the author still owns the copyright even with this broad license. The previously mentioned Creative Commons offers various license choices that achieve some of these goals.

¶41 There have been other creative proposals to stop the shrinking of the public domain, from reducing the term of copyright (which appears unlikely) to reinstituting copyright renewals or imposing maintenance fees,[55] but there is some concern that these proposals would run afoul the Berne Convention's prohibition on formalities for copyright protection.[56]

¶42 There are other reasons that the public domain is contracting that relate to accessibility. For example, there have been striking changes in federal information policy regarding the public availability of government information. After 9/11, the federal government mandated that some information previously published on government web sites be removed.[57] Not only did material disappear, but there often was no notice to the public that the material had been removed; it was simply missing from the web site.

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54. When the United States joined the Berne Convention, it was required to eliminate the notice requirement. *See* Berne Convention Implementation Act of 1988, Pub. L. No. 100-568 § 7, 102 Stat. 2853, 2857 (1988).

55. *See infra* ¶ 47.

56. Berne Convention for the Protection of Literary and Artistic Works, art. 5, § 2, Sept. 9, 1886, Paris Act of July 24, 1971, as amended on Sept. 28, 1979, S. Treaty Doc 99-27, *available at* http://www.wipo.int/export/sites/www/treaties/en/ip/berne/pdf/trtdocs_wo001.pdf.

57. *See* Lotte E. Feinberg, *FOIA, Federal Information Policy, and Information Availability in a Post-9/11 World,* 21 GOV'T. INFO. Q. 439, 446 (2004).

¶43 Another reason the public domain is shrinking is that copyright is being increasingly "propertized" by copyright holders who value the commercial aspects of copyrights, and even ideas, over the rights of the public to use copyrighted works in certain ways. Propertization may be defined as the conversion of intellectual property claims to those more closely resembling real and personal property. The term is often used to refer to "the strengthening of intellectual property rights" that has taken place in the United States since 1976.[58] Propertization is also being accomplished through license agreements that require libraries to pay for access to works, some of which may be public domain, in order to obtain access to other works. Other evidence of propertization is what seems to be an inexorable crawl toward a pay-for-use world.

¶44 The anti-circumvention provision of the Copyright Act[59] also has negatively impacted the public domain. Copyrighted works may have technological protection measures attached to them that prevent access and use. Some of these works may incorporate public domain material that is locked up, along with copyrighted material, by technological protections. Thus, access to public domain materials may be reduced because it is an infringement of copyright to circumvent those technological protection measures even to access a public domain work that is incorporated into a copyrighted work.

¶45 Copyright restoration is another factor contributing to the decline of the public domain. The General Agreement on Tariffs and Trade was amended to restore the copyright of certain works that had passed into the public domain in the United States, but that were still under copyright in their countries of origin.[60] These works may have entered the public domain in the United States because their owners failed to satisfy some of the formalities of copyright that were in effect at the time, such as notice of copyright and copyright renewal.[61] Once restored, the works enjoy the remainder of the copyright terms that they would have otherwise been granted in the United States had they never entered the public domain. For restoration, a copyright owner must satisfy a number of conditions: (1) the work must be an original work of authorship, (2) at least one author must have been a domiciliary of an eligible[62] foreign country where the work was created, (3) the work must have been published in an eligible country at least thirty days before publication in the United States, (4) the copyright in the source country must not have expired as of the date of restoration, (5) the reason the work was in the public domain in the United States must have been due to noncompliance with formali-

58. Justin Hughes, *Copyright and Incomplete Historiographies: Of Piracy, Propertization, and Thomas Jefferson*, 79 S. Cal. L. Rev. 993, 1046 (2006).

59. 17 U.S.C. § 1201 (2006).

60. Uruguay Round Agreements Act, Pub. L. No. 103-465 § 514, 108 Stat. 4809, 4976 (1994) (codified at 17 U.S.C. § 104A (2006)).

61. The constitutionality of the restoration provision was tested in *Luck's Music Library v. Gonzalez*, 407 F.3d 1262 (D.C. Cir. 2007), and the provision was held to be constitutional. *But see* Golan v. Holder, 611 F. Supp. 2d 1165 (D. Colo. 2009) (holding that the provision was broader than necessary to achieve the government's interest).

62. Eligible countries are basically those countries that are World Trade Organization members that adhere to the World Intellectual Property Organization Copyright Treaty and its Performances and Phonograms Treaty. 17 U.S.C. § 104A(h)(3) (2006).

ties or publication in an ineligible country, and (6) if restored, the copyright in the work in the United States would not have expired before the date of restoration.[63]

¶46 Even if a work is restored to copyright, though, enforcement against a reliance party may be curtailed or altered. There are three types of reliance parties. The first is a party who commits acts that now would be infringing, but who did so while the work was in the public domain in the United States. These acts typically involve creating or distributing derivative works, and the owner of the restored copyright may not recover damages for acts that occurred while the work was public domain.[64] For derivative works created before restoration that continue to be exploited post-restoration, courts often permit continued use but require payment of a reasonable royalty rate to the copyright owner.[65] The second type of reliance party is one who makes copies before restoration of the copyright. She is permitted to sell the remaining copies but not to reproduce and sell any additional copies without permission of the owner.[66] The third type of reliance party is successors and heirs of reliance parties who are permitted to stand in the place of the original reliance party.[67]

## Future of the Public Domain

¶47 Even with all of the difficulties for the public domain, there are a few encouraging signs. Following *Eldred v. Ashcroft*,[68] which unsuccessfully challenged the constitutionality of the retroactivity provision of the copyright term extension, the Public Domain Enhancement Act[69] was introduced. The bill would have implemented a $1.00 maintenance fee for continued copyright protection fifty years after the date of first publication or December 31, 2004, whichever was later. The maintenance fee would have been required every ten years from the fiftieth year of the copyright through seventy years after the death of the author. If a copyright holder failed to pay the maintenance fee, the work would pass into the public domain six months after the due date of the maintenance payment. It was referred to the House Subcommittee on Courts, the Internet and Intellectual Property, a subcommittee of the House Judiciary Committee, but the bill died in committee. There was serious concern about whether such a maintenance fee would not be another formality of copyright and thereby run afoul of the Berne Convention,[70] and this may have killed the bill.

¶48 Internationally, support for the public domain is growing. In 2006, Chile introduced to the World Intellectual Property Organization (WIPO) a proposal, now referred to as the Chilean Proposal Supporting the Public Domain.[71] It con-

63. *Id.* § 104A(h)(6) (2006).
64. *Id.* § 104A(d)(2).
65. *Id.* § 104A(d)(3)(A).
66. *Id.* § 104A(d)(3).
67. *Id.* § 104A(h)(4)(C).
68. 537 U.S. 186 (2003).
69. H.R. 2601, 108th Cong. (2003), *reintroduced as* H.R. 2405, 109th Cong. (2005).
70. *See* Aaron Schwabach, Internet and the Law 252 (2006).
71. Provisional Comm. on Proposals Related to a WIPO Dev. Agenda, World Intellectual Prop. Org., Proposal by Chile (Feb. 2006), *available at* http://www.wipo.int/edocs/mdocs/mdocs/en/pcda_1/pcda_1_2.doc [hereinafter Chilean Proposal].

tained three separate proposals: (1) an appraisal of the public domain, (2) "a permanent area for analysis and discussion of incentives" promoting "complementary systems to and in intellectual property," to be set up by WIPO, and (3) a study to assess the appropriate levels of intellectual property protection, considering the particular situation in each country, such as its degree of development and institutional capacity.[72] The appraisal proposal recognizes that the public domain is "fundamental for ensuring access to knowledge and promoting the creative processes of innovation."[73] The Chilean delegation said that its intention was not to attribute "a monetary value to the public domain but rather to recognize its inherent value to society."[74] The Chilean proposal urged WIPO to:

> (i) deepen the analysis of the implications and benefits of a rich and accessible public domain, (ii) draw up proposals and models for the protection and identification of, and access to, the contents of the public domain, and (iii) consider the protection of the public domain within WIPO's normative processes.[75]

Not surprisingly, the Union for the Public Domain announced its support for the Chilean Proposal.[76]

¶49 The impact the digitization of information will have on the public domain also promises to be very positive, primarily because of the increased availability of these works. Digital works can be made available around the world at very low cost. New generations will discover these works and be able to use them in creative new ways. Digitized versions of public domain works will not necessarily be available free of charge; in fact, they may be licensed. However, anyone else may digitize these works and distribute them. On the other hand, technological protection measures and anti-circumvention may also restrict access to these digitized versions of public domain works.

## Fair Use as a Substitute for the Public Domain

¶50 Some users of copyrighted works have posited that strong application of fair use could compensate for a public domain that is shrinking or growing more slowly than in the past.[77] With fair use, the work is protected by copyright, and the issue is whether a particular use of the work is permissible without permission of the copyright owner. There are many theories for allowing the doctrine of fair use as a defense to copyright infringement, ranging from an assumption that the

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72. *Id.* at 1.

73. *Id.* at 3.

74. Day 2: Chile's Presentation of Its Proposal, From Geneva, (Feb. 21, 2006), http://fromgeneva.blogspot.com/2006/02/day-2-chiles-presentation-of-its.html.

75. Chilean Proposal, *supra* note 71, at 3.

76. Union for the Public Domain, http://www.public-domain.org (last visited July 31, 2009). The Union for the Public Domain, formed in 1996, describes itself as a non-profit citizens group whose mission is "to protect and enhance the public domain in matters concerning intellectual property." Union for the Public Domain, About Us, http://www.public-domain.org/?q=node/2 (last visited July 31, 2009).

77. This is a frequent question or suggestion of librarians in workshops I have conducted over the years.

author would give implied consent for reasonable uses of his works, to market failure by providing no reasonable access, to a concession to the First Amendment, to insurance that the existence of the exclusive rights of the copyright holder will not defeat the ultimate purpose of copyright. Clearly, fair use provides a safety valve to excuse activity that would ordinarily be infringement.

¶51 First developed as a judicial doctrine,[78] fair use was added to the statute in 1976:

> [T]he fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.[79]

The Act then identifies four factors that a court must examine in considering whether a particular use is a fair use: (1) purpose and character of the use, (2) nature of the copyrighted work, (3) amount and substantiality used in comparison to the work as a whole, and (4) effect on the potential market for or value of a work.[80] Certainly, users who satisfy the four-pronged fair use test may make limited use of a particular copyrighted work without seeking permission, but the user's reliance on fair use is subject to challenge by the copyright owner and thus to possible litigation and adjudication by a federal court.

¶52 There are many ambiguities in fair use analyses. For example, what weight should courts give to each factor? Should there be a nationwide standard or should the weight given to each factor to vary by jurisdiction? Before 1976, courts often considered other factors—such as public interest—in making fair use determinations. Should other factors not listed in the statute be considered or should determinations be limited to the four statutory factors? Today, most courts seem to take the latter view.[81]

## What is Wrong with Fair Use?

¶53 While nothing is wrong with fair use, it is a critical limitation on the rights of the copyright owner on which the public depends to protect scholarly, educational, and library uses. The statutory list of activities that are fair uses, "criticism, comment, news reporting, teaching," etc., are illustrative only.[82] Unfortunately, this means that the public cannot rely on the plain meaning of the words of section 107. Fair use is fact determined, and therefore it is difficult for individuals to predict whether a use is a fair use unless the facts of a particular situation mirror those of an earlier case in which the fair use claim prevailed. Courts appear to apply fair use strictly as a defense and often appear hostile to fair use claims.[83]

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78. Folsom v. Marsh, 9 F. Cas. 342 (1841).

79. 17 U.S.C. § 107 (2006).

80. *Id.* (1)–(4).

81. *See e.g.*, Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 578 (1994); Harper & Rowe Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 560 (1985).

82. Campbell v. Acuff-Rose Music, Inc., 510 U.S. at 577–78.

83. *See, e.g.*, A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1014–17 (9th Cir. 2001); Universal City Studios, Inc. v. Reimerdes, 111 F. Supp. 2d 294, 321–24 (S.D.N.Y. 2000), *aff'd sub nom.* Universal City Studios, Inc. v. Corley, 273 F.3d 429 (2d Cir. 2001).

¶54 Other exceptions and limitations to the exclusive rights of the copyright owner are much clearer and easier to apply. For example, if the activity is covered under section 108,[84] the library section, that usually is the end of any discussion. If the defense is fair use, it is not black and white, and claiming that the use is a fair use is just the beginning of the discussion.

¶55 Fair use does not work well for everyone in the copyright sphere, such as publishers. Most publishing today, especially electronic and media publishing, is international in scope. Because fair use is a U.S. concept, which applies only domestically, publishers, whose works are distributed in other countries, cannot rely on it.

## The Future of Fair Use

¶56 Fair use has evolved over the years, and it seems to the user community that more and more often courts decide in favor of copyright holders, elevating economic interests over those of the public. Despite the strong efforts of library and educational institutions to claim fair use for typical education and library uses, it appears that fair use claims are increasingly unsuccessful in these cases.[85] Moreover, licensing and contract law is overtaking copyright owners' reliance on copyright law to control the use of their works. As licenses, as opposed to sales, become more common for copyrighted works, pay-for-use may become the norm. Unfortunately, license terms trump fair use. Section 108(f)(4) states: "Nothing in this section . . . in any way affects . . . any contractual obligation assumed at any time by the library or archives when it obtained a copy or phonorecord of a work in its collections,"[86] thus making it clear that for libraries and archives copyright is subservient to contract. This seems particularly harsh in a world of click-on and other non-negotiable licenses.

¶57 It is also likely that, in some instances, fair use is being legislated away. The anti-circumvention provision disingenuously says that nothing affects the right of fair use.[87] But how can an individual make a fair use of a copyrighted work that has technological protection measures attached to it, if disabling or interfering with that protection infringes copyright? One must first have access to a work in order to make a fair use of it. Thus, fair use for digital and other works that have technological protection has been legislated away.

¶58 Another reason that the future of fair use may be in jeopardy is that the public seems to be simply ignoring copyright law, for example by peer-to-peer file sharing and the illegal downloading of music and movies. There were early claims

84. 17 U.S.C. § 108 (2006).

85. *See generally* American Geophysical Union v. Texaco, Inc., 60 F.3d 913 (2d Cir. 1994) (copying of scientific journal articles for researchers at Texaco was not fair use); Princeton University Press v. Michigan Document Servs., Inc., 99 F.3d 1381 (6th Cir. 1996) (including copyrighted materials in student coursepacks was not fair use). The pending litigation between Cambridge and Oxford University Presses and Sage Publications and Georgia State University over the posting of copyrighted material within course management software is extremely important to libraries. *See* Complaint, Cambridge University Press v. Patton, No. 1:08-CV-1425 (N.D. Ga. Apr. 15, 2008), *available at* http://docs.justia.com/cases/federal/district-courts/georgia/gandce/1:2008cv01425/150651/1.

86. 17 U.S.C. § 108(f)(4) (2006).

87. *Id.* § 1201(c)(1).

of fair use for downloading, but courts found this claim inappropriate. In *Universal City Studios, Inc. v. Corley*[88] defendants argued that the anti-circumvention provision eliminated fair use. The court disagreed and characterized this as an "extravagant claim."[89] This decision and others aimed at stopping peer-to-peer file sharing[90] did little to eliminate illegal downloading of music or movies. Litigation initiated against individuals by the Recording Industry Association of America reduced downloading temporarily, but most studies showed that it continued and even increased.[91] If individuals simply ignore copyright or claim fair use for activities that courts have repeatedly held to be infringement, the defense may be weakened for members of the public and individual plaintiffs who might indeed have valid fair use claims.

¶59 There was some hope that the need for fair use claims would be decreased if the Freedom and Innovation Revitalizing U.S. Entrepreneurship (FAIR USE) Act of 2007[92] had been enacted. This bill would have added six exceptions to anti-circumvention legislation, permitting consumers who purchase digital media to enjoy a broad range of uses of the media for their own convenience, but in a way that did not infringe the copyright in the work. For example, it would have allowed consumers to make personal copies of media they owned for playing on other devices.[93] Although there was a good bit of support in the user community for this bill, it did not garner widespread support in Congress and died in committee.

¶60 There is also considerable international opposition from Commonwealth countries to fair use. William F. Patry[94] reported a whisper campaign by U.S. copyright industries to tell foreign ministries that fair use violates the Berne three-step test. "The purpose of the movement is to chill the willingness of countries to enact fair use or liberal fair dealing provisions designed to genuinely further innovation and creativity . . . ."[95] The Berne three-step test says that members shall confine limitations and exceptions to exclusive rights (1) to certain special cases; (2) that do not conflict with a normal exploitation of the work; and (3) that do not unreasonably prejudice the legitimate interests of the rights holder.[96] This test has now

88. 273 F.3d 429 (2d Cir. 2001).

89. *Id.* at 458.

90. *See, e.g.*, Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913 (2005).

91. *See Thanks Me Hearties*, ECONOMIST, July 17, 2008, at 74; FUTURESOURCE CONSULTING, CONSUMER HOME PIRACY RESEARCH FINDINGS (July 2008), *available at* http://www.futuresource-consulting.com/press/2008-07_HomeCopyingWhitePaper.pdf.

92. H.R. 1201, 110th Cong. (2007).

93. *Id.*

94. Bill Patry served as copyright counsel to the U. S. House of Representatives in the 1990s and as a policy advisor to the Register of Copyrights, and was a member of the Cardozo School of Law faculty. He currently is senior copyright counsel at Google. He has written a seven-volume treatise, *Patry on Copyright*, and until August 2008 he wrote the Patry Copyright Blog (williampatry.blogspot.com). *See* K. Matthew Dames, *Copycense Conversations: The William Patry Interview, Pt. 1*, COPYCENSE: ONLINE J. CODE & CONTENT, Aug. 10, 2007, http://www.copycense.com/2007/04/copycense_conve.html; End of the Blog, The Patry Copyright Blog (Aug. 1, 2008), http://williampatry.blogspot.com/2008_08_01_archive.html.

95. Fair Use, the Three-Step Test, and the Counter-Reformation, The Patry Copyright Blog (Apr. 2, 2008), http://williampatry.blogspot.com/2008/04/fair-use-three-step-test-and-european.html.

96. Berne Convention for the Protection of Literary and Artistic Works, *supra* note 56, art. 9.

been incorporated into other copyright agreements.[97] The three-step test has long been considered by copyright scholars to be compatible with fair use. According to Patry, during the hearings from 1985 to 1988 on United States adherence to the Berne Convention, both WIPO and European copyright experts testified before Congress, and no concerns were raised that fair use might be incompatible with the three-step test. In fact, the concerns about any incompatibility with Berne adherence were notice of copyright and registration.[98]

## Conclusion

¶61 Fair use is a very important defense to copyright infringement, and library and educational organizations and user groups should continue to advocate for using and strengthening it. But even if fair use were to be more broadly recognized than it is at present, it is not a substitute for a large, healthy, and ever-expanding public domain. A fair use claim applies only to the parties in the lawsuit. Other users of copyrighted works can only speculate about the applicability of a particular judicial ruling to their own circumstances. By contrast, the public domain is available to everyone. Fair use therefore has little hope of replacing the public domain for the benefit it provides to all.

¶62 The public domain guarantees that there will continue to be a large storehouse of creative material that may be freely adapted and used by everyone. The importance of the public domain to the creative community and to the general public cannot be over emphasized. A statutory provision that provides a formal means for creators to dedicate their works to the public domain would be a strong step in this direction, as would a shorter term of copyright. Increasing public awareness about the social good of the public domain should strengthen congressional support and begin to shift the direction of copyright law in the United States.

¶63 The public domain must be treasured, defended against encroachment, and expanded.

97. *See*, *e.g.*, World Intellectual Property Organization Copyright Treaty art. 10(1), Dec. 20, 1996, S. Treaty Doc. No. 105-17, 36 I.L.M. 65, 71 (1997); Council Directive 91/250 art 6(3), Legal Protection of Computer Programs, 1991 O.J. (L122) 42, 45 (EC); Council Directive 96/9 art. 6(3), Legal Protection of Databases 1996 O.J. (L 77) 20, 25 (EU)); Council Directive 2001/29 art. 5(5), Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, 2001 O.J. (L 167) 10, 17 (EU).

98. Fair Use, the Three-Step Test, and the Counter-Reformation, *supra* note 95.