

Copyright Term: When Does a Work Enter the Public Domain?

by Dustin Howell

Years ago, there was a radio show that featured a lawyer who would take calls from listeners and answer their legal questions. A man called into the show and said he had obtained some photographs of warplanes from a museum. A cable network had contacted the man about using the photographs as part of a documentary it was making. This man was wise enough to know that the photographs may very well be protected by copyright. He wanted to know how to find out if the photographs were still protected by copyright and who owned them, because without owning the copyrights himself or having a license from the copyright owner, the man could not authorize the cable network to use the photographs. Whether a work (e.g., photograph, literature, music, sculpture, movie, etc.) is protected by copyright or whether it is in the public domain for anyone to use can depend on a variety of factors.

When the Constitution replaced the Articles of Confederation in 1787, Congress had the power “To promote the Progress of Science and useful Arts, by securing for limited times to Authors...the exclusive rights to their...Writings.” (U.S. Const., Article 1, Section 8, Clause 8). The generally accepted justification for this protection, commonly known as copyright, is that it acts as an incentive for the creation of new works for the public’s benefit. In the conventional understanding, copyright is said to reflect a kind of quid pro quo: authors receive exclusive rights for a limited time in exchange for eventual contributions of their works to the public domain.

In 1790, Congress enacted the first federal copyright statute pursuant to its power under the new Constitution. This original statute detailed copyright’s protectable subject matter, term length, exclusive rights, and requirements to obtain and maintain copyright protection. Since the original copyright statute, Congress has broadened nearly every aspect of copyright protection.

For instance, under the Act of 1790, a work became eligible for copyright at the time of publication, and the copyright continued for an initial term of 14 years. The author could renew the copyright for additional 14 years if the author was still alive at the end of the first term. In 1831, Congress changed the term of copyright by extending the initial term to 28 years and allowing the author’s surviving spouse and children to renew the copyright. Since

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1831, Congress has extended the length of the copyright term several times. The 1909 Act extended the renewal term to 28 years, and beginning in 1962 Congress began extending the term of copyright one year at a time to prevent expiration of any then-existing copyrights before the comprehensive revisions of the copyright statute in 1976.

The most significant change in the copyright term came in 1976. Under the 1976 Act, Congress shifted the copyright term from the two-term regime that provided for a specific number of years of protection to a term based on the life of the author. Initially, this term was equal to life of the author plus 50 years. Congress most recently extended this term by an additional 20 years, so that any work created by an individual now lasts for the life of the author plus 70 years.

With the above-noted copyright terms in mind, one would think that it would be obvious whether a particular work is still protected by copyright or whether the work has entered the public domain. However, due to other significant changes that Congress has made to the copyright laws, determining whether a work has entered the public domain or is still protected by copyright is not as simple as it may seem.

While Congress has broadened most aspects of copyright protection over time, including the term of copyright, there is one aspect that it has all but eliminated. For nearly 200 years, authors could secure and maintain copyright protection only through compliance with a list of formalities. These formalities included registration, providing public notice, depositing a copy of the work with the government, and renewing the copyright registration. Initially, authors provided notice to the public by publishing notice of the copyright registration in a newspaper, and later by affixing notice to each copy of the work. Additionally, as mentioned above, at the end of the first term the author had to renew the copyright to maintain protection. Under the Copyright Act of 1976, these formalities that had acted as condition precedents to copyright protection have been effectively eliminated. Now, copyright protection immediately attaches when a work is fixed in a tangible medium.

Since the term and specific formality requirements for copyright protection have changed

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both subtlety and significantly over time, one should be cautious before using another's work. In evaluating whether a specific work is in the public domain, the copyright term applicable to the work should be determined. Additionally, it should also be determined whether the author/owner of the copyright complied with any required formalities and/or renewed the copyright registration. If you are not sure if a particular work is still protected by copyright, be wise like the man that called into the radio show and call your copyright attorney for help.