

The Public Domain Manifesto

Preamble

"Le livre, comme livre, appartient à l'auteur, mais comme pensée, il appartient—le mot n'est pas trop vaste—au genre humain. Toutes les intelligences y ont droit. Si l'un des deux droits, le droit de l'écrivain et le droit de l'esprit humain, devait être sacrifié, ce serait, certes, le droit de l'écrivain, car l'intérêt public est notre préoccupation unique, et tous, je le déclare, doivent passer avant nous." (Victor Hugo, *Discours d'ouverture du Congrès littéraire international de 1878*, 1878)

"Our markets, our democracy, our science, our traditions of free speech, and our art all depend more heavily on a Public Domain of freely available material than they do on the informational material that is covered by property rights. 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." (James Boyle, *The Public Domain*, p.40f, 2008)

The public domain, as we understand it, is the wealth of information that is free from the barriers to access and reuse usually associated with copyright protection, either because it is free from any copyright protection or because the right holders have decided to remove these barriers. It is the basis of our self-understanding as expressed by our shared knowledge and culture. It is the raw material from which new knowledge is derived and new cultural works are created. The Public Domain acts as a protective mechanism that ensures that this raw material is available at its cost of reproduction - close to zero - and that all members of society can build upon it. Having a healthy and thriving Public Domain is essential to the social and economic well-being of our societies. The Public Domain plays a capital role in the fields of education, science, cultural heritage and public sector information. A healthy and thriving Public Domain is one of the prerequisites for ensuring that the principles of Article 27 (1) of the Universal Declaration of Human Rights ('Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.') can be enjoyed by everyone around the world.

The digital networked information society has brought the issue of the Public Domain to the foreground of copyright discussions. In order to preserve and strengthen the Public Domain we need a robust and up-to-date understanding of the nature and

role of this essential resource. This Public Domain Manifesto defines the Public Domain and outlines the necessary principles and guidelines for a healthy Public Domain at the beginning of the 21st century. The Public Domain is considered here in its relation to copyright law, to the exclusion of other intellectual property rights (like patents and trademarks), and where copyright law is to be understood in its broadest sense to include economic and moral rights under copyright and related rights (inclusive of neighboring rights and database rights). In the remainder of this document copyright is therefore used as a catch-all term for these rights. Moreover, the term 'works' includes all subject-matter protected by copyright so defined, thus including databases, performances and recordings. Likewise, the term 'authors' includes photographers, producers, broadcasters, painters and performers.

The Public Domain in the 21st Century

The Public Domain as aspired to in this Manifesto is defined as cultural material that can be used without restriction, absent copyright protection. In addition to works that are formally in the public domain, there are also lots of valuable works that individuals have voluntarily shared under generous terms creating a privately constructed commons that functions in many ways like the public domain. Moreover, individuals can also make use of many protected works through exceptions and limitations to copyright, fair use and fair dealing. All of these sources that allow for increased access to our culture and heritage are important and all need to be actively maintained in order for society to reap the full benefit of our shared knowledge and culture.

The Public Domain

The structural Public Domain lies at the core of the notion of the Public Domain and is comprised of our shared knowledge, culture and resources that can be used without copyright restrictions by virtue of current law. Specifically, the structural Public Domain is made up of two different classes of material:

1. *Works of authorship where the copyright protection has expired.* Copyright is a temporary right granted to authors. Once this temporary protection has come to its end, all legal restrictions cease to exist, subject in some countries to the author's perpetual moral rights.
2. *The essential commons of information that is not covered by copyright.* Works that are not protected by copyright because they fail the test of originality, or are excluded from protection (such as data, facts, ideas, procedures,

processes, systems, methods of operation, concepts, principles, or discoveries, regardless of the form in which they are described, explained, illustrated, or embodied in a work, as well as laws and judicial and administrative decisions). This essential commons is too important for the functioning of our societies to be burdened with legal restrictions of any nature even for a limited period.

The structural Public Domain is an historically grown balance to the rights of authors protected by copyright and it is essential to the cultural memory and knowledge base of our societies. In the second half of the 20th century all two elements identified here have been strained by the extension of the term of copyright protection and the introduction of more copyright-like regimes of legal protection.

Voluntary commons and user prerogatives

In addition to this structural core of the Public Domain, there are other essential sources that enable individuals to freely interact with copyright protected works. These represent the "breathing space" of our current culture and knowledge, ensuring that copyright protection does not interfere with specific requirements of society and the voluntary choices of authors. While these sources increase access to protected works, some of them make this access conditional on certain forms of use or restrict access to certain classes of users:

1. *Works that are voluntarily shared by their rights holders.* Creators can remove use restrictions from their works by either freely licensing them, or by using other legal tools to allow others to use their works without restrictions, or by dedicating them to the Public Domain. For free licencing definitions see the definition of free software <http://www.gnu.org/philosophy/free-sw.html>, the definition of free cultural works <http://freedomdefined.org/Definition>, and the open knowledge definition <http://opendefinition.org/1.0/> for reference.

2. *The user prerogatives created by exceptions and limitations to copyright, fair use and fair dealing.* These prerogatives are an integral part of the Public Domain. They ensure that there is sufficient access to our shared culture and knowledge, enabling the functioning of essential social institutions and enabling social participation of individuals with special needs.

Taken together, the public domain, the voluntary sharing of works and exceptions and limitations to copyright, fair use and fair dealing go a long way to ensure that everyone has access to our shared culture and knowledge in order to facilitate innovation

and cultural participation for the benefit of the entire society. It is therefore important that the Public Domain in both its incarnations is actively maintained so that it can continue to fulfill this key role in this period of rapid technological and social change.

General Principles

In a period of rapid technological and social change the Public Domain fulfills an essential role in cultural participation and digital innovation, and therefore needs to be actively maintained. Active maintenance of the Public Domain needs to take into account a number of general principles. The following principles are essential to preserve a meaningful understanding of the Public Domain and to ensure that the Public Domain continues to function in the technological environment of the networked information society. With regard to the structural Public Domain these are as follows:

1. *The Public Domain is the rule, copyright protection is the exception.* Since copyright protection is granted only with respect to original forms of expression, the vast majority of data, information and ideas produced worldwide at any given time belong to the Public Domain. In addition to information that is not eligible for protection, the Public Domain is enlarged every year by works whose term of protection expires. The combined application of the requirements for protection and the limited duration of the copyright protection contribute to the wealth of the Public Domain so as to ensure access to our shared culture and knowledge.
2. *Copyright protection should last only as long as necessary to achieve a reasonable compromise between protecting and rewarding the author for his intellectual labour and safeguarding the public interest in the dissemination of culture and knowledge.* From neither the perspective of the author nor the general public do any valid arguments exist (whether historical, economic, social or otherwise) in support of an exceedingly long term of copyright protection. While the author should be able to reap the fruits of his intellectual labour, the general public should not be deprived for an overly long period of time of the benefits of freely using those works.
3. *What is in the Public Domain must remain in the Public Domain.* Exclusive control over Public Domain works must not be reestablished by claiming exclusive rights in technical reproductions of the works, or using technical protection measures to limit access to technical reproductions of such works.

4. The lawful user of a digital copy of a Public Domain work should be free to (re-)use, copy and modify such work. The Public Domain status of a work does not necessarily mean that it must be made accessible to the public. The owners of physical works that are in the Public Domain are free to restrict access to such works. However once access to a work has been granted then there ought not be legal restrictions on the re-use, modification or reproduction of these works.

5. Contracts or technical protection measures that restrict access to and re-use of Public Domain works must not be enforced. The Public Domain status of a work guarantees the right to re-use, modify and reproduce. This also includes user prerogatives arising from exceptions and limitations, fair use and fair dealing, ensuring that these cannot be limited by contractual or technological means.

In addition, the following principles are at the core of the voluntary commons and user prerogatives described above:

1. The voluntary relinquishment of copyright and sharing of protected works are legitimate exercises of copyright exclusivity. Many authors entitled to copyright protection for their works do not wish to exercise these rights to their full extent or wish to relinquish these rights altogether. Such actions, provided that they are voluntary, are a legitimate exercise of copyright exclusivity and must not be hindered by law, by statute or by other mechanisms including moral rights.

2. Exceptions and limitations to copyright, fair use and fair dealing need to be actively maintained to ensure the effectiveness of the fundamental balance of copyright and the public interest. These mechanisms create user prerogatives that constitute the breathing space within the current copyright system. Given the rapid pace of change in both technology and society it is important that they remain capable of ensuring the functioning of essential social institutions and the social participation of individuals with special needs. Therefore, exceptions and limitations to copyright, fair use and fair dealing should be construed as evolutionary in nature and constantly adapted to account for the public interest.

In addition to these general principles, a number of issues relevant to the Public Domain must be addressed immediately. The following recommendations are aimed at

protecting the Public Domain and ensuring that it can continue to function in a meaningful way. While these recommendations are applicable across the spectrum of copyright, they are of particular relevance to education, cultural heritage and scientific research.

General Recommendations

1. The term of copyright protection should be reduced. The excessive length of copyright protection combined with an absence of formalities is highly detrimental to the accessibility of our shared knowledge and culture. Moreover, it increases the occurrence of orphan works, works that are neither under the control of their authors nor part of the Public Domain, and in either case cannot be used. Thus, for new works the duration of copyright protection should be reduced to a more reasonable term.
2. Any change to the scope of copyright protection (including any new definition of protectable subject matter or expansion of exclusive rights) needs to take into account the effects on the Public Domain. Any change of the scope of copyright protection must not be applied retroactively to works already subject to protection. Copyright is a time-limited exception to the Public Domain status of our shared culture and knowledge. In the 20th century its scope has been significantly extended, to accommodate the interests of a small class of rights holders at the expense of the general public. As a result, most of our shared culture and knowledge is locked away behind copyright and technical restrictions. We must ensure that this situation will not be worsened at a minimum, and be affirmatively improved in the future.
3. When material is deemed to fall in the structural Public Domain in its country of origin, the material should be recognized as part of the structural Public Domain in all other countries of the world. Where material in one country is not eligible for copyright protection because it falls under a specific copyright exclusion, either because it does not meet the criterion of originality or because the duration of its protection has lapsed, it should not be possible for anyone (including the author) to invoke copyright protection on the same material in another country so as to withdraw this material from the structural Public Domain.
4. Any false or misleading attempt to misappropriate Public Domain material must be legally punished. In order to preserve the integrity of the Public

Domain and protect users of Public Domain material from inaccurate and deceitful representations, any false or misleading attempts to claim exclusivity over Public Domain material must be declared unlawful.

5. No other intellectual property right must be used to reconstitute exclusivity over Public Domain material. The Public Domain is integral to the internal balance of the copyright system. This internal balance must not be manipulated by attempts to reconstitute or obtain exclusive control via regulations that are external to copyright.

6. There must be a practical and effective path to make available 'orphan works' and published works that are no longer commercially available (such as out-of-print works) for re-use by society. The extension of the scope and duration of copyright and the prohibition of formalities for foreign works have created a huge body of orphan works that are neither under the control of their authors nor part of the Public Domain. Given that such works under current law do not benefit their authors or society, these works need to be made available for productive re-use by society as a whole.

7. Cultural heritage institutions should take upon themselves a special role in the effective labeling and preserving of Public Domain works. Not-for-profit cultural heritage organizations have been entrusted with preservation of our shared knowledge and culture for centuries. As part of this role they need to ensure that works in the Public Domain are available to all of society, by labeling them, preserving them and making them freely available.

8. There must be no legal obstacles that prevent the voluntary sharing of works or the dedication of works to the Public Domain. Both are legitimate exercises of exclusive rights granted by copyright and both are critical to ensuring access to essential cultural goods and knowledge and to respecting authors' wishes.

9. Personal non-commercial uses of protected works must generally be made possible, for which alternative modes of remuneration for the author must be explored. While it is essential for the self-development of each individual that he or she be able to make personal non-commercial uses of works, it is just as essential that the position of the author be taken into consideration when establishing new limitations and exceptions on copyright or revising old ones.

