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1. What does the term public domain mean?

Public domain applies to content that is not or is no longer protected by copyright and is therefore freely available to everyone. Such content is literally in the public domain. Access to it cannot be limited by copyright law or made available for a fee.

2. Which works belong to the public domain?

a. Which content belongs to the public domain under Swiss law?

Intellectual works without individual character (with the exception of photographs – see Question 2b) and individual intellectual works for which copyright has expired or which are excluded from copyright protection (for example, legislative texts – see Question 2c.) belong to the public domain.

b. What happens if an intellectual work lacks the necessary individual character for it to be protected under copyright?

Only an intellectual work with individual character is protected under copyright. If the individual character is lacking, the creation is not protected by copyright and it belongs to the public domain.

However, there is an important exception for photographs. They are protected by copyright even if they have no individual character.

c. Which publications by the authorities belong to the public domain?

A whole range of works by public authorities are excluded from copyright protection: legislation, official decrees, payment instruments, legal decisions, protocols, reports by the authorities or public administrations, as well as patent documents and published patent applications. However, not all works from the authorities are in the public domain. Internal administrative documents or documents that do not have so-called ‘sovereign character’ (e.g. journals by the authorities) are not in the public domain. However, access to them can be guaranteed through certain requirements under the Freedom of Information Act.

d. Does factual scientific data belong to the public domain?

Scientific data (e.g. population statistics) are not considered intellectual creations and therefore belong to the public domain. Statements made by scientists about states, processes or other facts become free in terms of content when they are published and are not protected by copyright, even if new findings are included or much effort was involved in their discovery (BGE 113 II 306, E. 3a). However, the way in which the scientific contents are communicated is protected (e.g. the written text of a research report). Databases can be protected as so-called ‘collected works’, regardless of whether the individual datasets can be protected under copyright if the selection and compilation of the data can be seen as individual. The selection of the data, however, is usually solely focused on completeness, and its compilation is only done in a systematic way. For example, the mere listing of telephone numbers for a specific region is not sufficiently individual to be protected by copyright. The same evaluation criteria apply to databases containing metadata of works. The European Union has regulated the legal protection of databases in a specific directive (Directive 96/9/EC). It is therefore possible that extracting or using at least a significant part of the contents of a database is permitted under Swiss law, but not under European law.

e. What is the legal situation if the author of a work is unknown (or if multiple authors of a work exist)?

In principle, copyright protection ends 70 years after the death of the author. For computer programs, copyright protection ends 50 years after the death of the author. However, if the author of a work is unnamed (anonymous) or unknown (acting under a pseudonym), copyright protection ends 70 years after the work was published (50 years for computer programs) or after the last delivery. If the true identity of the author is known, despite the use of a pseudonym, the term of protection ends 70 years (50 years for computer programs) after his death. It is a different case for what are known as 'orphan works' where the author is or was known (i.e. he or she may have been forgotten over the course of time), but today cannot be found. Here, the term of protection ends 70 years after the death or the presumed death of the author (see Question 2f). For non-individual photographs, protection always ends 50 years after they were taken.

For cases of joint authorship (whereby multiple authors jointly create a work), the protection of the work ends 70 years (50 years for computer programs) after the death of the last co-author. If the individual author contributions can be separated (e.g. lyrics and melody), then copyright expires individually for each contribution. A special regulation exists for audiovisual works such as films. The number of people involved in the creation of such a work is such that only the date of death of the director is taken into account when calculating when the copyright expires.

f. What is the case when the author's exact date of death is unknown?

If the exact date of the author's death is unknown, copyright protection ends as soon as it can be assumed that the author has been dead for more than 70 years (or 50 years for computer programs). At this point, the work falls into the public domain.

g. What is the legal situation in cases where various rights exist to the work (e.g. the copyright to a song and the right to a single performance)?

In such cases, different terms of protection exist for different protected subject matter. Take Bizet's Carmen, for example. The opera is in the public domain because George Bizet died in 1875 and the term of protection has long since expired. For Francesco Rosi's 1984 film version of this opera, however, there are copyrights, performer rights and producer rights. Therefore, it is possible to perform Bizet's opera without permission and without paying remuneration. However, to show Francesco Rosi's film version of this opera, it is necessary to gain permission from the rights owner and to pay remuneration for its use.

h. What is the legal situation in relation to translations or new editions of works in the public domain (if these works are adapted to current orthography or if spelling errors are corrected)?

Translations, including the translation of public domain works, can be protected by copyright. A translation is usually an adaptation, which means the translation is itself an intellectual creation with individual character. Whether new editions (with updated orthography or spelling corrections) are already protected by copyright cannot be evaluated in general. Here, it depends on whether the revision is altogether so significant that the new edition takes on its own individual character. The original public domain work, however, remains in the public domain and can continue to be used freely.

i. Does a work have to be published in order for it to belong to the public domain (e.g. letters from a person who died more than 70 years ago)?

Under Swiss law, a work automatically falls into the public domain when the term of protection expires, regardless of whether it has been published in the meantime or not.

3. What am I allowed to do with public domain works?

a. How can a public domain work be used?

If a work is in the public domain, it can be used in any way desired – this means reproduced (copied), edited, distributed, etc. – without permission.

b. Are there any legal restrictions to using public domain works?

Even the use of public domain works can be restricted. These restrictions can result from the prohibition of racial discrimination, for example, or the criminal law regulation of pornography.

4. Does the digitalisation of a public domain work (e.g. scanning, photography, etc.) lead to the creation of new copyright protection for the work, which in turn restricts the use and reproduction of the scans or photographs? What is the situation with regard to two and three-dimensional works?

An artistic photograph of a public domain work can be protected by copyright as a so-called 'derivative work'. A reproduction as true to the original as possible regularly lacks the individuality required for copyright protection. However, photographic reproductions and reproductions of three-dimensional objects produced by a process similar to photography are also protected in these cases. Photographs of two-dimensional works are not protected by copyright. Either way, the original photographed work remains in the public domain. Whether a work is two or three-dimensional is irrelevant. This is only of significance for so-called 'freedom of panorama'. In other words, if a copyright-protected work is permanently located in a public place, it may be depicted two-dimensionally (but not three-dimensionally) without the rights holder's permission. For example, the Oppenheim fountain in Bern may be photographed and the photo may be subsequently used. This is true even for commercial uses such as producing posters or postcards.

5. Some organisations distribute public domain works and protect them through technical measures such as Digital Rights Management (DRM). Am I allowed to circumvent DRM protection?

The Copyright Act distinguishes between two types of DRM. Technical protection measures (TPM) regulate the use of a work. Rights management information (RMI) gives information about the legal situation. Circumvention is only possible with TPM. RMI cannot prevent any use and therefore cannot be circumvented. However, it can be destroyed or removed. The circumvention of technical measures is only forbidden by copyright law if the rights holder uses it to regulate the use of his copyright protected work. Since, in the case of public domain works, they are not copyright-protected, circumvention of technical measures does not represent an infringement of copyright law. In these cases, however, it is possible that a prohibition may be invoked under computer crimes (e.g. unauthorised data acquisition or unauthorised entry in a data processing system).

6. Some organisations add watermarks or similar signs to public domain works and publish them on the internet. Does adding such a sign to a public domain work create new protection that restricts the use and reproduction of the work?

The purpose of a watermark is not meant to extend the term of copyright protection. From the point of view of copyright, adding a watermark to a work that is already in the public domain does not mean that new copyright protection arises. Theoretically, however, the watermark itself could be seen as an intellectual work with individual character, which in turn is protected by copyright. In this case, further use of the public domain work would be problematic because it would also involve the use of the watermark.

7. Some organisations exhibit public domain works but don’t allow them to be photographed. Am I allowed to circumvent this ban?

In this case, this is not about protecting copyright. An organisation (such as a museum) can ban photography on the basis of 'house rules'. Most museums compile their provisions in what are known as house regulations. These state how visitors to the museum are to conduct themselves. Normally, they also regulate whether exhibited works may be photographed or not. A ban on photography can be for different reasons, such as to protect the pictures from camera flashes or to ensure the orderly operation of the museum. By entering the museum, every visitor accepts the house regulations and may not, for example, circumvent a photography ban.

8. To what extent is metadata protected under Swiss copyright law?

Metadata is not protected under copyright law per se. If, however, it is captured on blank media or if it appears in a reproduction, then it likely concerns copyright-protected information for the assertion of rights (i.e. rights management information or RMI). For example, the metadata of a song (e.g. the song title and name of the composer) that exists on a CD may not be deleted in order to subsequently transmit the song without this data.

9. Can I relinquish the copyright to one of my own works by assigning it to the public domain?

Copyright arises automatically and, in contrast to property law, there is no procedure for simply giving up this right. An author, therefore, does not have any direct possibility of giving a work to the public domain. However, he is at liberty to simply tolerate copyright infringement and to waive legal prosecution. In addition, an author can actively decide to make his work available under an appropriate Creative Commons licence, which is very similar to the public domain, or an equivalent type of public licence.

10. To what extent can someone be held responsible for incorrectly issuing a work as a public domain work?

For copyright infringement, the person held responsible is the one who carried out the infringing act. Under certain circumstances, there may be a possibility of recourse for incorrect information, but it is always worth personally checking whether a work is actually in the public domain or not. There is no defence of good faith under copyright law.

11. To what extent can an institution or a person be held responsible for incorrectly claiming copyright to a work that is actually in the public domain?

If a person or institution knows that a work is in the public domain and still claims copyright to it, this is considered deliberate deception. If, for example, a licence contract for a public domain work were subsequently signed, this contract would not be binding on the deceived person if he stated before a court that he is not in agreement with the contract. If someone knowingly claims copyright remuneration for public domain works, this is usually viewed as unjust enrichment. In such cases, the remuneration received would have to be paid back.