Legal Advice for Artists

Sample Chapter

Colophon

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Many thanks to
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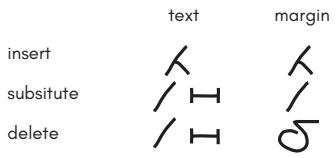
Legal Advice for Artists is an Irreverent Guide to Copyright, written for makers. It combines the practical and critical, the how and why, in a compact, contemporary, readable volume packed with strong examples, in an attractive design.

LAfA recognises the paradox intellectual property poses to artists and designers. On the one hand, makers can benefit from the protection that copyright offers, while on the other, it problematises the creative process because copyright limits the possibilities for building upon the work of others.

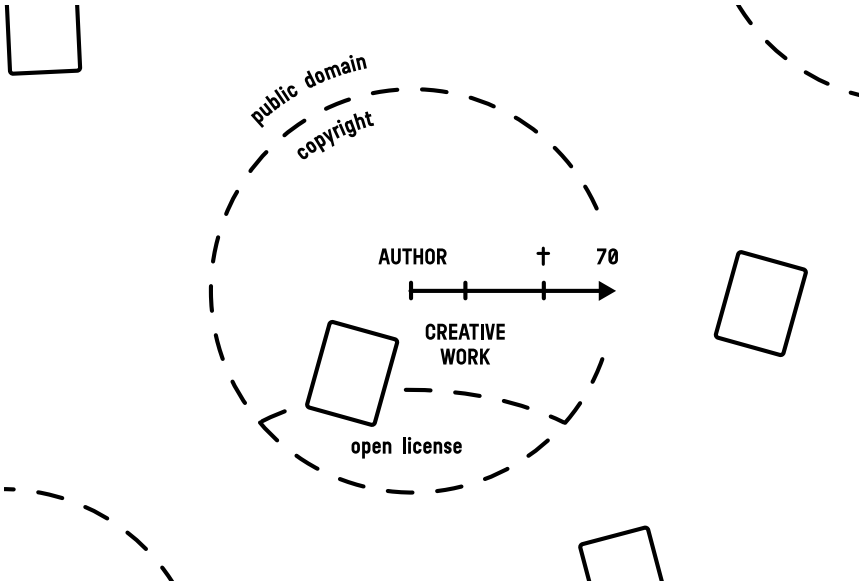
LAfA looks at the basic parameters of copyrights: who gets it? for what work? how? and for how long? Then: how do the categories of copyright apply to different media, and what happens when a work moves from medium to medium? And how does copyright relate to the web of related legal concepts: moral rights, image rights, trademarks, patents?

LAfA is going to be a practical guide, yet for all the real-world examples it will discuss how they relate to the concepts of authorship and original creation that underly our legal system. Beyond providing them with the tools to navigate the paradox of copyright in their own practice, it will equip readers with the conceptual keys to participate in the debate on copyright today.

The publication is currently under development. If you want to give feedback or are interested in being a partner in bringing this book to life, reach out to eric@ericschrijver.nl



6.1. No Known Restriction : the public domain



You are an author. You're a very special kind of worker: what you make is the product of your singular personality, and that's why you will get a lot of control on how others will get to use the fruits of your labour. This the theory of copyright. But works and authors have the tendency to drift apart. Once your work is out there, and others have connected to it, as a public, as researchers, as artists inspired, how much control can and should you exert? Then, some time after, you die. On the off chance that your work finds itself in an archive, a back catalogue, a collection, and just maybe somewhere in the public consciousness, what happens then? You were the author, that special someone who got to control the copies. What happens when you are no longer around?

Some of the influential early voices in copyright thought it should cease with death. Victor Hugo was skeptical of the heirs' capacity to look after the work. We should not, he wrote, "mistake the descendant of blood for the descendant of spirit". And

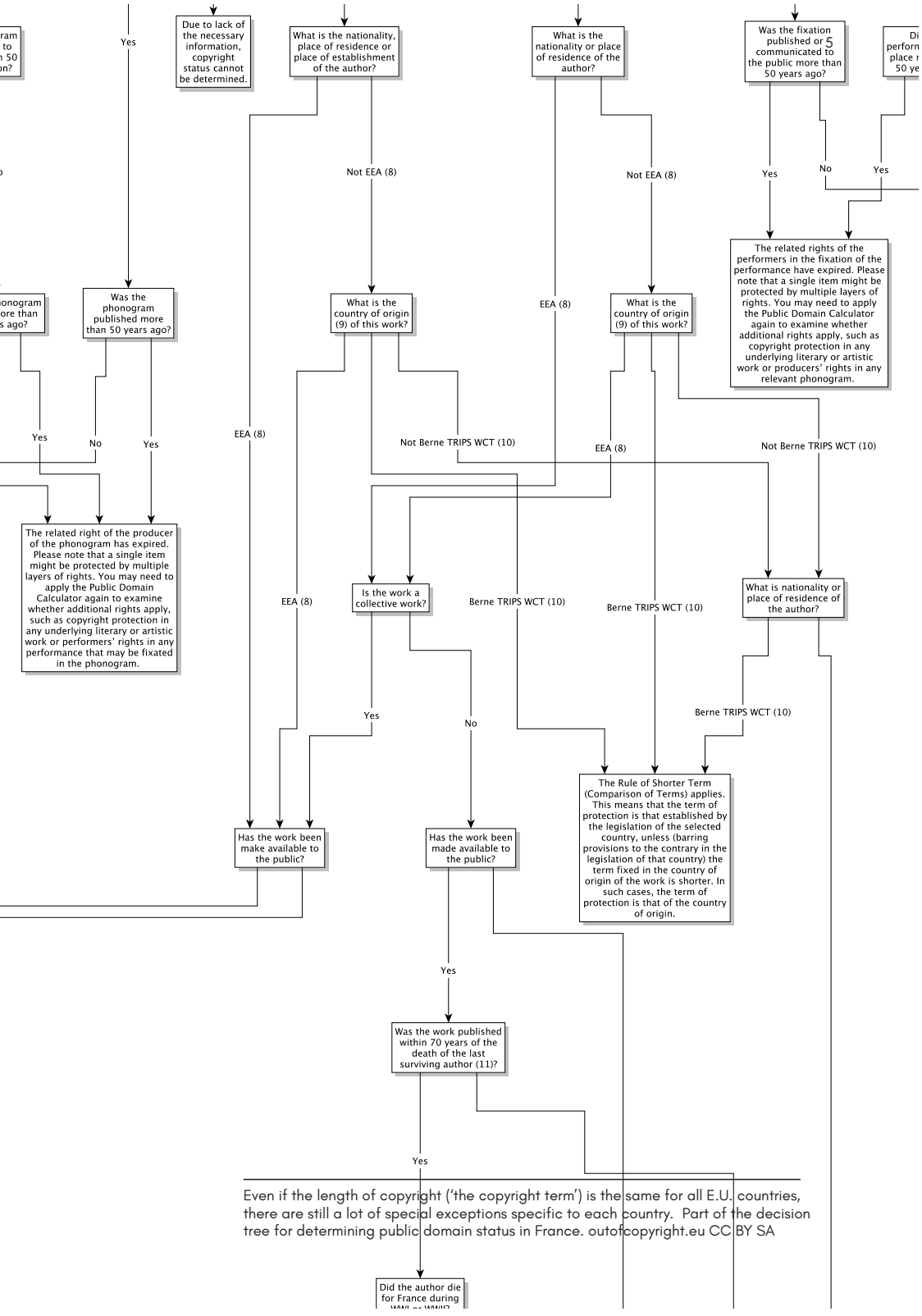
after all, "the heir doesn't make the book, he can not have the copyright." Yet the 18th and 19th century provided little in the way of a social safety net, and to the those negotiating the first conventions on author's rights, the idea that authors could use their copyright provide for their family's after their demise was very attractive.

Yet copyright does not last forever. A book belongs to its author, but it also, in the words of Hugo, "(…) to humankind. Every intelligence has a right to it." Your heirs might have an interest in the work, but the public might as well—why should it be up to the heirs to decide what kinds of copying are allowed and which are not? This is why copyright has evolved to reach a compromise: your copyright lasts after death, but for a limited time. A long time, though—70 years in most parts of the world. Then whatever you have made belongs to the public.

Delimiting The Public Domain

The public domain is not the same as the public consciousness. Groups of people share common cultural references. You probably know that Martin Luther King made a famous speech in which he says that he has a dream, and you probably know that his dream is one of racial equality. Yet if you want to listen to that speech in its entirety, copyright can still stop you. Let alone if you want to re-publish the speech: print the text in a school book or sample the recording for a piece of music. The copyright of 'I have a dream' is with the King family, who have partnered with EMI (now Sony) to exploit it. Users of online services like YouTube play cat and mouse with the rights holders: once an illegally uploaded video is removed, another one pops up somewhere else. In contrast, once a work is in the public domain, copyright restrictions no longer apply.

The most common definition of public domain refers to those works that used to have copyright, but no longer do. It can also refer to works that did not get copyright protection to begin with. Facts, or other pieces of information that do not meet the 'creativity threshold' required to be considered a creative work are in the public domain. Finally, some countries may have additional legal restrictions on copyright. In most countries, the



Even if the length of copyright ('the copyright term') is the same for all E.U. countries, there are still a lot of special exceptions specific to each country. Part of the decision tree for determining public domain status in France. outofcopyright.eu CC BY SA

text of laws and court rulings are considered to be in the public domain. In the United States, all work done by federal employees is in the public domain as well. This means, for example, that the 'Migrant Mother' photo by Dorothea Lange is in the public domain because she was working for the Farm Security Administration at the time.

The Length of Copyright

So when does a work of art that initially has copyright join the public domain? The Berne convention established what now is the almost universal way of determining copyright length: literally based on the death of the author. So we need to know two things: who is the author, and when did they die?

In most countries, and all E.U. countries, copyright lasts 70 years after death. The rule is to round up to the 31st of December of the year that protection ends. So in the E.U., the work of Virginia Woolf, who died the 28th of March of 1941, became part of the public domain the 1st of January 2012.

Even if the length of copyright ('the copyright term') is the same for all E.U. countries, there are still exceptions specific to each country. For example, France has instituted copyright extensions for all authors 'Mort pour la France'—all authors who died as casualties of war. After all, because copyright is calculated from the date of death, the work of artists who die young will have protection for a shorter time. Even if the reasoning for such exceptions is understandable, it doesn't make work easier for those seeking to understand if a work is part of the public domain. In the case of French authors that died in the period of 40–45, it means figuring how they died exactly.

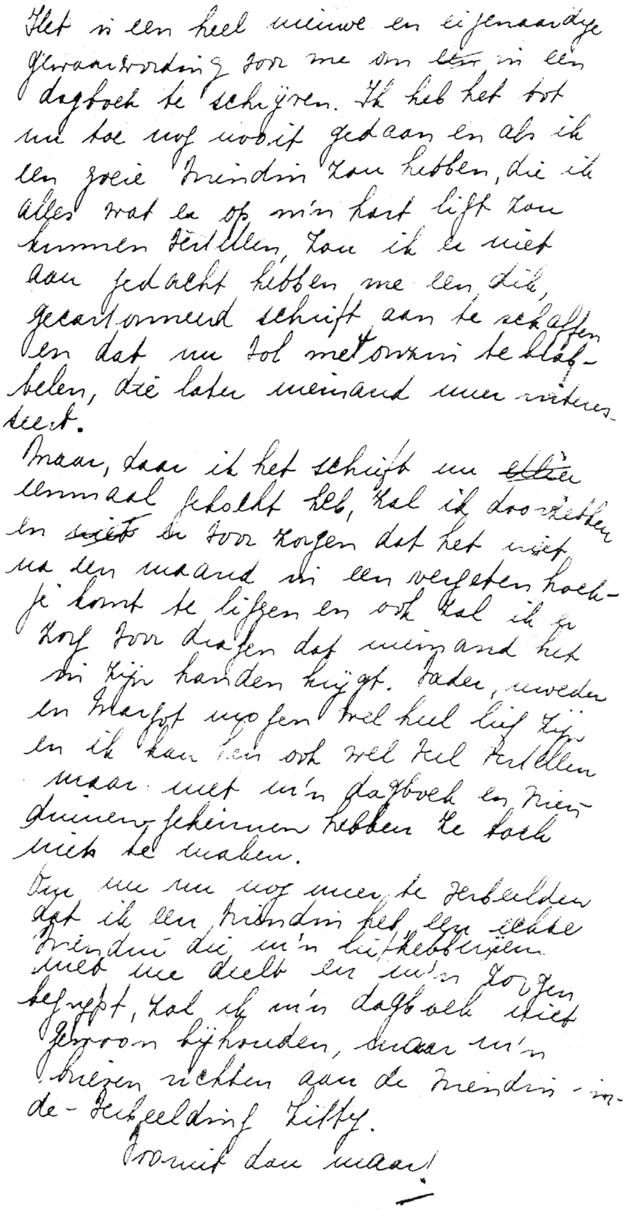
Several European institutions have collaborated to produce 'Public Domain Calculators', to try and alleviate some of the pain of figuring out the public domain status of a work. For many of the E.U. member states, `outofcopyright.eu` is a tool that helps to determine whether a work is in the public domain, by asking a series of questions. The website publishes flow-charts of the underlying decision trees, that make the complexity of the assessment visual.

The Identity of the Author

Another complicating factor is that one needs to know who is the author of a work. Work might be published anonymously, in which case the copyright lasts uptil 70 years after publication—unless the author has since made themselves known! A work can also be a collaborative work. In that case, the law stipulates that the year of death of the longest surviving author determines the year of entry into the public domain. In the Netherlands, if work is produced by an employee, it is the employer who has the copyright. In France, this is only the case for clearly collective works. These are works that have been created under the initiative of a moral person, like an enterprise or association, and that have been elaborated with a group of people of whom the individual imprints can no longer be clearly distinguished on the final result. In this case, since the work can not be associated to an individual author, copyright will be attributed to the moral person (the entreprise or association) and it will enter the public domain 70 years after the date of publication.

The Business of Authorship

When a work enters into the public domain, an interesting tension arises between the ideology of authorship and business interests. While artists are alive, various collaborators and business partners have a vested interest in maintaining an image of individual authorship. As we've seen before, copyright is based on an idea of the author as someone who leaves an imprint of their unique personality. The creative work is intimately tied to its author. This resembles closely how, at least for many people, we interpret culture. We might wonder which pop song of Taylor Swift maps to which of her ex-lovers. Yet the process by which a pop song gets written involves a large number of authors. The popular press could just as well dig up details about the romantic live of Max Martin, a Swedish song-smith, producer and Swift's co-author, and try to link the songs to his exes. Yet there are hardly any interviews with Max Martin, who has worked on a string of hits ever since the Backstreet Boys. This is what Roland Barthes calls 'the tenacity of the author': we like to consider the



Het is een heel nieuwe en eigenaardige gewaarwording voor me om in een dagboek te schrijven. Ik heb het tot nu toe nog nooit gedaan en als ik een goeie vriendin zou hebben, die ik alles wat er op m'n hart ligt zou kunnen vertellen, zou ik er niet aan gedacht hebben me een dik, gecartonneerd schrift aan te schaffen en dat nu vol met onzin te kladkladden, die later niemand meer interesseert.

Maar, daar ik het schrift nu eenmaal gekocht heb, zal ik doorzetten en er voor zorgen dat het niet na een maand in een vergeten hoekje komt te liggen en ook zal ik er zorg voor dragen dat niemand het in zijn handen krijgt. Vader, moeder en Margot mogen wel heel lief zijn en ik kan hun ook wel veel vertellen maar met m'n dagboek en m'n vriendinnen-geheimen hebben ze toch niets te maken.

Om me nu nog meer te verbeelden dat ik een vriendin heb, een echte vriendin die m'n liefhebberijen met me deelt en m'n zorgen begrijpt, zal ik m'n dagboek niet gewoon bijhouden, maar m'n brieven richten aan de vriendin-in-de-verbeelding Kitty.

Vooruit dan maar!

The original manuscripts of Anne Frank's diary, first published in 1986, are still under copyright in the Netherlands: publications posthumously published before 1995 are protected until 50 years after publication. This letter was found later, and published in 1999: it is in the public domain.

work of art as to coming from one person, and having a relationship to their life experience in particular.

Record companies, book publishers and art galleries do their part in helping to maintain the image of the author as an autonomous force, who is fully and individually responsible for their work. Yet when a work is about to enter the public domain, publishers and co-authors are quick to assert their role in the creative process, and claim their own rights.

A rather tragic example of rights holders re-assessing authorship can be found with the diary of Anne Frank. The diary of Anne Frank emerged after the war as a poignant testimony of the Holocaust. Through the years, the authenticity of the diary has been doubted, mainly by sympathisers of the extreme right. Anne's father, Otto Frank, was, at various times, accused of being the actual author. He fought these allegations successfully all his live. The non-profit to whom, after Otto Frank's death, the copyright of the diary was bequeathed, has been fearful of the work entering into the public domain. To prevent that, they posit that Onno Frank is a co-author. Having died in '86 instead of '45, this will make the copyright last 31 years longer. But in doing so, the Anne Foundation has had to contest a notion that used to be at the core of its convictions: that Anne Frank is the sole author of her diary.

Why the Heirs Stick in There

The interest of publishers in contesting the public domain status of work seems clear. As soon as a work enters the public domain, other publishers can make editions of the same work, leading to a possible loss in profit for the publisher that originally published it. The interest of heirs is less clear. Money plays a role as well. There are families that have made copyright licensing empires: the families Picasso and Hergé come to mind. But for many artists, the copyrights are assigned to foundations and non-profits, like in the case of Anne Frank. Even here, where profit is not an issue, those foundations might have salaried employees, that have a vested interest in keeping copyright licensing fees going. Yet it is hard to imagine that this is the only motivation for wanting to retain ownership over an oeuvre. It is more likely that a

sense of stewardship plays a role as well. Families continue the work of the artist, who, as we noted in the chapter 'The Artist's Honour: Moral Rights', not only creates works, but also crafts an oeuvre. In their lifetime, artists already had to make careful considerations about where to publish and with whom. Families can continue this work, and deny any publication of the work that is not in the right conditions, or that they believe is not respectful enough of the artist's work.

Different Kinds of Attachments

Creative labour is not like other kinds of labour. As authors, the product of our creativity is supposed to be so intimately related to our personality, that we are allowed to control what happens to our work after we let it go into the world. Legally, this control remains just as strong from the moment we publish a work until the day we die. Now, it is possible to assign a large part of the control to someone else—it is quite usual to hand over control to a publisher. But that still leaves control to one party, supposedly acting in the interests of the author. Copyright is less advanced in recognising the many different links that develop over time between a work and its public, and in choosing between the public and the author (or the publisher), will often choose for the latter.

That copyright remains as strong throughout the author's life can already be questioned—why do I, at 90, get to decide whether someone makes a movie after a book I wrote at 25? "From the moment the book is published, the author is no longer it's master": Hugo again. If there would be an elegant way to make copyright erode over time, and give the public more rights to adaptions and re-interpretations, that would definitely have my support. But it is more problematic still to posit a strong link between the work of art, and the heirs that survive the artist for 70 years. As an artist you do have some influence on what happens after your death—if you've managed to hang on long enough to your copyright, you can decide who to bequeath it to in your will. But 70 years is a long time. Your children will most probably be dead themselves, and if the copyrights belonged to a company, that company is more than likely to no longer exist.

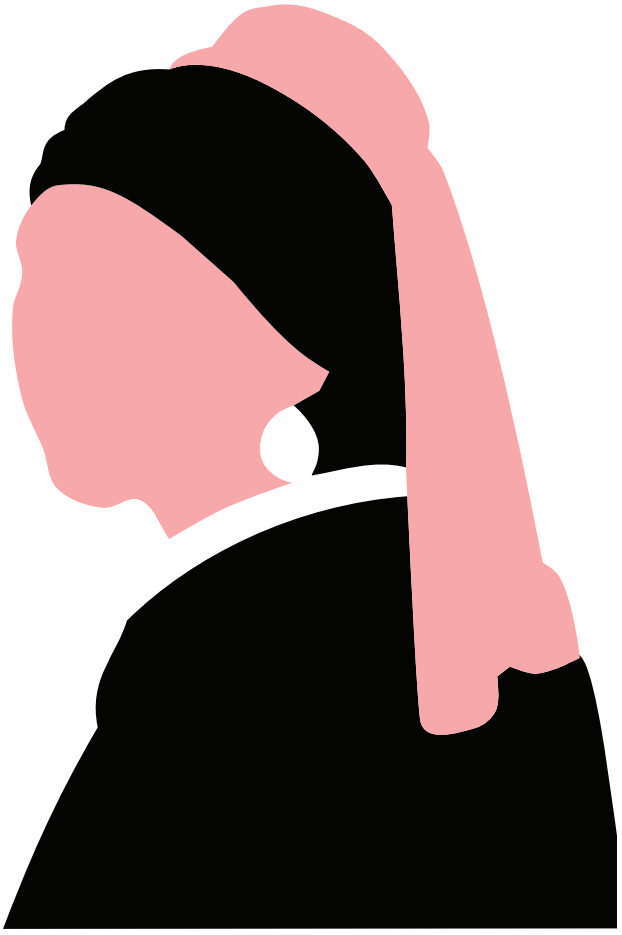
Whomever ends up with the rights, will have a slight connection to you, and by proxy, to the work of art. Yet it is hard to maintain that this connection is stronger than the connection that is felt, for example, by a scholar that has been investigating the oeuvre, or by another artist who has become inspired by it. This is what Hugo means when he discerns between the descendants of the blood and the descendants of the spirit, and it is the essence of the public domain: as the link between the artist and the work grows more faint, the links between the work and the members of the public can grow stronger. Does it make sense, that a company that bought a company that bought a company that published a work, gets to decide by themselves how it gets reproduced and adapted? Or the children of the children of the author? Copyright gives power to the author, because it recognises the work as an expression of an individual vision, but those who end up with the copyright down the line might only have a slight link with that vision. That's why the control granted by copyright gets harder to defend the longer it lasts, and that's why it lasts only for a limited time. The statute of the public domain, in contrast, allows everybody to reproduce the work. Continuing the oeuvre evolves, from a top-down curatorial approach, into a do-ocracy: those artists, performers and editors that most successfully reproduce and appropriate the work will have the largest influence in its reception.

This continued dialogue about a work in the public domain can be seen in many disciplines. In classical music, musicians and conductors continue to offer their own interpretation of music first composed hundreds of years ago.

Interpretation, Edition and Reproduction

For most works in the public domain, it has been a long time since they were first published. If we discover the work today, it is because many have laboured to document, archive, transmit, reproduce, interpret, translate and digitise it. When it comes to copyright, you have to take into account the layers of interpretation that separate you from the work's first edition. These layers of mediation might have created new rights of their own.

In the case of music, new interpretations can bring new



Transforming an existing work can easily lead to a new copyright

rights. The copyright concerns the composition, but the performers and also the record producer hold so-called 'neighbouring' rights up until 70 years after the release of the record. So if you want to add Bach's Goldberg variations to your movie, you won't be able to to use Glenn Gould's interpretation (neither the 1955 or the 1981 one) without paying royalties to CBS and the Gould estate. You could, however, use a version that is too old to still have neighbouring rights, like Wanda Landowska's 1945 version. Or you could use an interpretation that was donated to the public domain by the musicians and producers: in 2012, Kimiko Ishizaka made such a recording as part of the Open Goldberg Variations project.

When it comes to text, new editions can bring new rights. Even if the original text is out of copyright, a new edition might include a preface and explanatory footnotes, and these will still be under copyright. To be on the safe side, you can try to find the original edition of a text. A translation will certainly bring new rights: it is considered a derivative work of the original text, which has its own copyright, until 70 years after the translator's death. If you want to be able to freely reproduce a transated text, both the original text and its translation need to be in the public domain.

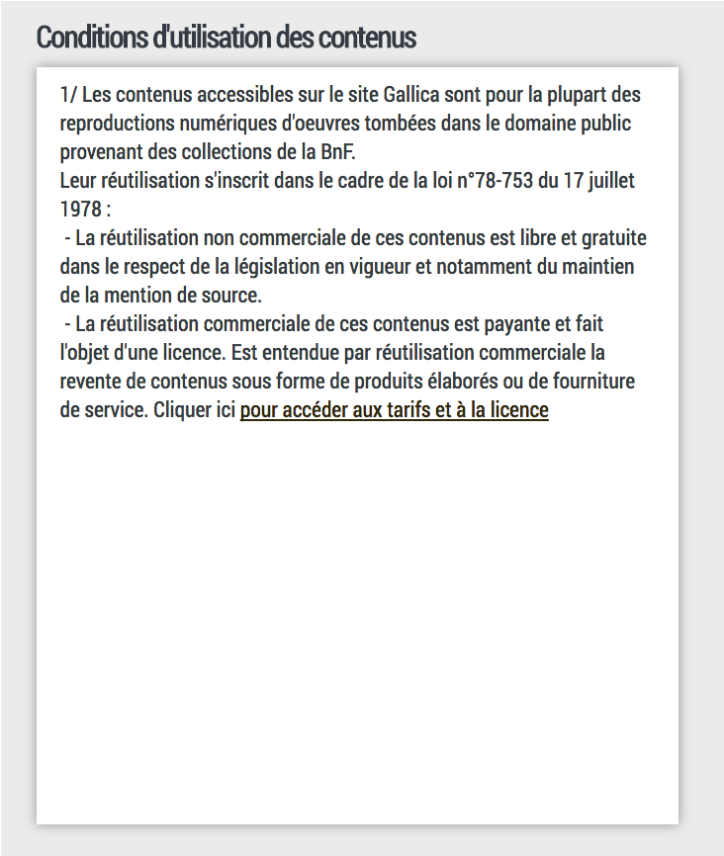
When it comes to images, new reproductions can bring new rights. In this case, there is a difference between two- and three-dimensional images. For sculptures and other 3-dimensional works, any image of such a work will most likely be a creative work in itself. That is because to take a picture of a sculpture, the photographer will have to make a number of creative choices in lighting and framing. The picture will be considered a derivative work, and be under copyright until 70 years after the photographer's death. If you have access to the work, you can of course photograph it yourself.

Two-dimensional images and illustrations are the simplest, at least in most countries. If you don't have access to the original documentation, but to a scan or a faithful photographic reproduction of a public domain image, you can use it freely.

The Public Domain Cycle

New interpretations bring new rights, and that also holds for your work when you use public domain materials as a part of it. As long as it is clear that you have made a series of creative choices, following a certain artistic vision, then the work you made will have its own copyright, which will in turn last until 70 years after your own death.

This might seem strange. After all, you've based yourself on something freely available, and now no-one can copy your interpretation. Indeed, there is a certain hypocrisy in the fervour with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BNF — The French National Library asks licensing fees for the commercial use of the reproductions of public domain works. They base themselves on a law that seems to deal with administrative documents produced by civil servants, rather than objects of cultural heritage.

which corporations like Disney champion restrictive intellectual property legislation, while at the same time basing their most famous works on fairy tales, myths and novels from the public domain. Yet, this privatisation is at the core of how copyright works: as an artist you are given the right to exploit a piece of culture you created, but where did you find the ingredients? You copy and sample within the limits of the law, and you use what you've obtained to make something new, which becomes your private property. You get the right to exploit that property. And after a set period of time, that right expires.

Intellectual Property and Physical Property

Copyright deals with copying, and you're free to copy a public domain work. But to be able to do so you have to be able to access the work. Intellectual property is not the same as physical property. The person who owns the physical object that you are looking to copy, can still prevent you from doing so.

When you buy a 19th century photograph at an auction, you can decide to scan it. You can then use it as part of your own work. You can also upload it to a website like archive.org or Wikimedia Commons, which will allow others to download it and use it as well. You can do both of these things. Or you can do neither. You can leave the photo in a drawer. Someone else might want to scan the photo, but that will only happen if you let them into your house: it's your house, and the photo is your physical property.

The difference between physical ownership and intellectual property is very important for cultural institutions. Museums, libraries and archives don't own the copyright to the works in their collections. The copyright mostly stays with the makers, and once the work is old enough to enter the public domain, there is no copyright anymore.

The reproduction of public domain works from the collections of cultural institutions is a complicated subject. Many cultural institutions have in their collection both copyrighted works and public domain works, which they hold the access to and sometimes sell the reproduction of. This might be in a physical form: postcards, posters; or in a digital form, to be used for

publications. The public domain works are potentially lucrative, because the institution no longer needs to pay any rights holders. Yet exactly because there are no rights holders, the museum has to make an effort to maintain their monopoly on these reproductions. After all, anyone could legally sell a reproduction of these works. What institutions do is to leverage the fact that they own the works and can regulate the access. For example, some museums simply prohibit taking pictures in their spaces. Most institutions take a more subtle approach: they just prohibit the tripods and lighting installations necessary for professional quality pictures.

The Value of Reproduction

We can reproduce a work of art if we have access to it. But can we use a reproduction someone else made? That depends on the question: is the reproduction itself considered creative. The question is pertinent, because there is an enormous wealth of reproductions already available. Museums, archives and libraries have scanned and photographed large collections of images and documents. In many cases, there is no way to get to the original document, and even if you could, it would not be easy to create a high-quality re-production.

Making a faithful reproduction of an existing work is painstaking. To photograph a painting, for example, takes a large amount of skill and patience, as well as expensive equipment. But does it take creativity? Insofar as the goal of the exercise is to create a copy that is as faithful as possible to the original, it does not seem to be the case. This might mean that a faithful reproduction of a painting can be valuable, in the same way that the recipe of Coca Cola is valuable. But it is not protected through copyright.

A photographic reproduction of a two-dimensional work requires skill, but no creativity. Therefore it does not get copyright. This is the reasoning that judges have followed in the U.S. (Bridgeman vs. Corel), and the U.K. Intellectual Property Office recently affirmed it for the U.K (Copyright Notice: digital images, photographs and the internet). Unfortunately, as often is the case when a certain kind of cultural artefact is not covered by existing

intellectual property law, legislators will move in to help cover the supposed gaps. A number of European countries have therefore expanded their laws.

outofcopyright.eu researched the position of different European countries. For reproductions requiring skill, but no creativity, the following countries add extra copyrights: Austria, Denmark, Finland, Germany, Iceland, Italy, Norway, Spain, Sweden. The following countries do not: Belgium, Bulgaria, Croatia, Czech Republic, Estonia, Greece, Hungary, Latvia, Lithuania, Luxemburg, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia.

Keeping the Monopoly in Digital Times

The internet has driven down the cost of copying culture dramatically and this has a profound impact on the exploitation of the reproduction of public domain images. It can be really expensive to produce a digital reproduction, but once it is available online, it can be copied at nearly zero cost. And with work in the public domain, there is nothing preventing people from doing so. This sounds like bad news for companies who try to make money distributing copies of public domain works. And it should come as no surprise that services like Getty Images tend to hide the fact that some of the images they offer for licensing are actually in the public domain. But it sounds like great news for heritage institutions like museums and archives, that service the public. Finally, their collections can travel further quicker and reach and inspire more people than ever before.

Unfortunately, it is not that simple. There are a number of reasons why museums and other heritage institutions may want to prevent their reproductions from circulating. The first are financial: many archives and museums want to maintain a monopoly on reproductions, so they can charge usage fees for these reproductions. Today, to be eligible for government funding, institutions will have to show they are able to provide revenue streams. As writes a Dutch task force from the heritage sector: “There is a fundamental tension that underlies the policies of pricing and exploiting [reproductions]: between ensuring the broad accessibility of the collection and developing cultural

entrepreneurship. The (national) government wants heritage institutions to achieve both goals, but are they compatible?"

In exploiting public domain reproductions, institutions mimic the models with which we are familiar from copyright licensing. Museums will often charge their public for a reproduction in function of the intended circulation: for instance the number of copies of the publication, the size of the image, its relative importance in the layout. These ways of establishing pricing resemble the kind of negotiation one could have when establishing a copyright license (see: 'Setting the Conditions of Copying: Licenses). Some institutions go as far as to put fake copyright claims: according to the same Dutch rapport, several institutions have put the English word 'copyright' next to images. Using English prevents them from making a false legal claim, since only the Dutch word 'auteursrecht' has legal significance. These tactics aim to obscure the fact that the works in reality have no copyright anymore, while playing on people's fear of getting into legal disputes over copyright infringement.

It hasn't proven easy for heritage institutions to make selling reproductions profitable however. According to research by King's College London: "Everyone (…) wants to recoup costs but almost none claimed to actually achieve or expected to achieve this. Even those services that claimed to coup full costs generally did not account fully for salary costs or overhead expenses." With all costs not fully accounted for, institutions might be able to satisfy their governments funding requirements for cultural entrepreneurship. Yet at the same time, it is hard to estimate what are the real costs of such policies: how many new interpretations and uses of the collection have been stifled by it being barred of to the public?

Still, just like with the heirs preventing artists from reusing the work of dead artists, there are convictions that run deeper than money. When meeting with actors from the world of heritage, it is surprising to note the resistance to the very idea of openly disseminating reproductions from the collection. Like heirs, museum people can feel like stewards of a body of work, responsible for its continued reputation. Making reproductions publicly available and putting no restrictions on their further use opens the door to others appropriating the work of that herit-

age—and while one could say this is the very goal of cultural heritage institutions, the open-ended nature of such an opening is also quite scary. An institution is always able to control the framing of their collections, as long as it stays within the confines of the institution. This is no longer the case when the reproductions are freely available. Especially, since (with the exception of France), there are no moral rights on public domain images, there is no requirement and even less of a guarantee that images will be properly credited. The historical context will be ignored or misread.

Short-circuting the Cycle

The public domain provides an incredibly rich source to build upon. Unfortunately it takes a long time for a copyrighted work to get there. You might be tempted to shorten the cycle. To that end, the Swiss artist Mario Pasternuk has created a public domain donor card. This way, when you die, your heirs know you did not leave your copyrights to them but to the public.
It is not easy to unambigously donate work to the public domain under European law: this is why Creative Commons has come up with the CC0 license, that makes sure that you give up as much control as you can.
While you are still alive, donating your work to the public domain might be radical. Luckily, there exist Creative Commons licenses that allow you to retain various degrees of control over your work. Unless the law changes, and the balance of rights between the public (themselves potential authors!) and the author gets restored somewhat, it is up to us individual authors to provide more access, at least to parts of our production, so that no one has to wait for our death.

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