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Tyler T. Ochoa
Santa Clara University School of Law, ttochoa@scu.edu

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ORIGINS AND MEANINGS OF THE PUBLIC DOMAIN

Tyler T. Ochoa

Abstract

This article surveys the history and development of the public domain in intellectual property law. The public domain has existed since time immemorial, and was first recognized in the Statute of Monopolies and the Statute of Anne, which placed time limits on patents and copyrights, after which the invention or work could be copied freely by anyone. The concept was enshrined in the U.S. Constitution and reflected in American patent and copyright laws. Before 1896, courts referred to matter not protected by patent or copyright law as "public property" or "common property." In 1896, the U.S. Supreme Court imported the term "public domain" from French law, and it was popularized by Learned Hand in the first decades of the 20th Century. Since 1960, the U.S. Supreme Court has repeatedly emphasized the Constitutional dimensions of the public domain. Those dimensions include two important principles that have been obscured in recent years: public ownership of matter in the public domain and the irrevocable nature of the public domain.

I. INTRODUCTION

The public domain is something that we enjoy every day without thinking about it. We take it for granted that the plays of Shakespeare and the symphonies of Beethoven are in the public domain and may be freely copied, adapted, and performed by anyone. Our theaters are filled with movies and musicals based on public domain works. We daily use technology derived from earlier inventions, such as the car, the airplane, the telephone, and the computer. We understand intuitively that any scientist may rely on Newton's laws of motion or Einstein's theory of relativity as he or she sees fit. We use common words that once were brand names such as, aspirin, cellophane, thermos, and escalator. Students and scholars debate historical events, ranging from the origins of man to the impeachment of President Clinton.

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** Professor and Co-Director, Center for Intellectual Property Law, Whittier Law School. A.B. 1983, J.D. 1987, Stanford University. The author would like to thank Richard Gruner, Peter Reich, David Welkowitz, Andrew Wistrich, and Craig Grossman for their comments on a draft of this article; Curt Jones and the staff of the Whittier Law School library for their assistance in locating material at other libraries; and Jeffrey Matsuura of the University of Dayton for inviting me to speak at the Symposium.
Yet for all of its importance in our daily lives, only in recent decades has the public domain become the object of serious scholarly study. Following David Lange's clarion call for more research in 1981, and Jessica Litman's influential 1990 study, scholarly interest started to blossom, and now entire symposia are devoted to the public domain. Duke Law School even recently announced the donation of an anonymous $1 million gift to fund a Center for the Study of the Public Domain.

This article will trace the history and development of the public domain in the United States, from its statutory recognition in England to current U.S. Supreme Court doctrine. Along the way, I will examine how the "public domain" came to be the preferred name for material unprotected by intellectual property law, and I will discuss two basic issues over which scholars continue to disagree: whether the public domain should be characterized as common ownership or the absence of ownership, and whether the public domain is irrevocable.

1 An exception to the relatively recent nature of this scholarly interest is M. William Krasilovsky, Observations on Public Domain, 14 Bull. Copy. Socy. 205 (1967).

2 See generally David Lange, Recognizing the Public Domain, 44 L. & Contemp. Probs. 147, 151 n. 20 (1981) ("I have not attempted in this essay to formulate a general public domain theory, although one inevitably has begun to suggest itself. I have simply presupposed a universal acknowledgement of what amounts to a dark star in the constellation of intellectual property and I have hoped to encourage a wider concern for its definition in case law and literature alike.") (internal citations omitted).


7 See infra nn. 154-205 and accompanying text.

8 See infra nn. 267-310 and accompanying text.

9 See infra nn. 311-333 and accompanying text.
II. A Brief Overview of the Public Domain

Of what does the public domain consist? Often the public domain is defined in terms of what it is not.\textsuperscript{10} Thus, many sources simply state that the public domain is the body of ideas and works that are not subject to intellectual property protection.\textsuperscript{11} But such a negative definition simply begs the question: What inventions and works are, or are not, subject to intellectual property protection? While a detailed answer to such a question would fill many multi-volume treatises,\textsuperscript{12} a brief overview is warranted.\textsuperscript{13}

First, ever since the earliest days of patent and copyright law in England, the law has imposed a durational limit on patent and copyright protection.\textsuperscript{14} Thus, a large portion of the public domain consists of inventions and works that were formerly subject to patent and copyright protection, but are no longer.\textsuperscript{15}

Second, certain types of material are considered to lie outside the realm of patent and copyright protection. For example, copyright law does not

\textsuperscript{10} E.g. Krasilovsky, supra n. 1, at 205 ("Public domain in the fields of literature, drama, music and art is the other side of the coin of copyright. It is best defined in negative terms."); J. Thomas McCarthy, \textit{McCarthy on Trademarks and Unfair Competition} § 1:30 (4th rev. ed., Clark Boardman Callaghan 2002) ("while intellectual property statutes and laws do not explicitly define the public domain, they do so by negative implication").

\textsuperscript{11} E.g. McCarthy \textit{on Trademarks}, supra n 10, at § 1:2 ("[P]ublic domain' is the status of an invention, creative work, commercial symbol, or any other creation that is not protected by any form of intellectual property."); \textit{id.} at § 1:31 ("A thing is in the public domain only if no intellectual property right protects it."); Samuels, supra n. 3, at 138 ("[T]he public domain is simply whatever remains after all methods of protection are taken into account."); \textit{Black's Law Dictionary} 1243 (Bryan A. Garner ed., 7th ed., West 1999) ("The realm of publications, inventions and processes that are not protected by copyright or patent.").


\textsuperscript{13} For a more detailed effort, see generally Pamela Samuelson, \textit{Mapping the Digital Public Domain: Threats and Opportunities} (draft manuscript on file with author).


\textsuperscript{15} See Krasilovsky, supra n. 1, at 205 ("the majority of culturally valuable items in the public domain are those for which the 'limited times' of copyright permitted by the Constitution have expired").
protect ideas, and patent law does not protect artistic works, so the ideas contained in all such works are in the public domain. Copyright law does not protect statutes or judicial opinions, so all such works are in the public domain. Patent and copyright laws do not protect basic scientific principles, so all such principles are in the public domain.

Third, as to inventions and works which would otherwise be within the scope of patent and copyright law, those laws impose a number of substantive requirements on the subject matter eligible for protection. Inventions are not subject to patent protection unless they are useful, novel, and non-obvious. Inventions are not subject to copyright protection at all.

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16 See 17 U.S.C. § 102(b) ("In no case does copyright protection for an original work of authorship extend to any idea, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.").


18 This is an oversimplification in several respects. First, a published work may describe a patentable invention. So long as the inventor applies for a patent within one year of the date of publication, the published work will not disqualify the inventor from getting a patent. See 35 U.S.C. § 102(b) (2000). Second, a patent may cover the utilitarian aspects of computer software, while copyright covers the original "expression" contained in the software. Third, a design patent may be granted for "any new, original and ornamental design for an article of manufacture," 35 U.S.C. § 171, while such a design may also fall within the subject matter of copyright to the extent it is "separable" from the utilitarian aspects of the article. See 17 U.S.C. § 101 (definition of "pictorial, graphic, and sculptural works").

19 See Wheaton v. Peters, 33 U.S. (8 Pet.) 591, 668 (1834) ("no reporter has or can have any copyright in the written opinions delivered by this Court"); Banks v. Manchester, 128 U.S. 244, 253 (1888); Veeck v. Southern Bldg. Code Cong. Int'l., 293 F.3d 791, 800 (5th Cir. 2002) (en banc) ("we read Banks, Wheaton, and related cases consistently to enunciate the principle that 'the law,' whether it has its source in judicial opinions or statutes, ordinances or regulations, is not subject to federal copyright law").

20 See Diamond v. Diehr, 450 U.S. 175, 185 (1981) ("Excluded from such patent protection are laws of nature, natural phenomena, and abstract ideas."); Diamond v. Chakrabarty, 447 U.S. 303, 309 ("The laws of nature, physical phenomena, and abstract ideas have been held not patentable. . . . Einstein could not patent his celebrated law that E = mc²; nor could Newton have patented the law of gravity. Such discoveries are manifestations of nature, free to all men and reserved exclusively to none.") (quotation marks and ellipsis omitted); 17 U.S.C. § 102(b) ("In no case does copyright protection for an original work of authorship extend to any idea . . . concept, principle or discovery.").


22 See 17 U.S.C. § 102(b) ("In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery"); 17 U.S.C. § 101 (The design of a useful article is subject to copyright "if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article."). This is an oversimplification in one respect: several provisions codified in Title 17, but outside the Copyright Act, provide sui generis protection for
That leaves all inventions that are obvious, not novel, or not useful in the public domain. Likewise, neither patent law nor copyright law protects facts, so facts are in the public domain. Copyright law does not protect works (or specific elements of works) which are not original, which consist of familiar or expected clichés, or which are (as a practical matter) indispensable to the expression of an idea. Since patent law requires novelty, all such clichés, unoriginal material, and indispensable expressions are also part of the public domain.

Fourth, both patent and copyright law impose certain procedural formalities as a condition of protection. Patent law requires government approval of a patent application, and copyright law requires (or, rather, used to require) that works be published with copyright notice. Thus, all ideas and works for which the proper formalities were not followed are also in the public domain.

Of course, patent and copyright are not the only types of intellectual property. Trademark law protects words, phrases, images, and even product or regulation of many types of useful articles. See e.g. 17 U.S.C. § 902(a)(1) (protecting a "mask work fixed in a semiconductor chip product"); 17 U.S.C. § 1002(a) (prohibiting import, manufacture or distribution of "any digital audio recording device . . . that does not conform to . . . the Serial Copy Management System" or its equivalent); 17 U.S.C. § 1201(a)(2), (b) (prohibiting manufacturing, importing, or trafficking in technology that is primarily designed, produced, marketed, or used for circumvention of technological protection measures); 17 U.S.C. § 1301(a) (protecting the "original design of a useful article"), 17 U.S.C. § 1301(b)(2) (defining "useful article" as "a vessel hull").

23 See Feist Publications, Inc. v. Rural Tel. Serv. Co., 449 U.S. 340, 348 (1991) (facts "may not be copyrighted and are part of the public domain available to every person."); 35 U.S.C. § 101 (patentable subject matter limited to "any new or useful process, machine, manufacture, or composition of matter").

24 See Feist, 499 U.S. at 346 ("Originality is a constitutional requirement."); Hoehling v. Universal City Studios, Inc., 618 F.2d 972, 979 (2nd Cir. 1980) ("These elements, however, are merely scenes a faire, that is, 'incidents, characters or settings which are as a practical matter indispensable, or at least standard, in the treatment of a given topic. Because it is virtually impossible to write about a particular historical era or fictional theme without employing certain 'stock' or standard literary devices, we have held that scenes a faire are not copyrightable as a matter of law.") (citations omitted); Alexander v. Haley, 460 F. Supp. 40, 46 (S.D.N.Y. 1978) ("Yet another group of alleged infringements is best described as cliched language, metaphors and the very words of which the language is constructed. Words and metaphors are not subject to copyright protection; nor are phrases and expressions conveying an idea that can only be, or is typically, expressed in a limited number of stereotyped fashions.").

25 See 35 U.S.C. § 111 (written application required); 35 U.S.C. § 131 ("The Director shall cause an examination to be made of the application and the alleged new invention; and if on such examination it appears that the applicant is entitled to a patent under the law, the Director shall issue a patent therefore.").

26 See Stewart v. Abend, 495 U.S. 207, 233 (1990) ("Under the 1909 Act, it was necessary to publish the work with proper notice to obtain copyright. Publication of a work without proper notice automatically sent a work into the public domain."). The notice requirement for published works was retained until the U.S. joined the Berne Convention on March 1, 1989. See Berne Convention Implementation Act, P.L. 100-568, § 7, 102 Stat. 2853 (1988).
designs that serve to identify the source of particular goods or services.\textsuperscript{27} Moreover, unlike patent and copyright, trademark protection is potentially indefinite in duration.\textsuperscript{28} However, like patent and copyright, trademark law does contain substantive limitations. Words, phrases, images, and product designs that are generic or that become generic, are in the public domain.\textsuperscript{29} In addition, trademark law does not protect any functional aspects of marks,\textsuperscript{30} so words, phrases, images, and product designs that are functional (and not otherwise protected by copyright or patent) are in the public domain. And while trademark law can be said to remove certain words, phrases, images, and product designs from the public domain, it may be more accurate to say that it removes certain uses of those words, phrases, images, and product designs from the public domain, leaving other uses available to the public.\textsuperscript{31} Finally, while trademark protection is potentially indefinite, a mark which ceases to be used returns to the public domain.\textsuperscript{32}

Trade secret law protects any information (including otherwise unprotectable facts and ideas), which gives one an advantage over one's competitors, and for which reasonable measures are taken to maintain its secrecy.\textsuperscript{33} Thus, facts and ideas that are kept secret can be kept out of the

\textsuperscript{27} See 15 U.S.C. § 1127 (definition of "trademark" and "service mark"); McCarthy on Trademarks, supra n. 10, at § 3:1 ("the role that a designation must play to become a 'trademark' is to identify the source of one seller's goods and to distinguish that source from other sources").

\textsuperscript{28} See 15 U.S.C. § 1059 (trademark registrations may be renewed every ten years); Kohler Co. v. Moen, Inc., 12 F.3d 632, 637 (7th Cir. 1993) ("trademark rights may continue as long as the mark is used to distinguish and identify.").

\textsuperscript{29} See McCarthy on Trademarks, supra n. 10, at § 12:2 ("Generic names are regarded by the law as free for all to use. They are in the public domain."); First Bank v. First Bank System, Inc., 84 F.3d 1040, 1045 (8th Cir. 1996) ("Generic terms are not entitled to protection under trademark law"); 15 U.S.C. § 1064(3) (trademark registration may be canceled "at any time if the registered mark becomes the generic name for the goods or services . . . for which it is registered.").

\textsuperscript{30} See 15 U.S.C. § 1052(e)(5) (trademark may not be registered if it "comprises any matter that, as a whole, is functional."); § 1064(3) (registration may be canceled at any time if the registered mark is functional); § 1125(a)(3) ("the person who asserts trade dress protection has the burden of proving that the matter sought to be protected is not functional."); Qualitex Co. v. Jacobson Products Co., 514 U.S. 159, 164 (1995) ("The functionality doctrine prevents trademark law . . . from instead inhibiting legitimate competition by allowing a producer to control a useful product feature.").

\textsuperscript{31} See nn. 323-335 and accompanying text.

\textsuperscript{32} See 15 U.S.C. § 1064(3) (trademark registration may be canceled at any time if the mark "has been abandoned"); § 1115 (b) ("incontestable" mark subject to defense that "the mark has been abandoned by the registrant"); § 1127 (defining "abandoned"); McCarthy on Trademarks, supra n. 10, at § 17:1 ("Once held abandoned, a mark falls into the public domain and is free for all to use.").

\textsuperscript{33} See Uniform Trade Secrets Act, § 1(4) (1985) ("'Trade secret' means information . . . that (i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and (ii) is the subject of efforts that are reasonable
public domain indefinitely. However, once such ideas become generally known, they become part of the public domain.

Finally, state right of publicity laws protect the use of a person’s name or likeness for commercial purposes. As with trademark law, it may be more accurate to say that such laws remove certain uses of the person’s name or likeness from the public domain, leaving other uses available to the public. And, like patent and copyright, in many states the right of publicity lasts only for a period of specified duration. Because the period differs from state to state, the boundaries of the public domain are subject to some uncertainty; but generally speaking, it can be said that the name or likeness of a person who has been dead for a long time is in the public domain.

This brief overview of the public domain makes it seem as if the public domain is nothing more than a mishmash of disparate types of subject matter, subject to varying degrees of intellectual property protection from many different sources. But just as physicists search for a “unified field theory” that explains all of physics, the elusive question remains whether there is a “unified field theory” of the public domain that can help unify and explain the disparate types of subject matter that are contained within it.
This article does not make any claims to have discovered a unified field theory, but it does aspire to help advance the search.

III. STATUTORY RECOGNITION OF THE PUBLIC DOMAIN

The public domain has existed from time immemorial. As any parent can attest, humans learn by imitating others. From the time the first humans created tools or drew paintings on the walls of caves, other humans copied what they did. In an oral tradition, songs and stories and know-how were handed down from generation to generation, as children, students and apprentices copied and modified the art and wisdom of their parents, teachers and mentors. It was only with the invention of the printing press that mass reproduction became possible. Fearful that the new technology would be used to spread heresy and sedition, church officials and monarchs imposed limitations on the freedom to copy. Works in the oral tradition remained in the public domain, but published works were subject to government censorship and control.

The freedom to engage in a trade or occupation of one’s choosing was made possible by the body of knowledge in the public domain. This freedom was endangered in Elizabethan England when the Queen granted a large number of monopolies over existing trades to favored courtiers. In the landmark case of Darcy v. Allin, the Court of King’s Bench held that such monopolies were unlawful, because monopolies could only be granted with respect to new inventions and newly-introduced trades for a limited period. This holding was codified in 1624 in the Statute of Monopolies, which limited patents for new inventions to a term of 14 years and patents for existing inventions to a term of 21 years.

Although not expressly stated, implicit in the Statute of Monopolies were two propositions concerning the public domain: first, that at the end of the

40 See McCarthy on Trademarks, supra n. 10, at § 1:30 ("The principle of free copying is an inherent right of the people, and is not created by either the Constitution or any statutory law.").

41 See generally Lyman Ray Patterson, Copyright in Historical Perspective 20-27 (Nashville Vanderbilt U. Press 1968).


44 Pollack, supra n. 42, at 52-79 (analyzing the common law predecessors, the text, and the history of the Statute of Monopolies, 21 James I, ch. 3 (1624 Eng.)). For an overview of the background of the Statute, see Ochoa & Rose, supra n. 14, at 677-79.

45 21 James I, ch. 3, § 6 (1624 Eng.).

46 21 James I ch. 3, § 5.
limited period, any person could practice the trade or invention without restraint; and second, that any person could practice any trade or invention which was not the subject of a valid patent. The Statute of Monopolies thus constitutes the first statutory recognition of the public domain in Anglo-American law.

The Statute of Monopolies, however, did not affect the near-monopoly on printing held by the Stationers Company. The Stationers maintained a system of registration under which the right to publish a particular work could be bequeathed or sold (but only to another member of the Company) in perpetuity. In order to break the Stationers' monopoly, Parliament enacted the Statute of Anne in 1710. The Statute of Anne limited copyrights for new works to a term of 14 years, which could be renewed once, and it limited copyrights for existing works to a term of 21 years. Like the Statute of Monopolies, implicit in the Statute of Anne was the principle that when the limited term expired, the work could be published by anyone without restraint.

Despite the limited terms in the Statute of Anne, the Stationers resisted the conclusion that the Statute created or recognized a public domain in works of authorship. In a series of court cases, the Stationers argued that the Statute of Anne merely provided supplemental remedies to an underlying common-law right that was perpetual. In 1774, however, the House of Lords ruled that copyright was limited to the term set forth in the Statute of Anne, thereby ensuring that all published works would eventually enter the public domain, where they could be freely copied for all to enjoy, and where

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48 Patterson, supra n. 41, at 28-77.


50 8 Anne c. 19, ¶ 1

51 See L. Ray Patterson & Stanley W. Lindberg, The Nature of Copyright: A Law of User's Rights, 29-30 (U. of Ga. Press, 1991) ("An even more notable aspect of the Statute of Anne was its creation of the public domain for literature . . . . [T]he public was assured not only of access to copyrighted works at a fair price but eventually of ownership of the work in the public domain.").

52 See Mark Rose, Authors and Owners: The Invention of Copyright, 67-91 (Harv. Univ. Press, 1993); Patterson, supra n. 41, at 158-72.

they would provide both inspiration and raw material for the next generation of authors.\(^{54}\)

The Framers of the U.S. Constitution recognized the importance of the public domain. By providing that patents and copyrights could only be granted "for limited Times,"\(^{55}\) they ensured that all patented inventions and copyrighted works of authorship would enter the public domain at the end of that limited period, just as they had in England.\(^{56}\) Both the Patent Act of 1790\(^{57}\) and the Copyright Act of 1790\(^{58}\) provided terms of 14 years; in the case of copyright, the term could be renewed once.\(^{59}\) As in England, it was argued that statutory copyright merely provided supplemental remedies for an underlying common-law right that was perpetual; but this argument was rejected by the U.S. Supreme Court in \textit{Wheaton v. Peters},\(^{60}\) reaffirming the principle that all works would eventually enter the public domain.

The Patent Act of 1790 also required that the inventor deliver to the Secretary of State a written specification, which "shall be so particular . . . [as] to enable a workman or other person skilled in the Art or Manufacture, whereof it is a branch . . . to make, construct, or use the same, \textit{to the end that the public may have the full benefit thereof, after the expiration of the patent term.}\(^{61}\) The specification thus served the purpose of ensuring that the invention would enter the public domain in practice, not just in theory. As amended, the specification requirement was carried forward in the Patent Acts of 1793,\(^{62}\) 1836,\(^{63}\) 1870,\(^{64}\) and 1952.\(^{65}\)

The Copyright Act of 1831 extended the initial copyright term to 28 years, with a single renewal period of 14 years.\(^{66}\) The Act, however, did not alter the public domain status of existing works; it provided, "this act shall not extend to any copyright heretofore secured, the term of which has

\(^{54}\) See Ochoa & Rose, \textit{supra} n. 14, at 684.

\(^{55}\) U.S. Const., art. I, § 8, cl. 8.

\(^{56}\) See Ochoa & Rose, \textit{supra} n. 14, at 685-95 (discussing the history, adoption, and purposes of the Patent and Copyright Clause).

\(^{57}\) Cong. Ch. 1-7, § 1, 1 Stat. 109, 110 (1790).

\(^{58}\) Cong. Ch. 1-15, § 1, 1 Stat. 124, 124-26 (1790).

\(^{59}\) Id.


\(^{61}\) Cong. Ch. 1-7, § 2, 1 Stat. 109, 110 (1790) (emphasis added).

\(^{62}\) Cong. Ch. 24-357, § 3, 1 Stat. 318, 321-22 (1793).

\(^{63}\) Cong. Ch. 24-357, § 6, 5 Stat. 117, 119 (1836).

\(^{64}\) Cong. Ch. 41-230, § 22, 16 Stat. 198, 201 (1870).


already expired." Likewise, the Patent Act of 1836 allowed an inventor to apply for a seven-year extension of his or her term; but it provided, "[t]hat no extension of a patent shall be granted after the expiration of the term for which it originally issued." Thus, the term of a patent was changed to 17 years, and extensions were prohibited.

In 1886, ten nations signed the Berne Convention for the Protection of Literary and Artistic Works. Article 14 of the Convention provided as follows:

Under the reserves and conditions to be determined by common agreement, the present Convention shall apply to all works which at the moment of its coming into force have not yet fallen into the public domain in the country of origin.

This article incorporated the term "public domain" from French copyright law. (Like England and the United States, France had provided a limited term of copyright in its 1791 and 1793 copyright decrees.) The article permitted works in the public domain of any member nation to remain in the public domain in that nation.

In the Berlin revision of 1908, Article 7 provided a minimum term of "life of the author and fifty years after his death." Article 14 was renumbered Article 18, and the phrase "through the expiration of the term of protection" was added at the end of the text, requiring member nations to remove works from the public domain if they were there for some reason other than the expiration of the copyright term. A proviso was added to Article 18, which read:

If, however, through the expiration of the term of protection which was previously granted, a work has fallen into the public domain of

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67 Cong. Ch. 21-16, §§ 1, 2, 16, 4 Stat. at 439.
68 Cong. Ch. 24-357, § 18, 5 Stat. 117, 124-25 (1836). In 1861, the term of a patent was changed to 17 years, and extensions were prohibited. Cong. Ch. 88, § 16, 12 Stat. 246, 249. The change was prospective only, so it had no effect on existing inventions already in the public domain. For a more complete history of patent terms, see Ochoa, supra note 14, at 51-58.
70 Id. at art. 14.
71 The original French text of Art. 14 reads: "Le presente Convention ... s'applique à toute les oeuvres qui, au moment de son entrée en vigueur, ne sont pas encore tombées dans le domaine public dans leurs pays d'origine." 168 CTS 185, 191.
73 Berne Convention, Item C-1, art. 7 (Nov. 13, 1908) (Berlin Revision); Copyright Laws and Treaties of the World, (UNESCO 1997).
74 Id. at art. 18.
the country where protection is claimed, that work shall not be protected anew in that country.\(^\text{75}\)

Although it limited the role of formalities in placing works in the public domain, Article 18 recognized that works already in the public domain by reason of expiration need not be removed from the public domain retroactively. With minor changes in language, these two paragraphs have been included in each subsequent revision of the Convention.\(^\text{76}\)

The 1909 Copyright Act used the phrase “public domain” for the first time in U.S. copyright law. The Act increased the renewal term of copyright to 28 years,\(^\text{77}\) but it specifically provided that the new term would not apply to works already in the public domain.\(^\text{78}\) Section 7 read as follows:

\[\text{[N]o copyright shall subsist in the original text of any work which is in the public domain, or in any work which was published in this country or any foreign country prior to the going into effect of this Act and has not been already copyrighted in the United States, or in any publication of the United States Government, or any reprint, in whole or in part, thereof.}\(^\text{79}\)

Section 6 of the Act provided for copyright protection of derivative works:

\[\text{[C]ompilations or abridgements, adaptations, arrangements, dramatizations, translations, or other versions of works in the public domain, or of copyrighted works when produced with the consent of the proprietor of the copyright in such works . . . shall be regarded}\]

\(^\text{75}\) \(\text{Id. at } \S\ 2.\)

\(^\text{76}\) \(\text{See Berne Convention art. 18(1), 18(2) (June 2, 1928) (Rome Revision), Copyright Laws and Treaties of the World, Item E-1, 5 (UNESCO 1997); Berne Convention art. 18(1), 18(2) (June 26, 1948) (Brussels Revision), Copyright Laws and Treaties of the World, Item F-1, 6 (UNESCO 1997); Berne Convention art. 18(1), 18(2) (July 14, 1967) (Stockholm Revision), Copyright Laws and Treaties of the World, Item G-1, 8 (UNESCO 1997); Berne Convention art. 18(1), 18(2) (July 24, 1971) (Paris Revision), Copyright Laws and Treaties of the World, Item H-1, 8 (UNESCO 1997).}\)

\(^\text{77}\) Cong. Ch. 60-320, § 23, 35 Stat. 1075, 1080 (1909). The maximum total duration was thus increased to 56 years from the date of first publication. For the legislative history of this extension, see Ochoa, supra n. 68, at 33-39.

\(^\text{78}\) Copyrights “subsisting . . . at the time when this Act goes into effect” were given the benefit of the extension, but not those, which had already expired. Cong. Ch. 60-320, § 24, 35 Stat. 1075, 1080 (1909).

\(^\text{79}\) \(\text{Id. at 1077. This language originated in } \S\ 30 \text{ of a memorandum draft bill prepared by Register of Copyrights Thorvald Solberg, dated October 23, 1905. See E. Fulton Brylawski & Abe Goldman, Legislative History of the 1909 Copyright Act, Dxxix-xxx (Fred B. Rothman & Co. 1976). Although not expressly stated, it is likely that Solberg’s choice of language was influenced by the use of this phrase in the Berne Convention.}\)
as new works subject to copyright under the provisions of this Act; but the publication of any such new works shall not affect the force or validity of any subsisting copyright upon the matter employed or any part thereof, or be construed to imply an exclusive right to such use of the original works, or to secure or extend copyright in such original works.\textsuperscript{80}

Under this section, a revision of a work in the public domain could qualify for copyright protection, but it would not affect the public domain status of the underlying work.\textsuperscript{81} Thus, in both sections, Congress expressed the view that once a work had entered the public domain, it should remain in the public domain.

The Universal Copyright Convention of 1952 was created to provide a multilateral copyright treaty that the United States and other countries outside the Berne Union could join without changing their domestic law.\textsuperscript{82} Article 7 provided that:

This Convention shall not apply to works or rights in works which, at the effective date of the Convention in a Contracting State where protection is claimed, are permanently in the public domain in the said Contracting State.\textsuperscript{83}

Unlike Revised Article 18 of the Berne Convention, which required retroactive protection if the work was in the public domain for some reason other than expiration,\textsuperscript{84} this article permitted states to forego retroactive protection if a work was in the public domain for any reason, including the failure to comply with formalities imposed by domestic law. The same provision was carried over in the 1971 Paris Revision of the U.C.C.\textsuperscript{85}

\textsuperscript{80} Copyright Act of 1909, § 6, 35 Stat. at 1077.
\textsuperscript{81} See \textit{Stewart v. Abend}, 495 U.S. 207, 231 (1990) (explaining the effect of this section); \textit{id.} at 234 (explaining that "if an author attempts to copyright a novel, \textit{e.g.}, about Cinderella, and the story elements are already in the public domain, the author holds a copyright in the novel, but may receive protection only for his original additions to the Cinderella story"). It should be noted that a new Section 6 was added in 1947 and that all of the succeeding sections were renumbered. See Act of July 30, 1947, ch. 391, 61 Stat. 652, 654. \textit{Stewart} therefore refers to this Section throughout as Section 7.
\textsuperscript{82} See Paul Goldstein, \textit{International Copyright: Principles, Law and Practice} 28 (Oxford U. Press, Inc. 2001). For that reason, the Convention permitted the imposition of formalities and permitted the duration of copyright to be measured from the date of first publication. See \textit{Universal Copyright Convention} (Geneva Text) art. 3 (formalities), art. 4 (duration) (Sept. 6, 1952).
\textsuperscript{83} \textit{Id.} art. 7.
\textsuperscript{84} See supra nn. 69-76 and accompanying text.
\textsuperscript{85} See \textit{Universal Copyright Convention} (Paris Text) art. 7 (July 24, 1971).
The 1976 Copyright Act recognized the public domain in a number of ways, including codifying limiting principles that had been developed in previous statutes or case law. Section 102(a) limits copyrightable subject matter to “original work[s] of authorship,” thereby leaving facts in the public domain. Section 102(b) codified the prohibition on copyright protection for ideas. Section 103 provides that “[t]he copyright in a compilation or derivative work . . . does not imply any exclusive right in the preexisting material.” The House Report states that under this section, “copyright in a ‘new version’ covers only the material added by the later author, and has no effect one way or the other on the copyright or public domain status of the preexisting material.” Section 105 continued the prohibition on copyright for works of the U.S. Government. The House Report says “section 105 is intended to place all works of the United States Government, published or unpublished, in the public domain.” The Act eliminated state common-law copyright, meaning that unpublished works would eventually enter the public domain for the first time. Section 301(a) also preempted state laws providing rights “equivalent” to copyright. The House Report explained that “[a]s long as a work fits within one of the general subject matter categories of sections 102 and 103, the bill prevents the States from protecting it even if it fails to achieve Federal statutory copyright because it is too minimal or lacking in originality to qualify, or because it has fallen into

86 17 U.S.C. § 102(a); Feist, 499 U.S. at 355; see 37 C.F.R. § 202.1 (2001) (“The following are examples of works not subject to copyright . . . (d) Works consisting entirely of information that is common property containing no original authorship, such as, for example: Standard calendars, height and weight charts, tape measures and rulers, schedules of sporting events, and lists or tables taken from public documents or other common sources.”).

87 “In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.” 17 U.S.C. § 102(b); see Baker v. Selden, 101 U.S. 99, 107 (1880).


92 17 U.S.C. § 301(a) (2000); see H.R. Rpt. 94-1476, at 130 (reprinted in 1976 U.S.C.C.A.N. at 5746) (“Common law protection in ‘unpublished’ works is now perpetual, no matter how widely they may be disseminated by means other than ‘publication’; the bill would place a time limit on the duration of exclusive rights in them.”). The time limit chosen was life of the author plus 50 years, or the lesser of 75 years from publication or 100 years from creation for works made for hire, subject to a statutory minimum of 25 years for works that remained unpublished, and 50 years for works published before the end of 2002. 17 U.S.C. § 303 (as enacted in Pub. L. No. 94-553, § 303, 90 Stat. 2541, 2573 (1976)) (the current version of this statute includes the above provisions as subsection (a)).

93 17 U.S.C. § 301(a); see H.R. Rpt. 94-1476, at 130-31 (reprinted in 1976 U.S.C.C.A.N. at 5746) (“Regardless of when the work was created and whether it is published or unpublished, disseminated or undisseminated, in the public domain or copyrighted under the Federal statute, the States cannot offer it protection equivalent to copyright.”).
the public domain.” All of these provisions help ensure that certain types of raw material remain in the public domain.

Somewhat inconsistently, however, Congress also expressed great skepticism about the benefits of the public domain. In addressing the question of copyright duration, it said:

Although limitations on the term of copyright are obviously necessary, too short a term harms the author without giving any substantial benefit to the public. The public frequently pays the same for works in the public domain as it does for copyrighted users at the author’s expense. In some cases the lack of copyright protection actually restrains dissemination of the work, since publishers and other users cannot risk investing in the work unless assured of exclusive rights.

Congress also expressed dismay that, as a result of increases in life expectancy, “more and more authors are seeing their works fall into the public domain during their lifetimes, forcing later works to compete with their own early works in which copyright has expired.” In so stating, Congress appeared to be unconcerned about the effect of term extension on authors and artists who rely upon the public domain to provide raw material for their own creations. Should not an artist live long enough to see the familiar works of his or her childhood enter the public domain, so that the artists most directly affected by a work may live to respond artistically to it? In addition, some scholars have challenged Congress’ unsupported empirical assertions about the role of the public domain in encouraging the dissemination of older works. Despite these concerns, Congress enacted in the 1976 Act a term of life of the author plus 50 years for works created on or after January 1, 1978; and it increased the term of existing copyrights to

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94 Id. at 131 (reprinted in 1976 U.S.C.C.A.N. at 5747).
95 Id. at 134 (reprinted in 1976 U.S.C.C.A.N. at 5750).
96 Id.
97 Cf. Sen. Rpt. 104-315, at 32 (July 10, 1996) (Minority Views of Mr. Brown) (“in part, the incentive to create comes from the public domain works which can inspire, be borrowed from, and improved upon. We do not necessarily provide an incentive to create by reducing the public domain.”).
99 17 U.S.C. § 302(a) (as enacted in Pub. L. No. 94-553, § 302, 90 Stat. 2541, 2572 (1976)) (the currently enacted version of this statute extends the applicable term to 70 years). Works made for hire were given a single term of 75 years from first publication or 100 years from creation, whichever was shorter. 17 U.S.C. § 302(c) (as enacted in Pub. L. No. 94-553, § 302, 90 Stat. at 2572 (1976)) (the currently enacted version of this statute gives works made for hire a term of 95 years from first publication or 120 years from creation, whichever was shorter).
75 years from the date of first publication. Congress specifically provided that “[t]his Act does not provide copyright protection for any work that goes into the public domain before January 1, 1978”, however, as a result of nine interim copyright extensions enacted while the 1976 Act was pending, the only works which were in the public domain by reason of age alone (as opposed to failure to comply with the required formalities, such as renewal) were works which had been copyrighted prior to September 19, 1906.

The U.S. finally acceded to the Berne Convention in 1989. When Congress passed the Berne Convention Implementation Act, however, it declined to remove any material from the public domain, despite the apparent command of Article 18. Five years later, however, when the GATT/TRIPs Agreement made the provisions of Berne enforceable between nations through the mechanism of the World Trade Organization, Congress “restored” the copyrights of certain works of foreign origin in compliance with Article 18 of Berne. As amended, Section 104A defines a “restored work” as:

100 17 U.S.C. § 304(a) (works in initial term); § 304(b) (works in renewal term) (as enacted in Pub. L. No. 94-553, § 304, 90 Stat. at 2573-74. (1976)). The currently enacted versions of these statutes have extended the maximum term for these works to 95 years from first publication.

101 Pub. L. No. 94-553, § 103, 90 Stat. at 2599 (1976); see H.R. Rpt. 94-1476, at 180 (reprinted in 1976 U.S.C.C.A.N. at 5796) (“Since there can be no protection for any work that has fallen into the public domain before January 1, 1978, Sec. 103 makes it clear that lost or expired copyrights cannot be revived under the bill.”).

102 See Ochoa, supra n. 68, at 39-42.

103 See supra n. 76, at Item H-2, 3.


105 Id. (“Title 17 . . . as amended by this Act, does not provide copyright protection for any work that is in the public domain in the United States.”); Sen. Rpt. 100-352, at 48 (reprinted in 1988 U.S.C.C.A.N. 3706, 3746) (“Section 12 provides that no retroactive protection is provided for any work that is in the public domain in the United States . . . . The obligations of the United States under the Berne Convention therefore will apply only to works which are protected in the United States on the effective date of this Act or to works which subsequently become subject to such protection.”).

106 Article 18 obligates member nations to retroactively protect works, which were in the public domain for reasons other than the expiration of protection. See supra nn. 73-76 and accompanying text. Congress apparently overlooked the fact that many works were in the public domain in the U.S. for failure to comply with formalities, such as copyright notice. See Sen. Rpt. 100-352, at 48 (reprinted in 1988 U.S.C.C.A.N. at 3746) (“In effect, this means that if a work has enjoyed protection in the United States, either as an unpublished or as a published work, and has subsequently had its term of protection expire there is no obligation to renew protection in that work.”).

107 See Agreement on Trade-Related Aspects of Intellectual Property Rights: General Agreement on Tariffs and Trade art. 9(1), art. 64 (April 15, 1994).

an original work of authorship that . . . is not in the public domain in its source country through expiration of term of protection; [but] is in the public domain in the United States due to (i) noncompliance with formalities imposed at any time by United States copyright law, including failure of renewal, lack of proper notice, or failure to comply with any manufacturing requirements; (ii) lack of subject matter protection in the case of sound recordings fixed before February 15, 1972; or (iii) lack of national eligibility.¹⁰⁹

In addition, the work had to have at least one author who was a national of an “eligible” country;¹¹⁰ and if published, it must have been first published in an eligible country and not have been simultaneously published in the U.S.¹¹¹ If those conditions were met, the work had its copyright restored in the U.S.¹¹² The duration of the restored copyright is “the remainder of the term of copyright that the work would have otherwise been granted in the United States if the work [had] never entered the public domain in the United States.”¹¹³ It remains an open question whether such restoration violates the U.S. Constitution.¹¹⁴

Finally, in 1998 Congress enacted the Sonny Bono Copyright Term Extension Act, adding 20 years to the terms of all existing and future copyrights.¹¹⁵ In doing so, Congress once again expressed great skepticism concerning the benefits of the public domain.¹¹⁶ As in the 1976 Act,

¹¹⁰ Id. at (h)(6)(D). An “eligible country” is defined as one that is a member of the WTO, or that adheres to the Berne Convention, the WIPO Copyright Treaty, the WIPO Performances and Phonograms Treaty, or that is the subject of a Presidential Proclamation concerning reciprocity. Id. at (h)(1).
¹¹¹ 17 U.S.C. § 104(h)(6)(D). By international convention, simultaneous publication means publication within 30 days of the date of first publication. Id.
¹¹² 17 U.S.C. § 104A(a)(1)(A) (“Copyright subsists, in accordance with this section, in restored works, and vests automatically on the date of restoration.”).
¹¹³ Id. at (a)(1)(B).
¹¹⁶ See Sen. Rpt. 104-315, at 14 (July 10, 1996) (“Many of the works we wish to preserve, including the motion pictures and musical works from the 1920's and 1930's that form such an extraordinary part of our Nation's cultural heritage, will soon fall into the public domain.”); H.R. Rpt. 105-452, at § 5 (Mar. 18, 1998) (“Upon the expiration of the copyright term, the work falls into the public domain. This means that anyone may perform the work, display the work, make copies of the work, distribute copies of the work, and create derivative works based on the work without first having to get authorization from the copyright holder. Essentially, the copyright holder no longer has the exclusive ability to exploit the work to their financial gain and no longer ‘owns’ the work.”). While these statements may sound neutral, they were part of
However, Congress did not attempt to revive any copyrights, which had already entered the public domain.\textsuperscript{117} The U.S. Supreme Court recently held that the CTEA does not violate either the "limited Times" requirement of the Patent and Copyright Clause or the First Amendment.\textsuperscript{118}

IV. CHARACTERIZING AND NAMING THE PUBLIC DOMAIN

A. Public Property and Common Property

Semantically speaking, it could be said that during the first 100 years of our nation's history, "the public domain" did not exist. That is because the term "public domain" was not applied to intellectual property in the U.S. until the 1890s.\textsuperscript{119} Instead, during most of the 19th Century the most frequent characterization applied to inventions or works, which were not protected by patent or copyright, by counsel and judge alike, was "public property."\textsuperscript{120} The term was applied to patents\textsuperscript{121} and copyrights\textsuperscript{122} whose terms had

Congress' justification for enacting term extension and delaying the entry of such works into the public domain. In other words, allowing works to enter the public domain was something to be condemned, or at least only grudgingly tolerated, rather than something to be celebrated.

\textsuperscript{117} 17 U.S.C. § 304(b) ("Any copyright in its renewal term at the time that the Sonny Bono Copyright Term Extension Act becomes effective shall have a copyright term of 95 years from the date copyright was originally secured."); see Sen. Rpt. 104-315, at 20 ("It is not the Committee's intent that copyright be restored to public domain works.").


\textsuperscript{119} See infra nn. 154-72 and accompanying text.

\textsuperscript{120} E.g. Evans v. Eaton, 20 U.S. 356, 378 (1822) (Mr. Sergeant, counsel for defendant) ("At the expiration of the period, the thing thus secured is to become public property, which any one is at liberty to use."); id. at 425 (majority opinion of Story, J.) (rejecting argument that a witness should have been disqualified for having an interest in the outcome: "If the patent is declared void, the invention may be used by the whole community, and all persons may be said to have an interest in making it public property."); id. at 447 (Livingston, J., dissenting) ("The old machine still remains public property; [and] may be used by every one.").

\textsuperscript{121} E.g. U.S. v. Am. Bell Tel. Co., 167 U.S. 224, 243 (1897) ("On March 7, 1876, patent No. 174,465 was issued to Alexander Graham Bell . . . . That patent has expired and all the monopoly which attaches to it alone has ceased, and the right to use that invention has become public property."); McCormick v. Talcott, 61 U.S. 402, 406 (1857) (referring to an invention "of McCormick, patented in 1834, which is now public property"); Atty. Gen. v. Rumford Chem. Works, 32 F. 608, 617 (C.C.D.R.I. 1876) (an invention "becomes public property at the expiration of the term of the patent . . . ."); Page v. Ferry, 18 F. Cas. 979, 983 (C.C.E.D. Mich. 1857) ("at the expiration of the patent . . . . his invention becomes public property"); Wintermute v. Redington, 30 F. Cas. 367, 369 (C.C.N.D. Ohio 1856) ("the consideration for which the patent issues to him, is the benefit he confers on the community, by his discovery
expired, to patents which were invalid, to material disclosed but not claimed in a patent, to material for which no patent or copyright could be obtained, and to material for which no patent or copyright had been obtained. Thus, one judge explained:

eventually becoming public property”); Pennock v. Dialogue, 27 U.S. 1, 12-13 (1829) (Mr. Sergeant, for the defendant) (“Patents are intended to be granted for a limited time, beginning with the invention . . . . [A]t the expiration of the time, the thing invented is public property.”).

122 E.g. Merriam v. Famous Shoe & Clothing Co., 47 F. 411, 413 (C.C.E.D. Mo. 1891) (“as the copyright on that edition has expired, it has now become public property. Any one may reprint that edition of the work . . . .”); Merriam v. Holloway Pub. Co., 43 F. 450, 451 (C.C.E.D. Mo. 1890) (“When a man takes out a copyright, for any of his writings or works, he impliedly agrees that, at the expiration of that copyright, such writings or works shall go to the public and become public property . . . . The copyright law gives an author or proprietor a monopoly of the sale of his writings for a definite period, but the grant of a monopoly implies that, after the monopoly has expired, the public shall be entitled ever afterwards to the unrestricted use of the book.”).

123 E.g. Evans, 20 U.S. at 425 (Story, J.) (“If the patent is declared void, the invention may be used by the whole community . . . . making it public property.”); Thompson v. Haight, 23 F. Cas. 1040, 1047 (C.C.S.D.N.Y. 1826) (“The right he once had was lost. It had become public property.”).

124 E.g. Mahn v. Harwood, 112 U.S. 354, 361 (1884) (“Of course, what is not claimed is public property. The presumption is, and such is generally the fact, that what is not claimed was not invented by the patentee, but was known and used before he made his invention. But, whether so or not, his own act has made it public property if it was not so before.”); Miller v. Brass Co., 104 U.S. 350, 352 (1881) (“[T]he claim of a specific device or combination, and an omission to claim other devices or combinations apparent on the face of the patent, are, in law, a dedication to the public of that which is not claimed.”).

125 E.g. Carr v. Rice, 5 F. Cas. 140, 143 (C.C.S.D.N.Y. 1856) (“If [the invention] has been previously in public use, or can be found described in substance, in printed publications, it is public property, and the law does not permit it to be appropriated, by means of a patent grant, to individuals.”); Many v. Sizer, 16 F. Cas. 68, 684 (C.C.D. Mass. 1849) (“[I]f the thing they produce existed before, though they might have been ignorant of it, they can not take and hold any exclusive right to what before was public property.”); Grant v. Raymond, 31 U.S. 218, 231 (1832) (Mr. Webster, for plaintiffs in error) (“The invention, by a single month’s use, unprotected by a patent, becomes public property . . . .”).

126 See e.g. Callahan v. Myers, 128 U.S. 617, 645 (1888) (“The broad proposition is contended for by the defendants, that these law reports are public property, and are not susceptible of private ownership, and cannot be the subject of copyright under the legislation of Congress.”); Banks v. Manchester, 23 F. 143, 145 (C.C.S.D. Ohio 1885) (“It is in accordance with sound public policy . . . . to regard the authoritative expositions of the law by the regularly constituted judicial tribunals as public property, to be published freely by any one who may choose to publish them.”), aff’d, 128 U.S. 244 (1888); see Wheaton v. Peters, 33 U.S. 591, 650 (1834) (Mr. Sergeant, for the defendants) (“The law is not established, at least it has not been so declared, that [judicial] reports can be private property. Essentially, their contents are public property.”); id. at 668 (“[T]he courts are unanimously of opinion, that no reporter has or can have any copyright in the written opinions delivered by this court.”).

127 E.g. Evans v. Eaton, 8 F. Cas. 846, 856 (D. Pa. 1816) (“If Stouffer was the original inventor of the hopperboy and chose not to obtain a patent for it, it became public property by his abandonment.”), rev’d in part on other grounds, 16 U.S. 454 (1818); Evans v. Hetick, 8 F. Cas. 861, 867-68 (E.D. Pa. 1818) (“If [the inventor] has not chosen to ask for a monopoly, but abandons it to the public, then it becomes public property, and any person has a right to use it.”), aff’d, 20 U.S. 453 (1822).
Whether the inventor gratuitously throws open his invention to the public, or whether it becomes known by other means; whether the patent expires by its own limitation, or is declared void by judgment of law, is perfectly immaterial. The invention is then the property of the public...

Courts of this era emphasized two characteristics, which attached to such “public property.” First, any member of the public could make, use or sell the invention, or publish the work. Second, this “public property” was irrevocable. Once something had become public property, it was beyond the power of the government to privatize it by granting a new patent or copyright.

128 E.g. Clemens v. Belford, Clark & Co., 14 F. 728, 730 (N.D. Ill. 1883) (“If [a person] publishes anything of which he is the author or compiler... without protecting it by copyright, it becomes public property, and any person who chooses to do so has the right to republish it.”); Lawrence v. Dana, 15 F. Cas. 26, 52 (D. Mass. 1869) (“[N]ew matter made or composed afterwards, requires a new copy-right, and if none is taken out, the matter becomes public property, just as the original book would have become if a copy-right for it had never been secured.”).

129 Thompson, 23 F. Cas. at 1047.

130 E.g. Pennock, 27 U.S. at 19 (public use of an invention before application “giv[es] the public at large a right to make, construct, use, and vend the thing invented, at as early a period as possible...”); Allen v. Hunter, 1 F. Cas. 476, 477 (D. Ohio 1855) (“[W]hen the patent shall expire and the invention or discovery shall become public property, any one skilled in the art or science may construct or compound it.”); Evans, 8 F. Cas. at 867-68 (“If [the inventor] has not chosen to ask for a monopoly, but abandons it to the public, then it becomes public property, and any person has a right to use it.”); cf. McCormick v. Manny, 15 F. Cas. 1314, 1318 (N.D. Ill. 1856) (“This patent having expired, whatever of invention it contained, now belongs to the public, and may be used by any one.”).

131 E.g. Banks, 23 F. at 145 (judicial reports are “public property, to be published freely by any one who may choose to publish them”), aff’d, 128 U.S. 244 (1888); Clemens, 14 F. at 730 (“If [a person] publishes anything of which he is the author or compiler... without protecting it by copyright, it becomes public property, and any person who chooses to do so has the right to republish it.”).

132 E.g. Pennock, 27 U.S. at 16 (“It has not been, and indeed cannot be denied, that an inventor may abandon his invention, and surrender or dedicate it to the public. This inchoate right, thus once gone, cannot afterwards be resumed at his pleasure; for, where gifts are once made to the public in this way, they become absolute.”); Thompson, 23 F. Cas. at 1047 (“It had become public property. And, I maintain, with confidence, the broad principle that congress had no authority to grant a monopoly of a thing which is known, and in common use... [T]he enjoyment of it can never again be made exclusive, in the hands of an individual.”); id. at 1048 (“[T]he invention or improvement for which [the patent] was granted had passed into common and general use. Congress possessed no right or power to make it private property again.”); Grant, 31 U.S. at 231 (Mr. Webster, for plaintiffs in error) (“The invention, by a single month’s use, unprotected by a patent, becomes public property and can never be resumed.”) (emphasis added).

133 E.g. Merriam, 43 F. at 451 (“[T]he grant of a monopoly implies that, after the monopoly has expired, the public shall be entitled ever afterwards to the unrestricted use of the book.”) (emphasis added).
Another frequent characterization of matter not protected by patent or copyright was "common property." This characterization was most often applied to fundamental ideas or principles which could not be patented or copyrighted under any circumstances, but it was also applied to inventions which were not novel, or were obvious, or for which no patent application was made. "Common property" was sometimes used interchangeably with "public property," indicating that the two terms

134 E.g. Baker, 101 U.S. at 100-01 ("Where the truths of a science or the methods of an art are the common property of the whole world, any author has the right to express the one, or explain and use the other, in his own way."); Wall v. Leck, 66 F. 552, 557 (9th Cir. 1895) ("A principle, considered as a natural physical force, is not the product of inventive skill. It is the common property of all mankind."); Detmold v. Reeves, 7 F. Cas. 547, 549 (E.D. Pa. 1851) ("The more comprehensive truths of all philosophy . . . can not be specially appropriated by any one . . . . If we could search the laws of nature, they would be, like water and the air, the common property of mankind . . . .").

135 E.g. Evans v. Eaton, 16 U.S. at 498 (Mr. Hopkinson & Mr. Sergeant, counsel for defendant) ("[E]very thing known by use, or described in books, might be considered as common property."); Wood v. Williams, 30 F. Cas. 485, 486 (E.D. Pa. 1834) ("They [the public] have the same interest in every suit, in which the validity of a patent is contested; for if it be defeated, the pretended invention becomes a common property, as fully as if the letters patent had been repealed by the proceeding here adopted."); In re Faure's Appeal, 19 D.C. 259, 268-69 (1890) (affirming denial of patent for lack of novelty) ("The subject of a patent, in the absence of a specific grant from the Government, belongs to the public as common property.").

136 E.g. Lovell Mfg. Co. v. Cary, 147 U.S. 623, 636 (1893) ("The method of the patent, already in use, thus occurred to Cary; but he was appropriating a method which was common property. When steel was adopted for the first time in any art, it was natural that existing methods of treating it should be applied to its new use in the given art.").

137 See e.g. Wilson v. Rousseau, 45 U.S. 646, 674 (1846) ("At common law, the better opinion, probably, is, that the right of the inventor to his invention or discovery passed from him as soon as it went into public use with his consent; it was then regarded as having been dedicated to the public, as common property, and subject to the common use and enjoyment of all."); Pennock, 27 U.S. at 23 ("If the public were already in possession and common use of an invention fairly and without fraud, there might be sound reason for presuming, that the legislature did not intend to grant an exclusive right to any one to monopolize that which was already common.").

138 E.g. Callaghan v. Myers, 128 U.S. 617, 623 (1888) ("[T]he invention had been completed and published in the year 1811, seven years before the application for this patent."); Edgerton v. Furst & Bradley Mfg. Co., 9 F. 450, 459 (N.D. Ill. 1881) ("I have therefore come finally and firmly to the conclusion that these treadles were old and common property at the time this patent was issued . . . . They were public property, and sold on the market long before the expiration of two years prior to the application for this patent."); Pennock, 27 U.S. at 8 (Mr. Sergeant, for the defendant) ("[T]he invention had been completed and published in the year 1811, seven years before the application. . . . [D]uring all that period, it had been known and used as common public property, (and not as private property) which any one might use as publicly known."); Evans, 20 U.S. at 386-87 (Mr. Sergeant, for the defendant) ("Does it follow, that if a machine has not been patented, he who improves upon it has a right to appropriate the whole to himself, and withdraw what was before public property from the public use? . . . What was common property remains so; the patentee of the improvement is at liberty to use it because it is common, and no
meant the same thing. Indeed, as with "public property," courts emphasized that any person was free to use "common property," meaning "of public right," as a synonym for "public property." The phrase fell out of favor for several decades, but it was revived in the late 1800s. The first edition of Black's Law Dictionary, published in 1891, demonstrates the close connection between the two phrases and the phrase "common property." The definition of "public property" is:

This term is commonly used as a designation of those things which are publici juris, (q.v.,) and therefore considered as being owned...
by "the public," the entire state or community, and not restricted to the dominion of a private person.\textsuperscript{144}

The definition of "publici juris" is:

Lat. Of public right This term, as applied to a thing or right, means that it is open to or exercisable by all persons. When a thing is common property, so that any one can make use of it who likes, it is said to be 'publici juris;' as in the case of light, air, and public water.\textsuperscript{145}

There is no entry for "common property," but the adjective "common" is defined to mean "shared among several; owned by several jointly."\textsuperscript{146} Thus, matter that was not protected by intellectual property law was considered to be a true commons, owned jointly by the public at large and free for all to use.

The most famous use of the phrase "publici juris" came in 1918, in \textit{International News Service v. Associated Press}.\textsuperscript{147} In dicta, the majority remarked that there could not be a valid copyright in facts (as opposed to expression):

But the news element—the information respecting current events contained in the literary production—is not the creation of the writer, but is a report of matters that ordinarily are publici juris; it is the history of the day. It is not to be supposed that the framers of the Constitution, when they empowered Congress "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries" (Const., Art I, § 8, par. 8), intended to confer upon one who might happen to be the first to report a historic event the exclusive right for any period to spread the knowledge of it.\textsuperscript{148}

Less well known is the following passage, which uses "common property" as a synonym for "publici juris."

\textsuperscript{144} Henry Campbell Black, \textit{Black's Law Dictionary} 963 (1st ed., West 1891). The entry adds: "It may also apply to any subject of property owned by a state, nation, or municipal corporation as such." \textit{Id.}

\textsuperscript{145} \textit{Id.} at 965. The entry adds "Or it designates things which are owned by 'the public'; that is, the entire state or community, and not by any private person." \textit{Id.}

\textsuperscript{146} \textit{Id.} at 230.

\textsuperscript{147} 248 U.S. 215, 234 (1918).

\textsuperscript{148} \textit{Id.}
Except for matters improperly disclosed, or published in breach of trust or confidence, or in violation of law, none of which is involved in this branch of the case, the news of current events may be regarded as common property.\textsuperscript{149}

Of course, despite its ringing endorsement of news as common property, the majority went on to uphold a preliminary injunction against International News Service, prohibiting it from systematically copying Associated Press’s uncopyrighted news dispatches and selling them in competition with Associated Press’s.\textsuperscript{150} Justices Holmes, McKenna and Brandeis dissented,\textsuperscript{151} and the language of Brandeis’ opinion is as famous as the majority’s:

The general rule of law is, that the noblest of human productions—knowledge, truths ascertained, conceptions, and ideas—become, after voluntary communication to others, free as the air to common use.\textsuperscript{152}

Once again, the analogy between intellectual property and the environmental commons is drawn. This analogy is reinforced by the fact that contemporary opinions also use the phrase “publici juris” to refer to common ownership of natural resources such as water.\textsuperscript{153} Thus, although

\textsuperscript{149} Id. at 235.
\textsuperscript{150} Id. at 245-46. In another famous passage, the majority laid the foundations of the still-troublesome misappropriation doctrine. Id. at 239-40 (“In doing this defendant, by its very act, admits that it is taking material that has been acquired by complainant as the result of organization and the expenditure of labor, skill, and money, and which is salable by complainant for money, and that defendant in appropriating it and selling it as its own is endeavoring to reap where it has not sown, and . . . is appropriating to itself the harvest of those who have sown.”).
\textsuperscript{151} Id. at 246 (Holmes & McKenna, JJ., dissenting); id. at 248 (Brandeis, J., dissenting).
\textsuperscript{152} Id. at 250 (Brandeis, J., dissenting).
\textsuperscript{153} E.g. Kan. v. Colo., 206 U.S. 46, 103 (1907) (“The right to flowing water is now well settled to be a right incident to property in the land; it is a right publici juris, of such a character, that whilst it is common and equal to all, through whose land it runs, and no one can obstruct or divert it, yet, as one of the beneficial gifts of Providence, each proprietor has a right to a just and reasonable use of it, as it passes through his land.”) (quoting Elliot v. Fitchburg R.R. Co., 64 Mass. 191, 193, 196 (Mass. 1852)); Head v. Amoskeag Mfg. Co., 113 U.S. 9, 23 (1885) (“The right to the use of running water is publici juris, and common to all the proprietors of the bed and banks of the stream from its source to its outlet. Each has a right to the reasonable use of the water as it flows past his land, not interfering with a like reasonable use by those above or below him.”); Mohl v. Lamar Canal Co., 128 F. 776, 778 (C.C.D. Colo. 1904) (“The waters of flowing streams are publici juris [sic]—the gift of God to all His creatures.”); Ill. Central R.R. Co. v. Ill., 146 U.S. 387, 457 (1892) (“The shore and lands under water of the navigable streams and waters of the province of New Jersey . . . were held by the state . . . in trust for the public uses of navigation and fishery, and the erection thereon of wharves, piers, light-houses, beacons, and other facilities of navigation and commerce. Being subject to this trust, they were publici juris; in other words, they were held for the use of the people at large.”) (quoting Stockton v. Baltimore & N.Y. Rail Co., 32 F. 9, 19-20 (C.C.D.N.J. 1887)).
the judges disagreed about the scope of unfair competition, it appears they agreed that information, which was not subject to any type of intellectual property law, was held in common by the public, and free for anyone to use.

B. Naming the Public Domain

During the first century of the United States' existence, the phrase "public domain" was used almost exclusively to refer to land owned by the government.\(^{154}\) The phrase was used to refer to an expired patent in only two intellectual property cases prior to 1896.\(^{155}\) In *Wheeler v. McCormick*,\(^ {156}\) in response to an argument that "the invention patented ... became, on the expiration of the term, public property,"\(^ {157}\) the court said:

I am of opinion that nothing fell into the public domain, on the expiration of that patent, except the special device claimed in it, and

\[^{154}\] *E.g.* Black's Law Dictionary, *supra* n. 144, at 385 ("The public lands of a state are frequently termed the 'public domain' ... "); *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518, 695 (1819) ("Titles to land, constituting part of the public domain, acquired by grants under the provisions of existing laws by private persons, are certainly contracts of civil institution."); *Mayor, Aldermen, and Inhabitants of New Orleans v. U.S.*, 35 U.S. 662, 735-36 (1836) ("It is well known that the policy of Spain in regard to a disposition of her public domain, is entirely different to that which has been adopted by the United States. We dispose of our public lands by sale; but Spain has uniformly bestowed her domain in reward for meritorious services, or to encourage some enterprise deemed of public utility."); *Long v. O'Fallon*, 60 U.S. 116, 125 (1856) ("The land was then a part of the public domain, and subject to entry at the land office, under the laws of the United States."); *Newhall v. Sanger*, 92 U.S. 761, 763 (1875) ("The act of [March 3, 1851] declared that all lands, the claims to which should not have been presented within two years therefrom, should 'be deemed, held, and considered to be a part of the public domain of the United States.'"); *Wash. & Idaho R.R. Co. v. Osborn*, 160 U.S. 103, 108 (1895) ("[T]he trial court found that the land claimed by Osborn was a part of the unsurveyed public domain of the United States.").

\[^{155}\] In two other intellectual property cases before 1896, the phrase was used to refer to lands owned by the government. *Marsh v. Nichols, Shepherd & Co.*, 128 U.S. 605, 610 (1888) (analogizing to patent patents for invention "[w]ith respect to patents for land we have had frequent occasion to assert their inviolability against collateral attack, where ... the land formed part of the public domain, and the law provided for their sale."); *La Republique Francaise v. Schultz*, 57 F. 37, 38 (C.C.S.D.N.Y. 1893) ("[T]he crown of France became the owner of said mineral springs, and remained such until 1790, when said springs were united to the public domain of the state of France."), dismissed, 94 F. 500 (C.C.S.D.N.Y. 1899), aff'd, 102 F. 153 (2d Cir. 1900); see also *La Republique Francaise v. Saratoga Vichy Spring Co.*, 99 F. 733 (C.C.N.D.N.Y. 1900), rev'd, 107 F. 459 (2d Cir. 1901), aff'd, sub nom. *French Republic v. Saratoga Vichy Spring Co.*, 191 U.S. 427, 434 (1903) (finding that mineral springs were "the property of the crown ... until 1790, when they were united to the public domain and afterwards passed to the French Republic and its successors ... ").

\[^{156}\] 29 F. Cas. 905 (C.C.S.D.N.Y. 1873).

\[^{157}\] *Id.* at 908.
that that patent did not include the devices embraced in the other reissues upon which this suit is brought.\textsuperscript{158}

And in \textit{Brush Electric Co. v. Electrical Accumulator Co.},\textsuperscript{159} the court remarked:

It is said the expiration of the Italian patent threw the invention into the public domain. So it did, into the domain of the Italian public, but if Mr. Brush had taken no patent in Italy the Italian public could have practiced the invention from the moment it became known there.\textsuperscript{160}

On May 18, 1896, the Supreme Court used the phrase “public domain” for the first time in an intellectual property case.\textsuperscript{161} The case, \textit{Singer Manufacturing Co. v. June Manufacturing Co.},\textsuperscript{162} involved the use of the name “Singer” to refer to sewing machines. The Court first held that the word “Singer” had become generic for sewing machines\textsuperscript{163} (much as the word “hoover” has become generic for vacuum cleaners in the United Kingdom,\textsuperscript{164} but not in the U.S.\textsuperscript{165}). The Court then explained the public policy behind its ruling:

It is self-evident that on the expiration of a patent the monopoly created by it ceases to exist, and the right to make the thing

\textsuperscript{158} \textit{Id.} at 909.
\textsuperscript{159} \textit{47 F. 48 (C.C.S.D.N.Y. 1891).}
\textsuperscript{160} \textit{Id.} at 56. The court nonetheless issued an injunction, based on the finding that “the more the Italian patent is studied the more settled becomes the conviction that it is not for the same invention...” \textit{Id.} at 55.
\textsuperscript{161} Not counting a patent case eight years before in which they had used the phrase to refer to government lands. \textit{Marsh}, 128 U.S. at 610.
\textsuperscript{162} \textit{163 U.S. 169} (1896).
\textsuperscript{163} \textit{Id.} at 180-83. It should be noted that it has more recently been held that Singer “has by the constant and exclusive use of the name ‘Singer’ in designating sewing machines and other articles manufactured and sold by it and in advertising the same continuously and widely[,] recaptured from the public domain the name ‘Singer.’”. \textit{Singer Mfg. Co. v. Briley}, 207 F.2d 519, n. 3 (5th Cir. 1953) (Finding of Fact No. 4); see \textit{Singer Mfg. Co. v. Singer Upholstering & Sewing Co.}, 130 F. Supp. 205, 208 (W.D. Pa. 1955) (“‘Singer’ and a letter ‘S’ are good and valid trade-marks and trade-names for sewing machines, furniture, sewing supplies and services . . . and are the exclusive property of plaintiff, The Singer Manufacturing Company.”); see \textit{Fleischmann Distilling Corp. v. Maier Brewing Co.}, 386 U.S. 714, 716-17, n. 5 (1967) (disapproved on other grounds).
\textsuperscript{165} \textit{Hoover}, 674 F. Supp. at 461 (“Plaintiff began using the Hoover name in 1908 and holds trademark registrations for the name on vacuum cleaners and other floor care products and home appliances.”).
formerly covered by the patent becomes public property. It is upon this condition that the patent is granted. . . . It equally follows from the cessation of the monopoly and the falling of the patented device into the domain of things public, that along with the public ownership of the device there must also necessarily pass to the public the generic designation of the thing which has arisen during the monopoly.\textsuperscript{166}

The Court supported its decision in part by quoting (in English translation) from three French treatises\textsuperscript{167} and two French cases,\textsuperscript{168} each of which used the term “the public domain.” Finally, having become accustomed to the French use of the phrase, the Court used the phrase itself in summing up.\textsuperscript{169}

\textsuperscript{166} Singer, 163 U.S. at 185 (emphasis added).

\textsuperscript{167} Id. at 186 (“Abandonment in industrial property is an act by which the public domain originally enters or reenters into the possession of the thing (commercial name, mark or sign,) by the will of the legitimate owner.”) (quoting De Maragy, \textit{International Dictionary of Industrial Property}); \textit{id.} at 196 (“But at the expiration of the patent does the designation fall into the public domain with the patented invention?”) (quoting Braun, \textit{Marques des Fabrique [Trademarks]} § 68, at 232); \textit{id.} at 198 (“That when an invention falls into the public domain, it enters with the name which the inventor has given it, and he cannot prevent a person from employing this designation . . .”) (quoting Pouillet, \textit{Brevets D'Invention [Patents]} § 328, at 279).

\textsuperscript{168} \textit{Id.} at 199 (“[T]he methods of manufacture of a patented product fall into the public domain after the expiration of the patent, but it is otherwise as to the name of the inventor . . . except in the case where, either by long usage or in consequence of a consent either expressly or tacitly given by the inventor, his surname having become the sole usual designation of his invention.”) (quoting a Court of Cassation decision reported in the \textit{Dictionary of De Maragy}, vol. I, at 11); \textit{id.} (“whereas, they . . . did not take patents in France for the invention and their improvements, which have therefore fallen into the public domain . . .”) (quoting another French decision reported in the \textit{Dictionary of De Maragy}).

\textsuperscript{169} \textit{Id.} at 202 (“On the machines made by the Singer Company there was a tension screw. This screw on the Singer machines served a useful mechanical purpose, and did not pass into the public domain with the expiration of the fundamental patents, because specially covered by a subsisting patent.”); \textit{id.} at 203 (“Clearly, as the word ‘Singer’ was dedicated to the public, it could not be taken by the Singer Company out of the public domain by the mere fact of using that name as one of the constituent elements of a trade-mark.”).

It should be noted that despite its holding that the word “Singer” was generic, the Court enjoined the defendants “from using the word ‘Singer’ or any equivalent thereto, in advertisements in relation to sewing machines, without clearly and unmistakably stating in all said advertisements that the machines are made by the defendant, as distinguished from the sewing machines made by the Singer Manufacturing Company.” \textit{Id.} at 204 (emphasis omitted). Thus, in allowing the defendant to use the word “Singer,” the court treated it more as a descriptive word than a generic one, similar to the current defense for descriptive fair use. \textit{See} 15 U.S.C. § 1115(b)(4) (permitting “a use, otherwise than as a mark . . . of a term or device which is descriptive of and used fairly and in good faith only to describe the goods or services of such party”). This interpretation also explains how the word “Singer” could be recaptured from the public domain, since the Lanham Act permits the registration of a descriptive word, which has acquired secondary meaning. 15 U.S.C. § 1052(f).
In adopting the phrase “public domain” from French law, the Supreme Court used the phrase interchangeably with the phrase “public property.”\textsuperscript{170} Some of the French sources that it quoted likewise used the two phrases interchangeably.\textsuperscript{171} In addition, the Court quoted an English case that used the phrase “publici juris” to describe an invention on which the patent had expired.\textsuperscript{172} This indicates that the Court intended and believed that the phrase “public domain” had the same meaning and legal effect as the phrases “public property” and “publici juris.” Despite the Supreme Court’s imprimatur, the phrase “public domain” was slow to catch on. It was used only four times during the next decade.\textsuperscript{173} Instead, courts continued to use the phrases “public property,”\textsuperscript{174} “common

\textsuperscript{170} Singer, 163 U.S. at 185 (stating that “on the expiration of a patent[,] . . . the right to make the thing formerly covered by the patent becomes public property . . . . It equally follows from the cessation of the monopoly and the falling of the patented device into the domain of things public . . . .”); \textit{id.} at 191 (“[A]t the expiration of that copyright, such writings or works shall go to the public and become public property.”) (quoting \textit{Merriam v. Holloway Pub. Co.}, 43 F. 450, 451 (E. D. Mo. 1890)); \textit{id.} at 203 (“But the word ‘Singer,’ as we have seen, had become public property, and the defendant had a right to use it . . . . [I]t could not be taken by the Singer Company out of the public domain . . . .”); \textit{see supra} nn. 156-58 (discussing \textit{Wheeler}, 29 F. Cas. at 908-09).

\textsuperscript{171} Singer, 163 U.S. at 196-97 (quoting Braun, \textit{Marques des Fabrique [Trademarks]} § 68, at 232); \textit{id.} at 198 (“We know, however, that when the name of the inventor has become the designation of the thing patented, it belongs to every one, at the expiration of the patent . . . .”) (quoting Pouillet, \textit{Brevets d’Invention [Patents]} § 329, at 280).

\textsuperscript{172} \textit{Id.} at 194 (“It is clear that on the expiration of this patent it was open to all the world to manufacture the article which had been patented; that is the consideration which the inventor gives for the patent; the invention becomes then entirely publici juris . . . . It is impossible to allow a man to prolong his monopoly by trying to turn a description of the article into a trademark. Whatever is mere description is open to all the world.”) (quoting \textit{Cheavin v. Walker}, 5 Ch. Div. 850, 863 (Eng. 1877)).

\textsuperscript{173} \textit{See Centaur Co. v. Hughes Bros. Mfg. Co.}, 91 F. 901, 904-05 (5th Cir. 1898) (Pardee, J., dissenting) (“[T]he word ‘Castoria’ . . . did pass into the public domain on the expiration of the patent.”); \textit{Rahijen’s Am. Composition Co. v. Holzapfel’s Composition Co.}, 101 F. 257, 261 (2d Cir. 1900) (quoting and distinguishing \textit{Singer}), rev’d, 183 U.S. 1 (1901); \textit{Kipling v. G.P. Putnam’s Sons}, 120 F. 631, 634 (2d Cir. 1903) (“This new copyright protected only what was original in [that] edition. It did not operate to extend or enlarge prior copyrights or remove from the public domain the author’s works which, by his own act, he had dedicated to the public.”); \textit{Warren Featherbone Co. v. Am. Featherbone Co.}, 141 F. 513, 516 (7th Cir. 1905) (“Under these circumstances the question occurs whether the name of a patented article at the expiration of the patent falls into the public domain with the patented article. We consider this question to be no longer an open one.”). Kipling is thus the first use of the phrase in a copyright case; the other three cases, like Singer, involved the name of a product covered by an expired utility patent.

\textsuperscript{174} \textit{See e.g. G. & C. Merriam Co. v. Syndicate Pub. Co.}, 237 U.S. 618, 622 (1915) (“After the expiration of a copyright of that character, it is well-settled that the further use of the name, by which the publication was known and sold under the copyright, cannot be acquired by registration as a trade-mark; for the name has become public property, and is not subject to such appropriation.”); \textit{Mifflin v. Dutton}, 190 U.S. 265, 266 (1903) (“As the first twenty-nine chapters of ‘The Minister’s Wooing’ appeared in the Atlantic Monthly before any steps whatever were taken . . . to obtain a copyright, it follows that they, at least, became public
property,"\textsuperscript{175} or "publici juris."\textsuperscript{176} The use of the phrase "public domain" in the 1909 Copyright Act\textsuperscript{177} and by the Supreme Court in 1911\textsuperscript{178} helped encourage its adoption;\textsuperscript{179} but it is Learned Hand who deserves much of the credit for making the phrase popular. He used it in twelve published cases between 1915 and 1924,\textsuperscript{180} nearly twice as many times as all other judges

\textsuperscript{175} See e.g. Am. Tobacco Co. v. Werckmeister, 207 U.S. 284, 299-300 (1907) ("It is a fundamental rule that to constitute publication there must be such a dissemination of the work of art itself among the public, as to justify the belief that it took place with the intention of rendering such work common property."); Slater on the Law of Copyright and Trademark 92; Holmes, 174 U.S. at 86 ("The right thus secured by the copyright act is not a right to the use of certain words, because they are the common property of the human race."); Centaur, 84 F. at 957 ("It matters not that the inventor coined the word by which the thing has become known. It is enough that the public has accepted that word as the name of the thing, for thereby the word has become incorporated as a nown into the English language, and the common property of all.").

\textsuperscript{176} See e.g. Ferris v. Frohman, 223 U.S. 424, 431 (1912) ("Hence, it is said, the play not being copyrighted in the United States was publici juris here, and the adapter was entitled to use it as common material."); G. & C. Merriam Co. v. Straus, 136 F. 477, 478 (S.D.N.Y. 1904) ("The bill is in part an attempt to protect the literary property in the dictionaries which became publici juris upon the expiration of the copyrights.") (emphasis added).

\textsuperscript{177} See supra nn. 77-81 and accompanying text (discussing the use of the phrase "public domain" in the 1909 Copyright Act); West Pub. Co. v. Edward Thompson Co., 176 F. 833, 837 (2d Cir. 1910); Mail & Express Co. v. Life Pub. Co., 192 F. 899, 900 (2d Cir. 1912); DuPuy v. Post Telegram Co., 210 F. 883, 884 (3d Cir. 1914).

\textsuperscript{178} See Baglin v. Cusenier Co., 221 U.S. 580, 598 (1911) (De Marag's definition of abandonment, as quoted in Singer, supra note 167).

\textsuperscript{179} See A.D. Howe Mach. Co. v. Cofffield Motor Washer Co., 197 F. 541, 547 (4th Cir. 1912) ("If, as often happens, Coffield has been so unfortunate as not to secure legal protection for his inventive idea, and as a consequence it became a part of the public domain, he and complainant must stand their loss."); Union Spec. Mach. Co. v. Maimin, 185 F. 120, 132 (E.D. Pa. 1911) ("The fact that machines not embodying the combination, as a whole, had fallen into the public domain through the expiration of a prior patent, conferred no right upon the seller to utilize those parts to form the new combination"); id. at 133 ("The machines not embodying the combination in suit, as a whole, have fallen into the public domain and gone into common use.") (report of special master); Richard Rodgers Bowker, Copyright, Its History and Its Law 127 (The Riverside Press 1912) ("[I]t is at least doubtful whether a book published in another country prior to publication here, unless protected by international copyright relations, has not fallen into the public domain and thus forfeited copyright protection here.").

\textsuperscript{180} See Shredded Wheat Co. v. Humphrey Cornell Co., 250 F. 960, 963-64 (2d Cir. 1918); Crescent Tool Co. v. Kilborn & Bishop Co., 247 F. 299, 300 (2d Cir. 1917); Strause Gas Iron Co. v. William M. Crane Co., 235 F. 126, 130 (2d Cir. 1916); Gross v. Van Dyk Gravure Co., 230 F. 412, 413 (2d Cir. 1916) (quoting Learned Hand's district court opinion); Fred Fisher,
combined. Particularly influential was his 1930 opinion in *Nichols v. Universal Pictures Corp.* in which the Second Circuit held that general plot ideas are part of the public domain, even if original to the plaintiff.

Hand was also responsible for the alternative spelling of "public demesne." "Demesne" is a Norman French spelling of the word "domain," used principally to refer to lands held by the Crown. It was already archaic in the 1920s, having been used only once in federal case law, a century before. Hand first used the variant to refer to intellectual property in 1920, and with a handful of exceptions (notably *Nichols*), he used it exclusively after 1924. The alternative spelling never caught on; it was

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182. 45 F.2d 119 (2d Cir. 1930).

183. Id. at 122 ("We assume that the plaintiff's play is altogether original, even to an extent that in fact it is hard to believe. We assume further that, so far as it has been anticipated by earlier plays of which she knew nothing, that fact is immaterial. Still, as we have already said, her copyright did not cover everything that might be drawn from her play; its content went to some extent into the public domain.").


185. See *Doe, ex dem. Governor's Heirs v. Robertson*, 24 U.S. 332, 343 (1826) (Mr. Sampson, for the plaintiff) ("The title of the public demesne lands in England is vested in the crown; the king has, by the constitution, the sole power of granting them.").

186. See *Vapor Car Heating Co., Inc. v. Gold Car Heating & Lighting Co.*, 296 F. 188, 195 (S.D.N.Y. 1920) ("It all proceeds upon the doctrine, thoroughly well settled, that, when an applicant receives his patent, the monopolies or 'inventions' are embodied in his claims, and the disclosure in all its parts he transfers over into the public demesne.").

187. See supra n. 183; *Am.-Marietta Co. v. Krigsman*, 275 F.2d 287, 290 (2d Cir. 1960); see also *Nat'l. Comics Publication v. Fawcett Publications*, 191 F.2d 594, 598-99, 603 (2d Cir. 1951); *Musher Found. v. Alba Trading Co.*, 150 F.2d 885, 888 (2d Cir. 1945).

188. See *Capital Records v. Mercury Records Corp.*, 221 F.2d 657, 668 (2d Cir. 1955) (L. Hand, J., dissenting); *Comnar Prods. Corp. v. Universal Slide Fastener Co.*, 172 F.2d 150, 155 (2d Cir. 1949); *Engr. Dev. Laboratories v. Radio Corp. of Am.*, 153 F.2d 523, 526 (2d Cir. 1946); *W. States Mach. Corp. v. S.S. Hepworth Co.*, 147 F.2d 345, 348-49 (2d Cir. 1945); *G.H. Mumm Champagne v. E. Wine Corp.*, 142 F.2d 499, 502 (2d Cir. 1944); *Picard v. United Aircraft Corp.*, 128 F.2d 632, 637 (2d Cir. 1942); *Fashion Originators Guild of Am. v. F. Trade Commn.*, 114 F.2d 80, 84, 86 (2d Cir. 1940); *Sheldon v. Metro Goldwyn Pictures Corp.*, 81 F.2d 49, 53-54 (2d Cir. 1936), on appeal after remand, 106 F.2d 45, 50 (1939), aff'd, 309 U.S. 390.
used in only a handful of opinions not written by Hand,\(^\text{189}\) and its last original use (other than quotations from earlier opinions) was in 1955.\(^\text{190}\)

Between 1924 and 1944, the courts of appeals used the phrase "public domain"\(^\text{191}\) (or "public demesne\(^\text{192}\)) in 52 intellectual property cases,\(^\text{193}\) compared with 24 uses of "public property,"\(^\text{194}\) 21 uses of "common property,"\(^\text{195}\) and 23 uses of 'publici juris.'\(^\text{196}\) The Supreme Court used

392 (1940) (quoting Hand's 1939 opinion); *E.I. DuPont de Nemours & Co. v. Glidden Co.*, 67 F.2d 392, 394 (2d Cir. 1933); *Dwight & Lloyd Sintering Co. v. Greenawalt*, 27 F.2d 823, 830, 832 (2d Cir. 1928); *Grasselli Chem. Co. v. Nat'l Aniline & Chem. Co.*, 26 F.2d 305, 308, 310 (2d Cir. 1928); *Traitel Marble Co. v. U.T. Hungerford Brass & Copper Co.*, 22 F.2d 259, 261 (2d Cir. 1927). Hand is probably also responsible for the per curiam opinion in *Barry v. Hughes*, 103 F.2d 427, 427 (2d Cir. 1939).

\(^{189}\) See e.g. *G. Ricordi & Co. v. Paramount Pictures, Inc.*, 189 F.2d 469, 471 (2d Cir. 1951) (Swan, J.) ("When the copyright expired, the play was property in the public demesne, since the record discloses no renewal of the copyright."); *id.* at 472 (clarifying that only "the copyrightable new matter in the play was property in the public demesne," since the play was a derivative work of a novel that was still protected by copyright).

\(^{190}\) See E-I-M Co. v. Phila. Gear Works, 223 F.2d 36, 39 (5th Cir. 1955) ("its presently accused structure stems from the prior art Jones patent, now in the public demesne . . . ").

\(^{191}\) See e.g. *Sawyer v. Crowell Pub. Co.*, 142 F.2d 497 (2d Cir. 1944) ("The information as to the continental outlines appearing on the map and as to the latitude and longitude of the cities located thereon was taken from maps, atlases and other publications on file in the Department [of the Interior], and such information was in the public domain."); *Arnstein v. Broad. Music, Inc.*, 137 F.2d 410, 412 (2d Cir. 1943) (noting "the vast amount of music in the public domain"); *Becker v. Loew's, Inc.*, 133 F.2d 889, 892 (7th Cir. 1943) ("[A]ny similarity is so abstract that the theme is common property and remains in the public domain with the result that no copyright protects it.").

\(^{192}\) See supra nn. 184-190 and accompanying text.

\(^{193}\) The methodology was to search for the specified phrase in the Westlaw ALLFEDS-OLD database, limited to those cases identified by key numbers as copyright, patent, and trademark cases (99k! 291K! 382k!).

\(^{194}\) See e.g. *Sandlin v. Johnson*, 141 F.2d 660, 661 (8th Cir. 1944) ("The discoverer's property right in a trade secret ceases prospectively to exist . . . once the matter has become public property by a general disclosure on the part of the discoverer, or by a legitimate discovery and rightful general disclosure on the part of another."); *Affiliated Enters. v. Gruber*, 86 F.2d 958, 961 (1st Cir. 1936) ("However good and valuable an idea, plan, scheme, or system is, the moment it is disclosed to the public without the protection of a patent, it becomes public property.").

\(^{195}\) See e.g. *Commr. of Internal Revenue v. Affiliated Enters.*, 123 F.2d 665, 667 (10th Cir. 1941) ("When a patent expires, the creative idea does not cease to have value; it simply becomes the common property of all."); *Leuddecke v. Chevrolet Motor Co.*, 70 F.2d 345, 349 (8th Cir. 1934) ("When plaintiff voluntarily divulged his mere idea and suggestion, whatever interest he had in it became common property, and, as such, was available to the defendants."). This count does not include uses of "common property" to refer to something other than material in the public domain, such as joint ownership of a patent or shared physical properties of chemical compositions.

\(^{196}\) See e.g. *DuPont Cellophane Co. v. Waxed Products Co.*, 85 F.2d 75, 82 (2d Cir. 1936) ("What is the test by which a decision is to be arrived at whether a word which was originally a trade mark has become publici juris?") (emphasis added); *Phillips v. The Gov. & Co.*, 79 F.2d 971, 973 (9th Cir. 1935) ("Descriptive terms and generic names are publici juris and not capable of exclusive appropriation by any one, but may be used by all the world in an honestly descriptive and nondeceptive manner.") (emphasis added).
"public domain" only three times, most notably in *Kellogg Co. v. National Biscuit Co.*, in which the Court quoted and reaffirmed *Singer*. During the same period, however, the Supreme Court began to abandon the phrase "public property"; its last original use of the phrase was in 1926, and it has used it only eight times since, in quotes or paraphrases of 19th Century cases. It stopped using the phrases "common property" and "publici juris" altogether. The Court used the phrase "public domain" three more times in 1945, but not again for another fifteen years.

Between 1945 and the present, federal courts decided 2097 intellectual property cases in which one or more of these terms was used. Of these, only 104 (5 percent) used the term "public property"; 93 (4.4 percent) used the term "common property"; and just 34 (1.6 percent) used the term "publici juris." One thousand sixty three cases, or 93.6 percent, used the term "public domain." Semantically speaking, the triumph of the public domain is complete.

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198 305 U.S. at 114 ("[The District Court] held that upon the expiration of the Perky patent... the name of the patented article passed into the public domain.").
199 Id. at 118, 120; see Pollack, supra n. 4, at 295-98.
200 See *Alexander Millburn Co. v. Davis-Bournonville Co.*, 270 U.S. 390, 400-01 (1926) ("[I]f Whitford had not applied for his patent until after the issue to Clifford, the disclosure by the latter would have had the same effect as the publication of the same words in a periodical, although not made the basis of a claim. The invention is made public property as much in the one case as in the other.") (internal citation omitted).
204 For a discussion of Supreme Court cases after 1960, see infra nn. 205-266 and accompanying text.
205 These statistics are based on a search of the Westlaw ALLFEDS database on September 16, 2002, limited to those cases identified by key numbers as copyright, patent, and trademark cases (99k! 291k! 382k!).
V. CONSTITUTIONAL DIMENSIONS OF THE PUBLIC DOMAIN

In the 1960s, the Supreme Court decided several patent cases that placed renewed emphasis on the Constitutional basis of U.S. patent law, and on the limits imposed by the Patent and Copyright Clause.

First, in a pair of 1964 decisions known collectively as Sears/Compco, the Court held that the States could not prohibit the copying of matter, which the patent laws left in the public domain. The Court in Sears reaffirmed that "when [a] patent expires the monopoly created by it expires, too, and the right to make the article? including the right to make it in precisely the shape it carried when patented? passes to the public." It also held that "[a]n unpatentable article, like an article on which the patent has expired, is in the public domain and may be made and sold by whoever chooses to do so." The Court then explained that "[t]o allow a State by use of its law of unfair competition to prevent the copying of an article which represents too slight an advance to be patented would be to permit the State to block off from the public something which federal law has said belongs to the public."

In Compco, the Court summarized its holding in Sears as follows:

Today we have held in Sears, Roebuck & Co. v. Stiffel Co. . . . that when an article is unprotected by a patent or a copyright, state law may not forbid others to copy that article. To forbid copying would interfere with the federal policy, found in Art. I, § 8, cl. 8, of the Constitution and in the implementing federal statutes, of allowing free access to copy whatever the federal patent and copyright laws leave in the public domain. Here Day-Brite's fixture has been held not to be entitled to a design or mechanical patent. Under the federal patent laws it is, therefore, in the public domain and can be copied in every detail by whoever pleases.

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207 376 U.S. at 230 (citing Kellogg, 305 U.S. at 120-22; Singer Mfg., 163 U.S. at 185). See supra nn. 162-172, 198-199 and accompanying text.
208 Sears, 376 U.S. at 231.
209 Id. at 231-32 ("Obviously a State could not, consistently with the Supremacy Clause of the Constitution, extend the life of a patent beyond its expiration date or give a patent on an article which lacked the level of invention required for federal patents. To do either would run counter to the policy of Congress of granting patents only to true inventions, and then only for a limited time.").
210 376 U.S. at 237-38.
According to Compco, therefore, the Constitution itself expresses a policy of “allowing free access to copy whatever the federal patent and copyright laws leave in the public domain.”

Two years later, in Graham v. John Deere Co., the Court again discussed the relationship between the Constitution and the public domain:

At the outset it must be remembered that the federal patent power stems from a specific constitutional provision which authorizes the Congress “To promote the Progress of . . . useful Arts, by securing for limited Times to . . . Inventors the exclusive Right to their . . . Discoveries.” Art. I, § 8, cl. 8. The clause is both a grant of power and a limitation. This qualified authority, unlike the power often exercised in the sixteenth and seventeenth centuries by the English Crown, is limited to the promotion of advances in the “useful arts.” It was written against the backdrop of the practices—eventually curtailed by the Statute of Monopolies—of the Crown in granting monopolies to court favorites in goods or businesses which had long before been enjoyed by the public. The Congress in the exercise of the patent power may not overreach the restraints imposed by the stated constitutional purpose. Nor may it enlarge the patent monopoly without regard to the innovation, advancement or social benefit gained thereby. Moreover, Congress may not authorize the issuance of patents whose effects are to remove existent knowledge from the public domain, or to restrict free access to materials already available . . . . This is the standard expressed in the Constitution and it may not be ignored.

After reviewing the views of Thomas Jefferson, the Court added:

The patent monopoly was not designed to secure to the inventor his natural right in his discoveries. Rather, it was a reward, an inducement, to bring forth new knowledge. The grant of an exclusive right to an invention was the creation of society—at odds with the inherent free nature of disclosed ideas—and was not to be freely given. Only inventions and discoveries, which furthered human knowledge, and were new and useful, justified the special inducement of a limited private monopoly.

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212 Id. at 5-6 (citations and footnotes omitted).
213 Id. at 9.
Thus, the Court in *Graham* concluded that a patent had to be both new (i.e., novel) and useful to meet the Constitutional standard.

In two other decisions, the Court made it clear that the federal policy permitting free copying of any article in the public domain preempted contractual provisions to the contrary. In *Brulotte v. Thys Co.*,\(^ {214} \) the Court held that a contract in which a licensee promised to pay royalties for the use of a patented machine was unenforceable after the patent had expired. It said: "[t]he right to make, the right to sell, and the right to use 'may be granted or conferred separately by the patentee.' But these rights become public property once the 17-year period expires."\(^ {215} \) And in *Lear v. Adkins Co.*,\(^ {216} \) the court held that a patent licensee could not be estopped from challenging the validity of a patent. The Court said: "enforcing this contractual provision would undermine the strong federal policy favoring the full and free use of ideas in the public domain."\(^ {217} \)

In the 1970s, the Court decided three cases that are viewed collectively as having cut back on the scope of preemption of state law. Two of the cases, however, are consistent with the view that the Constitution requires free copying of articles in the public domain. In *Kewanee Oil Co. v. Bicron Corp.*,\(^ {218} \) the Court held that state trade secret law was not preempted under the Supremacy Clause. The Court acknowledged that under *Sears/Compco*, "that which is in the public domain cannot be removed therefrom by action of the States,"\(^ {219} \) but it concluded that:

[T]he policy that matter once in the public domain must remain in the public domain is not incompatible with the existence of trade secret protection. By definition a trade secret has not been placed in the public domain.\(^ {220} \)

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\(^ {214} \) 379 U.S. 29 (1964).

\(^ {215} \) Id. at 31 (footnotes omitted) (citing *Singer Mfg.*, 163 U.S. at 185 and *Kellogg*, 305 U.S. at 118); *see also Brulotte*, 379 U.S. at 33 ("The exaction of royalties for use of a machine after the patent has expired is an assertion of monopoly power in the post-expiration period when, as we have seen, the patent has entered the public domain.").


\(^ {217} \) Id. at 670; *see also* id. at 674 ("Surely the equities of the licensor do not weigh very heavily when they are balanced against the important public interest in permitting full and free competition in the use of ideas which are in reality a part of the public domain.").

\(^ {218} \) 416 U.S. 470 (1974).

\(^ {219} \) *Id.* at 481.

\(^ {220} \) Id. at 484 (footnote omitted); *see also* *Graham*, 383 U.S. at 9 ("The grant of an exclusive right to an invention was the creation of society—at odds with the inherent free nature of disclosed ideas."). (emphasis added).
Similarly, in *Aronson v. Quick Point Pencil Co.*,\(^{221}\) the Court upheld a contract for the disclosure of an unpublished patent application that required payment of a 5 percent royalty in the event a patent issued, and payment of a 2\(\frac{1}{2}\) percent royalty in the event no patent issued.\(^{222}\) The Court said:

Quick Point argues that enforcement of such contracts conflicts with the federal policy against withdrawing ideas from the public domain . . . . We find no merit in this contention. Enforcement of the agreement does not withdraw any idea from the public domain. The design for the keyholder was not in the public domain before Quick Point obtained its license to manufacture it.\(^{223}\)

The Court also relied on the fact that the parties had expressly contemplated the possibility that a patent might not issue and had adjusted the royalty accordingly.\(^{224}\)

The third case, *Goldstein v. California*,\(^{225}\) involved a California criminal statute prohibiting "record piracy," i.e., "the unauthorized duplication of recordings of performances by major musical artists."\(^{226}\) Drawing an analogy to the dormant Commerce Clause,\(^{227}\) the defendants argued that the Copyright Clause preempted the state law. The Court rejected this argument, holding that the States remained free to adopt intellectual property laws that did not conflict with federal law.\(^{228}\) In response to the argument that Congress had occupied the entire field, the Court held 5-4 that "[i]n regard to this category of 'Writings,' Congress has drawn no balance; rather, it has left the area unattended, and no reason exists why the State should not be free to act."\(^{229}\) The Court also indicated that a state-law copyright of unlimited duration did not violate the Copyright

\(^{221}\) 440 U.S. 257 (1979).

\(^{222}\) Id. at 266.

\(^{223}\) Id. at 263 (citations omitted).

\(^{224}\) Id. at 261-62.


\(^{226}\) Id. at 549.

\(^{227}\) See *Cooley v. Bd. of Wardens*, 53 U.S. 299, 319 (1852) ("Whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress.").

\(^{228}\) *Goldstein*, 412 U.S. at 552-60; but see id. at 572-75 (Douglas, Brennan, & Blackmun, JJ., dissenting) (indicating federal policy of encouraging free competition in unpatented and uncopyrighted articles requires national uniformity).

\(^{229}\) Id. at 570; but see id. at 576-79 (Marshall, Brennan, & Blackmun, JJ., dissenting) (federal policy of encouraging free competition in unpatented and uncopyrighted articles requires that Congressional silence "be taken to reflect a judgment that free competition should prevail").
Clause, saying, "whatever limitations have been appended to such powers can only be understood as a limit on congressional, and not state, action."\(^{230}\)

Goldstein has been criticized on the ground that it is inconsistent with the principle that the Constitution requires free copying of material in the public domain.\(^{231}\) In addition, in the 1976 Act Congress overturned Goldstein prospectively by preempting all state causes of action "equivalent" to copyright.\(^{232}\) In so doing, Congress specifically indicated that states could not protect matter that was unprotected by copyright.\(^{233}\) While the 1976 Act expressly permitted state protection of sound recordings fixed before February 15, 1972, it imposed a limit on the duration of such protection.\(^{234}\) Thus, Goldstein may be considered an example of the adage that "hard cases make bad law."\(^{235}\)

In the next decade, the Court said little about the public domain. In Sony Corp. of America v. Universal City Studios, Inc.,\(^{236}\) the Court discussed the Patent and Copyright Clause\(^{237}\) and noted that one of the purposes of copyright is to place material into the public domain,\(^{238}\) but its view of the

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\(^{230}\) Id. at 560. The Court was not asked to address the possibility that a state copyright of unlimited duration would violate the First Amendment. Cf. Melville B. Nimmer, Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?, 17 UCLA L. Rev. 1180, 1193-94 (1970).

\(^{231}\) See e.g. Malla Pollack, Unconstitutional Incontestability? The Intersection of the Intellectual Property and Commerce Clauses of the Constitution: Beyond a Critique of Shakespeare Co. v. Silstar Corp., 18 Seattle U. L. Rev. 259, 305-20 (1995) ("[T]he Court's assertion that records were 'of purely local importance' failed the giggle test.").

\(^{232}\) 17 U.S.C. § 301(a).

\(^{233}\) See supra nn. 93-94 and accompanying text.

\(^{234}\) 17 U.S.C. § 301(c). February 15, 1972 was the date that the 1909 Copyright Act was amended to give federal copyright protection to sound recordings. Id.

\(^{235}\) See Pollack, supra n. 231, at 304 ("To be even more precise, the case exemplifies the two-sided focus of the adversary system allowing black-hat/white-hat rhetoric to distract the Court from public domain values."); id. at 306-09 (noting that the briefs and argument failed to adequately present the issue of dormant Copyright Clause preemption).


\(^{237}\) Id. at 431-32 ("The limited scope of the copyright holder's statutory monopoly, like the limited copyright duration required by the Constitution, reflects a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts. The immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.").

\(^{238}\) Id. at 429 ("The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired."). (emphasis added; see Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1261-
public domain was decidedly idiosyncratic. In three decisions between 1977 and 1987, however, the Court rejected a First Amendment defense to various types of intellectual property law. In *Zacchini v. Scripps-Howard Broadcasting Co.*, the Court held 5-4 that the First Amendment did not give a news station the right to broadcast a videotape of the plaintiff's human cannonball act. In *Harper & Row Publishers, Inc. v. Nation Enterprises*, the Court held 6-3 that the First Amendment did not protect a magazine that published excerpts from Gerald Ford's memoirs in advance of the authorized publication date. The Court stated that First Amendment values were already adequately reflected in various substantive limitations on copyright law, including the idea/expression dichotomy and the fair use doctrine. And in *San Francisco Arts & Athletics, Inc. v. United States* 62 (11th Cir. 2001) (identifying "protection of the public domain" as one of the purposes of the Copyright Clause).

239 The majority opinion included within the public domain privileged uses of otherwise copyrighted material. *Sony*, 464 U.S. at 433 ("All reproductions of the work, however, are not within the exclusive domain of the copyright owner; some are in the public domain. Any individual may reproduce a copyrighted work for a 'fair use'; the copyright owner does not possess the exclusive right to such a use."). Some scholars agree with this characterization. See e.g. Benkler, *supra* n. 4, at 358 n.16 ("As will become clear, I use the term 'public domain' in an atypically broad sense. The term more commonly denotes information or works that are not protected. It does not usually refer to privileged uses of protected information."). Another scholar places fair use "outside the public domain in theory, but seemingly inside in effect." Samuelson, *supra* n. 13, at 3.


241 *Id.* at 569-79. The intellectual property right at issue was Ohio's right of publicity law. *Id.* at 565, 569. It has been suggested, however, that the case is better analyzed as a state common-law copyright in an unpublished (indeed, unfixed) work of authorship. *Id.* at 564 (describing majority opinion in Ohio Court of Appeals); *id.* at 573, 575 (drawing an analogy to copyright law). "Publication" is defined in the Copyright Act to mean the distribution of tangible copies of the work; it does not include the public performance or public display of the work. 17 U.S.C. § 101. In addition, the Court relied on *Goldstein*, a case involving a state-law copyright. 433 U.S. at 577 n. 13.

242 471 U.S. 539.

243 *Id.* at 555-60. It should be noted that because the Ford manuscript had not yet been published, protecting it against unauthorized disclosure was analogous to protecting a trade secret. See *id.* at 552-55 (scope of fair use in an unpublished manuscript is less than in a published manuscript). In fact, The Nation knowingly copied the excerpts from a stolen copy of the manuscript. *Id.* at 543, 563; *but see Bartnicki v. Vopper*, 532 U.S. 514, 534 (2001) (holding that publication of illegally intercepted cell phone conversation, where publisher did not participate in the interception but had reason to know it was unlawful, was protected by the First Amendment where the subject matter of the phone call was a matter of public concern); *New York Times Co. v. U.S.*, 403 U.S. 713, 714 (1971) (per curiam) (holding that the First Amendment protects a newspaper's right to publish information of great public concern obtained from documents stolen by a third party).

244 *Harper & Row Publishers*, 471 U.S. at 560; see Nimmer, *supra* n. 230, at 1192-93. The Court specifically noted that "copyright does not prevent subsequent users from copying from a prior author's work those constituent elements that are not original—for example, quotations borrowed under the rubric of fair use from other copyrighted works, facts, or materials in the public domain—as long as such use does not unfairly appropriate the author's original contributions." *Id.* at 548.
Olympic Commision., the Court held 7-2 that the First Amendment did not restrict Congress' power to grant a statutory trademark in the word “Olympic” to the USOC.

In 1989, the Court revived its focus on the Constitutional limits placed on patent and copyright law. In Bonito Boats, Inc. v. Thunder Craft Boats, Inc., the Court unanimously held that the Supremacy Clause preempted a Florida statute, which prohibited duplication of boat hulls by a “direct molding” process. In so holding, the Court expressly “reaffirmed” Sears/Compco, as modified by Kewanee, and suggested that state regulation would be improper “without any showing of consumer confusion, or breach of trust or secrecy.”

More fundamentally, the Court in Bonito Boats repeatedly emphasized the importance and Constitutional underpinnings of the public domain. It stated:

The novelty and nonobviousness requirements of patentability embody a congressional understanding, implicit in the Patent Clause itself, that free exploitation of ideas will be the rule, to which the protection of a federal patent is the exception. Moreover, the ultimate goal of the patent system is to bring new designs and technologies into the public domain through disclosure.

The Court quoted Singer for the proposition that “on the expiration of a patent the monopoly created by it ceases to exist, and the right to make the thing formerly covered by the patent becomes public property.” It remarked that “[i]n essence, the Florida law prohibits the entire public from

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246 Id. at 531-41. The precise rationale for the decision is unclear; but the Court stressed that the statute “applies primarily to commercial speech,” and it found no significant harm to noncommercial speech in the record. Id. at 536 n. 15. The Court also noted that “[t]he possibility for confusion as to sponsorship is obvious,” id. at 539, even though it had ruled that the statute did not require proof of confusion. Id. at 529-30. Finally, the Court cited with approval a case, which allowed the use of the protected Olympic symbols in a non-misleading and non-commercial manner. Id. at 536 n. 14 (citing Stop the Olympic Prison v. U.S. Olympic Comm., 489 F. Supp. 1112, 1118-21 (S.D.N.Y. 1980)). Each of these limitations is a potentially significant qualification of the majority opinion.
248 Id. at 168.
249 Id. at 152-57. It is worth noting that while the Court discussed Kewanee and explained why it was consistent with Sears/Compco in great detail, it relegated Aronson and Goldstein to a single paragraph apiece. Id. at 156, 165.
250 Id. at 167.
251 Id. at 151 (emphasis added).
252 Id. at 152 (quoting Singer Mfg., 163 U.S. at 185). See supra nn. 162-172 and accompanying text.
engaging in a form of reverse engineering of a product in the public domain."253 Finally, it reiterated its statement in Graham that Congress may not "authorize the issuance of patents whose effects are to remove existent knowledge from the public domain, or to restrict free access to materials already available."254

Two years later, in Feist Publications, Inc. v. Rural Telephone Service Co.,255 the Court unanimously held that Congress cannot grant copyright protection to the telephone white pages. The Court stated that "[o]riginality is a constitutional requirement,"256 and held that "no one may claim originality as to facts . . . because facts do not owe their origin to an act of authorship."257 It explained:

The distinction is one between creation and discovery: The first person to find and report a particular fact has not created the fact; he or she has merely discovered its existence . . . . The same is true of all facts—scientific, historical, biographical, and news of the day. "They may not be copyrighted and are part of the public domain available to every person."258

The Court also emphasized that the freedom to copy facts is protected by the Constitution:

It may seem unfair that much of the fruit of the compiler's labor may be used by others without compensation. As Justice Brennan has correctly observed, however, this is not "some unforeseen byproduct of a statutory scheme." It is, rather, "the essence of copyright," and a constitutional requirement. The primary objective of copyright is not to reward the labor of authors, but "[t]o promote

253 Id. at 160 ("Reverse engineering of chemical and mechanical articles in the public domain often leads to significant advances in technology."); see TrafFix Devices, Inc. v. Mktg. Displays, Inc., 532 U.S. 23, 29 (2001).

254 Bonito Boats, 489 U.S. at 146, (quoting Graham, 383 U.S. at 6). The Court noted that "Sections 102(a) and (b) operate in tandem to exclude from consideration for patent protection knowledge that is already available to the public. They express a congressional determination that the creation of a monopoly in such information would not only serve no socially useful purpose, but would . . . injure the public by removing existing knowledge from public use." Bonito Boats, 489 U.S. at 148; see Pfaff v. Wells Elecs., Inc., 525 U.S. 55, 64 (1998) ("[S]ection] 102 of the Patent Act serves as a limiting provision, both excluding ideas that are in the public domain from patent protection and confining the duration of the monopoly to the statutory term.").


256 Id. at 346. The Court explained that it had defined the Constitutional terms "Authors" and "Writings" in such a way as to "presuppose a degree of originality." Id.

257 Id. at 347.

258 Id. at 347-48, (quoting Miller v. Universal City Studios Inc., 650 F.2d 1365, 1369 (5th Cir. 1981)).
the Progress of Science and useful Arts"... To this end... raw facts may be copied at will. This result is neither unfair nor unfortunate. It is the means by which copyright advances the progress of science and art.259

In the decade since Feist, the Court mentioned the public domain only in passing.260 In January 2003, however, in Eldred v. Ashcroft,261 the Court upheld against Constitutional challenge that portion of the Sonny Bono Copyright Term Extension Act which extended all subsisting copyrights by 20 years. The petitioners in Eldred had argued that retroactive extensions of copyright do not “promote the Progress of Science and useful Arts” because such extensions cannot provide an incentive to create works that already exist; and that serial extensions of copyright would amount to “perpetual copyright on the installment plan,”262 which would violate the “limited Times” requirement of the Patent and Copyright Clause.263 By a 7-2 majority, the Court rejected both arguments.264 The Court also rejected the argument that retroactive extension of copyright violates the First Amendment.265 Under the opinion in Eldred, Congress holds virtually
unlimited power to restrict the flow of new material into the public domain.266

VI. OWNERSHIP AND PERMANENCE OF THE PUBLIC DOMAIN

A. Who Owns the Public Domain?

Many modern definitions of the phrase "the public domain" characterize it as material not subject to intellectual property protection.267 In other words, the public domain is marked by the absence of ownership.268 Copyright owners have invoked this image in powerful rhetoric advocating stronger intellectual property protection. Consider, for example, the following statement of Jack Valenti, of the Motion Picture Association of America:

A public domain work is an orphan. No one is responsible for its life. But everyone exploits its use, until that time certain when it becomes soiled and haggard, barren of its previous virtues. Who, then, will invest the funds to renovate and nourish its future life when no one owns it?269

Such rhetoric is unfortunately reinforced by the commonly used phrase "fallen into the public domain."270 It sounds as if the work has fallen into a black hole, never to be heard from again.271

266 Eldred, 123 S.Ct. at 800-01 (Stevens, J., dissenting) ("Congress may extend existing monopoly privileges ad infinitum under the majority's analysis."); id. at 801 ("Fairly read, the Court has stated that Congress' actions under the Copyright/Patent Clause are, for all intents and purposes, judicially unreviewable."). For analysis of the Supreme Court's opinion, see Ochoa, supra n. 118.

267 See supra n. 11.

268 Cf. Natl. Broad. Co. v. Copy. Royalty Trib., 848 F.2d 1289, 1294 (D.C. Cir. 1988) (referring to "programs that were in the public domain, not owned by the challenged claimant, or for that matter anyone else"); Pollack, supra n. 4, at 280 (discussing "the usage we have inherited from Grotius and Pufendorf; these natural law philosophers held that the world was 'common' [only] in the sense that no individual had a right to exclude others—an unowned public domain").


270 Like the "public domain" itself, this usage is of French origin. See supra nn. 69-76, 167-171 and accompanying text.

As demonstrated above, however, the phrase “public domain” was used originally as a synonym for the phrases “public property” and “common property.” Both of these earlier phrases evoke a very different rhetorical image: that the entire public owns a property interest in the public domain.

That the terms “private property” and “common property” denoted a form of “ownership” is supported by contemporary definitions of those words and phrases. The first edition of Black’s Law Dictionary, published in 1891, defined “public property” as “those things which are publici juris. . . and therefore considered . . . owned by ‘the public.” “Common” was defined to mean “shared among several; owned by several jointly.” “Property” was defined as:

Rightful dominion over external objects; ownership; the unrestricted and exclusive right to a thing; the right to dispose of the substance of a thing in every legal way, to possess it, to use it, and to exclude every one else from interfering with it.

As so defined, the adjective “public” or “common” merely removes from the definition of property the “exclusive” nature of the ownership; it does not result in an absence of ownership.

The same should be no less true of the public domain. Indeed, the word “domain” was defined as “[t]he complete and absolute ownership of land.” Thus, the phrase “public domain” implies the public has an ownership interest in the material in question.

experience with public domain works such as Shakespeare’s plays, Beethoven’s symphonies, and Da Vinci’s paintings demonstrates that Valenti’s supposition is incorrect.

See supra nn. 156-158, 170-176 and accompanying text.

A similar argument is made in Pollack, supra n. 4, at 280-81.

See id. at 267-83 (discussing various definitions of “property” based on interpretations of John Locke).

Black’s Law Dictionary, supra n. 144, at 963 (emphasis added).

Id. at 230 (emphasis added).

Id. at 953; see Webster’s Third New International Dictionary 1818 (Philip Babcock Gove, ed., G. & C. Merriam Co. 1971) (defining property as “something that is or may be owned or possessed”); id. at 1836 (defining publici juris as “belonging to the public; subject to a right of the public to enjoy”).

See Pollack, supra n. 4, at 280 (“To Locke, ‘common’ requires two elements: (i) no individual has the right to exclude all others; and (ii) each member of the commonality has a claim right to be included in the common—a right not to be excluded.”).

Black, supra n. 144, at 385; see id. at 351 (defining demesne as “domain” or “held in one’s own right”).

See Black’s Law Dictionary 1229 (6th ed., West 1990) (defining public domain as “[p]ublic ownership status of writings, documents, or publications that are not protected by copyrights”); accord, Basic Am., Inc. v. Shatat, 992 P.2d 175, 192 (Idaho 1999). In the Seventh Edition, however, the “public ownership” part of the definition was dropped. Black’s Law Dictionary, supra n. 11, at 1243 (defining the public domain as the “realm of publications,
However, the phrase "public domain" also tends to obscure the nature of the public’s ownership interest in intellectual property. The word "domain" (or "demesne") expressly invokes the metaphor of land. Indeed, lands owned by the United States Government are frequently referred to as the "public domain."\(^{281}\) By virtue of the Property Clause of the Constitution,\(^{282}\) Congress enjoys virtually absolute discretion in managing the public lands of the United States.\(^{283}\) In particular, even though courts often characterize the government’s ownership of land in the public domain as a "public trust," Congress may dispose of those lands in any manner that it sees fit,\(^{284}\) and it may alienate those lands to individuals.\(^{285}\) In other words, inventions, and processes that are not protected by copyright or patent”). Conspiracy theorists may speculate as to the motives of the editors.

\(^{281}\) See Barker v. Harvey, 181 U.S. 481, 490 (1901) ("'Public domain' is equivalent to 'public lands,' and these words have acquired a settled meaning in the legislation of this country. The words 'public lands' are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws."); Newhall v. Sanger, 92 U.S. 761, 763 (1875); Hagen v. Utah, 510 U.S. 399, 412 (1994) ("The public domain was the land owned by the Government, mostly in the West, that was 'available for sale, entry, and settlement under the homestead laws, or other disposition under the general body of land laws."); Barker v. Harvey, 181 U.S. 481, 490 (1901) ("The public domain is the land available for sale, entry, and settlement under the homestead laws, or other disposition under the general body of land laws."); supra n. 265.

\(^{282}\) U.S. Const. art. IV, § 3, cl. 2 (providing that “Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States”).

\(^{283}\) See U.S. v. S.F., 310 U.S. 16, 29 (1940) ("The power over the public land thus entrusted to Congress is without limitations."); U.S. v. Cal., 332 U.S. 19, 27 (1947); Kleppe v. N.M., 426 U.S. 529, 539 (1976); Cal. Coastal Commn. v. Granite Rock Co., 480 U.S. 572, 580 (1987); Utah Power & Light Co. v. U.S., 243 U.S. 389, 404 (1917) ("The settled course of legislation, congressional and state, and repeated decisions of this court have gone upon the theory that the power of Congress is exclusive.").

\(^{284}\) See Light v. U.S., 220 U.S. 523, 537 (1911) ("All the public lands of the nation are held in trust for the people of the whole country .... And it is not for the courts to say how that trust shall be administered. That is for Congress to determine .... These are rights incident to proprietorship, to say nothing of the power of the United States as a sovereign over the property belonging to it."); supra n. 265.

\(^{285}\) See U.S. v. Midwest Oil Co., 236 U.S. 459, 474 (1915) ("For it must be borne in mind that Congress not only has a legislative power over the public domain, but it also exercises the powers of the proprietor therein. Congress ‘may deal with such lands precisely as a private individual may deal with his farming property. It may sell or withhold them from sale’ .... Like any other owner it may provide when, how and to whom its land can be sold. It can permit it to be withdrawn from sale."); supra n. 265.
the “public domain” in land is subject to government ownership and control.286

This is very different from the nature of ownership in the “public domain” in intellectual property. As discussed above, the defining characteristic of the public domain in intellectual property287 is that any individual is free to use the material as he or she sees fit,288 and once matter enters the public domain, the government cannot alienate that “property” by removing it from the public domain.289 These characteristics imply that the general public has an affirmative right of ownership in material in the public domain.290 Thus, one dictionary defines the “public domain” as “the realm embracing property rights belonging to the community at large, subject to appropriation by anyone.”291

The difference between government ownership of the public domain in land and common ownership of the public domain in intellectual property is explained by differences in the nature of the “property” involved. Real property is a finite resource that is subject to the “Tragedy of the Commons,” in which common ownership leads to an inefficient allocation of resources.292 Hence, government control, and a policy of privatization, serves the goal of economic efficiency.293 Intellectual property, by contrast, is a “public good” which can be used by any number of persons without depriving anyone else of its use.294 As Carol Rose has demonstrated, the law recognizes that certain types of “inherently public property” are best managed as a commons, owned by the unorganized public at large, rather

286 Cf. Black’s Law Dictionary, supra n. 144, at 385 (“A distinction has been made between ‘property’ and ‘domain.’ The former is said to be that quality which is conceived to be in the thing itself, considered as belonging to such or such person, exclusively of all others. By the latter is understood that right which the owner has of disposing of the thing.”).

287 I am using the term “public domain” here as a synonym for the former labels of public property, common property, and publici juris.

288 See supra nn. 130-131, 139-146, 208, 258 and accompanying text; Krasilovsky, supra n. 1, at 206 (“Whether a work is in the public domain by reason of expiration, abandonment, or non-copyrightability, the effect is the same; it may be made or sold by whoever chooses to do so, and the right to share in its good will is possessed by all.”).

289 See supra nn. 132-133 and accompanying text.

290 See Pollack, supra n. 4, at 298 (“In a Lockian owned public domain, each member of the rights-bearing community (i.e., all persons in the United States) have an inalienable right not to be excluded.”).


292 See generally Garrett Hardin, The Tragedy of the Commons, 162 Science 1243 (1968).


than by a governmental entity. \(^{295}\) Recall that 19th-Century intellectual property cases expressly analogized "common property" in the public domain to such natural resources as air and water; \(^{296}\) these are precisely the types of resources which 19th-Century real property cases suggested were incapable of private ownership and which were owned by the "unorganized public" at large. \(^{297}\) Indeed, in some instances the "public trust" in such resources was considered so important that courts imposed restrictions on the ability of the government to alienate the resource. \(^{298}\) Indeed, a number of authors have expressly drawn an analogy between the public domain in intellectual property law and the public trust doctrine in environmental law. \(^{299}\)

A number of recent cases reflect the view that the public domain is owned by everyone, rather than by no one. Some do so by using the phrases "public property," \(^{300}\) or "common property." \(^{301}\) For example, in explaining the idea/expression dichotomy, the Second Circuit said:

\(^{295}\) See Carol Rose, The Comedy of the Commons: Custom, Commerce, and Inherently Public Property, 53 U. Chi. L. Rev. 711, 720-21 (1986) (summarizing argument); id. at 730-49 (explaining three doctrines by which ownership by the "unorganized" public was recognized).

\(^{296}\) See supra nn. 140, 144-145, 152-153 and accompanying text.

\(^{297}\) See e.g. supra n. 153 and accompanying text; Rose, supra n. 295, at 717-18 (oceans and air); id. at 727-30 (tidal and submerged lands and navigable waterways).

\(^{298}\) Rose, supra n. 295, at 736-39; \(\textit{Ill. Central R.R. Co. v. Ill.}\), 146 U.S. 387 (1892) (holding that state's grant of entire waterfront of Lake Michigan to private owner was void and could be revoked without compensation); Epstein, supra n. 293, at 422-28 (discussing \(\textit{Ill. Central}\) and suggesting a Constitutional basis for the decision). This distinction also helps explain why the Property Clause has been construed to give Congress plenary authority while the Intellectual Property Clause (as the Patent and Copyright Clause is sometimes known) has been held to impose numerous substantive limitations on the power of Congress. See supra nn. 206-217, 247-259 and accompanying text.


\(^{300}\) See \(\textit{Bonito Boats}\), 489 U.S. at 152 ("It is self-evident that on the expiration of a patent the monopoly created by it ceases to exist, and the right to make the thing formerly covered by the patent becomes public property.") (quoting \(\textit{Singer}\), 163 U.S. at 185); \(\textit{Graham}\), 383 U.S. at 31 n. 17 ("While the sealing feature was not specifically claimed in the Livingstone patent, it was disclosed in the drawings and specifications. Under long-settled law the feature became public property.") (quoting \(\textit{Miller v. Brass Co.}\), 104 U.S. at 352); \(\textit{Am. Sci. & Engr., Inc. v. U.S.}\), 8 Cl. Ct. 129, 143 (1985) ("[A]ny invention, when it is disclosed to the public without protection of an issued patent, becomes public property.").

\(^{301}\) See Berkic v. Crichton, 761 F.2d 1289, 1293 (9th Cir. 1985) ("General plot ideas are not protected by copyright law; they remain forever the common property of artistic mankind."); \(\textit{Metal/c. Bochco}\), 294 F.3d 1069, 1074 (9th Cir. 2002).
[T]he protection afforded the copyright holder has never extended to history, be it documented fact or explanatory hypothesis. The rationale for this doctrine is that the cause of knowledge is best served when history is the common property of all, and each generation remains free to draw upon the discoveries and insights of the past. Accordingly, the scope of copyright in historical accounts is narrow indeed, embracing no more than the author's original expression of particular facts and theories already in the public domain.\textsuperscript{302}

Other opinions expressly address the issue of ownership. In \textit{Mayer v. Josiah Wedgewood & Sons, Ltd.},\textsuperscript{303} the court said:

In this case, the fact that Mayer permitted her design to enter the public domain is fatal to any claim she can assert. Any theory of liability she could advance would necessarily assume she holds some property interest in the snowflake design. Yet it is elementary that once copyrightable material is published without the author's first securing federal copyright protection, the author loses his property interest in the material. The material becomes public property. In this case, Mayer no longer owned her design. The public did.\textsuperscript{304}

And in \textit{Comedy III Productions, Inc. v. New Line Cinema},\textsuperscript{305} the court held that the heirs of the Three Stooges could not claim a trademark right in a film clip in the public domain. The court said: "any copyright has long expired and the film at issue is in the public domain. We all own it now."\textsuperscript{306}

One may legitimately ask: Why does it matter if the public owns a "property" interest in the public domain? One answer lies in the rhetorical power of the word "property." The protection of property is one of the most fundamental principles of American law.\textsuperscript{307} If the public has a property interest in the public domain, then the entire public, not just a patent or copyright owner, has an interest in preserving the work and disseminating it for future generations. A property interest gives each member of the public

\textsuperscript{302} \textit{Hoehling v. Universal City Studios, Inc.}, 618 F.2d 972, 974 (2d Cir. 1980); see also \textit{Miller}, 650 F.2d at 1372 (same).

\textsuperscript{303} 601 F. Supp. 1523 (S.D.N.Y. 1985).

\textsuperscript{304} \textit{Id.} at 1536 (citations omitted).

\textsuperscript{305} 200 F.3d 593 (9th Cir. 2000).

\textsuperscript{306} \textit{Id.} at 595.

\textsuperscript{307} See e.g. Pollack, \textit{supra} n. 4, at 267-68 (discussing importance of property to the Framers).
an equal right to adapt and transform the material in question,\textsuperscript{308} thus promoting creativity. Most importantly, if the public has a property interest in the public domain, any deprivation of that property would be subject to the Due Process Clauses of the U.S. Constitution.\textsuperscript{309} Such an interest may form the basis for challenging Congressional action that reduces the public domain, such as copyright restoration.\textsuperscript{310}

B. Is the Public Domain Irrevocable?

In determining whether the public domain is irrevocable, we must first remember that, historically speaking, the public domain is the default status of any publicly disclosed idea or work.\textsuperscript{311} In \emph{Wheaton v. Peters},\textsuperscript{312} the Supreme Court made it clear that by using the word "secure," the Framers did not mean to imply that patents and copyrights were natural pre-existing rights of the inventor or author:

\textit{[T]he word secure, as used in the constitution, could not mean the protection of an acknowledged legal right. It refers to inventors, as well as authors, and it has never been pretended, by any one, either in this country or in England, that an inventor has a perpetual right, at common law, to sell the thing invented.}\textsuperscript{313}

At the same time, an inventor or author was considered to have a property interest in an invention or work \emph{before} it was disclosed to the

\textsuperscript{308} \emph{Id.} at 280 ("[E]ach member of the commonality has a claim right to be included in the common—a right not to be excluded. This is the ownership right that I claim for all in the public domain.").

\textsuperscript{309} U.S. Const. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . . "); U.S. Const. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . "). See Epstein, \emph{supra} n. 293, at 426-28 (suggesting a Constitutional basis for limiting the government's uncompensated disposition of property from common ownership to private ownership); McCarthy on Trademarks, \emph{supra} n. 10, at § 1:30 ("The right to copy may be a right reserved to the people by the Tenth Amendment.").

\textsuperscript{310} See \emph{supra} n. 103-114 and accompanying text.

\textsuperscript{311} See McCarthy on Trademarks, \emph{supra} n. 10, at § 1:2 (defining "the principle of free copying—meaning that anyone's business ideas, inventions, writings and symbols, once disclosed to the public, are in the public domain and may be freely copied. . . Public domain is the rule; intellectual property is the exception."). This historical default status has been turned on its head by the 1976 Copyright Act, under which a copyright arises \textit{automatically} upon the fixation of a copyrightable work. 17 U.S.C. § 102(a).

\textsuperscript{312} 33 U.S. 591 (1834).

\textsuperscript{313} \emph{Id.} at 661 (emphasis omitted).
public. Inventions are subject to trade secret law, and authors were deemed to have a limited common-law copyright:

That an author, at common law, has a property in his manuscript, and may obtain redress against any one who deprives him of it, or by improperly obtaining a copy endeavours to realise a profit by its publication, cannot be doubted; but this is a very different right from that which asserts a perpetual and exclusive property in the future publication of the work, after the author shall have published it to the world.

Hence, the grant of a patent or copyright has traditionally been characterized as a statutory bargain: the public agrees to give the inventor or author an exclusive right for a limited period of time, in exchange for the patent or copyright holder making the work available to the public by disclosure or publication. At the end of the limited period, the invention or work enters the public domain, just as it would have done if it had been publicly disclosed without protection.

As shown above, a number of early opinions expressed the view that once the subject matter of a patent or copyright had become "public property," it could not be removed from the public domain. This principle has been reiterated in a number of more recent cases, most notably in Graham v. John Deere Co., in which the U.S. Supreme Court stated that "Congress may not authorize the issuance of patents whose effects are to remove existent knowledge from the public domain, or to restrict free

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314 See U.S. v. Dubilier Condenser Corp., 289 U.S. 178, 186 (1933) ("[The inventor] may keep his invention secret and reap its fruits indefinitely."); Kewanee Oil, 416 U.S. at 484 ("[T]he policy that matter once in the public domain must remain in the public domain is not incompatible with the existence of trade secret protection. By definition a trade secret has not been placed in the public domain.").

315 Wheaton, 33 U.S. at 657.

316 See e.g. Bonito Boats, 489 U.S. at 150-51 ("The federal patent system thus embodies a carefully crafted bargain for encouraging the creation and disclosure of new, useful, and nonobvious advances in technology and design in return for the exclusive right to practice the invention for a period of years."); Sony 464 U.S. at 429 ("It is said that reward to the author or artist serves to induce release to the public of the products of his creative genius.") (quoting U. S. v. Paramount Pictures, 334 U.S. 131, 158 (1948)); Dubilier, 289 U.S. at 186 ("In consideration of its disclosure and the consequent benefit to the community, the patent is granted.").

317 Sony, 464 U.S. at 429 (The purpose of patent and copyright is "to allow the public access to the products of their genius after the limited period of exclusive control has expired."); Dubilier, 289 U.S. at 186-87 ("An exclusive enjoyment is guaranteed him for seventeen years, but upon the expiration of that period, the knowledge of the invention enures to the people, who are thus enabled without restriction to practice it and profit by its use.").

318 See supra nn. 132-133 and accompanying text.

319 383 U.S. 1
access to materials already available." Similar statements are found in cases concerning copyrights and trade secrets.

Trademark law presents a challenge to this basic principle. As one court explained, trademark law operates in the opposite direction from patent and copyright law:

In the case of a copyright, an individual creates a unique design and, because the Constitutional fathers saw fit to encourage creativity, he can secure a copyright for his creation for a [limited] period. . . . After the expiration of the copyright, his creation becomes part of the public domain. In the case of a trademark, however, the process is reversed. An individual selects a word or design that might otherwise be in the public domain to represent his business or product. If that word or design comes to symbolize his product or business in the public mind, the individual acquires a property right in the mark. The acquisition of such a right through use represents the

320 Id. at 6; see Aronson, 440 U.S. at 262 (1979) ("[T]he stringent requirements for patent protection seek to assure that ideas in the public domain remain there for the free use of the public."); Dielectric Laboratories, Inc., v. Am. Technical Ceramics, 545 F. Supp. 292, 296 (E.D.N.Y. 1982) (relying on "basic tenets of patent law that common knowledge should not be removed from the public domain").

321 See e.g. Mayhew v. Allsup, 166 F.3d 821, 822 (6th Cir. 1999) ("If a work was published without a valid copyright notice, however, the work irretrievably entered the public domain."); Dolman v. Agee, 157 F.3d 708, 713 (9th Cir. 1998) ("If the owner failed to satisfy the [1909] Act's requirements, the work was injected irrevocably into the public domain."); Twin Books Corp. v. Walt Disney Co., 83 F.3d 1162, 1166 (9th Cir. 1996) ("[A] publication of a work in the United States without the statutory notice of copyright fell into the public domain, precluding forever any subsequent copyright protection of the published work."); Bridge Publications, Inc. v. F.A.C.T.Net, Inc., 183 F.R.D. 254, 262 (D. Colo. 1998) ("Once a work enters the public domain, it remains there irrevocably."); Intl. Film Exch., Ltd. v. Corinth Films, Inc., 621 F. Supp. 631, 635 (S.D.N.Y. 1985) ("[T]he Film irrevocably entered the public domain upon the expiration of the initial term of copyright."); Dow Jones & Co. v. Bd. of Trade of City of Chi., 546 F. Supp. 113, 116 n. 5 (S.D.N.Y. 1982) ("When a work has been injected into the public domain, all of its copyright protection is lost permanently.").

322 E.g. Smith v. Dravo Corp., 203 F.2d 369, 373 (7th Cir. 1953) ("[K]nowledge cannot be placed in the public domain and still be retained as a 'secret' . . . . That which has become public property cannot be recalled to privacy."); Religious Tech. Ctr. v. Netcom On-Line Commun. Servs., Inc., 923 F. Supp. 1231, 1256 (N.D. Cal. 1995) ("Although a work posted to an Internet newsgroup remains accessible to the public for only a limited amount of time, once that trade secret has been released into the public domain there is no retrieving it."); Milgrim, supra n. 12, at § 1.03 (however secrecy is lost, "the principle remains: a secret on the wing cannot be recalled."); cf. Kewanee Oil, 416 U.S. at 484 ("[T]he policy that matter once in the public domain must remain in the public domain is not incompatible with the existence of trade secret protection. By definition a trade secret has not been placed in the public domain.").
passage of a word or design out of the public domain into the protective ambit of trademark law.323

This vision of trademark law resembles John Locke's theory of creation of private property from common property through the application of one's own labor.324 Of course, the creation of such property is subject to Lock's famous proviso that "enough and as good" be left for others.325 In order to ensure that the public domain is not depleted, trademark law contains a number of limiting doctrines. First, trademark law has never been thought to confer a property right "in gross," but only a right to use a particular mark to identify the source of particular goods and services.326 Second, trademark law traditionally protects the mark owner only against uses that cause consumer confusion;327 others remain free to use the mark in non-confusing ways.328 (Trademark dilution law threatens to upset this balance by granting protection without a showing of likelihood of confusion;329 and for that reason, certain applications of dilution law may raise serious constitutional questions.330) Third, trademark protection cannot be granted to the functional

323 Boston Prof. Hockey Assn. v. Dallas Cap & Emblem Mfg., 510 F.2d 1004, 1014 (5th Cir. 1975).
325 Id. at 1562.
326 See 15 U.S.C. § 1127 (2002) (defining "trademark" as "any word, name, symbol, or device" used "to identify and distinguish his or her goods ... from those manufactured and sold by others and to indicate the source of the goods"); see id. (definition of "service mark"); Qualitex Co. v. Jacobson Prods. Co., 514 U.S. 159, 164 (1995) ("It is the source-distinguishing ability of a mark ... that permits it to serve these basic purposes.").
327 Kohler Co. v. Moen, Inc., 12 F.3d 632, 637 (7th Cir. 1993) ("Compared to patent protection, trademark protection is relatively weak because it precludes competitors only from using marks that are likely to confuse or deceive the public."); W.T. Rogers Co. v. Keene, 778 F.2d 334, 337 (7th Cir. 1985) ("The trademark owner has an indefinite term of protection, it is true, but in an infringement suit must also prove secondary meaning [i.e., source identification] and likelihood of confusion.").
328 See e.g. Mattel, Inc. v. MCA Recs., Inc., 296 F.3d 894 (9th Cir. 2002) (holding that title and lyrics of song "Barbie Girl" did not infringe Mattel's "Barbie" trademark); New Kids on the Block v. News Am. Publg., Inc., 971 F.2d 302 (9th Cir. 1992) (holding that use of mark to refer to trademark owner was a nominative fair use); 15 U.S.C. § 1115(b)(4) (holding that use of mark in good faith only to describe defendant's goods is a fair use).
329 See generally Welkowitz, supra n. 12, at 59-64.
330 Id. at 349-52 (Patent and Copyright Clause); id. at 328-34 (First Amendment); see e.g. I.P. Lund Trading v. Kohler Co., 163 F.3d 27, 35 (1st Cir. 1998) ("Kohler's constitutional claim [is] that dilution protection of trade dress of product design amounts to an unconstitutional perpetual monopoly under the Patent Clause of the Constitution."); id. at 52-53 (Boudin, J., concurring); L.L. Bean, Inc. v. Drake Publishers, Inc., 811 F.2d 26, 34 (1st Cir. 1987) (trademark parody protected by First Amendment). For a discussion of trademark parodies generally, see Tyler T. Ochoa, Dr. Seuss, The Juice and Fair Use: How the Grinch Silenced a Parody, 45 J. Copy. Socy. 546, 620-33 (1998).
features of a product. A particular application of the latter principle is the axiom that a mark that becomes the generic word for a product cannot be protected as a trademark. Like a patent or copyright, the entrance of a generic word into the public domain is, as a general matter, irrevocable. Only where a generic word, which was originally a trademark, loses its generic meaning may it be recaptured from the public domain.

These limiting doctrines serve to prevent the metaphorical over-fishing of the public domain. Thus, while it is correct to say that trademark law represents an exception to the principle that matter in the public domain must forever remain in the public domain, it may be more accurate to say that trademark law removes only certain uses of a symbol from the public domain, leaving other uses available for the public.

VII. CONCLUSION

This article has attempted to trace the evolution of the “public domain” in intellectual property law. While the public domain has existed from time immemorial, and has been legally recognized for nearly four hundred years, the phrase “public domain,” which previously had been applied only to public lands, was imported into U.S. intellectual property law only about 100 years ago.

331 Qualitex, 514 U.S. at 164 (“The functionality doctrine prevents trademark law ... from instead inhibiting legitimate competition by allowing a producer to control a useful product feature.”); Wilhelm Pudenz, GmbH v. Littlefuse, Inc., 177 F.3d 1204, 1211 (11th Cir. 1999) (“The functionality doctrine serves the extremely important function of avoiding conflict between the trademark law and the patent law. It does this by denying a perpetual exclusive right in a wholly functional product feature or configuration under the trademark law, where such a grant under the Patent Act would be unconstitutional.”).

332 See McCarthy on Trademarks, supra n. 10, at § 12:2 (“Generic names are regarded by the law as free for all to use. They are in the public domain.”).

333 See e.g. Henri’s Food Prods. Co. v. Tasty Snacks, Inc., 817 F.2d 1303, 1305 (7th Cir. 1987) (“On the other hand, a generic name—the common name of a class of things or a ‘common descriptive name’—is irretrievably in the public domain, and the preservation of competition precludes its protection.”); King-Seeley Thermos Co. v. Aladdin Indus., Inc., 321 F.2d 577, 579 (2nd Cir. 1963) (“the fact is that the word ‘thermos’ had entered the public domain beyond recall.”); Bayer Co. v. United Drug Co., 272 F. 505, 512 (S.D.N.Y. 1921) (L. Hand, J.) (“[I]t was too late in the autumn of 1915 to reclaim the word [‘aspirin’] which had already passed into the public domain.”).

334 McCarthy on Trademarks, supra n. 10, at § 12:30 (“Only in the extraordinarily rare case of a designation that began life as a mark and later became a generic name could a generic name be resurrected back into existence as a trademark and be ‘reclaimed’ from the public domain by a change in consumer usage over a long period of time.”). See supra nn. 163, 169 (“Singer” for sewing machines).

335 See Am. Online, Inc. v. AT&T Corp., 243 F.3d 812, 821 (4th Cir. 2001) (trademark law “protects for public use those commonly used words and phrases that the public has adopted, denying to any one competitor a right to corner those words and phrases by expropriating them from the public ‘linguistic commons.’”).
ago. To the extent that this phrase evokes the law, which applies to public lands, it mischaracterizes the public domain in intellectual property, which was conceived of as common property, owned by the public at large, which could not be alienated by the Government, except under the carefully limited provisions of the Patent and Copyright Clause. It is hoped that this vision of the public domain will assist Congress, courts and consumers in safeguarding the public interest in the public domain from those who seek to convert the intellectual commons into private property.