Public Rights: Copyright's Public Domains

Access to works in the public domain is an important source of human creativity and autonomy, whether in the arts, scientific research or online discourse. But what can users actually do with works without obtaining the permission of a copyright owner? Readers will be surprised to find how many different kinds of permitted usage exist around the world. This book offers a comprehensive international and comparative account of the copyright public domain. It identifies fifteen categories of public rights and gives a detailed legal explanation of each, showing how their implementation differs between jurisdictions. Through this analysis, the authors aim to restore balance to copyright policy debates, and to contribute to such debates by making practical law reform proposals. A major intervention in the field of intellectual property law and copyright, this book will appeal to lawyers, scholars and those involved in the administration of copyright law.

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Public rights

Copyright's public domains

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CAMBRIDGE
UNIVERSITY PRESS

CAMBRIDGE
UNIVERSITY PRESS

University Printing House, Cambridge CB2 8BS, United Kingdom

One Liberty Plaza, 20th Floor, New York, NY 10006, USA

477 Williamstown Road, Port Melbourne, VIC 3207, Australia

314–321, 3rd Floor, Plot 3, Splendor Forum, Jasola District Centre,
New Delhi – 110025, India

79 Anson Road, #06–04/06, Singapore 079906

Cambridge University Press is part of the University of Cambridge.

It furthers the University's mission by disseminating knowledge in the pursuit of education, learning, and research at the highest international levels of excellence.

www.cambridge.org
Information on this title: www.cambridge.org/9781107134065
DOI: 10.1017/9781316460214

First published 2018

Printed in the United Kingdom by Clays, St Ives plc

A catalogue record for this publication is available from the British Library.

Library of Congress Cataloging-in-Publication Data
Names: Greenleaf, G. W. (Graham William), author. | Lindsay, David, (Law teacher), author.
Title: Public rights : copyright's public domains / Graham Greenleaf, David Lindsay.
Description: New York : Cambridge University Press, 2018. | Series: Cambridge intellectual property and information law | Includes bibliographical references and index.
Identifiers: LCCN 2017061570 | ISBN 9781107134065 (hardback)
Subjects: LCSH: Fair use (Copyright). | Public lending rights (of authors).
Classification: LCC K1447.25 .G74 2018 | DDC 346.04/82–dc23
LC record available at https://lccn.loc.gov/2017061570

ISBN 978-1-107-13406-5 Hardback

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Foreword

The term 'public domain' bears different meanings, according both to the time and context of use. The notion is hardly new. Victor Hugo, in his opening discourse at the International Literary Congress in 1878,[1] spoke in favour of protecting 'literary property', but also of the need to create a 'public domain'. More provocatively, he proposed that, after the death of an author, the law should give all publishers the right to publish any book, subject to the requirement of paying the direct heirs of the author a 'very low fee' of no more than 5 per cent or 10 per cent of the net profit. This 'simple system', he went on to ague, would combine 'the unquestionable property of the writer with the equally incontestable right of the public domain'. The book, 'as a book', belonged to the author, but as 'a thought, it *belongs* – the word is not too extreme – to the human race'. Indeed, if it came to a question of choosing between the two rights here, it would certainly be the right of the author that would be sacrificed, 'because the public interest is our only concern, and that must take precedence in anything that comes before us'. Such sacrifice, however, was unnecessary, because Hugo saw both subsisting alongside each other, in an equal and balanced complementary relationship.

Hugo's views may seem at variance with our knowledge of the subsequent developments after that initial literary congress of 1878, which led ultimately to the creation of the Berne Convention for the Protection of Literary and Artistic Works in 1886 and the gradual ratcheting up of authors' rights protection that occurred in successive revisions of that Convention and national laws. Nonetheless, he was speaking at a time

[1] Held concurrently with the Universal Exhibition in Paris of that year. The proceedings of the congress were published as Société des gens de lettres de France, *Congrès littéraire internationale de Paris 1878, Comptes rendus in extenso et documents* (Paris, 1878), but without the discourse of Victor Hugo on 8 June 1878 at the opening of the congress. This is reproduced in an article published online in 2009 at www.sens-public.org/article.php3?id_article=648 ('Ce discours d'inauguration fut prononcé par Victor Hugo lors de l'ouverture du Congrès littéraire international en 1878'). The English translation used in the text is at www.thepublicdomain.org/2014/07/18/victor-hugo-guardian-of-the-public-domain/.

when authors' rights were protected in the most rudimentary and limited fashion in many countries, and where there were still vast open ranges where there was no protection at all for the works of foreign authors, even in as important an emerging economy as the United States of America. Accordingly, meaningful authors' rights protection still had to be established both internationally and nationally before it became necessary to speak of the need to balance these rights with those of the public, let alone to consider whether there was any need to sacrifice one in favour of the other.

Notwithstanding this, the notion of the public domain was recognised in the first iteration of the Berne Convention in relation to obligations of member countries to protect all works at the moment of its coming into force which had not yet 'fallen into the public domain in the country of origin'.[2] This notion of the public domain – as excluding works no longer protected in their country of origin – obviously differed from the way in which Victor Hugo had used the term to denote (a) the lack of protection for the 'thoughts' of the author as distinct from the form in which they were published and (b) the more radical notion that, following the death of the author, there should be no restriction on third-party republication, subject to the payment of a small royalty to direct descendants of the author. But it is clear that the concept of the public domain was a malleable one and there was nothing in the first Berne Act to suggest that any of these understandings of it was inconsistent with the Convention's newly adopted obligations to protect authors.[3]

In truth, the notion of a broader, albeit shifting, public domain has always been accommodated within the interstices of the Berne Convention and its associated agreements, whether this is to be found within its national treatment obligation which leaves much latitude to national laws as to what is protected (or not), its formulation of the exclusive rights specially to be granted to Berne claimants, or the array of limitations and exceptions to which such rights may be subjected. For the most part, Berne and WCT obligations set minimal levels rather than ceilings on what must be protected and allow considerable flexibility as to how this is to be done. For example, the obligation to protect reproduction rights hardly answers the questions of how close the reproduction must be to the original, the quantum taken or the form of the reproduction where this occurs only transiently. Again, the obligations with respect

[2] Berne Act 1886, Article 14.
[3] Indeed, while the concept of a paying public domain has only subsequently been recognised in a handful of Berne countries, it is notable that it was included in section 17 of the Tunis Model Law on Copyright for Developing Countries developed by WIPO in 1976 as a way of providing protection for works of 'folklore'.

to public communication rights provide no guidance as to the distinction between what is 'public' – and to be protected – and what is 'non-public' – and therefore unprotected. Similar flexibilities are to be found in relation to allowable limitations and exceptions as demonstrated by national implementations of the three-step test. Further examples could be given, but the overriding conclusion must be that what lies outside the scope of these obligations, even on the most rigid authors' rights interpretation, resides in what can be correctly called 'the public domain'. This position is affected only to a small degree by the adoption of later obligations, such as those under the TRIPS Agreement, while none of these international obligations affects the question of what national legislators may do, in the first place, with respect to their own authors and works.

The public domain, like air, is therefore all around us, but its scope and dimensions are only imperfectly perceived. While we have long framed debate in this area in terms of authors' rights, we have neglected, apart from rhetorical flourishes, to consider properly what is comprehended within the surrounding public domain and, indeed, what is meant by the word 'public'. There is a pressing need for identification and description of the scope and content of these concepts, and this is the monumental task that has been undertaken by the authors of the present work. Both Graham Greenleaf and David Lindsay are ideally suited for this mission and have executed it with an attention to detail and rigour of analysis that are truly impressive. They present a compelling argument for the recognition of 'public rights' in the public domain as the necessary complement to the protection of authors' rights and articulate a coherent and comprehensive taxonomy for analysing and understanding these rights. As readers will see, the terrain they sketch is far from simple, and the various public domains they uncover in their analysis emerge as a series of unevenly defined spaces that intersect at various points along the spectrum of authors' rights. In some instances, the lines of demarcation are clearly defined and readily justified; in others, they are blurred or overlap, meaning there may not be much satisfaction for those looking for 'bright line' solutions. The achievement of the authors, however, is to present these matters in an untarnished and readily understandable way, and to provide the starting points for further investigation. The range of issues with which they deal is extensive and covers the gamut of modern copyright scholarship and policy discussion, with the consequence that there is much here also for readers wishing to pursue particular issues such as orphan works, extended collective licences, user-generated content, to mention only a few. But the real joy of the work for the reader is to be found in the way the authors present a consistent and realist argument

throughout about the role of the public domain and public rights. Of particular interest here is their penultimate chapter in which they analyse the de facto public domain that has emerged on the Internet – an issue which we all know about subconsciously but rarely address expressly.

This is a distinguished contribution to our understanding of the relation between authors' rights and the public domain, and I congratulate the authors on their achievement.

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March 2018

Preface

In this book we examine copyright law primarily from the perspective of the users of works (in aggregate, 'the public'), rather than from the usual perspective of authors or copyright owners. The central question we ask is 'what can users do with works, without obtaining the permission of a copyright owner?' By putting the rights and abilities of users in the foreground, rather than relegating them to what is left after the exclusive rights are exhausted, we provide a new account of copyright's public domain, and of the 'public rights' which comprise it. We regard the public domain as not just important, but essential: for intellectual development, for public discourse and (not least) for replenishing the sources which nourish creativity.

This book is a global examination, because copyright public domains are different in every country in ways which are both important and complex. Nevertheless, there are globally consistent elements arising from both the constraints of international copyright law (sometimes weaker than imagined) and from the more recent uniformities arising from the globalising force of the Internet and its primarily expansive effects on public domains. Without claiming to be comprehensive, we present both the global elements of the copyright public domain and the great extent of its national diversities.

We hope that this book will contribute to revitalising discussion of both the concept of the public domain in copyright law and what can practically be done to protect and enhance it. We have both contributed to all chapters, and are equally responsible for Chapters 1–3 and 17. DL had principal responsibility for Chapters 4 and 5 and 7–12, and GG for Chapters 6 and 13–16.

The topic has proven too large to confine within a reasonable allowance of printed pages, so we have provided a free Online Supplement on SSRN (https://papers.ssrn.com/abstract_id=3144310) which contains additional details relevant to each chapter, indicated in footnotes.

The law is stated as at 31 August 2017.

Graham Greenleaf and David Lindsay

Acknowledgements

Graham Greenleaf would like to thank the many people and institutions who have contributed to his work on the copyright public domain for over a decade. Work leading to this book commenced under an Australian Research Council Linkage Project, 'Unlocking IP', in which numerous Chief Investigators and Industry Partners participated (see www.cyberlawcentre.org/unlocking-ip/) from 2006 to 2009. Three Conferences (2004, 2006, 2009) were organised by the project, through the Cyberspace Law & Policy Centre at UNSW Australia Faculty of Law. Thanks to David Vaile, Philip Chung, Catherine Bond, Abi Paramaguru, Ben Bildstein and Sophia Christou for their valuable work on that project. I was also assisted by visiting fellowships at the AHRC/SCRIPT Research Centre for the Study of IP and Technology Law, University of Edinburgh (2007, 2010) and Kyung Hee University College of Law, Seoul (2008).

Early versions of some of the arguments in the book were published in the *Australian Intellectual Property Journal*, *SCRIPTed* (University of Edinburgh) and *Global KHU Business Law Review* (Kyung Hee University, Seoul). Opportunities for conference presentations were provided by the 'Copyright Futures' Conference, Canberra, 2009; the 'Blue Sky' Conference, Sydney, 2010; the SCuLE Lecture, Exeter University Faculty of Law, 2012; the Australian IP Academics Conference, Adelaide 2012 and Fremantle, 2016; CREATe Glasgow, 2013; European University, Florence, 2015; and Australian Digital Alliance Conference, Canberra, 2016. Thanks to Brian Fitzgerald, QUT, Creative Commons Australia and the Australian Digital Alliance for organising many of these events and keeping discussion of the public domain alive in Australia, and to Whon-il Park and to Charlotte Waelde for international invitations to do so. Philip Griffith and Adrian Sterling encouraged me to stay interested in copyright law. I would like to offer particular thanks to David Lindsay for his willingness to co-author the book, which has benefited a very great deal from his expertise on international and comparative copyright law, and from his collegiate and collaborative approach.

David Lindsay would like to thank Monash Law School for supporting this project during a period of sabbatical in 2016–17, and my former colleagues at Monash, especially Ann Monotti and Sharon Rodrick, for their collegiality and support. I am indebted to Sam Ricketson, from Melbourne Law School, and David Brennan, from UTS Law School, for detailed feedback on draft chapters. In particular, I would like to thank Graham Greenleaf for his invitation to become a co-author. Completing the project has been stimulating and challenging in equal measure. We are both committed to the importance of protecting the interests of authors, of the public domain as an integral part of copyright law, and of civil debate on issues of improving copyright law. In addition, we are united in a belief that scholarship based on a sound analysis of the law as it is and drawing from the best of different legal cultures and traditions can assist with developing realistic proposals for improving copyright law.

As joint authors, we would both like to thank all of the following for generously reading and commenting on chapters of the book or earlier drafts (in alphabetical order): T. G. Agitha, Sara Bannerman, Judith Bannister, Catherine Bond, David Brennan, Roger Clarke, Robert Cunningham, Ronan Deazley, Peter Drahos, Kristofer Erickson, Sean Flynn, Michael Fraser, Andres Gaudamuz, Michael Geist, Anne Flahvin, Yahong Li, Lydia Loren, Jani McCutcheon, Ross McLean, Kylie Pappalardo, Sam Ricketson, James Scheibner and Nic Suzor. We would also like to thank Catherine Bond for being involved in this project for a long period of time, until other obligations prevented her continued involvement. Responsibility for the text, its errors and omissions, remains with us alone.

Our thanks to Cambridge University Press, and particularly to our editor, Kim Hughes, for her continuous patience, flexibility and warm support and to Emma Collison for her very effective production management.

Graham dedicates this book to Jill Matthews for her loving and patient support and encouragement, not to mention tedious proofreading, editing, critiquing and indexing, throughout a very difficult period.

David dedicates the book to his partner, Robyn Parker, who has been and remains a constant support.

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