Maggie Chin, a fifth grader at Miles Elementary School, loves her new social studies teacher. Ms. Taylor is so cool. She doesn’t treat Maggie like a little kid. Today, the class discussed copyright and music piracy. Ms. Taylor brought in magazines and newspapers on the topic, and the class watched a segment from the television program *60 Minutes* (Maggie’s favorite TV program!). Lots of kids download music files on peer-to-peer networks, and it may be a problem. It’s not exactly stealing, but it could be a copyright infringement and that’s against the law. Maggie asks Ms. Taylor about the copying that students do in the library – like photocopying magazine articles for schoolwork. Why isn’t that against the law? Ms. Taylor says there are a lot of situations in which copying is okay. For example, Ms. Taylor videotaped the *60 Minutes* program, and even though that is copying, it is not against the law because it is something called “fair use.” Copyright is confusing, but Maggie decides that her final class project — creating a Web site on a current news topic — will focus on copyright. The project isn’t due for eight weeks, but Maggie is the kind of person who wants to get an early start. Of course, the first step is research, and that means numerous trips to the school library. It would be neat if Maggie could convince her Mom to take her to the university library this weekend so she can check out books there, too. After school, Maggie will see the school librarian, Mrs. Velez. Maybe she can recommend a basic primer on copyright – sounds like great bedtime reading.

That evening, Maggie Chin falls asleep in bed with the copyright primer lying open on her bed. Already she has learned that United States copyright law began with the U. S. Constitution.
United States Copyright Law

The framers of the Constitution enumerated several key policy areas — among them commerce with foreign nations, coining money, collecting taxes, declaring war, and creating copyright law — that would fall under the purview of the national Congress. The various colonies already had their own individual copyright laws but the framers believed that a uniform copyright law was highly important. They believed that the new democracy required a well-informed citizenry, so access to knowledge was paramount. The framers were familiar with the pitfalls of earlier English copyright laws that were based almost entirely on monopoly control and censorship. The framers instead identified
with the positive aspects of the current English copyright law — the Statute of Anne (1695) — and promoted a more open copyright policy based to a large extent on free speech, open dialogue, broad distribution of knowledge and open competition.

[in a box]

“The Congress shall have the power …to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors exclusive Right to their respective Writings and Discoveries” (U.S. Constitution, art 1, sec 8)

If we deconstruct the clause, we can identify its key points:

- It is important that science and the arts be encouraged
- That the creation and dissemination of knowledge is the purpose of copyright
- Congress is granted the power to encourage creation of new works, but only via a very specific method, by granting authors and inventors exclusive rights
- Rights granted should be for a limited time
- That authors and inventors benefit from copyright is a side effect of encouraging the dissemination of knowledge, and not a direct intent of copyright
- The rights of authors and inventors are granted by Congress and are not intrinsic or natural

[sidebar]

English Copyright Law

Early English copyright law was a form of censorship. The Crown feared that anyone who had access to a printing press could publish materials that might be critical of the Crown. To prevent this, the Crown decreed that a special license was necessary to publish a work. This special license could only be obtained through the Stationers’ Company, a group of London publishers and printers who, in collusion with the government, censored undesirable publications. In return, the Stationers Company was granted a monopoly over publishing. Authors could only see their works published if they obtained a license that confirmed that the Company had reviewed the appropriateness
of the work and 2) agreed to turn their works over to the printers for publication. Only the Stationers’ Company reaped profits from the book sales.

In 1695, the Licensing Act lapsed and a new copyright law, the Statute of Anne ("A Bill for the Encouragement of Learning and for Securing the Property of Copies of Books to the Rightful Owners Thereof") was enacted by the Parliament in 1710. This law loosened up the printer monopoly and established that authors of works could maintain the right to copy their work for a fourteen-year period, renewable for another fourteen years if the author was still living. The Statute of Anne also established the philosophy of the public domain: Copyright protection was limited to terms that would end after, at most, a twenty-eight-year period, and then the work would belong to the public. Even with the improvements brought by the Statute of Anne, authors did not necessarily benefit financially. Most authors still had to go to a printer (having no printing press themselves), and most still had to sign over their rights to the printer to get published.
Copyright Basics

Exclusive Rights of Copyright

The founding fathers believed that authors and inventors would be more likely to create new works if they were given an incentive. Congress established a set of exclusive rights that gave copyright holders the sole right to reproduce and market their works to the public for “limited times.” During the term of copyright, copyright holders would have no competitors in the market for their particular copyrighted works. Initially, the exclusive rights pertained only to the rights of reproduction and distribution, but over the years, Congress has created additional rights.

The exclusive rights are outlined in §106 of the U.S. copyright law:

Subject to section 107 through 121, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

1 to reproduce the copyrighted work in copies or phonorecords;

2 to prepare derivative works based upon the copyrighted work;
3 to **distribute** copies or phonorecords of the copyrighted work to the public by
sale or other transfer of ownership, or by rental, lease or lending;

4 in case of literary, musical, dramatic, and choreographic works, pantomimes,
and motion pictures and other audiovisual works, to **perform** the copyrighted
work **publicly**;

5 in the case of literary, musical, dramatic, and choreographic works,
pantomimes, and pictorial, graphic, or sculptural works, including the individual
images of a motion picture or other audiovisual work, to **display** the copyrighted
work **publicly**; and

6 in the case of sound recordings, to perform the copyrighted work publicly by
means of a **digital audio transmission**.

Let’s take a photograph as an example. The copyright holder has the right to make
prints from the original negative and to sell or give away those photos. In other words,
the copyright holder has the exclusive right to market the work. The copyright holder
also has the right to create a derivative work from the original — for example, a set of
greeting cards that include the photograph. In addition, the copyright holder could also
display the photo publicly, perhaps at a photography exhibition.

If a person other than the copyright holder uses one of the exclusive rights without
the authorization of the copyright holder, that person has infringed copyright (unless fair
use or another exemption applies).
**Requirements for Copyright Protection**

Scenario:

Charles Gnöster, Head of Special Collections and East European and Slavic Studies Specialist at the Dodd Library, rarely takes a reference desk shift but the beginning of the semester is always a busy time. Mr. Gnöster would much rather focus on his digitization project, but he has to admit, occasionally reference work can be entertaining.

Just now someone asked him: “How do I get copyright protection for something?”

Gnöster: Well, it depends on what you want to copyright.

Patron: I want to copyright my idea for a screenplay, but I don’t want to tell anyone about it until I have legal protection. That’s why I want to copyright it. Then no one can take it away from me.

Gnöster: I’m sorry, copyright does not work that way. You cannot copyright an idea, but you could copyright your screenplay. Let me explain. Copyright protection is afforded not to ideas, but to expressions of ideas which must be original (not a copy of another person’s expression) and creative. An idea for a motion picture screenplay cannot be protected until you write it down and express it in an original way. In addition, you must capture your original expression in some sort of perceptible medium, so others can see, hear, or read it.

Patron: You mean, I have to write down the screenplay before it can be protected.

Gnöster: Exactly.

**Originality and Fixation**

An expression must be original. It must not be a copy of another person’s expression. An alphabetical list of names is not protected because it is not considered original enough.

An expression also must be “fixed in a tangible medium.” Other people must be able to physically perceive the expression, by reading the expression in a book or hearing it on a CD.
Q: How many times have you watched a television show that includes a dramatic scene of a woman giving birth to a baby in a taxi or an elevator? Why is it legal to copy this same idea in show after show?
A: The idea itself belongs to everyone and is in the public domain. The way the scene plays out is an expression of it. Each show uses the idea but creates a new expression.

In the famous U.S. Supreme Court case *Baker v Selden, 101 U.S. 99 (1879)*, Baker claimed copyright protection for a particular method of bookkeeping – a blank form with day, week, or month categories for recording accounting information. Selden used the form in a book without Baker’s permission. The Court ruled that the form did not qualify for copyright protection because the ideas expressed – days, weeks – were not original. The Court said that if everyone had to ask Baker’s permission to use the form, Baker would have a complete monopoly over a form that was obvious.

“Automatic” Copyright

Once an expression is fixed in a tangible medium, it is afforded copyright protection immediately. If you doodle during a staff meeting, your doodles are copyrighted. If you create a Web page and publish it on the World Wide Web, it is copyrighted. If you shoot a video of your friend’s wedding, the videotape is copyrighted.

In the past, to gain copyright protection for a work, it had to be registered with the U.S. Copyright Office and/or contain a copyright notice.

© 1999 Joe Creative
on the published work. The Berne Convention Implementation Act of 1988 (that went into effect on March 1, 1989) amended the Copyright Act of 1976 by eliminating the registration and notice requirement. This action was taken so U.S. copyright law would conform to the Berne Convention (an international copyright policy-making body). Many countries do not require “any formality” to gain copyright protection.

Since copyright is automatic, copyright is the rule rather than the exception. The creator or author must do something in order not to have copyright protection. She can put a notice on her work saying, “This material is not protected by copyright” or “I assert as the creator of this work that this work be recognized as public domain material.” If the creator does not take action to the contrary, all works she creates are automatically protected. Thus, materials are copyright protected, instantly.

[FAQs]

Q: Is there any value in registering your work with the U.S. Copyright Office?

A: Yes. Copyright registration is a prerequisite to filing a copyright infringement suit. You cannot sue someone for copyright infringement if your work is not registered. In addition, if your work is registered in a timely fashion, you have the right to claim statutory damages in an infringement suit. Currently, statutory damages are $30,000 per work infringed, or $150,000 for willful infringement. Formal registration is also helpful to those who wish to use your work and want to contact the copyright holder for permission.

Q: How does one register a work?

A: It is fairly easy. Just follow these steps:

   Go to the U.S. Copyright Office Web site (www.loc.gov/copyright).

   Find the “how to register a work” link.
Complete the appropriate form for the type of material you wish to copyright.

Send one or two (depending on the type of work) nonrefundable copies of the work to the Copyright Office.

Pay the registration fee ($30 in 2004).

In return, you will receive a certificate of copyright for your work. The Copyright Office will make a record of your registration. Selected works sent to the Copyright Office are added to the collection of the Library of Congress and the rest are discarded.

**The “Uncopyrightables”**

Some works can never be protected by copyright. These works or elements of works are in the public domain. They include “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” § 102 (b). However, patent or trademark law may protect some of these works.

Copyright does not protect ideas, but it does protect expression. The idea of a story – “boy meets girl” — cannot be protected by copyright, but a “boy meets girl” story expressed in an original way can be protected.

Works that are obvious in their nature, such as the 12-month Julian calendar, cannot be protected by copyright. However, other parts of the calendar, such as original art or photography, may be protected by copyright.

Recipes cannot be protected because they are merely a list of ingredients.

However, a list of ingredients expressed in an original way – such as cooking instructions
— can be protected by copyright. Trade secret law may protect certain recipes, such as the secret ingredients of the beverage Coke, giving the Coca-Cola company a competitive advantage.

Copyright law does not protect facts, but it does protect the original and creative selection and arrangement of facts. For example, a bibliography is a list of citations that cannot be protected. An annotated bibliography is copyright protected (not the list of citations but the original and creative annotations). On the other hand, a non-annotated bibliography might arguably qualify for copyright protection based on the originality of the selection of citations. Likewise, a bibliography arranged in a novel and creative way might also qualify.

[Tip]
Collections of facts or other non-copyrighted works are called compilations. Collections of copyrightable works – such as an anthology of short stories, or a database that includes full-text journal articles – are collective works. Each work in a collective work is independently copyrightable.

[end]

The Database Protection Debate

Over the last several years, database producers have urged Congress to pass new legislation that would provide increased copyright protection for databases. Current copyright law only protects those elements of databases that contain originality and creativity in selection, coordination, or arrangement. Copyright protection for databases is often considered minimal since databases frequently are composed almost entirely of
public domain materials. These types of works of authorship are sometimes said to have “thin” copyright protection.

Since existing copyright law protects an original selection, arrangement, and coordination of facts in databases, librarians and other public interest groups have argued that additional copyright protection is not necessary. If database producers could also copyright the facts that reside within a database, basic tenets of copyright law would be challenged:

Originality is a constitutional requirement for copyright protection.
Copyright only protects expression and not ideas.
Copyright’s purpose to advance learning demands that ideas and information presented by others be built upon to create new works.
Once materials fall into the public domain, they cannot be copyright protected.

In addition, database producers could secure monopoly control by dramatically limiting the ability of competitors to enter the market. If Database Company X has copyright control over business journal citations, Database Company Y would be prevented from using those same citations in another, perhaps less expensive and more effective database.

Database producers argue that they need the additional protection to prevent the “wholesale copying” of their databases by competitors who could then market the work without having invested the time and resources putting the database together in the first place. However, various state laws, such as misappropriation and “trespass to chattels,”
have been used as legal remedies. In addition, some argue that the Computer Fraud and Abuse Act of 1986 and recent court interpretation of its private cause of action clause could be used to successfully prosecute alleged infringers. If database producers prevail with Congress, they will control the “downstream” use of database information. If a scientist must request permission to use scientific data, innovation and building on previous knowledge may be thwarted.

[Illustration] Maggie Chin stands before a kiosk for extracting facts. The kiosk says:

“The height of Mount McKinley is 20,230 feet high. Please deposit 3 cents.”

[Case law]

In *Feist Publications, Inc. v. Rural Telephone Service Company, Inc.* 499 U.S. 340 (1991), Rural Telephone Service Company claimed that Feist Publications infringed its copyright by creating a competing telephone directory that contained listings from the Rural Telephone Service phone book. State regulation required that Rural produce a telephone directory as a public utility. Rural gave phone customers the directories free of charge but collected revenue by selling yellow page advertisements. Feist Publications produced telephone directories that covered a wider geographical area and also collected revenue by competing for advertising dollars. When Feist asked to license Rural Telephone’s directory listings to include in their phone book, Rural refused. Feist used the directory listings anyway and ended up in court.

Rural argued that Feist should collect its own phone listings, just as Rural did. But Rural was at a significant advantage since it collected listings through its own customers who had only one telephone service provider to choose from.

Feist argued that it would not be practical to go door-to-door to collect listings, and that the listings themselves did not warrant copyright protection. Names, addresses, and phone numbers were not original works. Rural merely collected facts. The arrangement and selection of the listings also did not warrant copyright protection – an alphabetical listing of phone subscribers was not a creative work.

The Supreme Court ruled that facts could not be copyright-protected and were in the public domain, although an original arrangement of facts may be copyrightable. Creativity is a prerequisite for copyright protection, and facts are not created but rather discovered. The Court also opposed the “sweat of the brow” argument — finding that copyright cannot be awarded based on time, effort, or resources spent on finding and
collecting facts. Originality is a prerequisite to copyright, not workmanship. (For more on this landmark case, see Appendix C).  

FAQs:  
Q: What can be protected by copyright?  
A: Section 102 of the 1976 copyright law lists:

- literary works;  
- musical works, including any accompanying words;  
- dramatic works, including any accompanying music;  
- pantomimes and choreography;  
- pictorial, graphic and sculptural works;  
- motion pictures and other audiovisual works;  
- sound recordings; and  
- architectural works.

Public Domain

The public domain has gotten a bad rap. Some people refer to it with disdain. Their assumption is that the public domain is the “information junkyard” — full of worthless, dusty, moldering stuff. The language we use to describe the public domain tends to dismiss its importance. Materials “fall” into the public domain and copyrighted materials eventually “expire.” Like Rodney Dangerfield, the public domain gets “no respect.” But the public domain is a fundamental tenet of copyright and one way to limit the monopoly control of a copyright holder. Eventually, when the copyright term has
expired, works are returned to the public in the public domain. Everyone and no one owns the public domain.

**What is The Public Domain?**

The public domain is information, knowledge, discoveries, and artistic creation never or no longer protected by copyright. Most of us know that facts, for example, are automatically part of the public domain, because facts cannot be copyrighted. The copyright law (§102) goes on to say that “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.” Thus you may have designed a particular way to shelve books in your library, but this process itself cannot be protected by copyright; however, a description, explanation, or illustration of the process could be protected by copyright.

In addition, works of the U.S. government produced by government employees are in the public domain. This category includes works that are created by all agencies of the government such as the Internal Revenue Service, federal legislation, the president’s speeches, and court rulings. The government may choose to hire a private contractor to create a government work. If the contractor retains copyright, that work is protected by copyright. That contractor also could assign the copyright to the U.S. government to hold in the work.

Works created by state governments and their employees may or may not be in the public domain. You will have to check individual state statutes to make a determination since some states have elected to assert copyright protection.
Once materials are in the public domain, anyone can exercise a right of copyright without the prior permission of the copyright holder. For example, publishing a work from the public domain is not a violation of copyright. In fact, the re-publication of such a work can generate new revenue, not for the original copyright holder but for whoever publishes and markets it.

[sidebar]

Public Domain Web Sites

American and English Literature Online Books for Educators
http://falcon.jmu.edu/~ramseyil/online.htm

University of Pennsylvania's "Online Books Page" has over 20,000 digitized works available.
http://digital.library.upenn.edu/books/index.html

Bibliomania – Free Online Literature
http://www.bibliomania.com

Knowledge Rush Online Books (Australia)
http://www.knowledgerush.com/Books.htm

Public Domain Information Project – Access to Public Domain Music and Songs
http://www.pdinfo.com/default.htm

The Choral Public Domain Library – free choral sheet music
http://www.cpdl.org/

Project Gutenberg – free electronic texts and e-books
http://gutenberg.net/

Project Wittenberg – texts of Martin Luther and other Lutherans
http://www.iclnet.org/pub/resources/text/wittenberg/wittenberg-home.html

[end]
The Creative Commons (www.creativecommons.org) is a non-profit organization that makes it easier for creators to dedicate their works to the public domain, or alternatively, to establish their own copyright conditions through the use of publicly accessible, easy-to-understand license agreements. Because copyright is automatic (no registration or other formality is required by law to gain copyright protection) and because the term of copyright (currently life of the author plus 70 years) has been extended many times, the Creative Commons provides a mechanism for creators to select alternative protection models not as expansive as current copyright law.

To do this, the Creative Commons developed licenses that creators can use to define the kind of copyright law that is more suited to their wishes. For some creators, the most important thing is to get their work out there — these individuals may choose to place their work in the public domain immediately. Other creators may want to retain their copyright but make it easier for people to use their works without the fear of repercussion. This is where the licenses come into play. Modeled after the General Public License (GNU), the Creative Commons license is a straightforward agreement from the creator that the work may be used in particular ways without permission. For example, some creators choose to retain copyright but allow non-profit, educational use of their work, as long as the work is appropriately attributed to the author. Other creators use a license to set the term of copyright to a length that they want – for example, creators could select a 14-year term of copyright for their works, the original term of U.S. copyright. The Creative Commons organization also hopes to encourage creators to
make their works available online in a searchable Creative Commons depository, making it easier for users to identify works with less stringent copyright restrictions.

[sidebar]

Legislation to Expand the Public Domain

Many argue that research funded by the government – including the majority of research produced by universities — should be beyond the reach of copyright protection. Like other government information, research is funded by the public’s tax dollars and therefore, should be owned by and readily available to the public. Instead, tax-dollar funded research, primarily conducted by researchers and scholars at universities, is published in costly scholarly journals that are purchased by libraries that are often also funded by tax dollars, essentially charging the public twice for the same research. In the 108th Congress, Representative Martin O. Sabo introduced the “Public Access to Science Act” (H.R. 2613, 108th Cong. 1st sess.(2003) to place government-funded research in the public domain. Sabo states that “American taxpayers invest about $45 billion a year in scientific and medical research, and the results should be readily available to them.” Representative Sabo suggests that access to the Internet could make research findings more immediately accessible to scientists, doctors, and the public. Is this legislation worthwhile? The scholarly publishing community says no, arguing that research findings can only be understood by and are only of interest to a select group of scientists, and that scholarly publishing meets the needs of the scientific community. Others say that increased open access is the correct strategy, but that H.R. 2613 is too great a step to take at this time. Still others embrace the legislation – let research findings be free! Does the Sabo legislation have a conceivable chance of moving forward in Congress? Probably not, but new interest in public access to research information is welcome.

[end]

Ownership of Copyright

In general, the author or creator owns the copyright of his original, creative expression, fixed in a tangible medium (17 U.S.C. § 201(a)). Works that are created as a part of one’s employment are “works made for hire” (§201(b). In this case, the employer owns the copyright from the get-go, unless there is an agreement that says otherwise. If you create a work as part of your employment — perhaps a logo for the company’s Web
site — the company holds the rights to the graphic. Individuals or businesses may also commission works from non-employees as works made for hire, but in these cases, a written document signed by the parties is necessary.

Works that are specially commissioned as works made for hire fall into one of the following categories:

- a contribution to a collected work;
- a part of a motion picture, such as the screenplay;
- a translation;
- supplemental works, such as forewords, illustrations, maps, annotated bibliographies, or graphs;
- a compilation (a collected of “noncopyrightable” materials arranged in an original and creative way);
- tests and answer materials for tests; or
- atlases.

**Scenario:**

Peter Kahn, assistant professor in the Cultural Studies Department, and Lola Lola, director of the Dodd Library, co-wrote an annotated bibliography on gender studies. Professor Kahn came up with the initial idea, but both he and Lola Lola wrote equal portions of the book. They decide to register the work with the U.S. Copyright Office.
Q: Who should they list as copyright holder? Does the university hold copyright as a “work made for hire?”

A: Both Professor Kahn and Lola Lola can be listed as joint authors. They hold the rights of copyright equally. If the book makes a profit, the profit must be shared equally. If one author decides to re-publish portions of the work in another resource or create a derivative work based on the original, that author should first get permission from the other author to do so, but must still share the profits. It would be prudent for Professor Kahn and Lola Lola to draw up an agreement or contract that stipulates the copyright interests and expectations of both of them. Most authors in creating a joint work agree by contract not to exercise their individual rights without agreement of the other authors.

Professor Kahn does not have a greater share of copyright just because he came up with the idea for the book. Remember, ideas cannot be protected by copyright.

Q: Could the university claim that it should hold copyright because it is a work for hire?

A: Probably not. Although both Kahn and Lola are employees of Wessex University and are expected to create scholarly works for tenure purposes, the employees had control of what they would write and were not supervised by the university. Traditionally, universities have not claimed any right to scholarly work created by their faculty. Sometimes universities set up agreements with faculty to share in the profits of very popular books closely related to actual teaching, like textbooks. Some universities claim ownership over distance learning courses created by faculty.

[Tip]
(For a Survey on Copyright Ownership Policies in Distance Education, see www.umuc.edu/distance/odell/cip/copyright_survey.pdf)

[end]

Q: How does the copyright law define an employee?

A: The copyright statute does not define an employee, but the Supreme Court has ruled that employment status should be based on how much control the employer has over defining what the work is and how it should be created by the employee. If the employer is directing the employee to create works in particular ways and under particular conditions, it is likely that the employer holds the copyright. (CCNV v. Reid, 109 S. Ct. 2166 (1989)). If the employee receives a regular paycheck and employee benefits like health insurance, and has taxes withheld like Social Security and federal taxes, it is more likely that the employer holds the copyright over works created by the employee. Another consideration is whether the employer provides the tools and other resources necessary to create the work. (For a more thorough discussion of copyright ownership, see Chapter Six.)
**Duration of Copyright**

The copyright term has been extended many times throughout the history of copyright law, and the rules for copyright registration, renewal, and notice have also been amended numerous times. As a result, it can be very difficult to determine whether materials are protected by copyright. To complicate matters, additional modifications of the law have affected the terms of unpublished materials. Furthermore, materials published outside the United States may be treated differently than U.S publications.

Bottom line: You need a copyright duration reference guide to keep track of the majority of the possibilities. Many of these guides are available on the Internet. Laura N. Gasaway prepared one of the most popular guides, *"When Works Pass into the Public Domain."*\(^1\)

[insert chart]

**The Sonny Bono Copyright Extension Act**

The most recent extension of the copyright term occurred in 1998 with the Sonny Bono Copyright Term Extension Act, which increased the term of copyright for post-1978 works by 20 years. Some say this extension was necessary for the United States to comply with the Berne Convention for the Protection of Literary and Artistic Works (the Berne Convention), an international treaty organization formed to reconcile the various copyright laws and policies of its member nations. Others argue that the extension was primarily driven by the motion picture industry, in particular the Disney Corporation because some early Mickey Mouse cartoons were soon to enter the public domain. Other supporters of the Sonny Bono Term Extension Act included the heirs of well-known and still popular creators. For example, some of the music written by George and Ira Gershwin was due to enter the public domain prior to the extension and would end the Gershwin heirs’ ability to collect royalties. The Gershwin heirs can now continue to collect royalties on these works for another twenty years beyond the original “expiration” date.

[box]
The current term of copyright is life of the author plus 70 years. For works for hire, works held by corporate entities, or pseudonymous or anonymous works, the term is 95 years from the date of first publication or 120 years from the date of creation (whichever comes first).

[end of box]

[sidebar]

The Supreme Court ruled that Congress had the right to extend the copyright term in *Eric Eldred v. John D. Ashcroft* (537 US 186, 208 (2003). The Court stated that Congress did not violate the copyright clause of the Constitution by extending the term of copyright by 20 years in the Sonny Bono Copyright Term Extension Act. The term — life of the author plus 70 years — is “limited in time” because it has an end date. The Court also ruled that term extension does not violate the First Amendment because even with long copyright terms, exemptions in the law, including fair use, allow for free speech.

The petitioner, Mr. Eldred, is the publisher of Eldritch Press, a Web site that publishes public domain works. Because of term extension, Mr. Eldred could not publish titles that would have gone into the public domain.

[end]

**Copyright Term Complexity (It Can Make You Go Mad!!!)**

The 1976 copyright law changed the term from 28 years plus one renewal of an additional 28 years to life of the author plus 50 years. All works published after 1978 had the life-plus-50 year-term. The Sonny Bono extension act affected post-1978 works by adding an additional 20 years.

But Congress also decided that pre-1978 works should get additional years of protection. Congress changed the second renewal term for pre-1978 from 28 to 67 years, and the act of renewing was no longer required — it happened automatically. These works will enter the public domain 95 years after their publication date. Pre-1978 works
were not affected by the Bono extension, since Congress set their term at 95 years and no more.

Clear as mud?

[potential illustration]

Here are some examples:

The movie *Raiders of the Lost Ark* was released in 1981. The production company Lucasfilm Ltd. holds its copyright, making the film a corporate work. It will be in the public domain in 2076 (1981+ 95= 2076). Before the Sonny Bono extension act, the film would have gone into the public domain in 2056.

Margaret Mitchell published *Gone with the Wind* in 1936. At that time, copyright protection lasted 28 years. But *Gone with the Wind* was renewed in 1964, adding an additional 28 years of protection, thus 1992 was its new expiration date. But since Congress increased the renewal term 67 years in 1978, the new expiration date for *Gone with the Wind* became 2031 (28 first term + 67 second term = 95 years from publication, 1936 + 95 = 2031). The Bono extension of 1998 did not affect the term of *Gone with the Wind*.

Here’s a similar example:

Miles Davis and Bud Powell registered the song “Budo” in 1956, giving it an initial term of 28 years (1956 + 28 = 1984). But Congress increased the second renewal
of 67 years in 1978 (28 + 67 = 95), so “Budo” will expire December 31, 2051 (1956+ 95 years=2051). The Bono extension had no effect.

Miles Davis published his autobiography in 1989 and claimed copyright protection. At that time, the term was life of the author plus 50 years. Davis died in 1991, so his autobiography would have gone into the public domain the end of 2041. With the Sonny Bono Copyright Term Extension Act of 1998, the copyright term was extended to life of the author plus 70 years (thus adding 20 years of protection to the Davis autobiography) so Davis’s autobiography will enter the public domain at the end of 2061 (2041 +20 = 2061).

[box]

In general, works are in the public domain if they were published before 1923. This is because the term of copyright for works published before 1923, even if renewed by the copyright holder, expired in 1998 (the year that the Sonny Bono Copyright Extension Act was passed).

[end box]

Exception to the rule: Due to changes made by Congress regarding registration and copyright notice requirements, some materials published after 1923 may be in the public domain. Works published between 1923 and 1978 without a copyright notice are in the public domain. In addition, works published between 1978 and March 1, 1989, without copyright notices, may also be in the public domain if the copyright holders did not register the works with the Copyright Office during the grace period offered by Congress to restore copyright.
Our advice: Use the chart!

[Sidebar: It’s a Wonderful Life story]

In 1974, Republic Pictures, the copyright owner and producer of the endearing holiday classic *It’s A Wonderful Life*, failed to renew its original 1946 copyright. As a result, the film became part of the public domain and for years was shown countless times on countless television and cable stations during the Christmas season.

Republic Pictures very belatedly realized its mistake. In 1993 the corporation made a move to regain copyright control by piggybacking on an important Supreme Court decision regarding another Jimmy Stewart classic, *Rear Window*. In that case, the Court found that the copyright holder of an underlying story enjoyed some property rights to a movie based on that story.

Because Republic Pictures retained copyright of the original story behind *It’s A Wonderful Life*, the company reasserted copyright control over the ubiquitous classic. Going a step further, Republic also secured copyright to the film’s music, thus bolstering their claim that the rights to show the film belonged exclusively to Republic.

Thus armed, Republic sent aggressive “cease and desist” letters to television and cable broadcasters and video dealers insisting that they refrain from showing the movie without first paying a royalty fee. Though untested in court and on shaky ground according to some copyright scholars, Republic Pictures’ strategy has paid off. Once a holiday staple found on hundreds of national, independent, and cable channels, *It’s A Wonderful Life* is now made available through a small handful of licensing contracts, including an exclusive network agreement with NBC.

More regrettably, Republic Pictures (whose film library is now owned by Artisan Entertainment) has used its tenuous hold on the film’s copyright to prevent the marketing of peripheral materials like calendars and cookbooks produced by members of the film’s original cast.

Finally, in an ironic twist, it is generally acknowledged that consistently repeated nationwide broadcasts of It’s A Wonderful Life due to its public domain status are responsible for turning a small, unknown, and unseen film into a true American classic.

[end of side bar]

Unpublished Works
Of course, the rules are different for unpublished works, so we are providing another chart for unpublished works created by Peter B. Hirtle.2

[insert peter’s chart]

[sidebar]

Another term extension oddity is found in section 303 of the copyright law. When the Copyright Act of 1976 was passed, Congress gave copyright protection to previously unpublished works created before January 1, 1978. The duration for these works as the Copyright Office explains in its Duration of Copyright Circular 15a

“is the same…as for new works: life of the author plus 70 or 95/120-year terms (for corporate and work-for-hire works) …However, all works in this category are guaranteed at least 25 years of statutory protection. The law specifies that in no case will copyright expire before December 31, 2002, and if the work is published before that date the term will extend another 45 years, through the end of 2047.”

[end]

[sidebar]

Happy Birthday to…AOL Time Warner?

The next time you gather around the dinner table to wish a relative a Happy Birthday, think about this: The song you sing is copyright protected!

Kentucky composer Mildred J. Hill wrote the tune we know today as “Happy Birthday to You” in 1893. Mildred’s sister Patty, an elementary school teacher and principal, wrote the song’s original words—”Good Morning to All”—as a way to greet her classes each morning for school.

The words “Happy Birthday to You” first appeared as the second stanza of Mildred’s tune in a songbook published in 1924. The song gained in popularity until, by 1933, it had appeared on the radio and in a number of Broadway shows. A third Hill sister, Jessica, who controlled the copyright to the original “Good Morning to All,” managed to secure ownership of the “Happy Birthday” version in 1934.

“Happy Birthday to You” was published and copyrighted in 1935 by the Clayton F. Summy Company. While the song’s copyright originally would have expired in 1991
(after a term renewal), those pesky extensions of the copyright law have ensured its protection until (at the time of this writing) the year 2030.

Through a series of acquisitions, AOL Time Warner now controls the copyright of “Happy Birthday to You” through a company called Summy-Birchard Music.

So does this mean when you sing Happy Birthday to Uncle Gerald you are infringing on AOL Time Warner’s rights? Will you go to jail? No! But AOL Time Warner does collect royalties—to the tune of $2 million a year!—when the song is included in any media product like movies, songs, or live action plays.

[end sidebar]

Special Exemption for Libraries and Archives to Digitize Works

Libraries and archives that wish to digitize materials can take advantage of a new exemption (§108(h)) as long as certain conditions are met. During the last 20 years of any term of copyright, a library, archive or non-profit, educational institution may make an exact copy or a digital copy of a work for purposes of preservation, scholarship or research. However, certain conditions must be met:

1. The work must be no longer be “subject to normal commercial exploitation”;

2. the work cannot be obtained at a reasonable price; or

3. the copyright holder notifies the Register of Copyrights that the work is no longer being sold or made available on the market, BUT

4. the library or archives cannot give this copy to subsequent users, AND

5. this exemption does not apply to musical works, graphic or sculptural works, motion pictures, or other audio visual work unless that work is news-related.

FAQs:
Q: Can copyright holders renew copyright after it has expired?
A: Not anymore. The renewal process ended in 1978. Even then, however, once protection lapsed, the work stayed in the public domain.

Q: What records are available to help determine the copyright status of works?
A: The U.S. Copyright Office has records of copyrights that have been registered and renewed.

Copyright registration records are not complete for two reasons. Some copyrighted works were never registered, yet due to changes in the law, they later received automatic protection. Second, since March 1, 1989, registration is no longer required to secure copyright protection.

Renewal records can provide a definitive answer about works published after 1923 but before 1963, when renewals were required. However, records for works between 1923 and 1949 may not be digitized and are only available in the print Catalog of Copyright Entries (CCE). Larger academic libraries often have copies of the CCE. But renewals were automatic from 1964 to 1977, so you will not find renewals for this time period in any format.

Q: If copyright protection occurs immediately after a work is “fixed in a tangible medium,” how can one put the work in the public domain?
A: You must publish the work with a notice alerting users to its public domain status. Copyright holders can choose a term of copyright for their original works – perhaps the original term of 14 years. Holders can also publicize that certain rights of copyright are waived, for example, “As long as attributed to me, this work can be used without permission for non-profit and/or educational purposes.”

Q: Do you ever need to seek permission to use a public domain work?
A: If there are limited copies of the work or only one copy in existence, the owner of that physical work may charge a fee or ask that a license be signed to gain access to the work. The owner cannot claim copyright protection but does have property rights to the copy and may choose to control access and use of the work.

Q: Is it legal to publish public domain works and make money on their sale?
A: Yes, once material is in the public domain, it belongs to the public. Anyone may republish the materials. However, any new material added to the public domain material that meets the requirements for copyright protection – original and creative and fixed in a tangible medium — is protected by copyright.

Q: If a book is out-of-print, is it no longer protected by copyright?
A: Materials do not automatically lose their copyright protection once they go out-of-print. Out-of-print books ARE protected by copyright if their term of copyright has not expired.

2. (Peter Hirtle, “Recent Changes to the Copyright Law: Copyright Term Extension,” Archival Outlook (January/February 1999): 4.)