

The Public Domain

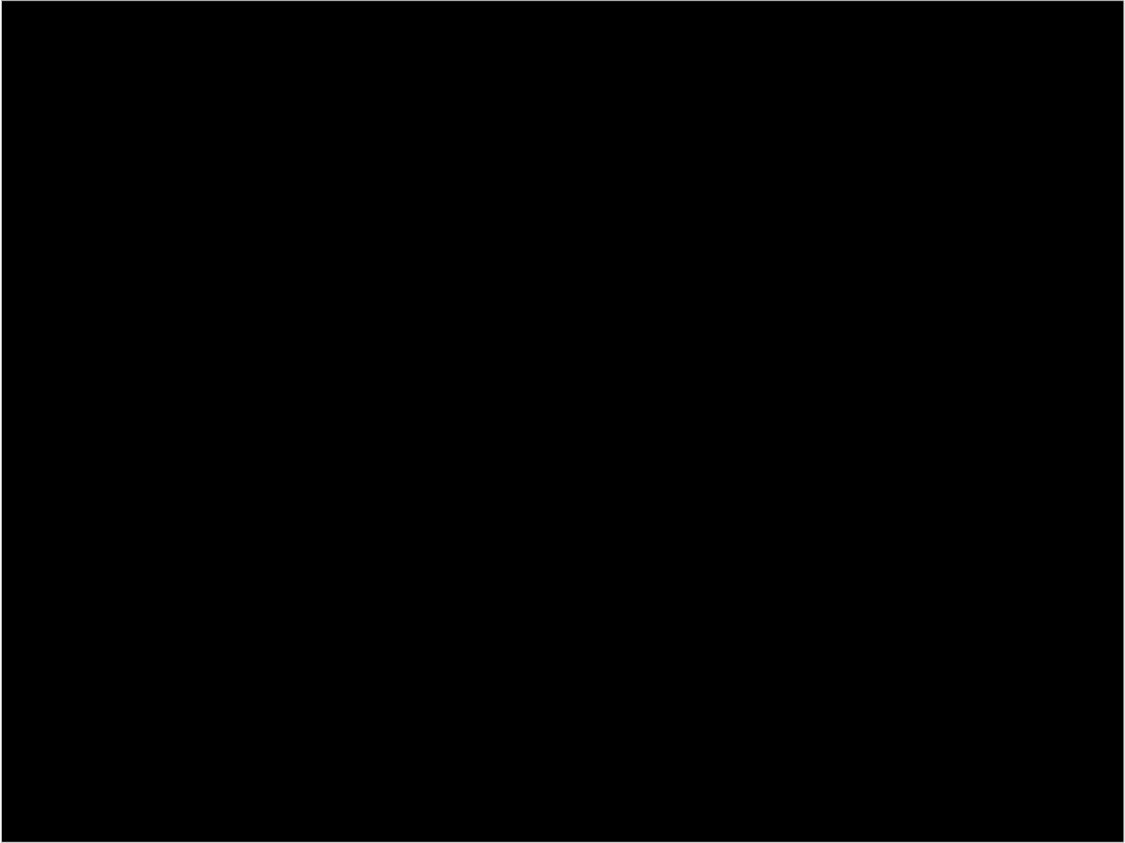
Neil Brown
neil@neilzone.co.uk

These are the slides I used for my talk on the public domain, as part of the Thames Valley branch of the Society for Computers and Law's inaugural session, on "the use of 'free'". As you'll see, I do not favour wordy slides, or bullet points, instead preferring to present, to talk, with just a minimum of supporting material. The notes I've added below each slide is probably a fair reflection of what I said on the night, based on research notes prepared beforehand, but, since I don't talk with notes, I cannot promise it is exactly the same material!

I would rather not own any rights in any aspect of these slides or note; I produced them because I wanted something to accompany my talk, and so was not reliant on the compact of copyright, and so do not feel I should be deserving of protection.

To this end, to the extent that I have any rights in any of the slides or notes here, I license these under CC0, the most permissive licence I know. Enjoy.

I'm more than happy to receive questions on anything contained in here, and will do my best to answer.



Most of the time when I talk about “Free”, I talk about open source software, about Linux and that kind of thing – but, tonight, I'm going to focus on something else – something which I think doesn't get enough coverage – so over the next 20 minutes or so, I'm going to talking about the concept of the public domain.

What is the public domain, then?

“The opposite of property”

James Boyle, I think, has proposed the best working definition of the public domain, and that's “the opposite of property”.

So, when one thinks of property as reserved rights, exclusive rights of exploitation, it's fair to think of the public domain as the antithesis of this – it's everything which is not restricted, without encumbrances and the like.

Freedom

In other words, it's everything which is Free – and that's “free” with a capital F – free as in Freedom. I couldn't charge you a royalty for use of something in the public domain – that would be non sequitur – but I could charge for giving you a copy of something in the public domain – charging for the distribution- Free as in freedom, not free as in price.

In fact, chances are you rely on the public domain every day – whether you realise it or not. The public domain holds the building blocks of knowledge – alphabets, equations and languages, ideas we build on every day.



It contains the giants on whose shoulders we stand.

It holds particular expressions – it holds the plays of Shakespeare, works of science, of literature, people's diaries, and records of historical events.

But, for those you who, like me, are fascinated by copyright, this gives rise to a question – and it's a deceptively simple question. If the public domain is the opposite of property, and holds everything that is Free, is copyright the exception or the norm?

Copyright: exception or norm?

Put differently, is copyright a temporary suspension of the public domain, or is the public domain the final resting place of a copyright work, when the copyrightness has run out?

Copyright: exception

Copyright



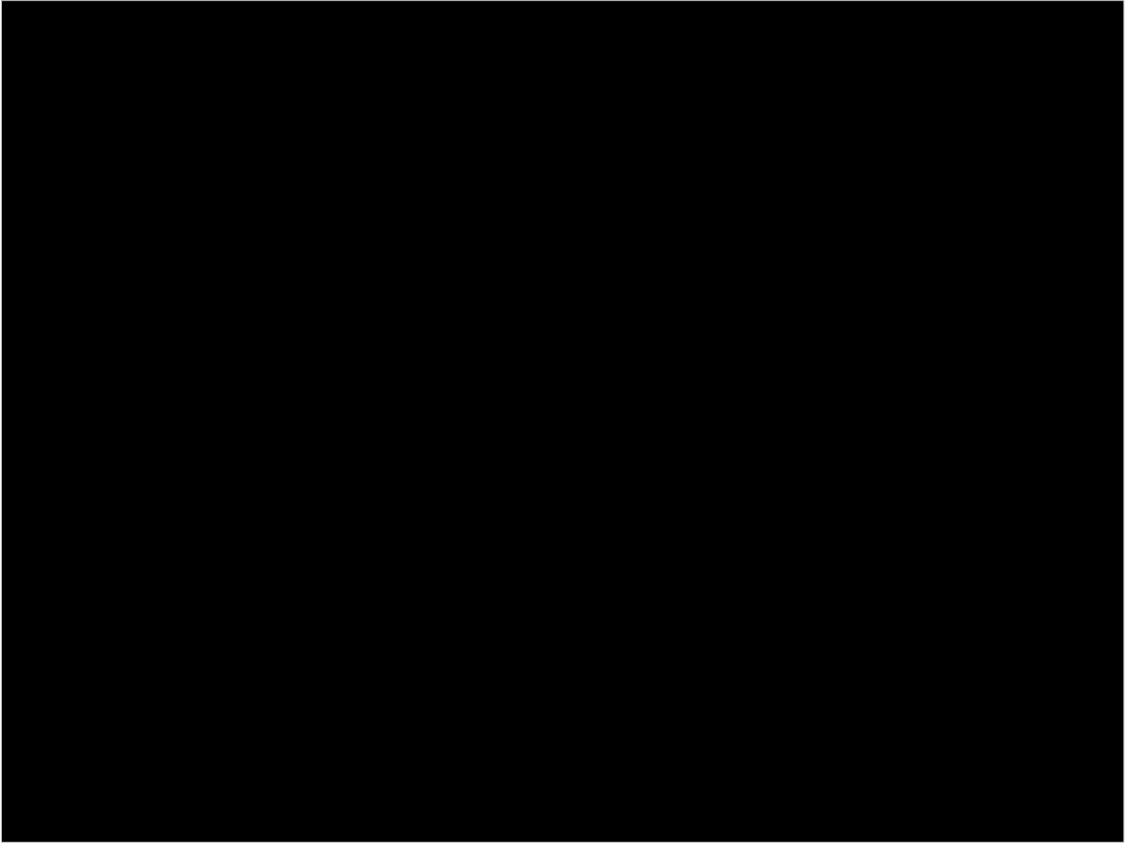
Public domain

Is it this?

Copyright: norm

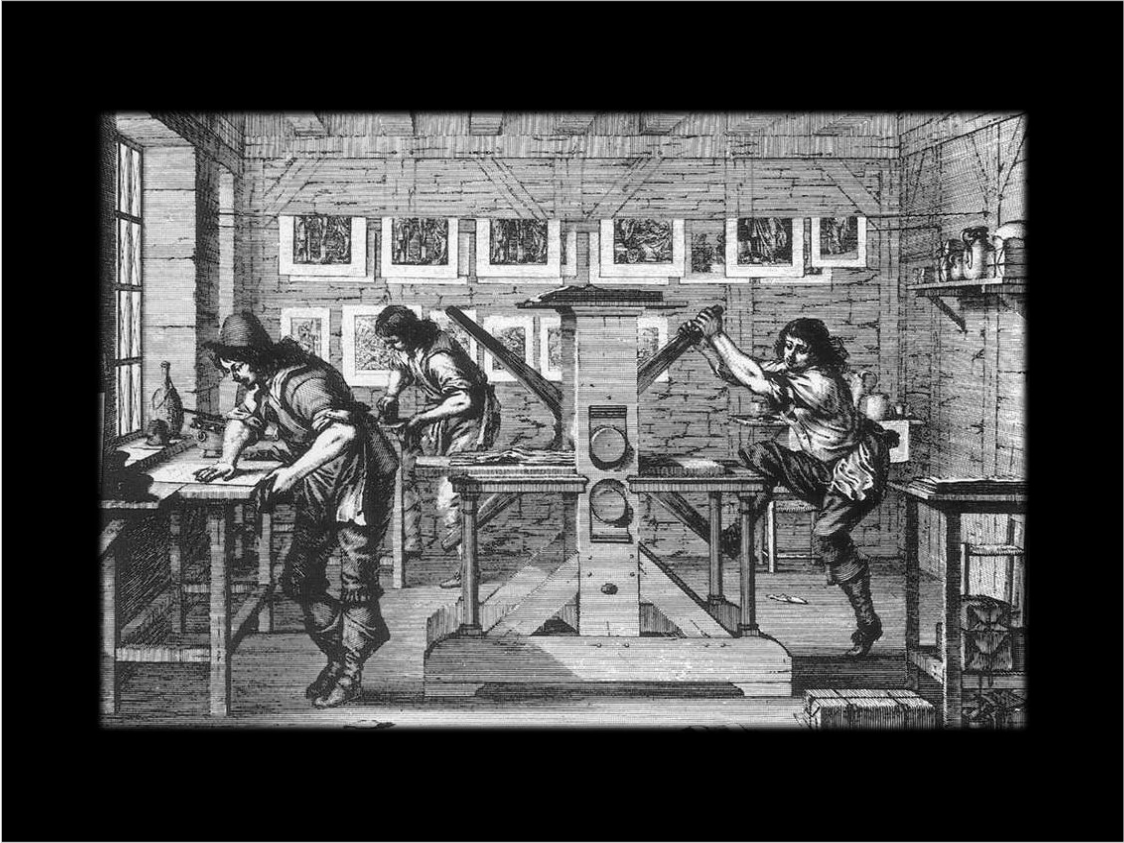


Or is it this?



Today, copyright is a creature of statute – of positive, enacted law. The rules of copyright are those rules set down in various international treaties, conventions, directives, acts of Parliament. But what if they were not there? If we had no legislation? Where would we be?

Would we have the public domain, where everything is free, where there is no property, or would everything be property, would everything be owned even without legislation – a common law copyright.



And this issue has been thrashed about for many years – so we're going to have to go back a bit in time – back to the 18th century, to the time of the booksellers, and printing. In the mind of some printers back then, there was one thing killing printing as a livelihood – and that was printing. Printing, they argued, by unauthorised printers – by printers without the rights to print the books in question.

Parliament had enacted the first copyright statute in 1709, which gave ownership of literary works to their authors – the Copyright Act talks clearly in terms of property rights, something I'll come back to, and these rights were reserved for the enjoyment and exploitation of the authors. This was a change of control – a shift in power from printers and booksellers, to authors. And the Copyright Act 1709 reserved these rights to the authors for a fixed period of time – 14 or 21 years, depending on whether the book in question had already been published.

So our one question has multiplied into two – what was the situation before the Copyright Act 1709 – was there a common law copyright then – and what was the situation after the Copyright Act 1709 – had all the rights in a book fallen away, such that it was in the public domain, or was there a common law copyright still protecting the book?

Millar v. Taylor

And in 1769, a decision was reached on the issue- Andrew Millar, a bookseller who had purchased the publishing rights to a poem years earlier, was suing Robert Taylor, another printer, who had printed copies of the poem (*The Seasons*). Millar's argument was not that he had rights under the Copyright Act, because those rights has expired, but that he had a common law copyright, which protected him against Taylor's actions. And in a 3:1 majority, the court held in favour of Millar – it held that there was a common law copyright, and that it prevented Taylor from republishing the poem.

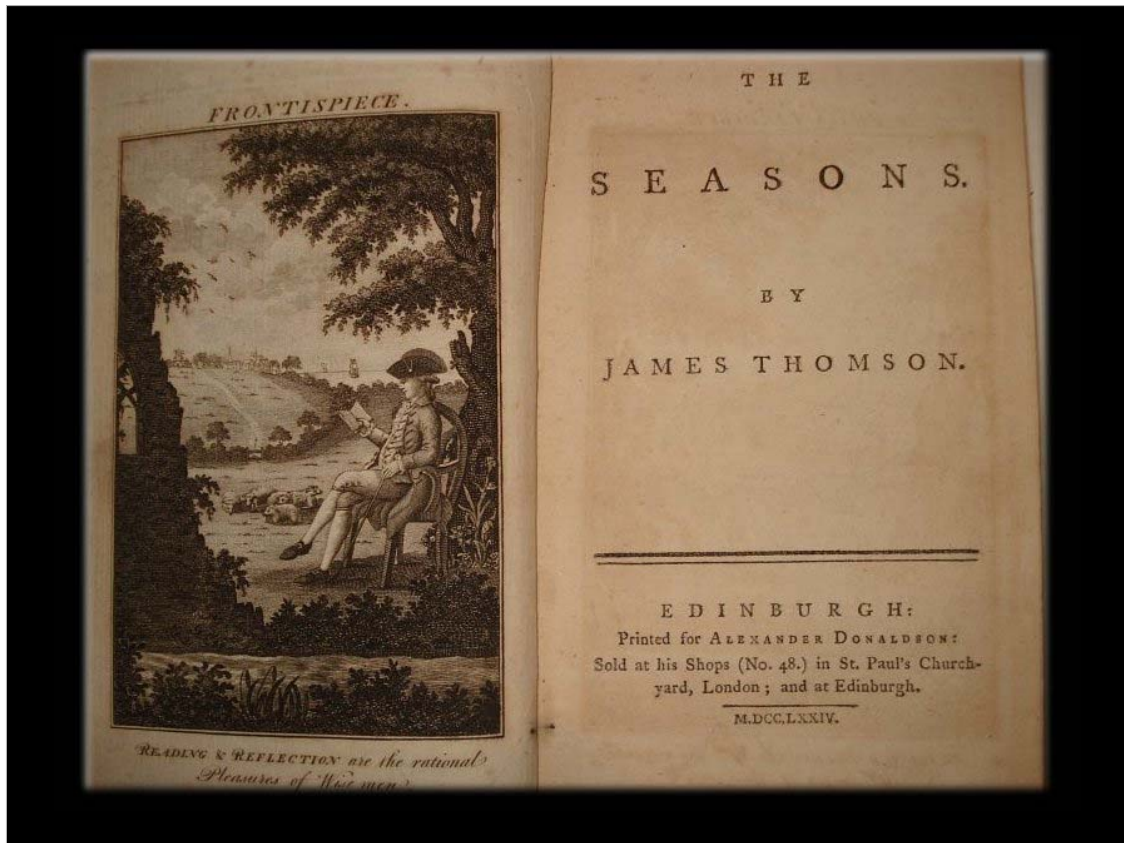
[This certainly was not the first case on the matter – *Tonson v. Collins* predated *Millar v. Taylor*, but the court never gave a judgment in *Tonson*, because it found out that the litigation was being sponsored by the booksellers – both side of the litigation.]

See! Winter comes, to rule the varied
Sullen, and sad; with all his rising Train
Vapours, and Clouds, and Storms: Be
These, that exalt the Soul to solemn Thought
And heavenly musing. Welcome kindly
Wish'd, wint'ry, Horrors, hail! -- With freedom
Pleas'd, have I, in my cheerful Morn of
When, nurs'd by careless Solitude, I liv'd
And sung of Nature with unceasing Joy
Pleas'd, have I wander'd thro' your rough
Trode the pure, virgin, Snows, my self alone
Heard the Winds roar, and the big Torrents
Or seen the deep, fermenting, Tempest
In the red, evening, Sky. -- Thus pass'd
Till, thro' the opening Chambers of the

Perpetual copyright?

This was a major victory for the booksellers – that despite copyright legislation lasting only twenty or so years, they had a perpetual right. On the basis of *Millar v. Taylor*, then, the public domain didn't exist – nothing ever entered the public domain.

The decision of *Hinton v. Donaldson*, in Scotland, rejected this notion, and held that, in Scotland, there was no common law copyright. So that left the position that there was common law copyright in England, but not in Scotland.



But the matter didn't end there. The Donaldson brothers (of *Hinton v. Donaldson*), brought another case, involving the same poem as in *Millar v. Taylor*, and, perhaps unsurprisingly, on the precedent of *Millar v. Taylor*, an injunction was granted.

(Beckett, by the way, had been Andrew Millar's apprentice – fundamental copyright law proves rather incestuous!)

Donaldson v. Beckett

And so the Donaldsons appealed this. However, before we can dig into the judgment of Donaldson, we need to understand that the House of Lords in 1774 was a different creature to the Supreme Court of today.

But first...

The House of Lords, back then in 1774, was the supreme appellate court, but it operated differently to the Supreme Court today – as well as arguments of counsel on each side, the judges of King's Bench, Common Pleas and the Exchequer were asked to give their opinions, being experts in the law, and the Lords gave their judgment based on everything they'd heard.



Similarly, the building was different too – the Palace of Westminster existed in 1774, but looked different to that which stands today, since it was burned down in the early 1800s. Unfortunately, whilst there are plenty of images of the old Palace of Westminster, which have, of course, fallen into the public domain, the photographs of those images have not fallen into the public domain yet – and, because I cannot find an image which is permissively licensed, I can't show the old Palace tonight – instead, you'll have to make do with a modern image which has been modified! I'll come back to the notion of copyright in photographs of public domain works later, along with some other risks to the public domain.

Donaldson v. Beckett

And so the Donaldsons appealed this. The House of Lords, back then in 1774, was the supreme appellate court, but it operated differently to the Supreme Court today – as well as arguments of counsel on each side, the judges of King's Bench, Common Pleas and the Exchequer were asked to give their opinions, being experts in the law, and the Lords gave their judgment based on everything they'd heard.

So, first of all, the 12 judges gave their opinions. Hindsight is a wonderful thing, and, with the benefit of hindsight, it would have been great if the decisions had been reported a little more clearly, and in a little more detail. You see, these 12 judges were asked five questions, and a vote was held on each of them. There are not always 12 responses to these questions. And, where there are responses, there's been considerable debate as to whether the reporter actually got the numbers right – whether a question was even decided one way or another.

First question: was there a common law copyright: 8:3 in favour

Second question: did the Copyright Act 1709 take away this common law copyright - and it's reported 7:4 against.

So there was common law copyright, and the act had not removed it.

Thirdly, and critically: even if there was common law copyright, and it was not abolished by the Act, did the existence of the act mean that the only remedies available were those provided by the act?

There are only eleven votes recorded for this question – 6 held one way, and 5 the other. Whilst the official record shows that the majority were in favour of the position that the act replaced the remedies of common law copyright, it's been argued that it was actually the other way round.

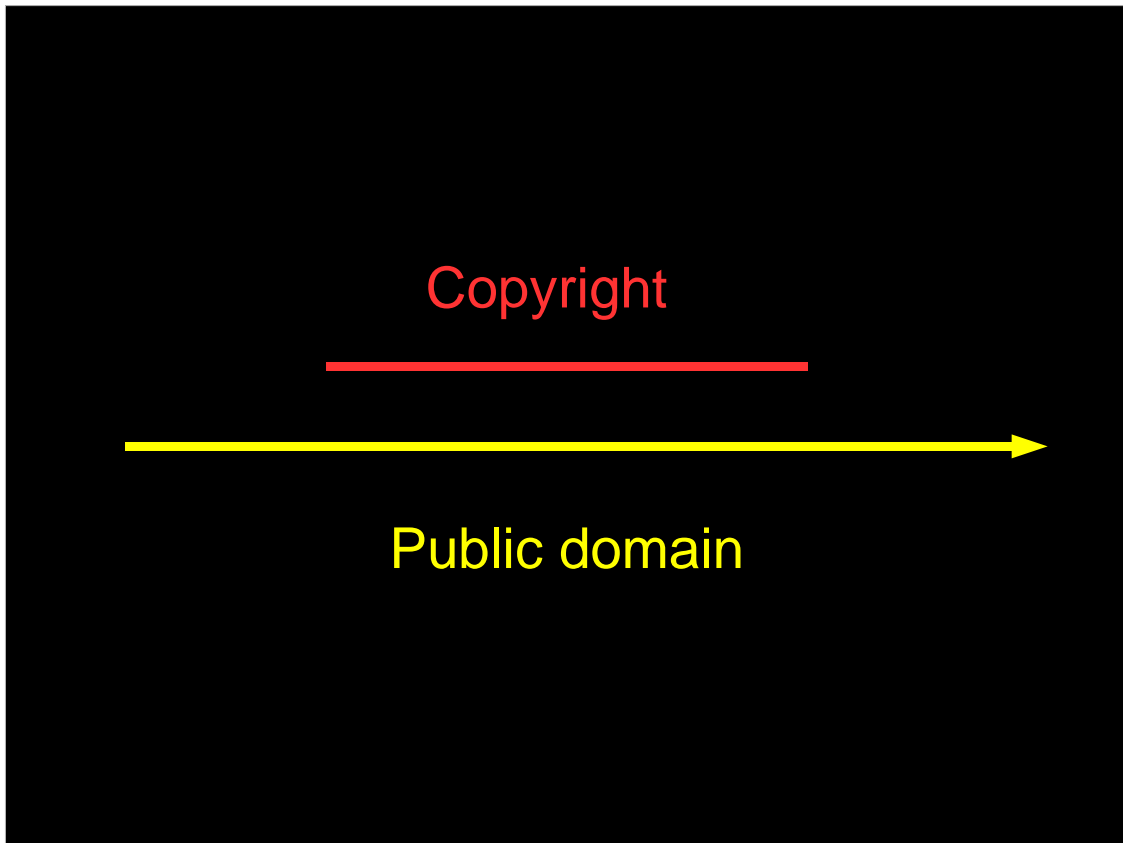
The conclusion of the judges, then, was that the injunction against Donaldson should be reversed.



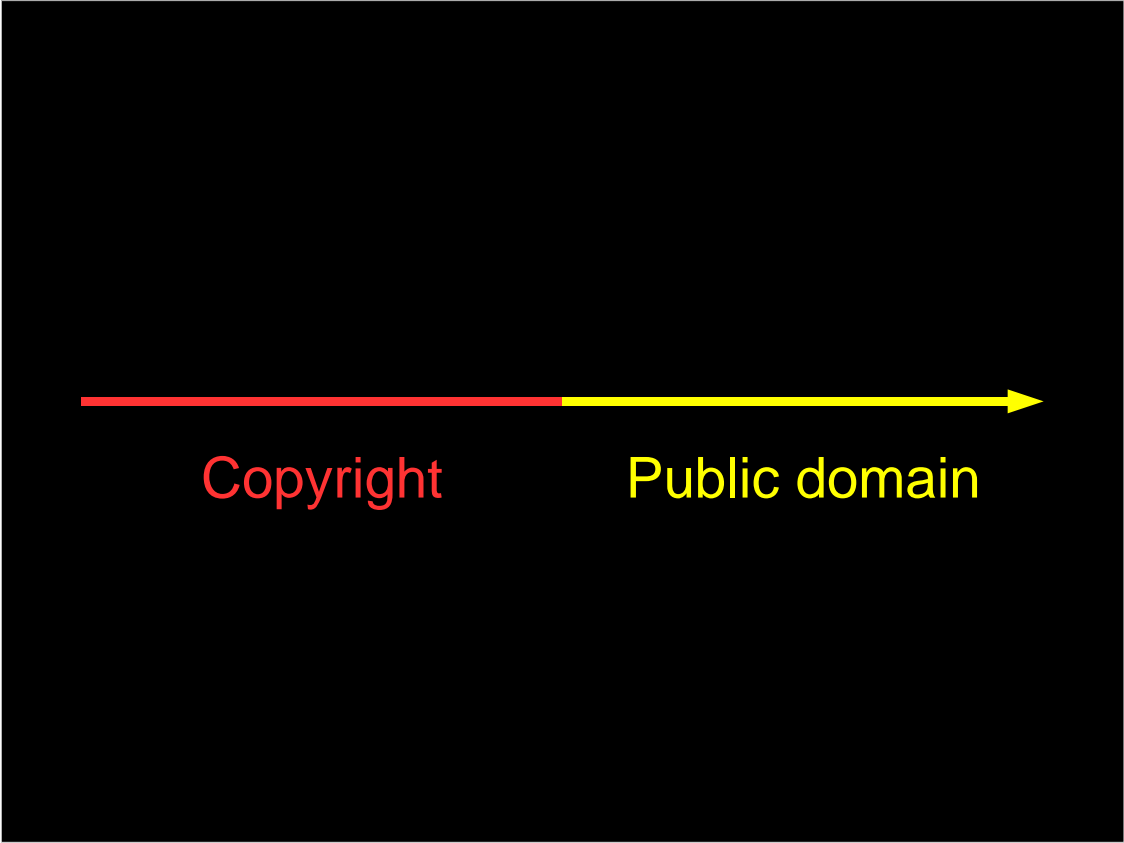
And then it was the turn of the Lords – and, 4 to 1, they spoke in favour of the motion to reverse the injunction.

So the conclusion was the same – that the injunction should be reversed. However, it's not entirely clear whether the Lords held that common law copyright no longer applied, or that it had never applied – unfortunately, the confusion in the reporting makes even this hard to determine.

So even if we conclude that the public domain, then, is the opposite of property, and that, after 1709, there was a public domain, we're not any clearer on whether there was a public domain prior to that.



We know that after the Copyright Act 1709, there was no common law copyright, but we are only marginally better informed as to whether there might have been a common law copyright prior to the Act.



Copyright

Public domain

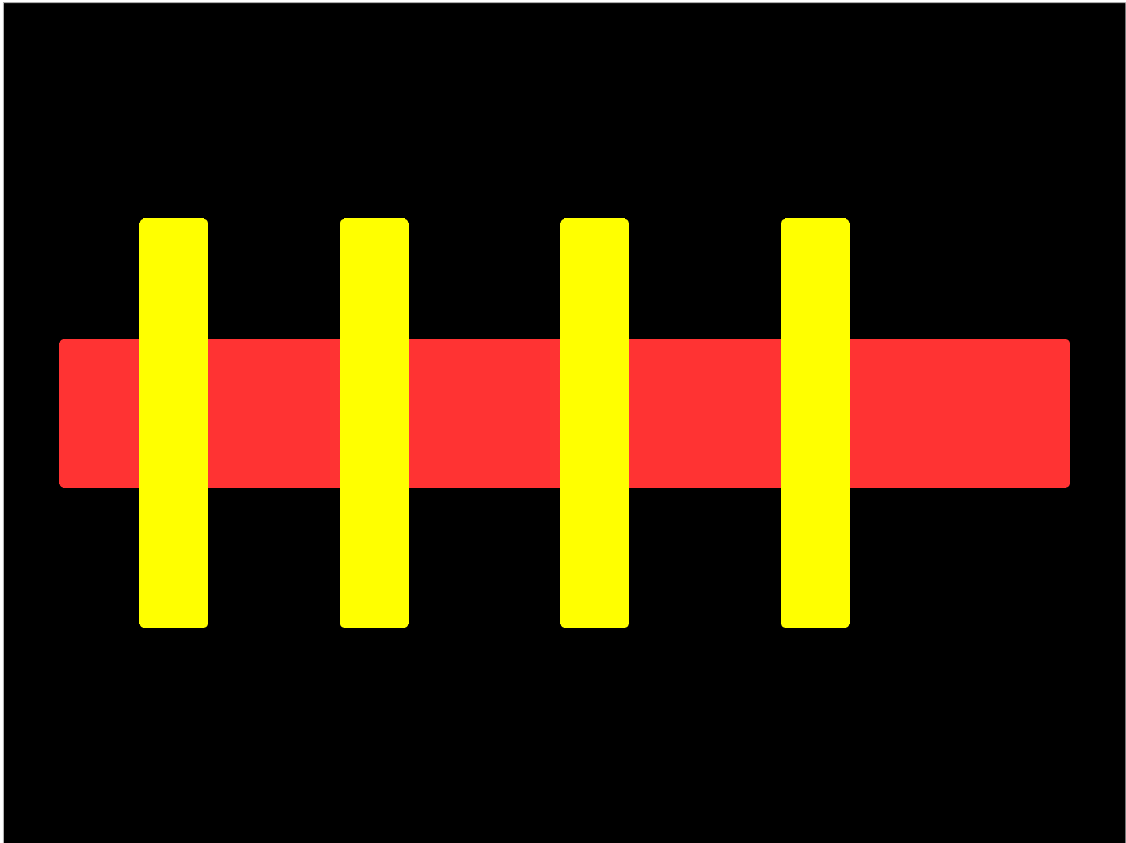
No common law copyright
(perhaps)

What is in the public domain?

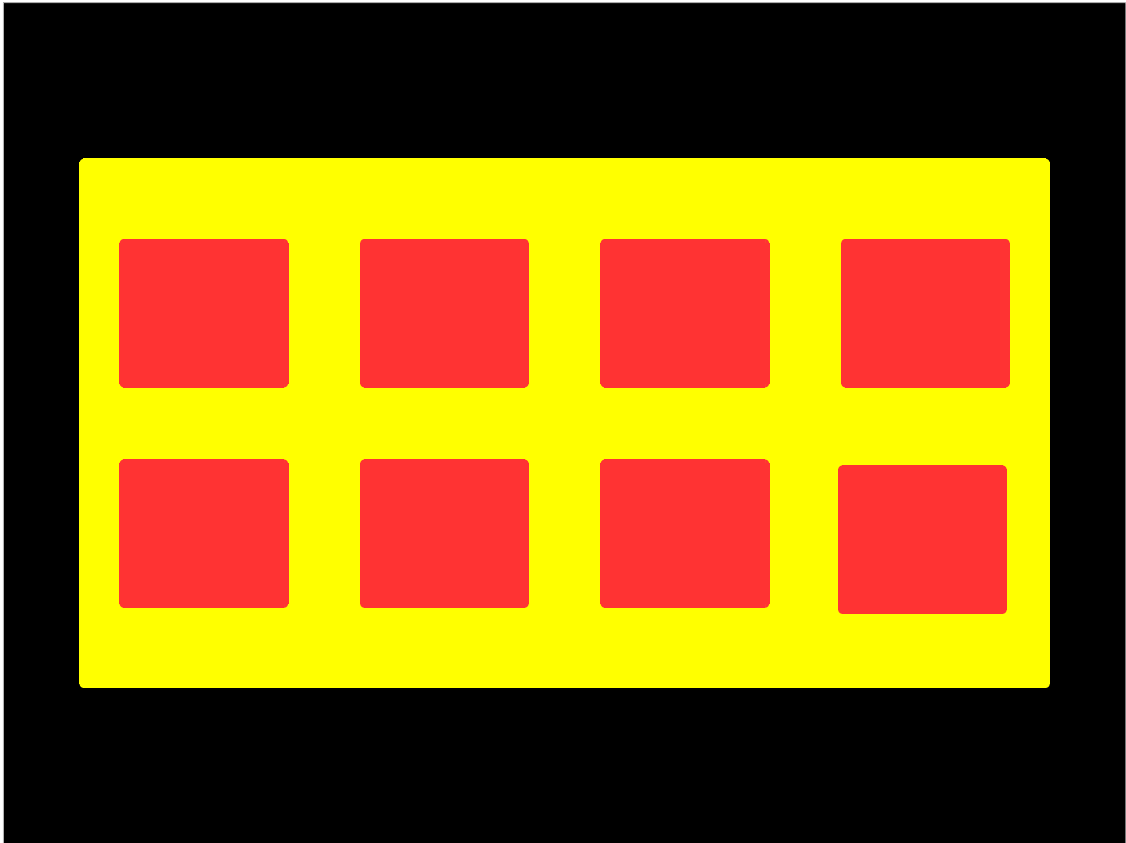
Having considered the notion of the public domain, and determined that, at least since 1709, works eligible for copyright protection passed into the public domain on the expiry of their term of protection, what else comprises the public domain?

And there are a number of methods.

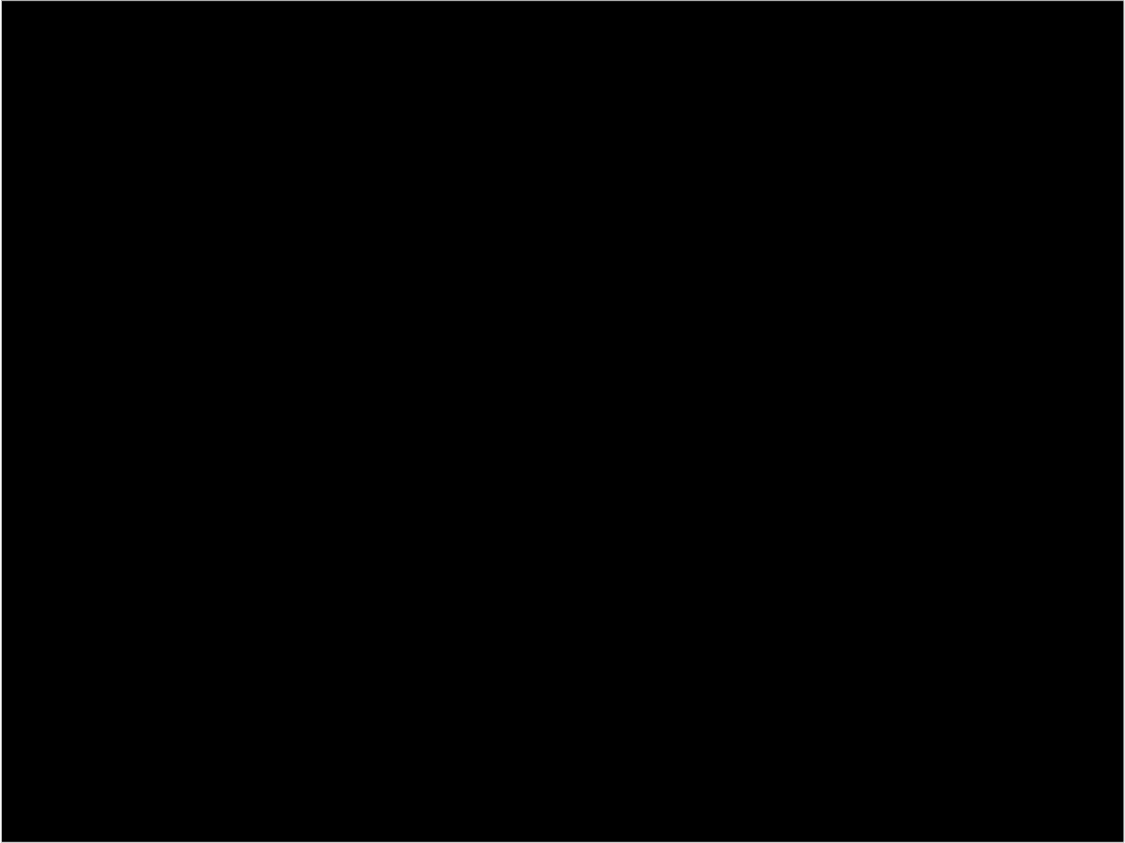
Things which were never subject to copyright- trivialities, unworthy of protection, anything fell outside the ambit of copyright law (and patents, and trade marks). So we have that which was never protected, and, as we've seen from the cases, once the term of protection of something has expired, that enters the public domain.



How about permitted uses – acts which are permitted, even though in respect of copyright works. Again, we have an issue of semantics – do we have a situation in which every aspect of a copyright work is protected, with permitted acts positively carving out of this



or do we have the situation in which everything is already in the public domain, excluding those acts which are not permitted.



Things which are outside copyright, things which were protected by now are not, and rights in respect of things which are currently protected.

But what if I, as a copyright owner, wanted to place something in the public domain? Can I do that?

Disclaiming copyright?

This is another one of those questions which makes me realise why I enjoy the study of law.

To get to the answer, one needs to consider two particular vagaries of English law:

Firstly, the nature of copyright, and
Secondly, that all property must have an owner

Looking first at the nature of copyright, Art. 5 of the Berne Convention establishes that, for modern day copyright, the rights of the author are guaranteed, and that the enjoyment and the exercise of these rights shall not be subject to any formality.

Because it is not subject to any formality, anything which falls within the ambit of copyright protection is actually protected by copyright. There's no choice in the matter – no opt in, or opt out - if it satisfies the requirements, it's grasped within the copyright regime, and it's protected. Or restricted.

So we know that copyright applies automatically, without formality. But what is a copyright? Copyright is reservation of rights in a work to someone – in the first case, the author. It's not ownership of the underlying work, but rather ownership of a right over that work – the work is the subject of an ownership right, not owned itself. It's the copyright which is owned. And that copyright is a proprietary right – it is a right of property.

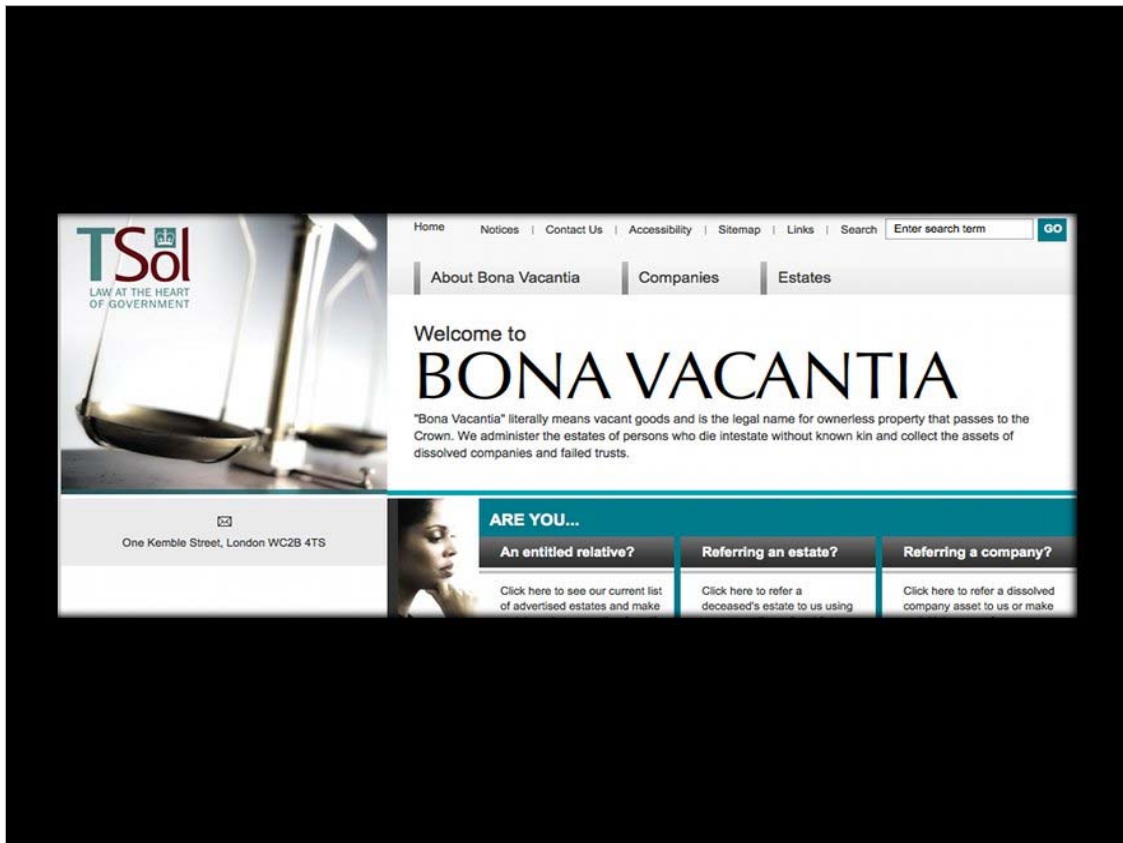
If we look back at Copyright Act 1709, it talks about “right and liberty”, and “property to be secured to the proprietor”.

Recital 9 to directive 2001/29/EC states that “Intellectual Property has therefore been recognised as an integral part of property.”

And finally the European Charter of Fundamental Rights deals with the right to property in Article 17, and the second paragraph of the article states that “Intellectual Property shall be protected.”

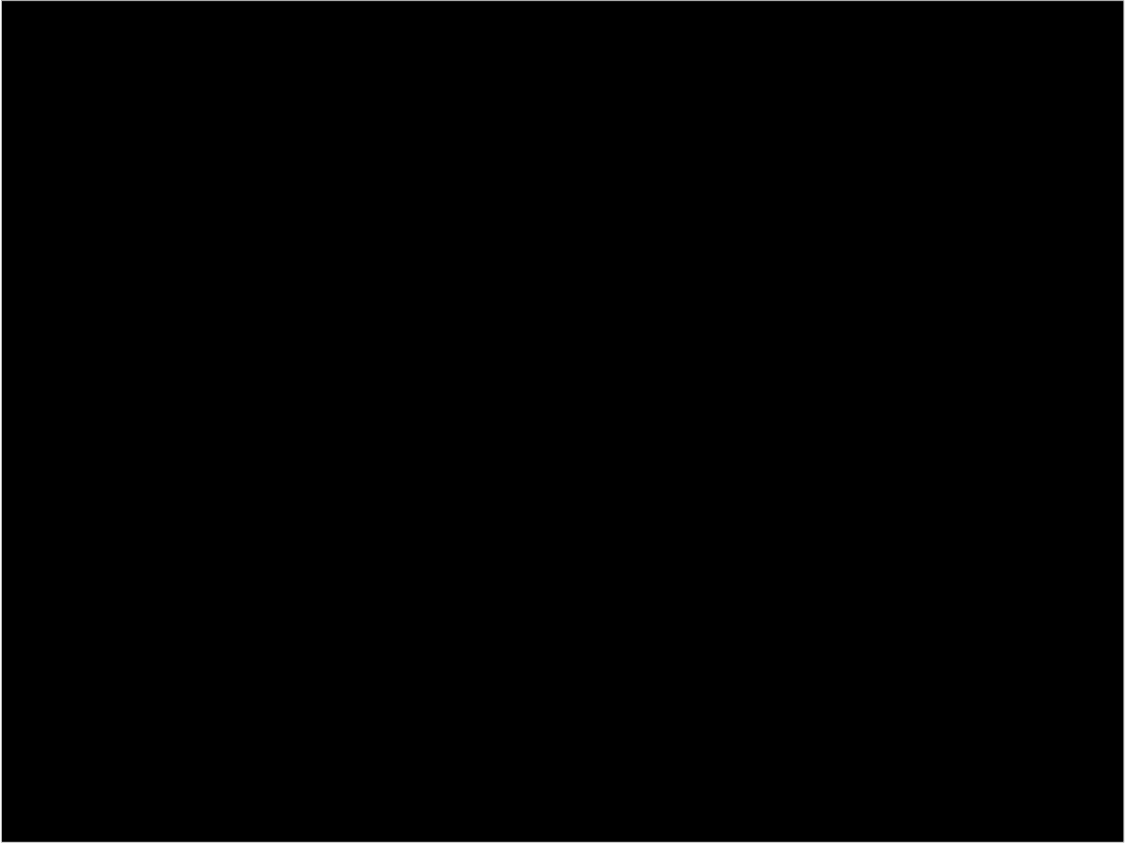
Copyright does not last forever, but, for as long as copyright exists, it is a property right, and one which arises automatically.

Whether you think that's right or wrong – whether copyright – to the extent that you agree with copyright at all – should be a property right, the question is: what is the impact of copyright being a property right?



And that's the second vagary of English law.

Under English law, all property must have an owner – the title to a beneficial interest must be vested in someone. There's a body of law in place to deal with the ownership of property by someone who dies intestate, or where a company is liquidated – reversion via *bona vacantia* to the Crown; we've previously had escheats, based on the system of feudal tenure.



And so we get to the position where, if I create something which could fall within the ambit of the copyright regime:

- a.) It **is** subject to that copyright regime – copyright is forced upon me; and
- b.) I can't get rid of that copyright – I can assign it – I can move it elsewhere; I can license it – give others the right to use it – but I can't remove that copyright altogether.



So we have the situation in which, if something falls within the ambit of copyright, I cannot place it in the public domain. My work – my writing – and I can't get rid of it. Instead, I have to wait – perhaps 70 years from my death. And that's a long time to wait. If someone wants true public good – that something that they have written to benefit the whole of the public – copyright actually works to prevent this, in the name of the public good.

Protecting the public domain

The public domain, then – a massively rich, and hugely wealthy resource – the nirvana of information and idea sharing. And, sadly, something that is hugely overlooked. Whenever we grant new rights to copyright owners, whenever we expand copyright, we actually diminish the public domain, we take something away from all of us. So if the public domain is the opposite of property, we still need to treat it with the same care as we do with property, if we wish to preserve it.

Unfortunately, I do not have time tonight to discuss the concept of technological protection measures – often casually referred to as “TPMs”, which sounds much softer and less harmful – and the impact which these can have on the public domain, particularly when considered in conjunction of rights which are not restricted by copyright. Suffice to say, under English law, if a technological protection measure impinges further than acts restricted by copyright, you are not entitled to breach the digital barbed wire, as James Boyle refers to such measures – instead, you can write to the Secretary of State, and ask for assistance.

We looked earlier at a photograph of the modern day Palace of Westminster – we had to, because I could not find a permissively licensed image of the old Palace of Westminster. Even though the images of the old Palace ceased to be protected by copyright many years ago, the photographs of the images – the photographs which are online today – are still protected by copyright. With a standard of originality so low, a photograph can assume protection of its own right, irrespective of the underlying image (i.e. The subject of the photograph.)



Perhaps the most widely-discussed example of this are the images collated by the National Portrait Gallery. The gallery has spent a considerable sum of money photographing the many wonderful works in its collection, making the resulting database of images and accompanying data available online. “Wonderful” I (and probably many others thought) – we can get hold of these old paintings in the digital age.

The Gallery, however, has not placed the images under a permissive licence, instead opting for a royalty-bearing licence. And there is a fair chance that the copyright in the photographs of the works will last for longer than that in the underlying works!

Should the gallery be entitled to recover the cost of its investment in digitising the images, which will, one day, perhaps, hopefully, enter the public domain of their own right, or should the public domain be protected, by not granting copyright protection to mere images of works in the public domain? Or would that mean fewer works were digitised and made available, if it were not possible to use copyright-based mechanisms of control? If the rationale for copyright is to encourage the expenditure of time, effort and money on the creation of new works, for the benefit of the public, does this, or does this not, cover the situation here?

The Register

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National Portrait Gallery bitchslaps Wikipedia
Hands off our photos!



However you might view the National Portrait Gallery situation, this sign, at Monkey World, in Dorset, amused me more.

This sign is displayed prominently after entering Monkey World – after you've paid for a ticket and been granted entry.

And, yes, it attempts to indicate that monkeys have image rights. Now, it's questionable enough whether there should be image rights for humans, so rights for monkeys is rather a considerable stretch. And, whilst I laughed and took the photograph, I was also somewhat annoyed – by attempting to place an image right on a monkey, to prohibit the commercialisation of a photograph I might take of a monkey scratching his bits, for example, Monkey World is actually seeking to carve something out of the public – to impose rights (through “intellectual property”, not through contract), on something which is otherwise unprotected.

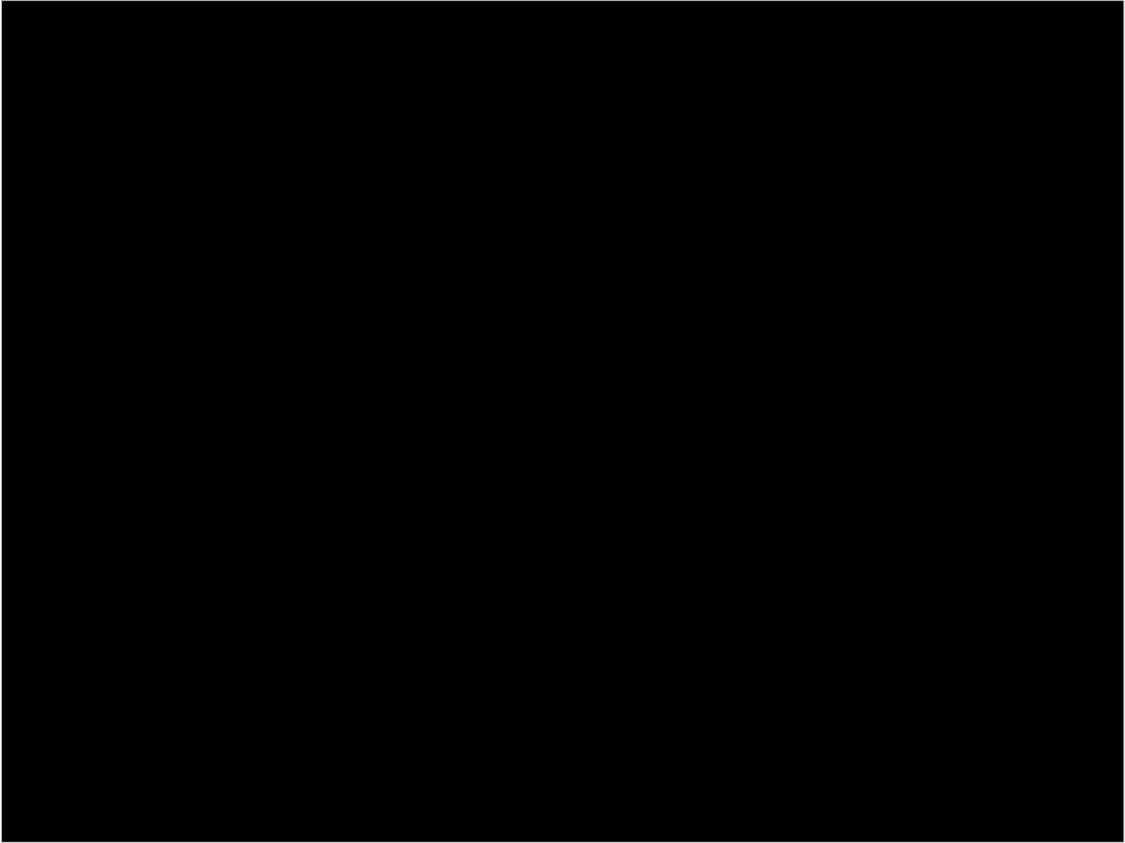
If we want a thriving public domain, we need to be on our guard against restrictions such as this – if the restriction were embedded in a contractual term, then, whilst still not desirable, it would have likely bothered me less. The public domain embodies freedom - the opposite of property – and so attempts to capture and restrict that freedom should be monitored, else the public domain will gradually diminish.

Public v. permissive

The last thing I want to touch on – very briefly, is that if the public domain can be construed as “the opposite of property”, and is the embodiment of information which can be freely used, without any restrictions, because it is not capable of being the property of anyone, what's the difference between the public domain, and a very permissive licence.

In practice, if one imagines the widest possible licence, perhaps there is no difference, in terms of end result – unfettered rights of use. And that's exactly what one particular licence sets out to do - that's the Creative Commons Zero licence, the “CC0” - sets out to get as close to the public domain as possible, but as a licence.

But if we take a step back, and look at more than just the end result, there's a substantial difference. The public domain - the opposite of property – is the absence of ownership. Simply, there are no rights reserved, nothing owned by anyone, and so there is nothing to license. A permissive licence, on the other hand, only works because there is something to be licensed – there is right which is capable of being licensed. Fundamentally, then, the difference is there being a right to license, and there being no right to license. Same end effect, but very different creatures.



And so, on that thought, I end for tonight. The public domain is a fascinating construct, and I've shared with you tonight just the bare bones of my thoughts on the subject – compared with the writings about copyright more generally, discussion about the public domain is relatively sparse, but there is certainly material out there for anyone interested in the subject.

If I leave you with one thought from tonight, it would be that freedom is not something which can defend itself – if we wish to benefit from the freedoms of the public domain, such that each of us can stand on the shoulders of the giants who have gone before us, and continue to create and innovate on the knowledge of the past, we should be watchful against the incursions of copyright, image rights and other “intellectual property” rights on the public domain.