

Practice Update

Public Domain Full of Mousetraps After Steamboat Willie

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The expiration of the 95-year copyright for Disney's first Mickey Mouse from Steamboat Willie marked a momentous day in IP history.[1] It also shines a spotlight on the public domain, and the inescapable fact that, as time passes, the owners of rights afforded to deceased artists and authors, and even living inventors, cannot prevent the commercialization of elapsed IP. Disney's loss of the ownership of Mickey Mouse has already opened the door to *Mickey's Mouse Trap*, a slasher film coming out this year.[2]

Outside of Steamboat Willie, a vast amount of unprotected resources exists, including inventions, literary works, music, and film ripe for copying and building upon. However, the public domain comes with risk if not used correctly.

The question then is how to use public domain resources without stepping in an IP trap.

What Is the Public Domain?

For works in the public domain, the IP may have expired, been forfeited, expressly waived, intentionally abandoned, or was never protectable in the first place. Because IP rights vary by jurisdiction, a work may be subject to protection in one country and treated as public domain in another.

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The expiration of famous works best illustrates the public domain's core. Today, songs and musical works published before 1929 are in the public domain as there can be no copyright protection by law. This includes millions of musical works, defined as underlying compositions along with lyrics, making pieces from musical artists from Irving Berlin to Ludwig van Beethoven available. Sound recordings — the musical, spoken, or other sounds fixed in a recording medium — are available if released before 1924.

Similarly, works published in 1925, considered the “greatest year for books,” are in the public domain, including *The Great Gatsby* — a sequel was published immediately upon its expiration. Winnie-the-Pooh expired in 2022, which brought us another slasher film, *Winnie-the-Pooh: Blood and Honey*.

Any patented invention filed more than 20 years ago is public domain technology. In the 80s and 90s, Floyd Rose made millions off his patented original double-locking tremolo made famous by the late guitar god Eddie Van Halen. That invention — one of rock's greatest — is now in the public domain spurning cheap foreign-made knockoffs.

The public domain also includes creative ideas deemed unprotectable because they are too important to the public. For example, individual food recipes cannot be protected once public. It is better to keep your “secret sauce” secret as Coca-Cola and Kentucky Fried Chicken have successfully done for decades. Yet cookbooks are protectable. Clothing producers cannot protect basic apparel because clothing serves a utilitarian purpose to the public. Instead, fashion designers prevent knockoffs through trademarks like Nike's swoosh symbol and Louis Vuitton's Toile Monogram design. Also, sewing patterns and fabric designs are copyrightable.

Proper Use of Public Domain Materials

Public domain works can be freely copied, distributed, displayed, and transformed into derivative works. For instance, filmmakers may reprint or adapt the works of Charles Dickens to the screen. Films made before 1929 may be shown for profit. A collection of public domain images can be compiled into a book or displayed on a website. Because Van Gogh's works are in the public domain, there are immersive experiences featuring the artist. The plays of William Shakespeare remain relevant because they have inspired hundreds of films. These are all permissible uses.

However, a work's copyright expiration does not extinguish any subsisting rights that the owner may maintain in that same work. Trademark rights do not necessarily expire so long as the work is continuously used as a trademark. To return to *Steamboat Willie*, we are free to build upon it as *Mickey's Mouse Trap* has done, but you cannot use that Mickey in a way that misleads consumers into thinking your work is produced or sponsored by Disney. One good practice is to include a prominent disclaimer that your work was not created, endorsed, licensed, or approved by the applicable trademark. Another is to steer clear of offering products that are the trademark owner's official merchandise — for instance, Disney mouse hats and other similarly iconic apparel.

Moreover, avoid using new, copyrightable versions of the public domain work until those copyrights expire. For another decade, you cannot use Fantasia's Mickey from 1940. And watch out for different copyrights on the same work. The nursery rhyme "Mary Had a Little Lamb" is public domain, but the popular kids' streaming show *Cocomelon's* sound recording of the song is not.

For inventions, unless you stay at the state of the art that existed 20 or more years ago, you may risk patent infringement. For example, Leonardo da Vinci's catapult invention is legitimately reproduced by numerous sellers of educational toys on Amazon.

However, you cannot find one with an iPhone interface because of the IP risks and contractual obstacles that arise with the use of such technology.

Takeaways

It may seem like IP registration dates are all that one needs to know before setting out to create and market a new derivative work or product, but in reality it's much more complex. For one thing, there is no central public domain repository, and the disparate existing sources will only guarantee public domain status if the work is clearly outside the period of enforceable IP rights. For instance, movies within the public domain still contain underlying copyrightable elements, such as cinematography, musical soundtrack, art, drama, literature, animated characters (e.g., Jessica Rabbit), and fictional characters (e.g., Indiana Jones), each of which must be examined for public domain status. A book or website collection presents problems because even though the individual items within the collection are public domain, the collection is not.

Those in the tech industry should know that any product that touches upon the state of the art as it has existed in the past two decades requires a thorough review of the patent landscape. Patent law is complex, and one must navigate through tens, if not hundreds, of unexpired patents that may block your business objectives.

It can be quite challenging to determine if a work is truly in the public domain. Performing proper due diligence and obtaining a formal legal opinion on “freedom to operate” can provide the proper foundation for building on existing intellectual property.

[1] Each year on January 1, a.k.a., Public Domain Day, a collection of copyrighted work loses its protected status and enters the public domain.

[2] A trailer for the movie can be found at <https://www.youtube.com/watch?v=jVjt52sOs6g>. As evident from the thousands of comments, the notoriety around Disney's copyright expiration likely helped the marketing of this film.

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