



What this research is about

*To create value from the copyright public domain,
we first need a clear understanding of what it is.*

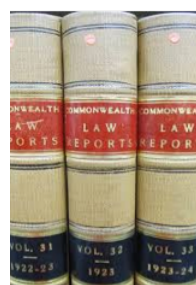
- A. **Value** of © public domain (to a country)
- B. **Definition** of the © 'public domain' & 'public rights'
- C. The **categories** of public rights (in a country)
- D. Is there a **global** public domain?
- E. What **constrains and supports** the public domain?
- F. What are the **purposes** of public rights in the 21st Century?
- G. What **practical use** is a public domain theory?

[A] Value of the © public domain to Australia, a 90% cultural importer



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These all involve the public's ability to use works in which © owners have some exclusive rights, and to build business models around that.

[B] Defining ... what?

Commons ... copyleft ... user rights ... free access ... peer production ... open source ... public rights ... copyright exceptions ... open access ... free and open source software (FOSS) ... public domain ... Creative Commons ... open access to knowledge (OAK) ... free culture ... open {anything} ... information environmentalism ... a place where they have to let you come in and dance ...

Defining 'public rights' and the 'public domain'

- By 2000 many IP and IT law scholars took an expansive view of the 'public domain'
 - Agreed it was no longer just works in which © had expired
 - Lange, Lipman, Boyle, Benkler, Lessig etc (mainly USA)
 - Wanted to assert the positive value of aspects of © other than proprietary rights
 - Some agreed on the core element of a definition, but did not finalise it or elaborate what it covered
- *Those supporting the © public domain usually don't define it – no comprehensive definition exists*
 - Common elements should be definable if it is a concept of use
 - Assists its advocates define and justify what they support

Definition of 'public domain'

- **Brief definition:** The public's ability to use works (on equal terms) without seeking prior permission.
- **Full definition:** The '**public domain**', in relation to ©, is the ability of members of the public (including a significant class of the public) to use works without obtaining a licence the terms of which are set (or changeable) by a © owner. Any licences must pre-exist, with terms set by a neutral party. Use must be on the same terms (including costs, if any) as other members of the public (or class)
- **Antecedents:** Littman, Boyle, Lessig & Deazley all use *lack of permission* as their key element of the PD
 - but without a definition capturing its complexities

Definition of ‘public rights’

- **‘Public rights’ (PR)** are the logically distinct components/categories of a public domain (PD)
 - Each must satisfy the public domain definition
 - Each must be distinct from the others
 - They are **the PD equivalents of ‘exclusive rights of the © owner’**
 - The public domain (PD) is the sum of these public rights (PR)
- The definitions of PD and PR may be universal but **their content is jurisdiction-specific**
 - PDs and PRs are essentially jurisdictional/national in content
 - Which PR are significant, or have any content, differs widely between jurisdictions
- PD and PR are **descriptive**, not normative, terms
 - Answers ‘What does Australia’s public domain now contain?’
 - Not ‘what should it contain?’

[C] 15 categories of public rights

1. Below minimum requirements	9. Insubstantial parts
2. Works ‘impliedly’ excluded	10. Mere facts, ideas etc
3. Works expressly excluded	11. Uses outside exclusive rights
4. Constitutional exclusions	12. Statutory exceptions
5. © has expired	13. Neutral collective licensing
6. ‘Public domain dedications’	14. Neutral voluntary licensing
7. Public policy refusals	15. De facto PD of benign uses
8. Public interest exceptions	

Categories empty/unimportant in Australia

	9. Insubstantial parts
4. Constitutional exclusions	
6. 'Public domain dedications'	
7. Public policy refusals	
8. Public interest exceptions	

Some are important but well understood

1 Below minimum requirements	
	10. Mere facts, ideas etc
	12. Statutory exceptions [VAST!]
5. © has expired	

Others are interesting/important in Australia

2. Works 'impliedly' excluded	
3. Works expressly excluded	11. Uses outside exclusive rights
	13. Neutral collective licensing
	14. Neutral voluntary licensing
	15. De facto PD of benign uses

(11) Uses outside statutorily defined exclusive rights

- Any uses outside the © owner's 'exclusive rights' are part of the PD (one type of 'gap' in ©)
- These were traditional 'public rights', fundamental to enjoying works:
 - to read, view or (not in public) listen to, perform or play works
 - to lend (privately or through libraries), hire/rent, sell second-hand (privately or through dealers), or destroy
- UK (& Europe) – new narrower position
 - Both lending & renting rights now exclusive for all types of work, with some exception for public libraries
- Australia – traditional rights only slightly gone
 - has 'rental rights' for sound recordings & computer programs
 - no restrictions on lending (but some compensation: PLR)



(13) 'Collective licences': Paid uses compulsorily allowed

- *Necessary* (to fit our definition) that licence conditions & fee be set by a neutral body on public interest grounds, and uniform for all users
 - Must not be set, or revocable, by the © owner
 - Many licences administered by collecting societies are therefore excluded, but *some are* part of the PD
- In Australia, such public rights are of 2 types:
 1. *Compulsory licences* where © Act *defines* the licence and the fee mechanism (eg music on radio)
 2. *'Blanket licences'* where a licensing practice *empowers* the Copyright Tribunal to set uniform conditions and licence fees across an industry (eg music in gyms)

Public rights through collective licensing in Australia

- This is the only part of PD where revenue flows to the © owner
- Only a *class of beneficiaries* can utilise such public rights (a closed commons)
 - The general public usually benefits indirectly (eg gym users, students, library users)
 - Public benefit not required by definition – *should it be?*
- **Conclusions**
 - In Australia they are of wide scope and importance
 - Where they fit the definition, they should be included
 - No one else (Lessig excepted) includes this in the PD
 - Distinguishes Australia's PD from many others (eg USA, UK)





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Advance Australia Fair

From Wikipedia, the free encyclopedia

"Advance Australia Fair" is the official [national anthem](#) of [Australia](#). Created by the Scottish-born composer [Peter Dodds McCormick](#), the song was first performed in 1878 but did not gain its status as the official anthem until 1984. Until then the song was sung in Australia as a patriotic song. In order for the song to become the anthem it had to face a vote against the Royal Anthem ("God Save the Queen"), "Waltzing Matilda" (the "unofficial anthem") and "Song of Australia". Other songs and marches have been influenced by "Advance Australia Fair", such as the Australian vice-regal salute.

The earliest known sound recording of "Advance Australia Fair" appears in *The Landing of the Australian Troops in Egypt* (circa 1916), a short commercial recording dramatising the arrival of Australian troops in Egypt en route to Gallipoli.^[1]

Contents [\[hide\]](#)

- 1 History
 - 1.1 Origin
 - 1.2 Competitions, plebiscite and adoption
- 2 Lyrics
- 3 Copyright
- 4 Orchestral version



(14) Voluntary licences to public by a neutral scheme

- Requirements in order to fit our definition:
 - Licence terms set by a neutral body, not © owner [CC ✓]
 - © owner cannot choose who can use licence [CC ✓]
 - © owner cannot vary or revoke existing licences [CC ✓]
- Examples:
 - Content under Creative Commons licences; software under most open source/FOSS licences
 - Viral licences (eg software under GPL; Wikipedia content) means their scope is vast and growing (‘tar baby’ effect)
- Their effect is largely global, not jurisdiction-specific
 - Important in Australia as elsewhere; perhaps more so as Australia is a 90/10 IP importing country
- *These must be part of any modern PD definition*


 The image shows the classic multi-colored Google logo (blue, red, yellow, blue, green, red) centered on a white background. Below the logo are two horizontal lines for a search input field. At the bottom, there are two buttons: "Google Search" and "I'm Feeling Lucky".

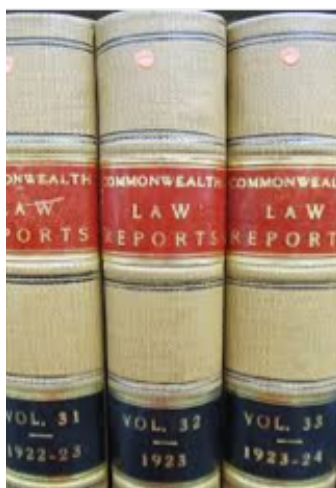
Google Search

I'm Feeling Lucky

(15) *De facto* public domain in benign uses, with opt-outs

- Our requirements: ‘Near-universal non-objection by © owners to benign uses of works, + effective opt-outs’
 - Example: effect of Internet search engines – ‘searchable commons’ despite the uncertain © status of technical aspects
- When is such ‘benign appropriation’ likely to work:
 1. the law is somewhat **unclear** (often differs between countries)
 2. vast majority of affected & aware © owners consider that tolerating the otherwise infringing use is **in their interests**
 3. if © owners do object, there are effective **opt-out** provisions
 4. only a manageable number of owners do object
- Narrower than ‘tolerated use’ (Wu’s ‘grey zone’)

Novel to include, but one of the largest parts of the PD
We include it through a definition based on ‘ability’



(3) Categories of works expressly excluded from ©

- Official documents can be excluded (Berne)
 - legislation and case law (almost all countries do)
 - Official and other translations (many do)
 - Australian law has no exclusions (in 'Crown ©' rump)
- 'News of the day' can be excluded (Berne)
 - Australia treats this as an idea/expression question
- Australian law has no categories of works (as a whole) excluded from ©
 - Its PD is very narrow in this regard
 - This is one of the empty categories of Australia's PD

(2) Categories of works 'impliedly' excluded from ©

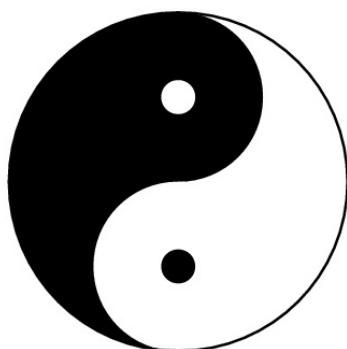
- © laws do not protect all forms of creative expression
 - Berne definition is very broad, and specifies minimums
 - Some laws have broad statements + inclusive lists
 - Other laws (eg UK & Australia) have exclusive lists only
 - 'Gaps' between categories in such countries therefore exist
 - Eg tangible creations not 'works of artistic craftsmanship'
 - *These 'unprotected works' are part of PD*
- Some countries exceed Berne minimum
 - This reduces that country's PD
 - Eg perfume smells, fashion garments as such
- Both create differences between national PDs

Conclusion: What do these 15 public rights add up to?

- A sufficiently comprehensive description of **Australia's** © public domain
 - It is based on a definition that applies to all 15 categories
 - The definition is 'user' or 'use' based: ie focuses on *the public*
 - A descriptive definition ('is') but the categories it leads to seem congruent with what Australia's public domain *ought* to cover – it does not seem to miss important public interests
- Is this definition and set of categories sufficient to describe other national PDs?
 - The categories significant to other jurisdictions will differ
 - The © PD has different content in the US or UK
 - It is differently different in Kosovo, Korea, Kuwait or Kenya

We need to better understand the contents of each national public domain and their differences

Public and proprietary rights



- PD & "©" are *within* a work.
- As are PR & exclusive rights
- Complementary public & proprietary 'halves'
- *Whole* works exist on a continuum with public & proprietary 'poles'
- Most current works are between the poles
- Mankind's heritage is at the public pole
- There is nothing at the purely proprietary pole

‘Rights’ or something else?

- Canadian Supreme Court asserts ‘user Rights’
- Our definition uses ‘abilities’, and ducks the question
- A mix of privileges, powers, interests, rights etc
- Can even include *de facto* capacities in some circumstances
- We use the ‘R word’: convenient; has rhetorical value

[D] Is there a global public domain?



What aspects of public domains are largely universal?

Public domains are essentially national/jurisdictional, but some elements are near-universally shared:

1. Restrictions imposed by international agreements
2. Internet-enabled public rights

(1) Restrictions imposed by international agreements

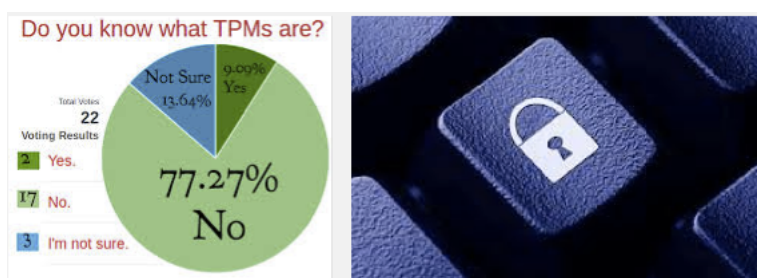
Berne Convention greatly limits the potential size of all public domains:

- Prohibition of formalities (A 18) reverses the default condition of a work from ‘public’ to ‘proprietary’
- Required minimum term (A 7(1)) – ‘life + 50’ unlikely for some categories of works
- Broad definition of works protected (eg A 1 and 2(1))

(2) Internet-enabled public rights

1. *de facto* public rights in Internet-published content
2. uniformity in voluntary licences through global licences & standards
 - Many licences are simply global
 - Ported CC licences are national but substantially the same across countries
3. viral effects of voluntary licences
 - ‘Tarbaby’ effect of FOSS, Wikipedia licences
4. the ‘spillover’ effect of broader national PD on other national PDs

[E] What constrains and supports the public domain?



What helps or hinders the components of the public domain being effective?



Supports

The effectiveness/value of public rights depends on external factors such as:

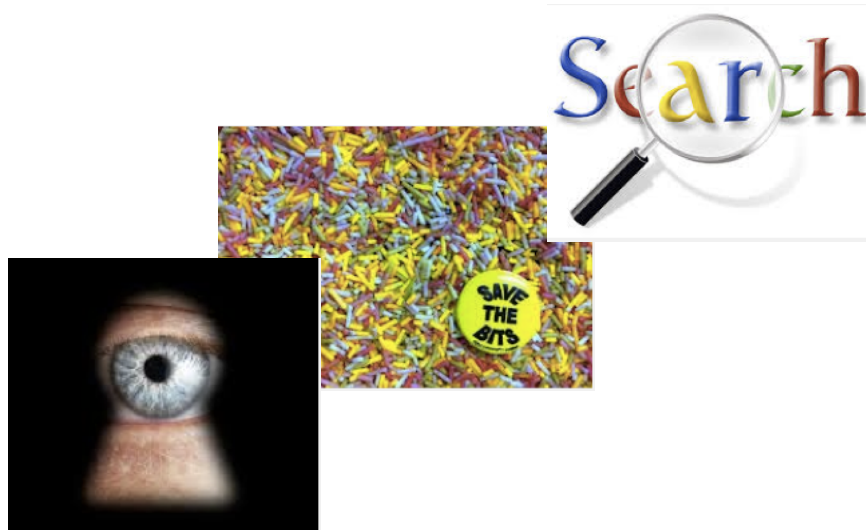
1. Statutory immunities for benign third parties
 - eg ISPs and institutional web hosts (universities, museums etc)
 - 'safe harbour' or 'take down' schemes
2. Legal deposit schemes
 - Expiry of term irrelevant if no accessible copies are in public hands
 - Aust lacks electronic legal deposit, or expiry of TPM protection
3. Methods of locating authors (or showing they cannot be located)
 - Either a licence fee or an orphan works right is enabled
4. Limited remedies (eg re orphan works)

Constraints

Public rights existing in theory can be destroyed or inhibited by (for example):

1. TPMs and their legislative protection
 - If works can't be obtained outside TPMs, some public rights may never be able to be exercised in practice
2. Contracts ousting statutory exceptions
 - ALRC is considering this as part of their review (proposes unenforceability for most purposes)
3. Surveillance of uses
 - Creativity is inhibited by spotlights

[F] What are the *purposes* of public rights in the 21st Century?



21st century values

1. Free access
2. Locatability ('search')
3. Reusability
4. Preservation
5. Accessibility, permanence & transferability
6. Privacy
7. Compatibility with incentives/remuneration

These are NOT public rights, but why we want them – reasons which have changed – and supports which make them effective

[G] What use is a public domain theory?

- It assists arguments for a stronger PD
 - Does not in itself provide such justification
 - Helps identify aspects of PD that might otherwise be overlooked
 - Assists identification of why we value aspects of the PD
- Enables comparisons of other national PDs
 - Tests the definition: Does it capture the necessary & sufficient conditions of other country's PDs
 - What factors explain differences and similarities?
- The categories identified test the definition
 - Are they congruent with our intuitions of what we think *should* be in our public domain?

Credits

- Based on joint work with Dr Catherine Bond, for a book to be published by Sydney University Press
- Our article on the definition and components of Australia's copyright public domain is at <http://ssrn.com/abstract=2212127>
- This work was originally funded (2006-09) by an Australian Research Council 'Linkage' grant, 'Unlocking IP'
- This presentation was supported by the RCUK Centre for Copyright and New Business Models in the Creative Economy (CREATe), AHRC Grant Number AH/K000179/1

The other categories (not included in presentation)



4 Constitutional restrictions

- In some countries, constitutional rights (eg freedom of speech) may limit ©
 - We include this as a pre-existing limit on © scope
- In Australia, there are implications
 - implied right of political free speech (positive)
 - Blank tape levy could not be based on IP power
 - Acquisition of property on just terms (negative)
- Deazley ignores re UK (as does Dusollier)
 - Do fundamental rights under Lisbon Treaty re-open this?
- US lawyers always include © clause and 1st Amendt as © limits: but *Eldred & Golan* undercut

5 Works where © has expired

- Australia's default position is the EU/US position of 'life of the author + 70 years'
 - But if copyright had expired before term extended from +50 to +70, no retrospectivity
- Indefinite © in unpublished works (no PD)
 - Exception for pre-1955 photos, published or not
- The narrowest traditional view of the public domain is that this is all it contains (narrower than Dusollier)

6 'Public domain dedications'

- Can you intentionally forfeit your © to the public as a whole?
 - Instead of transferring it to a class of persons
- Chile, Kenya, India etc have statutory procedure
- Judicially recognised in the USA
 - Also implemented by CCO licence
- Status uncertain in Australia (and the UK?)
- Samuelson & Dusollier include, Deazley doesn't

7 © refused on grounds of public policy

- UK has a long line of cases since 1721 refusing © protection on this ground
- Australia
 - *Venus Adult Shops* (2006): no such restriction
 - courts have refused remedies on this ground
 - © Act 1905 used to exclude 'blasphemous, indecent, seditious or libellous' matter
- Some countries exclude some infringing works
Deazley includes; Dusollier & Samuelson ignore

8 No © because of public interest

- Where Courts can authorise use of a work on public interest grounds
 - UK: *Lion Laboratories*, *Ashdown* and *Human Rights Act* have kept this category alive
 - Australia
 - *Cth v Fairfax* (1980) Mason J gave mild endorsement
 - *Collier Constructions* (1990) Gummow J strongly opposed
 - No full High Court or other decision yet
 - Q: Why shouldn't the existence of a PD category depend on Court decisions?
 - The boundaries of all categories depend on Court interpretations
- Deazley includes; Dusollier & Samuelson ignore*

9 Uses of less than a substantial part of the work

9-11 are 3 categories of uses outside the exclusive rights of © owner

- In Australia 'substantial' can mean something close to 'insubstantial'
 - Anything recognisable from the work is enough
 - Leaves little scope for public rights
 - No the same as Category 1 because it applies only to use of (part of) a work, not to the work as a whole

10 Use of mere facts, info. or ideas derived from work

- Not contentious, just that boundaries are uncertain
 - Australia does not have a 'database right' but did have a very strong 'sweat of the brow' caselaw protection for compilations
 - Ice TV (2009) High Court case has restricted scope of this and expanded the PD
 - Contrast *Feist* (US) lower level of protection
- Everyone includes this category*

12 Free uses allowed by statute

- 'Statutory exceptions' to © protection (no \$ required - 'free')
- Some countries (eg USA) have broad and undefined 'fair dealing' public rights
- Australia: numerous narrow exceptions
 - Narrowly defined 'fair dealings' (not general 'fair use') for study, criticism, reporting, courts
 - New free use exceptions: format shifting, time shifting, satire
 - Many other specific exemptions for particular types of works
- Some exceptions can only be used by particular classes (eg libraries, museums)
 - This does not matter, the © owner does not choose who can benefit from the exemption

Samuelson & Deazley include; Dusollier does not