

Florida A&M University College of Law

## Scholarly Commons @ FAMU Law

---

Journal Publications

Faculty Works

---

2019

### Limiting Lessons from Property: Re-imagining the Public Domain in the Image of the Public Trust Doctrine

Deidre Keller

*FAMU College of Law*, [deidre.keller@famu.edu](mailto:deidre.keller@famu.edu)

Follow this and additional works at: <https://commons.law.famu.edu/faculty-research>



Part of the [Common Law Commons](#), and the [Intellectual Property Law Commons](#)

---

#### Recommended Citation

Deidre Keller, Learning Lessons From Property: Re-imagining the Public Domain in the Image of the Public Trust Doctrine, 107 KY. L.J. 629 (2019).

This Article is brought to you for free and open access by the Faculty Works at Scholarly Commons @ FAMU Law. It has been accepted for inclusion in Journal Publications by an authorized administrator of Scholarly Commons @ FAMU Law. For more information, please contact [paul.mclaughlin@famu.edu](mailto:paul.mclaughlin@famu.edu).

# LIMITING LESSONS FROM PROPERTY: REIMAGINING THE PUBLIC DOMAIN IN THE IMAGE OF THE PUBLIC TRUST DOCTRINE

*Deidre A. Keller*<sup>1</sup>

## TABLE OF CONTENTS

TABLE OF CONTENTS.....	629
INTRODUCTION.....	630
I. COMMON LAW PROPERTY MAY OFFER LIMITS TO IP DOCTRINE	631
A. <i>Conceiving of IP as Property Does Not Necessitate More</i> <i>IP Protection</i> .....	635
B. <i>Deploying Common Law Property Principles to Limit IP</i> .....	636
II. THE PUBLIC TRUST DOCTRINE: AN ANCIENT PRINCIPLE WITH MODERN RELEVANCE.....	637
A. <i>The Public Trust Doctrine in Antiquity</i> .....	637
B. <i>The Public Trust Doctrine in American Jurisprudence</i> .....	638
C. <i>Modern Applications of the Ancient Principle</i> .....	640
III. APPLYING THE PUBLIC TRUST DOCTRINE IN COPYRIGHT .....	641
A. <i>The Parameters of Access to Public Domain Content</i> .....	643
B. <i>Cordoning Off the Public Domain by Weaponizing Extant Copyright</i> .....	644
i. Extending Existing Copyright to Limit Use of Public Domain Content.....	644
ii. An Anemic View of the Public Domain.....	646
iii. Getting to the Right Result in Precisely the Wrong Way.....	647
C. <i>Public Trust Principles as Ameliorative of Over-Protection Impulses</i> .....	648
CONCLUSION.....	649

---

<sup>1</sup> Associate Dean for Academic Affairs and Professor of Law, Ohio Northern University. A warm thank you to Brian Frye and Eric Johnson for their kind invitation to speak at the University of Kentucky Symposium in October, 2018. Without that invitation and the fruitful conversations that took place there, this piece would still be languishing on my agenda. I am also grateful to the University of Kentucky students who organized and edited and whose professionalism throughout was remarkable; and to the other participants in the Symposium, whose presentations certainly helped me to think through the issues engaged here. I must also thank my research assistants, Garrett Robinson, Irene Amoro, and Maria Ukattah who fielded myriad and often last minutes requests like champs. I so appreciate you guys! Finally, a much belated thank you to former Research Assistants, Jennifer English, Laura Waymire, and C. Todd Mosley, all of whom helped in the initial development of the thesis that became this piece.

*“Thus, the following things are by natural law common to all—the air, running water, the sea, and consequently the seashore. No one therefore is forbidden access to the seashore, provided he abstains from injury to houses, monuments, and buildings generally; for these are not like the sea itself, subject to the law of nations.”*<sup>2</sup>

*“The general rule of law is, that the noblest of human productions—knowledge, truths ascertained, conceptions, and ideas—become, after voluntary communication to others, free as the air to common use.”*<sup>3</sup>

## INTRODUCTION

On January 1, 2019, every copyrighted work published for the first time in the United States in 1923 entered the public domain.<sup>4</sup> The works newly in the public domain included Cecil B. DeMille’s first silent version of the film *The Ten Commandments*, *The Ego and the Id* by Sigmund Freud, and Agatha Christie’s *The Murder on the Links*.<sup>5</sup> January 1, 2019 marked the first time in twenty years that a whole year’s worth of copyrighted works entered the public domain.<sup>6</sup> Much has been written about how the passage of the Copyright Term Extension Act of 1998 (“CTEA”) significantly curtailed the flow of content into the public domain.<sup>7</sup> It was widely understood at the time of the passage of the CTEA that The Walt Disney Company was a major proponent of the CTEA,<sup>8</sup> and motivated by the desire to

<sup>2</sup> INST. OF JUSTIANA 2.1.1 (J. B. Moyle trans., 1913), [https://www.gutenberg.org/files/5983/5983-h/5983-h.htm#link2H\\_4\\_0029](https://www.gutenberg.org/files/5983/5983-h/5983-h.htm#link2H_4_0029).

<sup>3</sup> *Int’l News Serv. v. Associated Press*, 248 U.S. 215, 250 (1918) (Brandeis, J., dissenting).

<sup>4</sup> *Public Domain Day 2019*, CTR. FOR STUDY PUB DOMAIN, <https://law.duke.edu/cspd/publicdomainday/2019/> [<https://perma.cc/CR45-DJXQ>].

<sup>5</sup> Nick Douglas, *These 1923 Copyrighted Works Enter the Public Domain in 2019*, LIFE HACKER (Apr. 13, 2018), <https://lifelifehacker.com/these-1923-copyrighted-works-enter-the-public-domain-in-1825241296> [<https://perma.cc/TZ8D-MXVP>].

<sup>6</sup> Glenn Fleishman, *A Landslide of Classic Art Is About to Enter the Public Domain*, ATLANTIC (Apr. 8, 2018), <https://www.theatlantic.com/technology/archive/2018/04/copywritten-so-dont-copy-me/557420/> [<https://perma.cc/8EGZ-MNDJ>] (“*The Great American Novel* enters the public domain on January 1, 2019—quite literally. Not the concept, but the book by William Carlos Williams. It will be joined by hundreds of thousands of other books, musical scores, and films first published in the United States during 1923. It’s the first time since 1998 for a mass shift to the public domain of material protected under copyright. It’s also the beginning of a new annual tradition: For several decades from 2019 onward, each New Year’s Day will unleash a full year’s worth of works published 95 years earlier.”); see also Jennifer Jenkins, *In Ambiguous Battle: The Promise (And Pathos) of Public Domain Day, 2014*, 12 DUKE L. & TECH. REV. 1, 2–3 (2013) (“For works published between 1923 and 1977 that were still in copyright, the terms were extended to 95 years from publication, keeping them out of the public domain for an additional 20 years. The public domain was frozen in time, and artifacts from 1923 won’t enter it until 2019.”).

<sup>7</sup> See, e.g., Jane C. Ginsburg, et al., *The Constitutionality of Copyright Term Extension: How Long is Too Long?*, 18 CARDOZO ARTS & ENT. L.J. 651, 659–60 (2000) (“The CTEA’s extension of copyright terms does not increase the benefits to the public from the labors of authors because it gives no real present incentive to authors. By removing from the public domain for another twenty years a massive body of works, the CTEA dramatically limits access to the public commons.”).

<sup>8</sup> Brigid McMenamin, *Mickey’s Mine!*, FORBES (Aug. 23, 1999), <https://www.forbes.com/forbes/1999/0823/6404043a.html#4c0184ae3018> [<https://perma.cc/8FYR->

keep *Steamboat Willie*, which premiered at New York City's Colony Theatre on November 18, 1928,<sup>9</sup> and would have entered the public domain on January 1, 2004,<sup>10</sup> out of the public domain for as long as possible.<sup>11</sup> As things stand, *Steamboat Willie* will enter the public domain on January 1, 2024.<sup>12</sup> As we again approach the expiration of the copyright on *Steamboat Willie* and other iconic works, on which content owners have built very lucrative businesses, it's important to consider the extent to which content entering the public domain will actually be available for anyone "to release . . . , mash [] up with other work, or sell [] with no restriction."<sup>13</sup>

In the twenty years since the CTEA's passage, jurisprudence pertaining to the use of works in the public domain has marched along. Specifically, the cases in which a content owner argues that the use of a work in the public domain constitutes infringement of a work that remains protected by copyright are of particular salience in considering the breadth of access the public is likely to have to works newly added to the public domain. In one particularly famous instance, a copyright owner claimed that use of a work in the public domain infringed existing copyrights in related works, successfully, without ever filing suit.<sup>14</sup> The story

DS36] ("No Wonder Walt Disney, whose most valuable characters were set to lapse into the public domain, devoted millions to lobbying and campaign contributions as Congress weighed the idea."); see also Daren Fonda, *Copyright's Crusader*, BOSTON GLOBE MAG. (Aug. 29, 1999), <http://homepages.law.asu.edu/~dkarjala/OpposingCopyrightExtension/commentary/Fonda8-29-99.html> [https://perma.cc/4GW3-QD6P] ("Many of these copyright owners had made it clear to Congress that they wanted an extension bill passed. According to the nonprofit Center for Responsive Politics, in Washington, media companies and their political action committees contributed more than \$6.5 million to members of Congress during the 1997–98 election cycle. . . . Disney was one of the biggest donors. Eight of the Senate bill's 12 sponsors received contributions from Disney, as did 10 of the original House bill's 13 sponsors. Democrat Patrick Leahy of Vermont, the ranking minority member on the Senate Judiciary Committee (which passed the bill) and a man who very publicly forgoes PAC contributions, got nearly \$20,000 from individual Disney employees.").

<sup>9</sup> Keith Gluck, *The Birth of a Mouse*, THE WALT DISNEY FAMILY MUSEUM (Nov. 18, 2012), <https://www.waltdisney.org/blog/birth-mouse> [https://perma.cc/KK8D-P5M4].

<sup>10</sup> Alan K. Ota, *Disney in Washington: The Mouse that Roars*, CNN (Aug. 10, 1998), <http://edition.cnn.com/ALLPOLITICS/1998/08/10/cq/disney.html> [https://perma.cc/Z5Y4-VZ5F] ("The copyright for Disney's crown jewel, Mickey Mouse, will expire after 2003, 75 years after the appearance in 1928 of the Disney cartoon that launched Mickey's golden career, 'Steamboat Willie.'").

<sup>11</sup> See, e.g., *id.* ("On a recent Tuesday afternoon when the Senate halls were humming, Walt Disney Co. chairman Michael D. Eisner dropped in for an unpublicized chat with Senate Majority Leader Trent Lott. What did Eisner want? Plenty, it turned out. At the top of his list that includes tax breaks, visas for animal trainers and transportation to Disney theme parks, was a request for Congress to help his company's highest priority: HR2589, a bill to extend the soon-to-expire copyright on Mickey Mouse—Disney's most precious asset.").

<sup>12</sup> Stephen Carlisle, *Mickey's Headed to the Public Domain! But Will He Go Quietly?*, NOVA SOUTHERN UNIV. (Oct. 17, 2014), <http://copyright.nova.edu/mickey-public-domain/#note-676-3> [https://perma.cc/REK7-UBT4].

<sup>13</sup> Fleishman, *supra* note 6.

<sup>14</sup> Sam Williams, *Should Auld Copyrights Be Forgotten*, UPSIDE TODAY (Dec. 22, 1999), <http://homepages.law.asu.edu/~dkarjala/OpposingCopyrightExtension/publicdomain/Williams12-22-99.html> ("Jump cut to Feb. 6, 1975. After languishing for nearly two decades in the studio vaults, 'It's a Wonderful Life' fell into the public domain. . . . Republic Pictures, . . . embarked on a decades-long battle to win back its lost asset. . . . Ultimately, the attorneys at Republic found a legal back door. Although the film had entered

behind why those of us who grew up in the 1970s and 1980s couldn't watch television during the holiday season without encountering the 1946 film *It's a Wonderful Life*, and why it's been shown only sparingly since the 1990s, is a cautionary tale for anyone interested in maximizing access to public domain content.<sup>15</sup>

As the story goes, while the film was widely acclaimed at the time of its release, it underperformed at the box office.<sup>16</sup> For reasons now lost to the ages, when the copyright was up for renewal in 1974, twenty-eight years after it was initially issued in 1946, no renewal was filed.<sup>17</sup> Therefore, the film fell into the public domain.<sup>18</sup> In no time, the film was a staple on public broadcasting and network television during the Christmas season.<sup>19</sup> It would remain in the public domain and ubiquitous on television during the holidays until the early 1990s when the successor to the original copyright owner acquired the rights to the film's musical score and the short story on which the film was based.<sup>20</sup> Thereafter, the successor entered into an exclusive agreement with NBC and otherwise enforced against uses of the film, including a proposal to develop a sequel.<sup>21</sup> In this article

---

the public domain, the movie soundtrack was still under studio control. For the last decade, Republic used this fact to drive rival distributors out of the market and reestablish sole control of the broadcast rights. In 1994, Republic, now a property of Spelling Entertainment, licensed those rights to NBC. And the network has shown 'It's a Wonderful Life' as part of its holiday programming for the last five years.”)

<sup>15</sup> See STEPHEN COX, *IT'S A WONDERFUL LIFE: A MEMORY BOOK* 111–15 (2003) (explaining that “Television stations across the nation began airing [It's a Wonderful Life] regularly” after a clerical error led its copyright to lapse and the “legal property” fell into the public domain).

<sup>16</sup> Williams, *supra* note 14 (“Although the film garnered several Academy Award nominations—including Best Director, Best Picture and Best Actor—it was a commercial flop in the theaters.”).

<sup>17</sup> Williams, *supra* note 13 (“Movie historians disagree on the reason behind [the failure to renew]. Some attribute it to a clerical error. Others credit simple disinterest on the part of studio management.”).

<sup>18</sup> *Why Wonderful Life Comes But Once a Year*, SLATE (Dec. 21, 1999), <https://slate.com/news-and-politics/1999/12/why-wonderful-life-comes-but-once-a-year.html> [<https://perma.cc/56C2-77V5>] (“It's a Wonderful Life entered the public domain by accident. In 1946, when the movie was filmed, U.S. copyright protection lasted 28 years and could be renewed for another 28 years by filing some paperwork and paying a nominal fee. However, Republic Pictures, the original copyright owner and producer of Wonderful Life, neglected to renew the 1946 copyright in 1974. So, the film entered the public domain.”).

<sup>19</sup> Roger Ebert, *Great Movie: It's a Wonderful Life*, ROGER EBERT.COM (Jan. 1, 1999), <https://www.rogerebert.com/reviews/great-movie-its-a-wonderful-life-1946> [<https://perma.cc/YX3P-GSXU>] (“Because the movie is no longer under copyright, any television station that can get its hands on a print of the movie can show it, at no cost, as often as it wants to. And that has led in the last decade to the rediscovery of Frank Capra's once-forgotten film, and its elevation into a Christmas tradition. PBS stations were the first to jump on the bandwagon in the early 1970s, using the saga of the small-town hero George Bailey as counter-programming against expensive network holiday specials.”).

<sup>20</sup> Jay Bobbin, *‘Wonderful Life’ to Flash Before Our Eyes Only Once*, BALTIMORE SUN (Dec. 10, 1994), [http://articles.baltimoresun.com/1994-12-10/features/1994344056\\_1\\_wonderful-life-george-bailey-republic-pictures](http://articles.baltimoresun.com/1994-12-10/features/1994344056_1_wonderful-life-george-bailey-republic-pictures) [<https://perma.cc/923L-CMA9>] (“A few years ago, however, Republic Pictures became the legal owner of the picture by purchasing the rights to the original story (‘The Greatest Gift,’ by Philip Van Doren Stern) and the film's Dimitri Tiomkin music score. Republic gave TV stations and video distributors a short grace period to get rid of bootleg copies of the movie.”).

<sup>21</sup> *Id.* (“Now, NBC has acquired exclusive rights to broadcast ‘It's a Wonderful Life.’”). On the sequel saga, see Sean O'Connell, *It's A Wonderful Life Sequel Will Not Happen Without a Fight From Paramount*, CINEMA BLEND (2014), <https://www.cinemablend.com/new/It-Wonderful-Life-Sequel->

I'd like to suggest that an ancient property principle—the public trust doctrine—might act as an antidote to the story of how *It's a Wonderful Life* was in the public domain until it wasn't. Plainly stated, and in its narrowest sense, the public trust doctrine provides that all land covered by navigable waters is held in trust for the people to use.<sup>22</sup> Therefore, property owners on the shore are obliged to allow members of the public to cross their private property in order to reach the adjoining waterway.<sup>23</sup> The public trust doctrine has long been recognized because public access to navigable waterways is seen as a public good.<sup>24</sup> How much more so is access to the store of knowledge upon which our culture is built, a public good? I would argue that, in fact, access to that is even more important than access to navigable waters.

In this article I will endeavor to supplement the relatively sparse body of existing scholarship considering the applicability of the public trust doctrine to the conception of the public domain in copyright law.<sup>25</sup> While Sharon Sandeen argued in 2001 that States ought to hold any intellectual property they own in trust for the public,<sup>26</sup> here I would like to argue that recent decisions, including the Northern District of Georgia's and Eleventh Circuit's decisions in the *Code*

---

Happen-Fight-From-Paramount-40381.html [https://perma.cc/LVR2-FSUY].

<sup>22</sup> Gerald Torres & Nathan Bellinger, *The Public Trust: The Law's DNA*, 4 WAKE FOREST J. L. & POL'Y 281, 286 (2014) ("The public trust doctrine is meant to protect those resources that have an inherently public character and are not owned in the same way as traditional property. Early cases recognized marine resources, tidal waters and the submerged land beneath them, and navigable waters as resources protected by the public trust doctrine.") (citing *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387 (1892); *Martin v. Waddell's Lessee*, 41 U.S. 367 (1842); *Arnold v. Mundy*, 6 N.J.L. 1 (1821)).

<sup>23</sup> See Michael C. Blumm, *The Public Trust Doctrine and Private Property: The Accommodation Principle*, 27 PACE ENVTL. L. REV. 649, 663 (2010) ("More commonplace than transferring fee simples into defeasible fees are court decisions that interpret the public trust doctrine to impose a [sic] easement on fee simple estates. Perhaps the most vivid example is the New Jersey Supreme Court's recognition in *Matthews v. Bay Head* that the doctrine burdened private beaches with a public easement. The scope of this easement was not merely access to the ocean but also included recreational rights to sunbathe on the beach.") (footnotes omitted).

<sup>24</sup> See James Olson, *All Aboard: Navigating the Course for Universal Adoption of the Public Trust Doctrine*, 15 VT. J. ENVTL. L. 135, 143 n.19 (2014) ("The principles of the 'Commons' assert that no one owns water; instead it is a public good that belongs in common to all living things, including future generations.").

<sup>25</sup> It is interesting to note here that while scholars have not taken up the applicability of the public trust doctrine to copyright, specifically, or intellectual property more broadly, the concept has been utilized by lawyers arguing against specific copyright legislation. See Plaintiffs' Reply Memorandum in Support of Motion For Judgment on the Pleadings or in the Alternative for Summary Judgment at 52–67, *Eldred v. Reno*, 74 F. Supp. 2d 1 (D.D.C. 1999) (No. 1:99CV00065 JLG). Scholars considering this argument have done so largely within the framework of Law & Economics. See, e.g., Richard A. Epstein, *The Dubious Constitutionality of the Copyright Term Extension Act*, 36 LOY. L.A. L. REV. 123, 154–58 (2002) ("Giveaways are bad business. They are inconsistent with any system of constitutional governance. Once that simple point is recognized, then it hardly matters whether we start with the Copyright Clause, the First Amendment, or even the public trust doctrine."). In this article, I will utilize the framework of human flourishing.

<sup>26</sup> Sharon K. Sandeen, *Preserving the Public Trust in State-Owned Intellectual Property: A Recommendation for Legislative Action*, 32 MCGEORGE L. REV. 385, 396–418 (2001) (proposing legislation that "sets forth a general rule of public dedication" of state-owned intellectual property).

*Revision Commission* cases,<sup>27</sup> suggest a deeper dive into the utility of the public trust doctrine, as it relates to intellectual property, generally, and copyright, specifically, is warranted. In an unpublished article, Haochen Sun argued that introducing the public trust doctrine into copyright law would “promote the ethical values of guardianship, responsibility, and community.”<sup>28</sup> I will seek to add to Sun’s contribution by applying the public trust doctrine to a specific set of cases in which courts are asked to consider whether the use of content in the public domain infringes upon copyrights in content that remains protected. While filling the gaps in the existing literature, I would also like to suggest that the reconceiving of the public domain in the image of the public trust doctrine has conceptual as well as doctrinal and pragmatic utility. I will further consider whether those benefits outweigh the potential challenges including the not insignificant hurdle of how those interested in ensuring broad access to content in the public domain can effectuate that given the significant disparity in resources and coordination relative to content owners.<sup>29</sup>

In a broader sense, this paper will engage in the thought experiment of taking the notion of copyright as property seriously and applying the longstanding principle of the public trust doctrine to public domain works. While others have suggested that a property framework for copyright specifically and intellectual property broadly does not necessarily lead to expansion of rights,<sup>30</sup> in this piece I intend to demonstrate that theoretical claim with a practical and specific application of the public trust doctrine to questions of access in the context of intellectual property.<sup>31</sup> In Part I, I will situate the argument for analogizing to the public trust doctrine within the existing scholarship on intellectual property *as* property. Part II of the article undertakes to consider the history and theory underlying the public trust doctrine in order to make the case that the ancient principle has and should be put to some modern uses, namely, in the context of intellectual property. In Part III,

---

<sup>27</sup> *Code Revision Comm’n v. Pub.Resource.Org, Inc.*, 906 F.3d 1229, 1243 (11th Cir. 2018) (reversing the district court’s holding and finding that the annotations of the Official Code of Georgia “while not having the force of law, are part and parcel of the law” and are “constructively authored by the People”, and thus, “uncopyrightable”); *Code Revision Comm’n v. Pub.Resource.Org, Inc.*, 244 F. Supp. 3d 1350, 1355–57 (N.D. Ga. 2017) (enjoining from the public the use of the Official Code of Georgia Annotated, or any of its versions, because the court found those works copyrightable).

<sup>28</sup> Haochen Sun, *Toward a Public Trust Doctrine in Copyright Law* 4 (Cornell L. Sch. Inter-U. Graduate Student Conf. Papers, Paper 36, 2009), [http://scholarship.law.cornell.edu/lps\\_clap/36](http://scholarship.law.cornell.edu/lps_clap/36) [<https://perma.cc/NT68-PYL5>].

<sup>29</sup> See, e.g., Dennis S. Karjala, *Judicial Review of Copyright Term Extension Legislation*, 36 LOY. L. A. L. REV. 199, 233 (2002) (“It is easy to see why this happened in the case of the CTEA. The benefits of this legislation are concentrated on a relatively small number of individuals and companies who can afford to set aside a percentage of their potential benefit for lobbying. The costs of copyright term extension, on the other hand, are diffuse. These costs are paid, in small amounts, by just about every American, and they are paid in such a way that the extra cost to Americans is not directly identified with the legislation that creates the cost. Some of the heaviest costs of term extension—the loss of works *not* created or not performed because of the transaction costs of copyright licensing—may not be felt by individual members of the public. Few consumers can know what works have not been created or performed due to copyright licensing difficulties.”).

<sup>30</sup> See *infra* Part I.

<sup>31</sup> See *infra* Part I.

I will consider recent cases where copyright owners sought to quell uses of public domain content by deploying copyrights in related works. I will then consider how these cases would be decided differently if we applied the public trust doctrine. The article concludes with a call to action for those interested in ensuring broad and rich access to public domain content.

## I. COMMON LAW PROPERTY MAY OFFER LIMITS TO IP DOCTRINE

### A. *Conceiving of IP as Property Does Not Necessitate More IP Protection*

The question of whether copyright, trademark, and patent are property regimes has been considered often.<sup>32</sup> This is, of course, no mere semantic or rhetorical concern. Rather, as the argument goes, conceiving of these regimes as property has consequences in our policy and jurisprudence.<sup>33</sup> In fact, a very compelling argument has been made that thinking of the right of publicity as a type of property, rather than a species of privacy protection, is how some jurisdictions justify post-mortem protections while others steadfastly refuse to do so.<sup>34</sup>

The battle lines in this discussion have been drawn. The accepted narrative is that those who would call the protections for information “property” are doing so in an effort to expand those protections, while those who question whether copyright, patent, and trademark are properly understood as something other than property want to limit those protections.<sup>35</sup> But, the briefest glimpse beneath the veil of that narrative belies such a simplistic dichotomy. As an initial matter, common law property contains more than rights, it also includes limitations upon those rights.<sup>36</sup>

<sup>32</sup> See, e.g., Stephen L. Carter, *Does it Matter Whether Intellectual Property is Property*, 68 CHI.-KENT L. REV. 715 (1993) (discussing generally the common thought processes surrounding the question of whether or not intellectual property is “property” as the latter is commonly thought of in the legal community).

<sup>33</sup> See WILLIAM W. FISHER III, *THE GROWTH OF INTELLECTUAL PROPERTY: A HISTORY OF THE OWNERSHIP OF IDEAS IN THE UNITED STATES* 22 (1999), <https://cyber.harvard.edu/people/ffisher/iphistory.pdf> [<https://perma.cc/52JH-URSF>] (“Why does the popularity of the term [intellectual property] matter? The answer—as the Legal Realists recognized long ago—is that legal discourse has power. Specifically, the use of the term ‘property’ to describe copyrights, patents, trademarks, etc. conveys the impression that they are fundamentally ‘like’ interests in land or tangible personal property—and should be protected with the same generous panoply of remedies.”).

<sup>34</sup> See Jennifer E. Rothman, *The Inalienable Right of Publicity*, 101 GEO. L.J. 185, 203 (2012) (“Privacy rights terminate with the death of the privacy-holder. Once a person is dead, she can no longer suffer the dignitary or emotional harms that flow from a violation of privacy rights. Because the right of publicity has often been treated as a property right, many courts and scholars have concluded, without further reflection, that it—unlike a privacy right—is capable of being devised or bequeathed upon death.”).

<sup>35</sup> See, e.g., David Fagundes, *Property Rhetoric and the Public Domain*, 94 MINN. L. REV. 652, 658–72 (2010) (discussing this dichotomy as “property romance and property anxiety”).

<sup>36</sup> See *id.* at 677 (“It is thus understandable that both property romance and property anxiety proceed on the assumption that talking about IP in the language of traditional property will yield a broader view of owners’ copyright and patent protections. After all, the ownership discourse on which each of these perspectives relies is the prevalent way of thinking about property in American culture (although not necessarily within the legal academy). Yet this one-sided approach to property is more myth than reality. What property romance and anxiety each miss is that there are not one, but many discourses of



One of the most ancient of these limitations is the common law's command that the use of one's property cannot infringe upon the rights of another to use his or her property—*sic utere tuo ut alienum non laedas*.<sup>37</sup> This is, of course, the property conception underlying the common law nuisance tort which has been present in Anglo-American law for hundreds of years.<sup>38</sup>

Likewise, common law property principles imported into intellectual property discourse and jurisprudence do not always function to broaden or strengthen intellectual property. The next section of this article will consider prior arguments for importation into intellectual property of common law property principles which limit the rights of owners.

### *B. Deploying Common Law Property Principles to Limit IP*

Michael Carrier's article, *Cabining Intellectual Property Through a Property Paradigm*, suggests that rather than fight against the "propertyization" of copyright, trademark, patent, and right of publicity, IP scholars would be better served by utilizing the property framework to import some of the extant limitations from the common law of property.<sup>39</sup> While Carrier's article provides a theoretical framework for how such an importation might work, he specifically declines to "map particular property doctrines onto IP."<sup>40</sup> Others, though, have suggested the application of specific property doctrines, including adverse possession,<sup>41</sup> the numerus clausus principle,<sup>42</sup> usufruct,<sup>43</sup> and even, the public trust doctrine.<sup>44</sup>

---

property, and that the ownership discourse is only one way to talk about what possession means. A counter-narrative to this way of thinking deemphasizes the centrality of owners and instead regards property as a system that structures social relationships with resources. This alternative view—what I'll call the 'social discourse of property'—suggests that focusing primarily on private, individual ownership ignores the full range of functions served by property and blinds us to the ways that property is a communal institution that creates and depends on social relationships.").

<sup>37</sup> See Jeremiah Smith, *Reasonable Use of One's Own Property as a Justification for Damage to a Neighbor*, 17 COLUM. L. REV. 383, 384–90 (1917) ("A landowner's 'so-called absolute legal control of his own soil' is 'far from being unlimited.' It is obvious that unless the rights of individual landowners are modified and limited they must be frequently in conflict one with another. No landowner can always do as he pleases, except by preventing other landowners from doing as they please. 'The rule governing the rights of adjacent landowners in the use of their property, seeks an adjustment of conflicting interests through a reconciliation by compromise, each surrendering something of his absolute freedom so that both may live.'") (footnotes omitted).

<sup>38</sup> See John R. Nolon, *Historical Overview of the American Land Use System: A Diagnostic Approach to Evaluating Governmental Land Use Control*, 23 PACE ENVTL. L. REV. 821, 823 (2006) ("The powerful right of individuals to use their land under the common law was balanced to a degree by the doctrine of nuisance, which established that private landowners might not use their property in a way that was injurious to property held by others.") (citing *Aldred's Case*, [1611] 9 Coke R.D.F. 57b).

<sup>39</sup> Michael A. Carrier, *Cabining Intellectual Property Through a Property Paradigm*, 54 DUKE L. J. 1, 5–6 (2004).

<sup>40</sup> *Id.* at 83.

<sup>41</sup> See, e.g., Constance E. Bagley & Gavin Clarkson, *Adverse Possession for Intellectual Property: Adapting an Ancient Concept to Resolve Conflicts Between Antitrust and Intellectual Property Laws in the Information Age*, 16 HARV. J. L. & TECH. 327, 330 & 365–73 (2003) (proposing the "application of the real property concept of adverse possession in the intellectual property arena").

<sup>42</sup> See, e.g., Christina Mulligan, *A Numerus Clausus Principle for Intellectual Property*,

Taking up these suggestions and deepening the existing consideration of the public trust doctrine is particularly timely in light of the imminence of infusing some of the most famous works of the twentieth century into the public domain.

While this discussion regarding limiting concepts from property has been happening in academia, practitioners have also tried, albeit unsuccessfully, to advance the public trust doctrine as a limit on copyright. In fact, in *Eldred v. Reno*,<sup>45</sup> the District Court for the District of Columbia rejected the plaintiffs' assertion that the public trust doctrine disallowed Congress from extending the duration of existing copyrights.<sup>46</sup> The District Court stated, summarily, "[i]nsofar as the public trust doctrine applies to navigable waters and not copyrights, the retroactive extension of copyright protection does not violate the public trust doctrine."<sup>47</sup> This reading of the public trust doctrine is quite narrow. As the doctrine has developed in America, legal scholars and practitioners have aimed to broaden both the types of property to which the doctrine can apply and the types of public rights to which the doctrine might pertain. In order to understand the potential breadth of the public trust doctrine, a brief exposition of the doctrine is in order.

## II. THE PUBLIC TRUST DOCTRINE: AN ANCIENT PRINCIPLE WITH MODERN RELEVANCE

### A. The Public Trust Doctrine in Antiquity

There is some discrepancy in the literature about where and when the public trust doctrine originated.<sup>48</sup> American jurists trace the doctrine in Anglo-American jurisprudence back to the Magna Carta.<sup>49</sup> Commentators suggest that, in fact, the doctrine was not fully accepted in England until after the American Revolution.<sup>50</sup>

---

80 TENN. L. REV. 235, 265–68 (2013) ("In effect, the numerus clausus principle could be active in particular 'pockets' of the intellectual property legal landscape—local areas where the social costs of infinitely customizable property rights are higher than the costs of standardized property rights.").

<sup>43</sup> See, e.g., Eric R. Claeys, *Intellectual Usufructs: Trade Secrets, Hot News, and the Usufructuary Paradigm at Common Law*, in *INTELLECTUAL PROPERTY AND THE COMMON LAW* 11–32 (Shyam Balganesh ed. 2012).

<sup>44</sup> See, e.g., Sandeen, *supra* note 26, at 414–18; Sun, *supra* note 28, at 51–57.

<sup>45</sup> 74 F. Supp. 2d 1 (D.D.C. 1999).

<sup>46</sup> *Id.* at 3.

<sup>47</sup> *Id.* at 4.

<sup>48</sup> See, e.g., James L. Huffman, *Speaking of Inconvenient Truths—A History of the Public Trust Doctrine*, 18 DUKE ENVTL. L. & POL'Y F. 1, 12–19 (2007) ("An enthusiastic Yale law student . . . urged 'proponents of the public trust . . . [to] hold the original Roman law up as a useful model of a doctrinal purity to which we should return.' . . . As we shall see, it turns out Roman citizens had no such rights.").

<sup>49</sup> Carol Rose, *The Comedy of the Commons: Custom, Promise, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 728 (1986) ("Although American and English jurists confidently espoused the sovereign's 'trust' ownership of the tidelands as if it dated at least from Magna Carta, strong evidence exists that the theory originated much more recently.").

<sup>50</sup> See, e.g., Glenn J. MacGrady, *The Navigability Concept in the Civil and Common Law: Historical Development, Current Importance, and Some Doctrines That Don't Hold Water*, 3 FLA. ST. U. L. REV. 511, 590 (1975) ("[T]here was no public trust doctrine in England relating to Crown

This controversy notwithstanding, it is clear that to the extent that the public trust doctrine can be traced back to Rome and the Magna Carta, it is the limited version pertaining to navigable waters for use in fishing, specifically.<sup>51</sup> To understand the development of the doctrine in the American context, we must cross the Atlantic and begin in the 19<sup>th</sup> Century.

*B. The Public Trust Doctrine in American Jurisprudence*

Since 1842, the public trust doctrine has been recognized by the U.S. Supreme Court as a part of the American common law.<sup>52</sup> The Supreme Court, in what is widely recognized as its first articulation of the public trust doctrine, stated:

When the Revolution took place, the people of each state became themselves sovereign; and in that character held the absolute right to all their navigable waters, and the soils under them, for their own common use, subject only to the rights since surrendered by the constitution to the general government.<sup>53</sup>

In that case, the Court was called upon to consider whether the exclusive rights in a fishery in Raritan Bay, which was claimed by way of a charter granted to the Duke of York, persisted after the surrender of all governmental rights back to the crown and therefore were, at the time of the litigation, vested in the Duke of York's successor in title.<sup>54</sup> The Court held that such rights were necessarily surrendered back to the Crown as they were a normal incident of government at the time of the surrender.<sup>55</sup>

The Court stated:

The dominion and property in navigable waters and the lands under them, being held by the King as a public trust, the grant to an individual of an exclusive fishery in any portion of it, is so much taken from the common fund intrusted to his care for the common benefit. In such cases, whatever does not pass by the grant remains in the Crown for the benefit and advantage of the whole community. Grants of that

---

ownership of submerged beds and the foreshore at the time of the American Revolution. As a matter of English fact, the beds and shores of virtually all navigable waters, tidal and nontidal, were privately owned. As for English law on the subject of foreshore ownership as of 1776. . . . *Attorney General v. Richards*, the first English case to recognize the prima facie rule of Crown ownership of the foreshore, was not decided until 1795, and Hale's *De Jure Maris* was not published until 1786. Thus in 1776 there was virtually no received English law on Crown ownership of the foreshore.").

<sup>51</sup> Huffman, *supra* note 48, at 15.

<sup>52</sup> See *Martin v. Waddell*, 41 U.S. 367, 367–68 (1842). For a discussion of the history of the public trust doctrine in American jurisprudence, see Rose, *supra* note 49, at 726–30 (noting that the earliest American case recognizing the public trust doctrine was *Arnold v. Mundy*, 6 N.J.L. 1 (1821)).

<sup>53</sup> *Martin*, 41 U.S. at 367.

<sup>54</sup> *Id.* at 369–371.

<sup>55</sup> *Id.* at 373.

description are, therefore, construed strictly; and it will not be presumed that the King intended to part from any portion of the public domain, unless clear and special words are used to denote it.<sup>56</sup>

The Court went on to say:

The policy of England since Magna Charta -- for the last six hundred years -- has been carefully preserved; to secure the common right of piscary for the benefit of the public. It would require plain language in the letters patent to the Duke of York, to persuade the Court that the public and common right of fishing in navigable waters, which has been so long and so carefully guarded in England, and which was preserved in every other colony founded on the Atlantic borders, was intended in this one instance to be taken away. There is nothing in the charter that requires this conclusion.<sup>57</sup>

Even in this very early decision, the Supreme Court recognized that the rights of citizens in the navigable waters extended beyond fishing to include recreational uses.<sup>58</sup> While there is some dispute over whether the right to recreational uses of the navigable waters of the United States comes to us from the English common law,<sup>59</sup> since as early as 1972, a court of last instance, the New Jersey State Supreme Court, had “no difficulty in finding that, in [the] latter half of the twentieth century, the public rights in tidal lands are not limited to the ancient prerogatives of navigation and fishing, but extend as well to recreational uses, including bathing, swimming and other shore activities.”<sup>60</sup>

This recreational use reading of the public trust doctrine is, of course, of some relevance to our consideration of whether the public trust doctrine has applicability to the public domain. What it suggests is that even those who seek to use public domain content for uses that may not be universally regarded as productive should have some rights to use that content without having to worry about claims of

---

<sup>56</sup> *Id.* at 368.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 414 (“In all of [the original thirteen colonies], from the time of the settlement to the present day, the previous habits and usages of the colonists have been respected, and they have been accustomed to enjoy in common the benefits and advantages of the navigable waters for the same purposes, and to the same extent, that they have been used and enjoyed for centuries in England. Indeed, it could not well have been otherwise; for the men who first formed the English settlements, could not have been expected to encounter the many hardships that unavoidably attended their emigration to the new world, and to people the banks of its bays and rivers, if the land under the water at their very doors was liable to immediate appropriation by another as private property; and the settler upon the fast land thereby excluded from its enjoyment, and unable to take a shellfish from its bottom or fasten there a stake, or even bathe in its waters without becoming a trespasser upon the rights of another. The usage in New Jersey has, in this respect, from its original settlement, conformed to the practice of the other chartered colonies. And it would require very plain language in these letters patent to persuade us that the public and common right of fishery in navigable waters, which has been so long and so carefully guarded in England and which was preserved in every other colony founded on the Atlantic borders, was intended in this one instance to be taken away. But we see nothing in the charter to require this conclusion.”).

<sup>59</sup> See *Blundell v. Catterall* (1821), 106 Eng. Rep. 1190, 1190; 5 B. & Ald. 268, 268.

<sup>60</sup> *Borough of Neptune City v. Borough of Avon-by-the-Sea*, 294 A.2d 47, 54 (N.J. 1972).

infringement by those that own related content which may still be under copyright. Of course, the public trust doctrine has lessons to teach about the limitations upon those adjacent content owners' rights as well.

In *Raleigh Ave. Beach Ass'n v. Atlantis Beach Club, Inc.*, the New Jersey Supreme Court applied the public trust doctrine to allow members of the public use of the dry sand area of privately-owned beaches in certain circumstances.<sup>61</sup> The factors New Jersey courts use to determine whether the public needs access to particular dry sand areas were first articulated in *Matthews v. Bay Head Improvement Ass'n*.<sup>62</sup> These were distilled in *Raleigh Avenue*, as follows: (1) location of the dry sand area in relation to the foreshore; (2) extent and availability of publicly owned upland sand area; (3) nature and extent of the public demand; and (4) usage of the upland sand land by the owner.<sup>63</sup> These factors may help us to fashion some principled way to determine what the relationship between the works in the public domain and related works still protected by copyright ought to be. Before moving on to that consideration, though, it is important to consider some of the modern expansions of the public trust doctrine and whether those suggest a way to apply the public trust doctrine in the new context of copyright.

### C. Modern Applications of the Ancient Principle

In recent years, the public trust doctrine has been deployed for far more than access to beaches. In a widely cited article, Joseph Sax argued that champions of environmental protection could utilize the public trust doctrine to advance that cause.<sup>64</sup> Professor Sax's article represented a brand new use for the public trust doctrine and an expansion of the types of property to which the doctrine would apply to include not only navigable waters, but any resource in need of government stewardship.<sup>65</sup> Where the doctrine had previously been deployed to demand access, Sax suggested that it could be used to conserve resources.<sup>66</sup> A number of recent

---

<sup>61</sup> *Raleigh Ave. Beach Ass'n v. Atlantis Beach Club, Inc.*, 879 A.2d 112, 113 (N.J. 2005).

<sup>62</sup> 471 A.2d 355, 365 (N.J. 1984).

<sup>63</sup> *Raleigh Avenue*, 879 A.2d at 121–22.

<sup>64</sup> Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 474 (1970).

<sup>65</sup> See Carol M. Rose, *Joseph Sax and the Idea of the Public Trust*, 25 ECOLOGY L. Q. 351, 352 (1998) ("Joseph Sax's 1970 article, *The Public Trust Doctrine in Natural Resources Law*, ushered in the next and most recent major revival of the public trust concept. Sax returned to the old but persistent legal idea—that at least some resources or properties are especially subject to public claims—but unhooked it from its traditional moorings on or around water bodies and applied it to dry land as well. He himself has referred to the concept of the pub[li]c trust in his discussions of the takings doctrine, historical and cultural resources, and a variety of ecological resources. More than that, simply by dusting off this venerable phrase, Sax's Public Trust Doctrine article added a powerful, if controversial, rhetorical element to the discussion of these resource areas.") (footnotes omitted).

<sup>66</sup> Jedidiah Brewer and Gary D. Libecap, *Property Rights and the Public Trust Doctrine in Environmental Protection and Natural Resource Conservation*, 53 THE AUSTRALIAN J. OF AGRIC. AND RESOURCE ECON. 1, 1–2 (2009) ("In 1970, at the time of the rise of the modern environmental movement, Professor Joseph Sax argued that the public trust doctrine could be employed as a powerful tool for 'effective judicial intervention' on behalf of environmental protection and natural resource

cases have taken precisely this tact, asserting that the government's failure to conserve various natural resources constitutes a breach of the public trust doctrine, with mixed results.<sup>67</sup> Others have sought to utilize the doctrine even outside of the context of natural resources.

In *In re City of Detroit*, several parties argued that the art owned by the City of Detroit, and housed at the Detroit Institute of Arts Museum, could not be sold to satisfy the City's debt in the process of its bankruptcy proceeding.<sup>68</sup> The Court agreed with this argument, stating:

Th[ere] is strong evidence that the DIA was founded for the benefit of the residents of the City and the State, that the City believed that this was the case when the City received title to the art in 1919, and that the City has treated the DIA as a public trust for over one hundred years.<sup>69</sup>

While scholars quickly criticized this finding,<sup>70</sup> the Court's openness to this argument certainly represented an extension of the public trust doctrine in a manner that could suggest a willingness to also extend the doctrine into the intellectual property arena. It's important to note, though, that the decision itself does not represent such an extension as the property at issue in Detroit's bankruptcy was the chattel, the artworks themselves, rather than any underlying copyrights.<sup>71</sup> That begs the question, of course, of what it might look like to extend the doctrine into the copyright space.

### III. APPLYING THE PUBLIC TRUST DOCTRINE IN COPYRIGHT

To begin discussing deploying the public trust doctrine in the context of copyright, we must return to the Copyright Term Extension Act ("CTEA").<sup>72</sup> In

---

conservation.").

<sup>67</sup> See, e.g., *Pa. Env'tl. Def. Found. v. Commonwealth*, 161 A.3d 911, 916 (Pa. 2017) ("Because state parks and forests, including the oil and gas minerals therein, are part of the corpus of Pennsylvania's environmental public trust, we hold that the Commonwealth, as trustee, must manage them according to the plain language of Section 27, which imposes fiduciary duties consistent with Pennsylvania trust law."); *Ctr. for Biological Diversity, Inc. v. FPL Grp., Inc.*, 166 Cal.App.4th 1349, 1354 (Cal. Ct. App. 2008) ("Wildlife, including birds, is considered to be a public trust resource of all the people of the state, and private parties have the right to bring an action to enforce the public trust. Nonetheless, . . . [t]he proper means to challenge the adequacy of those measures is by petition for a writ of mandate or request for other appropriate relief brought against those agencies.").

<sup>68</sup> *In re City of Detroit*, 524 B.R. 147, 176 (Bankr. E.D. Mich. 2014) ("Several parties, including at times the City itself, have taken the position that the City holds title to several significant pieces of art in the DIA and has the right to sell them outright to pay its obligations to creditors. Several other parties, including the State Attorney General and the DIA, have taken the position that the art that the City purchased or that others contributed to it is held in public trust for the citizens of the City and the State, and cannot be sold to satisfy the City's debts.").

<sup>69</sup> *Id.* at 178.

<sup>70</sup> E.g., Brian L. Frye, *Art & the "Public Trust" in Municipal Bankruptcy*, 93 U. DET. MERCY L. REV. 627, 637–38 (2016) ("The public trust doctrine is irrelevant, as it does not and should not apply to works of art.").

<sup>71</sup> See *City of Detroit*, 524 B.R. at 176.

<sup>72</sup> Pub. L. No. 105-298, tit. I, § 101, 112 Stat. 2827, 2827 (1998) (codified as amended in scattered

*Eldred v. Reno*, the plaintiffs asserted a public trust doctrine argument.<sup>73</sup> Specifically, the plaintiffs argued that “[t]he Public Trust [d]octrine [s]hould [b]e [c]onstrued as a [c]onstitutional [c]onstraint upon [f]ederal [l]aw.”<sup>74</sup> In the plaintiffs’ formulation, during the term of the copyright, the copyright owner has a present possessory interest in the work while the government is holding a future interest in trust for the public.<sup>75</sup> The extension of the term that pertains to all copyrights necessarily decreases the value of that future interest and, as such, is in violation of the public trust doctrine.<sup>76</sup> While I agree with this argument, as noted above, this argument never made it past the District Court in that litigation.<sup>77</sup> It is also distinct from the argument I am advancing here. Practically, I am not suggesting the public trust doctrine as a constraint on the legislative power of Congress. Rather, I am asserting that we ought to treat public domain content in a similar manner to the way we treat another commons viewed as important for the people to thrive—navigable waters.<sup>78</sup> Rather than seeking to constrain the legislature, I am simply seeking to recognize that just as in the context of real property, the owner of intellectual property must recognize that there may be times when those rights must cede to the needs of the public to access the commons.<sup>79</sup> This claim is distinct from the argument advanced in the CTEA litigation because it does not rely on the future interest that was alleged to reside in the public to items which should have entered the public domain. Rather, it returns to the roots of public trust doctrine theory in recognizing that there are necessarily instances in which a private party’s rights must give way to the greater interest of public access. In the context of copyright, that commons is referred to as the public domain.<sup>80</sup> What immediately follows is a consideration of how courts have conceived of the

---

sections of 17 U.S.C. (2000)).

<sup>73</sup> Plaintiffs’ Reply Memorandum in Support of Motion For Judgment on the Pleadings or in the Alternative for Summary Judgment at 23–25, *Eldred v. Reno*, 74 F. Supp. 2d 1 (D.D.C. 1999) (No. 1:99CV00065 JLG).

<sup>74</sup> *Id.* at 23.

<sup>75</sup> *See id.* at 23–24.

<sup>76</sup> *See id.* at 24–25.

<sup>77</sup> *Eldred v. Reno*, 74 F. Supp. 2d 1, 4 (D.D.C. 1999); *see also supra* notes 45–47 and accompanying text.

<sup>78</sup> *See infra* notes 114–117 and accompanying text.

<sup>79</sup> *See infra* notes 114–115 and accompanying text.

<sup>80</sup> This idea is illustrated by Anupam Chandler & Madhavi Sunder:

Central to most definitions of the public domain is the notion that resources therein are available broadly for access and use. Just as property consists in a varying bundle of rights revolving around a central right to exclude, the public domain consists in a varying bundle of rights revolving around the right to access and use. . . . [S]cholarship has assumed that such access and use cannot be conditioned on the payment of a substantial price. Accordingly, we offer the following definition: Public domain: Resources for which legal rights to access and use for free (or for nominal sums) are held broadly. Adopting such a capacious definition, it becomes unnecessary to distinguish public domain from “commons.” Both terms have an intertwined past and an interrelated present. While the “public domain” often refers to resources to which there are rights of access shared among *all* people . . . .

Anupam Chandler & Madhavi Sunder, *The Romance of the Public Domain*, 92 CALIF. L. REV. 1331, 1338 (2004).

nature of the public domain.

### A. *The Parameters of Access to Public Domain Content*

Before *Golan v. Holder*, it had long been received wisdom that once a work was in the public domain, it was there forever.<sup>81</sup> The Supreme Court soundly rejected that notion, though the understanding of irretrievability was previously articulated by the Supreme Court to be “federal policy” found in the Intellectual Property clause of the Constitution and “the implementing federal statutes.”<sup>82</sup> The *Golan* Court completely spurned the idea that members of the public have any interest in the public domain. The majority opinion stated:

As petitioners put it in this Court, Congress impermissibly revoked their right to exploit foreign works that “belonged to them” once the works were in the public domain.

To copyright lawyers, the “vested rights” formulation might sound exactly backwards: Rights typically vest at the *outset* of copyright protection, in an author or rightholder. Once the term of protection ends, the works do not revert in any rightholder. Instead, the works simply lapse into the public domain. Anyone has free access to the public domain, but no one, after the copyright term has expired, acquires ownership rights in the once-protected works.<sup>83</sup>

This was, of course, exactly contrary to the prior received wisdom. Experts contemporaneously quipped, “[t]his decision [*Golan*] marked a significant departure from the ‘bedrock principle’ that once works enter the public domain, they remain there, free for anyone to use and build upon.”<sup>84</sup> The Court, recognizing this departure, tried to limit its holding on the basis of Congressional power stating, “[g]iven the authority we hold Congress has, we will not second-guess the political choice Congress made between leaving the public domain untouched and embracing Berne unstintingly.”<sup>85</sup> Nonetheless, the decision was broadly read as a blow to the public domain.<sup>86</sup> While *Golan* concerned Congress’ authority to

<sup>81</sup> See *Golan v. Holder*, 565 U.S. 302, 308 (2012).

<sup>82</sup> *Compro Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234, 237 (1964).

<sup>83</sup> *Golan*, 565 U.S. at 331–32 (citations omitted).

<sup>84</sup> James Boyle & Jennifer Jenkins, *Public by Sufferance Alone: The Worst of 2012*, HUFFPOST (Jan. 10, 2013), [https://www.huffingtonpost.com/james-boyle/public-by-sufferance-alone\\_b\\_2443850.html](https://www.huffingtonpost.com/james-boyle/public-by-sufferance-alone_b_2443850.html) [<https://perma.cc/MS3X-JSWX>].

<sup>85</sup> *Golan*, 565 U.S. at 324.

<sup>86</sup> See, e.g., Melissa Levine, *Golan v. Holder: In Praise of Breyer’s Dissent*, MICH. PUBL’G (Jan. 25, 2012), <https://www.publishing.umich.edu/2012/01/25/golan-holder-breyer/> [<https://perma.cc/2477-8TZ2>] (expressing the belief that “[i]n one fell swoop, the majority [of the *Golan* Court] managed to express a legal opinion out of touch with technological and social reality or related changes in communication”); Nicholas O’Donnell, *Golan v. Holder—Foreign Works in Public Domain Back Under Copyright*, SULLIVAN & WORCESTER (Mar. 7, 2012), <https://blog.sandw.com/artlawreport/2012/03/07/golan-v-holder-foreign-works-in-public-domain-back-under-copyright/> [<https://perma.cc/XCH9-BK2Q>] (asserting that the *Golan* “decision raises far-reaching implications for anyone who has copied, sold, or otherwise published foreign works of the 20<sup>th</sup> century that were



remove items from the public domain, and *Eldred v. Ashcroft* before it had considered the question of Congress' authority to forestall large scale addition to the public domain,<sup>87</sup> in light of the imminence of fresh annual infusions into the public domain, those interested in accessing work that is unquestionably in the public domain would do well to consider how courts treat cases where related works continue to be protected by copyright. What follows is a consideration of such cases. Immediately below, I'll discuss three recent cases that demonstrate that such access is, in fact, imperiled. Courts often extend protection from copyrighted works to disallow uses of public domain content. When they don't, it is often for exceedingly narrow reasons that do little to ensure wide access to public domain content.

### *B. Cordoning Off the Public Domain by Weaponizing Extant Copyright*

#### i. Extending Existing Copyrights to Limit Use of Public Domain Content

The Northern District of Georgia in *Code Revision Comm'n v. PublicResource.Org, Inc.*, recognized that statutory language itself is not copyrightable and nonetheless held that the Official Code of Georgia Annotated was, in fact, copyrightable and copyrighted.<sup>88</sup> In acknowledging that the statutory language could not be copyrighted, the court cited to the Compendium of U.S. Copyright Office Practices,<sup>89</sup> which expresses "longstanding public policy [of] the U.S. Copyright Office [that it] will not register a government edict that has been issued by any state, local, or territorial government, including legislative enactments, judicial decisions, administrative rulings, public ordinances, or similar types of official legal materials."<sup>90</sup> This longstanding policy reflects an understanding that the law of the land is properly in the public domain. As such, no work of the United States government is protected by copyright.<sup>91</sup> The Copyright Office has read this prohibition against copyrighting works of the United States government broadly. The provision in the Compendium regarding federal government works reads expansively:

This includes legislation enacted by Congress, decisions issued by the federal judiciary, regulations issued by a federal agency, or any other work prepared by an officer or employee of the U.S. federal government

---

assumed to be in the public domain"); Jeffrey R. Young, *Supreme Court Upholds Law that Pulled Foreign Works Back Under Copyright*, THE CHRONICLE OF HIGHER EDUC. (Jan. 18, 2012), <https://www.chronicle.com/article/Supreme-Court-Upholds-Law-That/130376> [<https://perma.cc/M3DX-6E5T>] (asserting that the *Golan* decision "will affect scholars and artists around the country").

<sup>87</sup> *Eldred v. Ashcroft*, 537 U.S. 186, 192–93 (2003).

<sup>88</sup> *Code Revision Comm'n v. PublicResource.Org, Inc.*, 244 F. Supp. 3d 1350, 1356–57 (N.D. Ga. 2017).

<sup>89</sup> *Id.* at 1356.

<sup>90</sup> U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES THIRD EDITION § 313.6(C)(1) (2017).

<sup>91</sup> 17 U.S.C. § 105 (2012) ("Copyright protection under this title is not available for any work of the United States Government. . . .").

while acting within the course of his or her official duties. It also includes works prepared by an officer or employee of the government of the District of Columbia, the Commonwealth of Puerto Rico, or the organized territories under the jurisdiction of the federal government.<sup>92</sup>

This expansive prohibition does not apply to the States.<sup>93</sup> Neither the Copyright Office nor the Northern District of Georgia explains the reasoning behind the public policy of dedicating the law to the public domain. While the Eleventh Circuit's recent decision in the case would endeavor to provide the explanation, its reasoning is so narrow as to foreclose application of the case outside of the context of cases regarding content which would be copyrightable but for its status as law or law-like.<sup>94</sup> The Northern District of Georgia nonetheless went on to find that the annotations, ordered by the Commission, the drafting of which was supervised by the Commission and once integrated with the statutory language, the content of which was ratified by the Georgia Legislature, was copyrightable and rendered the Official Code of Georgia, including the annotations, copyrightable.<sup>95</sup> On that reasoning, the court granted an injunction against Public Resource.Org's publication and dissemination of the O.C.G.A.<sup>96</sup>

The opinion of the Northern District of Georgia begs the question—why should access to federal law be more readily available than access to the official code of the State of Georgia or any other document with the force of law? The Eleventh Circuit's decision in the case handily addresses this question.<sup>97</sup> Unfortunately, it is not up to the task of explaining why public access necessitates negating copyright protectability, in the first place. This second question is particularly perplexing given that there is a great deal of jurisprudence and scholarship suggesting that copyright itself is the engine of dissemination/access.<sup>98</sup> Neither does it help us to conceptualize of the relative rights and interests of a copyright owner versus the public in cases where the copyrighted content in question is adjacent to content that is unquestionably in the public domain, as the statutory language in the case undoubtedly was. The public trust doctrine, might serve as a useful model for Courts considering cases like *Code Revision Commission v. Public.Resource.Org, Inc.* to answer that question.

---

<sup>92</sup> U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES THIRD EDITION § 313.6(C)(1) (2017).

<sup>93</sup> *Public.Resource.Org*, 906 F.3d at 1239 (“This partial codification of *Banks* for works created by the federal government leaves unmodified the rule as it applies to works created by the states.”) (referencing *Banks v. Manchester*, 128 U.S. 244 (1888) , the rule of which the *Public Resource Org* Court articulated as “government edicts cannot be copyrighted.”).

<sup>94</sup> See *infra* notes 107–113 and accompanying text.

<sup>95</sup> *PublicResource.Org*, 244 F. Supp. 3d at 1356–57.

<sup>96</sup> *Id.* at 1361.

<sup>97</sup> See *infra* notes 108–111 and accompanying text.

<sup>98</sup> See *Golan v. Holder*, 565 U.S. 302, 304–05 (2012) (“Recognizing that some restriction on expression is the inherent and intended effect of every grant of copyright, the Court observed that the Framers regarded copyright protection not simply as a limit on the manner in which expressive works may be used, but also as an ‘engine of free expression.’”) (citing *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003)).

## ii. An Anemic View of the Public Domain

*Code Revision Commission v. Public.Resource.org, Inc.*, is merely one example of courts restricting access to public domain content. Six years earlier in *Warner Brothers v. X One X Prods.*, the District Court of Missouri and then the Eighth Circuit had held that certain uses of works in the public domain could infringe other, related works that remained under copyright protection, essentially extending the protection of the copyrighted works to severely limit the use of the public domain works.<sup>99</sup> In the *Warner Brothers* cases, the works in question had never been protected by copyright, as they were published without notice during the period in which securing copyright protection required adhering to statutory formalities.<sup>100</sup> The Plaintiff asserted that use of the public domain works on t-shirts constituted infringement of the related films which remained under copyright.<sup>101</sup> Both the District Court and the Eighth Circuit ultimately curtailed the Defendant's uses of the public domain content pretty stringently, holding that certain uses of the public domain works could, in fact, infringe upon the copyrights in the related films.<sup>102</sup> A more recent decision out of the Seventh Circuit seems a move in the right direction in terms of how courts should treat items in the public domain. Though, I'll suggest, that move is not quite far enough in the right direction.

In the dispute between Leslie S. Klinger and Conan Doyle Estate, Ltd., the Northern District of Illinois and the Seventh Circuit get closer than any court has recently to circumscribing a copyright owner's ability to utilize existing copyrights to disallow use of public domain content.<sup>103</sup> In that case, the Conan Doyle Estate had argued that though most of the stories written by Sir Arthur Conan Doyle were in the public domain by virtue of the fact that they were published in the United States before 1923, the characters, Sherlock Holmes and Dr. Watson, remained under copyright because ten stories remained under copyright.<sup>104</sup> Both the District Court and the Seventh Circuit rejected that argument.<sup>105</sup> While these decisions certainly represent an improvement over the constrained access provided for in *Warner Brothers*,<sup>106</sup> they don't go far enough, in that, like in *Warner Brothers*, they require punctilious factual proof that the new user's use of the public domain content does not amount to infringement of the copyrighted content. In the Klinger/Conan Doyle dispute, Klinger was put to the task of demonstrating that none of the storylines, dialogue, characters or character traits utilized in the

---

<sup>99</sup> *Warner Bros. Entm't, Inc. v. X One X Prods.*, 644 F.3d 584, 597–99 (8th Cir. 2011).

<sup>100</sup> *Id.* at 593.

<sup>101</sup> *Id.* at 602.

<sup>102</sup> *Id.* at 603; *Warner Bros. Entm't v. Dave Grossman Creations, Inc.*, No. 4:06CV546 HEA, 2010 U.S. Dist. LEXIS 19547, at \*12–14 (E.D. Mo. 2010).

<sup>103</sup> *Klinger v. Conan Doyle Estate, Ltd.*, 988 F. Supp. 2d 879 (N.D. Ill. 2013), *aff'd*, 755 F.3d 496, 497, 500, 503 (7th Cir. 2014), *cert. denied*, 135 S. Ct. 458 (2014).

<sup>104</sup> *Id.* at 497–98.

<sup>105</sup> *Id.* at 503.

<sup>106</sup> See *supra* notes 99–101 and accompanying text.

anthology that he was seeking to publish was first introduced in the ten works which remained under copyright.<sup>107</sup> This, of course, is a daunting task that places the onus of ensuring access to public domain materials squarely on each and every potential follow-on user. Not only must you ensure that the work that you are utilizing is in the public domain, you must also endeavor to ensure that nothing in your new work could infringe related copyrighted content. There seems no question that such a requirement would have a chilling effect on those seeking to utilize public domain materials. In Section C. below, I'll suggest an alternative. First, though, the Eleventh Circuit's reversal of the Northern District of Georgia's decision in *Code Revision Comm'n v. Public.Resource.org, Inc.* bears analysis if for no other reason than that it allows for public access to a certain type of work—content having the force of law—without advancing the broader claim to access to public domain materials in any significant way.

### iii. Getting to the Right Result in Precisely the Wrong Way

The Eleventh Circuit's decision in *Code Revision Comm'n v. Public.Resource.org, Inc.* vindicates the public's rights to access the content in question.<sup>108</sup> While the decision can be read as a powerful victory for those, like the individual behind Public.Resource.org, who are interested in the public having access to law and regulations, it does little for those interested in ensuring access to public domain content more broadly. Further, the Eleventh Circuit noted that its decision was made based on “characteristics that are the hallmarks of law.”<sup>109</sup> In particular, the Eleventh Circuit stated that it would “rely on the identity of the public officials who created the work, the authoritativeness of the work, and the process by which the work was created.”<sup>110</sup> The Eleventh Circuit explained that:

[W]ith respect to certain governmental works, the term “author” should be construed to mean “the People,” so that the general public is treated as the owner of the work. This means that a work subject to the rule is inherently public domain material and thus not eligible for copyright protection.<sup>111</sup>

The Court's ruling is limited in two ways, which would make it basically inapposite in most copyright cases. First, the Court specifically limits its decision to copyrightability of content which has the force of law.<sup>112</sup> In doing so, it relies heavily on a niche set of precedents having little to no applicability outside of the context of determining the copyrightability of legal promulgations.<sup>113</sup> The

---

<sup>107</sup> *Klinger*, 988 F. Supp. 2d at 893.

<sup>108</sup> *Code Revision Comm'n v. Public.Resource.Org, Inc.*, 906 F.3d 1229, 1255 (11th Cir. 2018).

<sup>109</sup> *Id.* at 1232.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 1236.

<sup>112</sup> *Id.* at 1242.

<sup>113</sup> *Id.*

Eleventh Circuit also relied heavily on the Georgia law and process by which the annotations in question were produced and adopted which suggests that the applicability of the case may be limited even in the context of cases concerned with copyrightability of law.<sup>114</sup> A cynic could easily read that decision and conjure myriad ways that even Georgia could alter its law or process to avoid the Eleventh Circuit's holding in the future. What follows immediately is a potential alternative framework for considering questions of access to public domain works that are related to works in which copyright continues to persist.

*C. Public Trust Principles as Ameliorative of Over-Protection Impulses*

Professor Sax's groundbreaking 1970 article envisioned a public trust doctrine expansive enough to embrace the stewardship of not just natural resources but also, perhaps, cultural resources.<sup>115</sup> The recreational access public trust doctrine cases center human flourishing as the theoretical underpinning of the public trust doctrine and provide a model for how we might fashion a public trust doctrine for the public domain.<sup>116</sup> This model is appealing for a number of reasons. First, it is easy to map the issues presented in the beach access cases unto the issues presented in some of these public domain cases. In both instances, the central question is the public's access to a longstanding commons—navigable waters, on the one hand, and the public domain, on the other. And, in both instances, Courts are called upon to decide the extent to which the public should be able to access that commons in light of asserted private rights. Moreover, the factors distilled in *Raleigh Ave. Beach Ass'n v. Atlantis Beach Club, Inc.* provide a workable framework for taking the public's interest in access to a commons into account when potentially conflicting private rights are asserted. There, the New Jersey Supreme Court considered: (1) location of the dry sand area in relation to the foreshore; (2) extent and availability of publicly-owned upland sand area; (3) nature and extent of the public demand; and (4) usage of the upland sand land by the owner.<sup>117</sup> While these considerations don't map perfectly onto the public domain context, they certainly suggest some factors courts ought to take into account. These might include (1) the use the copyright owner is making of the protected work; (2) the ubiquity of the public domain work in the culture, i.e., the nature and extent of the public demand; and (3) the extent to which the follow-on users proposed use is likely to deprive the copyright owner of a reasonable return on investment in the protected work. I believe that this framework could provide far more balanced determinations in

---

<sup>114</sup> *Id.* at 1245–48.

<sup>115</sup> Sax, *supra* note 64, at 557 (“Finally, it must be emphasized that the discussion contained in this Article applies with equal force to controversies over subjects other than natural resources. While resource controversies are often particularly dramatic examples of diffuse public interests and contain all their problems of equality in the political and administrative process, those problems frequently arise in issues affecting the poor and consumer groups. Only time will reveal the appropriate limits of the public trust doctrine as a useful judicial instrument.”).

<sup>116</sup> See *supra* notes 60–63 and accompanying text.

<sup>117</sup> *Raleigh Ave. Beach Ass'n v. Atlantis Beach Club, Inc.*, 879 A.2d at 121 (N.J. 2005).

cases like *Klinger v. Conan Doyle Estate, Ltd.*,<sup>118</sup> and, hopefully, avoid altogether suits like *Code Revision Comm'n v. Pub.Resource.org, Inc.*<sup>119</sup>

There are, of course, challenges here. The most obvious of these is figuring out how the diffuse parties interested in access to public domain content might effectuate adoption of such a framework. The simplest way forward in that regard is likely a test case. But, of course, content owners certainly have the resources at their disposal to fight such a case vigorously. That means, I think, that the onus is on those interested in access to organize and strategize before works like *Steamboat Willie* enter the public domain and users find themselves on the defensive.

#### CONCLUSION: A CALL TO ACTION

There is no question in my mind that the major content owners, like Disney, are considering a strategy for limiting access to their content that is imminently entering the public domain. Even if you don't agree with the prescription I have offered here – importing the public trust doctrine's protections for access into the copyright context – it would certainly behoove those of us interested in ensuring such access to think broadly about the ways that may be accomplished. There is no question that content owners are far better organized and resourced. Unless those interested in access strategize, even without legislation like the Copyright Term Extension Act, content owners who have copyrights on related content can, and very likely will, tie those who seek to use the new public domain content up in expensive and time-consuming litigation.

---

<sup>118</sup> 755 F.3d 496 (7th Cir. 2014).

<sup>119</sup> 906 F.3d 1229 (11th Cir. 2018).

