



1. What does the term public domain mean?

Public domain (i.e. "public property", "commons") applies to content which is not or no longer protected by copyright and is thus freely available to everyone. This content is literally in the public domain. Access to it cannot be limited by copyright or made available for a fee.

2. Which works belong to the public domain?

a. Which content belongs to the public domain under Swiss law?

Intellectual works without individual character, such as so-called snapshots, individual intellectual works for which copyright has expired, or works which are excluded from copyright protection (for example, legislative texts; see Question 2c.) belong to the public domain.

b. What happens if an intellectual work lacks the necessary individual character for it to be protected under copyright?

Only an intellectual work with individual character is protected under copyright. If the individual character is lacking, the creation is not protected by copyright and it belongs to the public domain.

c. Which publications by the authorities belong to the public domain?

There is a whole list of works from the authorities which are excluded from copyright protection: legislation, official decrees, payment instruments, legal decisions, protocols, reports by the authorities or public administrations, as well as patent documents and published patent applications.

But not all works from the authorities are in the public domain. Internal administrative documents or documents which do not have so-called sovereign character (e.g. journals by the authorities) are not in the public domain. However, access to them can be guaranteed through certain requirements under the Freedom of Information Act.

d. Does research data, which is considered as facts, belong to the public domain?

Research data (e.g. population statistics) are not considered intellectual creations and therefore belong to the public domain. Statements made by scientists about states, processes or other facts become free in terms of content when they are published and are not protected by copyright, even if new findings are included or much effort was involved in the discovery (BGE 113 II 306, E. 3a). However, the way in which the scientific contents are communicated is protected (e.g. the written text of a research report). Databases can be protected as so-called collected works, regardless of whether the individual datasets can be protected under copyright, if the selection and compilation of the data can be seen as individual. The selection of the data, however, is usually simply focused on completeness, and its compilation is only done in a systematic way. For example, the mere listing of telephone numbers for a specific region is not sufficiently individual to be protected by copyright. The same evaluation criteria apply for databases containing metadata of works.

The European Union has regulated the legal protection of databases in a specific directive (Directive 96/9/EC). It is therefore possible that extracting or further using at least a significant part of the contents of a database is permitted under Swiss law, but it is not permitted under European law.

e. What is the legal situation if the author of a work is unknown (or more than one author exists for a work)?

If the author of a work is unnamed (anonymous) or unknown (acting under a pseudonym), copyright protection ends 70 years after the work was published (50 years for computer programs) or after the last delivery. However, if the true identity of the author is known, despite use of a pseudonym, the term of protection ends 70 years (or 50 years) after his death.

It is a different case for so-called orphan works in which the author is or was known (i.e. he possibly fell into oblivion over the course of time), but today cannot be found. Here, the term of protection ends 70 years after the death or the presumed death of the author (see Question 2f).

For cases of joint authorship (whereby multiple authors jointly create a work), the protection of the work ends 70 and 50 years respectively after the death of the last co-author. If the individual author contributions can be separated (e.g. lyrics and melody), then copyright expires individually for each contribution. A special regulation exists for audiovisual works such as films, whereby the term of copyright protection is calculated only by the director's date of death because so many people are involved in the making of a film.

f. What is the case when the author's exact date of death is unknown?

If the exact date of the author's death is unknown, copyright protection ends and the work becomes public domain as soon as it can be assumed that the author has been dead for more than 70 years (or 50 years for computer programs).



g. What is the legal situation in cases where various rights exist to the work (e.g. the copyright to a song and the right to a single performance)?

In such cases, different terms of protection exist for different protected subject-matter. Take Bizet's Carmen, for example. The opera is in the public domain because George Bizet died in 1875, and the term of protection has long since expired. For Francesco Rosi's 1984 film version of this opera, however, there are copyrights, performer rights and producer rights. Therefore, it is possible to perform the opera without permission and without paying remuneration. However, to show Francesco Rosi's film version of this opera, it is necessary to gain permission from the rights owner and to pay remuneration for its use.

h. What is the legal situation in relation to translations or new editions of works in the public domain (if these works are adapted to the current orthography or typographical errors are corrected)?

Translations, including the translation of public domain works, can be protected by copyright. The translation is usually an adaptation, which means the translation is itself an intellectual creation with individual character.

Whether new editions (with updated orthography or typographical corrections) are already protected by copyright cannot be evaluated in general. Here, it depends on whether the revision is altogether so significant that the new edition takes on its own individual character.

The original public domain work, however, remains free and can continue to be used.

i. Does a work have to be published in order for it to belong to the public domain (e.g. letters from a person who died more than 70 years ago)?

A work automatically falls under public domain when the term of protection expires, regardless of whether it has been published in the meantime or not.

3. What am I allowed to do with public domain works?

a. How can a public domain work be used without having to get permission?

If a work is in the public domain, it can be used in any way desired – this means reproduced (copied), edited, distributed, etc. – without permission.

b. Are there any legal restrictions to using public domain works?

Even the use of public domain works can be restricted. These restrictions can result from the prohibition of racial discrimination, for example, or the criminal regulation of pornography.

4. Does new copyright protection arise when a public domain work is digitalised (scans, photographs) and, and as a result of this, restrictions on the use and reproduction of the scans or photographs?

What is the situation with two and three- dimensional works?

The individuality required for copyright protection is commonly lacking for reproductions which are as true as possible to the original. In contrast, an artistic photograph of a public domain work can be protected by copyright as a so-called "derivative work". However, the original work in the photograph remains a public domain work. Whether a work is two or three-dimensional is irrelevant. This is only of significance for so-called 'freedom of panorama'. In other words, if a copyright protected work is located in a public place, it may be depicted two- dimensionally (but not three-dimensionally) without the rights holder's permission. For example, the Oppenheim fountain in Bern may be photographed and the photo may be subsequently used. This is true even for commercial uses such as producing posters or postcards.

5. Some organisations distribute public domain works and protect them through technical measures such as DRM (Digital Rights Management). Am I allowed to circumvent the DRM protection?

The Copyright Act distinguishes between two types of DRM. Technical protection measures (TPM) regulate the use of a work. Rights management information (RMI) gives information about the legal situation. Circumvention is only possible with TPM. RMI cannot prevent any use and therefore cannot be circumvented. It can, however, be destroyed or removed.

The circumvention of technical measures is only forbidden by copyright law if the rights holder uses it to regulate the use of his copyright protected work. Since, in the case of public domain works, they are not copyrighted, circumvention of technical measures does not represent an infringement of copyright law. In these cases, however, it is possible that a prohibition may be invoked under computer crimes (e.g. unauthorised data acquisition or unauthorised entry in a data processing system).



6. Some organisations add watermarks or similar signs to public domain works and publish them on the internet.

Does adding such a sign to a public domain work create new protection which restricts the use and reproduction of the work?

Watermarks on works of public domain are indeed annoying, but they do not restrict the use of the work. The purpose of a watermark is not meant to extend the term of copyright protection. From the point of view of copyright, adding a watermark to a work that is already in the public domain does not mean that new copyright protection arises. Theoretically, however, the watermark itself could be seen as an intellectual work with individual character, which in turn is protected by copyright. In this case, further use of the public domain work would be problematical because the watermark would be used at the same time.

7. Some organisations exhibit works of public domain but don't allow them to be photographed. Am I allowed to circumvent this ban?

This does not concern copyright protection. An organisation (such as a museum) can ban photography based on so-called 'house rules'.

Most museums compile the provisions of their house rules in a so-called house ordinance. This states how visitors to the museum are to conduct themselves and normally also regulates whether exhibited works may be photographed or not.

A ban on photography can be for different reasons; for example, to protect the pictures from camera flashes or to ensure the orderly operation of the museum.

8. To what extent is metadata protected under Swiss copyright law?

Metadata is not protected under copyright law per se. If, however, it is captured on blank media or if it appears in the reproduction, then it concerns copyright protected information for the assertion of rights (rights management information, RMI). The metadata of a song (e.g. song title and the name of the composer) that exists on a CD may not be deleted in order to subsequently transmit the song without this data.

9. Can I relinquish the copyright to one of my own works by assigning it to the public domain?

Copyright arises automatically and, in contrast to property law, no procedure exists for simply giving up the right. An author, therefore, does not have any direct possibility of giving a work to the public domain. However, he is at liberty to simply tolerate copyright infringement and to waive legal prosecution. In addition, an author can actively decide to make his work available under an appropriate Creative Commons licence, which is very close to the public domain, or an equivalent type of public licence.

10. To what extent can someone be held responsible for incorrectly issuing a work as a work of public domain?

For copyright infringement, the person held responsible is the one who carried out the infringing act. Under certain circumstances, there may be a possibility of recourse for incorrect information, but it is always worth personally checking whether a work is actually in the public domain or not.

11. To what extent can an institution or a person be held responsible for incorrectly claiming copyright for a work that is actually in the public domain?

If a person or institution knows that a work is in the public domain and still claims copyright to it, this is so-called intentional deception. If, for example, a licence contract for a public domain work is subsequently signed, this contract would not be binding on the deceived person if he stated before a court that he is not in agreement with the contract. If someone knowingly claims copyright remuneration for public domain works, this is usually viewed as unjust enrichment. In such cases, the remuneration received would have to be paid back.