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Unlocking the Public Domain

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Unlocking the Public Domain

Abstract

Public Domain Day, celebrated January 1st of every year, is a relatively new holiday, which has the potential to grow rapidly as 2019 marked the first year in 20 years in the United States that new works were added to the public domain. This article showcases Texas Tech University Libraries' "Public Domain Day: 1923 Unlocked" exhibition and outreach efforts as one approach, but also highlights other intuitions' promotions and suggests ways to connect to larger initiatives. Cultural heritage and visual resources professionals can adapt this celebration as a way of advocating for the public domain, educating on copyright literacy, bringing attention to newly public domain collections materials, and exciting and empowering the public. The growth of the public domain enriches many of our missions and goals including supporting creativity and preserving our past and should be celebrated and protected.

Keywords

public domain, Public Domain Day, copyright, Creative Commons, outreach, advocacy, information literacy

Author Bio & Acknowledgements

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What is Public Domain (Day)

This year's Public Domain Day, January 1, 2019, was an important one: It was the first time in 20 years any published works entered the public domain in the United States through copyright expiration. This 20 year lag was due to segments of the 1998 Copyright Term Extension Act, often referred to as the Sonny Bono or Mickey Mouse Copyright Act. Before its passage, the previous law had scheduled copyright expiration on January 1, 1999 for works published in 1923, but the act added twenty years to works originally copyrighted after 1922 and renewed before 1978. Many works published in 1923 have finally entered the public domain after 95 years under copyright, releasing restrictions upon their use in copying, publishing, editing, and other creative and intellectual pursuits. Google Books, Project Gutenberg, Internet Archive, and HathiTrust celebrated by making tens of thousands of works instantly accessible. HathiTrust alone opened 43,104 volumes. This number will grow as cultural heritage institutions, liberated to digitize 1923 works, release them for public consumption and creative pursuits.

Public Domain Day is a very recent celebration. The earliest documented internet mention is a 2004 post on the Canadian Digital Copyright Forum.¹ Duke's Center for the Study of the Public Domain began yearly posts in 2010, highlighting what could have been added to the public domain had the laws not been amended. Libraries, museums, and other non-profits have joined the efforts in recent years with a strong focus on education and advocacy in their activities. With a new batch of published materials to promote each Public Domain Day starting this year, proponents can focus on expanding the reach and scope of outreach and education events.

In contrast to the newness of the celebration, the concept of the public domain was implicit in the construction of copyright law at its inception. Article 1, Section 8, Clause 8 of the U.S. Constitution defines the purpose of copyright: "to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."² Over the years, lawmakers have changed the definition of "limited Times," but there has always been a fixed term length thereby granting to the public those works that no longer qualify for copyright protection. Public domain and additionally fair use serve as integral pieces to the copyright balance "between the interests of authors and inventors in the control and exploitation of their writings and discoveries on the one hand, and society's competing interest in the free flow of ideas, information, and commerce on the other hand."³ While often couched as an adversarial relationship, maintaining this balance benefits everyone. Creators have the ability to pull from a rich public commons and derive benefits from their labor and the public gets to explore and use creative works through a variety of access mechanisms.

Public Domain and Copyright Advocacy

In educational and cultural heritage fields, visual resource professionals are stewards and mediators of copyrightable works and therefore have a stake in maintaining the delicate

¹ Wallace J. McLean, "Happy Public Domain Day," *Canadian Digital Copyright Forum*, January 1, 2004, <http://www3.wcl.american.edu/cni/0401/35315.html>.

² U.S. Const. art. I, § 8.

³ *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984).

copyright balance. Visual resource professionals spend so much time trying to document and communicate the copyright status of our collections, that they often have less time for important services for patrons. Libraries and archives in particular struggle with orphan works, whose copyright owner cannot be identified and/or contacted. Museums and galleries must contend with evolving licensing procedures and use of image reproductions in promotion, education, and scholarship. Therefore, it is unsurprising that engagement with copyright issues has become a fundamental part of many of our professions.

Libraries and archives in the U.S. share an interest in reforming copyright law to make the process of providing access to patrons less fraught with exemptions and onerous restrictions. The American Library Association asserts “that copyright will only be effective when it is balanced between the rights of the public and the interests of rights holders” and they place “protection of the public domain” at the top of their summary list of positions.⁴ The Society of American Archivists states the profession will “advocate for amendments to the Copyright Act that facilitate making archival material available for research and use,” writing that “overlong terms of copyright protection inhibit the growth of the public domain to the detriment of the public interest.”⁵ In addition, these professional organizations also release issue statements and briefs on key legislation and mobilize their members to advocate directly to the public and lawmakers, making them leading voices in copyright reform.

Museum and gallery positions on the public domain can be more complicated, but recent moves of many major institutions to utilize open access, Creative Commons, or other licensing models have begun to address new ways of achieving a sustainable copyright balance. Studies in 2012⁶ and 2016⁷ called out practices where certain museums limited access to reproductions of their works as copyfraud, meaning they restricted the public’s rights to the works in ways that directly misrepresent copyright law concerning the public domain. These policies often run counter to the public mission of museums,⁸ and many institutions are now charting new paths that support collaboration and engagement, including open access digital collections (recent examples include the Cleveland Museum of Art and the Art Institute of Chicago). As more museums release parts of their digitized collections for open access they see benefits through increased efficiency in staff workflows, higher institutional website traffic, and public relevancy through increased use of their collection in research publications, news sources, and social media.⁹ As Petri, an art historian and lawyer researching the dynamics between art, law, and

⁴ “Copyright,” American Library Association, last modified January 24, 2019.

<http://www.ala.org/advocacy/copyright>.

⁵ “Issue Brief: Archivists and the Term of Copyright,” Society of American Archivists, last modified January 12, 2016, https://www2.archivists.org/statements/issue-brief-archivists-and-the-term-of-copyright#.Vz4PA_krKUK.

⁶ Kenneth D. Crews, “Museum Policies and Art Images: Conflicting Objectives and Copyright Overreaching,” *Copyright, Museums and Licensing of Art Images* (2012): 795-835.

http://www.kressfoundation.org/uploadedFiles/Sponsored_Research/Research/Crews_appendix_2.pdf.

⁷ Alain Marciano and Nathalie Moureau, “Museums, Property Rights, and Photographs of Works of Art. Why Reproduction through Photograph Should be Free,” *Review of Economic Research on Copyright Issues* 13, no. 1 (2016): 1-28.

⁸ Chris Needham, “Understanding Copyfraud: Public Domain Images and False Claims of Copyright,” *Art Documentation* 36, no. 2 (2017): 229.

⁹ Effie Kapsalis, *The Impact of Open Access on Galleries, Libraries, Museums, & Archives*, Smithsonian Institution Archive (April 27, 2016): 3. https://digitalcommons.law.uga.edu/podcasts_onreserve/6/.

economics, asserts, a “rethink of the approach to reproduction of works in the public domain has only just begun.”¹⁰

Regardless of the nature of the ideal copyright balance for our professions, visual resource professionals collectively struggle with copyright law and want the process to become clearer and more transparent. Voicing positions and contacting lawmakers concerning issues of concern in current copyright law, proposed legislation, and the management of the U.S. Copyright Office are key components of effective advocacy. The most integral component to true copyright reform is educating the public to make informed decisions and potentially become advocates themselves. An empowered public that can critically evaluate their access, use, and creation of creative works is necessary to the growth and vitality of our participatory and media driven culture. This empowered public can then engage discerningly with visual resources and collections, to the benefit of all.

Copyright Literacy

Educational and outreach efforts should include copyright literacy because a lack of copyright knowledge hampers creative and intellectual activities. Copyright literacy facilitates people “[a]cquiring and demonstrating the appropriate knowledge, skills and behaviours to enable the ethical creation and use of copyright material.”¹¹ While many visual resource professionals interact critically and routinely with copyright issues, many patrons of educational and cultural heritage institutions have limited experience with copyright. In a 2016 survey of librarians 97% of respondents indicated familiarity with the public domain.¹² That same year a survey of voting-age U.S. residents showed that 37.7% of respondents believed that copyrights never expire, and only 9.2% of respondents understood that a copyright holder has no recourse under modern copyright law once their copyright expires.¹³ This indicates that a majority of the public fundamentally fail to recognize the very concept of the public domain. Visual resource professionals can be excellent facilitators for copyright literacy including the public domain. Copyright skills and knowledge practices are already scattered across information literacy, digital literacy, and visual literacy, making integrations into existing educational programming easier.

Copyright literacy can be a key component of a robust literacy program in cultural heritage institutions and their educational outreach missions. Bringing awareness and educational materials aimed at specific audiences concerning copyright, public domain, and Creative Commons can help enrich educational programs and bring relevant and applicable knowledge and skills to patrons. Because Public Domain Day celebrates how copyright is intended to support creative growth, it can be easier to build engaging activities and exhibitions that draw attention to all copyright issues. Participating in Public Domain Day is one way cultural heritage

¹⁰ Grischka Petri, “The Public Domain vs. the Museum: The Limits of Copyright and Reproductions of Two-Dimensional Works of Art,” *Journal of Conservation and Museum Studies* 12, no. 1 (2014): 10.

¹¹ Jane Secker and Chris Morrison, *Copyright and E-learning: A Guide for Practitioners*, 2nd ed. (London: Facet Publishing, 2016), 121.

¹² Allison Estell and Laura Saunders, “Librarian Copyright Literacy: Self-Reported Copyright Knowledge among Information Professionals in the United States,” *Public Services Quarterly* 12, no. 3 (2016): 214–27.

¹³ W. Michael Schuster, “Public Choice Theory, the Constitution, and Public Understanding of the Copyright System,” *UC Davis Law Review* 51, no. 5 (2018): 2284. https://lawreview.law.ucdavis.edu/issues/51/5/Articles/51-5_Schuster.pdf

institutions can educate, empower, and excite patrons and has the potential to augment and strengthen other activities as well.

Public Domain Day 2019: 1923 Unlocked

Leading Public Domain Day 2019 outreach efforts at Texas Tech Libraries, the Architecture Image Librarian recruited a number of Libraries' faculty and staff to bring their expertise and enthusiasm to the project. This project had two prongs. The first prong was at the University Library, which housed an exhibition in three display cases that used social media (Figure 1) and a corresponding online quiz for added engagement. The second prong was at the Architecture Library, which housed a more focused set of posters and a study break event with online and in person activities. Overall, both prongs were titled "Public Domain Day 2019: 1923 Unlocked," with exhibitions and posters on display from January 16th - February 1st, and the Architecture Library study break event occurring on January 25th.

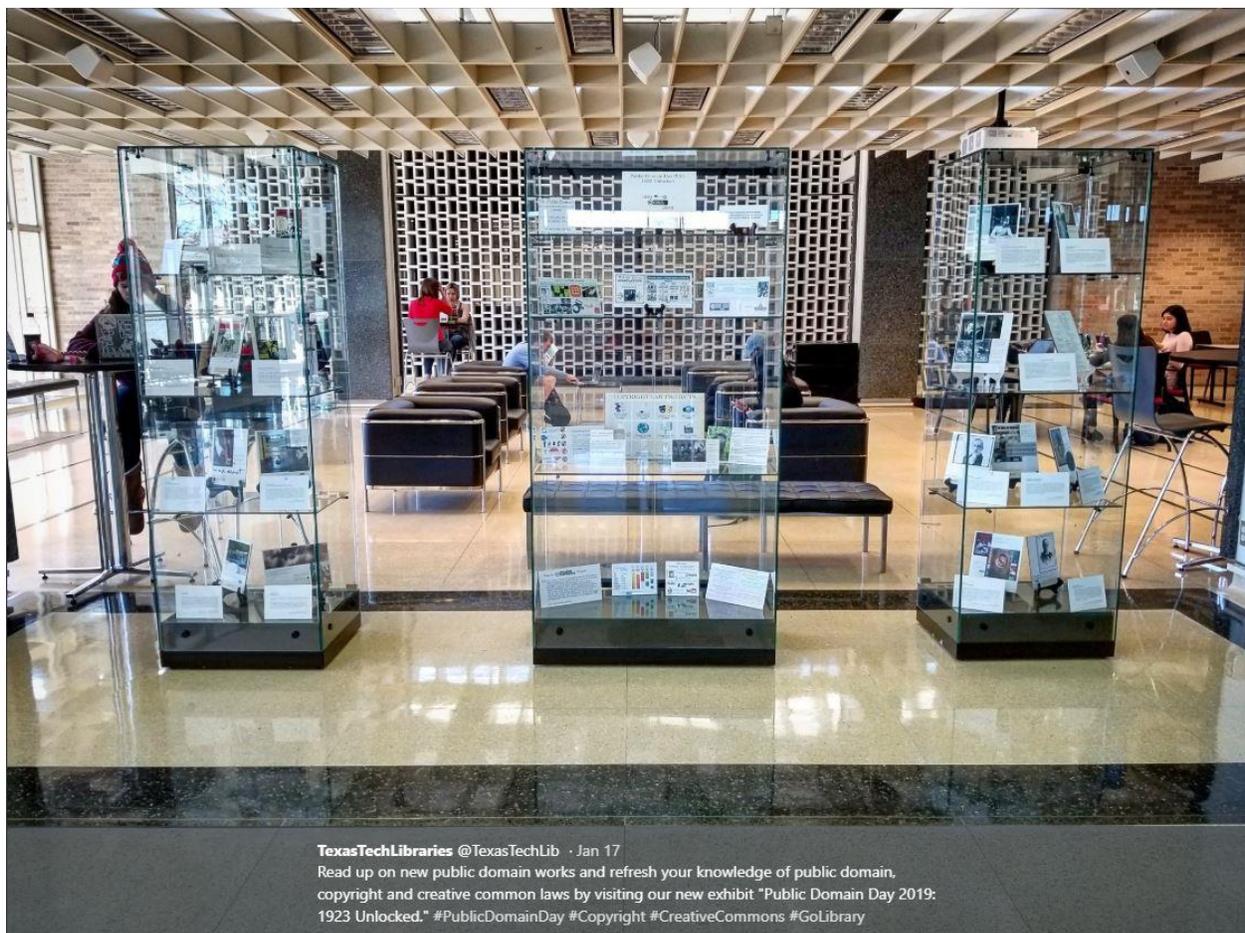


Figure 1: Texas Tech Libraries, twitter post, January 17, 2019, <https://twitter.com/TexasTechLib/status/1085945702134493184>.

The Architecture Image Librarian created four learning outcomes for the students, staff, and faculty who visited the exhibition or corresponding online and in person activities. First, they will be able to differentiate between public domain, copyright, and Creative Commons. Second,

they will recognize the role of public domain, copyright, and Creative Commons in our society's creative and intellectual progress. Third, they will appreciate the influence of published materials from 1923 on our culture. And fourth, they will be able to access these works in the Library collection in various formats.

The first two learning outcomes were the most difficult to teach, as it can be tricky to not to fall into the morass of intricacies and exceptions that make up the U.S. copyright law. For this section, the Architecture Image Librarian collaborated with Digital Publishing Librarian and decided to give equal weight to each section: public domain, copyright and Creative Commons. The pair then focused on answering three key questions: What is it? Why is it important? and What aspect specifically will engage our audiences?

Discussion of the public domain began with a brief definition, expanding to panels explaining the four ways works can enter the public domain: copyright expiration (including a general timeline of expiration), copyright rules not followed, creators waiving copyright, and copyright not applying (ideas, facts, federal government works). The next topic addressed purpose, highlighting government information, scholarship, creativity, and preservation as key concepts that are relevant to a university audience. The Libraries' Communications & Marketing Department posted on Twitter, Facebook and Instagram promotions for the exhibition. Posts included polling questions about recommended duration of copyright and linking to the personality quiz, "What type of Copyright/Public Domain user are you," created by Jessica Kirschner on H5P.¹⁴ Questions included choosing copyright length and Creative Commons licenses for personally created works and actions based on use scenarios of copyrighted written, visual and audio works. Quiz takers received one of six personality types such as Copyright Champion, Benefits Balancer, or Clueless and Carefree based on their answers.

Discussion of copyright began by highlighting the purpose of copyright from the founding fathers' perspective, the exclusive rights of copyright holders, and what types of works copyright law protects. Then to reach the student population the organizers focused on the current U.S. copyright being an opt-out system, meaning that original works are automatically under copyright when fixed in a tangible medium. For many this could be a revolutionary concept, as in our participatory culture, students create original copyrighted content without realizing. The organizers used examples like tweeting, taking selfies, and creating podcasts as types of creative activities that can qualify for copyright protection. They also highlighted the monkey selfie copyright saga (Figure 2) to provide a fun, real world example of copyright eccentricities. The phrase "Can a Monkey Own Copyright" also provided an excellent social media teaser.

¹⁴ Jessica Kirschner, "What type of Copyright/Public Domain user are you," *H5P*, January 2, 2019, <https://h5p.org/node/398712>.



Macaca Nigra self-portrait. Wikipedia. Web. 31 August, 2015.

Can a **Monkey** Own Copyrights?

2008: Crested macaque takes selfie with nature photographer, David Slater's camera

2011: Slater licenses images for publications and editor at Wikimedia Commons uploads image as public domain

2014: Wikimedia refuses requests to remove images citing Copyright law

December 2014: *US Copyright Office Compendium-- 313.2 Works that Lack Human Authorship*

"will not register works produced by nature, animals, or plants.

Examples: A photograph taken by a monkey"

2015: PETA files lawsuit against Slater and other parties arguing on behalf of the macaque, which they name Naruto, owning the copyright

January 2016: US District Judge William Orrick III states

copyright does not extend to animals

2016: PETA appeal decision

April 2018: US Ninth Circuit Court of Appeals upholds

monkey's lack statutory standing in the Copyright Act

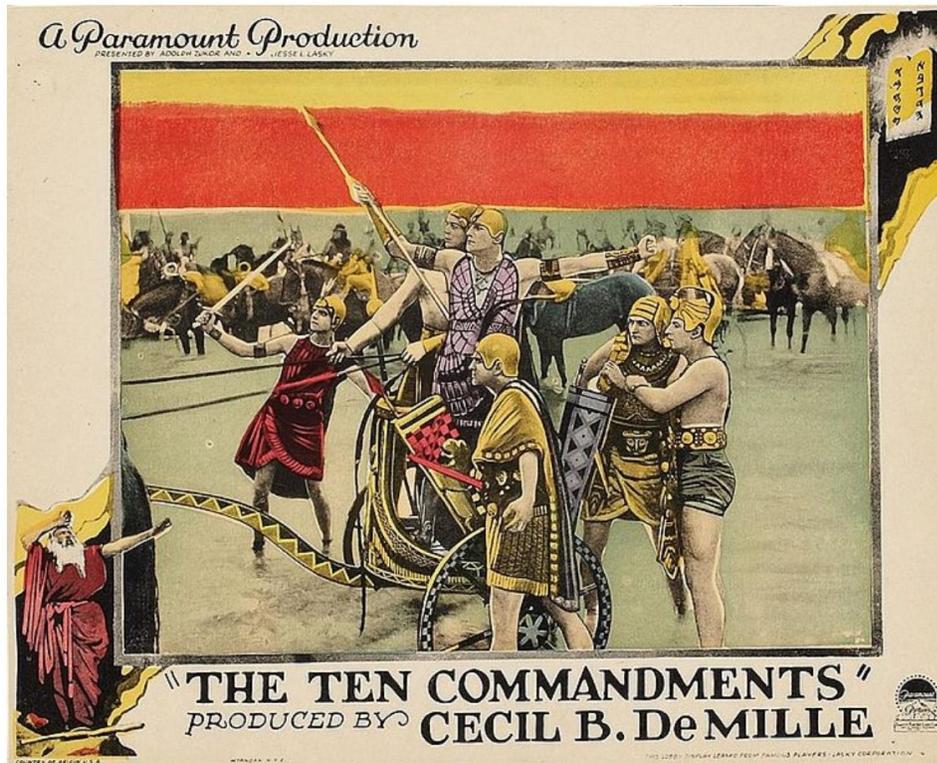
Figure 2: Can a Monkey Own Copyright panel for "Public Domain Day 2019: 1923 Unlocked"

Finally, for Creative Commons, panels focused on the mission, purpose, and goals behind the creation of the commons. They stressed Creative Commons as a standardized form of communicating copyright status and permissible and non-permissible activities. Illustrations explained the different types of Creative Commons' licenses and how each communicates users' rights to copy and publish provided they follow the creator's wishes concerning attribution, commercial use, modifications, and sharing via Creative Commons license. To highlight how this applies to the academic environment, the organizers included examples of information sources that use Creative Commons such as Public Library of Science, Flickr, and Wikimedia Commons.

For the third and fourth learning outcomes, the Architecture Image Librarian asked TTU librarians and archivists to choose a work published in 1923 and write a maximum of 150 words addressing its significance to our society, themselves personally, and/or current or future creative endeavors. Having numerous contributors ensured a variety of materials and diverse perspectives. Chosen works included Kahlil Gibran's novel *The Prophet*, Edna St. Vincent Millay's poem "Recuerdo", Harold Lloyd's film *Safety Last!*, Irving Cohn and Frank Silver's song "Yes! We Have No Bananas," and Yokoyama Taikan's painted scroll *Metempsychosis*.

Though many contributors struggled to adhere to the 150-word limit, the resulting texts were authoritative and engaging. The Architecture Image Librarian then paired these texts with illustrated panels, such as this one for Paramount Pictures' *The Ten Commandments* (Figure 3). Images selected for the exhibition showed the 1923 versions of the materials and creators and highlighted the lasting legacy of the creators through statues and memorials. Each image included a citation indicating either the public domain status or Creative Commons license for the image. To focus on library access, each work included a box that explained how patrons could retrieve related items via the Library's physical or digital collections. Many of these newly available public domain works became excellent promotional material for the Libraries' social

media, with teasers like: *What do Charlie Chaplin, Pablo Neruda, and Winston Churchill have in common?*¹⁵



Lobby card for the 1923 film *The Ten Commandments* from Paramount Pictures

Source: <https://commons.wikimedia.org/wiki/File:TenCommandments-lobbycard1923.jpg>



Check out the *Cecil B. DeMille Collection*
UNIV LIB--Digital Media Studio Media PN1995.9.A3 C43 2006

Figure 3: The Ten Commandments illustrated panel for “Public Domain Day 2019: 1923 Unlocked”

With the second prong at the Architecture Library, the Architecture Image Librarian tailored some of the material to the discipline, but still retained the same overall learning outcomes and reused much of the content to make four posters. The poster that included the most customizations is “Architecture and Copyright,” which the Architecture Image Librarian made available under a Creative Commons license on Texas Tech’s institutional repository.¹⁶ This poster covers the Architectural Works Copyright Protection Act (1990) including what can and

¹⁵ Texas Tech Libraries, twitter post, January 22, 2019, <https://twitter.com/TexasTechLib/status/1087757149881729024>.

¹⁶ Sara Schumacher, “Architecture and Copyright,” *ThinkTech*, January 11, 2019, <https://hdl.handle.net/2346/82361>.

cannot be eligible for copyright protection, concepts integral to creative fields like joint authorship and works for hire, and a relevant court case. Instead of using the monkey selfie example, the Architecture Image Librarian selected the 2005 court case *Shine v. Chiles*¹⁷ to highlight a crucial concept for students in design disciplines: inspiration versus infringement. This case addressed how architectural copyright infringement cases often rely on a lay observer's ability to identify substantial similarity of expression.¹⁸

To accompany the posters, the Architecture Library ran a study break, geared as a casual drop-in event with activities set up on tables or online. The casual nature of the event allowed more one-on-one and small group interactions. Faculty and student visitors asked questions and discussed specific copyright and public domain issues in depth. Activities included matching 1923 prices to commercially available foods like Ovaltine, Kellogg's Corn Flakes, and Maxwell House coffee and matching the architect to their 1923-era building.

The Architecture Image Librarian also created a five-question quiz titled #1923Unlocked using LibWizard to test their knowledge of the material covered on the exhibition posters.¹⁹ Snacks were chosen based on their availability in 1923 including Oreos, Cheez-It's, Cracker Jacks, and Coca Cola and students snacked and snickered at silent films and newsreels. Scattered through the library were printed 1923 advertisements from magazines featuring the food on offer as well as building products and mail order house plans. Because the study break format was new for the Architecture Library, many students lamented that they did not stop by with enough time before their studio classes to take advantage of all the activities. However, the Architecture Image Librarian documented interactions on Instagram, capturing students enjoying the activities (Figure 4).



Figure 4: Texas Tech Architecture Library, instagram posts, January 25, 2019.
<https://www.instagram.com/ttuarchlib/>.

Overall feedback in the form of conversations with faculty, staff, and students was positive, and the hope is to extend our reach and engagement beyond what was tracked via social

¹⁷ *Shine v. Chiles* 382 F.Supp.2d 602 (S.D.N.Y. 2005).

¹⁸ David Shipley, "The Architectural Works Copyright Protection Act at Twenty: Has Full Protection Made a Difference?," *Journal of Intellectual Property Law*, 18, no.1 (2010): 40.
<https://digitalcommons.law.uga.edu/jipl/vol18/iss1/2>.

¹⁹ Sara Schumacher, #1923Unlocked, Texas Tech University LibWizard, <http://ttu.libwizard.com/1923>.

media and online quiz completions. The goals for future Public Domain Days at Texas Tech include increasing faculty and student participation in the creation and execution of displays and events, gathering more immediate assessments on the learning outcomes, and extending activities to other university departments. By expanding the reach of Public Domain Day, TTU Libraries' role in copyright literacy on campus can expand. Faculty, staff, and students would benefit from discipline-tailored library materials and expertise, building momentum for future collaborations.

Beyond Texas Tech

Texas Tech was not the only institution to celebrate Public Domain Day 2019 through exhibitions, events, and outreach. The University Library of University of Illinois at Urbana Champaign created "Public Domain Songs from 1923 Exhibit," which featured sheet music in their collection.²⁰ University of Arkansas launched a digital exhibition "A Belated Gift - U.S. Copyright and the Public Domain," highlighting Arkansas-related newly public domain items.²¹ Santa Clara School of Law held events included a speakeasy-themed party and a performance of the Santa Clara University Laptop Orchestra playing 1923 music and works that would be in the public domain if not for amendments to the copyright law.²² The University of Georgia School of Law Library posted a podcast where librarians discuss the Copyright Term Extension Act of 1998, newly public domain works, and library resources and initiatives to promote the public domain.²³

Beyond Public Domain Day specific events, there is potential in keeping this conversation flowing and connecting it to other initiatives in which many cultural heritage institutions participate. Wikipedia Edit-a-thons that seek to improve or diversify coverage of specific topic or discipline, such as Art+Feminism are one example. Visual resource professionals could easily adapt or expand these edit-a-thons to focus on adding public domain images to Wikipedia or creating and enhancing entries on newly public domain works. Cultural heritage institutions also have the opportunity to provide content through open access institutional or consortia digital platforms, bringing to light materials newly designated as public domain.

Researching, digitizing, and making open these new public domain items should be a priority as it benefits the public and can have promotional benefit to the cultural institution. For example, The Association of Research Libraries is soliciting member libraries to submit links of their recently digitized materials published in 1923 for promotion on their website.²⁴ With increased media attention during future Public Domain Days, institutions can garner additional press coverage and use it as one way of celebrating their materials and educational mission.

²⁰ MPAL Exhibitions 2018-19, University of Illinois Library, <https://guides.library.illinois.edu/c.php?g=857475&p=6483800>.

²¹ A Belated Gift - U.S. Copyright and the Public Domain, University of Arkansas Libraries Digital Collections, <http://digitalcollections.uark.edu/>.

²² Dorice Kunis, "HTLI Celebrates Public Domain Day!," *High Tech Law Institute Blog*, January 2, 2019, <https://law.scu.edu/high-tech-law-institute/htli-celebrates-public-domain-day/>.

²³ Rachel S. Evans and Stephen Wolfson, "Episode 5: Public Domain," *On Reserve*, podcast audio, January 15, 2019, https://digitalcommons.law.uga.edu/podcasts_onreserve/6/.

²⁴ Public Domain Day, Association of Research Libraries, <https://www.arl.org/focus-areas/copyright-ip/4698-public-domain-day#.XFnjjVxKjes>.

Conclusion

Join the next Public Domain Day on January 1, 2020 for the release of 1924 published works. The list includes E.M. Forster's novel *A Passage to India*, Edna Ferber's novel *So Big*, A.A. Milne's poetry collection *When We Were Very Young*, Diego Rivera's fresco *The Day of the Dead*, Buster Keaton's film *Sherlock, Jr.*, Douglas Fairbanks's film *The Thief of Bagdad*, George Gershwin's song "Rhapsody in Blue," and Isham Jones' song "It Had to Be You."

Educational, cultural heritage and visual resource professionals serve to educate and empower a diverse public through a variety of collections, and Public Domain Days present an opportunity to extend our advocacy, literacy initiatives, and outreach. The public domain enables everyone to participate in supporting creativity, preserving the past, making government information available, and allowing for scholarship. Whether it takes the form of an exhibition, event, digitized item, or an altogether new idea, cultural heritage institutions can bring this relatively new celebration into the mainstream.

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