

## RESEARCH OUTPUTS / RÉSULTATS DE RECHERCHE

### Scoping study on copyright and related rights and the public domain

Dusollier, Séverine

*Publication date:*  
2010

*Document Version*  
Publisher's PDF, also known as Version of record

[Link to publication](#)

*Citation for published version (HARVARD):*  
Dusollier, S 2010, *Scoping study on copyright and related rights and the public domain..*

#### General rights

Copyright and moral rights for the publications made accessible in the public portal are retained by the authors and/or other copyright owners and it is a condition of accessing publications that users recognise and abide by the legal requirements associated with these rights.

- Users may download and print one copy of any publication from the public portal for the purpose of private study or research.
- You may not further distribute the material or use it for any profit-making activity or commercial gain
- You may freely distribute the URL identifying the publication in the public portal ?

#### Take down policy

If you believe that this document breaches copyright please contact us providing details, and we will remove access to the work immediately and investigate your claim.

**SCOPING STUDY ON COPYRIGHT AND RELATED RIGHTS AND THE PUBLIC  
DOMAIN**

PREPARED BY

*Séverine Dusollier, Professor, University of Namur, Belgium*

---

\* The views and opinions expressed in this Study are the sole responsibility of the author.  
The Study is not intended to reflect the views of the Member States or the WIPO  
Secretariat (April 30, 2010)

I.	INTRODUCTION .....	4
II.	THE PLACE OF THE PUBLIC DOMAIN IN COPYRIGHT .....	6
A.	The notion of the public domain .....	6
1.	The traditional definition of the public domain .....	6
2.	Limitations of the definition .....	7
(i)	The distinction between free use and free access .....	7
(ii)	Copyright Exceptions .....	9
(iii)	Governmental public domain information .....	11
(iv)	Orphan and out-of-print works .....	11
(v)	The Public domain and traditional knowledge .....	12
B.	The role of the public domain in intellectual property .....	13
C.	The history of the public domain.....	15
D.	The justification of the public domain .....	18
III.	THE COMPOSITION OF THE PUBLIC DOMAIN .....	21
A.	Key principles .....	21
B.	The territoriality of the public domain.....	22
C.	The many parts of the public domain based on the protected subject matter.....	23
1.	Idea/expression or the ontological public domain .....	23
2.	Requirements for protection or the subject-matter public domain .....	24
(i)	Originality.....	24
(ii)	Fixation .....	25
(iii)	Nationality of the work .....	26
3.	The term of protection or the temporal public domain .....	26
4.	The excluded creations or the policy public domain.....	31
(i)	Official acts.....	31
(ii)	News of the day .....	32
(iii)	Other exclusions .....	33
5.	Relinquishment of copyright: the voluntary public domain .....	33
6.	Intermediary conclusions on the composition of the public domain .....	36
D.	Relativity of the public domain.....	37
1.	Perpetual moral rights.....	42
2.	Domain public payant.....	46
3.	The reconstruction of Copyright in some works .....	48
4.	Property rights .....	49
5.	Privacy rights.....	50
6.	Technological protection measures.....	50
7.	Related rights.....	53
8.	Other intellectual property rights.....	55

IV. INITIATIVES AND TOOLS ALLOWING GREATER ACCESS, USE, IDENTIFICATION AND LOCATION OF THE PUBLIC DOMAIN.....	51
A. Copyleft, open source or open access licensing.....	51
1. Notion.....	51
2. Presentation of main licensing regimes.....	52
(i) Open source software.....	52
(ii) Creative Commons.....	53
(iii) Open access to scientific publications.....	57
3. Key features of copyleft licensing.....	57
(i) The Assertion of the Intellectual Property Right.....	57
(ii) The Reverse Use of Exclusivity.....	58
(iii) The Absence of Discrimination.....	59
(iv) The viral or copyleft effect.....	59
B. Data on public domain material.....	61
C. Public domain calculators.....	62
D. Registration systems.....	66
E. Databases and search engines about public domain material.....	66
F. Intermediate conclusion on public domain tools.....	67
V. PROTECTION OF THE PUBLIC DOMAIN AND RECOMMENDATIONS.....	67
A. Existing protection of the public domain.....	67
B. Key objectives for a robust public domain.....	69
C. Recommendations.....	71
ANNEXES - Comparative Analysis.....	74
ANNEX I - Composition of the public domain.....	75
ANNEX II - Encroachments upon public domain.....	85
ANNEX III - Positive protection of the public domain.....	95

*“The existence of a robust, constantly enriched public domain of material not subject for copyright (or other intellectual property protection) is a good in its own right, which our laws should promote at the same time as they provide incentives or reward creativity”*

D. Lange, “Recognizing the Public Domain”, 44 *Law & Contemp. Probs.*, 147 (1981)

*“We have to “invent” the public domain before we can save it”.*

J. Boyle, *The public domain*, Yale University Press, 2008, xv.

*“Constatons la propriété littéraire, mais, en même temps, fondons le domaine public. Allons plus loin. Agrandissons-le”*

V. Hugo, Discours d’ouverture du Congrès littéraire international, Séance du 17 juin 1878

## I. INTRODUCTION

The public domain is one of the most debated issue in intellectual property today. As Jane Ginsburg aptly said, “the public domain is all the rage”<sup>1</sup>. Which is rather paradoxical as the public domain is by definition no subject to intellectual property.

The topic of the public domain, and of its necessary preservation, has become the emblem of a wider critique against intellectual property and what this critique perceives as its increasing extension. The public domain is mainly considered as an endangered species, subject to an enclosure and commodification process<sup>2</sup>. This discussion mainly revolves around the threats that the public domain has to face, such as the extension of the duration of copyright or related right, the encroachments brought by the technological protection measures or the new protection of databases.

Could all this new writing about the public domain be seen only, as some have said, as taking part to the “now-preeminent confrontation in the copyright landscape, that of the “remix culture” against the “Romantic Author”<sup>3</sup>? It might have started there but the growing

---

<sup>1</sup> J. GINSBURG, “‘Une chose publique’? - The Author’s Domain and the Public Domain in Early British, French and US Copyright Law”, in P. Torremans (ed.), *Copyright Law: A Handbook of Contemporary Research*, Edgar Elgar, 2007, p.133.

<sup>2</sup> J. BOYLE, *The public domain – Enclosing the Commons of the Mind*, Yale University Press, 2008; Y. BENKLER, “Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain”, *New York University Law Review*, 1999, Vol. 74, 354; R. COOMBE, “Fear, Hope, and Longing for the Future of Authorship and a Revitalized Public Domain in Global Regimes of Intellectual Property”, *DePaul L. Rev.*, 2002-2003, Vol. 52, p. 1173; C. CARON, “L’irrésistible décadence du domaine public en droit de la propriété intellectuelle”, in *Etudes offertes à Jacques Dupichot*, Bruylant, 2004, p. 61-78; W. VAN CAENEGEM, “The public domain: Scientia Nullius?”, *E.I.P.R.*, 2002, p. 324; L. GUIBAULT & B. HUGENHOLTZ (eds.), *The Future of the Public Domain – Identifying the Commons in Information Law*, Kluwer Law International, 2006; as well as all the contributions of the Public Domain conference, held in Duke University in 2002 and published in the Volume 66 of the *Law Review Law and Contemporay Problems* (2003).

<sup>3</sup> J. GINSBURG, “‘Une chose publique’?...”, *op. cit.*, p. 133.

body of scholarship and legislative attention dedicated to the unprotected part of intellectual property has now overcome the mere denunciation to insist on the intrinsic value of the public domain as raw material for new creation, innovation and development and to try to construct a regime that could protect and promote a rich and accessible public domain. This project, as

Mr. Birnhack says, aims at demonstrating that “the public domain is not merely – or rather should not be – an unintended by product, or ‘graveyard’ of copyrighted works, but its very goal”<sup>4</sup>.

The WIPO Development Agenda also adheres to a protectionist approach of the public domain. Its Recommendation 16 advocates to “*consider the preservation of the public domain within WIPO’s normative processes and deepen the analysis of the implications and benefits of a rich and accessible public domain*”. Recommendation 20 intends “*to promote norm-setting activities related to IP that support a robust public domain in WIPO’s Member States, including the possibility of preparing guidelines which could assist interested Member States in identifying subject matters that have fallen into the public domain within their respective jurisdictions*”. Both recommendations, rather than denouncing the increasing erosion of the public domain and urging to curb the expansion of intellectual property, tend to address primarily the public domain itself and independently of its counterpart, intellectual property. Whereas the attention of policymakers, both national and international, has focused in the last decades on the definition and enforcement of exclusive rights, the attention is now equally shifting to the limitations of intellectual property and to the definition and promotion of places of non-exclusivity, such as the public domain or exceptions and limitations.

The digital development has also favoured projects, whether for profit or not, grounded on public domain material, extracting value out of it to provide the public with cultural resources for free or at low cost. Many business models are now thriving on public domain, such as Google Books Search, and public authorities work at promoting digitisation and public availability of their cultural heritage as the Europeana digital library demonstrates.

Protection of the public domain comprises two steps, as laid down by the Development Agenda: first, identifying the contours of the public domain, thereby helping to assess its value and realm, and, second, considering and promoting the conservation and accessibility of the public domain.

The present study will follow the same direction as it will first assess the scope of the public domain, as defined by copyright laws, history and philosophy, before turning to the issue of its effectiveness and greater availability to the public and society at large. This will lead to the formulation of some recommendations that, by viewing the public domain as material that should receive some positive status and protection, might help to support a robust public domain, as advocated by the Development Agenda.

Our purpose is not to define what should be or not be in the public domain, nor to look at the causes of the shrinking of the public domain, or only incidentally. This study is situated

---

<sup>4</sup> M. BIRNHACK, “More or Better? Shaping the Public domain”, in *The Future of the Public Domain*, *op. cit.*, p. 60.

beyond the debate as to what should be copyrighted or not, to what extent and for how long<sup>5</sup>. It will not deal with the question of determination of those limitations to intellectual property (as to the scope of the rights, the object of the protection, the adequate duration of the right, etc.). Such delineation is fundamentally a matter for policy that has to be decided by States, both at an international and national level.

As a consequence, the public domain that will be sketched here is not only what is left after the contours of copyright have been drawn, but is a repository of resources of its own. Accordingly, the recommendations formulated at the end of this study will not focus on the scope of copyright and the way to curb it, but will rather try to develop strategies to make the public domain itself flourish and be made more available to the public. This study will also be limited to the public domain as resulting from copyright legal regimes and not by patent or trademark.

Part I of this study will give an evaluation of the role of the public domain in copyright, starting by a definition of what public domain is and what it should be distinguished from. The public domain in the history and justification of copyright will also be provided.

Part II will identify the components of the public domain, notably based on an illustrative comparison of national legislation. It will also analyse other legislatively granted rights and/or interests that may modify and interfere with the level of accessibility and usability of the copyright-related public domain.

Part III will provide a survey of non-legislative and private ordering initiatives, which provide for greater access, use, identification and location of the public domain and other creative material whose conditions of use are akin thereto.

Part IV will sketch a possible future for the public domain, by developing the impetus it is gaining in legislative and judicial contexts, the key principles that could govern it for a more positive status, and finally by formulating recommendations in regard to future activities on the public domain in relation to copyright that may be carried out by the World Intellectual Property Organization.

## II. THE PLACE OF THE PUBLIC DOMAIN IN COPYRIGHT

### The notion of the public domain

#### 1. The traditional definition of the public domain

The public domain is generally defined as encompassing intellectual elements that are not protected by copyright or whose protection has lapsed, due to the expiration of the duration for protection.

---

<sup>5</sup> This study will not address the issue of Copyright Term Extension (or Related Rights for that matter) that has been fiercely discussed in many countries these last years. Its effect on the public domain will nevertheless be touched upon when discussing the restoration of copyright sometimes induced by extension of the duration of protection and in the recommendations formulated at the end of the study.

Sometimes, the definition is stricter, focusing only on works whose copyright has ended, or broader, welcoming in its ambit uses of works still protected by copyright, but legitimised through the operation of an exception or of a license<sup>6</sup>.

This extension of the concept of the public domain so as to include any resource, whose use would be unencumbered by exclusivity, has also been conveyed by a change of vocabulary. The terminology of “commons”, “intellectual commons” or “open content” has started to substitute for the terms of “public domain” so as to insist on the open or free use of public domain materials and on the collective and shared nature of such use.

This study will keep a traditional view of the public domain<sup>7</sup>, related to the subject matter not protected (or not any more) by copyright. Such a definition is primarily negative as its realm is the inverse of the scope of copyright protection.

This negative approach of the public domain prevails in most copyright regimes. It entails that if copyright is regulated and promoted, the elements of the public domain themselves are generally not subject to any rules or protection: the terms ‘public domain’ rarely appear in the provisions of the law. It is even more rare that specific rules are attached to the public domain or to its elements<sup>8</sup>.

This lack of a positive legal definition or regime is crucial in any analysis of the public domain. It reveals the profound conception of the public domain the copyright laws have adopted and constitutes one of the first obstacles to its promotion and preservation. Defining the public domain as what is *not* protected is imposed by copyright law, but any attempts to assess the value of the public domain should go further and focus on what could positively define the public domain, i.e. the free use of the elements contained therein and the absence of any exclusivity in such elements.

This study will identify the role and the contents of the public domain as the reverse of copyright, as is traditionally done. Nonetheless, based on the challenges to preservation and full accessibility raised by the absence of a proper regime for the public domain in copyright laws, recommendations will be drawn as a conclusion to lay the foundations for an enriched and more available public domain.

## 2. Limitations of the definition

### (i) The distinction between free use and free access

The main result of the lack or expiration of copyright in an element of the public domain is the absence of any exclusivity in the use of such element. Public domain material is said to be free for all to use. In other words, no one can control or prevent its reproduction, public communication or any other use that would be in the realm of the copyright prerogatives.

To be more accurate, such control cannot be grounded on copyright enforcement, but could well reappear through other means, whether legal or technical, as we will see later on.

Any regime applied to the public domain should ensure such free use. Yet, the ‘public domainness’ does not guarantee as such a freedom to access to the resources it contains. Access to a public domain work will depend on many factors.

---

<sup>6</sup> For the divergences between different mappings of the public domain, see P. SAMUELSON, “Challenges in the mapping of the public domain”, in *The Future the public domain, op. cit.*, p. 9.

<sup>7</sup> For other conceptions of the public domain, see P. SAMUELSON, “Enriching Discourse on Public Domains”, *Duke Law Journal*, 2006, vol. 55, 111-169.

<sup>8</sup> See however *infra*, Part IV. A.



Firstly, it should be pointed out that copyright protection itself does not to some extent touch upon a relative freedom to obtain access to works. Indeed, the possibility to intellectually enjoy the content of a work, to have knowledge of its meaning and content is, as a rule, not constrained by copyright<sup>9</sup>, as far as any member of the public can get a material access to that knowledge. This cognitive access to creation and free enjoyment of works is induced by the limited set of rights afforded to the copyright owner. The exclusivity given by copyright only entails the control of acts of public exploitation of works, which covers reproduction of the work<sup>10</sup>, communication to the public, public distribution and other public acts of diffusion of the work such as rental or lending. Acts of mere reading, viewing, listening or enjoying a work should not be deemed to infringe copyright. The natural scope of copyright is rather to control the public diffusion of the work to a public<sup>11</sup>. One can translate this idea by saying that the centre of attention for copyright is the *exploitation* of a work, where exploitation is defined as public diffusion. Copyright has never been about regulating *access* to or *use* of works.

Nevertheless, *intellectual* access, enjoyment and use of public domain works imply first obtaining a *material* access to them. Material access to works is made possible and regulated either by the property right in the original embodiment of the work, or by entering into a contract with a distributor to get a material copy of the work. The extent of the constraint posed by the property right will depend on the number of copies in circulation (see *infra*).

Besides, public domain works are not always free from any cost or remuneration. Nobody would reasonably argue to be entitled to take the writings of Cervantes for free in bookshops. The public domain status acquired by such works enables their free reproduction and dissemination to the public, which, hopefully, will nourish their free or low-cost provision to the market and will enable further creative expression based thereon. But the lack of protection cannot in itself impose free access to the copies of public domain works. Furthermore, it is the very logic of the public domain, conjugated with the freedom of commerce, that allows entrepreneurs to reproduce and distribute works whose copyright has expired, even for a fee. The latter will serve as a necessary incentive to promote the public availability of such works.

Another key factor in the effectiveness of access to works, closely related to the very regime of copyright, is the possible absence of divulgence or disclosure. Many works have been created without their author feeling the need to divulge them. Whether non original enough or after the term for their legal protection, they are technically in the public domain, but will remain unknown, hence unavailable to the public, as will be undisclosed ideas. The effective public domain will then be reduced to the body of works and creations that have been published<sup>12</sup>. The same can be said of public domain works that have fallen into

---

<sup>9</sup> That said, some evolutions of the IP system threaten that crucial idea of free intellectual consumption. Copyright, due to the contaminant introduction of software within its ranks, has been gradually extended to the mere use of the work, first through specific rules for software and databases, and eventually in relation to any type of work, through the protection of technological measures inhibiting and controlling the very use of works. The content of the work, in the case of the software, is not even available for intellectual knowledge. The disclosure of the source code of the software is not even certain when the software is part of a patented invention.

<sup>10</sup> but only when the resulting copy can be perceived by a public and thus be the stage for a public exploitation

<sup>11</sup> This argument is more thoroughly addressed in S. DUSOLLIER, *Droit d'auteur et protection des oeuvres dans l'environnement numérique*, Larcier, 2005, n<sup>os</sup> 419 et seq.

<sup>12</sup> R. DEAZLEY, *Rethinking Copyright – History, Theory, Language*, Edward Elgar, 2006, p. 111. It should be noted also that a revived copyright can vest upon works unpublished during the normal term of copyright.

oblivion. No or few copies might still be available which renders their re-use illusory. An unknown symphony by Mozart shall be in the public domain but will not enrich it in any way if that work is lost or not known anymore. Lots of novels or writings published before the 19<sup>th</sup> century are not read or known anymore, rare copies are covered with dust in libraries: they might belong to the public domain in theory but not be a very effective part thereof.

As a conclusion, endeavours to enhance effective access to public domain works should not neglect the effect of control over the physical access to works, and should also envisage some means to enhance public availability of creative material through public initiatives and libraries<sup>13</sup> (see *infra*). The more copies are freely available to the public, for no or a small fee, the more effective the public domain will be.

Any promotion of the public domain should then aim at safeguarding the free and promotion collective use of creative resources belonging thereto, to avoid any recapture of exclusivity, but could also purport to favour the wealth of the public domain by making works known and enhancing access to its content. The role of libraries and their involvement in the legal deposit is of particular importance in that regard.

## (ii) Copyright Exceptions

Arguably, objectives and justifications of the public domain and of copyright exceptions and limitations are closely related: they both aim at enhancing the access of the public to culture and creative expressions, and they are both justified by the public interest. One of the functions of the public domain is to enable productive practices, whether cultural, creative, purely cognitive or consumptive, and to exempt them from the exercise of an exclusive proprietary right. In that regard, it is akin to the operation of many copyright exceptions that allow for use of a protected work in a consumptive or creative ways.

From a sociological point of view, exceptions and public domain are similar to the extent that they are grounded in the public interest and entitle the public to use creative works without stepping on the intellectual rights of anyone. Economically speaking, they both cover the assets or uses of such assets for which no transaction could take place. Legally speaking also, if one defines the public domain as the absence of exclusivity, the exceptions might be considered as similar to it as no exclusivity applies to the use of a copyrighted work under an exception.

Such reasoning has convinced some scholars to include in the public domain not only unprotected subject matter but also unprotected uses of copyrighted works, i.e. copyright exceptions or fair use<sup>14</sup>. For example, P. Samuelson has namely distinguished, within the public domain, a “core” consisting of intellectual resources that are not protected by intellectual property, as well as a number of “contiguous terrains” and some “murky areas”<sup>15</sup>. Amongst those contiguous areas, can be included such things as open source software, fair

---

<sup>13</sup> G. DINWOODIE & R. COOPER-DREYFUSS, “Patenting Science: Protecting the Domain of Accessible Knowledge”, in *The Future of the Public Domain*, *op. cit.*, p. 191 ; P. SAMUELSON, “Enriching Discourse on Public Domain”, *op. cit.*, p. 163.

<sup>14</sup> See for instance J. COHEN, “Copyright, Commodification, and Culture: Locating the Public Domain”, in *The Future of the Public Domain*, *op. cit.*, p. 121; A. CHANDER & M. SUNDER, “The Romance of the Public Domain”, *Cal. L. Rev.*, 2004, Vol. 92, p. 1340; J. BOYLE, *The public domain*, *op. cit.*, p. 38 (with some qualification); P. SAMUELSON, “Digital Information, Digital Networks, and The Public Domain”, *Law & Contemp. Probs.*, 2003, Vol. 66, p. 148; V.L. BENABOU & S. DUSOLLIER, “Draw me a public domain”, in P. TORREMANS (ed.), *Copyright Law: A Handbook of Contemporary Research*, Edgar Elgar, 2007, p. 161.

<sup>15</sup> P. SAMUELSON, “Digital Information, Digital Networks, and The Public Domain”, *op. cit.*

use and other copyright exceptions, the latter being theoretically not within the public domain, but “seemingly inside in effect”<sup>16</sup>.

Annexing copyright exceptions to the overall definition of the public domain would actually separate the public domain into two separate parts: the first one would be *structural* and encompass the elements that are by themselves unprotected, whatever the circumstances of their use; the second one would be only *functional* as it would cover resources whose free use is only circumstantial<sup>17</sup>. In the first case, the openness and freedom of use is premised on the non-inexistence of copyright, in the second case on the impossibility to exercise and enforce copyright exclusivity.

This study will limit the public domain to the structural and stricter sense, leaving copyright exceptions outside of the analysis. Key differences between the public domain *stricto sensu* and copyright limitations justify this view.

While the public domain is by nature free for anyone, without discrimination and in all circumstances of use, copyright exceptions are generally limited to some classes of users (e.g. teachers, individuals, people with disabilities, ...) and to strictly defined contexts (e.g. illustration of teaching, private use, informational purpose, ...). The scope of copyright exceptions needs to take into account the exclusive rights of copyright owners, the latter being reduced by the legal entitlements conferred by exceptions. Conversely, the freedom of use granted by the public domain does not have any counterpart or private rights to limit it.

More fundamentally, at international level, copyright exceptions are framed by the three step test, originating in the Berne Convention and eventually adopted by all the other major international copyright Treaties, from TRIPS to the WIPO Treaties of 1996<sup>18</sup> to some extent: this test makes the public interest or some private interests prevalent over the exclusivity granted to authors when the normal exploitation of works is not harmed. It reflects the quest for balance justified not only by economic considerations but also by normative ones. In a sense, it constitutes a proportionality test between exclusive rights and defences to such rights justified by the public interest. On the contrary, the balance enshrined by the public domain in copyright regime predates the exclusivity granted by the law and does not have to be weighed against the normal exploitation of works. The public domain is what should not be protected, or not any more, and it does normally not require scrutiny based on a proportionality test.

Finally, promoting the public domain and copyright exceptions will follow very different paths. The public domain is a given in copyright regimes. Save for attempts to curb copyright expansion for instance in subject matter or duration, safeguarding the public domain will mostly entail promoting its availability and making it more effective in terms of access and free use. Copyright exceptions are based on policy decisions and are still to be defined at an international level. Before tackling the effectiveness of the benefit of these legal privileged uses, a primary task is to achieve a common definition of basic copyright exceptions. This will require a different approach and will result in different norm-setting activities.

---

<sup>16</sup> Ibidem.

<sup>17</sup> This distinction is more explained in V.L. BENABOU & S. DUSOLLIER, “Draw me a public domain”, *op. cit.*; and has been partially taken over by the Public Domain Manifesto, produced by the European project Communia (see <<http://www.publicdomainmanifesto.org>>).

<sup>18</sup> See S. RICKETSON, WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment, Standing Committee on Copyright and Related Rights, 2003, p. 65.

As a consequence and for the sake of defining clear priorities and recommendations, this study will dissociate the public domain, defined as intellectual resources not protected by copyright, from copyright exceptions.

(iii) Governmental public domain information

The terminology of the public domain is also increasingly used to refer to governmental information or data produced or financed by public authorities. For instance, the 2003 UNESCO Recommendation concerning the Promotion and Use of Multilingualism and Universal Access to Cyberspace defines the public domain as follows:

*“publicly accessible information, the use of which does not infringe any legal right, or any obligation of confidentiality. It thus refers on the one hand to the realm of all works or objects of related rights, which can be exploited by everybody without any authorization, for instance because protection is not granted under national or international law, or because of the expiration of the term of protection. It refers on the other hand to public data and official information produced and voluntarily made available by governments or international organizations.”*

Free access to and free use of such information or data are essential in a democratic society and serve the public interest. However, it should not be confused by the notion of public domain that is used here, as it neither has the same substance, nor the same objective. Some information or documents produced by the State or other public authorities might enter the public domain as defined within a copyright regime, through the effect of the rule of exclusion for official acts (see below), but much other governmentally-produced information might still be copyrighted. In some countries efforts have been undertaken to promote the public availability of such public documents or data, despite their possible copyright protection, namely by encouraging the re-use and commercial exploitation of public sector information<sup>19</sup> or even by relinquishing copyright in documents produced by the public administrations<sup>20</sup>.

Though pursuing a similar objective to the public domain in copyright (albeit sometimes with a more market-oriented approach), policies in the field of public sector information do not pertain to the public domain as defined in the scope of this study<sup>21</sup>.

(iv) Orphan and out-of-print works

Lacking a familial history, orphan works also often have no age: they might be in the public domain or not, for a key element for determination is the identification of their author, his or her death being the starting point in many cases for establishing the duration of copyright. Having recourse to national provisions that calculate the duration of protection from the date of publication for anonymous works can alleviate the problem in some but not all cases, as the date of publication might also be missing.

The issue of orphan works is often not viewed from this perspective: they are most of the time presumed to be still protected by copyright, the key obstacle for their exploitation and re-use being the lack of identification or physical location of their right owners<sup>22</sup>.

---

<sup>19</sup> See notably the EU directive 2003/98/EC on the re-use of public sector information, OJ, 2003 L345.

<sup>20</sup> See for instance the website of the Dutch government where content is released under a CC0 license that dedicates such content to the public domain (see <<http://www.rijksoverheid.nl/english>>).

<sup>21</sup> On the relationship between public sector information and copyright, see M. VAN ECHOUD, “The Commercialization of Public Sector Information: Delineating the Issue”, in *The Future of the public domain, op. cit.*, p. 279.

Actually, orphan works occupy a grey zone located between a defined realm of copyright protection with all elements requiring to get a proper authorisation to use the work, and the defined realm of the public domain with all elements proving that the work is no longer protected and can be freely used. The lack of identifying information about the author does not permit definitely placing the orphan work in either the protected or unprotected domain.

The need to clarify the situation of orphan works is thus as much related to copyright enforcement as to promotion of the public domain.

Many countries have started to devise mechanisms both to identify the legal filiation of such orphans (with the objective to reunite them with their authors) and, in the absence of identification, to authorise their exploitation all the same.

If the purpose of the public domain is to ensure the broadest exploitation and re-use of creative material as possible, the systems put in place to authorise the use of an orphan work, after a diligent search for its author has failed, sometimes providing for a remuneration, will serve the same ends as preservation of the public domain. It will enhance the public availability and fruitful exploitation of works (even if a fee is provisionally collected in the absence of the author)<sup>23</sup>.

Conversely, if its purpose is to ensure the freedom and gratuity of such re-use, then the current efforts for licensing the use of orphan works might run counter to such objective to the extent that, lacking the identification of the author or the possible public domain status of work, the orphan work regime will generally presume that the work is protected and require a fee prior to its use. The use of a public domain work would then be submitted to what could resemble a compulsory license and contradict the freedom of use normally attached to the public domain.

Accordingly, were orphan works to be included in endeavours aimed at preserving the free use of and access to the public domain, it would be essential to devote more efforts toward identification of works and their authors, so as to determine more exactly which creative works belong or not to the public domain. The issue of orphan works should be explored in parallel to projects carried out in the field of the public domain, even though it is not strictly related to it.

(v) The Public domain and traditional knowledge

The public domain has always been repository of traditional knowledge and folklore in the classical views of intellectual property. Traditional knowledge and folklore (except where traditional knowledge is subject to customary laws granting other forms of ownership and rights) have some difficulty enjoying intellectual property rights rooted in Western ideas of authorship, since it is generally not new or original but rather ancient material and based on a body of existing collecting rather than individual traditions. Not easily protected by copyright, folklore usually belongs to the public domain, which facilitates its exploitation and appropriation<sup>24</sup>.

---

[Footnote continued from previous page]

<sup>22</sup> See EU High Level Group on Digital Libraries, Copyright Subgroup, *Final report on Digital Preservation, Orphan Works, and Out-of-Print Works*, 2008; or, in the United States, the Report of the Copyright Office on Orphan Works, available at <<http://www.copyright.gov/orphan/>>.

<sup>23</sup> In that direction, EU Commission Recommendation of 24 August 2006 on the digitisation and online accessibility of cultural material and digital preservation, 2006/585/CE, O.J., 31.08.2006, L236/28, article 6.

<sup>24</sup> T. COTTIER & M. PANIZZON, "Legal perspectives on traditional knowledge : The case for intellectual property protection", in in K. MASKUS & J. REICHMAN (eds.), *International public goods and the*

[Footnote continued on next page]

Developing countries have for many years been reluctant to acknowledge a vision of the public domain that would leave unprotected their folklore and traditional creative expressions. A definition of the public domain, particularly if framed by development considerations, should take the specific status of traditional knowledge into account, as well as the current work undertaken at WIPO level to grant some rights in folklore. The (now global) regime of intellectual property should not continue to deny exclusivity or other types of legal entitlements to the many forms of intellectual production, knowledge or cultural expression. The consequence for the public domain is that it should be careful not to overlook the common property regimes of other cultures<sup>25</sup>.

This study will accordingly exclude expressions of folklore and traditional knowledge from the public domain it tries to define and delineate, even if they are still, in the current state of international law, considered as unprotected by authorship-based copyright.

It should be mentioned that many developing countries include in their copyright regime a specific protection of expressions of folklore that generally aligns, where it exists, with the protection of public domain works. This is the case, amongst the countries whose national laws have been surveyed for this study, of Algeria, Kenya and Rwanda. Under the denomination of folklore or cultural heritage, some creative forms of expression are conferred a specific status, not equating with copyright protection, but being a mix of regulations aimed at authorising their use by official bodies, sometimes for a fee, and prohibitions on misrepresenting or distorting such heritage.

#### The role of the public domain in intellectual property

No one challenges anymore the crucial role of the public domain in the balance of intellectual property, nor the fact that copyright is in principle limited in scope, subject matter and duration, which leaves many elements outside of its ambit and in the public domain.

The absence of protection of such elements or works results in a freedom to use, reproduce and communicate to the public what belongs in the public domain. This serves many objectives. P. Samuelson has listed eight primary values of the public domain in copyright and patent regimes<sup>26</sup>:

- to serve as building block for creation of new knowledge or creation;

---

[Footnote continued from previous page]

*transfer of technology under a globalized intellectual property regime*, Cambridge University Press, 2005, p. 570 ; R. COOMBE, "Protecting cultural industries to promote cultural diversity: Dilemmas for international policymaking posed by the recognition of traditional knowledge", in K. MASKUS & J. REICHMAN (eds.), *International public goods...*, *op. cit.*, p. 602-604 ; A. CHANDER & M. SUNDER, *op. cit.*; CARLOS M. CORREA, *Traditional knowledge and intellectual property – Issues and options surrounding the protection of traditional knowledge*, 2001; G. DUTFIELD & U. SUTHERSANEN, *Global Intellectual Property Law*, Edward Elgar, 2008, p. 335.

<sup>25</sup> In that direction, see the Bellagio Declaration on the public domain, adopted by many scholars in 1993: "in general, we favor recognition and protection of the public domain. We call on the international community through expansive application of concepts of fair use, compulsory licensing, and narrower initial coverage of property rights in the first place. But since existing author-focused regimes are blind to the interests of nonauthorial producers as well as to the importance of the commons, the main exception to this expansion of the public domain should be in favor of those of have been excluded by the authorial biases of current law." (cited by R. COOMBE, "Fear, Hope, and Longing for the Future of Authorship ...", *op. cit.*, p. 1184).

<sup>26</sup> P. SAMUELSON, "Challenges in Mapping the Public Domain", *op. cit.*, p. 22.

- to enable competitive imitation;
- to enable follow-on innovation;
- to enable low cost access to information;
- to get access to cultural heritage;
- to promote education;
- to promote public health and safety;
- to promote democratic process and values.

Amongst these values, some are particularly important for the public domain in copyright. Primarily, the free use of elements in the public domain, such as ideas, principles, facts or works whose protection has expired, allows for follow-on creators to build upon pre-existing elements. The public domain has here a value for further creative use and participates in the incremental nature of all artistic creation<sup>27</sup>. The public domain also provides material for educational use, allowing access to important pieces of society's knowledge and culture.

But mere consumptive use is also promoted by the public domain: once a work is not protected or not any more, its use is free for all and could be exercised at no or low cost, depending upon the modalities of making available thereof by the market or public institutions. Due to the nature of literary and artistic works, even consumptive use will have a social benefit as it provides knowledge, culture and education to the public.

Finally, the public domain has an economic interest: business models can be built upon unprotected works, as the cost of access to such works is reduced by the expiration of copyright. Some publishers specialise in the edition of public domain books or music. The digital environment has further reduced the cost of production of public domain-based business models, as the example of Google Books has recently demonstrated. Google has indeed launched a new business model that namely provides books that are not protected anymore and offered for free to the public, even though it produces advertising revenue for its search engine. In the framework of the Development Agenda, the public domain can also be seen as a key tool for development as it enables countries to build creation, education and innovation through access to information, knowledge and culture. Parallel to copyright, economic growth can be developed from public domain material, which justifies the renewed attention we see today devoted to the field of unprotected material.

In a larger landscape, the public domain can also be considered as a central element of the cultural heritage of humanity<sup>28</sup>. It is demonstrated by the intensive work that UNESCO carried out in the 1990's around the notion and the safeguarding of the public domain<sup>29</sup>, mostly defined as encompassing works whose copyright has expired. In this body of work, the public domain was deemed to be part of the common heritage of mankind, and as such, worthy of specific measures aiming at guaranteeing both its authenticity and integrity. As a result, even though the principle of free use of the elements belonging in the public domain was referenced, the policy efforts envisaged by UNESCO purported rather to reinforce the

---

<sup>27</sup> J. LITMAN, "The Public Domain", *Emory Law Journal*, 1990, vol. 39, p. 965-1023.

<sup>28</sup> B. D'ORMESSON-KERSAINT, "The protection of works in the public domain", *R.I.D.A.*, April 1983, p. 93.

<sup>29</sup> See UNESCO, Draft Recommendation to member States on the safeguarding of works in the public domain, 1993, 27 C/40, General Conference, 27<sup>th</sup> Session; Report on Intellectual Works of universal value that have fallen into the public domain and are regarded as forming part of the common heritage of humanity, UNESCO General Conference, 1999, 30 C/56.

control of the public domain, through perpetual moral rights or other legal systems enabling the State to preserve the works in question. This dimension of public domain departs from strict copyright regulation to enter in the field of preservation of cultural heritage, where criteria of quality might apply, since not all that copyright law defines as public domain will have a cultural heritage value.

The importance of the public domain in terms of the public interest is thus manifold, from educational, democratic, economic and free competition perspectives. It has an equal role to copyright in a democratic society where cultural diversity and freedoms to create, to innovate and to take part to the cultural and scientific environment are fundamental objectives. A strong and vivid public domain in culture and science is a pivotal element of the common heritage of mankind and as such, it should be made available to all. It is a key driver for social and economic development. It should also be preserved from undue privatisation and encroachment, and should serve as a balanced counterpart to intellectual property exclusivity.

### The history of the public domain

The history of the public domain in copyright law opposes two different narratives. The most common view, particularly with copyright scholars who try to defend the public domain, is that the public domain pre-existed copyright. Or, as M. Rose aptly describes it, that “in the beginning, so the story goes, all the literary world lay free and open, but then various parts were settled and enclosed and literary property came into being. The story implies that the public domain, the literary commons, precedes copyright”<sup>30</sup>. Copyright then entered the picture, as grabbing resources that had so far lacked protection, thereby diminishing this Eden of the public domain where everything was free for all to use<sup>31</sup>. Some add to that conception or qualify it by saying that the first copyright laws also created the public domain or reinforced it by delineating the privilege they granted, thereby leaving in the public domain what was outside the scope of copyright or did not qualify for protection<sup>32</sup>.

Conversely, other scholars tend to argue that such generally accepted idea according to which the public domain predates the grant of intellectual property might well prove wrong in the early copyright regimes<sup>33</sup>. According to them, the public domain has not always enjoyed the success it has today, both in discourse and in legal reality. The very terminology of the “public domain” did not appear until the 19<sup>th</sup> century<sup>34</sup>. But mostly, the freedom to copy was, in practice, largely a myth in the pre-copyright era, as printing and publishing activities were pervasively regulated by privileges or censorship, leaving not much space for free copying and publishing of writings, whether by dead or alive authors<sup>35</sup>. J. Ginsburg also demonstrates that, even after copyright was born, its grant cannot be considered as creating, by the same token, a public domain composed of all works that did not comply with

---

<sup>30</sup> M. ROSE, “Nine-Tenths of the Law: The English Copyright Debates and the Rhetoric of the Public Domain”, *Law and Contemporary Problems*, 2003, vol 66, p. 75; R. DEAZLEY, *Rethinking Copyright*, *op. cit.*, p. 108.

<sup>31</sup> J. BOYLE, *op. cit.*; L. LESSIG, *Free Culture – How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity*, 2004.

<sup>32</sup> M. ROSE, “Nine-Tenths of the Law...”, *op. cit.*, p. 75.

<sup>33</sup> See particularly, J. GINSBURG, “Une chose publique...”, *op. cit.* ; but also T. OCHOA, « Origin and Meanings of the Public Domain”, *Dayton L. Rev.*, 2002, Vol. 28, p. 215 ; and having a more balanced approach, M. ROSE, “Nine-Tenths of the Law...”, *op. cit.*.

<sup>34</sup> T. OCHOA, « Origin and Meanings of the Public Domain”, *op. cit.*

<sup>35</sup> M. ROSE, “Nine-Tenths of the Law...”, *op. cit.*, p. 75-76.



the requirements for protection<sup>36</sup>. Generous interpretations were often given to the categories of works to be protected, the required compliance with formalities then imposed proved not to be as stringent as it appeared in the law, generally leaving intact the common law remedies for unauthorised copying and publishing (at least in the United Kingdom) or their non-compliance having unclear consequences. Copyright protection, in those early systems of protection, should thus be considered as being broader and its borders not strictly delineated, as what would appear in the statutes. As a consequence, the contours of the public domain itself were fuzzy and indeterminate at that time of copyright history.

Both narratives might be somewhat excessive and could be brought closer together. True, “an idyll of communality from which we have supposedly declined”<sup>37</sup> is to some extent the projection of a wish for a public domain as a rule from which copyright has increasingly derogated. The regulation of the printing press and thus of publishing activity, before and beyond copyright legislation, left only a meagre space for free copying. However, this regulation only applies to expression in writings, such as books, even though these could be broadly construed as to include other literary works. Other types of creative expressions still laid open for copying and even writings could be copied or built upon to some extent by other creators in ways that would constitute copyright infringement today. Regulation of publishing activities and markets did not henceforth banish all possibility of free use and copying<sup>38</sup>.

The birth of a legal regime of copyright, abolishing the former privileges, also raised the issue of the proper limitations of such legal rights. Even though such limitations might be blurry and uncertain and the scope of the right be extensively construed, starting the increasing expansion of intellectual property that many denounce nowadays, their enactment gave birth to some debate and erected a legally defined space of free use. In that sense, it is true to say that “copyright and public domain were born together”<sup>39</sup>, at least their concepts as understood and limited by legal ordering. What had still to be built however, was a rhetoric and a regime for that free use space, which could lead to the emergence of a genuine public domain out of its historical invisibility, at least in copyright discourse, if not in factual reality.

That construction took some time from the Statute of Anne and the other early copyright regulations, which leaves the impression of a relatively absent public domain at the beginning of copyright history. The terminology of the public domain appeared rather late in most countries. It was first used by the French, who refer thereby to the expiration of the copyright. For a long time, ‘public domain’ referred only to works whose protection lapsed through the passage of time. The concept was gradually used to encompass all creations that are not or not any more protected by copyright<sup>40</sup>.

Alongside this progressive construction of a proper terminology and rhetoric, the notion and regime of the public domain began to emerge in many countries during the 19<sup>th</sup> century, both in debates surrounding the expansion of copyright and in case law settling issues of copyrightability. Even before the term ‘public domain’ was used, the concept of free resources being available to all served as a counterpart to the grant of a monopoly over creative expressions. J. Ginsburg reminds us that despite the current seemingly

---

<sup>36</sup> J. GINSBURG, “Une chose publique...”, *op. cit.*

<sup>37</sup> M. ROSE, “Nine-Tenths of the Law...”, *op. cit.*, p. 76.

<sup>38</sup> *ibidem*.

<sup>39</sup> *Ibidem*, p. 75.

<sup>40</sup> See for example, T. OCHOA, « Origin and Meanings of the Public Domain », *op. cit.*, who retraces the use of the terminology by the US case law, starting in 1896, to encompass creations or inventions that were not protected by patent or copyright, lacking the fulfilment of requirements for protection.

protectionist position of France, its copyright system “was at first the closest to acknowledging a public domain default, emphasizing the public’s property as the backdrop to private rights”<sup>41</sup>. Such a public domain was conveyed by the notions of ‘public property’ or ‘common property’<sup>42</sup>. The often quoted statement of Le Chapelier giving support to the principle of literary property –“the most sacred, the most legitimate, the most indisputable, and if I may say so, the most personal of all properties is the work which is the fruit of writer’s thoughts”– is well known as continuing as follows:

*“But it is a property of a different kind from all the other properties. [Once the author has disclosed the work to the public] the writer has affiliated the public with his property, or rather has fully transmitted his property to the public. However, because it is extremely just that men who cultivate the domain of ideas be able to draw some fruits of their labours, it is necessary that, during their whole lives and some years after their deaths, no one may, without their consent, dispose of the product of their genius. But also, after the appointed period, the public’s property begins, and everyone should be able to print and publish the works that have contributed to enlighten the human spirit”.*

It is remarkable that, in this quotation, the notion of ‘public property’ emerges as soon as the work has been disclosed to the public. The property of the public mentioned here should not be confused with the traditional right of property in things, tangible or not<sup>43</sup>, but be understood as the interest of the public to obtain access to and enjoy intellectual creations. In that sense, Le Chapelier introduces the idea of a public domain within the copyright system itself, to the extent this freedom to access works results from the mechanics of divulgation, and runs parallel to the exclusivity afforded by copyright protection. One finds here the notion of a cognitive public domain mentioned above that distinguishes between the freedom to use enabled by the public domain *stricto sensu* and the intellectual access to works depending on disclosure of works, irrespective of the existence of copyright protection.

The notion of a public domain, as we know it today, has gained more currency during the debate that took place during the 19<sup>th</sup> century around the extension of the duration of protection for artistic property<sup>44</sup>. In France, many famous writers, philosophers and politicians became impassioned by the question, either defending or opposing a perpetual duration for literary and artistic property, as for any other property right. Joseph Proudhon was one of the fiercest foes of a perpetual copyright and explicitly referred to the notion and terminology of the public domain:

*“By enacting such a law, the legislature will have done far worse than paying the author an exorbitant price, it will have abandoned the principle of the chose publique, of the intellectual domain, and at great harm to the community... Let us not disinherit humanity of its domain... Intellectual property does not merely encroach on the public domain; it cheats the public of its share in the production of all ideas and all expressions”<sup>45</sup>.*

---

<sup>41</sup> J. GINSBURG, “Une chose publique...”, *op. cit.*, p.144.

<sup>42</sup> T. OCHOA, « Origin and Meanings of the Public Domain », *op. cit.*, p. 233-235.

<sup>43</sup> As the notion of property was then used more in an ideological sense than in a legal one. For the use of public property in copyright, here in a legal sense, see rather P. RECHT, *Le droit d’auteur, une nouvelle forme de propriété*, Paris, LGDJ, 1969.

<sup>44</sup> On that history, see L. PFISTER, “La propriété littéraire est-elle une propriété? Controverses sur la nature du droit d’auteur au XIXe siècle”, *R.I.D.A.*, July 2005, p. 117.

<sup>45</sup> J. PROUDHON, *Les Majorats littéraires*, 1868 (where the terminology of the public domain appears many times).

Here the public domain is heralded as the opposite of the copyright grant, as its necessary counterpart and vocation, an opposition that still dominates contemporary discourse on public domain.

At the opening of the Congrès Littéraire International, in 1878, which prepared the adoption of the Berne Convention, Victor Hugo retained both ideas of the public domain: on the one hand affirming that “as soon as the work is published the author is not the master thereof, then the other character seizes it: call it whatever you like, human spirit, public domain, society”; and on the other hand, promoting the public domain as the necessary fate of works at the end of copyright protection.

The 19<sup>th</sup> century was also a time where the public domain erupted in case law and in legislative process. A notable forerunner is the famous English case *Donaldson v. Beckett*<sup>46</sup>, in 1774, that promoted the public domain, under the guise of *publici juris*, once the statutory term for copyright protection has ended. In that decision, Lord Camden famously equated science and learning to “things common to all mankind, that ought to be as free and general as air or water”.

In the United States, the Supreme Court started to use the terminology at the end of the 19<sup>th</sup> century, and more importantly, attached thereto a regime of free availability and irrevocability<sup>47</sup>.

At the international level, as early as 1886, the Berne Convention referred to the public domain to designate works in which copyright protection had terminated, borrowing the notion from French copyright law<sup>48</sup>. This reference to the public domain, always understood in relation to the expiry of the term of protection, still subsists today in article 18(1) of the Berne Convention<sup>49</sup>.

From this brief historical overview, one can see that the impetus for the public domain has gradually settled in copyright discourse and its legal regime, asserting itself as the necessary counterpart of copyright protection. If the public domain has gained more importance today both in discourse and in policy thinking, it is probably due to the digital environment that, having fostered access to cultural content, also begs the question of a rich public domain, apart from the copyright protection.

#### The justification of the public domain

The traditional philosophical justifications of intellectual property do not often mention the public domain but are nevertheless illustrative of the way intellectual property treats that which is not protected. Such theories mainly focus on the reason for granting exclusivity to authors in the fruits of their creative labours or activities, hence justifying the property grant. Not much attention is however devoted to a possible justification of the preservation of a public domain or of commons in knowledge or culture, at least in the Western theories of intellectual property (which remains dominant in the copyright discourse).

---

<sup>46</sup> *Donaldson v. Beckett*, 98 Eng. Rep., at 357 (1774).

<sup>47</sup> See the cases analysed by T. OCHOA, “Origin and Meanings of the Public Domain”, *op. cit.*, p. 240 and seq.

<sup>48</sup> See the article 14 of the Berne Convention of 1886 that provided that: “Under the reserves and conditions to be determined by common agreement, the present Convention shall apply to all works which at the moment of its coming into force have not yet fallen into the public domain in the country of origin”.

<sup>49</sup> “This Convention shall apply to all works which, at the moment of its coming into force, have not yet fallen into the public domain in the country of origin through the expiry of the term of protection”.

John Locke's labour theory of property is often used to justify the grant of a copyright or patent right, akin to a property right, to works or inventions resulting from intellectual labour<sup>50</sup>. Its famous proviso, in the *Treatise of Civil Government*, reads as follows:

*"Whatsoever [a man] removes out of the state that nature has provided and left it in, he has mixed his labour with, and joined to it something that is his own, and thereby makes it his property"*<sup>51</sup>.

It does not deal with intellectual property, and Locke has never written on that topic, but it has been constantly referred to in copyright history in order to attach a property right to the fruits of intellectual labour<sup>52</sup>.

Another traditional philosophical underpinning of intellectual property is that of Hegel, which justifies the granting of a right over an object to an individual who puts her will into that object. His personality theory of property validates private property rights resulting from the subjective act of appropriation, as an extension of personality.

Both philosophies, when applied to intellectual property, equate property with the cultural production of human beings: what is protected is what humans have extracted from the rough state of nature<sup>53</sup>. The Lockean principle of property is rooted in the principle that any resource is free for every man to appropriate through his labour, while the Hegelian vision is premised on the idea of a public domain ready to be owned by any "willing" individual. Both theories consider nature as private property to be. Transposed to intellectual property, nature can be equated to public domain that is thus considered as raw material for future creation and copyright protection.

However, Locke's philosophy does not neglect the necessity to keep some resources free for all to use, as he qualifies his proviso by saying that appropriation must leave

---

<sup>50</sup> On the influence of Locke's theory upon the early copyright laws, see S. DUSOLLIER, *Droit d'auteur et protection des oeuvres dans l'univers numérique*, *op. cit.*, n° 276; D. ATTAS, "Lockean Justifications of Intellectual Property", in A. GOSSERIES, A. MARCIANO & A. STROWEL (eds.), *Intellectual Property and Theories of Justice*, Palgrave Macmillan, 2009, p. 29.

<sup>51</sup> JOHN LOCKE, *An Essay Concerning the True original, Extent, and End of Civil Government*, in *Two Treatises of Government*, Ch. V, 27 (Peter Laslett ed., 1988).

<sup>52</sup> See the petition of librarians during the discussion around the *Statute of Anne*, in the *Journal of the House of Commons*, 26 février 1706, quoted by A. STROWEL, *Droit d'auteur et copyright – Divergences et convergences*, Bruylant/LGDJ, 1993, p.187 : "many learned Men have spent much Time, and been at great Charges, in Composing Books, who used to dispose of their Copies upon valuable Considerations, to be printed by the Purchasers (...) but of late Years such Properties have been much invaded"; or the Preamble of the Copyright Act of March 17<sup>th</sup>, 1783, of the State of Massachusetts, quoted by J. GINSBURG, "A tale of two copyrights : literary property in revolutionary France and America", *R.I.D.A.*, January 1991, p. 144; or, for France, the many declarations of Le Chapelier and Lakanal, during the enactment of the revolutionary decrees of 1791 and 1793, referring to the labour of the genius writer or the Manifest of Lous d'Héricourt in favor of the literary property (« Un manuscrit (...) est, dans la personne de l'auteur, un bien qui lui est réellement propre, parce que c'est le fruit de son travail qui lui est personnel, dont il doit avoir la liberté de disposer à son gré ») (quoted by A.C. RENOUEAU, *Traité des droits d'auteurs dans la littérature, les sciences et les beaux-arts*, Paris, Jules Renouard et Cie, Tome I, 1838, p. 156.

<sup>53</sup> A.-C. RENOUEAU, *op. cit.* p. 441: "Que l'intelligence ait empire sur les choses, que l'homme soit le maître légitime de la nature inintelligente livrée à lui pour le servir, c'est là une vérité trop évidente pour n'être pas incontestée."

“enough and as good” in commons for others to enjoy<sup>54</sup>. Therefore, there might be no natural right of property if there is no parallel recognition of commons. This will justify the crucial balance in intellectual property, the grant of exclusivity requiring to be counterbalanced by acknowledgment of intangible commons or what we call today ‘public domain’<sup>55</sup>.

Another philosophy that could help understand the need to recognize copyright while preserving some access to cultural expressions can be found in the work of Jürgen Habermas on the public sphere<sup>56</sup>. The public sphere, understood as a public of persons that can stand in critical opposition to the State, emerges during the 18<sup>th</sup> century at the same time as the early copyright laws. Enacting a protection to literary and artistic works in that particular time is not a coincidence. The matrix of the public sphere, as explained by Habermas, is indeed cultural, as it finds in literary and artistic production the ground for political discussion and thinking (which was already described by Kant at the time<sup>57</sup>). It explains that the social objective of copyright is the promotion of the public sphere. The work is intended for the public, and the regime of protection purports to facilitate the circulation of works in the public sphere by entitling the author to enjoy some control over that circulation. The public sphere model thus inherently integrates the public domain as a key element of the copyright regime, as its ultimate purpose should be to foster the public availability of works.

More recently, natural rights theories of intellectual property have been replaced by utilitarian conceptions, which justify the grant of a private property right by the overall social welfare it would yield. Intellectual property is legitimate in that framework if it gives enough incentives to creators and innovators to spur the production of works and inventions. Such a rationale nourished the development of a rich law and economics analysis of intellectual property for the last 30 years.

The economic benefits of intellectual property have often been demonstrated. This scholarship is not devoid of concerns about the public domain even though research in law and economics or economic analysis about the public domain is only emerging<sup>58</sup>. For instance, a study has been commissioned by the European Union on the economic value of the public domain, particularly for cultural heritage institutions<sup>59</sup>. As such studies aim at

---

<sup>54</sup> For an analysis of this part of the Locke philosophy, see W. GORDON, “A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property”, *Yale L.J.*, 1993, Vol. 102, p. 1555 et seq.

<sup>55</sup> For the application of Lockean theory to the public domain, see J. BOYLE, *op. cit.*, p. 28; see also, G. DUTFIELD & U. SUTHERSANEN, *op. cit.*, p. 55 .

<sup>56</sup> J. HABERMAS, *Strukturwandel der Öffentlichkeit*, 1962. On the application of the public sphere model to the copyright protection and its consequences for the digital protection of copyright, see S. DUSOLLIER, *Droit d’auteur et protection des œuvres...*, *op. cit.*, p. 220 et seq.

<sup>57</sup> I. KANT, « Beantwortung der Frage : Was Ist Aufklärung ? », *Berlinische Monatschrift*, 1784.

<sup>58</sup> R. POLLOCK, *The Value of the Public Domain*, July 2006, available at <<http://www.ippr.org/publicationsandreports/publication.asp?id=482>>; E. SALZBERGER, “Economic Analysis of the Public Domain”, in *The Future of the Public Domain*, *op. cit.*, p.27-58; Computer & Communications Industry Association, *Fair Use in the US Economy*, 2007, available at <<http://www.cciainet.org/Copyright-Resources/>>.

<sup>59</sup> See the first report of that study, *Economic and Social Impact of the Public Domain: EU Cultural Institutions and the PSI Directive*, May 2009, available at <[http://www.epsipius.net/reports/economic\\_and\\_social\\_impact\\_of\\_the\\_public\\_domain\\_eu\\_cultural\\_institutions\\_and\\_the\\_psi\\_directive\\_may\\_2009](http://www.epsipius.net/reports/economic_and_social_impact_of_the_public_domain_eu_cultural_institutions_and_the_psi_directive_may_2009)>

estimating the current value of public domain works and the value of works that will fall into the public domain in the coming years, they could help to assess the value of a rich public domain and the effect of any change that may be decided to modify the line between the protection and lack of protection within copyright regimes.

Economic studies on the extension of the duration of some intellectual property rights are also useful to assess the value of the public domain composed of works whose copyright has expired<sup>60</sup>. Other studies on the economics of open access licensing and of open source software abound<sup>61</sup>. They investigate the economic benefits that can be associated with sharing practices and non-exclusivity in the control of intellectual assets, features that the open access movements share with the public domain (see below).

A common point in those economic studies is a gradual evolution from the idea of the so-called tragedy of the commons to a vision where the organisation of such commons, instead of their privatisation, could be seen as beneficial. "The Tragedy of the Commons" was the title of a famous economic article by G. Hardin in 1968, where he considered that collectively managed resources, due to lack of exclusive rights therein, would necessarily lead to over-consumption and depletion<sup>62</sup>. Since then, many prominent authors (not the least of them being the 2009 Nobel Prize in Economy, Elinor Ostrom<sup>63</sup>), both in tangible and intangible commons, have managed to demonstrate that collective management of the commons could avoid such tragedy and create some value. Despite this recent research, one can say that "the exploration of information and knowledge as commons is still in its early infancy"<sup>64</sup>. But this exploration could serve to enrich the legal discourse on the public domain and on its value for creation and innovation.

The default of all those ideologies developed or applied to intellectual property might be that they are strongly rooted in Western philosophical or economic conceptions, which tend to place private property and exclusivity at the core of development and justice. Other notions of properties or entitlements over things might be beneficial to a discussion about commons or the public domain, by looking at the value of collective property or cultural production not as much related to individual acts of authorship, but as contributing to common culture and heritage<sup>65</sup>. Further research would be beneficial in this regard.

### III. THE COMPOSITION OF THE PUBLIC DOMAIN

#### A. Key principles

The public domain is composed of elements that are by themselves unprotected, whatever the circumstances of their use. That public domain is free to use by nature as it is premised on the absence of an exclusive right therein.

---

<sup>60</sup> W. LANDES & R. POSNER, "Indefinitely renewable copyright", *U. Chi. L. Rev.*, 2003, Vol. 70, p. 471.

<sup>61</sup> For a recent study see for example, J. HOUGHTON, *Open Access – What are the economic benefits?*, Study commissioned for Knowledge Exchange, 2009, available at <<http://www.knowledge-exchange.info/Default.aspx?ID=316>>.

<sup>62</sup> G. HARDIN, "The Tragedy of the Commons", *Science*, 1968, n°162, 1243.

<sup>63</sup> See for instance, E. OSTROM, *Governing the Commons: The Evolution of Institutions for Collective Action*, Cambridge University Press, 1990.

<sup>64</sup> C. HESS & E. OSTROM, *Understanding Knowledge as a Commons – From Theory to Practice*, MIT Press, 2006, p. 3.

<sup>65</sup> R. COOMBE, "Fear, Hope and Longing", *op. cit.*, p.1181.

It will be based on elements that are generally used by many countries to define the subject matter of copyright protection, but will be completed by other elements that appear in some national laws to belong to the public domain. In order to carry out this survey of the composition of the public domain in national laws, some countries have been selected in order to achieve a balanced and differentiated representation of legislation with respect to geographical distribution, level of economic development, and legal system. These are the following: Algeria, Australia, Brazil, Chile, China, Costa Rica, Denmark, France, Italy, Kenya, Malaysia, the Republic of Korea, Rwanda, and the United States.

Mapping the contents of the public domain can help in many regards. First, it can help countries to determine which works belong to the public domain. Secondly, it will illustrate that the public domain is not homogeneous. It is protean, encompassing many eclectic elements, which has two consequences. On one hand, the way each element is put, by the law or by any other way, into the public domain, underlines different mechanics and pursues different objectives, which can influence policy recommendations or strategies to maintain and promote the “publicness” of those different parts of the public domain. On the other hand, as each category of public domain elements obeys different mechanisms, it is certainly open to different threats of enclosure or commodification. Understanding the differences in the nature and operation of such threats is a prerequisite to adequate recommendations to counter such undue encroachments.

As a conclusion, different recommendations will be necessary to address the different parts of the public domain.

#### B. The territoriality of the public domain

The status of an intellectual resource depends on the law applicable thereto. The Berne Convention, like many national laws or case law providing for a rule determining the applicable law in copyright, provides that the enjoyment and exercise of copyright “shall be independent of the existence of protection in the country of origin of the work” and that “the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed” (article 5(2) of the Berne Convention). Where there is subject matter for the application of the Berne Convention, the law applicable to the existence of copyright is the *lex protectionis*. This rule of applicable law, that is inherent to the fundamental principle of territoriality in copyright, also applies to the duration of copyright protection, with some qualifications that will be addressed below. The only exception concerns expressions of folklore, by virtue of article 15(4)(a) of the Berne Convention<sup>66</sup>.

As a consequence, the status of a copyrighted work shall vary according to the laws of the country in which protection is sought. A work can still be protected by copyright in one country but be considered as belonging to the public domain in another, based on the different rules applicable to copyright protection or duration.

That variability can greatly complicate the task of identifying the composition of the public domain, particularly when the exploitation or use of a public domain work is envisaged simultaneously in many countries, as is increasingly the case, namely with the advent of on-line exploitation. This constitutes a key conundrum in the safeguarding and promotion of the public domain.

---

<sup>66</sup> “In the case of unpublished works where the identity of the author is unknown, but where there is every ground to presume that he is a national of a country of the Union, it shall be a matter for legislation in that country to designate the competent authority which shall represent the author and shall be entitled to protect and enforce his rights in the countries of the Union”. This provision deals more with the competent authority to enforce rights in folklore than with the determination of the applicable law, but its rationale at the time of its insertion in the Berne Convention was certainly to ensure that national folklore is protected according to the law of the country of their origin.

Creative material is not henceforth in itself in the public domain or not, but will be considered as subject to copyright or not according to the law applicable thereto. This raises a first difficulty for ensuring the preservation of the public domain. If a work has no definitive and permanent status, how can one promote its free use beyond a national basis? How can the user be certain of the free use she is entitled to make of such work, wherever such use will occur?

C. The many parts of the public domain based on the protected subject matter

Idea/expression or the ontological public domain

A key dividing line between the subject matter of copyright and the public domain resides in the so-called principle of the idea/expression dichotomy. This principle means that only creative expressions deserve protection, leaving ideas or information themselves free for all to use or, as Desbois has famously written, “de libre parcours”. Works are expressions and embodiments of ideas, facts, principles, methods. Actually, the idea/expression dichotomy is what constitutes the notion of the work<sup>67</sup>, even prior to the question of what is a literary and artistic work, or of what is an original work. Ideas, facts, style, methods, intrigue, mere information, concepts, are thus by nature unprotected and constitute commons in the proper sense of the word. They can be said to form an **ontological** public domain.

Ideas can still be protected by secrecy and non-disclosure but “once an author reveals his work to the public, therefore any *ideas* contained in the work are released into the public domain, and the author must be content to maintain control over only the *forming* which he first clothed those ideas”<sup>68</sup>. More than being a watershed dividing the protected copyright domain from the unprotected public domain, it also serves as a criterion for determining a possible copyright infringement, as only copying expression, and not idea, will amount to a copyright violation.

The Berne Convention does not explicitly state the principle of the idea/expression dichotomy. That has been completed by the WIPO Copyright Treaty in 1996, of which article 2 provides that “copyright protection extends to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such”. This formulation has been borrowed from article 9(2) of the TRIPS Agreement.

The ideas, procedures, methods of operations or mathematical concepts can be considered as being only examples of what the general term “ideas” encompasses<sup>69</sup>. Information as such, plain facts, raw data, concepts or styles are not protected either. One could add thereto words, musical notes, colours, or any other basic elements serving to express oneself.

The rationale underlying this principle comes from the recognised assumption that ideas and information are the basic building blocks of innovation, creation, scientific research and education. Copyright cannot restrict the ability of users and creators to get access to and build on existing knowledge to enable creation to progress.

Ideas constitute the “hard kernel” of the public domain, as being per se incapable of benefiting from copyright protection<sup>70</sup>. Obviously, even when such ideas take the form of

<sup>67</sup> V.-L. BENABOU, “Pourquoi une œuvre de l’esprit est immatérielle”, *Revue Lamy Droit de l’Immatériel*, January 2005, p. 53.

<sup>68</sup> C. JOYCE, M. LEAFFER, P. JASZI, T. OCHOA, *Copyright Law*, Lexis Nexis, 7<sup>th</sup> edition, 2006, p. 106.

<sup>69</sup> J. REINBOTHE & S. VON LEWINSKI, *The WIPO Treaties 1996*, Butterworths Lexis Nexis, London, 2002, p. 47.

<sup>70</sup> Neither by patent considering that, contrary to what is often said, abstract ideas can never be patented but need to have a technical or concrete character.



original expressions and leave the public domain, the object of protection is a new one, i.e. an original work, and leaves untouched the idea now contained in the work itself. In that sense the idea never really leaves the public domain and can be used again by anyone, anytime. Because of their ubiquity, ideas remain resistant to copyright protection focused on form and not on content.

Many national laws explicitly recall this principle. The exclusion of ideas appears for instance in the copyright laws of Australia (protecting only forms of expression), Brazil (excluding ideas, normative procedures, systems, methods or mathematical projects or concepts as such; diagrams, plans or rules for performing mental acts, playing games or conducting business, information in common use such as that contained in calendars, diaries, registers or legends, as well as the industrial or commercial exploitation of the ideas embodied in works), China (requiring that works be expressed in some form), Costa Rica (excluding “ideas, los procedimientos, metodos de operacion, conceptos matematicos en si”), Denmark (requiring works to be expressed in some manner), Korea (defining works as expression of ideas), Rwanda (excluding “any idea, procedure, system, methods of operation, concepts, principles, discovery of mere data, even if expressed, described, explained, illustrated or embodied in a work”), the United States (excluding from its scope “any idea, procedure, process, system, method of operation, concept, principle, or discovery “). In other regimes, that exclusion is implicitly recognised or applied by the courts or results from the protection only of “works”, which equates with creative expressions. As both TRIPS and WCT provisions can be read as imposing on their Member States a mandatory obligation, no country could decide otherwise<sup>71</sup>.

Despite its apparent strength in the copyright regime, the non-protection of ideas and information has been increasingly jeopardized in the recent decades of intellectual property expansion. A first cause of threat is the enactment of specific protection in the European Union and in some other countries (e.g. Korea) for non-original databases. The effect of the so-called *sui generis* right is to confer exclusive rights equivalent to reproduction and communication rights in sets of data. True, raw individual data will never be the object of such protection, which only vests in substantial parts of a database and in collections of data. However, when data or information makes sense only as a collection or when the database constitutes the sole source for such information, the *sui generis* right might well defy the principle of free access and use of ideas (see below).

#### Requirements for protection or the subject-matter public domain

##### (i) *Originality*

The entrance to the copyright building is conditioned on finding of some degree of originality in the work. Originality is, to borrow the words of R. Casas Valles, “the evidence and materialization of authorship and what justifies the granting of copyright”<sup>72</sup>. All countries apply this principle. Originality is not explicitly mentioned in the Berne Convention, and rarely in national laws (see for exception, the laws of Algeria, Australia, Costa Rica, Kenya, Malaysia, Ruanda, or the United States), even though one can probably infer it from the “literary and artistic work” wording and find it in the intellectual creation condition that applies to the protection of collections (art. 2.5 of the Berne Convention).

The Berne Convention also leaves the contours of originality to national determination, which leads to differences between countries as to the definition and degree

---

<sup>71</sup> See also article 1(1) TRIPS allowing for more extensive protection in national laws “provided that such protection does not contravene the provisions of this Agreement”.

<sup>72</sup> R. CASAS VALLES, “The requirement of originality”, in E. Derclaye (ed.), *Research Handbook on the Future of EU Copyright*, Edgar Elgar, 2008, p. 102.

of originality required. The quite radical distinction between the criteria used in countries of the *droit d'auteur* and copyright traditions, has been both often underlined and sometimes attenuated<sup>73</sup>. The first insists upon the imprint of the personality of the author, attaching the originality to a subjective approach, while the latter applies a less strict and more objective scrutiny, by requiring an independent creation, not copied from another, and demonstrating some intellectual effort. The “sweat of the brow criteria” that formerly sufficed in some countries to satisfy the requirement of originality, has been expressly disqualified by the well-known US Supreme Court case *Feist* that has held that:

*“The ‘sine qua non’ of copyright is originality. (...) Original as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works) and that it possesses at least some minimal degree of creativity. To be sure, the requisite level of creativity is extremely low; even a slight amount will suffice”<sup>74</sup>.*

But the touchstone of copyright protection is not a very selective tool for building the public domain. On one hand, in many countries, the threshold of originality to enjoy copyright protection is very low and is generally construed to encompass any intellectual involvement, any stamp of personality. Few intellectual creations will stay in the public domain by default of the required originality. In that sense, originality as a criterion for propelling a creation into copyright protection conveys a predominant idea in intellectual property that could be retraced both to the influence of Locke and Hegel, i.e. the principle that any creation due to human agency should be entitled to private protection (see supra). The trigger for protection is thus highly subjective while being very minimal.

On the other hand, originality is very difficult to determine with certainty and its final appreciation will often be left to the courts. In other words, it might be difficult to ascertain the protection of a creation and many potential users might carefully decide to opt for copyright protection in case of any uncertainty. Consequently, the contours of that part of the public domain may be very blurry.

This low level of originality also constitutes a threat to the public domain, as it leaves fewer and fewer works unprotected, extending to sometimes incongruous subject matter where creativity seems very minimal.

Some legal mechanisms also reinforce the lack of balance between what is protected and what is not. For instance, in Australia, copyright shall be presumed, in the course of a legal proceeding, to subsist in the work if the defendant does not contest it<sup>75</sup>. The possible status of the public domain of the work in an infringement procedure is thus not challenged *prima facie*.

#### (ii) *Fixation*

Some countries require the work to be fixed in a tangible embodiment in order to benefit from copyright protection. This is the case in the United States where the fixation requirement is satisfied when the embodiment of the work “in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration” (section 102(b) of the US Copyright Act). Some fixation of the work is also applied in Kenya (article 22(3) of the Kenyan Copyright Act) and Malaysia (section 7 (3) (b) of the Malaysian Copyright Act). In those countries, one can presume that works lacking a form of fixation will be left unprotected, hence becoming part to the public domain.

In other countries, works are said to be protected as soon as they are created.

---

<sup>73</sup> See mainly, A. STROWEL, *Droit d'auteur et Copyright, op. cit.*

<sup>74</sup> *Feist Publications, Inc. v. Rural Telephone Service Company, Inc.*, 499 U.S. 340 (1991).

<sup>75</sup> A similar presumption exists in Kenya.

## (iii) Nationality of the work

Many countries still provide in their laws for exclusion from copyright protection of works based on their nationality, reserving protection to the works created by their nationals or published in their territory, and to works the country of origin of which is a Member State of a Treaty to which they are themselves a party. For example the Kenya law on copyright explicitly includes in the public domain “foreign works which do not enjoy protection in Kenya” (article 45(1)). The same applies in Australia, Brazil, Chile, China, Costa Rica, Denmark, Korea, Malaysia, the United States. In some countries, such as France, Italy, Rwanda, this exclusion from protection only extends to works published in countries that do not recognize a sufficient level of protection to works published in the former. The rule of reciprocity can thus save works originating from countries not belonging to the Berne Convention.

As adherence to the Berne Convention and the TRIPS Agreement is steadily increasing, there are few countries whose works might not be protected in other territories. It is thus rather rare that this criterion could inject a work into the public domain in some jurisdiction.

## The term of protection or the temporal public domain

An essential feature in intellectual property, save for trademarks, geographical indications and, to some extent, the *sui generis* right conferred to databases, is its limitation in time. After a determined period of time has elapsed, the work or invention is said to fall into the public domain. One can talk of a **temporal** public domain.

The importance of that limitation in time for the constitution of a public domain explains that in many countries and for a long time, the expression “public domain” itself essentially referred to works that were not protected any more. At the origin of copyright, a defined duration was also considered as being the main engine for ensuring access to literary and artistic production by society at large, and as the best evidence for a trade-off between protection and the public interest.

The debates that took place in many countries during the 19<sup>th</sup> century as to the extension of such duration fiercely insisted on that point. A limited duration aimed at achieving a balance between proprietary protection and public availability, thus creating two separate domains, constituted by the passing of time. The public domain was also recognised as being the principle and the copyright the exception, necessary but application of which should not be eternal, as is reflected in that oft-quoted declaration of Lord Macaulay, in a speech before the English House of Commons in 1841:

*“It is good that authors should be remunerated; and the least exceptionable way of remunerating them is by monopoly. Yet monopoly is an evil. For the sake of the good we must submit to the evil; but the evil ought not to last a day longer than is necessary for the purpose of securing the good”*<sup>76</sup>.

The erection of a private property right was only a limited intrusion into the public domain that should stay the rule. J. Ginsburg has shown that this predominance of the public domain was present in the early regimes of literary and artistic property both in France and in the United States<sup>77</sup>. In 1774, in *Donaldson v. Beckett*<sup>78</sup>, one of the seminal copyright cases in the UK, the Court of Lords voted in favour of the principle that copyright should be limited in time, insisting on the public interest in preserving the public domain as the rule.

---

<sup>76</sup> T.B. MACAULAY, *Macaulay Speeches and Poems*, 1874, p. 285.

<sup>77</sup> J. GINSBURG, “A Tale of two Copyrights...”, *op. cit.*

<sup>78</sup> 1 Eng. Rep. 837 (H.L. 1774).

These days, all countries abide by the principle of limitation in time. The minimum duration for countries adhering to the Berne Convention or the TRIPS Agreement is 50 years after the death of the author. In addition, article 7 of the Berne Convention provides for specific ways of calculating the duration that are less author-centric. In the case of cinematographic works, article 7(2) states that national laws may provide that the term of protection shall expire fifty years after the work has been made available to the public with the consent of the author, or, failing such publication, fifty years after its making. For anonymous or pseudonymous works, the term of protection shall expire fifty years after the work has been lawfully made available to the public, except where the identity of the author is well known or is eventually disclosed. Article 7(4) finally allows for a shorter term of protection of 25 years after their making for works of applied art. The same tolerance could apply to photographic works unless the State has ratified the WIPO Copyright Treaty of 1996, article 9 of which withdraws such a shorter term, returning to the general minimum duration of 50 years *post mortem auctoris*.

But those terms are only minimal thresholds and nothing prevents States from extending the duration beyond the 50-year rule. Therefore the duration of a copyright in a work, and thus figuring out what is in the public domain and what is not, is left to national laws. The length of protection therefore varies greatly from a country to another, and can be difficult to ascertain, also due to the application of conflict of law principles to determine it. Indeed, as for the conditions of existence of copyright, article 7(8) of the Berne Convention provides that the duration will be determined by the legislation of the country where the protection is claimed. The determination of the temporal public domain will be dependant on the laws of the country where the work is exploited. However, the same provision attenuates somewhat this principle by stating that: “however, unless the legislation of that country otherwise provides, the term shall not exceed the term fixed in the country of origin of the work”. This is one of the main exceptions to the general application of the *lex loci protectionis*, which will be mandatory if the State has not decided otherwise<sup>79</sup>.

The effect of this term comparison rule might further complicate the task of calculating the duration of copyright in a work. It implies a rule of “material reciprocity”<sup>80</sup>, favouring the application of a shorter term of protection as fixed in the country of origin of the work. For example, the duration of a work whose country of origin is Algeria (where the term of protection is fixed to 50 years *pma*) shall be considered in France to be 50 years after the death of the author, putting aside the application of the normal term of 70 years granted by the French Intellectual Property Code<sup>81</sup>. As a consequence, computing the term of protection will firstly require knowledge as to whether the country has explicitly derogated from article 7(8) of the Berne Convention, and secondly to determine the country of origin of the work and the duration applicable in that country in order to compare it with the duration provided by the law of the country where the protection is sought.

Besides the possible application of this comparison rule, calculation of the copyright term can be arguably tricky due to some national oddities.

Most countries start with easy rules. The general principle is to apply a period either of 50 years (e.g., Algeria, China, Kenya, Korea, Malaysia, Ruanda) or 70 years (Australia, Brazil, Chile, Costa Rica, Denmark, France, Italy, the United States) after the death of an

---

<sup>79</sup> For a comprehensive explanation of the rule of term comparison, see S. CHOISY, *Le domaine public en droit d'auteur*, Litec, 2002, p. 117-142.

<sup>80</sup> J. REINBOTHE & S. VON LEWINSKI, *op. cit.*, p. 117.

<sup>81</sup> As the French does not derogate to that rule but reinforces it by providing that the duration of a work whose author and country of origin is non European, will be that granted in the country of origin without being superior to the term provided in France (see article L.123-12 CPI).

author<sup>82</sup>. On a regional level, a common duration is sometimes either imposed (as by the EU term directive of 1993 that harmonises the duration to 70 years *pma*) or suggested (as in Annex VII of the OAPI Bangui Agreement that lays down a duration of 70 years *pma*). Most countries calculate the term, as suggested by the Berne Convention, from the 1<sup>st</sup> of January following the death of the author or other relevant event.

This overall principle is then often completed by specific rules applying to some categories of works. The term might be calculated from the making available or publication of the work (or even from its making) in case of anonymous or pseudonymous works (applicable to all countries analysed), audiovisual works (Algeria, Brazil, China, Kenya), photographic works (Algeria, Brazil, China, Kenya) collective works (Algeria), for works created in employment or belonging to a legal entity (Chile, China), for unpublished works of unknown authorship (Denmark), for works created on commission from the Government (Kenya), or for Crown copyright when applicable (Australia<sup>83</sup>).

Shorter terms can also be provided. Brazil for instance confers a short protection of one year for the titles of periodical publications, including newspapers, and two years for annual publications. Costa Rica applies a term of 25 years after publication to works created by public authorities.

The EU term directive of 1993 grants a copyright protection of 25 years after publication or public communication to the publisher of a public domain work which was previously unpublished<sup>84</sup>. Let us imagine that a person finds an unknown manuscript of Victor Hugo and publishes it. Despite the fall of such a work in the public domain, Hugo being dead for more than 70 years, this person will enjoy exclusive rights in that work for 25 years. This protection is however limited to economic rights, which makes it more akin to a related right, based on investment, than to a genuine copyright, by lack of moral protection. The justification of this specific rule is to give incentives to publish and make available a work that should normally be considered as having fallen in to the public domain. It will be discussed below, as it encroaches to some extent on the public domain.

Very peculiar rules can also apply in some countries that will render the calculation even more complicated. In the United States, the now abrogated formalities as a condition for copyright enjoyment, still leaves some traces in the computing of the copyright term.

For US works created on or after January 1, 1978, copyright protection extends to the life of the author plus 70 years. When it is a anonymous or pseudonymous work, or a work made for hire, this duration extends to 95 years after first publication or 120 years after creation, whichever expires first. The same applies to works created but not published or registered before January 1, 1978, with one special rule in case of a subsequent publication before 2003, i.e. that the term will not expire before the end of 2047. For works created before 1978, the belonging or not to the public domain will still depend on the former accomplishment of formalities. Should the work be published at the time with a proper notice, the 28-year first term of protection is automatically renewed for a supplementary duration of 67 years (or only if the renewal was properly obtained for works published between 1923 and 1963). Works published before 1923 are in the public domain. It should also be noted that these already complicated rules only apply to works of US origin, foreign works being submitted to even more intricate provisions<sup>85</sup>.

---

<sup>82</sup> Note that the term of protection discussed here only concerns the economic rights, the duration of moral rights will be examined below.

<sup>83</sup> In Australia however, a copyright of unlimited duration vests upon the Prerogative Rights of the Crown in legislation and subordinate legislation.

<sup>84</sup> See article 4 of the EU Copyright Term Directive.

<sup>85</sup> For a complete overview of the way to calculate the copyright duration of work in the US, see <<http://copyright.cornell.edu/resources/publicdomain.cfm>>.

The determination of the public domain status of a domestic work in the US has thus to be based on many elements such as the existence and date of publication, the compliance with the notice formality then applicable, the existence of a renewal of protection, all information that might be difficult to obtain by non-specialists.

Australia is not easier. Besides the general rule of 70 years after the death of the author, or 70 years after first publication for anonymous or pseudonymous works, protection extends to works first published after the creator's death, recorded sounds, and films made since May 1, 1969. If the author died before 1955, however, the copyright in work published in the author's lifetime has expired, due to the non-retroactivity of extension of duration enacted in 2005.

Copyright in unpublished written works, such as unpublished letters, has not expired, save for photographs taken before 1955, whether published or not. Works made before 1 July, 1912, do not enjoy copyright anymore unless a right conferred by the Copyright Act of 1911 subsisted in the work.

The Australian case reveals a complication that might occur in many countries when extending the term of copyright by new legislation. Should such new legislative term be deemed not to restore copyrights in works already fallen into the public domain, such works will remain unprotected. For example, there is a controversy in Chile about the protection of the work of the Nobel Prize author Gabriela Mistral. She died in 1957, when the Chilean copyright law only guaranteed 30 years post mortem protection. As a result her work entered the public domain in 1988. The question is still open as to whether copyright in her work, as in other works fallen into the public domain, was restored when the duration was extended to 50 years of protection post mortem in 1992 (eventually to 70 years).

Many countries provide for an explicit rule for or against copyright restoration when extending the duration of copyright, but it can be difficult to know and apply.

When harmonizing the term of protection to 70 years *pma*, the European Union has opted for the restoration of copyright for works still protected in one country of the Union at the time of the entry into force of the directive. Consequently, a work in the public domain in one State could see its copyright revived if it was still protected in another Member State. This also requires investigation as to whether, at the time of adoption of the directive, a work was still protected in any Member State (there were 12 at the time).

These two examples show that the precise determination of the temporal public domain often necessitates being aware of the application in time of successive legislative extensions of copyright terms.

The duration of copyright can also be lengthened in some countries by what has been called the war time extensions. This is the case in France, where two laws, in 1919 and 1951, added extra months of protection to the normal duration of copyright for works that were not in the public domain when the laws were enacted, in order to compensate the lack of exploitation suffered during the two World Wars. The first law added six years and, depending on divergent computation, 83 or 152 days, the second one added 8 years and 120 days<sup>86</sup>. If the author died fighting for France, his (or her) works enjoyed a supplementary term of protection of 30 years! This set of extensions has created much controversy in France (as in Belgium which enacted a similar extension), particularly as to whether it was compatible with the now harmonised term of protection throughout the European Union. The French *Cour de Cassation* has partially settled the controversy in 2007 in a case involving a portrait of Verdi, painted by Boldini who died in 1931<sup>87</sup>. The work normally entered into the public domain on the 1<sup>st</sup> of January 2002, but the rightowners claimed the benefit of the two war extensions and hence protection until 2016. The

---

<sup>86</sup> A. LUCAS & H.J. LUCAS, *Traité de la Propriété Littéraire et Artistique*, Litec, 3d ed., 2006, § 513.

<sup>87</sup> Cass., 27 February 2007, *D.*, 2007, p. 807.

Supreme Court refused such extension on the ground that it was covered by the 70 years now imposed by the Community directive. One exception was made however, by interpretation of article 10(1) of the directive, when a term of protection longer than the duration of 70 years *post mortem auctoris*, had started to run on July 1<sup>st</sup>, 1995 (date of entry into force of the directive). Then the longer term of protection would apply, which leaves the French exception of wartime extensions still applicable in only rare cases.

Another national peculiarity can be found in Chile where the term of protection can be computed from the date of death of the last surviving person amongst the wife and daughters of the authors (only if they are not married). This strange (and not gender-neutral) provision might be soon abrogated by a Bill currently in discussion.

The analysis of these national laws appears to contradict the automatic building of the temporal public domain, according to which once a certain period of time has passed, the work falls into the public domain. Many events can render uncertain the date where its entry into the public domain will effectively occur, possible legislative extension of the duration not being the least.

This explains in part that repeated term extensions have always raised much opposition. Many reasons have been invoked to argue that some repeated extensions, are related to the protection of the creators and their heirs and their participation in the benefits from exploitation of the works, but most of the time, the demand for an extended protection comes from the industry, hence from the market, that would like to enjoy a unlimited monopoly over some works. Everybody remembers the strong opposition to the US Copyright Extension Act of 1998 (known also as the Sony Bono Act) that extended the term of protection of copyrighted works to 70 years after the author's death, as in Europe. This extension was challenged before the Supreme Court on the basis of its unconstitutionality, the US Constitution providing that the Congress has the power "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". In *Eldred v. Ashcroft*<sup>88</sup>, the Supreme Court upheld the law: a "Limited Time" was thus not considered as a short time but only as a non Unlimited Time, a subtle but meaningful difference.

Rather than adhering to a view of the term of protection that would draw a clear line between protected works and the public domain as in *Donaldson v. Beckett*, the US Supreme Court has hence admitted that the duration of copyright can be regularly extended as long as the Congress can proffer a rational basis for that extension. Economic needs are then approved to be a particularly strong motive for extending the protection. As was the case in Europe at time of the adoption of the 1993 duration directive, argument of the increased human longevity was equally raised: copyright should benefit the author and two successive generations of heirs, which, for demographic reasons, is not perfectly achieved with a 50-year rule. But what also counts as the "necessary life of copyright" is the productive life of works, the period of time during which they are valuable in the market. In other words, if works can still have a commercial value, copyright should subsist in them and the duration be extended accordingly. Under that reasoning, the public domain is reduced to garbage of valueless (at least in economic terms) works and the copyright regime will only be shaped by the market's demands and the public domain will only be for market failures that need not be cured. This illustrates that the temporal public domain is not the predominant principle and that the definition of the public domain in the copyright regime is not strong enough to resist such on-going extension. The effect of a term extension on the public domain is rarely assessed in such legislative contexts.

That also implies that the public domain, once constituted by the rule of the term of protection, is not immutable, or rather that the public domain does not take its definitive form once for all. To put it simply, we do not know now when existing works will fall into the public domain, we only know that all works will do so eventually. That does not confer much strength to the public domain.

---

<sup>88</sup> 537 U.S. 186 (2003).

### The excluded creations or the policy public domain

The public domain is also enriched by elements that are explicitly excluded from the field of protection. Those exclusions concern intellectual creations that could on their face qualify for the protection granted by copyright, but that the lawmaker has decided to render ineligible for protection for reasons of the public or general interest. Such exclusions constitute what can be called the **policy public domain**.

The Berne Convention provides for two possible exclusions from copyright protection<sup>89</sup>. One is mandatory and concerns news of the day and miscellaneous facts (article 2(8)), the other is optional and covers official texts of a State (article 2(4)). Many countries follow the Convention in providing both exclusions. Some other types of exclusions can also be found in some national laws.

#### (i) *Official acts*

In copyright, one traditional exclusion from protection relates to official texts of a legislative, administrative and legal nature, as well as to the official translations of such texts, as provided by article 2(4) of the Berne Convention. The latter also leaves to national determination the protection of political speeches and speeches delivered in the course of legal proceedings (article 2*bis* (1)) while imposing the grant of exclusive rights of making a collection of those speeches to their author (article 2*bis* (3)).

Such exclusion purports to leave documents such as laws, court decisions and other kinds of official documents available to all, to make effective the norm according to which “ignorance of the law is no defence”. Another ground might be that, to the extent such official acts are enacted by elected representatives of the people, they cannot be appropriated and are held in common by all citizens.

Albeit its optional character in the Berne Convention, most countries refuse to grant protection to this type of document, either through a legislative explicit exclusion (as in Algeria, Brazil, China, Denmark, Italy, Korea, Malaysia, Rwanda, the United States) or by case law (France).

The extent of the exclusion, and hence of the part of the public domain composed by official documents, varies from one country to another. At minimum, the laws and other regulations, as well as court decisions<sup>90</sup>, are deemed to be in the public domain (Algeria, China, France, Italy, Korea, Rwanda). Some countries sometimes extend the exclusion to the works produced or subsidized by the State or other public bodies (e.g. Brazil, Malaysia, the US) or grant some freedoms to use such administrative documents (e.g. Algeria, Denmark). Case law has also sometimes excluded works having a normative value such as bank notes<sup>91</sup>, official exams for some professions<sup>92</sup> or opinions delivered by the judges<sup>93</sup>.

---

<sup>89</sup> Another exclusion appears in article 2(7) of the Berne Convention, which allows States to exclude from copyright protection works of applied art to reserve them for the specific protection granted by design and models rights. As a consequence, in countries applying such exclusion, works of applied art will be formally in the public domain from a copyright perspective but will be generally protected, and thus effectively outside of the public domain, by design protection.

<sup>90</sup> As far as official translations of such acts are concerned, see J. GINSBURG & T. RICKETSON, *The Berne Convention for the Protection of Literary and Artistic Works – 1886-1986*, Oxford Press, 2006, § 8.108.

<sup>91</sup> See in France, Cass. 5 fév. 2002, *R.I.D.A.*, July 2002, p. 381 (excluding bank notes from copyright but reversed by an ordinance of 2005 granting a copyright in bank coins and notes to the institutions producing them).



The only countries derogating from that rule are those that recognise Crown Copyright such as the United Kingdom or Australia, thus removing official acts from the public domain and vesting copyright upon them in the State (in Australia) or the Queen (in the United Kingdom). Crown Copyright in official acts has been recently criticized by the Australian Copyright Law Review Committee, which recommends to repeal such protection, for the sake of the public interest in the availability of such official documents in a modern democracy<sup>94</sup>.

In Chile, the situation is uncertain, as it seems that by default of an explicit exclusion in the copyright law<sup>95</sup>, official acts might be protected, even though it is never enforced. However, in recent litigation related to speeches made by the Nobel Prize Pablo Neruda, when he was a congressman, the Supreme Court decided that those speeches are part of the public domain on the ground that the proper functioning of a democratic system requires the absence of copyright in the speeches of public officers.

The public domain nature of official acts has however not prevented the constitution of private exclusivity over collections of such documents, namely in the European Union through the *sui generis right* in databases. As demonstrated by a recent decision of the European Court of Justice<sup>96</sup>, a substantial investment might be proven in the collection of uncopyrighted laws or courts decisions that would vest in the database gathering such documents exclusive rights against extracting and re-using substantial parts thereof. As official acts are increasingly available through databases, which makes their consultation and search easier, the unlimited granting of *sui generis* right over such databases, combined with the very liberal approach of the European Court of Justice regarding the scope of rights so granted<sup>97</sup>, might harm the public availability that is guaranteed by putting laws, courts decisions and other State's productions in the public domain. This is another example of the difficulty of ensuring the effectiveness of the public domain.

(ii) *News of the day*

The second exclusion provided by the Berne Convention, this time mandatory, concerns « news of the day or miscellaneous facts having the character of mere items of press information » (article 2(8)).

This exclusion is explicitly provided by China, Costa Rica, Italy, Korea and Rwanda. Other countries apply it by case law, either on the grounds of a lack of originality or of the idea/expression dichotomy<sup>98</sup>.

---

[Footnote continued from previous page]

<sup>92</sup> See in France, TGI Paris, 9 nov. 1988, *Cah. Dr. auteur*, February 1989, p.16; CA Paris, 13 June 1991, *D.* 1992, somm. p. 12.

<sup>93</sup> see in the United States, *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 668, 8 L.Ed. 1055 (1834).

<sup>94</sup> See Copyright Law Review Committee's Crown Copyright report, available at <<http://www.austlii.edu.au/au/other/clrc/18.pdf>>.

<sup>95</sup> This could change however as the Bill to revise the copyright Act currently in discussion includes an exclusion of official acts from copyright.

<sup>96</sup> ECJ, 5 March 2009, *Apis-Hristovich EOOD c. Lakorda AD*, C-545/07.

<sup>97</sup> The ECJ has indeed considered that even the plain consultation of a protected database might in some cases amount to an infringement of the extraction right. See ECJ, 9 October 2008, *Directmedia Publishing GmbH c. Albert-Ludwigs-Universität Freiburg*, C-304/07.

<sup>98</sup> See for instance, the US Supreme Court case, *International News Service v. Associated Press*, 248 U.S. 215, 234 (1918).

News of the day feed the public domain more on the grounds of the idea/expression dichotomy than on a public policy justification. It is by their very nature that information, mere facts and news are unworthy of copyright protection<sup>99</sup>, which makes them belong to the *ontological* public domain we defined above.

(iii) *Other exclusions*

States are also free to invoke other public interest motives to exclude some creations from protection and place them in the public domain. From the analysis of the countries we have carried out, it appears that it is not frequent.

Chile, for example, puts into the public domain works that have been expropriated by the State, except if the law designates a beneficiary for the protection in such works (article 11 of the Copyright Act). That article was enacted in the early 70's when Chile was governed by a Socialist Government (before the coup of 1974) and reflects the spirit of the time when expropriations for public interest were a political strategy. But there seems to be no case of application of such provision to creative works so far.

Two other countries consider the works of authors who die without heirs to be in the public domain (see article 66 of the Costa Rica Copyright Law, and article 45 of the Brazilian Copyright Law). In other countries, the normal rules applicable to successions in abeyance will probably apply, generally conferring copyright on the State.

The dedication of works with no successors in title to the public domain in Costa Rica and Brazil can be understood as the will of the State not to exercise private rights in creative works but to leave them to the commons, as their transmission to the State has transformed them into collective goods. In that sense, the public domain to which they belong is closer to the notion of public domain known in administrative law, referring to goods owned by the State and used for collective purposes.

Let's note finally that the US Copyright Act excludes from copyright protection "any part of [a derivative] work in which [pre-existing] material has been used unlawfully" (§ 103(a)). This exclusion of infringing derivative creation also reflects a public policy motive as it discourages infringement of existing copyrights.

Relinquishment of copyright: the voluntary public domain

A recent question about the composition of the public domain relates to the possibility that the public domain would incorporate works in which copyright has been relinquished. Works for which copyright protection has been abandoned by their owners would form a sort of **voluntary public domain**<sup>100</sup>, not through the effect of the law but by the mere will of the authors themselves<sup>101</sup>.

Unlike other intellectual property rights such as patent or trademark, copyright ownership is triggered by the sole act of creation (or fixation in some legal systems). One cannot refuse the "title" once it has been granted, the "authorship" being consubstantial with the phenomenon of creation. There are no registration formalities, fees, cost, conflict with public order, which could possibly deny the author protection under a monopoly. Had she wanted not to be protected as such, the creator has no way of escaping from the legal pattern of exclusive protection.

---

<sup>99</sup> S. RICKETSON, *op. cit.*, p. 13.

<sup>100</sup> or « domaine public consenti » to borrow the expression of S. CHOISY, *op. cit.*, p. 167 ; see also, M. Clément-Fontaine, *Les oeuvres libres*, Thesis, University of Montpellier, December 2006, unpublished, 281 et seq.

<sup>101</sup> M. Clément-Fontaine, *Les oeuvres libres*, *op. cit.*, p. 420.

Relinquishing works into the public domain thus requires some formal act, a positive gesture of opting out from copyright. Such dedication of works to the public domain is increasingly occurring and takes part of a more general contestation of intellectual property. It is sometimes an offspring of movements that have experienced the licensing of copyright in open access and use schemes, such as Creative Commons (see below) that now also proposes a complete renunciation of copyright in one's creation through a standard license called Creative Commons CC0<sup>102</sup>. The purpose of this standard license is to affirm that a copyright owner waives all her copyright and related rights in a work, to the fullest extent permitted by law. Other abandonment of copyright can take the form of a less formalised license or even a mere statement to that effect.

Such a voluntary public domain differs from open access or freeware licenses, to the extent that they aim at a complete renunciation of the protection of copyright, while the latter only grant freedom to use works but retain the existence and exercise of copyright<sup>103</sup> (see below). The explanation often given of licenses of public domain dedication is that of an option of “no rights reserved”, whereas traditional copyleft licenses can be qualified to be “some rights reserved” (classical exercise of copyright exclusivity being an option of “all rights reserved”). The voluntary public domain should also be distinguished from situations where the author does not enforce his/her rights against copyright infringements: such decision does not affect the existence of the copyright, which still subsists in the work<sup>104</sup>.

Some countries include such renunciations of copyright protection in their definition of the public domain. Amongst the countries we have analysed, it is the case of Chile, even though the reality and extent of the renunciation of copyright is subject to controversy, and Kenya. The latter provides for some formal requirements to make such abandonment valid and secure by requiring that “renunciation by an author or his successor in title of his rights shall be in writing and made public but any such renunciation shall not be contrary to any previous contractual obligation relating to the work” (art. 45(2) of the Kenya Copyright Law). The Republic of Korea admits that authors can donate their rights to the Minister of Culture and Tourism that will then entrust the Korea Copyright Commission with managing the copyright in these works, but not for profit-making purposes<sup>105</sup>. However, copyright still subsists in the work that is not really dedicated to the public domain.

Save for countries explicitly allowing and formalizing such dedication to the public domain, the legitimacy and validity of copyright relinquishments raises many questions.

In most legislations, it is not clear whether the rightholder can renounce the full exercise of his/her exclusive rights. From a perspective of economic rights only, renunciation thereof will beg the question of the nature of the copyright itself. Should it be considered as a fundamental right, as might be the case in some legal systems? Is it legally allowed to renounce such a right? Conversely, if copyright is considered as a property right, the matter is less complicated as such right contains the inherent attribute of renouncing property itself (right of *abusus*).

But the key and more intricate issue will be the moral right. Attached to the person of the creator, the moral protection is deemed inalienable in many countries, which automatically implies an impossibility to forsake one's moral interest in the creation. Consequently, even if economic rights can be lawfully surrendered, the work shall still be protected by the moral right and the copyright owner could exercise it to retain some control over use of his/her work.

---

<sup>102</sup> See [http://wiki.creativecommons.org/CC0\\_FAQ](http://wiki.creativecommons.org/CC0_FAQ).

<sup>103</sup> S. CHOISY, *op.cit.*, 168.

<sup>104</sup> M. CLEMENT-FONTAINE, *op. cit.*, 286.

<sup>105</sup> Note that there is no case so far of such a donation.

Another question, if one admits some validity of a total waiver of copyright, is the irrevocability thereof. Can the author change his/her mind and, at some point, exercise again his/her exclusive right in the work, negating then the placing of the work in the public domain? Here again, there is no certainty. Everything will depend on the revocable character of licenses or unilateral acts by which the author will in practice affirm the termination of any protection in his/her work. Responses can greatly vary from one legal system to another.

Allowing such relinquishment might be a temptation for those creators who want to promote and enhance the public domain in copyright. One should however be particularly cautious when providing for such a mechanism.

First, only the authors of a work should be allowed to dedicate the work to the public domain, and not subsequent rights holders, or only with the expressed and informed consent of the authors.

Second, and particularly if the abandonment of copyright protection is deemed to be irrevocable, it should be submitted to a precise regime of formal requirements, whose objective would be to guarantee the free and certain will of author to that effect, and inform him/her of the irrevocability of his/her choice, when applicable. Industries are increasingly exercising pressures over authors to reduce their protections and might be very interested in a surrender of copyright that would make free and unconstrained their own exploitation of the work. The autonomy of the creators, that might justify the legitimacy of such choice, is a consequence of the exclusivity the copyright law grants them. However one should not underestimate the financial or social situation that could influence their decision to renounce to their copyright.

Even if one admits this relinquishment, it should be recalled that the work now abandoned to the public domain is not protected against any attempt at appropriation. Once the work is in the public domain, it will be subject to its regime of free use, which can open the possibility for others, with only small but original adaptations, to exploit the new work and gain exclusivity and revenue out of it. This can explain that some authors, wishing to allow the public to benefit from open access to and free enjoyment of their creation, might prefer having recourse to less radical licenses granting such freedoms, while retaining some control, over relinquishing their copyright altogether.

Intermediary conclusions on the composition of the public domain

The composition of the public domain can be represented as follows:

<b>Part of the public domain</b>	<b>Composition</b>	<b>Shifting boundaries</b>
<i>Ontological public domain</i>	<ul style="list-style-type: none"> <li>- Ideas, methods, rules, principles, style, facts, information, etc.</li> <li>- News of the day</li> </ul>	appropriation of collection of data through protection of non-original databases
<i>Subject-matter public domain</i>	<ul style="list-style-type: none"> <li>- Non original works</li> <li>- foreign works not covered by applicable Treaties</li> <li>In some countries: unfixed works</li> <li>In countries with a former regime of formalities works not complying at the time with formalities</li> </ul>	<ul style="list-style-type: none"> <li>- low level of originality required</li> <li>- difficulty to ascertain originality</li> <li>- adherence to international Treaties or bilateral agreements</li> </ul>
<i>Temporal public domain</i>	<ul style="list-style-type: none"> <li>- 70 years after the death of the author</li> <li>- specific rules</li> </ul>	<ul style="list-style-type: none"> <li>- comparison rule (Article 7(8) Berne Convention)</li> <li>- repeated extension of copyright term</li> <li>- transitional measures, restoration or not of copyright</li> </ul>
<i>Policy public domain</i>	<ul style="list-style-type: none"> <li>- Official texts</li> <li>In some countries: <ul style="list-style-type: none"> <li>- works expropriated by the state</li> <li>- works of authors deceased without heirs</li> <li>- infringing derivative works</li> </ul> </li> </ul>	appropriation of collection of official texts through protection of non-original databases
<i>Voluntary public domain</i>	Works relinquished into the public domain	Uncertainty of its legal validity

The analysis undertaken above has underlined that this composition is marked by the uncertain contours and the shifting dimension of public domain. Causes thereof are manifold.

Firstly, the territoriality of copyright protection leads to changing status of a creation, depending on the law of the country where protection is sought. As a consequence, its possible belonging to the public domain is also determined by the territorial application of the law, sometimes complicated by the interference of the law of the country of origin.

Secondly, it is difficult to precisely define the contours of some parts of the public domain, since the criteria for protection/non-protection are either subjective or uncertain (e.g. the appreciation of originality) or rely upon intricate rules (e.g. the duration of copyright).

Finally, the limited protection of the public domain in copyright laws, mainly considered as the negative of intellectual property, but not enjoying a specific regime for its preservation, makes it an easy target for recapture, as demonstrated by examples of the restoration of copyright in public domain works when extending the term of copyright, or the uncertain status of works dedicated by their authors to the public domain.

The unclear boundaries of the public domain are one of the first concerns for its identification and availability. They also makes them ill-equipped to encounter challenges from other legal or technical mechanisms, to which we turn now.

#### D. Relativity of the public domain

As a result of its negative definition, elements belonging to the public domain will only be free from exclusivity by operation of copyright law. *De lege lata*, nothing prevents their reservation or privatisation by other mechanisms, as the public domain so defined does not follow an absolute rule of non-exclusivity.

That means that some material that can be categorised as uncopyrighted, hence belonging to the public domain in copyright law, can be protected by other means, legal, contractual or technical. As a consequence, the contours of the public domain we have just drawn are only relative and do not result in an unquestionable status of non-protection or public property.

This part will list the different challenges that might apply to public domain works and might render their “publicness” or availability more limited. Most of the time, one can conclude that the influence of other means to exercise control over public domain material can be limited itself and does not significantly erode the public feature of the public domain and the effectiveness of its free use. The national laws of the countries analysed so far will continue to serve as a basis for our survey.

##### 1. Perpetual moral rights

The free availability and use of public domain works can be reduced by the effect of the exercise of a perpetual moral right. In the States where such perpetuity is acknowledged, the adaptation of a work fallen in the public domain might well be jeopardized by opposition of distant relatives of the authors, should they be able to prove their entitlement to succeed the author in the exercise of the moral right. They could also be tempted to play a role of censorship.

As a consequence, the reality of free use of public domain works can be fragile and no user or maker of a derivative work is safe from the continuing application of the moral right of integrity. When this perpetuity extends to the divulgation right, where such right exists, the copyright law itself gives a serious weapon to the heirs of the author to prevent the making available of posthumous and unpublished works, thereby diminishing intellectual access to public domain works by the public. The third attribute of the moral right, the paternity right, is likely to be less of an issue, as it will not prevent the making of new creations based on a work in the public domain, nor reduce the exploitation of or access to such a work. But it will force the subsequent creators or exploiters to adequately attribute the public domain work used to its author.

The Berne Convention does not impose any duration of the moral right nor does it prohibit a perpetuity rule in that regard. It is worthwhile to note that Annex VII of the Bangui Agreement of the African Intellectual Property Organisation, which serves as a model law for literary and artistic property for its African members, provides that the moral rights shall be without limit in time (see article 22, al.2).

In many countries the duration of moral rights follows that of the economic rights, as in Australia, Korea or Malaysia (for the countries analyzed here). It can sometimes be justified

by a monistic regime of copyright, where moral dimension of copyright is deemed to be an integral part of the economic one<sup>106</sup>. In other countries the moral protection shall differ in length from economic protection. Moral rights can be shorter and cease upon the death of the author, as in Korea (save for a protection of serious harm to the honour of the author).

The dissociation of economic rights and moral rights can be limited to some attributes of the moral protection. In Australia for instance the right of integrity in a cinematograph film ceases upon the death of its author(s) whereas the other moral right's attributes align themselves with duration of the economic rights. In China, the divulgation right derogates from the perpetuity rule of the moral right and lasts for 50 years after the death of the author. The United States is in a more complex situation: a moral right of attribution and integrity is only conferred on works of visual art, and its duration depends on the date of creation of such works. It lasts for the life of the author for works created after 1990, but follows the duration of the economic rights for the visual works created before that date.

France is probably the first example one can cite when thinking of a perpetual moral right. However, the perpetuity of the moral protection of the works and their authors is a reality in many countries around the world, not all of them being former French colonies or having civil law traditions. Amongst the countries we have analysed, Algeria, Brazil, Chile (still a controversial issue), China, Costa Rica, Denmark, France, Italy, Kenya and Ruanda provide for no limitation of the protection of moral interests of the authors.

The situation of Chile is once again unclear and controversial. As article 11 of the Chilean copyright Act provides for a free use of works belonging to the public domain, upon the condition that the attribution and integrity of the work be respected, some scholars and experts infer from that article an absence of limitation in time of the moral right. For others, perpetuity will only apply to the attributes of attribution and integrity but not to the rights of divulgation and withdrawal (*droit de repentir*).

The subsistence of a moral protection can also be limited to works presenting a key cultural interest. For example, the Danish copyright law provides for a moral right that is perpetual but will apply only if cultural interests are thereby violated (see article 75). It has been clarified that the purpose of such a rule is to protect cultural heritage, and that the rule should be applied only to works considered as being part of such heritage or to works of authors who otherwise had created works of value<sup>107</sup>. Two cases have been brought before courts so far. In the first one, the Supreme Court has held in favour of a violation of the moral right by an adaptation of a musical work that had fallen into the public domain<sup>108</sup>. In another case held in 1990, no infringement of the integrity of the Bible has been found in a film that had added pornographic content to the life of Jesus<sup>109</sup>. But the Bible was implicitly considered as still enjoying moral right protection by virtue of the Danish copyright Act (the difficulty being to know who will be entitled to exercise it)!

Defending the integrity of works that are considered as cultural heritage of the State is often the hidden purpose of rules of perpetuity applied to moral rights. One indication thereof is the possibility for the State or its representatives, generally the Minister of Culture, to exercise the moral right to defend the integrity of public domain works, a competence existing in Algeria (moral right exercised by the *Office national des droits d'auteur et droits voisins* in the absence of legal heirs), in Brazil (obligation to defend the integrity and authorship of public domain works imposed on the State), in Costa Rica (Minister of Culture and Youth), Denmark (the special protection seen above can only be exercised by the public

<sup>106</sup> A. DIETZ, "Legal principles of Moral Rights (Civil Law) – General Report", in *The moral right of the author*, ALAI Congress, Antwerp, 1993, p. 67.

<sup>107</sup> T. RIIS, *Intellectual Property Law. Denmark*, Kluwer Law International, 2nd Edition, 2009.

<sup>108</sup> UFR (*Danish Weekly Law Report*), 1965, 137, quoted by M. KOKTVEDGAARD, « Moral right – National Report for Denmark », in *The Moral right of the author*, Congress ALAI, Antwerp, 1993, 118.

<sup>109</sup> UFR (*Danish Weekly Law Report*), 1990, 856, quoted by M. Koktvedgaard, *ibidem*.

authority but not by the heirs of the author), Italy (the Minister of Culture in case of public interest). In most countries, this competence has never been exercised.

OAPI suggests that, after the expiry of protection of the economic rights, the national collective rights administration body be entitled to ensure compliance with moral rights for the benefit of the authors.

In France also, the public authority shall play a role in the defence of a perpetual moral right. Article L. 122-9 CPI provides that the Minister of Culture can refer to the court of first instance a case of abuse (presumably committed by the heirs of the authors) in the exercise of the right of divulgation, even for works in the public domain. A. Lucas considers that this article can be applied also to other abuses committed in the exercise of author's moral right, *post mortem auctoris*<sup>110</sup>. The Minister of Culture can thus claim in justice the respect of the moral right or force the heirs to abandon their refusal to divulge the work if there is a public interest at stake. Such intervention is henceforth not limited to exercise the moral right in lieu of the legal heirs of the authors, but can also aim at defending the interest of the public to see a posthumous work disclosed and published, despite the veto of the rightholders. Rather than a substitution of the State in the exercise of a perpetual moral right, this competence ensures a balance between safeguarding cultural heritage and the public interest in the access to culture. This possibility has however been rarely exercised<sup>111</sup>.

Such intervention of the State or of a collecting society can be understood to overcome the difficulty of identifying the proper heirs of a deceased author. Moral right then takes a more collective dimension<sup>112</sup> and becomes rather a "tool for the obligation of fidelity"<sup>113</sup>. But it is also, as clearly appears in the French copyright regime, a matter for public policy that is closer to the protection of national heritage than to a safeguarding of individual rights<sup>114</sup>. The public authorities or representatives of authors act more as watchdogs for the integrity of cultural monuments and as defenders of the collective interests.

Such a public policy justification for exercise of a perpetual moral right could qualify the challenge of such perpetuity to free use of the public domain. Indeed, as far as the integrity right is concerned, one could detach such protection from the exercise of an exclusive right under copyright and consider that it would be mostly a matter of protection of cultural heritage, under the guise of the moral right. Therefore, it should occur only when a key public interest or serious harm to the work is at stake. To some extent, this cultural heritage protection is itself a tool to safeguard and preserve the public domain<sup>115</sup>, on the

---

<sup>110</sup> A. LUCAS & H.J. LUCAS, *op. cit.*, §475.

<sup>111</sup> Other persons have tried to intervene in such debates such as the Centre National du Livre, whose legal competence is to ensure the integrity of literary works after the death of the author, or some collective societies, also for literary works (which has been often refused by the courts). For instance in a famous case, where a collective management society of literary authors has tried to oppose to the cinematographic adaptation of *Les Liaisons dangereuses* by Choderlos de Laclos, deceased in 1803 (Cass., 6 December 1966, *D.*, 1967, *Jurisprudence*, p.381, note DESBOIS.).

<sup>112</sup> A. LUCAS & H.J. LUCAS, *op. cit.*, § 428.

<sup>113</sup> P. SIRINELLI, *Propriété Littéraire et droits voisins*, Dalloz, 1992, p. 89. See also, S. STROMHOLM, *Le droit moral de l'auteur*, PA Nordstedt, 1967, t. I, p.480.

<sup>114</sup> A.M. CHARDEAUX, *Les Choses Communes*, LGDJ, 2006, § 211. In that sense, see also A. DIETZ, *Le droit d'auteur dans la Communauté européenne*, Study for the European Commission, 1976, § 165 (who evokes a « sort of protection for monuments »), B. D'ORMESSON-KERSAINT, *op. cit.*, p. 125.

<sup>115</sup> M.A. CHARDEAUX, *op. cit.*, §214.



condition that it is reasonably exercised by the public authorities and by the legal heirs of the authors, themselves controlled by public authorities if needed. It could never amount to a veto for adaptation of new creations.

Even if one does not agree with that conception, it seems that recourse to the moral right to prohibit adaptation of a public domain work is itself rather limited. A recent and famous case occurred in France with *Les Misérables* by Victor Hugo, where one of his heirs tried to prevent the publication of a sequel to the well-known novel. That claim was ultimately denied by the courts<sup>116</sup>, namely on the ground that a work fallen into the public domain was open for adaptation, based on the freedom of creation. The moral right could only be invoked to protect the right of paternity and integrity but upon the sole condition that an actual harm to such rights has been caused by the adaptation, which the heirs have to prove by demonstrating what the position of the author would have been. The difficulty of providing such evidence shows that the perpetual moral right will actually only be capable of preventing an adaptation where the latter is a clear abuse of the freedom to use public domain works.

## 2. Domaine public payant

The public domain payant (also called by its French origin, the *domaine public payant*) is a system by which a user of materials in the public domain is required to pay for a compulsory license in order to reproduce or publicly communicate the work, despite its status in the public domain. It is an idea one can retrace to Victor Hugo. In one of his speeches before the *Congrès littéraire international* in 1878, this great writer advocated that copyright end at the death of the author or of his/her direct heirs, to the benefit of the public domain of which he was an enthusiastic proponent. He also argued in favour of setting up a public domain payant, that would consist of the payment of a small fee for each exploitation of a public domain work, into a fund devoted to the encouragement of young writers and creators<sup>117</sup>.

The idea of providing some remuneration from the publication of works in the public domain to benefit current generation of creators, even though it did not appear in the work of the lawmakers that Hugo wanted to convince at the time, namely the drafters of the Berne Convention, has however had some recognition over time.

Italy was often cited as an example of a Western country applying such regime, referred to as *Diritto Demaniale* (Domain Right). Its system of public domain payant was however abrogated in 1996.

Nowadays, a regime of public domain payant exists in some countries, such as Algeria, Kenya, Ruanda, Senegal, the Republic of the Congo (Congo-Brazzaville), Côte d'Ivoire and Paraguay. The pre-eminence of African countries in that list can be explained by the presence of provisions in the Bangui Agreement and its Annex on literary and artistic property suggesting to set up such a regime<sup>118</sup>.

French law addresses the particular case of public domain payant related to the lack of protection of works first disclosed in a country that does not grant a sufficient protection to works disclosed in France (see above). Not only are such works not protected in France, save for a protection of integrity and attribution rights, but any exploitation in France of such works requires the payment of copyright royalties, which are collected to the benefit of some

---

<sup>116</sup> Cass. 30 January 2007, *JCP G*, 2007, p.29, note C. Caron; CA Paris, 19 December 2008, *Communications – Commerce Electronique*, Mars 2009, p. 26.

<sup>117</sup> See Victor Hugo's speech of the 25th of June, 1878.

<sup>118</sup> See article 59.

collective societies and the *Centre National des Lettres*<sup>119</sup>. This peculiar regime was never applied however.

The operation of a public domain payant may constitute an actual impediment to the free use of public domain works. The extent of such interference will depend on the scope of the required fees. It is worthwhile to note that the public domain to which such a regime applies is only composed of works the copyright of which has expired and not to the other part of the public domain (to the exception of countries applying the same regime to expressions of folklore).

In some countries (e.g. Algeria, Rwanda), only the commercial or for-profit exploitation of public domain material will be subject to the payment. In most cases, the integrity and paternity of the work must also be respected. Generally, the system works like a compulsory license: the use is conditioned on payment of the prescribed fee but not upon the securing of a prior authorisation (as in exclusive rights). The latter is however applicable in Algeria. In such a case, the free use of a public domain work is even more reduced.

The uses of which the fee is put also varies. Often collected by the national collective rights management society or the administration in charge of copyright (as the Office National du Droit d'Auteur et des Droits Voisins in Algeria that also acts as a collecting society), the royalties will be generally dedicated to welfare and cultural purposes, such as the funding of young creators, the social benefits of creators in difficulty or the promotion of creative works. Sometimes the remuneration is dedicated to the preservation of the public domain itself and not to individual creators, as in Algeria. In such a case, instead of being a burden for the exploitation of the public domain, the fees so collected can also be viewed as ways to fund the protection of public domain works.

The amount of the fee greatly differs from one country to another. The OAPI recommends it to be equal to one half the rate of the remuneration normally applicable to works still protected, which might be difficult to estimate.

The application of the system generally only pertains to national works. Italy was an exception to that rule as the fee was also due for the use of foreign public domain works.

The system of public domain payant is sometimes proposed as a model to protect traditional knowledge against unpaid re-use by Western entrepreneurs<sup>120</sup>. This idea is already present in some developing countries which apply the fee to exploitation both of the works in the public domain and to folklore material.

The regime of public domain payant was investigated in the early 80's by WIPO and UNESCO<sup>121</sup>. At that time such a system was applied in Algeria, Argentina, Brazil, Bulgaria, Czechoslovakia, Hungary, Italy, Mexico, Portugal, Tunisia, the USSR and Zaire<sup>122</sup>.

It was perceived at the time to be an interesting tool, mainly on social and cultural grounds, which could yield some revenue for the artistic sector that was very poor in

---

<sup>119</sup> See A. LUCAS & H.J. LUCAS, *op. cit.*, § 1139.

<sup>120</sup> M. LEISTNER, "Analysis of different areas of indigenous resources – Traditional knowledge", in S. VON LEWINSKI, *Indigenous Heritage and Intellectual Property: Genetic resources, traditional knowledge and folklore*, Kluwer Law International, 2003, at 84. See also the section 17 of the Tunis Model Law on Copyright of 1976.

<sup>121</sup> See the work of the UNESCO Committee of Non-Governmental experts on the 'Domaine Public Payant', *Copyright Bulletin*, vol.XVI, no 3, 1982, 49. See also A. DIETZ, "A Modern concept for the right of the community of authors (domaine public payant)", *Copyright Bulletin*, 1990, XXIV, n°4, 13-28.

<sup>122</sup> The current situation in those countries has not been verified, but it seems that the system was abrogated in many of those.

developing countries. But the emphasis at the time was not about the availability of the public domain as it is now. The effectiveness of such systems has not really been assessed, or so it seems. The administration and collection of such fees might be a great burden for collective societies, particularly in developing countries. And they may often be perceived as an additional tax.

More fundamentally, the public domain payant seems increasingly to be an outdated model due to its direct conflict with the public domain. At a time when the endeavour of many countries, and particularly of developing countries, is to balance intellectual property by enhancing the free use and access to the public domain, it could consist in further interference with the free use of the public domain. It would also diminish the incentives to individuals or publishers wanting to make known public domain works by new publications or communications to the public, particularly if the requested fee for such exploitation is high. At least, it should be limited to commercial exploitation only, and to a reasonable remuneration.

On the other hand, should the public domain payant be abrogated, other ways for funding cultural activities or social needs of artists might be essential in poorer countries when those are not priorities. Developing countries might face a dilemma between two key cultural objectives: supporting the local creation or the accessibility of the public domain. Besides, the idea of the public domain payant could also be envisaged as a way to fund the preservation of public domain works, by sharing the burden of financing the public availability of public domain works, namely by digital libraries, with the commercial exploiters thereof. The fees collected would then shift from providing assistance to living artists to the support of the public domain itself.

### 3. The reconstitution of copyright in some works

Once a work has fallen into the public domain through the passing of time, no copyright should be vested again in such work. Yet some specific mechanisms can restore protection by copyright. The European Directive on copyright term of 1993 provides for two mechanisms that can restore a copyright or a similar right in public domain works.

The Directive required the Member States to confer protection of 25 years limited to the economic rights of copyright to “any person who, after the expiry of copyright protection, for the first time lawfully publishes or lawfully communicates to the public a previously unpublished work”<sup>123</sup>. This protection of posthumous works, i.e. of works unpublished during the normal time of copyright based on the life of the author, purports to give an incentive to publishers to make available such public domain works. Its effect is however to remove these works from the public domain by restoring a limited copyright therein. Due to the absence of moral right protection and the grant of the economic right to the person investing in the publication (and not to the heirs of the deceased author), this copyright is more akin to a neighbouring right.

This protection of posthumous works in the European Union enhances the publication and making available of works that might otherwise stay undisclosed, making void and useless their public domain status. To that effect, the restriction it places to the public domain itself can be seen as a necessary evil.

The same Directive also allows (but not obliges) the Member States to provide for a limited protection of 30 years after publication for “critical and scientific publications of works which have come into the public domain”<sup>124</sup>. Italy has namely implemented such protection and grants a protection of 25 years to critical and scientific publications of works in the public

---

<sup>123</sup> Article 4, Council Directive 93/98/EEC (OJ L290, 24.11.1993, p. 9) codified by the Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights (codified version).

<sup>124</sup> Article 5.

domain (art. 85-quarter of the Italian Copyright Law). Even in default of the originality required for the critical work to be protected by copyright, as any other adaptation of a public domain work, this special right (limited to economic exploitation) aims at providing incentives to the publisher of critical publications of unprotected works, as in the case of posthumous works. The Italian Court of Cassation has held that reconstituting the original work is not sufficient to be protected, but that the critical publisher has for instance to re-create a missing part of the work<sup>125</sup>.

The latter case creates less interference with the public domain than the regime for posthumous works, as only the critical publication will be protected, but not the original work on which it is based which is still in the public domain and free to use.

#### 4. Property rights

Access to and use of an intellectual creation will require obtaining access to a material embodiment of such work. Such access can be lawfully controlled by the owner of this tangible copy of the work. Copyright, and its opposite the public domain, only pertain to the intangible work, and should be distinguished, and will normally be exercised separately, from the material property. Controlling access to tangible copies of works is a legitimate exercise of property rights.

Generally, the ownership of particular copies will not deter the possibility to freely use and reproduce something that is in the public domain, as many copies can be in circulation. Even though the Mona Lisa is the property of the Louvre, and access thereto is not completely free, reproduction and communication thereof are easy as many copies have been made of the famous painting.

However, there might be cases where the property right can be of concern as regards the freedom of the public domain. When no other copy of the work is available except the unique tangible embodiment reserved by its owner, enjoyment of the public domain work requires access to the latter. Imagine a painting by Van Gogh that knows no reproduction and over which its owner maintains strict control. As with unpublished works mentioned earlier, such creation, albeit theoretically in the public domain, is in reality outside the public domain as no one can enjoy it.

Forcing the owner of an important cultural asset to facilitate access to it should first be the task of legal provisions on cultural heritage: the owner should not abandon his/her control over his/her good but could be at least encouraged to make some reproductions of the work available to the public. Copyright law has not much to do with this in our view.

The property right can also interfere with the public domain in another way, as the recent controversy over the right of image in France has showed. In 1999, the Court of Cassation granted to the owner of the first house liberated by the Allied Forces in 1944, a right to oppose the making of reproductions of the house on the plain ground of her property right that extended, according to the Court, to the image of the good<sup>126</sup>. Such case law raised a difficult issue for copyright and for the public domain. If the owner of the tangible embodiment of a work (it could be a house whose architecture is copyrighted but also any other type of work) is entitled to authorise or prohibit its reproduction, what remains of the exclusive right of the author of such work? And if the work is not protected anymore by copyright, would such exercise of the tangible property right not mean the end of the public domain, as any reproduction thereof would run afoul of the monopoly of the owner? Many copyright scholars have denounced this new extension of the property right both as it contravened the key principle of the separation between physical property and intellectual

---

<sup>125</sup> Cass. 17 gennaio 2001, n. 559, BMG Ricordi s.p.a., Fondazione Gioacchino Rossini e Azio Corghi c. Ente Autonomo Teatro Regio di Torino, in *Giur. it.*, 2001, p. 1421, note M. CROSIGNANI, *Edizione critica e diritto d'autore: un'antitesi superata?*.

<sup>126</sup> Cass., 10 March 1999, *Bull. Civ.*, I, n°87, p. 58.

property, the right in the image being reserved to the latter, and because it endangered the freedom of use of the public domain<sup>127</sup>.

Fortunately, a few years later, the same court reversed itself by conferring such a right on the owner only when a specific right or interest, such as privacy, excessive harm to the enjoyment of property, is violated or trespassing occurs when taking or exploiting the image. This is a logic application of the cohabitation between two rights, the exercise of one not being allowed to harm the exercise and enjoyment of the other. But the property right in itself does not confer anymore an exclusivity over the image of the good.

The preservation of the public domain should keep at distance such attempts of the owners of tangible copies of unprotected works to capture some exclusivity in the image of their goods.

#### 5. Privacy rights

Privacy can also stand in the way of the publication or communication of some works, even when they have fallen into the public domain. It mainly concerns confidential information or private correspondence the divulgation of which might harm the private interests of the family or close acquaintances of the author. As for the property right, developed above, the exploitation of the public domain cannot be as absolute as harming private rights or interests of other persons.

Italy gives us an example of this necessary cohabitation by prescribing the consent of the authors or his/her successors prior to publication of confidential private letters or family memoirs, whether still protected by copyright or in the public domain (article 93-95 Italian Copyright Act).

#### 6. Technological protection measures

Digital evolution has witnessed the deployment of technological measures affixed to digital works to protect them against some unauthorised uses. Based on cryptography or other technical means, so-called digital rights management (or DRM) or technological protection measures (or TPM) have been developed in recent years to address the thorny issue of protecting and managing copyright in an electronic environment. Such technical tools are increasingly embedded in digital tangible embodiments of works such as DVDs, software or videogames, as well as in online distribution of music, news, films, books or images. They aim at controlling the use of the work, e.g. by preventing the access thereto by unauthorized persons, by preventing the making of a copy thereof, by allowing only the uses that have been paid for or by imposing the viewing or listening to the work on a specific device or in a determined region.

The technological protection measures do not usually distinguish between copyrighted and uncopyrighted material<sup>128</sup>. They are indifferently implanted in works still in copyright or fallen into the public domain. For example, a website making books available online might wrap them in technical systems that prevent them from being copied, printed or shared. Generally, the technical protection so devised will operate in the same way as to a book recently published by a living author as to Shakespeare plays. Technological locks can similarly be deployed so as to protect uncopyrightable material such as unoriginal creation, news or official acts. The lack of legal exclusivity can be compensated by encapsulating such material with a technological protection measure. Factual or technical exclusivity thus substitutes for the legal exclusivity.

---

<sup>127</sup> Cass. Ass. Plén., 7 May 2004, *D.*, 2004, Jurisp., p. 1545, note J.-M. BRUGUIÈRE.

<sup>128</sup> K. KOELMAN, "The Public Domain Commodified: Technological Measures and productive Information Use", in *The Future of the Public Domain*, *op. cit.*, p. 105-119.

This is one of the possible encroachments on the public domain that has been most severely denounced in recent years<sup>129</sup>. Already in 1996, the European Commission's Legal Advisory Board warned against a "widespread use of technical protection devices [that] might result in the de facto creation of new information monopolies. This would be especially problematic in regard of public domain materials"<sup>130</sup>.

The restriction of access to public domain material resulting from technological measures may be relative to some extent, at least if the material so constrained is still largely available in non-protected format or embodiments. That a seller of e-books wraps the plays by Shakespeare in an access-control mechanism might be unproblematic if such plays are easily accessible elsewhere. Here also the difference between access to an embodiment of a work, and use of that work is relevant. One cannot prevent providers of content from asking for remuneration for the goods or services they sell, and neither can the securing of such remuneration through access control tools be impeded. A more genuine recapture of the public domain can conversely occur if the work is only available in a technically-protected format. In such a case, availability of the public domain material is unduly endangered.

Technically restricting the free use of a public domain work once lawfully accessed and paid for is more challenging. Undeniably, any technological measure that would inhibit use of the work, e.g. its reproduction or communication, would run counter to the essence of the public domain and would erect new exclusivity over what should be left in the commons. Securing remuneration from access to a digital copy of Shakespeare plays could be legitimate whereas preventing the lawful acquirers from copying them might well be considered as an undue restriction of the free use of the public domain.

In addition to the technical commodification of digital content, a supplementary layer has come to reinforce the protection. As soon as technology has been envisaged to enhance an effective exercise of copyright, a similar technology might be used to defeat the technical protection. This gave birth to the anti-circumvention provisions that many countries have now implemented, following the WIPO Treaties of 1996 that require prohibiting the circumvention of technological measures used to protect copyright in works. Such legislation has a twofold effect: it acknowledges and justifies the deployment of technical locks on creative expression and it strengthens them by sanctioning anyone who tampers with the technical layer of protection. At each layer, an incursion into the public domain can take place.

First, most anti-circumvention provisions do not attempt to safeguard free access to public domain works. As P. Goldstein has rightfully stated:

*"The problem with Article 11 of the WIPO Copyright Treaty, and of any implementing legislation that builds on it, is its asymmetry: the provision outlaws disencryption of copyrighted subject matter, but it does not outlaw the encryption of uncopyrighted subject matter. (...) Only a measure that effectively made it unlawful to encrypt the product's easily separated public domain elements would strike copyright's balance - leaving the copyrighted content encrypted and the public domain content open to public access"*<sup>131</sup>.

---

<sup>129</sup> See for instance, Y. BENKLER, "Free as the air to common use..." *op. cit.*, p. 354-446; J. BOYLE, "The Second Enclosure Movement and the Construction of the Public Domain", *Law and Contemp. Probs.*, 2003, Vol. 66, p. 33; P. SAMUELSON, "Mapping the Digital Public Domain...", *op. cit.*, p. 147-171.

<sup>130</sup> European Legal Advisory Board Reply to the Green Paper on Copyright and Related Rights in the Information Society.

<sup>131</sup> P. GOLDSTEIN, "Copyright and Its Substitutes", *Wis. L. Rev.*, 1997, p. 869. In the same direction, W. GORDON, "Intellectual Property as Price Discrimination: Implications for Contract", *Chi.-Kent L. Rev.*, 1998, p. 1480, note 50.

Pleading for legal mechanisms that would regulate affixing technological measures of protection in public domain material could be grounded in the requirement of an “adequate protection of such measures” imposed by the WIPO Treaties. Such an adequacy should be measured in light of the Preamble of the Treaties, that insist on the “need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information”. As the public domain and its preservation and availability is one pivotal element of access to information and the public interest, any provisions dealing with circumvention of technological measures could draw on this Preamble to regulate the use of technical restrictions applied to use the public domain.

A useful analogy could be drawn to the solution put in place in the European Union to safeguard copyright exceptions from the operation of technological restrictions. Article 6(4) of the Directive of 2001 on the Copyright in the Information Society requires Member States to provide recourse to users impeded from exercising some fundamental exceptions by of a technical measures protecting the work<sup>132</sup>. European Member States have implemented this obligation either by setting up mediation or arbitration procedures between the beneficiaries of exceptions and the copyright owners having applied excessive technological measures, or by offering a judicial or administrative means of redress to the frustrated users. A similar solution could be offered in case of undue impediment over free use of public domain material, which could take into consideration the legitimate interests of the service providers offering public domain material to users.

Second, the anti-circumvention legislation prohibits both the act of circumvention of the technological measures and so-called preparatory activities, i.e. any act of distribution and manufacture of devices enabling or facilitating the circumvention. The effect of such prohibition on access to and free use of public domain material should normally be inexistent, since the WIPO Copyright Treaty and the countries implementing it limit the prohibition of circumvention activities to technical measures applied to copyrighted works. Accordingly, defeating the access-control or anti-copy mechanism affixed to a public domain work will not be an offence.

Yet, there might still be some indirect effect on the public domain. Some technical restraint can mainly apply to a public domain work that is also accompanied by a recent creation protected by copyright. Imagine that a small introduction is added to the e-book of the Shakespeare play, or that it is offered in a new Spanish translation<sup>133</sup>. The mere presence of a copyrighted element in the physical embodiment encapsulated by the technical protection measure would suffice to make its circumvention unlawful.

Further, the prohibition on trafficking in devices helping or facilitating circumvention does not depend on the subsequent use of such devices by their acquirers. Should they mainly serve to bypass technical measures attached to public domain elements, it would not make a difference as to the liability of the providers of such devices. If the trade in devices helping the public to obtain access to public domain works, despite the operation of overly restrictive technical locks, is unlawful, the only recourse would be for the users to have the technical competence to circumvent themselves such locks, which will not be evident.

Anti-circumvention provisions, even though it was not their objective or intent, might thus have an effect on the free availability and use of works belonging to or having fallen into the public domain.

## 7. Related rights

---

<sup>132</sup> See S. DUSOLLIER, “Exceptions and Technological Measures in the European Copyright Directive of 2001”, *International Review of Industrial Property and Copyright Law*, 2003, p. 62-83.

<sup>133</sup> See J. GINSBURG, “Access to copyrighted works in the “digital millennium””, in S. DUSOLLIER (ed.), *Copyright – a Right to control the access to Works? Cahiers du CRID*, n° 18, Bruylant, Brussels, 2000, p. 63.

Neighbouring rights can vest in public domain works, which could appear as reducing the free use of such works. This limitation should be somewhat qualified. Rights of performers or producers executing or producing a public domain work pertain to new subject-matter, i.e. the performance or the new recording of sounds<sup>134</sup>. The public domain work, even if it is the object of the performance or recording, will subsist in other forms and media, and, to some extent, can be used as such without infringing new rights so constituted.

The subsistence of related rights should however be acknowledged when assessing the public domain status of a cultural item, which would require separating the underlying creative work that might be no longer protected, from its interpretation or production in a recording. A recording of Bach will be only free as far as the music itself is concerned but some exclusivity will still vest in its interpretation or recording.

*Sui generis* rights in databases, where they exist, might be more problematic for the public domain created by copyright. Such rights protect non-original databases, notably in the European Union and in Korea, as soon as they have necessitated a substantial investment. The duration of protection is generally 15 years from the making of the database, and can be renewed in case of further substantial investment.

Databases so protected can be a collection of public domain elements of works, such as mere data, creations excluded from copyright such as official acts, or in which the copyright has expired. The *sui generis* right vested in such unprotected elements can then recapture some exclusivity that has been often denounced as an undue encroachment on the public domain<sup>135</sup>. The European Court of Justice has given a wide scope to such right, irrespective of the substantive or unprotected content of the materials contained in the database<sup>136</sup>.

Here again, the threat should be both attenuated and better articulated.

The *sui generis* protection will only vest in the database as a collection of elements, not in the individual elements as such. Mere facts or data integrated into a database can still be used individually without infringing the right in the database. Having said that, two elements could nevertheless raise some concerns. According to the case law of the European Court of Justice, one element can be in itself a substantial part of the database, protected as such against extraction and re-use, if its collection, verification or presentation has required a substantial investment<sup>137</sup>. This will however be rather rare. The ECJ has recently evoked this possibility when admitting that “the fact that part of the materials contained in a database are official and accessible to the public does not relieve the national court of an obligation (...) to verify whether the materials allegedly extracted and/or re-utilised from that database constitute a substantial part, evaluated quantitatively, of its contents or, as the case may be, whether they constitute a substantial part, evaluated qualitatively, of the database inasmuch as they represent, in terms of the obtaining,

---

<sup>134</sup> Rights of film producers in a public domain work is less probable as they should vest upon the first fixation of a film, and arguably not in a remastering or a digitisation of an old movie.

<sup>135</sup> See for instance, M. DAVIDSON, “Database Protection : The Commodification of Information”, *The Future of the Public Domain*, *op. cit.*, 167-190; J. BOYLE, *The public domain ...*, *op. cit.*, 207-213.

<sup>136</sup> see, to that effect, ECJ, Case 444/02 *Fixtures Marketing*, § 19 to 21; or, more recently in a case concerning a database of legislative acts, ECJ, 5 March 2009, *Apis-Hristovich*, C-545/07, § 69-70.

<sup>137</sup> *The British Horseracing Board and Others*, cited above, § 71 (A quantitatively negligible part of the contents of a database may in fact represent, in terms of obtaining, verification or presentation, significant human, technical or financial investment).



verification and presentation thereof, a substantial human, technical or financial investment”<sup>138</sup>.

Most worrying is the possibility that the individual data only gain value when used as a collection and in correlation with each other. In such a case, the extraction of a set of data will be necessary and might infringe the right in the database. To take again the example of a database containing the legislative acts of a country, the extraction of a whole body of laws in a specific domain can be relevant in terms of public access to official acts but is likely to enter the realm of the *sui generis* right. In such a case, the database right forms a more worrisome prejudice to the public domain nature of the data or elements encompassed in the database.

Another cause of concern is the possibly unlimited duration of the *sui generis* right. The initial term of protection of 15 years can indeed be repeatedly renewed as soon as a substantial investment has been made to update the database. In the European Union, this extension of the term does not seem to apply only to the new elements resulting from the substantial investment but to the database as a whole, including old elements thereof. This is not justified and a more reasonable protection, respecting the logic of the limited duration of intellectual property and of the public domain, would be to limit the grant of another term of 15 years only to the object of the new substantial investment<sup>139</sup>.

Finally, the database might prove an effective obstacle to the free use of the public domain when the database is the sole source of some unprotected information or data<sup>140</sup>.

#### 8. Other intellectual property rights

The public domain in copyright can also be affected by other intellectual property rights that might subsist in public domain works. Consequently, the use of such material shall not be subject to copyright reservation but might well be covered by the exclusive rights granted by other systems of intellectual property.

The problem will not generally occur with design rights or patent rights. Firstly, the duration of such rights being shorter than that of copyright, it will be rare, even impossible, that a work fallen into the public domain after the expiration of copyright, might be re-appropriated by a patent or a design right. Previous disclosure of a work destroys its novelty, which prevents in most cases an extension of its protection by an adjunct of design or patent rights after the term of copyright. Besides, it is difficult to imagine that a literary and artistic work that was eligible for copyright protection could qualify to be a technical invention likely to be protected by patent.

As to the interface between copyright and design right, it is difficult to imagine that a work that lacks the originality to accede to copyright protection will be sufficiently new and have the required individual character to be protected as a design.

Actually, the key issue for the public domain lies with trademark protection. The name or visual aspect of a character, a painting or the form of an object might be entitled to trademark registration, even after the copyright vesting upon such works has expired. Through the trademark protection so granted, the owner of the mark could in theory prohibit the free use of such name, image or form. Imagine that the appearance of Mickey Mouse is registered as a visual trademark (it is in many countries). When the copyright in that little mouse will elapse (if ever!), Disney could still rely on its registered mark, being unlimited in time, to prevent some uses of its famous figure.

As a matter of principle, a work that has fallen into the public domain is free for all to use. Therefore, this freedom to use also includes its registration as a trademark, the former

---

<sup>138</sup> Apis-Hristovich, §74.

<sup>139</sup> E. DERCLAYE, *The legal protection of databases*, Edward Elgar, 2008, p. 140.

<sup>140</sup> *Ibidem*, p. 280.

copyright owner not being capable anymore to prevent such registration<sup>141</sup> (save by a moral right, if perpetual, and if the registration could harm the integrity of the work). Many examples of public domain works registered as trademarks can be found in the trademarks registers, from cartoons or comics books heroes, to pieces of music<sup>142</sup> and famous paintings.

The threat of a reconstitution of an undue monopoly over a public domain work is however limited by the very principles of trademark law in many regards.

A first feature of trademark protection is the requirement of distinctiveness: the sign claiming the protection must be distinctive enough in the eyes of the consumer of the goods or services concerned. Popular images or sounds will probably lack inherent distinctiveness since the public will be more accustomed to see them as creative expressions and in cultural contexts, than to perceive through them the indication of a commercial origin of the goods on which they are affixed<sup>143</sup>, unless they can establish secondary meaning. In many cases, the primary value of creation pursued by the work, whether in the public domain or not, will stand in the way of a valid registration as a trademark. For instance the names 'Tarzan' or 'Harry Potter' have not been accepted as valid trademarks in the Benelux countries, since they referred mainly for the public to the character, the work and its author, but not to the provider of the goods related to the claimed trademark<sup>144</sup>.

This can be particularly so with trade dress or trademarks consisting of the shape of a product. One can imagine that the three-dimensional form of a product is original and as such protected by copyright. Registration as a trademark can then continue the protection once the term of copyright has ended. However the registration of a form is even more limited. Beyond the requirement for distinctiveness and the intrinsic difficulty in establishing it for the shape of a product<sup>145</sup>, some exclusion might exist, as is the case in the European Union for shapes giving a substantial value to the product. Famous works of sculpture would certainly fall within that exclusion as their substantial value lies in the form itself. As to the shape of works of applied art, such as furniture having a recognised design, that specific design can arguably give a substantial value to the product itself, irrespective of its possible distinctiveness to the public<sup>146</sup>. Such exclusion shall equally raise some obstacle to the registration of three-dimensional characters.

Besides, trademark law only allows the registration of a specific sign, which can limit the protection as a trademark of a character in itself<sup>147</sup>. In other words, Mickey Mouse himself cannot be registered, but only a specific graphic representation thereof (especially in

---

<sup>141</sup> See for instance the German Federal Patent Court, 25 November 1997, *GRUR*, 1998, 1021 (concerning the registration as a trademark of *Mona Lisa*) ; Benelux Court of Justice, 27 May 1999, *BIE*, 1999, 248 (registration of the initial notes of *Fur Elise* of Beethoven).

<sup>142</sup> At least in the countries admitting registration of sounds as trademarks.

<sup>143</sup> A. KUR, "General Report – Does /should trademark law prohibit conduct to which copyright exceptions apply?", *Adjuncts and Alternatives to Copyright*, Proceedings of the ALAI 2001, New York,, p. 600.

<sup>144</sup> Gerechtshof Amsterdam, 26 July 2001 and 6 November 2003, both cited and discussed in V. VANOVERMEIRE, « Inschrijving als merk van een in het publiek domeingevallen werk », A. CRUQUENAIRE & S. DUSOLLIER (eds.), *Le Cumul des droits intellectuels*, Larcier, 2009, p. 185.

<sup>145</sup> See for instance, German Supreme Court, *GRUR*, 1952, 516, excluding the appearance of popular porcelain figurines, by lack of distinctiveness.

<sup>146</sup> V. VANOVERMEIRE, *op. cit.*, at 190 seq.

<sup>147</sup> A.V. GAIDE, "Copyright, trademark and trade dress: Overlap or conflict for cartoon characters", in *Adjuncts and Alternatives to Copyright*, Proceedings of the ALAI 2001, New York, p. 557.

the EU where a graphical representation is required). True, the protection will extend to signs similar to the registered mark if there is a risk of confusion for the public. But the argument will not operate for the registration of paintings as trademark, that have a unique representation.

A final and essential limitation of trademark protection is its principle of speciality. The assessment of the necessary distinctiveness will be carried out in light of the products and services for which the mark is registered, and the protection granted will be limited to the products so defined. As a consequence, Mickey Mouse might well be registered as a trademark either as a name or as a visual sign, but must be only valid in respect of some limited products or services. The famous *Milkmaid* painting by Vermeer has for example been registered as a trademark and held valid for dairy products. Therefore, it does not unduly affect the public domain character of the work itself, which can still be free for all to use, reproduce and serve as a basis for derivative creation. The only limited use shall be to affix it to milk products in the territory where the trademark is effective. The monopoly regained by the trademark registration, as demonstrated by that case, is hence rather narrow and only partially encroached upon the public domain constituted by copyright principles.

Yet, this reassuring conclusion might prove untrue in some cases. On the one hand, in many countries, the protection will exceed the speciality realm for famous trademarks, upon some conditions, namely in the case of dilution or tarnishment of the mark. Courts should then be attentive not to apply too broadly the notion of dilution or tarnishment of a famous trademark when it is composed of a work fallen into the public domain and whose free use in creative expression is deemed to harm the goodwill of the mark by its trademark owner.

On the other hand, trademark owners will be tempted to register their signs for many classes of products that can in reality make void the principle of speciality. Even worse, a registration of a trademark in a class of products strongly related to the work itself and its creative value will likely undermine the free use pertaining to public domain work. As examples, one can cite the registration of the name 'Mickey Mouse' as a Community trademark for products and services of class 41, and particularly for "education; providing of training; entertainment; sporting and cultural activities", or that of 'Tintin' in the same class for "providing of education; training; teaching, entertainment; organisation of events and exhibitions for cultural, teaching and educational purposes; amusement parks; production of films, live and animated; publication and dissemination of books, newspapers and periodicals". Through such registration the owners of the rights in such popular cultural icons will be able, if the trademark is held valid and sufficiently distinctive (which might not be the case as seen above), to prevent the reproduction of the hero itself in books or films, after the copyright has expired.

There is where the actual risk to the public domain lies within the trademark monopoly. In order to immunize the public domain from such renewed commodification, the registration of a trademark should be denied when it would lead to the reconstitution of a monopoly akin to that provided formerly by copyright and preventing use of the work in creative expression. The public interest or general interest could be taken into account as a ground for such a refusal. It has sometimes been used in case law to prevent the overlapping of successive intellectual property rights when detrimental to the public domain. In a European case brought before the European Court of Justice, the Advocate General has held that: "the public interest should not have to tolerate even a slight risk that trademark rights unduly encroach on the field of other exclusive rights which are limited in time, whilst there are in fact other effective ways in which manufacturers may indicate the origin of a product"<sup>148</sup>. Here the trademark was used to gain a new reservation over an invention

---

<sup>148</sup> ECJ, *Linde AG, Winward Industries Inc. and Radio Uhren AG*, 8 April 2003, C-53/01 to C-55/01, Opinion of Advocate General Ruiz-Jarabo Colomer delivered on 24 October 2002, at 29.

whose patent has expired, but the affirmation was broad enough to be developed as a general principle applying also to the copyright public domain.

#### IV. INITIATIVES AND TOOLS ALLOWING GREATER ACCESS, USE, IDENTIFICATION AND LOCATION OF THE PUBLIC DOMAIN

In the recent years, private initiatives have emerged to promote a better access to and free use of creative works, thereby encouraging the development of the public domain. Open licensing has played a great part : even though its subject matter is generally not within the public domain, such licensing model grants freedom of use under more flexible conditions approaching that of the public domain. Other tools have been developed to help identify, locate or collect public domain material, trying to make its functioning more efficient

##### A. Copyleft, open source or open access licensing

###### 1. Notion

Unhappy with the extension of intellectual property, some creators have set up alternative regimes for exercising copyright. The first and best known is the open source software movement that was born in the 80's to counteract the proprietary exercise of copyright in software, considered by many as excessive and far-fetched and at odds with the needs of the community of software developers and users. Many licenses have been developed with common features that give some basic freedoms to the licensees, such as the right to reproduce, communicate or distribute the work to the public for free, and oblige the licensor to provide the source code of the program.

That first idea inspired and gave its name to a larger movement whose key purpose was to use the copyright to share one's works and grant large freedoms of use to the public. That movement has adopted many names. Open source is the germinal term that has embraced a myriad of licenses governing free software. It insists on the core obligation arising from such licenses—the obligation to provide the source code of the software. The movement or licenses promoting non-proprietary software are also generally dubbed as F/OSS, standing for Free/Open-Source Software (or even FLOSS, for Free, Libre, Open Source Software).

While the principles of open source have spread beyond software, these open-source initiatives have forsaken the “source” element to prefer instead “open access” or “open content.” The openness of the resource, whether such openness lies in its access or use, is there emphasized. Following a body of literature applying the economic concept of the “commons” to intellectual property, many projects have also borrowed that word to signify the newly gained communality of the resources that the open access and sharing initiatives could yield. The term “commons-based initiatives” has sometimes served to designate sharing projects in copyright or patent fields<sup>149</sup>.

Also taken from open-source software, the term “copyleft” gained momentum in the open-access schemes and in the literature describing them. It results from a play on words where *copyleft* stands in stark contrast to *copyright*—“left” versus “right”—but also progressive versus conservative (applying to what was perceived, by the copyleft proponents, as the “right-wing” and conservative position of the proprietary copyright), “right” as legal entitlement versus “left” as relinquishment of the property.

---

<sup>149</sup> See ROBERT P. MERGES, “A New Dynamism in the Public Domain”, *U. Chi. L. Rev.*, 2004, Vol. 71, p. 813.

Commons-based production has even worked its way up to the patent environment<sup>150</sup>. Some biotechnology projects have tried to apply the principles of free sharing and collective production promoted by open source software, to the results of biotechnological research<sup>151</sup>.

Software, works or inventions distributed to the public under an open source or copyleft licensing regime are often said to be in the public domain. This is not accurate as the decision to license the use of one's works under a copyleft license does not amount to a relinquishment of copyright, but rather as an exercise thereof, albeit different. Based on licenses granting the right to copy, distribute, communicate and sometimes modify the work to any user of the work, open access licensing can be seen as pursuing a similar objective to the public domain, i.e. promoting the free availability, use and exploitation of creative expressions. In that sense, it creates a sort of public domain, born from and within the monopoly itself, which one can include in the functional public domain defined above. Both in the copyright and patent fields, the copyleft strategy enables creating a sphere of free use without giving up the exclusivity one owns in intellectual creation. Additionally, it sometimes prevents other persons from appropriating that creation and making it their own, by imposing the further distribution of works under the same licensing conditions (see *infra*). In that sense it thwarts any attempts at commodification that often threaten elements put in the public domain.

The open access movement, as enshrined in those particular licenses, also purports to enhance the public domain on an ideological level. All these private initiatives—from open source in software to open patenting—share the desire to subvert the intellectual property regime from within. In the open-access narrative, copyright is exercised to share and socialize intellectual property, counter to the very meaning of the exclusivity that characterizes it. Such licensing schemes seek to cause a normative change in the way intellectual property rights are exercised. Sharing is advocated as a new norm in copyright. A powerful discourse and ideology is voiced by the open-access movement. Not only do they exercise copyright differently, they hope their model will signify a real and durable change in the law itself.

## 2. Presentation of main licensing regimes

### (i) Open source software

The history of open-source software is now well known and documented. Reacting to the early development of licensing practices aimed at restricting the “rights of use” of software and of the increasing closure of the source code, Richard Stallman imagined a new model of software distribution, that would fit more closely with the habits of the programmers' community. This alternate framework was named “free software” in order to convey the freedom to access and use the software.

The history of open-source software then took different paths. Richard Stallman founded the Free Software Foundation, which has developed and continues to manage the General Public License (“GPL”), the first license embedding free software principles. The development of the operating system Linux by a student quickly gave a market pedigree to the idea of free software, demonstrating the possible commercial success of this new model. A schism occurred in 1998 when less radical programmers launched the Open Source Initiative whose objective was to develop open-source principles that could be seen not only as a confrontation to the practices of the software industry but that could be part of a business strategy. They invented the term “open source” to emphasize not the

---

<sup>150</sup> S. BOETTIGER & D. BURK, “Open source patenting”, *Journal of International Biotechnology Law*, Nov/Déc. 2004, p. 221.

<sup>151</sup> For instance, the BIOS project (Biological Innovation for Open Society) makes publicly available tools for biological research under a license similar to open source licenses in software. The license imposes that improvements be shared, and that licensees do not appropriate the fundamental “kernel” of the technology and improvements. Licensees must also agree not to prevent other licensees from using the technology in the development of different products.

freedom to use but the necessity to make the source code of the software available. This meeting also gave birth to the Open Source Definition<sup>152</sup>, which lays down the key elements and provisions that a license should include to merit the open-source label. This definition contains ten “commandments” that form a sort of label certificate. They combine the four basic freedoms that a free or open-source license should grant: (1) the freedom to run the program, for any users or purpose (e.g., for commercial purpose or not); (2) the right to obtain access to source code; (3) the freedom to redistribute copies; and (4) the freedom to improve the program and release improvements if desired.

Eventually the open source software movement gave birth to more than one hundred open-source licenses that are in use worldwide. The GPL represents the biggest share of the licenses now employed on the market. Most of them originate from a US-based legal philosophy and writing. One European license, the EUPL (European Public License) has been recently developed by the European Commission to be applied to software in a way that would be compliant with the EU regulatory framework<sup>153</sup>.

(ii) *Creative Commons*

Lawrence Lessig, a well-known scholar in cyberspace law, has followed Richard Stallman and the overall open-source movement by imagining the transposition of the copyleft model at work in free software to other types of creation<sup>154</sup>. He founded the Creative Commons (“CC”) project and organization in 2001. The main objective of Creative Commons parallels that of the free software movement, i.e. to grant basic freedoms of copying and distributing a copyrighted work to users, but has devised licenses applicable to any type of literary and artistic work and not only software.

Besides developing licenses applicable outside of software, Creative Commons departs from the open-source model used in software by giving the author choices among different licenses. Each license grants diverse rights to the user. When deciding to license his/her work under Creative Commons, an author can choose whether he/she will allow the work to be modified by the user, whether he/she wants to limit uses of the work to non-commercial purposes, and whether he/she wants to oblige the user to grant the same freedom of use when the latter modifies the work and publicly communicates the derivative work. Regardless of which Creative Commons license the author chooses, a work should be attributed to its author when it is disseminated.

Creative Commons offers six different licenses for the author to choose from, divided into three basic characteristics: Commercial/Non-Commercial, Derivative Works/Non-Derivative Works, and Share Alike/Non-Share Alike<sup>155</sup>. Each license grants a worldwide, royalty-free, non-exclusive, perpetual license to the user to reproduce, display, perform, communicate, and distribute copies of the work. Depending on the type of license selected, the right to create derivative works or to use the work for commercial purposes might also be granted. All rights not expressly granted by the licensor are reserved with the exception of limitations to copyright that are not prejudiced by the license. The so-called Share Alike licenses require that the further distribution of derivative works be made under the same license terms.

Each license is then labelled with some symbols that represent the basic rights granted by the license:

---





<sup>152</sup> See Open Source Initiative OSI: The Open Source Definition, <<http://www.opensource.org/docs/definition.html>>.

<sup>153</sup> See <<http://ec.europa.eu/idabc/eupl>>.

<sup>154</sup> L. LESSIG, *Free Culture, op. cit.*, p. 183–200.

<sup>155</sup> For a list of these licenses, basic information about each, and links to more information, see Creative Commons, Creative Commons Licenses, <<http://creativecommons.org/about/licenses/meet-the-licenses>>.

Each license is then labelled with some symbols that represent the basic rights granted by the license:

	Attribution
	Non Commercial
	No Derivative Work
	Share Alike

A work made available on the Internet (or elsewhere for that matter), under an Attribution - Non Commercial – Share Alike license would then appear to the user with the following symbols:



Due to the success of the Creative Commons project and its iconography, a user obtaining access to a work including these logos can immediately recognize the terms of use governing the use and distribution of the work. The user will also receive a summary of the license appearing as follows:



## Attribution-Noncommercial-Share Alike 3.0 Unported

### You are free:



**to Share** — to copy, distribute and transmit the work



**to Remix** — to adapt the work

### Under the following conditions:



**Attribution** — You must attribute the work in the manner specified by the author or licensor (but not in any way that suggests that they endorse you or your use of the work).



**Noncommercial** — You may not use this work for commercial purposes.



**Share Alike** — If you alter, transform, or build upon this work, you may distribute the resulting work only under the same or similar license to this one.

### With the understanding that:

**Waiver** — Any of the above conditions can be **waived** if you get permission from the copyright holder.

**Other Rights** — In no way are any of the following rights affected by the license:

- Your fair dealing or **fair use** rights;
- The author's **moral** rights;
- Rights other persons may have either in the work itself or in how the work is used, such as **publicity** or privacy rights.

**Notice** — For any reuse or distribution, you must make clear to others the license terms of this work. The best way to do this is with a link to this web page.

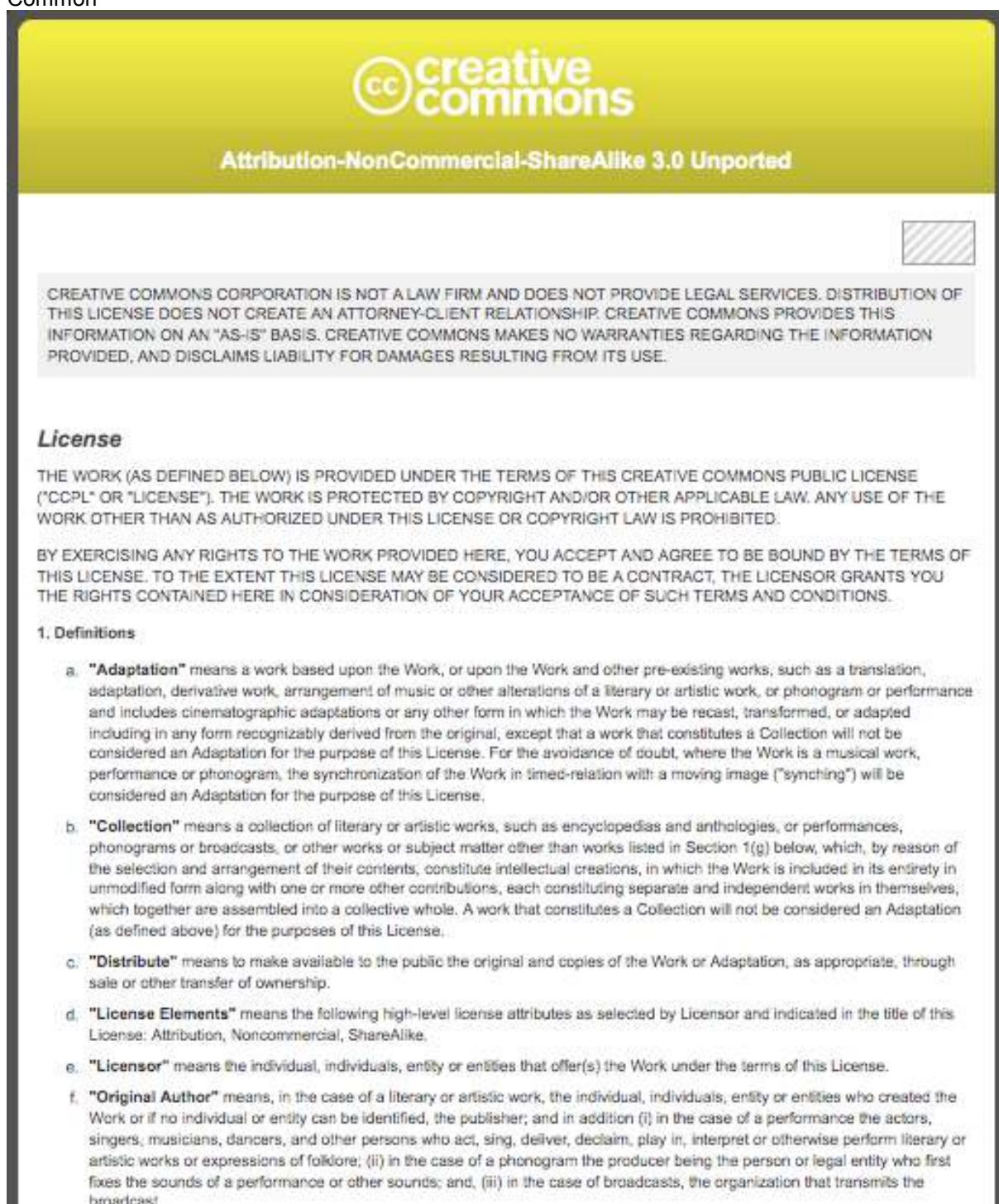
### CC License in its "human-readable version"

The licensee can have access to the full text of the license that lays down his/her rights and obligations. It appears as follows:

### CC License (extract)



Creative Commons licenses have been applied worldwide to a vast array of copyrighted works. The internationalisation of the use of CC licensing has been helped by the setting up of a network of national chapters of Creative Commons. Even though the project originated in the United States, Creative Commons



The image shows a document for the Creative Commons Attribution-NonCommercial-ShareAlike 3.0 Unported license. At the top, there is a yellow header with the Creative Commons logo and the text "creative commons" and "Attribution-NonCommercial-ShareAlike 3.0 Unported". Below the header, there is a disclaimer in a grey box: "CREATIVE COMMONS CORPORATION IS NOT A LAW FIRM AND DOES NOT PROVIDE LEGAL SERVICES. DISTRIBUTION OF THIS LICENSE DOES NOT CREATE AN ATTORNEY-CLIENT RELATIONSHIP. CREATIVE COMMONS PROVIDES THIS INFORMATION ON AN 'AS-IS' BASIS. CREATIVE COMMONS MAKES NO WARRANTIES REGARDING THE INFORMATION PROVIDED, AND DISCLAIMS LIABILITY FOR DAMAGES RESULTING FROM ITS USE." Below the disclaimer, the word "License" is written in bold. The main text of the license begins with "THE WORK (AS DEFINED BELOW) IS PROVIDED UNDER THE TERMS OF THIS CREATIVE COMMONS PUBLIC LICENSE ('CCPL' OR 'LICENSE'). THE WORK IS PROTECTED BY COPYRIGHT AND/OR OTHER APPLICABLE LAW. ANY USE OF THE WORK OTHER THAN AS AUTHORIZED UNDER THIS LICENSE OR COPYRIGHT LAW IS PROHIBITED." This is followed by a paragraph stating that by exercising any rights to the work, the user accepts and agrees to be bound by the terms of the license. The document then lists "1. Definitions" with six sub-definitions: a. "Adaptation", b. "Collection", c. "Distribute", d. "License Elements", e. "Licensor", and f. "Original Author".

has tried early on to adapt its licensing system to other nations' regulatory frameworks. For that purpose, the organization has asked national teams to translate the licenses into their languages and legal systems. Works can now be licensed under Creative Commons licenses that are customized to

the laws and languages of more than fifty countries, a third of which are developing ones<sup>156</sup>. Since the Creative Commons team monitors and checks the translation of licenses into national laws, all of these licenses are designed to be compatible both with the generic licenses and with each other, and to give the same rights and obligations to the parties. Compared to most open-source licenses, Creative Commons licenses are probably more easily accepted by authors and users, because they can understand the licenses' language and can rely on the licenses' compliance with their national law.

To some extent, Creative Commons can be said to provide a useful answer to the needs of some communities of creators who might consider sharing as the normal way of disseminating their creation, whether artistic, informational, scientific or functional.

Other free licenses have been developed for artistic creation such as the *Licence Art Libre*, in France in 1999, but they are less used now than Creative Commons.

### (iii) *Open access to scientific publications*

Open-access ideology has also spread to the field of scientific publications where it has been seen as a strategy for counteracting the increasing commodification of scientific publications and the reduced availability of scientific knowledge<sup>157</sup>. In the realm of scientific publications, the open-access dogma has been applied by putting in place free electronic distribution of scholarly journals in almost all fields of science and by setting up central repositories of open-access journals such as the OpenDOAR (Open Directory of Open Access Repositories) that contains more than 14,000 sources of academic open access repositories or journals.

Open-access ideology in the realm of scientific publications has been aided by the fact that many research organizations, universities, libraries, research funding agencies, and publishers have signed the Berlin Declaration on Open Access to Knowledge in the Sciences and Humanities. This declaration requires authors associated with the signatories to grant to all users a free worldwide right to access their works and requires that the works be deposited in at least one online repository enabling open access, unrestricted distribution, interoperability, and long-term archiving<sup>158</sup>. Publication of scientific results or articles in open access is increasingly the norm in scientific research. It does not follow any particular licensing framework for enabling open access, but rather relies on existing licensing platforms such as Creative Commons or lets the authors or the open-access repositories draft their own open-access policy.

## 3. Key features of copyleft licensing

Despite their diversity, whether in objectives or in form, open-access or copyleft initiatives present some common characteristics.

### (i) *The Assertion of the Intellectual Property Right*

The purpose of open access is, as said earlier, not to relinquish the work into the public domain or to make it unprotected by the law. On the contrary, open-source licenses generally assert a copyright in the object they govern.

All copyleft licenses, from open source software to Creative Commons, assert the copyright in the work. For example, the Preamble to the GPL states that " Developers that

<sup>156</sup> For the list of countries, see <<http://creativecommons.org/worldwide>>

<sup>157</sup> A. GUADAMUZ GONZÁLEZ, "Open Science: Open Source Licenses in Scientific Research", *N.C. J.L. & Tech.*, 2006, Vol. 7, p. 332.

<sup>158</sup> For the complete text of the Berlin declaration, see Berlin Declaration on Open Access to Knowledge in the Sciences and Humanities, available at <[http://oa.mpg.de/openaccess-berlin/berlin\\_declaration.pdf](http://oa.mpg.de/openaccess-berlin/berlin_declaration.pdf)>.

use the GNU GPL protect your rights with two steps: (1) assert copyright on the software, and (2) offer you this License giving you legal permission to copy, distribute and/or modify it”<sup>159</sup>. The Creative Commons licenses similarly insist that “the work is protected by copyright and/or other applicable law, any use of the work other than as authorized under this license or copyright law is prohibited”. The user has no rights to use the work other than those granted by the license and those from which he/she benefits according to local law (e.g., fair use or other limitations on copyright).

The principle of the license rests thus entirely on copyright, only some uses are expressly granted by the author. One often describes open access or copyleft licenses as the option of “some rights reserved” while the traditional exercise of copyright would be that of the “all rights reserved”. This assertion of copyright was considered as indispensable in the open source project, as it could require users to follow the logic of freedom of use, by distributing modified software under similar conditions and by providing the source code. Those were the conditions to be complied with to enjoy free use and copy privileges granted by the copyright owner in the first place. Conversely, putting the software into the public domain would enable the followers to either sell reproductions without providing the source code or a broad freedom of use, or to recapture some monopoly in the software by slightly modifying it. The trick for that propagation of the freedoms so granted, or rather to secure the public enjoyment and sharing of the work, was thus found in copyright itself. Exclusive rights subsist in the work licensed under copyleft, but the rights of access and use of the content are created within the exclusive monopoly and given to a large public.

Putting works into the public domain or making them available with no restriction has been thought to jeopardize the sustainability of public availability. Any modification of the work could vest a new copyright which might then be licensed in proprietary terms or even copies of an unprotected work could be provided under restrictive contracts or technological measures.

Therefore the strategy chosen by the copyleft movement is to leverage the exclusive rights of copyright to guarantee and maintain the public accessibility of works and of derivative creations. In other words, commons-based initiatives “create a self-binding commons rather than an unrestricted public domain”<sup>160</sup>.

Some licenses however purport to dedicate the work to the public domain, offering to its author the possibility to relinquish his/her copyright therein. For example, Creative Commons provides a license enabling putting one’s creation in the public domain through the CC0 License<sup>161</sup>, waiving all rights related to copyright to the fullest extent permitted by the law. We have addressed above the legal difficulties that such public domain dedication can raise in many legal regimes.

#### (ii) *The Reverse Use of Exclusivity*

The exclusive rights granted by copyright are fundamentally rights to authorize or prohibit the reproduction or public communication of the work. Open access lies in exercise of the right to *authorize* the use of the work, a use that can be subject to some conditions depending on the open-access license. The author or inventor opting for an open-access scheme exercises his/her right not to exclude but to grant freedom to use, a freedom that is sometimes limited to some purposes or to which the obligation to grant the same freedom subsequently is attached.

The exclusivity conferred by the intellectual property right is thus conceived not as an exclusionary power but as a liberty or monopoly to decide not to engage in exclusion. This is not

---

<sup>159</sup> See GPL, version 3.0, available at <<http://www.gnu.org/licenses/gpl.html>>

<sup>160</sup> A. KAPCZYNSKI, S. CHAIFETZ, Z. KATZ & Y. BENKLER, “Addressing Global Health Inequities: An Open Licensing Approach for University Innovations”, *Berkeley Tech. L.J.*, 2005, Vol. 20, p. 1072.

<sup>161</sup> See <<http://creativecommons.org/publicdomain/>>.

paradoxical if one adheres to the view that intellectual property is about exclusivity and not about exclusion-the terms not being synonymous. Exclusivity is a power to exclude but does not intrinsically lead to exclusion.

This is both similar and different to public domain that is characterized by an absence of exclusivity and where no user is excluded from the use of the unprotected work. Open access licensing achieves the same result but with the support of the exclusivity granted by the copyright protection.

(iii) *The Absence of Discrimination*

Another trait of most open-access initiatives is the equal treatment of any user who wants to use the copylefted asset. The granted freedom should benefit all users whether individual, academic, or business-like and should operate whatever the context of use, whether the user is pursuing a commercial purpose or not. Absence of discrimination is even one of the mandatory requirements of open-source licenses in software.

The principle of equal treatment as to the users or the type of use has been qualified in some open-access schemes. Creative Commons licenses provide a good example of differentiated treatment. One of the basic choices that the author can make is to allow the freedom to use and copy only for non-commercial purposes, allowing discrimination not against the type of user but as to the purpose of use. This departs from the public domain principle in which the freedom of use does not discriminate between types of users or contexts of uses.

The absence of a definition of “non-commercial” in the Creative Commons licenses complicates the matter as there is no certainty as to what types of use are permitted<sup>162</sup>. Non commercial is indeed a criterion that is rarely used in copyright legislation and whose scope is somewhat uncertain.

(iv) *The viral or copyleft effect*

An important feature of some open access licenses is to require on licensees to distribute the work or derivative works based on it under the same copyleft system, which prohibits a return to a proprietary system. This has been dubbed the viral effect or the copyleft effect, in the sense that the “free” distribution of works spreads itself epidemically along the chain of diffusion and modification of the primary work. It requires to conjugate the freedoms granted to the licensee with the obligation to grant herself the same freedoms to subsequent users of the work. The license then applies automatically, along the chain of distribution, to each new copy of the work as well as to each derivative or adapted version thereof. The person responsible for a modification of the copyrighted work developed and distributed in a free model is no longer able to impose restrictions other than those permitted by the original license. The copyleft licensing is said to contaminate each derivative work based on it. In simpler words, this mechanism is akin to a “prohibition to prohibit”, the ultimate goal being to keep the work so licensed free even if it is the subject of modifications and improvements.

The copyleft provision is not a necessary feature of all open-access licenses, even in open source software. In Creative Commons, only the licenses said to be “Share Alike” impose such contamination.

This mechanism of virality helps propagate the ethos of sharing and attach to the work itself, whose status is now determined by the copyleft nature, halfway between the exclusive copyright protection and the free public domain. It also enables the license, normally limited

---

<sup>162</sup> On that point see the study carried out by Creative Commons about the meaning of “non commercial”, at <[http://wiki.creativecommons.org/Defining\\_Noncommercial](http://wiki.creativecommons.org/Defining_Noncommercial)>.

to the parties involved to the contract<sup>163</sup>, to bind any user of the work. To that effect, copyleft licensing is often considered as being a private ordering tool, in the sense that “the rule-making process regarding the use of information is privatized, and the legal power to define the boundaries of public access to information is delegated to private parties”<sup>164</sup>.

To make the virality of the open-source or open-access system work, a necessary feature of such contracts is to oblige the user to affix the license to such copies. The user then distributes copies of the work or improvements or modifications. As a consequence, any subsequent user will encounter the license when he/she desires to use the licensed material. As Margaret Radin has described this process, it is an “attempt to make commitments run with a digital object”<sup>165</sup>. In viral contracts, the terms of the contract accompany the work or software that is disseminated<sup>166</sup>, the contract runs with the digital asset, and the license is embedded in the object it purports to regulate. It goes as far as running with modified or improved versions of the work or software it primarily seeks to rule. Therefore, the copyleft transforms a mere private ordering effect—normally applicable only to the parties to the private ordering tool (i.e., the contract)—into a feature applicable to the intellectual resource itself and to any user thereof. The protection transforms from contract to what oddly resembles a property right (or rather a sort of public domain status) valid against the world. Similar to what happens with public domain material, the freedom of use can be enjoyed by anyone and is intrinsically attached to the work itself.

However, the regulation of the copyrighted work so established by the copyleft contract is not as complete as what public domain achieves in terms of freedom to use and access. Even though it pretends to propagate through the distribution and modification of the objects it covers, the self-perpetuation of a copyleft license depends on many conditions: the enforceability of the licenses, the proper definition of the derivative works it can attract in its realm, the compatibility of different licenses applying to many parts of a creation, and the capacity to apply worldwide<sup>167</sup>. In comparison, a work in the public domain is freely accessible and usable under no conditions or reservations (save for the possible encroachments analysed supra).

Even though alike on appearance and pursuing a similar objective, open access licensing is hence less “public” than the public domain, and has a different scope. However, recognising and encouraging open access models, with the consent of the authors, would enhance freedoms of use and access to creative content, hereby promoting public domain.

---

<sup>163</sup> It is worthwhile to note that the qualification of the license is controversial. In the US, for instance the license is not seen as a proper contract, as in the civil law countries, no other legal qualification could apply to make it work. Once it is considered as a contract, all general principles of contract law apply, including the rule of relativity, meaning that only the parties having consented to the contract will be bound by its rights and obligations.

<sup>164</sup> N. ELKIN-KOREN, “A Public-Regarding Approach to Contracting over Copyrights”, in R. COOPER DREYFUSS, H. FIRST & D. LEENHEER ZIMMERMAN (eds.), *Expanding the Boundaries of Intellectual Property: Innovation Policy for the Knowledge Society*, 2001, p. 192.

<sup>165</sup> M.J. RADIN, “Human, Computers, and Binding Commitment”, *Ind. L.J.*, 2000, Vol. 75, p. 1132.

<sup>166</sup> This is particularly true in Creative Commons where the process of creating the license whose basic terms have been chosen by the author is completely automated and a digital code version of the license is provided to be affixed to the work. The product of the license is offered with the product of the work.

<sup>167</sup> For further explanation on this, see S. DUSOLLIER, “Sharing Access to Intellectual Property through Private Ordering”, *Chicago-Kent Law Review*, 2007, Vol. 82, p. 1391-1435.

## B. Data on public domain material

Identifying the components of the public domain in copyright requires, as we have seen, many elements, such as determination of the applicable law, the legal provisions applicable, some data about the work, its author, its date and country of publication, the compliance with some formalities, etc. It is mainly to determine the duration of copyright and, hence what we have called the temporal public domain, that key data are necessary.

Some of these data are easily available, others are not. As copyright is granted with no formalities in conformity with the requirement of the Berne Convention, there is generally no central agency or register where all data about works will be collected. To determine the expiration of copyright in a work, one can however have recourse to different bodies. Libraries have rich repositories of works and databases listing the publications dates, the names of authors and, when known, their date of death. Catalogues of libraries and other cultural institutions compile comprehensive and invaluable records of the works they hold. This is particularly the case of national libraries that are entrusted by law to manage legal deposit, when applicable. Collecting societies equally host rich data about the works they manage. Publishers, producers, archives or copyright registries when existing, can also be useful sources of information about copyrighted works.

The main problem is the disparity of the sources of data. Many projects have emerged recently to try to develop a converging and unique source of information. In the European Union for instance, the project ARROW (Accessible Registries of Rights Information and Orphan Works), encompassing national libraries, publishers, writers' organisations and collective management organisations, aims at finding ways to identify rightholders, rights and clear the status of a work<sup>168</sup>. The European Commission has also recently announced that it plans to create either an European register of works or a network of registries<sup>169</sup>.

Many of these attempts have started as an answer to the orphan works problem: helping identify the rights holders of a work will probably alleviate the qualification of some works as orphan, but it could also lead to acknowledge that a creation has fallen into the public domain. The ongoing development of data about orphan works will hence be a promising avenue for clarifying the contents of the public domain.

Digital developments can also convey such data in electronic format and attach them to works. "Rights Management Information" is dealt with in the WIPO Treaties of 1996, that require the States to prohibit the removal or tampering with such pieces of information. However, the prohibition only applies to information about protected works. The question of the possible extension of this protection to information about unprotected creations and public domain status should be raised.

When data about the status of a work are converted in electronic form and can be read by search engines or other software, one talks of "Rights Expression Languages" (REL). First developed to serve as a basis of Digital Rights Management Systems and limited to data about protected works and their conditions for use, they are now increasingly used to inform the users of the public domain status of a work or the open licensing conditions applying to a work. For instance, the Creative Commons project has devised a system of information called ccREL to express in metadata the licensing terms applying to works licensed under the many Creative Commons licenses. The ccREL system makes it possible for computers to interpret copyright licensing terms attached to material found on the Internet. Some search engines, such as Google, already implement such information and offer a possibility to search on the Internet only the resources whose use can be free, for they are licensed under Creative Commons terms. REL about public domain works are less developed and are not used by search engines to our knowledge.

---

<sup>168</sup> For more information see <<http://www.arrow-net.eu>>.

<sup>169</sup> *European Voice*, 1st October 2009.

A prominent issue for such public domain data, whether in analogue or digital form, is their joint collection, standardisation and interoperability. Many existing projects have put the interoperability concern at the core of their objectives.

The control and liability issues that may arise in the process of certifying a work as belonging to the public domain are also relevant. As the assessment of the public domain status of a work can be tricky, certifying that a work is not protected anymore is subject to errors in the labelling of such works. This would require further study.

One example can be found in the first version of the Google Book Search Settlement<sup>170</sup>, where works considered as belonging to the public domain under US law will be provided in their entirety by the search engine. The Settlement granted Google a safe harbour for any making available of a book, as soon as it is certified to be into the public domain, according to the principles laid down in the Attachment 5 of the first version of the Settlement. These principles in fact entrust Google itself with ascertaining the status of books. More exactly, it will suffice that at least two people (hired by Google) achieve the same conclusion about the data needed to check the status of a book, for that conclusion be accepted. It will not of course rule out the possible contestation of the protected status of a work but will exonerate Google from liability for all use of works that have occurred before that new knowledge about the status of a work. This example demonstrates the increasing private determination of the public domain nature of works, and the systems put in place, solely by private ordering means, to exempt the persons making such determination from any liability as regards possible errors and copyright infringements.

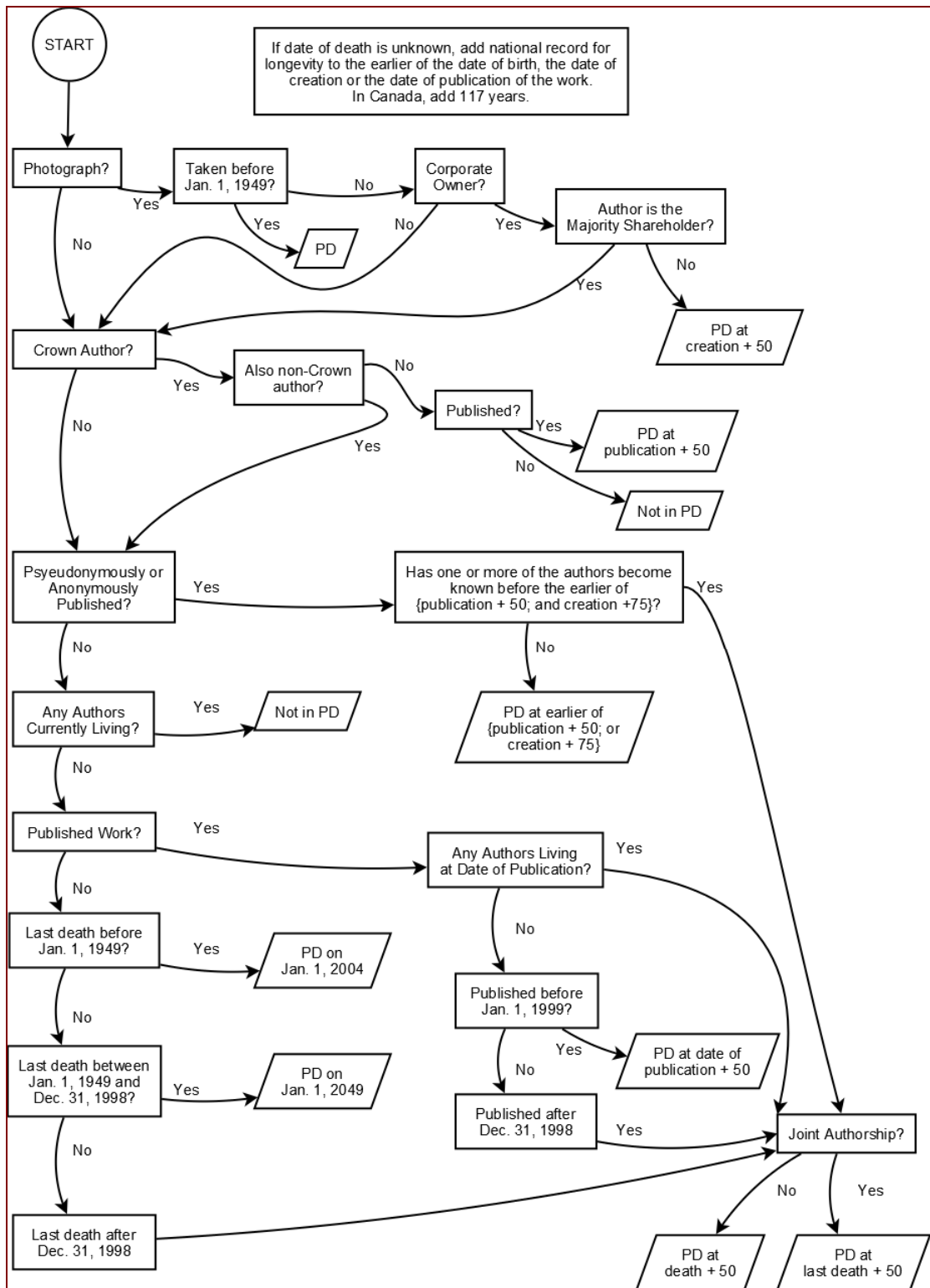
#### C. Public domain calculators

Public domain calculators are technical tools recently developed, mostly by individuals or non-governmental bodies, to help calculate when a work protected by copyright falls into the public domain. Such calculators aim at automatically computing the duration of protection of a work in a given jurisdiction, hence determining its protected or public domain status.

They are generally developed in two steps. The first one consists of gathering information about the legal provisions applicable to the copyright term and organising them as flow charts, i.e. in a series of successive questions helping to determine what precise rules are applicable.

---

<sup>170</sup> See <[http://www.googlebooksettlement.com/r/view\\_settlement\\_agreement](http://www.googlebooksettlement.com/r/view_settlement_agreement)>.



Example of a flow chart developed in Canada by Access Copyright, Creative Commons Canada, Creative Commons Corp. and the Wikimedia Foundation (version of 16<sup>th</sup> December, 2008).



Those flow charts are then converted into codes and algorithms in order to automatically process the information given by a user about a work, and provide an answer as to its copyright status.

Public Domain Sherpa is an existing web-based public domain calculator in US jurisdiction<sup>171</sup>. It gives the status of a creative work based on a series of questions and steps, as illustrated below.

This screenshot shows the 'Status' tab of the calculator. It contains a list of questions with their corresponding answers:

- Is the work published? **Yes.**
- Was it published in the US? **Yes.**
- When was the work first published? **1956.**
- Was it published with a valid copyright notice? **Yes.**
- Was the copyright renewed? **No.**

At the bottom, there is a copyright notice: © 2006 - 2009 www.pdsherpa.com and a 'Reset' button.

This screenshot shows the 'Status' tab with a question: 'Was the copyright renewed?'. Below the question are three radio button options: 'Yes', 'No', and 'Unknown'. A 'Back' button is on the left and a 'Next' button is on the right. The copyright notice and 'Reset' button are at the bottom.

This screenshot shows the 'Status' tab with a motivational message: 'Use the work any way your heart desires. You're limited only by your imagination -- create something remarkable!'. At the bottom, there is a copyright notice: © 2006 - 2009 www.pdsherpa.com and a 'Reset' button.

This screenshot shows the 'Status' tab with a question: 'When was the work first published?'. Below the question is a text input field with the value '1956' and a '+' button. A 'Back' button is on the left and a 'Next' button is on the right. The copyright notice and 'Reset' button are at the bottom.

Public domain calculators thus combine two sets of data. On one hand, the data entered by the user requesting the status of a work, data that might relate, according to the jurisdiction, to the date of the author's death, date of first publication or creation, or

<sup>171</sup> See <<http://www.publicdomainsherpa.com/calculator.html>>.

compliance with formalities then required. On the other hand, data related to the applicable legal provisions that have been integrated into the algorithm by the developer of the calculator.

The Open Knowledge Foundation, based in the UK, is one of the biggest developer of public domain calculators. Working with lawyers, scholars and relevant interest groups, it has initiated the development of such tools for as many as 17 countries<sup>172</sup>.

Such calculators will only indicate public domain status as regards the expiration of copyright, thus determining what is or not within what we have called the temporal public domain. That is both the most intricate part of the public domain to estimate, but also the most objective, since, contrary to the public domain based on lack of originality, it is grounded on fixed data such as date of the death of the author or of publication.

The key added value of such technical tools is to help solve the complex functioning of the rules related to the duration of copyright by having recourse to a computer-automated answer, and to offer this answer in many jurisdictions the specific provisions of which might be unknown to the potential user of the work.

However, one should be aware that, despite its obvious benefit, any public domain calculator has inherent limitations.

First, in order to work properly and be able to provide accurate answers, both the data entered in the algorithm about copyright legislation and the data entered by the request about the work have to be complete and correct. In countries where the calculation of the copyright term relies upon many elements, some data might be unknown to the user of the calculator or difficult to get. Anyone who has ever tried to assess the copyright status of a US work published before 1978, without knowing precisely if it was published with notice and was eventually renewed, will understand. Legal certainty can be jeopardized if mistakes occur either in data about the work or the applicable copyright provisions. As to the latter, developers of public domain calculators will have to ascertain that additional rules such as the possible revival of copyright when extending its term, or the consideration of the comparison of terms for foreign works, when applicable, have been taken into account.

Users of calculators should also be aware of a distinction between an artistic work and its many artefacts. A literary creation such as a novel might derive in different translations or adaptations. When requesting the public domain status of some creation, one should be able to separate the underlying work and its translation. One can be in the public domain while the other is not. Public domain calculators should integrate questions capable of drawing such distinctions.

More significantly, public domain calculators are developed on a jurisdictional basis, which is sound, as we have seen above that the contours of the public domain will depend on the country in which the protection of a work is sought. But this territoriality raises many issues. When a user intends to create something out of a public domain work or use it in any other way, he/she must be certain that this work is unprotected in whatever country she intends to carry out its exploitation. The positive result of a public domain calculator might not be true for another country. Besides, the rule of comparison of terms, laid down in the article 7(8) of the Berne Convention and applicable in many countries (see above), should not be neglected in the computation of the duration. However, it would require that the algorithm integrate all rules of duration applicable in other countries to be able to carry out this comparison between the term provided for by the *lex loci protectionis* and that of the country of origin.

Could practical issues raised by the inherent territoriality of the calculators be solved by the development of an international super-calculator? Maybe, but it would require waiting for the complete development of national projects and to entrust an international body to carry this huge work.

---

<sup>172</sup> For more information about the project, see <<http://wiki.okfn.org/PublicDomainCalculators>>.

As a conclusion, public domain calculators might well be never perfect and will at best provide an approximate answer as to the public domain status of a work. In most cases, the protected or unprotected status of a work could be obtained but it will always leave a grey zone where definitive answers are not possible, either through the absence of some key data about the work or by the involvement of many relevant jurisdictions.

#### D. Registration systems

Private systems of registration of works are increasingly offered on the Web. They generally do not consist in certifying the public or protected nature of a creation but only in providing electronic rights information and language to be affixed in a work in a permanent way. The registration so conferred can also serve as proof to be used in trial, often by means of a certificate of registry digitally signed. By and large, companies offering such services do so both for copyrighted works and works licensed in open access or copyleft regimes, but not really for public domain works, to the exception of works dedicated to the public domain by their authors. Examples of companies or websites specialised in labelling and registration of open licensed works are SafeCreative based in Spain<sup>173</sup> (working in close collaboration with Creative Commons), Registered Commons<sup>174</sup>, and Numly<sup>175</sup>.

#### Databases and search engines about public domain material

Based on public domain calculators, rights information languages and other data which enable assessing the status of a work, some websites now offer databases of works in the public domain, with the objective of promoting such works. Famous examples of such databases are the Project Gutenberg<sup>176</sup>, mainly specialised in literary works and enabling the downloading of the books concerned, the Public Domain Works Database set up by the Open Knowledge Foundation<sup>177</sup>, or the Public Domain Movie Database<sup>178</sup>. Other websites are specialised in making available works still protected by copyright but licensed under Creative Commons or other free licensing terms. One example is the Jamendo website offering free music<sup>179</sup>.

Such databases are often constrained by a recurring issue of the public domain, i.e. its territoriality. Most of the time they only assert that the work is in the public domain in one jurisdiction but advise users to check its status if located in other jurisdiction. For instance, on the project Gutenberg website, one can download for free the novel *Ulysses* by James Joyce, said to be in the public domain under US laws. Joyce being dead in 1941, it will not be in the public domain in Europe before 2012. As the status of a work may vary from one country to another, such databases are at best only accurate for one jurisdiction, depending on the legal provisions and public domain calculator they are using. Users are not always aware of such limitation.

Many of those providers are also very careful to deny any liability for certifying the status of a work and advise their users to do their own check if intending to publicly exploit the work.

---

<sup>173</sup> See <<http://www.safecreative.org>>.

<sup>174</sup> See <<http://www.registeredcommons.org>>.

<sup>175</sup> See <<http://www.numly.com>>.

<sup>176</sup> See <<http://www.gutenberg.org>>.

<sup>177</sup> See <<http://www.publicdomainworks.net>>.

<sup>178</sup> See <<http://pdmdb.org/>>.

<sup>179</sup> See <<http://www.jamendo.org>>.

One should not forget that the first databases of public domain works might still be the old libraries and other cultural heritage institutions. Their development into digital libraries is often premised on the public domain nature of a great part of their collections. Two examples suffice: the Europeana Digital Library<sup>180</sup> set up by the European Union that, as a portal to national institutions, already gives free access to more than 5 million works, and the World Digital Library developed by UNESCO<sup>181</sup>, that contains 1250 key documents of the world heritage. Such publicly funded projects will necessarily form an essential part of public policies enhancing access to public domain material.

#### E. Intermediate conclusion on public domain tools

All the tools developed to ascertain, certify or register the protected or unprotected status of a work come at a considerable cost, sometimes borne by individuals or non-governmental organisations, or by public institutions such as libraries or national registries. Any project to promote the public domain will have necessarily to address this cost or find ways to provide incentives for non-public actors to participate.

A key objective should also be to involve developing countries, which will not have equal opportunities and possibilities to develop costly public domain tools.

### V. PROTECTION OF THE PUBLIC DOMAIN AND RECOMMENDATIONS

The request for positive protection of the public domain that could preserve it against privatisation is an old demand. In his seminal article on the public domain, D. Lange asked for recognition and legal status of the public domain as early as 1981<sup>182</sup>. This legal status has not yet been created at the international or national level. Yet, some protection is emerging for works in the public domain, both in case law and in scholarship, that could serve as a ground for developing some key principles and recommendations for preservation and better availability and use of the public domain.

#### A. Existing protection of the public domain

In the countries that have been surveyed for the purpose of this study, the public domain seems to be gaining in importance both in case law and in legislation.

Some countries have inserted in their copyright laws an explicit reference to and definition of public domain. This is the case of Algeria, Brazil, Chile, Costa Rica, Kenya and Rwanda<sup>183</sup>. Most of the time, this definition is mainly descriptive of what the public domain encompasses but does not entail any normative consequences. At best, the law recalls the rule of free use attached to the public domain, as in Chile (art. 11 in fine: “the works of the common cultural heritage can be used by anyone, in the respect of the integrity and paternity of the work”) or Costa Rica (art. 7: “anyone can freely use, in any form or process, the works belonging to the public domain”).

In France, some scholars<sup>184</sup> have started to develop a positive protection for the public domain on the civil law notion of *choses communes* or commons, appearing in Article 714 of the Civil Code (known in other French-based systems also). Commons are defined as “goods that are owned by nobody and whose use is common to all”.

---

<sup>180</sup> See <<http://www.europeana.eu>>.

<sup>181</sup> See <<http://www.wdl.org>>.

<sup>182</sup> D. LANGE, “Recognizing the Public Domain”, *Law and Contemporary Problems*, 1981, Vol. 44, p.147.

<sup>183</sup> See the table III in Annex for complete definitions.

<sup>184</sup> S. CHOISY, *op. cit.*; M.A. CHARDEAUX, *op. cit.*, §230.

Considering the public domain in copyright, but also in patent law, as a commons or *res communis* in the legal meaning of the term, is not very controversial. But what is rather new is the attempt to attach to such qualification a status that could immunise the public domain from any recapture or appropriation<sup>185</sup>. The qualification of the public domain as a *res communis* implies two consequences. The first one is the prohibition of a recapture of the work as a whole, even though partial recapture can be envisaged (as seen above with trademark registered of a work fallen into the public domain). The second one is to guarantee a collective use of the work: each member of the public should be entitled to use, modify, exploit, reproduce and create new works from public domain material. The collective nature of the commons further entails an obligation of preservation thereof, as it is the case for environmental commons.

If the objective of a regime for the public domain is to guarantee freedom of access and use and prevent any exclusivity in the resource, the legal status of the commons, as understood in French law (or at least as defended by the cited scholarship), can provide the first building blocks of such a regime. Relying upon the qualification of the public domain as a “commons”, case law could prohibit any attempt to regain a monopoly over it.

There are examples of such endeavours. In France again, a court has limited the exercise of the copyright of two authors having restored and added a contemporary work of art in a public and historical square, the Place des Terreaux in Lyon, on the grounds of the public domain nature of historical buildings composing the square<sup>186</sup>. Those authors wanted to enforce their copyright in their original work of restoration against a company selling postcards that reproduced the square, including their protected work. The key argument of the decision was that the public domain status of the buildings necessarily constrains and limits the exercise of copyright held by the authors of a derivative work to the extent required by the free reproduction of the public domain. Otherwise, a copyright would be indirectly restored in the public domain work for the benefit of the authors of its restoration or modification. The decision was upheld on appeal, mainly on different grounds, even though the Court of Appeal stated that “the protection granted to the authors of the new design of the square should not prejudice the common enjoyment”<sup>187</sup>, which still recognizes a positive protection of the public domain and of its inherent collective use.

This reasoning should be approved solely in the case where exercise of the copyright in the derivative work would completely prevent and pre-empt the free use of the public domain. It should not be understood as reducing to nothing the exclusive and legitimate rights of the authors of any work built upon public domain material. The French case of the Place des Terreaux was remarkable in that regard. The postcards did not represent only or mainly the contemporary work but the latter was so integrated in the historical square that it was impossible to copy the square without including incidentally a reproduction of the still protected work.

In a case analysed above and implying the perpetual moral right, the French Court of Cassation has equally found in the public domain enough strength to limit the claim of Hugo’s heirs to prohibit an adaptation of one of his famous novels<sup>188</sup>.

---

<sup>185</sup> This construction is mainly due to M.A. CHARDEAUX, *Les Choses communes*, *op. cit.*

<sup>186</sup> TGI Lyon, 4 April 2001, *RIDA*, October 2001, note S. CHOISY.

<sup>187</sup> Lyon, 20 March 2003, *Communications – Commerce Electronique*, September 2003, note C. CARON. The Court of Cassation has confirmed the ruling on a very different justification, not making any mention of the public domain status of the underlying work. See Cass., 15 March 2005, available on [http://www.courdecassation.fr/jurisprudence\\_2/premiere\\_chambre\\_civile\\_568/arret\\_no\\_632.html](http://www.courdecassation.fr/jurisprudence_2/premiere_chambre_civile_568/arret_no_632.html).

<sup>188</sup> Cass. 30 January 2007, *JCP G*, 2007, p.29, note C. CARON.

United States case law also abounds in opinions recalling the principle of free copying of works or inventions in the public domain and the ensuing prohibition to reinstate an exclusive protection therein, namely by state law<sup>189</sup>.

Traces of a positive status of the public domain can further be found in the case law of the European Court of Justice, or rather in some opinions of its Advocate General. We have seen *supra* the opinion on the Advocate General in a trademark case that relied upon the public interest to prohibit the registration of a trademark that would reconstitute a monopoly in an invention whose patent had expired<sup>190</sup>. His argumentation was sufficiently general as to apply to any attempt to recapture, through a trademark registration, the exclusivity in a work fallen into the public domain. Here also, the prohibition for a trademark registration should be understood as limited to the sole case where the new right would harm the status of the public domain in a work by reserving all uses thereof (see *supra* the development about trademarks).

Some countries are more daring in their endeavour to preserve the public domain from any re-appropriation. Chile is now discussing a Bill modifying the Copyright Law. It plans to introduce new offences criminalising attempts to recapture a work fallen into the public domain. A new article 80 would prohibit:

- anyone who knowingly reproduces, distributes, makes available or communicates to the public a work belonging to the public domain under a name that is not the one of the real author;
- anyone who fraudulently claims economic rights in a work belonging to the public domain.

This protection has two prongs. The first one is related to the moral right of paternity by sanctioning anyone who falsely attributes a work belonging to the public domain. The second pertains to a prohibition to regain some exclusivity in the public domain material by sanctioning the person who tries to claim exclusive rights therein. It does not seem to prevent asking for remuneration for the provision of public domain works, which would render uninteresting the commercial exploitation of public domain works, through a lack of incentives. Depending on the construction of this provision, it seems that only the artificial renaissance of some exclusivity in the work would constitute an offence.

All these examples show a regained interest in the construction of a positive regime that could immunise the public domain against undue or excessive encroachment. They also provide some interesting ideas for the building blocks of such regime.

#### B. Key objectives for a robust public domain

Assessing the value and contents of the public domain has demonstrated that if a healthy and thriving public domain plays an essential role for cultural and democratic participation, economic development, education and cultural heritage, the lack of organisation of such public domain in most copyright laws, as well as its negative definition as the reverse of copyright protection, weakens such objective.

Identification of the many components of the public domain is uneasy and is even more complicated by rules of territoriality and applicable law. Being defined only as what is not protected by intellectual property also leaves the realm of the public domain at the mercy

---

<sup>189</sup> See for instance, *Compco Corp. v. Day-Brite Lighting*, 376 U.S. 234 (1964) (“when an article is unprotected by a patent or a copyright, state law may not forbid others to copy that article. To forbid copying would interfere with the federal policy, found in article 1 of the Constitution and the implementing federal statutes, of allowing free access to copy whatever the federal patent and copyright laws leave in the public domain”), as well as the other decisions cited in T. OCHOA, *op. cit.*, p. 248.

<sup>190</sup> Opinion of the Advocate General R.J. Colomer, 24 October 2002, in the *Linde* case, C-53/01 to C-55/01, at 29 (decision of the ECJ, 8 April 2003).

of the fluctuation of the scope of copyright itself, through generous appreciation of requirements for protection or on-going extensions, sometimes with retroactivity, of its duration. Once fallen into the public domain, unprotectable elements or works of authorship where copyright has expired do not find a legal status that would guarantee their free use or immunise them against new reservations or exclusivity, either by other intellectual property rights, by recapture of copyright or by technological measures.

A sound policy for the public domain would be first to help its identification and its inscription in a specific legal regime, in order to remove it from the garbage or fallow land of copyright protection where it mainly stands. It would require to give substance to the public domain, both in terms of identity and of legal status.

Being the reverse of copyright protection should not necessarily equate to being the valueless part of intellectual property. As intellectual property is characterised by exclusivity and rivalry, the public domain should conversely operate on the ground of non-exclusivity and non-rivalry. Those characteristics are typical of any commons whose wealth lies in collective and non rivalrous use and in the absence of any appropriation.

Effectiveness of such rules of non-exclusivity and non-rivalry would strengthen the public domain, and should be expressed in normative rules rejecting any exclusive reservation and easing free<sup>191</sup> use and common access.

This would entail the following pivotal principles for a robust public domain, as stated in the Recommendation 20 of the Development Agenda:

- A need for **certainty** in identification of public domain material: In order for economic development, follow-on creation, educational or consumptive use to thrive on the ground of the public domain, an important step is to enable to identify the composition of the public domain in the most precise and certain way. Ascertaining the scope of the public domain will never be an exact science, neither is determining the scope of copyright. But, legal rules should be clarified or simplified and tools should be developed and provided to help with such identification.
- A need for **availability and sustainability** of public domain material: theoretical belonging of a work to the public domain will not be very valuable if access thereto and use thereof is not effective. A policy for the public domain should enhance the availability of the public domain, the effectiveness of access to it, as well as its sustainability. As to the latter, it means that the public domain should be both available for re-use and exploitation, and that its content should be preserved and maintained for the benefit of future generations.
- A principle of **non-exclusivity** guaranteed by the law should be applied to the public domain: the rule of free use of the public domain, in absence of copyright protection should be legally established and sustained by enforcing a prohibition against commodification or private recapture of elements of the public domain.
- A principle of **non-rivalry** guaranteed by the law should be applied to the public domain: the absence of copyright protection should entail an effective collective use of public domain resources, which would also imply guaranteeing access to support and use of public domain material without discrimination.

These four principles can find some support in economic theories of the commons, whether tangible or intangible, which insist on equity, efficiency and sustainability of commons resources<sup>192</sup>. Knowledge commons do not face the same threats as physical

<sup>191</sup> Free refers more to unencumbered by any legal or technical reservation than to the absence of remuneration, even though the logic of the public domain is also to reduce the cost of the work to its cost of production.

<sup>192</sup> See for example, C. HESS & E. OSTROM, *Understanding Knowledge as a Commons – From Theory to Practice*, MIT Press, 2006, 5-6.

commons as they are less at risk of depletion and degradation. However the sustainability of intangible commons such as knowledge or the public domain will necessitate securing their effective access and preservation from oblivion. The organisation of repositories for the public domain would be a key element for such preservation. Libraries have been entrusted with this task for centuries and are increasingly in charge of cataloguing, maintaining and making available knowledge in the digital environment. They should thus be part of any effort dedicated to the fostering of a rich public domain<sup>193</sup>.

The above set of principles could lead to the following recommendations.

### C. Recommendations

The construction of a positive regime for the public domain, able to buttress the principles emphasized above would require both the adoption of normative rules in copyright laws and the setting up of material conditions to effectively enable access to, enjoyment and preservation of public domain resources.

It is thus difficult to draw precise recommendations with a normative effect, as endeavours should be pervasive and might go beyond formal changes in intellectual property laws. Action might also be more appropriate at national level. The following recommendations do not propose to curb the scope or duration of copyright in any way, mainly as it is a matter for national public policy.

At international level, the following ideas might be pursued:

- As far as ***identification of the public domain*** is concerned:
  - o The territoriality applying to the determination of the public domain should be further assessed. Recommendations are difficult to propose in that regard as substituting the law of the country of origin to the *lex loci protectionis* would only shift the uncertainty. Instead of having to deal with different laws when envisaging an exploitation of creative material in different jurisdictions, the user will have to determine the status of the resources used according to the law of countries of origin, even for an exploitation occurring in a single country.
  - o The difficulty of the rule of the comparison of terms applicable to the duration for protection, as provided by Article 7(8) of the Berne Convention, should at least be assessed.
  - o The voluntary relinquishment of copyright in works and dedication to the public domain should be recognised as a legitimate exercise of authorship and copyright exclusivity, to the extent permitted by national laws (possibly excluding any abandonment of moral rights) and upon the condition of a formally expressed, informed and free consent of the author. Further research could certainly be carried out on that point.
  - o An exception or attenuation of the *lex loci protectionis* could be envisaged so as to mutually recognize the validity of a dedication to the public domain when valid in the country of origin of the work.
  - o The issue of orphan works should be dealt with at the international level or at least, a mutual recognition of the status of the orphan work applied in one country should be recognized by other Parties to the Berne Convention (except when identification or

---

<sup>193</sup> This has already been theorised by C. HESS and E. OSTROM, that have analysed the library as a model for a common-pool resource institution for knowledge (see C. HESS & E. OSTROM, "Ideas, Artifacts, and Facilities: Information As A Common-Pool Resource", *Law and Contemporary Problems*, 2003, Vol. 66, 111-145).



location of the author can be solved in this other country). WIPO should also help to set up networks of information about works in order to facilitate the identification of authors of orphan works. This would clarify the protected or unprotected status of orphan works.

- International endeavours should be devoted to developing technical or informational tools to identify the contents of the public domain, particularly as far as the duration of copyright is concerned. Such tools can be data collections on works, databases of public domain works, or public domain calculators. International cross-operation and cross-referencing of such tools is of particular importance.
  - The 1996 WIPO Treaties could be modified to integrate, in the definition of “Rights Management Information”, any electronic information pertaining to public domain works.
- As far as the **availability and sustainability of the public domain** is concerned:
- The availability of the public domain should be enhanced, notably through cooperation with cultural heritage institutions and UNESCO (through its work on the preservation of intangible cultural heritage).
  - Legal deposit should be encouraged at national level, which might involve some financial and logistical help for developing countries. At international level, catalogues and cross-referencing of deposited works should be set up.
  - The role of cultural heritage institutions, and mainly libraries, in the labelling, cataloguing, preserving and making available of public domain works, should be recognised and supported, particularly in the digital environment.
  - Research should be carried out to identify means to promote the divulgation and exploitation of public domain material in terms of funding and incentives. The research could include the tool of the *domaine public payant*, as means to make commercial users of public domain works contribute, through a minimal sum, to the collecting and maintaining of public domain material carried out by public institutions. Where the moral right is perpetual, there should be ways of controlling possible abuses in exercising the divulgation or integrity right.
  - Any extension of the scope or duration of copyright and related rights, both at international and national level, should take into account the empirical effects on the sustainability of the public domain.
- As far as the **non-exclusivity and non-rivalry of the public domain** is concerned:
- Legal means should be found to prevent the recapture of exclusivity in works that have fallen into the public domain, whether through another intellectual property right (trademark or right in databases), property rights, other legal entitlements or technical protection, if such exclusivity is similar in scope or effect to that of copyright or is detrimental to non-rivalrous or concurrent uses of the public domain work.
  - The 1996 WIPO Treaties should be amended to prohibit a technical impediment to reproduce, publicly communicate or making available a work that has fallen into the public domain. There is no legal basis for the enforcement of technical protection measures applied to the public domain, as public domain status should guarantee the right to make re-use, modification, reproduction and communication. It could also be clarified that only technological measures protecting copyrighted works that form a substantial part of the digital content to which they apply will be protected against circumvention. Technological measures mainly protecting public domain works, with an ancillary and minimal presence of copyrighted works, should not enjoy legal protection.
  - As Berne countries are required to respect within their territory the intellectual property

protection granted by other countries, they should recognize the public domain status defined by other countries and prevent privatization of what is in the public domain elsewhere.

ANNEXES - Comparative Analysis

The following national copyright laws have been surveyed<sup>194</sup>:

- **Algeria:** Copyright, Ordinance, 19/07/2003 - 1424, No. 03-05 du 19 Joumada El Oula 1424 correspondant au 19 juillet 2003 relative aux droits d'auteur et aux droits voisins)
- **Australia:** Copyright Act 1968, Act No. 63 of 1968 as amended (up to Act No. 113 of 2008)
- **Brazil:** Law No. 9610 of February 19, 1998, on Copyright and Neighboring Rights (Lei N° 9.610, de 19 de Fevereiro de 1998-Alterada, atualiza e consolida a legislação sobre direitos autorais e dá outras providências)
- **Chile:** Ley N° 17.336 (1970) sobre Propiedad Intelectual (last amended by LEY-19928, 31.01.2004)
- **China:** Copyright Law of the People's Republic of China, Adopted at the 15th Session of the Standing Committee of the Seventh National People's Congress on September 7, 1990, and Amended According to the Decision on the Revision of the Copyright Law of the People's Republic of China, Adopted at the 24th Session of the Standing Committee of the Ninth National People's Congress on October 27, 2001
- **Costa Rica:** Law No. 6683 on Copyright and Neighbouring Rights (as last amended by law No. 8039 of October 10, 2000, (LEY N° 6683 de Derechos de Autor y Derechos Conexos)
- **Denmark:** Consolidated Act No. 763 on Copyright of June 30, 2006
- **France:** Intellectual Property Code of 1<sup>st</sup> July, 1992, as last amended in 2009 (Code de la Propriété Intellectuelle)
- **Italy:** Law of 22 April, 1941, n°663 on copyright protection, as last amended in 2008 (Legge 22 aprile 1941, n. 633, sulla Protezione del diritto d'autore e di altri diritti connessi al suo esercizio)
- **Kenya:** Copyright Act n°12, 2001.
- **Korea:** Copyright Law of Korea, as last amended by Law No. 8101, December 28, 2006
- **Malaysia:** Act 332 - Copyright Act 1987, as last amended by Act A1139/2002
- **Rwanda:** Law on the Protection of Intellectual Property of 31<sup>st</sup> March 2008
- **United States:** Copyright Law of the United States and Related Laws Contained in Title 17 of the United States Code

---

<sup>194</sup> The analysis of the national laws has benefited from the help of the following experts: Alberto Cerda (Chile), Heyyoon Choi (Korea), Jessica Coates (Australia), Prof. Andrew Christie (Australia), Andres Guadamuz (Costa Rica), Marisella Ouma (Kenya), Prof. Marco Ricolfi (Italy), Prof. Thomas Riis (Denmark), Manuela Rotolo (Brazil), Myriam Sanou (for the analysis of the OAPI provisions, Rwanda, Algeria and Kenya), Stefano Sciacca (Italy), Kuljit Singh (Malaysia), Prof. Hong Xue (China)

ANNEX I – Composition of the Public Domain

Country	Definition of PD	Ontological PD	Subject-matter PD			Temporal PD	Policy PD		Voluntary PD
			Originality	Fixation	Foreign works		Official texts	Other exclusions	
<b>Algeria</b>	National literary and artistic works whose term of protection has lapsed (art. 8)	Ideas (not explicit) News of the day (art.47)	Not original works (art. 3 of the Law)	NO	foreign works not covered by International Treaties (art.162)	- works whose author(s) died more than 50 years ago (art. 54-55) - collective works, pseudonymous and anonymous works, audiovisual works, posthumous works published more than 50 years ago (art. 56-58, 60) - photographs and works of applied art created more than 50 years ago(art. 59)	Laws, regulations, administrative decisions of public bodies, court decisions, and the translation thereof (art.11)	-	C opyright relinquishment  Uncertain

<b>Australia</b>	-	Ideas (not explicit)	Not original works (sec. 32)	Unfixed works	Foreign works not covered by applicable international treaties	<ul style="list-style-type: none"> <li>- works whose author(s) died more than 70 years ago (sec. 33)</li> <li>- works first published after the death of the author and more than 70 years ago</li> <li>- anonymous/pseudonymous works published more than 70 years ago</li> <li>- sound records, films published more than 70 years ago (if made after 1 May 1969)</li> <li>- 50 years from making or first publication for material made for a Commonwealth or State government department or agency</li> <li>- works published before 1955 and whose author died before 1955</li> <li>- anonymous and pseudonymous works published before 1955</li> <li>- photographs taken before 1955</li> </ul>	NO (Crown copyright)	-	Uncertain
------------------	---	----------------------	------------------------------	---------------	--	---	----------------------	---	-----------

<p><b>Brazil</b></p>	<p>Art. 45:          - works whose protection has expired          - works of author deceased without heirs          - works of unknown author (folklore)</p>	<p>- ideas, normative procedures, systems, methods or mathematical projects or concepts as such; (art.8 I)          - diagrams, plans or rules for performing mental acts, playing games or conducting business (art. 8 II)          - information in common use such as that contained in calendars, diaries, registers or legends (art. 8 V)          - the industrial or commercial exploitation of the ideas embodied in works (art. 8 VII)          - scientific / technical content of works (art. 7(3))</p>	<p>Not original works (not explicit)</p>	<p>-</p>	<p>- foreign works not covered by International Treaties or from countries not applying protection to Brazilian authors (art.1)</p>	<p>- titles of periodical publications (after one year or two years for annual publications) (art. 10)          - works whose author(s) died more than 70 years ago (art.41-42)          - anonymous/ pseudonymous works published more than 70 years ago (art.42)          - audiovisual and photographic works disclosed more than 70 years ago (art.44)          - works belonging to the public domain on June 20, 1998</p>	<p>- works that are merely subsidized by the union, the states, the federal district or the municipalities (art.6)          - the texts of treaties or conventions, laws, decrees, regulations, judicial decisions and other official enactments (art. 8 IV)</p>	<p>- works of author deceased with no heirs (art. 45)          - works of unknown authors subject to the legal protection or ethnic and traditional lore (art.45)          - blank forms intended for completion with all kinds of scientific or other information, and the instructions appearing thereon (art. 8 III)          - names and titles in isolation (art. 8 VI)</p>	<p>Uncertain</p>
----------------------	---	--	--	----------	---	---	--	--	------------------

<p><b>China</b></p>	<p>-</p>	<p>-Ideas (art.3) - news on current affairs (art. 5(2)) - calendars, numerical tables and forms of general use, and formulas (art. 5(3))</p>	<p>Not original works</p>	<p>-</p>	<p>foreign works not covered by International Treaties (art.2)</p>	<p>- works whose author died more than 50 years ago - works owned by legal entities, created in employment, cinematographic and photographic works published more than 50 years ago</p>	<p>laws; regulations; resolutions, decisions and orders of State organs; other documents of a legislative, administrative or judicial nature; and their official translations (art.5(1))</p>	<p>- works the publication or distribution of which is prohibited by law (art.4)</p>	<p>Uncertain</p>
<p><b>Costa Rica</b></p>	<p>-</p>	<p>Ideas, processes, methods and mathematical concepts as such (art. 1) News of the day (art.67)</p>	<p>Not original works (art.1)</p>	<p>-</p>	<p>foreign works not covered by International Treaties (art.3)</p>	<p>- works whose authors died more than 70 years ago (art.58-59) - dictionaries, encyclopaedias and collective works published more than 70 years ago (art.60) - cinematographic works made available to the public more than 70 years ago (art.61) -anonymous and pseudonymous works published more than 70 years ago (art.62) - State works published more than 25 years ago (art.63)</p>	<p>Uncertain</p>	<p>- works whose author died without heirs and not inherited by the State (art.66)</p>	<p>Uncertain</p>

<b>Denmark</b>	-		Ideas (art.1)	Not original works	NO	Non EU foreign works not covered by International Treaties (art.87-88)	- works whose authors died more than 70 years ago (art.63(1)) - anonymous and pseudonymous works made public more than 70 years ago (art.63(2)) - works of unknown authorship not been made public and created more than 70 years ago (art.63(4))	Acts, administrative orders, legal decisions and similar official documents (art.9)	-	Uncertain (probably no)
<b>France</b>	-		Ideas News information	Not original works	NO	Works from a country that does not grant sufficient protection to French works (L.111-4)	- works whose author(s) died more than 70 years ago (L.123-1 & 123-2) - anonymous, pseudonymous and collective works published more than 70 years ago (L.123-3)	Legislative acts and regulations, court decisions, works with a normative value	-	Uncertain
<b>Italy</b>	-		Ideas News	Not original works (except non original photographs protected for 20 years – art.87)	NO	foreign works not covered by International Treaties or from countries not granting protection to Italian works (art.185-187)	- works whose authors died more than 70 years ago (art.25-26) - collective works, anonymous and pseudonymous works published more than 70 years ago (art.26-27)	Official acts of State and public administrations	-	Uncertain



<p><b>Kenya</b></p>	<p>Art.45:          - works whose terms of protection have expired          - works in respect of which authors have renounced their rights          - foreign works which do not enjoy protection in Kenya</p>	<p>Ideas          Information and news</p>	<p>Not original works</p>	<p>Unfixed works</p>	<p>foreign works not covered by International Treaties (art. 23(1))</p>	<p>Art. 23(2)          - works whose author died more than 50 years ago          -audiovisual works and photographs created or made available more than 50 years ago          - sound recordings and broadcasts recorded or broadcasted more than 50 years ago          - anonymous and pseudonymous works published more than 50 years ago (art.23(3))          - works created on commission for the Government made more than 50 years ago (art. 25(2))</p>	<p>Official acts</p>	<p>-</p>	<p>- works in respect of which authors have renounced their rights if made in writing and made public (art. 45 (1)b &amp; (2))</p>
---------------------	---	--	---------------------------	----------------------	---	--	----------------------	----------	--

<p><b>Korea</b></p>	<p>-</p>	<p>Ideas News reports and simple facts</p>	<p>Not original works</p>	<p>NO</p>	<p>foreign works not covered by Internationa l Treaties (art.3)</p>	<p>- works whose authors died more than 50 years ago (art. 39) - anonymous and pseudonymous works made public more than 50 years ago (art.40) - works made by an employee in the course of his duties made public or created more than 50 years ago (art.41) - cinematographic made public or created more than 50 years ago (art.42)</p>	<p>Art.7 - Constitution, laws, treaties, decrees, ordinances and rules -Notices issued by the state or local government - court decisions - translations or compilations of such official acts produced by the state or local government</p>	<p>- works whose author dies without heirs (art. 49(1)) - works belonging to a legal person that is dissolved (art. 49(2))</p>	<p>Uncertain</p>
---------------------	----------	--	-------------------------------	-----------	---	---	--	--	------------------

<p><b>Malaysia</b></p>	<p>-</p>	<p>ideas, procedure, method of operation or mathematical concept as such (sec. 7(2A))</p>	<p>Not original works (sec. 7(3)a)</p>	<p>Unfixed works (sec. 7(3)b)</p>	<p>foreign works not covered by International Treaties nor by a specific regulation adopted by the competent Minister (art. 59A)</p>	<p>- works whose authors died more than 50 years ago (sec. 17(1))          - anonymous/pseudonymous works published or made available more than 50 years ago (sec. 17(3))          - sound recordings published or fixed more than 50 years ago (sec. 19)          - broadcasts made more than 50 years ago (sec.20)          - films published more than 50 years ago (sec.22)          - works of Government and international bodies published more than 50 years ago (sec.23)</p>	<p>-</p>	<p>-</p>	<p>Uncertain</p>
------------------------	----------	---	--	-----------------------------------	--	---	----------	----------	------------------

<p><b>Rwanda</b></p>	<p>- works whose terms of protection have expired - foreign works (art. 6(9))</p>	<p>Art. 198: - idea, procedure, system, methods of operation, concepts, principles, discovery of mere data, even if expressed, described, explained, illustrated or embodied in a work - Published daily news or news communicated to the public</p>	<p>Not original works (art. 195)</p>	<p>-</p>	<p>foreign works which do not enjoy protection through an international instrument or whose country does not grant equivalent protection to Rwanda works (art. 8)</p>	<p>- works whose authors died more than 50 years ago (art. 217-218) - anonymous / pseudonymous works published, made or made available more than 50 years ago (art.219) - collective works, audiovisual works and works published after the death of the author, published, made or made available more than 50 years ago (art.220) - works of applied art made more than 25 years ago (art.221)</p>	<p>Official texts of legislative, administrative or judiciary nature and any translation (art. 198)</p>	<p>-</p>	<p>Uncertain</p>
----------------------	---	--	--------------------------------------	----------	---	--	---	----------	------------------

<p><b>United States</b></p>	<p>-</p>	<p>idea, procedure, process, system, method of operation, concept, principle, or discovery (§102(b))</p>	<p>Not original works (§102(a))</p>	<p>Unfixed works</p>	<p>Published foreign works which do not enjoy protection through an international instrument or not covered by a Presidential proclamation (§104)</p>	<p>- US Works created after January 1, 1978, whose author died more than 70 years ago                  - US anonymous / pseudonymous works, works made for hire, first published more than 95 years ago or created more than 120 years ago.                  - US works created but not published or registered before January 1, 1978, whose author died more than 70 years ago (but not in the public domain before 2048 when republished before 2003)                  - US works published before 1978 with a proper notice, and published more than 95 years ago.                  - US works published from 1923 through 1977 without a copyright notice                  - US works published from 1923 through 1963 with a copyright notice but whose copyright was not</p>	<p>works of the United States Government (§105)</p>	<p>Infringing derivative works</p>	<p>Works dedicated to the public domain</p>
-----------------------------	----------	--	-------------------------------------	----------------------	---	---	---	------------------------------------	---

## ANNEX II - Encroachments upon public domain

<b>Country</b>	<b>Perpetual Moral right</b>	<b>Public domain payant</b>	<b>Reconstitution of copyright</b>	<b>Privacy right</b>	<b>Related rights</b>	<b>Technological measures</b>
<b>Algeria</b>	YES	YES (limited to for-profit exploitation)	NO	-	Performers, Phonogram and film producers, broadcasters	
<b>Australia</b>	NO	NO	NO	-	Sound recordings, cinematograph films, television and sound broadcast, published edition of works	Only TM applied to copyrighted works
<b>Brazil</b>	YES	NO	NO	-	Performers, Phonogram producers, broadcasters	Only TM applied to copyrighted works
<b>Chile</b>	YES (controversial)	NO	NO	-	Performers, Phonogram producers, broadcasters	NO protection of TPM
<b>China</b>	YES (save for divulgation right)	NO	NO	-	Performers, Phonogram and film producers, broadcasters	Only TM applied to copyrighted works
<b>Costa Rica</b>	YES	NO	NO	-	Performers, Phonogram and film producers, broadcasters	

<b>Denmark</b>	YES (only if cultural interests are harmed)	NO	Protection of 25 years in posthumous works	-	Performers, Phonogram and film producers, broadcasters Photographs Sui generis rights in databases	Only TM applied to copyrighted works
<b>Country</b>	<b>Perpetual Moral right</b>	<b>Public domain payant</b>	<b>Restitution of copyright</b>	<b>Privacy right</b>	<b>Related rights</b>	<b>Technological measures</b>
<b>France</b>	YES (limited if abuse)	(only for works whose country do not grant sufficient protection to French works, but never applied)	Protection of 25 years in posthumous works	-	Performers, Phonogram and film producers, broadcasters Sui generis rights in databases	Only TM applied to copyrighted works
<b>Italy</b>	YES	Abrogated in 96	- Protection of 25 years in posthumous works -protection of 25 years in critical publication of public domain works	- use of public domain confidential or private letters subject to family's consent	Performers, Phonogram and film producers, broadcasters Sui generis rights in databases Unoriginal photographs	Only TM applied to copyrighted works
<b>Kenya</b>	YES	YES	NO	-	Performances, sound recordings, broadcast	Only TM applied to copyrighted works
<b>Korea</b>	NO	NO	NO	-	performances, phonograms and broadcasts	Only TM applied to copyrighted works
<b>Malaysia</b>	NO	NO	NO	-	Performers, sound recordings, films, broadcasts	Only TM applied to copyrighted works

<b>Ruanda</b>	YES	YES (for-profit exploitation)	NO	-	Performers, phonogram producers, broadcasters	Only TM applied to copyrighted works
<b>United States</b>	NO	NO	NO	-	Sound recordings	Only TM applied to copyrighted works



## ANNEX III - Positive protection of public domain:

<b>Country</b>	<b>Definition of PD</b>	<b>Specific protection</b>	<b>Public domain payant</b>	<b>Protection by case law</b>
<b>Algeria</b>	Literary and artistic works whose term of protection has lapsed (art. 8)	-	YES	
<b>Australia</b>	-	-	NO	
<b>Brazil</b>	- works whose protection has expired - works of author deceased without heirs - works of unknown author (folklore) (art. 45)	-	NO	
<b>Chile</b>	Art. 11 (patrimonio cultural comun): - Works whose protection has expired - Works of unknown authors (incl.. Folklore) - Works whose author have abandoned copyright - foreign Works	- free use by anyone - criminal offences envisaged to prohibit the false attribution or the reclaim of exclusive rights in PD works	NO	
<b>China</b>	-		NO	
<b>Costa Rica</b>		Free use of PD works	NO	
<b>Denmark</b>	-		NO	
<b>France</b>	-		NO	Emerging case law
<b>Italy</b>	-		NO (abrogated)	

<b>Country</b>	<b>Definition of PD</b>	<b>Specific protection</b>	<b>Public domain payant</b>	<b>Protection by case law</b>
<b>Kenya</b>	art. 45(1): works whose terms of protection have expired; foreign works which do not enjoy protection in Kenya		YES	
<b>Korea</b>	-		NO	
<b>Malaysia</b>	-		NO	
<b>Ruanda</b>	Art. 6 (9): works whose terms of protection have expired; foreign works which do not enjoy protection through an international instrument	Part of the national heritage and culture (art. 202)	YES	
<b>United States</b>			NO	No monopoly by State Law

[End of document]