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7 Draw me a public domain

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'Draw me a sheep!'
...
'This is only his box. The sheep you asked for is inside.'
(Antoine de Saint Exupéry, *The Little Prince*)

Introduction

Like the sheep of the Little Prince, the public domain is presumed to be existing but is actually very hard to draw precisely. It is mostly viewed as a mere box into which the objects once protected by intellectual property, or never liable to its protection, are deemed to be 'falling'. But no one knows what happens next, after the fall: what becomes of the sheep once it is inside the box?

So far, 'European Intellectual Property' (if one can consider there is a common body of intellectual property in Europe, whether in legislation or in legal scholarship), has had little impact on issues related to the public domain.[3] The question has never been evoked as such during the harmonisation of the field; case-law is lacking; doctrine is only just emerging.[4] In contrast, in the United States, the public domain has been a favourite theme for scholarly research and writing in recent years: many have denounced the 'enclosure of public domain'[5] or have pleaded for its defence against undue appropriation.[6]

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3 The hypothesis of a positive status for the public domain that is developed in the present contribution will be specifically limited to its impact on copyright rules for mere material reasons even though the proposal sets out to analyse its relationship also with other intellectual property rights.

4 See, for instance, B. Hugenholtz and L. Guibault (eds), *The Public Domain of Information*, The Hague: Kluwer Law International, 2006 (including many contributions from US scholars); S. Choisy, *Le domaine public en droit d'auteur*, Paris: Litec, 2002.

5 As it was first phrased by one of the seminal scholarship works about the shrinking public domain, see J. Boyle, 'The Second Enclosure Movement and the Construction of the Public Domain', 66 *Law and Contemporary Problems* 33 (2003).

6 D. Lange, 'Recognizing the Public Domain', 44 *Law and Contemporary Problems* 147 (1981); J. Litman, 'The Public Domain', *39 Emory Law Journal* 965 (1990); J. Boyle, 'A Politics of Intellectual Property: Environmentalism for the Net?',

Central to most of these writings is the importance that the public domain has in a democratic society where cultural diversity and freedoms to create, to innovate and to take part in the cultural environment are considered as fundamental objectives. Current reflections about the public domain recall that a strong and vivid public domain is a pivotal element of the common heritage of humanity and that, consequently, it should be made available to all and be preserved from undue privatisation and encroachment.

Such thinking relies on the idea, too often forgotten, that the public domain was the beginning of intellectual property, and of copyright. For copyright is forged from pieces of land taken from the public domain. Public domain, the absence of any restrictions on the products of the mind and of creation, or freedom to copy, is the rule while intellectual property rights are the exception. Yet, the territory of intellectual property has constantly grown and expanded over the realm of the public domain to such an extent that the public domain increasingly looks like the exception.[7] The extension of the duration of copyright, the creation of new objects of rights and the broad interpretation of the criteria for protection were milestones in that expansion. The intellectual commons, as some have started to dub the contents of the public domain, are increasingly at risk of being commodified, of falling into the private domain of intellectual property rights.

Current scholarship on the public domain, despite its wishful thinking about the need to preserve the public domain, does not endeavour to draw it precisely, nor the box that should be containing it.

The objective of the present contribution is to try to sketch the first lines of a proper regime for the public domain, to build the rules through which it could resist encroachment by private property. We will not specifically address this phenomenon of constant extension of the principles of intellectual property: this point has already been made obvious by various publications.

47 *Duke Law Journal* 87 (1997); Y. Benkler, 'Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain', 74 *New York University Law Review* 354 (1999); R. Coombe, 'Fear, Hope, and Longing for the Future of Authorship and a Revitalized Public Domain in Global Regimes of Intellectual Property', 52 *DePaul Law Review* 1171 (2002–3), p. 1173; R. Merges, 'A New Dynamism in the Public Domain', 71 *University of Chicago Law Review* 183 (2004); N. Ochoa, 'Origins and Meanings of the Public Domain', 28 *Dayton Law Review* 215 (2002); as well as all the contributions at the Public Domain conference, held in Duke University in 2002 and published in 66 *Law and Contemporary Problems* (2003); E. Samuels, 'The Public Domain in Copyright Law', 15 *Journal of the Copyright Society* 137 (1993); K. Aoki, 'Authors, Inventors and Trademarks Owners: Private Intellectual Property and the Public Domain', 16 *Columbia – VLA Journal of Law and the Arts* 1 (1993).

7 Honoré de Balzac, *La peau de chagrin*.

Neither will we analyse the 'composition' of the public domain, save for delineating the elements which a new regime of public domain should encompass.

The difficulty is that, in most countries, the public domain receives no positive definition, either in its contents, or in its regime. The growth of intellectual property rights has led to the paradoxical situation where the principle has become an obscure notion and the exception to the rule of reference.

The starting point of this chapter is the impression that current depictions of the public domain tend to blur the real nature thereof and weaken attempts to preserve it. If many efforts to design the boundaries of public domain seem to have been unsuccessful, at least to draw a single image of 'the' public domain, this may be due to the erroneous idea that there are things which, by their very nature, cannot be owned. This romantic view of the public domain, as an open field[8] where everyone can go, is appropriate neither to describe the reality of the actual trend of privatisation of the commons, nor to struggle against it. There is no 'natural state' of the public domain; its composition is fundamentally a matter of political choice. Only an attribution of a specific regime to things which would otherwise be subjected to privatisation on economic grounds can turn the situation round. This political position is certainly a function of the economic and cultural interests of each State and therefore highly variable in time and space.

The imprecision of the public domain may be the cornerstone of its vulnerability, as is the metaphor used to depict it: as if by its very name, the public domain were a fortress immunised from any commodification and privatisation. We will demonstrate in the first section of this chapter that the conception of the public domain is fallacious in the sense that the actual regime of the public domain is one that operates to facilitate its ongoing encroachment. A first and necessary step in the construction of a solid regime for the public domain would thus be to deconstruct the way we conceive and make it operate in copyright laws.

Based on this deconstruction, we will, in Section 2, adopt a new definition for the public domain by trying to focus on the function of a desirable public domain and to figure out what 'belonging' to the public domain actually means, once an element is considered to be part of it. To achieve this goal, we will suggest that the public domain has not only to be looked at through the lens of intellectual property, as a receptacle of a formerly protected work or as a dead zone of protection, but should be considered on its own, as a positive notion which needs to be defined and protected. On these grounds, a specific regime for the public domain could be set up.

An adequate regime for preserving the public domain and the free availability of its elements should answer the following questions: How can this

8 'Les idées sont de libre parcours', as Desbois used to say.

freedom be maintained and the shrinking of the public domain be stopped? Has the public domain to be made legally 'immune' from appropriation, and if so, how? How should the 'non-appropriation' rule be sustained by a legal regime protecting the public domain? How should the effective accessibility of the public domain be guaranteed?

1. The vacuity of the public domain regime

1.1. The current definition of the public domain

At the beginning of the copyright era, the ineluctable fall of works into the public domain, once a (short) period of time had lapsed, was considered as being a key counterpart of the property grant, as being one side of the trade-off embedded in copyright. The limitation of intellectual property in time was indeed to constitute a public domain where contents could be used freely by members of the public. It aimed at achieving a balance between proprietary protection and public availability, thus creating two separate domains, constituted by the passing of time. The erection of private property was only a limited intrusion into the public domain that should remain the norm. J. Ginsburg has shown that this predominance of the public domain was present in the early regimes of both literary and artistic property both in France and in the United States.[9] In 1774, in *Donaldson v Beckett*,[10] one of the seminal cases in copyright in the UK, the House 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. The need to protect the public domain, as constructed through the rule of limited-time protection, was strong enough to deny any attempt at extended commodification.

Despite this strong emphasis on the public domain, no rule appeared in the early copyright laws to make this public domain effective, save for the limited duration of the right.

First the public domain was not inscribed as such in the copyright regime. Even today, the terms 'public domain' rarely appear in the provisions of the law and no specific rules are attached to the public domain or to its elements. Due to a lack of legal definition, the contents of the public domain are diversely determined. The public domain in copyright is generally defined as the realm of elements that are not or no longer protected, whether because they are not liable to protection by copyright (as with ideas, or works that are not

[9] J. Ginsburg, 'A Tale of two Copyrights: Literary Property in Revolutionary France and America', in B. Sherman and A. Strowel (eds), *Authors and Origins – Essays on Copyright Law*, Oxford: Clarendon Press, 1995, p. 145.

[10] 1 Eng. Rep. 837 (HL 1774).

original) or because the protection of copyright has expired (works whose author has died more than 70 years ago). Some even restrict that definition to the latter category, to works that were protected but, due to the lapse of time and expiration of the term of copyright protection, have 'fallen' into the public domain.[11] Nevertheless, many agree that the public domain comprises all intellectual assets that are not protected by copyright, thereby opting for a definition that is the inverse of the scope of copyright protection.

On the other hand, the terminology used, that of the 'public domain', is a powerful one that still seems to convey the early conception of a realm of elements protected by and isolated from private property. The public domain is a very abstract idea shaped in a very concrete territorial metaphor. The 'domain' evokes a particular place, clearly bordered, almost tangible. In most writings on the public domain, the metaphor is almost taken literally: the public domain is that territory where no intellectual property rights apply, a domain where anybody is free to enter and to help herself. As to the attribute of 'public', it sounds as if, by nature, the elements concerned were a public property, collectively enjoyed, as if the publicity of the domain was, in itself, sufficient to ensure public access by anybody thereto. The terminology employed is one of the main causes of the somewhat naïve rhetoric that has evolved around the notion of the public domain.

1.2. The limits of such definition and its defensiveness against commodification

This metaphor, in which all discourse on the public domain is rooted, is limited and fallacious on several counts.

First, opposing the public domain to the private domain of copyright gives only a partial view of what is not touched upon by the monopoly granted by copyright and of the freedoms enjoyed by the public. Such a traditional view of the public domain does not include copyright exceptions or any use of a protected work that is free. Only elements that are not protected by copyright, whatever the circumstances of their use, are deemed to belong to the public domain. This limitation of the public domain to unprotected elements portrays the public domain as a place separated from intellectual property rights. The private domain of intellectual property, characterised by exclusive rights, monopolies, and authorisation/prohibition schemes, appears to be fenced off from the public domain, as if both domains were contiguous, though separate, as if the domain of commoditised and privatised assets faces the domain of freely available resources, with no connection or relation between them. On one side, there would be the perimeter of intellectual property protections,

[11] Choisy, *op. cit.*

where copyright's exclusive rights would be the sole area for commodification process and action, whereas, on the other and opposite side, the public domain, where unprotected elements or the commons would lie, would be the only place where artistic creation could take place without infringing the right held by an author. As a consequence, critics of the expansion of copyright are easily brushed aside by the proponents of a strong copyright regime using the following argument: commodification by nature occurs in the field of copyright, leaving the public domain as such untouched.

Another consequence of a reverse-copyright definition of the public domain is equally worrisome. The touchstone of the definition being the lack of copyright protection, it does not enable the public domain to be viewed as a collection of elements to which a rule of inappropriability would apply. The negativity of the definition does not help to give status to the public domain, but only reinforces its perception as an empty territory where no protection applies, either through an intellectual property right, or by a rule of positive protection against private reservation. One can say that the public domain is a commons, in the sense of the *Code Civil*, where commons are defined as 'goods that are owned by nobody and whose use is common to all'. Having said that, that does not ensure that anybody could easily access and enjoy any element of the public domain, nor that such an element would be buttressed against any reservation, by contract or by a technological measure. Yet, the terminology of the public domain seems to indicate the public nature of the resources contained therein. The use of the word 'domain' itself points to a separate and enclosed place and its qualification as 'public' tends to label the public domain as naturally and inherently immune from private reservation, which would contradict the negative definition of the term. The ensuing binary rhetoric of 'the intellectual property v the public domain', clothed with the metaphor and terminology of the public domain, hides the real epistemology of the public domain where private and public are much more intertwined.

Indeed, as it is conceived in copyright law, the public domain does not at all create a separate site not liable to any privatisation, although the terminology of the public domain inclines to signify it. Only a few elements of the so-called public domain are completely safe from falling into the realm of intellectual property.[12] Contrary to what the public/private logic suggests, the

[12] See the elements that are explicitly excluded from the ambit of copyright protection, for instance official texts of a legislative, administrative and legal nature (save for the Crown's Copyright in the UK), as enabled by article 2(4) of the Berne Convention. News of the day can equally be deemed to be a legal exclusion from copyright protection, or to be an application of the idea/dichotomy expression. Yet, even in this case, commodification is not rendered impossible through for example database *sui generis* protection.

public domain often serves private property[13] and this interdependent relationship is rooted in the history and economics of intellectual property.[14] Actually, commodification is equally at work when granting exclusive rights on some intellectual creations *and* when leaving other intellectual productions in what is called the public domain. This can be better explained by considering some different elements of what is called the public domain.

For example, the idea/expression dichotomy works as a first exclusionary principle. Only the expression is protected by the copyright; the idea is said to be free for everybody to use. The notion of 'ideas' as unprotected in copyright also covers facts, principles, methods, news of the day, mere information or concepts, as noted by article 9(2) of the TRIPS Agreement and by the article 2(8) of the Berne Convention. As a second step, copyright law only welcomes within its ambit works that are considered original, even though that notion is rather loosely defined. It is rare that the law defines the notion of originality, save for the definition ('the author's own intellectual creation') that has been applied, in the European Union, to software, databases and photographs.

Rather than delineating a public domain as a field free from reservation, the joint operation of the two rules (idea/expression dichotomy and criteria of originality) works by leaving ideas, not already expressed in an original form, in a fallow land where they are only waiting for human authorship to save them from an 'un-property' destiny.

Besides, originality as a criterion for propelling a creation into copyright protection conveys a predominant idea in intellectual property, i.e. the principle that any creation due to human agency should be entitled to private protection. The threshold imposed by originality is indeed very low as it suffices that the work bears, depending on the country of protection, either the imprint of the personality of the author or some skill and labour. The trigger for protection is thus highly subjective while being very minimal given the construction of originality as any intellectual involvement, any stamp of personality imposed upon nature.[15]

The preceding observations are in line with the traditional Lockean justification of property right, according to which the labour of a human being grants him property in the product of his labour, any resource being free for every man to appropriate through his labour. Rooting the justification for copyright in the theory of Locke, as the early laws on copyright did, shapes the public domain

[13] A. Chander and M. Sunder, 'The Romance of the Public Domain', 22 *California Law Review* (2004), p. 1352.

[14] C. Rose, 'Romans, Roads, and Romantic Creators: Traditions of Public Property in the Information Age', 66 *Law and Contemporary Problems* 89 (2003), at 96.

[15] B. Edelman, 'The Law's Eye: Nature and Copyright', in B. Sherman and A. Strowel, *Of Authors and Origins*, Oxford: Clarendon Press, 1995, p. 83.

as a 'private-property-to-be'. It is then all the more difficult to describe the public domain as containing, *per se*, the elements enabling to limit the commodification by intellectual property. No positive regime of the public domain can be obtained from the elements defining the ambit of copyright.

The very structure of copyright law sustains this ambiguity and explains, for example, the difficulty of granting a right over traditional knowledge and/or defending it from undue appropriation. Traditional knowledge and folklore (except where traditional knowledge is subject to customary laws granting other forms of ownership and rights) have some difficulty in enjoying copyright (and patent) protection, since they are generally not new but ancient, not individual but collective, not vested with authorship but largely mixed with nature and tradition. Public domain has always been the repository of traditional knowledge and folklore in classical views of intellectual property, which facilitates its exploitation and appropriation by industrial entities.[16] It shows that the (now global) regime of intellectual property denies exclusivity to other forms of intellectual production, knowledge or cultural expression, and uses the empty concept of public domain as a lever to consolidate the private rights of others.[17]

Another example can be found in the duration of copyright. A key part of the public domain encompasses works which used to be protected but have fallen into the public domain after the lapse of copyright duration. Whereas the passage of time was considered in the early enactment of copyright laws as a public interest rule ascertaining the rapid constitution of a public domain, the term of copyright has been constantly and regularly lengthened without any due consideration of the ensuing status of the public domain.[18] Many reasons have been advanced to justify this repeated extension,[19] but strikingly, the

[16] T. Cottier and M. Panizzon, 'Legal Perspectives on Traditional Knowledge: The Case for Intellectual Property Protection', in K. Maskus and J. Reichman (eds), *International Public Goods and the Transfer of Technology under a Globalized Intellectual Property Regime*, Cambridge: 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 Maskus and Reichman, *op. cit.*, pp. 602–4; A. Chander and M. Sunder, op. cit., at p. 1331; Carlos M. Correa, *Traditional Knowledge and Intellectual Property – Issues and Options Surrounding the Protection of Traditional Knowledge*, Geneva: Quaker United Nations Office, 2001.

[17] Chander and Sunder, *op. cit.*, at p. 1355.

[18] The EU Directive on copyright duration, adopted in 1993, extended the term of the right to 70 years after the death of the author without much consideration of its effect on the public domain. To keep pace with the European extension, the United States has similarly lengthened the duration of copyright by the Copyright Extension Act of 1998 (known also as the Sony Bono Act).

[19] Some are related to the protection of the creators and their heirs and their participation in the benefits of exploiting the works, but most of the time, the demand for extended protection comes from industry, hence from the market, which would like to enjoy an unlimited monopoly over some works.

adverse effect on the limitation of the public domain has rarely been evoked and weighed in the balance. When the US Copyright Term Extension Act was challenged before the Supreme Court on the basis of its unconstitutionality, the latter upheld the law with only a meagre reference to the effects of extended duration on the public domain.[20] Instead of adhering to a view of the term of protection that would have drawn a clear line between protected works and the public domain as in *Donaldson v Beckett*, the Supreme Court admitted that the duration of copyright could be regularly extended as long as the Congress could proffer a rational basis for that extension.[21] That implies that the public domain, once constituted by the rule of the term of protection, is not immutable, that it does not take its definitive form once for all. The passing of time does not hence form a solid buttress against attempts at an extended commodification.

Another example of the vacuity of public domain status relates to the exclusion of works from copyright protection on the grounds of public policy concern, for example the exclusion of official texts where the general interest of making sources of law available to citizens is more important than the copyright of their authors. It would be logical that such elements are in the public domain and should resist appropriation. However, the seemingly positive nature of that public domain is thwarted by the possible reservation, through a database right, of a collection of such official texts. Here the human intervention sufficient to remove data and information from the public domain should only be a financial or time investment devoted to obtaining and verification of the contents of the database, as it results from the criteria chosen by the Database Directive.[22]

Public domain emptiness can also be illustrated by the movement of open access in software or in other fields of creation for there is actually no scope for a rightholder to relinquish a work into the public domain by a voluntary

[20] 537 US 186 (2003).

[21] Economic needs are considered to be a particularly strong motive for extending protection. Delivering the opinion of the court, Justice Ginsburg notes that the task of defining the scope of the limited copyright monopoly assigned to Congress aims to give the public appropriate access to the works, hence to constitute an effective public domain of literary and artistic works. However, in the notion of appropriate access to copyrighted works, Justice Ginsburg insists upon the need for an appropriate protection of the work and of the copyright holders, namely referring to statements made by members of Congress that equate the duration to the 'necessary life of copyright', i.e. the term during which works will be commercially exploited (see Opinion of the Court, footnote 14).

[22] Database Directive 96/9, 11 March 1996, OJ L77/20, 27 March 1996.

act. Unlike other intellectual property rights such as patent or trademark,[23] the lack of exploitation of copyright has no consequences for the duration of protection. In the 'droit d'auteur' model, ownership is triggered by the mere act of creation. 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, costs, conflict with public policy which could possibly deter the author from being protected by a monopoly. Had he wanted not to be protected as such, the creator has no way of escaping from the legal pattern. In most of legislations, it is not clear whether the rightholder can renounce the full exercise of its exclusive rights. Even if one admits this relinquishment, the work now abandoned to the public domain is not protected by this new status against any attempt at appropriation.

The open access licences are in someways an expression of a voluntary or 'agreed' public domain.[24] Though the decision over making the work available still belongs to the author, the latter cannot reverse his choice once he has disclosed the work for an open use. Instead of enduring the loss of control after the term of copyright protection, the author decides to 'relinquish' the legal exclusivity he has received from the law, to offer common access to and/or use of his work. One can see in such licences nothing but an exotic form of assignment of copyright, or in the style of the expression 'copyleft' – a reverse notion of copyright. But because of the *de facto* irrevocability of consent in most licences, it is also possible to consider this phenomenon as a variant of the public domain, the start of which being triggered by the rightholder's will.[25]

However, in order to protect the work or its derivations from being commodified, the open access schemes rely on licences based on proprietary copyright and impose free access to the work and to its modifications. Such recourse to property rights and contractual tricks is a weak answer to the lack of positive status of public domain elements, since it does not confer the legal certainty that the public domain status would do and, by using the very tool that they are trying to fight, constitutes an ambiguous response to copyright expansion.[26]

To conclude on that point, the depiction of the public domain as an open territory, free for others to take, devoid of any idea of property or undue privatisation, as a global commons, beneficial to the informational, cultural or technological needs of the world, is to some extent a naïve perspective. There is as much of a commoditised view of intellectual production in the notion of the public domain as in the notion of the private domain of intellectual property. The evolution of the intellectual property regime shows that the public domain is not so much an open territory from which some limited lands are grabbed to form islands of exclusivity as a way of allocating rights of access to intellectual resources, whether in the form of exclusive property or in the form of non-exclusive liberties. A negative definition of the public domain considered as a default theory and not as an area reserved to collective use is thus not very helpful to preserve the public domain from an extension of the scope or duration of copyright or other property rights.

[23] For revocation of a trademark see e.g., article L714–5 French Intellectual Property Code.

[24] On the existence of an agreed upon public domain, see M. Clément-Fontaine, 'Les oeuvres libres', thesis, Montpellier, December 2006, not published, p. 420ff.

[25] Clément-Fontaine, *op. cit.*, p. 494.

[26] S. Dusollier, ' The Master's Tools v the Master's House: Creative Commons v Copyright', 29 *Columbia Journal of Law & Arts* 271 (2006).

2. A positive regime for the public domain

Most copyright laws are intrinsically unsuitable for preventing the elements of the public domain from being commodified either by those who are being granted an intellectual property monopoly or by the mere owners of the unique source of the element in a position to refuse access to others (owner of the material who can thus apply technical protection measures). The results are therefore the possibility that some may confiscate the common and shared use of the intellectual production, subject to a new or ongoing protection.

Regarding the lack of answers given by copyright legislation, in an attempt to suggest some of the principles that could contribute to building the foundations of a positive public domain, one must explore the possible solutions not only within the intellectual property system but also and, maybe to a greater extent, outside it.

This positive regime for the public domain should first determine the definition and contents of the public domain to be so protected (Section 2.1), the objective of protection pursued by such a regime (Section 2.2) before going into the detail of what such a regime might look like (Section 2.3).

2.1. A new definition: what public domain?

We have already said that the current definition of the public domain focusing on a lack of copyright protection was rather limited. The public domain is generally defined as encompassing elements that are not or no longer protected by copyright, hereby opting for a structural notion of the public domain.

Conversely, one can relate to the definition to the very function pursued by the notion of the public domain in the copyright regime. In our view, the public domain is the principle to which the private right of copyright derogates. Any limitation of copyright, whether in its existence or its exercise, should then be a return to the principle of the public domain.

From that perspective, one can say that the freedom to copy entailed by the public domain occurs at different places within the copyright regime, not only outside its scope of protection but also within the rules of protection itself,

namely in the gaps between the exclusive rights and the exceptions. Besides, if the ultimate objective of the public domain is to foster the availability of works, it does not matter that this availability is achieved through a rule of no protection or through a limitation of the exercise of the right.

This has been aptly described by J. Cohen[27] who proposes to switch, for strategic reasons, to another definition of the public domain that would no longer be centred around the lack of protection but would include all freely available resources for intellectual production, such as fair use or other copyright limitations and exceptions. J. Cohen suggests that the commons should be seen as a set of cultural and creative practices that would form a better basis on which to build a strong theory and protective regime of the public domain and argues for a new metaphor, that of the 'cultural landscape'.[28] If the function of the public domain is to enable productive practices, whether cultural, creative, or purely cognitive or consumptive, and to exempt them from the exercise of an exclusive proprietary right, it should include not only elements in which such rights are non-existent, but also resources or practices that are left untouched by the exercise of those rights.

The fact that the work is still somewhat protected and that its access might be open only to those who fulfil the conditions of the exception is of no importance. Many functions can indeed be assigned to the public domain: public access to culture, to information, sharing of the elements of common heritage, a source of inspiration for creators and the core element of the freedom to create. But most of these functions are intertwined: the creator has certainly been a reader before beginning to write, a mere part of the audience before composing a symphony. . . . The journalist using a piece of information in a newspaper article is both acting as an author – freedom to create – and as a messenger of content – freedom of expression, access to culture, etc.

From a sociological point of view, the commons or the public domain should be a field where the public can enter without stepping on the intellectual rights of anyone. Economically speaking, it should cover the assets or uses of such assets for which no transaction can take place. The public domain could thus greatly benefit from a definition that would include in its realm copyright exceptions and limitations. It would also come close to the definition of the public domain put forward by UNESCO as 'the realm of all works or objects of related rights, which can be exploited by everybody without any authorisation, *for instance*[29] because protection is not granted under national or international law, or because of the expiration of the term of protection'. Even though the two examples given refer to unprotected elements, the core definition, by emphasising exploitation without a need for authorisation could well encompass copyright exceptions or any other circumstances where a copyrighted work can be freely used.

Therefore, the public domain might comprise the following elements:

- elements not protected by copyright (ideas or non-original works);
- works whose term of protection has expired;
- works excluded from protection (official texts, the question of Crown in the UK should also be addressed);
- exceptions to the exclusive rights;
- freedom of use not covered by the exclusive rights (e.g. the right to intellectually enjoy and access the work that is not covered by any exclusive rights held by the author).

2.2. *The key objectives of a new regime of the public domain: what for?*

The first function of the public domain would be to enable and guarantee a free and equal use of some intellectual resources, whether the resource is *per se* not 'copyrighted' or its use open in some circumstances. If such a 'broad' approach of the public domain is to be favoured, the regime should guarantee both freedom and equality of access.[30] In order to achieve this goal, one might prohibit any kind of monopoly of the element 'included' within the public domain.

Repelling any monopoly over public domain resources can be accomplished through a compulsory rule rejecting 'exclusivity'.[31] In this way conflict with a subjective right, such as copyright on derivative work, trademark, or physical ownership, could be avoided. When the element is still protected by copyright but its use free under some circumstances, it is not so much exclusivity that should be forfeited as the possibility of excluding others from the use. For instance, as far as copyright exceptions are concerned, the rightholder still enjoys exclusivity over her work but has to admit a rivalry in the use covered by the exception.

Introducing shades into the public domain depiction and regime might also help to achieve its objectives. So far the public domain has been described as a mere entity, a kind of melting pot in which each element loses its individuality to become part of a whole. But one might imagine that positive protection of the public domain would have different layers depending on the functions allotted to it. Thinking of the public domain not as a horizontal

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27 J. Cohen, 'Copyright, Commodification, and Culture: Locating the Public Domain', in Hugenholtz and Guibault, *op. cit.*

28 Ibid., p. 38.

29 Emphasis added.

30 M.-A. Chardeaux, *Les choses communes*, Paris: LGDJ, 2006, no. 211. The author suggests considering the *droit moral* as a public policy regime corresponding to the second paragraph of article 714 of the Civil Code.

31 Like the '68 French motto, 'il est interdit d'interdire'.

notion but as a pyramidal one may refine the definition of a positive status: it may encompass various hypotheses for which the answers would differ, yet still remain within the public domain system.

Depending on the values that the public domain is supposed to be representing, the rules governing its mechanism may vary significantly. Is it really aimed at allowing public access for everyone to all its constituents? Or, on the contrary, is the public domain consistent with the idea of a selection of tolerated uses, of beneficiaries and/or of conditions of access? If the principle of such a choice is agreed upon, who will be entitled to decide it: the State, the rightholder or the public itself? All these questions make one wonder whether the public domain should be drawn as a monolithic framework or composed of concentric circles.

At least three concentric circles could compose the public domain.

Its 'hard kernel' would be constituted, as it is today, by productions of the human mind that still resist copyright – if not patent – i.e., ideas. For ideas, unlike works, are not *per se* subject to protection.

Obviously, even when such ideas take the form of original expressions and leave the public domain, the object of protection is a new one, i.e. an original work, keeping untouched the idea now contained or reworked in the work itself. In that sense the idea never really leaves the public domain field and can be used again by anyone anytime, as long as it remains abstract. Because of their ubiquity, ideas remain resistant to copyright protection focused on form and not on content.

It is nevertheless paradoxical that the exclusion-of-ideas principle, usually considered as being the milestone of the public domain is not even supported by a clear statement according to which ideas are never to be protected by copyright. This principle lies, *inter alia*, in the Software Directive but is not mentioned as such in the Berne Convention though article 2, paragraph 8 excludes 'news' (and not ideas) from its range of protection. Conversely, article 2 of the WIPO Copyright Treaty of 1996 explicitly excludes ideas, procedures, methods of operation or mathematical concepts from scope of copyright protection.

A second layer would be composed of other elements for which a public policy concern requires free access thereto and/or which should be immune from any exclusivity. The production of the mind could there be protected by copyright as to its criteria but its public utility is stressed. It encompasses non-original works, works in which copyright has expired, and works excluded from the scope of protection, such as official texts.

Whatever choice the legislation makes as to the extent, scope, and strength of the public domain, its hard kernel and its second circle may at least guarantee concurrent uses of the elements included. Such a level of competition presupposes the setting up of a system formally repelling exclusivity and easing common access.

One should nevertheless bear in mind a shortcoming of what is quite a radical vision of the public domain: the possible lack of incentives to innovate. For example, withholding from future creators any possible protection of their derivative work would go far beyond what is necessary to meet public domain requirements. The expression of the 'exclusion' rule might therefore take such a proportionality test into account.

Another layer of public domain could encompass elements at the periphery, receiving a lesser level of positive protection consisting of preserving the rivalry of uses or a rule of 'unexcludability'. There would lie the exceptions or the possibility of getting access to protected works in order to be able to read or view them. In comparison with the actual copyright regime, where such rivalry results for instance from recognition of an exception, but is not in itself protected, a positive regime for the public domain should ensure effective enjoyment and preservation of such free and rival use.

The regime should seek to exclude the possibility of constituting over public domain resources a reservation in contradiction to public domain status but would also vary along with its purposes. Depending on the type of elements concerned, this rule might be achieved by a prohibition of any exclusivity or by a mere prohibition on excluding others from the use. For instance, the absence of exclusivity means that some intangible elements should be formally excluded from any private system, in a similar way to the protection of the commons in environmental or public international laws.[32] Meanwhile, in the second circle, one might find items of the so-called public domain over which there continues to be a certain measure of control exercised by the rightholder. The obligation of maintaining the rivalry of use would not contradict a possible control by the State or an agency, either to protect the integrity of the work or to collect fees on its exploitation thereof in order to sustain the protection of the public domain status thereof.

2.3. The positive protection of the public domain: how?

This pyramidal view of the public domain where positive protection of its elements varies from a prohibition on regaining exclusivity to the obligation to sustain rival uses would require both the adoption of new rules in intellectual property laws and the setting up of the material conditions to effectively enable access to and enjoyment of public domain resources.

To ascertain public domain efficiency one might enforce these minimum principles through at least two ranges of rules: the first category would consist

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32 See for instance protection as a commons of the Antarctica, the seas, or the recent declaration of UNESCO about the human genome considered as the common heritage of mankind.

of impediments to monopoly; the second would enumerate the positive obligations required to achieve the goals allotted to the public domain.

2.3.1. The impediments to a regained monopoly over the public domain As a first, and key rule in securing the nucleus of the public domain against undue privatisation, a specific law – dedicated to its regime – must assert that some elements – ideas, news, and discoveries – are not subject to any kind of property whatsoever, and free for all.

The 'no' rules may for example consist of a clear prohibition on cumulating different layers of intellectual property rights over the same object.[33] Once copyright has been granted on a specific creation, one might consider that no trademark can be registered on this very creation after the term of copyright protection even by the author himself, if this trademark would prevent the free use of the sign as such. Though very carefully, the Directive on Designs and Models has already introduced a rule distributing the protections between designs and copyright. Previous disclosure of a work destroys its novelty, which renders impossible an extension of the duration of protection by an adjunct of design and model monopoly after the term of copyright. Such a system might also prevail between copyright and patent, as far as novelty is concerned.

It should be expressly mentioned in copyright laws that no monopoly or reservation can be regained on works that have fallen into the public domain, be it by the effect of the exercise of another copyright, by the deposit of a trademark or any other intellectual or material property right, or by a technological measure. This prohibition on cumulating other ways of reservation over what is not protected by copyright would be limited to the verification that the exercise of the right or of the factual control unduly impedes access to or enjoyment of the public domain element. For instance, a trademark might well cover a design no longer protected by copyright in the limits of the speciality of the trademark protection, but it should not grant a protection that exactly substitutes for the former protection of copyright and prohibits the use of the resource in all circumstances. Mickey Mouse, once it falls into the public domain (if ever!), or any other cartoon character, can serve as a trademark for specific products but its protection as a trademark cannot result in transforming users of Mickey for uses other than branding products covered by the trademark, and especially authors of derivative works, into infringers. Technological measures can encapsulate public domain elements but this factual control cannot deprive users from getting access to all copies of such elements, or from reproducing or communicating technically protected elements.

[33] See part II of the ALAI Congress, New York, 13–17 June 2001 Adjuncts and Alternatives to Copyright, ALAI, 2002.

This prohibition on reconstituting a monopoly over public domain assets is already applied by some case law, in copyright and more broadly in intellectual property. For example, a French tribunal has limited the exercise of the copyright of two authors of a contemporary work of art included in a public and historic place of Lyon, on the ground that entitling them to prohibit the reproduction of their work on postcards would impede the free reproduction of the historical palaces surrounding it.[34] The key argument of the decision was that the public domain status of such buildings constrains and limits the exercise of the copyright held by the authors of a derivative work to the extent required by the necessity of preserving free access to and reproduction of this public domain. The decision was confirmed on appeal but on different grounds, as if this reasoning on the public domain was too dangerous to handle.[35]

The European Court of Justice has also declined to protect some three-dimensional trademarks where the result would be to prevent free access to and use of the element in question, not protected by a patent.[36] In its conclusion in the *Linde* case, the General Advocate relied on the fact that 'the public interest should not have to tolerate even a slight risk that trade mark 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'.[37]

A last example of this prohibition on regaining a lost monopoly is given by the French controversy over the scope of 'material property' and its extension to the image of a 'thing', that is to say to the intellectual elements embedded in material objects. For some time recognised as an attribute of property right, the exclusive right to control the image, and thus the reproduction, of a material property has finally been rejected by the Court of Cassation.[38] The claim of the owner of the material was actually an important threat to the principle of common access that underlies the intellectual public domain. One way to construe the Cassation decision is to admit that the Court has recognised that the status of the public domain prevails over any attempts to invoke a new monopoly in intellectual work.[39] One commentator has referred to article 4 of

[34] TGI Lyon (1ère ch.), 4 April 2001, *RIDA*, October 2001, note Choisy.

[35] Lyon, 1ère ch., 20 March 2003, *CCE*, September 2003, p. 23, note Caron.

[36] CJCE, *Linde AG, Winward Industries Inc. and Radio Uhren AG*, 8 April 2003, C-53/01 to C-55/01.

[37] Opinion of Advocate General Ruiz-Jarabo Colomer delivered on 24 October 2002, at p. 29.

[38] On the whole debate, see B. Gleize, 'La protection de l'image des biens', thesis, Montpellier, 2004; Cass. fr. (ass. plén.), 7 May 2004, *D.*, 2004, Jurisprudence, p. 1545, note J.-M. Bruguiere and E. Dreyer.

[39] V.-L. Benabou, 'La propriété schizophrène, propriété du bien et propriété de

the Duration Directive (which grants a limited right to the first publisher of a public domain work)[40] to prove that physical ownership was not a sufficient foundation for exclusivity over the intellectual content of a work. Only the publisher, as such and not as a mere passive owner of the manuscript, is, by a special text, being granted this exclusivity. The goal of this provision, i.e. wide disclosure of a work so far not revealed, was supposed to apply a specific rule that can either be read as the creation of a neighbouring right for the first publisher or as one within the regime of the public domain, as an exception to the common use.

Equally the status of the works relinquished by their authors into the public domain should be explicitly ascertained. We have seen earlier that, absent a positive protection of the public domain against re-appropriation, authors who wish to decline the protection of copyright increasingly resort to copyleft strategies that embed a contamination clause, strategies that are often legally fragile and disputable.[41]

A public domain regime – inside or outside copyright law – should give authors the legal means to abandon their rights in a way that would guarantee and formalise the new status given to the work, so that no new monopoly could make this intention void.

A last idea (last from our viewpoint at least) would be to make all elements of the public domain immune to undue reservation by technological measures or contracts. Technological measures and contracts can be part of a business model that distributes and gives access to public domain materials, such as a commercial service deserving protection on its own, but the actual operation of such a model should never be allowed to prohibit free reproduction of such material when authorised by the status of the public domain, whether the resource is no longer protected or the use is justified by an exception or by the mere consultation of the work.

In this respect, the European rules governing the combination between exceptions and technical protection measures should be reconsidered. Not only are they illogical but they are also highly difficult to enforce. In the French Intellectual Property Code, for example, exceptions are written in such a way that once the author has disclosed his work, he can no longer prohibit

l'image du bien en le renouveau du droit de propriété', *Droit et Patrimoine*, March 2001, no. 91; 'La guerre des droits n'aura pas lieu', *Auteurs et Médias*, April–June 2005, pp. 103–9.

[40] M. Cornu, 'Droit sur l'image photographique d'un immeuble – Prérogatives du propriétaire de l'immeuble', *RIDA* October 1999, pp. 149–81. Also see this author on the public domain in general, particularly, 'La mise hors cómmerce des biens culturels comme mode de protection', *Legicom*, no. 36, 2/2006, p. 75.

[41] On this point, see S. Dusollier, 'Sharing Access to Intellectual Property through Private Ordering', 74 *Chicago-Kent Law Review*, 101 (2007).

certain detailed and limited uses. Nevertheless, according to the Infosoc Directive, if the work is 'recovered' by a technical protection measure, the rightholder (who?) can ignore some (but not all!) of the exceptions. Yet, the French law implementing the directive, while creating a very sophisticated system of conciliation between exceptions and technical protection, has forgotten to wipe out the genuine wording, keeping therefore 'the prohibition of prohibition'. The result is that the provider of the technological protection measure may bar certain uses which cannot be banned by the author even though the technological measure is supposed to be protected only if it covers a protected work! The Belgian system, by clearly saying that some exceptions are compulsory, is strengthening the public domain.

Making exceptions mandatory, as it is the case in Belgium, would be part of our positive regime of the public domain, as well as the obligation imposed on technological measures operators to enable the free exercise of *all* copyright exceptions. Apart from this impediment rule, a general obligation on those having recourse to contractual or technical methods should be added to enable the reproduction and communication of the intellectual works or content once they are not protected by copyright, since protection of the service they provide should not extend to intellectual content, covered as it is by a public domain status. But this kind of positive obligation already belongs to the second category of rules ascertaining the effectiveness of the public domain.

2.3.2. A positive obligation towards the availability of the public domain It does not suffice to inscribe in the law the legal rules applying to the public domain; actual access thereto should also be promoted.

Equally, as already mentioned, one must look carefully at such exclusion rules as their result may be a loss of incentive to innovate or to invest. Yet the risk is low and can easily be avoided, at least from a theoretical point of view, by considering public domain not as a no-ownership but as a common-ownership area (*res communis*). To make possible this common use, the regime of the public domain should first guarantee public access to the assets concerned. Such access should at least enable material access to the element (i.e. access to a copy thereto), as well as intellectual or cognitive access (i.e. the possibility to enjoy the element, thus to read, view or use) for free.

Dependent on this effective access is an obligation to preserve and conserve the public domain. If we look at the system used for sharing natural resources such as Antarctica, the high seas, or other commons, it is obvious that there exists a loose obligation to preserve the resource. However, mere conservation might not be sufficient to make the intellectual public domain alive; because the existence of the public domain is only justified in this field by public diffusion of the content, there is also a need to display or disseminate the resource to a certain extent.

That preservation/exploitation obligation could rest upon the State, in its mission to protect the cultural heritage, but also upon the community of users of public domain elements.

There is, to our knowledge, no such thing in the current European legislation on copyright as a system organising or maintaining public access to a work. During the author's life, the moral right to divulge – when recognised – even seems totally in contradiction to an obligation to preserve.

Yet, moral right is not *per se* inconsistent with the rationale of the public domain. For example, in France, the *droit moral* continues after the end of exploitation rights. Even if the work can theoretically be employed by anyone, the user may not violate the right of the author over his name or quality nor distort the genuine expression of the work. Entrance into the public domain does not allow totally free use of the item, which remains somewhat protected. Yet, such control is not necessarily incompatible with the logic of free and equal use.[42] It is not an authorisation to use which is granted by the rightholder and anybody has access to the production of the mind without paying royalties. The *droit moral* shall remain only to make sure that the genuine intention of the artist is not betrayed and, along the way, it assumes the function of conservation of the work (right of integrity and of paternity). Although it is not in general considered as such, the *droit moral* may contribute to protecting the work against undue privatisation by applying to everyone but the genuine author the same conditions for the use of the work. The obligation to respect the integrity of the work and the paternity of the author can be considered as an expression of the obligation of preservation. To keep an environmental metaphor, the rightholder, his heirs or any agency entitled to do so will look after the work to prevent its possible 'pollution' and disappearance as such. In this perspective, perpetuity and prohibition of assignment of the *droit moral* contribute to achieving long-lasting and faithful access to the elements of the public domain.[43]

Other models can be used to achieve a common access and/or common use: the French 'depot legal' and the European texts on access to public information or cultural items.[44] While the French system is limited in its aims of conservation

[42] See, in this sense, Cour de Cassation no. 04-15.543, 30 January 2007 in the *Les misérables* case. The supreme court has overruled the Court of Appeal decision and has considered that, if the right of paternity and integrity of the work subject to adaptation are respected, freedom of creation prohibits interdiction by the author or his heirs of a sequel to the work under the terms of the exploitation monopoly they are beneficiaries of.

[43] See Chardeaux, *op. cit.*, no. 211.

[44] Directive 2003/98, 17 November 2003, on the re-use of public sector information; Recommendation of the Commission, 24 August 2006, on digitalisation and access to the cultural element and digital conservation.

and making certain sites available only for researchers,[45] the Directive has a wider scope. According to article 3, it considers that 'Member States shall ensure that, where the re-use of documents held by public sector bodies is allowed, these documents shall be re-usable for commercial or non-commercial purposes . . . Where possible, documents shall be made available through electronic means.'

The conditions of access might even suggest an underlying condition of interoperability, as for example article 5, paragraph 1 of Directive 2003/98, suggests:

> Public sector bodies shall make their documents available in any pre-existing format or language, through electronic means where possible and appropriate. This shall not imply an obligation for public sector bodies to create or adapt documents in order to comply with the request, nor shall it imply an obligation to provide extracts from documents where this would involve disproportionate effort, going beyond a simple operation.

The constant need for access to the public domain will not only require its elements to be locked in a secure box but also for them to be offered in an open standard.

To ascertain access, not only must the material conditions be preserved but also identification of works belonging to the public domain and the diffusion of this information must be kept up to date. In this perspective, the recommendation on digitisation and online accessibility of cultural material and digital preservation of 24 August 2006, article 6[46] considers it necessary to create mechanisms in order to facilitate the exploitation of orphan works or of works which are no longer published, to make a list of known orphan works and of works in the public domain.[47]

[45] Though recently expanded to the electronic depot legal by the law of 1 August 2006.

[46] Commission Recommendation of 24 August 2006 on the digitisation and online accessibility of cultural material and digital preservation, 2006/585/CE, OJEU, 31.08.2006, no. L236/28.

[47] Article 6: Improve conditions for digitisation of, and online accessibility to cultural material by:

(a) creating mechanisms to facilitate the use of orphan works, following consultation of interested parties,
(b) establishing or promoting mechanisms, on a voluntary basis, to facilitate the use of works that are out of print or out of distribution, following consultation of interested parties,
(c) promoting the availability of lists of known orphan works and works in the public domain,
(d) identifying barriers in their legislation to the online accessibility and subsequent use of cultural material that is in the public domain and taking steps to remove them.

Finally, as regards use, the Directive 2003/98 recalls a non-discrimination principle as to which, 'any applicable conditions for the re-use of documents shall be non-discriminatory for comparable categories of re-use'.

Ensuring public access to public domain elements would in some cases require encroachment upon the property rights of whoever owns the sole material copy of the work, now unprotected by copyright. In that case, the law should confer on the State or one of its agencies the right to get access to that material copy to make the reproductions necessary for the preservation and access obligations resulting from its public domain status. Such a right would be the equivalent, for the public domain, of the right granted, in some countries, to authors, to get access to the material embodiment of their work to the extent required by the necessity to exploit their copyright.

2.3.3. A public domain with remuneration? It may be difficult to achieve the goals allotted to the public domain if no one wants to sustain the positive obligations mentioned above, as some of these may require money, time and/or technical skills.

It is not clear whether common and equal access is actually better achieved through free access or by the payment of a lump sum by everyone or through a cross-compensation system in which the commercial users would support the upkeep of the public domain for others. The answer may also depend on the question of who will have to sustain this cost: the State, specific users, or the public.

The d*omaine public payant* doctrine has always considered that the entrance of an item within the public domain after a certain period of time would not mean that the use of the work would necessarily become 'free of charge' for all.[48] Such a system might be kept in mind, for instance, when copies of the public domain are made available through technological measures of protection.

Consideration should also be given to the situation where public access to an asset is rendered impossible, not because of an intellectual property right but since there is no incentive to publish. In this case, the status of the public domain could be a deterrent. Hence, one might consider the possible entrance

[48] The doctrine in favour of this theory is pleading for an ongoing royalty on the commercial exploitation of any work, notwithstanding the expiration of the duration of the monopoly. See A. Dietz, 'Le droit de la communauté des auteurs: un concept moderne de domaine public payant', *Bulletin du droit d'auteur*, January 1990, pp. 14–26.

Essentially, access to the work would be unconditional but its exploitation could only be made in counterpart of a fee paid to a community of living authors so as to stimulate creation and cultural development.

into a temporary 'ownership area' but with charge. For the rightholder, exclusivity would only be granted to the extent that 'he' would open up public access to the asset, which would otherwise be impossible to achieve under a common and free access regime.

A glimpse of such a system has already been implemented in the article 4[49] of the 'Term' Directive[50] for the protection of previously unpublished works. This provision, though granting extra-exclusivity even after the work falls within the public domain, makes the public interest prevail over the interest of the owner of the manuscript by granting a monopoly to the publisher, that is to say, to the one who will disseminate the very substance of the work by disclosing it publicly. Faced with a choice between gratuitousness and public access, the Directive has preferred the second course.

Though reconstitution of any exclusivity might be banned in principle, in conceiving a positive status for the public domain, one might not completely exclude the possibility of introducing a special and temporary right – the nature of which might vary according to the circumstances – granted to the person who will actually disclose the assets, in order to ensure the effectiveness of public access.

Conclusion

Ignoring the need for a regime of the public domain is not neutral, but has an impact on public acceptance and the legitimacy of intellectual property and might endanger it in the long run.

This overview of the possible protection of the 'public domain' through positive rules of delimitation, access and preservation outlines that the notion cannot be adequately articulated by a single regime and/or a single rule. In a positive vision of the public domain, the public domain should henceforth be considered as contingent, not because of the existence of the monopoly, but for the reason that it is evolving in accordance with a combination of values. Among these values are freedom, equality and solidarity as to the costs of this new openness. If we adopt a pyramidal vision of the public domain, the nucleus would be the result of a high dose of these principles to the extent they

[49] Article 4: '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, shall benefit from a protection equivalent to the economic rights of the author. The term of protection of such rights shall be 25 years from the time when the work was first lawfully published or lawfully communicated to the public.'

[50] Former Council Directive 93/98/EEC (OJ L290, 24.11.1993, p. 9) codified by a 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).

are consistent with each other. For example, the traditional image of the public domain (here the top of the pyramid) presupposes free access for all: no authorisation, no condition, no payment, no discrimination, the widest community of users possible, eternal length.

Yet, public domain should also encompass other uses, even if they are more restricted. Renouncement of one's monopoly claim for the public benefit, as long as the consent of the rightholder is clear and irreversible, might also contribute to an original expression of the public domain. Access to the intellectual content is then in general free, not subject to authorisation but use might be conditional. The same statement can be made for 'exceptions' to the rights: they allow equal access not to all, but to anyone who fulfils the conditions enumerated. Access and/or use might not be gratuitous even if, most of the time, the onus of the payment is divided throughout a public still distinct from the actual audience or directly supported by the State.

Common access, non-exclusive licence, non-discrimination for re-use, evolving formats of conservation of the item, a list of orphan works, the possible revival of works that are not exploited any more . . . New texts should contain suggestions of practical principles which would give full effect to the public domain. Yet, discussion about effective access to and preservation of the public domain should still get under way at the European level. Isn't it time for the Little Prince to open the box?