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Main Author	*Giancarlo F. Frosio*

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e*Content*plus

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a multiannual Community programme to make digital content in Europe more accessible, usable and exploitable.

[1] O.J. L 79 (March 24, 2005), at 1.

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COMMUNIA FINAL REPORT

> *What am I then? Everything that I have seen, heard, and observed I have collected and exploited. My works have been nourished by countless different individuals, by innocent and wise ones, people of intelligence and dunces. Childhood, maturity, and old age all have brought me their thoughts, their perspectives on life. I have often reaped what others have sowed. My work is the work of a collective being that bears the name of Goethe.*[2]

This Public[3] Report is the outcome of the work of the COMMUNIA Network on the Digital Public Domain (hereinafter "COMMUNIA"). This Report was undertaken to (i) review the activities of COMMUNIA; (ii) investigate the state of the digital public domain in Europe; and (iii) recommend policy strategies for enhancing a healthy public domain and making digital content in Europe more accessible and usable. Each of the subjects indicated above will be further developed and detailed in Annex I, Annex II, and Annex III of this Report, respectively.

WHAT IS THE PUBLIC DOMAIN?

COMMUNIA has valued the goal of grasping the inner meaning of the public domain as pivotal to the challenging task of the protection against appropriation and the promotion public domain. Defining the boundaries of the public domain is conducive to the aim of strengthening its protection.

Repeatedly, the literature notes, as a response to the variety of definitional approaches, that there are many public domains which change in shape according to the hopes and the agenda they embody. The diversity of the COMMUNIA network has provided an opportunity to internalize the protean nature of the public domain. The outcome has been a comprehensive vision that projects the understanding of the European public domain in a global international dimension. This vision conveys the perception that the public domain is never a definition but instead a statement of purpose, a project of enhanced democracy, globalized shared culture and reciprocal understanding.

To that end, COMMUNIA has attempted to propel a process of definitional re-construction of the public domain in positive and affirmative terms. Consequently, COMMUNIA envisions the

[2] Johann Wolfgang von Goethe, *cited in* Martha Woodmansee and Peter Jaszi, *The Law of Text: Copyright in the Academy*, 57 COLLEGE ENGLISH 769, 769 (1995).

[3] The Report will be made public in its final version after the final project review.

public domain as a very substantial element of attraction to aggregate social forces devoted to promote public access to culture and knowledge.

The traditional definition regarded the public domain as a "wasteland of undeserving detritus" and did not "worry about 'threats' to this domain any more than [it] would worry about scavengers who go to garbage dumps to look for abandoned property."[4] This is no more. This definitional approach has been discarded in the last thirty years. In 1981, Professor David Lange published his seminal work, *Recognizing the Public Domain*, and departed from the traditional line of investigation of the public domain. Lange suggested that "recognition of new intellectual property interests should be offset today by equally deliberate recognition of individual rights in the public domain."[5] In January 2008, Séverine Dusollier reinstated that idea at the 1st COMMUNIA Workshop by speaking of a "positively defined Public Domain."

> In legal regimes of intellectual property, the public domain is generally defined in a negative manner, as the resources in which no IP right is vested. This no-rights perspective entails that the actual regime of the public domain does not prevent its ongoing encroachment, but might conversely facilitate it. In order to effectively preserve the public domain, an adequate legal regime should be devised so as to make the commons immune from any legal or factual appropriation, hence setting up a positive definition and regime of the public domain.[6]

The affirmative public domain was a powerfully attractive idea that propelled the "public domain project." Many authors in Europe and elsewhere attempted to define, map, and explain the role of the public domain as an alternative to the commodification of information that threatened creativity. This ongoing public domain project offers many definitions that attempt to construe the public domain positively. A positive, affirmative definition of the public domain is a political statement, the endorsement of a cause.

As the *Public Domain Manifesto* puts it, the public domain is the "cultural material that can be used without restriction . . . ," which includes a structural core and a functional portion. The structural core of the public domain encompasses the "works of authorship where the copyright protection has expired" and the "essential commons of information that is not covered by copyright." The functional portion of the public domain consists of the "works that are voluntarily

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[4] Pamela Samuelson, *Mapping the Digital Public Domain: Threats and Opportunities*, 66 LAW & CONTEMP. PROB. 147, 147 (2003) [hereinafter Samuelson, *Mapping the Digital Public Domain*].

[5] David Lange, *Recognizing The Public Domain*, 44 LAW & CONTEMP. PROBS. 147, 147 (1981).

[6] Séverine Dusollier, *Towards a Legal Infrastructure for the Public Domain*, speech delivered at the 1st COMMUNIA Workshop, Turin, Italy (January 18, 2008) (please note that any of the materials cited in this Report and Annexes related to proceedings of COMMUNIA meetings can be found at http://www.communia-project.eu).

shared by their rights holders" and "the user prerogatives created by exceptions and limitations to copyright, fair use and fair dealing."[7]

However, notwithstanding many complementing definitional approaches, consistency is to be found in the common idea that the public domain is the material that composes our cultural heritage. The public domain envisioned by COMMUNIA becomes the "place we quarry the building blocks of our culture," as put by Professor James Boyle, the co-director of the Duke Center for the Study of the Public Domain, a member of the COMMUNIA network.[8] At the same time, the public domain is the building itself. It is, in the end, the majority, if not the entirety, of our culture. Therefore, the public domain must be free for all to use, and copyright expansionism is a welfare loss against which society at large must be guarded.

The modern discourse on the public domain owes much to the legal analysis of the governance of the commons, natural resources used by many individuals in common. Commons and public domain are in fact two different things: the public domain is free of property rights and control whilst a commons may be restrictive. However, this kind of control is different than under traditional property regimes because no permission or authorization is required to enjoy the resource. These resources are protected by a liability rule rather than a property rule. Free Software, Open Source Software and Creative Commons are examples of intellectual commons.

Though public domain and commons are diverse concepts, since the origin of the public domain discourse, the environmental metaphor has been largely used to refer to the cultural public domain. Therefore, the traditional environmental conception of the commons was ported to the cultural domain and applied to intellectual property policy issues. Under this conceptual scheme, the individual, legal, and market based control of the property regime is juxtaposed to the collective and informal controls of the well-run commons. Environmental and intellectual property scholars started to look at knowledge as a commons – a shared resource, as defined by the Nobel laureate Elinor Ostrom. The environmental metaphor has propelled what can be termed as a cultural environmentalism.

In the last decade, we have witnessed the emergence of a new understanding of the public domain in terms of affirmative protection and the sustainable development of a common pool of resources, especially in the digitally networked environment. This enhanced understanding of the value of the public domain has been undergoing a multi-faceted evolution with academic, civic, institutional and more practical ramifications. Today, the Institute for Information Law at Amsterdam University, the Berkman Center for Internet and Society at Harvard, the Cambridge Centre for Intellectual Property and Information Law, the Nexa Center for Internet and Society at the Politecnico of Turin, the Haifa Center of Law and Technology, the Duke Center for the Study of

[7] *See* The Public Domain Manifesto (produced within the context of COMMUNIA, the European thematic network on the digital public domain), http://publicdomainmanifesto.org and *infra* Annex V.

[8] JAMES BOYLE, THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND 40 (Yale University Press 2009).

the Public Domain, the Stanford Center for Internet and Society and a variety of other academic centers devote a substantial amount of their time to investigate the proper balance between intellectual property and the public domain, as detailed by the COMMUNIA *Survey of Existing Public Domain Competence Centers* delivered to the European Commission on September 30, 2009. Several advocacy groups are committed to the preservation of the public domain and the promotion of a shared commons of knowledge, including among many others the Open Knowledge Foundation, Open Rights Group, LaQuadratureduNet, Knowledge Ecology International, the Access to Knowledge (A2K) movement, Public Knowledge, Electronic Frontier Foundation. Civil advocacy of the public domain and access to knowledge has also been followed by several institutional variants, such as the "Development Agenda" at the World Intellectual Property Organization setting specific policy recommendations to protect and strengthen the public domain. The WIPO efforts for the promotion of the public domain were presented at the 5th COMMUNIA Workshop in London[9] and the 7th COMMUNIA Workshop in Luxembourg.[10] In addition, developments in commons theory have been coupled by efforts to turn theory into practice. For example, Creative Commons and the free and open-source software movement have created a commons through private agreement and technological implementation. Again, private firms in the biotechnological and software fields, have decided to forgo property rights to reduce transaction costs. The issue of voluntary sharing, private ordering and contractually constructed commons was widely investigated at the 1st COMMUNIA Conference in Louvain-la-Neuve and the 2nd COMMUNIA Conference, *Global Science and the Economics of Knowledge Sharing Institutions*, in Turin.

The emergence and growth of an environmental movement for the public domain and, in particular, the digital public domain, is morphing the public domain into the commons. The public domain is our cultural commons: it is like our air, water, and forests. We must look at it as a shared resource that cannot be commodified. As much as water, knowledge cannot be constructed mainly as a profitable commodity, as recently argued by Professor Stefano Rodotà, one of the distinguished members of the COMMUNIA Advisory Committee.[11] As for the natural environment, the public domain and the cultural commons that it embodies need to enjoy a sustainable development. As with our natural environment, the need to promote a "balanced and sustainable development" of our cultural environment is a fundamental right that is rooted in the Charter of Fundamental Rights of the European Union. As we will detail later in this Report, overreaching property theory and overly protective copyright law disrupt the delicate tension between access and protection. Unsustainable cultural development, enclosure and

[9] *See* Richard Owens, WIPO and Access to Content: The Development Agenda and the Public Domain, presentation delivered at the 5th COMMUNIA Workshop, London, United Kingdom (March 27, 2009).

[10] *See* Richard Owens, WIPO Project on Intellectual Property and the Public Domain, presentation delivered at the 7th COMMUNIA Workshop, Luxembourg (February 1, 2010).

[11] *See* Stefano Rodotà, *Se il Mondo Perde il Senso del Bene Comune*, REPUBBLICA, August 10, 2010, *available at* http://ricerca.repubblica.it/repubblica/archivio/repubblica/2010/08/10/se-il-mondo-perde-il-senso-del.html.

commodification of our cultural commons will produce cultural catastrophes. As unsustainable environmental development has polluted our air, contaminated our water, mutilated our forests, and disfigured our natural landscape, unsustainable cultural development will outrage and corrupt our cultural heritage and information landscape. A cultural development neglectful of the public domain, if not redressed, will negatively affect society at large in consequence of the loss of economic and social value that may be extracted from the public domain, especially from the digital public domain.

THE VALUE OF THE PUBLIC DOMAIN FOR EUROPE

The public domain is a valuable global asset. A forward looking approach to the use of the public domain would allow the extraction of considerable economic and, especially, social value from it. In particular, COMMUNIA asserts that open and public domain approaches can produce economic and social value, as spelled out at the 1st COMMUNIA Conference devoted to the *Assessment of Economic and Social Impact of Digital Public Domain Through Europe* and the 2nd COMMUNIA Conference. Unfortunately, so far this value has been left unattended. In addition, the intellectual property rhetoric has hidden the public costs of extreme propertization of the public domain. The current paradigm "binds us to a narrow and erroneous viewpoint in which innovation is central but access is peripheral," Rufus Pollock has noted.[12]

This imbalance should be redressed. This is far more relevant now because this disproportion between innovation and access prevents us from taking full advantage of the possibilities offered by the digital age. Digitization and Internet distribution have multiplied the potentialities and opportunities offered by the use of public domain material. On one hand, digitization offers the opportunity to extract economic value out of the public domain by benefiting the public with free or inexpensive cultural resources. On the other hand, digitization may produce immense social value by opening society up to immediate and unlimited access to culture and knowledge. In addition, the economic and social value of the public domain is enhanced by the mass production capacities of the digital environment. A new peer-based culture of sharing is changing our cultural landscape through the revolutionary technological ability of multiplying references instantaneously and endlessly. Openness and access fuel this new culture of shared production of knowledge. Commodification and enclosure of the public domain threaten its growth and survival.

The value of the public domain is a complex variable made up of many components. The public domain is a source of value in both economic and social terms. In addition, value can be extracted from the structural and the functional aspects of the public domain. The contribution of the public domain can be assessed in positive or negative terms by estimating the economic and social loss of enclosure and commodification. The positive value of the public domain can be the effect of direct use, indirect use or reuse of public domain works, the application of public domain business

models, the market efficiency triggered by a healthy public domain or, again, the democratic function of the public domain. In any event, social and economic value is always very much tangled up in the assessment of the riches of the public domain.

As per the value of a work entering into the public domain or public domain effect, the revenue value is to be distinguished from the social value, as the economic utility generated for society. If, after entering into the public domain, a work is sold for €5 instead of the €10 charged previously, the social value of the work entering into the public domain will be €5. In addition, the social value of a work entering into the public domain will also include the deadweight loss of restricting access to a good that is spared to society. Finally, the assessment of the value of a work entering into the public domain must also take into account the value of reuse. Reducing the public domain or retarding the entrance of a work into the public domain shall deprive the community of the correspondent social value of developing derivative works or invention from the original cultural artifact. Differently than the social value mentioned earlier, the value of reuse is a dynamic value that boosts society both economically and culturally.

Practice is often more explanatory than theory. A few examples may help to grasp the value of the "public domain effect," the entrance of a work in the public domain, and other social and economic value that can be extracted from the public domain. In 2010, the works of Sigmund Freud entered the public domain in Italy. This event propelled the publication of 36 works of Freud in the first 9 months of 2010 by 10 publishers. This is an astonishing figure if compared with the previous years. In the preceding 10 years, from 1999 to 2009, only 16 works of Freud were published in Italy.

2007 saw the end of the copyright protection of the works of Louis Vierne, a renowned French organist and composer. Upon expiration of Vierne's copyright, new editions of Vierne's works finally corrected many mistakes and inaccuracies included in the original scores. Louis Vierne was born nearly blind, and such mistakes were obviously due to Vierne's wobbly writing. Up to the expiration Vierne's copyright, none of its publishers tried to correct the mistakes, because the copyright laws prevented them from editing the original works whatsoever.

Again, an anecdote about the effect of a work suddenly falling into the public domain enlightens regarding the value of the public domain. The film "It's a Wonderful Life," directed by Frank Capra and starring Jimmy Stewart, fell into the public domain in 1974 after the copyright holder failed to renew it. The film had been largely ignored since its original release. However, in 1975, a TV station discovered that the movie was freely available and ran it during Christmas, because its climax comes on Christmas Eve. Within few years "It's a Wonderful Life" was being shown on televisions stations across the United States at Christmas. The success was terrific. Watching the

[12] RUFUS POLLOCK, THE VALUE OF THE PUBLIC DOMAIN 4 (UK Institute for Public Policy Research 2006) [hereinafter POLLOK, THE VALUE OF THE PUBLIC DOMAIN].

movie at Christmas time became a cultural tradition in the United States and references to the movie became commonplace as well.

Together with the value that may be immediately extracted from the entrance of a work into the public domain, a public domain approach to knowledge management may be a source of value on many different levels. Though, a quantitative measurement is impossible, some quantitative conclusions on the value of the public domain can be inferred by examining few examples of public domain approaches to knowledge production. In general, these examples show the role and the value of the digital public domain in allowing new business models to emerge.

In the case of file sharing, for example, few studies have found significant benefits of free access.[13] The studies have found that the impact of peer-to-peer file sharing on sales does not seem that relevant. Furthermore, data on the supply of new works seem to support the argument that the advent of file sharing did not discourage creators and creativity at large. In fact, the impact of file sharing on creators may be positive due to the increase of the demand for complements to protected works, such as concerts, special editions, or merchandising.

The value of few other examples of public domain models, as singled out by Rufus Pollock's study, *The Value of the Public Domain*, can be more immediately appreciated. Open source software is a quintessential example of the value of an open approach, or functional public domain approach, as the *Public Domain Manifesto* puts it, to the production of information goods. The Internet and the World Wide Web are further examples of the great wealth that can be built upon public domain material. These technologies were non-proprietary and openness was the key to their revolutionary success. Again, online search engines, such as Google, produce relevant social benefit through their service and generate very large revenue by copying "open" information on the web.

Finally, several studies have highlighted that a public domain approach to weather, geographical data, and public sector information ("PSI") in general, may yield a substantial long-run value for Europe, running into the tens of billions or hundreds of billions of euros.[14] The benefit of access to and re-use of public sector information has been widely investigated during the COMMUNIA proceedings among others by Professor Paul Uhlir, distinguished member of the COMMUNIA Advisory Committee.[15] In particular, the 5th COMMUNIA Workshop, co-organized by the Open Knowledge Foundation and London School of Economics, focused on *Accessing, Using and Reusing Public Sector Content and Data*.

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[13] *See*, *e.g.*, Felix Oberholzer-Gee and Koleman Strumpf, *File-Sharing and Copyright*, 10 INNOVATION POLICY AND THE ECONOMY 19, 34-38 (2010), *available at* http://www.hbs.edu/research/pdf/09-132.pdf.

[14] *See* POLLOK, THE VALUE OF THE PUBLIC DOMAIN, *supra* note 12, at 14.

[15] Paul Uhlir, Measuring the Economic and Social Benefits and Costs of Public Sector Information Online: a Review of the Literature and Future, presentation delivered at the 1st COMMUNIA Conference, Louvain-la Neuve, Belgium (June 30, 2010)

Additionally, the value of privileged and fair use of copyrighted material is also to be taken into account when assessing the overall value of the public domain. Privileged and fair uses of copyrighted material are an integral part of the functional public domain. As a recent study have shown, companies benefitting from fair use and copyright exceptions exceeded GDP, employment, productivity, and export growth of the overall economy.[16] Fair use enhanced industries include manufactures of consumer devices allowing for individual copying of protected content, educational institutions, software developers, and internet search and web hosting providers. The study also reveals that fair use industries have grown dramatically within the past twenty years, since the advent of the Internet and the digital information revolution. These data may help to argue that in the digital environment, open and public domain business models may spur growth at a faster pace than proprietary traditional business models. Promoting fair use and the functional public domain, thus related fair use industry, may have also a considerable added value for Europe. When contrasted with the United States case-by-case fair use model, the European list of predefined limitations and exceptions may be a vantage point for fair use industries in Europe. Fair use decisions are inherently complex and unpredictable in the United States. As a consequence of the inherent unpredictability of fair use in the United States, transaction costs will be higher and commercial endeavours will be chronically open to legal challenge. Europe should maximize the advantages that our legal framework offers to industries based on fair use. The enhanced legal certainty and lower transaction costs of the European legal framework will make that sector flourish in Europe and will boost the international investments. However, to that end, Europe needs to advance harmonization of exceptions and limitations across national jurisdictions, as sought by COMMUNIA policy recommendation # 3.

Further, the public domain plays a relevant role in terms of market efficiency. From an economic standpoint, a market with a shrinking public domain would be especially inefficient, as argued by the Nobel laureate Joseph Stiglitz. A market that commodifies information excessively will be less efficient in allocating resources in our society since key information to facilitate that allocation will be more difficult to find.

Finally, as we will better detail also later, the public domain is an engine of democratization by ensuring a proper access to information for EU citizens regardless of the market power of the players. The value of the public domain as a building block of our capacity of free expression has been immensely enhanced by the ubiquity of the interconnected society and the power of propagation of digitization. Technological advancement makes the public domain the perfect democratic forum.

As anticipated, today the traditional value of the public domain is tremendously enhanced by the recent technological advancement. Digitization and the Internet revolution are an

[16] *See* THOMAS ROGERS, ANDREW SZAMOSSZEGI, AND PETER JASZI, FAIR USE IN THE U.S. ECONOMY: ECONOMIC CONTRIBUTION OF INDUSTRIES RELYING ON FAIR USE (September 2007) (study prepared for the Computer & Communications Industry Association [CCIA]).

unprecedented opportunity for fostering progress, culture, and knowledge. For the purpose of the COMMUNIA project, digitization and the Internet revolution are an extraordinary opportunity to multiply the value of the public domain and exploit humanities' riches as never before. Several authors have described the Internet revolution as a monumental shift that we are undergoing. David Bollier, speaker at the 3rd COMMUNIA Conference, notes:

> I believe we are moving into a new kind of cultural if not economic reality. We are moving away from a world organized around centralized control, strict intellectual property rights and hierarchies of credentialed experts, to a radically different order. The new order is predicated upon open access, decentralized participation, and cheap and easy sharing.[17]

Digital networks fuel new forms of user-based creative sharing and collaboration. This mass collaboration may stifle social and economic enrichment to a far greater extent than in the past. Professor Yochai Benkler described the high generative capacity of online commons as the "wealth of networks." The wealth of networks lies in social and networked peer production that is highly generative, because it is modular, granular, and inexpensive to integrate the results. At the 1st COMMUNIA Workshop, Rishab Aiyer Ghosh explored the need to protect and foster open standard in the research community worldwide, to best embrace the collaborative networked projects. Ghosh noted that "our technology future will be based on collaborative, open projects of such large scale that global policies and regulations will become more flexible to meet the needs of every stakeholder involved."[18]

A great deal of attention has been paid by COMMUNIA to sharing and networked peer collaboration in education and research, especially at the 2nd COMMUNIA Conference, *Global Science and the Economics of Knowledge Sharing Institutions*, in Turin and the 8th COMMUNIA Workshop, *Education of the Public Domain: The Emergence of a Shared Educational Commons*, in Istanbul. In particular, at the 2nd COMMUNIA Conference in Turin, Professor Jerome H. Reichman, a distinguished member of the COMMUNIA advisory Committee, discussed the introduction of a contractually reconstructed commons via the *ex ante* acceptance of liability rules to promote the exchange of materials in a globally distributed and digitally integrated research commons.[19] At the same COMMUNIA Conference, Professor Paul Uhlir proposed a model of open knowledge environments (OKEs) for digitally networked scientific communication. OKEs would "bring the scholarly communication function back into the universities" through "the development of

[17] David Bollier, *The Commons as New Sector of Value Creation: It's Time to Recognize and Protect the Distinctive Wealth Generated by Online Commons*, Remarks at the Economies of the Commons: Strategies for Sustainable Access and Creative Reuse of Images and Sounds Online Conference (Amsterdam, April 12, 2008), *available at* http://www.onthecommons.org/content.php?id=1813

[18] Rishab Aiyer Ghosh, Technology, Law, Policy and the Public Domain, speech delivered at the 1st COMMUNIA Workshop, Turin, Italy (January 18, 2008)

[19] *See* Jerome H. Reichman, Formalizing the Informal Microbial Commons: Using Liability Rules to Promote the Exchange of Materials, speech delivered at the 2nd COMMUNIA Conference, Turin, Italy (June 30, 2009).

interactive portals focused on knowledge production and on collaborative research and educational opportunities in specific thematic areas."[20]

However, the revolution is far more massive and distributed than collaboration in education and research. Technological change has brought about cultural change, because the audience has become an active participant in its own culture. Open networks and networked peer collaboration have transformed markets by enabling amateurs to innovate. Individual experimentation, sub-cultures, and a community of social trust have created Linux, Wikipedia, Facebook, YouTube, and major political websites. Flexibility, decentralization, cooperative creation, and customization out-performed corporate bureaucracies unwilling to experiment because it was too risky and costly. Moreover, new models of decentralized and cooperative creation incessantly out-perform theirself, as it is the case for open alternatives to Facebook like the Diaspora project. Faced with Facebook's centralized nature and untrammeled desire to control online identities by trampling on privacy norms, the online community has been responding with the emergence of projects and experiments to redress the deficiencies of the Facebook model.

The MusOpen project provides an additional good example of the potential of public domain works when exploited within an open and peer based project. Musopen is a charity that aims to produce and distribute recordings and sheet music of public domain music. The project allows users to suggest pieces that they would like to have recorded and to pledge funds to pay for the recording. Recently, the project crowdfunded $70,000 through a KickStarter campaign.

The interactive nature of the web 2.0 has propelled user-generated creativity and defined a peculiar form of digital culture. Remix and mash up are now keywords of the cultural process taking place in the digital environment. Remix culture has emphasized the potential for reuse of public domain material. Open networks, user-generated creativity, and remix culture have made the public domain highly generative. The public domain, once regarded as a "virtual wasteland of undeserving detritus," has become "a fertile paradise . . . a commons," David Bollier has noted.

The revolution brought by the web 2.0 and the fertile paradise that the public domain has become call for a copyright 2.0, as noted by Professor Ricolfi at the 1st COMMUNIA Conference. This call is urged, as Professor Ricolfi puts it, by the fact that

> the social and technological basis of creation has been radically transformed. The time has come for us to finally become aware that in our post-post-industrial age, the long route which used to lead the work from its creator to the public by passing through different

[20] *See* Paul F. Uhlir, Revolution and Evolution in Scientific Communication: Moving from Restricted Dissemination of Publicly-Funded Knowledge to Open Knowledge Environments, paper presented at the 2nd COMMUNIA Conference, Turin, Italy (June 28, 2009).

> categories of businesses is gradually being replaced by a short route, which puts in direct contact creators and the public.[21]

Copyright 2.0 stands for a relaxed and more flexible set of rules that may adapt to the new mechanics of creative production in the digital age. In particular, copyright 2.0 should serve and pave the way for the "short route" that enhances an unrestrained discourse between authors and the public.

Together with the cultural revolution of networked peer production, the nature of digital information and digitization may also extraordinarily enrich the public domain. Digital information is inexpensive and easy to collect, store, and make available via digital networks. The nature of digital information has propelled the creation of databases of legislative, jurisprudential and governmentally produced material; digital libraries, such as Europeana, Project Gutenberg, Google Books, the Online Books Page, the Hathi Trust Digital Library; digital repositories; scientific libraries of reusable code; databases of scientific and technical information; vast non-profit digital archive of the Internet, such as the Internet Archive; electronic journals; and MP3 files of music posted by bands wanting to attract a new audience.

Again, digital tools are changing research in science and scholarship in history, literature and the arts. Our understanding of science and the liberal arts is changing by using high performance computers and vast stores of digitized materials. The human genome project is an example of how computational analysis of digitized data has changed scientific research. The emerging field of digital humanities encompasses a wide range of activities, including online preservation, digital mapping, data mining and the use of geographic information systems. Digital humanities can reveal unexplored patterns and trends by analyzing unprecedented amounts of data.

The digital environment has the potential to make knowledge a truly global public good. As Charles Nesson reminded us at the 3rd COMMUNIA Conference *University and Cyberspace: Reshaping Knowledge Institutions for the Networked Age* in Turin, the "challenge is how to use this environment to create knowledge."[22] Human inventiveness has provided us with a ground-breaking solution to underdevelopment, isolation, and cultural and social divide. The open question is whether we, as a society, are up to the task of re-inventing, and challenging our notions of democracy, education, economy, and social interaction.

COMMUNIA maintains that Europe should not be afraid of changing and flourishing. COMMUNIA believes that policy strategies implementing openness in information management are the key to any change that may fully exploit technological advancement. Any actions towards the enclosure of the public domain should be reversed. Outmoded intellectual property models

[21] Marco Ricolfi, Copyright Policies for Digital Libraries in the Context of the i2010 Strategy, paper presented at the 1st COMMUNIA Conference, Louvain-la-Neuve, Belgium (July 1, 2008), at 12.

[22] Charles Nesson, speech delivered at the 3rd COMMUNIA Conference, Turin (June 28-30, 2010)

should be re-invented. Again, Professor Ricolfi, reminded us at the 1st COMMUNIA Conference that the time to take up this challenge has come, regardless of how daunting the task may be.

This solicited change is sought to address the many challenges and tensions that the present intellectual property system is presenting to the public domain. The remaining part of this Report will introduce the most relevant of those challenges and tensions. Fuller discussion of that very same topic is included in Annex II of the Report. Later on, Annex III of this Report will lay down the principles that COMMUNIA understands should inspire policy strategies to overcome the challenges, redress the present tensions, and promote the digital public domain.

Public Domain Challenges and Bottlenecks

As anticipated, there is an undeniable tension between the public domain and the copyright system. This tension is represented by an equation where the enclosure of the public domain is proportional to the expansion of the copyright protection. This tension is unavoidable and originates from the dual functionality of knowledge as a commodity and as a driving social force. At the 2nd COMMUNIA Conference, Professor Hugenholz referred to this tension as the "paradox of intellectual property," because intellectual property is a "system that promotes, or at least, aspires to promote knowledge, dissemination, cultural dissemination by restricting it," by creating temporary monopolies in expressed ideas or in applied invention.[23]

In Europe the paradox is harshened by the intensity of moral rights. The strength of moral rights, especially the moral right of integrity, conversely weakens the public domain. In Europe, moral rights are inalienable and potentially perpetual. Any copyright expirations, public domain dedications or the licencing of a creative work under open access and re-use models will only enrich the structural and functional public domain under the assumption and to the extent that moral rights are not infringed. The capacity of the heirs and descendants of an author to claim infringement in perpetuity threatens the public domain with legal uncertainty. Adaptations and re-interpretations of works, abridged versions of works, colorizations of movies, or the application of other future unforeseeable technological tools, which may somehow temper with or modify the perception of the original work, may all trigger the reaction of the author's estate in perpetuity.

However, digitization and Internet distribution have exacerbated these traditional tensions between copyright protection and the public domain. The misperception of the "Internet threat" has led to a reaction that endangers the public domain. Concurrently, the opportunities that digitization and Internet distribution offer to our society make enclosure and commodification of our information environment even more troublesome. As Professor Paul A. David, key note speaker at the 1st COMMUNIA Conference, noted:

[23] See P. Bernt Hugenholtz, Owning Science: Intellectual Property Rights as Impediments to Knowledge Sharing, speech delivered at the 2nd COMMUNIA Conference, Turin (June 29, 2001).

> [t]oday, the greater capacity for the dissemination of knowledge, for cultural creativity and for scientific research carried out by means of the enhanced facilities of computer-mediated telecommunication networks, has greatly raised the marginal social losses that are attributable to the restrictions that those adjustments in the copyright law have placed upon the domain of information search and exploitation.[24]

With large agreement, scholars and the civil society have warned that our information environment is undergoing a process of enclosure. Professor Boyle has talked about a second enclosure movement that it is now enclosing the "commons of the mind." As for the natural commons, fields, grazing lands, forests, and streams that were enclosed in the XVI century in Europe by landowners and the state, relentlessly expanding intellectual property rights are enclosing the intellectual commons and the public domain. Enclosure is promoted by a mix of technology and legislation. According to Bernt Hugenholtz and Lucie Guibault, the public domain is under pressure from the "commodification of information."

> [T]he public domain is under pressure as a result of the ongoing march towards an information economy. Items of information, which in the 'old' economy had little or no economic value, such as factual data, personal data, genetic information and pure ideas, have acquired independent economic value in the current information age, and consequently become the object of property rights making the information a tradable commodity. This so-called 'commodification of information', although usually discussed in the context of intellectual property law, is occurring in a wide range of legal domains, including the law of contract, privacy law, broadcasting and telecommunications law.[25]

Commodification of information is propelled by the ability of new technologies to capture resources previously unowned and unprotected, as in a new digital land grab.

However, this digital land grab is the continuation of a well-settled analog trend whose limits and fallacies have already been shown and rebutted. In the past, law and economics scholars have launched a crusade to expose the evil of the commons, the evil of not propertizing. A much quoted article written by Garret Hardin in 1968 termed the evil of not propertizing as the tragedy of the commons.[26] Hardin identified the tragedy of the commons in the environmental dysfunctions of overuse and underinvestment found in the absence of a private property regime. Hardin made it clear that any commons open to all, ungoverned by custom or law, will eventually collapse. The fear of the tragedy of the commons propelled the idea that more property rights will

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[24] Paul A. David and Jared Rubin, *Restricting Access to Books on the Internet: Some Unanticipated Effects of U.S. Copyright Legislation*, 5 REV. ECON. RES. COPYRIGHT ISSUES 50 (2008), *available at* http://papers.ssrn.com/sol3/ papers.cfm?abstract_id=1260527.

[25] P. Bernt Hugenholtz and Lucie Guibault, *The Future of the Public Domain: An Introduction*, *in* THE FUTURE OF THE PUBLIC DOMAIN: IDENTIFYING THE COMMONS IN INFORMATION LAW 1 (Lucie Guibault and P. Bernt Hugenholtz eds., Kluwer Law International 2006).

[26] *See* Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968);

necessarily lead to the production of more information together with the enhancement of its diversity. In this perspective, the prevailing assumption is that anything of value within the public domain should be commodified. The recent tremendous expansion of intellectual property rights has been justified by this statement and the like.

Put it bluntly, this statement and the like are wrong. No economic theory of intellectual property and commons management supports the prediction stated. Nobel laureate Elinor Ostrom powerfully advocated the cause of the commons against the mantra of propertization. Ostrom's work showed the inaccuracies of Hardin's ideas and brought attention to the limitations of the tragedy of the commons. Empirical studies of Ostrom and others have shown that common resources can be effectively managed by groups of people under suitable conditions, such as appropriate rules, good conflict-resolution mechanisms, and well-defined group boundaries. Under suitable conditions and proper governance, the tragedy of the commons becomes "the comedy of the commons."[27]

Culture is quintessential comedic commons, because it gets enriched through reference as more people consume it. The carrying capacity of cultural commons is endless. Cultural commons are non-rivalrous. One person's use does not interfere with another's. Unlike eating an apple, my listening of a song does not subtract from another's. Therefore, cultural commons unveil the inaccuracy of the tragedy of the commons more than any other commons. Propertization and enclosure in the cultural domain may be a wasteful option by cutting down social and economic positive externalities, particularly in peer-based production environments.

Reviewing the peculiar nature of cultural commons, the academic literature has turned upside down the paradigm of underuse of common resources by developing the idea of the "tragedy of the anti-commons."[28] The tragedy of the anti-commons lies in the underuse of scarce scientific resources because of excessive intellectual property rights and all of the transaction costs accompanying those rights. Professor Paul David exposes the perverse resource allocation in an anti-commons scenario at the 1st COMMUNIA Conference.[29]

By increasing the asset value of copyright interests, **copyright term extension** is one basic tool of commodification of information and creativity. Copyright term extension may be singled out as the clearest evidence of the progressive expansion of property rights against the public domain. Any temporal extensions of copyright deprives and impoverishes the structural public domain. The

[27] *See* Carol M. Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711 (1986).

[28] Michael A. Heller, *The Tragedy of the Anticommons: Property In the Transition from Marx to Markets*, 111 HARV. L. REV. 621 (1998).

[29] *See* Paul A. David, New Moves in 'Legal Jujitsu' to Combat the Anti-commons – Mitigating IPR Constraints on Innovation by a 'Bottom-up' Approach to Systemic Institutional Reform, paper presented at the 1st COMMUNIA Conference, Louvain-la-Neuve, Belgium (June 30, 2008).

policy choice has so far privileged private interest over public, copyright protection over the public domain.

The timeline of temporal extension of copyright protection shows a steady elongation in all international jurisdictions. From the original protection encompassing a couple of decades, copyright protection has expanded to last for over a century and a half. As an example, today, the oldest work still in copyright in the United Kingdom dates back from 1859.[30] The Statute of Anne, the first copyright law enacted in England in 1709, provided only for fourteen years of protection renewable for a term of additional 14 years if the author was still alive at expiration of the first term. This expansionistic course does not appear to be interrupted or reversed and the line between temporary and perpetual protection seems to be blurred. The words of Lord Kames, discussing the booksellers' request for a perpetual common law right on the printing of books a couple of centuries ago, powerfully echo from the past: "[i]n a word, I have no difficulty to maintain that a perpetual monopoly of books would prove more destructive to learning, and even to authors, than a second irruption of Goths and Vandals."[31]

Today, an extension of the term of protection for performers and sound recordings is under discussion before the European Parliament.[32] In fact, the extension had already been adopted, but, for procedural reasons under Lisbon, it must be readopted. COMMUNIA is opposing any such re-adoption and asking the European Commission and Parliament to carefully review any previous convincement on the matter. Extending the terms of protection for related rights endangers a valuable public domain, as argued at the 2nd COMMUNIA Workshop, *Ethical Public Domain: Debate of Questionable Practices*, in Vilnius, by Stef van Gompel.[33] COMMUNIA policy **Recommendation # 2** asks for the withdrawal of this proposal. In particular, COMMUNIA is challenging the appropriateness of any retroactive extension of the copyright term. COMMUNIA opposes any blanket extension of copyright and neighbouring rights, as detailed in COMMUNIA Policy **Recommendation #1** and **Recommendation #2**. Once the incentive to create is assured, any extension of the property right beyond that point should at least require affirmative proof that the market is incapable of responding efficiently to consumer demand.

The most palpable example of the destructive effect of copyright extension on our cultural environment is the case of **orphan works**. Orphan works are those whose rightsholders cannot be identified or located and, thus, whose rights cannot be cleared. Publishers, film makers, museums, libraries, universities, and private citizens worldwide face daily insurmountable hurdles in

[30] See ANNA VUOPALA, ASSESSMENT OF THE ORPHAN WORKS ISSUE AND COST FOR RIGHTS CLEARANCE 10 (May 2010) (report prepared for the European Commission, DG Information Society and Media, Unit E4, Access to Information).

[31] Hinton v Donaldson, Mor 8307 (1773) (Lord Kames).

[32] *See* Proposal for a European Parliament and of the Council Directive Amending Directive 2006/116/EC on the Term of Protection of Copyright and Related Rights, COM (2008) 464 final (July 16, 2008).

[33] Stef van Gompel, Extending the terms of protection for related rights endangers a valuable public domain, paper presented at the 2nd COMMUNIA Workshop, Vilnius (March 31, 2008).

managing risk and liability when a copyright owner cannot be identified or located. Too often, the sole option left is a silent unconditional surrender to the intricacies of copyright law. Many historically significant and sensitive records will never reach the public. Society at large is being precluded from fostering enhanced understanding. Daily, steadily, small missing pieces of information prevent the completion of the puzzle of life.

The cultural outrage over orphan works is a by-product of copyright expansion, the retroactive effect of some copyright legislation, and the intricacies of copyright law. A study from the Institute for Information Law at Amsterdam University (IViR) attributed the increased interest in the issue of orphan works in the following factors: (1) the expansion of the traditional domain of copyright and related rights; (2) the challenge of clearing the rights of all the works included in derivative works; (3) the transferability of copyright and related rights; and (4) the territorial nature of copyright and related rights.[34] In particular, in Europe the problem gets further tangled up by the difficulty of determining whether the duration of protection has expired. As mentioned earlier, the complexities related to copyright term extensions, such as war extensions, blur the contours of the public domain, thereby making more uncertain and costly any attempt to clear copyrights.

Absent efficient sources of rights information, the clearing process can take from several months to several years. In many instances, the cost of clearing rights may amount to several times the digitization costs. The unfulfilled potentials of digitization projects worsen the cultural outrage over orphan works in terms of loss of opportunities and value that may be extracted from the public domain. The challenges of digitizing works today were widely investigated at the 6th COMMUNIA Workshop, *Memory Institutions and Public Domain*, in Barcelona in October, 2009. The European institutions are also aware of the potential loss of social and economic value if the orphan works problem remains unsolved. As the European Commission noted, "there is a risk that a significant portion of orphan works cannot be incorporated into mass-scale digitisation and heritage preservation efforts such as Europeana or similar projects."[35] The enhanced capacity of digitization and Internet distribution to unlock the humanities' riches has been urging a solution to the orphan works problem, as proposed by COMMUNIA policy **Recommendation # 9**.

As additional tools of commodification, term extension of copyright has been aided by copyright **subject matter expansion**, multiplication of strong commercial rights, and erosion of fair dealing prerogatives, exceptions and limitations. Firstly, the expansion of copyright has caused the contraction of the structural public domain. The protected subject matter has been systematically expanded from books to maps and photographs, to sound recording and movies, to software and databases. In some instances, new quasi-copyrights have been created, as in the case of the

[34] *See* P. BERNT HUGENHOLTZ ET AL., THE RECASTING OF COPYRIGHT & RELATED RIGHTS FOR THE KNOWLEDGE ECONOMY 164-166 (November 2006) (report to the European Commission, DG Internal Market), *available at* http://www.ivir.nl/publications/other/IViR_Recast_Final_Report_2006.pdf.

[35] Commission Communication on Copyright In The Knowledge Economy, at 5-6, COM (2009) 532 final (October 19, 2009), *available at* http://ec.europa.eu/internal_market/copyright/docs/copyright-infso/20091019_532_en.pdf.

introduction of *sui generis* database rights in the European Union, a quintessential example of the process of commodification of information. Additionally, subject-matter expansion has been coupled with the attribution of strong commercial distribution rights, especially the right to control imports and rental rights, and the strengthening of the right to make derivative works.

Together with the contraction of the structural public domain, the functional public domain has been similarly eroded by **narrowing the scope of fair dealing or fair use, exceptions and limitations to copyright**, and public interest rights. The erosion of public interest rights reached its peak in very recent times as a side effect of the transposition of the authorship rights from the analog to the digital medium. In particular, the enactment of anti-circumvention provisions as a response to the Internet threat played a decisive role in the process of contraction of fair dealing rights.

There is, finally, an additional dimension of the process of copyright expansion. Traditionally, the public domain was the default rule of our system of creativity, and copyright was the exception. The **abolition of formalities** changed it all. As a consequence of the international abolition of formalities enclosed in Article 5(2) of the Berne Convention, copyright was declared the default, and public domain was the exception. By default, intellectual works are created under copyright protection, and public domain dedication must be properly spelled out. COMMUNIA opposes any such overreaching expansion of copyright protection and strongly upholds the view embodied in the 1st general principle of the *Public Domain Manifesto* that "[t]he Public Domain is the rule, copyright protection is the exception." COMMUNIA upholds the position that the abolition of formalities no longer serves the purpose that it was served in the analog world. In the field of international law, the mandatory adoption of a "no formalities" approach had a precise target: it was an anti-discrimination norm, introduced to avoid any kind of hidden disadvantages for foreign authors. The digitized and interconnected world allows for instantaneous sharing of information and minimizes the space and time hurdles that persuaded the international community to abolish formalities. Today, the non-discriminatory goal of Article 5(2) of the Berne Convention may be reached using alternative tools: for instance, a simple and free online copyright register could be easily implemented and made accessible from every country in the world. Therefore, a carefully crafted registration system may enhance access and the reuse of creative works by attenuating some of the structural tensions between access and property rights encapsulated in our copyright system. COMMUNIA has embodied this position in **Recommendation # 8**.

As anticipated, the crucial driver of the modern drift toward commodification of the public domain is a mix of technology and legislation. Technology was able to appropriate and fence informational value that was previously unowned and unprotected. That value was appropriated by means of the adoption of **technological protection measures** (TPMs) to control access and use of creative works in the digital environment, including uses that previously could not be restrained. The seal on a policy of control was set by the introduction of the so called anti-

circumvention provisions aimed to forbid the circumvention of copyright protection systems. In addition, the law banned any technology potentially designed to circumvent technological anti-copy protection measures.

Anti-circumvention provisions have negative effects both on the structural and the functional public domain. COMMUNIA policy **Recommendation # 7** pleads for an immediate intervention to protect the public domain against the adverse effect of TPMs. Additionally, COMMUNIA would like the European institutions to carefully reconsider the adoption of any stronger protection of technological protection measures included in the last proposed text of the Anti-Counterfeiting Trade Agreement (ACTA), as also recently requested by several European academics.[36] The foremost concern with this legal and technological bundle is that TPMs and anti-circumvention provisions can make copyright perpetual. The legally protected encryption, in fact, would continue after the expiration of the copyright term. Because circumventing tools are illegal, users will be incapable of accessing public domain material fenced behind TPMs. In addition, TPMs will affect the public domain by restricting or completely preventing fair dealings, privileged and fair uses. TPMs cannot make any determination of purpose that is necessary to assess whether a use is privileged or not. In the absence of that determination copyright will be technologically enforced regardless of the fairness of the use, the operation of a copyright exception or limitation, or a private use. As per Directive 2001/29/EC, as with many other pieces of international legislation, circumventing a digital right management technology that restricts acts permitted by the law is a civil wrong, and perhaps a crime, as such. Exceptions and limitations, and in particular the limitations included in Article 6(4) of the Directive 2001/29/EC, will be of no avail to exclude infringement of the anti-circumvention provisions.

In recent years, **contract law** has also been deployed to commodify and appropriate information supposedly in the public domain. Contracts may be employed to restrict or prohibit uses of works that would otherwise be permitted under copyright law. The digital information marketplace has seen the emergence of standard form contracts restricting the capacity to use information not or no longer qualifying for intellectual property protection or whose use is privileged. The most powerful example is that of click-wrap agreements stating that some uses of a scanned public domain material are restricted or prohibited. A glimpse of such a practice has been implemented by Google as part of its project to partner with international libraries to digitize public domain materials. If you download any public domain books from the Google books website, quite awkwardly the Usage Guidelines included at the front of each scan read as follows: “We also ask that you: + Make non-commercial use of the files. We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.” In the preamble to the Usage Guidelines Google justifies these restrictions by stating that the digitization work carried out by Google “is expensive, so in order to keep providing this resource,

[36] *See* Opinion of European Academics on Anti-Counterfeiting Trade Agreement, at 6, *available at* http://www.iri.uni-hannover.de/tl_files/pdf/ACTA_opinion_200111_2.pdf.

we have taken steps to prevent abuse by commercial parties." COMMUNIA policy **Recommendation # 5** and **Recommendation #6** set up principles to affirmatively protect the public domain against the misappropriation of public domain works with special emphasis on the digital reproduction of public domain works.

However, the synergy between mass market licenses and technological protection measures poses the major threat to the availability of digital information in the public domain. As Professor Lucie Guibault has noted at the 1st COMMUNIA Conference,

> The digital network's interactive nature has created the perfect preconditions for the development of a contractual culture. Through the application of technical access and copy control mechanisms, rights owners are capable of effectively subjecting the use of any work made available in the digital environment to a set of particular conditions of use.[37]

This was never the case in the analog environment. The purchase of a book, the enjoyment of a painting or a musical piece never entailed the obligation of entering into a contract in the past. Hence, the emergence of this contractual culture, coupled with strict technological enforcement, has been endangering the public domain with a new set of threats in the digital environment.

Technological protection measures empower the application and enforcement of mass-market licenses on the Internet that may restrict the lawful use of unprotected information by the users. Technological protection measures act as a substitute for the traditional exceptions and limitations provided by copyright law. Therefore, "the widespread use of technological protection measures in conjunction with contractual restrictions on the exercise of the privileges recognised by copyright law does affect the free flow of information . . . .", as Professor Guibault concluded at the 1st COMMUNIA Conference. The control over the dissemination of ideas and facts or other unprotected and non-protectable information will unduly hinder democratic discourse and freedom of expression by restricting productive uses of unprotected information.

Any encroachment upon the public domain is an encroachment upon our capacity of **free and diverse expression**. Freedom of expression and the public domain are overlapping concepts that share the same goal. Public domain and free speech both have a democratic function in that they propel personal and political discourse. The public domain is pivotal to our ability to express ourselves freely regardless of the market power of the speakers. Any decrease in the public domain will produce the most relevant repercussions on people with less ability to finance creation and dissemination of their speech. Thus, any contraction of the public domain will push Europe away from the goal of bringing "the millions of dispossessed and disadvantaged Europeans in from the margins of society and cultural policy in from the margins of governance," to quote a

[37] Guibault, Lucie, Evaluating Directive 2001/29/EC in the light of the Digital Public Domain, paper presented at the 1st COMMUNIA Conference, Louvain-la-Neuve, Belgium (July 1, 2008), at 12.

European report drafted as a specific complement to the World Commission on Culture and Development's 1996 report on global cultural policy.[38]

As an interrelated issue, copyright expansion and public domain enclosure affect our freedom of expression by impinging on cultural diversity. Historically, cultural diversity has been a fundamental value in the European Union. In addition, since ratification in 2007, all of the relevant European policy decisions should be compelled to conform to the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions' obligations. In this regard, a recent study on the state of the implementation of the Convention in Europe noted that, while some copyright is necessary, too much copyright is detrimental to diversity of cultural expression. Diversity of cultural expression is particularly threatened by intellectual property rights "in markets that are dominated by big corporations exercising collective power as oligopolies."[39] Cultural conglomerates deepen their market dominance through horizontal and vertical integration. The high degree of control over the entire distribution process in a number of different areas of cultural output makes it possible to run any alternative, noninfringing creative material out of the market. As a consequence, global media and entertainment oligopolies will impose an homogenizing effect on local culture. Cultural filtering, homogenization and the loss of the public domain have exacerbated the "dysfunctional relationship between copyright and cultural diversity," as Professor Fiona Macmillan puts it.[40]

In particular, public domain enclosure and copyright expansion are very pernicious for the diversity and decentralization of modern forms of peer information production.

> In a digital environment where distribution costs are very small, the primary costs of engaging in amateur production are opportunity costs of time not spent on a profitable project and information input costs. Increased property rights create entry barriers, in the form of information input costs, that replicate for amateur producers the high costs of distribution in the print and paper environment. Enclosure therefore has the effect of silencing nonprofessional information producers.[41]

Amateur production has been the driving force of the Internet informational revolution. Blogs, listservs, forums, and user-based communities re-calibrated the meaning of diversity and freedom of expression toward a higher standard. Nonprofessional information production empowered the

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[38] THE EUROPEAN TASK FORCE ON CULTURE AND DEVELOPMENT, IN FROM THE MARGINS: A CONTRIBUTION TO THE DEBATE ON CULTURE AND DEVELOPMENT IN EUROPE 276 (1997) (report prepared for the Council of Europe), *available at* http://www.coe.int/t/dg4/cultureheritage/culture/resources/Publications/InFromTheMargins_EN.pdf

[39] GERMANN AVOCATS, IMPLEMENTING THE UNESCO CONVENTION OF 2005 IN THE EUROPEAN UNION, IP/B/CULT/IC/2009_057 (May 2010) (study prepared for the European Parliament Directorate General for Internal Policies, Policy Department B: Structural and Cohesion Policies, Culture and Education), *available at* http://www.diversitystudy.eu.

[40] Fiona Macmillan, *The Dysfunctional Relationship Between Copyright And Cultural Diversity*, 27 QUADERNS DEL CAC 101 (2007).

[41] Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on the Enclosure of the Public Domain*, 74 N.Y.U. L. Rev. 354, 410 (1999).

civic society with the ability to produce truly independent and diverse speech. Enclosure of the public domain would strike hard at the potentialities and openness of digital peer production. In this regard, any policy intervention should not underestimate the decreased production by organizations using strategies that do not benefit from copyright expansion. Increased copyright protection and public domain enclosure, in fact, may "lead, over time, to concentration of a greater portion of the information production function in society in the hands of large commercial organizations that vertically integrate new production with owned-information inventory management."[42]

Ironically, copyright law may end up serving the old enemy against which it was originally unleashed. Widely recognized as a tool to counter censorship so common in the old patronage system, copyright law may turn out to restrict free and diverse speech by its steady expansion and converse public domain enclosure and commodification. Moreover, and more regretfully, an unwise expansionistic copyright policy may empower again that old enemy of any democratic society at the very moment when technological progress may lead us close to its very annihilation.

It is worth mentioning that COMMUNIA has been also investigating the problem of the tension between cultural heritage protection laws (CHPLs) and the public domain. In some EU Member States, cultural heritage legislation may impose an additional layer of restrictions over works that are otherwise copyright free. In particular, in some instances, CHPLs may set up a permission system to reproduce cultural resources and monuments. The COMMUNIA Working Group 3 has gathered in Istanbul in December 2010 to explore the issue and produce a set of recommendations. The policy options discussed by the COMMUNIA Working Group 3 range from abolition of CHPLs, harmonization of CHPLs across the EU and gradual transition towards less and more rational restrictions. In particular, the most important conclusion of the meeting was perhaps that CHPLs could be used in order to mark and protect the public domain, if the permission system possibly in place is accompanied by an obligation to mark the work as a public domain work. Policy options and recommendations about cultural heritage and the public domain, as developed by the members of the COMMUNIA Working Group 3, will be released later this year.[43]

Together with the more substantial and specific factors troubling the public domain so far described, there are other more generic aspects of the legislative process that should be redressed to better protect and promote the European public domain. **Lack of representation of the interest of users and the public**, lack of transparency of the legislative process, obscurity of copyright legal provisions, and lack of legal harmonization are all factors that aggravate the tension between public domain and copyright protection.

[42] *Id.*

[43] *See* Federico Morando and Prodromos Tsiavos, Cultural Heritage Rights in the Age of Digital Copyright (forthcoming 2011).

Enclosure and commodification of the public domain are also the result of an unbalanced legislative process. Lobbying from cultural conglomerates played an important role in amplifying the process of copyright expansion beyond strict public interest. The public at large has always had very limited access to the bargaining table when copyright policies had to be enacted. This is due to the dominant mechanics of lobbying that largely excluded the users from any decision on the future of creativity management. The final outcome has been the implementation of a copyright system strongly protectionist and pro-distributors with an overbroad expansion of private property rights followed by a correspondent restriction of public prerogatives and enclosure of the public domain.

Legal uncertainty is an additional hurdle to the public enjoyment of a healthy and rich public domain. By blurring the contours of the structural and functional public domain, legal uncertainty will augment the unpredictability of the European public domain. As a consequence, users' prerogatives will be variable and ambiguous, transaction costs will rise, and the efficiency of the European Internal Market will be lowered, therefore undermining the Digital Agenda for Europe (hereinafter "Digital Agenda") goal of a "vibrant digital single market." The fundamental drivers of legal uncertainty are **obscure laws** and a lack of harmonization.

Authors have argued (i.e. Jessica Litman) that copyright laws are too obscure and complex for the users. Copyright law is drafted for the market players, not for users. The obscurity of copyright law causes a high level of uncertainty among users regarding what they can or cannot do with creative content. Because of the complexity of copyright provisions, users are discouraged from enforcing privileged or fair uses of copyrighted content in court. The obscurity of copyright law has perpetuated and propelled the misuse and abuse of copyright law by copyright conglomerates. The problem is exacerbated by the fact that users are involved far more than before in the creative process. Digitization, the Internet and user-generated culture has made everybody a potential author as well as a potential infringer.

The public domain suffers also from legal uncertainty that is the effect of **lack of harmonization** among European national jurisdictions. Firstly, Europe's diverse legal frameworks heighten the indeterminacy of that portion of the European structural public domain that may be termed the ontological public domain. The ontological public domain is defined by the application of the idea-expression dichotomy, the subject matters protected, the criteria for protection, either the requirement of originality or substantial investment, and the exhaustion doctrine. In Europe, subject matters of protection have been harmonized only with respect to new or controversial subject matters, such as software, databases and photographs. In addition, the concept of originality is still largely unharmonized throughout Europe and fundamental differences between continental and common law system still remain. COMMUNIA calls for a solution to this unpredictability through its policy **Recommendation # 4**. The diversity of the European legal framework adds peculiar complexity to the issue of copyright duration as well. Despite the fact that efforts have been made toward harmonization, the intricacies of length of protection and copyright extension, such as war extensions, in national jurisdictions aggravate the tension

between copyright protection and the public domain in Europe. COMMUNIA policy **Recommendations # 4** calls for further harmonization of rules of copyright duration. Further, lack of harmonization of exceptions and limitations in Europe plays a nefarious role for the public domain, as spelled out by Professor Lucie Guibault at the 1st COMMUNIA Conference. Notwithstanding the Information Society Directive aimed at harmonizing exceptions and limitations, that goal most probably failed, and legal uncertainty still persists. All but one of the limitations in the regime set up by the Information Society Directive was optional, and the regime provides the Member States with ample discretion to decide if and how they implement the limitations. This variety of different rules applicable to a single situation across the European Community has an adverse effect on the functional public domain thus undermining the users' prerogatives. COMMUNIA policy **Recommendation # 3** asks for further harmonization and revision of exceptions and limitations across Europe. This harmonization is of essence because Europe has the opportunity to acquire a leading international role in the fair use industry, by taking full advantage from the European system of predefined exceptions and limitations, if contrasted with the more unpredictable United States case-by-case fair use model. Finally, the promotion of the public domain calls for an effort towards harmonization of the definition of the moral right of integrity and duration of moral rights after the death of the author. COMMUNIA trusts that moral rights should not extend longer than the economic rights. This arrangement would be compliant with the minimum standard set by the Bene Convention. According to Article 6bis (2) of the Berne Convention, the moral rights of the author "shall, after his death, be maintained, at least until the expiry of the economic rights . . . ."

THE PUBLIC DOMAIN AND THE EUROPEAN COMMISSION STRATEGY

As mentioned, so far much of the value residing in the public domain has been left unattended. Much of the emphasis has been placed on private commodification of information rather than exploitation of the public domain for the public good. Unfortunately, no international player has yet focused upon the value of openness and public domain business models by reversing the present trend of extreme propertization. As detailed throughout the report, the emerging online culture of sharing and remixing has enhanced the value of the public domain. User-generated content, online collaborative endeavours and peer-production, such as open source software, are founded on the value of reuse and inherently diminished by increased propertization. The same applies to blogging, twittering and modern forms of online information that have radically changed our democratic landscape. Again, overreaching copyright expansion hinders the development of fair use industries that may be increasingly boosted by digitization and the Internet, as mentioned earlier. So far, no jurisdiction has really tackled the question of creativity in the digital age by shifting the paradigm of steady commodification of information, overlooking the fact that digitization and the Internet have changed it all. In contrast, digitization and the Internet have become a misperceived justification of extreme propertization. COMMUNIA believes that Europe has the opportunity to lead and the time has come to do so. Europe can become an

international leader in extracting value from the public domain with a few key solutions that do not substantially harm the current state copyright and do not entail overbroad efforts.

The large benefits that Europe could reap from preserving and promoting the public domain will substantially come at no additional costs. The assets of the public domain are ready to be profitably used. The public domain is a cultural mine enriched over the centuries. Today, the riches of the public domain can be enjoyed with the click of a computer mouse. The power of propagation through the Internet and the endless productivity of digitization have made exploitation easier and the public domain exponentially more valuable.

Additionally, mechanisms and tools to make the public domain and the value attached to it a priority for further intervention are already in place at the EU level. Since the i2010 strategy, European institutions have greatly valued digitization and preservation of the European public domain, open access to information, and the protection of users' prerogatives in the digital environment. The same priorities have been upheld by the most recent efforts of the European Union. In this regard, as one of the seven flagship initiatives of the Europe 2020 strategy, the Digital Agenda is setting up several key principles and guidelines to redress many of the tensions challenging the full exploitation of the value of the digital public domain. Many of the key actions proposed by the Digital Agenda strengthen the conclusions and the call for policy actions put forward by COMMUNIA. In particular,

i. digitization of the European cultural heritage and digital libraries are key aspects of the recently implemented Digital Agenda of the European Union. The Digital Agenda notes that fragmentation and complexity in the current licensing system also hinder the digitisation of a large part of Europe's recent cultural heritage. Therefore,
    a. rights clearance must be improved;
    b. Europeana - the EU public digital library - should be strengthened and increased public funding is needed to finance large-scale digitisation, alongside initiatives with private partners;
    c. funding to digitisation projects is to be conditioned to general accessibility of Europe's digitised common cultural heritage online.

ii. The Digital Agenda calls for a simplification of copyright clearance, management and cross-licencing. In particular, the European Commission should create a legal framework to facilitate the digitization and dissemination of cultural works in Europe by proposing a directive on orphan works.

iii. The review of the Directive on the Re-Use of Public Sector Information to oblige public bodies to open up data resources for cross-border application and services has been prioritized by the Digital Agenda;

iv. Promoting cultural diversity and creative content in the digital environment, as an obligation under the 2005 UNESCO Convention, is an additional relevant goal of the Digital Agenda.

v. The Digital Agenda is also very much concerned with harmonization and simplification of laws by calling for the creation of a "vibrant single digital market" and promoting the necessity of building digital confidence as per the EU citizens' digital rights that are scattered across various laws and are not always easy to grasp.

The mentioned European strategies have been translated in a vast array of projects and endeavours to protect and propel the public domain in Europe and to investigate its capacity to produce value for society at large. COMMUNIA is one of the outcomes of this strategic vision, especially conceived to investigate the challenges and the opportunities brought by digitization.

COMMUNIA AND THE EUROPEAN PUBLIC DOMAIN PROJECT

COMMUNIA is aggregating a strong coalition that is promoting the public domain and a sustainable cultural development in Europe. COMMUNIA has been strengthening a European network of organizations that have been developing a new perspective on the importance of the public domain for Europe and the international arena at large. This is an essential precondition to solve the typical collective action problem raised by copyright policy, which, in accordance with Mançur Olson classical work is driven by a small group of concentrated players to the detriment of the more dispersed interest of smaller players and the public at large.[44] Annex I of this Report will further detail activities, goals and the essence of the COMMUNIA network.

Several COMMUNIA members have embodied the COMMUNIA perspective and values in the *Public Domain Manifesto* produced within the context of COMMUNIA. Conscious of the challenges and opportunities for the public domain in the technological environment of the networked society, the *Public Domain Manifesto* endorses fundamental principles and recommendations to actively maintain the structural core of the public domain, the voluntary commons and user prerogatives. With regard to the structural public domain, the *Public Domain Manifesto* states the following principles:

> 1. The Public Domain is the rule, copyright protection is the exception. [. . .] 2. Copyright protection should last only as long as necessary to achieve a reasonable compromise between protecting and rewarding the author for his intellectual labour and safeguarding the public interest in the dissemination of culture and knowledge. [. . .] 3. What is in the Public Domain must remain in the Public Domain. [. . .] 4. The lawful user of a digital copy of a Public Domain work should be free to (re-)use, copy and modify such work. [. . .] 5. Contracts or technical protection measures that restrict access to and re-use of Public Domain works must not be enforced. [. . .].

Together with the structural core of the public domain, the *Public Domain Manifesto* promotes the voluntary commons and user prerogatives by endorsing the following principles:

> 1. The voluntary relinquishment of copyright and sharing of protected works are legitimate exercises of copyright exclusivity. [. . .] 2. Exceptions and limitations to copyright, fair use and fair dealing need to be actively maintained to ensure the effectiveness of the fundamental balance of copyright and the public interest. [. . .].

Further, the *Public Domain Manifesto* puts forward the following general recommendations to protect, nourish and promote the public domain:

> 1. The term of copyright protection should be reduced. [. . .] 2. Any change to the scope of copyright protection (including any new definition of protectable subject-matter or expansion of exclusive rights) needs to take into account the effects on the Public Domain. [. . .] 3. When material is deemed to fall in the structural Public Domain in its country of origin, the material should be recognized as part of the structural Public Domain in all other countries of the world. [. . .] 4. Any false or misleading attempt to misappropriate Public Domain material must be legally punished. [. . .] 5. No other intellectual property right must be used to reconstitute exclusivity over Public Domain material. [. . .] 6. There must be a practical and effective path to make available 'orphan works' and published works that are no longer commercially available (such as out-of-print works) for re-use by society. [. . .] 7. Cultural heritage institutions should take upon themselves a special role in the effective labeling and preserving of Public Domain works. [. . .] 8. There must be no legal obstacles that prevent the voluntary sharing of works or the dedication of works to the Public Domain. [. . .] 9. Personal non-commercial uses of protected works must generally be made possible, for which alternative modes of remuneration for the author must be explored. [. . .].

In addition, the European-wide relevance of the public domain has been strengthened by other policy statements endorsing the same core principles of the *Public Domain Manifesto*. The Europeana Foundation has published the *Public Domain Charter* to stress the value of public domain content in the knowledge economy.[45] The many relations between the Public Domain Manifesto and the Europeana Charter were discussed at the 7th COMMUNIA Workshop in Luxembourg.[46] The Free Culture Forum released the *Charter for Innovation, Creativity and Access to Knowledge* to plead for the expansion of the public domain, the accessibility of public domain works, the contraction of the copyright term, and the free availability of publicly funded research. Again, Open Knowledge Foundation launched the *Panton Principles for Open Data in Science* in

[44] MANÇUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (Harvard U. Press 1971) (1965).

[45] *See* The Europeana Public Domain Charter, http://version1.europeana.eu/web/europeana-project/publications.

[46] *See* Jill Cousins, The Public Domain, the Manifesto, his Charter and her Dilemma, presentation delivered at the 7th COMMUNIA Workshop, Luxembourg (February 1, 2010).

February, 2010, to endorse the concept that "data related to published science should be explicitly placed in the public domain."

Triggered by a forward-looking approach of the European institutions, Europe is putting together a very diversified and multi-sector network of projects for the promotion of the public domain and open access. The European public domain project is emerging in a strong multi-tiered fashion. Together with COMMUNIA, as part of the i2010 policy strategy, the European Union launched the Europeana digital library network, www.europeana.eu, to digitize Europe's cultural and scientific heritage. The LAPSI project, www.lapsi-project.eu, was started to build a network covering policy discussions and strategic action on all legal issues related to access and the re-use of public sector information in the digital environment. Further, to assess the value and to define the scope and the nature of the public domain, the European Commission has promoted the Economic and Social Impact of the Public Domain in the Information Society project. The project, together with its methodology, was presented at the 1st COMMUNIA Conference in Louvain-la-Neuve in 2008.[47]

Again, many other projects focus on extracting value form our scientific and cultural riches in the digital environment. The European DRIVER project, http://www.driver-repository.eu, presented at the 1st COMMUNIA Conference and the 1st COMMUNIA Workshop, is aimed to build a repository infrastructure combined with a search portal for all of the openly available European scientific communications.[48] The project ARROW (Accessible Registries of Rights Information and Orphan Works), http://www.arrow-net.eu, encompassing national libraries, publishers, writers' organisations and collective management organisations, aspires to find ways to identify rightholders and rights, clear the status of a work, or possibly acknowledge the public domain status of a work. Finally, the Digital Research Infrastructure for the Arts and Humanities (DARIAH) aims to enhance and support digitally-enabled research across the humanities and the arts.

With the support of the Open Knowledge Foundation, the UK government announced the launch of data.gov.uk, www.data.gov.uk, a collection of more than 2,500 UK government databases - now freely available to the public for consultation and re-use. The Open Knowledge Foundation launched the Public Domain Calculators project as part of the Public Domain Works project, www.publicdomainworks.net, an open registry of artistic works that are in the public domain. The Public Domain Calculators project, presented at the 3rd COMMUNIA Workshop, *Marking the Public Domain: Relinquishment & Certification*, in Amsterdam, is aimed at creating an algorithm to determine whether a certain work is in the public domain given certain details, such

[47] *See* Mark Isherwood, Rightscom Ltd, European Commission project: Economic and Social Impact of the Public Domain. Introduction to Methodology, paper presented at the 1st COMMUNIA Conference, Louvain-la-Neuve, Belgium (June 30, 2008).

[48] *See* Sophia Jones and Alek Tarkowski, Digital Repository Infrastructure Vision for European Research - DRIVER project, presentation delivered at the 1st COMMUNIA Workshop, Turin, Italy (January 18, 2008); Karen Van Godtsenhoven, The DRIVER Project: on the Road to a European Commons for Scientific Communication, presentation delivered at the 1st COMMUNIA Conference, Louvain-la –Neuve, Belgium (June 30, 2008).

as date of publication, date of death of author, etc.[49] The activities and goals of the Open Knowledge Foundation, a very active COMMUNIA member, were presented at the 1st COMMUNIA Workshop.[50]

Many other civic society endeavours have been working toward the goal of promoting open access and safeguarding the public domain throughout Europe. Among them, La Quadrature du Net, http://www.laquadrature.net, an advocacy group that promotes the rights and freedoms of citizens on the Internet, is very active within and outside of the COMMUNIA network. The European Association for Public Domain, www.europeanpublicdomain.eu, was recently initiated as a project to promote and defend the Public Domain. Again, Knowledge Exchange is a co-operative effort run by European libraries and research foundations that supports the goal of making a layer of scholarly and scientific content openly available on the Internet. Finally, it is worth noting that commercial enterprises joined the COMMUNIA network in an attempt to investigate and promote open and public domain business models.

This distributed European public domain project is an encouraging starting point. Nonetheless, much still must be done to promote sustainability in the development of our cultural environment, in particular our digital cultural environment. The commodification of information, the enclosure of the public domain, and the converse expansion of intellectual property rights tell a story of unsustainable unbalance in shaping the informational policy of the digital society. COMMUNIA is, therefore, calling for targeted policy actions to redress the informational policy of the digital society and to maximize the economic and social value that may be extracted from the public domain, especially from the digital public domain.

WHAT CAN EUROPE DO FOR THE PUBLIC DOMAIN?

One of the main goals of the COMMUNIA Network is to provide policy recommendations to strengthen the public domain in Europe. The COMMUNIA Policy Recommendations are detailed in Annex III of this Report. The recommendations included in the Report are principally addressed to the Commission. However, the recommendation portion of the Report has been envisioned as an agenda and stimulus to any other entity - Member States, national libraries, the publishing industry, expert groups, etc. - that may promote or influence public domain related decisions. In addition, an inner integration between public domain projects at the European level and the international level is a goal recommended by COMMUNIA. This may be easily done by strengthening a more qualified presence of the European Union during discussion and negotiations of public domain issues within the WIPO Development Agenda framework.

[49] See Jonathan Gray, Public Domain Calculators, presentation delivered at the 3rd COMMUNIA Workshop, Amsterdam, Netherlands (October 20, 2008).

[50] *See* Jonathan Gray, Rufus Pollock and Jo Walsh, Open Knowledge: Promises and Challenges, presentation delivered at the 1st COMMUNIA Workshop, Turin, Italy (January 18, 2008).

The COMMUNIA policy recommendations seek to re-define the hierarchy of priorities embedded in the traditional politics of intellectual productions and creativity. Any public policy of creativity should promote the idea that information is a cultural and democratic resource before than a commodity. The agenda of the information society cannot be dictated by commercial interests above and beyond any of the fundamental values that shape our community. This approach would be a myopic understatement of the relevance of information in the information society. Therefore, "intellectual property must find a home in a broader-based information policy, and be a servant, not a master, of the information society."[51] If Europe is eager to take up a leading role in the digital environment as stated in the i2010 strategy and the Digital Agenda, it is time to depart from the idea that the only paradigm available is a politics of intellectual property. Instead, it is pivotal to develop a global strategy and a new politics of the public domain. Private incentive to create shall naturally follow like exceptions from the rule, to quote again the *Public Domain Manifesto*.

The COMMUNIA proposal for a new politics for the public domain shall encompass the review of the following strategic subject matters:

- Term of protection
- Copyright harmonization
- Exceptions and limitations
- Misappropriation of public domain material
- Technological protection measures
- Registry system
- Orphan works
- Memory institutions and digitization projects
- Open access to research
- Public sector information
- Alternative remuneration systems and cultural flat rate

A politics for the public domain should (I) redress the many tensions with copyright protection by re-discussing the term of protection, re-empowering exceptions and limitations, harmonizing relevant rules and adapting them to technological change; (II) positively protect the public domain against misappropriation and technological protection measures; (III) propel digitization projects and conservation of the European cultural heritage by solving the orphan works problem and implementing a registry system; (IV) open access to research and public sector information; (V) and promote new business models to enhance creativity, including alternative remuneration systems and a cultural flat rate.

A politics of the public domain is needed to protect our intellectual domain as much as a strategy for national security is required to protect our physical home. We all are citizens of the

[51] Samuelson, *Mapping the digital public domain*, *supra* note 4, at 171-172.

public domain, Professor David Lange has argued. The public domain is our country and our home. Enclosure and propertization of the public domain correspond to depriving citizens of their country and homes. Any policy oriented to the enhancement of creativity should be respectful of our citizenship of the public domain. Any such policy should nourish, protect, and promote the public domain. A stronger public domain will make Europe stronger and richer.

A stronger public domain will help Europe earn a central and crucial place in fostering new creativity. The ability to promote new creativity will allow Europe to appropriate unexplored social and economic value that lies in the digital realm. A stronger public domain and the promotion of open business models will raise income levels across Europe.

The European advantage in promoting the public domain can be seen from multiple angles. Firstly, much value is still to be extracted from public sector information, if compared to other jurisdictions. Europe is a late entry in the market for public sector information. According to estimates, 7% of the United States GDP is coming from public sector information, whereas only 0.5% of European Union GDP is coming from that source. Several studies have highlighted that a public domain approach to weather, geographical data, and public sector information in general, may yield a substantial long-term value for Europe, running into the tens of billions or hundreds of billions of euros. Open access to public sector information will entail a considerable added value for the European market.

A stronger public domain will also help Europe to achieve its goal of creating a European digital public library. The Europeana platform is up and running. This is the only international project of its kind. Other jurisdictions are in the process of abdicating to private parties their public role in developing digital libraries and digitisation projects. This is not the European vision. Europe values public interest and full public access above all. However, in order not to lag behind private projects, as Google books, and suffer from negative network effects, Europe should strive to build a digital public library that can fully unlock the riches of digitization to European society at large. To that end, a European digital public library must be capable of including orphan works as well as access to information, sampling, and purchase of copyrighted in-print and out-of-print material.

Open access to scientific and academic publications and new business models, such as alternative remuneration systems and cultural flat rates that favour access and the reuse and remix of information, will be the tools of European cultural growth and enhanced creativity. As discussed at COMMUNIA meetings, networks of open knowledge environments may spread across European academic and public interest institutions. Open access will propel collaborative research and educational opportunities through interactive portals and functions such as wikis, forums, blogs, journals, post publication reviews, repositories and distributed computing.

In a modern, digital networked Europe, open and free public sector information, together with public domain material, will be the building blocks of our cumulative knowledge and innovation. Exceptions for scientific and academic purposes, open access to academic publications, easy remix promoted by alternative business models, will empower fast and efficient processing and reuse of

other protected material while lowering transaction costs. A pan-European digital library will assure access to and widen the distribution of knowledge with the enhanced tools of computational analysis to foster new research opportunities, such as the digital humanities and genomics. Additionally, a digital public library will push forth the rediscovery of currently unused or inaccessible works, open up the riches of knowledge in formats that are accessible to persons with disabilities and, empower a superior democratic process by favoring access regardless of users' market power. It will be a perfectly efficient integrated environment for boosting knowledge, research, and follow-up innovation. The goal of the Digital Agenda "to deliver sustainable economic and social benefits from a digital single market based on fast and ultra fast internet and interoperable applications" perfectly supports this vision.[52] COMMUNIA policy recommendations are meant to be one initial, but substantial, step to make this vision come true.

Additionally, if we look at the traditional market for creativity, we can see that there is a considerable added value for Europe to invest in a lead role in the market for open and public domain business models. Businesses based on legacy intellectual property models have been the strength of the United States economy (Hollywood, Microsoft, Apple, pharmaceutical and biotechnological companies, etc.). Most of the economic value created by those models has been harvested elsewhere other than Europe. Moreover, the dominance of imported cultural paradigms and industries has increasingly propelled pernicious forms of cultural colonization. The negative externalities are immense, especially in terms of impoverishment and the blurring of our cultural diversity. At the same time, an open, decentralized, networked model for creativity would boost cultural diversity at unprecedented levels. The Euroepan rich linguistic and cultural diversity, coupled with a net deficiency of European intellectual property industries, makes the European Union the ideal candidate to extract value from an open digital agenda and for successful deployment of cooperative, network driven enterprises. Further, as previously noted, the European Internal Market may become a haven for fair use industries, thanks to the legal certainty of its predefined list of exceptions to copyright, as opposed to the unpredictable case-by-case United States fair use system.

If Europe takes control of creativity in the digital environment, Europe will take full control of its future. However, the sole way for Europe to acquire this edge is to promote the immense cultural diversity that lies in the European public domain, as enhanced by the ubiquity and power of propagation of digitization. In order to do so, Europe needs to be innovative and creative. Europe does not need to be afraid to challenge outdated and inefficient business models, instead Europe should fully empower the values of public participation and collaboration. Neither does Europe need to be afraid to radically innovate. When the radical innovations become the new paradigm, the innovator will leapfrog ahead of former leaders who are incapable of changing fast enough, having been trapped by the strength and privileges of the traditional gatekeepers. We all know

[52] Commission Communication, A Digital Agenda for Europe, at 3, COM (2010) 245 final (May 19, 2010), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0245:FIN:EN:PDF.

that this is a time of radical innovation. Radical innovation is coming along regardless of the fact that the "Ancient Regime", as Nellie Kroes has termed it, may attempt to retard its advent. As Joseph Schumpeter would have put it, to best leapfrog all of its competitors, the European Union should take the opportunity to go full sail out of the Digital Dark Age into the Digital Enlightenment blown by the wind of creative change.

ANNEX I

COMMUNIA PROJECT

This Annex II of the Final Report is intended to describe the nature and review the activities of the COMMUNIA Network.

The COMMUNIA Project

COMMUNIA is a thematic project funded by the European Commission within the eContentplus framework addressing theoretical analysis and strategic policy discussion of existing and emerging issues concerning the public domain in the digital environment - as well as related topics, including, but not limited to, alternative forms of licensing for creative material; open access to scientific publications and research results; management of works whose authors are unknown (i.e. orphan works).

Coordinated by the Politecnico of Torino's NEXA Research Center for Internet and Society, COMMUNIA activities started on September 1, 2007 and ended on February 28, 2011.

COMMUNIA effort is aimed at helping to frame the general discourse on and around the public domain in the digital environment by highlighting the challenges arising from the increasingly complex interface between scientific progress, technological innovation, cultural development, socio-economic change on the one hand and the rise and mass deployment/usage of digital technologies in the European information society."

The COMMUNIA Network

The COMMUNIA network is represented by its members and aided by a committee of prestigious advisors, including Prof. Dr. Maximilian Herberger, Prof. Jerome H. Reichman, Prof. Stefano Rodotà, Dr. Paul F. Uhlir. The founding members are 36, with five more members added in September 2008. In August 2009, the 2nd (and final) Member Enlargement Selection was completed by 41 COMMUNIA members expressing their voting preferences for 10 new members. The network includes now 51 members - universities, consumer organizations, libraries, archives, non-profits, commercial enterprises, etc. - mostly from the EU, but also from a few overseas countries such as United States and Brazil. To look up COMMUNIA members, a worldwide interactive map is available at http://www.COMMUNIA-project.eu/members-map.

COMMUNIA Network members attended COMMUNIA workshops and conferences, participated in working groups of their interest and promoted the advancement of the understanding of public domain.

The COMMUNIA Working Groups

To carry out the institutional scope of COMMUNIA the following working groups ("WG") have been created.

- **WG1: Education and scientific research (EDUSCIENCE)** (led by Ignasi Labastida, Universitat de Barcelona)

WG1 focused on the role of the public domain for education and scientific research. More specifically, WG1 examined the way in which the public domain can or should act as a source of material for education and scientific research; how digital technologies impact on the relevance of the public domain for the scientific process; if and how current policies in granting (or denying) access to research results, both in the form of articles in journals and more generally as collections of research results (e.g. databases) is influencing the efficiency and effectiveness of research and education throughout Europe; whether a "protected public domain" or a "scientific commons" would be desirable and, if so, which would be the proper strategies to achieve such results.

- **WG2: Technology issues (TECH)** (led by Davide Bardone, NEXA Center for Internet & Society)

WG2 studied the complex relationships between technology, especially information and communication technologies, and the public domain and related issues. WG2 focused on the following sub-topics: the impact of data formats and protocols on the digital public domain; Rights Expression Languages and management of metadata applied to digital or digitalized works with particular emphasis on whether a change in the approach to such management is required to promote the public domain; search technologies, with a particular attention to semantic analysis capabilities and interface with legal ontologies; storage technologies, especially massively distributed storage such as can be found in P2P systems; trust as it is expressed through the use of digital signatures and timestamps for managing repositories of digital works, particularly when such works are either in the public domain or released under "sharing" licensing frameworks; Digital Rights Management systems and the way in which digital enforcement of copyright policies interacts with the public domain; network policies and the way in which they influence access to, exchange and re-use of the public domain.

- **WG3: Libraries, museums and archives (MEMORY)** (led by Maarten Brinkerink, Stichting Nederlands Instituut voor Beeld en Geluid)

WG3 studies the specific issues that libraries and archives - whether public or private and independently of the specific type of works they collect - have to deal with when confronted with the public domain and more particularly with the public domain of digital works or works for

which digitisation is feasible and probable. WG3 also conducted analysis on "bottom-up" archiving of works performed by volunteers, made possible by massively distributed collaboration technologies such as Wikis and other Internet and Web-based platforms. Another strand of research of WG3 related to the “voluntary sharing” area between the pure public domain and copyrighted works for which the rights holders wish to severely limit redistribution, namely works released under "sharing" licensing frameworks such as Creative Commons licenses. The issues is further complicated by the fact that libraries and archives are often vested with the particularly important duty to disseminate knowledge and culture, in its various forms, irrespective of the wishes of the rights holders. In this sense, WG3's analysis focused on the way in which public policies and the law handles the delicate balance between the role of libraries and archives, the protection that copyright law grants to rights holders and the promotion (or lack thereof) of the public domain.

- **WG4: Economic analysis and new business paradigms (ECONOMICS)** (led by Federico Morando, NEXA Center for Internet & Society)

WG4 focused on economic analysis of the digital public domain and the related issues of interest to the COMMUNIA project. More specifically, WG4 worked on what would be the proper analytical methods and tools when dealing with the public domain and/or "sharing" licensing frameworks in their interaction with existing and established business models (e.g. the "new" role of publishing intermediaries as agents that either act as an interface to the market for authors/rightsholders, providing distribution channels, legal advice, marketing efforts, etc.; or use the public domain as a resource for their activities). Furthermore, WG4 focused on how new business paradigms could emerge when different policies related to the public domain, and the intersection with information and communication technologies, are put in place. On this topic, WG4 devoted specific attention to the analysis of so-called "user-centered innovation", i.e. business processes and policy decisions that put end-users in a position to create and innovate information-intensive goods, and how the digital public domain and the "information commons" interact with this kind of phenomena.

- **WG5: The public sphere (PUBLIC)** (led by Philippe Aigrain, Sopinspace) [dissolved and merged with WG 1, during the Turin Conference 2009]

After discussion at the Amsterdam COMMUNIA workshop in October 2008, the workgroup has decided to focus on two tasks: (i) preparing and issuing an open call (to all interested parties) for position statements supportive of the public domain and voluntary information and knowledge sharing; each position statement would address a given regulatory, policy or technology issue; (ii) contributing to the work now undertaken by WG6 on "Mapping the public domain" (contents, structure, players and positions, specifics of jurisdictions).

- **WG6: Mapping the public domain (MAPPING)** (led by Jonathan Gray, Open Knowledge Foundation; Lucie Guibault, University of Amsterdam; and Séverine Dusollier, Facultés Universitaires Notre-Dame de la Paix)

WG6 focused on a twofold mission. Following a descriptive approach, WG6 provided a definition of what constitutes the public domain in Europe; and following a normative approach, WG6 developed principles and guidelines for the preservation, access to, and use of the public domain in Europe. The WG6 took a leading role in the development of the Public Domain Manifesto and the promotion of the ongoing work on the public domain calculators.

The COMMUNIA Meetings and Events

Among its activities, COMMUNIA organized several workshops and three International conferences in EU countries. Conference and Workshops have been also a special opportunity for members of the COMMUNIA Working Groups to gather together and discuss the COMMUNIA agenda, actions and policy recommendations.

The **1st COMMUNIA Workshop**, ***Technology and the Public Domain***, in Torino, on January 18, 2008, addressed different technology and infrastructure matters involving over 100 attendees. The bottom line remained an interdisciplinary and broad approach, pushing for the development of the "digital commons" as a general mainframe.

The **2nd COMMUNIA Workshop**, ***Ethical Public Domain: Debate of Questionable Practices***, took place in Vilnius on March 31, 2008. The workshop centered on identifying the obstacles to a vibrant Public Domain. The meeting was structured in a series of debates, each discussing a practice diminishing the Public Domain. A dialogue between proponents, opponents, mediators and audience members, the workshop was structured around position statements that were submitted in advance. Each session starts with the position statement of the proponent, followed by the reaction of an opponent and a debate with the audience coordinated by a mediator.

In July 2008, the COMMUNIA Thematic Network and the GICSI-EU initiative co-organized the **1st COMMUNIA Conference** 2008, in Louvain-la-Neuve, Belgium. The Conference centralized on the theme of ***Assessment of Economic and Social Impact of Digital Public Domain Through Europe***. During the two-day conference, various speakers breached various topics. Paul David pointed out Intellectual Property constraints "as a major barrier to innovation, growth and collaboration." His solution was the "widespread use of open access publishing and the creation of 'pools' or 'clubs' of scientific information commons." Mark Isherwood introduced the Economic and Social Impact of Public Domain in the Information Society for the purpose of "evaluating the social and economic value of Public Domain works for the next 10- 20 years." Audience interaction sparked debate and consent. It was agreed that through open access and public-oriented policies, both research productivity and knowledge diffusion could be augmented. As an endnote, Ed Steinmueller summarized the mission of the COMMUNIA Thematic Network whose goal it is "to share the true value of public domain and open licensing."

In October 2008, the **3rd COMMUNIA Workshop**, ***Marking the Public Domain: Relinquishment & Certification***, was held in Amsterdam. The workshop addressed the legal, economic and technical issues related to certifying public domain works and relinquishing intellectual property

rights in Europe. The two major topics were: relinquishing authors' rights and certifying public domain works. To conclude, the COMMUNIA Network announced the formation of a new working group called Mapping the Public Domain.

In January 2009, the **4th COMMUNIA Workshop** was held in Zurich at the Swiss Federal Institute of Technology (ETH). The Workshop was devoted to review the first year of the COMMUNIA Project and to plan future actions, Working Group projects and initiatives.

In March 2009, the **5th COMMUNIA Workshop**, co-organized by the Open Knowledge Foundation and London School of Economics, focused on ***Accessing, Using and Reusing Public Sector Content and Data***. It examined obstacles and solutions with the claim that: Public Sector content and data should be made available, both legally and technically, for public reuse. Tom Watson called for 4 kinds of openness: feedback, conversation, information and innovation alongside easy-to-use licensing for government information to encourage the public to use and reuse.

The **2nd COMMUNIA Conference** 2009 was scheduled for June 2009 in Torino. Titled ***Global Science and the Economics of Knowledge Sharing Institutions***, the Conference addressed contractually constructed commons and public domain initiatives. Bernt Hugenholtz strategized that the EU and national bodies should abolish any copyright in government information and reconsider the privatization of public data functions, while universities should discourage or prohibit 'all rights' transfers to publishers, promoting instead open access practices. The event addressed the conceptual foundations and practical feasibilities of contractually constructed “commons” and related bottom-up public domain initiatives (joint policy guidelines, common standards, institutional policies, etc.) capable of offering shared access to a variety of research resources, identifying models, needs and opportunities for effective initiatives across a diverse range of research areas.

In June 2009, NYU Law School hosted the First Open Video Conference with over 800 attendees and thousands more online. The COMMUNIA Project hosted ***Audiovisual Archives*** which investigated how memory institutions could provide access to their holdings enabling creative reuse, and how they continue to serve as storytellers of our past.

The **6th COMMUNIA Workshop** took place in Barcelona in October 2009. Based on ***Memory Institutions and Public Domain***, the workshop emphasized the challenges of digitizing works today. The Workshop stressed the need to achieve balance by reminding that authors should be paid, but memory institutions should be guaranteed the access to culture and knowledge. The event was organized under 3 main sessions: National Heritage Preservation: Legal Issues and Implications, Progressions from Open Access to the Public Domain: In Museums, Archives and Film Institutes and Developing the Public Domain of the Future.

In November 2009, COMMUNIA hosted a series of meetings devoted to **Public Domain Calculators** - a task carried out by the Working Group on Mapping the Public Domain. The goal of these workshops was to determine whether or not a given work is under copyright in a given EU

jurisdiction. The purpose of the first meeting co-organized by the Open Knowledge Foundation was to produce materials such as legal flow charts and public domain "algorithms" which will help with the representation of different national copyright laws and the determination of public domain status.

The **7th COMMUNIA Workshop**, took place at the National Library of Luxembourg, under the title ***Digital Policies: the Public Domain and Alternative Compensation Systems*** in February 2010. Licencing schemes for public domain projects like Europeana, French policies regarding the reutilization of the national cultural heritage, copyright exceptions for file sharing, cultural flat rate, and role of the collective societies in alternative compensation systems were among the topics discussed at the workshop..

The **8th COMMUNIA Workshop**, ***Education of the Public Domain: The Emergence of a Shared Educational Commons***, was held in April 2010 in Istanbul. The program included OpenCourseware objectives to achieve the vision of open educational resources, COMMUNIA education policy recommendations in the context of OER projects in the Middle East, and a copyright session on harmonized law and copyright management.

The **3rd** and final **COMMUNIA Conference**, ***University in Cyberspace: Reshaping Knowledge Institutions for the Networked Age***, was co-organized, in June 2010, by the NEXA Center for Internet and Society at the Politecnico di Torino and Berkman Center for Internet and Society at Harvard University. The Conference featured three days of academics, policymakers, visionaries, entrepreneurs, architects, and activists addressing some of the most significant issues facing universities in a networked age.

The Public Domain Manifesto

The **Public Domain Manifesto** was developed within the context of the COMMUNIA network and released in January 2010.[53] It outlines a series of general principles, addresses various issues and provides recommendations aimed at protecting the Public Domain. The Public Domain enshrined in the Manifesto has a broad range that can be used without restriction, in the absence of copyright protection. It includes shared material released under alternative licensing options, fair use and material released under "open access policies." The Public Domain Manifesto was first developed within the COMMUNIA Working Group 6 – Mapping the public domain. The members of COMMUNIA Working Group 6, starting from an idea expressed during the 1st COMMUNIA Conference, worked for many months during 2009 to prepare a draft text, which was later circulated among COMMUNIA members, until a final version was completed and publicly launched on January 25, 2010. The Public Domain Manifesto web site has been set up at

[53] *See* The Public Domain Manifesto (produced within the context of COMMUNIA, the European thematic network on the digital public domain), http://publicdomainmanifesto.org and *infra* Annex IV [hereinafter The Public Domain Manifesto]

http://publicdomainmanifesto.org to publish the document online and collect signatures. The Public Domain Manifesto has been so far signed by thousands of individuals and hundreds of organizations.

The Public Domain Day

Initiatives by COMMUNIA members are being directly organized to raise public awareness of **Public Domain Day** on New Year's Day that marks the entrance in public domain of creative works. COMMUNIA promotes a website devoted to Public Domain Day at http://publicdomainday.org to increase public awareness and education of the public domain concept and its potentialities for spreading culture and knowledge worldwide. The Center for the Study of Public Domain at Duke University, a COMMUNIA member, also published an informative website, available at http://www.law.duke.edu/cspd/publicdomainday. Additionally, to celebrate the Public Domain Day, the Open Knowledge Foundation has launched the Public Domain Review, http://publicdomainreview.okfn.org, a web-based review of works that have entered the public domain. Each week an invited contributor will present an interesting or curious work with a brief accompanying text giving context, commentary and criticism.

In 2010, to celebrate the Public Domain Day, COMMUNIA launched the public domain day web site. Celebrations were organized in Poland and Switzerland. The Open Knowledge Foundation put together a list of all the authors entering the public domain in 2010 as part of the Public Domain Works project.

The Public Domain Day 2011 was celebrated more effectively than the previous editions. COMMUNIA with special support from the Open Knowledge Foundation promoted a concerted effort and a coordinated web campaign, around the web site www.publicdomainday.org and other digital channels, with general information on the public domain and the authors about to enter it, suggestions on how to celebrate the Public Domain Day, and about events planned across the world. COMMUNIA-organized Public Domain Day celebrations took place in Warsaw, Zurich, Berlin, Turin, and Haifa. In Turin, the celebrations focused on authors entering the public domain with intellectuals and actors discussing and reciting their works. The event in Zurich addressed the active reuse of public domain works by society at large, and especially by children with "working stations", where children could actually apply their creativity in reusing public domain works.

The COMMUNIA Essence

The three year long history of COMMUNIA is a path of fruitful growth, change and understanding. If the main goal of the COMMUNIA project was “to build a network of organisations that shall become the single European point of reference for high-level policy discussion and strategic action on all issues related to the public domain in the digital

environment,"[54] that goal was achieved and, perhaps, exceeded. With more than 50 members, spanning three continents and the entire spectrum of social, economic and institutional activities, COMMUNIA build a stronghold for the promotion of the public domain discourse in Europe and elsewhere.

According to COMMUNIA pristine description of work, the analysis of the project has focused on public domain in the strictest sense, open access of scientific research, open access as voluntarily sharing, and orphan works. The first topic has been generally covered in most of the COMMUNIA meetings with special emphasis on the 1st COMMUNIA Conference, *Assessment of Economic and Social Impact of Digital Public Domain Through Europe*, held in Louvain-la-Neuve, the 1st COMMUNIA Workshop, *Technology and the Public Domain*, held in Turin, and the great deal of work on Public Domain Calculators lead by the Working Group 6 and Open Knowledge Foundation. Open access of scientific research has received a very large coverage during COMMUNIA proceedings: the 2nd COMMUNIA Conference in Turin was dedicated to *Global Science and the Economics of Knowledge Sharing Institutions*, the 8th COMMUNIA Workshop in Istanbul discussed *Education of the Public Domain: The Emergence of a Shared Educational Commons*, finally the 3rd COMMUNIA Conference in Turin investigated the issue of *University in Cyberspace: Reshaping Knowledge Institutions for the Networked Age*. Open access as voluntary renounce to exclusive rights was the focus of the 3rd COMMUNIA Workshop, *Marking the Public Domain: Relinquishment & Certification*, held in Amsterdam. Additionally, as detailed below, interaction between COMMUNIA and Creative Commons has been continuous throughout the duration of the project. The problem of orphan works is a fundamental concern of the COMMUNIA project. However, throughout the years, the focus has shift on the interplay between orphan work and memory institutions that received in depth coverage at the 6th COMMUNIA Workshop in Barcelona, *Memory Institutions and the Public Domain*. The emergence of new business models, an additional topic of the original description of COMMUNIA work, was investigated at the 7th COMMUNIA Workshop in Luxembourg, *Digital Policies: the Public Domain and Alternative Compensation Systems*. Finally, increased attention has been given to public sector information, especially by dedicating the 5th COMMUNIA Workshop in London to *Accessing, Using and Reusing Public Sector Content and Data*. Conversely, the question of the interaction of the digital public domain with the public sphere has lost some of its appeal and was finally left out of the scope of COMMUNIA investigations.

Besides growing in dimension and expanding the topics covered, the COMMUNIA Network has advanced the unity and the referential interplay of the European and international forces composing the network. The celebration of the Public Domain Day is an example of this networked effort and effect. At the same time, the last edition of the Public Domain Day celebrations tells how much the scope and the impact of COMMUNIA have expanded. The same flourishing has

[54] See COMMUNIA, The European Thematic Network on the Public Domain in the Digital Age, EPC 2006 PD 610001 COMMUNIA, Annex 1, Description of Work (June 18, 2007), at 5.

been witnessed at each new COMMUNIA meeting and appointment. On each occasion, new projects and strategic alliances for the public domain and for promoting open access to knowledge were envisioned and strengthened. The Public Domain Manifesto was an extemporary outcome of an idea expressed at the 1st COMMUNIA Conference. COMMUNIA has inspired to the members a common vision, an enhanced common understanding of traditional tensions that now can be tackled in a more targeted, interconnected and efficient manner.

A great deal of COMMUNIA efforts have been dedicated to interact with third parties valuing the promotion of open access and the public domain, especially in the digital environment. The project kept informal contacts, mostly through network members, with other relevant projects, including LAPSI, DRIVER, EPSIPLUS. Most prominently, the COMMUNIA Network has been collaborating, through meetings and shared members, with Europeana.[55] The many relations between the Public Domain Manifesto and the Europeana Charter were discussed at the 7th COMMUNIA Workshop in Luxembourg.[56]

The international dimension of COMMUNIA has propelled a fruitful interaction with the World Intellectual Property Organization to discuss the WIPO projects related to the promotion of the public domain. The WIPO position on the public domain was presented at the 5th COMMUNIA Workshop in London[57] and the 7th COMMUNIA Workshop in Luxembourg.[58]

COMMUNIA worked closely with Creative Commons teams around Europe and the world to investigate the best manner to protect an propel the public domain. Creative Commons public domain legal tools and infrastructure were presented at the 3rd COMMUNIA Workshop in Amsterdam.[59] In particular, COMMUNIA followed closely the development of the Creative Commons CC0 Licence and the Public Domain Mark. The Public Domain Mark was released in October 2010 by Creative Commons as a tool enabling works free of known copyright restriction to be labeled and easily discovered over the Internet.[60] The Public Domain Mark complements the Creative Commons CC0 public domain dedication which allows authors to relinquish their rights prior to copyright expiration.[61] Europeana – the major European digitization project - plans to

[55] *See* Harry Verwayen, Europeana Business Model and the Public Domain, presentation delivered at the 3rd COMMUNIA Workshop, Amsterdam, Netherlands (October 20, 2008).

[56] *See* Jill Cousins, The Public Domain, the Manifesto, his Charter and her Dilemma, presentation delivered at the 7th COMMUNIA Workshop, Luxembourg (February 1, 2010).

[57] *See* Richard Owens, WIPO and Access to Content: The Development Agenda and the Public Domain, presentation delivered at the 5th COMMUNIA Workshop, London, United Kingdom (March 27, 2009)

[58] *See* Richard Owens, WIPO Project on Intellectual Property and the Public Domain, presentation delivered at the 7th COMMUNIA Workshop, Luxembourg (February 1, 2010)

[59] Mike Linksvayer and Diane Peters, Creative Commons Public Domain Legal Tools and Infrastructure, presentation delivered at the 3rd COMMUNIA Workshop, Amsterdam, Netherlands (October 20, 2008).

[60] *See* Diane Peters, *Improving Access to the Public Domain: the Public Domain Mark*, CREATIVE COMMONS NEWS, October 11, 2010, http://creativecommons.org/weblog/entry/23830

[61] *See* About CC0 — "No Rights Reserved", http://creativecommons.org/about/cc0

make available through its portal millions of out-of-print books labeled with the Public Domain Mark by mid-2011.

By aggregating and coordinating efforts and public domain related projects with network members and third parties, COMMUNIA has sealed the emergence of a European public domain project. A new augmented vision of the role and value of the public domain is now shared by many institutional and civil society endeavours at the European level. The COMMUNIA vision will outlive the project and will be hopefully a fruitful source of additional efforts to promote the European public domain. In light of the exceptionally valuable synergy between the public domain and technological advancement, COMMUNIA believes that the European public domain project may finally lead to a politics of the public domain.

ANNEX II

THE DIGITAL PUBLIC DOMAIN IN EUROPE

This Annex of the Report frames the state of the public domain in Europe. Together with the review of the definition, sources, value and role of the public domain, this section will examine the challenges and bottlenecks impinging on the public domain. In addition, this Annex will discuss the opportunities that digitization and the Internet revolution have been offering to the public domain as well as access to knowledge. Annex II is intended to fuel and propel the final propositional part of the Report including the COMMUNIA policy recommendations.

Defining the Public Domain

COMMUNIA has valued the goal of grasping the inner meaning of the public domain as pivotal to the challenging task of its promotion and protection. Defining the boundaries of the public domain is conducive to the goal of strengthening its protection.

The public domain is an "unchartered terrain."[62] The literature on the public domain transfers an impression of insubstantiality, the conception of the public domain as a nebulae.[63] Repeatedly, the literature notes, as a response to the variety of definitional approaches, that there are many public domains that change in shape according to the hopes and the agenda that they embody.[64] The public domain, therefore, becomes "necessarily protean in nature."[65] The diversity of the COMMUNIA network has provided an opportunity to internalize the protean nature of the public domain. The outcome has been a comprehensive vision that projects the understanding of the European public domain in a global international dimension. This vision conveys the perception that the public domain is never a definition but instead a statement of purpose, a project of enhanced democracy, globalized shared culture and reciprocal understanding.

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[62] Pamela Samuelson, *Mapping the Digital Public Domain: Threats and Opportunities*, 66 LAW & CONTEMP. PROB. 147, 147-148 (2003) [hereinafter Samuelson, *Mapping the Digital Public Domain*]

[63] RONAN DEAZLEY, RETHINKING COPYRIGHT: HISTORY, THEORY, LANGUAGE 103 (Edward Elgar Publishing 2008) [herein after DEAZLEY, RETHINKING COPYRIGHT]

[64] *See Id*., at 105; James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 LAW & CONTEMP. PROB. 33, 52 and 62 (2003) [hereinafter Boyle, *The Second Enclosure Movement*].

[65] Craig J. Carys, *The Canadian Public Domain: What, Where, and to What End?*, 7 CANADIAN J. L. TECH. 221 (2010)

To that end, COMMUNIA has attempted to propel a process of definitional re-construction of the public domain in positive and affirmative terms. Consequently, COMMUNIA envisions the public domain as a very substantial element of attraction to aggregate social forces devoted to promote public access to culture and knowledge.

In Search of an Affirmative Definition of the Public Domain

Authors suggested that the Statute of Anne actually created the public domain, by limiting the duration of protected works and by introducing formalities.[66] However, in early copyright law, there was no positive term to affirmatively refer to the public domain, though terms like *publici juris* or *propriété publique* had been employed by 18th century jurist.[67] Nonetheless, the fact of the public domain was recognized, though no single locution captured that concept. Soon, the fact of the public domain was elaborated into a "discourse of the public domain - that is, the construction of a legal language to talk about public rights in writings."[68]

Historically, the term public domain has been firstly employed in France by the mid-19th century to mean the expiration of copyright.[69] The English and American copyright discourse borrowed the term around the time of the drafting of the Berne Convention with the same meaning.[70] Traditionally, the public domain has been defined in relation to copyright as the opposite of property, as the "other side of the coin of copyright" that "is best defined in negative terms".[71] This traditional definition regarded the public domain as a "wasteland of undeserving detritus" and did not "worry about 'threats' to this domain any more than [it] would worry about scavengers who go to garbage dumps to look for abandoned property."[72] This is no more. This definitional approach has been discarded in the last thirty years.

In 1981, Professor David Lange published his seminal work, *Recognizing the Public Domain*, and departed from the traditional line of investigation of the public domain. Lange suggested that "recognition of new intellectual property interests should be offset today by equally deliberate

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[66] *See* Jane C. Ginsburg, "*Une Chose Publique": The Author's Domain and the Public Domain in Early British, French and US Copyright Law*, 65 CAMBRIDGE L. J. 636, 642 (2006) [hereinafter Ginsburg, *Une Chose Publique*].

[67] *Id.*, at 638 *citing* Donaldson v. Beckett, 17 PARL. HIST. ENG. 953, 997, 999 (1774) (speech of Lord Camden) and *citing* Archives parlementaires (Assemblée nationale), January 13, 1791, at 210 (report of Le Chapelier)

[68] Mark Rose, *Nine-Tenths of the Law: The English Copyright Debates and the Rhetoric of the Public Domain*, 66 LAW & CONTEMP. PROBS. 75, 77 (2003) [hereinafter Rose, *Nine-Tenths of the Law*].

[69] *See* Lucie Guibault, *Wrapping Information in Contract: How Does it Affect the Public Domain?*, *in* THE FUTURE OF THE PUBLIC DOMAIN: IDENTIFYING THE COMMONS IN INFORMATION LAW 89 (Lucie Guibault and P. Bernt Hugenholtz eds., Kluwer Law International 2006) [hereinafter Guibault, *Wrapping Information in Contract*]; Ginsburg, *Une Chose Publique*, *supra* note 66, at 637.

[70] *See* Ginsburg, *Une Chose Publique*, *supra* note 66, at 637.

[71] William M. Krasilovsky, *Observations on Public Domain*, 14 BULL. COPYRIGHT SOC'Y 205 (1967).

[72] Samuelson, *Mapping the Digital Public Domain*, *supra* note 62, at 147.

recognition of individual rights in the public domain."[73] Lange called for an affirmative recognition of the public domain and drafted the skeleton of a theory of the public domain. The public domain that Lange had in mind would become a "sanctuary conferring affirmative protection against the forces of private appropriation" that threatened creative expression.[74]

In January 2008, Séverine Dusollier reinstated that idea at the 1st COMMUNIA Workshop by speaking of a "positively defined Public Domain."

> In legal regimes of intellectual property, the public domain is generally defined in a negative manner, as the resources in which no IP right is vested. This no-rights perspective entails that the actual regime of the public domain does not prevent its ongoing encroachment, but might conversely facilitate it. In order to effectively preserve the public domain, an adequate legal regime should be devised so as to make the commons immune from any legal or factual appropriation, hence setting up a positive definition and regime of the public domain.[75]

The affirmative public domain was a powerfully attractive idea for the scholarly literature and civic society. Lange spearheaded a "conservancy model", concerned with promoting the public domain and protecting it against any threats, that juxtaposed the traditional "cultural stewardship model" which regarded ownership as the prerequisite of productive management.[76] The positive identification of the public domain propelled the "public domain project", as Michael Birnhack called it.[77] Many authors in Europe and elsewhere attempted to define, map, and explain the role of the public domain as an alternative to the commodification of information that threatened creativity.

This ongoing public domain project offers many definitions that attempt to construe the public domain positively. As the *Public Domain Manifesto* puts it, the public domain is the "cultural material that can be used without restriction . . . ," which includes a structural core and a functional portion. The structural core of the public domain encompasses the "works of authorship where the copyright protection has expired" and the "essential commons of

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[73] David Lange, *Recognizing The Public Domain*, 44 LAW & CONTEMP. PROBS. 147, 147 (1981) [hereinafter Lange, *Recognizing The Public Domain]*.

[74] David Lange, *Reimagining The Public Domain*, 66 LAW & CONTEMP. PROBS. 463, 466 (2003) [hereinafter Lange, *Reimagining The Public Domain*].

[75] Séverine Dusollier, Towards a Legal Infrastructure for the Public Domain, speech delivered at the 1st COMMUNIA Workshop: Technology and the Public Domain, Turin, Italy (January 18, 2008) [hereinafter 1st COMMUNIA Workshop]; *see also* SÉVERINE DUSOLLIER, SCOPING STUDY ON COPYRIGHT AND RELATED RIGHTS AND THE PUBLIC DOMAIN 7 (prepared for the Word Intellectual Property Organization) (April 30, 2010) [hereinafter DUSOLLIER, SCOPING STUDY ON COPYRIGHT AND THE PUBLIC DOMAIN].

[76] Julie Cohen, *Copyright, Commodification, and Culture: Locating the Public Domain*, *in* THE FUTURE OF THE PUBLIC DOMAIN: IDENTIFYING THE COMMONS IN THE INFORMATION LAW 134-135 (Lucie Guibault & P. Bernt Hugenholtz eds., Kluwer Law International 2006) [hereinafter Cohen, *Copyright, Commodification, and Culture*]

[77] Michael D. Birnhack, *More or Better? Shaping the Public Domain*, *in* THE FUTURE OF THE PUBLIC DOMAIN: IDENTIFYING THE COMMONS IN INFORMATION LAW 59, 60 (Lucie Guibault and P. Bernt Hugenholtz eds., Kluwer Law International 2006).

information that is not covered by copyright."[78] The functional portion of the public domain consists of the "works that are voluntarily shared by their rights holders" and "the user prerogatives created by exceptions and limitations to copyright, fair use and fair dealing."[79]

As a way of example, other very broad definitions of the public domain describe it as a "true commons comprising elements of intellectual property that are ineligible for private ownership."[80] The public domain becomes in other authors' view the "synonymous with 'open' knowledge, that is, all ideas and information that can be freely used, redistributed and reused."[81] Narrower definitions entail "the range of uses of information that any person is privileged to make absent individualized facts that make a particular use by a particular person unprivileged."[82] Again, by remodeling Condorcet's idea of public domain as a democratic access to a common cultural inheritance,[83] the public domain has been envisioned as a public forum and a privileged venue for democratic discourse,[84] or a "cultural landscape" where creativity becomes an opportunity for social relationships.[85]

In any event, a positive, affirmative definition of the public domain is fluid by nature and cannot be unique as traditional definitions. An affirmative definition of the public domain is a political statement, the endorsement of a cause. In other words, "[t]he public domain will change its shape according to the hopes it embodies, the fears it tries to lay to rest, and the implicit vision of creativity on which it rests. There is not one public domain, but many."[86]

However, notwithstanding many complementing definitional approaches, consistency is to be found in the common idea that the "material that compose our cultural heritage must be free for

[78] The Public Domain Manifesto (produced within the context of COMMUNIA, the European thematic network on the digital public domain), at 2, http://publicdomainmanifesto.org and *infra* Annex IV [hereinafter The Public Domain Manifesto]

[79] *Id*., at 3.

[80] Jessica Litman, *The Public Domain*, 39 EMORY L. J. 965, 1023 (1990).

[81] RUFUS POLLOCK, THE VALUE OF THE PUBLIC DOMAIN 3 (UK Institute for Public Policy Research 2006) [hereinafter POLLOCK, THE VALUE OF THE PUBLIC DOMAIN].

[82] Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on the Enclosure of the Public Domain*, 74 N.Y.U. L. Rev. 354, 362 (1999) [hereinafter Benkler, *Free as the Air to Common Use*].

[83] *See* CARLA HESSE, PUBLISHING AND CULTURAL POLITICS IN REVOLUTIONARY PARIS, 1789–1810 121-122 (University of California Press 1991).

[84] *See* Rebecca Tushnet, *Domain and Forum: Public Space, Public Freedom*, 30 COLUM. J. L. & ARTS 597 (2007) [hereinafter Tushnet, *Domain and Forum*]; *see also* Diane L. Zimmerman, *Is There a Right to Have Something to Say? One View of the Public Domain*, 73 FORDHAM L. REV. 297 (2004); Malla Pollack, *The Democratic Public Domain: Reconnecting the Modern First Amendment and the Original Progress Clause (A.K.A. Copyright and Patent Clause)*, 45 JURIMETRICS J. 23 (2004); Birnhack, *supra* note 77, at 85.

[85] *See* Lange, *Re-imagining the Public Domain*, *supra* note 74, at 475-476; Cohen, *Copyright, Commodification, and Culture*, *supra* note 76, at 146.

[86] Boyle, *The Second Enclosure Movement*, *supra* note 64, at 62.

all to use no less than matter necessary for biological survival."[87] As a corollary, the many modern definitions of the public domain are unified by concerns over recent copyright expansionism. The common understanding of the participants to the public domain project is that enclosure of the "material that compose our cultural heritage" is a welfare loss against which society at large must be guarded from.

The modern definitional approach endorsed by the public domain project is intended to turn upside down the metaphor describing the public domain as what is "left over after intellectual property had finished satisfying its appetite"[88] by thinking at copyright as "a system designed to feed the public domain providing temporary and narrowly limited rights, [. . .] all with the ultimate goal of promoting free access."[89] Moreover, the public domain envisioned by COMMUNIA and recent legal, public policy and economic analysis becomes the "place we quarry the building blocks of our culture." [90] At the same time, the public domain is the building itself. It is, in the end, the majority, if not the entirety, of our culture.

However, the construction of an affirmative idea of the public domain should always consider that the abstraction of the public domain is slippery. The depiction of the public domain as a chimera, or better a unicorn, pregnant of meaning but ephemeral, may drive away the consideration that the public domain seeks in order to counter the expansion of copyright.[91] The public domain should not remain an affirmative concept in the abstraction of the platonic hyper-uranium. That concept must be embodied in a physical space that may be immediately and positively protected and nourished. As Professor Lange puts it, "the problems will not be resolved until courts have come to see the public domain not merely as an unexplored abstraction but as a field of individual rights fully as important as any of the new property rights."[92]

Public Domain, Commons, and Cultural Environmentalism

The modern discourse on the public domain owes much to the legal analysis of the governance of the commons, natural resources used by many individuals in common. The phrase public domain has been used interchangeably with the term "commons,",' and its variations, such as

[87] RAY L. PATTERSON & STANLEY W. LINDBERG, THE NATURE OF COPYRIGHT: A LAW OF USERS' RIGHTS 51 (University of Georgia Press 1991).

[88] The "feeding" metaphor is reported by Professor Lange as to be of rather uncertain origin. *See* Lange, *Reimagining The Public Domain*, *supra* note 74, at 465, n. 11.

[89] Boyle, *The Second Enclosure Movement*, *supra* note 64, at 60.

[90] JAMES BOYLE, THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND 40 (Yale University Press 2009) [hereinafter BOYLE, THE PUBLIC DOMAIN].

[91] *See* DEAZLEY, RETHINKING COPYRIGHT, *supra* note 63, at 105.

[92] Lange, *Recognizing the Public Domain, supra note* 73*, at 180.*

"cultural commons," "knowledge commons," "intellectual commons," "commons of the mind," "informational commons."[93]

However, commons and public domain are two different things. The main difference lies in the fact that a commons may be restrictive. The public domain is free of property rights and control. A commons, on the contrary, can be highly controlled, though the whole community has free access to the common resources. Free Software and Open Source Software are examples of intellectual commons.[94] The source code is available to anyone to copy, use and improve under the set of conditions imposed by the General Public License.[95] However, this kind of control is different than under traditional property regimes because no permission or authorization is required to enjoy the resource. These resources are protected by a liability rule rather than a property rule.[96] A commons is defined by the notions of governance and sanctions, which may imply rewards, punishment, and boundaries.[97]

Though public domain and commons are diverse concepts, the similarities are many. Since the origin of the public domain discourse, the environmental metaphor has been largely used to refer to the cultural public domain.[98] Therefore, the traditional environmental conception of the commons was ported to the cultural domain and applied to intellectual property policy issues. Environmental and intellectual property scholars started to look at knowledge as a commons – a shared resource.[99] Knowledge as a commons, as Elinor Ostrom defines it, "refers to all types of understanding gained through experience or study, whether indigenous, scientific, scholarly, or otherwise nonacademic. It also includes creative works, such as music and the visual and theatrical arts."[100] Cultural commons have been defined as "environments for developing and distributing

[93] *See* DEAZLEY, RETHINKING COPYRIGHT, *supra* note 63, at 103.

[94] See YOCHAI BENKLER, THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM 63-68 (Yale University Press 2007) (hereinafter BENKLER, THE WEALTH OF NETWORKS) (describing free software as "the quintessential instance of commons-based peer production").

[95] *See* GNU General Public Licence, Version 3, 29 June 2007, http://www.gnu.org/licenses/gpl.html.

[96] *See* Lawrence Lessig, *The Architecture of Innovation*, 51 DUKE L. J. 1783, 1788 (2002); *but see* Boyle, *The Second Enclosure Movement*, *supra* note 64, at 69 n. 145.

[97] *See* Wendy J. Gordon, *Response, Discipline and Nourish: On Constructing Commons,* 95 Cornell L. Rev. 733, 736-749 (2010) (discussing sanctions in constructed commons).

[98] *See* Mark Rose, *Copyright and Its Metaphors*, 50 UCLA L. REV. 1 (2002); William St Clair, *Metaphors of Intellectual Property*, *in* PRIVILEGE AND PROPERTY. ESSAYS ON THE HISTORY OF COPYRIGHT 391-392 (Ronan Deazley, Martin Kretschmer and Lionel Bently eds., Open Book Publishers 2010).

[99] *See* Charlotte Hess and Elinor Ostrom, *Introduction: An Overview of the Knowledge Commons*, *in* UNDERSTANDING KNOWLEDGE AS A COMMONS: FROM THEORY TO PRACTICE 3-26 (Charlotte Hess and Elinor Ostrom eds., MIT Press 2007) [hereinafter Hesse and Ostrom, *Introduction*]

[100] *Id*., at 8

cultural and scientific knowledge through institutions that support pooling and sharing that knowledge in a managed way."[101]

In 2003, the Nobel Prize Elinor Ostrom and her colleague Charlotte Hesse discussed the applicability of their ideas on the governance and management of common pool resources to the new realm of the intellectual public domain.[102] The following literature continued to develop the concept of cultural commons in the footsteps of the analyses of Elinor Ostrom by adopting modified forms of Ostrom's Institutional Analysis and Development (IAD) framework.[103] The application of the literature on governing the commons to cultural resources brings a shift in approach and methodology from the previous discourse of the public domain. This different approach has been described as follows:

> [t]he old dividing line in the literature on the public domain had been between the realm of property and the realm of the free. The new dividing line, drawn as a palimpsest on the old, is between the realm of individual control and the realm of distributed creation, management, and enterprise. [104]

Under this conceptual scheme, restraint on use may not be longer an evil but a necessity of a well-run commons. The individual, legal, and market based control of the property regime is juxtaposed to the collective and informal controls of the well-run commons.[105] The well-run commons can avoid the tragedy of the commons without the need of single party ownership.

The movement to preserve the environmental commons has also been inspirational to the advocates of the intellectual public domain to develop a new politics of intellectual property.[106] The environmental metaphor has propelled what can be termed as a cultural environmentalism.[107] Several authors spearheaded by Professor James Boyle have cast a defense of the public domain on the model of the environmental movement. Morphing the public domain into the commons, and casting the defense of the public domain on the model of the environmental movement, has

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[101] Michael J. Madison, Brett M. Frischmann & Katherine J. Strandburg, *Constructing Commons in the Cultural Environment*, 95 CORNELL L. REV. 657, 659 (2010) [hereinafter Madison, Fisherman, and Strandburg, *Constructing Commons*]

[102] Charlotte Hess and Elinor Ostrom, *Ideas, Artifacts, and Facilities: Information as a Common-Pool Resources*, 66 LAW & CONTEMP. PROBS. 111 (2003) [hereinafter Hesse and Ostrom, *Ideas, Artifacts, and Facilities*]

[103] *See* Madison, Fisherman, and Strandburg, *Constructing Commons*, supra note 101, at ; *see also* Elinor Ostrom and Charlotte Hess, *A Framework for Analyzing the Knowledge Commons*, *in* UNDERSTANDING KNOWLEDGE AS A COMMONS: FROM THEORY TO PRACTICE 41-81 (Charlotte Hess and Elinor Ostrom eds., MIT Press 2007).

[104] Boyle, *The Second Enclosure Movement*, *supra* note 64, at 66.

[105] *See* James Boyle, *Foreword The Opposite of Property,* 66 LAW & CONTEMP. PROB. 1, 8 (2003).

[106] *See* James Boyle, *A Politics of Intellectual Property: Environmentalism for the Net?*, 47 DUKE L. J. 87, 110 (1997) [hereinafter Boyle, *A Politics of Intellectual Property*]

[107] *See* James Boyle, *Cultural Environmentalism and Beyond*, 70 LAW & CONTEMP. PROB. 5 (2007); JAMES BOYLE, SHAMANS, SOFTWARE, AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY (1996).

the advantage of embodying the public domain in a much more physical idea, thus minimizing its abstraction and the related difficulty of affirmatively protecting it.

Their primary focus of the cultural environmentalism is to develop an affirmative discourse that will make the public domain visible. The lesson from the environmentalist movement thought that, before the movement, the environment was invisible. Therefore, "like the environment", Boyle suggests by echoing David Lange, "the public domain must be 'invented' before it can be saved."[108] In 2010, perhaps, the public domain has been "invented" as a positive concept and the "coalition that might protect it", evoked if not called into being by scholars more than a decade ago, is perhaps formed.[109] Many academic and civil society endeavors have joined and propelled this coalition. As with the idea of the environment in the environmentalist movement, the invention of the idea of a positively recognized public domain tied together apparently disparate interests in a cohesive movement.[110]

Today, the Institute for Information Law at Amsterdam University, the Berkman Center for Internet and Society at Harvard, the Cambridge Centre for Intellectual Property and Information Law, the Nexa Center for Internet and Society at the Politecnico of Turin, the Haifa Center of Law and Technology, the Duke Center for the Study of the Public Domain, the Stanford Center for Internet and Society and a variety of other academic centers devote a substantial amount of their time to investigate the proper balance between intellectual property and the public domain.[111] Several advocacy groups are committed to the preservation of the public domain and the promotion of a shared commons of knowledge, including, among many others, the Open Knowledge Foundation, Open Rights Group, LaQuadratureduNet, Knowledge Ecology International, the Access to Knowledge (A2K) movement, Public Knowledge, and the Electronic Frontier Foundation.

Civil advocacy of the public domain and access to knowledge has also been followed by several institutional variants, such as the "Development Agenda" at the World Intellectual Property Organization.[112] Recommendation 20 of the Development Agenda endorses the goal "[t]o 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

[108] Boyle, *The Second Enclosure Movement*, *supra* note 64, at 52.

[109] Boyle, *A Politics of Intellectual Property*, *supra* note 106, at 113.

[110] *See* Boyle, *Cultural Environmentalism*, *supra* note 107, at 14-17.

[111] *See also* COMMUNIA, *Survey of Existing Public Domain Competence Centers*, Deliverable No. D6.01 (Draft, September 30, 2009) (survey prepared by Federico Morando and Juan Carlos De Martin for the European Commission) (on file with the author) (reviewing the current landscape of European competence and excellence centers that focus on the study of the public domain and related issues from different disciplinary perspectives or from a multidisciplinary perspectives).

[112] *See* Development Agenda for WIPO, http://www.wipo.int/ip-development/en/agenda; *see also* DUSOLLIER, SCOPING STUDY ON COPYRIGHT AND THE PUBLIC DOMAIN, *supra* note 75.

respective jurisdictions." The WIPO Development Agenda is set to safeguard the public domain by encouraging a notion of the public domain not rooted in traditional copyright discourse but rather upon the idea of "access to content, irrespective of whether content is copyrighted."[113] Within the framework of recommendation 20 of the Development Agenda, WIPO is now promoting studies with respect to the public domain and the development of a public domain database.[114] The WIPO efforts for the promotion of the public domain were presented at the 5th COMMUNIA Workshop in London[115] and the 7th COMMUNIA Workshop in Luxembourg.[116] A inner integration between public domain projects at the European level and the international level is a goal sought by the COMMUNIA policy recommendations.

As part of the institutional efforts to nourish and protect the public domain, there is now also a proposed statutory example placing public domain and intellectual property protection on an equal playing field. [117] An innovative Brazilian copyright reform proposal is endorsing the principle that anyone who obstructs the use of works that has fallen in the public domain is to be subject to appropriate sanctions.[118] The same penalties will apply to whom hinders or prevents fair or privileged uses of copyrighted works.[119] The Brazilian proposal is the first eminent illustration of endorsement of a politics of creativity inspired by cultural environmentalist principles.

In addition, developments in commons theory have been coupled by efforts to turn theory into practice. As a way of example, Creative Commons and the free and open-source software movement have created a commons through private agreement and technological

[113] See WIPO Enriched by In-depth Discussion of the Public Domain, July 13, 2008, http://keionline.org/node/71 (reporting the statements of Richard Owens from the WIPO Secretariat).

[114] See WIPO Committee on Development and Intellectual Property [CDIP], *Initial Working Document*, CDIP/1/3 (March 3, 2008), *available at* http://www.wipo.int/edocs/mdocs/mdocs/en/cdip_1/cdip_1_3.pdf; WIPO CDIP, *Project on Intellectual Property and the Public Domain (Recommendations 16 and 20)*, CDIP/4/3 Rev. (December 1, 2009), *available at* http://www.wipo.int/edocs/mdocs/mdocs/en/cdip_4/cdip_4_3_rev.pdf.

[115] *See* Richard Owens, WIPO and Access to Content: The Development Agenda and the Public Domain, presentation delivered at the 5th COMMUNIA Workshop: Accessing, Using and Reusing Public Sector Content and Data, London, United Kingdom (March 27, 2009) [hereinafter 5th COMMUNIA Workshop].

[116] *See* Richard Owens, WIPO Project on Intellectual Property and the Public Domain, presentation delivered at the 7th COMMUNIA Workshop: Digital Policies: the Public Domain and Alternative Compensation Systems, Luxembourg (February 1, 2010) [hereinafter 7th COMMUNIA Workshop].

[117] *See* Lei No. 9610, de 19 de Fevereiro de 1998, Atualizada com as mudanças da Minuta de Anteprojeto de Lei que está em Consulta Pública [updated with the changes to the draft law which is under public consultation] (June 12, 2010), *available at* http://www.cultura.gov.br/consultadireitoautoral/lei-961098-consolidada [hereinafter Lei 9610/98 Atualizada]; *see also* Manuela C. Botelho Colombo, *Brazil's Discussion on Copyright Law Reform – Response to the Digital Era?*, IPWATCH, July 15, 2010, http://www.ip-watch.org/weblog/2010/07/15; Ralf V. Grassmuck, *Copyright Law Reform in Brazil: Anteprojeto or Anti-project?*, IPWATCH, December 23, 2009, http://www.ip-watch.org/weblog/2009/12/23.

[118] *See* Lei 9610/98 Atualizada, *supra* note 117, at Art. 107, I, § 1, b).

[119] *Id*., at Art. 107, I, § 1, a).

implementation.[120] Again, private firms in the biotechnological and software field have decided to forgo property rights to reduce transaction costs.[121] The key assumption is that injecting information in the public domain will preempt property rights of competitors and thus correct in part the market failure caused by the phenomenon of the "anti-commons".[122] In an anti-commons situation many rightholders own numerous exclusive rights over a single resource that, as a consequence, may go underused. This behaviour of the private sector has been interpreted as a self-correcting feature of the intellectual property system that can re-invigorate the public domain without government intervention.[123] These phenomena of de-propertization can be also seen as responses to the inefficient expansion of intellectual property rights.[124] The issue of voluntary sharing, private ordering and contractually constructed commons was widely investigated at the 1st COMMUNIA Conference in Louvain-la-Neuve[125] and the 2nd COMMUNIA Conference in Turin.[126]

The focus of cultural environmentalism has been magnified on online commons and the Internet as the "über-commons – the grand infrastructure that has enabled an unprecedented new era of sharing and collective action."[127] In the last decade, we have witnessed the emergence

[120] *See* LAWRENCE LESSIG, THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD (Vintage Books 2002); *see also* Madison, Fisherman, and Strandburg, *Constructing Commons*, *supra* note 101; Molly Shaffer Van Houweling, *Cultural Environmentalism and the Constructed Commons*, 70 LAW & CONTEMP. PROB. 5 (2007); Jerome H. Reichman and Paul F. Uhlir, *A Contractually Reconstructed Research Commons for Scientific Data in a Highly Protectionist Intellectual Property*, 66 LAW & CONTEMP. PROBS. 315 (2003).

[121] *See* Robert P. Merges, *A New Dynamism in the Public Domain*, 71 CHI. L. REV. 183, 186-191 (2004) [hereinafter Merges, *A New Dynamism*].

[122] *See* Michael A. Heller, *The Tragedy of the Anticommons: Property In the Transition from Marx to Markets*, 111 HARV. L. REV. 621 (1998) [hereinafter Heller, *The Tragedy of the Anticommons*]; *see also infra*, at 90.

[123] *See* Merges, *A New Dynamism*, *supra* note 121, at 184-185.

[124] Eli M. Salzberger, *Economic Analysis of the Public Domain*, *in* THE FUTURE OF THE PUBLIC DOMAIN: IDENTIFYING THE COMMONS IN INFORMATION LAW 36 (Lucie Guibault and P. Bernt Hugenholtz eds., Kluwer Law International 2006).

[125] *See*, *e.g.*, Mélanie Dulong de Rosnay, Identifying and Analyzing Current Available Legal Models for Voluntary Sharing of Content in Europe, speech delivered at the 1st COMMUNIA Conference: Assessment of Economic and Social Impact of Digital Public Domain throughout Europe, Louvain-la-Neuve, Belgium [hereinafter 1st COMMUNIA Conference] (June 30, 2008); Sevérine Dusollier, *Sharing Access to Intellectual Property Through Private Ordering*, 82 CHI-KENT L. REV. 1391 (2007), *available at* http://www.communia-project.eu/communiafiles/conf2008p_Sharing_access_to_intellectual_property_through_p rivate_ordering.pdf; Prodromos Tsiavos, Towards a Models of Commons Based Peer Regulatory Production: the Creative Commons Case, speech delivered at the 1st COMMUNIA Conference (June 30, 2008).

[126] *See*, *e.g.*, Jerome H. Reichman, Formalizing the Informal Microbial Commons: Using Liability Rules to Promote the Exchange of Materials, speech delivered at the 2nd COMMUNIA Conference: Global Science and the Economics of Knowledge-Sharing Institutions, Turin [hereinafter 2nd COMMUNIA Conference] (June 30, 2009); John Wilbanks, The Digital Commons: Infrastructure for the Data Web, speech delivered at the 2nd COMMUNIA Conference (June 30, 2009); Bronwyn H. Hall, Issues in Assessing Creative and Scientific Commons, speech delivered at the 2nd COMMUNIA Conference (June 30, 2009).

[127] David Bollier, *The Commons as New Sector of Value Creation: It's Time to Recognize and Protect the Distinctive Wealth Generated by Online Commons*, Remarks at the Economies of the Commons: Strategies for Sustainable Access and Creative Reuse of Images and Sounds Online Conference (Amsterdam, April 12, 2008), *available at* http://www.onthecommons.org/content.php?id=1813 (hereinafter Bollier, *The Commons as New Sector of Value Creation*).

of a "single intellectual movement, centered on the importance of the commons to information production and creativity generally, and to the digitally networked environment in particular."[128] According to David Bollier, the commoners have emerged as a political movement committed to freedom and innovation.[129] The "commonist" movement created a new order that is embodied in countless collaborative online endeavors.

The emergence and growth of an environmental movement for the public domain and, in particular, the digital public domain, is morphing the public domain into the commons. The public domain is our cultural commons: it is like our air, water, and forests. We must look at it as a shared resource that cannot be commodified. As much as water, knowledge cannot be constructed mainly as a profitable commodity, as recently argued by Professor Stefano Rodotà, one of the distinguished members of the COMMUNIA Advisory Committee.[130] As with the natural environment, the public domain and the cultural commons that it embodies must enjoy a sustainable development. As with our natural environment, the need to promote a "balanced and sustainable development" of our cultural environment is a fundamental right that is rooted in the Charter of Fundamental Rights of the European Union.[131] As we will detail later, overreaching property theory and overly protective copyright law disrupt the delicate tension between access and protection. Unsustainable cultural development, enclosure and commodification of our cultural commons will produce cultural catastrophes. As unsustainable environmental development has polluted our air, contaminated our water, mutilated our forests, and disfigured our natural landscape, unsustainable cultural development will outrage and corrupt our cultural heritage and information landscape.

The European Public Domain Project and Manifestos

COMMUNIA is aggregating a strong coalition that is promoting the public domain and a sustainable cultural development in Europe. COMMUNIA has been strengthening a European network of organizations that have been developing a new perspective on the importance of the public domain for Europe and the international arena at large. As we will further detail later, this is an essential precondition to solve the typical collective action problem raised by copyright policy, which is driven by a small group of concentrated players to the detriment of the more dispersed interest of smaller players and the public at large.

Several COMMUNIA members have embodied these values in the *Public Domain Manifesto* produced within the context of COMMUNIA. Conscious of the challenges and opportunities for the

[128] BENKLER, THE WEALTH OF NETWORKS, *supra* note 94, at 10.

[129] *See* DAVID BOLLIER, VIRAL SPIRAL: HOW THE COMMONERS BUILT A DIGITAL REPUBLIC OF THEIR OWN (New Press 2009), *available at* http://www.viralspiral.cc/;

[130] *See* Stefano Rodotà, *Se il Mondo Perde il Senso del Bene Comune*, REPUBBLICA, Agust 10, 2010, *available at* http://ricerca.repubblica.it/repubblica/archivio/repubblica/2010/08/10/se-il-mondo-perde-il-senso-del.html.

[131] *See* Charter of Fundamental Rights of the European Union, December 18, 2000, 2000 O.J. (C364) 1, 8, 37.

public domain in the technological environment of the networked society, the *Public Domain Manifesto* endorses fundamental principles and recommendations to actively maintain the structural core of the public domain, the voluntary commons and user prerogatives. With regard to the structural public domain, the *Public Domain Manifesto* states the following principles:

> 1. The Public Domain is the rule, copyright protection is the exception. [. . .] 2. Copyright protection should last only as long as necessary to achieve a reasonable compromise between protecting and rewarding the author for his intellectual labour and safeguarding the public interest in the dissemination of culture and knowledge. [. . .] 3. What is in the Public Domain must remain in the Public Domain. [. . .] 4. The lawful user of a digital copy of a Public Domain work should be free to (re-)use, copy and modify such work. [. . .] 5. Contracts or technical protection measures that restrict access to and re-use of Public Domain works must not be enforced. [. . .].[132]

Together with the structural core of the public domain, the *Public Domain Manifesto* promotes the voluntary commons and user prerogatives by endorsing the following principles:

> 1. The voluntary relinquishment of copyright and sharing of protected works are legitimate exercises of copyright exclusivity. [. . .] 2. Exceptions and limitations to copyright, fair use and fair dealing need to be actively maintained to ensure the effectiveness of the fundamental balance of copyright and the public interest. [. . .].[133]

Further, the *Public Domain Manifesto* puts forward the following general recommendations to protect, nourish and promote the public domain:

> 1. The term of copyright protection should be reduced. [. . .] 2. Any change to the scope of copyright protection (including any new definition of protectable subject-matter or expansion of exclusive rights) needs to take into account the effects on the Public Domain. [. . .] 3. When material is deemed to fall in the structural Public Domain in its country of origin, the material should be recognized as part of the structural Public Domain in all other countries of the world. [. . .] 4. Any false or misleading attempt to misappropriate Public Domain material must be legally punished. [. . .] 5. No other intellectual property right must be used to reconstitute exclusivity over Public Domain material. [. . .] 6. There must be a practical and effective path to make available 'orphan works' and published works that are no longer commercially available (such as out-of-print works) for re-use by society. [. . .] 7. Cultural heritage institutions should take upon themselves a special role in the effective labeling and preserving of Public Domain works. [. . .] 8. There must be no legal obstacles that prevent the voluntary sharing of works or the dedication of works to the Public Domain.

[132] The Public Domain Manifesto, *supra* note 78, at 4-5.

[133] *Id*., at 5.

> [. . .] 9. Personal non-commercial uses of protected works must generally be made possible, for which alternative modes of remuneration for the author must be explored. [. . .].[134]

In addition, the European-wide relevance of the public domain has been strengthened by other policy statements endorsing the same core principles of the Public Domain Manifesto. The Europeana Foundation has published the *Public Domain Charter* to stress the value of public domain content in the knowledge economy.[135] The many relations between the Public Domain Manifesto and the Europeana Charter were discussed at the 7th COMMUNIA Workshop in Luxembourg.[136] The Free Culture Forum released the *Charter for Innovation, Creativity and Access to Knowledge* to plead for the expansion of the public domain, the accessibility of public domain works, the contraction of the copyright term, and the free availability of publicly funded research."[137] Again, the Open Knowledge Foundation launched the *Panton Principles for Open Data in Science* in February 2010 to endorse the concept that "data related to published science should be explicitly placed in the public domain."[138]

Triggered by a forward looking approach of the European institutions, Europe is putting together a very diversified and multi-sector network of projects for the promotion of the public domain and open access. The European public domain project is emerging in a strong multi-tiered fashion. Together with COMMUNIA, as part of the i2010 policy strategy, the European Union launched the Europeana digital library network, www.europeana.eu, to digitize Europe's cultural and scientific heritage.[139] The LAPSI project, www.lapsi-project.eu, was started to build a network covering policy discussions and strategic action on all legal issues related to access and the re-use of Public Sector Information (PSI) in the digital environment.[140] Further, to assess the value and to define the scope and the nature of the public domain, the European Commission has promoted

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[134] *Id*., at 6-7.

[135] *See* The Europeana Public Domain Charter, http://version1.europeana.eu/web/europeana-project/publications.

[136] *See* Jill Cousins, The Public Domain, the Manifesto, his Charter and her Dilemma, presentation delivered at the 7th COMMUNIA Workshop (February 1, 2010).

[137] *See* Charter for Innovation, Creativity and Access to Knowledge: Citizens' and Artist's Rights in the Digital Age, Barcelona Free Culture Forum, http://fcforum.net/ (stating in its preamble that "[f]ree culture opens up the possibility of new models for citizen engagement in the provision of public goods and services. These are based on a 'commons' approach. 'Governing of the commons' refers to negotiated rules and boundaries for managing the collective production and stewardship of and access to, shared resources. Governing of the commons honours participation, inclusion, transparency, equal access, and long-term sustainability. We recognise the commons as a distinctive and desirable form of governing. It is not necessarily linked to the state or other conventional political institutions and demonstrates that civil society today is a potent force. [...]. In this context, the public interest is best served by supporting and ensuring continued creation of intellectual works of significant societal value, and to ensure all citizens have unfettered access to such works for a wide variety of uses . . . ."); *cf*. Evolution Summit 2010, http://d-evolution.fcforum.net/en (endorsing very similar principles).

[138] *See* Panton Principles: Principles for Open Data in Science, http://pantonprinciples.org.

[139] *See* Europeana: Think Culture, http://www.europeana.eu/portal.

[140] *See* LAPSI: Legal Aspects of Public Sector Information, http://www.lapsi-project.eu.

the Economic and Social Impact of the Public Domain in the Information Society project.[141] The project, together with its methodology, was presented at the 1st COMMUNIA Conference in Louvain-la-Neuve in 2008.[142]

Again, many other projects focus on extracting value form our scientific and cultural riches in the digital environment. The European DRIVER project, http://www.driver-repository.eu, presented at the 1st COMMUNIA Conference and the 1st COMMUNIA Workshop,[143] is aimed at building a repository infrastructure combined with a search portal of all the openly available European scientific communications.[144] The project ARROW (Accessible Registries of Rights Information and Orphan Works), http://www.arrow-net.eu, encompassing national libraries, publishers, writers' organisations and collective management organisations, aspires to find ways to identify rightholders and rights, clear the status of a work, or possibly acknowledge the public domain status of a work. Finally, the Digital Research Infrastructure for the Arts and Humanities (DARIAH) aims to enhance and support digitally-enabled research across the humanities and the arts.

With the support of the Open Knowledge Foundation, the UK government announced the launch of data.gov.uk, www.data.gov.uk, a collection of more than 2,500 UK government databases - now freely available to the public for consultation and re-use. The Open Knowledge Foundation launched the Public Domain Calculators project as part of the Public Domain Works project, www.publicdomainworks.net, an open registry of artistic works that are in the public domain.[145] The Public Domain Calculators project, presented at the 3rd COMMUNIA Workshop, *Marking the Public Domain: Relinquishment & Certification*, in Amsterdam, is aimed at creating an algorithm to determine whether a certain work is in the public domain given certain details, such as date of publication, date of death of author, etc.[146] As discussed in a meeting held in November 2009 within the COMMUNIA project, the Open Knowledge Foundation has produced a short video covering documentation and strategies for building a set of Public Domain Calculators for countries across Europe.

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[141] *See* Public Domain in Europe, Rightscom, http://www.rightscom.com/Default.aspx?tabid=20397;

[142] *See* Mark Isherwood, Rightscom Ltd, European Commission project: Economic and Social Impact of the Public Domain. Introduction to Methodology, paper presented at the 1st COMMUNIA Conference (June 30, 2008).

[143] *See* Sophia Jones and Alek Tarkowski, Digital Repository Infrastructure Vision for European Research - DRIVER project, presentation delivered at the 1st COMMUNIA Workshop (January 18, 2008); Karen Van Godtsenhoven, The DRIVER Project: on the Road to a European Commons for Scientific Communication, presentation delivered at the 1st COMMUNIA Conference (June 30, 2008).

[144] *See* DRIVER, Digital Repository Infrastructure Vision for European Research, http://www.driver-repository.eu; see also Karen Van Godtsenhoven, The DRIVER project: on the road to a European Commons for Scientific Communication, paper presented at the 1st COMMUNIA Conference (June 30, 2008).

[145] *See* Public Domain Works, http://www.publicdomainworks.net.

[146] See Jonathan Gray, Public Domain Calculators, presentation delivered at the 3rd COMMUNIA Workshop, Marking the Public Domain: Relinquishment & Certification, Amsterdam (October 20, 2008) [hereinafter 3rd COMMUNIA Workshop]; *see also* Public Domain Calculators, http://wiki.okfn.org/PublicDomainCalculators.

[INSERT THE VIDEO, http://vimeo.com/15678944]

The activities and goals of the Open Knowledge Foundation, a very active COMMUNIA member, were presented at the 1st COMMUNIA Workshop.[147]

Many other civic society endeavours have been working toward the goal of promoting open access and safeguarding the public domain throughout Europe. Among them, La Quadrature du Net, an advocacy group that promotes the rights and freedoms of citizens on the Internet, is very active within and outside of the COMMUNIA network.[148] The European Association for Public Domain, www.europeanpublicdomain.eu, was recently initiated as a project to promote and defend the public domain.[149] Again, Knowledge Exchange is a co-operative effort run by European libraries and research foundations that supports the goal of making a layer of scholarly and scientific content openly available on the Internet.[150] Finally, it is worth noting that commercial enterprises joined the COMMUNIA network in an attempt to investigate and promote open and public domain business models.

[*INSERT EUROPEAN PUBLIC DOMAIN PROJECT CHART (Fig. 1)*]

This distributed European public domain project is an encouraging starting point. Nonetheless, much still must be done to promote sustainability in the development of our cultural environment, in particular our digital cultural environment. As we will detail in the remaining of this paper, the commodification of information, the enclosure of the public domain, and the converse expansion of intellectual property rights tell a story of unsustainable unbalance in shaping the informational policy of the digital society. An unsustainable cultural development neglectful of the public domain, if not redressed, will negatively affect society at large though the loss of economic and social value that may be extracted from the public domain, especially the digital public domain.

The Value of the Public Domain

The public domain is a valuable global asset. A forward looking approach to the use of the public domain would allow the extraction of considerable economic and social value from it. In particular, COMMUNIA asserts that open and public domain approaches can produce economic and social value. Unfortunately, so far this value has been left unattended. In addition, the intellectual property rhetoric has hidden the public costs of extreme propertization of the public. The current paradigm "binds us to a narrow and erroneous viewpoint, in which innovation is central but access is peripheral," Rufus Pollock has noted.[151]

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[147] *See* Jonathan Gray, Rufus Pollock and Jo Walsh, Open Knowledge: Promises and Challenges, presentation delivered at the 1st COMMUNIA Workshop (January 18, 2008).

[148] See La Quadrature du Net, http://www.laquadrature.net.

[149] *See* The European Association for Public Domain, http://www.europeanpublicdomain.eu/index_en.html.

[150] *See* Knowledge Exchange, http://www.knowledge-exchange.info.

[151] POLLOCK, THE VALUE OF THE PUBLIC DOMAIN, *supra* note 81 4.

This imbalance should be redressed. This is far more relevant now, because this disproportion between innovation and access prevents us from taking full advantage of the possibilities offered by the digital age. Digitization and Internet distribution have multiplied the potentialities and opportunities offered by the use of public domain material. On one hand, digitization offers the opportunity to extract economic value out of the public domain by benefiting the public with free or inexpensive cultural resources. On the other hand, digitization may produce immense social value by opening society up to immediate and unlimited access to culture and knowledge.

In addition, the economic and social value of the public domain is enhanced by the mass production capacities of the digital environment. A new peer-based culture of sharing is changing our cultural landscape through the revolutionary technological ability of multiplying references instantaneously and endlessly. Openness and access fuel this new culture of shared production of knowledge. Commodification and enclosure of the public domain threaten its growth and survival.

The next portion this Report is intended to map the value of the public domain. To that end, the Report will briefly discuss sources, size, social and economic value, role, and uses of the public domain in Europe.

As mentioned earlier, to assess the value of the public domain the European Commission has launched a tailor-made project, the Economic and Social Impact of the Public Domain in the Information Society project. The findings of that project shall be of avail in the following analysis. The project, together with its methodology, was presented at the 1st COMMUNIA Conference in Louvain-la-Neuve in 2008[152] and the 7th COMMUNIA Workshop in Luxembourg.[153] The Public Domain in Europe project pursues the following main goals: estimating the number of works in the public domain in the EU; estimating the economic value of works in the public domain for the next 10-20 years; determining any change in value of works under copyright and once in the public domain; analyzing the current practices for re-use of public domain material held by European cultural institutions; reviewing current available mechanisms for voluntary sharing and assessing their efficiency and impact.

The Sources of the Public Domain

Before delving into the assessment of the value of the public domain, we should start by identifying its sources. A first set of sources of the public domain belongs in what can be termed the structural public domain or the "constitutionally core elements of the public domain."[154] As part of this core elements, an immediate source of the public domain is represented by those works not deserving of protection because, to use the words of the Public Domain Manifesto,

[152] *See* Mark Isherwood, Rightscom Ltd, European Commission project: Economic and Social Impact of the Public Domain. Introduction to Methodology, paper presented at the 1st COMMUNIA Conference (June 30, 2008).

[153] *See* Mark Isherwood, Economic and Social Impact of the Public Domain in the Information Society, presentation delivered at the 7th COMMUNIA Workshop (February 1, 2010).

[154] Samuelson, *Mapping the Digital Public Domain*, *supra* note 62, at 150.

> they fail the test of originality, or are excluded from protection (such as data, facts, ideas, procedures, processes, systems, methods of operation, concepts, principles, or discoveries, regardless of the form in which they are described, explained, illustrated, or embodied in a work, as well as laws and judicial and administrative decisions).[155]

This category partially overlaps with what authors have called "those aspects of copyrighted works that copyright does not protect."[156] These aspects may be termed as the ontological public domain and are defined by the application of the idea-expression dichotomy, the criteria for protection, either the requirement of originality or substantial investment, and the exhaustion doctrine.[157] The identification of the ontological public domain is left to a dissection test separating protectable from non-protectable elements of a work. The application of this test is often a complex case by case analysis, and, thus, inherently unpredictable. In this unpredictability rests the inevitable indeterminacy of the public domain. COMMUNIA calls for a partial solution to this unpredictability through its policy Recommendation # 4.

Expiration of copyright is a second relevant source of the public domain. Differently than the previous, this category is inherently predictable. Once the temporary right granted to authors is expired, the author's works enter the public domain. Nonetheless, the incredible complexity of copyright term rules makes it very difficult to determine the copyright status of individual works. This means that one of the biggest obstacles to positively identifying public domain works lies in the cumbersome process of determining the term of copyright protection. To this end promoting the development of efficient public domain calculators will help to counter this further source of indeterminacy of the public domain and thus help to unlock cultural, educational and economic potential of public domain works. Nevertheless, the development of public domain calculator cannot be by any means a general remedy. The complexity of the legal framework, therefore, calls also for a simplification of the rules of copyright term calculation, as COMMUNIA recommends by means of its policy Recommendation # 4.

Depending on special rules of exclusion from copyright protection of official acts within each jurisdiction, public data and official information produced and voluntarily made available by governments or international organizations may be a further source of the public domain.[158] For

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[155] The Public Domain Manifesto, *supra* note 78.

[156] Litman, *The Public Domain*, *supra* note 80, at 968.

[157] *See* DUSOLLIER, SCOPING STUDY ON COPYRIGHT AND THE PUBLIC DOMAIN, *supra* note 75, at 22-25; Lucie Guibault, Evaluating Directive 2001/29/EC in the light of the Digital Public Domain, paper presented at the 1st COMMUNIA Conference (July 1, 2008), at 3 [hereinafter Guibault, Evaluating Directive 2001/29/EC].

[158] See United Nations Educational, Scientific and Cultural Organization [UNESCO], Gen. Conf., 32nd Session, *Recommendation concerning the Promotion and Use of Multilingualism and Universal Access to Cyberspace*, at 7 (November 21, 2003) *available at* http://portal.unesco.org/ci/en/files/13475/10697584791Recommendation-Eng.pdf/Recommendation-Eng.pdf (including those data in the definition of public domain information); *see also* Antony Taubman, *The Public Domain and International Intellectual Property Law Treaties*, in INTELLECTUAL PROPERTY: THE MANY FACES OF THE PUBLIC DOMAIN (Charlotte Waelde and Hector L. MacQueen eds., Edward Elgar, 2007).

example, the U.S. law precludes copyright protection for laws and other governmental works.[159] In Europe, though much governmental information and data produced by public authorities might still be copyrighted, the public availability of governmental information and data has been broaden by many ongoing efforts. Most prominently, the Directive 2003/98/EC is intended to encourage the reuse and the commercial exploitation of public sector information.[160] Practical implementation and further efforts toward openness are still sought at the national level, though, as also recommended by COMMUNIA policy Recommendation # 13.

There is, then, other material whose nature as a source of the public domain is more contested.[161] As the Public Domain Manifesto puts it, next to the structural public domain would lie a functional public domain. Structural and functional public domain sources would be distinguished by the circumstance that "in the first case, the openness and freedom of use is premised on the non-[in]existence of copyright, in the second case on the impossibility to exercise and enforce copyright exclusivity."[162] As per the Public Domain Manifesto, the functional public domain represents "the "breathing space" of our current culture and knowledge" that it is made of "sources that enable individuals to freely interact with copyright protected works."[163] The Public Domain Manifesto identify the sources of the functional public domain as the "works that are voluntarily shared by their rights holders" and "the users prerogatives created by exceptions and limitations to copyright, fair use and fair dealing."[164]

Therefore, firstly, contiguous to the structural public domain is a set of privileged uses under copyright exceptions and limitations, fair use, and fair dealing. Public domain and copyright exceptions and limitations, in fact, share the public interest of enhancing access to culture and creativity.[165] In general, copyright exceptions and fair uses are deemed to be only functionally equivalent to public domain material. Nonetheless, a more extreme approach would locate within the public domain any use for which permission is not required.[166]

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[159] *See* 17 U.S.C. §105 (2006).

[160] *See* Council Directive 2003/98/EC on the reuse of public sector Information, 2003 O.J. (L 345) 90 (November 17, 2003) [hereinafter Directive 2003/98/EC or PSI Directive].

[161] *See* Guibault, Evaluating Directive 2001/29/EC, *supra* note 157, at 3-4.

[162] DUSOLLIER, SCOPING STUDY ON COPYRIGHT AND THE PUBLIC DOMAIN, *supra* note 75, at 10.

[163] *See* Public Domain Manifesto, *supra* note 78, at 3.

[164] *Id*.

[165] *See* DUSOLLIER, SCOPING STUDY ON COPYRIGHT AND THE PUBLIC DOMAIN, *supra* note 75, at 9.

[166] See DEAZLEY, RETHINKING COPYRIGHT, *supra* note 63, at 107 (stating that "if the institution of copyright necessitates permission before use, then the public domain allows for use without the need for permission"); Benkler, *Free as the Air to Common Use*, supra note 82, at 362-363 (adding to the traditional concept of the public domain the range of privileged uses that are "easy cases", therefore excluding fair use instances that involve complicated factual inquiries); Valérie-Laure Benabou and Sevérine Dusollier, *Draw Me a Public Domain*, *in* COPYRIGHT LAW: A HANDBOOK OF CONTEMPORARY RESEARCH 167 (Paul Torremans ed., Edgar Elgar 2007) [hereinafter Benabou and Dusollier, *Draw Me a Public Domain*]; *see also* The Public Domain Manifesto, *supra* note 78, at 3 ("The user prerogatives created by exceptions and limitations to copyright, fair use and fair dealing . . . are an integral part of the Public Domain")

Secondly, it is debated whether, and to what extent, content distributed under open access models, such as open source software, free software, and creative commons material, can be located within the public domain. Generally, open source software and CC-licensed content are included in a territory adjacent to the public domain.[167] The nature in between copyright all rights reserved and public domain no right reserved is due to the intellectual property rights acting as the very source of authority for the license terms under which this content is freely and openly distributed. However, as noted earlier, open source software, free software, and creative commons content belong to the category of contractually constructed commons and thus share much of the value of public domain content.[168]

As a final note, it is to be observed that the sources of the public domain may vary from jurisdiction to jurisdiction and shift overtime. By way of example, original design of useful articles and unoriginal compilation of facts will be feeding the public domain in the United States but not in Europe. Conversely, business methods and certain biotechnology innovation will serve as a source of the public domain in Europe but not in the United States. This may be an issue when attempting to map the public domain. Drafting national public domain maps for comparative analysis should minimize this difficulty, though.[169]

The Size of the Public Domain

In order to determine the overall value of the public domain, the first step to undertake is to assess its size. So far only one quantitative study on the size of the public domain is available in Europe. The study was developed within the Public Domain in Europe project by Rufus Pollock, Paul Stepan and Mikko Valimaki. The study was presented by Rufus Pollock at the 7th COMMUNIA Workshop in Luxembourg.[170] The study attempts to estimate the number of items in the public domain across a variety of European countries and different media types. The study focuses only on that part of the structural public domain that is composed by works whose copyright is expired. The results of the study show that

> the public domain for books alone consists of hundred[s] of thousands, and sometimes millions, of items, and that, taken as a whole, the European Public Domain must be measured in the millions, or even tens of millions. While a brief perusal of the relevant datasets indicates that much of this material may have only slight value today, nevertheless

[167] *See* Samuelson, *Mapping the Digital Public Domain*, *supra* note 62, at 151.

[168] *See* Samuelson Pamela, *Enriching Discourse on Public Domain*, 55 DUKE L. J. 101, 124 (2006).

[169] *See* Pamela Samuelson, *Challenges in Mapping the Public Domain*, *in* THE FUTURE OF THE PUBLIC DOMAIN: IDENTIFYING THE COMMONS IN INFORMATION LAW 12 (Lucie Guibault and P. Bernt Hugenholtz eds., Kluwer Law International 2006) [hereinafter Samuelson, *Challenges in Mapping the Public Domain*] (considering and rebutting criticisms of the public domain map).

[170] Rufus Pollock, The Size and Value of the Public Domain, presentation delivered at the 7th COMMUNIA Workshop (February 1, 2010).

> the scale and diversity of this vast public domain is indicative of significant value, cultural, social and commercial. [171]

In addition, the study reports a public domain for sound recordings that consists at least of tens of thousands of items. As per films, the study concludes that, since movies are an invention of the nineteenth century, "it is therefore likely that very little film is in the public domain."[172]

Needless to say, this study is only an initial partial quantitative assessment of the European public domain. Further studies are awaited to come up with more complete and precise data, in particular in the sound recording sector. In addition, any such study should be coupled with the assessment of the remaining part of the structural public domain and the amount of works that are voluntarily shared or dedicated to the public domain.

A quantitative research on a related issue has been carried out in the United States. [173] Paul David and Jared Rubin examined the impact of US copyright expansion on reducing the size of the public domain. They have tried to quantify the extent of the incursions into the public domain in books that have resulted from legal extensions of U.S. copyright law during the 20th century. David and Rubin made estimates of lower and efficient upper bounds for each of the several statutory changes, measured in terms of the number of copyrighted works that unambiguously will have been returned to the public domain in every year, going forward into the 2020's. The study found that "by 2027, changes in copyright laws over the last half-century will have prevented over 3.5 million books that would otherwise have entered the public domain from doing so."[174]

The Social and Economic Value of the Public Domain

The value of the public domain is a complex variable made up of many components. The public domain is a source of value in both economic and social terms. In addition, value can be extracted from the structural and the functional aspects of the public domain. The contribution of the public domain can be assessed in positive or negative terms by estimating the economic and social loss of enclosure and commodification. The positive value of the public domain can be the effect of direct use, indirect use or reuse of public domain works, the application of public domain business models, the market efficiency triggered by a healthy public domain or, again, the democratic

[171] *See* Rufus Pollock, Paul Stepan, and Mikko Valimaki, The Size of the Public Domain 20 (Rightscom, Draft, July 8, 2009).

[172] *Id*.

[173] *See* Paul A. David and Jared Rubin, *Restricting Access to Books on the Internet: Some Unanticipated Effects of U.S. Copyright Legislation*, 5 REV. ECON. RES. COPYRIGHT ISSUES 23 (2008), *available at* http://papers.ssrn.com/sol3/ papers.cfm?abstract_id=1260527 [hereinafter David and Rubin, *Restricting Access to Books on the Internet*]; *see also* Copyright Review Management System, http://www.lib.umich.edu/copyright-review-management-system (a project of the University of Michigan Library to increase the reliability of copyright status determination of books published in the United States from 1923 to 1963).

[174] David and Rubin, *Restricting Access to Books on the Internet*, *supra* note 173, at 46.

function of the public domain. In any event, social and economic value is always very much tangled up in the assessment of the riches of the public domain.

As per the value of a work entering into the public domain or public domain effect, we refer to the concept as described by Rufus Pollock within the framework of the Economic and Social Impact of the Public Domain in the Information Society project. [175] Firstly, the revenue value is to be distinguished from the social value of the public domain, as the economic utility generated for society. An example may help to differentiate the two concepts. Let us say that after a work enters in the public domain, that work is sold for €5 instead of €10, or may even be downloaded for free online. The social value of the work entering in the public domain, or the "consumer surplus," will be €5 or €10, if the work is freely accessible. Conversely, if we only looked at the revenue value, we should conclude that the value of the work dropped from €10 to €5 or zero. Indeed, what terminology is Rufus using?

In addition, the social value of a work entering in the public domain will also include the deadweight loss of restricting access to a good that it is spared to society. Right! With the term deadweight loss, economic analysis refers to the loss for society consequent to that portion of population that cannot afford to buy the good at a monopolistic price. For that portion of population, society gains the entire value that each consumer puts upon the work. As an example of the value that may be lost due to enclosure of the public domain, recent studies have shown data that suggest that, as to fictional books, copyright extension imposes deadweight losses without any offsetting efficiency gain.[176] The data show that in-print status and in store availability of public domain books are higher or equal to copyrighted books. Instead, the titles in the public domain are significantly less expensive than their copyrighted counterparts.

Finally, the assessment of the value of a work entering in the public domain must also take into account the value of reuse. In the case of monopolies on intellectual productions, innovators and creators will be prevented from developing derivative works or invention from the original. Reducing the public domain or retarding the entrance of a work into the public domain shall deprive the community of the correspondent social value of reuse. Differently than the social value mentioned earlier, the value of reuse is a dynamic value that boosts society both economically and culturally.

Together with the value that may be immediately extracted from the entrance of a work into the public domain, the public domain or a public domain approach to knowledge management may be a source of value on many different levels. Before delving into a more specific account of the social and economic value that can be extracted from the public domain, we note that, in

[175] POLLOCK, THE VALUE OF THE PUBLIC DOMAIN, *supra* note 81, at 5.

[176] *See* Paul J. Heald, *Property Rights and the Efficient Exploitation of Copyrighted Works: An Empirical Analysis of Public Domain and Copyrighted Fiction Best Sellers*, *in* NEW DIRECTIONS IN COPYRIGHT LAW: VOLUME 6 75, 78-91 (Fiona Macmillan ed., Edward Elgar Publishing 2007)[hereinafter Heald, *Property Rights and the Efficient Exploitation of Copyrighted Works*].

general terms, public domain literature has identified eight values of public domain information and works:

1. building blocks for the creation of new knowledge, examples include data, facts, ideas, theories and scientific principle;
2. enabling competitive imitation, through for example expired patents and copyright, or publicly disclosed technologies that do not qualify for patient protection;
3. enabling follow-on innovation through expired patents and copyrights and leaked trade secrets;
4. enabling low cost access to information without the need to locate the owner or negotiate rights clearance and pay royalties, through for example expired copyrighted works or patents, and non-original data compilation;
5. access to cultural heritage through information resources such as ancient Greek texts and Mozart's symphonies;
6. promoting education, through the spread of information, ideas and scientific principles;
7. promoting public health and safety, through information and scientific principles;
8. promoting the democratic process and values, through news, laws, regulation and judicial opinion.[177]

When it comes to value the mentioned benefits of the public domain, however, a quantitative measurement is impossible, at least with the present data and modeling tools.[178] Nonetheless, some quantitative conclusions on the value of the public domain can be inferred by examining few examples of public domain approaches to knowledge production. In general, these examples show the role and the value of the digital public domain in allowing new business models to emerge.

In the case of file sharing, for example, few studies have found significant benefits of free access. One U.S. study has found that public domain type access to music would entail a net gain for society of US$ 45 per person.[179] In addition, seminal studies have found that the impact of peer to peer file sharing on sales does not seem that relevant.[180] Furthermore, data on the supply of

[177] *See* Samuelson, *Challenges in Mapping the Public Domain*, *supra* note 169, at 22.

[178] *See* POLLOCK, THE VALUE OF THE PUBLIC DOMAIN, *supra* note 81, at 8.

[179] *See* Rafael Rob and Joel Waldfogel, *Piracy on the High C's: Music Downloading, Sales Displacement, and Social Welfare in a Sample of College Students*, 49 J. L. & ECON. 29 (2006), *available at* www.nber.org/papers/w10874.

[180] *See*, *e.g.*, Felix Oberholzer-Gee and Koleman Strumpf, *File-Sharing and Copyright*, 10 INNOVATION POLICY AND THE ECONOMY 19, 34-38 (2010), *available at* http://www.hbs.edu/research/pdf/09-132.pdf [hereinafter Oberholzer and Koleman, *File Sharing and Copyright*]; Felix Oberholzer-Gee and Koleman Strumpf, *The Effect Of File Sharing On Record Sales: An Empirical Analysis* 115 J. POL. ECON. 1 (2004), *available at* http://www.unc.edu/~cigar/papers/FileSharing_March2004.pdf; Fabrice LeGuel and Fabrice Rochelandet, *P2P Music-Sharing Networks: Why the Legal Fight Against Copiers May be Inefficient?* (Social Science Research Network Working Paper Series, 2005), *available at* http://ssrn.com/abstract=810124 (using a unique dataset collected from more than 2,500 French households); *but*, *e.g.*, Liebowitz Stan, *How Reliable is the Oberholzer-Gee and Strumpf Paper on File-Sharing*? (University of Texas at Dallas, Working Paper, August 2007), *available at* http://copyrightalliance.net/files/ssrn-id1014399.pdf; Liebowitz Stan, *File Sharing: Creative Destruction or Just Plain Destruction?*, 49 J. L. & ECON. 1 (2006).

new works seem to support the argument that the advent of file sharing did not discourage creators and creativity at large.[181] In fact, the impact of file sharing on creators may be positive due to the increase of the demand for complements to protected works, such as concerts, special editions, or merchandising.

The value of few other examples of public domain models, as singled out by Rufus Pollock's study, can be more immediately appreciated.[182] Open source software is a quintessential example of the value of an open approach to the production of information goods. The Internet and the World Wide Web are further examples of the great wealth that can be built upon public domain material. These technologies were non-proprietary, and openness was the key to their revolutionary success. Again, online search engines, such as Google, produce relevant social benefit through their service and generate very large revenue by copying "open" information on the web. Oddly enough a strict enforcement of copyright law would bring to a halt the web as it is known today.

Finally, several studies have highlighted that a public domain approach to weather, geographical data, and public sector information in general, may yield a substantial long-run value for Europe, running into the tens of billions or hundreds of billions of euros.[183] The benefit of access to and re-use of public sector information has been widely investigated during the COMMUNIA proceedings among others by Professor Paul Uhlir, distinguished member of the COMMUNIA Advisory Committee.[184] In particular, the 5th COMMUNIA Workshop, co-organized by the Open Knowledge Foundation and London School of Economics, focused on *Accessing, Using and Reusing Public Sector Content and Data*.

The value of privileged and fair use of copyrighted material is also to be taken into account when assessing the overall value of the public domain. Privileged and fair uses of copyrighted material are an integral part of the functional public domain. A recent, and so far isolated, study compiled data from 2002 to 2006 to show the contributions to the U.S. economy of companies

[181] *See* Oberholzer and Koleman, *File Sharing and Copyright*, *supra* note 180, at 46-49.

[182] *See* POLLOCK, THE VALUE OF THE PUBLIC DOMAIN, *supra* note 81, at 11-13.

[183] *Id*., at 14; PIRA INTERNATIONAL LTD ET AL, COMMERCIAL EXPLOITATION OF EUROPE'S PUBLIC SECTOR INFORMATION (October 30, 2000) (report prepared European Commission, Information Society DG), *available at* http://ec.europa.eu/information_society/policy/psi/docs/pdfs/pira_study/commercial_final_report.pdf; Richard E. W. Pettifer, *Towards a Stronger European Market in Applied Meteorology*, 15 METEOROLOGICAL APPLICATIONS 305 (2008), *available at* http://www.interscience.wiley.com/journal/118677468/abstract; *see also* PETER WEISS, U.S. NATIONAL WEATHER SERVICE, BORDERS IN CYBERSPACE: CONFLICTING GOVERNMENT INFORMATION POLICIES AND THEIR ECONOMIC IMPACT (February 2002) *available at* http://www.nws.noaa.gov/sp/Borders_report.pdf;

[184] Paul Uhlir, Measuring the Economic and Social Benefits and Costs of Public Sector Information Online: a Review of the Literature and Future, presentation delivered at the 1st COMMUNIA Conference, Louvain-la Neuve, Belgium (June 30, 2010)

benefitting from fair use and copyright exceptions.[185] Fair use enhanced industries include manufactures of consumer devices allowing for individual copying of protected content, educational institutions, software developers, and internet search and web hosting providers. The study have found that "the fair use economy in 2006 accounted for $4.5 trillion in revenues and $2.2 trillion in value added, roughly one-sixth of total U.S. GDP. It employed more than 17 million people and supported a payroll of $1.2 trillion. It generated $194 billion in exports and rapid productivity growth."[186] The study showed that industries based on or benefitting from fair use exceeded GDP, employment, productivity, and export growth of the overall economy. Further, the study reveals that fair use industries have grown dramatically within the past twenty years, since the advent of the Internet and the digital information revolution. These data may help to make a very relevant finding: in the digital environment, open and public domain business models may spur growth at a faster pace than proprietary traditional business models. In addition, the study shows as many of the industry compartments that may be included in the category of copyright-based industry[187] are in fact benefitting from privileged and fair uses of protected materials as well. Those benefits may be, in fact, a more relevant contribution to our economic growth than the benefits coming from the exploitation of proprietary business models, as the study points out. These findings, therefore, should play a central role in directing the European policy strategies.

Promoting fair use and the functional public domain, thus related fair use industry, may have also a considerable added value for Europe. When contrasted with the United States case-by-case fair use model, the European list of predefined limitations and exceptions may be a vantage point for fair use industries in Europe. Fair use decisions are inherently complex and unpredictable in the United States. Fair use has been declined by the United States Court of Appeals of the 2nd Circuit as "the most troublesome doctrine in the whole of copyright."[188] As a consequence of the inherent unpredictability of fair use in the United States, transaction costs will be higher, legal positions will be uncertain, and commercial endeavours will be chronically open to legal challenge. Europe should maximize the advantages that our legal framework offers to industries based on fair use. The enhanced legal certainty and lower transaction costs of the European legal framework will make that sector flourish in Europe and will boost the international investments. If compared with the United States market, the European Internal Market may become an heaven for fair use industries. However, to that end, Europe needs to advance harmonization of

[185] *See* THOMAS ROGERS, ANDREW SZAMOSSZEGI, AND PETER JASZI, FAIR USE IN THE U.S. ECONOMY: ECONOMIC CONTRIBUTION OF INDUSTRIES RELYING ON FAIR USE (September 2007) (study prepared for the Computer & Communications Industry Association [CCIA]).

[186] *Id*., at 7.

[187] *See* World Intellectual Property Organization [WIPO], Guide on Surveying the Economic Contribution of the Copyright-Based Industries (2003), *available at* http://www.wipo.int/copyright/en/publications/pdf/copyright_pub_893.pdf; STEPHEN E. SIWEK, COPYRIGHT INDUSTRIES IN THE U.S. ECONOMY: THE 2003-2007 REPORT (July 2009) (study prepared for the International Intellectual Property Alliance [IIPA], *available at* http://www.iipa.com/pdf/IIPASiwekReport2003-07.pdf.

[188] Dellar v. Samuel Goldwyn, Inc., 104 F.2d 661, 662 (2d Cir. 1939) (per curiam).

exceptions and limitations across national jurisdictions, as sought by COMMUNIA policy recommendation # 3. Further, the public domain plays a relevant role in terms of market efficiency. From an economic standpoint, a market with a shrinking public domain would be especially inefficient. Nobel laureate Joseph Stiglitz stressed this point by noting that

> [i]t is imperative to understand the ways in which the production and distribution of knowledge differs from that of goods like steel and cars. [. . .]. The fact that knowledge is, in central ways, a public good and that there are important externalities means that exclusive or excessive reliance on the market may not result in economic efficiency.[189]

Restricting access to information would increase the inefficiency of the market because perfect information makes the perfect market.[190] A market that commodifies information excessively will be less efficient in allocating resources in our society since key information to facilitate that allocation will be more difficult to find. In addition, by raising the costs of information, we will undermine creativity since the building blocks of future creations will be inaccessible to a portion of our society.[191]

Finally, as we will discuss in greater detail later, the public domain is an engine of democratization by ensuring a proper access to information for EU citizens regardless of the market power of the players. The value of the public domain as a building block of our capacity of free expression has been immensely enhanced by the ubiquity of the interconnected society and the power of propagation of digitization. Technological advancement makes the public domain the perfect democratic forum.

The Public Domain Effect in Action

Practice is often more explanatory than theory. A few examples may help to grasp the value of the "public domain effect," the entrance of a work in the public domain, and other social and economic value that can be extracted from the public domain.

In 2010, the works of Sigmund Freud entered the public domain in Italy. This event propelled the publication of 36 works of Freud in the first 9 months of 2010 by 10 publishers. This is an astonishing figure if compared with the previous years. In the preceding 10 years, from 1999 to 2009, only 16 works of Freud were published in Italy.[192] In the Czech Republic, works by Karel Čapek reached 39 new editions when the author entered the public domain in 2009. Previously,

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[189] JOSEPH E. STIGLITZ, PUBLIC POLICY FOR A KNOWLEDGE ECONOMY 25 (World Bank Department for Trade and Industry and Center for Economic Policy Research 1999), *available at* http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.123.9173&rep=rep1&type=pdf.

[190] *See* Sanford J. Grossman and Joseph E. Stiglitz, *On the Impossibility of Informationally Efficient Markets*, 70 AM. ECON. REV. 393 (1980).

[191] BOYLE, THE PUBLIC DOMAIN, *supra* note 90, at 39-41

[192] *See* International Book Shop, www.ibs.it.

the corresponding number was between 4 and 10 new editions per year.[193] In the examples given, in fact, decreasing marginal costs of production should be taken into consideration to assess the overall net value for society. However, the capacity of the public domain effect to propel revived interest in works of authorship may outweigh any other considerations. It is worth noting that one of the effects of works falling into the public domain may be to stimulate critical editions as a way to package unprotectable underlying works in a protectable form.[194]

2007 saw the 70th anniversary from the death of Louis Vierne, a renowned French organist and composer, and the end of the copyright protection of his works. Upon expiration of Vierne's copyright, two German publishers issued new editions of Vierne's opera omnia. These new editions finally corrected many mistakes and inaccuracies included in the original scores. Louis Vierne was born nearly blind due to congenital cataracts, and such mistakes were likely due to Vierne's hesitating writing. Up to the expiration Vierne's copyright, none of its publishers tried to correct the mistakes, because the copyright laws prevented them from editing the original works whatsoever. Only the full release in the public domain enabled a new publisher, Bärenreiter, to finally provide anybody in the world with a correct, elegant and appropriate collection of such great compositions.[195]

Again, an anecdote about the effect of a work suddenly falling into the public domain enlightens regarding the value of the public domain. The film "It's a Wonderful Life," directed by Frank Capra and starring Jimmy Stewart, fell into the public domain in 1974 after the copyright holder failed to renew it. The film had been largely ignored since its original release. However, in 1975 a TV station discovered that the movie was freely available and ran it during Christmas, because its climax comes on Christmas Eve. Within a few years "It's a Wonderful Life" was being shown on televisions stations across the United States at Christmas. The success was terrific. Watching the movie at Christmas time became a cultural tradition in the United States, and references to the movie became commonplace as well.[196]

Finally, a passage in English cultural history may further express the value of the public domain, as persuasively argued by William St. Clair.[197] The persistent and strong impact of the poets and novelists of the English Romantic period upon the reading public of the Victorian age, may be the consequence of the conjunctures of events affecting the economics of the printing and publishing business in Britain. In particular, that strong impact may be the result of the public domain effect

[193] See e-mail from Lukas Gruber, lukas.gruber@nkp.cz, to communia-members@lists.communia-project.eu (September 24, 2010, 13:58:00 CEST), *available at* https://lists.communia-project.eu/cgi-bin/mailman/private/communia-members.

[194] *See* John Sutherland, *The Great Copyright Disaster*, 17 LONDON REV. OF BOOKS 3-4 (1995).

[195] *See* Massimo Nosetti, *Il Maestro dell'Organo fuori dal Copyright*, *in* Il Giornale della Musica, November 2008, 38.

[196] *See* David A. Paul and Jared Rubin, How many Scanned Books on the Web 6-7 (SIEPER Policy Briefs, December, 2008), *available at* http://www.stanford.edu/group/siepr/cgi-bin/siepr/?q=system/files/shared/pubs/_papers/briefs/policybrief_dec08.pdf

[197] WILLIAM ST. CLAIR, THE READING NATION IN THE ROMANTIC PERIOD 20-23 (Cambridge University Press 2004).

on the works of the English Romantic authors. The works of English Romantic poets and novelists – Scott, Byron, Coleridge, Keats, Shelley, Campbell, Southey, and Wordsworth – appeared during the transient interval of short copyright protection granted under the judicial implementation of the statutory copyright prescribed by the Statue of Anne. That interval spanned from 1774 to 1841. Meanwhile, the application of stereotype printing technology propelled mass reprinting of inexpensive titles that could be kept "in print" for an unprecedented length of time. After 1841, the span of copyright protection in Britain was lengthened to two and then to three generations. As a result, the English Romantic literature prevailed as a canon in the Victorian age (1837-1901) after emerging from copyright to reach a greatly enlarged public in innumerable cheap editions within only a generation of their having been written. The literature published after 1841 did not reach the same enlarged audience within such a short term, therefore giving way to the endurance of the Romantic literature among the public.

Public Domain and Opportunities of Being Digital

Digitization and the Internet revolution are an unprecedented opportunity for fostering progress, culture, and knowledge. For the purpose of the COMMUNIA project, digitization and the Internet revolution are an extraordinary opportunity to multiply the value of the public domain and exploit humanities' riches as never before.

Several authors have described the Internet revolution as a monumental shift that we are undergoing. David Bollier, speaker at the 5th COMMUNIA Workshop and the 3rd COMMUNIA Conference, notes:

> I believe we are moving into a new kind of cultural if not economic reality. We are moving away from a world organized around centralized control, strict intellectual property rights and hierarchies of credentialed experts, to a radically different order. The new order is predicated upon open access, decentralized participation, and cheap and easy sharing.[198]

The Internet and digitization have produced a great value shift that is reversing what was termed by the economist Karl Polanyi as the "Great Transformation" – the 19th century rise of the Market Society when market activity took a life of its own and overpowered the other social institutions.[199]

In online interaction there is a growing recognition that value can be created by social practices that cannot be explained by standard market economic focus on quantification. The uncompensated users' contributions in developing free software, or updating Wikipedia, Facebook and YouTube are reversing the logics of the market society. Gift economy is emerging as a new

[198] Bollier, *The Commons as New Sector of Value Creation*, *supra* note 127.

[199] *See* KARL POLANYI, THE GREAT TRANSFORMATION (1944)

practice of value exchange. Consumer or user gift systems are emerging next to traditional market systems in many sectors of cultural production and creativity exchange.[200] The ring is not right;

Digital networks fuel new forms of user-based creative sharing and collaboration. This mass collaboration may stifle social and economic enrichment to a far greater extent than in the past. The high generative capacity of online commons has been described as the wealth of networks.[201] The wealth of networks lies in social and networked peer production that is highly generative, because it is modular, granular, and inexpensive to integrate the results.[202] As Professor Yochai Benkler puts it, the

> networked environment makes possible a new modality of organizing production: radically decentralized, collaborative, and nonproprietary; based on sharing resources and outputs among widely distributed, loosely connected individuals who cooperate with each other without relying on either market signals or managerial commands. This is what I call 'commons-based peer production.'[203]

Technology has made possible large scale cooperative behaviour and gift exchange that was before limited to rarified groups.[204] Initially, the large scale cooperative behaviour emerged and evolved in software communities[205] and the academia.[206] At the 1st COMMUNIA Workshop, Rishab Aiyer Ghosh explored the need to protect and foster an open standard in the research community worldwide to best embrace the collaborative networked projects. Ghosh noted that "our technology future will be based on collaborative, open projects of such large scale that global policies and regulations will become more flexible to meet the needs of every stakeholder involved."[207]

A great deal of attention has been paid by COMMUNIA to sharing and networked peer collaboration in education and research, especially at the 2nd COMMUNIA Conference, *Global Science and the Economics of Knowledge Sharing Institutions*, in Turin and the 8th COMMUNIA

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[200] *See* Markus Giesler, *Consumer Gift System: Netnographic Insights from Napster*, J. CONSUMER RES. 283 (2006), *available at* www.markus-giesler.de/publications.htm.

[201] *See* BENKLER, THE WEALTH OF NETWORKS, *supra* note 94.

[202] *Id*., at 101; *see also* Jerome H. Reichman, *Of Green Tulips and Legal Kudzu: Repackaging Rights in Subpatentable Innovation*, 53. VAND. L. REV. 1743 (2000).

[203] BENKLER, THE WEALTH OF NETWORKS, *supra* note 94, at 60.

[204] See LEWIS HYDE, THE GIFT: CREATIVITY AND THE ARTIST IN THE MODERN WORLD (Vintage Books 2007) (1979) (describing creativity exchange among artists); ROBERT K. MERTON, THE SOCIOLOGY OF SCIENCE: THEORETICAL AND EMPIRICAL INVESTIGATIONS 273-275, 339 (Norman W. Storer ed., University of Chicago Press 1973) (exploring norms of sharing among scientists).

[205] *See* Yochai Benkler, *Coase's Penguin, or, Linux and The Nature of the Firm*, 112 YALE L. J. 369, 374 (2002); Benkler Yochai & Helen Nissenbaum, *Commons-Based Peer Production and Virtue*, 14 J. POL. PHIL. 394 (2006); *see also* Hetcher Steven A., *Hume's Penguin, or, Yochai Benkler & the Nature of Peer Production*, 11 VAND. J. ENT. & TECH. L. 963 (2009);

[206] *See* Michael J. Madison, Brett M. Frischmann & Katherine J. Strandburg, *The University as Constructed Cultural Commons*, 30 WASH. U. J. L. & POL'Y 365 (2009).

[207] Rishab Aiyer Ghosh, Technology, Law, Policy and the Public Domain, speech delivered at the 1st XXX Workshop (January 18, 2008).

Workshop, *Education of the Public Domain: The Emergence of a Shared Educational Commons*, in Istanbul. In particular, at the 2nd COMMUNIA Conference in Turin, Professor Jerome H. Reichman, a distinguished member of the COMMUNIA advisory Committee, discussed the introduction of a contractually reconstructed commons via the *ex ante* acceptance of liability rules to promote the exchange of materials in a globally distributed and digitally integrated research commons.[208] At the same COMMUNIA Conference, Professor Paul Uhlir proposed a model of open knowledge environments (OKEs) for digitally networked scientific communication.[209] OKEs would "bring the scholarly communication function back into the universities" through "the development of interactive portals focused on knowledge production and on collaborative research and educational opportunities in specific thematic areas."

However, the revolution is far more massive and distributed than collaboration in education and research. Technological change has brought about cultural change, because the audience has become an active participant in its own culture. Open networks and networked peer collaboration have transformed markets by enabling amateurs to innovate. User-generated creativity plays a central role in the digital cultural environment.[210] Individual experimentation, sub-cultures, and a community of social trust have created Linux, Wikipedia, Facebook, YouTube, and major political websites. Flexibility, decentralization, cooperative creation, and customization out-performed corporate bureaucracies unwilling to experiment, because it was too risky and costly. David Bollier have described this process as a "viral spiral" by which Internet users come together to build digital tools and share content on self-created online commons.[211]

Moreover, new models of decentralized and cooperative creation incessantly out-perform theirself, as it is the case for open alternatives to Facebook. Faced with Facebook's centralized nature and untrammeled desire to control online identities by trampling on privacy norms, the online community has been responding with the emergence of many projects and experiments to redress the deficiencies of the Facebook model. In particular, a group of four New York University students has launched an open, distributed social networking system called Diaspora.[212] The specificity of the Diaspora project resides also in crowdsourced founding that was largely raised

[208] *See* Jerome H. Reichman, Formalizing the Informal Microbial Commons: Using Liability Rules to Promote the Exchange of Materials, speech delivered at the 2nd COMMUNIA Conference (June 30, 2009); *see also* Jerome H. Reichman, Tom Dedeurwaerdere, and Paul F. Uhlir, Designing the Microbial Research Commons: Strategies for Accessing, Managing, and Using Essential Public Knowledge Assets (Yale U. Press, forthcoming 2011).

[209] *See* Paul F. Uhlir, Revolution and Evolution in Scientific Communication: Moving from Restricted Dissemination of Publicly-Funded Knowledge to Open Knowledge Environments, paper presented at the 2nd COMMUNIA Conference (June 28, 2010); *see also* Paul F. Uhlir, The Emerging Role of Open Repositories for Scientific Literature as a Fundamental Component of the Public Research Infrastructure, in Open Access: Open Problems (G Sica ed., Polimetrica 2006).

[210] *See* MASHING-UP CULTURE: THE RISE OF USER-GENERATED CONTENT (Eva Hemmungs-Wirtén & Maria Ryman eds., proceedings from the COUNTER workshop Mashing-up Culture, Uppsala University, Sweden, May 13-14, 2009), *available at* http://counter2010.org/wp-content/uploads/2009/10/counter_proceedings_09.pdf.

[211] *See* BOLLIER, VIRAL SPIRAL, *supra* note 129.

out of the dissatisfaction for the centralized social networking models. Crowdsourcing is an increasingly popular tool to raise money online. On Kickstarter and the like platforms,[213] people can pledge for an economic goal set up in advance by the project developer. The quite amazing result of the Diaspora project is that, as a response to a campaign for collecting $10,000, the backers pledged over $200,000![214]

The MusOpen project provides an additional good example of the potential of public domain works when exploited within an open and peer based project. Musopen is a charity that aims to produce and distribute recordings and sheet music of public domain music. The project allows users to suggest pieces that they would like to have recorded and to pledge funds to pay for the recording. Recently, after being fairly dormant for a few years, the project crowdfunded $70,000 through a KickStarter campaign. Aided by KickStarter, Musopen reached an audience passionate about freeing culture and public domain works.

The interactive nature of the web 2.0 has propelled user-generated creativity and defined a peculiar form of digital culture that has been termed as "free culture."[215] Remix and mash up are now keywords of the cultural process taking place in the digital environment. [216] Remix culture has emphasized the potential for reuse of public domain material. Open networks, user-generated creativity, and remix culture have made the public domain highly generative. The public domain, once regarded as a "virtual wasteland of undeserving detritus,"[217] has become "a fertile paradise . . . a commons."[218]

The revolution brought by the web 2.0 and the fertile paradise that the public domain has become call for a copyright 2.0, as noted by Professor Ricolfi at the 1st COMMUNIA Conference.[219] This call is urged, as Professor Ricolfi puts it, by the fact that technology has radically transformed creation by attaching to it a new social emphasis. The long route that took works from the creators to the public by passing through a large number of intermediaries has been gradually replaced by a short route. This short route empowers a direct and unrestraint discourse between the authors and the public. [220]. –

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[212] *See* Diaspora, https://joindiaspora.com.

[213] *See* Kickstarter, www.kickstarter.com.

[214] *See* Kickstarter, Decentralize the Web with Diaspora, project by Daniel G. Maxwell S. Raphael S. Ilya Z., *available* at http://www.kickstarter.com/projects/196017994/diaspora-the-personally-controlled-do-it-all-distr.

[215] *See* LAWRENCE LESSIG, FREE CULTURE: THE NATURE AND FUTURE OF CREATIVITY (Bloomsbury Academic 2005).

[216] *See* LAWRENCE LESSIG, REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY (Bloomsbury 2008).

[217] Samuelson, *Mapping the Digital Public Domain*, *supra* note 62, at 147.

[218] Bollier, *The Commons as New Sector of Value Creation*, *supra* note 127.

[219] Marco Ricolfi, Copyright Policies for Digital Libraries in the Context of the i2010 Strategy, paper presented at the 1st COMMUNIA Conference (July 1, 2008) [hereinafter Ricolfi, Copyright Policies]

[220] *Id*., at 12.

Copyright 2.0 stands for a relaxed and more flexible set of rules that may adapt to the new mechanics of creative production in the digital age. In particular, copyright 2.0 should serve and pave the way for the "short route" that enhances an unrestrained discourse between authors and the public. The notion and the features of copyright 2.0, as described by Professor Ricolfi, are endorsed by COMMUNIA as one its main policy recommendations.

Together with the cultural revolution of networked peer production, the nature of digital information and digitization may also extraordinarily enrich the public domain. Digital information are cheap and easy to collect, store, and make available via digital networks. The nature of digital information has propelled the creation of databases of legislative, jurisprudential and governmentally produced material; digital libraries, such as Europeana,[221] Project Gutenberg, Google Books, the Online Books Page,[222] the Hathi Trust Digital Library;[223] digital repositories; scientific libraries of reusable code; databases of scientific and technical information; vast non-profit digital archive of the Internet, such as the Internet Archive; electronic journals; and MP3 files of music posted by bands wanting to attract a new audience.

Again, digital tools are changing research in science and scholarship in history, literature and the arts.[224] Our understanding of science and the liberal arts is changing by using high performance computers and vast stores of digitized materials. The human genome project is an example of how computational analysis of digitized data has changed scientific research. The emerging field of digital humanities encompasses a wide range of activities, including online preservation, digital mapping, data mining and the use of geographic information systems.

Digital humanities can reveal unexplored patterns and trends by analyzing unprecedented amounts of data. Few months ago, Google has made a gigantic database from nearly 5.2 million digitized books available to the public for free downloads and online searches.[225] A simple online tools will allow anybody to browse cultural trends throughout history of digitized literature by inserting a string of up to five words and see a graph that charts the phrase's use over time. A recent study has already investigated the vast array of research opportunities now open to literature, history and other liberal arts by the Google project. The research team drafting the study have termed the new field of study as "culturomics" which should extend "the boundaries of rigorous quantitative inquiry to a wide array of new phenomena spanning the social sciences and

[221] *See* Europeana, *supra* note 139.

[222] *See* The Online Books Page, http://onlinebooks.library.upenn.edu;

[223] *See* The Hathi Trust Digital Library, http://www.hathitrust.org/about.

[224] *See* Patricia Cohen, *Digital Keys for Unlocking the Humanities' Riches*, THE NEW YORK TIMES, November 16, 2010, http://www.nytimes.com/2010/11/17/arts/17digital.html?_r=1.

[225] *See* Google labs, Books Ngram Viewer, http://ngrams.googlelabs.com; *see also* Patricia Cohen, *In 500 Billion Words, New Window on Culture*, THE NEW YORK TIMES, December 16, 2010, http://www.nytimes.com/2010/12/17/books/17words.html?_r=2.

the humanities."[226] We may take a peek at the new opportunities of enhanced understanding brought by "culturomics" by looking at a graph generated by the Google Ngram Viewer reporting the use of the phrases "copyright" and "public domain" in the last two centuries. Enlightening, isn't it?

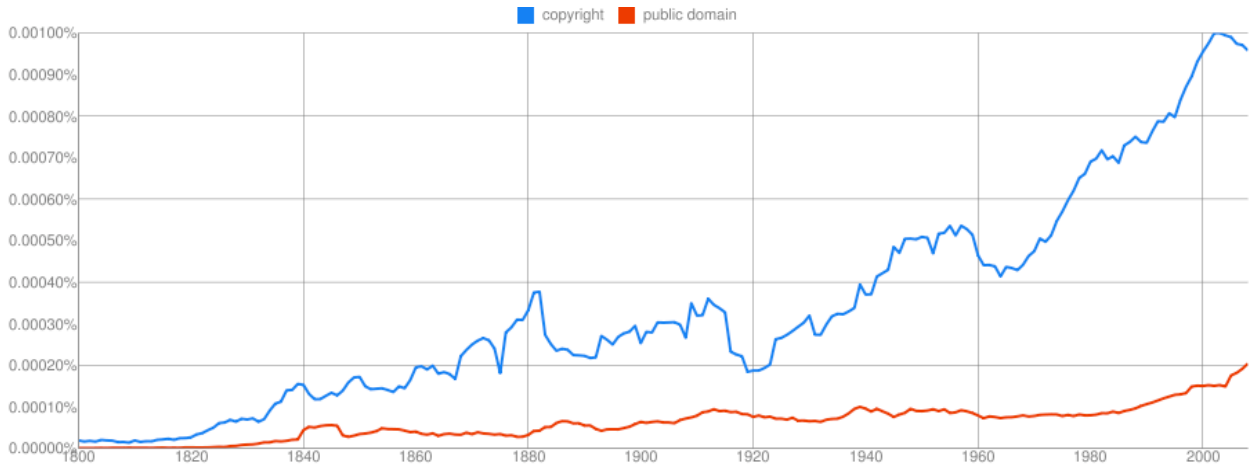

Fig. 1

The Google database is the most relevant example of many other research projects set to demonstrate how vast digital databases can transform our understanding of language, culture and the flow of ideas. Researches at Stanford and Oxford Universities are charting the flow of ideas during the Enlightenment by using a geographic information system to trace the letters' journeys.[227] Other projects are digitally mapping battlefields to see the role that topography played in victory, researching through a large libraries of books and text to see how ideas first appeared and spread. Again, researchers are digitally combining charts, documents and other information on travels of historical figures to come up with reveling patterns, using databases of thousands of jam sessions to track how musical collaborations influenced jazz, or digitizing the depiction of the Battle of Hastings in the Bayeux Tapestry, a 68 meter long embroidery, to propel artistic and historical research. Several projects attempt to push digital humanities in a more co-ordinated direction. In Europe, the Digital Research Infrastructure for the Arts and Humanities (DARIAH) aims to enhance and support digitally-enabled research across the humanities and arts.[228] Institutions in Britain, United States and Canada teamed up to create the create the Digging Into Data Challenge, a grant program designed to push research in the field of digital humanities.[229]

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[226] *See* Jean-Baptiste Michel et al, *Quantitative Analysis of Culture Using Millions of Digitized Books*, SCIENCE, December 16, 2010 (published online), http://www.sciencemag.org/content/early/2010/12/15/science.1199644.abstract; *see also* John Bohannon, *Google Opens Books to New Cultural Studies*, 330 SCIENCE 1600 (2010).

[227] *See* Mapping the Republic of Letters, http://stanford.edu/group/toolingup/rplviz.

[228] *See* DARIAH, Digital Research Infrastructure for the Arts and Humanities, http://www.dariah.eu.

[229] *See* Digging into Data Challenge, http://www.diggingintodata.org.

The digital environment has the potential to make knowledge a truly global public good. As Charles Nesson reminded us, the "challenge is how to use this environment to create knowledge."[230] Human inventiveness has provided us with a ground-breaking solution to underdevelopment, isolation, and cultural and social divide. The open question is whether we, as a society, are up to the task of re-inventing and challenging our notions of democracy, education, economy, and social interaction. This is a daunting enterprise. It is daunting because

> . . .our intelligence tends to produce technological and social change at a rate faster than our institutions and emotions can cope with . . . we therefore find ourselves continually trying to accommodate new realities within inappropriate existing institutions, and trying to think about those new realities in traditional but sometimes dangerously irrelevant terms . . . .[231]

However, if we manage to extract full public value from the public domain with the help of technological advancement, our culture and society may flourish as never before. COMMUNIA maintains that Europe should not be afraid of changing and flourishing. COMMUNIA believes that policy strategies implementing openness in information management are the key to any change that may fully exploit technological advancement. Any actions toward the enclosure of the public domain should be reversed. Outmoded intellectual property models should be re-invented. Professor Ricolfi reminded us at the 1st COMMUNIA Conference that the time to take up this challenge has come, regardless of how daunting the task be.

> Of course, to go this way, one would have to change hundreds of laws and a few international conventions. I do not know that this is an impossibility. I am among those who, at the beginning of the digital age, insisted that it was too early to legislate. In my opinion, however, the time has now come. It is for you to decide whether this is an impossibility, a dream or, may be, a vision. What I know is that the present time – and the present place – are the best to discuss this.[232]

The interaction between a cultural production and distribution mode based, on one side, on market decisions and, on the other side, on decentralized non-market decisions of social sharing calls for a recalibration of the policy agenda for the digital environment.

> First, the agenda should incorporate rules which are appropriate not only for the long route but also for the short route. Second, it should allow for the "peaceful coexistence" of the two sets of rules, making them interoperable, in such a way that the continued existence and specific contribution of the two sectors is maximized. Third, obstacles inherited by the

[230] Charles Nesson, speech delivered at the 3rd COMMUNIA Conference, *University and Cyberspace: Reshaping Knowledge Institutions for the Networked Age*, Turin, June 28-30, 2010.

[231] GWYNNE DYER, WAR: THE LETHAL CUSTOM 253 (Crown 1985).

[232] Ricolfi, Copyright Policies, *supra* note 219, at 15.

> past which unduly inhibit the emergence of the short route should be gradually phased out in ways which should minimize the disruption of the workings of the old route.[233]

This vision is shared by many worldwide. At the WIPO Global Meeting on Emerging Copyright Licensing Modalities – Facilitating Access to Culture in the Digital Age, scholars have called overhaul of the copyright system which will "never work on the internet." In proposing a roadmap for copyright reform, Professor Lessig urged WIPO to form a "blue sky commission […] that has the freedom to think about what architecture for copyright makes sense." This architecture must be simple and targeted – regulation makes sense in some areas, such as protecting professionals, but not in others, such as in amateur remixing.[234] Professor Lessig's call for change has not gone unheard. Recently, Francis Gurry, Director General of the World Intellectual Property Organization, has powerfully reinforced the very same idea by noting that there is "no other choice – either the copyright system adapts to [digitization] or it will perish."[235] As Francis Gurry additionally opined, that adaptation should not be "determined by a Darwinian process of the survival of the fittest business model," but it "should, rather, be established through a conscious policy response."

This solicited change is sought to address the many challenges and tensions that the present intellectual property system is presenting to the public domain. The remaining part of this portion of the Report will introduce and discuss the most relevant of those challenges and tensions. Later on, Annex III of this Report will lay down the principles that COMMUNIA understands should inspire policy strategies to overcome the challenges, redress the present tensions, and promote the digital public domain.

Challenges and Bottlenecks

As anticipated, there is an undeniable tension between the public domain and the copyright system. This tension is represented by an equation where the enclosure of the public domain is proportional to the expansion of the copyright protection. This tension is unavoidable and originates from the dual functionality of knowledge as a commodity and as a driving social force.[236] At the 2nd COMMUNIA Conference, Professor Hugenholz referred to this tension as the "paradox of intellectual property" because intellectual property is a "system that promotes, or at

[233] *Id*., at 14.

[234] *See* Larry Lessig, speech at the WIPO Global Meeting on Emerging Copyright Licensing Modalities – Facilitating Access to Culture in the Digital Age, Geneva, Switzerland (November 4, 2010), *available at* http://www.freedomtodiffer.com/freedom_to_differ/2010/11/larry-lessig-calls-for-wipo-to-lead-radical-overhaul-of-copyright-law.html.

[235] Francis Gurry, The Future of Copyright, speech delivered at the Blue Sky Conference: Future Directions in Copyright Law, Queensland University of Technology, Brisbane, Australia (February 25, 2011), *available at* http://www.wipo.int/about-wipo/en/dgo/speeches/dg_blueskyconf_11.html.

[236] Jerome H. Reichman and Jonathan A. Franklin, *Privately Legislated Intellectual Property Rights: Reconciling Freedom of Contract with Public Good Uses of Information*, 147 U. PENN. L. REV. 875 (1999).

least, aspire to promote knowledge, dissemination, cultural dissemination by restricting it," by creating temporary monopolies in expressed ideas or in applied invention.[237]

However, digitization and Internet distribution have exacerbated this tension.[238] The misperception of the "Internet threat" has led to a reaction that endangers the public domain.[239] Concurrently, the opportunities that digitization and Internet distribution offer to our society make enclosure and commodification of our information environment even more troublesome. As Professor Paul A. David, key note speaker at the 1st XXX Conference, noted:

> Today, the greater capacity for the dissemination of knowledge, for cultural creativity and for scientific research carried out by means of the enhanced facilities of computer-mediated telecommunication networks, has greatly raised the marginal social losses that are attributable to the restrictions that those adjustments in the copyright law have placed upon the domain of information search and exploitation.[240]

Commodification and Enclosure of Culture

With large agreement, scholars and the civil society have warned that "we are in the midst of an enclosure movement in our information environment."[241] Professor Boyle has talked about a second enclosure movement that it is now enclosing the "commons of the mind."[242] As for the natural commons, fields, grazing lands, forests, and streams that were enclosed in the XVI century in Europe by landowners and the state, relentlessly expanding intellectual property rights are enclosing the intellectual commons and the public domain. In a very similar fashion, Peter Drahos and John Braithwaite have spoken of an "information feudalism."[243] As in the case of medieval feudalism, there is a redistribution of property rights that involves this time a transfer of knowledge from the intellectual commons to media conglomerates and integrated life science corporations.

The expansion of property rights over information is a consequence of the transformation on the meaning of market power operated by the "information economy." Economic power is

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[237] See P. Bernt Hugenholtz, Owning Science: Intellectual Property Rights as Impediments to Knowledge Sharing, speech delivered at the 2nd COMMUNIA Conference (June 29, 2001); *see also* NEIL W. NETANEL, COPYRIGHT'S PARADOX (Oxford University Press 2008) [hereinafter NETANEL, COPYRIGHT'S PARADOX].

[238] Statute of Anne, 1709, 8 Ann., c. 19 (Eng.) ("An act for the encouragement of learning, by vesting the copies of printed books in the authors or publishers of such copies, during the times therein mentioned.")

[239] BOYLE, THE PUBLIC DOMAIN, *supra* note 90, at 54-82.

[240] David and Rubin, *Restricting Access to Books on the Internet*, *supra* note 173, at 50.

[241] Benkler, *Free as the Air to Common Use*, *supra* note 82, at 354.

[242] *See* Boyle, *The Second Enclosure Movement*, *supra* note 64; BOYLE, THE PUBLIC DOMAIN, *supra* note 64; *see also* Keith Maskus E. & Jerome H. Reichman, *The Globalization Of Private Knowledge Goods And The Privatization Of Global Public Goods*, 7 J. INT'L ECON. L. 279 (2004); DAVID BOLLIER, SILENT THEFT: THE PRIVATE PLUNDER OF OUR COMMON WEALTH (Routledge 2002).

[243] *See* PETER DRAHOS WITH JOHN BRAITHWAITE, INFORMATION FEUDALISM: WHO OWNS THE KNOWLEDGE ECONOMY? (Earthscan Publications 2002).

increasingly defined in term of control over the production and distribution of information. Therefore, gaining control over the production and distribution of information has become the natural focus of competition in the marketplace for content. The capacity of copyright laws to provide exclusive rights that restricts potentially competitive behaviour is essential to the new mechanics of market power. In addition, the decentralized nature of the Internet has increased the significance of control over the content via copyright law and has augmented the pressure on the legal system to produce new means of market control.[244]

Enclosure is promoted by a mix of technology and legislation. According to Bernt Hugenholtz and Lucie Guibault, the public domain is under pressure from the "commodification of information."[245]

> [T]he public domain is under pressure as a result of the ongoing march towards an information economy. Items of information, which in the 'old' economy had little or no economic value, such as factual data, personal data, genetic information and pure ideas, have acquired independent economic value in the current information age, and consequently become the object of property rights making the information a tradable commodity. This so-called 'commodification of information', although usually discussed in the context of intellectual property law, is occurring in a wide range of legal domains, including the law of contract, privacy law, broadcasting and telecommunications law.[246]

Commodification of information is propelled by the ability of new technologies to capture resources previously unowned and unprotected, as in a new digital land grab.[247] Professor Elinor Ostrom and her colleague Charlotte Hesse have argued that

> [i]nformation that used to be “free” is now increasingly being privatized, monitored, encrypted, and restricted. The enclosure is caused by the conflicts and contradictions between intellectual property laws and the expanded capacities of new technologies. It leads to speculation that the records of scholarly communication, the foundations of an informed, democratic society, may be at risk.[248]

However, this digital land grab is the continuation of a well-settled analog trend whose limits and fallacies have already been shown and rebutted. Mark Rose notes how the public domain

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[244] Niva Elkin-Koren, *It’s All About Control: Rethinking Copyright in the New Information Landscape*, *in* COMMODIFICATION OF INFORMATION: POLITICAL, SOCIAL, AND CULTURAL RAMIFICATIONS 81-82 (Niva Elkin-Koren and Neil W. Netanel eds., Kluwer Law International 2002) [hereinafter Elkin-Koren, *It’s All About Control*].

[245] *See* THE COMMODIFICATION OF INFORMATION: POLITICAL, SOCIAL, AND CULTURAL RAMIFICATIONS (Niva Elkin-Koren & Neil W. Netanel eds., Kluwer Law International 2002).

[246] P. Bernt Hugenholtz and Lucie Guibault, *The Future of the Public Domain: An Introduction*, *in* THE FUTURE OF THE PUBLIC DOMAIN: IDENTIFYING THE COMMONS IN INFORMATION LAW 1 (Lucie Guibault and P. Bernt Hugenholtz eds., Kluwer Law International 2006).

[247] *See* Hesse and Ostrom, *Introduction*, *supra* note 99, at 12.

[248] Hesse and Ostrom, *Ideas, Artifacts, and Facilities*, *supra* note 102, at 112.

discourse was comparatively weak against the rhetoric of property, as the law is mostly about property or, as the adage has it, possession is nine-tenths of the law.[249] In the past, law and economics scholars have launched a crusade to expose the evil of the commons,[250] the evil of not propertizing.[251] Since Harold Demsetz, economists have viewed property rights as a desirable tool to internalize the full social value of people's actions and therefore maximize the incentive to engage in those actions. [252]

A much-quoted article written by Garret Hardin in 1968 termed the evil of not propertizing as the tragedy of the commons.[253] The subject of Hardin's essay was the carrying capacity of the commons and its limits. Hardin identified the tragedy of the commons in the environmental dysfunctions of overuse and underinvestment found in the absence of a private property regime. Hardin made it clear that any commons open to all, ungoverned by custom or law, will eventually collapse. Though strongly criticized and rebutted, this analysis shaped the debate to come. As Professor Boyle noted, "any discussion of intellectual property or the public domain proceeds in the shadow of the 'the tragedy of the commons.'"[254]

The fear of the tragedy of the commons propelled the idea that more property rights will necessarily lead to the production of more information together with the enhancement of its diversity. In this perspective, the prevailing assumption is that anything of value within the public domain should be commodified. This "cultural stewardship model", as Julie Cohen has termed it, [255] regarded ownership as the prerequisite of productive management, assumed that any commons is inefficient, and promoted the idea that opposing the expansion of intellectual property is a mistake in economic terms.[256]

As Paul Goldstein puts it, "the best prescription for connecting authors to their audiences is to extend rights into every corner where consumers derive value from literary and artistic works. If history is any measure, the results should be to promote political as well as cultural diversity,

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[249] *See* Rose, *Nine-Tenths of the Law*, *supra* note 68, at 85.

[250] *See* H. Scott Gordon, *The Economic Theory of a Common-Property Resource: The Fishery*, 62 J. POL. ECON. 124 (1954) and Anthony D. Scott, *The Fishery: The Objectives of Sole Ownership*, 63 J. POL. ECON. 116 (1955) (introducing an economic analysis of fisheries that demonstrated that unlimited harvesting of high–demand fish by multiple individuals is both economically and environmentally unsustainable); *see also* Chander Anupam and Sunder Madhavi, *The Romance of the Public Domain*, 92 CAL. L. REV. 1331, 1332-1333 (2004);

[251] *See generally* Lee A. Fennell, *Commons, Anticommons, Semicommons*, *in* RESEARCH HANDBOOK ON THE ECONOMICS OF PROPERTY LAW (Kenneth Ayotte and Henry E. Smith eds., Edward Elgar 2010).

[252] *See* Harold Demsetz, *Toward a Theory of Property Rights*, 57 AMERICAN ECON. REV. 347 (1967); *see also* Salzberger, *Economic Analysis of the Public Domain*, *supra* note 124, at 33-36.

[253] *See* Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968);

[254] Boyle, *Foreword*, *supra* note 105, at 7.

[255] *See* Cohen, *Copyright, Commodification, and Culture*, *supra* note 76, at 134-135.

[256] *See* WILLIAM LANDES AND RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW (Harvard University Press 2003); William Landes and Richard A. Posner, *Indefinitely Renewable Copyright*, 70 U. CHICAGO L. REV. 471, 475, 483 (2003).

ensuring a plenitude of voices, all with the chance to be heard."[257] The recent tremendous expansion of intellectual property rights has been justified by this statement and the like. Put it bluntly, this statement and the like are wrong. No economic theory of intellectual property and commons management supports the prediction stated.[258]

Nobel laureate Elinor Ostrom powerfully advocated the cause of the commons against the mantra of propertization. Ostrom's work showed the inaccuracies of Hardin's ideas and brought attention to the limitations of the tragedy of the commons.[259] Empirical studies have shown that common resources can be effectively managed by groups of people under suitable conditions, such as appropriate rules, good conflict-resolution mechanisms, and well-defined group boundaries.[260] Under suitable conditions and proper governance, the tragedy of the commons becomes "the comedy of the commons."[261]

Culture is quintessential comedic commons because it gets enriched through reference as more people consume it.[262] The carrying capacity of cultural commons is endless. Cultural commons are non-rivalrous. One person's use does not interfere with another's. Unlike eating an apple, my listening to a song does not subtract from another's. Therefore, cultural commons unveil the inaccuracy of the tragedy of the commons more than any other commons.

In addition, the comedic nature of the cultural commons that are augmented through use and reference limits the argument that the market will always serve us well.[263] As traditional economic analysis of property a-la Adam Smith goes, commodification, propertization and enclosure are

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[257] PAUL GOLDSTEIN, COPYRIGHT'S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX 236 (Stanford University Press 1994); *see also* Wagner R. Polk, *Information Wants to Be Free: Intellectual Property and the Mythologies of Control*, 103 COLUM. L. REV. 995 (2003) (arguing that "increasing the appropriability of information goods is likely to increase, rather than diminish, the quantity of "open" information").

[258] *See* Yochai Benkler, *A Political Economy of the Public Domain: Markets in Information Goods vs. The Marketplace of Ideas*, *in* EXPANDING THE BOUNDARIES OF INTELLECTUAL PROPERTY: INNOVATION POLICY FOR THE KNOWLEDGE SOCIETY 270-272 (Rochelle Dreyfuss, Diane L Zimmerman, and Harry First eds., Oxford University Press 2001) [hereinafter Benkler, *A Political Economy of the Public Domain*].

[259] *See generally* ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION (Cambridge University Press 1990); ELINOR OSTROM, ROY GARDNER, AND JAMES WALKER, RULES, GAMES, AND COMMON-POOL RESOURCES (University of Michigan Press 1994); ELINOR OSTROM, THE DRAMA OF THE COMMONS (National Academies Press 2002);

[260] *See* Hesse and Ostrom, *Introduction*, *supra* note 99, at 11; RIGHTS TO NATURE: ECOLOGICAL, ECONOMIC, CULTURAL, AND POLITICAL PRINCIPLES OF INSTITUTIONS FOR THE ENVIRONMENT (Susan S. Hanna, Carl Folke, and Karl-Gören Mäler eds., Island Press 1996); MAKING THE COMMONS WORK: THEORY, PRACTICE AND POLICY (Daniel W. Bromley, David Feeny et al. eds., ICS Press 1992); COMMONS WITHOUT TRAGEDY: THE SOCIAL ECOLOGY OF LANA TENURE AND DEMOCRACY (Robert V. Andelson ed., Center for Incentive Taxation 1991); David Feeny, Fikret Berkes, Bonnie J. McCay, and James M. Acheson, *The Tragedy of the Commons: Twenty-Two Years Later*, 18 HUMAN ECOLOGY 1 (1990).

[261] *See* Carol M. Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711 (1986).

[262] Lawrence Lessig, *Re-crafting a Public Domain*, 18 YALE J. L. & HUMAN. 56, 64 (2006) [hereinafter Lessig, *Re-crafting a Public Domain*].

tools to be employed to aid market forces that are intended to manage efficiently scarce resources. Propertization should facilitate transactions by defining and evaluating assets and thus making them transferable. Nevertheless, traditional market principles may be inefficient when applied to cultural commons that are never by nature scarce. Propertization and enclosure in the cultural domain may be a wasteful option by cutting down social and economic positive externalities,[264] particularly in peer-based production environments. As technology has facilitated a vast array of cooperative creative projects, community production has been increasingly considered a solution to the free-rider problems of cultural production.[265]

Reviewing the peculiar nature of cultural commons, the academic literature has turned upside down the paradigm of underuse of common resources by developing the idea of the tragedy of the anti-commons.[266] This time, it is extreme propertization to be the evil hindering optimal and efficient use of resources. The tragedy of the anti-commons lies in the underuse of scarce scientific resources because of excessive intellectual property rights and all of the transaction costs accompanying those rights.[267] This is the case, for example, of overpatenting in biomedical research.[268] Professor Paul David exposed the perverse resource allocation in an anti-commons scenario at the 1st COMMUNIA Conference.[269] The notion of a tragedy of the anti-commons, together with the need of reacting to the commodification of culture by cultural conglomerates, has been taken to the extreme consequences by few authors who argued in favour of the abolition of copyright.[270]

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[263] *See* Lewis Hyde, Cultural Commons, Cultural Commons Project Description, http://www.lewishyde.com/progress.html.

[264] *See* Brett M. Frischmann and Mark A. Lemley, *Spillovers*, 107 COLUM. L. REV. 257 (2007).

[265] *See* CHARLES LEADBEATER, WE-THINK: MASS INNOVATION, NOT MASS PRODUCTION (Profile Books 2009); CLAY SHIRKY, HERE COMES EVERYBODY: THE POWER OF ORGANIZING WITHOUT ORGANIZATIONS 240-253 (Penguin Press 2008); DON TAPSCOTT AND ANTHONY D. WILLIAMS, WIKINOMICS: HOW MASS COLLABORATION CHANGES EVERYTHING (Atlantic Books 2008); BENKLER, THE WEALTH OF NETWORKS, *supra* note 94, at 36-37; CASS R. SUNSTEIN, INFOTOPIA: HOW MANY MINDS PRODUCE KNOWLEDGE (Oxford U. Press 2006); *see also* Madison, Fisherman, and Strandburg, *Constructing Commons*, *supra* note 101, at 670 (arguing, however, that an amorphous idea of community production could become a new one-size-fits-all panacea approach in rivalry with privatization)

[266] *See* Heller, *The Tragedy Of The Anticommons*, *supra* note 122.

[267] *See* MICHAEL HELLER, THE GRIDLOCK ECONOMY: HOW TOO MUCH OWNERSHIP WRECKS MARKETS, STOPS INNOVATION, AND COSTS LIVES 2 (Basic Books 2008);

[268] *See* Michael A. Heller and Rebecca S. Eisenberg, *Can Patents Deter Innovation? The Anticommons in Biomedical Research*, 280 SCIENCE 698 (1998); *see also* Merges, *A New Dynamism in the Public Domain*, *supra* note 121, at 186-191.

[269] *See* Paul A. David, New Moves in 'Legal Jujitsu' to Combat the Anti-commons – Mitigating IPR Constraints on Innovation by a 'Bottom-up' Approach to Systemic Institutional Reform, paper presented at the 1st COMMUNIA Conference (June 30, 2008).

[270] *See* JOOST SMIERS AND MARIEKE VAN SCHIJNDEL, IMAGINE THERE IS NO COPYRIGHT AND NO CULTURAL CONGLOMERATES TOO (Institute of Network Culture 2009); Joost Smiers and Marieke Van Schijndel, *Imagining a World Without Copyright: the Market and Temporary Protection, a Better Alternative for Artists and Public Domain*, *in* COPYRIGHT AND OTHER FAIRY TALES: HANS CHRISTIAN ANDERSEN AND THE COMMODIFICATION OF CREATIVITY 129 (Helle Porsdam ed., Edward Elgar Publishing Ltd. 2006).

Next to the economic inaccuracy of the tragedy of the commons and related commodification, it is worth mentioning that the idea of extending property "rights into every corner", may be at odds with the very rationales of copyright law. In this regard, Fiona Macmillan has argued:

> It is commonly argued that the process of commodification divorces the author from his or her work. This, in turn, casts doubt on the validity of the rationales frequently suggested for the existence of copyright. In relation to the natural rights rationale, the suggestion that copyright is granted because authors ought to have control over the products of their minds rings a little hollow given the commodification of and consequent loss of control over those products. Similarly, the argument that copyright is granted in order to benefit the public by stimulating the production of cultural works and thereby ensuring cultural development, seems strange when the process of commodification leads to cultural domination and homogenisation.[271]

In this last regard, copyright commodification will impinge on cultural diversity and freedom of expression by leading to global domination of a market for cultural output.[272] This tension will be investigated in details later, though. For now, let us only mention that Fiona Macmillan has noted that the "public domain is as much threatened by the concentration in private hands of copyright ownership over cultural products as it would be if such ownership was concentrated in the hands of the State." [273]

Copyright Extension and Orphan Works

By increasing the asset value of copyright interests, copyright term extension is one basic tool of commodification of information and creativity. The XVIII century debate over copyright protection and public interest in accessing culture was followed by two hundred years of progressive expansion of property rights. Copyright term extension may be singled out as the clearest evidence of the progressive expansion of property rights against the public domain. Any temporal extension of copyright deprives and impoverishes the structural public domain. The policy choice has so far privileged private interest over public, copyright protection over the public domain.

The timeline of temporal extension of copyright protection shows a steady elongation in all international jurisdictions. An example taken from the first jurisdiction enacting a copyright statue is enlightening of the extend of the copyright term lengthening. The Statute of Anne provided for fourteen years of protection renewable for a term of additional 14 years if the author was still

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[271] Fiona Macmillan, Copyright's Commodification of Creativity, at 18, University of London, London, 2003, http://www.oiprc.ox.ac.uk/EJWP0203.pdf

[272] See Fiona Macmillan, *Commodification and Cultural Ownership*, *in* COPYRIGHT AND FREE SPEECH: COMPARATIVE AND INTERNATIONAL ANALYSES 44-48, 52-62 (Jonathan Griffiths and Uma Suthersanen eds., Oxford University Press 2003) [hereinafter Macmillan, *Commodification and Cultural Ownership]*.

[273] *Id*., at 62.

alive at expiration of the first term.[274] Today, the oldest work still in copyright in the United Kingdom dates back from 1859.[275] The term of copyright protection in the United States has crept steadily upward over the last several centuries as well, from 14 years with an option to renew for another 14 in 1790, to 28 years with an option to double that in 1909, to life plus first 50 years in 1976 and then plus 70 years in 1998.[276] At the European level, the Council Directive 93/98/EC has extended the copyright protection of authors from life plus 50 years to life plus 70 years. Today, an extension of the term of protection for performers and sound recordings is under discussion before the European Parliament.[277] In fact, the extension has been already adopted, but, for procedural reasons under Lisbon, it must be readopted. COMMUNIA is opposing any such re-adoption. COMMUNIA policy Recommendation # 2 asks the European Commission and Parliament to carefully review any previous convincement on the matter and withdraw the newly pending proposal. In particular, COMMUNIA is challenging the appropriateness of any retroactive extension of the copyright term. As in the case of the Sonny Bono Copyright Term Extension Act in the U.S., the European proposal would give an extra 20 years of life to existing works nearing their copyright expiration. Retroactive copyright extension makes it difficult to put up any logic supporting economic argument, "as what matters for the authors are the incentives present at the time the work is created."[278]

Temporal extension of copyright is a common tendency of most international copyright laws. From the original protection encompassing a couple of decades, copyright protection has expanded to last for over a century and a half. This course does not appear to be interrupted or reversed, and the line between temporary and perpetual protection seems to be blurred. The words of Lord Kames, discussing the booksellers' request for a perpetual common law right on the printing of books a couple of centuries ago, powerfully echo from the past: "[i]n a word, I have no

[274] *See* Statute of Anne, 1709, 8 Ann., c. 19 (Eng.)

[275] See ANNA VUOPALA, ASSESSMENT OF THE ORPHAN WORKS ISSUE AND COST FOR RIGHTS CLEARANCE 10 (May 2010) (report prepared for the European Commission, DG Information Society and Media, Unit E4, Access to Information) [hereinafter VUOPALA, ORPHAN WORKS AND RIGHTS CLEARANCE].

[276] *See, e.g.,* Paul A. David and Rubin, *Restricting Access to Books on the Internet*, *supra* note 173, at 28-31.

[277] *See* Proposal for a European Parliament and of the Council Directive Amending Directive 2006/116/EC on the Term of Protection of Copyright and Related Rights, COM (2008) 464 final (July 16, 2008), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0464:FIN:EN:PDF.

[278] Hal R. Varian, *Copyright Term Extension and Orphan Works*, 15 INDUSTRIAL AND CORPORATE CHANGE 965, 968 (2006); *see also* Natali Helberger, Nicole Dufft, Stef van Gompel and P. Bernt Hugenholtz, *Never Forever: Why Extending the Term of Protection for Sound Recordings is a Bad Idea*, EUR. INTEL. PROP. REV. 174 (2008); P. BERNT HUGENHOLTZ ET AL., THE RECASTING OF COPYRIGHT & RELATED RIGHTS FOR THE KNOWLEDGE ECONOMY 83-137 (November 2006) (report to the European Commission, DG Internal Market), *available at* http://www.ivir.nl/publicati ons/other/IViR_Recast_Final_Report_2006.pdf [putting forward several legal, economic, and competition argument against the extension of neighbouring rights].

difficulty to maintain that a perpetual monopoly of books would prove more destructive to learning, and even to authors, than a second irruption of Goths and Vandals."[279]

COMMUNIA opposes any blanket extension of copyright and neighbouring rights, as detailed in COMMUNIA Policy Recommendation #1 and Recommendation #2. Once the incentive to create is assured, any extension of the property right beyond that point should at least require affirmative proof that the market is incapable of responding efficiently to consumer demand. In general, studies show that this proof can hardly be given. The data show a highly competitive and robust market for the production of public domain books, especially when production costs are low.[280] Public domain books are not under-exploited when compared to copyrighted books, as per probability of being in print, number of editions, and range of price. Instead, the data do not show any off-setting social benefits in the form of increased availability attributable to copyright status. Markets for other products, such as movies, music and software, where technology has made the cost of production extremely low, are likely to behave similarly.[281]

Orphan Works

The most palpable example of the destructive effect of copyright extension on our cultural environment is the case of orphan works. Orphan works are those whose rightsholders cannot be identified or located and, thus, whose rights cannot be cleared. The orphan works problem is quintessential of the tension between copyright protection and the public domain. In some instances, if all the information is missing, orphan works are ageless and their status, whether public domain or copyrighted, may be ambivalent. Resembling a modern two-headed Janus, "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," as Séverine Dusollier puts it.[282] Most times, however, the copyrighted status of the work is undisputed and the work is made orphan by the incapacity of identifying or physically locating the right owners that may be different from the original author.

At the EU level, two major consultations were organized to define the actual size of the orphan works problem.[283] The consultations indicated that the issue is perceived by several audiovisual

[279] Hinton v Donaldson, Mor 8307 (1773) (Lord Kames); *see also* Iain G. *Mitchell, Back to the Future: Hinton v Donaldson, Wood and Meurose (Court of Session, Scotland, 28th July, 1773), 1 IFOSS L. REV. 111 (2009)*

[280] *See* Heald, *Property Rights and the Efficient Exploitation of Copyrighted Works*, *supra* note 176, at 78-91.

[281] *Id*., at 92-98.

[282] DUSOLLIER, SCOPING STUDY ON COPYRIGHT AND THE PUBLIC DOMAIN, *supra* note 75, at 11.

[283] *See* European Commission Staff Working Paper on Certain Legal Aspects Relating to Cinematographic and Other Audiovisual Works, SEC (2001) 619 (11 April 2001), *available at* http://ec.europa.eu/avpolicy/docs/reg/cinema/cinedoc_en.pdf; European Commission Staff Working Document, Annex to the Communication from the Commission 'i2010: Digital Libraries', Questions for Online Consultation, SEC (2005) 1195 (September 30, 2005), *available at* http://ec.europa.eu/information_society/activities/digital_libraries/doc/communication/annex2_en.pdf.

and cultural institutions as a real and legitimate problem. In any event, neither of these consultations has generated firm quantitative data. According to a recent study published by the European Commission ("Vuopala Study"), a conservative estimate puts the number of orphan books in Europe at 3 million.[284] The Vuopala Study shows, then, even higher percentage for other categories of works, especially among photographs, and audiovisual works. However, some estimates put the number of orphan woks well over forty per cent of all creative works in existence.[285] Another recent study has calculated volumes of orphan works in collections across the UK's public sector well in excess of 50 million.[286] The Gowers Review of Intellectual Property claims that from the total collection of photographs of 70 institutions in the UK, around 19 million, the percentage of photographs where the author is known, other than for fine art photographs, is 10 per cent.[287]

Publishers, film makers, museums, libraries, universities, and private citizens worldwide face daily insurmountable hurdles in managing risk and liability when a copyright owner cannot be identified or located. Too often, the sole option left is a silent unconditional surrender to the intricacies of copyright law. Many historically significant and sensitive records will never reach the public. By way of example, the U.S. Holocaust Museum spoke of the millions of pages of archival documents, photographs, oral histories, and reels of film that cannot be published or digitized because ownership cannot be determined.[288] Society at large is being precluded from fostering enhanced understanding. Daily, steadily, small missing pieces of information prevent the completion of the puzzle of life.

The Vuopala Study shows cumbersome transaction costs in the right clearance process.[289] Besides the material costs of clearing rights, the transaction costs of the clearing process are extraordinarily augmented by the resources needed. Absent efficient sources of rights information, the clearing process can take from several months to several years. In many instances the cost of clearing rights may amount to several times the digitization costs. The pervasiveness and relevance of the problem cannot be undermined by the European institutions and civic society.

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[284] *See* VUOPALA, ORPHAN WORKS AND RIGHTS CLEARANCE, *supra* note 275, at 4.

[285] British Library, Intellectual Property: A Balance - The British Library Manifesto (September 2006) http://www.bl.uk/news/pdf/ipmanifesto.pdf.

[286] *See* NAOMI KORN, IN FROM THE COLD: AN ASSESSMENT OF THE SCOPE OF 'ORPHAN WORKS' AND ITS IMPACT ON THE DELIVERY OF SERVICES TO THE PUBLIC (June 9, 2009) (report prepared for Strategic Content Alliance and Collections Trust), *available at* http://www.jisc.ac.uk/media/documents/publications/infromthecoldv1.pdf.

[287] *See* ANDREW GOWERS, GOWERS REVIEW OF INTELLECTUAL PROPERTY (HM Treasury, November 2006), *available at* http://webarchive.nationalarchives.gov.uk/+/http://www.hm-treasury.gov.uk/gowers_review_index.htm [hereinafter GOWERS REVIEW]

[288] *See* Copyright, Orphan Works, The Importance of Orphan Work Legislation, http://www.copyright.gov/orphan; *see also* THE REGISTER OF COPYRIGHTS, REPORT ON ORPHAN WORKS 203 (2006), *available at* http://www.copyright.gov/orphan/orphan-report-full.pdf

[289] *Id*., at 5, 35-42.

The cultural outrage over orphan works is a by-product of copyright expansion, the retroactive effect of some copyright legislation, and the intricacies of copyright law. As a consequence of copyright temporal extension many works that have been out of print for decades may still be under copyright protection. The long out-of-print status of copyrighted work makes more and more difficult to retrieve the necessary data to clear rights in others' works. In case of highly perishable cultural artifact, such as audio and video recordings, the tragedy for our cultural heritage is even more substantial because old works with great historical value will root away and will be lost forever.[290]

A study from the Institute for Information Law at Amsterdam University (IViR) attributed the increased interest in the issue of orphan works in the following factors: (1) the expansion of the traditional domain of copyright and related rights; (2) the challenge of clearing the rights of all the works included in a derivative works; (3) the transferability of copyright and related rights; and (4) the territorial nature of copyright and related rights.[291] In particular, in Europe the problem gets further tangled up by the difficulty of determining whether the duration of protection has expired. As mentioned earlier, the complexities related to copyright term extensions, such as war extensions, blur the contours of the public domain, thereby making more uncertain and costly any attempt to clear copyrights. This is a further intricacy burdening the clearance of so called "orphan works" in Europe.

In modern time, term extension, orphan works and digitization project are the three co-ordinates that convey the dimension of the problem.[292] The unfulfilled potentials of digitization projects worsen the cultural outrage over orphan works in terms of loss of opportunities and value that may be extracted from the public domain. If the temporal extension of copyright has exacerbated and augmented the dimension of the orphan works problem, only the acquired capacity of digitizing our entire cultural heritage has fully unveiled the immense loss of social value that orphan works may cause. The above mentioned European Commission study strongly supports this conclusion. The study gathered responses from twenty-two institutions involved in the digitization of works. The high number of orphan works together with high transaction costs may represent an overwhelming burden for several digitization projects. The study concludes that a title by title rights clearance can be prohibitively costly and complex for many institutions.[293] Hence, a solution to orphan works and a more efficient rights clearing process is needed to propel

[290] *See* ANDREW GOWERS, GOWERS REVIEW OF INTELLECTUAL PROPERTY 65 (HM Treasury, November 2006), *available at* http://www.ipo.gov.uk/pro-policy/policy-information/policy-issues/policy-issues-gowers/policy-issues-gowersreport.htm (noting that the inability of the British Library and the other libraries and archives to make archive copies of sound recordings and films even for preservation "raises real concerns for the protection of cultural heritage"); Brief of Arnold P. Lutzker for the American Library Association et al., as Amici Curiae Supporting Petitioner, Eldred et al. v. Ashcroft, 537 US 186 (2003) (No. 01-618) (reporting that a large amount of early films in the United States are now forever lost after being forgotten for decades in dusty vaults.)

[291] HUGENHOLTZ ET AL., THE RECASTING OF COPYRIGHT , *supra* note 278, at 164-166.

[292] Varian, *Copyright Term Extension and Orphan Works*, *supra* note 278, at 965.

digitization of cultural artifacts and unlock the humanities' riches, as proposed by COMMUNIA policy Recommendation # 9.

The perception that a urgent solution to the orphan works problem is very much needed is shared by many European scholars, noting that "[a]s the problem of orphan works becomes more acute and threatens to undermine increasing numbers of digitization projects, it is hoped that national legislatures in Europe and elsewhere [. . .] introduce legislative solutions."[294] The challenges of digitizing works today were also widely investigated at the 6th COMMUNIA Workshop, *Memory Institutions and Public Domain*, in Barcelona in October, 2009.

The European institutions are also aware of the potential loss of social and economic value if the orphan works problem remains unsolved. As the Commission noted, "there is a risk that a significant portion of orphan works cannot be incorporated into mass-scale digitisation and heritage preservation efforts such as Europeana or similar projects."[295] Digitization of the European cultural heritage and digital libraries are key aspects of the i2010 strategy and the recently implemented Digital Agenda of the European Union.[296] Therefore, the necessity to resolve once for all the hindrance that orphan works represent for digitization projects is now on top of the European agenda. To deal with the economic, legal and technological issues raised by the i2010 strategy, the EU Commission published a Recommendation[297] and set up a High Level Expert Group on the European Digital Libraries initiative. The High Level Expert Group tackled the key challenges of digital preservation, web harvesting, orphan works and out of print works.[298] In addition, the High Level Expert Group defined the guidelines for public-private partnership for digitization, online accessibility and digital preservation of Europe's collective memory.[299]

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[293] *Id*., at 6.

[294] Stef van Gompel and P. Bernt Hugenholtz, *The Orphan Works Problem: The Copyright Conundrum of Digitizing Large-Scale Audiovisual Archives, and How to Solve it*, POPULAR COMMUNICATION - THE INTERNATIONAL JOURNAL OF MEDIA AND CULTURE 61, 71 (2010); *see also* MIREILLE VAN EECHOUD, P. BERNT HUGENHOLTZ, LUCIE GUIBAULT, STEF VAN GOMPEL, NATALI HELBERGER, HARMONIZING EUROPEAN COPYRIGHT LAW: THE CHALLENGES OF BETTER LAWMAKING 263-294 (Kluwer Law International 2009) [hereinafter EECHOUD ET AL, HARMONIZING EUROPEAN COPYRIGHT LAW]; Stef van Gompel, *Unlocking the Potential of Pre-Existing Content: How to Address the Issue of Orphan Works in Europe?*, 38 IIC INT'L REV. INTEL. PROP. COMP. L. 669 (2007); Ricolfi, Copyright Policies, *supra* note 219, at 5-7. HUGENHOLTZ ET AL., THE RECASTING OF COPYRIGHT, *supra* note 278, at 159-195.

[295] Commission Communication on Copyright In The Knowledge Economy, at 5-6, COM (2009) 532 final (October 19, 2009), *available at* http://ec.europa.eu/internal_market/copyright/docs/copyright-infso/20091019_532_en.pdf.

[296] *See*, *e.g.*, Commission Communication, i2010: Digital Libraries, COM (2005) 465 final (September 30, 2005), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2005:0465:FIN:EN:PDF.

[297] Commission Recommendation 2006/585/EC on the Digitisation and Online Accessibility of Cultural Material and Digital Preservation, (2006 O.J. (L 237) 28 (August 31, 2006).

[298] *See* i2010 European Digital Libraries Initiative, High level Expert Group, Copyright Subgroup, Report on Digital Preservation, Orphan works and Out-of-Print Works. Selected Implementation Issues (April 18, 2008), *available at* http://ec.europa.eu/information_society/newsroom/cf/itemlongdetail.cfm?item_id=3366.

[299] *See* i2010 European Digital Libraries Initiative, Public Private Partnership Subgroup, Final Report on Public Private Partnerships for the Digitisation and Online Accessibility of Europe's Cultural Heritage (May 2008), *available at* http://ec.europa.eu/information_society/ activities/digital_libraries/doc/hleg/reports/ppp/ppp_final.pdf.

Neelie Kroes, European Commission Vice-President for the Digital Agenda, sums up pretty well the threat to European cultural heritage.

> Look at the situation of those trying to digitise cultural works. Europeana, the online portal of libraries, museums and archives in Europe, is one key example. What a digital wonder this is: a single access point for cultural treasures that would otherwise be difficult to access, hidden or even forgotten. Will this 12 million-strong collection of books, pictures, maps, music pieces and videos stall because copyright gets in the way? I hope not. But when it comes to 20th century materials, even to digitise and publish orphan works and out-of-distribution works, we have a large problem indeed. Europeana could be condemned to be a niche player rather than a world leader if it cannot be granted licenses and share the full catalogue of written and audio-visual material held in our cultural institutions. And it will be frustrated in that ambition if it cannot team up with commercial partners on terms that are consistent with public policy and with the interests of right-holders. And all sorts of other possible initiatives, public and private, will also be frustrated.[300]

The relevant social value of digitization of our cultural heritage in terms of openness and accessibility may be potentially vanished by copyright strictures. So far, groundbreaking technological advancement, which could open our society up to unprecedented cultural exposure, is hindered by an outmoded legal framework.

Copyright Expansion

Copyright term extension is only one tool of commodification of information and creativity. Authors have noted that "as we have moved to an economy in which information and communication is a highly valued resource, a broad array of expanding intellectual property rights have colonized uses and subject matter that were previously public domain."[301] As additional tools of commodification, term extension of copyright has been aided by copyright subject matter expansion, multiplication of strong commercial rights, and erosion of fair dealing, exceptions and limitations.

Firstly, the expansion of copyright has caused the contraction of the structural public domain. Protected subject matter has been systematically expanded "into every corner." Copyright protection has been expanded from books to maps and photographs, to sound recording and movies, to software and databases. In some instances, new quasi-copyrights have been created,

[300] Neelie Kroes, European Commission Vice-President for the Digital Agenda, A Digital World of Opportunities, speech delivered at the Forum d'Avignon - Les Rencontres Internationales de la Culture, de l'Économie et des Medias, Avignon, France, SPEECH/10/619 (November 5, 2010), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/10/619&format=HTML&aged=0&language=EN&guiLanguage=en.

[301] *See* Neil W. Netanel, *Why Has Copyright Expanded: Analysis and Critique*, in 6 NEW DIRECTIONS IN COPYRIGHT LAW 16 (Fiona Macmillan ed., Edward Elgar 2008), *available at* http://ssrn.com/abstract=1066241 [hereinafter Netanel, *Why Has Copyright Expanded*].

therefore restricting accordingly the public domain, as in case of the introduction of sui generis database rights in the European Union, a quintessential example of the process of commodification of information.[302] Additionally, subject-matter expansion has been coupled with the attribution of strong commercial distribution rights, especially the right to control imports and rental rights,[303] and the strengthening of the right to make derivative works. Though the mentioned expansion is in part a response to technological development, it is worth noting that lobbying from cultural conglomerates played an import role in amplifying this process of expansion beyond strict public interest, as we will discuss in more details later.[304]

Together with the contraction of the structural public domain, the functional public domain has been similarly eroded by narrowing the scope of fair dealing or fair use, exceptions and limitations to copyright and public interest rights. "This has been accompanied by a significant shifts in rhetoric," Fiona Macmillan has argued. "Not only have the monopoly privileges of intellectual property owners become 'rights', user rights have become 'defences' or 'exceptions'. The public domain is thus protected by 'exceptions' to 'rights'. Nothing could better encapsulate its current vulnerability."[305]

The erosion of fair dealing was initiated early in the history of copyright by switching the focus from what the second comer had added to what had taken.[306] In the following years the contraction of fair dealing and public interest rights has moved forward as a consequence of an increasing confusion on the scope of those rights.[307] This confusion has made the users of copyrighted works more reluctant in relying on fair dealing. Conversely, the same confusion has empowered the copyright owners. However, the erosion of public interest rights reached its peak in very recent times as a side effect of the transposition of the authorship rights from the analog to the digital medium. In particular, as we will discuss later, the enactment of anti-circumvention provisions as a response to the Internet threat played a decisive role in the process of contraction of fair dealing.

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[302] Mark Davison, *Database Protection: The Commodification of Information*, *in* THE FUTURE OF THE PUBLIC DOMAIN: IDENTIFYING THE COMMONS IN INFORMATION LAW 167-189 (Lucie Guibault and P. Bernt Hugenholtz eds., Kluwer Law International 2006).

[303] *See* Macmillan, *Commodification and Cultural Ownership*, *supra* note 272, at 43 (mentioning Artt. 11 and 14(4) of the TRIPs Agreement, which include rental rights in relation to computer programs, films, and phonograms, Art. 7 of the WIPO Copyright Treaty 1996 and Artt. 9 and 13 of the WIPO Performances and Phonograms Treaty 1996).

[304] For an account of copyright industry political influence in the U.S. and worldwide, *see* JESSICA LITMAN, DIGITAL COPYRIGHT 22-69 (Prometheus Books 2001); *see also* Netanel, *Why Has Copyright Expanded*, *supra* note 301, at 3-11.

[305] Fiona Macmillan, *Public Interest And The Public Domain In An Era Of Corporate Dominance*, *in* INTELLECTUAL PROPERTY RIGHTS: INNOVATION, GOVERNANCE AND THE INSTITUTIONAL ENVIRONMENT 48 (Brigitte Andersen ed., Edward Elgar Publishing 2006) [hereinafter Macmillan, *Public Interest And The Public Domain*]

[306] Lionel Bently, *Copyright and the Death of the Author in Literature and Law*, 57 MODERN L. REV. 973, 979 (1994).

[307] Macmillan, *Public Interest And The Public Domain*, *supra* note 305, at 62-63.

There is, finally, an additional dimension of the process of copyright expansion. This expansion has been recently appreciated only in few jurisdictions, particularly in the United States. However, this expansion was perceived in Europe as well, although at an earlier stage. Traditionally, the public domain was the default rule of our system of creativity, and copyright was the exception. The abolition of formalities changed it all. In the early days, copyright restricted publishers and their monopolies by very narrow restrictions. Later copyright expanded to include any work that was registered or deposited in a copyright office's registrar or other institution. Copyright was for exceptions and anything else was "Public Domain". In some jurisdictions, copyright was expanded to include any work bearing the copyright sign and the year, such as © 1977. Copyright was still an exception, though. However, by the international abolition of formalities, copyright was declared the default, and public domain was the exception.[308] Any work by any author is assumed to be copyrighted at the moment of its creation regardless what the real intention of the author is. By default, intellectual works are created under copyright protection, and public domain dedication must be properly spelled out. COMMUNIA opposes any such overreaching expansion of copyright protection and strongly upholds the view embodied in the 1st general principle of the Public Domain Manifesto that "[t]he Public Domain is the rule, copyright protection is the exception."

In this regard, formalities and registration systems may serve the scope of enriching the public domain and avoiding a relevant part of the transaction costs burdening digital creativity and digitization projects. Therefore, it is hotly debated whether formalities are an obstacle or an opportunity for the promotion of culture and creativity in the digital era.[309] COMMUNIA upholds the position that the abolition of formalities no longer serves the purpose that it served in the analog world. In the field of international law, the mandatory adoption of a "no formalities" approach had a precise target: it was an anti-discrimination norm, introduced to avoid any kind of hidden disadvantages for foreign authors, such as the need to fill in a copyright registration form in a foreign language. The digitized and interconnected world allows for instantaneous sharing of information and minimizes the space and time hurdles that persuaded the international community to abolish formalities. Today, the non-discriminatory goal of Article 5(2) of the Berne Convention may be reached using alternative tools: for instance, a simple and free online copyright register could be easily implemented and made accessible from every country in the world. Therefore, a carefully crafted registration system may enhance access and the reuse of creative works by attenuating some of the structural tensions between access and property rights

[308] *See* Berne Convention for the Protection of Literary and Artistic Works, Art. 5(2), September 9, 1886, as last revised at Paris on July 24, 1971 and amended on September 28, 1978, 1161 U.N.T.S. 30 (hereinafter Berne Convention].

[309] *See also* Stef van Gompel, *Formalities in the digital era: an obstacle or opportunity?*, *in* GLOBAL COPYRIGHT: THREE HUNDRED YEARS SINCE THE STATUTE OF ANNE, FROM 1709 TO CYBERSPACE 395-424 (Lionel Bently, Uma Suthersanen and Paul Torremans eds., Edward Elgar 2010) (arguing that in the pre-digital era, the objections against copyright formalities were real, in the light of the changes caused by the advent of digital technologies, there is now sufficient reason to reconsider subjecting copyright to formalities).

encapsulated in our copyright system. COMMUNIA has embodied this position in Recommendation # 8.

Moral Rights and the Public Domain Payant

In Europe the tension between copyright protection and the public domain is harshened by the intensity of moral rights. The strength of moral rights, especially the moral right of integrity, conversely weakens the public domain.

As constructed in most European jurisdictions, moral rights are inalienable and potentially perpetual. Any copyright expirations, public domain dedications or the licencing of a creative work under open access and re-use models will only enrich the structural and functional public domain under the assumption and to the extent that moral rights are not infringed. The capacity of the heirs and descendants of an author to claim infringement in perpetuity threatens the public domain with legal uncertainty. Adaptations and re-interpretations of works, abridged versions of works, colorizations of movies, or the application of other future unforeseeable technological tools that may somehow temper with or modify the perception of the original work may all trigger the reaction of the author's estate in perpetuity.

The promotion of the public domain calls for an effort towards harmonization at the European level of the definition of the right of integrity and duration of moral rights after the death of the author. COMMUNIA trusts that moral rights should not extend longer than the economic rights. This arrangement would be compliant with the minimum standard set by the Bene Convention. According to Article 6bis (2) of the Berne Convention, the moral rights of the author "shall, after his death, be maintained, at least until the expiry of the economic rights . . . ."[310]

Additionally, it is worth mentioning that few European countries have in place *domaine public payant* arrangements. The term *domaine public payant* was coined by Victor Hugo in a speech of 1878 to refer to a right for publishers to publish works after the death of an author upon the condition of paying a low royalty to the direct heirs.[311] In modern times, under the domain public payant doctrine the entrance of a work within the public domain would not necessarily make the use of that work free of charge.[312] Although other proposals have been put forward, the most common *domaine public payant* model would gather the sums collected under this regime into a cultural fund and award subsidies to authors with a view to fostering creativity. The *domaine public payant* proposals have never been widely put into practice, nevertheless, where in place, they undermine the notion itself of the public domain.

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[310] Berne Convention, *supra* note 308, at Art. 6bis (2).

[311] *See* Discours d'ouverture du Congrès littéraire international de 1878, Paris, *available at* www.inlibroveritas.net/lire/oeuvre1923-page5.html#page, as cited in Guibault, *Wrapping Information in Contract*, *supra* note 69, at 89.

[312] *See* Benabou and Dusollier, *Draw Me a Public Domain*, *supra* note 166, at 182-183.

A form of erosion of the public domain that is very similar to the *domaine public payant* has been embodied in the mechanism set up by Article 4 of the Copyright Term Directive. Article 4 provides that the publisher of an unpublished work whose term of protection is expired shall be given an extra term of protection of 25 years.

Technological Enclosure of Culture

As anticipated, the crucial driver of the modern drift toward commodification of the public domain is a mix of technology and legislation. Digital networks may indifferently serve openness and perfect control. This is because the "lex informatica"[313] provides that code is law, therefore any change in hardware and software shall change the "morals" of cyberspace.[314] The initial open nature of the Internet has been gradually substituted by architectures of greater and greater control. The preference for architectures of control rather than architectures of openness have diminished and will increasingly diminish the digital public domain. Technology and architecture of control have a central role in the commodification of information, culture, and the public domain. Technology was able to appropriate and fence informational value that was previously unowned and unprotected. That value was appropriated through the adoption of technological protection measures (TPMs) or digital right management (DRM) systems to control access and use of creative works in the digital environment. TPMs served as a tool to empower copyright holders to control any use of copyrighted works, including uses that previously could not be restrained.[315] This capacity of control turned information into perfect commodities.[316]

The increased control has been the consequence of the insistence of governments and commercial entities.[317] The seal on a policy of control was set by the introduction of the so called anti-circumvention provisions. The WIPO Internet Treaties first, [318] the Digital Millennium Copyright Act in the United States[319] and the Directive 29/01/EC in Europe later,[320] enacted

[313] *See* Joel Reidenberg, *Lex Informatica: The Formulation of Information Policy Rules Through Technology*, 76 TEXAS L. REV. 553 (1998).

[314] *See* LESSIG LAWRENCE, THE CODE AND OTHER LAWS OF CYBERSPACE 3-60 (Basic Books 1999); WILLIAM J. MITCHELL, CITY OF BITS: SPACE, PLACE, AND THE INFOBAHN 111 (MIT Press 1995).

[315] *See* Kamiel J. Koelman*, The Public Domain Commodified: Technological Measures and Productive Information Use*, *in* THE FUTURE OF THE PUBLIC DOMAIN: IDENTIFYING THE COMMONS IN INFORMATION LAW 108-110 (Lucie Guibault and P. Bernt Hugenholtz eds., Kluwer Law International 2006) [hereinafter Koelman*, The Public Domain Commodified*].

[316] Elkin-Koren, *It's All About Control*, *supra* note 244, at 83-84.

[317] See JESSICA LITMAN, DIGITAL COPYRIGHT 122-145 (Prometheus Books 2001); Samuelson, *Mapping the Digital Public Domain*, *supra* note 62, at 165; Elkin-Koren, *It's All About Control*, *supra* note 244, at 81.

[318] *See* WIPO Copyright Treaty, Art. 11 (December 20, 1996), *available at* http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html#P87_12240;

[319] *See* Digital Millennium Copyright Act of 1998 § 103, 17 U.S.C.A. § 1201 (a) (1) (A) (West 2008), *available at* http://www.copy right.gov/legislation/pl105-304.pdf [hereinafter DMCA]

[320] *See* Council Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society, Art. 6(1), 2001 O.J. (L 167) 10, 17 (May 22, 2001), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ. do?uri=OJ:L:2001:167:0010:0019:EN:PDF [hereinafter Directive 2001/29/EC].

provisions aimed to forbid the circumvention of copyright protection systems. In addition, the law banned any technology potentially designed to circumvent technological anti-copy protection measures.[321]

As Professor Boyle argues, this has been an inadequate answer to what was perceived as the Internet or digital threat.[322] This answer concerns now greatly users' rights, market competition and the public domain.[323] In particular, anti-circumvention provisions have negative effects both on the structural and the functional public domain. COMMUNIA policy Recommendation # 7 is pleading for an immediate intervention to protect the public domain against the adverse effect of TPMs.

The foremost concern with this legal and technological bundle is that DRM and anti-circumvention provisions, as they are programmed so far, can make copyright perpetual.[324] The legally protected encryption, in fact, would continue after the expiration of the copyright term. Because circumventing tools are illegal, users will be incapable of accessing public domain material fenced behind DRM technologies. The persistence of technological protection measures after the expiration of copyright will impoverish the digital public domain greatly by precluding new works to enter it.

A more subtle point is related to the danger that the architecture of the networks will make the law irrelevant.[325] An excerpt from Professor Lessig is instructive to grasp the terms and the dimension of the problem.

> Through a relatively swift transformation in the basic elements of the network, the network is increasingly recognizing a permissions layer, layered onto the original Internet. This permissions layer will enforce the permission the law establishes by default. It will require, in a physical sense, the permission that the law now requires by rule. This will be the consequence of the set of technologies ordinarily referred to as "DRM"--digital rights management technologies. DRM technologies enable fine-grained control over how content is used in a digital environment. They control whether the content can be copied, or how often; they control how long the content survives; they control whom the content can be shared with, or whether it can be altered or transformed. DRM thus uses technology to enforce control of content, independent of whether the law authorizes that control."[326]

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[321] *Id*., at Art. 6 (2); DMCA, *supra* note 319, at § 1201 (a) (2) and (b).

[322] *Id*., at .

[323] *See* Fred Von Lohmann, Unintended Consequences: Twelve Years under the DMCA (Electronic Frontier Foundation February 2010), *available at* http://www.eff.org/wp/unintended-consequences-under-dmca.

[324] *See* BOYLE, THE PUBLIC DOMAIN, *supra* note 90, at 104; Samuelson, *Mapping the Digital Public Domain*, *supra* note 62, at 161.

[325] *See* Lessig, *Re-crafting a Public Domain*, *supra* note 262, at 61-64;

[326] *Id*., at 62.

This change will affect greatly our ecology of creativity and the public domain. In a very obvious way, DRM technologies will affect the public domain by restricting or completely preventing fair dealings, privileged and fair uses.[327] DRM technology cannot make any determination of purpose that is necessary to assess whether a use is privileged or not. In the absence of that determination, copyright will be technologically enforced regardless of the fairness of the use, the operation of a copyright exception or limitation, or a private use. It is worth noting that, as long as technological protection measures will prevent the application of exceptions allowing copying in news media and quotations, they may be viewed also as hampering freedom of expression.[328] As James Boyle describes the anti-circumvention provisions, it is like if we had made illegal to cut barbed wire fences regardless if they fence private property, public property or they obstruct a public way and if we had made the manufacture and possession of wire cutters a crime as well.[329]

As matter of the fact, the pristine wording of the WIPO Internet Treaties stated that sanctions had to be applied to the circumvention of effective technological measures that restrict acts in respect of works of authorship which are not authorized by their authors or permitted by law. Nevertheless, only few regional implementations make any specific exceptions to the anti-circumvention provisions when digital rights management technologies restrict acts that are permitted by the law.[330] In particular, European law, as well as similarly U.S. law, more narrowly provides that

> Member States shall take appropriate measures to ensure that rightholders make available to the beneficiary of an exception or limitation provided for in national law [. . .] the means of benefiting from that exception or limitation, to the extent necessary to benefit from that exception or limitation and where that beneficiary has legal access to the protected work or subject-matter concerned.[331]

This is to say that rights holders should make available the means to benefit from copyright exceptions and limitation, fair uses, and fair dealings, but if they do not, any circumvention is still punishable. A team of scholars from the Institute for Information Law at the University of Amsterdam (IViR) has noted that "for even if article 6(4) creates an obligation to provide the

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[327] *See* LUCIE GUIBAULT ET AL., STUDY ON THE IMPLEMENTATION AND EFFECT IN MEMBER STATES' LAWS OF DIRECTIVE 2001/29/EC ON THE HARMONISATION OF CERTAIN ASPECTS OF COPYRIGHT AND RELATED RIGHTS IN THE INFORMATION SOCIETY 102-133 (February 2007) (report prepared for the European Commission, DG Internal Market, ETD/2005/IM/D1/91), *available at* http://www.ivir.nl/publications/guibault/Infosoc_report_ 2007.pdf (discussing the relation between limitation and TPMs) [hereinafter GUIBAULT ET AL., STUDY ON DIRECTIVE 2001/29/EC]; *see also* MIREILLE VAN EECHOUD, P. BERNT HUGENHOLTZ, LUCIE GUIBAULT, STEF VAN GOMPEL, NATALI HELBERGER, HARMONIZING EUROPEAN COPYRIGHT LAW THE CHALLENGES OF BETTER LAWMAKING 131-179 (Kluwer Law International 2009).

[328] *See* Koelman*, The Public Domain Commodified*, *supra* note 315, at 118.

[329] *See* BOYLE, THE PUBLIC DOMAIN, *supra* note 90, at 83-85; NETANEL, COPYRIGHT'S PARADOX, *supra* note 237, at 66-71.

[330] *See* GUIBAULT ET AL., STUDY ON DIRECTIVE 2001/29/EC, *supra* note 327, at 96 (mentioning Australia, Canada, Switzerland and Japan, only for copy control mechanisms, among the countries requiring that the acts of circumvention results in copyright infringement for the prohibition to apply).

[331] Directive 2001/29/EC, *supra* note 320, at Art. 6 (4).

means to exercise a limitation, this obligation is imposed on rights owners and does not give users any authority to perform acts of circumvention themselves."[332] Circumventing a digital right management technology that restricts acts permitted by the law is a civil wrong, and perhaps a crime, as such. This conclusion is supported by the preparatory works that introduced the Directive 2001/29/EC and the definition of technological measures. The Council made clear that

> Art. 6(1) protects against circumvention of all technological measures designed to prevent or restrict acts not authorized by the rightholder, regardless of whether the person performing the circumvention is a beneficiary of one of the exceptions provided for in Article 5.[333]

Further, according to Directive 2001/29/EC, the obligation of the rights holder, and Member States, to provide users with the means to exercise exceptions and limitations against TPMs, "shall not apply to works or other subject-matter made available to the public on agreed contractual terms in such a way that members of the public may access them from a place and at a time individually chosen by them."[334] Given that Recital 53 of the Directive 2001/29/EC specifically excludes "non-interactive forms of online use" from this last provision, "the exclusion actually extends to any work offered "on-demand", covering any work transmitted over the Internet, as long as the user is able to choose and initialize that transmission."[335]

Additionally, it is worth noting that the enactment of the last proposed text of the Anti-Counterfeiting Trade Agreement (ACTA) would worsen the negative impact of the TPMs on the public domain at the international level. ACTA would generally require stronger protection of TPMs than the WIPO Treaties, without providing any mechanisms to ensure the exercise and enforcement of exceptions and limitations.[336] In particular, ACTA would provide a broad definition of TPMs, not included in the WIPO Treaties. Further, ACTA would prohibit both acts of circumvention and preparatory acts. Finally, ACTA would specifically cover technological measures having both legal and illegal functions. The need for the European institutions to carefully reconsider the adoption of any stronger protection of technological protection measures at the

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[332] GUIBAULT ET AL., STUDY ON DIRECTIVE 2001/29/EC, *supra* note 327, at 106; *see also* Nora Braun, *The Interface Between The Protection of Technological Measures and the Exercise of Exceptions to Copyright and Related Rights: Comparing the Situation in the United States and the European Community*, 25 EUR. INTEL. PROP. REV. 496, 499 (2003).

[333] *See* Common Position No. 48/2000 of 28 September 2000 adopted by the Council, with a view to adopting a Directive of the European Parliament and of the Council on the harmonisation of certain aspects of copyright and related rights in the information society, 2000 O.J. (C 344) 01, 19 (December 1, 2000), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2000:344:0001:0022:EN:PDF; *see also* Koelman, *The Public Domain Commodified*, supra note 315, at 108-109, n.10.

[334] Directive 2001/29/EC, *supra* note 320, at Art. 6 (4), par. 4

[335] Guibault, Evaluating Directive 2001/29/EC, *supra* note 157, at 11.

[336] *See* Anti-Counterfeiting Trade Agreement (ACTA),

international level has been recently stressed in a common opinion delivered by several European academics.[337]

Finally, as an additional effect of TPMs over our cultural environment, technology will prevent that practice of free culture that today happens, albeit against the law. As scholars have explained "the code will then make the law effective by making it effectively impossible for anyone to ignore the law."[338] This is particularly disturbing because an entire new ecology of creativity has been assembled around the re-use of content for which permission cannot be secured from the right holders, either because of economic constraints or because the use is not allowed by the copyright owner. The implementation of ubiquitous DRM technologies may silence the most innovative part of the digital revolution and "smother much of the potential of digital networks to reinvigorate a democratic free culture."[339] This change will not undermine the value of the Internet as a read-only medium. However, this change will destroy the potentials of the internet as a distributed, decentralized, interactive, and user-based creative medium. Therefore, "while the practical consequence of this change today may be small, the practical consequence tomorrow, once the technologies of control get added into the mix, will be profound."[340]

Contractual Enclosure of Culture

In recent years, contract law has also been deployed to commodify and appropriate information supposedly in the public domain.[341] Contracts may be employed to restrict or prohibit uses of works that would otherwise be permitted under copyright law. Current mass-market licencing practices increasingly tend to restrict or prohibit certain uses of works over the Internet far beyond the exclusive rights granted by copyright law. The digital information marketplace has seen the emergence of standard form contracts restricting the capacity to use information not or no longer qualifying for intellectual property protection or whose use is privileged. Click-wrap agreement may imply that restrictions on use on online content is extend to unprotected material or may prohibit any reproduction of the content for any purpose whatsoever.[342]

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[337] *See* Opinion of European Academics on Anti-Counterfeiting Trade Agreement, at 6, *available at* http://www.iri.uni-hannover.de/tl_files/pdf/ACTA_opinion_200111_2.pdf.

[338] Lessig, *Re-crafting a Public Domain*, *supra* note 262, at 63.

[339] Id., at 64.

[340] *Id*., at 63-64.

[341] *See* Guibault, *Wrapping Information in Contract, supra* note 69, at 87-104; LUCIE GUIBAULT, COPYRIGHT LIMITATIONS AND CONTRACTS: AN ANALYSIS OF THE CONTRACTUAL OVERRIDABILITY OF LIMITATIONS ON COPYRIGHT (Kluwer Law International 2002) [hereinafter GUIBAULT, COPYRIGHT LIMITATIONS AND CONTRACTS]; Loren Lydia Pallas, *Slaying the Leather-Winged Demons in the Night: Reforming Copyright Owner Contracting with Clickwrap Misuse*, 30 OHIO N. U. L. REV. (2004); Samuelson, *Mapping the Digital Public Domain*, *supra* note 62, at 155-158, 163; P. Bernt Hugenholtz, *Copyright, Contract and Code: What Will Remain of the Public Domain?*, 26 BROOK. J. INT'L L. 77 (2000); Niva Elkin-Koren, *Copyright Policy and the Limits of Freedom of Contract*, 12 BERKELEY TECH. L. J. 93 (1997).

[342] *See* Guibault, Evaluating Directive 2001/29/EC, *supra* note 157, at 13.

The most powerful example is that of click-wrap agreements that may state that some uses of a scanned public domain material are restricted or prohibited. A glimpse of such a practice has been implemented by Google as part of its project to partner with international libraries to digitize public domain materials. If you download any public domain books from the Google books website, quite awkwardly the Usage Guidelines included at the front of each scan read as follows: "We also ask that you: + Make non-commercial use of the files. We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes." In the preamble to the Usage Guidelines Google justifies these restrictions by stating that the digitization work carried out by Google "is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties." COMMUNIA policy Recommendation # 5 and Recommendation #6 set up principles to affirmatively protect the public domain against the misappropriation of public domain works with special emphasis on the digital reproduction of public domain works.

However, the synergy between mass market licenses and technological protection measures poses the major threat to the availability of digital information in the public domain. As Professor Lucie Guibault noted at the 1st COMMUNIA Conference,

> The digital network's interactive nature has created the perfect preconditions for the development of a contractual culture. Through the application of technical access and copy control mechanisms, rights owners are capable of effectively subjecting the use of any work made available in the digital environment to a set of particular conditions of use.[343]

This was never the case in the analog environment. The purchase of a book, the enjoyment of a painting or a musical piece never entailed the obligation of entering into a contract in the past. Hence, the emergence of this contractual culture, coupled with strict technological enforcement, has been endangering the public domain with a new set of threats in the digital environment.

Besides the capacity of technological protection measures to control any types of use of a piece of information, DRM systems may also assert control over more types of information if used in combination with enforceable contracts.[344] Technological protection measures empower the application and enforcement of mass-market licenses on the Internet that may restrict the lawful use of unprotected information by the users. Technological protection measures act as a substitute for the traditional exceptions and limitations provided by copyright law. Therefore, "the widespread use of technological protection measures in conjunction with contractual restrictions on the exercise of the privileges recognised by copyright law does affect the free flow of information . . . ."[345]

[343] *Id*., at 12.

[344] *See* Koelman*, The Public Domain Commodified*, *supra* note 315, at 110-111.

[345] Guibault, Evaluating Directive 2001/29/EC, *supra* note 157, at 4.

The mentioned contractual and technological synergy may burden the user with an insurmountable set of impediments to enjoy public domain information. Firstly, the legitimacy of the mass-licenses may be invalidated only in exceptional circumstances.[346] Therefore, the user may be contractually liable. This conclusion follows, on one end, from the inconsistent case law over Europe on the enforcement of licenses wrapping together information regardless of their public domain or private nature.[347] On the other end, this conclusion is supported by the absence of a mechanism for solving conflicts between copyright privileged uses and freedom of contract in continental Europe copyright law. The validity of the contract should be, therefore, tested under general rules of law. Nevertheless, no general principle seems to provide a mandatory requirement that the copyright holder shall exercise its right in conformity with the intended purpose and the function of the copyright system.[348] Please also note that similar conclusions may be reached also under U.S. law, therefore making the capacity of mass-market licenses to undermine the digital public domain a globalized threat.[349]

Secondly, even if the contractual legitimacy of the licenses may be challenged, any attempt to circumvent a technological measure may trigger users' liability.[350] This even more so, because DRM systems prevent use of both protected and unprotected information that may be bundled together in an information product. The act of gaining access to the non-copyrightable information will imply also the unlawful circumvention of technological measures to access copyrightable information. This act will most probably trigger liability under relevant law.[351]

Thirdly, even in the case the user may successfully argue that bypassing a technological measure is not actionable because the law only protects technological measures designed to "prevent or restrict acts which are not authorized by the rightholder of any copyright or any related right",[352] it would be necessary to manufacture a tool to circumvent the technological measure. However, the manufacture and the sale of any such tools would trigger liability under relevant law.[353] Therefore, no anti-circumventing tool should be lawfully available on the market. In the worst case scenario, this may deprive the users of any lawful means to use structural or functional public domain information.

In any event, the legal uncertainty and the described triple layer of impediments would make the enjoyment of public domain works extremely burdensome for the average user. In conclusion,

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[346] *See* Guibault, *Wrapping Information in Contract*, *supra* note 69, at 104.

[347] *Id*., at 94-97.

[348] *Id*., at 98.

[349] See ProCD Inc. v. Zeidenberg, 86 F.3d 1447 (7th Circ. 1996); *see also* Samuelson, *Mapping the Digital Public Domain*, *supra* note 62, at 156-157; Maureen O'Rourke, *Copyright Preemption After the ProCD Case: A Market-Based Approach*, 12 BERKELEY TECH. L. J. 53 (1997).

[350] *See* Directive 2001/29/EC, *supra* note 320, at art. 6 (1).

[351] *See* Koelman*, The Public Domain Commodified*, *supra* note 315, at 110.

[352] *Id*., art. 6 (3).

mass-market licenses coupled with anti-circumvention measures may threat the "integrity of the public domain, insofar as they may contribute to displace democratically established public ordering assumptions."[354] The control over unprotected information will hinder competition in the marketplace of ideas. Next generation products will become more costly, fewer information will be available, and more and more competitors will be prevented from offering reasonable substitutes. The control over the dissemination of ideas and facts or other unprotected and non-protectable information will unduly hinder democratic discourse and freedom of expression by restricting productive uses of unprotected information.[355]

Copyright Censorship and Cultural Diversity

The public domain is the place where, to borrow the words of Tacitus, "men [can] think as they please and speak as they [think]."[356] Any encroachment upon the public domain is an encroachment upon our capacity of free and diverse expression.

Freedom of expression and the public domain are overlapping concepts that share the same goal. Public domain and free speech both have a democratic function in that they propel personal and political discourse. As Michael Birnhack has argued, both concepts "construct, or aim at constructing, a communicative sphere, where people can interact with each other in various circles, whether it is an interpersonal circle, a communitarian one or a wider political circle."[357] The close connection between public domain and free speech should persuade us to think about the public domain as a fundamental human right. As powerfully stated, "the public domain represents our free speech concerns within the realm of copyright law."[358]

Though traditionally viewed as the "engine of free expression",[359] it is increasingly noted that copyright law may impinge heavily on freedom of speech.[360] Copyright law is characterized by continuing tensions between exclusive private rights on the one hand and the freedom to read

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[353] *Id*., art. 6 (2).

[354] Guibault, *Wrapping Information in Contract*, *supra* note 69, at 104.

[355] Koelman, *The Public Domain Commodified*, *supra* note 315, at 1118-119.

[356] TACITUS, 1 THE HISTORIES § 1 (A.D. 109) ("rara temporum felicitate ubi sentire quae velis et quae sentias dicere licet" said Tacitus, referring to the reigns of Nerva and Trajan); *see also* Lange, *Reimagining the Public Domain*, *supra* note 74, at 475 (employing the same quote when discussing public domain, citizenship and freedom of expression).

[357] Birnhack, *More or Better?*, *supra* note 77, at 62.

[358] *Id*.

[359] *See* Harper & Row Publishers, Inc. v. Nation Enterprises, 471 US 539, 558 (1985).

[360] *See generally* LANGE DAVID & POWELL JEFFERSON H., NO LAW: INTELLECTUAL PROPERTY IN THE IMAGE OF AN ABSOLUTE FIRST AMENDMENT (Stanford Law Books 2008); BOYLE, THE PUBLIC DOMAIN, *supra* note 90, at 89-110; NETANEL, COPYRIGHT'S PARADOX, *supra* note 237; KEMBREW MCLEOD, FREEDOM OF EXPRESSION: RESISTANCE AND REPRESSION IN THE AGE OF INTELLECTUAL PROPERTY (University of Minnesota Press 2007); Yochai Benkler, *Through the Looking Glass - Alice and Constitutional Foundations of the Public Domain*, 66 J. LAW & CONTEMP. PROBS. 173 (2003); Zimmerman, *supra* note 84, at 370-375; Macmillan, *Commodification and Cultural Ownership*, *supra* note 272, at 37-41, 52-62.

and express oneself on the other hand.[361] Copying and reusing other expressions can be often part of freedom of speech.[362] Many European authors, together with their transatlantic counterparts, worry about current trends toward overprotection in the potential conflict between copyright, free speech and the public right of information. Therefore, the relationship between copyright and freedom of expression must be carefully balanced when enacting new legislation that may compress the public domain. Focusing on trade alone when enacting intellectual property policies may have relevant unintended social consequences.[363] So far, legislations have failed to prevent commercialization of copyright while, in most cases, any actions to balance the copyright/free speech conflict has been demanded to the courts.[364]

The public domain is pivotal to our ability to express ourselves freely. The public domain is a metaphysical public forum, a place that belongs "to everyone, because [it] belong[s] to no one, from which people cannot be excluded on the grounds that a property owner wishes to exclude them."[365] Any increase or decrease in the public domain will proportionally affect our freedom of speech. As Waldron comments, "[t]he private appropriation of the public realm of cultural artifacts restricts and controls the moves that can be made therein by the rest of us."[366] Yochai Benkler discusses the idea in details by illustrating that

> [f]ocusing on the duty side of intellectual property clarifies that we are free to communicate at a given moment only to the extent we communicate using information that is in the public domain, we own, or we have permission to use for the proposed communication. An increase in the amount of material one person owns decreases the communicative components freely available to all others. Obtaining permission to use already assumes a prior state of unfreedom, lifted at the discretion of a person with authority over our proposed use. Only an increase in the public domain--an increase in the range of uses

[361] *See generally* Michael Birnhack, *Global Copyright, Local Speech*, 24 CARDOZO ARTS & ENT. L. J. 491 (2006) [hereinafter Birnhack, *Global Copyright, Local Speech*]; COPYRIGHT AND FREE SPEECH: COMPARATIVE AND INTERNATIONAL ANALYSES (Jonathan Griffiths and Uma Suthersanen eds., Oxford University Press 2003); Pamela Samuelson, *Copyright and Freedom of Expression in Historical Perspective*, 10 J. INTELL. PROP. L. 319 (2003);

[362] *See, e.g.*, Rebecca L. Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L. J. 535 (2004)

[363] *See* Birnhack, *Global Copyright, Local Speech*, *supra* note 363, at 527-530, 547.

[364] *See* Christophe Geiger, *"Constitutionalising" Intellectual Property Law? The Influence of Fundamental Rights on Intellectual Property in the European Union*, 37 INT'L REV. INTELL. PROP. COMP. L. 381 (2006); Bernt P. Hugenholtz, *Copyright and Freedom of Expression in Europe*, *in* EXPANDING THE BOUNDARIES OF INTELLECTUAL PROPERTY: INNOVATION POLICY FOR THE KNOWLEDGE SOCIETY 343-363 (Rochelle C. Dreyfuss, Diane Leenheer Zimmerman & Harry First. eds., Oxford Univ. Press, 2001); *see also* Helle Porsdam, *On European Narratives of Human Rights and their Possible Implications for Copyright*, *in 6 NEW DIRECTIONS IN COPYRIGHT LAW* 346-349 (Fiona Macmillan ed., Edward Elgar Publishing 2007).

[365] Tushnet, *Domain and Forum*, *supra* note 84, at 598.

[366] Jeremy Waldron, *From Authors to Copiers: Individual Rights and Social Values in Intellectual Property*, 69 CHICAGO-KENT L. REV. 842, 885 (1993).

> presumptively privileged to all--generally increases the freedom of a society's constituents to communicate.[367]

In addition, the above is to be read always through the lens of a further key argument: the public domain propels a rich and diverse expression regardless of the market power of the speakers. Any decrease in the public domain will produce the most relevant repercussions on people with less ability to finance creation and dissemination of their speech.

The extension of property "rights into every corner" favours large scale organizations that own information inventories over other types of information producers.[368] An organization that owns a large information inventory, in fact, can respond to the loss of public domain material by increasing the reuse of its own inventory. Other organizations and individuals must buy on the market information that are no longer available in the public domain. The costs of information producers that do not have large inventories and reutilization options will increase more rapidly than large scale vertically integrated organizations. In short, the legislator is to be reminded that when it passes a law extending and enlarging property rights on creative content,

> [i]t is choosing to increase the costs of academic scholars, whose libraries must decide whether to buy more publications or more access rights to a smaller number of publications, to increase Reed Elsevier's returns. It is choosing to increase the costs of amateurs—like children who would put together web-based projects about their favorite cartoon characters—in order to increase the returns to Disney. It is choosing to raise the economic barriers facing participants in the Free Republic forum in order to increase the returns to the Washington Post.[369]

Thus, any contraction of the public domain will push Europe away from the goal of bringing "the millions of dispossessed and disadvantaged Europeans in from the margins of society and cultural policy in from the margins of governance," to quote a European report drafted as a specific complement to the World Commission on Culture and Development's 1996 report on global cultural policy.[370]

As an interrelated issue, copyright expansion and public domain enclosure affect our freedom of speech by impinging on related values as cultural diversity, identity politics and participation.

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[367] Benkler, *Free as the Air to Common Use*, *supra* note 82, at 393; *see also* Christopher Yoo, *Copyright and Democracy: A Cautionary Note*, 53 VAND. L. REV. 1933, 1935-1952 (2000); Neil W. Netanel, *Market Hierarchy And Copyright In Our System Of Free Expression*, 53 VAND. L. REV. 1879 (2000); Neil W. Netanel, *Copyright and Democratic Civil Society*, 106 YALE L. J. 283 (1996).

[368] Benkler, *A Political Economy of the Public Domain*, *supra* note 258, at 273-274.

[369] *Id*., at 274.

[370] THE EUROPEAN TASK FORCE ON CULTURE AND DEVELOPMENT, IN FROM THE MARGINS: A CONTRIBUTION TO THE DEBATE ON CULTURE AND DEVELOPMENT IN EUROPE 276 (1997) (report prepared for the Council of Europe), *available at* http://www.coe.int/t/dg4/cultureheritage/culture/resources/Publications/InFromTheMargins_EN.pdf; *see also* WORLD COMMISSION ON CULTURE AND DEVELOPMENT, OUR CREATIVE DIVERSITY (July 1996), *available at* http://unesdoc.unesco.org/images/0010/001055/105586e.pdf.

Though there is a strong belief that copyright protection is essential to cultural diversity and self-determination,[371] Fiona Macmillan has duly noted that

> if copyright is necessary for the promotion of cultural diversity and self-determination, then something has gone wrong and we need to look very carefully again at the shape of copyright law and consider whether there are parts that we might want to jettison or change dramatically [. . .] if we want it to serve the objective of cultural diversity and self-determination.[372]

Indeed, copyright expansion and commodification has facilitated aggregation of private power on cultural goods and services that may function as a cultural filter on what we can see, hear, and read. Cultural filtering, homogenization and the loss of the public domain have exacerbated the "dysfunctional relationship between copyright and cultural diversity."[373] Therefore, the international copyright system may pose a threat to the goals of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions and the European Union.[374]

Historically, cultural diversity has been a fundamental value in the European Union. Very recently, in looking at the implementation of a digital agenda for Europe, the European Commissioner Nellie Kroes, powerfully reclaimed the value of cultural diversity by saying that "we want 'une Europe des cultures.'"[375] In general terms, the process of European integration has been based on the assumption that the co-operation among State members would not have been detrimental to their cultural distinctiveness. The promotion of the value of cultural diversity is embedded in the European constitutional texts and fostered by the existing practice of the European Union.[376] In addition, since ratification in 2007, the European Union has been bound to its obligations under the UNESCO Convention on the Protection and Promotion of the Diversity of

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[371] *See e.g.* UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, October 20, 2005, CLT-2005, *available at* http://portal.unesco.org/culture/en/ev.php-URL_ID=11281&URL_DO=DO_TOPIC&URL_SECTIO N=201.html (recognizing in the preamble ""the importance of intellectual property rights in sustaining those involved in cultural creativity") [hereinafter UNESCO Convention].

[372] Fiona Macmillan, *Copyright, the World Trade Organization, and Cultural Self-Determination*, in 6 NEW DIRECTIONS IN COPYRIGHT LAW 329 (Fiona Macmillan ed., Edward Elgar Publishing 2007) [hereinafter Macmillan, *Copyright, the WTO*].

[373] Fiona Macmillan, *The Dysfunctional Relationship Between Copyright And Cultural Diversity*, 27 QUADERNS DEL CAC 101 (2007); *see also* Macmillan, *Copyright, the WTO*, *supra* note 372, at 313-319; Macmillan, *Public Interest And The Public Domain*, *supra* note 305; Fiona Macmillan, *The Cruel ©: Copyright and Film*, 24 EUR. INTEL. PROP. REV. 483, 488-489 (2002).

[374] *See* Fiona Mcmillian, *The UNESCO Convention as a New Incentive to Protect Cultural Diversity*, *in PROTECTION OF CULTURAL DIVERSITY FROM A EUROPEAN AND INTERNATIONAL PERSPECTIVE* 163-192 (Hildegard Schneider and Peter van den Bossche eds., Intersentia, 2008).

[375] Neelie Kroes, European Commission Vice-President for the Digital Agenda, A Digital World of Opportunities, speech delivered at the Forum d'Avignon - Les Rencontres Internationales de la Culture, de l'Économie et des Medias, Avignon, France, SPEECH/10/619 (November 5, 2010), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/10/619&format=HTML&aged=0&language=EN&guiLanguage=en.

[376] See Bruno de Witte, *The Value of Cultural Diversity in the European Union*, *in PROTECTION OF CULTURAL DIVERSITY FROM A EUROPEAN AND INTERNATIONAL PERSPECTIVE* 219-247 (Hildegard Schneider and Peter van den Bossche eds., Intersentia, 2008);

Cultural Expressions. Therefore, all of the relevant European policy decisions should be compelled to conform to the Convention's cultural diversity obligations. Recently, the Digital Agenda for Europe has stressed the need to promoting cultural diversity in compliance with the UNESCO Convention, especially in the digital environment.[377]

In this regard, a recent study on the state of the implementation of the Convention in Europe noted that, while some copyright is necessary, too much copyright is detrimental to diversity of cultural expression.[378] Policy-makers in the EU are generally overly exposed to lobbyists advocating the need for better copyright law as a dogma and, therefore, fail to implement the most valuable parts of the Convention. Diversity of cultural expression is particularly threatened by IPRs "in markets that are dominated by big corporations exercising collective power as oligopolies."[379] The study concluded that the Commission should be particularly cautious when pushing for extending copyright protection which could also reduce creativity and freedom of expression.

These conclusions are generally accepted by the most recent scholarly reviews of the public domain. Firstly, it is noted that copyright expansion and commodification can lead to global domination of a market for cultural output.[380] In general terms, the emphasis of this argument is on the capacity of cultural conglomerates to control dominant cultural images and the power deriving from that control. That power will sharpen the ability of media and entertainment corporations to shape taste and demand through cultural filtering. Correspondently, that same power will enhance the ability to suppress critical speech about the process of taste-shaping.

In addition, it has been largely outlined why centralization of information is an evil for a democratic system.[381] In general, concentrated systems are likely to exclude challenges to prevailing wisdom[382] and translate unequal distribution of economic power into unequal

[377] *See* Commission Communication, A Digital Agenda for Europe, COM (2010) 245 final (May 19, 2010), at 30, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0245:FIN:EN:PDF [hereinafter Digital Agenda].

[378] GERMANN AVOCATS, IMPLEMENTING THE UNESCO CONVENTION OF 2005 IN THE EUROPEAN UNION, IP/B/CULT/IC/2009_057 (May 2010) (study prepared for the European Parliament Directorate General for Internal Policies, Policy Department B: Structural and Cohesion Policies, Culture and Education), *available at* http://www.diversitystudy.eu.

[379] *Id*.

[380] Macmillan, *Public Interest And The Public Domain*, *supra* note 305, at 49.

[381] *See* Jerome A. Barron, *Access to the Press: A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967) [hereinafter Barron, *Access to the Press*]; Jerome A. Barron, *Access--The Only Choice for the Media?*, 48 TEX. L. REV. 766 (1970); Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405 (1986); *see also* Netanel Neil W., *New Media in Old Bottles? Barron's Contextual First Amendment and Copyright in the Digital Age*, 76 GEO. WASH. L. REV. 952 (2008), *available at* http://ssrn.com/abstract=1183167.

[382] *See* Barron, *Access to the Press*, *supra* note 381, at 1641-1647.

distribution of power to express ideas.[383] Scholars have noted that, together with the traditional case in which a secondary author wishes to make use of existing copyrighted material,

> the unique characteristics of media products, as public and solidarity goods, together with the advantages that extensive copyright protection grants large-scale corporate media, prevent alternative, noninfringing creative materials from reaching effective audience attention and competing equally for the public's attention and cultural preferences. Extensive copyright protection does so, first, by enabling commercialized media to deepen their market dominance and the cultural centrality of their products through ancillary and derivative markets, and second, by producing a "solidarity value" for the commercialized and commodified nature of media products.[384]

Cultural conglomerates deepen their market dominance through horizontal and vertical integration. The high degree of control over the entire distribution process in a number of different areas of cultural output makes it possible to run any alternative, noninfringing creative material out of the market. In fact, horizontal and vertical mergers and acquisitions have been the trend in the entertainment and media market for the last three decades.[385] This process of concentration endangers closely cultural diversity in that "a handful – six to ten vertically integrated communications companies – will soon produce, own and distribute the bulk of the culture and information circulating in the global marketplace."[386] As a consequence, global media and entertainment oligopolies will impose an homogenizing effect on local culture.

Moreover, the internal validity of the mentioned conclusions is accrued with regard to information production in the digital environment. In particular, public domain enclosure and copyright expansion are very pernicious for the diversity and decentralization of modern forms of peer information production.

> In a digital environment where distribution costs are very small, the primary costs of engaging in amateur production are opportunity costs of time not spent on a profitable project and information input costs. Increased property rights create entry barriers, in the form of information input costs, that replicate for amateur producers the high costs of distribution in the print and paper environment. Enclosure therefore has the effect of silencing nonprofessional information producers.[387]

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[383] *See* Fiss, *supra* note 381, at 1412-1413; Jack M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L. J. 375, 404-412 (1990).

[384] Guy Pessach, *Copyright Law as a Silencing Restriction on Noninfringing Materials: Unveiling the Scope of Copyright's Diversity Externalities*, 76 S. CAL. L. REV. 1067, 1068 (2003).

[385] *See* Macmillan, *Public Interest And The Public Domain*, *supra* note 305, at 49-52; Macmillan, *Commodification and Cultural Ownership*, *supra* note 272, at 44-48.

[386] RONALD V. BETTIG, COPYRIGHTING CULTURE, THE POLITICAL ECONOMY OF INTELLECTUAL PROPERTY 38 (Westview Press 1996).

[387] Benkler, *Free as the Air to Common Use*, *supra* note 82, at 410.

Similar conclusions have been reached by the Digital Agenda for Europe when discussing the application of the UNESCO Convention principles to new digital environments and noting that "[t]he internet is also a driver of greater pluralism in the media, giving both access to a wider range of sources and points of view as well as the means for individuals – who might otherwise be denied the opportunity – to express themselves fully and openly."[388]

Amateur production has been the driving force of the Internet informational revolution. Blogs, listservs, forums, and user-based communities re-calibrated the meaning of diversity and freedom of expression toward a higher standard. Nonprofessional information production empowered the civic society with the ability to produce truly independent and diverse speech. Enclosure would strike hard at the potentialities and openness of digital peer production. In this regard, any policy intervention should not underestimate the decreased production by organizations using strategies that do not benefit from copyright expansion. [389] The still unexplored wealth of peer production in digital environments make this note even more cautionary.

Enclosure is likely to nullify the diverse and decentralized process of information production spread over the Internet. Increased copyright protection and public domain enclosure, in fact, may "lead, over time, to concentration of a greater portion of the information production function in society in the hands of large commercial organizations that vertically integrate new production with owned-information inventory management."[390]

Ironically, copyright law may end up serving the old enemy against which it was originally unleashed. Widely recognized as a tool to counter censorship so common in the old patronage system, copyright law may turn out to restrict free and diverse speech by its steady expansion and converse public domain enclosure and commodification. Moreover, and more regretfully, an unwise expansionistic copyright policy may empower again that old enemy of any democratic society at the very moment when technological progress may lead us close to its very annihilation.

Legislative Process, Legal Uncertainty and Harmonization

Together with the more substantial and specific factors troubling the public domain so far described, there are other more generic aspects of the legislative process that should be redressed to better protect and promote the European public domain. Lack of representation of the interests of users and the public, lack of transparency of the legislative process, obscurity of copyright legal provisions, and lack of legal harmonization are all factors that aggravate the tension between public domain and copyright protection.

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[388] Digital Agenda, *supra* note 377, at 30.

[389] *See* Benkler, *A Political Economy of the Public Domain*, *supra* note 258, at 272-285 (reviewing in details the effects of intellectual property approaches to organizing information production); *see also* Benkler, *Free as the Air to Common Use*, *supra* note 82, at 400-408.

[390] Benkler, *Free as the Air to Common Use*, *supra* note 82, at 410.

Enclosure and commodification of the public domain are also the result of an unbalanced legislative process. Lobbying from cultural conglomerates played an important role in amplifying the process of copyright expansion beyond strict public interest.[391] The public at large has always had very limited access to the bargaining table when copyright policies had to be enacted. This is due to the dominant mechanics of lobbying that largely excluded the users from any decision on the future of creativity management. In accordance with Mançur Olson classical work, copyright policy is driven by a small group of concentrated players to the detriment of the more dispersed interest of smaller players and the public at large.[392] Users' class interests have always hardly been represented, in particular in the pre-Internet and the early Internet era when copyright matters where considered entertainment industry sector specific issues. The final outcome has been the implementation of a copyright system strongly protectionist and pro-distributors with an overbroad expansion of private property rights followed by a correspondent restriction of public prerogatives and enclosure of the public domain.

As a related problem, often the copyright legislative process appears to be biased by a certain amount of lack of transparency and due process. The Anti-Counterfeiting Trade Agreement (ACTA) is a good example of secrecy in the process of enacting copyright and intellectual property laws. ACTA is a secret treaty that is being negotiated away from the UN, behind closed doors. The very existence of ACTA was surrounded by total secrecy from 2005 to 2007. No information on negotiations were disclosed until 2008. Only in 2010, after leaks and strong transparency concerns, the first draft text has been released. As reported by a Wikileaks cable of November 2008, even negotiating parties were concerned that the uncommon level of secrecy that has been set for ACTA renders impossible to conduct consultations with stakeholders and legislatures.[393] According to Professor Geist, ACTA appears to have set a new standard for secrecy in negotiating intellectual property matters at the international level.[394] ACTA includes proposals to search iPods, phones and laptop hard-drives at the world's borders to look for infringement, although the last draft does also incorporate a *de minimis* provision. ACTA may impinge heavily on freedoms of citizens, privileged uses and public interest rights. Nevertheless, users are completely excluded from the bargaining table of ACTA, while information on the negotiations and relevant provisions included in the agreement are scarce and contradictory.

The asymmetric distribution of interests, power and institutions in IP politics and the difficulty of representing public interest in copyright matters due to an unbalanced legislative process have

[391] For an account of copyright industry political influence in the U.S. and worldwide, *see* JESSICA LITMAN, DIGITAL COPYRIGHT 22-69 (Prometheus Books 2001); *see also* Netanel, *Why Has Copyright Expanded*, *supra* note 301, at 3-11.

[392] *See* MANÇUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (Harvard U. Press 1971) (1965).

[393] *See* US embassy cables: Italy, the EU and the Anti-Counterfeit Trading Agreement, THE GUARDIAN, December 22, 2010, http://www.guardian.co.uk/world/us-embassy-cables-documents/176810.

[394] See Michael Geist, The Implication of the Counterfeiting Trade Agreement, 2010 Intellectual Property Symposium, Duke University Law School, Durham, United States (February 11, 2011).

recently lead to proposals for a European Public Domain Supervisor, acting as a guardian of the fundamental rights and freedoms relating to the public domain.[395]

Legal uncertainty is an additional hurdle to the public enjoyment of a healthy and rich public domain. By blurring the contours of the structural and functional public domain, legal uncertainty jeopardizes users' prerogatives, rises transaction costs and propel market inefficiency. The fundamental drivers of legal uncertainty are obscure laws and a lack of harmonization.

Authors have argued that copyright law is too obscure and complex for the users.[396] Copyright law is drafted for the market players, not for users. By way of example, it is worth mentioning Article 6(4) of the Information Society Directive that Professor Lucie Guibault describes as "extremely complex, vague and prone to interpretation."[397] It is illustrative to observe that the provision refers to actions to be taken to ensure that users may benefit form exceptions and limitations with respect to works protected by TPMs. The obscurity of copyright law causes a high level of uncertainty among users regarding what they can or cannot do with creative content. Because of the complexity of copyright provisions, users are discouraged from enforcing privileged or fair uses of copyrighted content in court. The obscurity of copyright law has perpetuated and propelled the misuse and abuse of copyright law by copyright conglomerates. The problem is exacerbated by the fact that users are involved far more than before in the creative process. Digitization, the Internet and user-generated culture has made everybody a potential author as well as a potential infringer. Rip, mix and burn is the way to enjoy and create culture for young generations. Therefore, extraordinarily technical legislation is more and more often enforced against the users without them being involved in the legislative process.

The public domain suffers also from legal uncertainty that is the effect of lack of harmonization among European national jurisdictions. In general, time, circumstances, and jurisdictions will influence the dividing line between public and private, so that "it will always remain impossible to determine with accuracy, at any given time, that which is public domain and that which is not."[398] As noted earlier, some of the sources of the public domain are inherently unpredictable. On this unpredictability rests the inevitable indeterminacy of the public domain. Lack of harmonization of the principles and criteria governing "that which is public domain and that which is not" will augment the unpredictability of the European public domain. As a consequence, users' prerogatives will be variable and ambiguous, transaction costs will rise, and the efficiency of the European Internal Market will be lowered.

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[395] Alexander Peukert, *A European Public Domain Supervisor*, INT'L REV. INTEL. PROP. COMP. L. (Forthcoming).

[396] JESSICA LITMAN, DIGITAL COPYRIGHT (Prometheus Books 2001); Jessica Litman, *Real Copyright Reform*, 96 IOWA L. REV. 1 (2010).

[397] Guibault, Evaluating Directive 2001/29/EC, *supra* note 157, at 10; *see also* GUIBAULT ET AL., STUDY ON DIRECTIVE 2001/29/EC, *supra* note 327, at 105.

[398] DEAZLEY, RETHINKING COPYRIGHT, *supra* note 63, at 131

Firstly, Europe's diverse legal frameworks heighten the indeterminacy of that portion of the European structural public domain that may be termed the ontological public domain. As we have noted earlier, the ontological public domain is defined by the application of the idea-expression dichotomy, the subject matters protected, the criteria for protection, either the requirement of originality or substantial investment, and the exhaustion doctrine. In Europe, subject matters of protection have been harmonized only with respect to new or controversial subject matters, such as software, databases and photographs.[399] In addition, the concept of originality is still largely unharmonized throughout Europe, although the recent *Infopaq* ECJ decision may have in part propelled the process of harmonization of the concept.[400] The *Infopaq* decision aligned the standard for creativity to the U.S. standard[401] by requiring that only original works are copyright protected "in the sense that they are their author's own intellectual creation". This seems to rule out from the concept of originality all those works where no hint of creativity is involved. The ECJ bases the decision on the *acquis communautaire* and the provisions regarding the originality of computer programs, databases and photographs in preexisting directives. However, fundamental differences between continental and common law system still remain, especially considering that the definition of the concept of originality in the United Kingdom is governed by "sweet of the brow" doctrines. Under UK common law, skill, judgment and labour are sufficient requirement for copyright protection, while creativity may be missing. COMMUNIA calls for a solution to this unpredictability through its policy Recommendation # 4.

The diversity of the European legal framework adds peculiar complexity to the issue of copyright duration as well. Despite the fact that efforts have been made toward harmonization, the intricacies of length of protection and copyright extension, such as war extensions, in national jurisdictions aggravate the tension between copyright protection and the public domain in Europe. As a consequence of those intricacies, the structural public domain remains an elusive concept due to the difficulty in Europe to know whether the duration of protection has expired. COMMUNIA policy Recommendation # 4 calls for further harmonization of rules of copyright duration to redress the tension, strengthen the public domain and public prerogatives.

Finally, lack of harmonization of exceptions and limitations in Europe plays a nefarious role for the public domain, as spelled out by Professor Lucie Guibault at the 1st COMMUNIA Conference.[402] Notwithstanding the Information Society Directive aimed at harmonizing exceptions and limitations, that goal most probably failed, and legal uncertainty still persists. All but one of the limitations in the regime set up by the Information Society Directive were optional, and the regime provides the Member States with ample discretion to decide if and how they implement

[399] *See* HUGENHOLTZ ET AL., THE RECASTING OF COPYRIGHT , *supra* note at 31-41 .

[400] *See* Case C-5/08, Infopaq International A/S v Danske Dagblades Forening, 2009 E.C.R. C-220 *available at* http://curia.europa.eu.

[401] *See* Feist Publications, Inc., v. Rural Telephone Service Co., 499 U.S. 340 (1991).

[402] *See* Guibault, Evaluating Directive 2001/29/EC, *supra* note 157, at 5-7.

the limitations.[403] This was a direct consequence of the highly controversial issue that the harmonization exceptions and limitations proved to be.[404] As foreseeable, the Member States have implemented the limitations very differently by construing them according to their own traditions and priorities. This variety of different rules applicable to a single situation across the European Community has an adverse effect on the functional public domain thus undermining the users' prerogatives. As a source of legal uncertainty, the lack of harmonization of exceptions and limitations raises transaction costs and especially troubles individual users. As mentioned, Europe has the opportunity to acquire a leading international role in the fair use industry, by taking full advantage from the European system of predefined exceptions and limitations, if contrasted with the more unpredictable United States case-by-case fair use model. To that end, however, it is of essence to improve harmonization of exceptions and limitations across European national jurisdictions. COMMUNIA policy Recommendation # 3 asks for harmonization and revision of exceptions and limitations to copyright in Europe.

Public Domain as the Very Goal of Copyright

As powerfully stated, "a vigorous public domain is a crucial buttress to the copyright system; without the public domain, it might be impossible to tolerate copyright at all."[405] Propertization and enclosure of the public domain should be opposed as contrary to the historical scope of copyright. The return of the commons, in fact, has a credible source in the history of copyright law.[406] Copyright law was born in Europe and elsewhere with broad civic purposes as well as strong anti-monopolistic sentiment.[407] Copyright was conceived as a limited monopoly to be granted to fulfill a higher end. The first copyright law, the Statue of Anne, embodied in the title its civic purpose by emphasizing the encouragement of learning.[408]

The construction of literary property departed from the fundamental principles of traditional property rights. The rational for that departure, for the limited term of copyright and the consequent emergence of the public domain, has to be found in the emergence of the "public sphere."[409] Jürgen Habermas identified this emergence in a social process giving birth to a new

[403] *See* Directive 2001/29/EC, supra note […], Art. 5.

[404] See GUIBAULT ET AL., STUDY ON DIRECTIVE 2001/29/EC, *supra* note 327, at 39-59 (discussing also the legislative history of the exception and limitation provisions included in the Directive).

[405] Litman, *The Public Domain*, *supra* note 80, at 977.

[406] *See* Karl-Nikolaus Peifer, The Return of the Commons – Copyright History as a Common Source, *in* PRIVILEGE AND PROPERTY. ESSAYS ON THE HISTORY OF COPYRIGHT 348 (Ronan Deazley, Martin Kretschmer and Lionel Bently eds., Open Book Publishers 2010).

[407] *See* Rose, *Nine-Tenths of the Law*, *supra* note 68, at 78-80.

[408] *See* Statute of Anne, 1709, 8 Ann., c. 19 (Eng.) ("An act for the encouragement of learning, by vesting the copies of printed books in the authors or publishers of such copies, during the times therein mentioned.")

[409] *See* Mark Rose, *The Public Sphere and the Emergence of Copyright: Areopagitica, the Stationers' Company, and the Statute of Anne*, 12 TUL. J. TECH. & INTELL. PROP. 123 (2009); Rose, *Nine-Tenths of the Law*, *supra* note 68, at 76.

sense of civil society as a collectivity distinct from the family or the state.[410] The emergence of the "public sphere" and the Enlightenment commitment to the circulation of knowledge drafted the agenda of the protection of creative artifacts. Protection of private interests was viewed as a means, not as an end in the pristine copyright-public domain discourse.

This is unquestionable in the United States where the natural rights view has been rejected or dramatically limited by utilitarian legal theories.[411] The words of Thomas Jefferson sum up the utilitarian view:

> [i]f nature has made any one thing less susceptible than all others of exclusive property, it is the action of the thinking power called an idea.... He who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me.[412]

Jefferson concludes by saying that intellectual property rights might be necessary and "society may give an exclusive right to the profit arising from [inventions] as an encouragement to men to pursue ideas which may produce utility."[413]

Although natural rights theory dominated the European early copyright debate, European legal theorists drafted arguments against the idea of copyright as a traditional property as strong as the Jefferson's utilitarian ones. The natural rights view was modified in Europe by the emergence of the discourse of the public domain propelled by a modern sense of civil collectivity and the Enlightenment idea of knowledge.

The British debate that followed the enactment of the Statute of Anne strongly argued in favor of the public value of cultural artifacts and against their propertization. In 1774, Lord Cadmen addressed the House of Lords by noting that "science and learning are in their nature *publici juris*, and they ought to be as free and general as air or water."[414] Lord Cadmen speech won the day. The House of Lords rejected the claim for a perpetual common law right of literary property and the public domain was finally confirmed. Few years later, in 1841, Lord Thomas Babington Maculay revived the anti-monopoly tradition before the House of Commons. Arguing against a greatly extended copyright term, Maculay remarked:

> Copyright is monopoly, and produces all the effects which the general voice of mankind attributes to monopoly. [. . .] It is good that authors should be remunerated; and the least

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[410] JÜRGEN HABERMAS, THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE: AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY 57-67 (Thomas Burger trans., MIT Press 1991)

[411] *See* BOYLE, THE PUBLIC DOMAIN, *supra* note 90, at 27;

[412] Letter from Thomas Jefferson to Isaac McPherson (August 13, 1813), *in* THE WRITINGS OF THOMAS JEFFERSON (Albert Ellery Bergh ed., The Thomas Jefferson Memorial Association of the United States 1907).

[413] *Id*.

[414] Donaldson v. Beckett, 2 Brown's Parl. Cases 129, 1 Eng. Rep. 837; 4 Burr. 2408, 98 Eng. Rep. 257 (1774) (Lord Cadmen)

> exceptionable way of remunerating them is by a 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.[415]

In France, at the time the concept of public domain is first mentioned in the French Decree of 1791, quite unexpectedly, the recognition and the enlargement of the public domain was as important as the protection of author's works.[416] The abused selective quotations from Le Chapelier are misleading of what the early *droit d'auteur* debate was in France.[417] In fact, Le Chapelier warned us that "the most sacred, the most legitimate, the most indisputable, and […] the most personal of all properties [, . . .] the work which is the fruit of a writer's thought" is "a property of a different kind from all the other properties."[418] Le Chapelier continued by arguing that, once the work is disclosed to the public, "the writer has affiliated the public with his property, or rather has fully transmitted his property to the public."[419] The author's work is, therefore, public property, whose disposal is under the dominion of the author for the term established by law "because it is extremely just that men who cultivate the domain of ideas be able to draw some fruits of their labors," Le Chapelier says.[420]

Moreover, it has been noted that much 19th century French copyright rhetoric anticipated modern cyber-libertarian arguments.[421] The *Conseiller d'Etat* Riché emphasized in 1866 that upon publication the work "is no longer the property of its producer" because "in the nature of things there is no literary property right in a work once it has been given over to the public."[422] Joseph Prudhon noted that "[i]ntellectual 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."[423]

The modern public domain project takes over from where Kames, Jefferson, Le Chapelier, and Maculay have left it. Modern and old advocates of the public domain remind us that the rhetoric

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[415] Thomas B. Macaulay, *A Speech Delivered in the House of Commons (Feb. 5, 1841)*, *in* VIII THE LIFE AND WORKS OF LORD MACAULAY 201 (Longmans, Green, and Co. 1897)

[416] *See* Guibault, *Wrapping Information in Contract*, *supra* note 69, at 89.

[417] *See* Ginsburg, *Une Chose Publique*, *supra* note 66, at 653 (discussing, in general, the truncation of Le Chapelier's quotations in property-enthusiasts' literature); *see also* Jane C. Ginsburg, *A Tale of Two Copyrights: Literary Property in Revolutionary France and America*, *in* OF AUTHORS AND ORIGINS: ESSAYS ON COPYRIGHT LAW 131, 144 (Brad Sherman and Alain Strowel eds., Oxford 1994) (discussing the origins of the truncation).

[418] Archives parlementaires (Assemblée nationale), January 13, 1791, at 210 (report of Le Chapelier)

[419] *Id*. at 212-213.

[420] *Id*.

[421] *See* Ginsburg, *Une Chose Publique*, *supra* note 66, at 656, *citing* Laurent Pfister, *La Propriété Littéraire est-elle une Propriété? Controverses sur la Nature du Droit D'auteur au XIXe Siècle*, 205 RIDA 117, 117-19 (July 2005)

[422] Rapport fait au nom de la Commission rassemblée pour la rédaction d'un projet de loi sur la propriété d'arts, de sciences et des lettres, par le Comte de Ségur, Moniteur du 28 mars 1837, *reprinted in* Fernand Worms, 2 Etude sur la Propriété Littéraire 228, 244, 249 (Lemerre 1878)

of property does not have it all. They remind us that the rhetoric of property has derailed the original civic and anti-monopolistic purpose of copyright law. Copyright law is meant to encourage learning, in the language of the Statute of Anne, and to promote progress, as the US Constitution formulation puts it.[424] Modern and old thinkers remind us that the public domain is not "an unintended by product, or 'graveyard' of copyrighted works but its very goal."[425]

A new politics of intellectual productions and creativity is sought that may re-define the hierarchy of priorities. Any public policy of creativity should promote the idea that "information is not only or mainly a commodity; it is also a critically important resource and input to learning, culture , competition, innovation and democratic discourse."[426] The agenda of the information society cannot be dictated by commercial interests above and beyond any of the fundamental values that shape our community. This approach would be a myopic understatement of the relevance of information in the information society. Therefore, "intellectual property must find a home in a broader-based information policy, and be a servant, not a master, of the information society."[427] If Europe is eager to take up a leading role in the digital environment as stated in the i2010 strategy and the Digital Agenda for Europe, it is time to depart from the idea that the only paradigm available is a politics of intellectual property. Instead, it is pivotal to develop a global strategy and a new politics of the public domain. Private incentive to creativity shall naturally follow like exceptions from the rule, to quote again the *Public Domain Manifesto*.

But there is more to it. We all are citizens of the public domain. As David Lange said, this citizenship is "arising from the exercise of creative imagination rather than as a concomitant of birth."[428] The public domain is the only place where we truly belong. The public domain encompasses all we are and all the prospects for our future. There is no idea of original authorship, even the most powerful, that would help us to locate our individuality as the public domain does. In this regard, the words of one of the most relevant thinkers and authors in Western culture are an enlightening manifesto of how far human citizenship of the public domain goes:

> [w]hat am I then? Everything that I have seen, heard, and observed I have collected and exploited. My works have been nourished by countless different individuals, by innocent and wise ones, people of intelligence and dunces. Childhood, maturity, and old age all have

[423] Joseph Prudhon, *Les Majorats Littéraires : Examen d'un Projet de Loi Ayant pur but de Créer, au Profit des Auteurs, Inventeurs et Artistes, un Monopole Perpétuel* (1862), *in* LE COMBAT DU DROIT D'AUTEUR 140, 152-53 (Jan Baetens ed., Les Impressions Nouvelles 2001)

[424] *See* Art. 1, Sec. 8, cl. 8, US Const.

[425] Birnhack, *supra* note 77, at 60.

[426] Samuelson, *Mapping the digital public domain*, *supra* note 62, at 171.

[427] *Id*., at 171-172.

[428] Lange, *Reimagining the Public Domain*, *supra* note 74, at 475.

> brought me their thoughts, their perspectives on life. I have often reaped what others have sowed. My work is the work of a collective being that bears the name of Goethe.[429]

The public domain is our country and our home. Enclosure and propertization of the public domain is the equivalent of depriving citizens of their country. It is the equivalent of locking people out of their home. Any policy oriented to the enhancement of creativity should be respectful of our citizenship of the public domain. Any such policy should nourish, protect, and promote the public domain. Any such policy should make, for every citizen, the public domain "a place like home, where, when you go there, they have to take you in and let you dance."[430]

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[429] Johann Wolfgang von Goethe, *cited in* Martha Woodmansee and Peter Jaszi, *The Law of Text: Copyright in the Academy*, 57 COLLEGE ENGLISH 769, 769 (1995).

[430] Lange, *Reimagining the Public Domain*, *supra* note 74, at 470.

ANNEX III

COMMUNIA POLICY RECOMMENDATIONS

One of the main goals of the COMMUNIA Network is to provide policy recommendations to strengthen the public domain in Europe. The COMMUNIA policy recommendations have been developed in accordance with the goals of the Europe 2020 Strategy,[431] Digital Agenda for Europe,[432] the i2010 Strategy,[433] and the Audiovisual and Media Policies.[434]

As one of the seven flagship initiatives of the Europe 2020 strategy, the Digital Agenda for Europe (hereinafter "Digital Agenda") is setting up several key principles and guidelines to redress many of the tensions challenging the full exploitation of the value of the digital public domain. Many of the key actions proposed by the Digital Agenda strengthen the conclusions and the call for policy actions put forward by COMMUNIA. In particular,

i. digitization of the European cultural heritage and digital libraries are key aspects of the recently implemented Digital Agenda of the European Union. The Digital Agenda notes that fragmentation and complexity in the current licensing system also hinders the digitisation of a large part of Europe's recent cultural heritage. Therefore,

   a. rights clearance must be improved;

   b. Europeana - the EU public digital library - should be strengthened and increased public funding is needed to finance large-scale digitisation, alongside initiatives with private partners;

[431] See Commission Communication, Europe 2020: A Strategy for Smart, Sustainable and Inclusive Growth, COM(2010) 2020 (March 3, 2010), *available at* http://europa.eu/press_room/pdf/complet_en_barroso___007_-_europe_2020_-_en_version.pdf.

[432] *See* Commission Communication, A Digital Agenda for Europe, COM (2010) 245 final (May 19, 2010), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0245:FIN:EN:PDF.

[433] *See* Commission Communication, i2010 – A European Information Society for growth and employment, COM(2005) 229 final (June 1, 2005), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2005:0229:FIN:EN:PDF.

[434] *See* Council Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive), 2010 O.J. (L 95) 1 (March 10, 2010), *available at* http://eur-lex.europa.eu/ LexUriServ/LexUriServ.do?uri=OJ:L: 2010:095:0001:0024:EN:PDF.

c. funding to digitisation projects is to be conditioned to general accessibility of Europe's digitised common cultural heritage online.

ii. The Digital Agenda calls for a simplification of copyright clearance, management and cross-licencing. In particular, the European Commission should create a legal framework to facilitate the digitization and dissemination of cultural works in Europe by proposing a directive on orphan works.

iii. The review of the Directive on the Re-Use of Public Sector Information to oblige public bodies to open up data resources for cross-border application and services has been prioritized by the Digital Agenda.

iv. Promoting cultural diversity and creative content in the digital environment, as an obligation under the 2005 UNESCO Convention, is an additional relevant goal of the Digital Agenda.

v. The Digital Agenda is also very much concerned with harmonization and simplification of laws by calling for the creation of a "vibrant single digital market" and promoting the necessity of building digital confidence as per the EU citizens' digital rights that are scattered across various laws and are not always easy to grasp.

In drafting these policy recommendations, COMMUNIA shares very much the vision of Neelie Kroes, European Commission Vice-President for the Digital Agenda, that "[c]ulture is the peak of human creativity and a source of collective strength" and "we want 'une Europe des cultures.'" The promotion of the public domain is empowering that "collective strength" and the European public domain is quintessential of "une Europe des cultures." The riches of digitization may multiply endlessly our cultural collective strength. However, new enlightened policy approaches and solutions are needed to reap the benefits of the present groundbreaking technological advancement. Again, the words of the European Commissioner Kroes powerfully convey the agenda of a modern digital Enlightenment that COMMUNIA aspires to propel with the help of the Commission.

> Just as artists have always travelled, to join sponsors, avoid wars or learn from masters far from home, now digital technology helps them to cross borders and break down barriers. Their work can be available to all. In a sense, the internet is the realisation of the Renaissance dream of Giovanni Pico della Mirandola: all knowledge in one place. Yet, it does not mean there are no more obstacles to sharing cultural and artistic works on the net. All revolutions reveal, in a new and less favourable light, the privileges of the gatekeepers of the "Ancien Régime". It is no different in the case of the internet revolution, which is unveiling the unsustainable position of certain content gatekeepers and intermediaries. No historically entrenched position guarantees the survival of any cultural intermediary. Like it or not, content gatekeepers risk being sidelined if they do not adapt to the needs of both creators and consumers of cultural goods. […] Today our fragmented copyright system is ill-adapted

> to the real essence of art, which has no frontiers. Instead, that system has ended up giving a more prominent role to intermediaries than to artists. It irritates the public who often cannot access what artists want to offer and leaves a vacuum which is served by illegal content, depriving the artists of their well-deserved remuneration. And copyright enforcement is often entangled in sensitive questions about privacy, data protection or even net neutrality. […] It may suit some vested interests to avoid a debate, or to frame the debate on copyright in moralistic terms that merely demonise millions of citizens. But that is not a sustainable approach. […] My position is that we must look beyond national and corporatist self-interest to establish a new approach to copyright.[435]

Additionally, the COMMUNIA policy recommendations have been inspired by the perspective and values epitomized in the *Public Domain Manifesto* produced within the context of COMMUNIA, the *Public Domain Charter* published by the Europeana Foundation, the *Charter for Innovation, Creativity and Access to Knowledge* released by the Free Culture Forum, and the *Panton Principles for Open Data in Science* launched by Open Knowledge Foundation. Further, the interplay with many other institutional and civil society endeavours sharing many of the goals of COMMUNIA has been a source of inspiration for the COMMUNIA policy recommendations. People from Europeana, LAPSI, EPSI, the Economic and Social Impact of the Public Domain in the Information Society project, the European DRIVER project, Creative Commons, etc. have repeatedly participated to COMMUNIA activities and meetings and greatly influenced and broaden the vision that is now embodied in the COMMUNIA policy recommendations.

The COMMUNIA policy recommendations intend to re-define the hierarchy of priorities embedded in the traditional politics of intellectual productions and creativity. Any public policy of creativity should promote the idea that "information is not only or mainly a commodity; it is also a critically important resource and input to learning, culture, competition, innovation and democratic discourse."[436] The agenda of the information society cannot be dictated by commercial interests above and beyond any of the fundamental values that shape our community. This approach would be a myopic understatement of the relevance of information in the information society. Therefore, "intellectual property must find a home in a broader-based information policy, and be a servant, not a master, of the information society."[437] In other words, the new policy for creativity envisioned by COMMUNIA shall revolve around the founding principle that the public domain is not "an unintended by product, or 'graveyard' of copyrighted works but its very

[435] Neelie Kroes, European Commission Vice-President for the Digital Agenda, A Digital World of Opportunities, speech delivered at the Forum d'Avignon - Les Rencontres Internationales de la Culture, de l'Économie et des Medias, Avignon, France, SPEECH/10/619 (November 5, 2010), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/10/619&format=HTML&aged=0&language=EN&guiLanguage=en.

[436] Pamela Samuelson, *Mapping the Digital Public Domain: Threats and Opportunities*, 66 LAW & CONTEMP. PROB. 147, 171 (2003).

[437] *Id*., at 171-172.

goal."[438] If Europe is eager to take up a leading role in the digital environment as stated in the i2010 strategy and the Digital Agenda for Europe, it is time to depart from the idea that the only paradigm available is a politics of intellectual property. Instead, it is pivotal to develop a global strategy and a new politics of the public domain. Private incentive to creativity shall naturally follow like exceptions from the rule, to quote again the *Public Domain Manifesto*.

COMMUNIA proposal for a new politics for the public domain shall encompass the review of the following strategic subject matters:

- Term of protection
- Copyright harmonization
- Exceptions and Limitations
- Misappropriation of public domain material
- Technological protection measures
- Registry system
- Orphan works
- Memory institutions and digitization projects
- Open Access to Research
- Public sector information
- Alternative remuneration systems and cultural flat rate

A politics for the public domain should (I) redress the many tensions with copyright protection by re-discussing term of protection, re-empowering exceptions and limitations, harmonizing relevant rules and adapting them to the technological change; (II) positively protect the public domain against misappropriation and technological protection measures; (III) propel digitization projects and conservation of the European cultural heritage by solving the orphan works problem and implementing a registry system; (IV) open access to research and public sector information; (V) promote new business models to enhance creativity including alternative remuneration systems and cultural flat rate.

On a final note, the recommendations included in the Report are meant to be principally addressed to the Commission. However, the recommendation portion of the Report has been envisioned as an agenda and stimulus to any other entity - Member States, national libraries, publishing industry, experts groups, etc. - that may promote or influence public domain related decisions. In addition, an inner integration between public domain projects at the European level and the international level is a goal recommended by COMMUNIA. The WIPO Development Agenda is very much concerned with the protection against appropriation and the promotion of the public domain through the implementation of recommendation 16 and 20 of the Agenda. The

[438] Michael D. Birnhack, *More or Better? Shaping the Public Domain*, *in* THE FUTURE OF THE PUBLIC DOMAIN: IDENTIFYING THE COMMONS IN INFORMATION LAW 60 (Lucie Guibault and P. Bernt Hugenholtz eds., Kluwer Law International 2006).

WIPO position on the public domain was presented at the 5th COMMUNIA Workshop in London[439] and the 7th COMMUNIA Workshop in Luxembourg.[440] In particular, many leading developing countries, such as Brazil, India, Egypt and Chile, are working for the promotion and the recognition of the public domain at the international level. The public domain may become the subject matter where the priorities of developing and developed countries meet. The European Union, strong of its networked and diversified efforts on promoting open access and the public domain, may lead the way in integrating the efforts of developed and developing countries towards the emergence of an affirmative protection for the public domain. This may be easily done by strengthening a more qualified presence of the European Union during discussion and negotiations of public domain issues within the WIPO Development Agenda framework. Hopefully, this may lead to more direct multi-party negotiations to build consensus on future international legal instruments. The integration between the efforts of developing and developed countries toward the promotion of the public domain may also counter-balance potential tensions developed within the negotiations of other pieces of international IP legislation, such as ACTA. The COMMUNIA network is a practical example of the successful workability of a diverse international network that was propelled by the institutional and civic society efforts of the European Union.

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***Recommendation # 1**: The term of copyright protection should be reduced. The excessive length of copyright protection combined with an absence of formalities is highly detrimental to the accessibility of our shared knowledge and culture.*

The term of copyright protection should be reduced. There is no evidence that copyright protection that extends decades beyond the life of the author encourages the production of copyright protected works. Instead the requirement to obtain permission for works by authors that have long died are one of the biggest obstacles for providing universal access to our shared culture and knowledge. Given the above the term of copyright protection for new works (that is works created after the term-reduction) should be reduced.

Additional Proposals

However, the Commission and the Parliament may investigate the possibility of following alternative strategies, including

- ✓ limiting the term of protection to the artist's life;
- ✓ making the rights related to such an extended term not transferable to record producers (labels);

[439] *See* Richard Owens, WIPO and Access to Content: The Development Agenda and the Public Domain, presentation delivered at the 5th COMMUNIA Workshop, London, United Kingdom (March 27, 2009)

- ✓ regulating that the extended period will be managed under liability rules (rights to remuneration) via collecting societies (ensuring that sound recordings will become available);
- ✓ regulating contracts during the existing term (e.g. extending the "use it or lose it" provision to the current term of protection).

Relevant Actions to Be Taken by:

- ❖ European Commission (EC)
  - ✓ Introduce legislation that reduces the term of copyright protection across the member states.
  - ✓ Advocate term-reduction in international fora such as WIPO
- ❖ European Parliament (EP)
  - ✓ Introduce legislation that reduces the term of copyright protection across the member states.
- ❖ Member States (MS)
  - ✓ Introduce legislation that reduces the term of copyright protection across the member states.
  - ✓ Advocate term-reduction in international fora such as WIPO

***Recommendation # 2**: The proposed term extension of copyright protection for performers and sound recordings will harm the public domain and must not be implemented.*

[The Policy Recommendations # 2 was initially delivered to the Commission on December 17, 2010 as deliverable *DPolicy1 – First set of policy recommendations regarding the digital public domain*.]

The Commission and Member States should carefully review expert opinions on this topic, as detailed at the end of this recommendation. Term extension will not create additional incentives to create but will make access to large parts of our audiovisual heritage more difficult than it already is. Instead of pursuing this special interest driven legislation the divergence in the length of protection between allotted to performers and authors should be taken as an opportunity to reevaluate the effectiveness of the current term of protection. Such a reevaluation must take into account the COMMUNIA policy recommendations #1 and #8.

[440] *See* Richard Owens, WIPO Project on Intellectual Property and the Public Domain, presentation delivered at the 7th COMMUNIA Workshop, Luxembourg (February 1, 2010)

Background

In July 2008, the European Commission adopted a proposal (COM(2008) 464/3) intended to extend the term of protection for performers and sound recordings. Currently these rights are protected for 50 years starting from the recording (or "fixation") or from the performance, as the case may be. According to the proposal, the term would have been extended to 95 years. According to the Commission, the aim of the proposal was to bring performers' protection more in line with that currently available to authors (expiring 70 years after their death). More generally, the extended term was deemed necessary to enable performers to earn a decent income during their lifetime.

In April 2009 the proposal was voted in Parliament, which essentially approved it, with the following main planks: (1) the extension of the term of protection from 50 to 70 years (instead of the proposed 95); (2) the creation of a fund for the benefit of session players amounting to 20% of record labels' offline and online sales revenue coming from the term extension; (3) a "use it or lose it" clause allowing performers to get back control of their rights after 50 years, in cases in which producers are not marketing their recording; and (4) a newly introduced "clean slate" provision, preventing the use of previous contractual agreements to deduct money from the additional royalties granted to performers from the term extension.

Overall, the Parliament reduced the quantitative significance of the term extension (from 45 to 20 years) and slightly reinforced the provisions aimed at ensuring the benefits from the extension could accrue in a significant way to performers. However, these amendments did not substantially address the reasons because of which all the independent studies which examined the term extension proposal came to the conclusion that the proposed measures fail to reach each and all of their intended goals (see below).

That is the case because of several orders of reasons:

(**1**) The proposal fails to provide for additional income effectively accruing to the pockets of performers, since performers lack bargaining power vis-à-vis their more powerful counterparts, the labels (to which they frequently assign all their rights through so called buy-out agreements). Instead of addressing this issue, Art. 10a of the draft directive still provides that agreements between performers and phonogram producers entered into before the date of the term extension would remain in force, "in the absence of clear contractual indications to the contrary".

This conclusion is not affected by the provision whereby a minimum of 20% of the additional proceeds received by phonogram producers would be allocated to a collecting-society managed social fund. This benefit would accrue only to session musicians and, moreover, its calculation method is at best uncertain. The relevant proceeds are the ones generated through the reproduction, distribution and making available of the performances, with the exclusion of the important income deriving as a result of communication to the public (e.g. by radio broadcasting).

(**2**) The proposal does not even supply any effective incentive to phonogram producers and to labels. This is so for the very fundamental reason that the proposal also applies to existing works and no provision adopted today may provide any incentive towards investments which were already decided and made in the past. Even if we look at the future only, the need for an additional prospective incentive is hardly proved. Indeed, the common intuition whereby digital technology has decreased rather than increased the costs necessary to set up a performance and to fixate it has been confirmed by available empirical evidence [Helberger et al 2008].

(**3**) The Commission explicitly relates the need for a term extension to the fact that the music industry is suffering from illegal peer-to-peer file sharing and need to be compensated. However, it is hard to see how the extension of the term may in any way deter illegal distribution of music.

(**4**) The case made by the proposal whereby European label companies should be put on an equal footing with their US counterparts, which recently were granted an extension of terms similar to the one proposed for the EU, is technically flawed and misguided. Indeed, in the field of IP, including in connection with the neighbouring rights here considered, which in the US are described as copyright in sound recordings, the principle of National Treatment applies. Now, as a result of this principle, European labels currently are not in any way disadvantaged in comparison to their US counterparts. EU labels are treated in the US in the same way as their American competitors, which, in turn, are treated as European labels in the EU. Quite apart from this, all the "majors" are US labels; therefore any term extension would disproportionately benefit US firms to the detriment of EU consumers.

(**5**) In specific connection with the issue of the assessment of the costs the legislative measure would involve, the argument advanced by the Commission whereby the term extension would not entail additional costs, as a survey has shown that the price of in copyright music does not exceed the cost of music out of copyright, is disingenuous and self-contradictory. In its Explanatory Memorandum, the Commission mentions that the term extension would generate additional income for phonogram producers in the range of over Euro 750 million. Now, it would appear that it is impossible that additional income accrues to one group of beneficiaries, if nobody pays for it. Indeed, the cost of the term extension for consumers would be in the same order of magnitude (around Euro 1 billion).

Overall, it is clear that the proposed measures fail to reach each and all of their intended goals, hence the term extension, from 50 to 70 years, will harm Europe's culture and economy.

Objections and Critiques

(**1**) *The term extension may be the only hope of a decent leaving for old performers*.

Answer. As it has been already discussed, the proposal fails to provide for convincing mechanisms guaranteeing that any additional income will effectively accrue to the pockets of performers, since they lack bargaining power vis-à-vis the labels. This shortcoming can be solved only by mandatory provisions reserving a share of the overall proceeds deriving from a given

performance to the benefit of performers themselves, e.g. by means of some form of 'equitable remuneration'.

Moreover, the term extension may not offer a chance to redistribute from young to old artists (a characteristic that could be desirable in a system aiming at saving "retired" performers from poverty): instead, it may actually redistribute from the living to the dead artists, that is from actual creators to the estates of dead creators. In order to avoid that, at least, the term extension should be limited to the duration of performers' life.

(**2**) *The Commission claims that consumer prices are not going to rise and that there is empirical evidence confirming this expectation*.

Answer. There is indeed an empirical study that concluded that there was no systematic difference between prices of in-copyright and out-of copyright sound recordings.[441] However, the absence of a statistically significant difference between the prices of in-copyright and out-of copyright sound recordings in that study may be an effect of the limited set of available data. Moreover, this study, prepared for the British Phonographic Industry, may hardly be seen as an independent analysis. In fact, a major analysis of the scope and nature of the public domain in Europe currently performed by Rightscom for the European Commission seem to confirm that richer datasets show clear evidence of the impact on prices of performer's rights [forthcoming: the study will be quoted in the final version of the recommendation].

(**3**) *Both under the new term and under the current term of protection, the majority of the recordings from the '60s would not really enter into the public domain, since their authors' copyright would still be in place. Hence, the expiration of related rights would impoverish performers, but one can expect little or no impact on prices for final users*.

Answer. Indeed, under current rules, most copyright protected works would keep enjoying protection even though no term extension is granted. Typically the expiry of the current 50 years term for the protection of performers' and phonogram producers' right would bring into the public domain von Karajan's performances of Beethoven, not Beatles' songs. The latter still enjoy copyright protection; most of the times classical music does not. This means that, if the current situation were to remain unchanged, the dissemination of a sizeable chunk of non-classical music by means of CD, DVDs or digital tracks as distributed through i-stores would in the near future require consent only from copyright holders (i.e. authors of music and lyrics; their heirs and assigns such as music publishers; collecting societies) to the exclusion of holders of performers' and phonogram producers' rights. This might lead to a benefit for the public, as economic theory predicts that the costs for end users tend to go up, when dissemination requires the authorisation of multiple categories of rightholders.

[441] PRICE WATERHOUSE COOPERS, THE IMPACT OF COPYRIGHT EXTENSION FOR SOUND RECORDINGS IN THE UK (April 28, 2006) (a report of the Gowers Review of Intellectual Property prepared on behalf of the British Phonographic Industry), *available at* http://www.ipo.gov.uk/report-termextension.pdf.

That the public would benefit from the confirmation of the current set of legal rules is not an unlikely proposition, if one considers that, in digital distribution, out of the typical 99 cents paid by end users to i-Tunes, 30 go to i-Tunes itself, 14 to authors and all the other 55 flow to labels. This means that the expiry of the final term of protection of neighbouring rights may entail a remarkable promise in specific connection with digital distribution.

(**4**) *We should take into account the effect of new technologies (in particular of the Internet) on the music industry: they are suffering from illegal peer-to-peer file sharing and the like and should be compensated!*

Answer. Apart from the fact that it is hard to see how the extension of the term may in any way deter illegal distribution of music, the recording industry was quick enough to increase its legal prerogatives in connection with the legislative changes which accompanied the digital revolution. Phonogram producers, as such and as assignees of performers, successfully bargained for the legislative grant of a new exclusive right, the right of making available interactively performed and fixated works (Art. 3(2) of Directive 29/2001). This result was obtained at a time in which collecting societies representing authors had reasons to question whether their mandate from rightholders also extended to this interactive feature. This was by itself a quite remarkable power shift to the advantage of the labels. This does not however mean that the power shift should also extend to the term of protection and that labels should thereby be put in a position to stake claims also for a time horizon in which, under current rules, all exclusive rights are due to concentrate in the hands of the authors and of their successors and assigns.

In reviewing this policy recommendations, the European Commission, the Parliament and the governments of member states of the European Union should

(**i**) consider that any change to the scope of copyright protection, including any expansion of exclusive rights or right to remuneration, needs to take into account, and possibly measure and quantify, the effects on the Public Domain; and

(**ii**) consider carefully the independent evidence against copyright term extension. The following independent studies commissioned by Member States, by the European Commission or undertaken by independent research centres recommended against any extension of the term of protection for sound recordings. The list includes statements and letters from European academics.

- Gowers Review of Intellectual Property: Included commissioned review of the Economic Evidence Relating to an Extension of the Term of Copyright in Sound Recordings (2006), Centre for Intellectual Property and Information Law (CIPIL) – http://www.hm-treasury.gov.uk/gowers_review.htm
- P. BERNT HUGENHOLTZ ET AL., THE RECASTING OF COPYRIGHT & RELATED RIGHTS FOR THE KNOWLEDGE ECONOMY (November 2006) (report to the European Commission, DG Internal Market), *available at* http://www.ivir.nl/publications/other/IViR_ Recast_Final_Report_2006.pdf;
- Professor David Newbery, FBA, University of Cambridge, letter to Commission President Barroso (April 10, 2008);

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- Joint Press Release by European Academics - The Proposed Directive for a Copyright Term Extension (11 March 2009), *available at* http://www.cippm.org.uk/downloads/Press%20Release%20Copyright%20Extension.pdf.

Relevant Actions to be taken by:

- European Commission (EC)
  - ✓ Withdraw the proposal to extend the term of protection for performers and sound recordings.
  - ✓ Initiate a review process that examines the effectiveness of current terms of protection
- European Parliament (EP)
- Member States (MS)

- ✓ Withdraw the proposal to extend the term of protection for performers and sound recordings.

***Recommendation # 3**: Harmonize Exceptions and Limitations of the Copyright Directive among the Member States and open up the exhaustive list so that the user prerogatives can be adapted to the ongoing technological transformations.*

The limited list of Exceptions and Limitations established by the copyright directive limits the possibilities to adjust the copyright system to the rapid pace of technological innovation that shapes how we interact with copyright protected works. This not only limits the abilities of citizens to gain access to our shared culture and knowledge but also imposes restrictions innovative business models and as a result economic growth. In the absence of an open ended exceptions such as a fair use clause it is imperative that exceptions and limitations can be adjusted to the needs of society at large en innovative economic actors in particular.

Relevant Actions to Be Taken by:

- ❖ European Commission (EC)
  - ✓ Review the copyright directive by opening up the exhaustive list of exceptions and limitations. Examine the possibility of introducing a fair use provision.
- ❖ European Parliament (EP)
  - ✓ Review the copyright directive by opening up the exhaustive list of exceptions and limitations. Examine the possibility of introducing a fair use provision.
- ❖ Member States (MS)

***Recommendation # 4**: As a pre-requisite for unlocking the cultural, educational and economic potential of the public domain, identification of works being in the public domain should be made easier and less resource consuming by simplifying and harmonizing rules of copyright duration and territoriality.*

The rules for establishing the duration of the term of protection of individual works have become so complex that it is almost impossible to establish with certainty whether a work is protected by copyright (including all neighboring rights) or whether it is in the public domain. This complexity of the system makes it very difficult to automatically calculate the status of a work. Two factors have contributed to this situation: the divergence of legislation between de different member states and a large number of (national) exception clauses. This situation can only be remedied by intervention on the European level, preferably by simplifying the rules and harmonizing them across Europe.

The work on public domain calculators has highlighted the incredible complexity of copyright term rules which makes it very difficult to determine the copyright status of individual works. This

means that one of the biggest obstacles to positively identifying public domain works (and thus unlocking their cultural, educational and economic potential) lies in the cumbersome process of determining the term of copyright protection.

4.1. The COMMUNIA network has contributed to the development of tools for identifying the copyright status of works. as these tools in their current form require human input in order to determine the status of works, the Commission should consider supporting work on future versions of these tools that can automatically determine the copyright status of works based on publicly available bibliographic metadata.

Relevant Actions to Be Taken by:

- European Commission (EC)
  - ✓ Introduce legislation that simplifies the rules to determine the term of protection and further harmonizes these rules across the member states.
  - ✓ Supporting work on public domain calculators
- European Parliament (EP)
- Member States (MS)

***Recommendation # 5**: Digital reproductions of works that are in the Public Domain must also belong to the Public Domain. Use of works in the public domain should not be limited by any means, either legal or technical.*

The internet enables the widespread re-use of digital reproductions of works of authorship whose copyright protection has expired. The public Domain status of these works means that there is no owner of the works who can impose restrictions on their reuse. At the same time the owners of the physical works (such as heritage institutions) often feel that they are entitled to control over digital reproductions as well and that they can impose restrictions on their reuse. However digitization of Public Domain works does not create new rights over it: works that are in the Public Domain in analogue form continue to be in the Public Domain once they have been digitized.

Relevant Actions to Be Taken by:

- European Commission (EC)
  - ✓ Ensure that cultural heritage institutions that receive funding for digitization projects or contribute to Europeana do not impose undue restrictions on the reuse of Public Domain works.
  - ✓ Promote the explicit marking of works that are in the public domain.
- European Parliament (EP)

- Member States (MS)
- Memory Institutions (MI)
  - ✓ Refrain from implementing business models that rely on exclusive control over public domain works.

***Recommendation # 6**: Any false or misleading attempt to misappropriate Public Domain material must be declared unlawful. False or misleading attempts to claim exclusivity over Public Domain material must be sanctioned.*

In order to preserve the integrity of the Public Domain and protect users of Public Domain material from inaccurate and deceitful representations, any false or misleading attempts to claim exclusivity over Public Domain material must be declared unlawful. There must be a system of legal recourse that allows members of the public to get sanctions imposed on anyone attempting to misappropriate Public Domain works.

Relevant Actions to Be Taken by:

- European Commission (EC)
  - ✓ Introduce legislation that makes false or misleading attempts to claim exclusivity over Public Domain material unlawful.
- European Parliament (EP)
- Member States (MS)

***Recommendation # 7**: The Public Domain needs to be protected from the adverse effects of Technical Protection Measures. Circumvention of TPMs must be allowed when exercising user rights created by Exceptions and Limitations or when using Public Domain works. The deployment of TPMs to hinder or impede privileged uses of a protected work or access to public domain material must be sanctioned.*

Technical Protection Measures such as Digital Rights Management systems can have adverse effects on the Public Domain. Access restrictions imposed on works can remain in effect even after a work has passed into the public domain and over time Protections Measures can become orphaned making access to protected works impossible. Most current TPM 'solutions' do not take into account user rights created by Exceptions and Limitations thereby limiting their effectiveness and undermining the inherent checks and balances of the copyright system. Given the above, circumvention of TPMs must be allowed when exercising user rights created by Exceptions and Limitations or when using Public Domain works.

Background

The crucial driver of the modern drift towards commodification of the public domain is a mix of technology and legislation. Technology and architecture of control have a central role in the commodification of information, culture, and the public domain. Technology was able to appropriate and fence informational value that was previously unowned and unprotected. That value was appropriated through the adoption of technological protection measures (TPMs) or digital right management (DRM) systems to control access and use of creative works in the digital environment. TPMs served as a tool to empower copyright holders to control any use of copyrighted works, including uses that previously could not be restrained.

The seal on a policy of control was set by the introduction of the so called anti-circumvention provisions. The WIPO Internet Treaties first,[442] the Digital Millennium Copyright Act in the United States[443] and the Directive 29/01/EC in Europe later,[444] enacted provisions aimed to forbid the circumvention of copyright protection systems. In addition, the law banned any technology that may be designed to circumvent technological anti-copy protection measures.

Anti-circumvention provisions may have negative effects both on the structural and the functional public domain. The foremost concern with this legal and technological bundle is that DRM and anti-circumvention provisions, as they are programmed so far, can make copyright perpetual. The legally protected encryption, in fact, would continue after the expiration of the copyright term. Because circumventing tools are illegal, users will be incapable of accessing public domain material fenced behind DRM technologies. The persistence of technological protection measures after the expiration of copyright will impoverish the digital public domain greatly by precluding new works to enter it.

A more subtle point is related to the danger that the architecture of the networks will make the law irrelevant. This change will affect greatly our ecology of creativity and the public domain. In a very obvious way, DRM technologies will affect the public domain by restricting or completely preventing fair dealings, privileged and fair uses. DRM technology cannot make any determination of purpose that is necessary to assess whether a use is privileged or not. In the absence of that determination copyright will be technologically enforced regardless of the fairness of the use, the operation of a copyright exception or limitation, or a private use. It is worth noting that, as long as technological protection measures will prevent the application of exceptions allowing copying in news media and quotations, they may be viewed also as hampering freedom of expression.

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[442] *See* WIPO Copyright Treaty, Art. 11 (December 20, 1996), *available at* http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html#P87_12240.

[443] *See* Digital Millennium Copyright Act of 1998 § 103, 17 U.S.C.A. § 1201 (a) (1) (A) (West 2008), *available at* http://www.copy right.gov/legislation/pl105-304.pdf.

[444] *See* Council Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society, Art. 6(1), 2001 O.J. (L 167) 10, 17 (May 22, 2001), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ. do?uri=OJ:L:2001:167:0010:0019:EN:PDF.

As matter of the fact, the pristine wording of the WIPO Internet Treaties stated that sanctions had to be applied to the circumvention of effective technological measures that restrict acts in respect of works of authorship which are not authorized by their authors or permitted by law. Nevertheless, few regional implementations make any specific exceptions to the anti-circumvention provisions when digital rights management technologies restrict acts that are permitted by the law. In particular, European law, as embodied in Art. 6(4) of Directive 2001/29/EC, more narrowly provides that

> Member States shall take appropriate measures to ensure that rightholders make available to the beneficiary of an exception or limitation provided for in national law [. . .] the means of benefiting from that exception or limitation, to the extent necessary to benefit from that exception or limitation and where that beneficiary has legal access to the protected work or subject-matter concerned.

This is to say that rights holders should make available the means to benefit from copyright exceptions and limitation, fair uses, and fair dealings, but if they do not, any circumvention is still punishable. A team of scholars from the Institute for Information Law at the University of Amsterdam (IViR) has noted that "for even if article 6(4) creates an obligation to provide the means to exercise a limitation, this obligation is imposed on rights owners and does not give users any authority to perform acts of circumvention themselves." Circumventing a digital right management technology that restricts acts permitted by the law is a civil wrong, and perhaps a crime, as such. This conclusion is supported by the preparatory works that introduced the Directive 2001/29/EC and the definition of technological measures. The Council made clear that

> Art. 6(1) protects against circumvention of all technological measures designed to prevent or restrict acts not authorized by the rightholder, regardless of whether the person performing the circumvention is a beneficiary of one of the exceptions provided for in Article 5.[445]

Further, according to paragraph 4 of Art. 6(4) of Directive 2001/29/EC, the obligation of the rights holder, and Member States, to provide users with the means to exercise exceptions and limitations against TPMs, "shall not apply to works or other subject-matter made available to the public on agreed contractual terms in such a way that members of the public may access them from a place and at a time individually chosen by them." Given that Recital 53 of the Directive 2001/29/EC specifically excludes "non-interactive forms of online use" from this last provision, the obligation to provide users with the means to exercise exceptions and limitations against TPMs shall not apply to any work transmitted "on demand" over the Internet.

[445] *See* Common Position No. 48/2000 of 28 September 2000 adopted by the Council, with a view to adopting a Directive of the European Parliament and of the Council on the harmonisation of certain aspects of copyright and related rights in the information society, 2000 O.J. (C 344) 01, 19 (December 1, 2000), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2000:344:0001:0022:EN:PDF.

Additionally, the open-ended nature of the Information Society Directive exceptions and limitations regime further concerns users in terms of lack of legal certainty. Article 5 of the Directive 2001/29/EC provides mostly for optional limitations and grant the Member States ample discretion on how implement the limitations. As foreseeable, this regime has led to dissonant implementations in the Member States. In particular, Article 5(2) c) of the Directive 2001/29/EC, permitting specific acts of reproduction by public libraries and archives, has been transposed inconsistently throughout the European Union. Some countries have applied the limitation for purposes of preservation and restoration to all types of works. Some other countries have restricted the limitation to specific works. Finally, other countries have not implemented the limitation at all. Such a diverse legal framework is an hindrance to digitization projects by heightening the level of legal uncertainty and the consequential transaction costs. To this regard, Professor Lucie Guibault has noted at the 1st COMMUNIA Conference that

> All in all, the regime of limitations and technological protection measures established by the Information Society Directive does not appear to offer the necessary legal certainty to support the deployment of a cross-border European library project as advocated in the Recommendation on the digitisation and online accessibility of cultural material and digital preservation. It is fair to conclude that the goals of the Information Society Directive are not compatible with those of the Recommendation on digitisation and accessibility of material.[446]

Proposals

The described legal framework is at odds with users prerogatives as well as the public interest to preserve and exploit European cultural heritage. Those tensions need to be redressed as a matter of urgency, especially in light of their long standing inclusion in the European agenda for the information society. In 2005, the i2010 strategy already prioritized the issue of TPMs by providing that "the Commission will also seek to establish a comprehensive approach for effective and interoperable digital rights management." Effective and inter-operable digital rights management should necessarily take into proper account the characteristics of the digital public domain and users' prerogatives.

Preliminary, it is worth noting that the European protection against circumvention activities goes further than any other international legislation. It is the only legislation that does not require an express link to copyright infringement and prohibits acts of circumvention of both access control and copy control mechanisms. Therefore, firstly, following the requirements of the WIPO Internet Treaties, any comprehensive approach related to digital right management should redress this extreme approach of the European legislation by précising that

[446] Lucie Guibault, Evaluating Directive 2001/29/EC in the light of the Digital Public Domain, paper presented at the 1st COMMUNIA Conference (July 1, 2008), at 11 [hereinafter Guibault, Evaluating Directive 2001/29/EC].

(i) acts of circumvention are prohibited only in circumstances where there is an express link between circumvention and copyright infringement; and

(ii) the prohibition on commercial dealing in circumventing devices applies only if those commercial dealings constitute preparatory acts of circumvention that results in copyright infringement.

In general terms, to protect the public domain against the adverse effect of TPMs, there are two options: either (**i**) legalizing circumventions to exercise users' rights and use public domain works or (**ii**) outlawing TPMs that restrict public domain and privileged uses. Indeed, the optimal solution to strengthen the public domain and protect users' prerogatives, would be to adopt both measures by legalizing "good" circumvention and outlawing "bad" TPMs. Implementing both measures would be advisable because circumventing TPMs is, however, an action entailing some degree of technological literacy. Absent a positive protection against structural and functional public domain enclosure operated by TPMs, the large majority of the users will be left without an effective redress. TPMs will prevent in practice privileged uses and access to public domain works to all those users short of the required technical literacy to circumvent TPMs. The fact that circumvention is lawful is of no avail if sanctions are not in place to discourage private parties from fencing the public domain and making extremely burdensome for the users to access it.

In this regard, COMMUNIA draws attention to other jurisdictions that are taking seriously the impact of DRM on the public domain and are arranging the necessary countermeasures. Europe should not lag behind. A recent proposed update to Brazilian copyright law is aimed to assure that technological protection measures have time limited effects that will not surpass the expiration of copyrights over the work and do not hinder or impede fair or privileged uses of a protected work. To foster this goal, the new proposed legislation shall allow the circumvention of DRM technologies to make fair or privileged uses of a work or in cases where the copyright has expired.[447] Further, the proposal establishes sanctions for hindering or preventing the users from exercising their fair dealing prerogatives, through whatever means, thus including DRM technologies.[448]

On a final note, further action to be undertaken to protect the public domain against TPMs may entail the harmonization of the observatory bodies monitoring the use of TPMs.[449] Several

[447] *See* Lei No. 9610, de 19 de Fevereiro de 1998, Atualizada com as mudanças da Minuta de Anteprojeto de Lei que está em Consulta Pública [updated with the changes to the draft law which is under public consultation] (June 12, 2010), at Art. 107, IV, § 2 and 3, *available at* http://www.cultura.gov.br/consultadireitoautoral/lei-961098-consolidada [hereinafter Lei 9610/98 Atualizada].

[448] *Id*., at Art. 107, IV, § 1, a) and b).

[449] *See* LUCIE GUIBAULT ET AL., STUDY ON THE IMPLEMENTATION AND EFFECT IN MEMBER STATES' LAWS OF DIRECTIVE 2001/29/EC ON THE HARMONISATION OF CERTAIN ASPECTS OF COPYRIGHT AND RELATED RIGHTS IN THE INFORMATION SOCIETY 124-133 (February 2007) (report prepared for the European Commission, DG Internal Market, ETD/2005/IM/D1/91), *available at* http://www.ivir.nl/publications/guibault/Infosoc_report_2007.pdf.

European Member States have implemented the obligation provided by Art. 6(4) of the Directive 2002/29/EC by setting up observatories to provide individual redress in case TPMs prevented the exercise of a limitation or exception on copyright and related rights. Since the diversity, or the absence all together in some jurisdictions, of these monitoring bodies has disharmonizing effects, one option would be to set up a pan-European observatory body in the area of TPMs and copyright. However, more analysis is needed to determine the powers that may be attributed to the pan-European observatory body and whether it should co-exist with the national bodies.

Relevant Actions to Be Taken by:

- European Commission (EC)
  - ✓ Propose legislation to allow the circumvention of TPMs when exercising user rights created by Exceptions and Limitations or when using Public Domain works.
  - ✓ Propose legislation to positively protect the public domain by sanctioning the use of TPMs that prevent user's fair dealing or the use of public domain material
  - ✓ Harmonize TPMs monitoring bodies by setting a pan-European observatory body
- European Parliament (EP)
  - ✓ to allow the circumvention of TPMs when exercising user rights created by Exceptions and Limitations or when using Public Domain works.
  - ✓ Amend the Directive 2001/29/EC or enact new legislation to positively protect the public domain by sanctioning the use of TPMs that prevent user's fair dealing or the use of public domain material
- Member States (MS)
  - ✓ Amend national legislations to allow the circumvention of TPMs when exercising user rights created by Exceptions and Limitations or when using Public Domain works.
  - ✓ Propose legislation to positively protect the public domain by sanctioning the use of TPMs that prevent user's fair dealing or the use of public domain material
- (CHI)
  - ✓ Refrain from using TPMs that limit access to Public Domain works.
  - ✓ Make available the means of benefitting from exceptions and limitations

***Recommendation # 8**: In order to prevent unnecessary and unwanted protection of works of authorship, full copyright protection should only be granted to works that have been registered by their authors. Non-registered works should only get moral rights protection.*

One of the unintended consequences of the near universal access to electronic publishing platforms is an increase in the amount of works that are awarded copyright protection even though their authors do not require or desire this protection. This extension of protection threatens to undermine the value and effectiveness of protection for works where copyright protection is necessary and desired. Given the above full copyright protection should only be granted to works that have been registered by their authors. Non-registered works should only be granted moral rights protection. This recommendation requires the introduction of a registration system. Such a system needs to be accessible and transparent.

Background

In the field of copyright, the current default level of protection is "all rights reserved" for the maximum possible duration allowed by the law. No formalities are required, not even a statement that a certain work is copyright protected. This "copyright default rule" automatically reserving all rights to the author has been generalised thanks to the Berne Convention and the TRIPS Agreements.

Information and communication technologies – and the Internet in particular – make everybody a potential author and self-publisher. Instead of following the traditional "long route," passing through several professional intermediaries, new authors are able to reach the public directly or through new "lightweight" service providers. The revolution represented by the so-called Web 2.0 makes the phenomenon of authors publishing through new "short routes" even more significant. Users generate a growing percentage of creative material and the distinction between authors and their audience becomes increasingly blurred.[450] Additionally, creating by remixing existing works becomes increasingly common and socially valuable, thanks to new technologies.[451]

In such a setting, in order to make possible many of the most productive forms of distributed and incremental creation enabled by information and communications technologies (e.g. wiki websites), thousands of authors should understand the complex working of current copyright law and of copyright licenses. In fact, in absence of any licensing, intellectual creations cannot be reproduced or altered in any way. However, there are transaction costs associated to the

[450] *See* Yochai Benkler, *From Consumers to Users: Shifting the Deeper Structures of Regulation Toward Sustainable Commons and User Access*, 52 FED. COMM. L. J. 561 (2000); see also Liu, J., *Copyright Law's Theory of the Consumer*, 44 B. C. L. Rev. 397 (2003).

[451] *See* LESSIG, LAWRENCE, REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY (Bloomsbury 2008); DON TAPSCOTT AND ANTHONY D. WILLIAMS, WIKINOMICS: HOW MASS COLLABORATION CHANGES EVERYTHING (Atlantic Books 2008); Stefan Thomke and Eric Von Hippel, *Customers as Innovators: A New Way to Create Value*, 80 HARV. BUS. REV. 74 (2002).

understanding of copyright licenses. Moreover, these transaction costs concern both authors and their readers/users. The latter are affected in two ways: as potential authors, since they have difficulties in understanding what they can and cannot do; and as simple users/readers, since they cannot legally share/archive freely accessible online material without asking for permission.

Additionally, a significant amount of new authors publishing over the Internet does not need all the exclusive rights provided by copyright and it is almost undisputed amongst economists that granting an unnecessary exclusive right reduces social welfare.

Indeed, more and more new authors recognize that this situation is suboptimal and see the benefits of more open and sharing oriented approaches. Hence, the use of open licenses is quantitatively significant and growing. For instance, in November 2009, the Creative Commons Monitor project calculated that more than 207 million Web pages has been licensed under some Creative Commons Public License. Moreover, a single service provider specialized in pictures, Flickr, offers more than 120 million pictures under open copyright licenses and Wikipedia, the free online encyclopedia, offers more than 3,175,000 articles in English, more than 1 million in German, etc.

That said, and despite the success of open licenses and their promotions through communities and social networks, the majority of creators remain (and probably will remain) unaware of copyright related issues. This locks-in a huge amount of intellectual creations because of the "all rights reserved" default rule provided by the existing copyright regime.

As suggested by some scholars, a potential solution to the weaknesses of the current copyright regime would be a setting in which published works are not copyrighted, unless the authors comply with some formalities which should be very simple, cheap and non-discriminatory with respect to national/foreign authors.[452] With the principal aim of preventing unnecessary protection, the Copyright 2.0 proposal is a specific articulation of such an alternative copyright default rule. The proposal was first presented at the 2nd COMMUNIA Conference by Professor Marco Ricolfi.[453]

Proposal

Change the existing default level of copyright protection (i.e. Adopt Copyright 2.0). "Copyright 2.0" identifies a new kind of copyright having the basic features detailed below.

(**1**) Traditional copyright, or Copyright 1.0, is still available.

[452] See Christopher Sprigman, *Reform(aliz)ing Copyright*, 57 STAN. L. REV. 485 (2004); LAWRENCE LESSIG, FREE CULTURE: THE NATURE AND FUTURE OF CREATIVITY (Bloomsbury Academic 2005); LAWRENCE LESSIG, THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD (Vintage Books 2002).

[453] See Marco Ricolfi, Copyright Policies for Digital Libraries in the Context of the i2010 Strategy, paper presented at the 1st COMMUNIA Conference, Louvain-la-Neuve, Belgium (July 1, 2008); *see also* Marco Ricolfi, Making Copyright Fit for the Digital Agenda (forthcoming 2011)

(**2**) In order to be enjoyed, Copyright 1.0 has to be claimed by the creator at the onset, e.g. by inserting a copyright notice, such as ©, as done by the United States before accessing the Berne Convention:

- copyright 1.0 should be claimed before the first publication of a work;
- at certain conditions, the Copyright 1.0 notice could also be added after the first publication (possibly during a specified and short grace period, e.g. one year)
  - ✓ to minimize transaction costs, late notices should only have the effect of giving exclusivity against certain classes of unauthorized uses, especially commercial uses;
  - ✓ the effect of a late notice would be similar to the one currently achieved by a Creative Commons (CC) NonCommercial license, such as CC BY-NC.

(**3**) If no notice is given, Copyright 2.0 applies and this gives creators mainly one right, the right to attribution:

- the "default" legal status of creative works could be similar to the one of works licensed under a (CC) Attribution (BY) public license;
- the attribution requirement should impose the minimum possible burden on subsequent creators, taking into account the specificities of digital distributed and incremental creation;
- the possibility of reserving some more rights to authors under Copyright 2.0 is worth exploring, if this significantly decreases the likelihood that Copyright 1.0 is chosen by a large proportion of authors:
  - ✓ the Commission should fund empirical studies and surveys to determine the minimum set of rights that authors publishing over the Internet want/need to reserve to themselves;
  - ✓ in any case, non-commercial uses should always be allowed, including for remixing purposes (i.e. to create derivative works): hence, the default legal status of works under Copyright 2.0 could be similar to a CC BY-NC license.

(4) The Copyright 1.0 protection given by the original notice is deemed withdrawn after a specified period of time (e.g. the 14 years of the original copyright protection), unless an extension period (e.g. of another 14 years or longer) is formally requested:

- in order to reduce transaction costs and ease the problem of orphan works, the extension request must be entered in a copyright register kept by an authority of some kind;
- the registration procedure should be accessible from the Internet and the main registration data should be freely accessible over the Internet.

The idea of a registration system for creative works is increasingly gaining momentum. The establishment of a voluntary register of copyright is endorsed also by the Gowers Review.[454] Today, technological advancement is making easier to set up an efficient registration system for creative works. State-of-the art technology enables the creation of global digital repositories that ensure the integrity of the digital works and the identity of the person or entity claiming copyright. Concurrently, modern technology renders the corresponding filings user-friendly and inexpensive.

Two options may be available in implementing a registration system. Firstly, registration could be set as a precondition for protection. In this scenario registration will function as a legal tool as well as a technical tool.[455] As a legal tool, registration would provide the creator of a work with the full enjoyment of ownership rights. In contrast, absent registration, the default level of protection would be limited to moral rights, as described earlier. As a technical tool, registration will enable searches on the status of any creative work. Alternatively, if one were to consider that making registration into a global registry, rather than notice, a precondition for protection, is too harsh a requirement, then registration might at least be required as a precondition of extension of protection.

The need to develop open standards for copyright registries interoperability has been also discussed in connection with COMMUNIA meetings. In particular, some efforts to propel the discussion over interoperability of copyright registries have been achieved at the 3rd Creative Commons Technology Summit that was conducted in parallel to the 2nd COMMUNIA conference in Turin.[456] As a related project, the Open Standards for Copyright Registries Interoperability Group (OSCRI) was set up as a "platform for the study and development of standardisation rules and protocols in the copyright field, with the main aim of creating a scenario where all copyright registries are compatible between each other."[457] Commercial enterprises that were members in the COMMUNIA project, which are already offering copyright registries to clients in the creative industry sector, are working towards the goal of interoperability. An open standard and open metadata would allow also private parties to manage the registration process and offer search services, as an additional governance options to public authorities or monopolies for running registries.

Theoretically, the introduction of any kind of formalities to enjoy copyright protection may require an amendment of the Berne Convention. Likewise, consent of state members would be required under Art. 9 of TRIPs.

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[454] *See* ANDREW GOWERS, GOWERS REVIEW OF INTELLECTUAL PROPERTY, Recommendation 14b (HM Treasury, November 2006), *available at* http://www.ipo.gov.uk.

[455] See 3rd COMMUNIA Workshop, Amsterdam, October 20-21, 2010, http://communia-project.eu/ws03.

[456] *See* Creative Commons, Creative Commons Technology Summit 2009-06-26, http://wiki.creativecommons.org/Creative_Commons_Technology_Summit_2009-06-26.

[457] *See* OSCRI, Open Standards for Copyright Registries Interop, WIkidot OSCRI Site, http://oscri.org.

Objections and Critiques

(**1**) *We survived until now with the "all rights reserved" copyright default, why should we change?*

Answer – The desirability of a "no formalities" approach has been dramatically reduced by the growing importance of intellectual creations directly published by their authors typically over the Internet.

(**2**) *The proposed approach may be appropriate or neutral for amateurs publishing over the Internet, but it creates additional costs for professional authors and their publishers or intermediaries. What guarantees that the net effect is positive for the society?*

Answer – Insofar the only formality to receive the current standard of full protection for one's published works is explicitly to state "© Copyright: all rights reserved", no author is likely to have her incentives lowered by such "formality". In particular, many professional authors and firms active in the field of copyrighted work production should not even change the copyright notice they are already using.

(**3**) *You are saying that several authors are already adopting open copyright licenses: why should the legislator intervene, if "the market" is already taking care of this issue?*

Answer – Some authors are aware of the fact that using open licensing schemes is not only in the best interest of society as a whole, but also in their own best interest as individuals. However, in order to "opt out" of the current copyright default rule, authors publishing over the Internet need to incur useless transaction costs. In fact, in order to reap the full benefit of the possibilities offered by the digital online environment, not only authors, but also all the readers/users (who are also potential subsequent authors) should become aware of the working of copyright and of open licensing schemes. In this setting, changing the current default rule entails lower costs for society (see also the answer 4).

(**4**) *The proposed approach just shifts costs between non-professional and professional creators*.

Answer – Even if the cost of "opting out" from the new Copyright 2.0 default rule were the same for each user as the cost of opting out from Copyright 1.0 (and this is not the case: see answer 2), making professional authors explicitly deviating from the (new) Copyright 2.0 default rule would be more efficient, since traditional (i.e. following the "long route") professional authors/intermediaries are a minority (in absolute quantitative terms) of publishing authors (considering all the authors publishing through the Internet).

(**5**) *If many authors are already publishing on the Internet and they are not even aware of holding copyright over their creations, why should we bother changing the existing default rule for copyright protection? They will not complain in any case, as they do not even know/care about their rights.*

Answer – This critique is not conclusive, since – ex post – the same authors could understand that "their rights have been violated" and – for opportunistic reasons or as a "matter of principle" – this could create an incentive to litigate. In other words, the existence of an "all rights reserved" default level of protection creates scope for significant transaction costs and increases the likelihood of litigations. In particular, this situation may discourage any professional reuse of creations which are freely accessible over the Internet (Morando 2010). This situation is similar to the one preventing the effective reuse of orphan works (Brito & Dooling 2005).

Relevant Actions to Be Taken by:

- European Commission (EC)
  - ✓ Introduce legislation that reserves full copyright protection for works that have been registered by their authors
  - ✓ Set up a pan-European registration system for works or authorship and related rights.
- European Parliament (EP)
  - ✓ Introduce legislation that reserves full copyright protection for works that have been registered by their authors
- Member States (MS)
  - ✓ Introduce legislation that reserves full copyright protection for works that have been registered by their authors

***Recommendation # 9**: Europe needs an efficient pan-European system that guarantees users full access to orphan works. Both mandatory exceptions and extended collective licensing in combination with a guarantee fund should be explored. Any due diligent search requirements should be proportionate to the ability of the users to trace the rights holders.*

The orphan works problem is in urgent need of a solution that unlocks the benefits of access to these works. Across Europe digitization projects are undertaken that produce large quantities of digitized versions of orphan works that are not available to the general public. Neither the authors nor the general public benefit from the orphan work status of these works. Since most mass digitization projects are undertaken by publicly funded memory institution any 'solution' for this problem that includes a diligent search requirement amounts to large scale waste of public resources. Instead of establishing diligent search guidelines mandatory exceptions and extended collective licensing in combination with a guarantee fund need to be explored to allow for the non-commercial dissemination of orphan works.

Background

Orphan works are those whose rightsholders cannot be identified or located and, thus, whose rights cannot be cleared. At the EU level, two major consultations were organized to define the actual size of the orphan works problem.[458] The consultations indicated that the issue is perceived by several audiovisual and cultural institutions as a real and legitimate problem. In any event, neither of these consultations has generated firm quantitative data. According to a recent study published by the European Commission ("Vuopala Study"), a conservative **estimate** puts the number of orphan books in Europe at 3 million.[459] However, some estimates put the number of orphan woks well over forty per cent of all creative works in existence.[460] Another recent study has calculated volumes of Orphan Works in collections across the UK's public sector well in excess of 50 million.[461] For certain specific works as photographs, the volumes of orphan works seem to increase. The Gowers Review of Intellectual Property claims that from the total collection of photographs of 70 institutions in the UK, around 19 million, the percentage of photographs where the author is known, other than for fine art photographs, is 10 per cent.[462]

Publishers, film makers, museums, libraries, universities, and private citizens worldwide face daily insurmountable hurdles in **managing risk and liability** when a copyright owner cannot be identified or located. Too often, the sole option left is a silent unconditional surrender to the intricacies of copyright law. Many historically significant and sensitive records will never reach the public. Society at large is being precluded from fostering enhanced understanding. Daily, steadily, small missing pieces of information prevent the completion of the puzzle of life. The Vuopala Study shows, then, even higher percentage for other categories of works, especially among photographs, and audiovisual works. In addition, the report shows cumbersome transaction costs in the right clearance process. Besides the material costs of clearing rights, the transaction costs of the clearing process are extraordinarily augmented by the resources needed. Absent efficient

[458] *See* European Commission Staff Working Paper on Certain Legal Aspects Relating to Cinematographic and Other Audiovisual Works, SEC (2001) 619 (11 April 2001), *available at* http://ec.europa.eu/avpolicy/docs/reg/cinema/cinedoc_en.pdf; European Commission Staff Working Document, Annex to the Communication from the Commission 'i2010: Digital Libraries', Questions for Online Consultation, SEC (2005) 1195 (September 30, 2005), *available at* http://ec.europa.eu/information_society/activities/digital_libraries/doc/communication/annex2_en.pdf.

[459] *See* ANNA VUOPALA, ASSESSMENT OF THE ORPHAN WORKS ISSUE AND COST FOR RIGHTS CLEARANCE 4 (May 2010) (report prepared for the European Commission, DG Information Society and Media, Unit E4, Access to Information) [hereinafter VUOPALA, ORPHAN WORKS AND RIGHTS CLEARANCE]

[460] British Library, Intellectual Property: A Balance - The British Library Manifesto (September 2006) http://www.bl.uk/news/pdf/ipmanifesto.pdf.

[461] *See* NAOMI KORN, IN FROM THE COLD: AN ASSESSMENT OF THE SCOPE OF 'ORPHAN WORKS' AND ITS IMPACT ON THE DELIVERY OF SERVICES TO THE PUBLIC (June 9, 2009) (report prepared for Strategic Content Alliance and Collections Trust), *available at* http://www.jisc.ac.uk/media/documents/publications/infromthecoldv1.pdf

[462] *See* ANDREW GOWERS, GOWERS REVIEW OF INTELLECTUAL PROPERTY (HM Treasury, November 2006), *available at* http://webarchive.nationalarchives.gov.uk/+/http://www.hm-treasury.gov.uk/gowers_review_index.htm;

sources of rights information, the clearing process can take from several months to several years. In many instances the cost of clearing rights may amount to several times the digitization costs.

The cultural outrage of orphan works is a **by-product of copyright expansion, retroactive effect of some copyright legislation, and intricacies of copyright law**. As a consequence of copyright temporal extension many works that have been out of print for decades may still be under copyright protection. The long out-of-print status of copyrighted work makes more and more difficult to retrieve the necessary data to clear rights in others' works. In case of highly perishable cultural artifact, such as audio and video recordings, the tragedy for our cultural heritage is even more substantial because old works with great historical value will root away and will be lost forever.

A study from the Institute for Information Law at Amsterdam University (IViR) has identified the increased interest in the issue of orphan works in the following factors: (1) the expansion of the traditional domain of copyright and related rights, (2) the challenge of clearing the rights of all the works included in a derivative works, (3) the transferability of copyright and related rights, and (4) the territorial nature of copyright and related rights. In particular, in Europe the problem gets further tangled up by the difficulty to know whether the duration of protection has expired. The complicacies related to copyright term extensions, such as war extensions, blur the contours of the public domain, therefore making more uncertain and costly any attempt of clearing copyrights. This is a further intricacy burdening the clearance of so called "orphan works" in Europe.

However, the exact dimension of the orphan works problem can be only conveyed by looking at the **relation with digitization projects**. The unfulfilled potentials of digitization projects worsen the cultural outrage of orphan works in terms of loss of opportunities and value that may be extracted from the public domain. If the temporal extension of copyright has exacerbated and augmented the dimension of the orphan works problem, only the acquired capacity of digitizing our entire cultural heritage has fully unveiled the immense loss of social value that orphan works may cause. The Vuopala Study strongly supports this conclusion. The study gathered responses from twenty-two institutions involved in the digitization of works. The high number of orphan works together with high transaction costs may represent an overwhelming burden for several digitization projects. The study concludes that a title by title rights clearance can be prohibitively costly and complex for many institutions. The enhanced capacity of digitization and Internet distribution to unlock the humanities' riches has been urging a solution to the orphan works problem and a more efficient rights clearing process. The relevant social value of digitization of our cultural heritage in terms of openness and accessibility may be potentially vanished by copyright strictures. So far, groundbreaking technological advancement, which could open our society up to unprecedented cultural exposure, is hindered by an outmoded legal framework.

The **European institutions** are aware of the potential loss of social and economic value if the orphan works problem remains unsolved. As the Commission noted, "there is a risk that a

significant portion of orphan works cannot be incorporated into mass-scale digitisation and heritage preservation efforts such as Europeana or similar projects."[463] Digitization of the European cultural heritage and digital libraries are key aspects of the i2010 strategy and the recently implemented Digital Agenda of the European Union. Therefore, the necessity to resolve once for all the hindrance that orphan works represent for digitization projects is now on top of the European agenda. To deal with the economic, legal and technological issues raised by the i2010 strategy, the EU Commission published a Recommendation[464] and set up a High Level Expert Group on the European Digital Libraries Initiative ("HLEG"). The Recommendation and the HLEG tackled the key challenges of digital preservation, web harvesting, orphan works and out of print works. The Copyright Subgroup of the HLEG unanimously concluded that a solution to the issue of orphan works is desirable, at least for literary and audiovisual works.[465]

Proposals

A solution for the orphan works problem should be investigated across few different co-ordinates: harmonization and mutual recognition of the status of orphan works at the national, regional and international level, registries or networks of information to facilitate the identification of rightholders, and the implementation of other tools including mandatory exceptions, extended collective licences or guarantee funds.

Harmonization and **mutual recognition** are the first goal to be achieved. Séverine Dusollier argues in a similar fashion in the Scoping Study on Copyright and Related Rights and The Public Domain prepared for the Word Intellectual Property Organization:

> [th]e 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 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.[466]

A very similar position is shared by the HLEG as summed up by Professor Marco Ricolfi, chairman of the High Level Expert Group on the European Digital Libraries initiative and

[463] Commission Communication on Copyright In The Knowledge Economy, at 5-6, COM (2009) 532 final (October 19, 2009), *available at* http://ec.europa.eu/internal_market/copyright/docs/copyright-infso/20091019_532_en.pdf.

[464] *See* Commission Recommendation 2006/585/EC on the Digitisation and Online Accessibility of Cultural Material and Digital Preservation, 2006 O.J. (L 237)28 (August 31, 2006).

[465] *See* i2010 European Digital Libraries Initiative, High level Expert Group, Copyright Subgroup, Report on Digital Preservation, Orphan works and Out-of-Print Works. Selected Implementation Issues (April 18, 2008), at 5, *available at* http://ec.europa.eu/information_society/newsroom/cf/itemlongdetail.cfm?item_id=3366.

[466] SÉVERINE DUSOLLIER, SCOPING STUDY ON COPYRIGHT AND RELATED RIGHTS AND THE PUBLIC DOMAIN 69 (prepared for the Word Intellectual Property Organization) (April 30, 2010)

COMMUNIA member, at the 1st COMMUNIA Conference. Speaking of the Report delivered by the HLEG, Professor Ricolfi noted that

> [f]irst, it was assumed that a minimum of harmonisation is required between the rules concerning clearance of orphan works applicable in the 27 different Member States. This harmonisation should particularly concern the issue of establishing what are the relevant diligent search criteria for each sector. Second, it was noted that under EU law minimum harmonisation usually leads to mutual recognition. Indeed, once the basic rules to determine what is due diligence in the search of rightholders of orphan works are established, what is deemed acceptable in one Member State should be held to be correspondingly acceptable in all the other Member States, or, in other words, should have cross-border effect. [. . .] Third, the consequences of compliance with due diligence guidelines should be established at Member States' level. The mechanisms may again vary from one Member State to the other. One Member State may consider resorting to extended collective licenses (ECL). [. . .] Of course, other Member States might adopt different mechanisms [. . .] In either case, what is important is that an orphan work which gets the green light under any of these mechanisms in any Member State should also be considered cleared in all the other 26 Member States. [. . .] EU law does indeed come into the picture; but only to the extent it resorts to the time honoured "minimum harmonisation-mutual recognition" principle to give EU-wide interoperability to solutions in all other respects based only on a combination of contractual arrangements and Member States legislation.[467]

A solution to the orphan works problem encompasses also new modes of **collecting data** to facilitate the identification of rightholders. Many projects aim at (**i**) increasing supply of rights management information to the public, (**ii**) developing converging and unique sources of information, (**iii**) establishing specific databases for orphan works. The project ARROW (Accessible Registries of Rights Information and Orphan Works), http://www.arrow-net.eu, is a notable European example. The project includes national libraries, publishers, writers' organisations and collective management organisations and aspires at finding ways to identify rightholders and rights, clear the status of a work, or possibly acknowledge the public domain status of a work in Europe. ARROW aims in particular to support the European Community i2010 Digital Library Project and Europeana. The project is expected to scale up in order to cover all the print material, textual and non-textual, and afterwards also photographic and audiovisual works.[468]

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[467] Marco Ricolfi, Copyright Policies for Digital Libraries in the Context of the i2010 Strategy, paper presented at the 1st COMMUNIA Conference, Louvain-la-Neuve (July 1, 2008), at 5-6; *see also* Marco Ricolfi, *Digital Libraries in the Current Legal and Educational Environment: A European Perspective*, *in* GLOBAL COPYRIGHT. THREE HUNDRED YEARS SINCE THE STATUTE OF ANNE, FROM 1709 TO CYBERSPACE (Lionel Bently, Uma Suthersanen and Paul Torremans eds., Edward Elgar 2010)

[468] *See* Neelie Kroes, European Commission Vice-President for the Digital Agenda Addressing the orphan works challenge, speech delivered at the IFRRO (The International Federation of Reproduction Rights Organisations) launch of ARROW+ (Accessible Registries of Rights Information and Orphan Works towards Europeana), Brussels, Belgium,

Proposals to create either an **European register** of works **or a network of registries** will help minimizing the orphan works problem as well. The implementation of some sort of copyright registry is endorsed by COMMUNIA policy Recommendation # 8.

The implementation of a system of **diligent search** is advocated by institutional proposal both in Europe and the United States. In particular, the HLEG has made the following recommendation to tackle the orphan works problem:

> Member States are encouraged to establish a mechanism to enable the use of such works for non-commercial and commercial purposes, against agreed terms and remuneration, when applicable, if diligent search in the country of origin prior to the use of the works has been performed in trying to identify the work and/or locate the rightholders.[469]

The mechanisms in the Member States need to fulfil prescribed criteria: (**i**) the solution should be applicable to all kinds of works; (**ii**) a bona fide/good faith user needs to conduct a diligent search prior to the use of the work in the country of origin; (**iii**) best practices or guidelines specific to particular categories of works can be devised by stakeholders in different fields. The system should be based on a reciprocity so that Member States will recognise solutions in other Member States that fulfil the prescribed criteria. As a result, material that can be lawfully used in one Member State would also be lawfully used in another.

The HLEG has also godfathered a **Memorandum of Understanding on Orphan Works**, a form of self-regulation subscribed by 27 stakeholders' organisations representing European right holders and cultural institutions. They agreed to observe a set of diligence guidelines when searching for rightholders, and that a work can only be considered orphan if the relevant criteria, including the documentation of the process, have been followed without finding the rightholders.

However, the solution proposed by the Commission is tailor-made for achieving the cross-border effect needed in the Digital Libraries' Initiative. Most likely, the measure would be a far less efficient solution if applied to the orphan works problem at large, especially the individual re-use of orphan works. To that end other solutions should be investigated and evaluated. In any event, as indicated by the HLEG, the mechanism to enable the use of orphan works for commercial and non-commercial purposes should be established at the Member States' level. The chosen mechanism may vary from one Member State to the other but clearance in one Member State will extend to all the Members of the European Union. To that end, EU law should step in only to set up a principle of mutual recognition and minimum harmonization to national solutions.

SPEECH/11/163 (March 10, 2011), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/11/163&format=HTML&aged=0&language=EN&guiLanguage=en.

[469] i2010 European Digital Libraries Initiative, High Level Expert Group on Digital Libraries, Final Report, Digital Libraries: Recommendations and Challenges for the Future (December, 2009), *available at* http://ec.europa.eu/information_society/activities/digital_libraries/doc/hleg/reports/hlg_final_report09.pdf.

As a possible solution, **COMMUNIA would firstly look into extended collective licensing and mandatory exceptions, both tied to a guarantee fund**.

Extended collective licenses are applied in various sectors in Denmark, Finland, Norway, Sweden and Iceland with the following basic characteristics.

(**1**) The system combines the voluntary transfer of rights from rightholders to a collective society with the legal extension of the collective agreement to third parties who are not members of the collective society. However, to be extended to third parties of the same category, the collective society must represent a substantial number of rightholders.

(**2**) In any event, the legislation in Nordic countries provides the rightholders with the option of claiming individual remuneration or opting out from the system.

(**3**) Therefore, with the exceptions of the rightholders who opted out, the extended collective licence automatically applies to (i) all domestic and foreign rights owners, (ii) deceased rights holders, in particular where estates have yet to be arranged, and (iii) unknown or untraceable rights holders.

(**4**) A user may obtain a licence to use all the works included in a certain category with the only exception of the opted out works. Re-users of existing works will achieve the legal certainty that all the orphan works will be covered by the licence, also in consideration of the fact that opted out works instantly cease to be orphan.

The introduction of a **mandatory exception for orphan works** is an alternative solution for the orphan works problem. The most comprehensive proposal for an exception to copyright to permit the use of an orphan works has been outlined in a paper for the Gowers Review by the British Screen Advisory Committee (BSAC). [470] This proposal would set up a compensatory liability regime.

(**1**) Preliminary, to the end of triggering the exception: (**i**) a person is requested to have made 'best endeavours' to trace the copyright owner of a work; supposedly 'best endeavours' will be judged against the particular circumstances of each case; (**ii**) the work has to be marked as used under the exception to alert any potential rights owners.

(**2**) If a right owner emerges, (**i**) he is entitled to claim a 'reasonable royalty' to be agreed by negotiation, rather than sue for infringement; if the parties cannot reach agreement, a third party should step in to establish the amount to be paid; (**ii**) the terms of use of the formerly orphan work would need to be negotiated between the user and the rights owner in the usual way.

(**3**) However, users should be allowed to continue using the work that has been integrated or transformed into a derivative work, provided payment of the reasonable royalty and sufficient attribution.

[470] BRITISH SCREEN ADVISORY COUNCIL, COPYRIGHT AND ORPHAN WORKS (August 31, 2006) (paper prepared for the Gowers Review).

It is worth noting that Article 5 of the EU Copyright Directive, which has harmonized limitations and exceptions in all Member States of the EU, should be amended to allow this type of exception.

Finally, a guarantee fund may be combined with the above mentioned solutions.

Relevant Actions to be taken by:

- European Commission (EC)
  - ✓ Propose a directive for access to orphan works that will set up a principle of mutual recognition and minimum harmonization to national solutions to orphan works
- European Parliament (EP)
  - ✓ Enact a directive for access to orphan works that will set up a principle of mutual recognition and minimum harmonization to national solutions to orphan works
- Member States (MS)
  - ✓ Enact legislation to make extended collective licences enforceable *erga omnes*.

***Recommendation # 10**: Memory Institutions must be enabled to fulfill their traditional function in the online environment. In order to be able to provide access to knowledge and culture they must benefit from compulsory and harmonized exceptions and limitations that allow them to make their collections available online for non-commercial purposes.*

Memory Institutions must be able to fulfill their duty to provide access to knowledge and culture by benefitting from harmonized exceptions and limitations (copyright, but also other IPR), solutions for orphan works and standardized and harmonized licensing terms. To ensure the functioning of Memory Institutions the term of copyright protection must not be extended.

Memory Institutions must keep in mind the long-term costs of the lifecycle of cultural content, including sustainability costs and skilled personnel. Public-private partnerships must be aimed at opening up the content, public investments must at least ensure access, preferably under an open license or directly into the Public Domain.

In order for publicly funded memory institutions to maintain their position in the digital age they need to be enabled to make available their collections online for non-commercial purposes. Across Europe these organisations hold an unrivaled wealth of knowledge and information related to our shared knowledge and culture. Preventing these organisations from effectively making their collections available online means delegating them to second class status and devaluing the long term investments embodied by these organisations. Existing exceptions and limitations benefitting memory institutions need to be broaden to allowing institutions to make available those works that they hold in their collections for non-commercial purposes.

Relevant Actions to Be Taken by:

- European Commission (EC)
  - ✓ Develop a policy framework that allows European cultural heritage institutions to properly function in the online environment
- European Parliament (EP)
  - ✓ Develop a policy framework that allows European cultural heritage institutions to properly function in the online environment
- Member States (MS)
  - ✓ Develop a policy framework that allows European cultural heritage institutions to properly function in the online environment
- Memory Institutions

***Recommendation # 11**: Digitization projects that receive public funding must - at the minimum - ensure that all digitized content is publicly available online. Allowing for the free redistribution of digitized content should be considered since it is beneficial for the sustainability of the access to digitized cultural heritage.*

When public funding is used for digitization projects it needs to be assured that the public benefits from these efforts. At the minimum this means that digital versions need to be available online for consultation by the public that has paid for the digitization effort. Public funding bodies should prioritize digitization projects that will increase the amount of our shared and culture that is available to the public. Memory institutions that receive public funding should consider making available digitized collections with as little restrictions as possible. Free availability of collections that includes the free redistribution and reuse of the digital artifacts will result in wider availability and reduce the risks inherent to centralized storage

Relevant Actions to Be Taken by:

- European Commission (EC)
- European Parliament (EP)
- Member States (MS)
- Memory Institutions (MIs)
  - ✓ Memory Institutions should consider allowing free redistribution of digitized content.
- Public Funding Bodies (PFBs)
  - ✓ Prioritize digitization projects that result in an increase the amount of our shared and culture that is available to the public.

***Recommendation # 12**: Access to copyright protected works for education and research purposes must be facilitated by strengthening existing exceptions and limitations and broadening them to cover uses outside of formal educational institutions. All publicly funded research output and educational resources must be made available as open access materials.*

The current exceptions and limitations intended to promote education and research activities assume that such activities are carried out within dedicated educational or research institutions. Pervasive access to the Internet and policy objectives like lifelong learning mean that growing parts of learning and research are taking place outside of such institutions. The exceptions and limitations intended to promote education and research need to take this reality into account and need to be broadened to facilitate all educational and research activities regardless of their institutional settings. In addition all publicly funded educational materials as well as publicly funded research output should be available without restrictions on its reuse. What has been paid for by the public must be available to the public.

Background

The COMMUNIA action has been putting a lot of emphasis on access to knowledge (A2K) and open access to education and research resources. To that end, the COMMUNIA Working Group 1 has been devoted to the investigation of the role of the public domain for education and scientific research. The COMMUNIA WG1 has noted:

> Education and science are at the core of modern knowledge based societies. The information technologies have created new opportunities in making the scientific and educational materials and publications available to the society as a whole, through universities as well as both formal and informal life-long learning. A robust Public Domain - that includes the structural Public Domain, voluntary commons and user prerogatives as defined in the Public Domain Manifesto - provides the necessary basis for the legitimate needs of education and science.

Similarly, access to educational and scientific information has been the subject of detailed analysis at several COMMUNIA meetings. In particular, the 2nd COMMUNIA Conference, *Global Science and the Economics of Knowledge Sharing Institutions*, addressed contractually constructed commons and public domain initiatives with particular emphasis on academic research. The **8th COMMUNIA Workshop**, ***Education of the Public Domain: The Emergence of a Shared Educational Commons*** focused on open educational resources (OER) and several OER projects. Finally, the **3rd COMMUNIA Conference**, ***University in Cyberspace: Reshaping Knowledge Institutions for the Networked Age***, touched extensively upon open access in scholarship and research while discussing the most significant issues facing universities in the networked age.

However, COMMUNIA advocacy of open access is not an isolated one. Open access as a new norm in scholarship and research has been promoted globally, as the worldwide celebration of the fourth edition of the open access week on October 18-24, 2010 may witness.[471]

As a general rule, open access refers to a publishing model where the research institution or the party financing the research pays for publication and the article is then freely accessible. In particular, open-access refers to free and unrestricted world-wide electronic distribution and availability of peer-reviewed journal literature.[472] The Budapest Open Access Initiative uses a definition that includes free reuse and redistribution of "open access" material by anyone.

The major propulsion to open access at the European level was given by the so called Berlin Conferences.[473] The first Berlin Conference was organized in 2003 by the Max Planck Society and the European Cultural Heritage Online (ECHO) project to discuss ways of providing access to research findings. Annual follow-up conferences have been organized ever since. The most significant result of the Berlin Conference was the *Berlin Declaration on Open Access to Knowledge in the Sciences and Humanities* ("Berlin Declaration"), including the goal of disseminating knowledge through the open access paradigm via the Internet.[474] The Berlin Declaration has been signed by hundreds of European and international institutions.

Since the inception of the open-access initiative in 2001, there are now more than five thousand open access journals.[475] In addition, several leading international academic institutions have endorsed open-access policies[476] and have been working towards mechanisms to cover open-access journals' operating expenses.[477] At the 2nd COMMUNIA Conference in Turin, Bernt Hugenholtz strategized that universities and research institutes should discourage or prohibit 'all rights' transfers to publishers, promoting instead open access practices.

Together with research articles, data, teaching materials, and the like, the importance of open access models extends also to books. Millions of historic volumes are now openly accessible from various digitization projects such as Europeana, Google Books, or Hathi. In addition, many recent volumes are also available as open access from a variety of academic presses, government and nonprofit agencies, and other individuals or groups.

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[471] *See* Open Access Week, http://www.openaccessweek.org.

[472] *See* Budapest Open Access Initiative, Budapest, Hungary, February 14, 2002, http://www.soros.org/openaccess/index.shtml.

[473] *See* Open Access at the Max Planck Society, Berlin Conferences, http://oa.mpg.de/lang/en-uk/berlin-prozess/berlin-konferenzen.

[474] *See* Berlin Conference, Berlin, October 20-22, 2003, *Berlin Declaration on Open Access to Knowledge in the Sciences and Humanities* (October 22, 2003), *available at* http://oa.mpg.de/lang/en-uk/berlin-prozess/berliner-erklarung.

[475] See DOAJ, Directory of Open Access Journals, http://www.doaj.org.

[476] *See* The Scholarly Publishing & Academic Resources Coalition [SPARC], Campus Open Access Policies, http://www.arl.org/sparc/advocacy/campus.

[477] *See, e.g.,* Compact for Open-Access Publishing Equity, http://www.oacompact.org; *see also* Stuart M. Shieber, *Equity for Open-Access Journal Publishing*, 7 PLoS Biol 1 (2009), http://dash.harvard.edu/handle/1/4140820.

Libraries cataloging data have been more and more released under open access models. Some institutions have taken a more open approach than others but openness seems to become a widespread solution when it comes to cataloging data. The Online Computer Library Center (OCLC) has a policy in place that allows access and reuse of WorldCat-mediated data by OCLC members. Several German libraries and the biblios.net project make their bibliographic data available for reuse without restriction.[478] The Open Knowledge Foundation has also released principles for open bibliographic data, recommending that bibliographic data be made available with public domain dedication or with as few restrictions as possible.[479] The British Library has been following the OKF recommendations by making its bibliographic data generally available for non-commercial use[480] and releasing three million records from the British National Bibliography into the public domain using the CC0 public domain waiver.[481]

Recent economic studies have been showing a positive net value of open access models when compared to other publishing models. In June 2009, a study authored by John Houghton of the Centre for Strategic Economic Studies at Victoria University in Melbourne, Australia, has compared the costs and benefits of three different publication models in the United Kingdom, Netherlands and Denmark.[482] The report was commissioned by Knowledge Exchange and based on background studies undertaken in the UK by the Joint Information Systems Committee (JISC),[483] in the Netherlands by the SURF Foundation,[484] and in Denmark by the Denmark's Electronic Research Library (DEFF).[485] The studies showed that adopting an open access model to scholarly publications could lead to annual savings of around €70 million in Denmark, €133 million in the Netherlands and €480 million in the United Kingdom. In addition, potential increases in the social

[478] Libraries in Cologne open up bibliographic data!, Open Knowledge Foundation Blog, March 15, 2010, http://blog.okfn.org/2010/03/15/libraries-in-cologne-open-up-bibliographic-data; Biblios.net, the Open Data Commons Public Dedication and Licence, http://biblios.net/faq#20n109.

[479] *See* Open Bibliographic Projects, Principles for Open Bibliographic Data, October 15, 2010, http://openbiblio.net/2010/10/15/principles-for-open-bibliographic-data.

[480] *See* British Library, Metadata Services, Data Services, Free Data Services, http://www.bl.uk/bibliographic/datafree.html.

[481] The British Library Releases 3 Million Bibliographic Records into the Public Domain Using CC0, Creative Commons News, November 22, 2010, http://creativecommons.org/weblog/entry/24973.

[482] *See* JOHN HOUGHTON, OPEN ACCESS – WHAT ARE THE ECONOMIC BENEFITS? A COMPARISON OF THE UNITED KINGDOM, NETHERLANDS AND DENMARK (June 23, 2009) (report prepared for Knowledge Exchange), *available at* http://www.knowledge-exchange.info/Default.aspx?ID=316 [hereinafter HOUGHTON, OPEN ACCESS].

[483] *See* JOHN HOUGHTON ET AL, ECONOMIC IMPLICATIONS OF ALTERNATIVE SCHOLARLY PUBLISHING MODELS: EXPLORING THE COSTS AND BENEFITS (January 2009) (report prepared for the Joint Information Systems Committee [JISC]), *available at* http://www.jisc.ac.uk/media/documents/publications/rpteconomicoapublishing.pdf.

[484] *See* JOHN HOUGHTON, JOS DE JONGE AND MARCIA VAN OPLOO, COSTS AND BENEFITS OF RESEARCH COMMUNICATION: THE DUTCH SITUATION (May 29, 2009) (report prepared for the SURF Foundation), *available at* http://www.surffoundation.nl/SiteCollectionDocuments/Benefits%20of%20Research%20Communication%20_April%202009_%20FINAL_logos2.pdf.

[485] *See* JOHN HOUGHTON, COSTS AND BENEFITS OF ALTERNATIVE PUBLISHING MODELS: DENMARK (May 29, 2009) (report prepared for the Denmark's Electronic Research Library [DEFF]), *available at* http://www.knowledge-exchange.info/Admin/

returns to R&D resulting from more open access to research findings would largely outweigh the costs.[486]

Few months ago, another study authored by the same Australian research team concluded that free access to U.S. taxpayer-funded research papers could yield $1 billion in benefits.[487] The study was commissioned to examine the potential payoff of expanding a National Institutes of Health (NIH) policy requiring grantees to post their papers in a free database after a 12-month delay. A bill pending in the U.S. Congress would extend the policy to 11 more agencies and shorten the disclosure delay to 6 months.[488] The model developed by the Australian team found that over a period of 30 years from implementation, the benefits of a policy opening access to publicly funded research would exceed by eight times the costs (e.g. of archiving), or five times counting the benefits only accruing in the United States.[489] In fact, the study found that one-third of these benefits would spill over to other countries.

Discussion

As described above, privileged and open access to education and research materials entails considerable social and economic value. To the end of extracting this value and profiting from the new technological opportunities, COMMUNIA promotes privileged and open access to cultural outputs for education and research purposes. The COMMUNIA members detail the strategy to promote education and science by requesting the European institutions to undertake the following actions and implement the following principles:

12.1. It is essential to expand exceptions and limitations for educational and research use so as to allow for unlimited reusability free from technological restrictions of any kind of material covered by exclusive rights. This includes uses occurring outside of institutional settings.

In particular, exception and limitations to exclusive right for educational and research purposes should (**i**) be mandatory for Member States, (**ii**) apply to education as a general process, not to

Public/DWSDownload.aspx?File=%2fFiles%2fFiler%2fdownloads%2fDK_Costs_and_benefits_of_alternative_publishing_models.pdf.

[486] *See* HOUGHTON, OPEN ACCESS, *supra* note 482, at 9, 12-14.

[487] *See* JOHN HOUGHTON WITH BRUCE RASMUSSEN AND PETER SHEEHAN, ECONOMIC AND SOCIAL RETURNS ON INVESTMENT IN OPEN ARCHIVING PUBLICLY FUNDED RESEARCH OUTPUTS (July 2010) (report prepared for The Scholarly Publishing & Academic Resources Coalition [SPARC]), *available at* http://www.arl.org/sparc/bm~doc/vufrpaa.pdf; *see also* Jocelyn Kaiser, *Free Access to U.S. Research Papers Could Yield $1 Billion in Benefits*, SCIENCE INSIDER, August 4, 2010, *available at* http://news.sciencemag.org/scienceinsider/2010/08/free-access-to-us-research-papers.html?rss=1.

[488] *See* Federal Research Public Access Act (FRPAA), H.R. 5037, *available at* http://thomas.loc.gov/cgi-bin/bdquery/z?d111:HR05037:@@@P; *see also* Jocelyn Kaiser, *House Hearing Explores Debate Over Free Access to Journal Articles*, SCIENCE INSIDER, July 30, 2010, *available at* http://news.sciencemag.org/scienceinsider/2010/07/house-hearing-explores-debate.html.

[489] See Victoria University, Centre for Strategic Economic Studies, Economic and Social Returns on Investment in Open Archiving Publicly Funded Research Outputs, http://www.cfses.com/FRPAA (for an online model which makes a subset of the cost-benefit modelling available to the public).

institutions only, and be unbounded from the physical space of institutions, (**iii**) apply to both compiled material and data.

12.2. All publicly funded research output, educational resources and other protected works that are made publicly available, must be made available according to the open access standards and at a minimum compliant with the 'Berlin Declaration on Open Access to Knowledge in the Sciences and Humanities'.

In particular, as per the Berlin Declaration, to meet open access standards a work must satisfy two conditions: (**1**) the authors and right holders of the work grant to all users a free, irrevocable, worldwide, right of access to, and a license to copy, use, distribute, transmit and display the work publicly and to make and distribute derivative works, in any digital medium for any responsible purpose, subject to proper attribution of authorship, as well as the right to make small numbers of printed copies for their personal use; and (**2**) a complete version of the work and all supplemental materials, including a copy of the permission as stated above, in an appropriate standard electronic format is deposited (and thus published) in at least one online repository using suitable technical standards that is supported and maintained by an academic institution, scholarly society, government agency, or other well established organization that seeks to enable open access, unrestricted distribution, inter-operability, and long-term archiving.

Additionally, universities should respect the Wheeler Declaration Principles stating that (**i**) the research that the university produces is open access; (**ii**) the course material are Open Educational Resources (OER); (**iii**) the university embraces free software and open standards; (**iv**) if the university holds patents, it readily licenses them for free software, essential medicines, and the public good; (**v**) the university network reflects the open nature of the internet.

Further, funding organizations supporting the creation of educational resources should adopt a policy that strongly encourages or require their grantee to disseminate the educational resources under Creative Commons licences, and particularly Creative Commons Attribution (CC-by) as the preferred licencing option for Open Educational Resources (OER).

12.3. All publicly funded data-sets must be made available, including for commercial use, in the structural Public Domain or in the voluntary commons (as defined in the Public Domain Manifesto) with due respect for privacy and ethical issues.

In particular, EC funded data-sets which are perceived as publicly needed as infrastructures for research and science should be made available under (**i**) public domain dedication, (**ii**) Creative Commons Zero Waiver (CC0) or (**iii**) a licensing scheme allowing free re-use, possibly under a "share-alike" clause.

It is worth noting that substantially similar principles have been endorsed by the *Charter for Innovation, Creativity and Access to Knowledge* released by the Free Culture Forum,[490] and the *Panton Principles for Open Data in Science*, launched by Open Knowledge Foundation.[491]

Further Proposals

Further proposals to enhance open access to academic material have been put forward during COMMUNIA proceedings. In particular, Professor Paul Uhlir talked about a model of open knowledge environments (OKEs) for digitally networked scientific communication. The OKEs would "bring the scholarly communication function back into the universities" through "the development of interactive portals focused on knowledge production and on collaborative research and educational opportunities in specific thematic areas."[492]

The OKE model would build upon online peer production and participative web 2.0 environments and techniques. The OKEs would transform the traditional scientific journal model into a "truly interactive networked mechanism for integrated knowledge production and reuse." The OKEs would be practically implemented as follows:

(i) the OKE would be developed around thematically linked open access journal;

(ii) openly available report, gray literature and data would augment the OKE;

(iii) various interactive functions, such as wikis, discussion forums, blogs, post publications reviews, and distributed computing, would be added to stimulate discussions and contributions;

(iv) semantic web technologies would be added to increase the opportunities for automated knowledge generation, extraction and integration, and the OKE could encode references under a unified numbering system for easy search and integration of information.

Several options would be available for setting up the physical location of the OKEs:

(i) the OKEs could be hosted at single universities;

(ii) the components of the OKE may be distributed among a consortium of universities sharing a privileged interest in a specific subject matter; alternatively,

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[490] *See* Charter for Innovation, Creativity and Access to Knowledge: Citizens' and Artist's Rights in the Digital Age, Barcelona, Free Culture Forum, http://fcforum.net; *cf*. Evolution Summit 2010, http://d-evolution.fcforum.net/en (endorsing very similar principles).

[491] *See* Panton Principles: Principles for Open Data in Science, http://pantonprinciples.org.

[492] *See* Paul F. Uhlir, Revolution and Evolution in Scientific Communication: Moving from Restricted Dissemination of Publicly-Funded Knowledge to Open Knowledge Environments, paper presented at the 2nd COMMUNIA Conference (June 28, 2009); *see also* Jerome H. Reichman, Tom Dedeurwaerdere, and Paul F. Uhlir, Designing the Microbial Research Commons: Strategies for Accessing, Managing, and Using Essential Public Knowledge Assets (Yale U. Press, forthcoming 2011).

(iii) the OKEs could be based at based at not-for-profit research centers or government agencies.

The OKEs would be multidisciplinary in character by bringing in the experts of the specific subject matter, in house computer engineers, information scientists and librarians to help establish and manage the OKEs. As a consequence of being integrated directly into the curricula or research functions of the host organizations, the OKEs would have low overhead cost to operate by using on site personnel and students. Additionally, financial sustainability of OKEs would be provided by grants and other positive externalities that the OKEs will attract to the hosting organizations.

The European Commission should promote quantitative studies to investigate the value and feasibility of OKE projects. The European Commission should take into consideration the opportunity to design an action plan to promote the development of OKEs throughout the network of European academic institutions.

Relevant Actions to Be Taken by:

- European Commission (EC)
  - ✓ Broaden existing exceptions and limitations to cover uses outside of formal educational institutions.
  - ✓ Require that all publicly funded research output, educational resources, other protected works, and data-sets are made available according to the open access standards.
  - ✓ Promote quantitative studies to investigate the value and feasibility of OKE projects and the development of OKEs throughout the network of European academic institutions
- European Parliament (EP)
  - ✓ Broaden existing exceptions and limitations to cover uses outside of formal educational institutions.
  - ✓ Require that all publicly funded research output, educational resources, other protected works, and data-sets are made available according to the open access standards .
- Member States (MS)
  - ✓ Broaden existing exceptions and limitations to cover uses outside of formal educational institutions.
  - ✓ Require that all publicly funded research output, educational resources, other protected works, and data-sets are made available according to the open access standards.

- ✓ Promote the development of OKEs throughout the network of national academic and research institutions

❖ Public Funding Bodies (PFBs)

- ✓ Require that all publicly funded research output, educational resources, other protected works, and data-sets are made available according to the open access standards .

***Recommendation # 13**: The PSI Directive needs to be broadened, by increasing its scope to include publicly funded memory organisations - such as museums or galleries - and strengthened by mandating that Public Sector Information will be made freely available for all to use and re-use without restriction.*

Currently publicly funded memory organisations fall outside the scope of the PSI directive. In order to strengthen the position of these organisations they should be brought within the scope of the directive. The directive also needs to be strengthened by mandating that Public Sector Information will be made freely available for all to use and re-use without restrictions. What has been paid for by the public must be available to the public regardless of the nature of the intended uses.

Background and Discussion

Public sector information ("PSI") is produced and collected by public bodies and includes digital maps, meteorological, legal, traffic, financial, economic and other data. PSI is the major source of information in Europe. As the Commission notes on the Europe's Information Society Thematic Portal, the great value of PSI lies in the potential for re-use of the data.

> [. . .] Most of this raw data could be re-used or integrated into new products and services, which we use on a daily basis, such as car navigation systems, weather forecasts, financial and insurance services. [. . .] Re-use of public sector information means using it in new ways by adding value to it, combining information from different sources, making mash-ups and new applications, both for commercial and non-commercial purposes.[493]

The Commission fully understands the value of re-use of PSI by highlighting that "[i]ncrease in the re-use of PSI generates new businesses and jobs and provides consumers with more choice and more value for money."[494] According to surveys conducted by the European Commission in

[493] European Commission, Information Society, Public Sector Information – Raw Data for New Services and Products, http://ec.europa.eu/information_society/policy/psi/index_en.htm.
[494] *Id*.

2006, the overall market size for PSI in the EU is estimated between 27 billion[495] and 68 billion annually.[496]

Since the adoption of the European Directive on the re-use of public sector information in 2003 (PSI Directive), digitization has multiplied the economic potential of PSI. Therefore, the Digital Agenda for Europe and the Commission work program 2011 have signaled the review of the PSI Directive as one of the key actions for propelling European growth.

COMMUNIA has investigated the matter of PSI in several occasions, especially at the 5th COMMUNIA Workshop, co-organized by the Open Knowledge Foundation and London School of Economics, focusing on *Accessing, Using and Reusing Public Sector Content and Data*. In the context of a review of the PSI Directive, COMMUNIA recommends the Commission to discuss and consider few actions to be undertaken to the extract all the economic potential from PSI.

11.1. The Commission should broaden and strengthen the PSI Directive, by increasing its scope and urging Member States to make Public Sector Information freely available for all to use and re-use without restriction.

COMMUNIA reinstate that it should be recognized that Public Sector Information is a crucial part of the digital public domain. All official documents, including laws, other official text of a legislative, administrative or legal nature, official translations of such texts, speeches delivered in the course of legal proceedings or by publicly elected or appointed officials, should fall in the structural public domain. Access to and re-use of PSI should be included in the functional public domain. This will create a flourishing information economy and a strong European digital society. In order to create a flourishing information economy, strengthen European digital society and build a fast growing and wealthy market, barriers to access and transaction costs should be as low as possible.

To that end, PSI materials should follow the **open by default rule**, which means: (**1**) using standard legal tools, such as Creative Commons, General Public Licence, etc., reconstructing a legal status as similar as possible to the public domain, such as Creative Commons Zero (CC0); (**2**) being accessible as raw data, machine readable formats on the Internet without restrictions; (**3**) being free of charge. In particular, public sector information available in digital format should be open.

The open by default rule could have some **exceptions** that should be motivated on a case by case basis according to the following principles: (**i**) licensing restrictions related to special type of data (privacy, etc.) or chain of authorization may be taken into account; (**ii**) the infrastructure to

[495] See MAKX DEKKERS, FEMKE POLMAN, ROBBIN TE VELDE, MARC DE VRIES, MEPSIR - MEASURING EUROPEAN PUBLIC SECTOR INFORMATION RESOURCES: FINAL REPORT OF STUDY ON EXPLOITATION OF PUBLIC SECTOR INFORMATION – BENCHMARKING OF EU FRAMEWORK CONDITIONS (June 2006) (study prepared for the European Commission), *available at* http://ec.europa.eu/information_society/policy/psi/mepsir/index_en.htm.

[496] See PIRA INTERNATIONAL LTD ET AL, COMMERCIAL EXPLOITATION OF EUROPE'S PUBLIC SECTOR INFORMATION (October 30, 2000) (report prepared European Commission, Information Society DG), *available at* http://ec.europa.eu/information_society/policy/psi/docs/pdfs/pira_study/commercial_final_report.pdf.

give access should be as efficient as possible; (**iii**) when it is necessary to charge a price, the pricing mechanism should be based on hard evidence of the cost directly related to process; (**iv**) reasonable restrictions related to the materiality of some supports may be taken into account (i.e. no flash in museums; limited access to ancient manuscripts).

Whilst fee-based charging for a service and related material should continue, COMMUNIA notes that making digital upstream non-personal PSI available at marginal cost of distribution, which is close to zero, bears several benign effects. Firstly, it encourages the government to ration PSI to what it really needs to be considered for good government (a good that is produced with public money and should be enjoyed by the public at cost of distribution) and to fulfil its statutory duty at minimum costs. Secondly, the re-use by the private sector and individuals is genuinely encouraged, creating innovation and enterprise. Finally, the current internal PSI licencing complexities that bedevil the public sector would largely be eradicated.[497]

Additionally, COMMUNIA would like to stress that PSI should be always made available for public reuse, including commercial re-use. Only the information that is actively made available in open standards under terms that allow all forms of re-use is likely to contribute to the creation of economic and social wealth. Under the assumption that legal constraint on the re-use of PSI are not increased, COMMUNIA promotes the use of Creative Commons Attribution Licences (CC-by) for PSI, as detailed in the IViR Report, *Creative Commons Licencing for Public Sector Information*.[498]

Finally, a proper regulatory authority responsible for oversight of PSI provision, maintenance, licencing and pricing should be created at the European level and national level.

11.2. Broaden the scope of the PSI Directive to include publicly funded cultural heritage organisations - such as museums or galleries.

The directive does not currently include publicly funded cultural heritage organisations - such as museums or galleries - within its scope. Under Article 2 of the Directive, certain types of content are excluded from the scope of the Directive including documents held by cultural institutions such as museums, libraries, archives, orchestras, operas, ballets and theatres (with other exemptions in this same article for secrecy, educational and research organisations and intellectual property rights of third parties).[499] The directive could be broadened to include these kinds of organisations, which might encourage them to open up their content and data for others to reuse.

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[497] *See* Marc de Vries, Reverse Engineering Europe's PSI Re-use – Towards an Integrated Conceptual Framework for PSI Re-use (2010), https://www.lapsi-project.eu/lapsifiles/Reverse_engineering_PSI_re-use_regulatory_framework_-_Marc_de_Vries__final2_.pdf.

[498] *See* MIREILLE VAN EECHOUD AND BRENDA VAN DER WAL, CREATIVE COMMONS LICENSING FOR PUBLIC SECTOR INFORMATION, OPPORTUNITIES AND PITFALLS (IViR 2008), *available at* http://learn.creativecommons.org/wp-content/uploads/2008/03/cc_publicsectorinformation_report_v3.pdf

[499] *See* Council Directive 2003/98/EC on the reuse of public sector Information, Art. 2, 2003 O.J. (L 345) 90 (November 17, 2003).

Opening up metadata about works and objects held by publicly funded cultural heritage organisations could be very useful to (**i**) help establish what is in the public domain in a given jurisdiction (as per the work on the calculators) and (**ii**) help to bootstrap a new generation of digital services for researchers and for the general public.

11.3. Broaden the evidence base for opening up PSI.

At present the European Commission primarily focuses on the value of PSI in a fairly narrow sense - e.g. citing the MEPSIR and PIRA study estimates of a market size of 27 or 68 billion Euros, respectively. While this kind of evidence is obviously crucial for European policymakers, the Commission should also take into account other potential benefits of opening up PSI, such as improvements to public service delivery, greater accountability of public bodies, the intrinsic value of PSI (e.g. cultural or educational), and enabling the creation of new digital services for citizens.

Additionally, COMMUNIA emphasizes that open access and free re-use of PSI is pivotal to boost the democratic process. PSI encompasses a large amount of extremely sensitive data, including information related to (i) political decision-making processes, (ii) environmental and health issues, and (iii) different cultures and their histories. To this regard, any new policy strategies should take into account that opening up access to and re-use of PSI will empower people with less ability to finance creation and dissemination of their speech. Open PSI will contribute to the goal of bringing "the millions of dispossessed and disadvantaged Europeans in from the margins of society and cultural policy in from the margins of governance."[500] The quality and democratic value of PSI, not only the economic value, must be carefully pondered and investigated when discussing new policy strategies.

Relevant Actions to Be Taken by:

- European Commission (EC)
  - ✓ Review the PSI directive and include publicly funded memory institutions in its scope.
  - ✓ Broaden the evidence base for opening up PSI to social and democratic value
- European Parliament (EP)
  - ✓ Review the PSI directive and include publicly funded memory institutions in its scope.
- Member States (MS)
  - ✓ Review the national implementations of the PSI directive and include publicly funded memory institutions within their scope.
  - ✓ Make PSI freely available for all to use and re-use without restriction

[500] THE EUROPEAN TASK FORCE ON CULTURE AND DEVELOPMENT, IN FROM THE MARGINS: A CONTRIBUTION TO THE DEBATE ON CULTURE AND DEVELOPMENT IN EUROPE 276 (1997) (report prepared for the Council of Europe), *available at* http://www.coe.int/t/dg4/cultureheritage/culture/resources/Publications/InFromTheMargins_EN.pdf

***Recommendation # 14**: In order to support the emerging culture of sharing copyright protected works alternative reward systems and cultural flat rate models should be explored.*

The current debate about copyright is dominated by a narrow focus on the business models of the entertainment industry. As part of this discussion rights holders advocate more extensive copyright protection and more stringent enforcement in order to ensure the survival of business models based on selling access to copies of protected works. While there is no evidence that extended copyright protection and/or stronger enforcement will allow these business models to continue to exist, there is clear evidence that any extension of copyright protection will harm our ability to access our shared knowledge and culture. Instead of focusing on an extension of copyright protection and enforcement alternative rewards systems and cultural flat rate models should be explored. These systems are in line with the emerging of a culture of sharing that attempts to maximize access to and interaction with cultural works.

Background and Proposals

Sharing is essential to the emerging digital culture. Young generations digitize, share, rip, mix, burn, and share again as a natural tool of human interactions. COMMUNIA maintains that full recognition of a non-commercial right to share creative works between individuals should be the goal of any modern policy aiming to enhance creativity in the digital environment. At the same time, criminalization of Internet users by cultural conglomerates is a source of social tension that needs to be promptly redressed.

Joseph Schumpeter noted that the "fundamental impulse that sets and keeps the capitalist engine in motion" is the process of creative destruction which "incessantly revolutionises the economic structure by incessantly destroying the old one, incessantly creating a new one."[501] COMMUNIA calls for the blow of the Schumpeterian wind of creative destruction to support the emerging culture of online, digital sharing of copyright protected works. The investigation and promotion of alternative business models for financing the production of creative works is the key to unlocking the potentials of technological advancement. In Schumpeter's words, revolutionizing the economic structure by introducing alternative business models is the key to keep our economy in motion. Hence, to propel innovation and growth in the European Internal Market for knowledge, a great deal of COMMUNIA activities has been dedicated to the investigation of alternative business models for creativity, in particular the 7th COMMUNIA Workshop, *Digital Policies: the Public Domain and Alternative Compensation Systems*, that took place in Luxembourg in February 2010.

Alternative remuneration systems have been widely discussed and investigated lately. New business models have been emerging that switch the focus from the content to the container.

[501] JOSEPH SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY 83 (Harper Perennial Ed., 1976) (1942).

Artists have come to realize that it may be more valuable to sell the *corpus meccanicus*, such as live performances, special editions, bonus material, merchandize, and share the *corpus immaterialis.* The examples are on the rise: Radiohead, Nine Inch Nails, The Arctic Monkeys, who got to number one in 2005 after giving away their single for free on their website, and plenty of other bands and artists. Sharing content is a powerful drive for increasing the revenue stream more directly linked to the reputational value that can be extracted from a broader distribution of the content. Giving away music records may increase concerts' attendance and help to build or enlarge the artist's fan base. As also the Economist has noted, "a lot of things are making money" in the music business notwithstanding the decline in sales of recorded music.[502]

A recent Harvard report showed that the classical revenues sources shift from recordings to concerts, coupled by an increase in diversity with a greater number of artists on tour, almost 95% more in 10 years.[503] The conclusion of the study is that broader illegitimate distribution of digital goods may have off-setting demand implications for legitimate sales of complementary non-digital products. Similar findings have been put forward by other studies. In particular, Oberholzer-Gee and Strumpf have noted that file sharing has not undermined the incentives of authors to produce new works, instead has increased the demand for complements to protected works, raising, for instance, the demand for concerts and concert prices.[504]

In search of alternative remuneration systems, throughout the last decade, researchers, activists, consumer organizations, artist groups, and policy makers have proposed to finance creative works and artists on a flat-rate base. Flat rate proposals are set to favour an ecology of sharing, mindful that any business model preventing or limiting sharing is an outmoded solution which is unsuited for the digital environment. As Volker Grassmuck, speaker at the 7th COMMUNIA Workshop, has noted, "the world is going flat(-rate)."[505] A recent study of the Institute of European Media Law has argued that this may be "nothing less than the logical consequence of the technical revolution introduced by the internet".[506]

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[502] Having a Ball: In the Supposedly Benighted Music Business, a Lot of Things are Making Money, THE ECONOMIST, October 7, 2010, *available at* http://www.economist.com/node/17199460?story_id=17199460.

[503] JULIE HOLLAND MORTIMER, CHRIS NOSKO, AND ALAN SORENSEN, SUPPLY RESPONSES TO DIGITAL DISTRIBUTION: RECORDED MUSIC AND LIVE PERFORMANCES (October 2010), *available at* http://mortimer.fas.harvard.edu/concerts_01oct2010.pdf

[504] Felix Oberholzer-Gee and Koleman Strumpf, *File-Sharing and Copyright*, 10 INNOVATION POLICY AND THE ECONOMY 19 (2010), *available at* http://www.hbs.edu/research/pdf/09-132.pdf.

[505] Volker Grassmuck, *The World is Going Flat(-Rate): A Study Showing Copyright Exception for Legalizing File-Shearing Feasible as a Cease-Fire in the "War on Copyright" Emerges*, INTELLECTUAL PROPERTY WATCH, May 11, 2009, http://www.ip-watch.org/weblog/2009/05/11/the-world-is-going-flat-rate [hereinafter Grassmuck, *The World is Going Flat(-Rate)*].

[506] INSTITUT FÜR EUROPÄISCHES MEDIENRECHT [INSTITUTE OF EUROPEAN MEDIA LAW] (EML), DIE ZULÄSSIGKEIT EINER KULTURFLATRATE NACH NATIONALEM UND EUROPÄISCHEM RECHT [THE ADMISSIBILITY OF A CULTURAL FLAT RATE UNDER NATIONAL AND EUROPEAN LAW] 63 (March 13, 2009) (study prepared for the German and European Green Party), *available at* http://www.gruene-bundestag.de/cms/netz politik/dokbin/278/278059.kurzgutachten_zur_kulturflatrate.pdf [hereinafter EML Study)

As a matter of fact, quasi flat rate models have been already widely implemented throughout Europe, although in the analog environment.[507] Many national legislations have implemented different arrangements of private copying levies that may be envisioned as a form of cultural tax. Private copying levies are special taxes or levies which are charged on purchases of recordable media and copying devices and then redistributed to the right holders by means of collecting societies. The point of what we can learn from private copy has been largely discuss during COMMUNIA proceedings, especially by Mark Cole at the 7th COMMUNIA Workshop.[508] Applying the flat-rate model to the online exchange of digital files would only port a traditional tool from the analog to the digital environment. The rational for implementing a flat rate model online would be very similar to the reasoning that led many European countries to set up private copies levies. As levies on recording devices and media have been set up upon the acknowledgment that private copying cannot be prevented, the same should apply to the introduction of the legal permission to copy and make available published copyrighted works by individuals for non-commercial purposes in the Internet. Sharing deeply characterizes a preponderant part of online interactions. Lawmakers should acknowledge that an entire culture of sharing cannot be criminalized or prevented. Therefore, online sharing should be legalized, while ensuring fair remuneration to creators. This can be done by the implementation of alternative remuneration systems, especially flat rate models.

Several flat-rate models have been proposed. For some, the flat-rate payment by Internet broadband subscribers is to be construed as a compensation to authors, artists and producers for an alleged harm caused by sharing. Other see the flat-rate as putting in place a new reward system, which is outside the scope of copyright, and could enable a wider engagement in creative activity. Some see the scheme as similar to private copying levies managed by collecting societies, while others want to put in place an entirely new management model, giving the key role to Internet users themselves. Some of the flat-rate models proposed will be review below. As per the proposals reported, please note that the description provided is not intended to be exhaustive and full reference should be made to the original studies as cited in the footnotes.

Firstly, a **non-commercial use levy** permitting non-commercial file sharing of any digitised work was proposed by Professor Neil Netanel.[509] Such levy would be imposed on the sale of any consumer electronic devices used to copy, store, send or perform shared and downloaded files but also on the sale of internet access and p2p software and services. An *ad hoc* body would be in charge of determining the amount of the levy. The proceeds would be distributed to copyright holders by taking into consideration the popularity of the works to be measured by tracking and

[507] See HUGENHOLTZ, BERNT, LUCIE GUIBAULT AND SJOERD VAN GEFFEN, THE FUTURE OF LEVIES IN A DIGITAL ENVIRONMENT (Institute for Information Law 2003), *available at* http://www.ivir.nl/publications/other/DRM&levies-report.pdf,

[508] Mark Cole, What Can we Learn from the Private Copy? Licence Global or Flatrate in Light of Previous Experiences, presentation delivered at the 7th COMMUNIA Workshop, Luxembourg (February 2, 2010).

[509] Neil W. Netanel, *Impose A Noncommercial Use Levy To Allow Free Peer-To-Peer File Sharing*, 17 HARV. J. L. & TECH. 1 (2003).

monitoring technologies. Users could freely copy, circulate and make non-commercial use of any works that the right holder has made available on the Internet.

A more refined and comprehensive proposal has been put forward by Professor William Fisher.[510] Creators' remuneration would still be collected through levies on media devices and internet connection. In Fisher's system, however, a governmentally administered registrar for digital content, or alternatively a private organization, would be in charge of the management of creative works in the digital environment. Digitised works would be registered with the Registrar and embedded with digital watermarks. Tracking technologies would measure the popularity of the works circulating online. The Registrar would then redistribute the proceedings to the registered right holders according to popularity of the works.

Further proposals would subject the right to "make available to the public" to mandatory collective management. In particular, this proposal has been put forward by Silke von Lewinski from the Max Planck Institute for Intellectual Property, discussing a proposed amendment in the Hungarian Copyright Act.[511] The same proposal has also been endorsed by the French *Alliance Public-Artistes*, campaigning for the implementation of a *Licence Globale*.[512] Both studies confirm that the application of the mandatory collective management model to the making available right would be compliant with European and international copyright law. This solution would not qualify as an exception or limitation, hence would not trigger the three-step-test of Berne Convention or the finite list of exceptions of the European law, nor would violate the principle of national treatment or automatic protection. Under this framework the exercise of the exclusive right of the author would be only limited by the obligation of resorting to collective management to enjoy the economic rights attached to the right of making available to the public. As a consequence, the internet service providers would have to pay a lump-sum or levy to the collective societies in exchange of the authorization to download and make available to the users the entire repertoire of the works managed by the collective society. The money collected will be then redistributed to the right holders.

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[510] FISHER WILLIAM W., PROMISES TO KEEP: TECHNOLOGY, LAW AND THE FUTURE OF ENTERTAINMENT (Stanford Law and Politics 2004).

[511] *See* SILKE VON LEWINSKI, MANDATORY COLLECTIVE ADMINISTRATION OF EXCLUSIVE RIGHTS – A CASE STUDY ON ITS COMPATIBILITY WITH INTERNATIONAL AND EC COPYRIGHT LAW (UNESCO e-Copyright Bulletin, January – March 2004), *available at* http://portal.unesco.org/culture/en/files/19552/11515904771svl_e.pdf/svl_e.pdf.

[512] *See* CARINE BERNAULT AND AUDREY LEBOIS UNDER THE SUPERVISION OF PROFESSOR ANDRÉ LUCAS, PEER-TO-PEER ET PROPRIÉTÉ LITTÉRAIRE ET ARTISTIQUE ETUDE DE FAISABILITÉ SUR UN SYSTÈME DE COMPENSATION POUR L'ÉCHANGE DES ŒUVRES SUR INTERNET [PEER-TO-PEER FILE SHARING AND LITERARY AND ARTISTIC PROPERTY. A FEASIBILITY STUDY REGARDING A SYSTEM OF COMPENSATION FOR THE EXCHANGE OF WORKS VIA THE INTERNET] (June 2005) (study prepared for ADAMI and SPEDIDAM), *available at* http://alliance.bugiweb.com/usr/Documents/RapportUniversiteNantes-juin2005.pdf and http://privatkopie.net/files/Feasibility-Study-p2p-acs_Nantes.pdf (English translation).

COMMUNIA member Philippe Aigrain discusses a proposal termed **creative contribution** in his book *Internet & Création*.[513] Aigrain's proposal would encompass a global licence to share published digital works in the form of extended collective licensing, or, absent an agreement, of legal licensing.[514] Remuneration would be provided by a flat-rate contribution that will be paid by all internet broadband subscribers. The amount proposed for all media (in France) is 5 to 7 € per subscriber per month with an yearly contribution between 1200 million € and 1700 million €. Half of the money collected would be used for the remuneration of works that have been shared over the Internet according to their popularity. Measurement of popularity would be based on a large panel of voluntary Internet users transmitting anonymous data on their usage and statistical techniques aiming at minimizing privacy intrusion. The other half of the money collected would be devoted to funding the production of new works and the promotion of added-value intermediaries in the creative environment. Distribution of the system's proceedings would differ according to their intended use. As per the proceedings to be distributed for compensating the creators, an independent observatory would be created to process the data on popularity and forward the final results to collective management societies. As per the proceedings devoted to foster new creations, a mix of peer-based allocation of funds and assignment to intermediaries by internet subscribers (under the competitive intermediaries model) would be used.

Extended collective licencing is also endorsed by the proposal of the NEXA Center for Internet and Society at the Politecnico of Turin.[515] In view of the NEXA Center, an extended collective licensing scheme is the most appropriate tool to be used by a European Member State to legitimize the file-sharing of copyrighted content since: (**i**) it is already successfully in use in the Nordic countries; (**ii**) it does not affect the (exclusive) nature of the right since it consists of a voluntary management modality, thus not degrading the exclusive right into a right of mere remuneration; (**iii**) it represents a fair balance between the fundamental right of authors to the protection of their moral and economic interests and that of access to knowledge, which belongs to the general public; (**iv**) it is identified as a possible solution to the problem of orphan works in the "Final Report on Digital Preservation, Orphan Works, and Out-of-Print Works" adopted by the High Level Expert Group – Copyright Subgroup, and above all (**v**) it is explicitly contemplated by recital 18 of the Directive 2001/29/CE. Collective management bodies will negotiate the license with users' associations or ISPs. In exchange of the right of reproducing and making available

[513] PHILIPPE AIGRAIN, INTERNET & CRÉATION: COMMENT RECONNAÎTRE LES ÉCHANGES SUR INTERNET EN FINANÇANT LA CRÉATION [INTERNET & CREATION: HOW TO RECOGNIZE NON-MARKET EXCHANGES OVER THE INTERNET WHILE FUNDING CREATION] (Editions InLibroVeritas 2008).

[514] For a detailed discussion of the notion of extended collective licences, *see* COMMUNIA Policy Recommendation # 9, *supra*.

[515] MARCO CIURCINA, JUAN CARLOS DE MARTIN, THOMAS MARGONI, FEDERICO MORANDO, AND MARCO RICOLFI, CREATIVITÀ REMUNERATA, CONOSCENZA LIBERATA: FILE SHARING E LICENZE COLLETTIVE ESTESE [REMUNERATING CREATIVITY, FREEING KNOWLEDGE: FILE-SHARING AND EXTENDED COLLECTIVE LICENCES] (March 15, 2009) (position paper prepared for the NEXA Center for Internet and Society), *available at* http://nexa.polito.it/licenzecollettive.

content online, right holders will be remunerated by the proceedings collected through the extended collective license.

COMMUNIA looks with particular favour on a recent proposal from the German and European Green Parties. The German and European Green Parties have included in their policy agenda the promotion of a **cultural flat rate** to decriminalise P2P users, remunerate creativity and relieve the judicial system and the ISPs from mass-scale prosecution. The Green Party's proposal has been backed up by a study commissioned to the Institute of European Media Law (EML) that found that a levy on Internet usage legalising non-commercial online exchanges of creative works conforms with German and European copyright law, even though it requires changes in both. The EML study has described the minimum requirements for a culture flat-rate as follows: (**i**) a legal licence permitting private individuals to exchange copyright works for non-commercial purposes; (**ii**) a levy, possibly collected by the ISPs, flat, possibly differentiated by access speed; and (**iii**) a collective management, i.e. a mechanism for collecting the money and distributing it fairly.

It also is worth mentioning that, together with proposals for an explicit exception in copyright law and a redistribution to creators via collective management, voluntary market solutions based on contracts among companies and between companies and consumers have also emerged, as detailed in Volker Grassmuck, *The World is Going Flat(-Rate)*.[516]

On a related note, as shown by the proposals mentioned and as argued at the 7th COMMUNIA Workshop,[517] the importance and the role of collective societies for any future systems must be acknowledged and carefully reviewed. COMMUNIA maintains that the European collective society system has to be modernised and harmonised to take up the challenge of fostering a culture of sharing in the digital environment, while providing fair remuneration to the creators. Harmonization at the European level and governmental supervision should contribute to define the role of collective society in the management of alternative remunerations systems. To that end, an "alternative" or simply overhauled system based on collective societies must be transparent and credible. In this regard, it is of essence to develop fixed rules for collective societies for the documentation and allocation of the use of content as well as for the re-distribution of the earned money to the right-holders.

Alternative Forms of Licencing for Creative Material

Additionally, COMMUNIA believes that public policies could favour the use of already existing open licensing schemes, including Creative Commons licences.

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[516] *See* Grassmuck, *The World is Going Flat(-Rate)*, *supra* note 505, at 12-17.

[517] *See* Florian Philapitsch, I Dream of Dodos - Why Collecting Societies Should Play a Major Role in "Alternative Compensation Systems" and Why They Should be Saved from Extinction, presentation delivered at the 7th COMMUNIA Workshop, Luxembourg (February 2, 2010).

(**1**) Public bodies may increase the likelihood of open licenses being chosen by private parties just by using such licenses themselves, unless national laws already provide for a public domain status for the relevant kind of public sector information. Public bodies should use the most open licensing schemes, such as a Creative Commons Attribution License, for their publications and for all the content they make available, unless they can provide compelling reasons to do otherwise (e.g. they do not own sufficient rights to do so). In other words, a legal status similar to Copyright 2.0 should be by default the goal of licensing choices of public entities.

(**2**) Internet service providers hosting blogs, forums, newsgroups and/or social networks and other Web 2.0 platforms should be explicitly encouraged to make it very easy for their users to choose open licences under the following terms: (**i**) users should be enabled to set an open license as their own "default choice" for copyright licensing of newly created content; (**ii**) platforms should be encouraged to recommend the most open licensing choices and/or should enable them by technological default. In other words, Copyright 2.0 should be implemented as the default choice of authors publishing through online platforms.

Relevant Actions to Be Taken by:

- European Commission (EC)
  - ✓ Explore the opportunities offered by alternative rewards systems and cultural flat rate models.
  - ✓ Encourage the use of open licencing schemes by private parties and public bodies.
  - ✓ Include a file-sharing exception in the Directive 2001/29/EC.
- European Parliament (EP)
  - ✓ Amend the Directive 2001/29/EC to include a file-sharing exception.
- Member States (MS)
  - ✓ Encourage the use of open licencing schemes by private parties and public bodies.
  - ✓ Provide for a file-sharing exception to copyright protection.

ANNEX IV

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ANNEX V

THE PUBLIC DOMAIN MANIFESTO

Preamble

> "Le livre, comme livre, appartient à l'auteur, mais comme pensée, il appartient—le mot n'est pas trop vaste—au genre humain. Toutes les intelligences y ont droit. Si l'un des deux droits, le droit de l'écrivain et le droit de l'esprit humain, devait être sacrifié, ce serait, certes, le droit de l'écrivain, car l'intérêt public est notre préoccupation unique, et tous, je le déclare, doivent passer avant nous." (Victor Hugo, *Discours d'ouverture du Congrès littéraire international de 1878*, 1878)
>
> "Our markets, our democracy, our science, our traditions of free speech, and our art all depend more heavily on a Public Domain of freely available material than they do on the informational material that is covered by property rights. The Public Domain is not some gummy residue left behind when all the good stuff has been covered by property law. The Public Domain is the place we quarry the building blocks of our culture. It is, in fact, the majority of our culture." (James Boyle, *The Public Domain*, p. 40f, 2008)

The public domain, as we understand it, is the wealth of information that is free from the barriers to access or reuse usually associated with copyright protection, either because it is free from any copyright protection or because the right holders have decided to remove these barriers. It is the basis of our self-understanding as expressed by our shared knowledge and culture. It is the raw material from which new knowledge is derived and new cultural works are created. The Public Domain acts as a protective mechanism that ensures that this raw material is available at its cost of reproduction - close to zero - and that all members of society can build upon it. Having a healthy and thriving Public Domain is essential to the social and economic well-being of our societies. The Public Domain plays a capital role in the fields of education, science, cultural heritage and public sector information. A healthy and thriving Public Domain is one of the prerequisites for ensuring that the principles of Article 27 (1) of the Universal Declaration of Human Rights ('Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.') can be enjoyed by everyone around the world.

The digital networked information society has brought the issue of the Public Domain to the foreground of copyright discussions. In order to preserve and strengthen the Public Domain we need a robust and up-to-date understanding of the nature and role of this essential resource. This

Public Domain Manifesto defines the Public Domain and outlines the necessary principles and guidelines for a healthy Public Domain at the beginning of the 21st century. The Public Domain is considered here in its relation to copyright law, to the exclusion of other intellectual property rights (like patents and trademarks), and where copyright law is to be understood in its broadest sense to include economic and moral rights under copyright and related rights (inclusive of neighboring rights and database rights). In the remainder of this document copyright is therefore used as a catch-all term for these rights. Moreover, the term 'works' includes all subject-matter protected by copyright so defined, thus including databases, performances and recordings. Likewise, the term 'authors' includes photographers, producers, broadcasters, painters and performers.

The Public Domain in the 21st Century

The Public Domain as aspired to in this Manifesto is defined as cultural material that can be used without restriction, absent copyright protection. In addition to works that are formally in the public domain, there are also lots of valuable works that individuals have voluntarily shared under generous terms creating a privately constructed commons that functions in many ways like the public domain Moreover, individuals can also make use of many protected works through exceptions and limitations to copyright, fair use and fair dealing. All of these sources that allow for increased access to our culture and heritage are important and all need to be actively maintained in order for society to reap the full benefit of our shared knowledge and culture.

The Public Domain

The structural Public Domain lies at the core of the notion of the Public Domain and is comprised of our shared knowledge, culture and resources that can be used without copyright restrictions by virtue of current law. Specifically, the structural Public Domain is made up of two different classes of material:

1. **Works of authorship where the copyright protection has expired.** Copyright is a temporary right granted to authors. Once this temporary protection has come to its end, all legal restrictions cease to exist, subject in some countries to the author's perpetual moral rights.

2. **The essential commons of information that is not covered by copyright.** Works that are not protected by copyright because they fail the test of originality, or are excluded from protection (such as data, facts, ideas, procedures, processes, systems, methods of operation, concepts, principles, or discoveries, regardless of the form in which they are described, explained, illustrated, or embodied in a work, as well as laws and judicial and administrative decisions). This essential commons is too important for the functioning of our societies to be burdened with legal restrictions of any nature even for a limited period.

The structural Public Domain is an historically grown balance to the rights of authors protected by copyright and it is essential to the cultural memory and knowledge base of our societies. In the

second half of the 20th century all two elements identified here have been strained by the extension of the term of copyright protection and the introduction of more copyright-like regimes of legal protection.

Voluntary commons and user prerogatives

In addition to this structural core of the Public Domain, there are other essential sources that enable individuals to freely interact with copyright protected works. These represent the "breathing space" of our current culture and knowledge, ensuring that copyright protection does not interfere with specific requirements of society and the voluntary choices of authors. While these sources increase access to protected works, some of them make this access conditional on certain forms of use or restrict access to certain classes of users:

1. **Works that are voluntarily shared by their rights holders.** Creators can remove use restrictions from their works by either freely licensing them, or by using other legal tools to allow others to use their works without restrictions, or by dedicating them to the Public Domain. For free licencing definitions see the definition of free software http://www.gnu.org/philosophy/free-sw.html, the definition of free cultural works http://freedomdefined.org/Definition, and the open knowledge definition http://opendefinition.org/1.0/ for reference.

2. **The user prerogatives created by exceptions and limitations to copyright, fair use and fair dealing.** These prerogatives are an integral part of the Public Domain. They ensure that there is sufficient access to our shared culture and knowledge, enabling the functioning of essential social institutions and enabling social participation of individuals with special needs.

Taken together, the public domain, the voluntary sharing of works and exceptions and limitations to copyright, fair use and fair dealing go a long way to ensure that everyone has access to our shared culture and knowledge in order to facilitate innovation and cultural participation for the benefit of the entire society. It is therefore important that the Public Domain in both its incarnations is actively maintained so that it can continue to fulfill this key role in this period of rapid technological and social change.

General Principles

In a period of rapid technological and social change the Public Domain fulfills an essential role in cultural participation and digital innovation, and therefore needs to be actively maintained. Active maintenance of the Public Domain needs to take into account a number of general principles. The following principles are essential to preserve a meaningful understanding of the Public Domain and to ensure that the Public Domain continues to function in the technological environment of the networked information society. With regard to the structural Public Domain these are as follows:

1. **The Public Domain is the rule, copyright protection is the exception.** Since copyright protection is granted only with respect to original forms of expression, the vast majority of data, information and ideas produced worldwide at any given time belongs to the Public Domain. In addition to information that is not eligible for protection, the Public Domain is enlarged every year by works whose term of protection expires. The combined application of the requirements for protection and the limited duration of the copyright protection contribute to the wealth of the Public Domain so as to ensure access to our shared culture and knowledge.

2. **Copyright protection should last only as long as necessary to achieve a reasonable compromise between protecting and rewarding the author for his intellectual labour and safeguarding the public interest in the dissemination of culture and knowledge.** From neither the perspective of the author nor the general public do any valid arguments exist (whether historical, economic, social or otherwise) in support of an exceedingly long term of copyright protection. While the author should be able to reap the fruits of his intellectual labour, the general public should not be deprived for an overly long period of time of the benefits of freely using those works.

3. **What is in the Public Domain must remain in the Public Domain.** Exclusive control over Public Domain works must not be reestablished by claiming exclusive rights in technical reproductions of the works, or using technical protection measures to limit access to technical reproductions of such works.

4. **The lawful user of a digital copy of a Public Domain work should be free to (re-)use, copy and modify such work.** The Public Domain status of a work does not necessarily mean that it must be made accessible to the public. The owners of physical works that are in the Public Domain are free to restrict access to such works. However once access to a work has been granted then there ought not be legal restrictions on the re-use, modification or reproduction of these works.

5. **Contracts or technical protection measures that restrict access to and re-use of Public Domain works must not be enforced.** The Public Domain status of a work guarantees the right to re-use, modify and reproduce. This also includes user prerogatives arising from exceptions and limitations, fair use and fair dealing, ensuring that these cannot be limited by contractual or technological means.

In addition, the following principles are at the core of the voluntary commons and user prerogatives described above:

1. **The voluntary relinquishment of copyright and sharing of protected works are legitimate exercises of copyright exclusivity.** Many authors entitled to copyright protection for their works do not wish to exercise these rights to their full extent or wish to relinquish these rights altogether. Such actions, provided that they are voluntary, are a legitimate exercise of

copyright exclusivity and must not be hindered by law, by statute or by other mechanisms including moral rights.

2. **Exceptions and limitations to copyright, fair use and fair dealing need to be actively maintained to ensure the effectiveness of the fundamental balance of copyright and the public interest.** These mechanisms create user prerogatives that constitute the breathing space within the current copyright system. Given the rapid pace of change in both technology and society it is important that they remain capable of ensuring the functioning of essential social institutions and the social participation of individuals with special needs. Therefore, exceptions and limitations to copyright, fair use and fair dealing should be construed as evolutionary in nature and constantly adapted to account for the public interest.

In addition to these general principles, a number of issues relevant to the Public Domain must be addressed immediately. The following recommendations are aimed at protecting the Public Domain and ensuring that it can continue to function in a meaningful way. While these recommendations are applicable across the spectrum of copyright, they are of particular relevance to education, cultural heritage and scientific research.

General Recommendations

1. **The term of copyright protection should be reduced.** The excessive length of copyright protection combined with an absence of formalities is highly detrimental to the accessibility of our shared knowledge and culture. Moreover, it increases the occurrence of orphan works, works that are neither under the control of their authors nor part of the Public Domain, and in either case cannot be used. Thus, for new works the duration of copyright protection should be reduced to a more reasonable term.

2. **Any change to the scope of copyright protection (including any new definition of protectable subject-matter or expansion of exclusive rights) needs to take into account the effects on the Public Domain.** Any change of the scope of copyright protection must not be applied retroactively to works already subject to protection. Copyright is a time-limited exception to the Public Domain status of our shared culture and knowledge. In the 20th century its scope has been significantly extended, to accommodate the interests of a small class of rights holders at the expense of the general public. As a result, most of our shared culture and knowledge is locked away behind copyright and technical restrictions. We must ensure that this situation will not be worsened at a minimum, and be affirmatively improved in the future.

3. **When material is deemed to fall in the structural Public Domain in its country of origin, the material should be recognized as part of the structural Public Domain in all other countries of the world.** Where material in one country is not eligible for copyright protection because it falls under a specific copyright exclusion, either because it does not meet the criterion of originality or because the duration of its protection has lapsed, it should not be

possible for anyone (including the author) to invoke copyright protection on the same material in another country so as to withdraw this material from the structural Public Domain.

4. **Any false or misleading attempt to misappropriate Public Domain material must be legally punished.** In order to preserve the integrity of the Public Domain and protect users of Public Domain material from inaccurate and deceitful representations, any false or misleading attempts to claim exclusivity over Public Domain material must be declared unlawful.

5. **No other intellectual property right must be used to reconstitute exclusivity over Public Domain material.** The Public Domain is integral to the internal balance of the copyright system. This internal balance must not be manipulated by attempts to reconstitute or obtain exclusive control via regulations that are external to copyright.

6. **There must be a practical and effective path to make available 'orphan works' and published works that are no longer commercially available (such as out-of-print works) for re-use by society.** The extension of the scope and duration of copyright and the prohibition of formalities for foreign works have created a huge body of orphan works that are neither under the control of their authors nor part of the Public Domain. Given that such works under current law do not benefit their authors or society, these works need to be made available for productive re-use by society as a whole.

7. **Cultural heritage institutions should take upon themselves a special role in the effective labeling and preserving of Public Domain works.** Not-for-profit cultural heritage organizations have been entrusted with preservation of our shared knowledge and culture for centuries. As part of this role they need to ensure that works in the Public Domain are available to all of society, by labeling them, preserving them and making them freely available.

8. **There must be no legal obstacles that prevent the voluntary sharing of works or the dedication of works to the Public Domain.** Both are legitimate exercises of exclusive rights granted by copyright and both are critical to ensuring access to essential cultural goods and knowledge and to respecting authors' wishes.

9. **Personal non-commercial uses of protected works must generally be made possible, for which alternative modes of remuneration for the author must be explored.** While it is essential for the self-development of each individual that he or she be able to make personal non-commercial uses of works, it is just as essential that the position of the author be taken into consideration when establishing new limitations and exceptions on copyright or revising old ones.

ANNEX VI

THE EUROPEANA PUBLIC DOMAIN CHARTER

Europeana, Europe's digital library, museum and archive, belongs to the public and must represent the public interest.

The Public Domain is the material from which society derives knowledge and fashions new cultural works.

Having a healthy and thriving Public Domain is essential to the social and economic well-being of society.

Digitisation of Public Domain content does not create new rights over it: works that are in the Public Domain in analogue form continue to be in the Public Domain once they have been digitised.

Principles for a healthy Public Domain

Museums, libraries and archives of all kinds are holders of our cultural and scientific heritage. These memory organisations are the guardians of society's shared knowledge. They play an essential part in maintaining the Public Domain on behalf of citizens and must uphold a number of general principles. These principles are essential to preserve a meaningful understanding of the Public Domain and to ensure that it continues to function in the technological environment of the networked information society. These principles are not intended to prevent organisations from commercial exploitation of Public Domain works in their collections. Instead they provide a set of minimum standards that ensures that the Public Domain functions in the digital environment.

1. **Copyright protection is temporary**. Copyright gives creators a time-limited monopoly regarding the control of their works. Once this period has expired, these works automatically fall into the Public Domain. The mass of knowledge over recorded time is in the Public Domain; copyright offers an appropriate and time-limited exception to this status.
2. **What is in the Public Domain needs to remain in the Public Domain**. Exclusive control over Public Domain works cannot be re-established by claiming exclusive rights in technical reproductions of the works, or by using technical and or contractual measures to limit access

to technical reproductions of such works. Works that are in the Public Domain in analogue form continue to be in the Public Domain once they have been digitised.

3. **The lawful user of a digital copy of a Public Domain work should be free to (re-) use, copy and modify the work**. Public Domain status of a work guarantees the right to re-use, modify and make reproductions and this must not be limited through technical and or contractual measures. When a work has entered the Public Domain there is no longer a legal basis to impose restrictions on the use of that work.

Guidelines for preserving the function of the Public Domain

There are a number of significant developments that threaten the function of the Public Domain. Over the last decades we have witnessed an expansion of the scope of copyright both in terms of time and protected subject matter. This has been detrimental to the Public Domain and the ability of citizens and memory organisations to interact with important parts of our shared culture and knowledge. The following Guidelines are issued to counter this trend.

1. **Any change to the scope of copyright protection needs to take into account the effects on the Public Domain**. Changes to the scope of copyright must not be retroactive. In the 20th century copyright has been extended to accommodate the interests of rights holders at the expense of the Public Domain. As a result a large portion of our shared culture and knowledge is locked away behind copyright and technical restrictions, and we must ensure that this situation will not be worsened in the future.
2. **No other intellectual property right must be used to reconstitute exclusivity over Public Domain material**. The Public Domain is an integral element of the internal balance of the copyright system. This internal balance must not be manipulated by attempts to reconstitute or obtain exclusive control via regulations that are external to copyright. No technological protection measures backed-up by statute should limit the practical value of works in the Public Domain. Industrial property rights, such as trademarks, should not be used to restrict the re-use and copying of Public Domain works.

Background

The Public Domain is a shared resource that underpins contemporary society. As knowledge and information are digitised, legal contracts are often being used that inhibit free access to the digitised Public Domain. This runs counter to the founding objective of Europeana. Our essential aim is to make Europe's Public Domain cultural and scientific heritage freely accessible to citizens in digital form to encourage the development of knowledge and stimulate creative enterprise and innovation. This is the position of the European Commission, who fund Europeana, and the Europeana Foundation, who run the service.

The Europeana Foundation is made up of international associations that represent museums, archives, audiovisual collections and libraries: the memory organisations which provide content to

Europeana. It is in the Foundation's interest to be clear on the use and meaning of the Public Domain. Europeana belongs to the public and must represent the public interest.

This Charter is a policy statement, not a contract. It does not bind Europeana's content providers to any position. The Europeana Foundation is issuing the Charter in order to influence the debate among the Europe's memory organisations, policy makers and funders about the terms under which Public Domain digital content is made available.

In its access and re-use terms Europeana follows the policies of its content providers. Each of them is legally responsible for deciding the terms on which they make content available, and for determining and clearing any rights in their content. Consequently, there are a wide range of practices among institutions providing Public Domain content to Europeana.

The Public Domain Charter will help to promote greater consistency for the benefit of our users. Users have complained of the range of different practices and especially that some content providers charge for downloading and even for accessing digitised items which are in the Public Domain in their analogue form. They perceive this as a barrier to citizens wishing legitimate access to their Public Domain heritage.

What is the Public Domain?

The Public Domain comprises all the knowledge and information – including books, pictures and audiovisual works – which does not have copyright protection and can be used without restriction, subject in some European countries to the author's perpetual moral rights. The Public Domain provides a historically developed balance to the rights of creators protected by copyright and it is essential to the cultural memory and knowledge base of our societies. The Public Domain covers two categories of material:

1. **Works on which copyright protection has expired**. Copyright in a work in most of Europe lasts for 70 years after the death of its longest living creator. If copyright is held by a corporation, then it lasts for 70 years after publication. Once this temporary protection has come to its end, all legal restrictions cease to exist. It means that almost everything published, painted, photographed or released anywhere in the world before the 20th century is out of copyright and in the Public Domain.
2. **The essential commons of information that is not covered by copyright**. Works are not protected by copyright if they are not original. Ideas and facts are not covered by copyright, but the expression of them is. Laws and judicial and administrative decisions are excluded from this protection. This essential commons is regarded as too important for the functioning our societies to be burdened with legal restrictions of any nature even for a limited period.

It is important to note that next to the Public Domain as described above there are a number of other limitations and exceptions that reduce legal restrictions and ensure sufficient access to our shared knowledge and culture. These exceptions ensure that the copyright granted to creators

does not interfere with certain specific requirements of society. They ensure access, enable the functioning of essential social institutions and provide for the social participation of individuals with special needs.

Why is the Public Domain important?

The Public Domain is the raw material from which we make new knowledge and create new cultural works. Having a healthy and thriving Public Domain is essential to the social and economic well-being of our societies.

Much of the world's knowledge – Diderot's Encyclopédie, the paintings of Leonardo, Newton's Laws of Motion – is in the Public Domain. Society constantly re-uses, reinterprets and reproduces material in the Public Domain and by doing so develops new ideas and creates new work. New theories, inventions, cultural works and the like are indebted to the knowledge and creativity of previous centuries.

The Public Domain in the digital age

The internet gives access to the digitised portion of that knowledge and creativity on a scale previously impossible. It is the driver for massive digitisation efforts that will fundamentally change the role of cultural and scientific heritage institutions. The digitisation of analogue collections creates new opportunities for sharing and creative re-use, empowering people to explore and respond to our shared heritage in new ways that our legislation has yet to catch up with. It has also brought copyright to the centre of attention for holders of our cultural and scientific heritage. Our memory organisations have for generations had the public duty of holding the heritage in trust for the citizenry and of making it accessible to all. Both of these functions are usually conducted at the citizens' – i.e. the tax payers' – expense.

Entrusted with the preservation of our shared knowledge and culture, not-for-profit memory organisations should take upon themselves a special role in the effective labelling and preserving of Public Domain works. As part of this role they need to ensure that works in the Public Domain are accessible to all of society, by making them available as widely as possible. It is important for memory organisations to recognise that as the guardians of our shared culture and knowledge they play a central role in enabling the creativity of citizens and providing the raw materials for contemporary culture, science, innovation and economic growth.

At the same time the transformation from guardians of analogue collections to providers of digital services places enormous challenges on these organisations. Creating and maintaining digital collections is expensive; the cultural heritage sector may lack resources for this new responsibility. Government sponsors may encourage or require organisations to generate income by way of licensing content to a wide variety of commercial users.

Public-Private Partnerships have become one option for funding large scale digitisation efforts. Commercial content aggregators pay for the digitisation in exchange for privileged access to the digitised collections. These activities are seen as a reason for attempting to exercise as much

control as possible over digital reproductions of Public Domain works. Organisations are claiming exclusive rights in digitised versions of Public Domain works and are entering into exclusive relationships with commercial partners that hinder free access.

When this exclusivity locks down digital content and inhibits access and re-use by teachers, innovators and citizens, memory organisations may be compromising their core mission and undermining their relationship with their users. Works that are in the Public Domain in analogue form must remain freely available in digital form and digitisation of such works must lead to increased access by the public instead of new restrictions. To remain relevant in the digital age, cultural and scientific heritage organisations must strive to increase access to our shared knowledge and culture by being the primary points of access to the works that they have in their collections. Value-added services can be developed around content without the need to claim exclusive rights over works that have been in the Public Domain in analogue form.

Ultimately, at a political and policy-making level, it is in the interests of society that Public Domain knowledge and information be digitised. Once digitised, it should be freely available to creative enterprise, R&D innovators and technical entrepreneurs to use as the basis for generating ideas and applications yet to be envisaged.

The aim of this Charter is to give a clear signal to content providers, policy makers and the public that Europeana and the Europeana Foundation believe in and wish to strengthen the concept of the Public Domain in the digitised world. In order to do so we need a robust and up-to-date understanding of the nature of this essential resource.