The Invisibility of the Public Domain in European IP Law

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• **What is the public domain (PD)?**
  • No exclusive IP rights, no statutory remuneration (levies)
  • Equal liberty to access and use intangibles (innovations, signs) for any lawful purpose
  • 4 Dimensions of the PD
    – Structural PD (requirements of protection)
      – Abstract ideas, concepts, formulas
      – Non-original, non-inventive applications of PD knowledge
    – Time-dependant PD (term of protection)
    – Voluntary PD (no application/waiver)
    – Specific PD (limitations/exceptions/scope of protection)
The invisibility of the

Public Domain

In European IP law
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• On the conceptual/semantic level
  • All knowledge is “intellectual property”
    – “Commission Recommendation on the management of intellectual property in knowledge transfer activities and Code of Practice for universities and other public research organisations” of 2008:
      – “Effectively exploiting publicly-funded research results depends on the proper management of intellectual property (i.e. knowledge in the broadest sense, encompassing e.g. inventions, software, databases and micro-organisms, whether or not they are protected by legal instruments such as patents)"
    – Commons as the dominant alternative narrative
      – But: open source, creative commons etc. also rely on IP rights
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• On the political level
  • Commission Recommendation “on the digitisation and online accessibility of cultural material and digital preservation“ 2006
    – (c) promote the availability of lists of known orphan works and works in the public domain,
    – (d) identify barriers in national legislation to the online accessibility and subsequent use of cultural material that is in the public domain and take steps to remove them
  • But no reactions in this regard on the national (Communication 2008/513 final) or European level
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• EU legislation:
  • Directive Copyright Term of Protection 2006/116
    – Art. 5: “Member States may protect critical and scientific publications of works which have come into the public domain.“
    – But Art. 4: protection of previously unpublished works “after the expiry of copyright protection”
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### On a comparative level:

<table>
<thead>
<tr>
<th>Language</th>
<th>Art. 5 Dir. 2006/116</th>
<th>ECJ Flos/Semeraro</th>
</tr>
</thead>
<tbody>
<tr>
<td>Spanish</td>
<td>domnio público</td>
<td>domnio público</td>
</tr>
<tr>
<td>Danish</td>
<td>offentlig ejendom</td>
<td>offentligt tilgængelig</td>
</tr>
<tr>
<td>German</td>
<td>gemeinfrei</td>
<td>gemeinfrei</td>
</tr>
<tr>
<td>Swedish</td>
<td>som inte längre skyddas av upphovsrätt</td>
<td>rättsskydd löpte ut</td>
</tr>
<tr>
<td>Greek</td>
<td>κτήμα του δημοσίου/κτήμα δημοσίου</td>
<td>κοινό κτήμα</td>
</tr>
</tbody>
</table>
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• EU law removes works/designs from the PD
  • ECJ Sony Music/Falcon Neue Medien 2009:
    – Requirement to grant copyright protection to works which had fallen into the public domain or had never been protected in member state A if only the work is still protected in one other member state
  • ECJ Flos/Semeraro 2011:
    – Requirement to grant copyright protection to designs which had been protected by a national design right but which had entered the public domain in that country before the implementation of the respective Design Directive
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• But see Golan v Holder in the U.S.
  • “Restoration” of copyright in foreign works which had never been protected in the U.S.
  • There is a bedrock principle of copyright law that works in the public domain remain there
  • Removing works from the public domain alters the traditional contours of copyright protection
  • In this case, courts review whether such legislation violates the fundamental right of freedom of speech
• How to counter this systemic imbalance
  • Study the PD
    – Functions: economic, culture, education, democracy …
  • Legal doctrine:
    – Analyze the IP system from the perspective of the PD
    – Identify principles and rules which reflect/ignore the PD in the IP system and beyond
• In particular: establish a *European Public Domain Supervisor* as an independent “guardian” of the PD

• Who would
  – monitor all legal developments;
  – advise all EU and national institutions;
  – hear and investigate complaints lodged by any person;
  – intervene in actions brought before the courts subject to applicable procedural law;
  – bring further limitations of the public domain to the attention of the public.
• Some more self-promotion:
• See Alexander Peukert
  – “Die Gemeinfreiheit. Begriff, Funktion, Dogmatik”
    – forthcoming 2011/2012 Mohr Siebeck, Tübingen
  – “A European Public Domain Supervisor”
    – IIC 42 (2011), 125-129