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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

The invisibility of the PD

- **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 - But Art. 4: protection of previously unpublished works “after the expiry of copyright protection”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:

	Art. 5 Dir. 2006/116	ECJ Flos/Semeraro
Spanish	dominio público	dominio público
Danish	offentlig ejendom	offentligt tilgængelig
German	gemeinfrei	gemeinfrei
Swedish	som inte längre skyddas av upphovsrätt	rättsskydd löpte ut
Greek	κτήμα του δημοσίου/ κτήμα δημοσίου	κοινό κτήμα

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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*

The invisibility of the PD

- **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
 - “A European Public Domain Supervisor”
 - IIC 42 (2011), 125-129
 - <http://www.ssrn.com/abstract=1711745>

Thanks!