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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

# The invisibility of the PD

- **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

# The invisibility of the PD

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    - But Art. 4: protection of previously unpublished works “after the expiry of copyright protection”

## The invisibility of the PD

- 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/<br>κτήμα δημοσίου  | κοινό κτήμα            |

## The invisibility of the PD

- **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*
    - “Die Gemeinfreiheit. Begriff, Funktion, Dogmatik”
      - forthcoming 2011/2012 Mohr Siebeck, Tübingen
    - “A European Public Domain Supervisor”
      - IIC 42 (2011), 125-129
      - <http://www.ssrn.com/abstract=1711745>