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A Doctrine of the Public Domain

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The legal status of knowledge/information not protected by IPR

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Die Gemeinfreiheit

*Geistiges Eigentum und
Wettbewerbsrecht*
63

Mohr Siebeck

The Public Domain: Theory, Function, Doctrine

Examples

The Task

Article 18 Berne Convention:

The convention “shall apply to all works which, at the moment of its coming into force, have not yet fallen into the public domain in the country of origin through the expiry of the term of protection.”

The long silence around the public domain

German Federal Court of Justice: The public domain as a legal principle

U.S. literature

U.S. literature: theory, theory, theory

My book:
doctrine

Overall normative aim:
A balanced IP system

What knowledge is in the public domain?

The territoriality of the public domain

The structural public domain in patent and copyright law

The structural public domain in trademark law

The conditional public domain

The contractual public domain

The specific public domain

PD knowledge
is owned by no-one

The principle of equal negative liberty

Adoption by a German court

Why the no-rights-status
is acceptable:
non-rivalry

Alternative conceptions: Subjective rights to use

Alternative conceptions: Concepts of Roman Law

Alternative conceptions: Commons

A good can be owned

- by one or several identifiable persons (property right);
- by a community composed of unspecified members (collective good/commons);
- by no-one (public domain).

The dilemma of a no-rights-conception

Legally protected freedoms

(Robert Alexy)

How is the equal negative liberty to use PD knowledge protected in private law?

Limit IP Rights!

IP Rights as an exception to the basic principle of equal negative liberty to use knowledge

The creation of IP Rights by the legislature

The requirement to justify IP protection

In particular:
retroactive term extensions

Unlimited copyrights/patents
unconstitutional

Limitations/exceptions to existing IP rights

The task of the judiciary

Don't extend exclusivity
beyond the statute

Don't read limitations
restrictively

In particular:
overlaps of rights
and the public domain

Public authorities
are called upon to limit IPRs

Private actor interferences with the public domain

Beyond property law

Procedural safeguards of the public domain

Formal requirements for the acquisition of IPRs

Opposition, revocation, cancellation proceedings: Art. 62 para. 4 TRIPS

Means to foster invalidity proceedings

In particular:
The language of the EU patent

The defense of invalidity in infringement proceedings

The burden of proof

Out-of-court interferences with the public domain

The contractual public domain

In particular:
Waiver of copyright

Freedom of contract as a tool to limit the public domain

The validity of contractual limitations of the public domain

Competition law as a limit

Public policy as a limit

Contractual liability for licensing public domain knowledge

German court practice

Criticism: Liability of the seller/licensor

Reasonable care in selling/licensing IPRs

Overall result

Non-contractual interferences with the public domain

Misleading advertisements

Unjustified warning letters

Consequences of denying liability

But Reichsgericht 1904: Juteplüscht

Federal Court of Justice 2005: Liability as a correlate necessary

Damages: Reasonable care in sending warning letters

Contractual and non-contractual liability for interferences with the public domain