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The Public Domain and the Subject Matter of Intellectual Property Law

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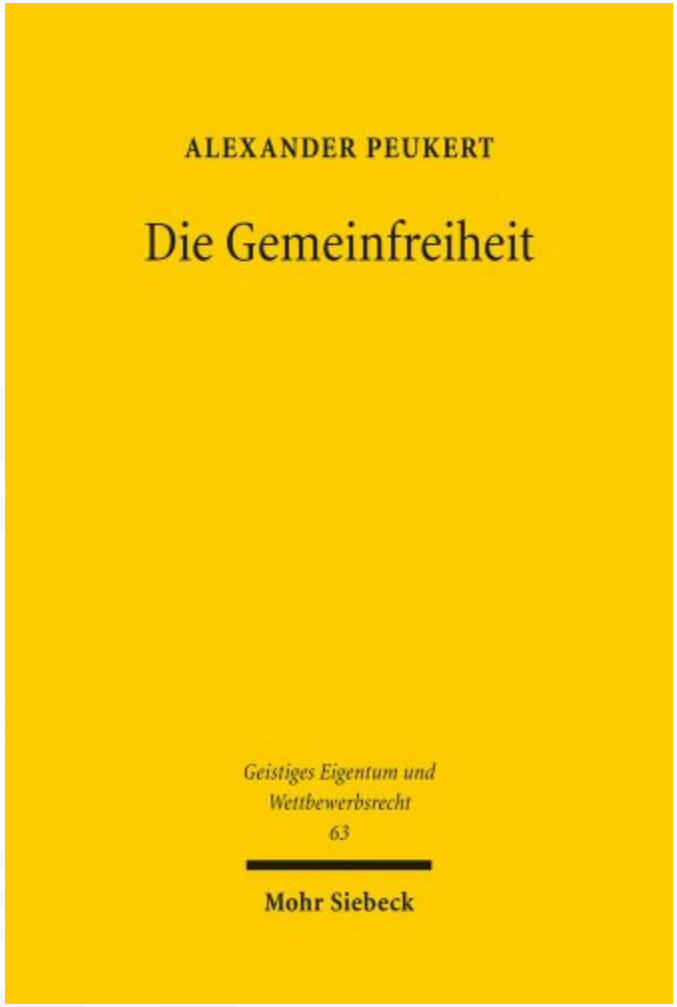


English Summary Article:
A Doctrine of the Public Domain
https://ssrn.com/abstract=2713757

A critique of the Ontology of Intellectual Property, 2018
English translation to be published with Cambridge University Press 2020

- The hypothesis of this lecture:
  - A full understanding of the public domain in IP law depends upon a precise understanding (an ontology) of the subject matter of the public domain (and IPRs).

- Basic definition of the public domain:
  - Information/knowledge not protected by IPRs

- The meaning and scope of the public domain cont'd
  - The territoriality of the public domain
    - Since the boundaries of the public domain meet with the boundaries of the IP protection, both are territorial in nature.
    - IPRs and the public domain are two sides of the same coin.
  - The structural public domain
    - Information/knowledge never protected by any IPR:
      - discoveries, scientific theories, mathematical methods/laws of nature, natural phenomena, and abstract ideas in patent law
      - ideas, procedures, methods of operation or mathematical concepts as such in copyright law
      - signs devoid of distinctive character, signs consisting of a characteristic resulting from the nature of the good itself

- The meaning and scope of the public domain cont'd
  - The time-conditional public domain
    - Formerly protected subject matter (e.g. "generics")
  - The contractual public domain
    - Rightholder waives IPR with effect erga omnes
  - The specific public domain
    - Uses of protected subject matter that do not constitute an infringement nor are subject to the payment of statutory levies
      - Uses beyond the scope of IPRs: repairs and private communications of works
      - Exceptions to exclusive rights: experimental use in patent law; quotations in copyright law

- Summary definition:
  - Public domain information/knowledge may be freely used by everyone under equal terms for every lawful purpose, including in particular commercial uses.

- The legal status of the public domain in IP law
  - Is it the principle or the exception? What is the *Grundnorm* of IP law?
    - Exclusive ownership
    - … or the public domain?

- The *Grundnorm* of IP law cont'd
  - IPRs are creatures of statutes: There is no protection without/beyond a statute.
  - The public domain, instead, rests on the principle of equal negative liberty:
    - Fundamental rights to freedom of expression, freedom of the arts and sciences, to conduct a business, etc.; the right to free development of everyone's personality (Art. 2(1) German Basic Law)
    - + Equality before the law
    - Equal negative liberty is not established by the state, but protected against unjustified interferences

- The *Grundnorm* of IP law cont'd
  - Thus, IPRs are the exception ("islands of exclusivity")
  - … to the rule, namely the public domain ("an ocean of equal freedoms").

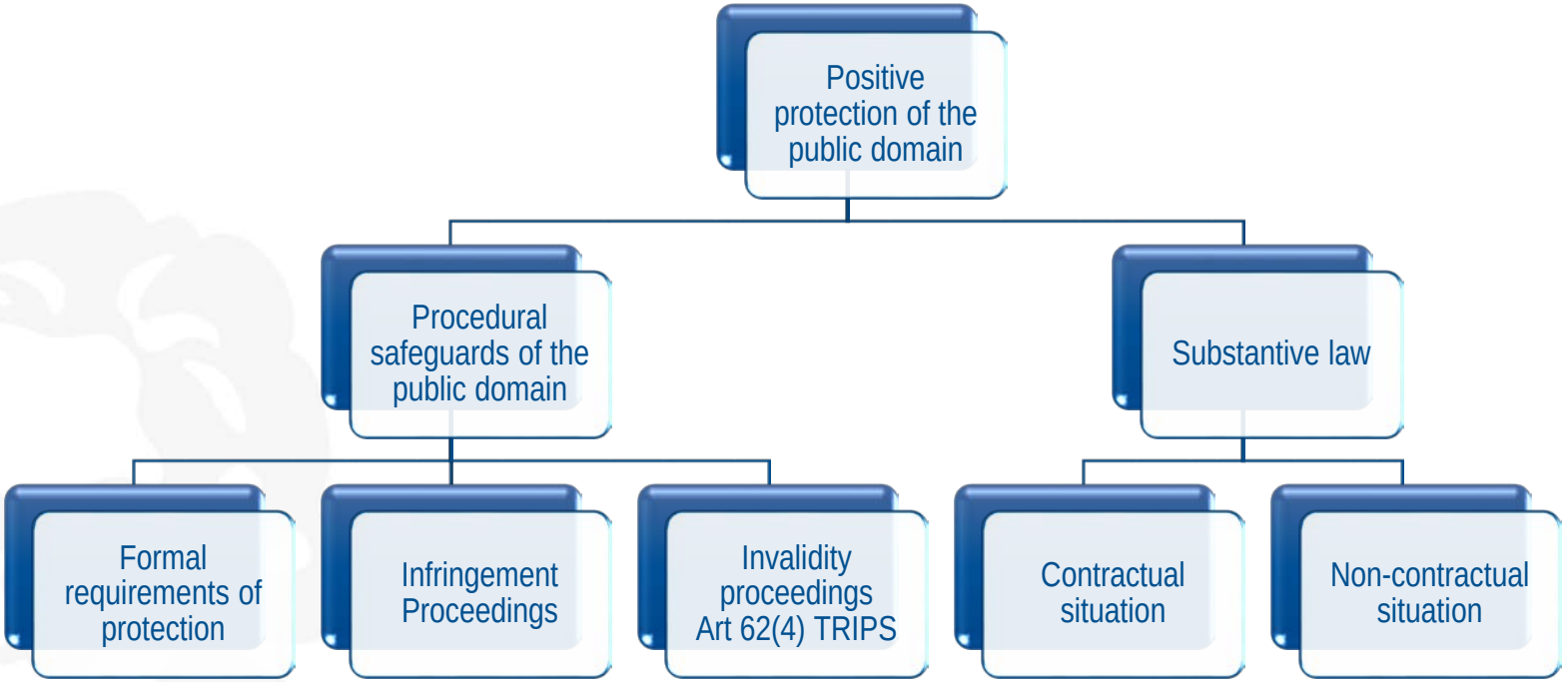
- In terms of ownership:
  - Intellectual property is owned by one or several person(s)
  - Public domain information/knowledge is owned by
    - no-one (libertarian perspective)
    - … everyone (communitarian perspective)
      - But the communitarian understanding fails to:
        - distinguish between intangible attributes "common to all mankind" (EFTA Court (see below); UNESCO cultural heritage)
        - … and other (regular) public domain information/knowledge.

- Confirmation of this understanding of the public domain
  - Higher Administrative Court of Baden-Württemberg 2013:
    - Everyone is equally at liberty to access and use German court decisions, which are not copyrightable
    - Thus, the German Federal Constitutional Court is obliged to provide all publishers, including the provider of an open access legal database with electronic copies of its decisions on equal terms. It must not favor certain publishers because such discrimination is unjustified in light of the public domain status of court decisions.

- Confirmation of this understanding of the public domain
  - EFTA Court 2017, E-5/16 Municipality of Oslo (Vigeland)
    - "The public domain entails the absence of individual protection for, or exclusive rights to, a work. Once communicated, creative content belongs, as a matter of principle, to the public domain. In other words, the fact that works are part of the public domain is not a consequence of the lapse of copyright protection. Rather, **protection is the exception to the rule that creative content becomes part of the public domain once communicated**." (para 66)
    - "Registration of a sign may only be refused on basis of the public policy exception … if the sign consists exclusively of a work pertaining to the public domain and the registration of this sign constitutes a genuine and sufficiently serious threat to a fundamental interest of society." (para 100)

- Confirmation of this understanding of the public domain
  - Art. 14 pending EU Directive „Copyright in the Digital Single Market“
    - “Works of visual art in the public domain: Member States shall provide that, when the term of protection of a work of visual art has expired, any material resulting from an act of reproduction of that work shall not be subject to copyright or related rights, unless the material resulting from that act of reproduction is original in the sense that it is the author's own intellectual creation.”
      - Recital 53: “… the circulation of faithful reproductions of works in the public domain contributes to the access to and promotion of culture (or access to cultural heritage). In the digital environment, the protection of these reproductions through copyright or related rights **is inconsistent with the expiry of the copyright protection of works.**”

The Protection of the Public Domain



- BUT:
  - If the public domain is the *Grundnorm* in IP law,
  - … why is ownership the *Grundnorm* of real property law?
    - No time limitation
    - Acquisition of ownership by prescription, finding, and (re-)appropriation
  - And: IPRs and ownership in tangible property have the same legal structure:
    - Private exclusive rights regarding certain objects
    - Protected by the fundamental right to property

- The answer to this puzzle cannot be found in the law:
  - The *explanandum* cannot provide the *explanans*
- Instead, the differing *Grundnormen* of IP and real property reflect categorically different subject matters:
  - Movable or immovable tangibles as distinct objects of real property rights
  - Intellectual property: a distinct object like a piece of land or cake?

- The paradigm of the abstract IP object
  - works of art, inventions, designs, trademarks, etc. are considered abstract objects (types) embodied in certain instantiations (tokens)
    - An invention is embodied in products or processes
    - A work is fixed in copies
    - A design is an appearance of industrial or handicraft articles that bear or embody the design
    - A sign is used by affixing it to goods or by using it in advertising, etc.

- The mode of existence of abstract IP objects
  - An ontological question rarely raised
  - Confirmation of the paradigm by Platonist-realist philosophy
  - Mainstream economic analysis:
    - IP is a non-rival, non-exclusive public good (as opposed to rival, exclusive, private tangibles)
    - … that is made artificially scarce by IP law
      - Note: A non-scarce good!?
  - IP theory
    - Peter Drahos and others: IP object is a “fiction”
    - But in what sense?

- A legal realist approach
  - Scandinavian legal realism
    - Alf Ross, Ophavsrettens grundbegreber, Tidsskrift for Rettsvitenskap 58 (1945), 321-353 vs. Vinding Kruse and Josef Kohler
    - Ole-Andreas Rognstad, Property Aspects of Intellectual Property, CUP 2018, with further references
    - The abstract IP object is a fiction, there are only artefacts and actions whose use is regulated
  - My own approach
    - Legal realism + John Searle's social ontology

- The inconsistency of the dominant paradigm
  - It assumes the existence of an abstract ("intellectual") type that can be owned
  - But at the same time, it acknowledges
    - that IP is created at a certain point in time by someone
    - that works etc. can get lost
      - the lost poem
    - that the existence of abstract IP objects/types depends upon the existence of at least one physical or mental token
  - And: Law can legitimately regulate only human behavior that relates to artefacts that humans are able to control

- An alternative ontology
  - The Master Artefact
    - The original painting, the manuscript, the live performance, the first fixation of a phonogram etc.
    - The representation of a sign/design in the register
    - The patent claims
    - A grown plant variety or deposited micro-organism
    - Brute/raw facts with measurable existence in the real world
  - The name of the Master Artefact (signifier)

- An alternative ontology
  - What does the name of the Master Artefact signify:
    - A plurality of raw facts
      - The Master Artefact and sufficiently similar copies (Secondary Artefacts)
      - The language of the privileges in the 16th-18th century
    - An abstract IP object
      - A *Kollektivsingular* (R. Koselleck) existing only in our language and thinking
      - This meaning/understanding only emerged in the late 18th century

- An alternative ontology
  - What IP law regulates in practice:
    - A claim of a Master Artefact by an applicant/plaintiff
    - The comparison of the Master Artefact as claimed with prior art artefacts (requirements of protection)
    - The comparison of the Master Artefact with the allegedly infringing Secondary Artefact (scope of protection)
    - The prohibition of certain real-world activities
      - Reproduction, communication to the public
      - Making, using etc. products or processes forming the “subject matter of a patent” (Art. 28(1) TRIPS)
      - Using signs in the course of trade

- Implications of this ontology
  - The subject matter and purpose of real property
    - Exclusive right between the owner and the world with regard to a particular thing
    - Particular tangibles (raw facts), existing independent from property law
    - Protection of the expectation of an unfettered enjoyment of possession vis-à-vis the world

- Implications of this ontology
  - The subject matter and purpose of IPRs
    - Do not allocate a particular tangible (e.g. a manuscript) in the interest of peaceful possession
    - Only come into existence or at least become relevant only after the Master Artifact has been published
    - The core positive power of the IPR holder is the right to "prevent" or "authorize" (cf. TRIPS, Berne Convention, etc.) certain conduct of third parties with respect to Secondary Artefacts.
    - This conduct is typically "remote from the persons or tangibles of the party having the right" (Holmes, J., in White-Smith Music v. Apollo 1908)
    - Third parties employ their own resources (tangible property) to produce and otherwise use Secondary Artefacts

- Implications of this ontology
  - Thus, an IPR is an **exclusive right** of the right holder **to act** with regard to a Master Artefact and respective Secondary Artefacts:
    - Copy or exhibit the Master Artefact (original)
    - Produce or otherwise use Secondary Artefacts
    - If this conduct occurs without prior authorization
  - In early modern times, exclusive rights to act were called privileges
    - From privilege to property = from common denominators for artefacts to the abstract IP object

- Implications of this ontology
  - To make conduct “remote from the right holder” dependent on a prior authorization of the right holder
    - Limits the freedom to act with everyone’s own resources and capabilities
    - Requires justification
  - Accordingly, IPRs form a statutory exception to the rule of equal negative freedom to copy and use artefacts, i.e. the public domain
  - IPRs are exclusive privileges to act, not property rights in distinct objects

- If time permits: further implications of this IP theory
  - Setting of damages in real property law:
    - Concrete damage (§ 249 BGB: "… restore the position that would exist if the circumstance obliging him to pay damages had not occurred. Where damages are payable for injury to a person or damage to a thing, the obligee may demand the required monetary amount in lieu of restoration."
  - Setting of damages in IP law (cf. Art. 13 Enforcement Directive 2004/28):
    - Concrete damage practically irrelevant
    - Either equitable license fee
    - Or profits obtained by the infringer

- If time permits: further implications of this IP theory
  - Ontological explanation of this difference:
    - In real property law
      - The damage concerns the tangible thing that forms the object of the property right
      - That damage can be easily monetized
    - In IP law
      - There is no distinct object that can be damaged in the first place
      - Infringers violate their legal duty to refrain from using their resources/capabilities with regard to certain Secondary artefacts
      - Accordingly, respective usages have to be monetized
        - Equitable license fee
        - Profits arising from this use