‘Public rights’ in copyright:
What makes up the public domain?

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Those supporting the public domain often don’t define it

- By 2000 a major group of IP and IT law scholars supported an expansive view of copyright’s ‘public domain’
  - Lange, Lipman, Boyle, Benkler, Lessig etc
- Most agreed on the core element of a definition, but did not go on to finalise it or elaborate what it covered
- *This paper attempts a more precise definition and enumerates its scope in one jurisdiction (Australia) as an example*
  - Australia, including its courts, have not added much yet
  - Compare the Canadian Supreme Court’s ‘user rights’ approach

Séverine Dusollier's WIPO 'Scoping Study' (2010)

- Dusollier adopts 'a traditional view' of PD
  - Public domain (PD) = 'elements that are not protected by © or whose protection has lapsed' [by term expiry]
- Strong points
  - Considers some elements outside her definition
  - Recognises the territorial (jurisdictional) basis of PDs
  - Compares the (traditional) PDs of 13 countries
  - Itemises types of other laws, and practices, which reduce PD
- Contestable points
  - Considers a work must be wholly within or without PD
  - Inconsistent in recognising that PDs are jurisdictionally-based, but insisting exceptions be internationally defined

Dusollier's categories (within her definition)

1. Idea/expression ('ontological PD')
2. Requirements for protection ('subject-matter PD')
   - (i) Originality; (ii) Fixation; (iii) Nationality
3. Term of protection ('temporal PD')
4. Excluded creations ('public policy PD')
   - (i) Some official docs (most countries); (ii) news items; (iii) no heirs
5. Relinquishment of © ('voluntary PD')

All 5 fall within our proposed PD definition

Categories Dusollier excludes

- Dusollier discusses but excludes:
  1. Uses outside the exclusive rights
  2. Statutory exceptions to © (free uses)
  3. Voluntary licensing (CC, open source etc)
  4. Compulsory licensing
- All 4 are in the proposed PD definition
  - Other categories contributing to the reality of the PD are impliedly excluded by omission

Samuelson's 7 categories

Samuelson's 2006 terminology and US categories:

- (1) 'IP-free information artifacts'
- (2) 'IP-free information resources'
- (3) 'the constitutional or mandatory public domain'
- (4) 'the privatizable public domain'
- (5) 'broadly usable information resources'
- (6) 'the contractually constructed commons
- (12) 'the unpublished public domain'

Valuable, but no definition showing commonalities

All are included by our proposed definition

Ronan Deazley's 8 elements of the (UK) public domain

The enumeration closest to ours

1. 'those works which fail to meet whatever **threshold** requirements [for] protection';
2. 'works whose periods of protection have **expired**';
3. '**ideas**, generic plots, themes and so on, as well as certain unoriginal materials';
4. 'use of an **insubstantial** part of a work';

Deazley's 8 elements (cont)

5. **uses** of a copyright work **outside** the 'acts restricted by copyright'
6. 'any use which falls within the statutorily defined "**acts permitted** ..."';
7. 'use of works which the courts refuse to protect on the grounds of **public policy'**;
8. 'uses of a work ... authorised by the courts because they are in the **public interest'**

We include all of Deazley's 8 but find more ...

Proposed definition of 'public rights' in copyright

- **Proposed definition:** The 'public domain', in relation to ©, is the effective ability of members of the public (including a significant class of the public) to use works without obtaining a licence on terms set (or changeable) by a © owner, on the same terms (including costs, if any) as other members of the public (or class).
- **Briefly**: 'The public's ability to use works (on equal terms) without seeking permission.'
- **Antecedents**: Littman, Boyle, Lessig & Deazley all use lack of permission as their key element (contrast Dusollier; not sure of Samuelson) but with no precise definition

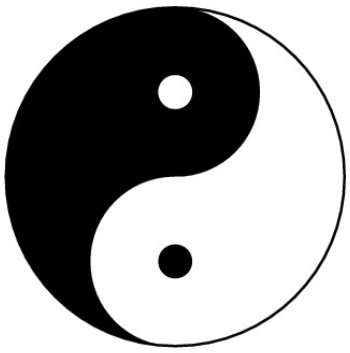
Why this definition? (1) Continua & dichotomies

- Private/public distinction should not be based on whole works
  - Dusollier: A work must be completely within/without PD; based on a dichotomy *between* works
  - Alternative: Recognise that most works are partly within and mainly outside the PD; they are on a public/private continuum
  - Only at the extremes are works totally PD or (perhaps) totally proprietary
- Copyright is a zero-sum game
  - any increase in proprietary rights diminishes public rights in *quantity*, and vice versa
  - But this is not the same as *value/benefit*: sometimes 'less is more' for © owners (eg voluntary licensing; collective licensing; the de facto benign PD)

Why this definition? (2) Better focus, better scope

- A 'user centred' or 'use centred' definition
  - A definition of 'public rights' should capture **all the most important uses** that members of the public can make of works The origin of the right does not matter
  - © Act; an omission from it; another statute; common law;
- Universality is not the key question
  - Most significant public rights now only allow *some* uses
  - Many can only be exercised by some classes of the public
- Use of 'ability' (not only 'right') encompasses both *de jure* and *de facto* PDs
  - If a use will not in practice be challenged it is as good as a right

Public and proprietary rights



- This is "©" *within* a work.
- Complementary public *&* proprietary 'halves'
- The boundaries are fuzzy
- *Whole* works exist on a continuum with public *&* proprietary 'poles'
- Most current works are between the poles
- Mankind's heritage is at the public pole
- There is nothing at the purely proprietary pole

15 categories of 'public rights' (de jure & de facto)

1. Below minimum requirements
2. Works impliedly excluded
3. Works expressly excluded
4. Constitutional exclusions
5. © has expired
6. 'Public domain dedications'
7. Public policy refusals
8. Public interest exceptions
9. Insubstantial parts
10. Mere facts, ideas etc
11. Uses outside exclusive rights
12. Statutory exceptions
13. Neutral collective licensing
14. Neutral voluntary licensing
15. *De facto* PD of benign uses

? *De facto* PD of unreachable uses

1 Works which fail to meet minimum requirements

1. Fall below minimum requirement for originality
   - Aust. requirement is very low
2. Not reduced to a material form
   - Australia's requirement is very low: 'any form (whether visible or not) of storage of the work or adaptation, or a substantial part of the work or adaptation, (whether or not the work or adaptation, or a substantial part of the work or adaptation, can be reproduced)'
3. Nationality requirements

Everyone agrees these are included in PD

- It's what is missing that is most important:
  - No registration requirements or other formalities(Berne)

2 Categories of works impliedly excluded from ©

- © laws do not protect all forms of creative expression
  - Berne definition is very broad, and they are minimums
  - Some laws have broad statements + inclusive lists
  - Other laws (eg UK & Australia) have exclusive lists only
  - 'Gaps' between categories therefore can exist and differ between countries: these 'unprotected works' are part of PD
- Some laws go beyond Berne minimum categories
- The actual and potential differences between national laws are differences between PDs

Deazley & Dusollier don't include, Samuelson does

3 Categories of works expressly excluded from ©

- Exclusion of official documents
  - legislation and case law (almost all)
  - Official translations and others (many)
  - Australian law has no exclusions (Joins UK in the rump of 'Crown ©' countries)
- 'News of the day'
  - Australia treats this as idea/expression

Dusollier & Samuelson include, Deasley not

4 Constitutional restrictions

- In some countries, constitutional rights (eg freedom of speech) may limit ©
  - We include this as a pre-existing limit on © scope
- In Australia, there are implications
  - implied right of political free speech (positive)
  - Blank tape levy could not be based on IP power
  - Acquisition of property on just terms (negative)
- Deazley ignores re UK (as does Dusollier)
  - Do fundamental rights under Lisbon Treaty re-open this?
- US lawyers always include © clause and 1st Amendt as © limits: but *Eldred & Golan* undercut

5 Works where © has expired

- Australia's default position is the EU/US position of 'life of the author + 70 years'
  - But if copyright had expired before term extended from +50 to +70, no retrospectivity
- Indefinite © in unpublished works (no PD)
  - Exception for pre-1955 photos, published or not
- The narrowest traditional view of the public domain is that this is all it contains (narrower than Dusollier)

6 'Public domain dedications'

- Can you intentionally forfeit your © to the public as a whole?
  - Instead of transferring it to a class of persons
- Chile, Kenya, India etc have statutory procedure
- Judicially recognised in the USA
  - Also implemented by CC0 licence
- Status uncertain in Australia (and the UK?)
- Samuelson & Dusollier include, Deazley doesn't

7 © refused on grounds of public policy

- UK has a long line of cases since 1721 refusing © protection on this ground
- Australia
  - *Venus Adult Shops* (2006): no such restriction
  - courts have refused remedies on this ground
  - © Act 1905 used to exclude 'blasphemous, indecent, seditious or libellous' matter
- Some countries exclude some infringing works

Deazley includes; Dusollier & Samuelson ignore

8 No © because of public interest

- Where Courts can authorise use of a work on public interest grounds
- UK: *Lion Laboratories*, *Ashdown* and *Human Rights Act* have kept this category alive
- Australia
  - *Cth v Fairfax* (1980) Mason J gave mild endorsement
  - Collier Constructions (1990) Gummow J strongly opposed
  - No full High Court or other decision yet
- Q: Why shouldn't the existence of a PD category depend on Court decisions?
  - The boundaries of all categories depend on Court interpretations

Deazley includes; Dusollier & Samuelson ignore

9 Uses of less than a substantial part of the work

9-11 are 3 categories of uses outside the exclusive rights of © owner

- In Australia 'substantial' can mean something close to 'insubstantial'
  - Anything recognisable from the work is enough
  - Leaves little scope for public rights
  - No the same as Category 1 because it applies only to use of (part of) a work, not to the work as a whole

10 Use of mere facts, info. or ideas derived from work

- Not contentious, just that boundaries are uncertain
- Australia does not have a 'database right' but did have a very strong 'sweat of the brow' caselaw protection for compilations
  - Ice TV (2009) High Court case has restricted scope of this and expanded the PD
- Conrast *Feist* (US) lower level of protection

Everyone includes this category

11 Uses outside statutorily defined exclusive rights

- Traditional 'public rights', fundamental to enjoying works:
  - to read or view or listen to or perform or play works (at least non-public uses of legitimate copies)
  - to lend (privately or through libraries), hire/rent, sell second-hand (privately or through dealers), or destroy
- Australia
  - now has 'rental rights' for all subject matter, reducing public rights
  - no restrictions on lending
- UK (& Europe) in contrast
  - Both lending & renting rights now exclusive for all types of work, with some exception for public libraries

Deazley and Samuelson both include, Dusollier does not

This omission shows how 'useless' is the traditional definition

12 Free uses allowed by statute

- 'Statutory exceptions' to © protection (no $ required - 'free')
- Some countries (eg USA) have broad and undefined 'fair dealing' public rights
- Australia: numerous narrow exceptions
  - Narrowly defined 'fair dealings' (not general 'fair use') for study, criticism, reporting, courts
  - New free use exceptions: format shifting, time shifting, satire
  - Many other specific exemptions for particular types of works
- Some exceptions can only be used by particular classes (eg libraries, museums)
  - This does not matter, the © owner does not choose who can benefit from the exemption

Samuelson & Deazley include; Dusollier does not

13 'Collective licences': Paid uses allowed by statute

- The only part of the public domain where revenue flows to the © owner
  - Only a *class of beneficiaries* can utilise (a closed commons) but the general public usually obtains benefits indirectly
  - ***Necessary*** (for our definition) that licence class, conditions & fee be uniform, and set by a neutral body on public interest grounds, not the © owner on private interest grounds
- In Australia, extensive and 2 types:
  1. *Compulsory licences* where © Act *defines* the licence and the fee mechanism (eg music on radio)
  2. *'Blanket licences'* where a licensing practice *empowers* the Copyright Tribunal to set uniform conditions and licence fees across an industry (eg music in gyms)

No one else includes this in the PD (except perhaps Lessig).
In Australia, it must be included because its scope is vast.

14 Voluntary licences to public by a neutral scheme

- Requirements in order to fit our definition:
  - Licence terms set by a neutral body, not © owner
  - © owner cannot choose who can use licence
  - © owner cannot vary or revoke licence
- Examples are Creative Commons and most open source/FOSS licences
  - Viral licences (eg software under GPL; Wikipedia) means their scope is vast and growing ('tar baby' effect)
- Their effect is largely global not jurisdictional
  - Important in Australia as elsewhere; probably more so as Australia is a 90/10 IP importing country

Samuelson includes, Deazley & Dusollier do not

Deazley objects because the © owner issues the licence

15 De facto commons in benign uses, with opt-outs

- 'Non-objection to benign uses of works coupled with effective opt-outs'
  - Internet search engines: the best example
- General conditions for benign appropriation:
  - The law is somewhat unclear, and differs between countries
  - vast majority of affected copyright owners consider that tolerating the otherwise infringing use is in their interests
  - if owners object, there are effective opt-out provisons
  - Only a manageable number of owners do object
- Narrower than 'tolerated use' (Wu)
  - 'grey zone' of possibly infringing uses, either undetected or where enforcement not worth it

No one else includes this; it is one of the largest parts of the PD

An unreachable non-benign public domain?

- Are there works beyond the effective reach of any national copyright laws, including beyond enforcement resource, due to features of the Internet?
  - Wikileaks is the most striking possible example
- Is this a (non-benign) *de facto* commons?
  - As yet uncertain whether the category exists in fact in Australia or elsewhere else
  - Individual (infringing) copies of works would still likely result in enforcement actions, at least for some individuals: so 'conditions of access' would not be equal, disqualifying it
- Conclusion: Not part of the public domain

Q: What do these 15 public rights add up to?

- A sufficiently comprehensive description of Australia's © public domain
  - One that is based on a definition applicable to all 15
  - The definition is 'user' or 'use' based: ie focuses on *the public*
- Not a universal description of '*the*' © public domain (no such thing)
  - The © public domain in the US or UK is different, as we see
  - It is differently different in Kosovo, Korea, Kuwait or Kenya
- We need more analysis of national public domains, their similarities and differences

Unanswered questions

1. Are the *de jure* components 'rights' or something else?
2. What aspects of © public rights are most important today? (not the same as the rights)
3. What makes the *de jure* public rights effective or ineffective?
4. What effect do other laws have on the © public domain?
5. Are there 'global' factors that have a similar effect on all national public domains?
6. What are the relationships between national public domains, in their effects on each other

Credits

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