

Committee on Copyright and other Legal Matters (CLM)

The Public Domain Why WIPO should care

**Provisional Committee on Proposals Related to a WIPO Development Agenda
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IFLA, Library Copyright Alliance (LCA) and Electronic Information for Libraries (eIFL)**

"A rich public domain and fair access to copyright protected material enhances creativity and the production of new works. It is often assumed that economic growth benefits from ever stronger intellectual property rights while some concession must be made to copyright exceptions for purely social reasons. In fact this is a false dichotomy. Many industries require access to copyright material for the purposes of research and development, education, software or hardware interoperability. A lack of reasonable access can actually hurt economic growth."

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What is the Public Domain?

"Public domain" means works that either never have been copyrighted or that are no longer within the term of protection under the applicable intellectual property laws.

These works are crucial in preserving our history, scientific knowledge, technology and inventions, and cultural heritage for present and future generations. Access to the public domain fosters learning, innovation and creation of new works. Those works may themselves then be subject to new rights, but that is a benefit not a burden of a rich public domain. Libraries all over the world are working to save "including through digitisation" older, and often endangered, materials that are in the public domain.

Public domain works may be used without expending resources and cost in tracing rightholders to obtain permission or buying licences. It is a lot easier therefore

- for a publisher to produce special low-cost editions of a book in the public domain
- a songwriter to parody a well-known ballad without fear of being sued
- a teacher to distribute copies of a poem for students in their class, and
- for a library to digitise a set of public domain photographs for their online local history exhibition
- for business and industry around the world to create new value-added products from US government information, since it is all in the public domain, including government funded research.

In February 2007 Dr Kamil Idris, WIPO Director-General, pledged WIPO's support in the establishment by Belarus of an electronic library *"to ensure protection of the country's scientific and artistic heritage."*

Without the availability of public domain works to form the core of this online library, this wonderful project will be stalled at the starting post since considerable time and resources will be required to identify, locate and obtain permission for rightholders of

copyright works before they can be included. A number of works are furthermore likely to be orphaned which will exacerbate these problems. There are likely to be significant gaps in the record of Belarus' scientific and artistic heritage.

Why is the Public Domain important?

The public domain is part of the common cultural and intellectual heritage of humanity and is the major source of inspiration, imagination and discovery for creators. Works in the public domain are not subject to any restrictions and may be freely used without permission for commercial and non-commercial purposes. It is important for access to knowledge and must be accessible for the benefit of creators, inventors, universities and research centres.

The Public Domain encourages creativity

Examples of uses of public domain works to create new works are:

The Maha-bha-rata

The renowned Bollywood film producer, Bobby Bedi will create a Trilogy of feature films, a television series, plus computer games, comic books, merchandising and "*The Vedic Experience*" theme park based on the Maha-bha-rata, one of ancient India's two major Sanskrit epics.

Mozart

Mozart is among the most enduringly popular of European composers and many of his works are part of the standard concert repertoire of orchestras ranging from world class philharmonic to local youth orchestras. Recordings of performances acquire new rights which bring revenue to musicians and producers. For example browse the Berlin Philharmonic Orchestra's catalogue at:

<http://www.berliner-philharmoniker.de/en/home/>

Snow White

Snow White and the Seven Dwarfs (1937) produced by Walt Disney Productions, was the first animated feature to become widely successful within the English speaking world and was therefore intrinsic to the company's success.

Fyodor Dostoevsky

The Brothers Karamazov is one of the most acclaimed novels by the 19th century Russian novelist Dostoevsky. It is now available online in full text for students of Russian literature around the world. His complete works are also available as recorded books. All his major novels have been translated and dramatised as successful television or feature films and have been performed on stage in several countries.

Why is the Public Domain in WIPO's remit?

- WIPO sets norms.
- Copyright norms set by WIPO, in particular the scope and duration of rights, impact on the public domain.
- When private rights on content are increased, material in the public domain decreases.
- The WIPO Secretariat already acknowledges this in the statement in Annex A, Cluster B Proposal 17 Column (iii) of Ambassador Manalo's working document for PCDA/3.

No conflict with IP rights

Safeguarding the public domain does not at all conflict with the protection of intellectual property. A robust public domain enriches and functions within the intellectual property structure. Protecting the public domain does not imply legal protection but a general protection against ever encroaching IP rights created by the current trend for ever upward harmonisation of the terms and scope of patent, trademark, copyright, moral and related rights.

Why is the Public Domain under threat?

Extending Terms of Copyright Protection

- During the 1990's the world's two largest trading blocs, the European Union (1993) and the United States (1998) extended the term of protection for general copyright by a further 20 years to life plus 70 years.
- Recently certain developing and transition countries have even exceeded these long levels of protection e.g. Mexico (life + 100 years), Côte d'Ivoire (life + 99 years), and Ghana (life + 70 years).
- Furthermore copyright is also now within the realm of free trade agreements (FTAs), which, if with the EU or US, typically require the partner country to extend the copyright term to at least match.

For developing and transition countries, where the issue of accessing information is a key determinant in their development, term extensions mean that information that traditionally belonged to everybody is removed from collective ownership with grave consequences for education and innovation. Furthermore, the extension of the term disproportionately benefits rights owners and their estates in developed nations, at the expense of users of information and potential new creators in developing countries, reflecting the information flows from North to South.

Content in the public domain is shrinking because of these extended terms of protection, resulting in less content for creators to build upon and less content for the benefit of society. Pioneering projects such as that of Eduvision, providing digital learning materials to the poorest children in Kenya, suffer as a result because they must rely on older out-of-copyright and more out-of-date materials which impedes academic research.

Longer terms of protection also exacerbate the problem of orphaned works i.e. copyright works whose owners are difficult or impossible to trace, thus making rights clearance difficult, and cumbersome and very expensive in terms of library resources and budgets. This is particularly significant when libraries need to get permission to include works in digitisation projects. Academic, scholarly material or less known works of no commercial value but important to researchers, historians, architects and other specialists is being disproportionately affected.

Technological Protection Measures (TPMs)

- TPMs acquired legal protection under the WCT. Yet they are adversely affecting access to the public domain. WIPO has a role to ensure that TPMs do not harm access to content in the public domain.
- TPMs last on average for three to five years. If the product is no longer made, there will be no new TPM compatible with new operating systems and no key available to allow libraries to migrate content to new platforms, rendering the product orphaned.
- TPMs do not expire when the term of copyright protection expires, thus they lock up the content in perpetuity and digital content in the public domain becomes inaccessible to future generations. The result will be damaging gaps in the cultural and scientific record.

- Public domain content which is digitised and repackaged within commercial materials becomes subject to contract. In most countries licences and contracts are allowed to override copyright exceptions and limitations so if such content is prevented by contractual terms from being re-digitised and made available in an open access repository such as those that will be created through public programmes such as the European Digital Library, it risks being locked up in perpetuity by TPMs and the DRMS that enforce the licence terms.
- The world's research libraries need to keep digital works in perpetuity and be able to transfer them to other formats and platforms in order to preserve them for the public domain, so they can make the content fully accessible and usable once all the rights have expired. The total protection of TPMs introduced by the WCT is having serious and detrimental effects on the preservation of our cultural and scientific heritage in digital form. Great research libraries such as the British Library have expressed their grave concern on the future implications and have publicly called on policy makers to find a solution.

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