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Copy Left v. Copy Right

June 2004

Content

Intellectual property must find a home in a broader-based information policy, and be a servant, not a master, of the information society.

Pamela Samuelson[1]

1 [2003] L&C.P. 171.

1. Introduction

> *[...W]hile our system of protection has produced Britney Spears and Madonna, the framers' system of nonprotection produced Beethoven[...].*
>
> *Lawrence Lessig*[2]

In the light of legislative changes like the DMCA[3] or the Information Society Directive (ISP)[4], an opposition thinking that either changes has gone too far or access to information is endangered, has formed. Included in this group are individuals like Lawrence Lessig[5],the Open Source Movement[6], the EFF[7] or the signers of the Berlin Declaration on Open Access to Knowledge in the Sciences and Humanities[8].

For the purpose of knowing which side is right, the public domain as it is now known will be drawn against the background of the actual legal circumstances in order to see if the law serves the public in general. It will also be seen how favouring the producer's side can lead to unwanted results.

2. Total Freedom

When talking about access to information, one possible model is the total lack of any restrictions. Everybody can access anything without having to pay something. One model implementing such a thought was the Marxist one[9]: Nobody had any rights in their works. Not thinking about other restrictions, free access to the available information was granted from a copyright point of view[10]. Communism failed, though.

2 Lessig 51 Duke L. J. 1795. But then, Mozart might or might not have died in total poverty, http://en.wikipedia.org/wiki/Wolfgang_Amadeus_Mozart [11.05.04].
3 Pub. L. No. 105-304, 112 Stat. 2860 (1998), http://www.copyright.gov/title17/circ92.pdf [11.05.04] and http://www.copyright.gov/legislation/dmca.pdf [11.05.04].
4 http://europa.eu.int/cgi-bin/eur-lex/udl.pl?REQUEST=Seek-Deliver&COLLECTION=oj&SERVICE=eurlex&LANGUAGE=en&DOCID=2001l167p0010 [11.05.04].
5 Lessig, Free Culture.
6 E.g. http://www.gnu.org [11.05.04] or http://www.stallman.org/ [11.05.04].
7 http://www.eff.org/ [11.05.04], esp. http://www.eff.org/IP/DRM/DMCA/ [11.05.04].
8 http://www.zim.mpg.de/openaccess-berlin/berlindeclaration.html [11.05.04]; cp. also Sietman, “Zirkelspiele – Die wissenschaftliche Literaturversorgung steckt weltweit in der Krise”, http://www.heise.de/ct/99/20/216/default.shtml [21.04.04].
9 See Burkitt [2001] I.P.Q. 175 et seqq. writing about the Chinese system and referring to the Marxist's one.
10 But then information for the masses is probably not an aim, see “Internet: China's Public Enemy Nr. 1”, http://www.spiegel.de/netzwelt/politik/0,1518,298565,00.html [11.05.04].

2.1. What is the Public Domain

In the centre of the discussion as to how far the legislation should embrace "total freedom" stands the public domain. In a nutshell it is information freely available to the public. The question to be answered is how prominent the public domain should be.

Because of many different definitions and contents of the „Public Domain" even finding an adequate description is difficult[11].

2.1.1. Copyright Layers

The system of copyright can be understood as a system of different layers called "uses". Certain uses of a work and of information are controlled by a copyright while others are not. In between these extremes are uses of a work, which are governed by a copyright, but other persons than the holder of the copyright are not infringing when making use of them because of the principle of "fair dealing/use"[12]:

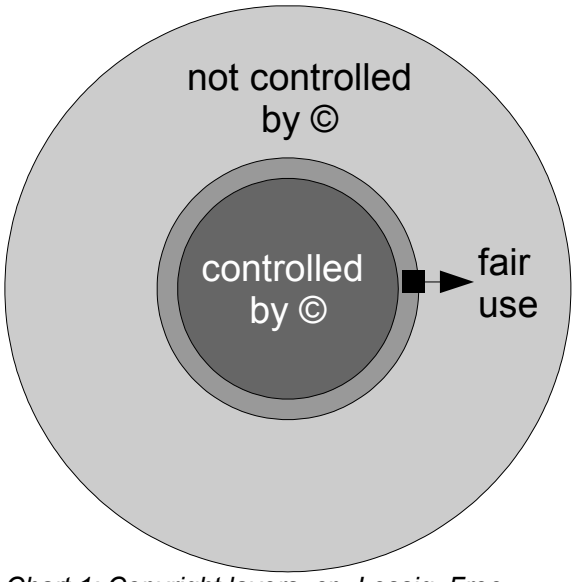

Chart 1: Copyright layers, cp. Lessig, Free Culture, pg. 141-142; see also Samuelson p. 151.

11 Rose [2003] L&C.P. 84; Samuelson [2003] L&C.P. 148 et seqq.; Boyle, Shamans p. 209 n.8.

12 Cornish 11-36 et seqq.; Bentley p. 194 et seqq.

2.1.2. Strict Definition

A strict definition only accepts rights not governed by intellectual property rights as the public domain[13]. Works like Conan Doyle's Sherlock Holmes[14] fall within this category[15], their copyright long expired. Everybody is free to do whatever he wants to do with the work and nobody is capable of restricting this using intellectual property law.

2.1.3. Including Fair Dealing

Against the background of free access to information, when speaking about the public domain uses covered by fair dealing can also be included into the definition[16], because it is of no difference to the public because of which legal declaration a work can be used[17].

2.1.4. Including Certain Copyrighted Materials

Some authors[18] even include some copyrighted materials like Open Source software. Again the reasoning is the availability of information to the public for free or for marginal costs.

Another argument is, that once knowledge finally gets into the public domain, it may be outdated[19]. Even if this is more likely to happen with patented inventions, it can apply to copyrighted material, especially when software is concerned[20]. In order, therefore, to be able to talk about technical knowledge which is relevant, it seems appropriate to include certain copyrighted materials.

2.1.5. Importance of The Public Domain

What is the importance of the public domain?

Work in the public domain can be used freely without the fear of infringing somebodies rights. It is a pool of material upon which new works can be based. Lessig consequently argues that from a cultural background, it might be advisable to put as many works as possible in the public domain or at least lessen restraints in order to promote creativity based on older works[21]. However, the idea-expression dichotomy should not be forgotten: Even with

13 Van Caenegem [2002] E.I.P.R. 324;Samuelson [1999] L&C.P. 149; cp. the definition of public domain software at http://www.oit.ohio-state.edu/glossary/gloss3.html#p [21.04.04].
14 http://www.gutenberg.net/etext/1661 [11.05.04].
15 Cp. Project Gutenberg at http://promo.net/pg/ [21.04.04].
16 Benkler [1999] N.Y.U.L.Rev. 361 et seqq. Esp. p. 362.
17 Even if this might be true from a theoretical point of view, problems concerning the practical enforcement of fair use rights should not be forgotten, cp. Lessig's remarks in Free Culture p. 143 et seqq.
18 See Samuelson [2003] L&C.P. 149.
19 Van Caenegem [2002] E.I.P.R. 325.
20 Admittedly it is unlikely to happen to a novel.
21 See for example Lessig, Free Culture, p. 30, 57.

an existing intellectual property right, the idea itself is free to use[22]. Apart from that, the public domain, as it is defined in this essay[23], enables critics to deal with current works. Because of fair use it is possible to quote, to criticize, to parody[24]. Without a critical assessment of current products, the public can only rely on the original – perhaps biased – opinion of the creator. Enabling fair use is therefore in the interest of an informed public[25]. On the other hand restricting the public domain might lead to a situation in which new works are not created because of the fear of infringing copyright[26].

2.2. Open Source Model

Some steps away from total freedom but still in the public domain is the open source model.

2.2.1. Ideology

While it is questionable if everybody involved in Open Source Software would agree to Stallman's statement that all software should be free[27], the underlying ideology is the "free speech, not free beer" paradigm[28], advocating the free flow of information[29]. Because the motivations of developers differ[30], a large pool of free information is generated for everyone to learn from in the end.[31]

However, the idea behind Open Source is not always transferable. Even an advocate of Free Speech might not be interested in letting all of her work pass into the public domain right from the start[32], having used public domain knowledge or not.

2.2.2. Legal Concept

Behind the Open Source idea stands the GPL, the General Public Licence[33]. Because the original information (i.e. the program) was free, this status should prevail.

22 Practical problems which might occur will not be discussed.
23 See 2.1.4.
24 Cohen [1999] E.I.P.R. 239. Cp. Lessig, Free Culture p. 97 et seqq. as to practical problems with the fair use principle and the American legal system as such, p. 51.
25 Which then might or might not make use of the presented information.
26 Cp. Samuelson [2003] L&C.P. 168.
27 Stallman, Owners. See also Moglen, Transcript [15:02].
28 The Free Software Definition, http://www.gnu.org/philosophy/free-sw.html [11.05.04].
29 Nevertheless, looking at the market as it presents itself now, Mostonen, [2003] I.E.P. 102, does not accept "ideology" as an explanation for the phenomenon Open Source.
30 Lakhani/Wolf, Hackers.
31 Cp. Lessig, Free Culture p. 21 et seqq. as to the importance of available information for a cultural environment.
32 Samuelson [2003] L&C.P. 168.
33 http://www.gnu.org/copyleft/gpl.htm [12.05.04].

Without discussing problems regarding the legal validity of some parts of the GPL[34], the means of the GPL to reach this goal are a contract, which allows users to copy and distribute the program[35], modify it[36], and copy and distribute the modified version[37].

Whilst the user is free to do these described actions, he must licence his work under the GPL again[38]. Hence the information, with added parts by the new author, remains in the public domain.

2.2.3. Intermediate Result

Whilst OSS would not work in a system without a copyright[39] - § 2 b.) GPL could not be enforced – it gives the users a great amount of freedom as to the things they can do with the software, approaching total freedom. A similar concept, inspired by the GPL[40], is followed by the "Some Rights Reserved" licences of the Creative Commons team[41].

Open Source Software however is not free of monetary thoughts; it can be understood just as another business model, shifting the focus from paying for the software to paying for a service. IBM is not embracing Linux without a reason[42].

2.3. Wikipedia

Wikipedia[43], "The Free Encyclopedia", is another example for the creation of content without the benefit of financial compensation for the work done. As impressive as Wikipedia is, it also shows one of the problems of a system were everybody can change everything: Can the information be relied on? Is it up to date? In contrast, proprietary encyclopedias like Encarta[44] provide somebody who is responsible for possible damages.

3. Total Control

The opposite way of thinking gives total control to the holder of a copyright. He can decide when, how, for how long and for what price information may be accessed.

34 There are for example problems with the time the contract between the developers and a new developer is concluded or how to actually prosecute infringements.
35 § 1 GPL.
36 §2 GPL.
37 § 2 GPL.
38 § 2 b.) GPL.
39 See Lambert [2001] E.I.P.R. 171.
40 http://creativecommons.org/learn/aboutus/ [11.05.04].
41 http://creativecommons.org [11.05.04].
42 http://www-1.ibm.com/linux/ [11.05.04].
43 http://en.wikipedia.org/wiki/Main_Page [11.05.04].
44 http://www.microsoft.com/uk/encarta/default.mspx [11.05.05].

Whereas it is unfair to suggest that the DMCA and the ISD tried to give all the power to the holder of a copyright[45], combined with a working digital rights management system[46], the effects are nearly the same.

Therefore some of the backgrounds of the ISD and the DMCA will be discussed.

3.1. Involved Interests

The interests to be considered when forming a copyright system nowadays are far-ranging[47]. Even if one normally just discusses the friction between the public and the right-owners, the interest are not so clearly cut[48].

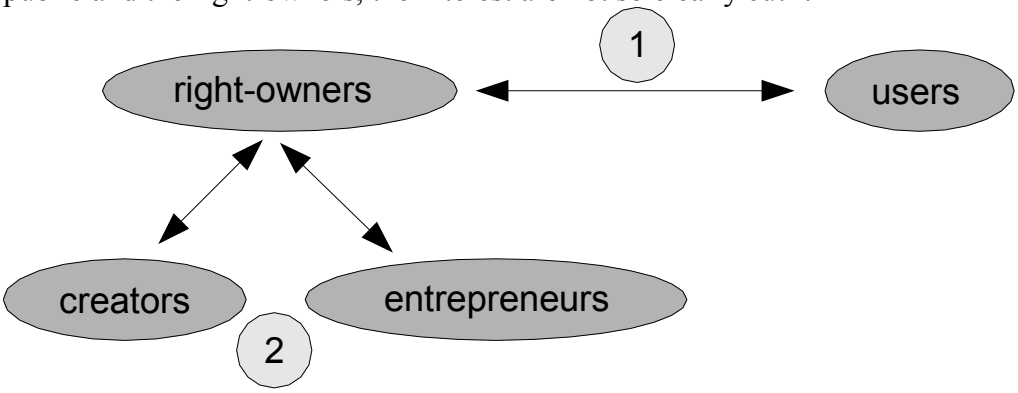

Chart 2 Involved interests, cp. Cornish 9 – 42.

3.1.1. Right-owners and Users

Between right-owners and users (1), the main concern is how, and if, a work is licensed. Focusing on the right-owners, the aim is to maximize the financial returns on use[49]. On the other hand, the users – especially the scientists – are interested in gaining access as cheaply as possible, preferably for free.

3.1.2. Creators and Entrepreneurs

After splitting up the right-owners (2), the picture is not as obvious as it seemed. Friction occurs because there are different ideas about the way the work should be exploited. Friction also occurs as to the way the returns should be shared. Whilst entrepreneurs are interested in maximizing profit[50], the authors are, at least at the beginning of a career, interested in getting their work

45 cp. for example recitals 14 and 43 of the ISD.
46 It stands to reason, that this is the one of the aims of the Trusted Computing Group -https://www.trustedcomputinggroup.org/home [11.05.04]. See the EFF's opinion delivered by Seth Schoen during the CFP 2004, http://www.cmcgc.com/cfp2004/422_Plenary_5.mp3 [11.05.04] or http://cfp2004.org/blogs/trustedcomp/ [11.05.04].
47 Wing/Ewan [2000] I.P.Q. 139.
48 Cp. also Kretschmer's 1st Thesis at [2003] E.I.P.R. 338.
49 Cornish 9-42.
50 Kretschmer [2003] E.I.P.R. 339.

known and gaining fame[51]. It may therefore be in their interest to distribute the work widely, meaning low prices and even free copies. According to the proposed definition[52], it can be said that some creators are interested in having at least some parts of their work in the public domain. Interestingly, this attitude is often changed, once the authors are famous ("u-turn")[53]. There seems to be a tendency to burn the bridges, once the author himself has crossed them[54].

3.2. Origins Of Copyright

As widespread as the involved interests nowadays are, as widespread are the historic origins of copyright being mirrored in copyright debates. The historic origins are not global. Whilst the ideas about how creative accomplishments should be treated, differ around the world[55], at least the the western legal societies – meaning the European and the Anglo-American models – have basically the same ideas about copyright, although resulting in different emphases. Even if copyright is somehow globalised thanks to TRIPS etc., it is still based on a certain cultural background[56].

3.2.1. Short History of Copyright

Starting with legislation primarily focused on how to control the content published – more precisely censorship –[57], legislation then focused on the commercial exploitation[58]. Whilst Britain kept on focusing on the commercial angle, following the French Revolution mainland Europe – mainly France and afterwards Germany – developed an approach focusing on the moral rights of the author[59]. Because of international treaties like the Berne Convention some of these ideas were to be included in the British system[60].

3.2.2. Copyright's Functions

Because of historical differences, different states may lay emphasis on different parts of copyright theory. Due to international standardisation nonetheless three main functions can be recognized[61].

51 Kretschmer [2003] E.I.P.R. 338.
52 See. 2.1.4
53 Couser chapter 8; Kretschmer [2003] E.I.P.R. 340.
54 Cp. Bill Gates' comments about software patents, http://www.lessig.org/blog/archives/001447.shtml [12.05.04].
55 Cp. Aborigines – Van Caenegem [2002] E.I.P.R. 329 – and Marxist theories – Burkitt [2001] I.P.Q. 175 et seqq.
56 Cp. Van Caenegem [2002] E.I.P.R. 330.
57 Cornish 9-02.
58 Copyright Act of 1710 (Statute of Anne), Cornish 9-03.
59 Burkitt [2001] I.P.Q. 158 et seqq.
60 Article 6bis of the Berne Convention, 1886, protected the right of integrity and paternity.
61 cp. Cornish 9-33 et seqq.

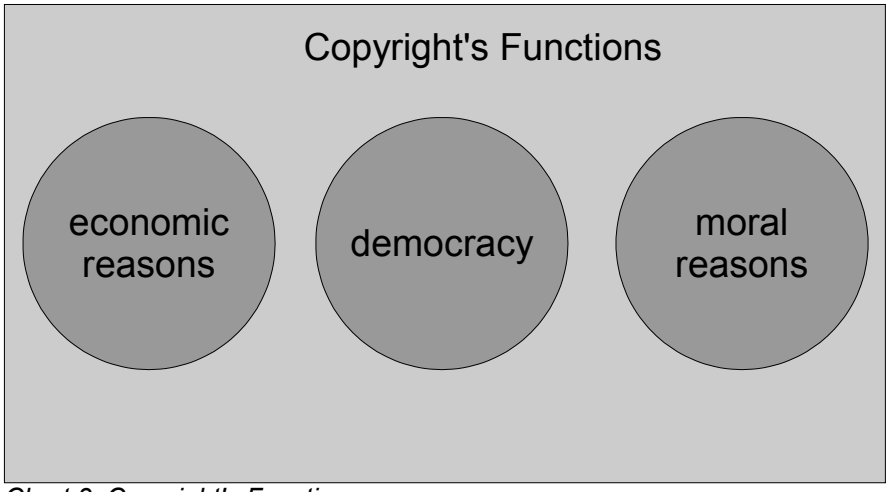

Chart 3: Copyright's Functions

- Following Locke, one function of intellectual property rights is to give the creator an economic incentive to produce new work (favoured by the Anglo-American model)[62].
- Based on thoughts which emerged during the French Revolution, another part is to secure the personality of the creator[63]. Because the work is a form of expression of his own being, the author is thought to have an inseparable connection to his work. Copyright therefore helps him to secure his moral investment. This approach is dominant in the European models, such as in French and German copyright theory[64].
- Whilst the former two functions accentuate the author, information is essential for a democracy[65]. It is therefore important to get people to create information, but it is equally important for the public to have access to this information. A free society accordingly has to balance the incentive it gives to creators with the accessibility of the created information. Promoting free speech, this is a line of argument dominant in the Open Source community. Copyright should therefore encourage authors to create for the public interest[66].

Depending on the respective background, the emphasis in copyright discussions differs.

3.3. Building an Information Society

Yet when discussing about the ISD, the European Commission's only emphasis was laid on a framework, which would enable an information society to flourish. In order to enable this society, the Commission wanted

62 Cp. Cornish. 9-33; Bently/Sherman p. 32.
63 Cp. Cornish 9-34, Bently/Sherman p.32.
64 Cp. Burkitt [2001] I.P.Q. 158 et seqq.
65 Cp. Cornish 9-35, Bently/Sherman p. 32.
66 Wing/Kirk Wing/Kirk [2000] I.P.Q. 141.

content/software providers to be confident as to the safety of their investments[67]. The way to approach this was considered to be technological measures. Also, in order to enrich the culture it was thought that it therefore might even be of interest to be on top of the race as far as copyright protection is concerned, in order to attract foreign investment[68]. This can arguably lead to a broader range of cultural products.

Before the background of extensive copying[69], preventing copying is a valid goal.

Albeit there are other options to secure investments: One possibility is a sort of compulsory levy as it is implemented in German law concerning analogue copying[70]. This could even be applied to a computer as a "copier". But problems arise, especially because business computers are mostly used to create new and original work, so that there is no justification for a levy. Even if works are copied, this is often paid for[71]. Another problem is determining the adequate amount for the levy. How much money should an author of a movie get assigned in order to encourage him to produce another one?

Similar counter-arguments can be found in respect of Lessig's proposed "tax" for peer-to-peer-users or copying occurring on the Internet in general[72], whose practical implementations seem to be in need of further thought.

While copy protection favours the authors, a levy or tax would favour the public. The ISD accordingly favoured the authors. Because of the stated problems with other approaches this in itself does not speak for a need for change.

3.4. Legislative Changes

Both the DMCA and the Information Society Directive (ISD) have enforced the ability of the author/publisher to secure the work and to stop people from circumventing the used protection measures[73] by making this illegal. Thereby technical measures can be divided in two groups: those, which prevent unauthorized access and those, which prevent unauthorized copying of a work.

3.5. Measures By the ISD

Stating different rights for various groups of creators[74], the ISD then arranges for some exceptions and limitations[75].

67 ISD recital 4.
68 Meaning stronger protection for works than in other countries, Wing/Kirk [2000] I.P.Q. 140-141.
69 Whose real effects are nott as obvious as it is sometimes alleged, cp. Oberholz/Koleman, File Sharing.
70 Annex to § 54d Abs. 1 UrhG.
71 Cp. Lexis or Westlaw.
72 Lessig, Free Culture p. 300 et seqq.
73 Article 6 ISD.
74 Article 2 ISD et. seqq.
75 Article 5 ISD.

One source of potential problems is the fact, that this exceptions "may"[76] be implemented, resulting in different exceptions throughout Europe.

Whilst this might be a simple inconvenience, Article 6 I ISD declares circumventing effective technological measures illegal. Apart from Article 6 IV ISD no further reference is made to the exceptions mentioned in Article 5 ISD. Using technological measures, Article 5 ISD therefore can be rendered useless by the author[77]. Even if "appropriate measures"[78] will be sufficient[79], only roughly half of the limitations are affected. Most prominently, prohibiting users from making copies for private copies[80] or for quotations[81] will not lead to "appropriate measures".

3.6. Differences

Whilst the general goal and means both of the DMCA[82] and the ISD are the same, the DMCA only prohibits the circumvention of access controls, not the circumvention of copy controls[83], mainly to enable fair dealing, whilst the ISD prohibits both[84]. In practice though, this is not such a big difference: The tool used to circumvent a copy control will also enable the user to circumvent an access control. Therefore it is quit likely that it will be illegal[85]. And being allowed to circumvent a copy control without being allowed to access the needed tools is without effect[86].

3.7. Intermediate Result

Even if therefore no cultural or democratic reasoning for copyright and for a public domain is used[87], there is no clear-cut picture, allowing to favour one side over the other (e.g. the right-owners).

76 Articles 5 II, III, IV ISD.
77 Cp. Shah [2004] D.L.&T.Rev. 6.
78 Article 5 IV ISD.
79 It is quite possible, that it will take quit a time for the authorities to react.
80 Article 5 II b ISD.
81 Article 5 III d ISD.
82 Other legislative steps which also led to a possible thread of the public domain but will not be dealt with in this essay, are the Anti-Cybersquater Consumer Protection Act - Pub. L. No. 106-113, 113 Stat. 1536 (1999) –, the Copyright Term Extension Act - Pub. L. No. 105-298, 112 Stat. 2827 (1998) "Sonny Bono Act"; see also Eldred v. Ashcroft, 534 U.S. 1126 (2002), *and cert. amended*, 534 U.S. 1160 (2002) –, the Uniform Computer Information Transaction Act – http://www.law.upenn.edu/bll/ulc/ucita/ucita01.htm [11.05.04] – and the Collections of Information Anti-Piracy Act - *See* H.R. 354, 106th Cong. (1999) –. Discussed at Samuelson [2003] L&C.P. 153 et seqq.
83 17 U.S.C. § 1201 (1998); cp. Shah [2004] D.L.&T.Rev. 4.
84 Article 6 ISD.
85 Samuelson [2003] L&C.P. 161.
86 This might change due to the possible Digital Media Consumer's Rights Act, http://news.findlaw.com/entertainment/s/20040510/filmpoliticsdc.html [11.05.04].
87 See 2.1.5.

4. Problems with an overly strict regime

Fair use, while not quite dead, is dying.

Siva Vaidhyanathan[88]

Whilst there has to be some incentives for creators to create[89], there are some effects of the DMCA and the ISD on the availability of information, which might not be desirable.

Whereas there are many (potential) problems[90], the main challenges seem to be the following[91]:

1. The possibility to prevent works from ever being in the public domain, consequently making information unavailable,
2. the possibility to circumvent fair use by contractual terms and
3. the effects of criminalisation.

4.1. Unavailability Of Information

Works whose copyrights are long expired can be secured by technical measures, making copies impossible[92]. Thus information can be monopolized and the term of copyright can be elongated indefinitely in practice[93]. But there is one thing to remember: Even if Aristotle's Politics can not be printed in Lessig's eBook-version[94], it still can be accessed for free using other web-sites[95].

Thinking about databases like the ones provided by Lexis or Westlaw, even material being in the public domain right from the start – e.g. judicial opinions – can monopolized effectively[96], assisted by the sui generis protection for databases[97]. Against the background of a judiciary controlled by the public this might not be the favoured result.

But on the one hand there is the concept of insubstantial taking and on the other hand there has to be an incentive for Lexis to provide the service of preparing the data. It can even be argued, that Lexis is not paid for the data as

88 Cp. Vaidhyanathan, Activism.
89 Cp. 2.3.
90 Cp. e.g. Lessig's views in Free Culture.
91 Samuelson [2003] L&C.P. 161.
92 Lessig, Free Culture, p. 148-151; Benkler [1999] N.Y.U.L.Rev. 420-421.
93 Samuelson [2003] L&C.P. 161.
94 Lessig, Free Culture, p. 150.
95 E.g. http://classics.mit.edu/Aristotle/politics.html [11.05.04].
96 Cp. Samuelson [2003] L&C.P. 152, 160 with further references. Another example are statutes, which sometimes are not protected - § 5 of the German UrhG -, and sometimes they are, cp. the Crown copyright.
97 http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=31996L0009&model=guichett [11.05.04].

such, but for the service of keeping it up to date and ready for access. Therefore securing – meaning oligopolizing – information is a valid goal sometimes.

Yet greater danger seems to lurk from another angle: Work which is not in the public domain can be secured, preventing it from being available for copying etc. once it actually passes into the public domain[98].

4.2. Preventing Works From Passing Into The Public Domain

4.2.1. Why should works pass into the Public Domain?

If a carpenter builds a cupboard he will be the owner of this cupboard for as long as he does not sell it and it does not decay. Yet an author not using his hands but his brains looses his *intellectual* property sooner or later[99]. Accordingly there is an argument saying that there is no need for a public domain, as long as copyrighted work passing into it is concerned[100]. Not tackling the question as to the classification of intellectual property as traditional property[101], the cupboard-example raises the question as to why works should pass into the public domain.

Granting a copyright is sometimes compared to granting a patent: As a reward for publishing his work, society gives the author a monopoly, the copyright. The consideration on the author's part is the passing of the work into the public domain after a certain amount of time.

Whilst this argument is appealing on the first glance, there is one problem: a patent prohibits others from using the same idea, copyright however only protects the actual form of expression, the underlying idea is free for others to use[102].[103] Thus, society gains something right from the moment of publication[104]. The public by giving some sort of a monopoly – a thing normally thought not to be desirable[105] – can also define the terms which are to be applied. If part of the bargain is letting works pass into the public domain, it consequently can be argued that the author by not allowing this is not fulfilling his part of the "contract".

98 Kretschmer [2003] E.I.P.R. 337.
99 Noah Webster, see Seville [2003] I.P.Q. 317 et seqq. for historical background and actual quotes. The same argument but with the opposite result was used by Chinese writers, Burkitt [2001] I.P.Q. 180, fn. 98.
100 Noah Webster, see Seville [2003] I.P.Q. 319.
101 Cp. Lipton [1999] IJL&IT 171 et seqq.; deciding against it: Vaidhyanathan, Activism.
102 The idea-expression dichotomy, Bentley p. 168 et seqq.
103 Seville [2003] I.P.Q. 314.
104 Cp. Samuels 36 L.L.A.L.Rec 406 et seqq.
105 Cp. e.g. Thomas Jefferson's and other's views reproduced at Boyle [2003] L&C.P. 53 et seqq.

4.2.2. Disappearance Of Knowledge

Not allowing the public to access the public domain can lead to a disappearance of knowledge. Whilst market forces quite possibly correct some overreaching restrictions, information which never was in the public domain might just disappear: The copyright holder might not have an incentive to republish the work after it passed into the public domain, the public does not have the (legal) ability to republish it. Whereas books can be bought even after their copyrights have expired, digital knowledge can be stopped from being distributed after the initial purchase using technical measures. Part of history could disappear when the last owner of a digital copy not able to hand it down deletes it.

This is not a new situation, though. Not every book published 200 years before is available online. Not every book can be found in libraries. Knowledge has disappeared and will do so in the future. Only works that are interesting for people are in demand. Eric Eldred wanted to republish Robert Frost's *New Hampshire*, not John Doe's memoirs. Knowledge might accordingly sink into oblivion, with or without the possibility of the public to access it.

On the other hand, what now seems to be of no relevance will possibly be seen in a totally different light in 200 years time.

The threat of disappearing knowledge therefore is a real one, the potential of preventing this by enforce the public domain however might be slight.

4.3. Fair Dealing

As mentioned before[106], certain actions falling under the regime of fair dealing, like quoting for the purpose of criticism or review, now can be effectively prohibited[107]. Albeit one aspect is often forgotten: It might not be possible to quote directly using copy and paste, but one can not be stopped from quoting "analogue". One can just type in the quote in the own word processor, one can record a piece of music using the stereo – maybe digitalizing it afterwards – and then manipulate it[108]. Insofar nothing has changed as compared to the "analogue" times. In the light of digital technologies, it can be argued, that this is not an adequate way of quoting etc., still, the possibility exists. Besides, the ability to copy and paste 10 times during 10 days[109] seems to be hilarious on the first glance, but it is a way – even if quite possible an inadequate one – to ensure fair dealing on the one hand and protecting the work as a whole on the other hand.

106 See 3.4 et seqq.
107 Cp. Samuelson [2003] L&C.P. 161, using CSS as an example.
108 As long as You do not regard this actions as "circumvention".
109 Example after Lessig, Free Culture p. 150.

There is one problem, though: At least the DMCA enables the holder of a copyright to override fair dealing by contractual arrangement[110]. Without any control, e.g. by courts, this can render even the "analogue" copying irrelevant. This can lead to similar problems as described above[111]. Even if information is accessible at one place, it might not be possible to transfer it. An example are inter-library loans: Sending books or "analogue" copies by mail is not a problem, doing the equivalent with an electronic book might be forbidden.

The DMCA and the ISD give the authors therefore a greater possibility of controlling the user. Whilst authors could not control the way libraries used their works, this has changed as to electronical versions[112]. The author not only can stop the users from copying the work, she can also forbid the transfer of the purchased work.

It still remains to be seen if the content providers can or will uphold such a strict regime. Somebody has to purchase the offered products. If for example libraries can not cooperate because of contractual terms, they might not be able to finance the product, leading to a decline in total sale numbers. Increasing the price for the buyers who are able to pay the asked price also will not work infinitely. Between an omnipotent content provider and a helpless public therefore stands the market. If this is enough, remains to be seen.

4.4. Criminalisation

Whilst the ISP only covers civil liability, in order to prevent circumvention effectively, according acts were rendered to be criminal offences by the DMCA[113].

This already led to several incidents, for example the Sklyarov-case[114]- and the letter Edward Felden received from the RIAA[115].

The problems with these incidents are, that whilst the DMCA provides exemptions for free speech[116] and encryption research[117] amongst others, the actual scope is not clear, as it became obvious with the Felden-case. Starting with the question of what "any technology, product, service, device, component, or part thereof"[118] are – Are scientific research papers included? –, it is also dubious what exactly "commercial advantage or private financial gain"[119] stands for in the end. In the past, large scale infringement for commercial gains was equally illegal, but now even private activities are considered to be criminal offences.

110 Cp. Kretschmer [2003] E.I.P.R. 333.
111 See 4.1.
112 Cp. Vaidhyanathan, Activism.
113 17 U.S.C. § 1204 (1998).
114 Cp. Benkler [2003] L&C.P. 174 et seqq.
115 Cp. Benkler [2003] L&C.P. 175 et seqq.;
http://www.eff.org/IP/DMCA/Felten_v_RIAA/ [11.05.04].
116 17 U.S.C. § 1201 (c) (4) (1998).
117 17 U.S.C. § 1201 (g) (1998).
118 17 U.S.C. § 1201 (a) (2) (1998).
119 17 U.S.C. § 1204 (a) (1998).

Whilst it might be acceptable for an individual to face a civil liability proceeding in order to protect his freedom of expression or his abilities for research, the threat of going to prison is of a different nature[120].

It therefore stands to reason that the fact of a possible criminal action alone can lead to a decrease in published information[121], preventing free speech.[122]

5. Conclusion

> *The point of all this is that it is a slope that is much easier to go down than to come up.*
>
> *James Boyle*[123]

To conclude, the question, if the public domain has gotten the adequate attention by the legislator, is a valid one. The DMCA and the ISP include parts, which are favouring the holder of copyright unduly. Yet the interests of the industry in the light of lossless digital copies can not be neglected. Authors need an incentive to create, investors to invest.

In order not to overreact in the same way, just favouring the other side, it might be prudent to wait for what the future will bring. Perhaps the fears of excessive control will be unfounded, simply because the market will not accept the offered products. In order to be able to wait however, it should be ensured that no irrevocable facts are produced. Especially, it should not be forgotten, that the problems described concerning the criminalisation of actions are unlikely to be corrected by the market.

An example for a market-driven correction of discriminating practices is the Apple iTunes-Store[124]: Probably because of "Generous Personal Use Rights" this service has proven to be a success compared to other attempts to sell music online. As long as the user seems to be happy with the offered service, she seems to be willing to pay, if only for the convenience of a One-Stop-Shop. Because of the "Generous Personal Use Rights", she is then able to call upon her fair dealing rights.[125]

120 Cp. Benkler [2003] L&C.P. 216 et seqq.;
121 Cp. Samuelson [2003] L&C.P. 168.
122 Declaring a collection of CSS-code as an art gallery seems to be a little bit adventurous: Touretzky, Gallery of CSS Descramblers.
123 [2003] L&C.P. 50.
124 http://www.apple.com/itunes/store/ [11.05.04].
125 For a general iTunes-discussion see DMP, iTunes.

6. Bibliography

6.1. Books

Bently, Lionel and Sherman, Brad
Intellectual Property Law
Oxford University Press
1st Edition, 2001
Referred to as **Bently**

Boyle, James
Shamans, Software and Spleens: Law and the Construction of the Information Society
Harvard University Press
1st ed. 1996
Referred to as **Boyle, Shamans**

Cornish, William and Llewelyn, David
Intellectual Property: Patents, Copyright, Trade Marks And Allied Rights
Sweet & Maxwell, London
5th Edition, 2003
Referred to as **Cornish**

Lessig, Lawrence
Free Culture – How Big Media Uses Technology And the Law To Lock Down Culture And Control Creativity
The Penguin Press
1st ed. 2004
http://www.free-culture.org/freecontent/ [11.05.04]

6.2. Articles And Commentaries

Benkler, Yochai
Free As the Air To Common Use: First Amendment Constraints on Enclosure of the Public Domain
74 New York University Law Review Rev. 354, 397 (1999)
http://www.nyu.edu/pages/lawreview/74/2/benkler.pdf [11.05.04]

Benkler, Yochai
Through The Looking Glass: Alice And The Constitutional Foundations Of The Public Domain
66 Law & Contemporary Problems 173 (Winter/Spring 2003)
http://www.law.duke.edu/shell/cite.pl?66+Law+&+Contemp.+Probs.+173+(WinterSpring+2003) [11.05.04]

Bowrey, Kathy
Who's Writing Copyright's History
European Intellectual Property Review 1996, 18(6), 332-329

Boyle, James
A Politics Of Intellectual Property: Environmentalism For The Net?
http://www.law.duke.com/boylesite/intprop.htm [11.05.04]

Boyle, James
The Second Enclosure Movement and the Construction of the Public Domain
66 Law & Contemporary Problems 33 (Winter/Spring 2003)
http://www.law.duke.edu/shell/cite.pl?66+Law+&+Contemp.+Probs.+33+(WinterSpring+2003) [11.05.04]

Burkitt, Daniel
Copyrighting Culture – The History And Cultural Specificity Of The Western Model Of Copyright
Intellectual Property Quarterly 2003, 3, 312-341

Cohen, Julie E.
WIPO Copyright Treaty Implementation In The United States: Will Fair Use Survive
European Intellectual Property Review 1999, 21(5), 236-247

Couser, James
Software Piracy And The Doris Day Syndrom: Some Legal, Ethical And Social Implications Of Contemporary Conceptions Of Property
International Journal Of Law And IT 1999 7 (1)

Digital Media Project
iTunes
How Copyright, Contract, and Technology Shape the Business of Digital Media - A Case Study
GREEN PAPER V. 1.2
Draft as of April 10, 2004
http://cyber.law.harvard.edu/media/uploads/53/GreenPaperiTunes041004.pdf [11.05.04]
Referred to as **DMP, iTunes**

Hess, Charlotte and Ostrom, Elinor
Ideas, Artifacts, and Facilities: Information as a Common-Pool Resource
66 Law & Contemporary Problems 111 (Winter/Spring 2003)
http://www.law.duke.edu/shell/cite.pl?66+Law+&+Contemp.+Probs.+111+(WinterSpring+2003) [11.05.04]

Kohn, Alfie
Studies Find Reward Often No Motivator – Creativity And Intrinsic Interest Diminish If Task Is Done For Gain
http://www.gnu.org/philosophy/motivation.html [11.05.04]

Kretschmer, Martin
Digital Copyright: The End Of An Era
European Intellectual Property Review 2003, 25 (8), 333-341

Lakhani, Karim R., Wolf, Robert G.
Why Hackers Do What They Do: Understanding Motivation Effort In Free/Open Source Software Projects

http://freesoftware.mit.edu/papers/lakhaniwolf.pdf [11.05.04] or
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=443040 [11.05.04]
Referred to as **Lakhani/Wolf, Hackers**

Lambert, Paul B.
Copyleft, Copyright And Software IPRS: Is Contract Still King
European Intellectual Property Review 2001, 23 (4), 165-171

Lessig, Lawrence
The Architecture of Innovation
51 Duke Law Journal 1783
http://www.law.duke.edu/journals/dlj/articles/dlj51p1783.htm [11.05.04]

Lipton, Jacqueline
A Revised “Property” Concept For The New Millenium?
International Journal Of Law And IT 1999 7 (171)

Manes, Stephen
The Trouble With Larry
http://www.forbes.com/columnists/business/free_forbes/2004/0329/084.html [11.05.04]

Moglen, Eben
Anarchism Triumphant: Free Software And The Death Of Copyright
http://www.firstmonday.dk/issues/issue4_8/moglen/ [11.05.04]
Referred to as **Moglen, Anarchism**

Moglen, Eben
Eben Moglen's Harvard Speech – The Transcript
http://www.groklaw.net/article.php?story=20040226003735733 [11.05.04]
Referred to as **Moglen, Transcript**

Mustonen, Mikko
Copyleft – The Economics Of Linux And Other Open Source Software
Information Economics and Policy 15 (2003) 99-121

Oberholzer, Felix, Strumpf, Koleman
The Effect of File Sharing on Record Sales
An Empirical Analysis
http://www.unc.edu/~cigar/papers/FileSharing_March2004.pdf [11.05.04]
Referred to as **Oberholz/Koleman, File Sharing**

Rimmer, Matthew.
A Creature Of Statute: Copyright Law And Legal Formalism
European Intellectual Property Review 2002, 13 (2), 31-38

Rose, Mark
Nine-Tenths Of the Law: The English Copyright Debates and The Rhetoric of The Public Domain
66 Law & Contemporary Problems 75 (Winter/Spring 2003)
http://www.law.duke.edu/shell/cite.pl?75+Law+&+Contemp.+Probs.+33+(WinterSpring+2003) [11.05.04]

Samuels, Edward
The Public Domain In Copyright Law
41 Journal of the Copyright Society 137 (1993)
http://www.edwardsamuels.com/copyright/beyond/articles/public.html [11.05.04]

Samuels, Edward
The Public Domain Revisited
36 Loyola Of Los Angeles Law Review 389-436
http://llr.lls.edu/eldred/samuels.pdf [11.05.04]

Samuelson, Pamela
Mapping the Digital Public Domain: Threads and Opportunities
66 Law & Contemporary Problems 147 (Winter/Spring 2003)
http://www.law.duke.edu/shell/cite.pl?66+Law+&+Contemp.+Probs.+147+(WinterSpring+2003) [11.05.04]

Seville, Catherine
Copyright's Bargain – Defining Our Terms
Intellectual Property Quarterly 2001, 2, 146-186

Shah, Aashit
UK's Implementation of the Anti-Circumvention Provision of the EU Copyright Directive: An Analysis
2004 Duke Law & Technology Review 0003
http://www.law.duke.edu/journals/dltr/articles/PDF/2004DLTR0003.pdf [14.05.04]

Stallman, Richard
Why Software Should Not Have Owners
http://www.gnu.org/philosophy/why-free.html [11.05.04]
Referred to as **Stallman, Owners**

Vaidhyanathan, Siva
The State Of Copyright Activism
http://firstmonday.org/issues/issue9_4/siva/ [11.05.04]
Referred to as **Vaidhyanathan, Activism**

Van Caenegem, Wiliam
The Public Domain: Scientia Nullius
European Intellectual Property Review 2002, 24(6), 324-330

Wing, Mark, Kirk, Ewan
European/U.S. Copyright Law Reform: Is A Balance Being Achieved?
Intellectual Property Quarterly 2000, 2, 138-163

6.3. Websites

CFP 2004, Computer, Freedom & Privacy Conference
http://www.cfp2004.org/ [11.05.04]

Creative Commons
http://creativecommons.org [11.05.04]

Duke Conference On The Public Domain
http://www.law.duke.edu/pd/ [11.05.04]

Recording Industry Association of America
http://www.riaa.com/ [11.05.04]

The Digital Speech Project
http://www.digitalspeech.org/ [11.05.04]

The Electronic Frontier Foundation
http://www.eff.org/ [11.05.04]

The Eric Eldred Act
http://eldred.cc/ [11.05.04]

The GNU Project and the Free Software Foundation (FSF)
http://www.gnu.org/ [11.05.04]

particularly the **GPL** General Public License
http://www.gnu.org/copyleft/gpl.html [11.05.04]

Touretzky, David S. (2000) Gallery of CSS Descramblers
http://www-2.cs.cmu.edu/~dst/DeCSS/Gallery/ [11.05.04]

U.S. Copyrigh Office
http://www.copyright.gov/ [11.05.04]