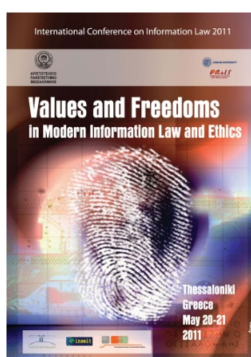
# Public Domain vigor in Copyright based on John Locke

By
**Marinos Papadopoulos**
Attorney-at-Law, Legal Lead Creative Commons Greece
Managing Partner of
PATSIS, PAPADOPOULOS, KAPONI, & ASSOCIATES
(Attorneys-at-Law)
**E:** marinos@marinos.com.gr | **URL:** www.marinos.com.gr
&
**Alexandra Kaponi**
Attorney-at-Law
PATSIS, PAPADOPOULOS, KAPONI, & ASSOCIATES
(Attorneys-at-Law)
**E:** alexandra@marinos.com.gr | **URL:** www.marinos.com.gr




International Conference on Information Law 2011
Values and Freedoms in Modern Information Law and Ethics
May 20-21, 2011, Thessaloniki, Greece

**Abstract:** In this work, we're approaching John Locke's labor theory for the appropriation of intellectual property balance between copyright of the labourer and the protection of the common good. Locke's labor theory is framed by the no-harm principle. Locke thought of the public good and was a proponent of the idea that property must be limited in order to maintain a stable social order. The *enough and as good* proviso in Locke's theory argues that a grant of property must not do any harm to other persons' equal abilities to create or to draw upon the pre-existing cultural matrix and scientific heritage that exists in the commons and where from the author draws and appropriates resources. Locke was fully aware of the importance of preserving a vibrant public domain to promote the formation of ideas, works and the evolution of authors. For him, the authorial rights cannot be held captive in traditional concepts of property and ownership. Locke's interest and views for the public domain considering it as a commons in which cultural and scientific heritage resides and upon which the general public including authors have all right to draw materials from but no right to appropriate them in a way that restricts others from accessing materials in the commons have been revived in contemporary copyright literature and copyright activism.

**Keywords:** Emmanuel Kant, John Locke, public domain, inalienable right, intellectual property, commons, the no-harm principle, the no-spoliation proviso, the enough and as good proviso, "domaine public payan," "tragedy of the commons," archives, non-transformative uses of works, positive protection of the public domain.

This work is licensed under a Creative Commons Attribution—Non-Commercial—No-Derivatives v.3.0, GR license ( see license at http://creativecommons.org/licenses/by-nc-nd/3.0/gr )

Immanuel Kant who is credited with setting the foundations of intellectual property in European continental law,[1] writes in section 31/II of the "*Metaphysics of Morals*"[2] "*Why does unauthorized publishing, which strikes one even at first glance as unjust, still have an appearance of being rightful? Because on the one hand a book is a corporeal artifact (opus mechanicum) that can be reproduced (by someone in legitimate possession of a copy of it), so that there is a right to a thing with regard to it. On the other hand a book is also a mere discourse of the publisher to the public, which the publisher may not repeat publicly without having a mandate from the author to do so (praestatio operae), and this is a right against a person. The error consists in mistaking one of these rights for the other.*"

For Immanuel Kant, the book belongs to whoever has written it and this independently from the number of exemplars of the book or of the work of art in their passages from owner to owner. The initial bond cannot change and it ensures the author authority on the work. The peculiarity of intellectual property consists thus first in being indeed a property, but property of an action; and second in being indeed inalienable, but also transferable in commission and license to a publisher. The bond the author has on his work confers him a moral right that is indeed a personal right, a

[1] Otfried, H., (1996), ***Immanuel Kant***, 4th edition, Munich; Mulholland, L.A., and Elliott, E.J., (1990), ***Kant's System of Rights***, Columbia University Press; Stengel, D., (2004), ***Intellectual Property in Philosophy***, 90 ARSP, pp.20-50; Westphal, K.R., (2002), ***A Kantian Justification of Possession***, in ***Kant's Metaphysics of Ethics: Interpretive Essays***, Mark Timmons ed., New York, Oxford University Press, pp.89-109; the same, (1997), ***Do Kant's Principles Justify Property or Usufruct?***, *Jahrbuch für Recht und Ethik/Annual Review of Law and Ethics* 5, pp.141-194; Byrd, S. B., and Hruschka, J., (2010), ***Kant's Doctrine of Right, A Commentary***, Oxford University Press.
[2] Kant, I., (1996), ***The Cambridge Edition of the Works of Immanuel Kant, Practical Philosophy***, Cambridge University Press, Paul Guyer and Allen M. Wood eds., pp.437-438, available at http://books.google.gr/books?id=0hCsbUjFiBwC&printsec=frontcover&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false [last check, Apr.20, 2011].

right attached to the author's personality. It is also a right to exploit economically his work in all possible ways, a right of economic use, which is a patrimonial right. Kant argued that moral right and the right of economic use are strictly connected, and that the offense to one implies inevitably offense to the other.[3]

In his essay titled "*On the Illegitimacy of Print Piracy*" Kant asserts the presence of a direct link between the author and the reader of an author's book in the sense that through an author's book the author speaks directly to the readers, thus the ability to do so should be considered as the author's inalienable right to connect with his/her readers. What was more important for Kant was the safeguarding of an author's right to connect with his/her readers rather than his/her property rights over the means of that connection, i.e. the book. For Kant, the freedom of the pen is the only safeguard of the rights of the people.[4] Kant does not endorse the thesis that ideas can be privately owned; he believed that only physical things can be owned and their purchasers as legitimate owners are free to copy them and even sell their reproductions. Kant draws a distinction between the book as a physical object and the thoughts it conveys. The book as a physical object becomes a property of whoever buys it. For this reason, Kant believed, that it is not fair to restrain the ways in which its legitimate purchaser may use it without his consent. Therefore, it is undeniable that the property owner of a book may even copy it at his sole will. But, the

---

[3] Pozzo, R., (2006), ***Immanuel Kant on Intellectual Property***, v.29, no.2, pp-11-18, available at http://www.scielo.br/pdf/trans/v29n2/v29n2a02.pdf [last check, Apr.20, 2011].

[4] Williams, G. (2009), ***Kant's Account of Reason***, Stanford Encyclopedia of Philosophy, available at http://plato.stanford.edu/entries/kant-reason/ [last check, Apr.20, 2011]. From Kant's "*What is Enlightment?*" (1784) work the author posits that Kant is not primarily concerned with enlightenment as the activity or condition of an individual: rather as something that human beings must work towards together. For this, he says, *nothing is required but… the least harmful… freedom: namely, freedom to make public use of one's reason in all matters* (8:36). This is not the freedom to act politically. Rather, it is what we now call freedom of the pen—in Kant's words, the use of reason *as a scholar* before the entire public of the *world of readers* (8:37). See also Fauscher, F., (2007), ***Kant's Social and Political Philosophy***, Stanford Encyclopedia of Philosophy, available at http://plato.stanford.edu/entries/kant-social-political/index.html#RepEnlDem [last check, Apr.20, 2011].

book also contains the thoughts that are published through it, which in Kant’s theory, remain a property of the author of the book regardless of their reproduction. The original thoughts of the author should not be miss-replaced with the physical resources which convey them. The connection between the author and his ideas will continue to exist regardless of them being thought by everyone and/or the property status of their written expressions.

For Kant, the unbreakable connection between an author and his ideas is the result of the fact that ideas are not physical resources. When physical resources are the property of one individual, they cannot be owned and used by everyone else. Yet, with ideas this is not the case. Ideas can be reproduced and thought by everyone without depriving their authors. Kant believed that knowledge is not a physical object exposed to rivalrous use; for this reason it is senseless to submit it to private property and to forbid the reproduction of ideas. On the other hand, it is equally senseless to forbid the reproduction of any physical object if it has been purchased in a legal transaction and the purchaser copies it by his own means. Therefore, if intellectual property is meant to be a right on the physical objects any reservation on copyright is untenable.

Kant believed that a book through which an author’s ideas are published is not merely a physical object but also the medium through which an author can transmit his ideas to the public. The medium is provided by the publisher who, thus, speaks to the public in the name of the author and only if the former has the latter’s authorization. The mandate of the author to the publisher, Kant believed, is only a personal relationship that does not imply the acquisition of proprietary rights on the texts. The goal of this personal relationship is conveying a speech to the public. The author speaks to the public and the public has the right to his speech regardless to the publisher whose rights are justified only to the point that he provides

the author the medium to reach the public.[5] Kant justified the reproduction of texts for personal use—he saw no piracy in the reproduction for personal use that was non-commercial, too, by his time. Kant believed that the problem of unauthorized reproduction is that the reproducer acquires the capability to speak to the public without the author's authorization. But if said reproduction is aimed for personal use (a.k.a. non-commercial use) of the text that conveys an author's speech then the reproducer does not speak to the public in the name of the author, thus reproduction of the text even without an author's authorization is justified.

There is no specific consideration for the commons in the Kantian theory, at least in the same clear sense that said consideration is made in the Lockean theory. Probably this explains why theories on the wealth of the public domain in continental European Law with the Kantian tradition are quite different in perspective than theories on the same subject in the Lockean-based legal tradition of the U.S. Contrary to the situation in the U.S., in Europe legal literature only recently developed on the subject of the public domain mostly elaborating upon the perspective that relates to the duration of the author's rights protection.[6] The fact that Europe is lagging compares to the U.S. in the discussion about the public domain is as much impressive as odd. Despite the lacking of a meaningful elaboration upon public domain as a commons in the Kantian theoretical approach to Copyright in continental European legal tradition, the origins of the public domain are traced not in the American, but rather in Europe and more specifically in the French inventive philosophical elaborations.[7]

---

[5] Pievatolo, C.M., (2010), ***Freedom, Ownership and Copyright: Why Does Kant Reject the Concept of Intellectual Property?***, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1540095 [last check, Apr.20, 2011].

[6] For a critical overview of the U.S. and European legal regimes upon Copyright, see Spinello, R., and Bottis, M., (2009), ***A Defense of Intellectual Property Rights***, Edward Elgar, pp.50-114.

[7] French Copyright law in effect before the pass of the Berne Convention provisioned the public domain. Said provisioning was the cause for article 14 of the Berne Convention of 1886 that provided as follows: *Under the reserves and conditions to be determined by common agreement, the present 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.* See more regarding the origins of the public domain at Ochoa,

Debates in Europe regarding the duration of copyright protection have reached at an impasse, and it does not seem that there is any room for an agreement among negotiating parties. The debate in Europe as well as internationally and beyond the European legal tradition[8] upon the applicability of Victor Hugo's proposal for the '*domaine public payant*' (paying the public domain) regarding the use of works that were no longer protected by copyright and have fallen into the public domain,[9] has also reached a dead-end point mainly due to its controversial nature and mainly because the remuneration fee for public domain works is an

---

T., (2002), ***Origins and Meanings of the Public Domain***, 28 University of Dayton Law Review, pp.215-266, available at http://law.scu.edu/faculty/File/ochoa-tyler-origins-meanings-public-domain.pdf [last check, Apr.20, 2011]; Samuelson, P., (2006), ***Challenges in Mapping the Public Domain***, Chapter II in Lucie Guibault and P. Bernt Hugenhotz eds., (2006), ***The Future of the Public Domain – Identifying the Commons in Information Law***, Kluwer Law International; Dusollier, S., (2010), ***Scoping Study on Copyright and Related Rights and the Public Domain***, WIPO CDIP/4/3/REV./STUDY/INF/1, p.16, available at http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=147012 [last check, Apr.20, 2011]; Ginsburg, J., (2006), ***Une Chose Publique? The Author's Domain and the Public Domain in Early British, French and US Copyright Law***, Cambridge Law Journal, 2006, Columbia Public Law Research Paper No. 06-120, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=928648 [last check, Apr.20, 2011].

[8] See UNESCO, (1982), ***Committee of Non-Governmental experts on the 'Domaine Public Payant'***, Geneva, Switzerland, Apr.26-29, 1982, XVI Copyright Bulletin, 3, pp.46-54; United Nations Educational, Scientific and Cultural Organization & WIPO, (1982), ***Analysis of the Replies to the Survey of Existing Provisions for the Application of the System of 'Domaine Public Payant' in National Legislation***, Committee of Non-Governmental Experts on the 'Domaine Public Payant ', UNESCO/WIPO/DPP/CE/I/2, March 10, 1982, available at http://unesdoc.unesco.org/images/0004/000480/048044EB.pdf [last check, Apr.20, 2011]; UNESCO, (1990), XXIV Copyright Bulletin, 4, 1990, pp.14-28, available at http://unesdoc.unesco.org/images/0008/000885/088519eo.pdf [last check, Apr.20, 2011].

[9] Victor Hugo's '*domaine public payant*' proposal pertains to the possibility of imposing a remuneration right to the author's heirs or assignees for works that lapsed into the public domain or imposing said right to a cultural fund with the aim to collect and distribute subsidies to subsequent authors with a view to help the creation and enlargement of the public domain. Hugo made his proposal in one of his speeches before Congrés Littéraire International that was given in June 25, 1878. See more upon the European public domain perspective at Guibault, L., (2006), ***Wrapping Information in Contract: How Does it Affect the Public Domain?,*** Chapter V in Lucie Guibault and P. Bernt Hugenhotz eds., (2006), ***The Future of the Public Domain–Identifying the Commons in Information Law***, Kluwer Law International; d'Ormesson-Kersaint, B., (1983), ***La protection des oeuvres du domain public***, 116 Revenue internationale du droit d' auteur, pp.73-151.

impediment to the free use of public domain material;[10] it is a form of compulsory licensing or taxation for works that are supposed to be free of any copyright restrictions.[11] The current perspective in most European Community Members' copyright debates regarding the public domain revolves around copyright's inherent limits that are designed to promote the dissemination of new works or inventions and to ensure the preservation of a vigorous public domain. Said limits are the definition of protected subject matter, the criteria for protection, the fixed duration of the intellectual property protection, and the exhaustion doctrine.[12]

What is Immanuel Kant for the history of copyright in continental Europe and the author's inalienable right approach is John Locke for the history of copyright in the Anglo-Saxon, and especially in the United States legal tradition.

## John Locke

In 1690 John Locke published his "*Two Treatises of Civil Government*" in which he posted that in the beginning "*earth and all inferior creatures*" are common to everybody. But every individual who mixes with what nature has provided with his own labor creates something new and thus makes it his property.[13] For John Locke property meant what men have in their persons as well as goods.[14] This conception of property meant that Locke included intangibles such as intellectual assets in his vision of what

---

[10] See Kallinikou, D., (2008), ***Intellectual Property and Related Rights***, 3rd edition, P.N. Sakkoulas, pp.234-235.

[11] The idea of providing remuneration from the publication of works in the public domain with the aim to benefit current creators exists nowadays in the legislation of some countries such as Algeria, Kenya, Ruanda, Senegal, Congo, and Paraguay. It was also included in the Copyright law of Italy as Diritto Demaniale (Domain Right) until 1996 when said law was amended and said remuneration was abrogated. See more in Dusollier, S., (2010), ibid, pp.40-42.

[12] Guibault, L., (2006), *ibid*, p.91.

[13] This is the so called Locke's '*mixing argument*'. See more upon it in Spinello, R., and Bottis, M., (2009), ibid, pp.150-155.

[14] Locke, J., (1967), ***Two Treatises of Government, Second Treatise, (1690),*** §§ 25-51 at pp.302-351, and § 173, p.401, in Peter Laslett ed., 2nd ed., Cambridge University Press; the same, (1988), ***An Essay Concerning the True original, Extent, and End of Civil Government,*** in ***Two Treatises of Government***, Chapter V, p.27, Peter Laslett ed., Cambridge University Press.

the concept of property covered since what men have in their persons referred to property associated with men's personality that could be of an intangible nature.[15]

In Chapter V of the Second Treatise, Locke remarked that every man has a property in his own person in which nobody has any right to but himself.[16] Locke expressed a natural law viewpoint for the appropriation of resources based on labor and a man's natural right to enclose with his individual sphere of control the fruits of his labor.[17] For some scholars[18] this remark by Locke may support common ground with the Kantian theory associating copyright to the personality of authors.[19] John Locke's essay "*Labour*"[20] which was published only a year before the "*Liberty of the Press*" and five years after the Second Treatise clarified that when he used the term property he referred to both tangibles and intangibles.[21] In this essay, Locke addressed issues for manual labor performed by country men and intellectual labor performed by gentlemen and scholars.

In Locke's labor theory—that has an effect on intellectual labor as well—there is a union of two complementary theses: first, the thesis that

---

[15] Zemer, L., (2006), ***The Making of a New Copyright Lockean***, 29 Harvard Journal of Law & Public Policy 3, pp.891-947, p.907, available at http://www.law.harvard.edu/students/orgs/jlpp/Vol29_No3_Zemer.pdf [last check, Apr.20, 2011].

[16] Locke, J., (1967), ibid, § 27, pp.305-306, and § 44, p.316.

[17] Spinello, R., and Bottis, M., (2009), ibid, p.171, where the authors recognize that Locke's deontic philosophical views seem to be closer to the European legal perspective which focus on the author's natural rights than the current U.S. legal perspective of utilitarianism in Copyright law.

[18] See, for example, Benkler, Y., (2001), ***Siren Songs and Amish Children: Autonomy, Information and the Law***, 76 New York University Law Review, p.59, who points that the basic ideological commitment of U.S. intellectual property law is heavily utilitarian, not Lockean or Hegelian. See, also, Spinello, R., and Bottis, M., (2009), ibid, p.178, who accept that the Lockean model basing limited property rights in the author's right to his or her labor is the most morally persuasive non-utilitarian rationale in intellectual property; and is also a sufficient basis upon which the reconciliation of exclusive intellectual property rights with the common good as is expressed in a robust intellectual commons could happen.

[19] Zemer, L., (2006), ibid, p.908, note 80; Rose, M., (1995), ***Authors and Owners: The Invention of Copyright***, 2nd ed., Harvard University Press.

[20] Locke, J., (1997), ***Labour (1693)***, reprinted in ***Locke: Political Essays***, pp.326-328, Mark Goldie ed., Cambridge University Press.

[21] Zemer, L., (2006), ibid, pp.910-911.

everyone has a natural property right in the labor of his body and, obviously, his mind, too;[22] and second, the thesis that a property right is limited by specific social norms.[23] The Lockean approach to property—including intellectual property—rights requires that those rights must be properly configured to ensure that others are not harmed by the acquisition of property.

Locke's theory demands that property rights be limited by the concern for the public domain and the common good. The bestowal of property and intellectual property rights should not cause any harm to others through a wasteful depletion of the commons. Locke's labor theory was affected by influential French philosophers and thinkers such as Voltaire and Jean-Jacques Rousseau, as well as many Scottish Enlightenment thinkers, and American revolutionaries. Locke's contributions to classical republicanism and liberal theory are reflected in the American Declaration of Independence. Locke's ideas had an impact on the philosophy of the late eighteen and nineteen centuries in Europe, according to which an author was deemed to vest his work in the public sphere, i.e. society, through the mere act of publishing.[24] In that sense, thinkers such as Augustine Charles Renouard,[25] Isaac René Guy Le Chapelier,[26] and Victor Hugo[27] in France and the England, considered authors as servants of the public to which they contributed their intellectual work aiming at

[22] Spinello, R., and Bottis, M., (2009), ibid, p.152.
[23] Zemer, L., (2006), ibid, pp.914-918.
[24] See more on the history and origins of Copyright in the U.S. and Europe in Ginsburg, J., (1990), ***A tale of two copyrights: literary property in revolutionary France and America***, 64 Tulane Law Review, pp.991-1031, available at http://www.compilerpress.ca/CW/Library/Ginsberg%20Tale%20of%20Two%20Copyrights%20TLR%201990.htm [last check, Apr.20, 2011].
[25] Renouard, A.Ch., (1839), ***Traite des droits d' auters, dans la literature, les sciences at les beaux-arts***, Paris, available through http://www.archive.org/details/traitdesdroitsd00renogoog [last check, Apr.20, 2011].
[26] Isaac René Guy Le Chapelier was a French jurist and politician of the French Revolution period, a.k.a. 1789-1799.
[27] In his speech of 1878 entitled '*Domain public payant*', Hugo advocated the creation of a property right in favor of authors on their works, coupled with the right of publishers to publish all works after the death of their author under the sole condition that a very low royalty not exceeding 5-10% of the net revenue be paid to the direct heirs of author. See Hugo, V., (2005), ***Discours d'ouverture du Congrès littéraire international de 1878*** available at http://www.inlibroveritas.net/lire/oeuvre1923.html#page_1 [last check, Apr.20, 2011].

the growth of knowledge.[28] Also, the utilitarian theorists such as Jeremy Bentham[29] and John Stuart Mill[30] leveraged on Locke's labor theory with the aim to explicitly apply it to informational goods. In that sense, creative works represented for utilitarianism one of the purest forms of an individual's labor and personality. A few years before publishing his seminal work "*Two Treatises of Civil Government*", John Locke had drafted a memorandum on the 1662 Licensing Act[31] to the parliament urging it for the abolition of the old publishers' privileges and their replacement with what seemed like a more author-centric copyright approach.[32] Thus, John Locke could justifiably be considered Copyright's über-father.[33]

---

[28] The following often quoted statement of Le Chapelier introduced the idea of a public domain within the copyright system itself: *The most sacred, the most legitimate, the most indisputable, and if I may say so, the most personal of all properties is the work which is the fruit of writer's thoughts. But it is a property of a different kind from all the other properties. [Once the author has disclosed the work to the public] the writer has affiliated the public with his property, or rather has fully transmitted his property to the public. However, because it is extremely just that men who cultivate the domain of ideas be able to draw some fruits of their labours, it is necessary that, during their whole lives and some years after their deaths, no one may, without their consent, dispose of the product of their genius. But also, after the appointed period, the public's property begins, and everyone should be able to print and publish the works that have contributed to enlighten the human spirit*. See more in Dusollier, S., (2010), ibid, p.17.

[29] Jeremy Bentham (1748 –1832) is the father of utilitarianism. He was an English jurist, philosopher, and legal and social reformer. He became a leading theorist in Anglo-American philosophy of law and a political radical whose ideas influenced the development of welfarism. He is best known for his advocacy of utilitarianism.

[30] John Stuart Mill (1806-1873), a British philosopher, economist, moral and political theorist, and administrator, was the most influential English-speaking philosopher of the nineteenth century. His views are of continuing significance, and are generally recognized to be among the deepest and certainly the most effective defenses of empiricism and of a liberal political view of society and culture. His views are not entirely original, having their roots in the British empiricism of John Locke, George Berkeley and David Hume, and in the utilitarianism of Jeremy Bentham.

[31] The 1662 Act was titled *An act for preventing the frequent abuses in printing seditious treasonable and unlicensed Books and Pamphlets and for Regulating of Printing and Printing Presses*, and its main goal was to control the press.

[32] Hughes J., (2006), ***Locke's 1964 Memorandum (and more incomplete Copyright historiographies), introductory essay***, an accompanying piece to Justin Hughes' ***Copyright and Incomplete Historiographies: Of Piracy, Propertization, and Thomas Jefferson***, 79 Southern California Law Review, p.993, Cardozo Legal Studies Research Paper No. 166, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=934869 [last check, Apr.20, 2011].

[33] Mayer-Schönberger, V., (2005), ***In Search of the Story: Narratives of the Intellectual Property***, 10 Virginia Journal of Law & Technology, 11, available at http://www.vjolt.net/vol10/issue4/v10i4_a11-Mayer-Schonberger.pdf [last check, Apr.20, 2011].

John Locke's opposition to the 1662 Licensing Act was also explicit in the 1694 letter titled "*Liberty of the Press*"[34] in which he opposed the renewal of the Licensing Act of 1662.[35] The Act was a punitive instrument for controlling printing presses. It restricted the number of printing presses and revived the practice in which all publications had to be approved by the Licensor. According to the 1662 Act, the entrance of a book or copy in the Register, i.e. the Government, was deemed to vest a perpetual copyright in the stationer, i.e. the publisher, who entered it. John Locke opposed to the control of printing presses by the Government through the stationers guild, and elaborated upon the reasons for abolishing Government's monopoly over printing presses; he argued in support of readers' free access to literature and scholarship encouraging the unobstructed study and dissemination of knowledge.[36] Locke contended that the monopoly and excessive powers of the Government-controlled Stationers' Company[37] over the printing presses adversely affected the dissemination of knowledge and the availability of classic authorial works affecting negatively scholars, authors and the public at large. The Crown had vested the Stationer's Company with the power to decide upon the printing of a book on condition of registration with it. All lawfully printed books had to be recorded in the Company's register. The right to make an entry to the register was confined by the Crown to the register of the Company's members who were furnished with perpetual

---

[34] Locke, J., (1997), ***Liberty of the Press (1695),*** reprinted in ***Locke: Political Essays***, Mark Goldie ed., Cambridge University Press.

[35] Astbury, R., (1978), ***The Renewal of the Licensing Act in 1693 and Its Lapse in 1695***, 33 Library (5th Ser.), pp.296-297.

[36] Zemer, L. (2006), ibid, p.899.

[37] In England the printers, known as stationers, formed a collective organization, the Stationers' Company. In the 16th century the Stationers' Company was given the power to require all lawfully printed books to be entered into its Register. Only members of the Stationers' Company could enter books into the Register. This meant that the Stationers' Company achieved a dominant position over publishing in 17th century England. But the monopoly, granted to the Stationers' Company through the Licensing Act 1662, came to an end when parliament decided to not renew the Act after it lapsed in May 1695. See more for the Worshipful Company of Stationers and Newspaper Makers, i.e. the Stationers' Company, available at Wikipedia at http://en.wikipedia.org/wiki/Stationers'_Company [last check, Apr.20, 2011]; also, at Spinello, R., and Bottis, M., (2009), ibid, pp.18-19.

copyright on the books that were published after proper registration.[38] Authors of said books were not, and could not become, members of the Stationers' Company, thus no copyright was possible for them.

Additionally, Locke supported limiting the duration of an author's right as vital so that knowledge could become available to the public without any proprietary right limitations. In that sense, Locke claimed that the 1662 Act violated the three basic rights of trade, liberty and property meaning that the perpetual rights vested to the Stationers' Company denied an author his property rights and violated his liberty to exchange and trade his own property.[39] Locke remarked that nobody should have any peculiar right in any book which has been in print for fifty years, and supported a term of years for copyright followed by a lapse into the public domain.[40] This term, Locke supported, should be either fifty years after the first publication of the book or fifty or seventy years after the death of author in case the author's work had not been published during his lifetime.

John Locke's approach on copyright was an extension of his labor theory of property. It had a deep impact and influenced utilitarianism,[41] and it was mainly this utilitarian approach[42] that affected world's first copyright law, the Statute of Anne in 1709.[43] The utilitarian approach to copyright[44]

---

[38] The Stationers' Company was empowered by the Crown with police-like powers of search and seizure of books which were not registered. The Crown was using the Stationer's Company as ready-made agents of censorship. See more at Spinello, R., and Bottis, M., (2009), ibid, p.15-19.

[39] Zemer, L., (2006), ibid, p.903; Locke, J., (1997), ibid, p.333.

[40] Zemer, L., (2006), ibid, p.905 ; Locke, J., (1997), ibid, p.337.

[41] Utilitarianism (also: utilism) is the idea that the moral worth of an action is determined solely by its usefulness in maximizing utility and minimizing negative utility (utility can be defined as pleasure, preference satisfaction, knowledge or other things) as summed among all sentient beings. It is thus a form of consequentialism, meaning that the moral worth of an action is determined by its outcome. The most influential contributors to this theory are considered to be Jeremy Bentham and John Stuart Mill. See more upon Utilitarianism at Wikipedia, available at http://en.wikipedia.org/wiki/Utilitarianism#History [last check, Apr.20, 2011].

[42] The utilitarian approach focuses on the general good which is described in terms of 'utility' for the general public. Utility becomes the foundation of morality and the ultimate criterion of right or wrong; it is the sum of the net benefits caused by an action.

[43] ***The Statue of Anne***, available at http://en.wikipedia.org/wiki/Statute_of_Anne [last check, Apr.20, 2011]; it was titled ***An Act for the Encouragement of Learning, by***

was passed to the American Constitution's provisions[45] for the protection of copyright since the drafting process of the Constitution by the time of Thomas Jefferson.[46] The U.S. Federal Copyright Act of 1790[47]—the first U.S. Copyright Law[48]—was one of the first laws passed by the U.S. Congress; said Act gave authors an exclusive right to their creations for the duration of fourteen years from the date of compliance with certain notice, deposit, and recordation procedures. The 1790 Act also provided that, if the author survived the initial term, he or his "executors, administrators or assigns" could renew the copyright for a renewal term of another fourteen years.

---

***Vesting the Copies of printed Books in the Authors, or Purchasers, of such Copies during the Times therein mentioned***. See more upon the Statute of Anne at Spinello, R., and Bottis, M., (2009), ibid, pp.19-26.

[44] The utilitarian approach to copyright posits that copyright's essence is to enhance over social welfare by providing an incentive for new innovation where social welfare is understood as the maximization of aggregate wealth that society gets from its scarce resources. Intellectual property rights are necessary in order to maximize social welfare by providing authors and other creators with a reward that is secured through Copyright's provisions for strongly protected intellectual property rights. Without these strong rights, authors and other creators would have no incentive to create, thus society would suffer from loss of creations and inventions. Without strong Copyright laws, people would be more inclined to use works regardless of authors' will and against authors' interests to recoup their investments spent in the creative process. See more about classic utilitarianism in Spinello, R., and Bottis, M., (2009), ibid, pp.167-171.

[45] The U.S. Constitution in Article I, Section 8, Clause 8 confers upon the Congress the power *To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries* by awarding exclusive property rights.

[46] Thomas Jefferson served as a delegate to the Second Continental Congress beginning in June 1775, soon after the outbreak of the American Revolutionary War. When Congress began considering a resolution of independence in June 1776, Jefferson was appointed to a five-man committee to prepare a declaration to accompany the resolution. The committee selected Jefferson to write the first draft probably because of his reputation as a writer. Jefferson completed a draft in consultation with other committee members, drawing on his own proposed draft of the Virginia Constitution, George Mason's draft of the Virginia Declaration of Rights, and other sources. See more upon Thomas Jefferson, available at http://en.wikipedia.org/wiki/Thomas_Jefferson#Drafting_a_declaration [last check, Apr.20, 2011]. See, also, http://www.archives.gov/exhibits/charters/ [last check, Apr.20, 2011] for the making of the Charters, the Declaration of Independence, The Constitution of the United States, the Bill of Rights and the impact of the Charters.

[47] See more on ***U.S. Copyright Act of 1790*** available at Wikipedia at http://en.wikipedia.org/wiki/Copyright_Act_of_1790 [last check, Apr.20, 2011].

[48] For a brief introduction and history of U.S. Copyright Law, see United States Copyright Office available at http://www.copyright.gov/circs/circ1a.html [last check, Apr.20, 2011].

In John Locke's labor theory for the appropriation of intellectual property balance between copyright of the labourer and the protection of the common good is framed by the no-harm principle.[49] Locke believed that under certain conditions an individual's acquisition of property should not violate anyone's right to property in the commons,[50] i.e. intellectual labor creates a property entitlement in so far as it does not limit a person's rights to intellectual property in the common.[51] For Locke, labor as well as intellectual labor is the basis for a property right instead of a mere use right because without that right to control one's labor and exclude others from the product of it, self-governance becomes impossible.

However, Locke through the no-harm principle suggested that a person's natural property right based on his labor is protected only when it is balanced against and regulated by certain social norms so that it did not conflict with the common good.[52] The labourer himself has the principal claim on the output of his labor which is per se sufficient justification for

---

[49] Spinello, R., and Bottis, M., (2009), ibid, p.9.

[50] The terms "*public property*" or "*common property*" or "*publici juris*" were first used in 19th-century by American courts in order to refer to non-copyrightable and non-patentable subject matter. The term "*publici juris*" is first met in the 1774 *Donaldson v. Beckett* case brought in front of English court as a reference to statutory term once copyright protection has ended. In the late 19th century the term "*public domain*" began to appear occasionally in patent decisions. The aforementioned three terms were initially used by 19th-century American courts in order to describe both materials for which patent and copyright protection had expired as well as material definitionally ineligible for protection. Gradually, however, these terms fell into disuse in intellectual property law, while the only term used to describe the boundary between the proprietary and the public is the term "*public domain*." See more for the evolution of these terms in Lee E., (2003), ***The Public's Domain: The Evolution of Legal Restraints on the Government's Power to Control Public Access Through Secrecy or Intellectual Property***, 55 Hastings Law Journal, pp.91-209, available at http://www.estig.ipbeja.pt/~ac_direito/lee.pdf [last check, Apr.20, 2011]; Ochoa, T., (2002), ibid; Cohen, J., (2006), ***Copyright, Commodification, and Culture: Locating the Public Domain***, Chapter IV in Guibault, L., & Hugenholtz, P.B., eds., pp.121-166, Kluwer Law International, 2006, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=663652 [last check, Apr.20, 2011].

[51] In the famous English case *Donaldson v. Beckett* (1774), Lord Camden famously equated science and learning to *things common to all mankind, that ought to be as free and general as air or water.* See more about the case in http://www.copyrighthistory.com/donaldson.html [last check, Apr.20, 2011].

[52] Zemer, L., (2006), ibid, p.918.

the appropriation of objects and resources and their integration into the labourer's private sphere of influence. However, the same labor is also sufficient justification for the enlargement of social wealth in the sense that labor adds new value and creates social wealth for labor puts the difference of value on everything.[53] If the appropriation of labor's output ends up with scarcity of wealth to the detriment of social benefit, then appropriation per se is the cause of an imbalance in society and labor transforms from a power to create wealth into a cause for the depletion of wealth. Similarly, if an author's appropriation of labor's output cannot end up with the creation of wealth that he has a natural right upon, then labor is insufficient as a foundation for progress.

The centrepiece of the Lockean theory is the labor as a means to create wealth. Labor is justified as the foundation upon which wealth and progress can be based on condition that labor meets the interests of both the creator and society's. The safety valve in the Lockean theory upon the justification of labor as a means to create wealth and cause progress is the no-harm principle that balances individual and social interests.[54]

Locke's no-harm principle evangelizing balance between proprietary rights and public property became the central theme of the seminal 1896 Supreme Court of the U.S. decision in the case *Singer Manufacturing Co. v. June Manufacturing Co.*,[55] which is a landmark verdict regarding Copyright theory and related legal terminology regarding the public domain. The case concerned the eligibility of the name '*Singer*' for protection following expiration of the Singer Manufacturing Company's

---

[53] Attas, D., (2009), ***Lockean Justifications of Intellectual Property***, in Alex Gosseries, Alain Marciano and Alain Strowel (eds.) ***Intellectual Property and Theories of Justice***, Palgrave Macmillan, p.29.

[54] Spinello, R., and Bottis, M., (2009), ibid, p.206, who recognize in Locke's views the proper intellectual and normative background and intellectual property's foundation in the sense of an equilibrium between an author's interests and the interests of the general public for authorial works of intellect; they supplement said normative background and copyright's foundation with the Hegelian theory's sensitivity to personhood interests.

[55] Singer Manufacturing Co. v. June Manufacturing Co., 163 U.S. 169, 203 (1896), available at http://supreme.justia.com/us/163/169/case.html [last check, Apr.20, 2011].

patents on its sewing machines. The Supreme Court quoted Justice Miller's discussion of '*public property*' as well as British and French provisions regarding the subject matter of expired patents, and linked all these information to the idea of the '*public domain*' in which such property—i.e. the name '*Singer*'—resided. Said U.S. Supreme Court case concluded that '*the world 'Singer', as we have seen, had become public property, and …it could not be taken by the Singer Company out of the public domain by the mere fact of using that name as one of the constituent elements of Singer Company's trade-mark.*' After the U.S. Supreme Court verdict in the case *Singer Manufacturing Co. v. June Manufacturing Co.*, courts gradually began to adopt the terminology '*public domain*.'[56] At an international level, the term '*public domain*' was first used in the legal text of the 1886 Berne Convention article 14 which provided that "*Under the reserves and conditions to be determined by common agreement, the present 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.*"[57]

## The no-spoliation proviso

The social norms in Locke's no-harm principle are composed by two immediate conditions: the first condition is known as "*the no-spoliation proviso*" which posits that the laborer may appropriate only the amount that he can use. This is the meaning in Locke's words "*nothing was made*

---

[56] Cohen, J., (2006), ibid, p.126, according to who the legislative impetus for widespread adoption of the '*public domain*' term in the U.S. Copyright Law was the enactment of the 1909 Copyright Act in Section 7 expressly excluded copyright protection for '*works in the public domain*'. See the amended text of Section 7 of the 1909 Copyright Act at http://www.megalaw.com/top/copyright/1909/1909_7.php [last check, Apr.20, 2011]. See, also, Ochoa, T., (2002), ibid; Rose, M., (2003), ***Nine-Tenths of the Law: The English Copyright Debates and the Rhetoric of the Public Domain***, *66 Law & Contemporary Problems, pp.75-87, available at* http://www.law.duke.edu/shell/cite.pl?66+Law+&+Contemp.+Probs.+75+(WinterSpring+2003) [last check, Apr.20, 2011].

[57] See also article 18§1 of the Berne Convention that is available at http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html [last check, Apr.20, 2011] as it has been amended and applies today, which posits that *This 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*.

*by God for Man to spoil or destroy*."[58] Locke's no-spoliation proviso is an expression of his awareness that in situations of perpetual rights in works of authorship spoilage of social value is inevitable.[59] For Locke, any system of authors' rights must incorporate the no-spoliation condition as part of its moral applicability. Locke's ideal of a system that caters for authorial rights respects the requirement of public access to authorial works for educational and learning purposes, and considers perverse any copyright system that prohibits proper access and use of works by the public because of authorial rights.[60] For John Locke, the ideal authorial rights system must ensure that the author-laborer's rights are protected in as much as he is made by the system to leave enough and as good in the common wherefrom he draws resources with the aim to create.[61] Locke rejected the idea that authors create their works ex nihilo. On the contrary, he believed that authors create their works based on pre-existing mental and intellectual raw materials in the commons, i.e. in the public domain. Authors do not create in the vacuum, but rather they create by mixing their mental labor with pre-existing ideas and collectively owned objects.[62] This idea for creativity is still respected in legal theory which understands common resources not simply as the distant backdrop for productive activity that is largely private, but as the infrastructure that supports private productive activity and enables its success.[63]

---

[58] Zemer, L., (2006), ibid, p.919; Locke, J., (1967), ibid, §31, p.308.

[59] Damstedt, B.G., (2003), ***Limiting Locke: A Natural Justification for the Fair Use Doctrine***, 112 Yale Law Journal, pp.1179-1221, available at http://www.yalelawjournal.org/the-yale-law-journal/content-pages/limiting-locke:-a-natural-law-justification-for-the-fair-use-doctrine/ [last check, Apr.20, 2011].

[60] Zemer, L., (2006), ibid, pp.922-925.

[61] Zemer, L., (2006), ibid, p.933.

[62] Zemer, L., (2006), ibid, p.936, and p.945, according to who John Locke writes in Book IV of his work ***An Essay Concerning Human Understanding (1690)***, Peter H. Nidditch ed., Oxford University Press 1975, ch.iv, § 3, p.563: *Our Knowledge therefore is real, only so far as there is a conformity between our ideas and the reality of things*; the meaning in Locke's words is that knowledge is never innate, but rather is socially constructed. Locke believed that knowledge is the outcome of experience, social and cultural exposure and communication, and thus the public plays an important role in the process of an author's creativity in the sense that copyrighted works are depended on an author's capacity to act as a sociable creature.

[63] Cohen, J., (2006), ibid, p.139. See, also, Rose, M., (1986), ***The Comedy of the Commons: Commerce, Custom and Inherently Public Property***, 53 University of Chicago Law Review, pp.711-781; the same,(2003), ***Romans, Roads, and Romantic Creators: Traditions of Public Property in the Information Age***, 66 Law and Contemporary

Thus, Locke believed that public interest in authorial works and proprietary rights in them are interrelated and must be kept in balance, otherwise an authorial system is doomed to fail. For Locke, an authorial system—a Copyright law system—which grants authors unconditional monopoly-type rights for their works, and which withholds optimal public access to copyrighted materials will eventually have adverse effects on the public interests and is bound to fail for that cause. Locke thought of the public good and was a proponent of the idea that property must be limited in order to maintain a stable social order. In that sense, authorial property should be carefully balanced against certain social norms. Locke was not a defender of a robust system of natural property rights for authors unencroachable by norms of equality and public good. Both in his Second Treatise of the "*Two Treatises of Civil Government*" and in his "*Liberty of the Press*" Locke expressed his commitment to the public interest regarding authorial rights, contended that in consideration of public interest there is no reason in nature to preclude a freer system of use of authors' works, and concluded that an author's natural right to his works is a dynamic rather than static guarantee changing to meet the needs of different situations.[64]

### The enough and as good proviso

The second condition in Locke's no-harm principle is known as "*the enough and as good proviso*" under which a man has a right to

Problems, pp.89-110, available at http://www.law.duke.edu/pd/papers/rose.pdf [last check, Apr.20, 2011]; Hess, C., and Ostrom, E., (2003), ***Artifacts, Facilities, and Content: Information as a Common-Pool Resource***, 66 Law and Contemporary Problems, pp.111-145, available at http://www.law.duke.edu/pd/papers/ostromhes.pdf [last check, Apr.20, 2011]; Lessig, L., (2001), ***The Future of Ideas: The Fate of the Commons in a Connected World***, Vintage Books, available at http://www.the-future-of-ideas.com [last check, Apr.20, 2011]; Benkler, Y., (2003), ***Through the Looking Glass: Alice and the Constitutional Foundations of the Public Domain***, *66 Law and Contemporary Problems*, pp.173-224, available at http://www.law.duke.edu/shell/cite.pl?66+Law+&+Contemp.+Probs.+173+(WinterSpring+2003) [last check, Apr.20, 2011]; Boyle, J., (2003*)*, ibid*,* pp.33-74, available at http://www.law.duke.edu/pd/papers/boyle.pdf [last check, Apr.20, 2011]; Litman, J., (1990), ***The Public Domain***, 39 Emory Law Journal, pp.965-1023.

[64] Zemer, L. (2006), ibid, p.934-935.

appropriate from the common as long as there is enough and as good left in the commons for others.[65] In the "*Liberty of the Press*," Locke justified the imposition of an involuntary harm on authors' rights for matters of public interest and advocated a weaker version of a natural right for authors that is limited in time and is available for purposes of education and learning.[66] The "*enough and as good*" proviso ensures that a grant of property does no harm to other persons' equal abilities to create or to draw upon the pre-existing cultural matrix and scientific heritage that exists in the commons and where from the author draws and appropriates resources; the enough and as good proviso restricts the ownership of intellectual creations and widens the doorway to new creators.[67]

Locke was fully aware of the importance of preserving a vibrant public domain to promote the formation of ideas, works and the evolution of authors. For him, the authorial rights cannot be held captive in traditional concepts of property and ownership.[68] Locke's theory on labor's justification represents a plausible conception of intellectual property rights and an intelligible ground for appropriation of resources in the commons so long as said appropriation occurs within the bounds of fairness and ethical uprightness in consideration of the interests from both the laborer and society.[69] The Lockean-based entitlement for intellectual property rights is an optimal starting point for policy-making provided that social welfare considerations are not ignored or under-ruled when copyright legislation is crafted and appropriate limits are imposed in respect of an author's rights.[70]

---

[65] Zemer, L., (2006), ibid, p.919; Locke, J., (1967), ibid, §27, pp.305-306.
[66] Zemer, L. (2006), ibid, p.921; Shiffrin S.V., (2001), ***Lockean Arguments for Private Intellectual Property***, in Munzer (ed.), ***New Essays in the legal and political theory of property***, Cambridge University Press.
[67] Zemer, L., (2006), ibid, p.926.
[68] Zemer, L., (2006), ibid, pp.946-947.
[69] Gordon, W., (1993), ***A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property***, 102 Yale Law Journal, pp.1533-1609; Dusollier, S., (2010), ibid, p.20.
[70] Spinello, R., and Bottis, M., (2009), ibid, p.206.

To that point, Locke's interest and views for the public domain considering it as a commons in which cultural and scientific heritage resides and upon which the general public, including authors, have all right to draw materials from but no right to appropriate them in a way that restricts others from accessing materials in the commons, have been revived in contemporary copyright literature and copyright activism that target the imbalances of the stringent copyright system as it has evolved. In his seminal 1981 article titled "*Recognizing the Public Domain*"[71] David Lange argued that the public domain should be considered as a public right rather than simply the negative or obverse of intellectual property.[72] Jessica Litman has, also, sought to explain the public domain's purpose and to form a coherent theory about it.[73] Among the many reputable supporters for public domain's necessary existence, the need for its reinforcement and/or acknowledgement by proper legal framework, and its use as an opportunity to reconsider Copyright in the era of information networks and Internet networking applications used for accessing and using culture, i.e. knowledge, art and science, are Yochai Benkler,[74] Lawrence Lessig,[75] James Boyle,[76] Pamela Samuelson,[77]

---

[71] Lange, D., (1981), ***Recognizing the Public Domain***, 44 Law and Contemporary Problems, p.147, available at http://www.law.duke.edu/pd/papers/lange_background.pdf [last check, Apr.20, 2011].

[72] Lange, D., (2003), ***Reimagining the Public Domain***, 66 Law and Contemporary Problems, pp.463-483, available at http://www.law.duke.edu/shell/cite.pl?66+Law+&+Contemp.+Probs.+463+(WinterSpring+2003) [last check, Apr.20, 2011].

[73] Litman, J., (1990), ibid.

[74] Benkler, Y., (2003), ibid; the same, (2006), ibid; the same and Nissenbaum, H., (2006), ***Commons-based Peer Production and Virtue***, 14 The Journal of Political Philosophy, 4, pp.394-419, available at http://www.nyu.edu/projects/nissenbaum/papers/jopp_235.pdf [last check, Apr.20, 2011]; the same, (1999), ibid; the same, (2001), ***Siren Songs and Amish Children: Autonomy, Information and the Law***, 76 New York University Law Review, pp.23-113, available at http://www.benkler.org/SirenSongs.pdf [last check, Apr.20, 2011]; the same, (2003), ***Freedom in the Commons: Towards a Political Economy of Information***, 52 Duke Law Journal, pp.1245-1276 , available at http://www.law.duke.edu/shell/cite.pl?52+Duke+L.+J.+1245 [last check, Apr.20, 2011]; the same, (2000), ibid; the same, (2003), ***The Political Economy of Commons***, European Journal for the Informatics Professional, Upgrade Vol. IV, no.3, June 2003, available at http://www.benkler.org/Upgrade-Novatica%20Commons.pdf [last check, Apr.20, 2011]; the same, (2001), ***Property, Commons, and the First Amendment: Towards a Core Common Infrastructure***, Brennan Center for Justice at New York University, available at http://www.benkler.org/WhitePaper.pdf [last check, Apr.20, 2011].

Jessica Litman,[78] Jerome Reichman,[79] Mark Rose,[80] Mark Lemley,[81] Julie Cohen,[82] Jonathan Zittrain,[83] Charles Nesson,[84] Diane Zimmerman,[85] Brad Sherman,[86] Michael Birnhack,[87] Charlotte Hess and Elinor Ostrom,[88]

---

[75] Lessig, L., (2001), ibid; the same, (2006), ***Re-crafting the Public Domain***, 18 Yale Journal of Law & Humanities, p.56; the same, (2001), ***Architecting Innovation***, The First Annual Meredith and Kip Frey Lecture in Intellectual Property, Duke University, Mar.23, 2001, video available at http://www.youtube.com/watch?v=XKL0Qy2vRA4 [last check, Apr.20, 2011].

[76] Boyle, J., (2003), ibid; the same, (2008), ibid; the same, (2006), ***Tales from the Public Domain: bound by Law?***, Duke University Center for the Study of the Public Domain, available at http://www.law.duke.edu/cspd/comics [last check, Apr.20, 2011]; the same, (2007), ***Cultural Environmentalism and Beyond****, 70 Law & Contemporary Problems, pp.5-21, available at* http://www.law.duke.edu/shell/cite.pl?70+Law+&+Contemp.+Probs.+5+(spring+2007) [last check, Apr.20, 2011]; the same, (2003), ***Forward: The Opposite of Property?***, 66 Law & Contemporary Problems, pp.1-32, available through http://james-boyle.com [last check, Apr.20, 2011].

[77] Samuelson, P., (2003), ***Mapping the Digital Public Domain: Threats and Opportunities****, 66 Law & Contemporary Problems, pp.147-171, available at* http://www.law.duke.edu/shell/cite.pl?66+Law+&+Contemp.+Probs.+147+(WinterSpring+2003) [last check, Apr.20, 2011]; the same, (2001), ***Digital Information, Digital Networks, and the Public Domain***, available at http://www.law.duke.edu/pd/papers/samuelson.pdf [last check, Apr.20, 2011].

[78] Litman, J., (1990), ibid.

[79] Reichman, J., and Uhlir, P.F., (2003), ***A contractually reconstructed research commons for scientific data in a highly protectionist intellectual property environment****, 66 Law & Contemporary Problems, pp.315-462, available at* http://www.law.duke.edu/shell/cite.pl?66+Law+&+Contemp.+Probs.+315+(WinterSpring+2003) [last check, Apr.20, 2011].

[80] Rose, M., (2003), ibid.

[81] Lemley, M.A., (2005), ibid; the same, (2004), ibid.

[82] Cohen, J., (1998), ibid; the same, (1998), ***Copyright and the Jurisprudence of Self-Help***, 13 Berkeley Technology and Law Journal, pp.1089-1143, available at http://www.law.berkeley.edu/journals/btlj/articles/vol13/Cohen/html/text.html [last check, Apr.20, 2011]; the same, (2000), ***Copyright and the Perfect Curve***, 53 Vanderbilt Law Review, pp.1799- 1823, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=240590 [last check, Apr.20, 2011].

[83] Zittrain, J., (2002), ***Responses by the Research and Education Communities in Preserving the Public Domain and Promoting Open Access: New Legal Approaches in the Private Sector***, National Academy of Sciences, Symposium on the Role of Scientific and Technical Data and Information in the Public Domain, September 6, 2002.

[84] Nesson, C., Lessig, L., and Zittrain, J., (1999), ***Open Code – Open Content – Open Law, Building a Digital Commons***, Harvard Law School, available at http://cyber.law.harvard.edu/sites/cyber.law.harvard.edu/files/opencode.session.pdf [last check, Apr.20, 2011].

[85] Zimmermann, D.L., (2004), ***Is There A Right to Have Something to Say? One View of the Public Domain***, 73 Fordham Law Review, p.297.

[86] Sherman, B. and Wiseman, L., (2006), ***Towards an Indigenous Public Domain?***, Chapter XI in Lucie Guibault and P. Bernt Hugenhotz (eds.) ***The Future of the Public Domain – Identifying the Commons in Information Law*** Kluwer Law International.

[87] Birnhack, M., (2006), ***More or Better? Shaping the Public Domain***, Chapter IV in Lucie Guibault and P. Bernt Hugenhotz (eds.) ***The Future of the Public Domain – Identifying the Commons in Information Law***, Kluwer Law International.

Severine Dussolier,[89] Lucy Guibault,[90] Jane Ginsburg,[91] Bernt Hugenholtz,[92] Rosmary Coombe,[93] and William V. Caenegem[94] of whom almost all elaborate upon current Copyright's damaging and intrusive application in the commons causing the suffocation of and questioning the survivability of the public domain in a similar way to the description of the so called "*tragedy of the commons*."[95] The central idea in the "*tragedy of the commons*" is that public ownership of a piece of property is inefficient, because non-owners who use the property have no incentive to take care of it and will therefore overuse it.[96]

---

[88] Elinor Ostrom is the 2009 Nobel Laureate in Economy. Hess, C., and Ostrom, E., (2006), ***Understanding Knowledge as a Commons—From Theory to Practice***, MIT Press; Ostrom, E., (1990), ***Governing the Commons: The Evolution of Institutions for Collective Action***, Cambridge University Press.

[89] Dusollier, S., (2009), ***The public domain in intellectual property: beyond the metaphor of a domain***, in ***Intellectual property and public domain***, pp. 31-69; the same, (2008), ***Le domaine public, garant de l'intérêt public en propriété intellectuelle ?***, in ***L'intérêt général et l'accès à l'information en propriété intellectuelle***, , pp. 117-147, available at http://www.crid.be/pdf/public/5887.pdf [last check, Apr.20, 2011]; the same and Benabu, V.L., (2007), ***Draw me a Public Domain***, in ***Copyright law***, collection research handbooks in intellectual property, pp. 161-184, available at http://www.crid.be/pdf/public/5662.pdf [last check, Apr.20, 2011].

[90] Guibault, L., (2006), ibid.

[91] Ginsburg, J., (2006), ibid.

[92] Guibault, L., and Hugenholtz, B., (2006), ***The Future of the Public Domain – Identifying the Commons in Information Law***, Kluwer Law International; Hugenholtz, B., (2000), ***Copyright Contract and Code: What Will Remain of the Public Domain****?*, 26 Brooklyn Journal of International Law, pp.77-90.

[93] Coombe, R., (2003), ***Fear, Hope, and Longing for the Future of Authorship and a Revitalized Public Domain in Global Regimes of Intellectual Property***, 52 DePaul Law Review, pp.1171-1186, available at http://www.yorku.ca/rcoombe/publications/Fear_Hope_and_Longing.pdf [last check, Apr.20, 2011].

[94] Van Caenegem, W., (2002), ***The public domain: scientia nullius***, 24 European Intellectual Property Review, 6, pp. 324-330.

[95] The "*tragedy of the commons*" is a dilemma arising from the situation in which multiple individuals, acting independently and rationally consulting their own self-interest, will ultimately deplete a shared limited resource even when it is clear that it is not in anyone's long-term interest for this to happen. See more about '*The tragedy of the Commons*' in Wikipedia at http://en.wikipedia.org/wiki/Tragedy_of_the_commons [last check, Apr.20, 2011].

[96] Hardin, G., (1968), ***The Tragedy of the Commons***, 162 Science, pp.1243-1248, available at http://www.sciencemag.org/content/162/3859/1243.full.pdf [last check, Apr.20, 2011]. In 1968, Garrett Hardin spoke about the "*tragedy of the commons*" through the example of fish stocks. When a fisherman catches fish of reproductive age, he reduces future fish stocks. The fisherman's action penalizes all fishermen, including himself; but, unlike other fishermen, he offsets the damage to himself with a benefit that he alone appropriates, i.e. a higher catch, so his net situation improves. Every fisherman is tempted to adopt this free riding behaviour, which leads to the depletion of the natural resource and a tragedy of the commons.

Almost all contemporary legal theorists and public domain advocates have eloquently expressed the importance of the public domain and its social value to the ongoing creative process and to deliberative democracy. Critics of the current intellectual property regime point to the damage done to the intellectual commons by the privatization and excessive appropriation of resources available in the commons under the provisions of Copyright law that cater excessively for authorial "*individualism*" and "*information capitalism*" regardless of any public interest in the access to and use of copyrighted works. They contend that the narrow conception of an exclusive individual property right that is over-protected by regulation which in parallel under-protects the general public's interest in copyrighted works provides an insufficient framework for formulating sound public policy that promotes the social good through regulation that caters for the protection of intellectual property that is deemed to balance private interests and boost creativity in the market for the sake of society.[97]

Instead, what seems to be necessary nowadays is a prudent level of intellectual property protection that is measured and proportionate to an author's need to appropriate a fair portion of the value of his work while said protective legal framework also caters for the need of the general public to enjoy the fruits of a robust, rich, and sufficiently protected public domain from the "*information capitalism*" which denigrates the value of intellectual commons and promotes the hyper-thick protections of current Copyright law.[98] The WIPO Development Agenda[99] adheres to a

[97] Spinello R., and Bottis, M., (2009), ibid, p.6. The authors compare '*normative individualism*' or '*information capitalism*' with '*information socialism*' with the aim to ponder on Locke, Fichte, and Hegel's theories for an author's moral right to appropriate the value of his/her creative expression without causing any direct harm to the intellectual commons. The authors contend that Locke's theory is especially helpful in reconciling strong intellectual property rights with a commons composed of intangible goods.
[98] Spinello R., and Bottis, M., (2009), ibid, p.10.
[99] See ***The 45 Adopted Recommendations under the WIPO Development Agenda*** which in 2007 the General Assembly of WIPO Member States adopted (45 out of the 111 original proposals). The 45 adopted recommendations are available at

protectionist approach of the public domain. In its Recommendation 16 advocates to "*consider the preservation of the public domain within WIPO's normative processes and deepen the analysis of the implications and benefits of a rich and accessible public domain*." Also, WIPO's Recommendation 20 intends to "*promote norm-setting activities related to IP that support a robust public domain in WIPO's Member States, including the possibility of preparing guidelines which could assist interested Member States in identifying subject matters that have fallen into the public domain within their respective jurisdictions*." WIPO's adherence to protect public domain indicates an international trend in motivating both national and international policymakers to focus on the definition of the public domain as well as to include provisions in law which cater for the protection and promotion of places of non-exclusive intellectual property rights.[100]

### Archives in the Public Domain in Greek Legislation

Is the public domain, or any notion of it in Law, sufficiently provisioned and protected in the Greek Copyright Law?

Legislation in effect currently in Greece which includes provisions catering for works in the commons, is legislation that defines and regulates the creation, availability, distribution and permitted use of archives which are (supposed to be) available for use in the public commons. Law 1946/1991 gives the definition for the meaning of an archive and determines the new legal framework ruling the operation of

---

http://www.wipo.int/ip-development/en/agenda/recommendations.html [last check, Apr.20, 2011].

[100] Dusollier, S., (2010), ibid, p.5, who considers that protection of the public domain comprises of two steps: 1) identifying the contours of the public domain, thereby helping to assess its value and realm, and 2) considering and promoting the conservation and accessibility of the public domain. See, also, Sherman, B., and Wiseman, L., (2006), ibid, p.260 in which WIPO is reported to have said that *a robust public domain, rather than being the antithesis of copyright protection, is the foundation upon which the copyright system works. It is the availability of public domain resources that enables exchange and creativity*.

the General State Archives[101] organization up to date. The Central Service of the General State Archives organization is composed of departments, and archives are established in the capitals of the prefectures that did not exist in the past. Article 1 of Law 1946/1991 provides the definition for the meaning of an archive described as the collection of records and documents, no matter what the imprinted or implied dating of the record and/or document is as well as the size and material of it, which (record and/or document) may be related to the authorities of State, public or private organizations or legal entities or physical persons or a group of physical persons.[102] Further articles of the same Law provide the definitions for public,[103] ecclesiastical,[104] and private[105] archives as well as the definition for audiovisual[106] archives and archives of maps and drawings.[107] In the Greek law there has been no classification of archives similar to the categorization of government information provided in other European countries' legislation such as in Dutch policy for improving access to public sector information. Dutch government information is categorized as research data,[108] public registers,[109] administrative data,[110] and auxiliary data.[111]

---

[101] The ***General State Archives (G.S.A.)*** is a centre of national heritage and its main goal is to protect and preserve Greek historical memory. Through this new portal at http://www.gak.gr/frontoffice/portal.asp?cpage=NODE&cnode=1&clang=1 [last check, Apr.20, 2011].

[102] See, also, Law 2846/2000 which refers to the Archives of the Prime Minister.

[103] See article 2 of Law 1946/1991.

[104] See article 3 of Law 1946/1991.

[105] See article 4 of Law 1946/1991.

[106] See article 5 of Law 1946/1991.

[107] See article 6 of Law 1946/1991.

[108] Research data comprises the information collected by public organization, the key task of which is to collect data for use by others. The primary customers of these organizations are different parts of government which use the data in policymaking and administration. See Eechoud, van M., (2006), ***The Commercialization of Public Sector Information: Delineating the Issues*****,** Chapter XII in Lucie Guibault and P. Bernt Hugenhotz (eds.) ***The Future of the Public Domain – Identifying the Commons in Information Law***, Kluwer Law International, pp.279-301.

[109] Public register data covers the public registers that are held on the basis of specific laws and regulations. See Eechoud, van M., (2006), ibid.

[110] Administrative data results from the exercise of a particular administrative task of a public sector body that is directly aimed at citizens or companies. These include tax registers, police registers, social security files, etc. See Eechoud, van M., (2006), ibid.

[111] Auxiliary data comprises information not belonging to any of the above categories. This data is collected and enhanced to support policymaking or the execution of government policies. See Eechoud, van M., (2006), ibid.

All laws pertaining to archives and their availability in the public domain—the commons—in Greece make provisions for the public's right to access and use them on condition of due respect to any applicable intellectual property rights. In other words, access of works aimed to become available in the public domain is provisioned only as conditional in the Greek law; in case of effective copyright or industrial property restrains, the general public's right to access and make use—even merely the non-transformative and passive use of reading—of any kind of records and/or documents and/or any other material that is defined as an archive, and which theoretically, at least, should have been available for the general public and accessible in the commons falters because of intellectual or industrial property rights.[112]

The same reasoning in the provisions of law is identified in the provisions of more recently passed legislative texts such as the so called "*Translucence Program*" that was passed through Law 3861/2010 and which requires the publication of any action or decision of a public sector organization[113] or decision-making body onto the Internet.[114] More

---

[112] See article 5§5 of Law 2690/1999; see, also, article 1§2(b) of ***Directive 2003/98/EC of the European Parliament and of the Council of 17 November 2003 on the re-use of public sector information,*** *Official Journal L 345 , 31/12/2003 P. 0090 – 0096, available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32003L0098:EN:HTML [last check, Apr.20, 2011], according to which said Directive shall not apply to documents for which third parties hold intellectual property rights.

[113] The meaning of the "*Public Sector Organization*" is derived from article 2§§1,2,3 of Law 3861/2010 according to which (1)- *The provisions of this Act apply to laws, decrees, decisions and acts of the Prime Minister, the Cabinet and collective government bodies, Ministers, Deputy Ministers, Deputy Ministers, Secretary Generals of Ministries and Prefectures, Special Secretaries to Ministries, administrative bodies of public law entities (public entities), the independent regulatory authorities, the State Legal Council, the governing bodies of institutions of the public sector in the cases referred to in this Act, and the entities of the local authorities of first and second grade. The provisions of this Law shall also apply to acts or decisions issued by entities, to which the referred to in this paragraph institutions have granted authority to sign or delegate responsibility.* (2)- *For the purposes of this Act as agents of the public sector are meant: a) private entities owned or sponsored regularly in accordance with the applicable provisions of state funds at least 50% of the annual budget and b) public companies and organizations referred to in Article 1 of Law 3429/2005.* (3)- *For the purposes of this Act as agents of local government of first and second grade are meant the elected officers of Local Authorities (OTA) first and second grade and legal persons and enterprises of local authorities.* In a number of rulings such as Case C-360/96 BFI Holding [1998] ECR I-6821,

precisely, effective copyright restrains result in the failure of the general public's right to access and make use of public administration's works in the public domain regarding the availability of said works in the online environment of the commons.

For any offline availability in the commons of said works, such as the physical environment of public libraries or other public archives, current legislation in Greece though it sets conditions for legitimate access and proper use, it is not prohibitive at least for the passive use of these works. It does not prohibit access and passive use, i.e. accessing and mere reading of protected works that become available in the restricted physical environment of public libraries or public archiving organizations such as the General State Archives organization or other Government organizations' libraries and/or archiving repositories. The passive act of reading is not regulated by copyright law; and the act of accessing archives in the commons of the restricted physical environment of public libraries or public archiving organizations cannot be understood as a

---

Case C-44/96 Mannesmann v. Strohal [1998] ECR I-73, Case C-214/00 Commission v. Spain [2003] ECR I-4667, Case C-373/00 Adolf Truly [2003] ECR I-1931, and Case C-18/01 Korhonen [2003] ECR I-5321, the European Court of Justice (ECJ) has clarified that a "*Public Sector body*" includes organizations under both public and private law which are established for specific purpose of meeting needs in the general interest not having an industrial or commercial character, i.e. needs that are satisfied otherwise than by the supply of goods and services in the marketplace and which, for reasons associated with the general interest, the State chooses to provide itself or over which it wishes to retain a decisive influence. Said organizations must possess a legal personality and must be closely dependent as regards financing, management or supervision on the State, regional or local authorities or other bodies governed by public law. See, also, the definition of the "*Body governed by Public Law*" in article 1(b) of *Directive 93/37/EEC OJ 1993 L 199/54* concerning the coordination of procedures for the award of public works contracts, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31993L0037:EN:NOT [last check, Apr.20, 2011] as well as article 1(b) of *Directive 92/50/EEC OJ 1992 L 209/1* relating to the coordination of procedures for the award of public service contracts, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31992L0050:EN:NOT [last check, Apr.20, 2011].

[114] See article 5 of Law 3861/2010, the so called Translucence Program (*Πρόγραμμα Διαύγεια*) available at http://www.epdm.gr/Uploads/Files/nomoi_kya/N_3861_2010.pdf [last check, Apr.20, 2011], which makes room for the nullification of translucence of any action/decision of a public sector authority through the publication of relevant documentation onto the Internet, in the event of effective third-party's intellectual or industrial property rights. See, also, Law 3861/2010's Preamble, p.5, available at http://diavgeia.gov.gr/site/AITIOLOGIKIEKTHESI2.pdf [last check, Apr.20, 2011].

violation of relevant law.[115] If this is true for the offline environment, it is also true for the online. Yet, it seems that Greek Copyright Law treats both truths differently.

The different treatment in Greek Copyright Law as well as in laws catering for the archives of works in the online public domain compares to works in the offline public domain provides sufficient evidence that currently there is a senseless imbalance in legislation in Greece to the detriment of the public domain, especially the digital public domain which current public administration in Greece seems to aim at enhancing and enriching directly or indirectly through legislation such as Law 3861/2010. Said imbalance which favours the offline availability of works in the public domain while at the same time discriminates against an equivalent availability of the same works in the online public domain, is the result of legislation that was formed and passed without any proper or thorough consideration for the evolution of Internet networking technologies and their catalytic effects on intellectual and industrial property rights as well as on the general public's rights for works in the public domain.

The fact that Greek legislation caters for works in the public domain and makes provisions for the public's right to access and use them on condition of due respect to any applicable intellectual or industrial property rights, indicates also that the notion of the public domain per se in the Greek legislation is the so called "*traditional*" one according to which the public domain is defined as encompassing intellectual elements that are not protected by copyright or whose protection has lapsed due to the expiration of the duration of the copyright protection. Succumbing to that traditional mind-frame in legislation in Greece is the rule, and the pass of Law 3861/2010 is not an exception to the rule. Such notion is negative, as its realm is the inverse of the scope of copyright protection.

[115] Kallinikou, D., (2010), ***Intellectual Property, Digital Archives, and the Public Domain***, speech to Hellenic National Audiovisual Archive, Sep.20, 2010, available at http://www.avarchive.gr/files/Image/Kallinikou_30%20-9-2010.pdf [last check, Apr.20, 2011]; Dusollier, S., (2010), ibid, p.8.

The negative approach to public domain entails that if copyright is regulated and promoted then the elements of public domain themselves are generally not subject to any rules or protection[116] or that any rules that might exist governing the public domain and/or ruling for any obligation or right with the aim to enrich and enlarge the public domain with works produced either by public or private bodies succumb to regulation for copyright protection. Neither is this definitely a positive view for public domain protection, nor a bold step towards the unhindered access of the general public in works supposedly to be in the public domain! And it reminds a lot, a description of public domain that was attempted by UNESCO in its "*2003 Recommendation concerning the Promotion and Use of Multilingualism and Universal Access to Cyberspace*," according to which "*Public domain information is publicly accessible information, the use of which does not infringe any legal right, or any obligation of confidentiality. It thus refers on the one hand to the realm of all works or objects of related rights, which can be exploited by everybody without any authorization, for instance because protection is not granted under national or international law, or because of the expiration of the term of protection. It refers on the other hand to public data and official information produced and voluntarily made available by governments or international organizations.*"[117] The right approach, though, to public domain's nature is to understand it not as the realm of material that is undeserving of protection, but as a device that permits the rest of the copyright system to work by leaving the raw material of authorship available for authors to use.[118]

In addition, the striking difference in the treatment provisioned in the Greek law of the offline and online environments of the public domain is

---

[116] Dusollier, S., (2010), ibid, p.7.

[117] UNESCO, (2003), ***Recommendation concerning the Promotion and Use of Multilingualism and Universal Access to Cyberspace***, Adopted by the UNESCO General Conference in 2003 (32nd session), available at http://portal.unesco.org/ci/en/ev.php-URL_ID=13475&URL_DO=DO_TOPIC&URL_SECTION=201.html [last check, Apr.20, 2011].

[118] Litman, J., (1990), ibid, p.968.

characteristic in the application of legal restrictions stemming from Copyright for protected works in the Internet while no such application is usually exercised by right-holders in the environment of public libraries and archiving repositories. And this happens, despite the fact that copyright pertains only to the intangible work which is distinguished from the material property in which the protected work has been embodied.[119] In both environments, the online and offline, wherein protected works become available they are available for "*public performance*", "*communication to the public*" and probably for "*broadcasting*", too.

Greek Copyright law considers "*public performance*" any performance of a work at a place where the public is or can be present, or at a place not open to the public, but where a substantial number of persons outside the normal circle of a family and its closest social acquaintances are present.[120] The availability of a work in the offline environment of a public library as well as in the online environment of the Internet meets the "*public performance*" criterion in Copyright law. On the basis of the right of public performance, the author or any other right-holder may authorize live performances of a work, such as the presentation of a play in a theatre or an orchestra performance of a symphony in a concert hall etc. Public performance also includes performance by means of recordings; thus, musical works embodied in phonograms are considered

---

[119] Kallinikou, D., (2008), ibid, pp.30-34.

[120] Kallinikou, D., (2008), ibid, pp.163-177. See also article 3§2 of Law 2121/1993 available at http://web.opi.gr/portal/page/portal/opi/info.html/law2121.html/ch01.html#a3 [last check, Apr.20, 2011] according to which *The use, performance or presentation of the work shall be deemed to be public when the work thereby becomes accessible to a circle of persons wider than the narrow circle of the family and the immediate social circle of the author, regardless of whether the persons of this wider circle are at the same or at different locations*. Greek Court decisions upon the nature of public performance of a work include Supreme Court (ΑΠ) 135/1983 ΕλλΔικ 1983 pp.1332-1333, ΑΠ 61/1981 ΝοΒ 1981 pp.384-385, ΑΠ 64/1984 ΠοινΧρ 1984 pp.705-706, ΑΠ 500/2001 ΕλλΔ 2001 p.847, ΑΠ 433/1992 ΕΕμπΔ 1994 p.293 & ΕλλΔ 1993 p.1411, & ΠοινΧρ 1992 pp.534-535, ΑΠ 907/2003 ΠοινΧρ 2004 pp.213-215 & ΕλλΔ 2003 pp.1480-1481; also, First Instance Court decisions (ΠρωτΑθ) 67230/1976 ΝΔ 1976 pp.470-472 & ΝοΒ 1977 pp.789-790 & ΑρχΝ 1977 pp.61-62 & ΠοινΧρ 1977 pp.279-280 & ΕΕμπΔ 1977 pp.136-139, ΜονΠρωτΑθ 5808/2002, ΜονΠρωτΑθ 1577/2003, ΤριμΠλημΑθ 29171/1975 ΠοινΧρ 1976 pp.773-774, ΜονΠρωτΑθ 3413/2002 ΧρΙΔ 2003 pp.652-654, ΜονΠρωτΑθ 1639/2001 ΔΕΕ 2001 pp.858-860.

"*publicly performed*" when the phonograms are played over amplification equipment in such places as libraries.

In addition, the right of "*broadcasting*" covers the transmission by wireless means for public reception of sounds or of images and sounds, whether by radio, television, or satellite.[121] When a work is "*communicated to the public*"[122] a signal is distributed, by wire or wireless means, which can be received only by persons who possess the equipment necessary to decode the signal. An example of "*communication to the public*" is cable transmission or transmission of a work in the intranet of a public library. The difference between the right to communicate a work to the public[123] and the right to a public performance[124] of a work is that in the case of the former the public is not present at the place where the communication originates from, while in the case of the later it is.[125] Under the Berne Convention,[126] authors have the exclusive right of authorizing public performance, broadcasting and communication to the public of their works. Provisions for safeguarding said rights for the author/right-holder are also included in Copyright Law 2121/1993 in Greece.[127]

[121] See article 3§1(g) of Law 2121/1993, available at http://web.opi.gr/portal/page/portal/opi/info.html/law2121.html/ch01.html#a3 [last check, Apr.20, 2011]; Kallinikou, D., (2008), ibid, pp.177-183.
[122] See Kallinikou, D., (2008), ibid, pp.161-163.
[123] See article 3§1(h) of Law 2121/1993.
[124] See article 3§1(f) of Law 2121/1993.
[125] See Recital 23 of *the InfoSoc Directive* available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001L0029:EN:HTML [last check, Apr.20, 2011]; Kallinikou, D., (2008), ibid, pp.161-163; see also ΜονΠρωτΑθ 3413/2002 ΧρΙΔ 2003, pp.652-654; ΜονΠρωτΑθ 1639/2001 ΔΕΕ 2001, pp.858-860.
[126] See article 11bis of the *Berne Convention*, **available at** http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html#P156_28886 [last check, Apr.20, 2011] titled ***Broadcasting and Related Rights*** **1)** *Broadcasting and other wireless communications, public communication of broadcast by wire or rebroadcast, public communication of broadcast by loudspeaker or analogous instruments; 2) Compulsory licenses; 3) Recording; ephemeral recordings. See the Berne Convention of September 9, 1886, and its amendments ever since for the Protection of Literary and Artistic Works, available at* http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html [last check, Apr.20, 2011].
[127] See article 3 of Law 2121/1993, available at http://web.opi.gr/portal/page/portal/opi/info.html/law2121.html/ch01.html#a3 [last check, Apr.20, 2011].

The striking difference in the treatment in law of the offline and online environments of the public domain stems from the fact that Copyright law restrictions are almost always claimed by right-holders and become acceptable by courts regarding the unauthorized availability of their works online, while no such claims are raised regarding the availability of works in the commons of the offline environment of public libraries and archiving organizations. Non-transformative uses of works such as accessing and reading them through the non-traditional online environment seem to collide with traditional copyright law provisions.[128] The mere accessing and reading of a book that becomes available online, even if said actions are taken for non-commercial purpose might be in breach of copyright law which confers the author with the exclusive right to authorize or prohibit the fixation and direct or indirect, temporary or permanent reproduction of his/her works by any means and in any form, in whole or in part;[129] the author is also conferred with the exclusive right on the public performance of his/her works, the broadcasting or rebroadcasting of his/her works to the public by radio and television, by wireless means or by cable or by any kind of wire or by any other means, in parallel to the surface of the earth or by satellite, the communication to the public of his/her works, by wire or wireless means or by any other means, including the making available to the public of his/her works in such a way that members of the public may access these works from a place and at a time individually chosen by them. These exclusive rights of the author are not exhausted by any act of communication to the public.[130]

The copyright protection of traditional legal frameworks seems to prohibit even non-transformative uses of works online even if said uses are made

[128] See Court of First Instance decisions ΜονΠρωτΑθ 3413/2002 ΧρΙΔ 2003 pp.652-654, ΜονΠρωτΑθ 1639/2001 ΔΕΕ 2001 pp.858-860.
[129] See article 3§1(a) of Law 2121/1993, available at http://web.opi.gr/portal/page/portal/opi/info.html/law2121.html/ch01.html#a3 [last check, Apr.20, 2011].
[130] See article 3§§1(f), (g), (h) of Law 2121/1993.

with non-commercial interest.[131] Copyright law seems to impede end-users even from engaging in the most inoffensive non-transformative uses of creative works such as reading a work online and via their computers, unless they ask for prior permission from the author and/or right-holder of the right to access to and copying of protected works. Every time the users are accessing copyrighted works that are available online via their computers, they have no option but to copy said works in order to use them. Said copying is done without any prior permission from the author and/or right-holder, and unless said copying is permitted as an exception from the reproduction right of the author and/or right-holder,[132] violation of copyright is the outcome. Therefore, existing Copyright system does not encourage users to make confident and lawful use of works available onto the Internet. Event the most inoffensive non-transformative uses of creative works such as reading a work online or downloading a work with the aim to read it privately without any commercial purpose in mind is considered by courts as an action that conflicts with a normal exploitation of the work or other protected subject-matter and unreasonably prejudices the legitimate interests of the rightholder, according to existing Copyright law provisions and according to the application of the "*three-step-test*."[133] This treatment of users' online behaviour by currently effective Copyright legislation in Greece does not make any balanced sense and cannot achieve any equilibrium between an author's proprietary rights and the

[131] Stallman, R., (2002), ***The Right to Read, in Free Software Free Society: selected essays of Richard Stallman***, GNU Press, Boston, p.73; see also, the same, (1997), ***The Right to Read***, 40 Communications of the ACM, 2, available at http://www.gnu.org/philosophy/right-to-read.html [last check, Apr.20, 2011], who, by projecting current trends in copyright law, sets a fictional story in 2047 and pictures a world in which access to information is strictly controlled and is deployed by '*trusted*' computing systems only. In said fictional world, no one is allowed to read another's book without a license, and each book has a copyright monitor which reports when, where, who read a book to a hypothetical central authority.

[132] See article 28B of Law 2121/1993, according to which *Temporary acts of reproduction which are transient or incidental, which are an integral and essential part of a technological process and whose sole purpose is to enable: a) a transmission in a network between third parties by an intermediary or b) a lawful use of a work or other protected subject-matter, and which have no independent economic significance, shall be exempted from the reproduction right*.

[133] See article 28C of Law 2121/1993, available at http://web.opi.gr/portal/page/portal/opi/info.html/law2121.html/ch04.html#a28c [last check, Apr.20, 2011].

general public's right to access and read an author's output, as this equilibrium was conceived both through the Lockean and Kantian perspectives for intellectual property. The difference in the treatment of actions such as accessing and reading of a work depending whether these actions take place offline or online beefs up the argument that the existing legal framework for Copyright—in Greece as in elsewhere, too—cannot cope successfully with the online environment of digitized works and discriminates clearly against any online public domain operation.

### Voicing the need for Copyright reform

A functioning copyright system must provide the incentives needed for creative professionals, but must also protect the freedoms necessary for scientific research and amateur creativity to flourish. In this scope and regarding the digital environment, copyright seems to have failed at both.[134] And this failure is not the outcome of local or national Copyright policy, but rather it is the result of international decision-making in intellectual property regulation; it is the result of lagging rule-making, and of sluggish provisions in international intellectual property conventions. Voices supporting action for Copyright reform at the international level are becoming more and are sounding louder by the pass of time. The Copyleft movement and the licensing of works that has been developed because of and through it is the most characteristic voicing for Copyright reform levering on existing copyright regulation. Licensing one's work under a Copyleft license, such as a Creative Commons license, does not amount to the relinquishment of Copyright, but rather amounts to an exercise of intellectual property rights provisioned through existing regulation. Based on licenses granting the right to copy, distribute,

[134] Kaitlin, M., (2010), ***Lessig Calls For WIPO To Lead Overhaul Of Copyright System,*** Intellectual Property Watch, available at http://www.ip-watch.org/weblog/2010/11/05/lessig-calls-for-wipo-to-lead-overhaul-of-copyright-system/?utm_source=post&utm_medium=email&utm_campaign=alerts [last check, Apr.20, 2011]; Lawrence Lessig questioned the survivability of current Copyright system as it was designed and has been inherited from the past. For Lessig, *The copyright system will never work on the Internet. It'll either cause people to stop creating or it'll cause a revolution.* Lessig cited a growing system of copyright "*abolitionism*" online in response to a worrying tendency to criminalize the younger generation.

communicate, and modify the licensed work, Creative Commons licensing pursues similar—yet not identical—objectives to the public domain, i.e. the promotion of free availability, use, and exploitation of licensed works set under certain conditions for such availability, use, and exploitation. In that sense, Creative Commons licensing—and any other Copyleft licensing—ends up in the creation of a sort of public domain, born from within the monopoly and exclusivity of copyright. Said licensing enables creating a sphere of free use of licensed works without giving up the author's exclusivity owned because of effective copyright.[135]

Copyleft and Open Access movements purport to enhance ideologically the existence and further development of the public domain. Both movements represent a copyright reform initiative that subverts copyright from within and cause a normative change in the way intellectual property rights are exercised aiming at the reconstitution of the balance between an author's intellectual property rights and the general public's interest in accessing and using creative expressions.[136] The search of said balance becomes also explicit in the "*2004 Geneva Declaration on the Future of the World Intellectual Property Organization*."[137] It has been widely quested through the noteworthy work of many poised scientists and copyright theorists, too.[138]

---

[135] Dusollier, S., (2010), ibid, p.52.
[136] Dusollier, S., (2010), ibid, p.52.
[137] WIPO, (2004), ***Geneva Declaration on the Future of the World Intellectual Property Organization***, available at http://www.cptech.org/ip/wipo/genevadeclaration.html [last check, Apr.20, 2011].
[138] See Boyle, J., (2004), ***Manifesto on WIPO and the Future of Intellectual Property***, 9 Duke Law and Technology Review, available at http://www.law.duke.edu/journals/dltr/articles/2004dltr0009.html [last check, Apr.20, 2011]; Reichman , J., and Maskus, K., (2004), ***The Globalization of Private Knowledge Goods and the Privatization of Global Public Goods***, 7 Journal of International Economic Law, 2, pp.279-320, available at http://www.law.duke.edu/cspd/articles/reichman.pdf [last check, Apr.20, 2011]; Signed-on July 7, 2003, ***letter from 69 scientists and economists to Kamil Idris, Director General of the World Intellectual Property Organization requesting that WIPO host a meeting on open and collaborative development***, available at http://www.cptech.org/ip/wipo/kamil-idris-7july2003.pdf [last check, Apr.20, 2011].

Given that the public domain is not sufficiently provisioned and protected in the Greek Copyright Law, what needs to be done?

What is still missing in the Greek copyright system and what needs to be done is an amendment in Copyright Law aiming at the positive protection of the public domain that could protect it against either privatisation of its elements or unequal legal support compares to the provisions of law that cater for copyright protection. In France, some scholars[139] have started to develop a positive protection for the public domain on the civil law notion of "*les choses communes*" or the commons appearing in article 714 of the French Civil Code.[140] The positive description in law of the public domain is a legislative proof that public domain plays an essential role for cultural and democratic participation, economic development, education and cultural heritage. Aligning the private domain of exclusivity and the public domain of collective use within one regime of intellectual property is the way to describe in law the balance of interests embedded in copyright laws that cater for both the right-holders of intellectual property as well as the general public's interests in copyrighted or not copyrighted work.[141] The lack of a positive description in law for public domain as well as the negative definition of public domain in legislation as the reverse of copyright is an evidence of an imbalance in law concerning the protection from one side of author's exclusive rights and from the other of general public's interests in creative works. The Greek copyright law is still imbalanced and lagging in passing a positive description in its provisions for public domain acknowledgement, protection, and enhancement.

[139] Choisy, S., (2002), ***Le domaine public en droit d' auteur***, No 22, Litec --Editions du Juris Classeur; Chardeaux, M.A., (2006), ***Les Choses Communes,*** LGDJ; Dusollier, S., (2010), ibid, p.67.

[140] Article 714 in Book III of the French Civil Code pertaining to the various ways in which ownership is acquired provides that *There are things which belong to nobody and whose usage is common to all. Public order statutes regulate the manner of enjoying them.* The text in French is *Il est des choses qui n'appartiennent à personne et dont l'usage est commun à tous. Des lois de police règlent la manière d'en jouir.*

[141] Dusollier, S., (2007), ***Sharing Access to Intellectual Property Through Private Ordering***, 82 Chicago-Kent Law Review, 3, p.1932, available at http://www.crid.be/pdf/public/5610.pdf [last check, Apr.20, 2011].

Greek Copyright law 2121/1993 does not include any provisions for positive acknowledgement, protection, and enhancement of the public domain, with the exception of article 29§2 which pertains to the duration of copyright protection and describes State's empowerment to pursue, after the expiration of copyright's term of protection, the protection of a work's integrity stemming from an author's moral rights that are inalienable and beyond any expiration.[142] Yet, this is not a positive provision in law concerning the public domain. And neither can it guarantee the free use of unprotected elements of works that fall in the public domain when their copyright has expired, nor can it immunize them against any reservations or exclusivity either by intellectual property rights through the recapture of copyright or by any technological measures.[143] Greek Copyright Law's provisions provide no balancing counter-measures to any contractual or technical private measures which aim at enforcing unilaterally right-holder's intellectual property rights by locking up works either copyrighted or in the public domain preventing any use of them either it is included in the exceptions and limitations of

[142] See article 29§2 of Law 2121/1993, according to which *After the expiry of the period of copyright protection, the State, represented by the Minister of Culture, may exercise the rights relating to the acknowledgment of the author's paternity and the rights relating to the protection of the integrity of the work deriving from the moral rights pursuant to Article 4(1)(b) and (1)(c) of this Law*. The provision of article 29§2 of Law 2121/1993 is similar to France's article L. 122-9 CPI which provides that the Minister of Culture can refer to the court of first instance a case of abuse in the exercise of the right of divulgation even for works in the public domain. The Minister of Culture can claim in the courts the respect of the moral right of the author either said claim relates to a violation of the divulgation of the work or to the refusal for divulgation. That means that the provision for the intervention of the Minister of Culture is not limited to any act of violation of the divulgation but extends also to any act that results in the refusal of the divulgation of the work; thus the Minister of Culture is empowered with the right to pursue in courts the protection of the an author's moral right by claiming the illegality of the refusal (probably claimed by the heirs or other subsequent right-holders of the author) of divulgation of an author's work that resides in the public domain if there's public interest at stake. See more, Dusollier, S., (2010), ibid, p.39, as well as her reference in p.40 to a famous case upon this issue that occurred in France with the Hugo's work *Les Misérables*; in said case, one of Hugo's heirs tried to prevent the publication of a sequel of his novel based on claims from moral right. The claim was ultimately denied by the court on the ground that a work fallen into the public domain was open for adaptation in respect of the freedom for creation. The court ruled that the moral right could only be invoked to protect the right of paternity and integrity but upon the sole condition that an actual harm to such rights was evident from the adaptation which the Hugo's heir tried to prevent.

[143] Dusollier, S., (2010), ibid, p.70.

Copyright Law or not. The main consequence of such private initiatives is to cause a shift from the intended in law balance to a unilaterally determined norm of usage of intellectual property rights.[144]

The positive description of the public domain in law should immunise the public domain from any encroachment or appropriation of its elements. It should affirm through new provisions of copyright law the prohibition of a recapture of a work as a whole that resides in the public domain, as well as guarantee the collective use of work fallen into the public domain in the sense that anyone from the general public is entitled to use, modify, exploit, reproduce, and create new works from works residing in the public domain.[145] A positive description in law of the public domain should operate conversely to the exclusivity and rivalry operations of the copyright being the explicit ground for non-exclusivity and non-rivalry, i.e. being the explicit description in law of the commons whose wealth lies in collective and non-rivalrous use and in the absence of any appropriation.[146] In the same sense, Greek Copyright law needs to amend so as to enrich its provisions with allowances for non-commercial use of works online beyond the existing provisions of article 18.[147]

Traces of such a positive stance in case-law concerning the protection of the public domain have already been found in the European Court of Justice,[148] thus there is probably good timing for an amendment in Greek

[144] Dusollier, S., (2007), ibid, p.1394.
[145] Dusollier, S., (2010), ibid, p.68.
[146] Dusollier, S., (2010), ibid, p.70.
[147] See article 18 titled *Reproduction for Private Use* according to which *(1) Without prejudice to the provisions laid down in the following paragraphs, it shall be permissible for a person to make a reproduction of a lawfully published work for his own private use, without the consent of the author and without payment. The term private use shall not include use by an enterprise, a service or an organization.* (2) *The freedom to make a reproduction for private use shall not apply when the act of reproduction is likely to conflict with normal exploitation of the work or to prejudice the author's legitimate interests, and notably: a) when the reproduction is an architectural work in the form of a building or similar construction, b) when technical means are used to reproduce a fine art work which circulates in a restricted number of copies, or when the reproduction is a graphical representation of a musical work.*
[148] *See Opinion of the Advocate General Ruiz Jarabo Colomer*, October 24, 2002, in the *Linde* case, in joined cases C-53/01 (Linde AG), C-54/01 (Winward industries Inc.), and C-55/01 (Radio Uhren AG), regarding the interpretation of Article 3(1)(b), (c) and (e) of

Copyright Law favouring such a positive description of the public domain. The positive description in copyright law could prohibit any action that may consist of knowingly performed reproduction, distribution, making available or communication to the public of a work belonging to the public domain under a name that is not the one of the real author; it could also prohibit any action which may be based upon fraudulently claims of economic rights in a work belonging to the public domain. Provisions with this suggested content in Greek Copyright Law would sanction any attempt of encroachment of works belonging to the public domain as well as any attempt either through private contracts or technical means, to regain exclusivity of a work belonging to the public domain. Said provisions could set unsanctioned by law any attempt to set up remuneration fee for the provision of public domain content, in case the "*domaine public payant*" managed to implement.[149]

Said recommended provisions as an amendment to Greek copyright law require the adoption of normative rules in intellectual property legal framework and the setting up of material conditions which could effectively enable access to and enjoyment, and preservation of the public domain. The suggested amendment to Greek copyright law is necessary for robust public domain recognition in legislative text which would create certainty in the identification of the composition of the public domain and works falling into it. It would, also, enhance the availability of the public domain materials, the effectiveness of access to them, and

---

First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks (OJ 1989 L 40, p. 1); The Advocate General has held that *the public interest should not have to tolerate even a slight risk that trade mark rights unduly encroach on the field of other exclusive rights which are limited in time whilst there are in fact other effective ways in which manufactures may indicate the origin of a product* . Said Opinion relates to ECJ Decision of April 8, 2003, that is available at http://curia.europa.eu/jurisp/cgi-bin/gettext.pl?lang=en&num=79969591C19010053&doc=T&ouvert=T&seance=ARRET [last check, Apr.20, 2011]. Dusollier, S., (2010), ibid, pp., 50, 69; Laustsen, R.D., (2009), ***The principle of keeping free within EU Trade Mark Law***, available at http://www.marques.org/teams/LGMS/2009%20Rasmus%20Laustsen.pdf [last check, Apr.20, 2011].

[149] The implementation of the "*domaine public payant*" would render uninteresting the commercial exploitation of works in the public domain by any encroaching appropriator. See more, Dusollier, S., (2010), ibid, p.69.

thus public domain's sustainability. The suggested amendment in law should guarantee the application of the non-exclusivity principle for materials that reside in the public domain in the sense that the law should prohibit any commodification or private recapture of works residing in the public domain. The suggested amendment in law should, finally, guarantee the application of the non-rivalry principle for materials of the public domain in the sense that the absence of any exclusive rights upon the public domain materials entails an effective collective use of them without any discrimination.[150]

[150] See Dusollier, S., (2010), ibid, pp.70-71 who describes the four pivotal principles—1) certainty, 2) availability and sustainability, 3) non-exclusivity, and 4) non-rivalry—for a robust public domain, as they are stated in ***The 45 Adopted Recommendations under the WIPO Development Agenda*** which in 2007 the General Assembly of WIPO Member States adopted. Recommendation 20 of the WIPO Development Agenda speaks for promotion of *norm-setting activities related to IP that support a robust public domain in WIPO's Member States, including the possibility of preparing guidelines which could assist interested Member States in identifying subject matters that have fallen into the public domain within their respective jurisdictions*. The 45 adopted recommendations are available at http://www.wipo.int/ip-development/en/agenda/recommendations.html [last check, Apr.20, 2011].