



## **Contribution to the Definition of a Positive Agenda for the Public Domain**

**A policy paper by COMMUNIA International Association on the Public Domain**

**December 2012**

<http://www.communia-association.org/>

The mission of the Communia Association is to foster, strengthen, and enrich the Public Domain. Our goal is to educate about, advocate for, offer expertise and research about the public domain in the digital age within society and with policy-makers.

This policy paper proposes to contribute to defining a positive agenda for the Public Domain. It is grounded on a [WIPO study](#) by Professor Séverine Dusollier, [Communia policy recommendations](#) and [Communia previous WIPO statements](#). This work-in-progress document presents policy recommendations and strategies aimed at the trans-national level, namely WIPO CDIP and SCCR. Legal language will be drafted at a later stage.

### **Preamble: what is the Public Domain?**

The Public Domain consists of all material that can be freely accessed and reused:

- creations which are no longer covered by copyright or related rights,
- information, facts, data, and ideas which are outside of the scope of copyright protection.

These materials are the basis of the exercise of many fundamental human rights and values, such as the right to cultural expression and to education, freedom of expression, citizen democratic participation and economic and social innovation.

### **Rationale: why strengthen the Public Domain?**

The role of the Public Domain, already crucial in the past, is even more important today, as the Internet and digital technologies enable us to access, use and re-distribute information with a marginal cost of zero. It has thus become necessary to reform the copyright system to recognise the existence of the Public Domain, so as to counteract the continuous extension of copyright protection threatening the right to access and reuse culture, education, science and public information for the shared benefit of all creators and members of the society.

### **Policy recommendations:**

**1. Definition of a positive status for the Public Domain**

**2. Recognition of the validity of voluntary dedication to the Public Domain**

**3. Facilitating the identification of the Public Domain status**

## 1. Definition of a positive status for the Public Domain

The Public Domain deserves a positive recognition to better identify works and usages which are available for creators and users to build upon. It should not be defined as a mere non "Intellectual Property" protection zone. This would be consistent with the history of "Intellectual Property", which used to consider the Public Domain as the rule and copyright as the exception, as a temporary and limited monopoly of exploitation. This crucial balance should be clearly reintroduced within the copyright regulatory framework.

*Implementation:*

### 1.1. Positive definition

Copyright law should include a definition for the Public Domain.

*Proposed legal language:*

***The Public Domain consists of all material that can be freely accessed and reused. This shall include:***

1.1.1. Material being no longer covered by copyright protection: these include copyrighted works but also data, databases, compilations, performances, phonograms and broadcasts subject to copyright-related protection.

For example, Chilean Law No. 17,336, article 11 recognises the existence of the Public Domain as a common pool of works that "*may be used by anyone, provided they respect the ownership and integrity of the work.*" This includes, *inter alia*, "(a) Works whose term of protection has been extinguished."

1.1.2. Information, facts, data, and ideas which are outside of the scope of copyright protection: these include all materials that are not eligible for protection under copyright or related rights.

Copyright legislations usually provide a list of material subject to protection but not of items which should remain out of protection. This contrasts with patent laws in many jurisdictions, which often include specific provisions stipulating what is specifically excluded from protection.

### 1.2. Legal safeguarding

The Public Domain should be safeguarded from private appropriation and closures through legal, contractual or technical barriers. Works that are in the Public Domain in analogue form should stay in the Public Domain once they have been digitised.

*Implementation:*

#### 1.2.1. Safeguarding the Public Domain from private appropriation

A positive definition of the Public Domain should be accompanied by guarantees of freedom of access and re-use for all, without the possibility for adding legal, contractual or technical restrictions.

The WIPO 1996 Treaties should prohibit the use of technical protection measures on Public Domain material.

There should be a system for legal recourse allowing Public Domain users to prevent attempts of Public Domain misappropriation. Legal sanctions should be devised to prevent false or misleading attempts to claim exclusivity over Public Domain material.

For instance, Chilean Law No. 17,336, article 80 provides that *“(a) anyone who knowingly reproduces, distributes, makes available or communicates to the public a work belonging to the public domain [...] under a name which is not that of the true author” or “(b) anyone who claims or demands economic rights in works in the public domain” shall be “deemed to have committed an intellectual property violation.”*

### 1.2.2. Preserving the digital Public Domain

Digital reproductions of works that are in the Public Domain shall also belong to the Public Domain. The use of works in the Public Domain should not be limited by any means, either legal or technical.

The internet enables the widespread re-use of digital reproductions of works whose copyright protection has expired. The Public Domain status of these works means that there is no owner who can impose restrictions on their reuse. Nonetheless, the owners of the physical works (such as heritage institutions) can consider themselves entitled to control digital reproductions and impose restrictions on their reuse conditions. However, the digitisation of Public Domain works does not create new rights: works that are in the Public Domain in analogue form continue to be in the Public Domain once they have been digitised.

Therefore, the law shall consider such restrictions to access and reuse of digitised Public Domain material as void (with possible legal sanctions).

## 2. Recognition of the validity of voluntary dedication to the Public Domain

Dedicating a work or any copyright protected item to the Public Domain should be considered as a legitimate way to exercise one's exclusive right in order to contribute to a common pool of reusable works. (We recommend the use of "dedication" to the Public Domain as a more positive expression than "voluntary relinquishment of rights").

The legal enforceability of voluntary dedications (or "rights relinquishments") should be recognised in all jurisdictions and interpreted as compatible with rightholders' moral rights.

A positive status for the Public Domain should recognise in all jurisdictions the legitimacy and enforceability of voluntary dedications to the Public Domain by the use of tools such as CC0 (<http://creativecommons.org/publicdomain/zero/1.0/>). Moral rights should not be seen as impediments, as dedicating a work to the Public Domain is in fact a way to exercise one's moral rights. Since moral rights are compatible with the Public Domain, they are also compatible with the *voluntary* Public Domain.

For example, Chilean Law No. 17,336, article 11 stipulates that the Public Domain shall include, inter alia, *“(c) works whose owners have waived the protection granted by [copyright] Law” which “may be used by anyone, provided they respect the ownership and integrity of the work.”*

Besides, the mandates between collective rights management organisations and their members should guarantee the ability of rightholders to fully exercise their rights to dedicate their works to the Public Domain.

### 3. Facilitating the identification of the Public Domain status

It is difficult to assess whether a work is in the Public Domain due to the complexity and the lack of harmonisation of national copyright rules. The need for legal certainty for users in this respect calls for clarification. Beyond registration and Rights Management Information systems, copyright law shall allow for a clear identification of the Public Domain status of a work or any subject-matter eligible for copyright or copyright-related protection.

Implementation:

#### 3.1 Simplified and harmonised copyright duration and territoriality rules

The rules to determine the term of copyright protection have become so complex that it is almost impossible to establish with certainty whether a work or other subject matter is protected by copyright or whether it is in the Public Domain. Harmonising the legal framework with regard to copyright duration and territorial scope would allow for an easier identification of Public Domain contents across the world.

The way to reduce the divergence between national legislations as regards copyright scope and duration should be clarified at WIPO and EU levels.

#### 3.2 Rights Information Measures

The role of Rights Management Information (RMI) in the identification of the contents of the Public Domain should be recognised. The use of a "Public Domain Mark" such as the tool developed by Creative Commons (<http://creativecommons.org/publicdomain/mark/1.0/>) or a stronger equivalent with metadata carrying the stamp of the declarant – be it a national library, the ministry of culture or public and private registries - would be extremely useful to identify Public Domain material and prevent their misappropriation by adding a layer of rights.

Such technical informational tools identifying Public Domain contents shall be coordinated on a trans-national level by existing rights management structures such as collecting societies.

The definition of "Rights Management Information" in the 1996 WIPO Treaties should include any electronic information pertaining to Public Domain material as recommended by Prof. Severine Dusollier.

#### 3.3 Registration tools

The relevance of registration tools to help identify and locate rights holders and Public Domain contents has to be acknowledged and further analysed. Easier identification and location of rights holders and Public Domain material would help avoid situations like the "orphan works" phenomenon and foster innovative digitisation initiatives. In this respect, the re-introduction of copyright protection formalities would deserve further analysis.

In order to prevent a default protection system being not in line with both digital needs and rightholders' will for less protection, full copyright protection should only be granted upon registration. Non-registered items eligible for copyright protection should only get moral rights protection. This would help users identify resources being in the Public Domain, either at the end of rights duration or following a Public Domain dedication.

-----

COMMUNIA Association on the Public Domain is built on the eponymous Thematic Network, funded by the European Commission from 2007 to 2011, which issued the *Public Domain Manifesto* (<http://publicdomainmanifesto.org/manifesto>).

The mission of COMMUNIA Association is to foster, strengthen and enrich the Public Domain. To fulfill its mission, COMMUNIA and its members raise awareness in, educate about, advocate for, offer expertise on and research about the Public Domain in the digital age within society and with policy-makers, at the EU level and worldwide. COMMUNIA Association is a WIPO observer since October 2012.

More information about COMMUNIA activity and policy recommendations at: [http:// www.communia-association.org](http://www.communia-association.org). Contact: [info@communια-association.org](mailto:info@communια-association.org) - Follow us: @Communia\_eu Avenue Washington, 40, B-1050 Brussels, Belgium