Chapter I

The Future of the Public Domain: An Introduction

P. Bernt Hugenholtz and Lucie Guibault

The presence of a robust public domain is an essential precondition for cultural, social and economic development and for a healthy democratic process. But the public domain is under pressure as a result of the ongoing march towards an information economy. Items of information, which in the 'old' economy had little or no economic value, such as factual data, personal data, genetic information and pure ideas, have acquired independent economic value in the current information age, and consequently become the object of property rights making the information a tradable commodity. This so-called 'commodification of information', although usually discussed in the context of intellectual property law, is occurring in a wide range of legal domains, including the law of contract, privacy law, broadcasting and telecommunications law.

The increasing commodification of information has sparked, particularly in the United States, an intense social debate on the present state and future of the public domain, and has already led to a rich body of scholarly literature,[1] initially as a result of three important academic conferences organized by the University of Haifa in 1999, New York University in 2000 and Duke University in 2001.[2] Understandably, much of these discussions has focused on the apparently unstoppable expansion of intellectual property rights, both in traditional fields (copyright, patent and trademark

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1. *See* Nancy Kranich, 'The Information Commons: Selected Bibliography', Revised November 2002, <www.willfulinfringement.com/bibliography.asp>.
2. Proceedings published in: R. Cooper Dreyfuss, D. Leenheer Zimmerman, H. First (eds.), *Expanding the Boundaries of Intellectual Property*, Oxford, Oxford University Press 2001; N. Elkin-Koren and N. Weinstock Netanel (eds.), *The Commodification of Information*, The Hague, London, Boston, Kluwer Law International, 2002, Information Law Series No. 11; and J. Boyle (ed.), 'Duke Conference on the Public Domain', 66 *Law and Contemporary Problems* 1-483 (2003).

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law) and in new 'sui generis' domains, such as the special database right introduced by the European legislature in 1996 or the yet-to-be-established protection of 'traditional knowledge'. In this connection, the dangers of information 'enclosure' due to the application of technological protection measures has also been, and still is, widely debated. At a more pragmatic level, these discussions have led to exciting experiments with copyright and contract based alternatives, such as Open Source or 'Creative Commons' licensing, in order to safeguard the public domain.

Other aspects of commodification have thus far received less attention. Ironically, an important cause of commodification of information may lie with the government whose very duty it should be to promote and safeguard a robust public domain. However, largely in response to budgetary restrictions and – often ill-conceived – privatization efforts, especially in Europe many governmental institutions have turned to the commercialization of public information, whereby intellectual property rights and other property claims are exercised as instruments of exclusivity.

Building on the important findings of these prior studies and discussions, this project intends to take a somewhat broader, 'information law' oriented approach towards the question of preserving the public domain, in which a wide range of interrelated legal questions converge. Although the ongoing proliferation of intellectual property rights is undeniably an important 'culprit', it is our hypothesis that there is much more to the problem of preserving the public domain than defining the proper boundaries of intellectual property, i.e. finding that mythical 'delicate balance' between protecting information producers and preserving user freedoms. Fundamental rights and freedoms, such as freedom of expression and information and the right to privacy, obviously, are also important factors in this equation, as are commercial freedoms enshrined in competition law. Other (quasi) property rights, such as rights of 'ordinary' property in tangible goods or movable property, may also play a role as instruments of commodification. Paradoxically, in the right of privacy, being one of the core informational freedoms that might serve as a remedy against overbroad rights of intellectual property, lies a potential instrument of commodification. The right to privacy is at the core of so-called rights of publicity or 'portrait rights', that provide increasingly powerful proprietary protection to pecuniary interests in marketable names and images of public or less than public figures. Privacy rights also underlie proprietary claims of individuals in 'their' body tissues or genetic information.

From a perspective of information law and policy, other – broader – questions should also be posed. Assuming 'commodification' of information is actually occurring in these, and possibly other, legal domains, to what extent is the free flow of information really affected? Isn't a certain commodification inherent in copyright's function to act as 'engine of free expression'? An economist might even argue that commodification is a sine qua non for the growth of markets in information products and services – necessary prerequisites for a healthy information 'environment'.

How and to what extent does the commodification of information affect the free flow of information and the integrity of the public domain? Does the freedom of expression and information, guaranteed *inter alia* in the European Convention on Human Rights, call for active state intervention to 'save' the public domain?

What means – both legal and practical – are available or might be conceived to guarantee and foster a robust public domain? These were the main questions that were addressed in a major collaborative research project led by the Institute for Information Law of the University of Amsterdam (IViR) in cooperation with the Tilburg Institute for Law, Technology and Society (TILT) of Tilburg University, and funded by ITeR, the Dutch National Program for Information Technology and Law. The preliminary papers resulting from the project were discussed during an international symposium held in Amsterdam on July 1-2, 2004. The final results are presented in this book.

Thirteen authors from academia worldwide have contributed a chapter to the present book, each author or pair of authors addressing the future of the public domain from a different angle. In addition, we have invited all authors to reflect upon the notion and role of the public domain in the context of information law and policy. Should this concept be limited to that of a 'negative' image of (intellectual) property protection, i.e. all publicly available information not subject to a property right, and therefore freely (i.e. *gratis*) available,[3] or should a broader approach be taken, e.g. all information available from public sources at affordable cost? Should information policies be aimed at maximizing the public domain or optimizing information flows? To what extent are these aims congruent?

Following this introduction, the three first chapters of this book will deal with the public domain in a 'horizontal' way. First *Samuelson* will map the public domain by providing a schematic overview of the way and the extent to which the public domain is affected by various legal and paralegal influences, particularly in the digital realm. *Salzberger* will then examine the law and economics of the public domain. What does law and economics research teach us about the social utility of having a robust public domain? To what extent do the economics of the digital realm change the parameters underlying the traditional economic rationale of intellectual property? Is the oft-quoted 'tragedy of the commons' really a proper metaphor? Finally, *Birnhack* will discuss the public domain from the perspective of fundamental (human) rights and freedoms. To what extent is the idea(l) of a robust public domain recognized in free speech or possibly elsewhere in human rights or constitutional law? Are some domains more 'public' – more important to preserve – than others? Can fundamental freedoms provide remedies against ongoing commodification?

The next two chapters will look at the public domain through the lens of digital rights management. First *Guibault* will examine the increasing commodification of information by contractual means. The World Wide Web has created an ideal environment for establishing a multitude of contractual relationships between information providers and users. Many web-based contracts will be imposed unilaterally, as

3. Cf. J. Boyle, 'The Second Enclosure Movement and the Construction of the Public Domain', 66 *Law & Contemp. Probs*. 33-74 (2003), p. 58 ff (discussing different meanings of public domain).

standard forms, upon information users not able or even willing to negotiate. Often, such standard forms leave users little freedom to re-utilize the licensed information, either in whole or in part. In a future world totally dominated by contract, what will remain of statutory user freedoms aimed at safeguarding the public domain?

Similar questions can be asked with respect to the use of technical protection measures, which *Koelman* will then address. Technical measures, either as part of digital rights management systems integrating contractual and technical protection, or as 'stand-alone' copy-protection or access-control mechanisms, may serve as potentially powerful means of information 'enclosure'. In remarkable contrast to the history of intellectual property law, where exclusive rights were established to 'commodify' information that could not otherwise be excluded from public use, here actual excludability has led to an additional layer of legal protection. In some jurisdictions, the dangers of information enclosure due to the wide-scale application of technical measures have already been recognized in the law. The European Copyright (or 'Information Society') Directive calls for a complicated obligation on the part of rights owners applying technical measures to allow certain groups of information users to actually benefit from statutory exemptions. The Directive, however, fails to instruct EC Members States as to the methods and means of such facilitation.

The next three chapters will focus on intellectual property law, the legal domain that has been at the heart of most discussions concerning the encroachment of the public domain. *Cohen* will deal with copyright law, *Davison* with database protection law, in particular the European sui generis right that comes dangerously close to a property right in data, and finally *Dreyfuss* and *Dinwoodie* on patent law. Under an ideal system of intellectual property law, rights and freedoms constitute a 'delicate balance' between exclusivity and public domain, in which intellectual property's incentive function, principles of natural justice, the public interest and fundamental freedoms are all reflected. In recent years, due in part to the advance of information technology, this delicate balance has come under pressure. The domain of copyright, which was traditionally limited to the production of cultural goods, has been expanded by embracing (quasi-)technological products, such as industrial design and computer software. Concomitantly, the term of protection was extended, and existing copyright exemptions were curtailed. A new 'database right' was introduced, initially only in Europe, to protect collections of facts left to the public domain by way of copyright's idea/expression dichotomy. The domain of patent law, which originally limited the field of technology, also has undergone a gradual expansion. Here, too, we have seen the advent of computer software, followed later by biotechnological discoveries and, more recently, methods of doing business.

So, undeniably, commodification is occurring in the context of intellectual property law, but is it really harming the free flow of information? Does not a juxtaposition between a 'rights-free' public domain and its antithesis, intellectual property law, blind us from the fact that intellectual property law, as the famous US Copyright Clause will have it ('to promote the progress of science and useful arts'), actually provides powerful incentives for the dissemination of information to the general public, and technological innovation? Many information products

subject to intellectual property rights undergo large-scale commercialization, and are therefore widely available to the general public at low cost. On the other hand, (over)commodification may lead to counterproductive monopolies that stifle the free flow of information and impede further innovation. This may be true especially in areas where intellectual property rights cover 'raw data' or other building blocks of knowledge and creation, as is the case for the new European database right or for certain patents in the field of information technology or biotechnology.

From a perspective of sound information policy, the problem, then, is not simply one of 'saving' the public domain from (further) commodification, by cutting back on intellectual property rights as a matter of principle, but rather of fine-tuning the system in such a way that intellectual property's incentive function remains intact while not unnecessarily impeding further dissemination of information. In sum, commodification in intellectual property law raises many difficult, interrelated questions, some of which might require a rethinking of the rationales of intellectual property laws. How and in what areas does the proliferation of intellectual property rights actually affect the public domain? Is commodification still noticeable in recent legal developments, or has it 'peaked'? Assuming this proliferation has actually reduced the public domain, does it also jeopardize the free flow of information in a broader sense? To what extent, and how is the idea(l) of a public domain already internalized in the legal system (e.g. delineation of subject matter, scope, exceptions, etc.)? What legal measures are available, or might be introduced, to 'save' the public domain?

The next chapters will deal with two instruments of commodification that might be qualified as 'quasi-property rights', and that are conceptually interrelated. *Prins* will deal with data protection and (other) privacy rights that underlie property-like claims in personal data and other privacy-based commodities. The increasing recognition of a general right of privacy, particularly in continental Europe, has led to powerful data protection laws and other substantive rules of privacy protection, such as 'portrait rights' or (broader) rights in personal names and faces. *Wiseman* and *Sherman* will then describe the emergence of a novel right in traditional knowledge and culture ('expression of folklore'), a yet to be fully developed and conceptualized quasi-property right which is the subject of intense debate in various international fora, such as WIPO. Interestingly, here is a form of commodification of information inspired not by economic theory, industry lobbying or commercial necessity, but by notions of natural justice and cultural policies aimed at protecting the cultural heritage and identity of non-western societies besieged and exploited by industrial development. Still, the idea of creating property rights or interests in science and culture that, under prevailing conceptions of intellectual property law, would fall squarely in the public domain, raises searching questions from a perspective of information law and policy.

The notion of the 'public domain' in property law traditionally refers to (immovable) property belonging to the government, to be used for public purposes. This original connotation appears to be almost lost in market-inspired public policies that encourage public agencies to 'enter the marketplace', convert themselves into self-financing 'profit centers' and 'compete' with private enterprise. Privatisation of

government functions or government agencies and public-private partnerships easily lead to withdrawal of public-sector information from the public domain. *Van Eechoud* will describe the process of 'commercialization' of government information, as it is occurring in many countries not governed by the principle, well established in the United States, that such information remain firmly in the public domain. A recently adopted European Directive apparently deals with the risks of commodification of public sector information, albeit in a rather ambiguous and reluctant way.

The final two chapters will examine two self-regulatory initiatives that aim at safeguarding the public domain in a very pragmatic way. *Elkin Koren* will describe and critically assess the Creative Commons project, which was largely inspired by the Open Source Software movement that will first be evaluated by *Schellekens*. Both authors will reflect upon the capability of these and similar 'self-help' measures to serve as remedies against large-scale information enclosure. Is there any hope that the success of open source software will become a meaningful model of information distribution outside the realm of computer programming? If so, should such models be promoted by government and/or regulation, and in what way? What are the hidden dangers of promoting the public domain by using legal instruments based in copyright and contract law? What are the normative effects?

The proceedings of the two-day workshop where preliminary versions of the chapters of this book were discussed, are summarized – by *Melzer* and *Guibault* – at the very end of this book.