

The Public Domain: A Source of Raw Material for Authorship

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I. INTRODUCTION

Intellectual property is knowledge that has been presented by any person, but which is unique such that no other person can replicate it without reference to the original work of the property owner. Since intellectual property is knowledge, it is not tangible. For knowledge to be considered intellectual property attributable to a particular person or group of individuals, it has to satisfy several conditions. The said intellectual property has to be clear to other experts in the related field such that they can attach value to it. This is necessary for the original developer of the intellectual property to obtain a patent for it. James Boyle describes this property of uniqueness as a necessary aspect for the developer of the knowledge to claim copyright and hold a patent (Boyle 2008: 19).¹ Copyright is the ownership of the intellectual property by the original developer.

As much as intellectual property is important to the original developer, the other people aware of the existence of the particular knowledge may adopt it and use it in certain applications. This is necessary for the development of the society and the field to which the specific intellectual property is related. All knowledge has a basis that the author of any intellectual property builds on. Thus, all intellectual property is developed on a basis that has already been created by a preceding author. For this reason, one cannot claim absolute ownership of intellectual property.

Some aspects of the intellectual works must be attributable to work by other authors. This is so because no author can develop an original framework without referring to previous works by other authors. While the

¹ James Boyle, *The public domain: enclosing the commons of the mind* (Yale University Press, New Haven, Conn 2008) 19

availability of intellectual property to the public domain increases and leads to further development, it also increases the popularity and sales of original authors' work (Boyle 2008: 21).² Consequently, it is necessary to allow access to all materials of intellectual value for the sake of growth of the market for authors, and for development and refinement of the existing intellectual material.

Research questions

1. Is the public domain an inherently essential raw material for development of ideal authorship?
 - (a) Is public domain a prerequisite for authorship?
 - (b) Is originality real?
2. Does fair use of intellectual property go against the interest of the authors or does it honour the rights of the public and enhance popularity of authors' work?
 - (a) Does fair use expand market?
 - (b) Is fair use the right of the public?

II. THE PUBLIC DOMAIN

The public domain, in relation to intellectual property, refers to the essence of availability of any material of intellectual value to any other person other than the original author of the said property for further development or for use in authorship of other works. When any material of intellectual value is made available for use by any author with minimal restriction, it is considered

² Ibid 21

to exist in the public domain. In this case, “other authors” refers to the public, which has the freedom to adopt the material and introduce it in a new and unique style that can be attributed to them. Jessica Litman says that copyright is awarded to people who present work that has already been produced in a new and unique style using their own creativity (Litman 1990: 2).³ The new author may not acknowledge the original source of the material utilised in authorship since the presentation is entirely new. The users of works in the public domain may not be compelled to pay for usage of the work. However, they may have to purchase a copy of the work for reference.

Works of authorship in the public domain was traditionally considered that work that is not of any value worth of protection. However, this is an outdated view, and modern scholars have a different view of the public domain. Litman considers the public domain a necessary ingredient for any successful authorship, and is thus as valuable as any other protected material of intellectual value (Litman 1990: 3).⁴ For any useful authorship to exist in copyrighted form or otherwise, there must be a public domain to form the basis of the work. David Lange describes intellectual property as a feeling rather than a reality (Lange 1982: 149).⁵ However, he stressed on the importance of protection of intellectual creativity even in the public domain. Thus, public domain is the environment in which all authors and other users get access to works of authorship with the aim of acquiring intellectual knowledge or for further development without the necessarily acknowledging

³ Jessica Litman, ‘The Public Domain’ (1990) 39 ELJ 2

⁴ Ibid 3.

⁵ David Lange. ‘Recognizing the Public Domain’ (1982) 44 LCP 149

the original developer of the idea. Intellectual works in the public domain can be partially copyrighted or open to all for use. Thus, no person can claim absolute ownership of any material of intellectual value in the public domain.

III. THE ESSENTIALITY OF PROTECTION OF THE PUBLIC DOMAIN

A. Copyright law and originality: A delusion

Copyright laws, which allow individuals to own the content of materials of intellectual value, are based on the notion that the authors are the original sources of the intellectual knowledge. According to Jessica Litman, in any profession, the existing body of experts borrows its knowledge from those experts that preceded them. Nothing is created anew in any profession, but one can improve the existing material to fit the context of the particular time it is being used. "To say that every new work is in some sense of the works that preceded it" (Litman 1990: 2).⁶ Software developers, barristers, doctors, poets, philosophers, musicians, and all other people in professions that have a high regard for intellectual property rely on work that has been developed by their predecessors in the particular discipline for their working base. This fact is sufficient to render the essence of originality of intellectual property a mere illusion. Had the public domain always been outlawed, most of the material with a vast intellectual value that exists today would not have been developed, and if it had, it would be illegal (Litman 1990: 2).⁷ However, for the sake of continuity and further refinement of existing material, intellectuals are allowed to borrow building frameworks from the work of their predecessors.

⁶ Jessica Litman, 'The Public Domain' (1990) 39 ELJ 2

⁷ Ibid. 3

Consequently, the fact that the framework upon which these products of intellectual creativity are built is inherited or borrowed nullifies the notion that there is originality in intellectual property.

When an author obtains a copyright for his or her work, the said rights protect the whole work including the framework upon which the work is built and other borrowed aspects of intellectual knowledge. In that essence, the copyright restricts the use of that material which has been borrowed from the public domain. Thus, the sense of absolute ownership that copyright owners attach to their work is more a delusion than reality. It can be said that the laws protect what is due to the author of the creativity appended to his or her new presentation of the inherited idea. Otherwise, total ownership of any material of intellectual value is an ideal created by the capitalistic nature of the society (Samuelson 2001: 10).⁸ As much as the law aims to protect the value of the creativity of the author, it also endeavours to protect the public domain to ensure progressive continuity of authorship in the society. In fact, the law is tasked with the protection of the public domain from depletion of relevant intellectual material as its cardinal duty in relation to preservation of the intellectual value of authorship works (Litman 1990: 4).⁹ The idea of copyright is accepted as it is because it would be impossible to measure the degree of originality and the extent to which a particular author has borrowed from other creators in order to reward the creativity of the specific author. Otherwise, in reality, ownership of intellectual property is a delusion on which the law hangs on to protect the essence of creativity due to authors.

⁸ Pamela Samuelson, 'Digital Information, Digital Networks, and the Public Domain' (2001) 10 DULS 80

⁹ Jessica Litman, 'The Public Domain' (1990) 39 ELJ 4

B. Public domain is a prerequisite for authorship

Intellectual property is generally characterized as non-physical property that is the product of 'original' thought. However, the difficulty of defining "originality" has long been a cliché since every thought or idea is unavoidably inspired or influenced by existing knowledge and works, that is to say, creation without raw materials is next to impossible. Great as Newton is, he still admitted benefiting from the human intellectual heritage by saying that "If I have seen further it is by standing on the shoulders of giants", which demonstrates intellectual achievement is intrinsically cumulative and recombinant. Public domain as a provider of raw material to future creators, therefore, deserves to be protected so as to "permit authors to avoid the harsh light of a genuine search for provenance, and thus maintain the illusion that their works are indeed their own creations"(Litman 1990: 36).¹⁰

C. Public domain is a stimulus for competition

The public domain creates an environment where competition is based on skills and creativity rather than the ability to obtain patents and copyright protection for intellectual material.

"...Apparent tension between antitrust, or competition, policy and intellectual property rights" (Greenhalgh and Rogers 2010: 123)¹¹ are triggered by the exclusive rights given by Intellectual Property laws to the

¹⁰ Jessica Litman, 'The Public Domain' (1990) 36

¹¹ Christine Greenhalgh and Mark Rogers, *Innovation, Intellectual Property and Economic Growth* (Princeton University Press, Princeton and Oxford 2010) 123

original right holders. The creators can make full use of a specific invention or an immaterial work. These rights, nevertheless, might stifle competition by allowing patent- and copyright-based monopoly:

“Patent-sharing agreements did exactly the same things that good old-fashioned cartel agreements did. They divided up territories, set prices and controlled production.” (Drahos and Braithwaite 2002:53)¹²

Through the use of copyright laws and patents, it is possible for a few authors to create a market for their products, divide it into sections and control the divisions. This would block out all new entrants into the market, creating a monopoly of intellectual property. Furthermore, such actions would prevent other authors' from applying their intellectual skills and creativity.

In all likelihood, there might be the use of unreasonable exercise of market power or the abuse of dominant position obtained because of the Intellectual Property rights. Although such institutions may protect intellectual material from misuse, they are not the appropriate methods of controlling quality and nurturing talent.

D. The need for unique treatment of public domain

Intellectual material has its own special characteristics that distinguish it from other tangible forms of property. It is one of the few forms of property that cannot be perceived or detected by primary human senses. Creativity and knowledge can only be ascertained by perception of the mind. For this reason, intellectual property receives an exceptional treatment by the law. It can be

¹² Peter Drahos and John Braithwaite, *Information Feudalism: Who Owns the Knowledge Economy?* (The New Press, New York 2002) 53

observed that other forms of property such as land, which is common to all places in the world, is in most instances, a private domain (Lange 2003: 465).¹³ The public is often denied access to such property since it has no right to use or access the said property without the consent of the owner. However, it is necessary to give intellectual property a unique treatment to allow authors to obtain frameworks upon which they can build their work (Lange 2003: 466).¹⁴ If the law and the society were to treat intellectual property in the manner all other forms of property are treated by the law and the societal code of morals, the world become devoid of intellectual creativity owing to the suppression of the essence of learning and study. This means that authors, who learn their skills from works by their predecessors from past generations, would have to develop their own framework of authorship upon which to build the ideas. It would be almost an impossible feat to create work of any intellectual value considering that the art of writing is also an inherited skill. For example, if the ancestors of the human race who developed the art of writing had obtained a form of copyright protection for their creation, all the developments in the world that can be attributed to writing would not be there. Alternatively, James Lange gives an example of speech common to all normal average human beings. If one were to abolish public domain, it would be possible for people to obtain patents and copyright ownership for speech. Any person referring to the speech or making a similar utterance would be violating copyright laws. Consequently, we would create a silent society where

¹³ David Lange. 'Reimagining the Public Domain' (2003)66 LCP: 465

¹⁴ Ibid 466

speech would be almost outlawed (Lange 2003: 467).¹⁵ Thus, it is imperative that public domain remains a highly guarded realm for preservation of creativeness of the authors and transition of knowledge from one generation to another.

The difficulty associated with differentiating separate versions of intellectual property necessitates the presence of the public domain. It is now clear that intellectual property is developed in a platform or framework assumed from other authors. It then becomes inevitable that a single framework may be suitable for several authors to base their different works on. If such different authors choose a single framework for their work, it is highly likely that the results of their work will be different versions of the same idea (Lange 2003: 469).¹⁶ In fact, this is usually the outcome of many works of authorship. Many written works are similar to each other, but exhibit different aspects of creativity attributed to the authors. The same work can be reproduced for an infinite number of times, with each reproduction bearing different style and presentation. For such works of authorship to be useful in the society, it is necessary to put them in a public domain. This is justified by the fact that all works of authorship on any single particular issue appear to be copies of each other to a significant extent. Alternatively, the public domain nullifies the apparent importance of copyright ownership. Patents and the idea of intellectual property as a private domain become void since the creativity perceived in any work of intellectual value cannot be attributed to a single person. Thus, the public domain accommodates intellectual property and

¹⁵ Ibid 467

¹⁶ Ibid, 469

makes it available to other authors by avoiding a conflict where more than one author claims ownership of certain works of significant intellectual value. If no one author can claim ownership of any single piece of intellectual property with total justification, one can conclude that the public domain creates harmony among authors who borrow basic ideas from each other.

E. The interest of the public

The most straightforward understanding of copyright laws is that the said laws are meant to protect the interest of the original creator of intellectual property or to guard the interest of the perceived original creator from misappropriation by the public. However, the use of any material of intellectual value by the public should not be viewed as exploitation of resources that belong to the associated author, but it should be perceived as the ultimate achievement of the original author. When an author creates intellectual property, dissemination of the information contained in the material is the primary aim of the author. Thus, as much as copyright laws protect the interest of the author, the interest of the public domain should also be upheld. The interests of people who later acquire rights for the work and use it for commercial gain should also be protected as long as the use of the material is fair (Bajon 2007: 2).¹⁷ Therefore, there must be a balance between the rights of the original creators of the work and the right of the players in the public domain. Although copyright laws usually limit the possible applications of original work by players in the public domain, it is necessary to grant copyright

¹⁷ Benjamin Bajon. 'Declaration: A Balanced Interpretation of the "Three-Step Test" In Copyright Law' (2007) MIP 2

ownership only to the extent where it is sufficient to protect the interest of the author. This way competition in the commercial realm is allowed to prevail (Bajon 2007: 3).¹⁸ Through competition, the quality of all work available in the public domain improves, and the cardinal aim of intellectual material is progressively realised. Thus, the interest of the public promotes competition, rather than grant undue protection to the creators of the original material, and copyright laws must consider this fact.

The public domain prevents overcompensation of authors and ensures fair compensation. Regardless of the distributor of works of authorship, the ultimate bearer of the cost of compensation is the public. It is logical that creative authors must be compensated for their work. However, this factor should not be used as the determinant of the manner in which works of authorship are used in the public domain. As long as the material contains aspects of creativity and is competitive in the public domain, then the compensation to the original authors becomes automatic (Bajon 2007: 2).¹⁹ Thus, the public domain is essential in ensuring that compensation is proportionate to the work of a particular author. In other words, the public domain ensures that authors do not use copyright laws to create the mystery of their works and exploit the public, and that compensation is awarded when it is due. This way all authors who utilise the public domain in their work are compensated as far as their creativity is concerned.

F. The scope of the public domain

¹⁸ Ibid, 4

¹⁹ Ibid, 6

Many types of property or resources are subject to artificial scarcity. This scarcity ensures that the resources are continuously available to the public. The essence of artificial scarcity is for the sustenance of the industry. Lawrence Lessig gives an example of personal belongings such as cars and residential houses. For the sake of maintaining functionality of such resources, their access and use by the public should be limited. This reality is inevitable. However, there are other resources that require the context of the public domain for their usefulness to be realised (Lessig 2001: 16).²⁰ Lessig gives the example of Albert Einstein's scientific theories. While Einstein invested a significant degree of creativity in the formulation of his theories, it is necessary to allow free access of these works of authorship. This means that the public domain validates the importance of the theories as a resource for modern scientists to use. However, it is important to note that such freedom to use Einstein's theories does not allow any person utilising resources in the public domain to assume ownership of the said work without acknowledging the original creator. On the other hand, any person can read Einstein's works of authorship, criticise them, and even add creative input that might add value to the existing knowledge (Lessig 2001: 18).²¹ Such development is only possible in the public domain where access to materials of intellectual value is not limited at all. Lessig further presents internet as a product of the freedom of the public domain. The creativity and innovation that the internet has exhibited in the public domain is an example of the benefits of free resources. Continuous development and improvement of material existing in the public

²⁰ Lawrence Lessig, *The future of ideas: The fate of the commons in a connected world* (Random House, New York 2001) 16

²¹ *Ibid.*, 18

domain is the main reason for the growth of the internet (Lessig 2001: 16).²² While it is imperative that some types of property must be protected through restriction of their access and use, works of authorship are only useful in the public domain. Thus, the scope of the public domain is limited to materials of intellectual value, and cannot be applied universally to cover other types of property.

G. The public domain: A platform for equality

Due to the unique nature of the public domain, it offers opportunities to all authors without discrimination. Although the material in the public domain may be valuable in terms of the creative content available there is no direct, monetary value attached to all materials of intellectual value in the public domain. For this reason, the capitalistic tendency that characterises utilisation of other resources in the public domain is not present. All authors utilising material in the public domain obtain their references without having to pay for them. This way, there is equal opportunity in obtaining materials for works of authorship. Production, creativity, and innovation are not determined by the ability of any author to raise capital (Chander & Sunder 2004: 4).²³ In contrast, if the society were to attach a direct monetary value to works of authorship, some of the creative people who have utilized the opportunity offered by the public domain would not obtain the raw material for their work. Rich authors, who may not be necessarily creative, would take credit for authorship

²² Ibid., 17

²³ Anupam Chander and Madhavi Sunder, 'The Romance of the Public Domain (2004) 31 DLS 4

(Chander & Sunder 2004: 5).²⁴ Thus, the creativity that is usually observed in the development of intellectual property would not be observed.

Such equality has to be contrasted with unregulated usage that brings about the tragedy of the commons. When Hardin introduced the idea of the self-destructive freedom of the commons, he considered property to be the tangible resources. Intellectual resources lack a clear representation in his theory. It is not possible to diminish the creative quality of valuable intellectual materials. This can be observed in the intellectual inheritance obtained from researchers over centuries. The presence of such material in the public domain has not made it less valuable that it was at the time of its creation. In fact, it grows more valuable as a basis for research (Chander & Sunder 2004: 4).²⁵ Thus, the theory of the tragedy of the commons does not apply to materials of intellectual value.

²⁴ Ibid., 5

²⁵ Ibid., 7

IV. PUBLIC'S RIGHT VS. AUTHORS' INTEREST

V. CONCLUSION

It can be concluded that the public domain defines the essence of free access to works of authorship with intellectual value. Furthermore, it cannot be assumed that the public domain ignores the plight of the authors. Otherwise, the public domain appears in a necessary environment for development of intellectual property. Authors accessing material of intellectual value in the public domain are allowed to make fair use of the works of authorship without the consent of the original creator of the work. For this reason, the material in the public domain is a reproduction of a few ideas in many unique styles by different authors. Different aspects of creativity are added to the works. Consequently, no single person can claim absolute ownership of work in the public domain. All materials in the public domain are copies of each other, bearing different styles and unique creativity, and available to all people for fair use.

Furthermore, copyright laws award authors full ownership of intellectual material based on the notion that the material in question has similar properties to any other form of private property. However, existence of intellectual property is also an assumption with no proof. Any material of intellectual value is usually developed over generations. Thus, intellectual property ought to exist in the public domain, and no single author should claim the material as his or her private asset. Alternatively, the idea of intellectual property is a misinterpretation of the need to award creativity of the authors. It is evident that the idea of intellectual property is not realistic and is based on the acquisitive nature of some authors.

Since intellectual material is of a special nature, it cannot be treated like a property. Such material should not be subject to ownership or copyright laws that prevent the public from accessing them at no cost and at its convenience. If copyright laws have to be present to ensure fair use of the material, the interest of the public has to be respected. A balance between the interest of the original creator of the material and the public domain has to be established. However, even with the balance of interests, the material should remain accessible to the public without restriction.

Due to the interdependency of the authors in creating their works, it is necessary to have the public domain as the medium through which the authors obtain their frameworks for their works. This framework is considered the raw material for authorship. Furthermore, when a resource of intellectual value is available for all people to access, all potential authors are able to utilise the material, and this is the realisation of equality among authors with potential to generate high quality work. Thus, works in the public domain

should not be considered that which is not worth of protection, but as a source of raw material for authorship.

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