PUBLIC DOMAIN PROTECTION. USES AND REUSES OF PUBLIC DOMAIN WORKS

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Abstract

This study tries to highlight the necessity of an awareness of the right of access to the public domain, particularly using the example of works whose protection period has expired, as well as the ones which the law considers to be excluded from protection. Such works are used not only by large libraries from around the world, but also by rights holders, via different means of use, including incorporations into original works or adaptations. However, the reuse that follows these uses often only remains at the level of concept, as the notion of the public's right of access to public domain works is not substantiated, nor is the notion of the correct or legal use of such works.

Keywords: *copyright, public domain, exceptions and limitations, innovation, right of access, technological means of protection, TPM, protection system, access to culture, copy control mechanism, Circumvention of TPMs.*

1. Public domain protection?

I mentioned a so-called "protection" of the public domain and it might seem inappropriate that I talk about the protection of a sector that includes works that are meant to be used freely, meaning unprotectable, whose main characteristic is that they can be used in any way without the consent of the author/proprietor, and without payment of any fee.

But the free use must not be confused with the right of ownership. Large defined the public domain as being "a place of sanctuary for individual creative expression, a sanctuary conferring affirmative protection against forces of private appropriation that threatened such expression."[1]

Public domain works can be used in any way, it's true, can suffer any form of transformation, adaptation, remixing, incorporations of any kind, but none of these forms should lead to a way of appropriation of the public domain work, damaging other users or in the detriment of other types of uses. It's true that a new work is created, with patrimonial and moral rights that are distinct from the ones held by the original work. But all of these new rights can be exercised only as far as the new contribution is concerned, this original component being different from the one which belongs to public domain.

Because there won't always be a clear demarcation between the two types of works, or rather between the public domain work and the added value of the new contribution, there are cases in which the proprietors of the new work have tried to exercise their exclusive exploitation rights over the work as a whole, including over the public domain component, forbidding any

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[1] David Lange, Reimagining the Public Domain, *66 Law and Contemporary Problems*, Winter 2003, p. 463-484.

form of usage. These uses are completely inappropriate and disadvantageous for society, because it can be deprived of exercising the right of access to the public domain work.

Mostly, everything starts from a misperception of what a "public domain work" means. The majority of people thinks that it's an abandoned material, when, in fact, it's a material that belongs to everyone, meaning a material upon which we all have rights and the protection that is mentioned in the title refers exactly to this aspect, namely the protection of the rights that every person holds over public domain materials, rights that need to be protected in the same way that regular works are protected by copyright.

The most discussed case of private appropriation is that of Disney Enterprises, Inc., a producer who, following the exhaustion of the exploitation rights in its 1938's adaptation, started a series of trademark registrations of several character names such as "Snow White" who, before belonging to its film adaptation, belonged to a story that was part of the public domain ("Snow White" - as part of the Brothers Grimm anthology). Actually, the replacement of a determined and limited in time form of protection is being attempted, with an infinite one (through mark renewals) and maybe the perseverance of defending intellectual property rights as efficiently as possible would be admirable, if this form of protection wouldn't cover elements that belong to public domain and that should remain in this sphere of free use.

Another example is that of the works management done by libraries and museums. There is now a fairly high frequency of efforts to digitize works owned by museums and public libraries. Although works that these institutions present to the public digitally belong to the public domain (most works' protection periods have expired), the access to these is marked by copyright references that belong to said libraries and museums. Since the work in question is not protected by copyright, the only right that could be claimed is over photographic reproduction. But photographic reproductions of public domain materials cannot be protected, as they lack the main quality – originality. This was argued in a case discussed before U.S. courts, but could easily be argued before any other court (including the European ones), because a digital copy is just a form of reproduction; if the original belongs to the public domain the copy has to belong to it as well. These things seem clear and simple, but the copyright references of libraries and museums are mentioned to the damage of the public, which perceives the access to these works as being restricted.[2]

Libraries and museums have gone from copyright references to publicly communicate the works by submitting to open licenses, such as creative commons, but isn't the access to this licensing system allowed solely to authors/owners? It's the case of the National Library of Spain, which uses open licensing (licensing systems that should not be confused with copyright), in order to communicate works that belong to the public domain. It's what can be called an attempt to limit the use of works that should be available to anyone.

2. What is public domain and what is the importance of the right of access?

The report issued by WIPO in 2010 on the protection of traditional knowledge and

[2] Ignasi Labastida i Juan, The Digital Closing Of The Public Domain, http://blogs.cccb.org/lab/en/article_el-tancament-digital-del-domini-public/ - Long live the public domain.

traditional cultural expressions of folklore[3] has held that the public domain "consists of intangible materials that are not subject to exclusive IP rights and which are, therefore, freely available to be used or exploited by any person."

The definition does not transpose a normative text; the sphere of what public domain involves being rather inferred/ understood in relation to what a work that benefit or could benefit from copyright protection means. Perceived more as a symbol of non-property (the opposite of property), the public domain seems to contradict protection itself, although there are plenty of opinions who argue that, on the contrary, innovation, in its essence, depends on the existence of a rich/vast public domain.

We support this opinion, adding that the position according to which the act of creation itself is the result, not only of the individual effort, but of the multitude of resources made available throughout the years, needs to be affirmed. Among these, a substantial part is represented by the public domain materials, a range of works whose protection rights have expired, for example, or which do not fulfill the conditions to be protected by copyright, any one of them being available to be taken and used for the development of future works. One could say that the creative act itself can be dependent on the existence of a public domain that the author can access and that should contain a wide enough variety of quality works.

The aforementioned WIPO report clarifies the types of works that can belong to the public domain; this nuancing is important because each type comes with specific abusive forms of use or with specific limitation forms of subsequent access.

WIPO identifies three categories in the sphere of public domain: (i) works whose protection term has expired, (ii) works that do not meet the legal conditions to be protected by copyright and (iii) invalidated materials (if we consider the US legislation from before 1978, for example, these would be works that have not been registered or those that, after their registration, have never been renewed).

Freedom of use, the first of the characteristics that are presented as a common denominator of all the aforementioned categories, actually represents an effect of the lack of any intellectual property rights. The work, although it can belong to a certain author, will be available for use, in principle, without restrictions, without the need of any payments or requesting said author's permission. A second common characteristic of all the works belonging to the public domain is accessibility, a characteristic that, moreover, emphasizes the freedom of use because a free work that cannot be accessed, is in fact a work that carries restrictions, one being unable to refer to these as public domain works.

Concretely, freedom of use and accessibility are not just features derived from the definition of public domain, since they mark the existence of certain rights that automatically arise in each person's patrimony. Accessibility is only one aspect of the right of access, while the characteristic of being free cannot be accepted in the lack of a right of usage without restrictions, all of these generating, independently, as well as corroborated, the need for symmetric exploitation.

This is the context in which we can talk in detail about the existence of a right of access that can be exercised by any person, regarding any public domain work and without which the public domain itself is

[3] World Intellectual Property Organization Draft report of Sixteen Session, 2008.

under the risk of remaining at the level of concept, with repercussions on innovation itself.

I think of the right of access to public domain as being one of the cultural rights, considered a natural component of human rights, without which the human personality cannot assert itself in its entirety.

Edmond Kaiser maintained, in his study "Terre des Hommes" ("Lands of People") that cultural rights are "acknowledged as one of the most important conquests of the human spirit," the states' obligation being that of "insuring the access to training, education, participation in the cultural life, in order to guarantee the normal development of the individual, in a world that is increasingly more complex and demanding."

Is the existence of this right of access to public domain works certain? And what value does this right have in relation to copyright? In order to answer these questions, some aspects correlated with the very functions of copyright need to be mentioned.

The copyright limitations, for example, have been discussed and sustained from the very first forms of copyright regulation, and they are especially correlated with its social function.

The social function of copyright imposes a double limitation – in its duration – and in exercising certain prerogatives. In order to explain the limitation in exercising copyright, Adoph Diez talks about a tension relation between copyright and modern society's need for information. From this perspective, we could, in reality, consider that, in addition to the categories indicated by the abovementioned WIPO report, one can also talk about a free use category resulted from copyright limitations and exceptions.

What justified the existence of these limitations? Was the protection system always thought out to be limited, or is it in its nature that rights not be exclusive or that this exclusivity manifest itself within certain limits? There are interpretations that explain the existence of these limitations as a regulation of exception, conceived to lead the work to its destiny of being devoured by the consumer and to finally become a part of the cultural heritage, which needs to be continuously enriched. The limitative nature of copyright is explained, as well as the purpose of the regulation derived from the copyright's social function, which is that of also satisfying the public's need of information/knowledge. This perspective is not at all wrong, but without a detailed explanation of what a regulation is in the field of copyright, the majority will perceive the existence of limitations as being similar to a series of legislative favors awarded by authors and owners to society in general. Whereas in reality, copyright limitations and exceptions "translate" into fact real rights of access to protectable works or to works in general (if we take into account the works from the public domain).

Anyway, to not recognize the rights of the public (with the right of access in a leading role) in this field is equivalent to deny the process preceding any regulation and the fact that any provision, regardless of the domain, has as main purpose social order, which is made by attempting to create an equilibrium between holders of various conflicting interests. In the field of copyright, the norm is the expression of an attempt to maintain the interests of authors/copyright holders in order, on one hand, with the interests of the general public, of access to culture, on the other hand.

The above mentioned tension relation represent, in fact, the legal relationship regulated by the norm, the subjects remaining the same, regardless of whether or not they are expressly highlighted. There is, without a doubt, a relation between owners

and the object of the protection, namely protectable or protected works, but the copyright regulation itself is the prioritized expression of the relation between authors and the rest of the people, categorized as being the general public, society in general, if you will, whose interest is of access to information/culture is contrary (somewhat and to a certain level) with the interest of the author to protect that work and narrow/limit the access to the work without its consent.

Guaranteeing certain rights to a category of subjects, for example to owners, will always correspond with the existence of certain obligations assigned to the other category of subjects, the obligation to not reproduce a protected work without the owner/author's permission, for example, actually being the expression of the owner's rights to authorize or forbid the reproduction of said work. It is what the doctrine considers to be an indissoluble connection between the subjects of judicial relation, manifested throughout the ongoing judicial relationship.

In general, the norm goes into effect according to certain situations, mostly determined, or at least relatively determined. Outside of those situations, the norm does not have effect, respectively, the obligation cannot be imposed, which leads to the birth of the corresponding right – which can at least be accepted as a right to non-conform to the norm.

It is easier to highlight these aspects in the context of the limitations accepted by the current legislation, and, if you take into account the characteristics of the public domain and the fact that its existence is manifested just as any limitation of exercise the exclusive rights, the same explanations can also be used as regards to the right of access to public domain works. The rule of symmetry mentioned above is also applied to the public domain. If you consider, for example, the works that became part of the public domain as a result of the expiration of the protection period, we would be dealing with a norm that indicates a protection up to a certain date, after which the norm would cease to function in the sense of the existence of certain rights over the works. The inexistence of the patrimonial rights actually represent the owners/author' corresponding obligation to abstain from exercising them, thus being confirmed the correlative existence of the right of access to these works.

But what is the right of access in the context of a confusing regulation, which does not emphasize it clearly? And what value does this right have in the lack of obligations of correct use of public domain works?

The correct use is actually a legal use, in the context of guaranteeing right of access. With exact reference to another type of work in the public domain, different from the ones whose protection period has expired, Yolanda Eminescu noted, in 1987, regarding folklore materials, that these should be used correctly and exactly. It was mentioned the necessity of limiting the usage, as well as the necessity to "ban the deformation of folkloric works to preserve, unaltered, this important legal indissoluble fund of cultural identity of a people."

It's most certainly the specific nature of folkloric works that entails particular discussions, but the common denominator between any type of works in the public domain sphere, is the fact that the inexistence of rules of exercising the right of access implicitly leads towards abusive forms of use that restrain future uses, ultimately altering the public domain fund.

3. The right of access and the technological means of protection as an abusive form of exercising the owners' rights

In order to prevent and limit any actions on protected works, to the benefit of the rights holder, the possibility of using "efficient technology" has been created, meaning technologies that "allow control by the right holders through application of an access control or protection process, such as encryption, scrambling or other transformation of the work or other subject-matter or a copy control mechanism."

The definition of technological measures of protection has been integrated at European legislation through the Information Society Directive[4]:

"(...) "Technological measures" means any technology, device or component that, in the normal course of its operation, is designed to prevent or restrict acts, in respect of works or other subject-matter, which are not authorised by the rightholder of any copyright or any right related to copyright as provided for by law or the sui generis right provided for in Chapter III of Directive 96/9/EC. Technological measures shall be deemed "effective" where the use of a protected work or other subject-matter is controlled by the rightholders through application of an access control or protection process, such as encryption, scrambling or other transformation of the work or other subject-matter or a copy control mechanism, which achieves the protection objective."

This type of technology meets the efficiency conditions required by the European norm only in the case in which the control is as efficient as to ensure the achievement of the goal of protection, namely the prevention and ban of some unauthorized acts by the author/holder. Basically, the possibility not only of a copy control is created, but more importantly, a control of access is created, equivalent with the possibility to exercise the rights granted to holders, exclusively, unlimitedly.

This type of technology allows, at any point, abuses by the rightholders, to the disadvantage of the users/public, with serious repercussions over the availability that has to define public domain works, in order to allow access to culture, to information, ultimately stagnating development, progress.

Point 4 of the same Article 6 from the Directive, presents itself as an 'attempt' to balance interests by so-called provisions meant to protect the beneficiaries of the copyright exceptions provided by the same directive, however, without any of these provisions being more than a simple recommendation, if we consider the fact that neither one of these provisions is supported by methods of sanction of the non-conforming holder.[5]

"*Member States shall take appropriate measures to ensure that rightholders make available to the beneficiary of an exception or limitation provided for in national law in accordance with Article 5(2)(a), (2)(c), (2)(d), (2)(e), (3)(a), (3)(b) or (3)(e) the means of benefiting from that exception or limitation, to the extent necessary to benefit*

[4] Art. 6, point 3 of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001, on the harmonization of certain aspects of copyright and related rights in the information society.

[5] References to Articles 5(2)(a), (2)(c), (2)(d), (2)(e), (3)(a), (3)(b) or (3)(e) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society, correspond to the following exceptions: private reproductions, specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, ephemeral reproductions that are transitional, for the benefit of people with a disability, for the sole purpose of illustration for teaching or scientific research.

from that exception or limitation and where that beneficiary has legal access to the protected work or subject-matter concerned.

A Member State may also take such measures in respect of a beneficiary of an exception or limitation provided for in accordance with Article 5(2)(b), unless reproduction for private use has already been made possible by rightholders to the extent necessary to benefit from the exception or limitation concerned and in accordance with the provisions of Article 5(2)(b) and (5), without preventing rightholders from adopting adequate measures regarding the number of reproductions in accordance with these provisions."

Therefore, although there are clear provisions[6] that regulate the cases of violation of the technical protection methods and there are obligations addressed to efficiently protect these instruments of control ("legal protection of anti-circumvention measures"), there is no obligations assigned to Member States in order to guarantee the right of access for the beneficiaries of the copyright exceptions, nor are there any sanctions provided for the abusive use of technical measures. And this is largely because of the fact that the interests of the two parties are not considered as needing equal protection, an aspect that is also nuanced by the preamble of the Directive, "(39) Such exceptions or limitations should not inhibit the use of technological measures or their enforcement against circumvention."

The aspects above mentioned exclusively nuance the situations of copyright exceptions and especially of certain exceptions, through precise identification, one also being able to mention that the application through analogy for other types of exceptions, which are not specified in the European text, could not be accepted. For these reasons, it cannot be assumed that the text would apply to other types of free uses that, even without being identified as exceptions, have the same effects, and we are particularly referring to the examples of public domain work usage. Particularly, we're talking about what is actually called "retelling a story" from public domain, or about the situations in which certain public domain works or fragments of them, are taken over and integrated into original works, or about the case of adapting works from the public domain. Each of these is an example of situation in which the public has the right of access to the public domain work, as it does not carry exclusive rights and because the access to it should be free, therefore unrestricted. But this right of access is only theoretical, since we cannot talk of its actual exercising in the context of the existence of technical protection measures, to which the Member States have obliged themselves to a legal and unconditioned protection.

The situation deserves to be summed up – the protection of technological measures needs to be legal and the measures need to be efficient, including through the sanction of any form of violation/circumvention of TPM, whereas, as far as the general public is concerned, Member States are obliged to only take "appropriate measures" and that only to some of the forms of free use, which do not include, as I mentioned, the use of public domain works, but only those forms of use corresponding to the exceptions noted in Article 6.

Legalizing TPM indisputably led to the impossibility of enforcing the provisions relating to copyright exceptions and

[6] Art.6 pt.1, of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society, "Member States shall provide adequate legal protection against the circumvention of any effective technological measures".

limitations, as prof. Lawrence Lessig, correctly, classified it as a transposition of "copyright abuse", indeed referring exclusively to fair-use. His assessment was supported by the reality of many processes initiated by owners, also being just as pertinent referring to the well-known warning that marks the beginning of any DVD or VHS recording, through which the reproduction of any part of said recording, without permission from the producer, is strictly forbidden. This example represents a blatant denial of the fair-use doctrine, of what is represented by the copyright exceptions and limitations, implicitly of the notion of private copy, of user and consumer rights, of the possible public domain components, and of society in general.

The American correspondent of the aforementioned European Directive is the Millennium Copyright Act, at least as far as the technological protection means are concerned, and the means of sanction any forms of circumvention.

"Section 1201(a)(1) of the Copyright Act prohibits the act of "circumvent[ing] a technological measure that effectively controls access to a work," including, for example, by-passing password protection or encryption intended to restrict access to paying customers. Section 1201(a)(2) prohibits the manufacture or sale of "any technology, product, service, device, component, or part thereof' primarily designed for the purpose of circumventing access controls on copyrighted works. Additionally, § 1202(b) prohibits the manufacture or sale of products, devices or services primarily designed to circumvent "a technological measure that effectively protects a right of a copyright owner"-for example, a technological measure intended to prevent reproduction of a copyrighted work. The authors of Fair's Fair[7] said, "the ban against circumvention devices can prevent many users from making a fair use of protected works. The problem illustrates a more general threat. A legal prohibition against circumventing the protective measures adopted by copyright owners leaves those owners with virtually absolute control over the terms of use."

There are currently DVDs or e-books sold with restricted access, although many of them contain collections or public domain works, such as stories whose protection period has expired, or legends belonging to traditional knowledge or folklore[8].

Inevitably, the issue of the existence or not of a right of access is, most of the time, unresolved in these situations because reference may be made to the multitude of **other** free resources, available as alternatives, and which allow, to the same extent, the user's access to public domain works, such as the versions available in public libraries. But the issue of the right of access should not be studied from the perspective of other alternative resources that are available. Encrypting an e-book will represent in any case an abusive form of use of the public domain works it contains and this is because, by applying technological protection methods, the nature of these free materials change, through their restriction.

In all these cases, we obviously also need to consider the interest of the owner who uses those technological protection methods. Even if, most times, these collections do not represent aspects of originality and the only valuable component resides in its public domain material, it needs to be accepted that there are also situations in which the owner's interest especially

[7] Robert C. Denicola, Fair's Fair - An Argument for Mandatory Disclosure, University of Nebraska, 2004.

[8] http://www.elefant.ro/ebooks/fictiune/literatura-romana/literatura-romana-clasica/legende-populare-romanesti-167551.html, http://www.polirom.ro/catalog/ebook/povestile-fratilor-grimm-2572/redirect.html

require protection, the most obvious cases being those of adaptations, of the type of retelling, as well as of the public domain works' integration as part of original works. Each of these shows, without a doubt, particularities but the most important aspect, and the most common, of these examples is the fact that the right of access needs to be guaranteed and, if the solutions to protect both interests are not impossible to find, even in the event in which there is not a clear divide between the public domain material and the original work[9].

Coming back on European ground, we have to admit that, despite the provisions mentioned, the recent jurisprudence has nuanced interpretations of Directive 2001/29/EC that are closer to what it could be called an equilibrium of interests. The year 2014 meant quite a lot if we consider the decision taken in January 2014 by the European Court of Justice, which decided that circumventing a protection system may be lawful[10], from which we hold:

1 "'Technological measures' within the meaning of Article 6 may include measures incorporated not only in protected works themselves but also in devices designed to allow access to those works;

2 When determining whether measures of that kind qualify for protection pursuant to Article 6 where they have the effect of preventing or restricting not only acts which require the rightholder's authorisation pursuant to that directive but also acts which do not require such authorisation, a national court must verify whether the application of the measures complies with the principle of proportionality and, in particular, must consider whether, in the current state of technology, the former effect could be achieved without producing the latter effect or while producing it to a lesser extent."

It's interesting to study the problem of protecting technologies created not only to prevent copying, but to restrict interoperability as well, being a way to emphasize the fact that technologies applied by owners are not protected unconditionally, but only if they conform with the definitions provided by law[11]. A correct interpretation leads to the conclusion that, beyond the limitations expressly provided by the law, one cannot talk about a correct/legal use, the protection, as a final effect, being unobtainable. If the technological protection measures have the effect of restriction of those acts that are not subject to holder authorization (by effect of the law), these TPM are obviously examples of abusive TPM, whose violation can be considered legal.

Indeed, CJEU ruled that the manufacturer of the console is protected against that circumvention only in the case where the protection measures seek to prevent illegal use of videogames, thus being understood that legal protection

[9] GPL licenses for open-source software have the particularity of maintaining the source code available for any other subsequent use. Similarly, the rightholders that take over, in any way, public domain materials, should be obliged to allow the access of public to that material, in a format free of any other intervention, in order to ensure the access is unrestricted.

[10] Advocate General Eleanor Sharpston, Opinions in Case C-355/12 Nintendo v PC Box, September 2013 http://curia.europa.eu/juris/document/document.jsf?docid=141822&mode=req&pageIndex=1&dir=&occ=first&part=1&text=&doclang=EN&cid=1931439 http://curia.europa.eu/juris/document/document_print.jsf?doclang=EN&text=&pageIndex=1&part =1&mode=req&docid=141822&occ=first&dir=&cid=1931439

[11] Article 6 of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society – "Technological measures" means any technology, device or component that, in the normal course of its operation, is designed to prevent or restrict acts, in respect of works or other subject-matter, which are not authorized by the rightholder.

cannot be ensured to other forms of restriction.

Legal protection cannot be granted to restrictions aiming at the public domain component, as these type of measures also have the purpose of forbidding/limiting some forms of use that do not need the permission of the authors/owners.

4. Other dangers: Information society and the impact on the public domain sphere.

The public domain is diverse in its content, works whose protection period has expired being only one of the categories that belong to this sphere. Another category is that of materials that, in accordance with the internal or international legislation, cannot be protected by copyright[12].

These types of materials are, most of the times, located outside of copyright protection, as effect, for example, of provisions that establish the exemption from protection of ideas, mathematical concepts and formulas, theories, procedures and methods of function. Mathematical formulas, concepts and functioning methods, are, in accordance with the legislation corresponding to copyright, types of materials that are included in the public domain sphere, naturally, from their very development.

But as diverse as the sphere of public domain is, it is just as fluctuant, certain legislative changes or court decision leading to a narrowing of the public domain sphere, by considering some material/information, which are by nature excluded from protection, as being protectable, such as functioning methods, or simple data.

I'm referring to the case of Oracle v. Google[13], the most recent decision regarding them stating that "the APIs are protected by copyright, both in regards to their source code, as well as the structure, sequence and organization of the Java library (API packages)."

Taking into account their component[14], and the purpose for which these APIs were used in programming, objectively established as being – the insurance of interoperability, it goes without saying that this decision has the potential to significantly affect the public domain sphere, by considering these materials/information (if we can call them that) as being protectable by copyright.

This decision would affect everything open-source stands for, and innovation in general, the EFF[15] mentioning that the freedom to reimplement and extend existing APIs represents the key to progress both in the development of hardware products, as well as software. With a higher emphasis on the need for software compatibility, the following explanations are offered: "When programmers can freely reimplement or reverse engineer an API without the need to negotiate a costly license or risk a lawsuit, they can create compatible software that the interface's original creator might never have

[12] This paper exclusively takes into account the public domain related to copyright, but, evidently, any work or material that does not carry exclusive rights and that can be freely used, regardless of their rights, trade secrets, patents, etc., falls in the sphere of what the public domain is.

[13] U.S. appeals court decided Oracle could copyright parts of the Java programming language, which Google used to design its Android smartphone operating system - see the full text of the decision: https://www.eff.org/files/2014/11/10/oracle_v_google_13-1021.opinion.5-7-2014.1.pdf

[14] All SSO details/components – structure, sequence and organization – lack protection, as they **represent** functioning methods.

[15] https://www.eff.org/deeplinks/2014/05/dangerous-ruling-oracle-v-google-federal-circuit-reverses-sensible-lower-court

envisioned or had the resources to create. Moreover, compatible APIs enable people to switch platforms and services freely, and to find software that meets their needs regardless of what browser or operating system they use."

Pamela Samuelson recently said[16], referring directly to the dispute between Google and Oracle:

" (...) a computer program designed to be compatible with another program must conform precisely to the API of the first program which establishes rules about how other programs must send and receive information so that the two programs can work together to execute specific tasks".

"(...) once that the API exists, it becomes a constraint on the design of follow-on programs developed to interoperate with it."

The digital era is supposed to be favorable to the spread of information and innovation in general, but also bears, as we've seen, multiple threats to the public domain.

5. Conclusions

An excessive control of copyright actually means a denial of the citizens' right of access to the public domain, a denial of the importance of public domain in general and a denial of the special role the public domain has in innovation.

The context of the existence of technological protection methods and of some confusing regulations of what a legal use of the public domain means, has lead to numerous actions, such as the Communia Association, which issued, in 2014, a set of recommendations, from which we can mention the ones with implications involving the public domain[17].

"Pt.6 Any false or misleading attempt to misappropriate Public Domain material must be declared unlawful. False or misleading attempts to claim exclusivity over Public Domain material must be sanctioned.In order to preserve the integrity of the Public Domain and protect users of Public Domain material from inaccurate and deceitful representations, any false or misleading attempts to claim exclusivity over Public Domain material must be declared unlawful. There must be a system of legal recourse that allows members of the public to get sanctions imposed on anyone attempting to misappropriate Public Domain works.

Pt. 7 The Public Domain needs to be protected from the adverse effects of Technical Protection Measures. Circumvention of TPMs must be allowed when exercising user rights created by Exceptions and Limitations or when using Public Domain works. The deployment of TPMs to hinder or impede privileged uses of a protected work or access to public domain material must be sanctioned. Technical Protection Measures such as Digital Rights Management systems can have adverse effects on the Public Domain. Access restrictions imposed on works can remain in effect even after a work has passed into the public domain and over time Protections Measures can become orphaned making access to protected works impossible. Most current TPM 'solutions' do not take into account user rights created by Exceptions and Limitations thereby limiting their effectiveness and undermining the inherent checks and balances of the copyright system. Given the above, circumvention of TPMs must be allowed when exercising user rights created by Exceptions and Limitations or when using Public Domain works."

[16] Pamela Samuelson, Are APIs Patent or Copyright Subject Matter?, http://patentlyo.com/patent/2014/05/copyright-subject-matter.html, May 2014

[17] http://www.communia-association.org/recommendations-2/

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