

# National Treatment, National Interest and the Public Domain

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# National Treatment, National Interest and the Public Domain

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## 1. INTRODUCTION

SEVERAL YEARS AGO, in 2001, I was in the audience at an important conference at Duke University—a conference which proclaimed itself “the first major meeting to focus squarely on the topic of the public domain.”<sup>1</sup> In the audience were scholars and both policy advocates and policy makers from a number of jurisdictions. Pamela Samuelson, my colleague on this panel, was one of the distinguished speakers. I was sitting in the audience next to a member of the executive of the American Library Association. That experience generated some of the impulse for this paper.

As an individual trained as both a librarian and a lawyer, I participated in conferences that devoted significant program time to issues involving the public domain over at least twenty years before that one in 2001—but all of those conferences were organized by librarians, not by legal academics.<sup>2</sup> This led me to reflect on what it is about the public domain that its intrinsic value seems to have

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1. James Boyle in the Introduction to the *Focus Paper Discussion Drafts for the Conference on the Public Domain, Duke University School of Law, November 9–11, 2001*, <<http://www.law.duke.edu/pd/about.html>>. In the theme issue of the journal *Law and Contemporary Problems*, which followed the conference, James Boyle mutes the claim somewhat in saying that, “So far as we could tell, this was the first conference on the subject [of the public domain]....” See James Boyle, “Foreword: The Opposite of Property?” (2003) 66 *Law & Contemp. Probs.* 1 at 1, <[http://www.law.duke.edu/shell/cite.pl?66+Law+%+Contemp.+Probs.+1+\(WinterSpring+2003\)](http://www.law.duke.edu/shell/cite.pl?66+Law+%+Contemp.+Probs.+1+(WinterSpring+2003))>.
  2. See Kevin A. Janus, “Defending the Public Domain in Copyright Law: A Tactical Approach—Part II” (2000) 15 *I.P.J.* 67 at 71-72, where he identifies five potential groups to represent the public interest, the “so-called proponents of the public domain”: (1) other actors in a given industry; (2) civil-liberties groups; (3) artists and software engineers; and (4) consumer groups. His fifth group seems to be public-education institutions, listed together with civil-liberties groups in his text. It may be noted that none of these categories seems to directly include librarians. On the other hand, my colleague Samuel Trosow, himself both a lawyer and a librarian, clearly identifies the library associations as representing the fifth group of stakeholders in his recent paper concerned with the recent Sabo Bill initiative in the United States, “Copyright Protection for Federally Funded Research: Necessary Incentive or Double Subsidy?”. Trosow’s other four stakeholder groups are the commercial publishers, non-commercial publishers (including university presses, in his view, focusing on the American context), universities and colleges, and authors and researchers.

been discovered by legal academics only quite recently?<sup>3</sup> One simple answer is that the “public domain” is not a term that is directly linked to intellectual-property legislation; certainly, it is not a term appearing in the Canadian intellectual-property statutes.<sup>4</sup> James Boyle points to a 1966 American patent case as his earliest illustration of the adoption of the term by the American courts.<sup>5</sup>

The real importance, I think, of the recognition given to the concept of the “public domain” at that conference and increasingly in our legal literature is that it is a reflection of the emergence of the “public domain” as, at least, a powerful rhetorical element in the policy debates involving intellectual property.<sup>6</sup> Yet, beyond rhetoric, can this concept play a significant role in analysis and policy development?

A second observation about the Duke Conference is that, with the single exception of our colleague Professor Rosemary Coombe of York University in Toronto,<sup>7</sup> all the speakers hailed from American institutions, even though there was an international presence in the audience. Did that reality bias the perceptions of the public domain put forward then? What is the relationship between our perspectives on the concept of the “public domain” and on concepts like “national interest” and “national treatment”? Perhaps our American guests will agree that my curiosity in this paper about the possibility of a distinction between the public interest and the national interest is a focus that is less common in conferences focused strictly on American law. Certainly from an empirical standpoint it appears that the concept of the “national interest” is explored in

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3. James Boyle, for example, in his paper from the above-mentioned Conference on the Public Domain at Duke, cites to David Lange, “Recognizing the Public Domain” (1981) 44 *Law & Contemp. Probs.* 147 as being the first genuine scholarly treatment of the subject. See James Boyle, “The Second Enclosure Movement and the Construction of the Public Domain” (2003) 66 *Law & Contemp. Probs.* 33 at 59, <[http://www.law.duke.edu/shell/cite.pl?66+Law+&+Contemp.+Probs.+33+\(WinterSpring+2003\)](http://www.law.duke.edu/shell/cite.pl?66+Law+&+Contemp.+Probs.+33+(WinterSpring+2003))>. Kevin A. Janus, in “Defending the Public Domain in Copyright Law: A Tactical Approach—Part I” (1999-2000) 14 *I.P.J.* 379, provides an extensive bibliographic essay on the topic of the public domain and, at 387, he also cites to David Lange’s article as being seminal.
  4. Stephen E. Weil makes the claim that in 1710 the *Statute of Anne*, <<http://www.copyrighthistory.com/anne.html>>, created “the notion of the public domain—a space in which even the greatest accomplishments would, after some specified term, pass out of individual proprietorship to become the common property of humankind....” See Stephen E. Weil, “Copyright and Its Counterweights: A Faltering Balance” (2001) 49 *Journal of the Copyright Society of the U.S.A.* 357 at 359. But he acknowledges that this is a functional argument: the *Statute of Anne* did not use the term “public domain,” but merely introduced a fixed term of copyright protection. Weil states, also at 359, without citation that “[p]reviously, copyright had been perpetual.” This perspective on the period before 1710 does not accord with the detailed account provided by Harry Ransom in *The First Copyright Statute: An Essay on An Act for the Encouragement of Learning*, 1710 (Austin: University of Texas Press, 1956).
  5. *Graham v. John Deere Co. of Kansas City*, 383 U.S. 1 at 5-6, <[http://cyber.law.harvard.edu/ilaw/BMP/graham\\_v\\_john\\_deere.html](http://cyber.law.harvard.edu/ilaw/BMP/graham_v_john_deere.html)>, 86 S. Ct. 684 (1966) [*Graham* cited to U.S.], cited in James Boyle, “The Second Enclosure Movement and the Construction of the Public Domain,” *supra* note 3 at 58–59.
  6. Notwithstanding Edward Samuels’s view that the concept of the public domain does not add to the debate, see Edward Samuels, “The Public Domain in Copyright Law” (1993) 41 *Journal of the Copyright Society of the U.S.A.* 137 at 150. However, in his recent book, *The Illustrated Story of Copyright* (New York: Thomas Dunne, 2000), Samuels does employ the concept of the public domain—perhaps as a useful explanatory device as the book is intended for a wide audience.
  7. Rosemary Coombe did not deliver one of the conference’s “focus papers,” but she was a member of a panel on “Creativity, appropriation, culture and the public domain.” She brought forward international activity through the United Nations in the realm of cultural-diversity protection as an element of the discussion of the public domain.

more papers on information policy written from the Canadian perspective,<sup>8</sup> for example,<sup>9</sup> than in those written from the American perspective. In this paper, I will suggest why this might be the case. But the real focus of this aspect of our investigation will be to return to and to augment our first question: if these concepts do in fact transcend national boundaries, do they have a stable and consistent meaning and do they play a consistent role in the information-policy decisions of individual nations?

I hope that you will agree with me that this is an interesting place to begin our thinking at this first session of the equally foundational colloquium on comparative intellectual property and cyberlaw. I also hope to explore the validity of the assumptions behind the fact that, when I proposed my title incorporating the concept of the “public domain” to our conference organizers, my presentation was slotted into this Copyright Panel. Is the concept of the public domain really only viable in the context of copyright?<sup>10</sup>

The importance of exploring emerging concepts in intellectual property and cyberlaw in a comparative context like this symposium is that, of course, not every country is perceiving or grappling with the emerging “information age” from the same perspective. As Ronald Bettig points out, “The global proliferation of communications technologies and the expansion of the realm of intellectual property is a process that clearly benefits the advanced economies of the United States, Europe, and Japan.”<sup>11</sup> Bruce Doern and Markus Sharaput agree entirely with this characterization in the conclusion of their policy study about

8. Oliver R. Goodenough, “Defending the Imaginary to the Death? Free Trade, National Identity, and Canada’s Cultural Preoccupation” (1998) 15 *Ariz. J. Int’l & Comp. L.* 203; Amy E. Lehmann, “The Canadian Cultural Exemption Clause and the Fight to Maintain an Identity” (1997) 23 *Syracuse J. Int’l L. & Com.* 187; John A. Ragosta, “The Information Revolution—Culture and Sovereignty—A U.S. Perspective” (1998) 24 *Can.-U.S.L.J.* 155 (wherein, notwithstanding the title, Ragosta discusses the protection of Canadian culture); Donald S. Macdonald, “The Canadian Cultural Industries Exemption Under Canada-U.S. Trade Law” (1994) 20 *Can.-U.S.L.J.* 253; Jonathan L. Faber, “Culture in the Balance: Why Canada’s Copyright Amendments will Backfire on Canadian Culture by Paralyzing the Private Radio Industry” (1998) 8 *Ind. Int’l & Comp.L. Rev.* 431; Andrew M. Carlson, “The Country Music Television Dispute: An Illustration of the Tensions Between Canadian Cultural Protectionism and American Entertainment Exports” (1997) 6 *Minn. J. Global Trade* 585; Stephen R. Konigsberg, “Think Globally, Act Locally: North American Free Trade, Canadian Cultural Industry Exemption, and the Liberalization of the Broadcast Ownership Laws” (1994) 12 *Cardozo Arts & Ent. L.J.* 281.
9. The perspectives of other countries also appear in the literature, though apparently less frequently: see e.g. Karsi A. Kish, “Protectionism to Promote Culture: South Korea and Japan, A Case Study” (2001) 22 *U.Pa. J. Int’l Econ. L.* 153. I would also include in this grouping my own study looking at the Canadian and Vietnamese situations: see Margaret Ann Wilkinson, “The Challenges of Coping with Intellectual Property Regime Implementation: Observations on Canada and Vietnam” (2002-03) 16 *I.P.J.* 45.
10. One argument for limiting the discussion of the concept of the public domain to the context of copyright is that there is an international protection for the public domain that is present only in the context of copyright. Article 9(2) of the TRIPS Agreement provides: “Copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such.” Of course those seeking to protect procedures and methods of operation more commonly seek out patent protection in any event. The prohibition on the protection of mathematical concepts is more commonly also associated with the patent regime than with copyright. Limiting copyright to expressions and not to ideas is a restatement of the foundations of copyright. Thus, it would seem that this Article does not contribute to clarifying the concept of the public domain. Nor, I would argue, does its existence cogently require that the concept of the public domain, if it is useful at all, be limited in application to the copyright realm. See *Agreement on Trade-Related Aspects of Intellectual Property Rights*, Annex 1C to the “Marrakesh Agreement Establishing the World Trade Organization” (WTO Agreement) (Marrakesh, April 15, 1994), <[http://www.wto.org/english/tratop\\_e/trips\\_e/t\\_agm0\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm)> [TRIPS].
11. Ronald V. Bettig, *Copyrighting Culture: The Political Economy of Intellectual Property* (Boulder: Westview Press, 1996) at 5. Many of the examples and case studies in his book involve the co-opting of Canadian intellectual-property policy by American entertainment-industry elites.

Canada. Indeed,

...the main impetus for change in Canada has come ultimately from U.S. corporate and political forces seeking to strengthen IP protection at the expense of IP dissemination. The analysis has shown that Canada initially resisted such pressures but then ultimately adopted them as being in the national interest in the new innovation age. In an overall sense, Canada has become more of a policy-taker than a policy-maker on matters of IP.<sup>12</sup>

Doern and Sharaput based these conclusions on analyses completed prior to July 1999<sup>13</sup> and I am certain that the symposium speakers will take the opportunity to comment on Canada's more recent policy directions. Regardless, there can be no doubt that Canada is in the position of an information-importing country, next to the world's largest information exporter.<sup>14</sup>

Bearing these differing perspectives in mind, let us begin an examination of the notion of the "public domain" in order to try to discern whether its meaning implies a common theoretical construct which can usefully frame intellectual-property policy debate.

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## 2. WHAT IS THE MEANING OF "PUBLIC DOMAIN"?

### 2.1. *Is the "public-domain" concept relevant to all aspects of intellectual property?*

In the *Dictionary of Publishing*, the "public domain" is defined as:

That which by its nature might have been or once was protected by copyright, patent, or trademark, but which is now unprotected and open to use by anyone. For example, a book written 100 years ago, which was once copyrighted, but is now unprotected because its copyright period has run out, is in the public domain, as is a government publication which, by the nature of its publisher, is in the public domain as soon as it is published.<sup>15</sup>

The illustrations are interesting. The first illustration is the example of a book, which presumably "once was protected by copyright" within the meaning of the definition,<sup>16</sup> and the second illustration is the example of a government publication, "which, by the nature of its publisher, is in the public domain as soon as it

12. G. Bruce Doern & Markus Sharaput, *Canadian Intellectual Property: The Politics of Innovating Institutions and Interests* (Toronto: University of Toronto Press, 2000) at 182 [emphasis added].

13. See the date on the Preface to *ibid.* at xii.

14. See *supra* note 11 at 201, where Bettig characterizes Canada as the American entertainment industry's "largest 'foreign' market in the Western Hemisphere." Samuels in *The Illustrated Story of Copyright*, *supra* note 6 at 7, discusses the "recent realization [of the United States] that the United States is a net exporter of creative works."

15. David Brownstone & Irene M. Franck, *The Dictionary of Publishing* (New York: Van Nostrand Reinhold, 1981).

16. Under the law in force in the U.S. before that country's adherence to the *Berne Convention*, this would have been a clear example: at 100 years, all publications would have been out of American copyright—but, post-1989, the example would require the assumption that the author would have died at less than age 49.

is published” and which, strictly speaking, seems under American law<sup>17</sup> to be neither a work which was “once protected by copyright” nor a work which “might have been protected by copyright” and which would thus fall outside the definition given. On the other hand, it is a work, which, though not having been copyrighted in the U.S. and though not, by this definition, being within the public domain in the U.S., would certainly be protected by copyright law in other jurisdictions, such as Canada.<sup>18</sup>

Indeed, Jerome Reichman and Paul Uhlir point out that,

Scientific and other kinds of data and information generated by the governments of other nations may also end up in the public domain and become available internationally. Generally, however, the quantities are considerably smaller than the information resources generated by the U.S. government, and the public-access policies are much less open than those applicable in the United States.... [A] key issue for both the exploitation of public data resources and for cooperative research generally is the asymmetry between the United States and foreign government approaches to the public domain availability of scientific data.<sup>19</sup>

The definition is interesting if for no other reason than that it highlights the challenges of examining the concept of the “public domain;” while the definition situates the “public domain” concept in the context of three areas of intellectual property, not just in the context of copyright, the above-mentioned illustrations are both drawn from the realm of copyright and the definition does not in fact embrace any of these illustrations.

Indeed, this attempt by the *Dictionary of Publishing* to capture the essence of the notion of the “public domain” appears to be both over-inclusive and under-inclusive. Given the developing protection for confidential information in Canada<sup>20</sup> and elsewhere, it appears less and less accurate to assume that

17. 17 U.S.C. § 105, “Copyright protection under this title is not available for any work of the United States Government”, <<http://www4.law.cornell.edu/uscode/17/>>.

18. *Copyright Act*, R.S.C. 1985, c. C-42, as amended, <<http://laws.justice.gc.ca/en/C-42/>>. Section 13(3) provides:

Where the author of a work was in the employment of some other person under a contract of service or apprenticeship and the work was made in the course of his employment by that person, the person by whom the author was employed shall, in the absence of any agreement to the contrary, be the first owner of the copyright....

And s. 12 provides:

Without any prejudice to any rights or privileges of the Crown, where any work is, or has been, prepared or published by or under the direction or control of Her Majesty or any government department, the copyright in the work shall, subject to any agreement with the author, belong to Her Majesty and in that case shall continue for the remainder of the calendar year of the first publication of the work and for a period of fifty years following the end of that calendar year.

19. J.H. Reichman & Paul F. Uhlir, “A Contractually Reconstructed Research Commons for Scientific Data in a Highly Protectionist Intellectual Property Environment” (2003) 66 *Law & Contemp. Probs.* 315 at 328-29, <[http://www.law.duke.edu/shell/cite.pl?66+Law+&+Contemp.+Probs.+315+\(WinterSpring+2003\)](http://www.law.duke.edu/shell/cite.pl?66+Law+&+Contemp.+Probs.+315+(WinterSpring+2003))>.

20. See *LAC Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, <[http://www.lexum.umontreal.ca/csc-scc/en/pub/1989/vol2/html/1989scr2\\_0574.html](http://www.lexum.umontreal.ca/csc-scc/en/pub/1989/vol2/html/1989scr2_0574.html)>, (1989), 26 C.P.R. (3d) 97 [LAC Minerals cited to S.C.R.], where the Supreme Court of Canada clearly articulated the recognition of an independent action at common law for breach of confidentiality, and see *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, [1999] 1 S.C.R. 142, <[http://www.lexum.umontreal.ca/csc-scc/en/pub/1999/vol1/html/1999scr1\\_0142.html](http://www.lexum.umontreal.ca/csc-scc/en/pub/1999/vol1/html/1999scr1_0142.html)>, (1999), 83 C.P.R. (3d) 289 [Cadbury cited to S.C.R.], where the S.C.C. effectively extended recovery for breach of confidence to recovery from third parties not involved in the original incident of transmission of the confidential information beyond the bounds of the confidence specified by the confider.

information that is not protected by patent, trademark or copyright will be “open to use by anyone.” In this respect the above definition must be considered to be over-inclusive. However, it is the case that there is strong rhetoric backing the idea of the power of the “public domain” as a guarantee of access to information for the public. And this conversation is often opposed to the “property interest” created by intellectual-property devices. And it is certainly true, as was pointed out some time ago by David Vaver, that, for example, copyright can be exercised in such a way that it has a censoring effect.<sup>21</sup> However, it is also true that the ability of the creators of invention and expressions, prior to the emergence of intellectual-property devices, to control original manuscripts and ideas and to decide whether to make them available to others did in fact exist. Indeed, it is often forgotten by passionate advocates for the power of the “public domain” that it is guaranteed through the patent system that the public will have free access to knowledge of the invention<sup>22</sup> in return for the issuance of the patent, which gives a limited-term monopoly over the manufacture, use and distribution of the patented subject matter.<sup>23</sup>

Recently, the Supreme Court of Canada has twice reiterated that two of the central objectives of the *Patent Act* are “to advance research and development and to encourage broader economic activity.”<sup>24</sup> As Justice Binnie put it at the beginning of his minority opinion in the recent *Harvard Mouse* decision:

Having disclosed to the public the secrets of how to make or use the invention, the inventor can prevent unauthorized people for a limited time from taking a “free ride” in exploiting the information thus disclosed. At the same time, persons skilled in the art of the patent are helped to further advance the frontiers of knowledge by standing on the shoulders of those who have gone before.<sup>25</sup>

This seems to be a different approach to the function of the patent than was demonstrated by Justice Ginsburg writing for the majority of the United States Supreme Court in *Eldred v. Ashcroft*. In that decision, Ginsburg stated that, even though patent requires disclosure to the public of the invention and even though in copyright “disclosure [to the public] is the desired objective, not something [to be] exacted from the author in exchange for the copyright,” it is

21. David Vaver, “Some Agnostic Observations on Intellectual Property” (1991) 6 I.P.J. 125.
22. See e.g. the Canadian *Patent Act*, R.S.C. 1985, c. P-4, as amended, <<http://laws.justice.gc.ca/en/p-4/89972.html>>. Section 10 provides: “[subject to a confidentiality period and certain secret applications in the context of national defence] all patents, applications for patents and documents filed in connection with patents or applications for patents shall be open to public inspection at the Patent Office, under such conditions as may be prescribed.” See Ian McKeivitt, “Patents information in the Library/Information Studies Curriculum” (1992) 10 *Education for Information* 223 for a discussion of the information potential that patents hold.
23. See e.g. the Canadian *Patent Act*, *ibid.*, s. 42 (for the grant of the patent) and s. 32 (for improvement patents).
24. *Harvard College v. Canada (Commissioner of Patents)*, 2002 SCC 76, <[http://www.lexum.umontreal.ca/csc-scc/en/pub/2002/vol4/html/2002scr4\\_0045.html](http://www.lexum.umontreal.ca/csc-scc/en/pub/2002/vol4/html/2002scr4_0045.html)>, [2002] 4 S.C.R. 45 at para. 185 [*Harvard Mouse* cited to S.C.R.], Bastarache J. speaking for the majority (comprised of himself and L’Heureux-Dubé, Gonthier, Iacobucci and LeBel JJ.), citing *Free World Trust v. Électro Santé Inc.*, 2000 SCC 66, <[http://www.lexum.umontreal.ca/csc-scc/en/pub/2000/vol2/html/2000scr2\\_1024.html](http://www.lexum.umontreal.ca/csc-scc/en/pub/2000/vol2/html/2000scr2_1024.html)>, [2000] 2 S.C.R. 1024 at para. 24 [*Free World* cited to S.C.R.].
25. *Harvard Mouse*, *ibid.* at para. 4, Binnie J. speaking for the minority (comprised of himself, McLachlin C.J.C. and Major and Arbour JJ.).

nevertheless the case that “[f]urther distinguishing the two kinds of intellectual property, copyright gives the holder no monopoly on any knowledge...[while] the grant of a patent, on the other hand, does prevent full use by others of the inventor’s knowledge.”<sup>26</sup>

Notwithstanding the learned authority of Walter A. Copinger, cited by Justice Ginsburg, and notwithstanding, in the Canadian context, the explicit statutory authority of s. 27(8) of the *Patent Act* to the effect that “No patent shall be granted for any mere scientific principle or abstract theorem,” it seems that the better view is that patent gives no more monopoly over knowledge than does copyright and, indeed, that it provides a statutory requirement that the invention be placed in the public domain. In this respect, then, the definition of the “public domain” in the *Dictionary of Publishing* is under-inclusive.

The definition from the *Dictionary of Publishing* that we have used to guide this initial discussion included reference not just to copyright and patent, but also to trademark.<sup>27</sup>

## 2.2. Are the “public domain” and the “information commons” synonymous terms?

Are the “public domain” and the “information commons” synonymous terms?<sup>28</sup> One of our later speakers, Jessica Litman, has described the public domain as “a commons that includes those aspects of copyrighted works which copyright does not protect.”<sup>29</sup> This view of the public domain as being analogous to or inseparable from the historical notion of the commons is a theme that has reverberated in a number of places, particularly amongst American authors.<sup>30</sup>

Given the rapid changes in U.S. copyright law over the last quarter of the twentieth century, one can well sympathize with James Boyle’s assertion that:

We are in the middle of a second enclosure movement. It sounds grandiloquent to call it “the enclosure of the intangible commons of the mind,” but in a very real sense that is just what it is.<sup>31</sup>

This experience of the United States is, however, an isolated one in terms of the developed world: in Canada, for example, there has been no such radical change in the form or substance of copyright from the time that our first national, and continuing, *Copyright Act* came into force in 1924. James Boyle’s

26. 537 U.S. 186, <<http://cyber.law.harvard.edu/openlaw/eldredvashcroft/>>, 123 S. Ct. 769 at para. 787 (2003) [*Eldred* cited to S. Ct.].

27. See Walter A. Copinger, *The Law of Copyrights*, 7th ed. (London: Sweet & Maxwell, 1936); *Canadian Patent Act*, *supra* note 22, s. 27(8). In many enquiries concerning intellectual-property theory, the examination of trademark is cursory at best. Here, I shall include a limited discussion of trademark. The question of the treatment of trademark in intellectual-property analyses is the subject of research under my guidance that is currently being pursued by Natasha Gerolami, an information-policy doctoral student.

28. This is a question that James Boyle also asks. See Boyle, “The Second Enclosure Movement,” *supra* note 3 at 60.

29. Jessica Litman, “The Public Domain” (1990) 39 *Emory L.J.* 965 at 968.

30. See Carol Rose, “The Comedy of the Commons: Custom, Commerce, and Inherently Public Property” (1986) 53 *U. Chicago L. Rev.* 711 and see *infra*.

31. Boyle, “The Second Enclosure Movement,” *supra* note 3 at 37, citing (at footnote 12) Ben Kaplan, Pamela Samuelson, Yochai Benkler, David Lange, Christopher May, David Bollier and Keith Aoki as also having employed the same analogy to the enclosure movement.

assertion that “[t]he older strategy of intellectual property law was a ‘braided’ one [that] thread a thin layer of intellectual property rights around a commons of material from which future creators would draw”<sup>32</sup> accurately reflects this unique American experience; however, any resident of a country with a long history of *Berne* compliance, like Canada, almost certainly has a very different image of the pervasiveness of intellectual-property rights.

Despite these differences in perspective, the analytic analogy to the commons may be persuasive. On the other hand, the commons analogy appears sometimes to take the discussion of the public domain in contradictory directions. A common dictionary in library-and-information science defines “public-domain software” as “any software program that is not protected by copyright.”<sup>33</sup> We, as teachers of intellectual-property law, would likely leap in, as James Boyle has,<sup>34</sup> and say that this definition is inaccurate—that software has been clearly and automatically protected by copyright for some years.<sup>35</sup> Yet there has been much learned discussion of software in connection with the notion of the commons. Moreover, as discussed further below, Jerome Reichman and Paul Uhlir are able to propose a patent commons that is premised upon recognition of private rights in patent and to argue that this commons lies within the conception of the public domain.<sup>36</sup> Thus, it seems that a reference to the notion of the commons does not assist in clarifying the notions inherent in the concept of the public domain.

Abraham Drassinower, another of our symposium speakers, has stated:

One might say that the public domain is not only a space containing freely available materials. It is also a fundamental condition of free and equal interaction between persons in their capacity as authors. The public’s domain is the domain of fair interaction.<sup>37</sup>

He argues that the most important boundary in the copyright sphere is the idea/expression dichotomy.<sup>38</sup> This is indeed an important and clarion call to societies to actively guard that separation. But can that boundary be successfully implemented to identify the public domain?

32. *Ibid.* at 39.

33. Stella Keenan & Colin Johnston, *Concise Dictionary of Library and Information Science*, 2nd ed. (London/New Providence: Bowker-Saur, 2000) at 202.

34. Boyle, *supra* note 3 at 65.

35. See the Canadian *Copyright Act*, *supra* note 18, s. 2, as amended to include computer programs in 1988: “‘literary work’ includes...computer programs...”

36. My former law student David Faye analyzed and critiqued this model from the standpoint of its efficacy in embracing aboriginal peoples’ interests in traditional knowledge. See David Faye, “A Question of Recognition: Bioprospecting, Gene Patenting, and the Role of Indigenous Populations in Reichman and Uhlir’s Contractually Reconstructed Commons” in the *Working Paper Series of the Centre for Innovation Law and Policy* at <[http://www.innovationlaw.org/lawforum/pages/workingpaper\\_series.htm](http://www.innovationlaw.org/lawforum/pages/workingpaper_series.htm)>; also forthcoming in *Journal of World Intellectual Property*.

37. Abraham Drassinower, “A Rights-Based View of the Idea/Expression Dichotomy in Copyright Law” (2003) 16 *Can. J.L. & Jur.* 3 at 10.

38. *Ibid.* at 15. This partitioning of the world into public domain and copyrighted expression relies completely, as the author expressly acknowledges, on the idea/expression dichotomy. Since this particular dichotomy does not play a role in the patent system, it will be interesting to see the author’s position on the relationship between patent and the public domain.

One of the major areas of difference between the United States and Canada in the context of the debate over the public domain is often thought to pertain to the treatment of government information. Under Canadian law, there is explicit statutory recognition of the Crown's right to hold copyright.<sup>39</sup> On the other hand, under the American legislation, there is an equally explicit prohibition against the U.S. federal government holding copyright in its own productivity. Can this distinction between ideas and expression on which Drassinower has focused our attention serve any policy function in reconciling or evaluating these two very different approaches? Can we ask whether government documents should fall within copyright if they are deemed to be expression and lie outside if they are deemed to be merely facts or ideas? Given the choice of this dichotomy, one might argue that Canada has adopted the correct view and that government documents, if they are original expressions, should be covered by copyright.

But this is not the distinction that Drassinower is making when he argues that the significance of the public domain is that it is necessary for a free and equal interaction for potential authors. His view of the role of the public domain seems to echo more the American position that the kinds of concerns safeguarded through the protection of freedom of expression also mandate unfettered access to the products of government and hence the unequivocal assignment of products of the federal government to the public domain.

Moreover, in commenting on the role of the public domain, Drassinower was writing in the context of an analysis focused only on copyright. A distinction such as the idea/expression dichotomy does not seem to be readily transferable to the patent arena. Can one say of the public domain and of patent that the relevant distinction which will delineate the bounds of the public domain is that which exists between inventors and potential inventors as, in the copyright environment, Drassinower claims that the world is composed of the authors of expressions and the potential authors of expressions? It seems difficult to incorporate into this boundary the relatively short lifespan of the patent. If technology post-patent falls into the "public domain," how can this be captured as a distinction between inventors and potential inventors?

### 2.3. *Is the "public domain" capable of empirical identification?*

My fellow panelist, Pamela Samuelson, and I each hold a joint appointment between a faculty of law and a faculty concerned with the study of information. It is perhaps not surprising then that, given our respective interdisciplinary environments, we have each, at different times and in different forums, published pieces that have attempted to demonstrate what an empirical modeling of the public domain might look like.<sup>40</sup> Each of our exploratory papers argues for a realistic modeling, description or definition of the public domain that is developed by attempting to discover the meaning of the public domain by empirical

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39. See the *Copyright Act*, *supra* note 18, s.12.

40. Pamela Samuelson, "Mapping the Digital Public Domain: Threats and Opportunities" (2003) 66 *Law & Contemp. Probs.* 147, <[http://www.law.duke.edu/shell/cite.pl?66+Law+&+Contemp.+Probs.+147+\(WinterSpring+2003\)](http://www.law.duke.edu/shell/cite.pl?66+Law+&+Contemp.+Probs.+147+(WinterSpring+2003))>; Margaret Ann Wilkinson, "Anticipating the Impact of Intellectual Property Protections" (1996) 21 *Canadian Journal of Information and Library Science* 23.

means—that is, by means of an examination of the actual material which demonstrably falls into it through the operation of various laws.

While Pamela Samuelson also acknowledges the differences in the contours of the public domain in different jurisdictions,<sup>41</sup> her model focuses on providing an initial topology, grounded in the American experience, of the contents of the “public domain.” In Figure 1 of her paper, Samuelson has created within the central oval a taxonomy of information elements which she identifies as falling within the “public domain”<sup>42</sup> and then, radiating out from this oval between spokes, she has listed other “terrains” which she has identified as being “adjacent” to the “public domain.”<sup>43</sup> The taxonomy of items in this second section of her “map” is different in kind from the elements in the oval section of the map. The oval-section items might be identified collectively as information ele-

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41. Samuelson, *ibid.* at 148.

42. Within the oval in Figure 1 in Samuelson’s model we find the following: scientific & mathematical principles; ideas, concepts, theories; words, names, numbers, symbols; information not qualifying [for intellectual-property protection]; information qualifying: rights expired; information qualifying: rights not claimed; facts, data, information; laws, regulations, judicial opinions.

43. Moving clockwise around the oval in Figure 1 in Samuelson’s model, from the top, we find the following: classified information; murky area; open source; widely usable without restriction; fair use & privileged uses; copyright; trademark; patent; trade secret; other IPR [intellectual-property rights], PVPA [*Plant Variety Protection Act*, Pub.L.No.91-577, 84 Stat.1542 (1970), as amended], SCPA [*Semiconductor Chip Protection Act of 1984*, Pub.L.No. 98-620, 98 Stat.3347 (1984)]. The classification of “murky area” is a bold rubric that one cannot but admire; in this context, as Samuelson explains, it includes “some intellectual creations [that] are, in theory in the public domain, but for all practical purposes, do not really reside there.” She provides several examples: a painting in which copyright has expired but which is held in a private collection and is not made available to the public, or an original work of art in which copyright has expired but which has been destroyed (by implication from her example, it continues to be present in public through reproductions or other representations), or, from another perspective, material which is in the public domain from one perspective—for example, it enjoys no copyright protection—but is protected from another, for example, through trademark. See *supra* note 40 at 149, and including footnotes 12 and 13 in particular. As discussed below, information that is free from copyright control is not specifically required to be made freely available. Therefore, it seems to me that in as much as anything out of copyright is in the public-domain space on Samuelson’s chart, the privately held painting should be also. I would suggest that the ambiguity felt by Samuelson that led her to place that example in the “murky” area is really a reflection of the inadequacy of the concept of the public domain in capturing the nuances of particular experiences relating copyright and access. The “murky” example of the destroyed work is indeed conceptually and analytically interesting from the point of view of copyright law—but it seems that its “murkiness” lies in analysis, not in any ambiguity of its role once this has been determined. It would seem that a work once destroyed cannot lie in the public domain any more than it can then be held as private property: use can only be made of its “descendants” (prints, derivative works, copies, etc.), if there are any, and issue would become the existence and ownership of any copyright interests in those descendants. Finally, if the public domain is taken to refer to access or wide dissemination generally, and not just in the context of copyright, then there is nothing “murky” about an artifact protected in trademark but not in copyright: it would fall outside the public domain. Again, Samuelson, in invoking the “murky” section seems to be highlighting some inadequacies in the conceptualization of the public domain. If the concept applies only to copyright, then what can it really mean if the public control or use of the artifact in the “public domain” can be circumscribed by another intellectual-property device. On the other hand, is it any different if other law, outside the ambit of intellectual property, circumscribes public activity with information defined as falling within the ambit of the public domain in an intellectual-property context?

ments, such as facts,<sup>44</sup> laws,<sup>45</sup> symbols<sup>46</sup> and so on.<sup>47</sup> The categories of the taxonomy of the “adjacent terrains” are of a different order: “fair use & privileges uses,” “widely usable without restriction,” “open source”<sup>48</sup> and the intellectual-

44. The extent to which facts remain in the public domain in the United States, given the recent *sui generis* legislation covering databases, is one of the matters of concern to Pamela Samuelson – a matter which she addresses in the remainder of her article, “Mapping the Digital Public Domain: Threats and Opportunities,” *supra* note 40 at 158–66. It is also a situation much discussed by Jerome Reichman and Paul Uhler in “A Contractually Reconstructed Research Commons,” *supra* note 19 at 374–78. Canada has no such database legislation. Moreover, the extent of copyright protection of databases in Canada is still uncertain, given the appeal to the Supreme Court of Canada in *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2002 FCA 187, <<http://decisions.fct-cf.gc.ca/fct/2002/2002fca187.html>>, [2002] 4 F.C. 213 (F.C.A.) [*CCH* cited to F.C.], which is further discussed below.

45. As noted, Samuelson has placed “laws, regulations, judicial opinions” within the public-domain space in her map. It is most probably the case that these instruments are not in the public domain in Canada but, rather, are covered under Crown copyright. Reproduction of Federal Law Order S.I./97-5, C. Gaz. 1997.II. 444 (Registration January 8, 1997) (Canada Gazette Part II, Vol.131, No.1) provides the following:

Whereas it is of fundamental importance to a democratic society that its laws be widely known and that is citizens have unimpeded access to that law;

And whereas the Government of Canada wishes to facilitate access to its law by licensing the reproduction of federal law without charge or permission;

Therefore...

Anyone may, without charge or request for permission, reproduce enactments and consolidations of enactments of the Government of Canada, and decisions and reasons for decisions of federally-constituted courts and administrative tribunals, provided due diligence is exercised in ensuring the accuracy of the materials reproduced and the reproduction is not represented as an official version.

There has been a roughly corresponding administrative directive in Ontario since 1998. Currently, the provinces and territories of Canada vary in their approaches to this issue. See the chart prepared by my research assistant E. Prokopenko, “Crown Copyright Policy in Provinces and Territories of Canada” in M.A. Wilkinson & S. Trosow, *Cases and Materials on the Law of Intellectual Property, 2003–2004* (London, Ontario: Faculty of Law, University of Western Ontario, 2003) at 374–78. See also in this connection two articles by one of my colleagues: Mark Perry, “Acts of Parliament: Privatization, Promulgation, Crown Copyright—Is There a Need for a Royal Royalty?” [1998] N.Z.L. Rev. 493–529 and Mark Perry, “Judges’ Reasons for Judgments—To Whom Do They Belong” (1998) 18 N.Z.U.L. Rev. 2 at 257–93. It is clear then that in Canada these instruments can only possibly be included in the public domain if the broadest definition of an intentional, actively created public domain is adopted (see below)—and then only in some Canadian jurisdictions.

46. Words, names, numbers and symbols may well be protected in Canada, either through statutory trademark (see, in this connection, *United Grain Growers Ltd. v. Lang Michener*, 2001 FCA 66, <<http://reports.fja.gc.ca/fc/2001/pub/v3/2001fc28477.html>>, [2001] 3 F.C. 102 (F.C.A.) [*United Grain* cited to F.C.] or through the common-law action for passing off and hence not being available in the public domain in respect of certain uses (at least in respect of the limitations on protected uses, see *Compagnie générale des établissements Michelin–Michelin & Cie v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (C.A.W.–Canada)* (1996), [1997] 2 F.C. 306, <<http://reports.fja.gc.ca/fc/1997/pub/v2/1997fc19917.html>>, (1996), 71 C.P.R. (3d) 348 (F.C.T.D.) [*Michelin* cited to F.C.]). Pamela Samuelson’s map has Trademark marked as an “adjacent territory.” In addition to the problem of having some words, names, numbers and symbols extracted from the public-domain space and repositioned into the adjacent space of trademark, trademark is also a challenging device to map in this way because it depends for its existence upon a public recognition of a distinctive relationship between a particular mark and the goods or services to which it is attached. In a very real sense, the public perception defines the intellectual property, which can be claimed—and, in that sense, the trademark belongs to the public just as much as to the rights-holder. These relationships, then, are very difficult to map within the constraints of this two-dimensional representation.

47. The category of “Information qualifying: rights not claimed,” which Pamela Samuelson places within her oval of the public domain, is problematic in this regard. Again, for this type of information to qualify as public domain one would have to adopt the broadest definition of the public domain, one that would embrace an actively created domain, see below. In the copyright environment, unless there was an express notice to potential users abandoning the rights-holders’ rights, the public would really not be in a position to rely upon any notion of “Qualifying information: rights not claimed” because the rights-holders’ rights are asserted through an infringement action, which would logically occur only after the disputed use.

48. As discussed above, many consider the open-source software movement to be the epitome of public-domain activity and would quarrel with Samuelson’s view of its public role by placing it in an adjacent area, but without accepting it as quintessentially falling within the public domain.

property devices themselves.<sup>49</sup>

It is interesting that “fair use” is here identified as an “adjacent terrain” rather than as a clear component of the “public domain” itself. Describing matters from a perspective akin to Pamela Samuelson, American Yochai Benkler has written that, “the traditional definition of public domain would treat short quotes for purposes of critical review as a fair use—hence as an affirmative defense – and not as a use in the public domain.”<sup>50</sup>

On the other hand, arguing from the perspective of the traditional Canadian experience of “fair dealing,” my earlier paper specifically called for a rigorous empirical examination of both “fair use” and “fair dealing” as elements of the “public domain” (see my Figure 2). This may reflect not only my national origins<sup>51</sup> in an environment where the fair-use exception has been interpreted as being almost completely categorical rather than as being situated in the context of any situational factors,<sup>52</sup> but also my dual professional background. In library-and-information science literature, despite the fact that in North America this professional literature primarily originates from U.S. authors, fair use is often assumed to be one of the elements contributing to the public domain – that is, “that which is not protected by copyright.”<sup>53</sup> Indeed, even though Yochai Benkler acknowledges the interpretation of the fair-use exception set out above, his own preferred definition for the “public domain” would move most examples of fair

49. Recall the point made above that the requirement that the patent be laid open to the public may arguably bring the patent into the public domain, even as narrowly defined; this would seem to be the attitude of the Supreme Court of Canada, as discussed above. Or it may be that the adjacent status here is meant to reflect that ambivalence between statutory monopoly over the production and sale of the invention on the one hand and the public status of the information about the invention on the other. Or, the complexity of the patent may be too difficult to map in two dimensions, which may be the effect of the kinds of nuanced differences between copyright and patent that were enunciated by the United States Supreme Court in *Eldred*, *supra* note 26. It should also be noted that in David Lange’s paper, acknowledged to be pivotal in its consideration of the public domain, as noted above, he argues that most problems in the public domain lie outside the bounds of copyright and patent law but instead lie inside such areas as the courts’ treatment of the right of publicity (not present in Samuelson’s map) or of trademark use. See Lange, *supra* note 3 at 158.
50. Yochai Benkler, “Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain” (1999) 74 N.Y.U.L. Rev. 354 at 362, <<http://www.nyu.edu/pages/lawreview/74/2/benkler.pdf>>.
51. Janus, “Defending the Public Domain in Copyright Law: A Tactical Approach—Part I,” *supra* note 3 at 386, writing also from the Canadian perspective, clearly identified fair use and fair dealing as falling within the public domain: “The final major category of the public domain involves uses of protected works which are specifically exempted from copyright violation by federal statute. The best example, for our purposes, is the fair use/fair dealing exemptions in the United States and Canada.”
52. See note below on the current appeal before the Supreme Court of Canada from the judgment of the Federal Court of Appeal in *CCH*, *supra* note 44.
53. Deborah Chalsty, “The Economic Logic of Copyright” (1999) 17 Legal Ref. Serv. Q. 145 at 150. According to Joan F. Cheverie, “The Changing Economics of Information, Technological Development, and Copyright Protection: What are the Consequences for the Public Domain?” (2002) 28 The Journal of Academic Librarianship 325 at 328:

However, copyright also recognizes the necessity of balancing the exclusive rights of information owners with those of society as embodied in the public domain, the seedbed of creativity and innovation. The monopoly of the rights holders is limited in time to retain this balance. Additionally, the fair use doctrine was devised to prevent the copyright holder’s exclusive right to make copies and derivative works from becoming an instrument for controlling the flow of ideas [statutory reference omitted].

use—and all examples of the Canadian fair dealing, as classically understood<sup>54</sup>—into the realm of the public domain and, referring to Pamela Samuelson’s map, out of adjacent territory and into the oval.<sup>55</sup> Indeed,

[t]he public domain is the range of uses of information that any person is privileged to make absent individualized facts that make that particular use by a particular person unprivileged.<sup>56</sup>

Justice Binnie, speaking for the majority of the Supreme Court of Canada, would appear to have adopted in *obiter*<sup>57</sup> in the recent case of *Théberge*<sup>58</sup> a model of the “public domain” which is similar to that which I have described and to that which Yochai Benkler has defined:

Excessive control by holders of copyrights and other forms of intellectual property may unduly limit the ability of the public domain to incorporate and embellish creative innovation in the long-term interests of society as a whole, or create practical obstacles to proper utilization. This is reflected in the exceptions to copyright infringement enumerated in ss. 29 to 32.2, which seek to protect the public domain in traditional ways such as fair dealing for the purpose of criticism or review and to add new protections to reflect new technology, such as limited computer program reproduction and “ephemeral recordings” in connection with live performances.<sup>59</sup>

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54. Currently, the Canadian defence of “fair dealing” appears in the *Copyright Act*, *supra* note 18, ss. 29, 29.1 and 29.2. It is the interpretation of these provisions that is at issue in the pending litigation before Supreme Court of Canada in *CCH*, *supra* note 44. Despite the simpler wording of the Canadian sections, which do not contain the tests for fair use present in the American statute, in *CCH* Linden J.A. (speaking for himself) and Sharlow J.A. at paragraphs 150–60 identified the following factors “that are usually among the non-exhaustive list of considerations: (1) the purpose of the dealing; (2) the nature of the dealing; (3) the amount of the dealing; (4) alternatives to the dealing; (5) the nature of the work in question; and (6) the effect of the dealing on that work.” At para. 150, the court stated that these factors “should influence the fairness of the Law Society’s dealings with the Publishers’ works on behalf of patrons of the Great Library.” Rothstein J.A. concurred in the result but with independent reasons. He expressly concurred, however, with his two brother judges on this approach to fair dealing (see para. 296).
55. As Pamela Samuelson indeed notes this is Yochai Benkler’s perspective, see Samuelson, *supra* note 40 at footnote 14.
56. Benkler, *supra* note 50 at 361–62. He goes on to define the obverse: “Conversely, the enclosed domain is the range of uses of information as to which someone has an exclusive right, and that no other person may make absent individualized facts that indicate permission from the holder of the right, or otherwise privilege the specific use under the stated facts.”
57. Significantly, on the facts in *Théberge v. Galerie d’Art du Petit Champlain Inc.*, 2002 SCC 34, <[http://www.lexum.umontreal.ca/csc-scc/en/pub/2002/vol2/html/2002scr2\\_0336.html](http://www.lexum.umontreal.ca/csc-scc/en/pub/2002/vol2/html/2002scr2_0336.html)>, [2002] 2 S.C.R. 336 [*Théberge* cited to S.C.R.], the holder of the economic rights and the artist who controls the moral rights would be in common cause in opposing the actions of the third-party art gallery which purchased copies of the work, without any copyright interest, and then transferred the work from one medium to another. Because of the nature of the proceeding being appealed—a pre-trial seizure under the Civil Code of Quebec—the issue of the moral-rights interest in the work was not before the Court. However, Binnie J. did say in *obiter* at para. 58 that, “To the extent a change in substrate can be said to change the ‘physical structure’ containing the [artist] respondent’s work, it does not ‘by that act alone’ amount to a violation of a moral right either.” For the purposes of the present discussion, it is sufficient to point out that only private interests were in competition on the facts of the case; there was no issue directly involving the public domain.
58. However, the precise issue in the case—a case arising out the Province of Quebec with its distinctive civil law tradition—was not concerned with the classical copyright balancing of private incentives versus public access or dissemination, but, rather, as was characterized by the majority, the issue was concerned with a competition between the statutory, economic copyright interests of the copyright holder and the civil-law proprietary rights of the purchasers of the printed matter. See Binnie J., speaking for himself, and McLachlin C.J.C. and Iacobucci and Major JJ. in *ibid.* at paras. 31–33.
59. *Ibid.* at para. 32, Binnie J.

As mentioned above, Reichman and Uhler create a highly expansive definition of the public domain in their paper:

We define the “public domain” as sources and types of data and information whose uses are not restricted by statutory intellectual property (“IP”) laws and other legal regimes and that are accordingly available to the public for use without authorization. For analytical purposes, information in the public domain, including scientific data and information, may be divided into three major categories:

- (1) Information that is not subject to protection under exclusive IP rights.
- (2) Information that qualifies as protectable subject matter under some IP regimes, but that is contractually designated as unprotected (for example, is transferred or donated to a public archive or data center, or is made available directly to the public, with no rights reserved). Typically, such material consists of scientific data collections.
- (3) Information that becomes available under statutorily created immunities and exceptions, which is also important in this context although it does not constitute public domain information per se.<sup>60</sup>

This definition appears to move most of the categories identified by Pamela Samuelson as bordering upon the public domain into the public domain itself.<sup>61</sup>

It may be noted that the need for a representation of the public domain in patent as being a contractually constructed commons might not be so acute in the Canadian context where patent is available over a narrower sphere of subject matter, though not over higher life-forms and business methods—thus leav-

60. Reichman & Uhler, *supra* note 19 at 318–19 at footnote 10.

61. The paper published by Jerome Reichman and Paul Uhler in the *Journal of Law and Contemporary Problems* is considerably re-worked from the version of the paper that was originally presented at the Duke Conference on the Public Domain; see J.H. Reichman & Paul F. Uhler, “Promoting Public Good Uses of Scientific Data: A Contractually Reconstructed Commons for Science and Innovation” in *Focus Paper Discussion Drafts for the Conference on the Public Domain, Duke University School of Law, November 9–11, 2001* at 239, <<http://www.law.duke.edu/pd/papers/ReichmanandUhler.pdf>>. Whereas at the Conference, Reichman and Uhler began with a consideration of the ambit of the public domain (Part I.A. Defining the Public Domain) at 242, this concern was relegated to a footnote in the subsequent publication (see *supra* note 19). The definition of the public domain is changed between the two papers in some interesting ways. As may be seen from the earlier definition, following, it is unambiguously clear that the fair-dealing exception lies within their conception of the public domain. On the other hand, with the later definition reproduced in the text above, there is an ambiguity introduced because the third category is indicated to be a category of the public domain and yet the definition of that third category indicates that “it does not constitute public domain information per se.” According to *ibid.* at 242–43 (footnotes omitted):

For the purposes of this paper, we define the public domain in terms of sources and types of information whose uses are not impeded by legal monopolies grounded in statutory intellectual property regimes, and which is accordingly available to some or all members of the public without authorization. For analytical purposes, the public domain in information...may be subdivided into three major categories:

- (1) information that is not subject to protection under exclusive intellectual property rights;
- (2) information that qualifies as protectable subject matter under some intellectual property regime[s], but that is contractually designated as unprotected; and
- (3) information that becomes available under statutorily created immunities and exceptions from proprietary rights in otherwise protected material, such as the “fair use” exception in copyright law, which promote certain public-interest goals at the expense of proprietors’ exclusive rights

Later the two authors, in the earlier paper, give the example of compulsory licences in this third category (see *ibid.* at 256).

ing more “unpatentable” and thus in the public domain without need of an active transfer of rights by patent-holders to a constructed commons.

Reichman and Uhlir also introduce a new dimension in their definition of the “public domain.” Rather than have the public domain exist as matter of law, it is treated as both an active and a passive space: “...the public domain must be actively created, rather than [be] passively conferred.”<sup>62</sup> If one assumes that the patented technology, disclosed as being part of the laying open of patents required in return for the limited-term monopoly of patent, forms part of the public domain, then it is clear that this notion of a distinction between active and passive participation is also echoed by Doern and Sharaput. They point out that, in Canada as in other countries, patent information has been “made available” passively rather than having been put into public circulation in any active way.<sup>63</sup> They then contrast this passivity with a “more aggressive, value-added IP dissemination role”—a role that the Canadian government has declined to take on.<sup>64</sup>

If there is an ability to participate in the public domain by actively seeking out this participation, rather than by being passively categorized into it, this would of course pose further challenges to the kinds of categorizations that I set out in my earlier paper and that are part of the mapping that Pamela Samuelson has effectuated.

If the Reichman and Uhlir notion of active participation in public-domain creation is viable, then it might be useful at a comparative level in seeking to explain the challenge of various national differences. For example, virtually all definitions of the public domain point out that, once copyright has expired, previously protected expressions fall into the public domain. As was pointed out earlier, works in the United States and works in Canada have traditionally enjoyed different durations of copyright monopoly. After a very brief and companionable period of mutual agreement about the appropriate length of copyright, these two jurisdictions have again parted company with regard to the length of protection for copyrighted works. However, now it is the American monopoly that is longer and the Canadian that is shorter. Thus, the “rights-expired” element of Samuelson’s map would necessarily create proportional differences in the diagrammatic representations which I had developed some years ago.<sup>65</sup> The Canadian and American “publics” have experienced not only differ-

62. *Supra* note 19 at 331.

63. Doern & Sharaput, *supra* note 12 at 162.

64. *Ibid.* at 166.

65. In my earlier work, I had hypothesized (and represented in Figures 1 and 2) that the universe of works in existence in the United States in copyright would be smaller than the comparable proportion of works in Canada. This hypothesis was based upon the inclusion of Crown work within the category of copyrighted works in Canada and the much longer experience of the *Berne Convention* term of protection in Canada. Now, given the extension of copyright protection in the U.S. to the life of the author plus an additional 70 years, I would hypothesize the reverse: Canada will now have lesser proportion of its works in copyright than the proportion that is in copyright in the U.S. I had hypothesized then that proportionately more users in the United States were able to take advantage of the American fair-use exceptions than was the case under the Canadian fair-dealing exceptions. Despite the subsequent additions to the Canadian statute of various further exceptions, such as those for educational institutions (*Copyright Act, supra* note 18, ss. 2, 29.4–30 and 30.3) and “libraries, archives and museums,” as defined under the Act (*ibid.*, s.2 and ss.30.1, 30.2 and 30.3), I would hypothesize that a greater proportion of users in the United States still benefits from the exceptions than is the case in Canada and that, if the Supreme Court of Canada upholds the Federal Court of Appeal’s factors in *CCH, supra* note 44, for determining the fairness of the use in Canada, it would be even more likely that this hypothesis will in fact be borne out.

ent public domains, but also different proportions of public domains relative to each other over different periods in history, such as, for example, over the course of the twentieth century. These differences over time have occurred through changes in the American copyright environment.

Is it possible, within a consistent notion of the “public domain,” to account for or to reconcile these differences? Or is it sufficient to demonstrate empirically that these differences in scope exist and to agree both that the ambit of the public domain appears to be jurisdictionally—that is, nationally—bound and that that which falls within the ambit of the public domain may differ from jurisdiction to jurisdiction?<sup>66</sup> That is, even if its outlines are established to have different contours in different countries, can it be said that the role, if not the specifics, of the public domain remain constant across jurisdictional frontiers? But what is that role? Is the notion of the public domain a theoretical construct or is it merely a useful descriptor to provide a reflection of national policy?

#### 2.4. *Is the notion of the “public domain” a theoretical construct?*

##### 2.4.1. An access model: “Open to use by anyone”

Is the definition from the *Dictionary of Publishing* that we have challenged as being descriptively inadequate nonetheless functionally accurate? The definition makes the assumption that works in the “public domain,” which it makes clear are works not protected by patent, trademark or copyright, are “open to use by anyone.” But is this the function of the public domain?

Even in the copyright context, as Drier reminds us, “falling into the public domain” does not necessarily mean being able to access the information; rather, it opens up the market to other suppliers of the same expression—“an opportunity to produce new editions at a cheaper price and hence with wider circulation.”<sup>67</sup>

On the other hand, returning momentarily to the definition from the *Dictionary of Publishing*, it will be recalled that the result of being in the public domain—according to that conception of the public domain – was that the information therein would be “open to use by anyone.” The focus from this perspective is on use of the information. This perspective may be analytically useful in the realm of the distinction between trademark and the public domain. The essence of the trademark is control over use of marks in connection with goods and services. There are national differences in the extent to which the monopoly over use of trademarks in connection with goods and services is protected. The American-style protection of famous marks from dilution, for example, has no equivalent in Canadian law.

There has been a recent furore in library-and-information-science circles over litigation pending in the United States between OCLC, the major purveyor

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66. As noted above, demonstrable differences exist just between Canada and the United States, for example, in terms of the possible scope of the public domain, which affects the mapping created by Pamela Samuelson in a significant number of instances.

67. Thomas Drier, “Balancing Proprietary and Public Domain Interests: Inside or Outside of Proprietary Rights?” in Rochelle Cooper Dreyfuss et al., eds., *Expanding the Boundaries of Intellectual Property: Innovation Policy for the Knowledge Society* (Oxford: Oxford University Press, 2001) 295 at 305.

of cataloguing information today, and a New York hotel which has had the temerity to call itself the Library Hotel and to incorporate into its décor elements of the Dewey Decimal System.<sup>68</sup> It appears that OCLC has also registered DEWEY as a Canadian trademark, specifically in connection with print wares and educational services.<sup>69</sup> It is most unlikely that an action like the present American action would be successful in Canada in curbing the use of a “Dewey theme” in a hotel. One might therefore argue that, using this notion of the public domain as an access concept, the public domain in respect of trademark, at least, is larger in Canada than it is in the United States.

However, the making of things available to the public actually occurs more through depository schemes,<sup>70</sup> through access-to-information legislation and through such things as Canadian-content regulations in broadcasting.<sup>71</sup> Thus, given the fact that being out of copyright or patent does not necessarily create access and given the fact that access is covered in other areas of the law, the concept of the public domain as an intellectual-property-law construct cannot be consistently maintained only from the perspective of access.

#### 2.4.2. A functional model: active vs. passive creation

James Boyle has asked whether the role of the public domain is to create a repository of ideas that are uncontrolled by anyone and are thus available to be used by anyone, or to create a repository that is free—possibly including a communal right to forbid certain kinds of uses of the shared resource—or to create some combination thereof.<sup>72</sup> Reichman and Uhler, who, as we have discussed, have proposed the widest characterization of the public domain, seem to see the public domain in functional terms, defining it as “a public space in which the traditional sharing ethos can be preserved and insulated from the [current] commodifying trends...”<sup>73</sup> and as one that will “ensure a continuous flow of raw materials through the national innovation system;”<sup>74</sup> yet, they also recognize that this “public domain” is not the original “public domain” but that it is a “contractually reconstructed public domain”<sup>75</sup> which will include an “impure domain”<sup>76</sup> wherein information will not be freely available but instead will be

68. Writ issued in the United States District Court Southern District of Ohio Eastern Division between OCLC Online Computer Library Center, Inc. and 299 Madison Avenue, LLC for doing business as “The Library Hotel” in September 2003, available at <<http://www.bespecific.com/mt/resources/2003.09.22.hotel.pdf>>.

69. Registration No. TMA 455424, registered in the Canadian Trademark Office in 1996.

70. Note that Canada’s depository system, in the sense of making government information available to the public, has not been legislated; see Elizabeth Macdonald Dolan, *The depository dilemma: a study of the free distribution of Canadian federal government publications to depository libraries in Canada* (Ottawa: Canadian Library Association, 1989). On the other hand, there has long been a legislated requirement for publishers to deposit monographs with the National Library of Canada. See *National Library Act*, R.S.C. 1985, c. N-12, s. 13.

71. Thomas Drier has a similar list; see *supra* note 67 at 310.

72. *Supra* note 3 at 61–62.

73. Reichman & Uhler, “A Contractually Reconstructed Research Commons,” *supra* note 19 at 418.

74. Reichman & Uhler, “Promoting Public Good Uses of Scientific Data,” *supra* note 61 at 296.

75. *Supra* note 19 at 448.

76. Reichman and Uhler, in *supra* note 61 at 308, use the term “impure domain.” In the later, reworked document, *supra* note 19 at 455, the authors admit that their reconstructed research commons is not a pure commons but, rather, is something that would be “a second-best arrangement that could be expected to emerge from brokered individual transactions in a high-protectionist legal environment, [which would require] a judicious resort to conditionality....”

available only under restricted conditions.

The concept of being “open to use by anyone” (the access model, as discussed above) is not broad enough to include the actively created public-domain constructs of the open-source software community or Reichman and Uhler’s patent commons. These models impose conditions upon the recipients of information. The communities that participate in these “public” domains are not open communities, regardless of how large they might be. In other words, Reichman and Uhler’s commons is not necessarily a free or costless domain.

If the public domain can be characterized as being an actively created space that can be created either through state action or through private actors so long as it facilitates a widespread (though not universal) sharing of information resources at a relatively low cost (though not necessarily without cost), then the concept of the public domain would encompass the open-source software movement and the proposed patent commons. But would it be possible under this conception of the public domain to limit its application in any meaningful way? Would we be willing, for example, to accept as part of the public domain the collective licensing regimes in the Canadian copyright context, which are presided over by the Canadian Copyright Board?<sup>77</sup> Given the fact that collectives must make their records widely available,<sup>78</sup> might this be considered to be an augmentation of the public domain? Is the making of the provision of permission for uses through the payment of state-approved royalties<sup>79</sup> having the result of making copyright uses “open to use by anyone” and thus a part of the public domain? One would think that this would exceed any typical understanding of the public domain. Would we be willing to characterize Canada’s legislated private-copying regime,<sup>80</sup> which imposes a levy on manufacturers for sales of blank audio-recording media<sup>81</sup>—a levy which is inevitably passed on to the purchasers of these media—and which at the same time statutorily permits certain reproductions of copyrighted works onto audio-recording media for the private use of the copier,<sup>82</sup> as an aspect of the public domain? In this regard it should be noted that the levy is mandated to be distributed to copyright holders.<sup>83</sup>

Although this private-copying regime functionally creates certain freedoms of use for members of the public and might therefore be said to be enlarging the public domain, the regime also guarantees “remuneration” (the statutory term) to rights-holders drawn from a wider segment of the population (those who buy audio-recording media) rather than to those who will actually make any use of the media that would, absent this regime, be reserved exclusively to the rights-holders. It would appear that both this regime and the collective management of rights in general, in the Canadian copyright environment, are too complex to be adequately characterized by notions of the public domain, whether

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77. See Part VII, “Copyright Board and Collective Administration of Copyright,” of the *Copyright Act*, *supra* note 18, ss. 66–78.

78. See the duty to provide public access to the repertoires of various collecting societies, *ibid.*, s. 67.

79. See e.g. *ibid.*, s. 68(3), concerning the Copyright Board’s role in certifying certain tariffs.

80. *Ibid.*, ss. 80–88.

81. *Ibid.*, s. 82.

82. *Ibid.*, s. 80.

83. *Ibid.*, s. 81.

understood functionally or understood in terms of access mechanisms.

This overview of current conceptions of the public domain indicates that there are significant differences of opinion concerning its scope and origins; these include differences concerning the scope of the public domain in terms of the intellectual-property devices involved in its articulation and differences concerning whether the public domain emerged of its own accord or was actively created. There has not yet emerged a theoretical approach for resolving these differences and, thus, there is not at present a consistent theoretical foundation for the public domain.

## 2.5. *Is the concept of “public domain” merely a rhetorical device?*

### 2.5.1. *Is its etymology important?*

Returning to the etymology of the term “public domain,” what is the importance of the concept of the “domain”?

A “domain” has a clear etymological history based on land ownership.<sup>84</sup> In the context of the rising attention being given to the notion of property inherent in the concept of intellectual property,<sup>85</sup> the adoption of the property-based language for the rights of the public is indeed a compelling one. Against the property claims of the intellectual-property rights-holders we pit the property claims of the public. Certainly, the notion of the “public domain” seems to be a more powerful rhetorical device to emphasize in the face of a regime of private interests perceived to be in competition with it. After all, in the first enclosure movement the capitalist property interests certainly won out over the communitarian notions of the commons! As Boyle puts it:

To the “bundle of rights” conception of property...can be counterposed the “bundle of privileges” vision of the public domain, where we assume, for example, that fair use over a copyrighted work is part of the public domain.<sup>86</sup>

This kind of property-based language certainly enhances the appeal of the notion of “mapping” the public domain: that which is not defined as private property—as falling within the monopolies of intellectual-property devices—will be the property of the public. Such binary thinking has often served Anglo-American-Canadian jurisprudence well, as it is grounded in the adversarial process.

However, a binary approach to issues can also sometimes mask the complexities of the relationships at stake and therefore not serve long-term policy goals in the best manner possible. My former colleague, Wendy Adams, for example, has warned against viewing information problems only within the circle

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84. See *The Oxford English Dictionary*, 2nd ed., prepared by J.A. Simpson and E.S.C. Weiner (Oxford: Clarendon Press, 1989); *The Oxford Dictionary of English Etymology*, ed. by C.T. Onions (New York: Oxford University Press, 1966); *The Oxford Dictionary of Word Histories*, ed. by Glynnis Chantrell (Oxford: Oxford University Press, 2002); *The Barnhart Dictionary of Etymology*, ed. by Robert K. Barnhart (New York: H.W. Wilson, 1988); and *Cassell's Dictionary of Word Histories*, ed. by Adrian Room (London: Cassell, 1999).

85. Here it is instructive to note that Georges Koumantos dates the use of the term “intellectual property” only back as far as the 1950s. See Georges Koumantos, “Reflections on the Concept of Intellectual Property” in Jan J.C. Kabel & Gerard J.H.M. Mom, eds., *Intellectual Property and Information Law: Essays in Honour of Herman Cohen Jehoram* (The Hague: Kluwer Law International, 1998) 39 at 39. <[http://www.ipmall.info/hosted\\_resources/hennessey/concepts\\_intellectual\\_property.pdf](http://www.ipmall.info/hosted_resources/hennessey/concepts_intellectual_property.pdf)>

86. Boyle, “The Second Enclosure Movement,” *supra* note 3 at 68.

of the intellectual-property perspective; the original common-law rubrics can often serve instead to sort out the problems that are being encountered in the “information age.”<sup>87</sup> Moreover, it is difficult to reconcile this notion of the public domain with the traditional perspective on the moral-rights regime as being a system of personal rights. Certainly, it is difficult to “map” the realm of the interactions between the economic-rights holder and the public when another dimension of the map must include the holders of the moral rights who have their own control to exercise over the uses of the expressions in question.<sup>88</sup>

### 2.5.2. Is the concept of the “public domain” merely synonymous with the concept of the “public interest”?

For some authors, the “public domain” and the “public interest” are so clearly synonymous that there is no need to disentangle the two terms.<sup>89</sup> Abraham Drassinower, in examining both the property-based conceptions of the economic rights inherent in copyright and the rights-based European tradition, appears to believe that the two are, at least, directly related:

...[T]hough there may be an intuitive affinity between the public interest and the public domain, nothing in the [dominant] instrumentalist account of copyright law is in principle opposed to a minimalist conception of the public domain. ...[T]he question of the public domain...is a question about the requirements of the public interest, and the public interest may well require a severely constricted public domain.<sup>90</sup>

Drassinower shows that as well as, or even better than, the instrumentalist justification for the public domain, “the rights-based account regards both the author’s right and the public domain as a matter of inherent dignity.”<sup>91</sup>

In the *Oxford English Dictionary*, the term “public domain” occurs in connection with the fourth definition of “public”—and not in connection with the definition of “domain.” Its first listed occurrence is in 1832.<sup>92</sup> And the definition of “public” to which it is attached is conceptually difficult in the context of this discussion:

87. W.A. Adams, “Personal Property Law and Information Assets: Rehabilitation and Relevance” (2002) 36 Can. Bus. L.J. 267.

88. I describe elsewhere a functional approach to understanding the moral-rights regime in the context of the economic-rights regime. See Margaret Ann Wilkinson and Natasha Gerolami, “The Information Context of Moral Rights Under the Copyright Regime” forthcoming in *Proceedings of the Annual Conference of the Canadian Association for Information Science*, Winnipeg, 2004.

89. Gillian Davies in *Copyright and the Public Interest*, 2nd ed. (London: Sweet & Maxwell, 2002) at 5, begins to use the term “public domain” early in her Introduction, without defining it, in a context that makes it clear that she views the public domain as an aspect of the public good, as being in the public interest.

90. *Supra* note 37 at 20.

91. *Ibid.* at 21.

92. *Oxford English Dictionary*, 2d ed., vol. xii (Oxford: Clarendon Press, 1989), s.v. “public domain,” citing Whig Almanac 1844, 31,1, “Within a few years...restless men have thrown before the public their visionary plans for squandering the public domain.” And then again in 1943 J.S. Huxley TVA vii, 50, “over a quarter of the 40,000 square miles of the Southern Highlands is or will shortly be public domain, under either Federal or State ownership.” And, finally, in 1977, Listener 30 June 86 1/3, “After years of legal wrangles and bankruptcy, Jacques Tati has managed to get his films back into the public domain.”

4a. That is open to, may be used by, or may or must be shared by, all members of the community; not restricted to private use of any person or persons; generally accessible or available... Also (in narrower sense), that may be used, enjoyed, shared, or competed for, by all persons legally or properly qualified.

This latter, narrower sense would include Reichman and Uhlir's contractual commons.

There is, moreover, a sense in which the public interest is represented by government. Indeed, Crown copyright in Canada is exercised by governments in the public interest.<sup>93</sup> Charlotte Hess and Elinor Ostrom, in working on their conception of an information commons, found a dictionary definition of public domain where the first definition was "land owned by the government."<sup>94</sup> Indeed, the effectiveness at a national level of government ownership in moving national interests forward in intellectual property was the subject of comment by Reichman and Uhlir, who are quite candid about their views regarding the unfairness of European Union countries and of countries like Canada in clinging to the idea of the abilities of their respective governments to commercialize and control their own outputs in the face of the U.S. government's domestically imposed and legislated inability to do the same.<sup>95</sup>

While such devices as Crown copyright do not receive the approval of Reichman and Uhlir and, of course, are not without their Canadian detractors, they are protected by TRIPS. The "national interest" is deliberately preserved on the international level in the so-called "three-step test"<sup>96</sup> whereby a country's exceptions and limitations to the intellectual-property rights are limited to:

- (1) certain special cases that
- (2) do not conflict with a normal exploitation of the work and that
- (3) do not unreasonably prejudice the legitimate interests of the rights-holder.<sup>97</sup>

### 2.5.3. Is the "public interest" really just another way of expressing the "national interest"?

Copyright is, in particular, a device whose international enforceability rests upon the notion that each jurisdiction has a national interest in the protection of expressions—both of expressions within its own borders, wherever they are created, and of the productivity of the jurisdiction's authors wherever their works

93. See also Wilkinson, "Anticipating the Impact of Intellectual Property Protections," *supra* note 40 at 29.

94. Charlotte Hess & Elinor Ostrom, "Ideas, Artifacts, and Facilities: Information as a Common-Pool Resource (2003) 66 Law & Contemp. Probs. 111 at 114, <[http://www.law.duke.edu/shell/cite.pl?66+Law+&+Contemp.+Probs.+111+\(WinterSpring+2003\)](http://www.law.duke.edu/shell/cite.pl?66+Law+&+Contemp.+Probs.+111+(WinterSpring+2003))>, citing to Daniel Oran, *Oran's Dictionary of the Law* (St. Paul: West, 1983).

95. Reichman & Uhlir, "A Contractually Reconstructed Research Commons," *supra* note 19 at 329 and 424–25.

96. Thomas Drier views this three-step test as a strong indication of international respect for public interests. This argument is not persuasive for me because I tend to see this test as a very narrow one, limiting nation-states rather than empowering them. See *supra* note 67 at 309.

97. *Berne Convention*, <[http://www.jurisint.org/pub/01/en/doc/147\\_1.htm](http://www.jurisint.org/pub/01/en/doc/147_1.htm)>, Article 9(2); *TRIPS*, *supra* note 10, Article 13; *WIPO Copyright Treaty*, December 20, 1996, <<http://www.wipo.int/clea/docs/en/wo/wo033en.htm>>, Article 10(2); *WIPO Performances and Phonograms Treaty*, <<http://www.wipo.org/eng/diplconf/distrib/95dc.htm>>, December 20, 1996, Article 16(2).

may be disseminated beyond the jurisdiction's borders. The original *Berne Convention* was intended to advance the economic interests of each of the participating countries by obtaining protections for each country's respective authors when these authors' works were disseminated in other member states and, correspondingly, by recognizing the rights of authors from other member states when they disseminated works within its own jurisdiction. The principle of national treatment preserves the essentially nationalistic impulses behind the internationalization of copyright. The *Berne Convention* is essentially a pragmatic series of compromises between countries arrived at over more than a century by member states.

If, from time to time, countries differ with respect to the extent to which particular works should be given copyright protection, with respect to the particular rights that should be extended in connection with copyright or with respect to the particular exceptions or exemptions to be granted, then representations about the extent of the public domain will differ from country to country and, therefore, when the public is defined as being the nationals of any particular state, the public domain cannot be said to be necessarily a representation of any general, international, public interest. As Thomas Drier points out:

[W]hile the term "public interest" is often cited, there is a certain vagueness inherent in it. Who is, or who represents, the "public"? In some instances, the reference is to the "general" public, *i.e.* to society as a whole. In other instances, the reference is to the interest of a certain subgroups of society: for example, end-users, who are viewed as [being] in opposition to the interests of the rightholders. Furthermore, the label "public" is sometimes used to mask private—often commercial—interests; by the same token, denial of a "public interest" can be a mask for unfettered individualistic interests. In fact, post-modern discourse has made it clear that every one of us forms part of several "publics," each of which has its own unique interests.<sup>98</sup>

Bruce Doern and Markus Sharaput argue convincingly in their institutional examination of intellectual-property policy in Canada that differences between policy programs in patent and copyright at the federal level in part reflect the more complex relationships inherent in the copyright environment.<sup>99</sup> They stress the inevitable tension that exists in copyright between cultural and "industrial" policy and characterize the recent ascendancy of creator rights in Canada as, at least in large measure, being an extension of cultural policy.<sup>100</sup>

Indeed, Doern and Sharaput at first appear to be describing a paradox when they initially conclude that intellectual-property policy in Canada has, of late, been primarily American-driven and then argue that:

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98. *Supra* note 67 at 297.

99. *Supra* note 12 at 101–07.

100. *Ibid.* at 117.

[C]opyright enjoyed an ascendancy in the 1990's because it was possible to Canadian policy-makers to cast it as a cultural policy which, unlike many other subsidy-based cultural policies which were seen as antithetical to market liberalism, could be presented as being entirely in keeping with such pro-market framework rules.<sup>101</sup>

They resolve the apparent paradox with the finding that “by the late 1990's the federal government, in response to pressure and arguments from its industry and trade departments, was gradually adopting the view that the global agenda was in Canada's interests.”<sup>102</sup>

In information-importing countries such as Canada and Vietnam,<sup>103</sup> protection and promotion of culture are a major focus of information policy. On the other hand, in a dominant, information-exporting country such as the United States today, such a focus is unnecessary: American culture is the dominant culture being exported and is relatively unaffected by the much smaller volume of information from other cultures that is being imported. Justice Linden, writing for the majority of Federal Court of Appeal, in *CCH Canadian Ltd. v. Law Society of Upper Canada* recognized this reality:

Importantly, the elements of fairness are malleable and must be tailored to each unique circumstance. None of the factors are conclusive or binding, and additional considerations may well apply uniquely in the Canadian context.<sup>104</sup>

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### 3. CAN THE NOTION OF THE “PUBLIC DOMAIN” PLAY A CONSISTENT OR USEFUL ROLE IN INFORMATION POLICY MAKING?

THIS PAPER EXPLORES THE LIMITATIONS of our common understandings of a concept that is increasingly being discussed in intellectual-property circles. It canvasses a number of approaches that various authors have taken in describing, explaining or defining this concept. (A number of these authors are amongst the panelists here.) What has become evident in this review is that each of these authors has captured a particular perspective on the notion of the public domain but that none of these explanations, by itself, can be used to adequately address the relationships inherent in all of the intellectual-property devices. Each explanation captures certain elements of the interplay among various stakeholders in the intellectual-property realm but no one explanation is wholly satisfactory.

Thus it seems that the notion of the public domain, notwithstanding the fact that it is fixed in property rhetoric and notwithstanding the usefulness of juxtaposing this notion against the claims of those emphasizing a property-rights interpretation of the rights accorded to rights-holders under intellectual-prop-

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101. *Ibid.* at 183.

102. *Ibid.*

103. Wilkinson, “The Challenges of Coping with Intellectual Property Regime Implementation,” *supra* note 9.

104. *Supra* note 44 at para. 150. Justice Linden was aware of the impending decision of the S.C.C. in *Théberge*, *supra* note 57, when writing for the majority of the Federal Court of Appeal in *CCH*. In *Théberge*, *ibid.* at para. 5, Justice Binnie, writing for the majority, reiterated that, “[c]opyright in this country is a creature of statute and the rights and remedies it provides are exhaustive.”

erty statutes, does not really move intellectual-property questions forward in ways that can properly encompass the complexity of the issues and the multiplicity of interests involved in information policy.

Rather than focus on the question of the public domain, one might better focus on the extension of “intellectual-property” rights into new realms and ask whether those extensions still bear the hallmarks of classic “intellectual property”<sup>105</sup>—that is, of a tradeoff of incentives for production in order to encourage the free flow of ideas and facts. On the other hand, we are also witnessing the extension of other areas of law affecting information flows that are not part of any “bargain” theory of information transfer. Ideas and information are being increasingly enclosed through the extension of the protection for breach of confidentiality, for example, in which there is no inherent incentive for the free circulation of information. And the expansion of regimes giving individuals rights to control information about themselves is adding yet another dimension to the regulation of information flows through law. These many and varied approaches and interests demand analytic frameworks that permit the simultaneous examination of many factors and interests. Unfortunately, it would appear that the notion of the public domain is not capable of an interpretation that would permit it to assist us in performing these kinds of multi-dimensional analyses.<sup>106</sup>

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#### 4. CONCLUSION

THIS REVIEW HAS SERVED TO REMIND US of the power of the emerging rhetoric of the public domain, but it has also, I hope, reminded us of the inherent difficulties associated with creating a consistent theoretical construct that can define or describe the “public domain.”

It becomes clear that the concept of the public domain is probably not easily limited to the ambit of copyright; if it is a useful construct for analysis at all, it is probably most useful in the wider context of the whole of intellectual property—and it is increasingly viewed from that perspective. The concept of the public domain, in this wider context and even in the narrower context of the copyright regime, is not used unambiguously. In particular, the eliding of the concepts of the “information commons” and of the public domain is contributing to this ambiguity. Thus, the public domain is not necessarily clearly portrayed as an arena of free and universal access. It is often conceived of simply as any alternative to the private exercise of the statutory intellectual-property monopolies by the rights-holders. Attempts to identify empirically the elements of the public domain have been useful in demonstrating these differences in interpretation as well as in identifying national differences in perceptions and experiences of the public domain.

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105. Wendy Adams reminds us of the value of the common law in permitting courts to adjudicate between disputants in the absence of defined statutory answers (see *supra* note 87, particularly in the last paragraph at 289). This inherent ability of the common law to adapt to changing circumstances may be a more thoughtful vehicle than legislated solutions that exceed the traditional boundaries of intellectual-property devices.

106. A different, and perhaps more effective, approach that does take into account multiple interests and various patterns of information exchange is discussed elsewhere; see Margaret Ann Wilkinson and Natasha Gerolami, “The Information Context of Moral Rights in the Copyright Regime,” *supra* note 88.

Despite—or even because of—the power of the concepts embedded in this compound notion of “public” and “domain,” the “public domain” is probably not a term or concept which, in the long run, can carry our respective jurisdictions forward in terms of developing their own national information agendas, including developing their national intellectual-property regimes, in light of global information communications and politics.<sup>107</sup> Notions like the “national interest” are probably more useful in the context of intellectual-property-law development than is the notion of the public domain. The emphasis on the national interest dovetails appropriately with the traditional approach to international consensus-building exercises, based on the principles of national treatment, which have characterized intellectual-property conventions for over a century. Arguably, terms like the “public domain,” with their close association with notions of property and their implied binary approach (“public/private”), are rhetorical devices or explanations that actually detract from the kinds of multi-dimensional approaches that are needed to situate intellectual-property policy—at both the national and international levels—within the arena of global information-policy analysis.

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107. Thus, exactly a decade later, we return to Edward Samuels's position, referred to above, that the concept of the public domain does not add to the debate; see Samuels, “The Public Domain in Copyright Law,” *supra* note 6 at 150.