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ARTICLE

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I. INTRODUCTION

Intellectual property laws grant exclusive rights over creations to private individuals or entities, thereby creating a realm of works that cannot be appropriated by the public without the permission of the rightsholders. There is another realm of intellectual creations that is not subject to exclusive private rights because either the works are not protectable or the private rights over those works have expired. This other realm is the public domain. The public domain is a realm of non-exclusive intangible properties of the mind "which can be exploited by everybody without any authorization, for instance because protection is not granted under national or international law, or because of the expiration of the term of protection."[1] Each category of intellectual property rights has its own public domain because each category protects a different class of intellectual creations.[2]

The copyright public domain is the realm of "an ever-growing corpus of material over which no author or successor in title may exercise a private right."[3] Previous writings on the copyright public domain have either discussed the existence of the public domain in general terms or in relation to the freedom of expression and authorship of works.[4] As this Article will demonstrate, the

[1] UNESCO, *Recommendation Concerning the Promotion and Use of Multilingualism and Universal Access to Cyberspace*, https://www.unesco.org/en/legal-affairs/recommendation-concerning-promotion-and-use-multilingualism-and-universal-access-cyberspace (last visited Oct. 13, 2023).

[2] *See* Ruth L. Okediji, *Traditional Knowledge and the Public Domain,* 176 CTR. FOR INT'L GOVERNANCE INNOVATION 1, 1 (2018); Pamela Samuelson, *Mapping the Digital Public Domain: Threats and Opportunities,* 66 L. & CONTEMP. PROBS. 147, 148-151 (2003).

[3] Jane Ginsburg, *'Une chose publique'? The Author's Domain and the Public Domain in Early British, French and US Copyright Law*, *in* COPYRIGHT LAW: A HANDBOOK OF CONTEMPORARY RESEARCH 133, 134 (Paul Torremans ed., 2009).

[4] *See* GRAHAM GREENLEAF & DAVID LINDSAY, PUBLIC RIGHTS: COPYRIGHT'S PUBLIC DOMAINS (2018); JAMES BOYLE, THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND (2008); VALÉRIE-LAURE BENABOU & SÉVERINE DUSOLLIER, DRAW ME A PUBLIC

copyright public domain can have a more consequential impact in ways other than those discussed in the existing literature. Public domain works are usually free from (1) the copyright monopolies responsible for increasing prices and (2) copyright restrictions on use, reuse, and modifications that affect access to literary works.[5] As such, public domain works are easier to distribute widely for the benefit of all and are also free from obstacles to access and use. Therefore, this Article focuses on securing global access to knowledge through a thriving and accessible copyright public domain. The copyright public domain here is considered in its relation to literary works.

This Article is structured into four additional sections. The next section considers the origin and meaning of the term "public domain" in copyright law and then highlights the significance of a well-established public domain in promoting access to literary works (knowledge) to fulfill objectives of human development. Section three discusses some legal, technological, and contractual threats to this notion of an accessible public domain and considers how these threats may be addressed in the interest of access to knowledge. Section four argues for the need to legally recognize, protect, and enrich the global public domain and recommends steps that should be taken in this direction. Section five then concludes by suggesting that one of the ways the international copyright system can better support access to knowledge for human development is by promoting and sustaining an accessible public domain globally. A robust body of works in the public domain offers greater opportunities and freedoms for people to use this knowledge to expand their capabilities and remain educated and healthy. These capabilities would contribute to the overall wellbeing of people, allowing them to flourish.

DOMAIN in COPYRIGHT LAW: A HANDBOOK OF CONTEMPORARY RESEARCH 161 (Paul Torremans ed., 2009); Pamela Samuelson, *Enriching Discourse on Public Domains,* 55 DUKE L. J. 783 (2006); Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354, 411 (1999); Rosemary J Coombe, *Fear, Hope, and Longing for the Future of Authorship and a Revitalized Public Domain in Global Regimes of Intellectual Property*, 52 DEPAUL L. REV. 1171, 1171-73 (2003); Jessica Litman, *The Public Domain,* 39 EMORY L. J. 965, 966-68 (1990).

[5] *See* Benkler, *supra* note 4, at 360.

II. ORIGIN, MEANING, AND SIGNIFICANCE OF THE PUBLIC DOMAIN

A. ORIGIN OF AND REFERENCES TO THE PUBLIC DOMAIN IN COPYRIGHT LAWS

The idea of the public domain as a class of "public property" did not originate in intellectual property law.[6] The origin can be traced to early Roman law on tangible property rights.[7] The idea of public domain sprouted from the concepts of *res communes*,[8] *res publicae,*[9] and *res universitatis*[10] in ancient Roman law, which were used to denote various tangible properties that could not be exclusively owned by private individuals or entities.[11] These laws ensured that properties could be enjoyed in common by members of the society.[12] While Roman law did not concern itself with intellectual property, the concept of the public domain in intellectual property law draws upon the typology of these classes of non-exclusive (public) property in Roman law.[13]

Even if the idea of the public domain did not originate in copyright law,[14] Mark Rose has expressed the view that "copyright and public domain were born together."[15] This is perhaps because when copyright law was first formally conceived in English law (and in other countries) it was conceived as a limited right[16] and it was generally understood that the protected works would, after a given time, be free of all restrictions occasioned by copyright grants.[17] Thus, when the grant of copyright was statutorily recognized, implicit in that

[6] Carol M. Rose, *Romans, Roads, and Romantic Creators: Traditions of Public Property in the Information Age,* 66 L. & CONTEMP. PROBS. 89, 92 (2003); Hui Huang, *On Public Domain in Copyright Law*, 4 FRONTIERS L. CHINA 178, 179 (2009).
[7] Huang, *supra* note 6, at 179.
[8] *See* Rose, *supra* note 6, at 93 (explaining that *res communes* were things that by their nature could not be exclusively appropriated by an individual, such as the oceans and air).
[9] *See id.* at 96 (explaining that *res publicae* were things that collectively belonged to the public and were open to public use by operation of law, such as roads, bridges, ports, harbors, etc.).
[10] *See id.* at 105 (explaining that *res universitatis* were things that belonged to municipal authorities in Rome, usually public facilities like theatres and racecourses).
[11] *Id.* at 92-110; *see generally* Huang, *supra* note 6, at 179 ("Romans defined many things that cannot be privately owned, including without limitation to res communes, res publicae and res universitatis.").
[12] *See* Rose, *supra* note 6, at 92-110.
[13] *Id.* at 92.
[14] *See supra* notes 6-11 and accompanying text (explaining the Roman law origins of the public domain).
[15] Mark Rose, *Nine-Tenths of the Law: The English Copyright Debates and the Rhetoric of the Public Domain*, 66 L. & CONTEMP. PROBS. 75, 76 (2003); Ginsburg, *supra* note 3, at 137.
[16] Statute of Anne, 8 Anne c. 19, § 2 (1710).
[17] *See* Donaldson v. Beckett, (1774) 98 Eng. Rep. 257 (HL) (appeal taken from Scot.).

recognition was also recognition of the public domain.[18] The moment a person creates a work and has copyright protection conferred, the work becomes one that is merely waiting to be moved into the public domain because of the limited nature of copyright grants in various countries. Copyright was, therefore, understood as a limited incursion into the non-rivalrous[19] nature of literary works. According to Séverine Dusollier, "[t]he erection of a private property right was only a limited intrusion into the public domain that should stay the rule."[20]

The 1710 Statute of Anne has been credited for implicitly creating the copyright public domain by limiting the term of copyright protection.[21] However, the notion of the public domain as a domain of works whose copyrights have expired and are now considered public property ("*propriété publique*") was first adopted in French copyright law.[22] Since France follows a civil law tradition, it would be correct to state that in common law jurisdictions, copyright public domain was first recognized in principle in 1710 when the Statute of Anne was enacted.[23] The Statute of Anne limited the term of copyright protection in existing works to 21 years and for new works to a term of 14 years, renewable for an additional term of 14 years but no more.[24]

Although the Statute of Anne made no express reference to the public domain as the French law did, it was implicit in the statute that once the copyright term for a work expired, anyone could print and publish such work without restraint.[25] This is similar to the implications of the *propriété publique* in French law.[26] In the landmark case of *Donaldson v. Beckett*, the Stationers' Company challenged the fact that their right to reproduce and publish a work was limited in duration and argued that they had perpetual copyright under common law.[27] The House of Lords ruled against this claim, noting that copyright in a published

[18] Ginsburg, *supra* note 3, at 137.
[19] *See* ZOHAR EFRONI, ACCESS-RIGHT: THE FUTURE OF DIGITAL COPYRIGHT LAW 86 (2011) (noting that copyrighted works are considered non-rivalrous because they are expressions of knowledge and one person's use of a particular piece of knowledge does not preclude the use of that knowledge by another).
[20] SÉVERINE DUSOLLIER, *Scoping Study on Copyright and Related Rights and the Public Domain*, WIPO Doc. CDIP/4/3/REV./STUDY/INF/1, 26 (2010).
[21] Huang, s*upra* note 6, at 180; Ginsburg, *supra* note 3, at 137.
[22] Ginsburg, *supra* note 3, at 144; DUSOLLIER, *supra* note 20, at 16; Litman, *supra* note 4, at 975 n.60.
[23] Tyler T. Ochoa, *Origins and Meanings of the Public Domain*, 28 DAYTON L. REV. 215, 223 (2002).
[24] 8 Anne c. 19, §§ 2, 11 (1710).
[25] Ochoa, *supra* note 23, at 223.
[26] *See* Ginsburg, *supra* note 3, at 145-146.
[27] Donaldson v. Beckett, (1774) 98 Eng. Rep. 257 (HL) (appeal taken from Scot.).

work depended solely on the Statute of Anne.[28] This decision established that works were expected to be free of copyright protection at some point and thereafter enter the public domain for free use.[29] Implicit in the Statute of Anne was also the idea that "subject matter not included within the statute was not protected"[30] and "rights not included within the statute were not protected [or granted]."[31]

Jane Ginsburg also notes the predominance of the public domain in France and the United States ("U.S.") in the heyday of copyright protection for literary works.[32] In the U.S., the first statutory mention of the term "public domain" was in Section 7 of the 1909 Copyright Act's provision that "no copyright shall subsist in the original text of any work which is in the public domain."[33] The public domain was used in this instance to refer to works in which the term of copyright protection had expired, following similar connotations in the French and English copyright jurisprudence.[34]

Within the international copyright system, the term "public domain" was first expressed in Article 14 of the 1886 Berne Convention, which provided that "[u]nder the reserves and conditions to be determined by common agreement, the present Convention shall apply to all works which at the moment of its coming into force have not yet fallen into the public domain in the country of origin."[35] Article 14 adopted the term "public domain" from the French copyright law.[36] Arguably, in Article 14, the public domain connoted more than the works in which copyright no longer subsists because of expiration of term. It could also be interpreted to include works that were ineligible for copyright for any other reason given that it subjected the public domain status work of a

[28] *Id.*
[29] Ochoa, *supra* note 23, at 223.
[30] Ginsburg, *supra* note 3, at 137.
[31] *Id.* at 138.
[32] Jane C. Ginsburg, *A Tale of Two Copyrights: Literary Property in Revolutionary France and America,* 64 TUL. L. REV. 991, 991-992 (1990).
[33] Law of March 4, 1909, Copyright Act Pub. L. No. 60–349, § 7, 35 Stat. 1075 (repealed 1978).
[34] This is the only probable interpretation of the word public domain in that section given that it went further to expressly categorize other works for which copyright would not subsist without subsuming them under the term "public domain." *See id.* ("That no copyright shall subsist in the original text of any work which in the public domain, or in any work which was published in this country or in any foreign country prior to the going into effect of this Act and has not been already copyrighted in the United States, or in any publication of the United States Government . . . .").
[35] Berne Convention for the Protection of Literary and Artistic Works, art. 14, *opened for signature* Sept. 9, 1886, 828 U.N.T.S. 221 (entered into force Dec. 4, 1887) [hereinafter Berne Convention 1886].
[36] Ochoa, *supra* note 23, at 225; Litman, *supra* note 4, at 975 n.60.

country to the rules of the country of origin which might define public domain in broader terms. That this is a most likely interpretation of Article 14 is supported by its subsequent revision in 1908. When the Berne Convention was revised in 1908, it retained the original Article 14, but renumbered it as Article 18(1) and added the phrase "through the expiration of the term of protection"[37] to the end of the text. This, however, does not imply that the scope of the public domain as recognized by the Convention is limited to works in which copyright has expired. It only suggests a weakening of the protection given to public domain works against reappropriation within the international copyright system, in that works falling into the public domain for a reason other than expiration of a term may be protected anew by the member states.[38] Article 18(1) has been retained in every subsequent revision of the Berne Convention and is contained in the current Paris Act of the Berne Convention.[39]

The Universal Copyright Convention of 1952, which the United States and other countries signed as a multilateral treaty on copyright when they were not willing to be part of the Berne Convention, also recognized the public domain.[40] Article 7 of the Convention provides that "[t]his Convention shall not apply to works or rights in works which, at the effective date of this Convention in a Contracting State where protection is claimed, are permanently in the public domain in the said Contracting State."[41]While only a few national and international laws refer to the public domain,[42] the notion of the public domain is deemed to be widely accepted—though with differing views as to its scope.[43]

However, even though the existence of a sphere known as the public domain is generally accepted, the exact scope of the public domain remains fluid.[44] Most national and international laws do not make express reference to the public

[37] Berne Convention for the Protection of Literary and Artistic Works, art. 18, *opened for signature* Sept. 9, 1908, 828 U.N.T.S. 221 (entered into force Sept. 9, 1910) [hereinafter Berlin Act of 1908].
[38] *See id.* at art. 18(2).
[39] Berne Convention 1886 (revised at Rome on June 2, 1928) art. 18; Berne Convention 1886 (revised at Brussels on June 26, 1948) art. 18; Berne Convention 1886 (revised at Stockholm on July 14, 1967) art. 18; Berne Convention 1886 (revised at Paris on July 24, 1971) art. 18; Berne Convention 1886 (as amended Sept. 28, 1979) art. 18.
[40] Ochoa, *supra* note 23, at 227.
[41] Universal Copyright Convention (as amended July 24, 1971) art. 7, *opened for signature* Sept. 6, 1952, 13444 U.N.T.S. 943 (entered into force July 10, 1974) [hereinafter Universal Copyright Convention].
[42] *See id.* at art. 7; *see also* Berne Convention for the Protection of Literary and Artistic Works (as amended 28 Sept. 28, 1979), art. 18, Nov. 19, 1984, 102 Stat. 2853 [hereinafter Berne Convention].
[43] Okediji, *supra* note 2, at 2-3.
[44] DUSOLLIER, *supra* note 20, at 68-69.

domain and even laws that expressly mention the public domain seldom define the term.[45] Yet it is necessary to map the terrain of the public domain to know the scope of works that are protected as private properties and those that are available to the public. Pamela Samuelson gives three reasons why mapping the public domain is useful: (i) it can help assess the possible impacts of certain non-legal changes like digitization on the public domain; (ii) it can determine the extent to which certain laws or policies may affect the public domain; and (iii) it can help categorize the contents of the public domain, including determining the "contents [that] will be most harmed if propertized (for example, information)."[46] The next section examines how scholars have drawn the borders between privately owned works and the public domain in light of copyright rules.

B. MEANING AND SCOPE OF THE PUBLIC DOMAIN

The earliest and most universal meaning of the public domain in copyright law is as a realm of works in which copyright protection no longer subsists because of the expiration of the term of protection.[47] Copyright protection does not, in principle, subsist in perpetuity; protection is usually granted in national copyright systems for a limited term.[48] At the end of the copyright term, the cloak of exclusivity on such works is immediately taken away by operation of law and the works fall into the public domain for non-exclusive exploitation.[49] However, within the international copyright system, there is no stated period for the expiration of copyright protection and international copyright laws only recommend a minimum term of protection within national copyright

[45] Copyright Act, 2001 (Kenya) § 45(1); The term is also defined in Rwandan law as a "set of works that can be used by whoever without authorization of the author, either because of the end of the period of protection, either because of the absence of international instrument assuring their protection in the case of the foreign works." Law No. 31/2009 of 26/10/2009 (Rwanda) art. 6(9).

[46] Samuelson, *supra* note 2, at 150-51. Samuelson's map of the public domain (not limited to the copyright public domain) includes the following: (i) Facts, Data, Information; (ii) Scientific & Mathematical Principles; (iii) Ideas, Concepts, Theories; (iv) Laws, Regulations, Judicial Opinions; (v) Words, Names, Numbers, Symbols; (vi) Information Not Qualifying; (vii) Information Qualifying; (viii) Rights Expired; (ix) Rights Not Claimed. *Id.*

[47] *See* Huang, *supra* note 6, at 180 (describing the public domain as historically referring to expired copyright works); *see also* Litman, *supra* note 4, at 976 (same); Ginsburg, *supra* note 3, at 137-38 (same); William Van Caenegem, *The Public Domain: Scientia Nullius?*, 24 EUR. INTELL. PROP. REV. 324 (2002) (same); BENABOU & DUSOLLIER, *supra* note 4, at 164-65 (same).

[48] Graeme W. Austin, *Property on the Line: Life on the Frontier Between Copyright and the Public Domain*, 44 VICTORIA UNIV. WELLINGTON L. REV. 1, 10 (2013).

[49] *Id.* at 10-11.

frameworks.[50] Although the Berne Convention recognizes that copyright protection expires at some point, it provides no express ceiling for copyright protection.[51] Instead, it merely provides the minimum term of protection that states must grant to a work that qualifies for copyright protection.[52] The same goes for the TRIPS Agreement.[53] The maximum duration of copyright protection is thus left to the discretion of countries and as such the duration differs from country to country. Therefore, there is no clear or express direction within the international copyright framework on a certain term after which copyright should expire in a work globally and fall into the public domain.

In her seminal work on the copyright public domain, Jessica Litman defines the public domain as a "commons that includes those aspects of copyrighted works which copyright does not protect."[54] According to Litman, the scope of works protected by copyright constitutes private property while the unprotected works are within the domain of the public.[55] As James Boyle notes, Litman's definition of the public domain "includes the recyclable, unprotected elements in existing copyrighted works as well as those works that are not protected at all."[56] Some of the unprotected elements of existing copyrighted works are ideas,[57] facts,[58] data, principles,[59] methods of operation,[60] processes, and *scènes à*

[50] *See* Berne Convention, *supra* note 42, at art. 7; Marrakesh Agreement Establishing the World Trade Organization, Annex 1C Agreement on Trade-Related Aspects of Intellectual Property Rights (as amended Jan. 23, 2017), art. 12, *opened for signature* Apr. 15, 1994, 1867 U.N.T.S. 3 (entered into force Jan. 1, 1995) [hereinafter TRIPS Agreement] (suggesting a minimum term for protection).
[51] Berne Convention, *supra* note 42, at art. 18(1)-(2) (recognizing that works fall into the public domain in the country of origin of a work or the country where protection is claimed at the expiration of the term of protection in that country).
[52] *Id.* at art. 7.
[53] TRIPS Agreement, *supra* note 50, at art. 12.
[54] Litman, supra note 4, at 968.
[55] *Id.* at 1000.
[56] James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 L. & CONTEMP. PROBS. 33, 61 (2003).
[57] *See* Designers Guild Ltd. v. Russell Williams (Textiles) Ltd., 2001 E.C.D.R. 10 (2000) ("[C]ertain ideas expressed by a copyright work may not be protected because, although they are ideas of literary, dramatic or artistic nature, they are not original, or so commonplace as not to form a substantial part of the work.").
[58] *See* Hoehling v. Universal City Studios, Inc., 618 F.2d 972, 978 (2d Cir. 1980) (finding that facts cannot be copyrighted).
[59] *See* Borden v. Gen. Motors Corp., 28 F. Supp. 330, 332 (S.D.N.Y. 1939) ("[G]eneral principles of ideas or thoughts in themselves they are not the subject of valid copyright.").
[60] *See* Baker v. Selden, 101 U.S. 99, 103 (1879) (rejecting copyrights for "methods of operation").

faire.[61] This copyright exclusion of certain elements of a protected work is codified in Article 9(2) of the TRIPS Agreement which provides that "copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such."[62] Article 2 of the WIPO Copyright Treaty is similarly worded and is aptly titled "Scope of Copyright Protection."[63] Copyright protection also does not apply to "news of the day or to miscellaneous facts having the character of mere items of press information."[64]

The previously mentioned unprotected elements of copyrighted works are considered the building blocks for creating new works[65] and should, therefore, become immediately "recyclable" by other creators for a sustainable knowledge production environment. Once a work is created, these elements expressed therein immediately enter the public domain for free use since copyright does not protect these aspects of a work. Subject to eligibility requirements, the way these elements are expressed is however protected by copyright. This fact underlies one of the most pervasive doctrines in copyright law, the idea-expression dichotomy.[66] Copyright protection in a work does not extend to the underlying ideas in the work but only to the expression of those ideas.[67] Thus, members of the public are free to use the idea in a work notwithstanding that copyright subsists in the work.[68] However, they are not permitted to express the

[61] *See* Ochoa, *supra* note 23, at n.24. (describing *scènes à faire* as "'incidents, characters or settings which are as a practical matter indispensable, or at least standard, in the treatment of a given topic[] [and] [b]ecause it is virtually impossible to write about a particular historical era or fictional theme without employing certain "stock" or standard literary devices, we have held that scènes à faire are not copyrightable as a matter of law'" (quoting *Hoehling*, 618 F.2d at 979)).

[62] TRIPS Agreement, *supra* note 50, at art. 9(2).

[63] *See* WIPO Copyright Treaty, art. 2, Dec. 20, 1996 (TRT/WCT/001) ("Copyright protection extends to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such.") [hereinafter WCT]; 17 U.S.C.A. § 102(b) (providing that "[i]n no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.").

[64] Berne Convention, *supra* note 42, at art. 2(8).

[65] GREENLEAF & LINDSAY, *supra* note 4, at 186.

[66] For an extensive discussion of the idea-expression dichotomy, see Edward Samuels, *The Idea-Expression Dichotomy in Copyright Law*, 56 TENN. L. REV. 321 (1989); *see also* Richard H. Jones, *The Myth of the Idea/Expression Dichotomy in Copyright Law*, 10 PACE L. REV. 551 (1990) (discussing idea/expression dichotomy).

[67] MARK J. DAVISON ET AL., AUSTRALIAN INTELLECTUAL PROPERTY LAW 191 (2016).

[68] In *Bauman v. Fussell*, R.P.C. 485 (1978), the defendant was inspired by a photograph to make a painting. The court considered whether the taking of the idea in the photograph constituted copyright infringement. *Id.* The court held that all the painter took was the idea of the birds in the picture to make a painting of birds of his own and that the painter was free to do so. *Id.*

idea in the same manner without the authorization of the copyright owner. As Justice O'Connor held in *Feist Publications, Inc. v. Rural Telephone Service Co.*, "copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work."[69] The rationale behind the idea-expression dichotomy is that extending copyright protection to ideas would stifle innovation and access to the ideas needed for the subsequent creation of works.[70]

Valérie-Laure Benabou and Séverine Dusollier adopt the definition of the public domain "as the realm of elements that are not or no longer protected, whether because they are not liable to protection by copyright (as with ideas or works that are not original) or because the protection of copyright has expired."[71] While copyright protection automatically arises once a work is created and does not depend on any formal requirements of registration or deposit,[72] works may be subjected to certain eligibility requirements. A work may be ineligible for copyright protection in a country either because it is unoriginal or it has not been fixed in a material form.[73] For a work to be considered original, it must either originate from the author or demonstrate a sufficient level of authorial contribution (in form of skill, labor, or judgment) to give the work an original character.[74] The former does not mean that the ideas in the work must be new; the originality required is in the form of expressing the ideas.[75] The form of expression must not have been copied from another work. A work created from pre-existing copyright materials like compilations of copyright works and works of "low authorship" like dictionaries and collections of data may also be protected.[76] Protection of such a work is subject to putting sufficient skill, effort,

[69] Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 349–50 (1991) (citation omitted).
[70] DAVISON, ET AL., *supra* note 67, at 192; Jones, *supra* note 66, at 561.
[71] BENABOU & DUSOLLIER, *supra* note 4, at 164-65.
[72] *See* Berne Convention, *supra* note 42, at art. 5(2).
[73] *Id.* at art. 2, § 2 (providing that countries may "prescribe that works in general or any specified categories of works shall not be protected unless they have been fixed in some material form"). Most common law countries have the fixation requirement as a condition for eligibility for copyright protection. *See* Copyright Act (1968) No. 63, §§ 22(1), 32 (Austl.) [hereinafter Copyright Act, 1968]; Copyright Act (1990) Cap. (68), § 1(2)(a)-(b) (Nigeria), amended by Copyright Amendment (1992) Decree No. (98), Copyright Amendment (1999) Decree, and Companies and Allied Matters Act (2004) Cap (20) LFN, 2 (Nigeria); Copyright, Designs and Patents Act 1988, c. 48, § 3(2) (UK); Copyright Act, 17 U.S.C. § 102(a) (1976).
[74] GREENLEAF & LINDSAY, *supra* note 4, at 187.
[75] *See* British Northrop Ltd. v. Texteam Blackburn Ltd. (1973) 241 F.S.R. 254 (UK) ("Copyright is concerned not with any originality of ideas but with their form of expression, and it is in that expression that originality is requisite.").
[76] *See* GREENLEAF & LINDSAY, *supra* note 4, at 187.

or judgment[77] into the creation to give the resultant work an original or creative character.[78]

The Berne Convention also gives countries leeway to determine whether copyright protection will be granted to "official texts of a legislative, administrative and legal nature, and to official translations of such texts."[79] Following this, some countries have excluded such texts from the domain of copyrighted works and as such these are within the public domain for free use and exploitation by anyone. For instance, in the U.S., copyright protection "is not available for any work of the United States Government."[80]

The public domain has also been defined as including works that are free from copyright barriers to access and use "because the right holders have decided to remove these barriers."[81] Rightsholders can completely remove copyright barriers to access by relinquishing their copyrights in works and in such instances those works should constitute part of the public domain.[82] However, as will be shown in section III of this article,[83] there appear to be legal uncertainties as to whether such works fall within the public domain because there is no legal framework for opting out of copyright grants under international copyright law and most national copyright laws.[84] Instead of relinquishing their copyrights, rightsholders may retain their copyrights in works but allow the public to gain free access to the full texts of their works. While this will remove some copyright-enabled barriers to access like price and sometimes obviate the need

[77] There are slight modifications of the sufficient skill, effort, or judgment test in some jurisdictions. *Id.* at 188-191 (distinguishing this test between the United States, Canada, and Australia).

[78] *See* Dicks v. Brooks (1880) 15 Ch. D. 22 (involving an engraving of a well-known picture in a different medium). In *Feist Publications, Inc. v. Rural Telephone Service Co*., 499 U.S. 340 (1991), the Supreme Court considered whether a white pages telephone book (a compilation of 7,700 listings in alphabetical order) was original and held that it was unoriginal because there was nothing creative in arranging names in alphabetical order for a white pages directory. *Id.* at 349, 363; *see also* Berne Convention, *supra* note 42, at art. 2 § 5 (prescribing that collections of literary works must constitute intellectual creations to be protected); TRIPS Agreement, *supra* note 50, at art. 10 § 2 (prescribing that collections of literary works must constitute intellectual creations to be protected).

[79] Berne Convention, *supra* note 42, at art. 2, § 4.

[80] 17 U.S.C. § 105.

[81] MELANIE DULONG DE ROSNAY & JUAN CARLOS DE MARTIN, *The Public Domain Manifesto*, *in* DIGITAL PUBLIC DOMAIN: FOUNDATIONS FOR AN OPEN CULTURE xix, xix (Melanie Dulong de Rosnay & Juan Carlos De Martin eds., 2012).

[82] *See* J.H. Reichman & Paul F. Uhlir, *A Contractually Reconstructed Research Commons for Scientific Data in a Highly Protectionist Intellectual Property Environment*, 66 L. & CONTEMP. PROBS. 315, 318-19 (2003).

[83] *See infra* Section III, part E (discussing the lack of this framework).

[84] GREENLEAF & LINDSAY, *supra* note 4, at 101; BENABOU & DUSOLLIER, *supra* note 4, at 170.

to obtain licences, such works do not form part of the public domain per se.[85] Some scholars, however, have a contrary perspective.[86]

The author of a work made freely available to the public does not relinquish or assign their rights by the mere provision of free access to their work.[87] The World Intellectual Property Organization ("WIPO") makes it clear that the adoption of its open access policy to provide public access to its materials does not mean that those materials are in the public domain and emphasizes that it retains full copyright ownership of all its materials.[88] As such, the author still has all of the exclusive rights of a copyright owner, and it is through the exercise of these rights that they provide public access to their work and sometimes also freely license part of their rights.[89] The author (licensor), therefore, has the power both to license the use of the work (even if at no cost to end-users) in an inclusionary manner and to exclude some persons from doing certain acts in relation to the work.[90] The continued retention and exercise of copyrights over such publicly-accessible yet copyright-protected works makes it important to draw a distinction between public domain works and protected works. A public domain work is "premised on the absence of an exclusive right"[91] and its elements are "freely available to be used or exploited by any person"[92] without the need for any licensing terms.

Graham Greenleaf and David Lindsay have also defined the public domain as including "all uses of works that do not require the permission of the copyright owner."[93] Similarly, Yochai Benkler defines the public domain as "the range of uses of information that any person is privileged to make absent individualized facts that make a particular use by a particular person unprivileged."[94] By these definitions, permitted uses under copyright limitations and exceptions ("L&Es") are in the public domain.[95] Defining public domain generally in terms of uses

[85] *See* NEIL BUTCHER, A BASIC GUIDE TO OPEN EDUCATIONAL RESOURCES 8 (Asha Kanwar & Stamenka Uvalić-Trumbić eds., 2015).
[86] *See* ROSNAY & DE MARTIN, *supra* note 81, at xix (describing the works as if they do form part of the public domain); DUSOLLIER, *supra* note 20, at 7 (same); Samuelson, *supra* note 2, at 149 (noting that since these works are widely available and usable, "for practical purposes, they seem to be part of the public domain").
[87] DUSOLLIER, *supra* note 20, at 58.
[88] *Open Access Policy,* WIPO, https://www.wipo.int/tools/en/disclaim.html#openaccess (last visited Dec. 3, 2023).
[89] DUSOLLIER, *supra* note 20, at 58.
[90] *Id.* at 58-59.
[91] *Id.* at 21.
[92] Caenegem, *supra* note 47, at 324.
[93] GREENLEAF & LINDSAY, *supra* note 4, at 33.
[94] Benkler, *supra* note 4, at 362.
[95] *Id.* at 363.

that do not require the permission of the copyright owner invariably extends the public domain to all copyrighted works. This is because all copyrighted works are at least subject to a general exception or limitation, e.g. the U.S. fair use exception.[96] Unlike the unprotected elements of a work in which one can ascertain which part of the work is in the public domain, with L&Es such distinction cannot be made readily. This makes it difficult to justify extending the scope of the public domain to L&Es.

Copyright L&Es are in a class of their own, different from the public domain. The fact that a person can copy or use the expression in a work because it is permissible under a copyright exception does not mean that the work is in the public domain. This is because it is not free for any kind of exploitation that a user may desire (for example, making the work available to the public), and it may not be open for the exploitation of all kinds of users (for example, an exception for persons with visual impairments).[97] Further, subscribing to the view that E&Ls form part of the public domain can yield unintended chilling effects because it presupposes that all works are in the public domain regardless of how limited the scope of permitted uses is. It can also push to the background the need for mechanisms that promote access to copies and not just use-access. Additionally, it is important to keep the momentum for access to copies going, because it is a necessary precondition to use-access. For these reasons, it is integral to distinguish between copyright E&Ls and the public domain. J.H. Reichman and Paul Uhlir also share the view that information that becomes available to a person or category of persons under statutory exceptions "does not constitute public domain information per se."[98]

Having considered how scholars have defined the scope of the public domain, in summary and for the purpose of this Article the public domain is a public realm that contains: (i) works that are no longer protected by copyright (for example, because of expiration of term, or a subsequent removal from the scope of protected works under law, or an opt-out of copyright protection by the copyright owner); (ii) unprotected elements of works in which copyright subsists (for example, ideas, facts, data, etc.); and (iii) works that are not protected by copyright law (for example, because they do not meet the eligibility requirements for copyright protection like originality). The next section considers the significance of having a public realm of the kind described above.

[96] *See* Berne Convention for the Protection of Literary and Artistic Works, art. 9, *opened for signature* Sept. 28, 1979, 1161 U.N.T.S. 3 (listing possible exceptions).

[97] *E.g.*, Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled, art. 3, Sept. 30, 2016 [hereinafter Marrakesh Treaty] (copyright exceptions in the Marrakesh Treaty are only enjoyable by a category of users–the visually impaired and print-disabled.)

[98] Reichman & Uhlir, *supra* note 82, at 319 n.10.

C. SIGNIFICANCE OF THE PUBLIC DOMAIN

The copyright public domain is significant for many reasons. It is necessary to maintain a fair copyright balance, as it shows that there is a realm of knowledge that is outside of private control and is thus free for public use. Litman notes that "a vigorous public domain is a crucial buttress to the copyright system; without the public domain, it might be impossible to tolerate copyright at all."[99] Indeed, maintaining a balance within the copyright system is crucial for its acceptance by society. Simply recognizing a realm of protected works without limiting the scope of copyright protection or duration can make it challenging to achieve this balance.

A thriving and accessible public domain is crucial for ensuring access to knowledge. Works in the public domain are freely available and accessible to the public for unrestricted use and exploitation, thereby making it an important source for accessing knowledge. Access to this body of knowledge is not subject to copyright barriers like costs and use restrictions. The public domain further supports access to knowledge by promoting creativity and authorship by providing raw materials that may be used to create new works. It thus expands the sphere of knowledge and allows production of useful works.

A rich and accessible public domain can promote human development objectives by enabling access to literary works for education, research, and creativity. The ability to access and use works without copyright restrictions allows humans to flourish and develop.[100] Dusollier notes that "a healthy and thriving public domain plays an essential role for . . . education" and the lack of a robust public domain weakens the realization of educational objectives.[101] Access to copies of works and the freedom to use works for teaching, learning, and researching are integral to education.[102] The public domain, as a realm free from copyright restrictions on access to and use of works for these purposes, can therefore support quality education.[103] The ability to access and use literary works is also essential to promoting global health.[104] The public domain can give way to valuable and critical scientific works that may be necessary for dealing with global health issues. Works in the public domain can be widely disseminated

[99] Litman, *supra* note 4, at 977.
[100] *See* GREENLEAF & LINDSAY, *supra* note 4, at 19 (explaining the development benefits of the public domain).
[101] DUSOLLIER, *supra* note 20, at 68.
[102] Faith O. Majekolagbe, *Copyright and Quality Education for All (SDG4)*, 46(1) EUR. INTELL. PROP. REV. 6, 9-10 (2024).
[103] *Id.* at 15-17 (showing how open educational resources which include public domain works can be used to propel quality education for all).
[104] GREENLEAF & LINDSAY, *supra* note 4, at 19.

at no cost and without restrictions to facilitate the use of information and data contained in the research publications for promoting health objectives.[105] Melanie Dulong de Rosnay and Juan Carlos De Martin also argue that "[h]aving a healthy and thriving public domain is essential to the social and economic well-being of our societies" with a significant "role in the fields of education, science, cultural heritage and public sector information."[106] Access to knowledge, free of price and legal barriers, through a robust and thriving public domain, can help people freely use works in ways that expand their capabilities. It can also encourage leading a healthy life, thereby contributing towards successful human development.

For the realization of human rights, including the right to development as recognized in international law,[107] a thriving and accessible public domain is key. The right to development entitles every human being "to participate in, contribute to, and enjoy economic, social, cultural, and political development, in which all human rights and fundamental freedoms can be fully realized."[108] To participate in, contribute to, and enjoy these forms of development that are key to realizing other human rights such as the rights to education and health care, a person must be able to access necessary resources that can support these objectives. One key resource for education, health, and other capabilities is knowledge. If a thriving and accessible public domain can contribute significantly to human beings' capabilities, then it follows that the public domain is integral to the full realization of the right to development. Writing on the public domain from the perspective of human rights, Graeme Austin states that,

Human rights certainly provide compelling reasons for being concerned about the public domain, reasons *that go beyond* getting more stuff more cheaply. Human rights law draws attention to a broader set of values: educational rights, . . . an adequate standard of health . . . which any decent intellectual property system, and any decent society, must contend.[109]

Article 27(1) of the Universal Declaration on Human Rights ("UDHR") provides that "everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its

[105] *See generally* Faith O. Aboyeji, *Access to Health and Medical Research: Lessons from the COVID-19 Pandemic*, 27 J. L. Med. 901, 905-913 (2020) (arguing that exclusive copyrights in health research publications lead to high costs of access to important health knowledge and that eliminating copyright restrictions can facilitate widespread access and use of health knowledge).
[106] ROSNAY & DE MARTIN, *supra* note 81, at xix-xx.
[107] *See* U.N. GAOR, 41st Sess., 97th mtg., U.N. Doc A/Res/41/128 (Dec. 4, 1986) (recognizing the right to development).
[108] *Id.* at art. 1.
[109] Austin, *supra* note 48, at 14.

benefits." [110] This provision envisages that there will be a realm of works that everyone will be able to enjoy and benefit from "freely," without copyright restrictions.[111] Through this right, the UDHR seeks to emphasize upon the need for a balance between authorial rights and protection, and the fundamental right to participate in culture and enjoy the production of literary works.[112] The existence, flourishing, and accessibility of the public domain are essential to this balance and ultimately to the realization of the right proclaimed in Article 27(1).[113] Article 15(1) of the International Covenant on Economic, Social and Cultural Rights contains a similar right.[114]

Considering the immense importance of the public domain for maintaining the copyright balance and promoting access to knowledge, human development, and the realization of key human rights, the public domain should operate without limitations. However, due to a range of countervailing factors, this is not presently the case. The next section will examine the various barriers and threats to a thriving and accessible global public domain.

III. THREATS TO A THRIVING AND ACCESSIBLE GLOBAL PUBLIC DOMAIN

The enclosed domain, as Benkler calls the domain of works protected by copyright,[115] and the public domain ought to coexist in a way that the existence and relevance of one is not stifled by the other. The public domain should in fact be viewed as the general rule or the main realm and the enclosed domain as the exception or subordinate realm because of the freedom and equality of access associated with the public domain.[116] The primacy of the public domain is necessary for its maintenance[117] since the risk of over-exclusiveness is more likely than over-openness within the international copyright system.[118] Despite the significance of the public domain, it is often overlooked, dominated, and made the "exception" to the enclosed domain.[119] Further, the territory of protected

[110] G.A. Res. 217 (III)A, Universal Declaration of Human Rights (Dec. 10, 1948).
[111] *Id.*
[112] *Id.* at. 27(2).
[113] ROSNAY & DE MARTIN, *supra* note 81, at xx.
[114] *See* G.A. Res. 2200A (XXI), art. 15 (Dec. 16, 1966) ("The States Parties to the present Covenant recognize the right of everyone: (a) To take part in cultural life; (b) To enjoy the benefits of scientific progress and its applications . . . .").
[115] Benkler, *supra* note 4, at 362.
[116] ROSNAY & DE MARTIN, *supra* note 81, at xxii; BENABOU & DUSOLLIER, *supra* note 4, at 184; DUSOLLIER, *supra* note 20, at 26.
[117] ROSNAY & DE MARTIN, *supra* note 81, at xxii.
[118] Reto M. Hilty & Kaya Köklü, *Access and Use: Open vs. Proprietary Worlds*, 6 MAX PLANCK INST. FOR INNOVATION & COMPETITION, no. 14-07, 2014, at 2.
[119] BENABOU & DUSOLLIER, *supra* note 4, at 184.

works is constantly being expanded, thereby threatening the sheer existence of the public domain.[120] The following sub-sections highlight some of the barriers and threats to the flourishing and accessibility of the public domain.

A. DISPARITIES IN THE SCOPE OF THE PUBLIC DOMAIN

There is no single (global) public domain in copyright law, but there are multiple public domains because the scope of the public domain at any given time may differ from one country to another.[121] Since copyright is territorial and none of the international copyright agreements defines or draws the contours of the public domain with a view to harmonization, national laws determine the scope of the public domain.[122] While there is some form of uniformity in the area of unprotected elements of copyrighted works like ideas, facts, mathematical concepts, and methods of operation under the mandatory provisions of the TRIPS Agreement[123] and the WCT,[124] there are still other components of the public domain that are left to national discretion. Even in the area of unprotected elements where there is some form of uniformity, countries have maneuvered to extend protection to unprotected elements like data.[125] The rules of eligibility for copyright protection also differ from country to country and what may be protected in one country may be in the public domain in another.[126]

There is also no harmonization regarding when copyright expires in works, notwithstanding that expired works form the bulk of the public domain. The Berne Convention[127] and the TRIPS Agreement[128] lay down only minimum terms of copyright protection, thereby giving states the discretion to grant longer terms of protection.[129] Consequently, there are differences in the terms of copyright protection and the rules for calculating copyright terms in national laws which result in an uncoordinated global public domain. Whereas the copyright

[120] *Id.*
[121] *See* Robert Spoo, *The Uncoordinated Public Domain*, 35 CARDOZO ARTS & ENT. L.J. 107, 111-13 (2016); Samuelson, *supra* note 4, at 814-15; Okediji, *supra* note 2, at 3.
[122] Okediji, *supra* note 2, at 3.
[123] *See* TRIPS Agreement, *supra* note 50, at art. 9.
[124] *See* WCT, *supra* note 63, at art. 2.
[125] *See* Council Directive 1996/9, 1996 O.J. (L 77/20) ("Database Directive").
[126] For example, in many common law countries fixation is a requirement for eligibility for copyright protection, whereas in most civil law countries fixation is not a requirement for eligibility. Also, in the United States, works of the United States Government are not protected by copyright law and as such they are in the public domain. 17 U.S.C. § 105. In other countries like Australia this is not the case. Copyright Act, 1968.
[127] Berne Convention, *supra* note 42, at art. 7.
[128] TRIPS Agreement, *supra* note 50, at art. 12.
[129] Berne Convention, *supra* note 42, at art. 7(6) ("The countries of the Union may grant a term of protection in excess of those provided by the preceding paragraphs.").

in a work may have expired in one country, and it is thus in the public domain, copyright may still subsist in the same work in another territory.[130] After surveying the rules on copyright duration in the national copyright laws of different countries and finding marked differences in how copyright durations are computed, Greenleaf and Lindsay concluded that:

> [R]ules on copyright duration are highly technical and complex, with the dense thicket of rules often being a real obstacle to users wishing to determine if a work has conclusively entered the public domain. These complexities arise because of differences in the term for different categories of works, differences in how the terms are calculated, and different terms of protection at different times.[131]

Having uniform global copyright regulations as to the maximum term of copyright protection and the rules for calculating copyright duration would establish a global public domain where works are free for use without liability.[132] However, this is not the case. This disharmony in the term of copyright protection "perpetuates a tragedy of the uncoordinated public domain"[133] and militates against the emergence of a true global public domain.

A fragmented public domain impedes universal access to and use of works. Whether one can access and use works in a completely unrestricted way under copyright law at a given place depends on its public domain status in that place. The internet and digital technologies make universal access to literary works possible in ways that were unimaginable many decades ago. Despite these technological advancements, we are unable to freely share works that have entered the public domain in one country on the internet. This is because access to the content in territories where copyright may still exist is subject to copyright restrictions and therefore access might need to be blocked in those territories. Otherwise, there may be exposure to liability for copyright infringement. Furthermore, copyright owners may even have a legitimate cause to request internet service providers to completely take down their works from the online

[130] For example, the term of copyright protection in the United States is generally the life of the author plus 70 years after the end of the year in which the author dies. 17 U.S.C. § 302. In Kenya, it is generally the life of the author plus 50 years after the end of the year in which the author dies. Copyright Act No. 12 of 2001 Cap. 130 (as amended by The Copyright (Amendment) Act No. 20 of 2019), § 23. In India, it is the life of the author plus 60 years after the end of the year in which the author dies. Copyright Act, Act No. 14 of 1957, § 22. This means that when the copyright in a work expires in Kenya, copyright will still subsist in the work for varying numbers of years in India and the United States.

[131] GREENLEAF & LINDSAY, *supra* note 4, at 275.

[132] Spoo, *supra* note 121, at 108.

[133] *Id.* at 109.

pages where access is provided because it infringes on subsisting copyrights in some other countries where the work is also available.[134] This would make it difficult to embark on projects involving the publication of public domain resources on the internet for universal availability and free access. This may also be challenging for educational and research institutions, and for libraries that may want to provide cross-border access to public domain works in their collections to students, staff, researchers, and users who may be overseas. This is especially important for remote learning and research since some of the works may still be protected in territories where the recipients are located. When these institutions are required to limit access to content based on geographical boundaries (i.e., geoblock),[135] some individuals may be disadvantaged. As a result of geoblocking, they may not have access to the same information as their peers who are studying or working in the country where the institution is located and where the content is accessible to the public. This could potentially affect their educational or career development as well as the educational and health objectives of the countries where they are situated. A fragmented public domain, therefore, affects the widespread dissemination of works for human development purposes.

There is a rule in the Berne Convention that seeks to harmonize the term of protection for foreign works. However, as will be shown, the rule does not provide much certainty in this area. The rule is known as the rule of comparison of terms or the shorter-term rule[136] and it is contained in Article 7(8) of the Convention. It provides that the term of copyright protection "shall be governed by the legislation of the country where protection is claimed; however, *unless the legislation of that country otherwise provides*, the term shall not exceed the term fixed in the country of origin of the work.[137] By this rule, the term of copyright protection of a work is determined by comparing the term of protection of the country of origin of the work with that of the country where protection is claimed (the country where the work is to be utilized). Where the term of protection in the country of origin exceeds the term in the country where protection is claimed, the term of protection in the latter country will apply.[138]

[134] *See* David N. Weiskopf, *The Risks of Copyright Infringement on the Internet: A Practitioner's Guide*, 33 UNIV. SAN FRANSISCO L. REV. 1, 58 (1998).
[135] Geoblocking is the term used to describe the act of limiting a user's internet access based on their geographical location. *Explainer: What is Geoblocking*, CONVERSATION (Apr. 17, 2013, 12:31 AM) https://theconversation.com/explainer-what-is-geoblocking-13057. Typically, this is enforced by telecommunications companies, websites, and content creators who wish to adhere to copyright laws. *Id.* To implement these geoblocks, databases are frequently used to identify the geographical locations of internet protocol addresses of internet users. *Id.*
[136] GREENLEAF & LINDSAY, *supra* note 4, at 105.
[137] Berne Convention, *supra* note 42, at art. 7(8) (emphasis added).
[138] *Id.*

Where the converse is the case, the term of protection in the country of origin will apply in the country where protection is claimed.[139] In any case, the shorter of the two terms will apply in a country where protection is claimed, hence the name "shorter-term rule."[140] However, this is not an absolute rule. The country where protection is claimed may provide in its legislation that the same term of protection it offers its nationals should apply and such term may be longer than the term in the country where the work originates.[141] In that case, the shorter-term rule defers to such a provision.[142]

The proviso in Article 7(8) of the Berne Convention makes it more difficult to ascertain if copyright immediately expires in a work in all other countries upon its expiration in the country of origin of the work. Any assumption that the shorter-term rule applies without ascertaining the legislation of other countries may be very costly. Where a work is in the public domain in one jurisdiction but not in another, it exposes those involved in digitization projects to the risk of liability for copyright infringement. To avoid this risk, they may need to spend money on legal or research fees to ascertain jurisdictions where the works may still be in the public domain and adopt geo-blocking mechanisms. The proviso to the shorter-term rule, therefore, creates further uncertainty as to when a work falls into the public domain.

A person who wishes to make available globally a work that has entered the public domain in the country of origin cannot be sure that the shorter term of the country of origin applies in all countries. This uncertainty would work in favor of the copyright owner and to the detriment of the global public in accessing useful works. The uncertainty in this area is not beneficial to the emergence of a single global public domain because a work will not necessarily be stripped of copyright protection in all countries at the same time. Users in some countries will obtain non-exclusive access to the work earlier than users in others. The shorter-term rule of the Berne Convention, therefore, "offers little certainty for the prospective disseminator of a work whose copyright has terminated in its country of origin."[143]

Assuming the shorter-term rule even applies to all works (which is not the case), it does not relieve users of the cumbersome task of referring to the terms of protection in the countries of origin of every work to know which works can be freely exploited and which ones cannot. This further highlights how disparate rules on the term of copyright protection make access to the public domain more

[139] *Id.*
[140] *Id.*
[141] *See id.* (stating that the normal rule will apply "unless the legislation of that country otherwise provides").
[142] *Id.*
[143] Spoo, *supra* note 121, at 123.

difficult. If the shorter-term rule had been drafted somewhat differently, it could have provided more certainty and ensured that a work enters the public domain globally at the time the term of protection in the country of origin lapses.

B. COPYRIGHT EXTENSIONS

The public domain is supposed to be a "global storehouse of knowledge, a storehouse that expands each year as copyright protection in works expires."[144] However, with the possibility of extending the term of copyright protection in works, the public domain may be stagnant for many years. For instance, the 1998 Sonny Bono Copyright Term Extension Act,[145] that added 20 years to the duration of all existing copyrights in the U.S., froze the public domain from January 1, 1999, until January 1, 2019.[146] No published works covered by the extension entered the public domain in the U.S. between 1999 and 2019.[147] Also, effective from December 30, 2020, Canada extended its general term of copyright protection from 50 years after the life of the author to 70 years after the life of the author.[148] As a result, unlike previous years, no work entered the public domain in Canada on January 1, 2023, and there will be no further entries until January 1, 2043 (reflecting the twenty-year addition). Every extension of the copyright term increases the waiting period for a work to fall into the public domain for free access and use. Copyright extension, therefore, represents one of the major threats to the public domain.[149]

The Berne Convention and the TRIPS Agreement only lay down the minimum term of copyright protection, thereby giving members freedom to grant longer terms and arbitrarily increase the term of copyright protection from time to time. While perpetual copyright protection is not technically recognized

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[144] Lydia P. Loren, *Technological Protections in Copyright Law: Is More Legal Protection Needed?*, 16 INT'L REV. L., COMPUT. & TECH. 133, 136 (2002) (citation omitted).

[145] Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827-2834 (1998).

[146] Alison Flood, *'The Drought is Over': Mass US Copyright Expiry Brings Flood of Works into Public Domain*, GUARDIAN (Jan. 2, 2019, 9:45 AM) https://www.theguardian.com/books/2019/jan/02/the-drought-is-over-mass-us-copyright-expiry-brings-flood-of-works-into-public-domain.

[147] *Id.*

[148] *See* Budget Implementation Act, No. 1, S.C. 2022, c. 10, sec. 276-279, §§ 6-9 (amending the Canadian Copyright Act and increasing the term of copyright protection). Note that December 30, 2022 is not the implementation date for all the provisions of the Budget Implementation Act. It was fixed by an order in council as the date for the implementation of Division 16 of Part 5 of the Act that contains the copyright amendments. *Id.* (Order in Council dated November 11, 2022 PC Number: 2022-1219).

[149] Joseph P. Liu, *The New Public Domain*, 4 UNIV. ILL. L. REV. 1395, 1425 (2013).

in international copyright law, there is nothing to suggest that states cannot grant perpetual rights (in principle) since international copyright laws are silent on the limits of copyright duration. International copyright law would permit any term length. Similarly, although national copyright laws do not formally provide for perpetual copyright protection, legislators may be able to circumvent the limits of copyright duration through various practices and create unending terms of copyrights.[150]

One of the reasons officials have proffered for extending copyright duration is the need to provide authors incentives to produce new works.[151] The assertion that extending copyright terms is necessary to reward authors is difficult to defend. The minimum term of copyright protection is already long enough to financially reward authors for the exploitation of their works because authors are rewarded with copyrights throughout their lifetime.[152] Additionally, the term extension usually concerns increasing the years in which copyright continues to subsist in a work following the author's death. Therefore, it is practically impossible to incentivise the deceased to make new works.[153] Even during the lifetime of the author, there are works that are commercially exploited not by authors but by publishers and distributors.[154] Most notable in this category are journal articles which journal publishers and distributors often commercially exploit without giving any financial compensation to the authors.[155] Considering the above reasons, it is safe to conclude that copyright extensions are really aimed at enriching corporate copyright owners like publishers and distributors, and the authors' compensation justification is a mere smokescreen. Jacob Flynn, Rebecca Giblin, and Francois Petitjean also note that "the additional years of economic rights almost always vest, not in works' authors, but in their owners and licensees."[156]

Some argue that extension of copyright terms provides publishers with incentives to publish older works that would otherwise be unavailable and unused without such publication.[157] The United States Congress expressed the view that "the lack of copyright protection actually restrains dissemination of the

[150] Okediji, *supra* note 2, at 5.
[151] *See, e.g.*, S. REP. NO. 104-315, at 3 (1996).
[152] Jacob Flynn et al., *What Happens When Books Enter the Public Domain? Testing Copyright's Underuse Hypothesis across Australia, New Zealand, the United States and Canada*, 42 UNIV. NEW S. WALES L. J. 1215, 1216-1217 (2019).
[153] *See id.* (arguing that protection after the authors death does little to incentivize the creation of new works).
[154] *See* PETER SUBER, OPEN ACCESS 9–10 (2012).
[155] *Id.*
[156] Jacob Flynn, et al., *supra* note 153, at 1217 (citation omitted).
[157] *See* Liu, *supra* note 149, at 1401.

work, since publishers and other users cannot risk investing in the work unless assured of exclusive rights."[158] Others also argue that publishers will not invest in the publication and distribution of works if they are not assured of copyrights and that a lack of copyright would then prevent the availability and dissemination of works.[159] However, in a recent empirical study, Flynn, Giblin and Petitjean investigated this hypothesis and found that the expiration of copyright and the possibility of increased competition in the publication of works without copyright protection do not deter commercial publishers from investing in the publication and distribution of works in which copyrights have expired.[160] According to their findings, publishers are driven by commercial demand in investing in a work and the subsistence of copyright in works with low commercial demand is not sufficient to make publishers invest in the dissemination of such works.[161]

Contrary to arguments that copyright extensions facilitate the availability of and access to literary works, the authors found that "where copyright has been extended, libraries are being obliged to pay higher prices in exchange for worse access."[162] Paul Heald made similar findings to those of Flynn, Giblin and Petitjean in earlier works that tested the relationship between the existence of copyright and the availability and cost of works on the market.[163] Heald found that titles are less available when they are under copyright than when copyright in the titles has expired and that the price of works is higher when they are under copyright than when copyright in the works has expired.[164] As such, extended copyright terms do not benefit the public as they affect access to works by freezing the public domain, limiting and delaying its availability, and increasing the cost of access. The minimum term for copyright protection in international copyright laws is already long enough as most works published in one generation will not enter the public domain in many countries until the next generation.

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158 H.R. REP. NO. 94-1476, at 134 (1976).

159 *Evidence to Subcomm. on Courts and Intell. Prop. of the H. Comm. on the Judiciary*, 104th Cong. 171, 633-34 (1995) (Statement of Marybeth Peters, Register of Copyrights and Associate Librarian for Copyright Services, Library of Congress).

160 Jacob Flynn, et al., *supra* note 153, at 1246.

161 *Id.*

162 *Id.*

163 Paul J. Heald, *Property Rights and the Efficient Exploitation of Copyrighted Works: An Empirical Analysis of Public Domain and Copyrighted Fiction Bestsellers*, 92 MINN. L. REV. 1031, 1039-50 (2008) (finding that American novels in which copyright protection still subsists are about 40% to 80% more expensive, less available, and more than ten times likely to be out of print when compared to similar titles in which copyright has expired). In a latter work, Heald reached similar findings. *See* Paul J. Heald, *How Copyright Keeps Works Disappeared,* 11 J. EMPIRICAL L. STUD. 829 (2014).

164 Heald, *supra* note 163, at 1049.

In the last three decades, one of the principal reasons why some countries have extended their copyright terms is to fulfill obligations in TRIPS-Plus Agreements.[165] Since the TRIPS Agreement was negotiated under the auspices of the WTO, several regional and bilateral trade agreements have been negotiated.[166] These agreements were mostly initiated by the U.S. and E.U. and they impose copyright protection beyond that contained in TRIPS.[167] The U.S. has especially pushed many countries through Free Trade Agreements ("FTAs") to extend their copyright term beyond the minimum standard in the TRIPS Agreement.[168] The U.S.'s FTAs usually seek a level of copyright protection in partner countries that is at least on par with the level of protection in the U.S.[169] Since the U.S.'s Copyright Act provides for the life of the author plus 70 years,[170] under the FTAs its trading partners are obliged to have a similar term of protection for copyrighted works.[171]

Following the conclusion of the USA-Australia FTA in 2004 and in compliance with its obligations under the agreement, Australia extended its term

[165] TRIPS-Plus Agreements are agreements that increase intellectual property protection beyond the minimum threshold required by the TRIPS Agreement. SUSY FRANKEL & DANIEL J. GERVAIS, ADVANCED INTRODUCTION TO INTERNATIONAL INTELLECTUAL PROPERTY LAW 115 (2016).
[166] *Id.* at 127.
[167] *Id.*
[168] *Id.* at 127-128.
[169] *Id.*
[170] 17 U.S.C. § 302(a).
[171] *See, e.g.*, United States—Mexico—Canada Agreement, art. 20.62(a), July 1, 2020, OFF. U.S. TRADE REP., https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between; United States-Chile Free Trade Agreement, art. 17.5(4)(a), June 6, 2003, OFF. U.S. TRADE REP., https://ustr.gov/sites/default/files/uploads/agreements/fta/chile/asset_upload_file912_4011.pdf (entered into force Jan. 1, 2004); United States-Morocco Free Trade Agreement, art. 15.5(5), June 15, 2004, OFF. U.S. TRADE REP., https://ustr.gov/sites/default/files/uploads/agreements/fta/morocco/asset_upload_file797_3849.pdf (entered into force Jan. 1, 2006); Australia-US Free Trade Agreement, art. 17.4(4)(a), May 18, 2004, [2005] A.T.S 1; Bahrain Free Trade Agreement, Bahr.-U.S., art. 14.4(4)(a), Sept. 14, 2004, OFF. U.S. TRADE REP., https://ustr.gov/sites/default/files/uploads/agreements/fta/bahrain/asset_upload_file211_6293.pdf (entered into force Jan. 11, 2006); Oman Free Trade Agreement, Oman-U.S., art. 15.4(a), Jan. 19, 2006, https://ustr.gov/sites/default/files/uploads/agreements/fta/oman/asset_upload_file715_8809.pdf (entered into force Jan. 1, 2009); Peru Trade Promotion Agreement, Peru-U.S., art 16.5(5)(a), Apr. 12, 2006, OFF. OF THE U.S. TRADE REP., https://ustr.gov/sites/default/files/uploads/Countries%20Regions/africa/agreements/pdfs/FTAs/peru/16%20IPR%20Legal.June%2007.pdf (entered into force 1 February 2009).

of copyright protection in literary works by 20 years.[172] Australia estimated that its obligations to extend the term of protection would cost users an additional $88 million per year.[173] This further proves that copyright extensions impose greater costs of access on users and can be greatly detrimental to the ability of users to access copyrighted works. Excessively long copyright terms, fuelled by extensions, can also increase the likelihood for works to become orphaned (where rights holders can no longer be identified). This is because copyright owners may change over time, and it may become difficult for users to identify and locate the current copyright owners.[174] Copyright works that have already been produced but cannot be accessed and used by consumers benefit no one in the long run.[175]

The international copyright system has provided an environment where copyright extensions are not only possible but possible without limit. The prescription of only a minimum term of copyright protection only benefits copyright owners. Instead, an international prescription on the maximum term of copyright protection is exactly what is needed to protect the interest of users in enjoying a realm of works that is outside the reach of private control. In the absence of international standardization as to the maximum term of copyright protection, powerful countries will continue to push for terms that are longer than the minimum term in international copyright agreements and that undermine public interest in and benefits from an ever-growing public domain.

C. PRIVATIZATION OF PUBLIC DOMAIN RESOURCES

Legal rules that allow recapturing and privatization of resources that are in the public domain present significant threats to its preservation. In this sub-section, two of these legal rules are examined: rules on the protection of non-original databases, and rules concerning the re-monopolization of previously unpublished works in which copyright protection has expired.

1. Protection of Non-Original Databases

For compilations of data, facts, or other materials to enjoy copyright protection, there must have been enough creativity in the selection and arrangement of the data, facts, or other materials to give the work an original

[172] *See* US Free Trade Agreement Implementation Act 2004 (Cth) sch 9 pt 5 sub-s 33(2) (Austl.); Australia-United States Free Trade Agreement, *supra* note 171, at art. 17.4(4).
[173] Intellectual Property Arrangements, PROD. COMM'N INQUIRY REP. No. 78 at 129 (2016).
[174] ROSNAY & DE MARTIN, *supra* note 81, at xxiv.
[175] FRANKEL & GERVAIS, *supra* note 167, at 45, 71.

character.[176] The TRIPS Agreement[177] and WCT recognize the protection of compilations of uncopyrightable data or facts and copyrightable elements. Article 5 of the WCT provides that,

> Compilations of data or other material, in any form, *which by reason of the selection or arrangement of their contents constitute intellectual creations*, are protected as such. *This protection does not extend to the data or the material itself* and is without prejudice to any copyright subsisting in the data or material contained in the compilation.[178]

There are at least two implications of the above provision for the protection of databases in international copyright law. First, a database must meet the originality requirement to enjoy copyright protection, i.e., the database must constitute an intellectual creation by reason of the selection or arrangement of its contents. Second, the copyright protection in such creations relates only to the structure and arrangement of the database and not the content of the database. The database content may or may not be independently protected depending on whether the contents are protectable under copyright law. The Agreed statement concerning Article 5 of the WCT also supports this. It provides that "another scope of protection for compilations of data (databases) under Article 5 of this Treaty, read with Article 2, is consistent with Article 2 of the Berne Convention and at par with the relevant provisions of the TRIPS Agreement."[179] Article 2 of the WCT defines the scope of copyright protection to ensure that copyright protection is not extended to unprotected elements like ideas and data.[180] Article 2(5) of the Berne Convention limits the protection of compilations to items that constitute literary works because they are original, thereby precluding the protection of unoriginal compilations or databases.[181] At the 1996 WIPO Diplomatic Conference where the WCT was adopted, one of the documents presented for consideration was a Basic Proposal for the Substantive Provisions of the Treaty on Intellectual Property in Respect of Databases.[182] Since existing copyright laws, including the WCT, already protect original databases, the proposal was for the protection of non-original databases

[176] *See* Feist Publ'ns., Inc. v. Rural Tel. Serv. Co, 499 U.S. 340 (1991).
[177] TRIPS Agreement, *supra* note 50, at art. 10(2).
[178] WCT, *supra* note 63, at art. 5 (emphasis added) (citation omitted).
[179] *Id.* at Agreed Statement Concerning Article 5.
[180] *Id.* at art. 2.
[181] Berne Convention, supra note 42, art. 2(5).
[182] WIPO, *Protection of Non-Original Databases,*
https://www.wipo.int/copyright/en/activities/databases.html (last visited Mar. 29, 2023).

that do not qualify for copyright protection. However, no agreement was reached on the protection of non-original databases at that Conference.[183]

Despite the non-recognition of the protection of non-original databases in international copyright laws, there are examples of national and regional legislation that protect these databases through *sui generis* rights.[184] The most notable is the Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the Legal Protection of Databases ("Database Directive"). By the Database Directive, EU member states are required to protect non-original databases by conferring *sui generis* rights on the makers of the databases. Article 7 provides that,

> Member States shall provide for a right for the maker of a database which shows that there has been qualitatively and/or quantitatively a substantial investment in either the obtaining, verification or presentation of the contents to prevent extraction and/or re-utilization of the whole or of a substantial part, evaluated qualitatively and/or quantitatively, of the contents of that database.[185]

The database maker does not need to show that there has been any originality in the making of their work or that their work constitutes an intellectual creation. The database maker only needs to show that "there has been qualitatively and/or quantitatively a substantial investment in either the obtaining, verification or presentation of the contents . . . ."[186] The investment here may be financial or non-financial ("time, energy and effort")[187] and the maker of the database is "the person who takes the initiative and the risk of investing . . . ."[188] The database maker is granted two rights: the rights to prevent extraction and re-utilization of the whole or a substantial part of the database.[189] Also, a database maker can prevent the "repeated and systematic extraction and/or re-utilization of insubstantial parts of the contents of the database . . . ."[190] Extraction of a

[183] *Id.*
[184] *See* Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the Legal Protection of Databases [1996] OJ L 77/20 [hereinafter "Database Directive"]; Iceland Copyright Act, No. 73 of 29 May 1972, as last amended by Act No. 109 of 19 October 2016, art 50.
[185] Database Directive, supra note 184, at art. 7.
[186] Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the Legal Protection of Databases, art. 7, 1996 O.J. (L 77) 20 (EC).
[187] *Id.* at recital 40.
[188] *Id.* at recital 41.
[189] *Id.* at art. 7(1).
[190] *Id.* at art. 7(5).

database means the permanent or temporary transfer of all or part of its contents to another medium, whereas reutilization indicates making the contents of a database publicly available.[191] Both prohibited acts are important to accessing contents of databases.

Sui generis rights in databases pose a significant threat to the public domain because they privatize its elements.[192] Non-original databases are non-copyrightable and hence constitute public domain elements under copyright law.[193] However, under database protection laws, non-original databases are protected to reward the human, technical, and financial resources invested in gathering and arranging copyrighted and non-copyrighted materials into a database.[194] Unlike copyright protection in databases, *sui generis* rights are intended to grant protection beyond the selection or arrangement of the contents of a database.[195] *Sui generis* rights in databases protect against extraction and reutilization, even if the contents are works in which copyright no longer subsists or that entails unprotected elements—both being public domain materials.[196] The rationale for this—as stated in the *Database Directive*—is to give database makers protection against a "misappropriation" of the contents of the database by a user or competitor.[197]

Protecting the extraction and reuse of content, including public domain materials arranged in databases, through *sui generis* rights may limit public access and use of those materials.[198] The protection of databases through *sui generis* rights does not bar a person from accessing, extracting, and using the same content from another unprotected source.[199] However, access to the same content cannot be obtained through a protected database without the consent of the database maker.[200] This is notwithstanding public interest in the extraction and utilization of public domain elements within a protected database. As Monica Lupaşcu reminds us, "a database user being considered as being in a position of opposite interests to the database's manufacturer . . . is also a public domain works user."[201] In essence, the user of copyright public domain elements

[191] *Id.* at art. 7(2).
[192] *See* DUSOLLIER, *supra* note 20, at 46.
[193] *Id.*
[194] Database Directive, *supra* note 184, at recital 7-12.
[195] *See id.* at recital 39.
[196] *Id.* at recital 41, art. 7(5).
[197] *Id.* at recital 39.
[198] *See* Monica Lupaşcu, *Databases and the Sui-Generis Right – Protection Outside the Originality. The Disregard of the Public Domain*, 12 CHALLENGES KNOWLEDGE SOC'Y 762, 763 (2018).
[199] *See* Database Directive, *supra* note 184, at art. 1 (limiting the right to acts done in relation to contents of databases protected under the Directive).
[200] Database Directive, *supra* note 184, at art. 7.
[201] Lupaşcu, *supra* note 198, at 764.

extracted from a database protected by the Database Directive may be held liable for infringing the right of the database maker.

The protection of databases encloses the public domain and privatizes access to the public domain. Ordinarily one can extract data, facts, ideas, and other unprotected elements from a copyrighted or non-copyrighted work, without limit on the quality or quantity of the elements being extracted. However, if a database maker puts these elements within a database and obtains a *sui generis* right, others cannot extract or make available a substantial amount of the public domain contents of this database.[202] Extracting and using an insubstantial amount is prohibited if it is "repeated and systematic" and considered as "implying acts which conflict with a normal exploitation of that database or which unreasonably prejudice the legitimate interests of the maker of the database . . . ."[203] This is nothing short of privatization of public domain elements and the taking of public rights for the financial benefits of a few.

The *sui generis* right not only makes possible the privatization of public domain elements, but also gives the possibility of a perpetual monopoly over these contents. The right is for an initial term of 15 years.[204] It is renewable and there is no limit on the number of times the right can be renewed if there is any substantial change (including additions, deletions, or alterations) to the contents of the database.[205] The database maker will enjoy protection for both new additions and original contents in the subsequent term(s) of protection.[206] The *sui generis* right also applies to original databases that already qualify for and enjoy copyright protection.[207] This makes it possible to extend the term of protection in those databases beyond the copyright term, and possibly for an indefinite number of years.[208]

The *sui generis* database right does more harm than good to innovation.[209] Scientific data generated from research that should otherwise be part of the

[202] *See* Database Directive, *supra* note 184, at art. 7(1).
[203] Database Directive, *supra* note 184, at art. 7(5).
[204] *Id.* at art. 10(1).
[205] *Id.* at art. 10(3).
[206] *See* Mark J. Davison, *Sui Generis or Too Generous: Legislative Protection of Databases, its Implications for Australia and Some Suggestions for Reform,* 21 UNIV. NEW S. WALES L.J. 729, 740 (1998).
[207] *See* Database Directive, *supra* note 184, at art. 7(4).
[208] *See* Database Directive, *supra* note 184, at recital 26 ("[W]orks protected by copyright and subject matter protected by related rights, which are incorporated into a database, remain nevertheless protected by the respective exclusive rights and may not be incorporated into, or extracted from, the database without the permission of the right-holder or his successors in title . . . ."); *id.* at recital 27 ("[C]opyright in such works and related rights in subject matter thus incorporated into a database are in no way affected by the existence of a separate right in the selection or arrangement of these works and subject matter in a database . . . .").
[209] Lupaşcu, *supra* note 198, at 764.

public domain (since copyright does not protect the data but protects only the expressions of the findings) is now being protected by *sui generis* rights.[210] This curtails access to and reuse of important data for scientific progress and ultimately, human development. The implications of this for innovation and development in this age of big data, artificial intelligence ("AI"), and machine learning are immense. To engage in the text and data mining research—which is necessary to train AI systems to perform tasks they were not even programmed for— researchers rely on access to a large pool of data that can be extracted and analysed.[211] When useful data is locked up behind paywalls, it can make it difficult to appropriate the benefits of big data and AI in health innovation and development. There are legitimate concerns with respect to confidential information and the need to limit public accessibility of certain research data.[212] This must, however, be balanced against the needs of the public to access and use this data and information for human development purposes. Moreover, the rationale behind *sui generis* rights in databases is commercial and not the protection of privacy.[213]

The protection of databases from extraction and re-utilization is particularly worrisome where the database is the sole source of the required contents. In such instance, database protection can lead to a monopolization (including perpetual monopoly) of information and data, with no alternative source of access. This could happen where the maker of the database is also the person who generated the data or the exclusive licensee of the person who generated the data.[214] One such situation is where the "[D]atabases are created as an effect of activities specific to certain companies or entities . . . which have the possibility to exclusively gather and combine certain data and materials from the public domain."[215] This means there can be no other source for getting the data, and the database maker has a monopoly that can be unduly exploited to charge excessively for access and use of the database content.[216] No one can extract

[210] *See id.* at 766.
[211] Sean Flynn et al., *Implementing User Rights for Research in the Field of Artificial Intelligence: A Call for International Action*, 42 EUR. INTELL. PROP. REV. 393, 395–96 (2020).
[212] Tom Pollard & Leo Anthony Celi, *Open Data in Health Care in* Samuel A. Moore ISSUES IN OPEN RESEARCH DATA 129, 132 (Ubiquity Press, 2014); Expert Advisory Group on Data Access, *Establishing Incentives and Changing Cultures to Support Data Access*, 2, 9, 12 (2014), https://wellcome.org/sites/default/files/establishing-incentives-and-changing-cultures-to-support-data-access-eagda-may14.pdf.
[213] *See*, *e.g.*, Database Directive, *supra* note 184, at recitals 7-12 (explaining that the rationale for the *sui generis* right is to encourage investment in databases and allow database makers to recoup their financial investments and make profit).
[214] Davison, *supra* note 206, at 741.
[215] Lupaşcu, *supra* note 198, at 764.
[216] Davison, *supra* note 206, at 742.

data from the database to improve on the same without the permission of the database maker. Additionally, because of the peculiarity of the information, another person may not be able to observe the same recorded facts and data because the settings are not available or accessible to the general public.[217]

For example, scientific data generated from a specific research project might be put in a database and granted *sui generis* rights against access and reuse of the data. In such case, it may be impossible or very difficult for another researcher to recreate the same research, in terms of the participants and in relation to that point in time. Even if such research can be replicated, it is inefficient to expend time and money on research that may otherwise be unnecessary if access to and reuse of the research data from the previous research was possible without restrictions. The Database Directive is therefore harmful to access to knowledge, especially considering that for some collections of data or information, only certain entities or persons can be in the position of the database maker.[218] At the same time, some generated data is subject to specific research activities that are difficult to reproduce with precision.

The Database Directive recognizes a few exceptions to the *sui generis* right.[219] However, the adoption of these exceptions by member states is optional "despite the importance of access to data to the advancement of education and research."[220] Even if recognized, these exceptions are insufficient to grant users the freedom they hitherto had to use public domain elements that are in original and non-original databases. For instance, the extraction of a substantial part of the contents in a database for private purposes is only permitted where the database is non-electronic.[221] In today's digital age, this means the extraction of the contents of most databases for private purposes without first obtaining a license from the database maker is prohibited under EU law.

2. Re-monopolization of previously published works, including critical and scientific publications

Besides the privatization of unprotected elements of copyrighted works in the EU, there is also an open door for regaining copyright over some categories of literary works with expired copyrights. Within the European Community, copyright in unpublished works expires 70 years after the year in which the work

[217] Lupaşcu, *supra* note 198, at 764.
[218] *Id.*
[219] Database Directive, *supra* note 184, at art. 9.
[220] Davison, *supra* note 206, at 740.
[221] Database Directive, *supra* note 184, at art. 9(a).

was created.[222] If at the end of this period, a work has not been published, copyright in the work ceases, and it falls into the public domain.[223] The work's subsequent publication after that point should therefore be free of any copyright use or access restrictions. This, however, is not the case. Article 4 of Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the Term of Protection of Copyright and Certain Related Rights ("Term Harmonization Directive")[224] provides that,

> Any person who, after the expiry of copyright protection, for the first time lawfully publishes or lawfully communicates to the public a previously unpublished work, shall benefit from a protection equivalent to the economic rights of the author. The term of protection of such rights shall be 25 years from the time when the work was first lawfully published or lawfully communicated to the public.[225]

Member states must "withdraw" from the public domain a previously unpublished work that becomes published by conferring the person who publishes the work with a 25-year copyright monopoly.[226] A similar provision exists in the Copyright Act of Iceland.[227] Clearly, the rationale behind granting another term of protection to such works is to incentivize anyone in possession of an unpublished work that may be useful to publish and communicate the work to the public.[228] As long as the work remains unpublished, even though it is legally in the public domain, the public cannot benefit from the information and knowledge contained in it. The grant of copyright protection, in this case, may then be considered a "necessary evil."[229] If a work is published in response to the 25-year monopoly incentive, it becomes accessible (even if subject to payment and restrictions as to use) to the public and it can fall back into the public domain. This time it would be practically accessible to the public. However, some works are so important to the public that they should not be

[222] *Id.* at art. 1(6).
[223] *Id.*
[224] *See* Directive 2006/116 of the European Parliament and of the Council of 12 December 2006 on the Term of Protection of Copyright and Certain Related Rights, 2006/116/EC 2006 O.J. (L 372/12) [hereinafter Term Harmonization Directive]. This directive replaced the Directive 93/98 of 29 October 1993 which originally harmonized the term of copyright protection with the EU.
[225] *Id.*
[226] *Id.*
[227] Copyright Act, 1972 (No. 73 of 29/1972), as last amended by Act No. 109 of 19 October 2016, art. 44a.
[228] DUSOLLIER, *supra* note 20, at 28.
[229] *Id.* at 41.

subject to copyright restrictions upon publication. For example, historically scientific publications may help scientists better combat a public health challenge.[230] The interest of the public in immediately accessing such works that were already legally in the public domain was not considered in the Term Harmonization Directive.

In another provision of the Term Harmonization Directive, member states are permitted to "protect critical and scientific publications of works which have come into the public domain" for a maximum term of 30 years from the time of first publication.[231] Critical scientific publications, even those important to understanding or solving scientific problems, may be re-monopolized for up to 30 years, notwithstanding the effect this may have on human development. One would think that such works would either be excluded from re-monopolization or that the period of monopoly would be considerably reduced in comparison with other works. On the contrary, the period allowed is much longer. This presents a real danger to an accessible public domain as an essential resource for human development objectives such as health.

Imagine that an old scientific publication about the 1918 Spanish Flu suddenly surfaced in 2020 as the world grappled with the novel coronavirus. Imagine that this publication could help scientists understand the coronavirus better and make more informed decisions that could save lives. However, the person who found the work published it behind paywalls with several access and use restrictions, empowered to do so by a regained copyright protection over the work. Reproducing, disseminating, and translating such a work for widespread access would require obtaining a license from the now-copyright owner for a fee and subject to the restrictions imposed by them. In this scenario, the public urgently requires access to a publication that could potentially be locked away for an additional 25-30 years. This is the grim reality that society would have to grapple with—a situation where the economic interests of a few trumps the human development interests of many.

Any attempt at privatizing public domain works is undesirable because these attempts open the door for subsequent legislative acts aimed at re-privatization of these works. This is detrimental to access of knowledge since it leads to depletion of the public domain and strips the public of the freedom of its use.

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[230] Elise Smith et al., *Knowledge Sharing in Global Health Research – The Impact, Uptake and Cost of Open Access to Scholarly Literature*, 15 HEALTH RSCH. POL'Y & SYS. 1, 1 (2017) ("In 1982, the *Annals of Virology* published a paper showing how Liberia has a highly endemic potential of Ebola warning health authorities of the risk for potential outbreaks . . . . Limiting the accessibility of such knowledge may have reduced information propagation toward public health actors who were indeed surprised by and unprepared for the 2014 epidemic.")

[231] Term Harmonization Directive, *supra* note 224, at art. 5.

D. *DOMAINE PUBLIQUE PAYANT* SYSTEMS

The *domaine publique payant* (the "paying public domain" in English) "is a system by which a user of materials in the public domain is required to pay for a compulsory license in order to reproduce or publicly communicate the work, despite its status in the public domain."[232] The system, which has a French origin traceable to renowned author Victor Hugo, was originally based on the idea of collecting a small fee for the exploitation of public domain works, with the intention of using them for the benefit of young creators.[233] Although the system is no longer used in France, some African countries, especially Francophone African countries, have this system in their copyright laws.[234] This is made more prevalent by the obligation to adopt the *domaine publique payant* system contained in the Bangui Agreement Instituting an African Intellectual Property Organization - Act of December 14, 2015 ("Bangui Agreement")[235] administered under the auspices of the Organisation Africaine de la Propriété Intellectuelle ("OAPI").[236] The Bangui Agreement provides that the use of works in which copyright has expired "shall be subject to an undertaking by the exploiter to pay the relevant royalties to the national collective rights management organization."[237] The royalty is set as one-half the normal rate of remuneration for protected works and the royalties collected are to be devoted to social and cultural purposes.[238] Some African countries that are parties to the Bangui Agreement, like Senegal[239] and Democratic Republic of Congo,[240] and even non-

[232] DUSOLLIER, *supra* note 20, at 40.
[233] *Id.*
[234] *See, e.g.*, Senegal - Copyright Act 1973 (as amended up to January 24, 1986) art. 43; Congo - Law on Copyright and Neighbouring Rights (No. 24/82 of July 7, 1982) art. 85.
[235] Bangui Agreement Instituting an African Intellectual Property Organization - Act of December 14, 2015 art. 68, *opened for signature* Dec. 14, 2015 (entered into force Nov. 14, 2020) [hereinafter Bangui Agreement].
[236] The name of the organization is translated as African Organization of Intellectual Property.
[237] Bangui Agreement, *supra* note 235, at art. 68(1).
[238] *Id.* at art. 68(2).
[239] Law No. 2008-09 of January 25, 2008 on Copyright and Neighboring Rights (Senegal), art. 157, ¶ 1 (providing that "[t]he exploitation . . . of works that have fallen into the public domain . . . shall be subject to payment of a royalty").
[240] Ordinance-Law No. 86-003 of April 5, 1986 on the Protection of Copyright and Neighbouring Rights (Democratic Republic of Congo), art. 82 (providing that exploitation of public domain works shall be subject to authorization and payment of a royalty).

OAPI member countries, like Rwanda[241] and Kenya,[242] have set up such regimes in their copyright legislation. While no prior authorization is required in most countries,[243] the use of public domain works in these countries is subject to the prescribed fee.[244] The Bangui Agreement does not limit the cases where payment is required to the commercial exploitation of public domain works.[245] However, some countries have limited the system to commercial exploitations of such works.[246]

The *domaine publique payant* system encroaches on the freedom to exploit and use public domain works.[247] While fees collected are arguably often administered towards the welfare of young and upcoming creators, they are not legally required to go directly to authors.[248] The system puts a great strain on access to public domain works. Persons wishing to communicate public domain works to the public through the internet may be deterred from doing so, particularly if the required fee is high.[249] In some countries, the system only applies to works by national authors where the system is in operation.[250] This system is a barrier to the global public domain as a work that has fallen into the public domain in such a country may be used without any payment obligations in all other countries except for the country of origin.

For these reasons, the *domaine publique payant* system ought to be abolished. In countries where such abolition would be contrary to an obligation under a multilateral instrument, this may be difficult to realize without prior amendment

[241] Law No. 31/2009 of 26/10/2009 (Rwanda), *supra* note 45, at art. 202, ¶ 2 (providing that "[t]he use, for profit making purposes, of work of the public domain shall be made in return for payment of royalties in the conditions determined by the empowered authority").
[242] Copyright Act, 2001 (Kenya), *supra* note 45, at § 45(3) (providing that "[s]*ubject to the payment of such fees as may be determined by the Minister in relation thereto*, a work which has fallen into the public domain may be used without any restriction." (emphasis added)); *see also id.* at § 45(1) (applying even to works that entered into the public domain through voluntary relinquishments).
[243] In Democratic Republic of Congo, prior authorization of the national body responsible for collective management of rights is required to perform and reproduce public domain works. Ordinance-Law No. 86-003 of April 5, 1986, *supra* note 240, at art. 81.
[244] *See* Bangui Agreement, *supra* note 235, at art. 68(1).
[245] *See id.*
[246] *E.g.,* Law No. 31/2009 of 26/10/2009 (Rwanda), *supra* note 45, at art. 202.
[247] *See* DUSOLLIER, *supra* note 20, at 40.
[248] *See* Bangui Agreement, *supra* note 235, at art. 68 (providing for the payment of the royalties to a national collective rights management organization, which is usually an entity set up by authors, thus not suggesting that the organization should pay the money to authors).
[249] *Id.*
[250] *Id.*

of the instrument. Since there are only 17 member states of the OAPI,[251] the amendment process for the Bangui Agreement should not be as cumbersome as that of a treaty with more parties. In line with WIPO's mandate to preserve the public domain,[252] WIPO can advise the OAPI and non-OAPI member countries on the implications of the *domaine publique payant* system for access to knowledge in these countries. OAPI should know that because of the territoriality of copyright protection the works that are restricted in these African countries can still be disseminated freely in other countries. As such, there is no reason why the users in African countries should be deprived of the freedom to exploit public domain works that originate from their countries when others enjoy free exploitation of the same works.

Dusollier notes that abolition of the system in poor countries may affect the funding of cultural activities and the welfare of creators.[253] While supporting local creators in poor countries is desirable and necessary, it should not occur at the expense of an accessible public domain. Instead, governments should explore other welfare mechanisms for creators: cultural exhibitions and fairs, for example, can promote the works of local creators and encourage patronage. An accessible public domain is essential for promoting creativity as it provides would-be authors with access to works that they can draw inspiration from. Additionally, in most African countries, the cost of purchasing works that are subject to copyright protection negatively impacts education and lifelong learning.[254] Placing restrictions on public domain works in a way that increases the costs of disseminating those works will therefore do more harm to the realization of educational objectives. It could also hinder the production of creative works in these countries.

E. ABSENCE OF LEGAL MECHANISM FOR PUBLIC DOMAIN DEDICATIONS

Another threat to a robust public domain is the absence of a legal mechanism for dedicating copyrightable works to the public domain. International copyright

[251] OAPI, *Member Countries*, http://www.oapi.int/index.php/en/aipo/presentation/member-countries (last visited Sept. 27, 2023).
[252] *See* WIPO Development Agenda, *infra* note 308, at ¶ 16.
[253] DUSOLLIER, *supra* note 20, at 42.
[254] *See Every Child Should Have a Textbook*, UNESCO, (Jan. 2016), https://unesdoc.unesco.org/ark:/48223/pf0000243321 (showing how rising costs of purchase has caused an acute shortage of books in many African countries); THE WORLD BANK, *Textbooks and School Library Provision in Secondary Education in Sub-Saharan Africa* (Afr. Region Hum. Dev. Dep't, Working Paper No. 126, 2008), https://documents1.worldbank.org/curated/en/847601468002425196/pdf/425410PUB0ISBN101OFFICIAL0USE0ONLY1.pdf (showing how rising costs of purchase and restrictions on distribution and reproduction affects access to textbooks in sub-Saharan Africa).

agreements are silent on the practice and legal status of public domain dedications or voluntary relinquishment of copyright. The Berne Convention's rule against imposing compliance with formalities as a precondition for the grant of copyright protection[255] means that there is no positive action required of an author for gaining copyright protection. Therefore, eligible works are protected by default immediately upon creation. One of the implications of the automatic grant of copyright protection is that a person who does not wish to exercise or receive copyright protection in a work must take positive actions to "opt out" of this protection.[256] Otherwise, members of the public would not be aware that the copyright owner does not wish to preclude anyone from exploiting their works in ways prohibited by copyright law. Yet there is no mechanism in place for such "opt out" within international copyright laws and in most national laws.[257]

Even in countries like India and Kenya where there is a mechanism in place for relinquishing copyright protection,[258] the status of notice vis-à-vis other countries—where the work is protected, and legal opt-out notice is not in force—is uncertain. If an author of a work relinquishes copyright in the work in India or Kenya, for instance, does copyright in the work cease to exist in all other countries from the date of the notice in India or Kenya? Or is the notice only valid for copyright protection in the country where notice is given? The territorial nature of copyright seems to accord with the latter supposition unless the copyright owner makes clear in the notice that the relinquishment is for copyrights in all countries of the world. Even in that case, the status of such notice in other countries, where no mechanism for the relinquishment exits, is still uncertain.

Creative Commons acknowledges that it is extremely difficult for copyright owners to dedicate their works to the public domain before their copyright expires because of the absence of clear legal rules on the subject.[259] Creative

[255] Berne Convention for the Protection of Literary and Artistic Works, art. 5, cl. 2, Sept. 9, 1886, 1161 U.N.T.S. 39 (as revised at Stockholm on July 24, 1971).
[256] *See* GREENLEAF & LINDSAY, *supra* note 4, at 101 ("Conditioning copyright on formalities creates a default that copyright will not subsist unless the claimant takes positive action to 'opt in' to protection.").
[257] *See* BENABOU & DUSOLLIER, *supra* note 4, at 170.
[258] The Copyright Act, 1957, §21(1) (India) ("The author of a work may relinquish all or any of the rights comprised in the copyright in the work by giving notice in the prescribed form to the Registrar of Copyrights . . . and thereupon such rights shall . . . cease to exist from the date of the notice."); Copyright Act (2012) Cap. 130 § 45 (Kenya) (stating "works in respect of which authors have renounced their rights" belong to the public domain, and "renunciation by an author or his successor in title of his rights shall be in writing and made public").
[259] *CC0 "No Rights Reserved"*, CREATIVE COMMONS, https://creativecommons.org/share-your-work/public-domain/cc0/ (last visited Sept. 10, 2023).

Commons provides a mechanism for the dedication of works to the public domain called CC0 ("No Rights Reserved").[260] CC0 is a declaration that is attached to a work expressing the intention of the author to waive all their copyrights in a work.[261] However, Creative Commons admits that CC0 is limited in its effectiveness, as it cannot guarantee a total relinquishment of all copyrights in a work in every country of the world.[262]

An important question that arises in public domain dedications is whether authors can regain copyright for works they gave up before the expiry of the copyright term. International law is completely silent on this matter. The very few national laws that have relinquishment provisions are silent on whether re-monopolization of a work that has been relinquished to the public domain is permissible. Benabou and Dusollier have argued that nothing prevents a subsequent reappropriation of a work that has been abandoned or relinquished to the public domain.[263] This is especially so in countries where the legal status of the relinquishment is not clear in the first instance. Arguably, in such countries, copyright in the work never ceased at any point. This makes it difficult to prevent the re-privatization of such works that may have been in the public domain or have been treated for all intents and purposes as public domain resources. As a result, re-privatization not only makes it possible to deplete the public domain but it also presents users with uncertainties that may deter them from accessing or making available these categories of works.

Users that have already utilized or reproduced works based on a representation that the copyright owner has relinquished their right may be able to rely on the doctrine of estoppel.[264] In *Petrella v. Metro-Goldwyn-Mayer, Inc.*,[265] the Supreme Court of the United States held that estoppel would apply "when a copyright owner engages in intentionally misleading representations concerning his abstention from suit, and the alleged infringer detrimentally relies on the copyright owner's deception . . . ."[266] Thus, If a copyright owner claims that they have given up the rights in their work, and people use that work based on that claim, the doctrine of estoppel may prevent the owner from later challenging that use.

Nonetheless, public domain dedications and voluntary relinquishments of copyright can enrich the public domain and promote access to knowledge. In

[260] *Id.*
[261] *Id.*
[262] *Id.*
[263] BENABOU & DUSOLLIER, *supra* note 4, at 170.
[264] Phillip Johnson, *Dedicating Copyright to the Public Domain*, 71 MOD. L. REV. 587, 606 (2008) (citation omitted).
[265] Petrella v. Metro-Goldwyn-Mayer, Inc., 572 U.S. 663 (2014).
[266] *Id.* at 684–85.

both cases, works otherwise locked up by copyright protection for many years fall into the public domain earlier. However, for the public to benefit from these dedications and relinquishments, the law must clarify their implications. Nothing short of express legal provisions prescribing the status of relinquished works will suffice, as models like the CC0 and mere declarations without legislative support are prone to disputes and uncertainties.

There should be no legal barrier to the dedication of works to the public domain.[267] International copyright law should provide legal certainty for the relinquishment of copyright by requiring states to include provisions allowing creators and their successors in title to relinquish their copyrights. Copyright owners should have the right to relinquish their copyright at any time and there should be a database for the legal deposit of such works. The law should make clear that upon relinquishment of copyright in a work, all exclusive rights granted by copyright law in the work ceases and the work becomes a public domain work. Such express provision in the law would guarantee the status of the work as a public domain material and prevent the re-privatization of the work.

Since copyright protection is territorial, it is important to make clear the status of a work dedicated to the public domain under the legal regime of one jurisdiction vis-à-vis other jurisdictions where the work is protected. Where a work has been dedicated to the public domain by giving notice in one country, copyright in the work should immediately cease in all other countries, except the copyright owner expressly reserves copyright in the work in other countries. This would not just clarify the international status of the work, but it would also help promote and enrich the global public domain.

The public domain should not just exist in theory. It should also be functional, and providing the public with information about the public domain status of a work is the first step towards such functionality. WIPO should set up a centralized, publicly accessible database for recording public domain dedications or copyright relinquishments. This could help people become aware of works that are in the public domain as a result of such dedications.

F. TECHNOLOGICAL AND CONTRACTUAL THREATS

Technological tools and standard contracts can be barriers to the flourishing and accessibility of the public domain. For public domain works to be truly free and widely accessible and available in this digital age, attention must be paid to technological protection measures ("TPMs"). The use of TPMs can affect the "practical availability of such works for copying and re-use."[268] TPMs can

[267] *See* ROSNAY & DE MARTIN, *supra* note 81, at xxv.
[268] Liu, *supra* note 149, at 1455.

prevent widespread access to public domain materials.[269] Through TPMs, copyright owners can effectively fence off users from accessing contents that are legally in the public domain, thereby enclosing such works for practical purposes. TPMs can take different forms such as passwords, digital locks, and encryption, but regardless of which TPM is used in connection with a work, all TPMs seek to control access to and use of a work.[270] When a work contains a TPM, the TPM functions to preclude acts that are within the exclusive control of the copyright owner by law.[271] However, TPMs may also preclude acts that are not legally within the exclusive control of the copyright owner.[272] Copyright owners are not legally restricted from using a TPM in this manner.[273] Also, there is no obligation to remove a TPM attached to a work once the copyright term expires.[274] TPMs can therefore be used to perpetuate a monopoly over works beyond the duration allowed in copyright law. This implies that a work that should ordinarily be in the public domain, and be free from every copyright restriction as to use and access, may remain locked behind paywalls notwithstanding its legal status as a public domain work. Thus, while copyright law would not stand in the way of the reproduction, access, and use of such works, TPMs would.[275]

In a world where content is becoming increasingly digitized it may be difficult, if not impossible, to find paper copies of such locked public domain works that can be freely accessed, reproduced, and digitized. Lydia Loren notes that "the real danger arises when the only copies of public domain works that can be accessed are distributed through technologically protected systems."[276] In this digital age, this danger may become inevitable as some of the works being created today are only distributed in digital copies which have TPMs attached. By the time these works fall into the public domain, the copyright owner may continue to exercise monopoly unless someone circumvents the TPM (assuming the TPM utilized has not become technically obsolete, in which case it may be impossible to circumvent it).

The use of TPMs can result in the monopolization and censorship of knowledge. According to a statement by the European Commission's Legal Advisory Board, "'widespread use of technical protection devices [that] might result in the de facto creation of new information monopolies. *This would be*

[269] *Id.*
[270] *See* Loren, *supra* note 144, at 134-35.
[271] EFRONI, *supra* note 19, at 192.
[272] *See* Peter K. Yu, *Anticircumvention and Anti-circumvention*, 84 DENV. UNIV. L. REV. 34-35 (2006).
[273] *See* WCT, *supra* note 63, at art. 11; 17 U.S.C. § 1201.
[274] *See* WCT, *supra* note 63, at art. 11; 17 U.S.C. § 1201.
[275] Loren, *supra* note 144, at 136.
[276] *Id.* at 145 n.22.

especially problematic in regard of public domain materials."'[277] Despite this, at the international copyright level, legal protection against the circumvention of TPMs has been mandated through the WCT.[278] Many countries have introduced anti-circumvention provisions in line with their international obligations.[279] This provides an additional layer of protection for users of TPMs. The WCT and most anti-circumvention rules do not contain safeguards for free access to the public domain.[280]

While it may be argued that the circumvention of TPMs in works that have fallen into the public domain would not give rise to any liability under copyright law, the public should not even have to go through the rigor of circumventing TPMs before using a work that should legally be free of such restrictions. Furthermore, some countries have gone as far as banning circumvention devices and the provision of circumvention services.[281] In such countries, access to circumvention devices and services may be difficult to come by even to remove TPMs preventing the use of public domain works. Also, publishers may want to recapture exclusive rights by attaching TPMs to a collection of works that are mainly in the public domain and then including one or two copyrighted works in the file to enjoy legal protection against circumvention. In such a case, it becomes practically impossible to circumvent the attached TPM to access and use the public domain work without gaining "unlawful" access, thereby opening users to liabilities under anti-circumvention rules.[282]

Copyright owners are not only controlling access to works through TPMs, they are also doing so through contracts.[283] These contracts are usually designed as standard form contracts (also known as End User Licensing Agreements)

[277] *See* DUSOLLIER, *supra* note 20, at 45 (emphasis added) (quoting European Legal Advisory Board Reply to the Green Paper on Copyright and Related Rights in the Information Society (1996)).
[278] WCT, *supra* note 63, at art. 11.
[279] *See* Copyright Act, Pub. L. 94–553, 90 Stat. 2541, 1976 (codified as amended 17 U.S.C.S. §§ 1201-1205 [hereinafter Copyright Act, 1976]; Copyright Act 1968 (Cth), s 116AN (Austl.); Copyright Act (2001) Cap. 130 § 35(3) (Kenya); Directive 2001/29 of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, 2001/29/EC 2001, O.J. (L 167) 10,17-18.
[280] DUSOLLIER, *supra* note 20, at 45.
[281] *See* Copyright Act, 1976, *supra* note 279, at § 1201(b); Copyright Act 1968 (Cth), s 116AO (Austl.); Copyright Act (2001) Cap. 130 § 35(3) (Kenya).
[282] *See* Liu, *supra* note 149, at 1454.
[283] Katherine Klosek, *Copyright and Contracts: Issues & Strategies*, ASSOCIATION OF RESEARCH LIBRARIES 3-5 (July 22, 2022), https://www.arl.org/wp-content/uploads/2022/07/Copyright-and-Contracts-Paper.pdf; Viva R. Moffat, *Super-Copyright: Contracts, Preemption, and the Structure of Copyright Policymaking*, 41 U.C. DAVIS L REV. 45, 49-70 (2007).

containing the terms of use of works owned by a copyright owner.[284] A person may make public domain content available on a website but bind users of that website to click-wrap contracts[285] containing restrictive terms of use of such content, even if they are in the public domain.[286] The use of a licensing business model by publishers is now prevalent, especially for works that are to be procured by institutional users like universities, libraries, and research institutes.[287] Rather than sell digital copies of the works to these users, the works are instead licensed for use, and as such, users do not receive a copy of which they can claim ownership.[288] The license to use is subject to certain contractual terms. Through these terms, copyright owners or publishers can prevent the user-licensee from using the works in certain ways like reproducing, archiving, or disseminating the work.[289] Since continued access to the works requires users to renew their licenses for a regular fee, copyright owners can continue to subject users to copy and use restrictions even after the copyright term lapses.

Copyright owners can use contract provisions to restrict the use and reproduction of public domain resources beyond the duration of their copyright grants. This will allow them to receive rents for their works and limit widespread dissemination. Databases may even bundle protected works and public domain resources, forcing institutions to pay for the use of public domain works as a condition for providing them access to protected works. So, while it would not amount to copyright infringement to reproduce, make publicly available, or archive the public domain content in such databases, it could amount to a breach of the licensing contract. The misuse of copyright protection to restrict access to public domain works through contract terms therefore poses a significant threat to the accessibility of the public domain.

To safeguard the public domain and maintain its accessibility to users, it is necessary to address the misuse of technological and contractual restraints. As Loren argues, adopting legal protection from TPMs is necessary "to avoid monopolistic stagnation, [and] increased rates of private censorship . . . ."[290] The use of TPMs in connection with public domain works should be considered a violation of the freedom of the public and penalized. The use of TPMs to restrict

[284] Rebecca Bolin, *Locking down the Library: How Copyright, Contract, and Cybertrespass Block Internet Archiving*, 29 HASTING COMMC'N & ENT. L. J. 1, 35 (2006).
[285] *See* Bradley E. Abruzzi, *Copyright, Free Expression, and the Enforceability of Personal Use-Only and Other Use-Restrictive Online Terms of Use*, 26 SANTA CLARA COMPUT. & HIGH TECH. L. J. 85, 111 (2009) (stating the contract is presented to the user upon entering the website to "'click through,' i.e., check a box indicating that he or she agrees to the contract's terms").
[286] *Id.* at 102-03.
[287] *See* Bolin, *supra* note 284, at 35.
[288] Abruzzi, *supra* note 285, at 108.
[289] Bolin, *supra* note 284, at 35-36.
[290] Loren, *supra* note 144, at 134.

access to and use of public domain works may be discouraged if penalties are introduced for such actions.[291] This, however, is only useful where TPMs are attached at a time when a work has fallen into the public domain. If a TPM was attached to a work during its copyright term but not removed after the term expired because the TPM was outdated and circumvention tools are unavailable, access and usage of the work may be restricted indefinitely. To avoid a possible loss of unrestricted access to and use of works when copyrights expire, a deposit system is helpful. Centrally managed (whether nationally or internationally) deposit systems should be created and rightsholders can be required or encouraged to deposit a digital copy of their work that is free of any technical control.

Circumventing a TPM to gain access to and use of a public domain work should be expressly excluded from circumvention liability under anti-circumvention rules. Excluding the circumvention of TPMs to gain access to public domain works would not be enough to facilitate access to and use of these works if the ban on circumvention tools and services remains. It is important that international understanding of the legal measures necessary to protect the use of TPMs should be stated to exclude far-reaching measures, including the ban on circumvention tools and services. It may be necessary to amend the WCT to clarify that TPMs should not be used to prevent the use or exploitation of works that have fallen into the public domain and that the use of such TPMs is not protected under law. Given the considerable time that amending the WCT will take, WIPO may issue a guide to states on the implementation of the WCT. Such guide should note that the WCT does not encourage the use of TPMs to prevent the reproduction, dissemination, and adaptation of public domain works. The guide should encourage states to prohibit and penalize the use of TPMs in connection with public domain works.

Dusollier also suggests that it should be clarified that TPMs which do not protect contents that are substantially copyrighted should not be protected against circumvention.[292] This is to allow circumvention of TPMs that are used in connection with works that are substantially public domain resources, and which should be free from any use restrictions. Legal obligations may also be placed on a copyright owner to remove a TPM placed on a work at the expiration of the copyright term, and failure to do so could attract a penalty. This may, however, be difficult to enforce, especially in the case of orphan works. Also, the cost of enforcing this obligation may render it redundant.

Once a work enters the public domain, it should become public property in the sense that any member of the public should be able to reproduce, distribute, translate, and make adaptations of the work. There should be a legal prohibition

[291] Loren, *supra* note 144, at 139.
[292] DUSOLLIER, *supra* note 20, at 44-45.

against the privatization of public domain resources through contract-based restrictions. Contracts that restrict access to and use of public domain works should be declared unenforceable.[293]

IV. RECOGNIZING, PROTECTING, AND ENRICHING THE GLOBAL PUBLIC DOMAIN IN INTERNATIONAL LAW

International copyright laws have mostly responded to the interests of a small group of rightsholders at the expense of the interests of the general public in access to knowledge. Little attention is paid to the need to create a policy space where the public domain can thrive in the interest of the general public. Some copyright rules, as discussed above, have the potential to shrink the public domain and delay the period when a work falls into the public domain for free use. Subsequent norm-setting activities within international law must, therefore, consider the potential effects of proposed rules on the public domain if the public domain is to be protected and enriched.[294] The end goal of copyright regimes should be to enrich the public domain to promote access to knowledge for human development purposes. Enriching the public domain should not be a mere incidental consequence of copyright regulations.

The existence of the public domain cannot be subject to mere inference; it must be recognized explicitly as a standalone domain where proprietary rights cannot trespass. There is, therefore, a need for a positive legal regime for preserving the public domain and the free availability and accessibility of its elements. The absence of a legal definition or regime for the public domain presents challenges to the advancement, conservation, and accessibility of the public domain.[295] Benabou and Dusollier have also argued in favour of a specific regime for the public domain. They contend that the public domain should not just be looked at through the lens of copyright, "but should be considered on its own, as a positive notion which needs to be defined and protected."[296]

The preservation of the public domain involves at least two steps: (i) defining or identifying the scope of the public domain and (ii) promoting its protection and accessibility.[297] The international copyright system needs to define the public domain in positive terms as a sphere of its own and draw up its scope. It should not merely be defined as a domain of works that are not protected by copyright or any other proprietary right as this would give leeway to shrink the

[293] ROSNAY & DE MARTIN, *supra* note 81, at xxiii.
[294] ROSNAY & DE MARTIN, *supra* note 81, at xxiv.
[295] DUSOLLIER, *supra* note 20, at 7.
[296] BENABOU & DUSOLLIER, *supra* note 4, at 163.
[297] DUSOLLIER, *supra* note 20, at 5.

public domain by expansion of the scope of copyright protection. Instead, a public domain positively defined by its elements will birth a legal recognition of that domain, upon which property rights cannot encroach. If the scope of the public domain is well-defined internationally, international and domestic norm-setting activities will consider how proposed rules may clash with the public domain. As Benabou and Dusollier also argue, "a negative definition of the public domain . . . [is] not very helpful to preserve the public domain from an extension of the scope or duration of copyright or other property rights."[298] However, if the public domain is positively defined and recognized, such recognition may avoid an extension of the scope of copyright or other property rights in a manner that restricts the public domain.

Recognition of the public domain is long overdue. In his 1981 seminal work on the public domain, David Lange notes that the "recognition of new intellectual property interests should be offset today by equally deliberate recognition of individual rights in the public domain."[299] Four decades later, there is still no deliberate (positive) recognition and delineation of the public domain in most national intellectual property regimes or even at the international level. Yet the affirmative recognition of the public domain is important for access to knowledge, human development, and even an optimal copyright equilibrium. As William Van Caenegem rightly notes, "the subject-matter of intellectual property is knowledge. . . .[And] the essence of intellectual property law is not to determine which knowledge is available for appropriation but to identify which knowledge cannot be appropriated."[300] There must be a positive regime within international copyright law that identifies, recognizes, and protects a realm of knowledge that cannot be monopolized and appropriated exclusively by a few private entities or individuals. This is necessary to preserve, enrich, and make available public domain elements that are important to access to knowledge and human development.

The side to which copyright rules lean (either extreme protectionism or an optimal equilibrium between protection and access) will more often than not have effects (negative or positive) on the public domain. Having a standalone regime for the public domain is not enough if changes in copyright law will render ineffective rules that are made to support the public domain. Copyright laws, like any other body of laws, are dynamic and as such susceptible to

[298] BENABOU & DUSOLLIER, *supra* note 4, at 171.
[299] David Lange, *Recognizing the Public Domain*, 44 L. & CONTEMP. PROBS. 147, 147 (1981).
[300] Caenegem *supra* note 47, at 324.

changes.[301] The kind of changes that will be implemented is dependent on the factors that are taken into consideration during the decision-making process. Where purely economic considerations are used, human development issues like education and health may inadvertently be affected by undue restrictions on access to protected works. Over the years, the main justification for changes in copyright law has been economic.[302] The economic justification of copyright is premised on the fact that copyright owners will not be encouraged to create and distribute works unless there is a system that guarantees profit maximization from the distribution and use of their works.[303] The constant shrinkage and enclosure of the public domain has been fueled by an over-reliance on economic reasons for changes in copyright rules.[304] This includes arguments in favour of an extended copyright duration that are rooted in economic justifications for copyright subsistence.[305] The extension of property rights to public domain elements like non-original databases also stems from economic justifications.[306] Undue reliance on the economic/incentive theory has little utility to the public and serves little or no public interest in access to knowledge. While an increase in an already long term of copyright protection may, at most, provide a little incentive to the publisher of a work, such increases cost users greatly in terms of access to works.[307]

For the public domain to be preserved, enriched, and constantly accessible, there must be a shift in the factors considered in copyright norm-setting. There must also be a consideration regarding the possible impact of new rules on access to knowledge. The international copyright system is already replete with rules that seek to promote the interest of copyright owners.[308] It is high time the copyright system catered to the interests of users in access to knowledge and

[301] For example, the 1976 US Copyright Act has been amended over 40 times in less than five decades. *Preface,* U.S. COPYRIGHT OFF., https://www.copyright.gov/title17/92preface.html (last visited Sept. 27, 2023).
[302] William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. L. STUD. 325, 326 (1989); Wendy J. Gordon*, Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors*, 82 COLUM. L. REV. 1600, 1610 (1982); Barry W. Tyerman, *The Economic Rationale for Copyright Protection for Published Books: A Reply to Professor Breyer*, 18 UCLA L. REV. 1100, 1100-01 (1971).
[303] Landes & Posner, *supra* note 302, at 328.
[304] *Evidence to Subcomm. on Courts and Intell. Prop. of the H. Comm. on the Judiciary*, 104th Cong. 171, 633-34 (1995) (Statement of Marybeth Peters, Register of Copyrights and Associate Librarian for Copyright Services, Library of Congress).
[305] GREENLEAF & LINDSAY, *supra* note 4, at 252.
[306] *See* Database Directive, *supra* note 184, at recitals 7-8.
[307] *See* GREENLEAF & LINDSAY, *supra* note 4, at 252.
[308] See the provisions of the major international treaties on copyright standards: Berne Convention, *supra* note 39; TRIPS Agreement, *supra* note 50; and the WCT, *supra* note 63.

human development by recognizing, protecting, and rendering accessible the public domain. New rules should be adopted within the international copyright system to (i) identify and define the elements of the public domain and promote certainty of its scope; (ii) promote a global/universal public domain; (iii) protect the public domain against re-monopolization; (iv) enrich the public domain; and (v) facilitate free and equal access to the contents of the public domain. Further, to ensure that there is a thriving and accessible public domain, international and national normative processes that seek to increase the scope of protection must consider the implications of such norms for the accessibility and scope of the public domain. Norms that restrict access to the public domain and shrink its elements should be avoided. Irrevocability should be recognized as a key nature of the public domain and as such the status of a work as a public domain work should be irrevocable whether by legal or technological measures.

WIPO may be in the best position to coordinate international cooperation on the legal recognition and protection of the global public domain, as the preservation of the public domain is one of its development mandates under the WIPO Development Agenda.[309] Cluster B of the development agenda is, among other things, on the public domain. Recommendation No. 16 of the development agenda enjoins WIPO members to "consider the preservation of the public domain within WIPO's normative processes and deepen the analysis of the implications and benefits of a rich and accessible public domain."[310] Recommendation No. 20 further provides that WIPO should "promote norm-setting activities related to IP that support a robust public domain in WIPO's Member States . . . ."[311] In accordance with these provisions, WIPO would be fulfilling its development mandate if it were to take active steps to promote the international recognition, protection, and accessibility of the public domain. The World Trade Organization ("WTO") is also in a very good position to facilitate the international recognition and protection of the public domain. The unprotected elements of copyrighted works were first highlighted in a WTO administered agreement, the TRIPS Agreement.[312] It noted the interest of the public as an essential principle to be considered in intellectual property norm-setting activities.[313] I recommend a WIPO-WTO partnership. These organizations should also consider working closely with international organizations, like the United Nations Educational, Scientific and Cultural

[309] WIPO, WIPO DEVELOPMENT AGENDA 6–7 (2009) [hereinafter WIPO Development Agenda].
[310] *Id.*
[311] *Id.*
[312] TRIPS Agreement, *supra* note 50, at art. 9.
[313] *Id.* at art. 7-8.

Organization ("UNESCO") and the International Federation of Library Associations and Institutions ("IFLA"), that are inclined to sustain the public domain.[314]

Furthermore, one of the major steps that needs to be taken at the international level for the protection and enrichment of the public domain is the harmonization of copyright term. The next section discusses this harmonization and highlights its importance in detail.

A. INTERNATIONAL HARMONIZATION OF COPYRIGHT TERM

Harmonizing these copyright rules to remove or minimize the disparities that fuel an uncoordinated and perhaps non-existent global public domain at the international level is integral. As Robert Spoo argues, "[it] is as important as harmonizing authors' rights on the international level."[315] This is essential for a single, global, public domain and is highly desirable in the term of copyright protection. Since current international copyright agreements only provide for the minimum term of copyright protection,[316] they leave nations with the discretion to adopt their own maximum term of copyright protection, and as such there are differences in the terms adopted by countries for literary works.[317]

These differences result in territorial public domains, thereby preventing simultaneous global access to public domain works and leading to uncertainties regarding the public domain status of works. It is, therefore, necessary for there to be international harmonization of the term of copyright protection for all literary works and of the rules for calculating the term of protection.

A maximum term for copyright protection should be fixed at the international level to put a global limit on the term of copyright protection. According to Greenleaf and Lindsay, "[a] limited copyright term is a fundamental safeguard for the copyright public domain . . . ."[318] Such a maximum term will put a limit on copyright duration beyond which no domestic legislation can go. Also, states should be required to adopt the same term of copyright protection for all literary works and the same rules for calculating the term of protection. There should also be international harmonization in the terms of protection for orphan works to ascertain the status of such works. Adopting the same terms

[314] *See, e.g.*, UNESCO, Policy Guidelines for the Development and Promotion of Governmental Public Domain Information (UNESCO, 2004); IFLA, *The Public Domain – Why WIPO Should Care (2007)*, https://www.ifla.org/publications/the-public-domain-why-wipo-should-care-2007/ (last visited Sept 29, 2023).
[315] Spoo, *supra* note 121, at 113 (citations omitted).
[316] Berne Convention, *supra* note 42, at art. 7; TRIPS Agreement, *supra* note 50, at art. 12.
[317] *See supra* note 130 (discussing various copyright term lengths in different countries).
[318] GREENLEAF & LINDSAY, *supra* note 4, at 106.

of protection and similar rules for calculating the terms would result in certainty and promote the emergence of a global public domain, since works would enter the public domain simultaneously in all countries.

In 1993, the European Parliament and the Council of the European Union harmonized the term of copyright protection in all EU member states through Directive 93/98/EEC of 29 October 1993 Harmonizing the Term of Protection of Copyright and Certain Related Rights[319]. These terms were harmonized to allow copyright protection for 70 years after the death of the author or 70 years after the work is lawfully made available to the public (for pseudonymous and anonymous works).[320] The mode of calculating the term of protection was also harmonized to run from January 1 of the year following the relevant event (whether the death of the author or the making available of the work).[321] In all countries of the EU, the Term Harmonization Directive also mandates the application of a shorter-term/comparison of terms rule.[322] This guarantees that all foreign works will fall into the public domain at the same time within the European Community.[323]

Although the Term Harmonization Directive was intended to extend copyright protection to 70 years in all countries of the EU,[324] it has three unintended positive consequences. The first and second consequences are the creation of a single public domain within the Community and the prevention of unilateral extension of the term of copyright protection by any of the member states. The third consequence is that it creates a precedent for a harmonized maximum term of copyright protection in the interest of users. The EU Term Harmonization Directive, therefore, presents a model replicable at the

[319] Directive 93/98, of 29 October 1993 on Harmonizing the Term of Protection of Copyright and Certain Related Rights 93/98/EEC, 1993 O.J. (L 290). This Directive and subsequent amendments thereto have been repealed and are now codified into the Term Harmonization Directive. Subsequent references will therefore be to the Term Harmonization Directive.
[320] Term Harmonization Directive, *supra* note 224, at art. 1.
[321] *Id.* at art. 8.
[322] *Id.* at art. 7(1). By this rule, to determine the term of copyright protection of a work, a comparison must be made between the term of protection of the country of origin of the work and the country where protection is claimed (the country where the work is to be utilized). *Id.* Where the term of protection in the country of origin exceeds the term in the country where protection is claimed, the term of protection in the latter country will apply. Article 7(1) adopts this rule by providing that "[w]here the country of origin of a work, within the meaning of the Berne Convention, is a third country, and the author of the work is not a Community national, the term of protection granted by the Member States shall expire on the date of expiry of the protection granted in the country of origin of the work, but may not exceed the term laid down in Article 1." *Id.*
[323] *Id.* at art. 7.
[324] *Id.* at recital 12.

international level. There should be a maximum term of copyright protection that every country should follow for the benefit of users, just like there is a minimum term for the benefit of copyright owners. This would not only prevent an arbitrary extension of copyright term, but would also effectively create the single global public domain that is necessary in a borderless digital environment.

As part of its norm-setting activities in copyright, WIPO ought to be the one to take steps in this direction. One of the functions of WIPO is to promote the development of measures necessary to harmonize national legislation in the field of copyright.[325] Arguably, WIPO will functionally attain the objectives set on establishing the organization, to wit, the protection of IP throughout the world. However, by the WIPO Development Agenda,[326] WIPO's mandate now includes the promotion of access to knowledge and development objectives through the international IP system.[327] Therefore, WIPO is required not only to promote harmonization to support copyright protection but also to support access to knowledge and the realization of development objectives.

This kind of harmonization is also consistent with WIPO's development mandate to support a robust and accessible public domain.[328] The rule on a maximum term of protection should however be drafted in a manner that does not prevent countries from adopting a copyright term that is below the prescribed maximum in the public interest. By prescribing a ceiling on copyright term, an international framework for a global and single public domain would emerge, and the unilateral extension of copyright terms through national legislation would also be restrained. The prescription of a maximum copyright term would lead to certainty regarding when a work would fall into the public domain globally. Establishing such certainty would increase the digitization of public domain works and the widespread dissemination of those works on the internet, without restricting access to users in any country.

V. CONCLUSION

This Article examines the meaning and scope of the public domain and finds that at the international level and in most national copyright laws, the public domain is not well identified or expressly recognized. This does not, however, detract from the significance of the public domain as a source of works that may

[325] World Intellectual Property Organization: Convention Establishing Organization art. 4(i), July 14, 1967, 6 I.L.M. 782, 828 U.N.T.S. 3 (as amended Sept. 28, 1979) (entered into force Jun. 1, 1984).
[326] WIPO Development Agenda, *supra* note 309.
[327] *Id.*
[328] *Id.*

be freely accessed and exploited for the realization of human development objectives, human rights, and sustainable development goals. The main barriers and threats to the flourishing and accessibility of the public domain were highlighted. Most of these barriers are occasioned by legal rules, technological measures, and contracts.

This Article further notes that the lack of harmonization on the limits of copyright protection and the rules for calculating copyright terms has led to an uncoordinated public domain globally. Therefore, uniformity of copyright terms and the rules for calculating those terms is a necessary step for the true emergence of the global public domain. The benefits of having a single global public domain include harmonization in the time works become freely accessible globally and the certainty of the public domain status of a work in every country.

Other recommendations address how the public domain could be protected and made accessible. It was recommended that legal protection from TPMs used to restrict access to public domain resources should be implemented in copyright laws and that contractual terms that restrict the use of public domain works be declared unenforceable. The case was also made for a legal mechanism to facilitate the voluntary relinquishment of copyrights and the abolition of *domaine publique payant* systems.

Most of the recommendations made in this Article require making new rules that would have to be negotiated and discussed by the nations of the world under the auspices of WIPO or WTO, and this may take considerable time. As a starting point, WIPO, or WTO, or even more desirably both organizations, may issue a 'Declaration Concerning the Copyright Public Domain,' which would still have some level of influence on member states, considering the international status of these organizations. The Declaration could be framed as a guideline to assist member states in preserving and enriching the public domain. Such a Declaration may be viewed as soft international law and could lead to quick changes in domestic copyright laws in favour of the public domain. The benefits of having a rich and accessible public domain should be highlighted in the Declaration. The following points may be considered for the purposes of the Declaration:

(i) Define the scope of the public domain;

(ii) Encourage countries to adopt the minimum term of copyright protection in the Berne Convention and TRIPS Agreement as the duration (maximum term) for copyright protection in their countries. It should be emphasized that the minimum term

recognized in these instruments is enough to provide fair compensation to copyright owners;

(iii) Discourage copyright term extensions through national copyright laws or trade agreements to avoid shrinkage of the public domain and delay in access to works;

(iv) Simplify legal rules on copyright terms, including rules on calculating the terms and applicable terms for different categories of literary works;

(v) Encourage states to opt for the shorter-term rule in the protection of foreign works;

(vi) Adopt a simple and clear procedure for opting out of copyright protection and dedicating works to the public domain. The status of such works as public domain works should also be made clear and a system for notifying the public of the absence of copyright in such works should be put in place;

(vii) Clarify that legal measures necessary to protect TPMs do not apply to TPMs attached to public domain works and countries should prohibit and penalise the use of TPMs used in connection to public domain works;

(viii) Discourage countries from placing a total ban on circumvention devices and services to ensure availability of these devices and services for access to public domain works;

(ix) Encourage the OAPI and all countries with the *domaine publique payant* system to abolish it; and

(x) Discourage countries from developing rules that monopolize public domain elements and discourage the private recapturing of elements in the public domain through contracts by declaring such contractual restrictions unfair and unenforceable.