

Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore

Seventeenth Session
Geneva, December 6 to 10, 2010

NOTE ON THE MEANINGS OF THE TERM “PUBLIC DOMAIN” IN THE INTELLECTUAL PROPERTY SYSTEM WITH SPECIAL REFERENCE TO THE PROTECTION OF TRADITIONAL KNOWLEDGE AND TRADITIONAL CULTURAL EXPRESSIONS/EXPRESSIONS OF FOLKLORE

Document prepared by the Secretariat

INTRODUCTION

1. At its sixteenth session, held from May 3 to 7, 2010, the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (“the Committee”) decided that the Secretariat should “prepare and make available for the next session of the Committee [...] a technical information document on the meanings of the term ‘public domain’ in the intellectual property system with special reference to the protection of traditional knowledge and traditional cultural expressions.”¹ The present document has been prepared pursuant to the above decision.

Background

2. The public domain, in intellectual property (IP) law, is generally said to consist of intangible materials that are not subject to exclusive IP rights and which are, therefore, freely available to be used or exploited by any person.

¹ Draft Report of the Sixteenth Session (WIPO/GRTKF/IC/16/8 Prov.)

3. The public domain is, however, an elastic, versatile and relative concept and it is not susceptible to a uniform legal meaning. Its meaning and effect in IP theory are not yet well understood. The term rarely appears in legal texts and it is even rarer that specific rules are attached to it.
4. Further, the public domain is not necessarily the “opposite of property”; on the contrary, it might be argued that innovation captured as private property depends upon the existence of a rich public domain.² In this sense, the public domain is not simply the residue of what is not protected by IP. Instead, the public domain is itself a valuable resource.³ Indeed, maintaining a rich and robust public domain is commonly put forward as an important public policy goal.
5. Nevertheless, regarding the protection of traditional knowledge (TK) and traditional cultural expressions (TCEs), and from the perspective of indigenous peoples and local communities, the “public domain” operates to exclude TK and TCEs from protection and can be used to justify their misappropriation.⁴ It is argued that indigenous cultures tend not to make property/non-property distinctions, and so the very concept of the “public domain” is alien to them. TK may superficially resemble public domain material, as sharing within a community is common. Yet there are often social restrictions on who, if anyone, can use certain knowledge, and under what circumstances. Some knowledge is considered secret, sacred, and an inalienable part of indigenous cultural heritage from time immemorial to time unending.⁵ Putting TK and TCEs into the public domain would violate the confidential character of many intangible, sacred and secret elements which belong to the living heritage and would accentuate the deterioration and illicit appropriation of cultural values⁶ Further, while public domain advocates accept that because a resource is free for use by all the resource will be exploited symmetrically by all, advocates for the protection of TK and TCEs might be alarmed that the public domain movement “leaves the common person to the mercy of an unregulated marketplace [...]”.⁷ Indigenous peoples and local communities might, therefore, argue that the definition of the public domain needs to accommodate a number of different worldviews with regard to the sharing of knowledge. There are, it is argued, not one public domain but a number of different, overlapping public domains or knowledge-sharing spaces.⁸ In this regard, a “Traditional Knowledge Commons” has been proposed.⁹

² CHANDER, A. and M. SUNDER, “The Romance of the Public Domain”, 92 CAL. L. REV. 1331 (2004), at 1334, 1340

³ See also BOETTIGER, S. and C. CHI-HAM, “Defensive Publishing and the Public Domain”, in *Intellectual Property Management in Health and Agricultural Innovation: A Handbook of Best Practices*, (Krattiger A., R.T. Mahoney, L. Nelsen, J.A. Thomson, A.B. Bennett, K. Satyanarayana, G.D. Graff, C. Fernandez, and S.P. Kowalski (eds.), 2007, MIHR (Oxford, U.K.), PIPRA (Davis, U.S.A.), Oswaldo Cruz Foundation (Fiocruz, Rio de Janeiro, Brazil) and bioDevelopments-International Institute (Ithaca, U.S.A)

⁴ VAN CAENEGEM, W., “The Public Domain: Scientia Nullius?”, [2002] E.I.P.R., 324

⁵ “Implementing a Traditional Knowledge Commons”, *Natural Justice*, 2010, p. 40

⁶ See Report of the Fifth Session (WIPO/GRTKF/IC/5/15), para. 80

⁷ CHANDER A. and M. SUNDER, *op. cit.* note 2, at 1341

⁸ RAVEN, M., “Rethinking the Public Domain: A Challenge for Knowledge-sharing Societies in the Information Age”, *Work in Progress*, Vol. 17, Number 2, Summer 2005, p. 23

⁹ “Implementing a Traditional Knowledge Commons”, *op. cit.* note 5

6. Conversely, others argue that the public domain character of TK and TCEs is valuable as it allows for their regeneration and revitalization. Neither members of an indigenous community nor others would be able to create or innovate based on the intangible cultural heritage if exclusive private property rights were to be established over it. By overprotecting cultural expressions, the public domain diminishes, leaving fewer works to build on. Therefore, indigenous artists wishing to develop their artistic traditions by reinterpreting traditional motifs in non-traditional ways, and wanting to compete in the creative arts markets, may be inhibited by these regimes. The consequence is that these laws may “freeze” the culture in a historic moment, and deny traditional peoples a contemporary voice.¹⁰
7. Accounting for these various views, the Committee recognized early on in its work that an understanding of the role, contours and boundaries of the “public domain” was integral to an IP-related analysis of the protection of TK and TCEs.¹¹ The issue has been referred to by several participants during the course of the Committee’s deliberations, and the decision taken by the Committee at its 16th session to commission the writing of this document revisits this key question in a focused and structured manner.
8. These are complex and sensitive issues, and this document ventures only to scope the various meanings of the term “public domain”, generally and in specific reference to TK and TCEs. The document does not seek to advance any particular interpretation or approach, and it is without prejudice to discussions of the public domain in other WIPO bodies.

Structure of this Document

9. With this background, the Annex discusses the subject further under the following headings:
 - a) Definitions of the public domain: generally;
 - b) Specific definitions of the public domain in the various fields of IP;
 - c) Identification and meanings of related terms and concepts;
 - d) Discussion of the public domain in other WIPO bodies;
 - e) Discussion of the public domain in the Committee; and,
 - f) TK and TCE national and regional legislation referring to the public domain.

¹⁰ See “Expressions of Folklore”, document submitted by the European Community (WIPO/GRTKF/IC/3/11.). See also HAIGHT FARLEY, C. “Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer?” 30 Conn. L. Rev. 1, 1997, and Consolidated Analysis of the Legal Protection of Traditional Cultural Expressions, document WIPO/GRTKF/IC/5/3

¹¹ See Consolidated Analysis, op. cit. note 10, para. 15

10. Certain of the terms discussed in another document prepared for this session, namely the “List and Brief Technical Explanation of Various Forms in which Traditional Knowledge May be Found” (WIPO/GRTKF/IC/17/INF/9), are also relevant to the present document.

11. The Committee is invited to take note of this document and the Annex to it.

[Annex follows]

ANNEX

NOTE ON THE MEANINGS OF THE TERM “PUBLIC DOMAIN” IN THE INTELLECTUAL PROPERTY SYSTEM WITH SPECIAL REFERENCE TO THE PROTECTION OF TRADITIONAL KNOWLEDGE AND TRADITIONAL CULTURAL EXPRESSIONS/EXPRESSIONS OF FOLKLORE

I. DEFINITIONS OF THE PUBLIC DOMAIN: GENERALLY

1. Most definitions of the public domain in the IP context¹ cluster around three main foci: the legal status of material, freedoms to use material, and the accessibility of material.
2. For example, Black’s Law Dictionary defines the public domain as “[t]he universe of inventions and creative works that are not protected by intellectual property rights and are therefore available for anyone to use without charge. When copyright, trademark, patent, or trade-secret rights are lost or expire, the intellectual property they had protected becomes part of the public domain and can be appropriated by anyone without liability for infringement.”² Black’s Law Dictionary, Second Pocket Edition, provides that the public domain, in respect of IP, is “the realm of publications, inventions, and processes that are not protected by copyright or patent.”³
3. The three foci are articulated below:

A. IP-FREE MATERIAL

4. The public domain consists of information resources free from IP rights,⁴ or IP-free resources,⁵ or “information artifacts unencumbered by IP rights,”⁶ i.e., every intellectual product that was never or no longer is under IP protection.⁷ Put differently, it is made up of material that was ineligible for protection in the first place,⁸ e.g., (i) material of insufficient originality to qualify for copyright protection or an invention that did not fulfill the conditions of patentability or was not patentable, (ii) material “freed” by invalidation or

¹ The public domain is an important concept in other areas of law, such as “First Amendment rights of access, government secrecy agreements, espionage law, laws regulating classified information and munitions lists, and the Freedom of Information Act.” See LEE, E., “The Public’s Domain: The Evolution of Legal Restraints on the Government’s Power to Control Public Access Through Secrecy or Intellectual Property,” 55 HASTINGS L.J. 91 (2003), at 97. The present document is limited to the IP sphere

² Black’s Law Dictionary, 1027 (8th ed. 2005)

³ Black’s Law Dictionary, 569 (2nd ed. 2001)

⁴ SAMUELSON, P., “Mapping the Digital Public Domain: Threats and Opportunities,” 66 Law & Contemp. Probs. 147 (2003)

⁵ SUTHERSANEN, U., *A2K and the WIPO Development Agenda: Time to List the “Public Domain”*, UNCTAD-ICTSD Project on IPRs and Sustainable Development, Policy Brief Number 1, December 2008

⁶ BOYLE, J., “The Second Enclosure Movement and the Construction of the Public Domain,” 66 LAW & CONTEMP. PROBS. 33 (2003), at 59-60, 68, and BOYLE, J., “Foreword: The Opposite of Property?,” 66 LAW & CONTEMP. PROBS. 1, 29-30 (2003)

⁷ SUTHERSANEN, U., *op. cit. note 5*

⁸ The public domain may include “abstract subject matter, such as ideas or discoveries [...]” information, concepts, principles, laws of nature, etc. See SUTHERSANEN, U., *op. cit. note 5*. Some, however, do not see such material as being part of the public domain. See, e.g., ROSE, M., “Nine-Tenths of the Law: The English Copyright Debates and the Rhetoric of the Public Domain,” 66 LAW & CONTEMP. PROBS. 75 (2003), at 80; see also GORDON, W., “On Owning Information: Intellectual Property and the Restitutory Impulse,” 78 VA. L. REV. 149, 163 (1992)

expiry of the relevant IP right, and (iii) material that was eligible for protection but, in the case of industrial property, in respect of which protection was not applied for.

5. At this prong's core is an emphasis on an IP-free legal status, on the absence of IP rights. Such definitions can only be understood in relation to what is protected under IP laws. In that sense, the public domain is "simply whatever is left over after various tests of legal protection have been applied [...], the 'negative' of whatever may be protected [...]."⁹
6. Although it may be common to conceive of material as either being in an IP-free public domain or encumbered by IP rights, the public domain literature reveals a continuum of legal states in between those endpoints.¹⁰

B. MATERIAL AVAILABLE FOR USE BY ANYONE AND INELIGIBILITY FOR PRIVATE OWNERSHIP

7. A critical distinction is made between information resources that are freely usable and those to which an owner can exercise exclusive rights.¹¹
8. Public domain material is said to be free or available for any member of the public to use¹² for any purpose without having to obtain the consent or permission of a right owner and without charge.
9. Moreover, the term is used to refer to intellectual material or elements in which no one can establish or maintain proprietary interests, i.e., which are ineligible for private ownership. Material in the public domain is not the private property of any individual; it is instead common and open to the public for use without restriction.¹³

C. AVAILABILITY AND ACCESSIBILITY

10. It is argued that "a domain must be public in the sense of being publicly accessible to be a public domain."¹⁴ This contention calls for two remarks. First, not all that is accessible is in the public domain. Thus the public domain has to be distinguished from material which is simply publicly available or accessible. It should further be noted that accessibility is a relative concept: there are various degrees of "accessibility."¹⁵ And second, perhaps in contradiction with the above contention, not necessarily all that is in the public domain is accessible.

⁹ SAMUELS, E., "The Public Domain in Copyright Law", 41 J. COPYRIGHT SOC'Y U.S.A. 137 (1993), quoted in SAMUELSON, P., *Enriching Discourse on Public Domain*, 55 Duke Law Journal 101(2006) 105

¹⁰ SAMUELSON, P., *op. cit.* note 9, 151

¹¹ BENKLER, Y., "Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain", 74 N.Y.U. L. REV. 354, (1999), at 361-62, as quoted in SAMUELSON, P., *op. cit.* note 9, 121

¹² See, e.g., Copyright and Fair Use, Stanford University Libraries, "Welcome to the Public Domain," http://fairuse.stanford.edu/Copyright_and_Fair_Use_Overview/chapter8/8-a.html ("The public owns these works, not an individual author or artist. Anyone can use [them] without obtaining permission, but no one can ever own [them].")

¹³ REESE, A., *The New Unpublished Public Domain 2* (Aug. 2005) (unpublished manuscript), at 48, as quoted in SAMUELSON, P., *op. cit.* note 9, 135

¹⁴ SAMUELSON, P., *op. cit.* note 9, 166

¹⁵ SAMUELSON, P., *op. cit.* note 9, 153. Some information may be maintained as a closely guarded secret. Secrets may be licensed or otherwise distributed to one or more persons subject to implicit or explicit confidentiality restrictions. (See, e.g., POOLEY, J., *TRADE SECRET LAW* § 9.04[2] (1997)). Licenses vary in restrictiveness regarding who may access and use the information and for what purposes

C.1 ACCESSIBLE BUT PROTECTED

11. Contrary to some perceptions, material is not in the public domain simply because it is accessible or available through a free and open source. For example, paintings hung on the walls of public museums may be freely accessible and reproduction by means of photography may be permitted, but it does not mean that the paintings are in the public domain. Likewise, being able to view a reproduction of a work, or, in fact, a TCE, on the Internet does not mean that the work or TCE is in the public domain.¹⁶

C.2 UNPROTECTED BUT NOT ACCESSIBLE

12. The fact that something is in the public domain does not guarantee as such a freedom to access it. The lack of IP protection cannot in itself impose free access to the copies of public domain material.¹⁷
13. Indeed, public domain material is not always free from any cost or encumbrance. For example, accessibility to some public domain material may depend on laws that protect classified information and other trade secrets from disclosure. Moreover, a considerable amount of information is publicly accessible (e.g., court records) if one is willing to take time and effort to discover it, but is, pragmatically speaking, not so accessible.¹⁸ Technical protection measures may further restrict uses and be backed up by legislated anti-circumvention rules, thereby affecting the boundaries of the public domain.
14. One narrow definition of the public domain in fact proposes that it consists of: “publicly accessible information, the use of which does not infringe any legal right, or any obligation of confidentiality. [...] It refers [...] to public data and official information produced and voluntarily made available by governments or international organizations.”¹⁹
15. Similarly, some definitions of the public domain include unpublished works or works that have not been publicly disclosed. As one scholar points out, it is fair to ask what it means for material to be in a copyright-free public domain if it is not publicly accessible.²⁰ It is contended that if possessors of material have personal property rights that include the right to control access to and uses of the material, the public does not really derive any benefit from the existence of an unpublished public domain. Physical control over the IP-free material may convey more power to control uses than IP laws would provide.²¹

¹⁶ Digital recording and documentation of cultural heritage may contribute to their easy access for inappropriate use and exploitation by third parties, as the content may be considered part of the public domain when displayed

¹⁷ WIPO Scoping Study on Copyright and Related Rights and the Public Domain, Séverine Dusollier, 2010, p.7

¹⁸ SAMUELSON, P., *op. cit.* note 9., 154

¹⁹ UNESCO Recommendation concerning the Promotion and Use of Multilingualism and Universal Access to Cyberspace

²⁰ See REESE, A., *op. cit.* note 13, at 48

²¹ *Ibid.*, at 24–25

C.3 PUBLIC DOMAIN AND PUBLICLY AVAILABLE TK

16. In the field of TK, experts on questions of access and benefit-sharing concerning genetic resources and associated TK²² have recognized a critical distinction between TK associated with genetic resources being in the “public domain” and that being “publicly available”. An expert report states that:

- The term public domain, which is used to indicate free availability, has been taken out of context and applied to TK associated with genetic resources that is publicly available. The common understanding of publicly available does not mean available for free. The common understanding of public availability could mean that there is a condition to impose mutually agreed terms such as paying for access. TK has often been deemed to be in the public domain and hence freely available once it has been accessed and removed from its particular cultural context and disseminated. But it cannot be assumed that TK associated with genetic resources that has been made available publicly does not belong to anyone. Within the concept of public availability, prior informed consent from a TK holder that is identifiable, could still be required, as well as provisions of benefit-sharing made applicable, including when a change in use is discernible from any earlier prior informed consent provided. When a holder is not identifiable, beneficiaries could still be decided for example by the State.²³

17. TK might be widely accessible to the public and might be accessed through physical documentation, the Internet and other kinds of telecommunication or recordings. TK might be disclosed to third parties or to non-members of the indigenous and local communities from which TK originates, with or without the authorization of the indigenous or local communities (see further “List and Brief Technical Explanation of Various Forms in which Traditional Knowledge may be Found”, document WIPO/GRTKF/IC/17/INF/9).

II. SPECIFIC DEFINITIONS OF THE PUBLIC DOMAIN IN THE VARIOUS FIELDS OF INTELLECTUAL PROPERTY

18. As Black’s aforementioned definition indicates, the public domain concept pertains to patents, copyright, trademarks and trade secrets.

A. PUBLIC DOMAIN AND COPYRIGHT LAW

19. The existence of the public domain is a foundational principle of the copyright system.²⁴

A.1 BASIC DEFINITION

20. The Berne Convention for the Protection of Literary and Artistic Works, 1971 applies to all works which, at the moment of the Convention’s coming into force, “have not yet fallen

²² The experts at the *Meeting of the Group of Technical and Legal Experts on Traditional Knowledge Associated with Genetic Resources in the Context of the International Regime on Access and Benefit-Sharing* distinguished the terms “public domain” and “publicly available” with special reference to TK associated with GR

²³ See UNEP/CBD/WG-ABS/8/2, Report of the Meeting of the Group of Technical and Legal Experts on Traditional Knowledge Associated with Genetic Resources in the Context of the International Regime on Access and Benefit-Sharing

²⁴ LITMAN, J., “The Public Domain”, 39 Emory L.J. 965 (1990)

into the public domain in the country of origin through the expiry of the term of protection.”²⁵

21. Under the Convention, the public domain is “the scope of those works and objects of related rights that can be used and exploited by everyone without authorization, and without the obligation to pay remuneration to the owners of copyright and related rights concerned – as a rule because of the expiry of their term of protection, or due to the absence of an international treaty ensuring protection for them in the given country.”²⁶
22. Such a definition is primarily negative, as its scope is the opposite of the scope of copyright protection.²⁷ The public domain comprises intellectual material which, either because it does not meet the copyright eligibility criteria or because the copyright term has expired, among other reasons, is not protected by copyright. Sometimes, the definition is stricter, focusing only on works whose copyright has ended.²⁸ The public domain may also include materials which were created before any copyright law existed (which might include TCEs) and portions or aspects of otherwise copyrighted works that copyright does not protect.²⁹ It should be noted that as copyright protection is territorial, a work may be protected in one country but be in the public domain in another. Further, while the economic rights of copyright expire, moral rights may subsist in perpetuity.

A.2 “USES” IN THE PUBLIC DOMAIN

23. Some definitions of the public domain focus on freedoms to use material even when works embodying this material are protected by IP rights.³⁰ That is, the public domain includes not only unprotected subject matter but also unprotected uses of copyrighted works, including copyright exceptions or fair use.³¹ The public domain may thus be said to include “unregulated, implicitly licensed, unambiguously fair, and otherwise privileged uses of IP-protected information resources,”³² yet contested uses that might ultimately be deemed fair or otherwise privileged after protracted litigation are excluded.³³
24. Also included might be uses of works still protected by copyright, but legitimized through the operation of a license.³⁴ Hence, the public domain may include material that, although protected by copyright law, is privileged or implicitly licensed for common uses.³⁵

²⁵ *Berne Convention for the Protection of Literary and Artistic Works*, article 18(1)

²⁶ *Guide to the Copyright and Related Rights Treaties by WIPO and Glossary of Copyright and Related Rights Terms*

²⁷ WIPO Scoping Study on Copyright and Related Rights and the Public Domain, Séverine Dusollier, 2010, p.6

²⁸ *Ibid.*

²⁹ COHEN, J., *et. al.*, *Copyright in a Global Information Economy*, Aspen Law and Business, 2002

³⁰ SAMUELSON, P., *op. cit.* note 9, 146

³¹ WIPO Scoping Study, *op. cit.* note 27, p.9, 11

³² BENKLER, Y., *op. cit.* note 11, 361-62. See also, MERGES, R., “A New Dynamism in the Public Domain”, 71 U. CHI. L. REV. 183, 184 (2004), as quoted in SAMUELSON, P., *op. cit.* note 9, 121

³³ SAMUELSON, P., *op. cit.* note 9, 146

³⁴ WIPO Scoping Study, *op. cit.* note 27, p.9, 11. See also NIMMER, D. et al., “The Metamorphosis of Contract Into Expand”, 87 CAL. L. REV. 17, 23 (1999), as quoted in SAMUELSON, P., *op. cit.* note 9, 151

³⁵ SAMUELSON, P., *op. cit.* note 9, 121

Material made widely available under Creative Commons (CC) and similar licenses may, subject to how the licenses are structured, be considered in the public domain.³⁶

25. Furthermore, the concept of public domain knows some quasi-equivalent variants, such as “open access” or “open source,” “information commons”, “intangible commons of the mind” or “knowledge commons.” Such distinct yet analogous concepts are often used in connection with the perspective that innovation and creativity can only be fostered in the presence of an open, commons-based pool of ideas and knowledge, i.e., a “robust public domain.”³⁷
26. Lastly, orphan works and out-of-print works also occupy a gray area which may be said to be part of the public domain.³⁸

A.3 PLEAS FOR A BROAD PUBLIC DOMAIN

27. It is often contended that creativity depends on the ability to access and draw upon a corpus of existing public domain material. Indeed, it has been claimed that authors do not conjure up new works from nothing³⁹ and that almost every cultural creation has antecedents: preexisting creations in the public domain.⁴⁰ Accordingly, the public domain acts as the “laws’ primary safeguard of the raw material that makes authorship possible [...] (it) should be understood not as the realm of material that is undeserving of protection, but as a device that permits the rest of the system to work by leaving the raw material of authorship available for authors to use.”⁴¹ Likewise, the public domain has a “central importance in promoting the enterprise of authorship.”⁴²
28. In that sense, the public domain is not a place separate and apart from the realm of IP-protected content,⁴³ or “what is left after the contours of copyright have been drawn, but [...] a repository of resources of its own.”⁴⁴ It “foster[s] the development of artistic culture,” being part of the “cultural landscape.”⁴⁵
29. In a nutshell, pleas for a vibrant public domain emphasize its positive functions for society: as a building block for the creation of new knowledge, as an enabler of competitive imitation,⁴⁶ follow-on creation,⁴⁷ free or low cost access to information,⁴⁸ public access to

³⁶ SAMUELSON, P., *op. cit.* note 9 123 and 152. Creative Commons, Choosing a License, <http://creativecommons.org/about/licenses/> (last visited July 16, 2010)

³⁷ SUTHERSANEN, U., *op. cit.* note 5. For a discussion on open-source software, see SAMUELSON, P., *op. cit.* note 9, 123

³⁸ WIPO Scoping Study, *op. cit.* note 27, p.9, 11

³⁹ LITMAN, J. *op. cit.* note 24, at 965

⁴⁰ See DUTFIELD, G. and U. SUTHERSANEN *Innovation and development*, in INNOVATION WITHOUT PATENTS: HARNESSING THE CREATIVE SPIRIT IN A DIVERSE WORLD, (Suthersanen U, Dutfield G, & Boey Chow K. eds.), Edward Elgar, 2007

⁴¹ LITMAN, J., *op. cit.* note 24, at 967, 968

⁴² *Ibid.*

⁴³ COHEN, J., *Copyright, Commodification and Culture: Locating the Public Domain*, in THE PUBLIC DOMAIN OF INFORMATION (P. Hugenholtz & L. Guibault eds., 2006), as quoted in SAMUELSON, P., *op. cit.* note 9.

⁴⁴ WIPO Scoping Study, *op. cit.* note 27, p.6

⁴⁵ COHEN, J., *op. cit.* note 43

⁴⁶ See, e.g., OCHOA, T., “Origins and Meanings of the Public Domain”, 28 U. DAYTON L. REV. 215 (2002), at 215, as quoted in SAMUELSON, P., *op. cit.* note 9

cultural heritage,⁴⁹ etc. In this perspective, the public domain could provide “a fertile foundation on which creators can build new works, as well as a rich source of content for education.”⁵⁰

B. PUBLIC DOMAIN AND PATENT LAW

B.1 BASIC DEFINITION

30. In general, the public domain in relation to patent law consists of knowledge, ideas and innovations over which no one has any proprietary rights, and upon which anyone can use and build without restriction.⁵¹
31. It is generally understood that the patent system is a social contract between the inventor and the public: on the one hand, it grants exclusive rights to the patentee to prevent others from commercially using the patented invention without his or her consent, and on the other hand, it obliges him or her to disclose the invention in a manner that the invention can be carried out by a person skilled in the art.
32. For each patent, applicants are required to provide technical details of the invention, which, under most national laws, are made publicly available through publication 18 months from the filing date (or priority date). Once a patent is expired, abandoned or invalidated, others may use the claimed invention without the consent of the owner of that patent. Even during the term of the patent, others are free to incorporate the information into new inventions, as long as it does not infringe the granted patent. Granted patents may also encourage others to invent around the patent. For example, others can use the disclosed information to develop new technologies that fall outside the exclusive rights of the issued patent.⁵² The concept “prior art” is discussed further below.

B.2 THE WAYS INVENTIONS GET INTO THE PUBLIC DOMAIN

33. Generally, inventions get into the public domain because of:
 - a) absence of legal restrictions on use: a work may be in the public domain if there is no legislation establishing proprietary rights over the work or if the work is ineligible for protection and specifically excluded from protection under existing laws;⁵³

[Footnote continued from previous page]

⁴⁷ See, e.g., LITMAN, J., *op. cit.* note 24, at 966

⁴⁸ See, e.g., VAN HOUWELING, M., “Distributive Values in Copyright Law”, 83 TEX. L. REV. 1535, 1575 (2005), as quoted in SAMUELSON, P., *op. cit.* note 9

⁴⁹ See, e.g., OCHOA, T., *op. cit.* note 46, at 215 (“We take it for granted that the plays of Shakespeare and the symphonies of Beethoven are in the public domain and may be freely copied, adapted, and performed by anyone.”)

⁵⁰ Joint Statement by IFLA, EIFL and EBLIDA to the Provisional Committee on Proposals Related to a WIPO Development Agenda, Second Session, Geneva, 26-30 June 2006, at <http://www.ifla.org/III/clm/p1/A2K-7.htm>

⁵¹ See Dissemination of Patent Information (SCP/13/5), para. 110

⁵² See Report of the International Patent System (SCP/12/3), para. 37-39

⁵³ See Dissemination of Patent Information (SCP/13/5), para. 11

- b) expiration of patent protection: patent protection is limited in time. In most countries, the term for patents is 20 years counted from the filing date, after which the invention is no longer under patent protection;⁵⁴
- c) non renewal: to maintain a granted patent in force, in general, national laws request maintenance or renewal fees to be paid by the patent holder to the patent office. Failure to pay maintenance fees to the patent office results in the forfeiture of the patent concerned;⁵⁵ and
- d) revocation or invalidation: in general, patent laws provide certain procedures for the revocation or invalidation of a patent during its lifetime, where a patent has failed to meet the statutory requirements for patentability.⁵⁶

B.3 TERRITORIALITY

- 34. Patent protection is territorial. In many cases, and put simply for present purposes, inventions may be protected in one country but may be in the public domain in other countries. This may happen simply because a patent application was not filed in those countries or because the legislation in place does not allow the grant of patents for that kind of inventions.
- 35. Since the patent right is a territorial right, in principle, a patent application has to be filed in each country in which patent protection is sought.⁵⁷ A work may be in the public domain in one country if patent protection is not sought in that country.
- 36. An invention work may be in the public domain if there is no legislation establishing proprietary rights over the invention or if the invention is ineligible for protection and specifically excluded from protection under existing laws. The differences in legislations among countries suggest that a certain invention may be considered in the public domain in one jurisdiction but not in another.⁵⁸

B.4 EXCEPTIONS AND LIMITATIONS

- 37. As indicated regarding copyright law, it could be considered that the public domain includes not only unprotected subject matter but also unprotected uses of patented inventions.
- 38. In view of the policy objectives of the patent system, the scope of the exclusive patent right is carefully intended under national patent laws to strike a balance between the legitimate interests of the right holders and those of third parties.⁵⁹ A number of countries provide in their national legislations for certain exceptions and limitations to the exclusive rights, including, but not limited to:

⁵⁴ See Dissemination of Patent Information (SCP/13/5), para. 116

⁵⁵ See Dissemination of Patent Information (SCP/13/5), para. 117

⁵⁶ There is a direct relationship between the quality of patents granted and the public domain. In recent years, some patent offices have been criticized for issuing patents that are overbroad compared to the actual innovation disclosed in the patent application. On the other hand, an overly strict application of the patentability requirements may lead to a potential expansion of the public domain. See Dissemination of Patent Information (SCP/13/5), para. 118

⁵⁷ See Dissemination of Patent Information (SCP/13/5), para. 175

⁵⁸ See Dissemination of Patent Information (SCP/13/5), para. 114

⁵⁹ See Report of the International Patent System (SCP/12/3), para. 235

- a) acts done for private and non-commercial use;
- b) uses of patented articles on aircraft, land vehicles or vessels of other countries which temporarily or accidentally enter the airspace, territory or waters of the respective country;
- c) acts done only for experimental purposes or research purposes;
- d) acts performed by any person who, in good faith, before the filing date (priority date) of the application on which the patent is granted, was using the invention or was making effective and serious preparation for such use in the respective country (prior user's exception);
- e) acts solely for uses reasonably related to the development and submission of information required for obtaining a regulatory approval; and
- f) preparation of drugs in accordance with a medical prescription.⁶⁰

C. PUBLIC DOMAIN AND TRADEMARK LAW

39. The public domain can be viewed from two angles when examining its meaning under trademark law.

C.1 "FISHING OUT" OF THE PUBLIC DOMAIN

40. Exclusive rights may be acquired in names and symbols that were initially considered as public domain material.⁶¹ Indeed, "descriptive names, for example, may, after some years of use, come to signify the origins of goods or products, thereby acquiring secondary meaning that enables them to serve as trademarks."⁶² *International Business Machines (IBM)* is an example of a registered mark that was once too descriptive to be protected.⁶³
41. Likewise, the right of publicity is a common law IP right that allows celebrities to appropriate material, such as their name and likeness, from the public domain. Such appropriation is justified by the time, money and energy invested in the creation of a commercially valuable persona. Ordinary people do not have publicity rights and their names and likenesses may be in an IP-free public domain, although protected by privacy laws. Yet upon becoming celebrities, a name or likeness may be and often are "propertized."⁶⁴

⁶⁰ See Report of the International Patent System (SCP/12/3), para. 237

⁶¹ SAMUELSON, P., *op. cit.* note 9, 119

⁶² *Ibid.*

⁶³ *Ibid.*

⁶⁴ See LANGE, D., "Recognizing the Public Domain", 44 LAW & CONTEMP. PROBS. 147 (Autumn 1981), at 165, as quoted in SAMUELSON, P., *op. cit.* note 9

C.2 "FALLING INTO" THE PUBLIC DOMAIN

42. Conversely to the above, protected trademarks can become generic and lose their distinctiveness. In that case, they may be considered to have fallen into the public domain, even though initially they were words or symbols protected by trademark law.
43. Generally, it should be noted that "trademark laws, like all IP laws, are territorial in nature. As a general matter, ownership of trademark rights in one country affords no rights to use that mark or to enjoin others from using the mark in another country. A trademark has a separate existence in each independent legal system that accords and recognizes trademark rights; indeed, the same mark may be owned by different persons in different countries."⁶⁵
44. Moreover, "when registering a trademark, most countries require the applicant to describe the goods and services to be protected."⁶⁶ WIPO established the International Classification System Classes (the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of 1957) which creates specific descriptive classes for filing an international application. It follows that a trademark can only be registered in relation to certain classes of goods or services; and that, except in the case of well-known marks, protection of a trademark will be limited to those classes of goods and services.

D. PUBLIC DOMAIN AND TRADE SECRETS

45. Broadly speaking, any confidential business information which provides an enterprise with a competitive edge may be considered a trade secret. Trade secrets encompass manufacturing or industrial secrets and commercial secrets. The unauthorized use of such information by persons other than the holder is regarded as an unfair practice and a violation of the trade secret. Depending on the legal system, the protection of trade secrets forms part of the general concept of protection against unfair competition or is based on specific provisions or case law on the protection of confidential information.⁶⁷
46. Contrary to patents, trade secrets are protected without registration, that is, trade secrets are protected without any procedural formalities. Consequently, a trade secret can be protected for an unlimited period of time. There are, however, some conditions for the information to be considered a trade secret. Compliance with such conditions may turn out to be more difficult and costly than it would appear at first glance. While these conditions vary from country to country, some general standards exist which are referred to in Article 39 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement):
 - a) The information must be secret (i.e., it is not generally known among, or readily accessible to, circles that normally deal with the kind of information in question);
 - b) It must have commercial value because it is a secret; and
 - c) It must have been subject to reasonable steps by the rightful holder of the information to keep it secret (e.g., through confidentiality agreements).⁶⁸

⁶⁵ DINWOODIE, G., INTERNATIONAL INTELLECTUAL PROPERTY LAW AND POLICY, Lexis Nexis, 2001, p. 89

⁶⁶ *Ibid.*, p. 142

⁶⁷ See http://www.wipo.int/sme/en/ip_business/trade_secrets/trade_secrets.htm

⁶⁸ See http://www.wipo.int/sme/en/ip_business/trade_secrets/protection.htm

47. However, once a trade secret is disclosed to the public, even accidentally, it is no longer possible to protect the information, which then falls into the public domain.⁶⁹
48. A trade secret may be made up of a combination of characteristics and components, each of which by itself is in the public domain, but where the unified process, design and operation of such characteristics or components, in combination, provides a competitive advantage.⁷⁰

III. IDENTIFICATION AND MEANINGS OF RELATED TERMS AND CONCEPTS

49. Several concepts are sometimes confused with the notion of “public domain,” e.g., “common heritage of mankind,” “*domaine public payant*,” “prior art,” “*res nullius*,” “*res communis*” (and “commons”) and “disclosed TK.”

A. COMMON HERITAGE OF MANKIND

50. The “common heritage of mankind” (also termed the “common heritage of humanity”, “common heritage of humankind,” “universal heritage of humanity” or simply “common heritage”) is a principle of international law which holds that defined territorial areas and elements of humanity’s common heritage (cultural and natural) should be held in trust for future generations and be protected from exploitation by individual nation states or corporations.⁷¹
51. The concept of common heritage of mankind was first specifically enunciated in the Outer Space Treaty of 1967.⁷² The concept also appears in the Moon Treaty, Article 11 declaring that “[t]he Moon and its natural resources are the common heritage of mankind.”⁷³ In 1982, the concept was stated to relate to “the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction” under Article 136 of the United Nations Law of the Sea Treaty (UNCLOS).⁷⁴
52. Cultural heritage has, generally and for some time, been considered as part of the universal heritage of humanity. It was indeed contended that cultural heritage belonged to all mankind. It was further argued that, therefore, cultural heritage could not be privately owned nor receive the individual protection of copyright. As such, it was considered in the public domain. Reciprocally, the public domain was considered part of the common cultural and intellectual heritage of humanity.
53. Literature that links TK and TCEs with the broader cultural heritage policy context often draws connections to such international instruments as the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970); the UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage (1972); the Recommendation on the Safeguarding

⁶⁹ Verbauwheide, L., *Intellectual Property Issues in Advertising*, available at http://www.wipo.int/sme/en/documents/ip_advertising.htm

⁷⁰ *Trade Secrets are Gold Nuggets: Protect Them*, WIPO Magazine, April 2002, available at http://www.wipo.int/sme/en/documents/wipo_magazine/04_2002.pdf

⁷¹ See, Wikipedia entry on “Common heritage of mankind” http://en.wikipedia.org/wiki/Common_heritage_of_mankind

⁷² Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, Jan. 27, 1967, 18 U.S.T. 2410, 610 U.N.T.S. 205

⁷³ Agreement Governing Activities of States on the Moon and Other Celestial Bodies art. 1, Dec. 17, 1979, 18 I.L.M. 1434

⁷⁴ United Nations Convention on the Law of the Sea art. 1, para. 1, Dec. 10, 1982, 1833 U.N.T.S. 397 [UNCLOS]

of Traditional Culture and Folklore (1989); the UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage (2003); the UNESCO Convention on the Promotion and Protection of the Diversity of Cultural Expressions (2005) and the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (1995).

B. *DOMAINE PUBLIC PAYANT*

54. Under a system of *domaine public payant*, or “paying public domain,” a fee is imposed for the use of works in the public domain. Generally, the system works like a compulsory license: the use is conditioned on payment of the prescribed fee but not upon the securing of a prior authorization. The public domain to which such a regime applies is usually only composed of works the copyright of which has expired (except in countries applying it to expressions of folklore, as further detailed below). In some countries, only the commercial or for-profit exploitation of public domain material is subject to payment.
55. The idea can be traced back to French author Victor Hugo, who advocated the setting up a public domain *payant*. The money would be collected into a fund devoted to the encouragement of young writers and creators. The idea of providing some remuneration to benefit new generations of creators has had some recognition over time.⁷⁵
56. The amount of the fee and the uses to which it is put both vary greatly. The royalties are generally dedicated to welfare and cultural purposes, such as the funding of young creators, the social benefits of creators in difficulty or the promotion of creative works. Sometimes, as in Algeria, the remuneration is dedicated not to the assistance of individual living creators, but to the preservation of the public domain itself. In such cases, the fees so collected can be viewed as ways to fund the protection of the public domain, by sharing the burden of financing the public availability of public domain works with the commercial exploiters thereof.⁷⁶
57. Nevertheless, the operation of such a system may constitute an impediment to the free use of public domain works. The extent of such interference depends, at least in part, on the level of the fees.
58. The system has been proposed as a model to protect TCEs,⁷⁷ directed at indigenous arts councils,⁷⁸ for the nurturing of traditional works⁷⁹ by providing monetary compensation for

⁷⁵ Italy was often cited as an example of a Western country applying such a system, which it abrogated in 1996.

Nowadays, such regimes exist in Algeria, Kenya, Ruanda, Senegal, Republic of the Congo, Côte d'Ivoire and Paraguay. The pre-eminence of African countries can be explained by the Bangui Agreement of the OAPI and its Annex on literary and artistic property that provides for such a regime for the exploitation of expressions of folklore and works or productions that have fallen into the public domain (Section 59, (as amended in 1999) Annex VII, Title I)

⁷⁶ WIPO Scoping Study *op. cit.* note 17, p.38

⁷⁷ LEISTNER, M., “Analysis of Different Areas of Indigenous Resources – Traditional Knowledge”, in VON LEWINSKI, S., *INDIGENOUS HERITAGE AND INTELLECTUAL PROPERTY: GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE*, Kluwer Law International, 2003, at 84. See also Section 17 of the Tunis Model Law on Copyright of 1976, which encourages the use of *domaine public payant* to assist developing countries to “protect and disseminate national folklore”; HARVEY, E., “The *domaine public payant* in comparative law with special reference to Argentina”, News and Information, UNESCO Copyright Bulletin, Vol. XXVIII, No. 4, October-December 1994

⁷⁸ See HAIGHT FARLEY, C., *op. cit.* note 10 of the cover document

⁷⁹ BLAKENEY, M., *The Protection of Traditional Cultural Expressions*, available at http://www.ecap-project.org/fileadmin/ecapll/pdf/en/activities/regional/aun_sept_07/traditional_cultural_expressions_word.pdf.

indigenous communities. The idea was investigated in the early 1980's by WIPO and UNESCO.⁸⁰ Some developing countries actually apply the system to exploitation of folklore material. However, the effectiveness of such a system has not really been assessed and the extent to which it can protect traditional works has been questioned.⁸¹ Indeed, the administration and collection of such fees can be a great burden for collective societies, particularly in developing countries. What is more, it has been contended that it would not be a satisfactory solution for communities whose priority is control over their TK and TCEs rather than remuneration. This is further reported on in a report on national and regional experiences with the protection of TCEs, prepared for the Committee's third session (WIPO/GRTKF/IC/3/10). A proposal for a Public Domain Commission was made in the Committee at its ninth session.⁸²

C. PRIOR ART

59. "Prior art" determines the scope of novelty and inventive step, two major patentability requirements that prevent patents from being granted in respect of inventions which already exist or which are obvious compared to existing inventions. "Prior art" refers to, in general, all knowledge that has been made available to the public prior to the filing or priority date of a patent application under examination, whether it existed by way of written or oral disclosure or by way of public use.⁸³
60. In general, an invention becomes part of the prior art in three ways, namely: (1) by a description of the invention in a published writing or publication in other form; (2) by a description of the invention in spoken words uttered in public, such a disclosure being called an oral disclosure; and (3) by the use of the invention in public, or by putting the public in a position that enables any member of the public to use it.⁸⁴
61. As indicated above, patent applicants are required to provide technical details of the inventions in the patent application. After the publication of patent application and/or patents, the inventions become part of prior art. However, it does not mean that they enter the public domain. The patent owners still have the exclusive rights over the claimed inventions. In general, the inventions claimed in patents fall into the public

⁸⁰ See the work of the UNESCO Committee of Non-Governmental experts on the 'Domaine Public Payant', *Copyright Bulletin*, vol.XVI, no 3, 1982, 49. See also DIETZ, Adolf, "A Modern concept for the right of the community of authors (domaine public payant)", *Copyright Bulletin*, 1990, XXIV, n°4, 13-28

⁸¹ See NIEDZIELSKA, M., "The Intellectual Property Aspects of Folklore Protection" (1980) 16 COPYRIGHT: MONTHLY REV. WORLD INTELL. PROP. ORG. 339, at 344

⁸² See statement by the representative of Music in Common, on behalf of Mr. Peter Seeger, (document WIPO/GRTKF/IC/9/14PROV 2, at par. 120): "Old songs, worldwide, now in the public domain are often 'adapted and arranged' and the new song copyrighted. We propose that a share, .01% or 99.99%, of the [...] royalties go to the place and people where the song originated. Every country should have a Public Domain Commission to help decide what money goes where. [...]The public domain [...] did not mean that monies generated by sale somewhere not be returned to their source of inspiration, namely the peoples or countries whence they had arisen. Indeed, it would be one function of the Public Domain Commission to ensure that two apparently contradictory purposes were served: to ensure preservation and development of a natural resource for the benefit of all and, at the same time, to limit use by those seeking to profit from it and to ensure that a reasonable portion of those profits were returned to the source to sustain it. [...]"

⁸³ See Report of the International Patent System (SCP/12/3), para. 210

⁸⁴ See WIPO Intellectual Property Handbook (Second Edition, 2004), p. 19

domain after the expiration of the patents. That is, after their expiration, the technology claimed in a patent can be freely used by anyone without the patent owner's permission.

62. In some countries, information which was publicly disclosed orally or through use in a foreign country is not part of the prior art. Accordingly, under the patent law of those countries, a patent may be granted on an invention which is identical to, or obvious from, undocumented knowledge already available to the public in another country. Without a universal recognition of the scope of the prior art, there is the risk that patent rights are granted on subject matter that is already in the public domain in another country. Further, in view of the increasing operational cooperation among patent offices, a universal understanding of the definition of prior art is the basis for a common understanding with respect to novelty and inventive step.⁸⁵

D. RES NULLIUS

63. *Res nullius* (nobody's property) is a Latin term derived from Roman law whereby *res* (an object in the legal sense, anything that can be owned) is not yet the object of rights of any specific subject. Such items are considered ownerless property and are usually free to be owned. Examples of *res nullius* are wild animals or abandoned property.

E. RES COMMUNIS OR COMMONS

E.1 RES COMMUNIS

64. *Res communis* (common property) is a Latin expression used in Roman public law to designate a common thing or good, i.e., one which, by its very nature, cannot be appropriated. It belongs to everyone, to all citizens and is thus accessible by all.
65. In Roman law, examples of *res communes* include the sea, the ocean, the atmosphere, aerial space, as well as sanctuaries or public baths. However, water or air, which may be separated from the sea, ocean, atmosphere or from aerial space, and which may be the subject of appropriation for private use or consumption purposes, are *res nullius*. They may be possessed and appropriated individually or collectively. *Res nullius* do not have an owner but are nevertheless appropriable. Conversely, *res communes* are unavailable for private ownership and no one can prevent anyone else from using them.
66. To some, the *res communis* of Roman law is a concept similar to that of common heritage of mankind. This is, however, debated, as others prefer the concept of *res universitatis*, in which the notion of citizenship, instead of humanity, is applied.⁸⁶

E.2 COMMONS

67. Black's Law Dictionary defines "common" as "a legal right to use another person's property, such as an easement. It also offers "a tract of land set aside for the general public's use."
68. The "commons" refers to resources that are collectively owned or shared between or among populations. These resources are said to be "held in common" and can include

⁸⁵ See Report of the International Patent System (SCP/12/3), para. 211

⁸⁶ See Wikipedia entry on "*Res communis*", in French, http://fr.wikipedia.org/wiki/Res_communis

everything from natural resources and land to software. In some discourse, the process by which the commons were transformed into private property was termed “enclosure.”

69. The commons were traditionally defined as the elements of the environment—forests, atmosphere, rivers, fisheries or grazing land—that are shared by all. These are the tangible and intangible aspects of the environment that no-one owns but everybody enjoys.
70. Today, the commons may be understood within the cultural sphere as well. The commons thus include (unless these are protected as IP) literature, music, performing arts, visual arts, design, film, video, television, radio, community arts and sites of heritage.
71. The commons can also include “public goods” such as public space, public education, health and the infrastructure that allows society to function (such as electricity or water delivery systems).
72. There are a number of important features that can be used to describe true commons. First, true commons cannot be commodified—and if they are, they cease to be commons. Second, while they are neither public nor private they tend to be managed by local communities. While this may be true to a degree, commons cannot be exclusionary. That is, they cannot have borders built around them otherwise they become private property. Third, unlike resources, they are not scarce but abundant. In fact, if managed properly, they work to overcome scarcity.⁸⁷
73. A model of a TK Commons has been developed as a potential mechanism for addressing the problems faced by indigenous and local communities in negotiating meaningful and effective benefit sharing arrangements with researchers who want to obtain access to TK for non-commercial research.⁸⁸ As indicated in the report of the Traditional Knowledge Commons Workshop, December 2009, Cape Town, South Africa, the distinction between knowledge commons and the public domain is especially important in the context of a TK Commons since customary laws regulating TK are influenced by concern related to proper relationships and reciprocity with the goal of maintaining these relationships, not moving knowledge toward the public domain. Large amounts of TK are already publicly available in publications and archives, and indigenous and local communities have long struggled to prevent this TK from being treated as though it were in the public domain and used as though it were free. It is therefore essential that a TK Commons provides access to the use of TK strictly within the framework of customary law so as to avoid its enclosure into the public domain. In other words, the TK Commons would be a mechanism for providing regulated access to TK – albeit guided by the biocultural values of indigenous and local communities – not altogether free access. For this reason, indigenous and local communities need to be able to exercise the options to stop access and refuse appropriation of any development based on their TK when necessary to protect against its misuse.⁸⁹

⁸⁷ See Wikipedia entry on “Commons”, <http://en.wikipedia.org/wiki/Commons>

⁸⁸ More information on TK Commons is available at http://naturaljustice.org.za/index.php?option=com_content&task=view&id=55&Itemid=94

⁸⁹ “Implementing a Traditional Knowledge Commons”, *op. cit.* note 5 of the cover document, p. 14

IV. DISCUSSION OF THE PUBLIC DOMAIN IN OTHER WIPO BODIES

74. The notion of the public domain is under discussion in several forums at WIPO.

A. COMMITTEE FOR DEVELOPMENT AND INTELLECTUAL PROPERTY

75. In 2007, the WIPO General Assembly adopted 45 recommendations with a view to integrating a development dimension in all of the organization's activities.⁹⁰ A Committee on Development and Intellectual Property (CDIP) was established to develop a work program for the implementation of these recommendations.

76. Among the 45 recommendations of the WIPO Development Agenda, two recommendations are related to the public domain. Recommendation 16 states that WIPO's normative processes should consider "the preservation of the public domain" and "deepen the analysis of the implications and benefits of a rich and accessible public domain." Recommendation 20 aims to promote "norm-setting activities related to IP that support a robust public domain in WIPO's Member States, including the possibility of preparing guidelines that could assist interested Member States in identifying subject matters that have fallen into the public domain within their respective jurisdictions."

77. With the intention of implementing the adopted recommendations in an effective and coherent manner, the CDIP established a project on "Intellectual Property and the Public Domain." The objective of this project is to provide a series of surveys and studies to deepen the conceptual understanding of what constitutes the public domain in different jurisdictions, what tools have already been made available to help identify the subject matter that has fallen into the public domain, and, to the extent relevant information is made available, what are the implications and benefits of a rich and accessible public domain. The project is divided into four components that address the issue from the perspectives of (1) copyright, (2) trademarks, and (3) patents.⁹¹

B. STANDING COMMITTEE ON COPYRIGHT AND RELATED RIGHTS

78. The abovementioned Project on Intellectual Property and the Public Domain, dealing with Development Agenda Recommendations 16 and 20, includes the preparation of a "Scoping Study on Copyright and Related Rights and the Public Domain" (Activity 1.3).⁹²

C. STANDING COMMITTEE ON THE LAW OF PATENTS

79. Two studies prepared for the Standing Committee on the Law of Patents, namely "Exclusions from Patentable Subject Matter and Exceptions and Limitations to the Rights" (SCP/13/3) and "Dissemination of Patent Information" (SCP 13/5), include useful information about the role of the patent system in the identification, access and use of technology that is in the public domain.

⁹⁰ See <http://www.wipo.int/ip-development/en/agenda/>

⁹¹ See CDIP/4/3 Rev. 1

⁹² *Ibid.* This study has been prepared and is available at http://www.wipo.int/ipdevelopment/en/agenda/pdf/scoping_study_cr.pdf.

D. STANDING COMMITTEE ON THE LAW OF TRADEMARKS

80. Within the Standing Committee on the Law of Trademarks, there have been discussions on the “privatizing” of cultural assets in the public domain. In principle, a literary or artistic work which has fallen into the public domain may be used freely, including for commercial purposes. However, there might be public policy reasons which would justify an enterprise not being entitled to acquire trademark rights in a work that is in the public domain.⁹³

V. THE PUBLIC DOMAIN IN THE CONTEXT OF THE INTERGOVERNMENTAL COMMITTEE ON INTELLECTUAL PROPERTY AND GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE (the COMMITTEE)

81. The issue of the public domain has been stressed and highlighted in Committee discussions. Some participants have argued that TK and TCEs are in the public domain, some did not accept the concept of a “public domain”, and others have had questions and comments on the concept. The following is a selection of interventions made during previous Committee sessions.

A. TK AND TCES ARE IN THE PUBLIC DOMAIN

82. The Delegation of the Russian Federation stated that, in the Russian Federation, works of folklore, in particular non-material expressions of folklore, were not protected by copyright, in accordance with national legislation, which further provided that works that had never enjoyed protection on the territory of the Russian Federation should be deemed to have entered the public domain.⁹⁴
83. The Delegation of the European Union and its Member States stated that “the fact that folklore for the most part is in the public domain does not hamper its development—to the contrary, it allows for new creations derived from or inspired by it at the hands of contemporary artists.” It further stated, “those who advocate IP protection for their own expressions of folklore would create monopolies of exploitation and would naturally then be faced with monopoly claims from other regions. Exchange or interaction could thus be made more difficult, if not impossible. Indeed, IP protection should only be used where appropriate and beneficial to society in that it stimulates creativity and investment while respecting the interests of others and of society at large. If expressions of folklore were fully protected, this could almost have the effect of casting it in concrete. Folklore may thus not be able to evolve and may risk its very existence as it would lose one of its main features: its dynamics. There is a point where a line must be drawn between the public domain and protected IP. [...] the realm of IP protection should not be extended to a point where it becomes diffuse and legal certainty diluted.”⁹⁵ It also said that European folklore was considered to be part of the public domain but that other countries and cultures might have different concerns and interpretations.⁹⁶
84. The Delegation of Canada noted that the general objective of the proposed activities was to ensure that TK which was already in the public domain and was identifiable as such

⁹³ See SCT/16/5

⁹⁴ Draft Report of the second Session (WIPO/GRTKF/IC/2/16), para. 24

⁹⁵ European Community comments on document WIPO/GRTKF/IC/4/3, see Consolidated Analysis, document WIPO/GRTKF/IC/5/3, para. 27

⁹⁶ Draft Report of the second Session (WIPO/GRTKF/IC/2/16), para. 169

was not patentable. The Delegation stated that prior art in Canada was considered to be any disclosure that became available to the public anywhere in the world. Oral disclosures would also form part of the prior art, but in practice, would only be used by the Canadian Patent Office if the oral disclosures were captured on paper or in machine readable form. In addition, the Delegation emphasized that the date and source of the prior art had to be clearly established and, in summary, identification of prior art was largely dependent on the availability and accessibility of relevant documents. The Delegation of Canada additionally stated that TK fell in two main categories, namely (i) TK which had been codified, i.e., appeared in written form, and was in the public domain; and (ii) TK which was not codified and which formed part of the oral traditions of indigenous communities.⁹⁷

85. The Delegation of Peru stated that *sui generis* protection system should cover even those elements of TK which were already in the public domain.⁹⁸
86. The Representative of the Center for International Environmental Law (CIEL) stated that the drafting of a *sui generis* system should take into account and explore the use of protection systems similar to trade secrecy for areas of TK not in the public domain and mechanisms for compensation for equitable benefit-sharing regarding knowledge considered as prior art in the public domain.⁹⁹
87. The Delegation of New Zealand stated it was critically important for any menu of options or *sui generis* systems of protection to include some form of protection for TK and TCEs in the public domain.¹⁰⁰

B. THE CONCEPT OF PUBLIC DOMAIN NOT ACCEPTED

88. The Delegation of Nigeria stated that the public domain indicated something which had once been protected when this protection had lapsed and that TCEs had never been protected under IP laws, yet this should not suggest that because a work is accessible it was already in the public domain and available freely.¹⁰¹
89. The representative of the Tulalip Tribes also stated that the concept of public domain was not accepted by Indigenous peoples. The history of the concept of the public domain and its relation to the development of IP rights show that the two have developed hand in hand, as an outcome of Western intellectual movements during the late Enlightenment and the Age of Reason. Open sharing of TCEs by the caretakers of these gifts did not mean that these TCEs had fallen into the public domain. If it was misused by the general public who were not caretakers of these TCEs, then there could be great physical and spiritual harm to the individual caretakers of this knowledge. The representative urged governments to find ways to protect TCEs and TK considered to be in the public domain. Many songs or stories, for example, were held by individuals or families. These songs and stories were performed in public, and might be known by all members of a community. However, the right to sing these songs or tell these stories fell only to the individuals or families who are caretakers of the Creator's gifts. TCEs were not in the

⁹⁷ Draft Report of the second Session (WIPO/GRTKF/IC/2/16), para. 131. See also WIPO/GRTKF/IC/17/INF/8

⁹⁸ Draft Report of the second Session (WIPO/GRTKF/IC/2/16), para. 123

⁹⁹ Draft Report of the second Session (WIPO/GRTKF/IC/2/16), para. 149

¹⁰⁰ Draft Report of the sixth Session (WIPO/GRTKF/IC/6/14), para. 41

¹⁰¹ Draft Report of the fifth Session (WIPO/GRTKF/IC/5/15), para. 37

“public domain” because indigenous peoples had failed to take the steps necessary to protect the knowledge in the Western IP system, but from a failure of governments and citizens to recognize and respect the customary law regulating its use. The fears raised about the possible repercussions to cultural innovation were expressed in terms of theories under the Western IP regime, and did not reflect the motivations of many of the world’s indigenous peoples. There was often no comparative idea for the “public domain” in traditional cultures.¹⁰²

90. The representative of the Saami Council argued that commercial and other interests were continuously exploiting Indigenous pre-existing, underlying, cultural heritage that were claimed to be in the “public domain” and that this term did not mean anything to Indigenous peoples. He also said that Indigenous peoples rarely placed anything in the public domain and that it was an IP system construct. He also objected to suggestions that protection of TCEs in the public domain constituted a threat to Indigenous artists and their creativity, but overlooked the customary laws on use of TCEs.¹⁰³
91. The representative of Tupaj Amaru stated that putting TK and TCEs into the public domain would violate the confidential character of many intangible, sacred and secret elements which belong to the living heritage and accentuate the deterioration of cultural values and illicit appropriation of their cultural values by corporations.¹⁰⁴

C. QUESTIONS AND COMMENTS ON THE CONCEPT OF PUBLIC DOMAIN

92. The Delegation of Norway highlighted that it was especially important to find the right balance between protectable TK and knowledge which had become part of the public domain. There was not a coherent approach to what the notion of public domain actually meant.¹⁰⁵ It believed that the knowledge at least should be considered as a part of the public domain when it had become widely known outside the community that had generated it and consequently was easily accessible by the public from other sources than the community that had generated it or representatives for that community. The decisive criterion for when TK had become a part of public domain would then be the level of dissemination and the knowledge outside the group that had developed it. How the knowledge had been disseminated should be irrelevant in that assessment, it should be a mere objective assessment. The idea to draw the line between protected TK and knowledge in the public domain based on the extent the knowledge was disseminated to the public did not imply that TK would lose its protection merely on the ground that someone outside the community had accessed the knowledge or the knowledge was accessible outside the community (*inter alia* through databases).¹⁰⁶
93. The Delegation of Sweden asked: (1) What is the relationship between the foreseen protection of TK and knowledge already in the public domain? Where is the relevant point

¹⁰² Draft Report of the fifth Session (WIPO/GRTKF/IC/5/15), para. 56

¹⁰³ Draft Report of the fifth Session (WIPO/GRTKF/IC/5/15), para. 53

¹⁰⁴ Draft Report of the fifth Session (WIPO/GRTKF/IC/5/15), para. 80

¹⁰⁵ The Protection of Traditional Knowledge: Revised Objectives and Principles (WIPO/GRTKF/IC/17/5), page 25 of Annex

¹⁰⁶ The Protection of Traditional Knowledge: Revised Objectives and Principles (WIPO/GRTKF/IC/17/5), page 37 of Annex

of access to TK, which is not fixed locally in nature, to be determined? (2) How do Member States foresee protection of TK contained in databases?¹⁰⁷

94. The Delegation of Japan raised the following question: How would the knowledge which belonged to the public domain be treated and how would the public domain in this context be defined?¹⁰⁸
- VI. TK AND TCE NATIONAL AND REGIONAL LEGISLATION REFERRING TO THE PUBLIC DOMAIN
95. The Peruvian Law N° 27811 *Law Introducing a Protection Regime for the Collective Knowledge of Indigenous Peoples Derived from Biological Resources* adopts a position regarding TK in the public domain. Article 13 states that collective knowledge is in the public domain when it has been made accessible to persons other than the indigenous peoples by mass communication media such as publications, or when the properties, uses or characteristics of a biological resource have become extensively known outside the confines of the indigenous peoples and communities.¹⁰⁹
96. Article 8 of Law of the Kyrgyz Republic on the Protection of Traditional Knowledge states that “[i]n order to prevent illegal patenting of subject-matters created on the base of Traditional Knowledge the Traditional Knowledge database shall be maintained, which shall be used during examination of subject-matters to be patented. The database shall be maintained by the Authorized State Body based on the data on registered Traditional Knowledge and information regarding Traditional Knowledge which has entered into public domain.”¹¹⁰
97. The public domain in relation to TK has been set out in the draft *Model Law for the Protection of Traditional Ecological Knowledge, Innovations and Practices* for Pacific Island countries. Article 3 defines its application as including “traditional ecological knowledge in the public domain.” In determining the extent to which the Act should be applied to the public domain, it states that this “will depend upon an assessment of the following factors: (a) whether there was an intention by the owner to share the knowledge, and if so the purpose for sharing; (b) whether permission was given to publicize or disseminate the knowledge; (c) whether the owner knew that the knowledge might be used for commercial ends; (d) whether the owner understood that sharing the knowledge with outsiders would result in a loss of control over its subsequent use; (e) the extent to which unauthorized use of the knowledge may undermine the spiritual and cultural integrity of the owners.”¹¹¹

¹⁰⁷ The Protection of Traditional Knowledge: Revised Objectives and Principles (WIPO/GRTKF/IC/17/5), page 25 of Annex

¹⁰⁸ The Protection of Traditional Knowledge: Revised Objectives and Principles (WIPO/GRTKF/IC/17/5), page 37 of Annex

¹⁰⁹ English and Spanish versions of the Peruvian Law N° 27811 “Law Introducing a Protection Regime for the Collective Knowledge of Indigenous Peoples Derived from Biological Resources” are available at <http://www.wipo.int/clea/en/details.jsp?id=3420>.

¹¹⁰ English version of the Law of the Kyrgyz Republic on the Protection of Traditional Knowledge is available at <http://www.wipo.int/wipolex/en/details.jsp?id=5571>.

¹¹¹ See Model Law for the Protection of Traditional Ecological Knowledge, Innovations and Practices, available at http://www.grain.org/brl_files/brl-modellaw-pacific-en.pdf.

98. Article 89 of Law No. 032-99/AN of 22 December 1999 on the Protection of Literary and Artistic Property of Burkina Faso states that “[e]xpressions of traditional cultural heritage by known individual authors shall belong to their authors if, in accordance with the term of copyright protection, the expressions are not yet in the public domain. Any person claiming to be the author of an expression of traditional cultural heritage must legally prove that he is the author. The royalties to be paid by the users upon exploitation of expressions of traditional cultural heritage whose authors are known shall be shared between the rights holders and the collective management organization in accordance with the organization’s distribution rules.”¹¹²
99. Chapter XIV of the Colombian Law No. 23 of January 28, 1982, on Copyright refers to the public domain. Article 187 states that “[t]he following shall belong to the public domain: (i) works whose term of protection has expired; (ii) works of folklore and traditional works by unknown authors; (iii) works whose authors have renounced their rights; and (iv) foreign works that do not enjoy protection in the Republic.” Article 189 states that “[i]ndigenous art in all its manifestations, including dances, songs, crafts, drawings and sculptures, shall belong to the cultural heritage.”¹¹³

[End of Annex and of document]

¹¹² English and French versions of Law No. 032-99/AN of 22 December 1999 on the Protection of Literary and Artistic Property of Burkina Faso are available at <http://www.wipo.int/wipolex/en/details.jsp?id=420>.

¹¹³ English French and Spanish versions of the Colombian Law No. 23 of January 28, 1982, on Copyright are available at <http://www.wipo.int/wipolex/en/details.jsp?id=872>