Part I

What is the Copyright Public Domain?

1 The Copyright Public Domain – A New Approach

1.1 Introduction: Rethinking the Copyright Public Domain

Texts and articles on copyright law conventionally organise the law through the lens of the rights of the owners of works – both the creators of works and others, such as exclusive licensees, with commercial interests in them. Orthodox treatments therefore focus on copyright subsistence, exclusive rights, infringement, ownership and exploitation; the organising principle is the exclusive property rights in works or other protected material. For convenience, this book generally uses the term 'works' in a non-technical sense to refer to all forms of creative expression, including what are commonly referred to as neighbouring and related rights, and without regard to the extent of their protection (if at all) by copyright law, meaning that it also refers to unprotected material as 'works'.

This book takes a different approach, based on an alternative perspective, of how copyright law might be conceptualised if we put the 'user' (and, in aggregate, 'the public')[1] of works, and the 'rights' of users, in the

[1] This is not meant to imply that authors and owners are not also members of 'the public'. As we explain in Chapter 2, our analysis avoids drawing simplistic distinctions between private rights of owners and public rights of users.

foreground, rather than being relegated to what is left after the exclusive rights are exhausted. Our core question is 'what can users do with works, without obtaining the permission of a copyright owner?' This question derives from our fundamental understanding of the public domain as being essential to protect the negative liberty of users to use works for their own purposes: [1.6.3]. By focusing on this question, and on what we refer to as 'public rights', we aim to reinvigorate the notion of 'the public domain' in copyright law, while building on the extensive literature in this area. In the process, our analysis aims to render new insights into the nature of copyright, which can sometimes be obscured by automatic and unthinking foregrounding of exclusive rights. This chapter outlines our basic approach, while our conceptual framework and terminology are further explained in Chapter 2.

This chapter is structured as follows. We begin by reviewing previous scholarly work on the copyright public domain. Second, we explain how our approach builds on this work, and identify our original contributions. After that, we set out the four-part structure of our book, consisting of our conceptual framework, constraints on and supports for national public domains, detailed comparative analysis of national laws and our conclusions. Fourth, we describe our analytical approach, which we call a 'realist' perspective, and our main assumptions and methodology. This leads to an explanation of the relationship between our approach and copyright theory, and our justification for a conception of the public domain as the freedom or ability to use works without permission. Sixth, we summarise traditional values we regard as supporting the public domain, and explain how these relate to our conception of it as permission-free uses of works. Seventh, we qualify our critical analysis of copyright law by acknowledging the role of exclusive rights in promoting important values. As copyright law is essentially territorial, the chapter then reviews conceptual approaches to copyright in national laws, identifying the main jurisdictions covered in this book. Given the importance of the EU for our comparative analysis, we describe the main features of EU copyright law, as well as the relationship between EU and UK copyright law, including the implications of the UK decision to withdraw from the EU. We summarise our approach in the concluding section to the chapter.

1.2 Previous Approaches to the Public Domain

Despite continuing interest in the public domain, mainstream copyright law texts generally fail to recognise it as a fundamental concept, giving it only passing mention when discussing expiry of the copyright term, and

sometimes the principle that copyright does not extend to ideas or facts (the 'idea/expression dichotomy'). The public domain, on this traditional view, is defined negatively by reference to those things that do not merit protection, being summed up as follows by Krasilovsky in 1967:

> Public domain in the fields of literature, drama, music and art is the other side of the coin of copyright. It is best defined in negative terms. It lacks the private property element granted under copyright in that there is no legal right to exclude others from enjoying it and is 'free as the air to common use'.[2]

Our approach to the public domain draws upon previous substantial contributions, many dating from the 2000s, which made important breakthroughs, but left many issues unresolved. While building on this work, we aim to take it further by grounding our analysis in an ambitious survey of international and national copyright laws. But, before doing so, it is important for us to review previous approaches.

The modern literature on the public domain can be traced to a 1981 article by David Lange, where he argued that recognition of new intellectual property rights (IPRs) should be offset by recognition of rights in the public domain.[3] The article cautioned against the tendency to over-expansion of IPRs by legislatures and courts, and argued for better recognition of rights in the public domain. It stimulated further interest, including Litman's seminal 1990 article which, as part of a critique of the view that authors create from thin air, argued for a positive justification for the public domain as the source of raw material for producing original works.[4] In 1991, Patterson and Lindberg first claimed that the public domain was the basis for a law of users' rights, arguing that copyright is 'a law for consumers as well as for creators and marketers'.[5]

The 1990s therefore marked a transition from an approach which sought to defend the public domain against encroachments from expanding IPRs to a focus on identifying and justifying positive values which underpin it. Impetus was given to attempts to build positive accounts of the public domain by developments in the United States, notably the

[2] M. Krasilovsky, 'Observations on the public domain' (1967) 14 *Bulletin of the Copyright Society* 205 at 205. The phrase 'free as the air to common use' comes from the Brandeis J dissent in *International News Service* v. *Associated Press* 248 US 215 at 250 (1918).

[3] D. Lange, 'Recognizing the public domain' (1981) 44(4) *Law and Contemporary Problems* 147; J. Boyle, 'The second enclosure movement and the construction of the public domain' (2003) 66 *Law and Contemporary Problems* 33 at 59; J. Cohen, 'Copyright, commodification, and culture', in L. Guibault and P. B. Hugenholtz (eds.), *The Future of the Public Domain: Identifying the Commons in Information Law* (Kluwer Law International, 2006), p. 132.

[4] J. Litman, 'The public domain' (1990) 39(4) *Emory Law Journal* 965.

[5] L. Ray Patterson and S. Lindberg, *The Nature of Copyright: A Law of Users' Rights* (University of Georgia Press, 1991), pp. 3–4.

twenty-year extension of the copyright term in 1998.[6] Concerns outside the United States were inspired by EU directives in 1993 concerning the copyright term and in 1996 protecting non-original databases, as well as proposals for an international database treaty.[7]

Scholarly attention to these issues culminated with the 2001 Duke Law School conference on the public domain, and papers resulting from it, which presented diverse analyses of positive values of the public domain.[8] Lange, for example, revisiting the issue, suggested that the public domain should be reimagined as a 'status' given to exercise of the creative imagination that could protect acts of creative appropriation against proprietary claims.[9] Boyle, on the other hand, advanced a complex affirmative argument for the public domain by analogy with arguments for protecting the natural environment, claiming that there are commonalities in various positive interests and values underpinning the public domain, which can clarify debates about creation, innovation and free speech.[10] The 2000s therefore saw the emergence of a rich literature addressing values supporting a positive view of the public domain.[11]

1.3 A New Approach to Copyright Public Domains

Building on this literature, this book endorses a positive account of the public domain, with implications for its definition being explained in Chapter 2. Although values supporting the public domain are introduced in this chapter, it is not the main intention of this book to engage with theoretical debates about public domain values; nor does it attempt to provide a particular theory of the public domain. Instead, the book develops a second theme arising from the public domain literature: that is, we agree with Samuelson that building a positive, descriptive account

[6] Sonny Bono Copyright Term Extension Act, Pub L. No. 105-298, tit. I, 112 Stat. 2827 ('CTEA').
[7] See P. Samuelson, 'Enriching discourse on public domains' (2006) 55 *Duke Law Journal* 783 at 787 n. 21.
[8] Papers presented at the conference were collected as articles published in (2003) 66 *Law and Contemporary Problems*.
[9] D. Lange, 'Reimagining the public domain' (2003) 66 *Law and Contemporary Problems* 463 at 474.
[10] Boyle, 'The second enclosure movement'.
[11] See, for example, L. Lessig, *The Future of Ideas: The Fate of the Commons in a Connected World* (Random House, 2001); Y. Benkler, 'Through the looking glass: Alice and the constitutional foundations of the public domain' (2003) 66 *Law and Contemporary Problems* 173; R. Coombe, 'Fear, hope, and longing for the future of authorship and a revitalized public domain in global regimes of intellectual property' (2002–3) 52 *DePaul Law Review* 1171; Cohen, 'Copyright, commodification, and culture'; V.-L. Benabou and S. Dusollier, 'Draw me a public domain', in P. Torremans (ed.), *Copyright Law: A Handbook of Contemporary Research* (Edward Elgar, 2007), pp. 161–84.

of what is in the public domain is essential to understanding its positive character.[12]

To do so, we go beyond previous attempts at mapping the public domain in two main ways. First, we provide an exhaustive account of the legal categories that we contend comprise the copyright public domain. This is based on our expansive definition of the public domain, which is explained and justified in Chapter 2, and which leads us to identify fifteen public domain categories, which we also call 'public rights'. Our approach is consistent with broad definitions of copyright's public domain proposed by some others, but we refine and extend the analysis, conceptualising the public domain as the complete and equal complement to the proprietary domain of copyright law. In sum, we conceive of 'copyright' not merely as the rights comprising owners' rights, but as a complex system of inter-related rights and interests, with users' 'rights' also being a positive bundle of rights: [2.4.2]. This reconceptualisation enables us to show that there are areas of copyright law and practice which are more significant to the public domain than often assumed, such as compulsory licences and some types of voluntary licensing. While traditional approaches disaggregate limits and exceptions to exclusive rights, treating different categories in isolation, our analysis enables common features of these rights and interests to stand out. The public domain that emerges is a collection of specific 'abilities' or 'rights', but with conceptual connections between the rights, just as the traditional approach sees copyright as a conceptually linked collection of related 'exclusive rights' of copyright owners.

Second, our approach is firmly anchored in detailed analysis of positive law in each of our fifteen public domain categories, an endeavour which is even more unusual for being conducted across numerous jurisdictions. Moreover, in focusing on international copyright law and on comparative analysis of the law in selected jurisdictions, we attempt to transcend previous jurisdiction-specific accounts of the public domain.[13] Throughout, our conviction is that it is impossible properly to understand the complexity of the public domain, let alone propose measures for supporting public domain values, in isolation from detailed knowledge of the law. That said, at a number of points in the book, and especially in our account of the de facto public domain in Chapter 16, we readily acknowledge that practices and norms are as important to the public domain as the strict legal position.

[12] P. Samuelson, 'Challenges in mapping the public domain', in Guibault and Hugenholtz (eds.), *The Future of the Public Domain*, pp. 7–8.
[13] Patterson and Lindberg's 1991 book is, for example, US-centric.

We therefore attempt to provide the first systematic and comprehensive analysis of the concept and legal constituents of the copyright public domain, going beyond previous schematic and jurisdiction-specific exercises. We have deliberately limited our analysis to the copyright public domain (and not in relation to all IPRs) partly to make the project achievable, but also to focus on building a better understanding of copyright law. While we acknowledge the significance of restrictions on the public domain arising from laws outside copyright, such as the EU database law or confidentiality law, these issues are primarily dealt with in Chapter 6, which addresses extra-copyright constraints on the copyright public domain.

While we adopt a user-centric approach to the public domain, we also stress there is no sharp dichotomy between creators and users of works. On the contrary, creators are also users of existing works, and their relationship to those works (and to the public domain) is an important part of their creativity. Neither do we deny the importance of conferring exclusive rights on authors: in market-based economies creativity depends, although not entirely, both on exclusive rights in works and rights of users, including users that are creators: [1.7]–[1.8]. The difficulties, of course, lie in determining the legal boundaries between proprietary exclusive rights and the public domain.

1.4 An Outline of the Book

The argument by which we develop our approach to the copyright public domain is reflected in the four-part structure of the book.

Part I, consisting of Chapters 1 to 3, sets the framework for our analysis. In the rest of Chapter 1 we set out our main assumptions, establishing the conceptual foundations for our expansive approach to the public domain based on permission-free uses of works. We also briefly identify traditional public domain values. Finally, as copyright law is inherently territorial, we introduce perspectives on copyright legal jurisdictions. Chapter 2 focuses on our definition of the public domain, which is based on permission-free uses. This approach recognises that the proprietary/public domain distinction is not merely a distinction between works that are or are not protected, but a distinction that exists within each work. The chapter expands upon and justifies the elements of our definition, as well as explaining our use of the terminology of 'public rights'.

Chapter 3 identifies the fifteen categories of the copyright public domain, which form the lynchpin of the book. Following from the territorial nature of copyright, the fifteen categories, which are more

exhaustive than previous approaches, are drawn from our analysis of selected national laws. The categories are: (1) Works failing minimum requirements; (2) Works impliedly excluded; (3) Works expressly excluded; (4) Constitutional and related exclusions; (5) Works in which copyright has expired; (6) Public domain dedications; (7) Public policy refusals against enforcement; (8) Public interest exceptions to enforcement; (9) Insubstantial parts; (10) Ideas or facts; (11) Uses outside exclusive rights; (12) Statutory exceptions; (13) Neutral compulsory licensing; (14) Neutral voluntary licensing; and (15) De facto public domain of benign uses. The chapter comprehensively defines and describes each category.

Part II of the book, consisting of Chapters 4 to 6, turns to the law, introducing legal regimes outside of national copyright laws that condition national public domains. Chapters 4 and 5 introduce and explain international copyright law, concentrating on those elements of international law that have the most effect on national public domains. Chapter 4 explains the relevant essential elements of the international legal framework, while Chapter 5 deals with the framework for copyright limitations and exceptions and the international enforcement regime. As we explain, while international law generally acts as a constraint on national public domains, it does not completely determine the shape of public domains. Although our fifteen public domain categories are based on national copyright laws, the practical importance of a category for the public domain can depend upon laws that are external to the copyright category, and may be external to copyright law. We refer to these as laws that either support or constrain public domains, causing them to thrive or shrink. In Chapter 6, we identify the most important types of supports and constraints, and illustrate them through examples.

Part III, which is the bulk of the book, is a detailed comparative examination of each of the fifteen categories identified in Chapter 3, how they are implemented in national jurisdictions, and the implications of the category for the public domain. Chapters 7–17 therefore comprehensively describe and analyse: 'works' outside copyright protection (Chapters 7–8); works where copyright has expired (Chapter 9); permissible uses of works (Chapter 10); copyright exceptions and limitations (Chapters 11–12); compulsory licences (remunerated use exceptions) (Chapters 13–14); neutral voluntary licensing (Chapter 15); and a category we refer to as 'the de facto public domain' (Chapter 16). These last two chapters, in our view, present a partial corrective to the constraining effects of international copyright law, because they show that there has developed over recent decades an Internet-enabled global expansion of the public domain.

Part IV, which consists of Chapter 17, looks to the future of the public domain and proposes realistic reforms, which might be achievable under national laws, and which might protect and support copyright public domains.

Taken together, the book is a comprehensive attempt at defining and identifying the legal contents of the global public domain and national public domains, and analysing the implications for copyright law.

1.5 A 'Realist' Perspective: Assumptions and Methodology

We describe as 'realist' the perspective we have taken, and explain here its purpose and limitations. Although this book is a comprehensive overview of copyright from the perspective of the public domain, it is far from an exercise in reimagining copyright from first principles.[14] We are more concerned with determining the shape and scope of public domains under current copyright laws, taking a 'realist' approach to international copyright law, which can be summed up as 'what if we are stuck with copyright treaties as they are now, with little prospects of significant change?'[15] This approach is, we contend, soundly based in the history and development of international copyright law. As explained in Part II, the history of international copyright law has been characterised by progressive expansion of copyright protection and, with few exceptions – notably, the recent Marrakesh Treaty assisting visually impaired and print-disabled people – few express concessions to users' rights. Moreover, the Berne Convention, which remains the centrepiece of international copyright law, has not been amended for nearly half a century, illustrating the substantial difficulties in achieving multilateral agreement.

Existing international copyright law is therefore a constraint within which national laws must pragmatically work. Applying our realist perspective, from the analysis of constraints imposed by international law and the comparative analysis of national laws, we identify flexibilities which may assist in protecting or potentially expanding national public domains. To the extent

[14] R. Giblin and K. Weatherall (eds.), *What If We Could Reimagine Copyright?* (Australian National University Press, 2017).

[15] Our approach has affinities with, but is not identical to, the 'legal realist' school of international law: see, for example, G. Shaffer, 'The new realist approach to international law' (2015) 28(2) *Leiden Journal of International Law* 189. It is also similar to that taken by the Australian Productivity Commission in its report on intellectual property (IP) arrangements, which acknowledged that law reform occurs in a 'constrained environment', including constraints arising from international IP law: Productivity Commission (Aus.), 'Intellectual property arrangements', Report 78 (23 September 2016), pp. 5–6.