

Call for a Progressive Agenda on Creation and Innovation

Greens/EFA group at the European Parliament

September 2012

A Progressive Agenda for the Digital Public Domain

by Communia Association

<http://www.communia-association.org>

Fostering creation and innovation is a serious task for the European legislator to meet the challenges of the Information Society. In doing so, policy-makers shall look beyond the system as currently framed by the “Intellectual Property” regime. At the core of this reform of perspective is the due consideration of the Public Domain.

The Public Domain needs to be recognized positively. Through the existing “Intellectual Property” prism, the Public Domain is only considered as a vague “non-IP protected” zone. Such a negative and limited perspective failing to capture the Information Society’s realities and opportunities shall be overturned. It is the European policy-makers’ responsibility to enable a clear understanding and recognition of the Public Domain by the Member States, thus encouraging the development of diverse valorization models of content in the digital internal market. In this purpose, future policy shall be guided towards more flexibility, for the shared benefit of all creators and members of the society.

Such a positive agenda shall be able to protect the right to access and reuse culture, education, science and public information. Works that can be freely accessed to and reused are the basis of the exercise of many fundamental human rights and values, such as the right to cultural expression and to education, freedom of expression, citizen democratic participation and economic and social innovation. The role of the Public Domain, already crucial in the past, is even more important today, as the Internet and digital technologies enable us to access, use and re-distribute information with a marginal cost of zero. The Public Domain is therefore a space guaranteeing fundamental freedoms but also a stepping stone for new opportunities.

In order for the Public Domain to be recognized, protected, enhanced and thus remain available for all to use and build upon and after decades of measures extending copyright and threatening the Public Domain, it is time for regulation to adjust its scope of action to meet the real and positive dimension of the digital society.

Based on the policy recommendations formulated by the Communia Thematic Network (The Communia European Thematic Network was funded by the European Commission until the end of 2010: <http://www.communia-project.eu/>) and on WIPO working document (WIPO Development Agenda recommendations 16 and 20 and WIPO Study by Séverine Dusollier, *Scoping study on copyright and related rights and the public domain*, CDIP WIPO document

CDIP/7/INF/2, March 2011, http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=182617), Communia Association calls the European policy-makers to:

1. Define a legal status for the Public Domain.
2. Protect the Public Domain from private appropriation and underuse: the use of works in the public domain should not be limited by any means, either legal or technical.
3. Recognize the legal validity of voluntary dedication of works to the Public Domain by their authors.
4. Facilitate the identification of Public Domain works through registration mechanisms and Rights Management Information, thus avoiding the increasing phenomenon of “orphan works”.
5. Promote the development of adapted rights management models like extended collective licenses.
6. Raise awareness about the Public domain among all stakeholders and citizens through the promotion of the Public Domain Day, a Communia initiative launched in 2010 and celebrated each year's January 1st (<http://www.publicdomainday.org>).

This can be achieved through simple, but nonetheless strong, legal means:

- A. First of all, the Directive on the term of protection of copyright and of certain related rights (2011/77/EU), unfairly extending the duration of copyright protection and thereby eroding the Public Domain as well as the bargaining power of some “small” rights holders, should be annulled.
- B. The positive definition of the Public Domain shall be part of the legal instruments pertaining to “intellectual property” matters. The following language shall be introduced into the **Copyright Directive (2001/29/EC)**:

New Article 1.2 (f) :

Article 1 – Scope

(...)

2. Except in the cases referred to in Article 11, this Directive shall leave intact and shall in no way affect existing Community provisions relating to:

- (a) the legal protection of computer programs;
- (b) rental right, lending right and certain rights related to copyright in the field of intellectual property;
- (c) copyright and related rights applicable to broadcasting of programmes by satellite and cable retransmission;
- (d) the term of protection of copyright and certain related rights;
- (e) the legal protection of databases.

(f) the public domain, consisting of subject matters being free from copyright or related rights protection, which shall remain freely accessible and reusable.

Article 2: Reproduction right

Member States shall provide for the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part, **unless the rightholders have voluntarily relinquished their rights**: (...)

Article 3: Right of communication to the public of works and right of making available to the public other subject-matter

1. Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them, **unless the authors have voluntarily relinquished their rights.**

2. Member States shall provide for the exclusive right to authorise or prohibit the making available to the public, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them, **unless the rightholders have voluntarily relinquished their rights:** (...)

Article 4: Distribution right

1. Member States shall provide for authors, in respect of the original of their works or of copies thereof, the exclusive right to authorise or prohibit any form of distribution to the public by sale or otherwise, **unless the rightholders have voluntarily relinquished their rights.**

Article 7: Obligations concerning rights-management information

(...)

2. (...)

(new second §)

To facilitate the management of rights, the provision of rights management information shall be mandatory. A publicly available registry of rights management information shall be administered by the competent collecting societies.