

Cultural Expressions, From Common Source to Public Domain.

outline paper Lucky Belder

AHRB Conference New Directions in Copyright

June 2005

In our common global society cultural expressions are valued for their significance in representing the unique character of the community in which they originate. Woven into the fabric of knowledge, traditions and local customs, expressions of culture are not only to be found in material or immaterial objects. Art, literature, science or objects that signify a way of life all communicate cultural information, that is the source of creativity and innovation, the lifeblood of the modern world.

New developments in information technology have generated a debate on open access and exclusive rights to cultural information and a new interest in the concept of public domain. The cultural information that is enclosed in cultural goods and services has a dual character; representing both an economic value, as material assets and as potential objects of intellectual property rights, and a cultural value, conveying symbolic meaning and artistic content. In the latest discussions certain notions, such as “commons”, “open access”, “intellectual commons” and “public domain”, are used to refer to an imaginary space where this kind of information is, or at least should be, freely accessible for all.

The 19th century theory on the public domain has a completely different outlook. After the French Revolution and the codification of French civil law, the public domain served to distinguish the private, exclusive property rights of citizens from the right of the state to own material property. The traditional public domain therefore contained all the material property of the state in the service of the community.

The discussion on the modern public domain, however, seems to focus on immaterial property in general, and then on the problematic issues of exclusivity and open access. Exclusivity is generally considered to be one of the main features of the right of ownership. It is the right of the owner to use and alienate his property, and to exclude all others from that right. Nevertheless, the immaterial character of information makes it difficult to exclude others from access. These days, the downloading of music files or the copying of digital movies are considered to be a threat to the cultural industries and continuous efforts are being made to safeguard the industry from the illegal use of their products. While the rights to the goods and services of the cultural industries are protected by international legislation, rights to folklore or indigenous knowledge are not that clearly defined. Access to these forms of information is open to all because they are seen as part of the public domain.

This paper will examine whether we should make a distinction between two domains of open access: a source domain, in which there are no objects of ownership, like ideas, knowledge and traditions, and the public domain, in which it is the result of an active decision, that property, or a part thereof, is open to use for all. It will therefore discuss the theoretical background of 19th century property law as compared to the modern thinking on the public domain. This should contribute to the debate on the content of intellectual property rights to cultural expressions.

