

Comparative analysis of national approaches on voluntary copyright relinquishment

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Committee on Development and Intellectual Property (CDIP)

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COMPARATIVE ANALYSIS OF NATIONAL APPROACHES ON VOLUNTARY COPYRIGHT RELINQUISHMENT

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1. The Committee on Development and Intellectual Property (CDIP), at its ninth session held in May 2012, discussed the document entitled “Scenarios and Possible Options Concerning Recommendations 1(c), 1(f) and 2(a) of the Scoping Study on Copyright and Related Rights and the Public Domain” (CDIP/9/INF/2). With respect to Recommendation 1(c), proposed Terms of Reference for a Comparative Study on Copyright Relinquishment would be submitted to the next session of the Committee.
2. The Committee discussed the said Terms of Reference (CDIP/10/14) at its tenth session held in November 2012 and requested the Secretariat to proceed with the Study, taking into account Member States’ comments.
3. Accordingly, the Annex to this document contains a Comparative Analysis of National Approaches on Voluntary Copyright Relinquishment, prepared by Dr. Andres Guadamuz, Senior Lecturer in Intellectual Property Law, University of Sussex, United Kingdom.
4. *The CDIP is invited to take note of the information contained in the Annex to this document.*

[Annex follows]

¹ The views expressed in this study are those of the author and do not necessarily reflect those of the WIPO Secretariat or any of the Organization’s Member States.

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EXECUTIVE SUMMARY

This report is the result of the ongoing work of the Committee on Development and Intellectual Property (CDIP), specifically arising from a report analyzing the different aspects of copyright and the public domain written by Professor Séverine Dusollier (CDIP/4/3/REV./STUDY/INF/1). As a result of the issues raised in that report, the World Intellectual Property Organization (WIPO) commissioned the present study to ascertain the legal issues surrounding the renouncement of copyright.

The report considers first the question of how copyright is justified, as this may have some bearing on whether a country will allow an author to make a voluntary statement leading to the expiration of his/her rights. Copyright can variously be described as a natural right, as a reward for creators, as a stimulus for creativity, as a property right, as an economic reward and as part of the public interest. Two justifications are explored, the moral and the utilitarian. The moral justification places the existence of intellectual property as a natural result of the right of the creator to anything he or she produces. The moral element of copyright has given way to the economic one, but the existence of moral rights, particularly important in civil law jurisdictions, continues to strongly represent the elements of copyright as a personality right.

On the other hand, the utilitarian justification for copyright can usually be characterized as one that states that such protection exists with the utilitarian purpose of encouraging creation by rewarding authors and inventors with the means of recuperating their investments. Where such a philosophy is prevalent, the economic rights will usually be more important.

This report then explores the issue of the public domain from both negative and positive perspectives, namely, whether one can see the public domain as the absence of copyright, or if it should be seen as something not only that should be strived for and protected, but also as a place into which copyright owners can voluntarily place their works, if they so desire.

This dichotomy lies at the heart of the question of copyright relinquishment.² If one considers copyright simply as a right that can be disposed of as the author or owner sees fit, then it would be logical to expect that rights holders can dispose of their own property in whichever manner they see fit, including the possibility of unilaterally renouncing that property. The problem is that the law is not harmonized in this respect. In many jurisdictions it is not permissible to do so, while some other jurisdictions contain provisions that allow it, as is considered in detail in the second section of the report. The reason for this lack of clarity arises in great part from the very nature of copyright and the public domain that has been discussed in previous paragraphs. If copyright were an economic right more akin to traditional property, then it should be possible for owners to rent, sell or even give up those rights. If on the other hand, copyright were more like an inalienable right of personality, then giving it up would be impossible, just as it is not possible to renounce human rights.

Moral rights are seen as the biggest stumbling block for any sort of declaration of works into the public domain. While there are a few jurisdictions where moral rights can be waived, in most countries moral rights are inalienable.

This is where the nature of copyright comes into play. In some jurisdictions, copyright has a monistic nature, that is, both economic and moral rights are considered to be an integral and indivisible part of copyright. In other jurisdictions, copyright is dualistic and moral and

² It is important to make a small side note with regard to the terminology used in this report. The words “relinquishment” and “renouncement” may have some negative connotations particularly for those who are interested in furthering the scope of the public domain. In some circles, the term “dedication” is therefore preferred, as in “dedicating a work into the public domain”. The report tries to overcome this by using each of the terms interchangeably.

economic rights are dealt with separately. Copyright in monistic jurisdictions then can only be licensed and any form of waiver is impossible. However, most jurisdictions tend to be dualist in nature, allowing moral rights to be treated independently from the asset element and therefore allowing all sorts of partial and full alienation of those rights, including full transfer. Under dualist systems, voluntary relinquishment is possible if the law allows it.

The report then deals with the question of irrevocability. It is a concern for some that public domain dedications are final and irrevocable and this should somehow be seen as an impediment to allowing copyright relinquishment to take place. The report concludes that this may not be such a problem after all, as most of the evidence from practice points towards authors making decisions that are well-informed; therefore the issue of changing the decision later rarely arises.

The next section of the report looks at nine jurisdictions to ascertain whether their copyright law allows public domain dedications. Of the nine countries studied, four permit copyright relinquishment unequivocally, while in the remaining five the question is not addressed directly and therefore open to interpretation. On the other hand, moral rights cannot be waived in most countries, lending credit to the dualist theory of copyright.

Table

Country	Allows voluntary relinquishment?	Can moral rights be waived?
Brazil	Unclear	No
Chile	Yes	No
China	Unclear	No
Colombia	Yes	No
Egypt	Unclear	No
France	Unclear	No
India	Yes	Unclear
Kenya	Yes	No
Republic of Korea	Unclear	No

The final section of the report deals with practical issues of copyright relinquishment. Given the unclear legal situation surrounding renouncement, authors interested in making some form of dedication into the public domain may prefer to bypass this uncertainty and choose a licensing option that has similar effects to those that would have taken place if the work's copyright protection had expired. This can be achieved through the use of open licensing schemes. Two licensing suites are explored in more detail, namely Creative Commons Zero (CC0) and the Open Data Commons Public Domain Dedication and License. Both of these fulfill a dual function. First, they both outright dedicate the work to the public domain. Second, they contain fallback clauses in case it is not possible to relinquish copyright. These clauses grant a license for the work that has the same effect as if the work had been placed in the public domain.

The report ends by listing several examples of copyright relinquishment which usually come from public institutions placing data and some works in the public domain, mostly through the public domain dedication contained in CC0.

The report concludes that while the legal issues surrounding public domain dedications remain clouded, licensing solutions such as Creative Commons (CC) produce a situation in which such questions are less important. The result is that works can be shared freely with others, which for all practical purposes is similar to what would occur if the author had successfully dedicated the work to the public domain.

1. INTRODUCTION

As part of the work of the CDIP, WIPO commissioned a report analyzing different aspects of copyright and the public domain,¹ written by Professor Séverine Dusollier. Part of the report discusses the public domain from a positive perspective, that is, as something that can be achieved not only by the expiration of copyright but by authors relinquishing their copyright and therefore dedicating a work to the public domain. The report contains an interesting discussion on the voluntary public domain and finds that in many countries the issue of whether an author can renounce copyright in works is unclear. Therefore, the report includes the following recommendation:

“1c: The voluntary relinquishment of copyright in works and dedication to the public domain should be recognized as a legitimate exercise of authorship and copyright exclusivity, to the extent permitted by national laws (possibly excluding any abandonment of moral rights) and upon the condition of a formally expressed, informed and free consent of the author. Further research could certainly be carried out on that point.”

As a result of this recommendation and of an accompanying report from the WIPO Secretariat,² Member States agreed in the 9th Session of the CDIP to implement the suggestions made and commissioned the present report.³ The main objective of the report is to conduct a survey of various jurisdictions on copyright renouncement, specifically looking at the topics of irrevocability of rights, moral rights and practical issues surrounding relinquishment.

This report is divided into three main sections. First, the report looks at copyright relinquishment in the context of current copyright law and doctrine, including issues such as the nature of protection, irrevocability and moral rights. The second section of the report is a survey of national legislation and jurisprudence on the subject. Finally, the report considers practical issues surrounding public domain dedications by looking at examples of institutions and individuals who might be interested in donating their copyright. It focuses on some private licensing solutions such as CC.

It is important to make a small side note with regard to the terminology used in this report. The words “relinquishment” and “renouncement” may have some negative connotations particularly for those who are interested in furthering the scope of the public domain. In some circles, the term “dedication” is therefore preferred. The report tries to overcome this by using each of the terms interchangeably. Although this may not be technically correct in the strictest sense, it is done to defuse the loaded language implications in choosing one term over the other.

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¹ Dusollier S, *Scoping Study on Copyright and Related Rights and the Public Domain*, CDIP/4/3/REV./STUDY/INF/1, WIPO, 2010 at <http://bit.ly/13DtM0G>.

² WIPO Committee on Development and Intellectual Property (CDIP), *Scenarios and Possible Options Concerning Recommendations 1c, 1f and 2a Of The Scoping Study On Copyright And Related Rights And The Public Domain*, CDIP/9/INF/2 ANNEX, WIPO, 2012 at <http://bit.ly/16xtrgp>.

³ The terms of reference for the report can be found in WIPO, *Terms of Reference for Comparative Study on Copyright Relinquishment*, CDIP/10/14, 2012 at <http://bit.ly/16s3eOn>.

2. BACKGROUND TO THE ISSUE OF VOLUNTARY COPYRIGHT RELINQUISHMENT

2.1 THE NATURE OF COPYRIGHT

While the question of the nature of copyright may seem like a basic one for a report at this level, it is vital nonetheless to determine precisely what is meant when we talk about a situation in which copyright is abandoned. As the terms of reference for the report clearly state:

“If copyright is considered as a fundamental right, it is essential to determine whether it would be legal to abandon such right. However, if it is deemed to be a mere property right, the matter would be less complicated as it is possible in most legislation to renounce property itself.”⁴

The nature of copyright is actually a difficult issue to tackle, as it will usually depend on the justifications that gave rise to the existence of the right itself. There are many different interpretations of the theoretical justifications of intellectual property rights in general and copyright in particular. The opinion on what exactly is the rationale behind this institution is a subject of heated debate; it depends largely on the philosophy and the ideology of the person discussing it.

Depending on which theory one favors, copyright can variously be described as a natural right, as a reward for creators, as a stimulus for creativity, as a property right, as an economic reward and as part of the public interest. It is possible to divide the justifications into two main categories by using a teleological approach: public interest and private interest justifications, usually expressed as moral justifications and utilitarian justifications.⁵

2.2.1 Moral justification

The moral justification for copyright stems from an ideal view that assigns property as a natural human right. The moral justification places the existence of intellectual property as a natural result of the right of the creator to anything he or she produces. This is the classical view of ownership as stipulated by philosophers such as Locke, who stated that individuals have a moral right to the fruits of their labor.⁶ While natural rights do not feature strongly in modern thinking as such, they tend to be a prominent part of copyright, particularly through the moral rights of the author.⁷ According to the moral right ideal, copyright is an important part of personality;⁸ every author will be entitled to, amongst others, the moral right to ensure that no derogatory use of the work is made (the right of integrity protecting the honour and reputation of the author) and to make sure that it is rightly attributed under his or her name (the right of paternity). These rights are not patrimonial in nature, that is, they cannot be exhausted or alienated.⁹ Moral rights are therefore derived from natural law ideas, in which they are considered as inherent to the very nature of creation. They carry the author's “integrity and personal reputation”.¹⁰

One of the origins of copyright protection has been precisely the perception that the copying of another person's work is an immoral act.¹¹ While the greatest driver for the initial push to grant creators a right that would protect their works was economic incentive,¹² the idea of

⁴ Ibid.

⁵ Davies G, *Copyright and the Public Interest*, New York, VCH, 1994, pp. 10-13.

⁶ Locke J, *Second Treatise of Government* (1690), 3rd ed., Oxford, Blackwell, 1966, s. 27.

⁷ Vetrone A, *The Legal and Moral Rights of All Artists*, New York, iUniverse, 2003, p. 17.

⁸ Bently L and Sherman B, *Intellectual Property Law*, 3rd ed., Oxford, Oxford University Press, 2008, p. 32.

⁹ Ibid, p. 233.

¹⁰ Phillips J and Firth A, *Introduction to Intellectual Property*, 3rd ed., London, Butterworths, 1995.

¹¹ Guadamuz A, *Technology Transfer, Open Source and Developing Countries*, Saarbrücken, Germany, Lambert Academic Publishing, 2010, p. 69.

¹² For more on this see: Deazley R, *On the Origin of the Right to Copy: Charting the Movement of Copyright Law in Eighteenth-Century Britain (1695-1775)*, Oxford, Hart, 2004.

copyright having a strong moral element was eventually implemented by giving creators moral rights to their works, especially in civil law jurisdictions.¹³ This moral consideration has subsisted through most of the history of intellectual property and it is an important basis for the international system of copyright protection.

The view of copyright as a result of moral considerations does not exist without its critics. Hettinger points out that according to the moral or natural rights justification, the laborer would be entitled only to the value added by his or her labor. He states that this creates an unworkable system, as it would be impossible to ascertain just how much labor has been added.¹⁴ Hettinger does not deny creators the exclusive right to possess and use for personal purposes what they develop. The problem he sees is in trying to impose that right upon society by means of intellectual property. He claims that this is not so much a moral right, as the result of social circumstances that have decided to allocate certain privileges to creators. He claims that:

“The ‘right’ to receive what the market will bear is a socially created privilege, and not a natural right at all. The natural right to possess and personally use what one has produced is relevant to the justifiability of such a privilege, but by itself it is hardly sufficient to justify that privilege.”¹⁵

The relevance of the moral justification for the present report should become evident later, but for now it must be stressed that moral justification is used in systems where copyright is seen as an inherent part of the personality of the author.

2.2.2 Utilitarian justification

The utilitarian justification for copyright is that such protection exists with the utilitarian purpose of encouraging creation by awarding authors and inventors with the means of recuperating their investments.

The utilitarian justification for copyright assumes that there is some benefit to society involved, but also a private interest. There are three different ways in which the utilitarian justification is expressed. First, it is said that providing a property right over intellectual works serves as a stimulus to further creation.¹⁶ The rationale is that awarding creators with limited property rights over the expression of their ideas as a reward for their efforts will in turn encourage those rights holders and others to come up with new ideas and new ways to express them. In particular, earlier copyright legislation stressed this point. Both the Statute of Anne and the United States (US) Constitution recognized that copyright was a way to promote science and technological advancement by providing authors with the means to obtain profit from their works.¹⁷ The US Constitution, when talking about the powers of Congress, stresses that the legislative body will have:

“the power to promote the Progress of Science and useful Arts, by securing for limited times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries...”¹⁸

Second, by having a limited monopoly over their works, creators will be more inclined to share their work, which is in the public interest.¹⁹ For the proponents of this view, intellectual

¹³ Vetrone, *supra* note 7, p. 11.

¹⁴ Hettinger E, “Justifying Intellectual Property”, *Philosophy and Public Affairs*, Vol. 18(1) (1989), p. 32 at pp. 36-37.

¹⁵ *Ibid*, pp. 39-40.

¹⁶ Mackaay E, “The Economics of Emergent Rights on the Internet”, in Hugenholtz B (ed.), *The Future of Copyright in a Digital Environment*, The Hague, Kluwer Law International, 1996.

¹⁷ Carlson B, “Balancing the Digital Scales of Copyright Law”, *SMU Law Review*, 50 (1997), p. 825 at p. 829.

¹⁸ US Constitution, Article I, Section 8, Clause 8.

¹⁹ Davies, *supra* note 5, pp. 12-13.

property will be beneficial to society because it encourages the disclosure of works and inventions, making them available to society. If creators believe that they will profit from their work and other people will not steal their ideas upon disclosure, then creators will communicate their work to a wider audience.²⁰

Third, there is a reward element to copyright that assumes that intellectual and artistic creations require some form of monetary investment. Examples abound, such as scholarly research, software development, recording music and motion picture production just to name a few.²¹ The reward justification assumes that it is only fair that creators should have an adequate way to receive reimbursement for that investment by obtaining a property right over their work. This limited property right would also be awarded as a just recompense to the skill, labor and investment involved in the creative process of the original work.²² Again, the relevance of this justification will be explored later, but it must be pointed out that this is prevalent in systems that give more importance to the economic aspect of copyright, such as is the case in Anglo-Saxon legal systems.²³

2.2 THE PUBLIC DOMAIN

It is remarkable that the topic of the public domain has become an important subject of study in modern copyright scholarship considering the little interest devoted to the topic until recently. In an article dedicated to creating a theory of the public domain, Lange famously commented: "Remarkably little direct attention has been paid to the public domain in recent years."²⁴

The reason for this increased interest may stem from the greater importance given to copyright law in general, but it also may come from increased interest in what could be called a more skeptical view of a maximalist interpretation of intellectual property enforcement.²⁵ The increase in academic discussion on the public domain has resulted in a change in the perception of what the public domain entails, as well as its overall value to society.

Even from its origins,²⁶ the public domain as such was usually understood in opposition to copyright. That is, whenever a work lacked protection, it would be in the public domain. Dusollier comments that the public domain is generally defined as:

"encompassing intellectual elements that are not protected by copyright or whose protection has lapsed, due to the expiration of the duration for protection."²⁷

However, this definition can be extended to encompass two further aspects. First, a work is understood to be in the public domain if it never benefited from copyright protection because it fell outside what was covered, such as a work that fails to meet the originality

²⁰ Ibid, p. 13.

²¹ Some examples can be found in: Henry C, *Entrepreneurship in the Creative Industries: An International Perspective*, Cheltenham, Edward Elgar, 2007.

²² Hurt RM and Schuchman RM, "The Economic Rationale of Copyright", *American Economic Review* 56 (1966), p. 430.

²³ Waelde C et al, *Contemporary Intellectual Property: Law and Policy*, Oxford: Oxford University Press (2013), p.38.

²⁴ Lange D, "Recognizing the Public Domain", *Law & Contemporary Problems* 44(4) (1981), p. 147.

²⁵ Exemplified by the publication of books such as Lessig L, *The Future of Ideas: The Fate of the Commons in a Connected World*, New York, Random House, 2001; Boyle J, *Shamans, Software, and Spleens: Law and the Construction of the Information Society*, Cambridge, Mass., Harvard University Press, 1996; and Litman J, *Digital Copyright: Protecting Intellectual Property on the Internet*, Amherst, N.Y., Prometheus Books, 2001.

²⁶ For more about the history of the public domain, see: Ochoa TT, "Origins and Meanings of the Public Domain", *University of Dayton Law Review* 28 (2002), p. 215.

²⁷ Dusollier, supra note 1.

requirement and is therefore not protected. Secondly, there are those works that have entered into the public domain because the protection awarded by law has expired.²⁸

This definition of the public domain is expanded by Samuels, who lists as part of what usually is considered as being in the public domain works for which the term of protection has expired; works which are eligible for protection but lack one or more formalities;²⁹ works that are not copyrightable; and other categories such as laws and official government documents.³⁰

The above definitions could be considered as the traditional view of the public domain and their common element is that they offer a “negative” view of the public domain as an absence of something. This prevalent view may have emerged from various sources, particularly from the fact that the language of property versus public discourse has tended to favor economic rights to exploit a work.³¹

Furthermore, the prevalence of the negative nature of the public domain can be seen by the historic move from formal requirements in copyright law to the norm today in which copyright is granted as soon as the work is created as long as it meets the requirement of originality.³² According to Ginsburg, the existence of formal requirements can be very indicative about the nature of the public domain and copyright. Lack of formalities tends to hint that copyright is a right and not in “purely positivistic terms. No registration, no right. Full stop.”³³ If copyright is the default, then conversely its absence is the public domain.

Despite the dominance of the traditional “negative” view of the public domain there are growing calls to take a positive approach. One of the most recognizable theorists of the public domain is James Boyle. In his influential book on the subject entitled *The Public Domain*,³⁴ he explores some of the recent attacks on the “intangible commons of the mind”, or what he calls the second enclosure movement. The picture he paints of the erosion of the public domain could be seen as a continuation of the negative view of the public domain, but Boyle ends with positive steps being taken in defense of the intangible commons. He takes the example from the environmental movement and proposes the creation of cultural environmentalism, an idea in which the public domain is seen in a positive light and not just an absence. He comments:

“Cultural environmentalism is an idea, an intellectual and practical movement, that is intended to be a solution to a set of political and theoretical problems—an imbalance in the way we make intellectual property policy, a legal regime that has adapted poorly to the transformation that technology has produced in the scope of law, and, perhaps most importantly, a set of mental models, economic nostrums, and property theories that each have a public domain-shaped hole at their center.”³⁵

Boyle’s ideas of cultural environmentalism propose the creation of conservation areas for the mind in which common ideas are seen in a positive manner as heritage. These ideas

²⁸ MacQueen HL, Laurie GT and Waelde C, *Contemporary Intellectual Property: Law and Policy*, Oxford, Oxford University Press (2011), p. 107.

²⁹ This was particularly relevant in the US where copyright notices were required for protection.

³⁰ Samuels E, “The Public Domain in Copyright Law”, *Copyright Society of the USA*, 41(2) (1993), p. 137 at p. 151.

³¹ Rose M, “Nine-Tenths of the Law: The English Copyright Debates and the Rhetoric of the Public Domain”, *Law and Contemporary Problems*, 66(2) (2003), p. 75.

³² Based on the lack of formal requirements in Article 5 of the Berne Convention for the Protection of Literary and Artistic Works (1886 – 1979).

³³ Ginsburg J, “‘Une Chose Publique’? The Author’s Domain and The Public Domain In Early British, French And US Copyright Law”, *Cambridge Law Journal*, 65(3) (2006), p. 636 at p. 645.

³⁴ Boyle J, *The Public Domain: Enclosing the Commons of the Mind*, London, Yale University Press (2008).

³⁵ *Ibid*, p. 241.

are part of a new crop of scholarship³⁶ that looks at the public domain as something that can be curated, encouraged, managed, expanded and in some instances, created.

The Public Domain Manifesto,³⁷ a document created as part of the COMMUNIA European thematic network on the digital public domain, also has a positive definition:

“The public domain, as we understand it, is the wealth of information that is free from the barriers to access or reuse usually associated with copyright protection, either because it is free from any copyright protection or because the right holders have decided to remove these barriers.”

Similarly, Samuelson argues that the public domain consists not only of a works for which copyright has expired but should also be expanded to include categories of content that are practically part of the public domain, such as scientific theories, mathematical formulae, facts, data, laws, jurisprudence, government documents, ideas, concepts and discoveries, just to name a few.³⁸ The public domain should include this contiguous territory. Benkler had already expressed the idea that copyright exceptions should be included as part of the public domain,³⁹ a view that has gained traction amongst several other commentators.⁴⁰

Taking into account some of the more utilitarian and maximalist views of copyright law, it might be argued that this expansion of the public domain is not useful or even desirable.⁴¹ It is interesting that these views must be posed as a thought experiment as recent legal scholarship dealing with the public domain is almost universally in favor of its expansion and would-be critics seem suspiciously silent.⁴² This may be caused by the nature of legal academia itself, as the voices of more measured approaches to intellectual property law in general tend to be very vocal in the debate. But the reason could be that there is little real argument to be presented against the public domain.

What seems evident is that “the public domain will continue to be viewed in a more positive light, as the last section of the report will show. This view, however, has not been translated into legislative recognition of the public domain, which is one of the most salient points made by Dusollier in the scoping study that gave birth to the present report. She comments that any enhancement of the public domain will require the adoption of normative rules that will “effectively enable access to, enjoyment and preservation of public domain resources.”⁴³

An example of a measure that would be seen as encouraging the public domain is the adoption of registration and/or other formalities.⁴⁴ As commented above, the forgoing of registration and notification formalities enhances the current view of the public domain as

³⁶ Some of the literature includes: Waelde C and MacQueen HL, *Intellectual Property: The Many Faces of the Public Domain*, Cheltenham, Edward Elgar, 2007; Lee E, “The Public Domain: The Evolution of Legal Restraints on the Government’s Power to Control Public Access through Secrecy or Intellectual Property”, *Hastings Law Journal*, 55 (2003), p. 91 and Chander A, and Sunder M, “The Romance of the Public Domain”, *California Law Review*, 92 (2004), p. 1340.

³⁷ At <http://www.publicdomainmanifesto.org>.

³⁸ Samuelson P, “Digital Information, Digital Networks, and The Public Domain”, *Law & Contemporary Problems* 66 (2003), p. 148.

³⁹ Benkler Y, “Free as the Air to Common Use: First Amendment Constraints on the Enclosure of the Public Domain”, *New York University Law Review*, 74 (1999), p. 354 at p. 393.

⁴⁰ Cohen J, “Copyright, Commodification, and Culture: Locating the Public Domain”, in Guibault L and Hugenholtz PB, *The Future of the Public Domain: Identifying the Commons in Information Law*, Alphen aan den Rijn, Kluwer Law International, 2006, p. 122.

⁴¹ Some of these arguments against the public domain are cited here: Buccafusco CJ and Heald P, “Do Bad Things Happen When Works Enter the Public Domain?: Empirical Tests of Copyright Term Extension”, *Berkeley Technology Law Journal*, 28(1) (2013).

⁴² With few notable exceptions, see: Masnick M, “Entertainment Industry Lawyer: The Public Domain Goes against Free Market Capitalism”, *Techdirt* (June 3, 2011) at <http://bit.ly/13V9ImR>.

⁴³ Dusollier, supra note 1, p. 67.

⁴⁴ Dusollier S, “(Re)Introducing Formalities in Copyright as a Strategy for the Public Domain”, in Guibault L and Angelopoulos C, *Open Content Licensing: From Theory to Practice*, Amsterdam, Amsterdam University Press, 2010, p. 75.

the absence of copyright. It is felt by some of the proponents of registration that the re-introduction of formalities would make the public domain the default position and copyright the exception.⁴⁵ The first principle of the Communia Public Domain Manifesto is also indicative of this argument:

“The Public Domain is the rule, copyright protection is the exception. Since copyright protection is granted only with respect to original forms of expression, the vast majority of data, information and ideas produced worldwide at any given time belongs to the Public Domain. In addition to information that is not eligible for protection, the Public Domain is enlarged every year by works whose term of protection expires. The combined application of the requirements for protection and the limited duration of the copyright protection contribute to the wealth of the Public Domain so as to ensure access to our shared culture and knowledge.”

Placing the public domain as the default setting helps to cement a situation in which property rights over intellectual creations are temporary and works will eventually revert to the standard position.

The introduction of formalities is one of the proposals by the COMMUNIA⁴⁶ European thematic network on the digital public domain, a multi-stakeholder project funded by the European Commission designed to study the public domain. In its 8th policy recommendation it states that:

“In order to prevent unnecessary and unwanted protection of works of authorship, full copyright protection should only be granted to works that have been registered by their authors. Non registered works should only get moral rights protection.”⁴⁷

However, any such measure would have to contend with the consensus amassed with the almost universal adoption of the Berne Convention, which forgoes registration in favor of automatic protection. Thus this seems like a far-fetched proposal, at least at the time of writing.

If the introduction of registration as a positive element of copyright is not possible in the immediate future there is another measure that would serve to enhance the public domain, and this is the voluntary dedication of a work into the public domain through the relinquishment of copyright. This will be analyzed next.

2.3 ISSUES WITH COPYRIGHT RELINQUISHMENT

2.3.1 Introducing the subject

If we consider the public domain as something that can be created and not just as expiring copyright, then public domain dedications, or voluntarily renouncing intellectual property, could be classed as a statement designed to build a vibrant and dynamic intellectual common space.

The Communia Public Domain Manifesto comes out in favor of voluntary copyright relinquishment. Calling for the creation of the “voluntary commons”, it represents the positive public domain with a principle that calls for wider user prerogatives:

⁴⁵ See also: Ricolfi M, “Consume and Share: Making Copyright Fit for the Digital Agenda”, in Dulong de Rosnay M and De Martin JC, *The Digital Public Domain: Foundations for an Open Culture*, Cambridge, Open Book Publishers, 2012.

⁴⁶ At <http://communia-project.eu/>.

⁴⁷ At <http://www.communia-association.org/recommendations-2/>.

“The voluntary relinquishment of copyright and sharing of protected works are legitimate exercises of copyright exclusivity. Many authors entitled to copyright protection for their works do not wish to exercise these rights to their full extent or wish to relinquish these rights altogether. Such actions, provided that they are voluntary, are a legitimate exercise of copyright exclusivity and must not be hindered by law, by statute or by other mechanisms including moral rights.”⁴⁸

As was pointed out in the Introduction to the report, Dusollier also comes out in favor of voluntary copyright relinquishment in her scoping paper on the public domain. Voluntary relinquishment is defined as the voluntary public domain in which a work does not cease to have copyright through expiration or other legal effects but “by the mere will of the authors themselves”.⁴⁹ This definition may seem redundant, but it is vital to determine exactly what it is we are talking about with regard to public domain dedications, as what is being described may not be a voluntary relinquishment in the strict sense. As was mentioned in the previous section of the report, one way in which a work may go into the public domain could be by failing to meet formal requirements, such as used to take place with the failure to place a copyright notice on the work. This is what is often described as “forfeiting” copyright, which is different from voluntary relinquishment, as forfeiture occurs with the publication of a work that is lacking a vital formality.⁵⁰

Anyone who is not familiar with how voluntary relinquishment works might be justified in asking why it is even necessary to make a recommendation requesting copyright legislation to allow for public domain dedications. If one considers copyright as just a right that can be disposed of as the author/owner sees fit then it would be logical to expect that the rights holder can dispose of their own property in whichever manner they see fit, including the possibility of renouncing unilaterally rights to that property.

The issue is that the law is not harmonized in this regard. In some jurisdictions, it is not permissible for rights holders to unilaterally renounce their rights to their property. Other jurisdictions allow it. This lack of clarity can be traced back to the nature of copyright itself, as discussed previously in the report. The economic or utilitarian justification for copyright sees it as akin to traditional property and therefore it should be possible for rights holders to rent, sell or even give up their copyright. However, if copyright is considered from the moral perspective, analogous to an inalienable right of personality, then to give it up is impossible.

This leaves the current situation without a clear-cut answer; it all depends on the prevalent theory that dominates copyright protection in each jurisdiction. It is quite interesting that most of the literature dealing with the public domain has tended to ignore the issue of copyright relinquishment altogether. The most thorough analysis performed to date was by Johnson,⁵¹ who examined the problem mostly from the United Kingdom (UK) perspective and concluded that copyright relinquishment was not possible in that jurisdiction. While the UK falls outside of the remit of the present study, it would be neglectful to ignore one of the few articles dealing with this topic.⁵² Johnson begins by citing an English case, *Millar v Taylor*,⁵³ which is generally used to support the argument that voluntary public domain dedications are possible. In that case, a bookseller named Andrew Millar had purchased the publishing rights to a book of poems entitled “The Seasons”; after the copyright had expired, a person named Robert Taylor began to publish his own competing version. The Court famously (or infamously as Johnson puts it) sided with the claimant by establishing that Millar retained the exclusive right to publish by virtue of having a “common law of copyright”

⁴⁸ Ibid.

⁴⁹ Dusollier, supra note 1.

⁵⁰ Nimmer MB and Nimmer D, *Nimmer on Copyright: A Treatise on the Law of Literary, Musical and Artistic Property, and the Protection of Ideas*, New York, Bender, 1997, §13.06.

⁵¹ Johnson P, "Dedicating Copyright to the Public Domain", *Modern Law Review*, 71(4) (2008), p. 587.

⁵² The article also includes the US perspective, which is not discussed in this study as it is outside the terms of reference.

⁵³ *Millar v Taylor* (1769) 98 ER 201, 4 Burr 2303.

which meant that copyright would be perpetual by virtue of natural law, as “it is not agreeable to natural justice that a stranger should reap the beneficial pecuniary produce of another man’s work”.⁵⁴ The case eliminated the very existence of the public domain and while it was later superseded by other cases that allowed copyright to expire, it contained an interesting concurring opinion with regards to copyright expiration:

“I do not know, nor can I comprehend any property more emphatically a man’s own, nay, more incapable of being mistaken, than his literary works. And if an author has really and openly abandoned them, that might be found; or the plaintiff on such proof would fail in his action. And there may be many circumstances properly inquirable in an action of this sort; viz ‘if the composition be given to the public, made common, abandoned;’ ‘if published without a name;’ ‘if not claimed;’ ‘if allowed to be pirated, without objection’ -- all this is evidence to the jury of the gift to the public; and not at all above the comprehension of a common jurymen; nor so ideal, but that full and satisfactory evidence may be given of the substantial work or compilation, and of its original or derivative ownership.”⁵⁵

Johnson disagrees that this paragraph is important in defining voluntary relinquishment, mostly because the above is not really discussing a public domain dedication, but rather forfeiture.⁵⁶ So, if we dismiss the only case that deals with public domain dedication we are left only studying the nature of copyright itself and the letter of the law in order to determine whether it is possible to relinquish copyright. In this regard, Johnson proposes two main reasons why it is not possible to dedicate a work into the public domain.

First, UK copyright law provides a strong indication that once a work has been granted protection it cannot be relinquished. Section 153(3) of the Copyright, Designs and Patents Act 1988 (CDPA) states that:

“If the qualification requirements of this Chapter [...] are once satisfied in respect of a work, copyright does not cease to subsist by reason of any subsequent event.”

In contrast with this strong statement regarding economic rights, there is the fact that under UK copyright law it is possible to waive moral rights,⁵⁷ so given the specific power to waive moral rights, and the absence of permission to waive or abandon economic rights, then it must be understood that this omission is on purpose, and copyright cannot be relinquished.⁵⁸

Second, the fact that copyright has a fixed term of protection would seem to limit whether or not an author can place a work in the public domain earlier than the law permits. Given that both UK law and the relevant international treaties and European Directives⁵⁹ are not qualified in any way to allow voluntary acts that reduce the term of protection, the conclusion must be that copyright must subsist for the entire term stipulated by law.⁶⁰

For these and other reasons, Johnson argues that any dedication to the public domain is at most a copyright license and as such the author can revoke it. While there is no obligation for the author to enforce the copyright, the user of the work will rely on the good faith of the person making the dedication, and at most it can be seen “as a political statement”.⁶¹

⁵⁴ Ibid, at p. 2334.

⁵⁵ Ibid, at pp. 2345-2346.

⁵⁶ Johnson, supra note 50, p. 595.

⁵⁷ S 87(2) CDPA.

⁵⁸ Johnson, supra note 50, pp. 596-597.

⁵⁹ Specifically Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights, OJ L 372 12, 2006.

⁶⁰ Johnson, supra note 50, pp. 596-598.

⁶¹ Ibid, p. 604.

2.3.2 Moral rights and relinquishment

Besides these arguments, the biggest stumbling block for any sort of declaration of works into the public domain is the issue of moral rights. While there are a few jurisdictions where moral rights can be waived, such as the UK as mentioned above, in most countries moral rights are inalienable.⁶² The idea of moral rights arises as a personal right that protects those elements of an intellectual creation that are connected with the personhood of the author. Rigamonti identifies them as follows:

“The standard set of moral rights recognized in the literature consists of the author’s right to claim authorship (right of attribution), the right to object to modifications of the work (right of integrity), the right to decide when and how the work in question will be published (right of disclosure), and the right to withdraw a work after publication (right of withdrawal).”⁶³

Because moral rights are inherent to the person, they are often considered as separate from economic rights. While the latter rights can be transferred, the former for the most part cannot. If moral rights are inalienable, then it will be impossible to renounce to them, hence the problem for voluntary copyright relinquishment.

This is where the nature of copyright comes into play. In some jurisdictions, copyright has a monistic nature, that is, both economic and moral rights are considered to be an integral and indivisible part of copyright. In other jurisdictions, copyright is dualistic and moral and economic rights are dealt with separately.⁶⁴ Germany is one of the countries where the monistic theory has more sway and the personality elements of copyright are so embedded on the economic side that they cannot be transferred. Copyright in monistic jurisdictions then can only be licensed and any form of permanent waiver is impossible.⁶⁵

However, most jurisdictions tend to be dualist in nature, allowing moral rights to be treated independently from the asset element and therefore allowing all sorts of the partial and full alienation of those rights, including full transfer. To support this point, the author has taken part in a comparative review of approximately 20 jurisdictions in order to compare the transfer of formalities in copyright law for the purpose of open source license contributor agreements.⁶⁶ The study found that out of all of the countries studied, only two did not allow copyright transfer due to their monist nature. This means that the vast majority of countries fall under the dualist camp.

Under dualist systems, voluntary relinquishment would be possible if allowed by law. The Berne Convention appears to have been drafted with dualism in mind which would further the argument that these actions are allowed. Article 6bis which deals with moral rights is drafted in a dualist manner. It reads in relevant part:

“(1) *Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.*”
[Emphasis added by the author]

⁶² Dietz A, “The Moral Right of the Author: Moral Rights and the Civil Law Countries”, *Columbia Journal of Law & the Arts*, 19 (1994), p. 199.

⁶³ Rigamonti CP, “Deconstructing Moral Rights”, *Harvard International Law Journal*, 47(2) (2006), p. 353.

⁶⁴ Skauradzun D, “Approaching or Overtaking: Transferring Copyright in Germany and in the UK”, *Journal of Intellectual Property Law & Practice*, 6(9) (2011), p. 651.

⁶⁵ This is the case in Germany, where the author’s rights cannot be abandoned. See: Rahmatian A, *Copyright and Creativity: The Making of Property Rights in Creative Works*, Cheltenham, Edward Elgar, 2011, p. 239.

⁶⁶ For more on this see: Guadamuz A and Rens A, “Comparative Analysis of Copyright Assignment and Licence Formalities for Open Source Contributor Agreements”, *SCRIPTed*, 10(2) (2013), p. 207 at <http://script-ed.org/?p=1065>.

The above makes the strongest case against monistic approaches, at least at the international level. It will be up to each jurisdiction where dualism is prevalent to determine if public domain dedications will be specifically permitted. Some countries such as Chile, Colombia and India have included in their copyright law norms that allow voluntary copyright relinquishment. These will be discussed in more detail in later sections of this report.

However, the subject of relinquishment is simply ignored in other countries, which creates the lack of clarity that has given rise to the present report. It might be worthwhile for countries to make a decision on whether they will allow voluntary abandonment and specify it in their relevant legislation. In monistic countries and other systems that favor moral rights, the law will say that copyright cannot be renounced. Wherever there is a dual system of copyright, then it would be possible to separate personality and economic aspects and the law would allow the work to be dedicated to the public domain.

2.3.3 Irrevocability

There is a final subject of importance with regard to copyright relinquishment in general, and it is the fact that any unilateral declaration that would place a work into the public domain would be irrevocable. An author who makes the decision to relinquish his copyright would be placing the work into the public domain without the benefit of undoing their act. This makes it important that before unilaterally waiving their rights, authors should be well-informed and thoroughly conscious about the consequences of their action.

Johnson tends to think that these acts are revocable in some jurisdictions, particularly in the UK and the US, and whether this is the case will depend on the actual wording and nature of the relinquishment. If the act is more akin to a contractual copyright license, then it will be subject to the laws governing such contracts in each country. For the UK, he comments:

“A contractual copyright licence can only be revoked if this is in accordance with the terms of the contract. Indeed, the House of Lords has indicated that there is a prima facie presumption in favour of continuance with the burden falling on the party wishing to revoke. However, where the presumption is rebutted, a contractual licence can be revoked with reasonable notice. In contrast, a bare licence can be revoked at any time; provided that the notice of revocation is sufficient to bring it to the attention of any ‘licensee’, a requirement that might be difficult to satisfy in the case of a dedication to the public.”⁶⁷

This is something that seems to be more of an abstract concern than a real preoccupation. As will be seen in the last section of the report in which we study several cases of voluntary copyright relinquishment, these decisions tend to be taken mostly by institutions interested in the dissemination of cultural and scientific works and there is little or no evidence that there are many individuals giving up their rights. If we understand that those involved in willful abandonment of copyright tend to be institutions that have no interest in profiting from certain types of work, then it will also be understood that these organizations are performing their actions in complete knowledge of what they are doing.

To safeguard author’s rights and make sure that an act of abandonment is not undertaken lightly, Dusollier proposes two measures:

“First, only the authors of a work should be allowed to dedicate the work to the public domain, and not subsequent rights holders, or only with the expressed and informed consent of the authors.

⁶⁷ Johnson, *supra* note 50, p. 605.

Second, and particularly if the abandonment of copyright protection is deemed to be irrevocable, it should be submitted to a precise regime of formal requirements, whose objective would be to guarantee the free and certain will of author to that effect, and inform him/her of the irrevocability of his/her choice, when applicable.”⁶⁸

Additionally, perhaps another measure that could help to safeguard users' rights is a campaign by bodies such as WIPO to educate users about their rights. It is, however, not useful to underestimate the users who will be conducting these actions. In the last section of the report we look at some systems such as CC, which are going a long way towards educating users about their rights.

3. SURVEY OF NATIONAL LEGISLATION AND JURISPRUDENCE ON VOLUNTARY COPYRIGHT RELINQUISHMENT

This section of the report looks specifically at the law regarding copyright relinquishment in nine jurisdictions selected by WIPO Member States through the CDIP. In all cases the author analyses the existing legislation, and where available, case law and doctrinal commentary. Something that has become evident is that apart from existing legislation, there are few sources to draw on in this area. There is practically no case law in the studied jurisdictions and similarly doctrinal commentary seems scarce.

3.1 BRAZIL

Brazil is typical of many countries, both included in the report and not, in that the copyright legislation remains ambiguous with regard to the ability of authors to dedicate works into the public domain. A narrow interpretation of the *Lei dos Direitos Autorais*⁶⁹ (the LDA) leads to the conclusion that it is not possible to renounce voluntarily copyright protection, but this is entirely open to interpretation. Article 43 of the LDA specifies the term of protection for a work after which it goes into the public domain when copyright expires. Furthermore, Article 45 of the LDA includes two other situations in which a work can go into the public domain:

- I. the works of authors deceased without heir;
- II. the works of unknown authors, subject to the legal protection of ethnic and traditional lore.”

The lack of inclusion of a voluntary act from the author clearly seems to preclude this from being contemplated in the law. However, a broad interpretation of Article 28 of the LDA could be used to make the argument that authors have complete control over their work. The Article reads:

“28. The author has the exclusive right to use his literary, artistic or scientific work, to derive benefit from it and *to dispose* of it.” [Emphasis added by the author]

The meaning of dispose here (“*dispor*” in the original Portuguese) might lead one to believe that the author's will is supreme, as authors can dispose of their work as they see fit. Both arguments however have not been tested and so the question remains open.

Brazilian authorities on the subject of the public domain appear to acknowledge the ambiguity. Branco in particular comments that intellectual works are protected “regardless

⁶⁸ Dusollier, *supra* 1, p. 35.

⁶⁹ Brazil Law No. 9610 of February 19, 1998 on Copyright and Neighbouring Rights.

of the author's will and even against his will"⁷⁰ but then goes on to admit that Brazilian law does not specifically deal with the question and therefore it is left unanswered.⁷¹ Because of this ambiguity and lack of clarity, Branco spends a considerable amount of time discussing the reason why voluntary relinquishment should be possible, but also argues that it might be a moot point given technological changes and legal developments such as CC, which give authors tools that mimic voluntary dedications. Interestingly, and perhaps to prove the point of the Brazilian law's lack of clarity, Branco relinquishes copyright on his own work in a dedication that reads:

"This work is in the public domain by the will of its author. In this sense, the author expressly dedicates irrevocably and with worldwide scope, all his rights, while maintaining his moral rights, to the extent permitted by law. [...] In any use, the authorship of the original work must be duly acknowledged."

The above is an unequivocal relinquishment of copyright yet it would be ironic if Brazilian copyright law did not allow it. It is similarly interesting that the author maintains the moral rights of the work. This is an almost universal feature that can be found in other legislation.

The LDA is typical of civil law jurisdictions in that moral rights are "inalienable and irrevocable".⁷² Moreover, the Brazilian Government will be under the obligation to defend "the integrity and authorship of a work that has passed into the public domain"⁷³ opening the argument that moral rights not only are valid beyond the life of the author, but that the State has an obligation to safeguard them in the name of the author.

3.2 CHILE

Chile has one of the best examples of copyright legislation that unambiguously and directly allows authors to renounce their economic rights. Article 11 of the Chilean Intellectual Property Law (the Chilean IP Law)⁷⁴ stipulates the circumstances in which a work will pass into the public domain and therefore will belong to the common cultural heritage. Amongst these, clause c) clearly states that the works "whose owners gave up the protection provided by this law" will pass into the public domain.

Furthermore, clause e) allows for works to be expropriated by the State, unless the law specifies a beneficiary. It is not clear under which circumstances the State will be able to expropriate copyright works, and it must be assumed that the system is ruled by similar expropriation rules of private property. However, it must be noted that under expropriation the works would belong to the State, and would not be in the public domain as such.

Besides allowing unequivocal renouncement, Chilean law is remarkable in the protection allocated to works already in the public domain. Copyright reform of the Chilean IP Law that took place in 2010⁷⁵ created several criminal and civil offences for the misappropriation of works in the public sphere.⁷⁶

The Chilean IP Law does not specify the manner in which an author may express the will to give up copyright protection. It is possible that the copyright relinquishment statement does not require formalities; but it might also be possible to use as an analogy what happens with

⁷⁰ Branco S, *O Domínio Público No Direito Autoral Brasileiro: Uma Obra Em Domínio Público*, Rio de Janeiro, Editora Lumen Juris, 2011, p. 231.

⁷¹ Ibid.

⁷² LDA, Art. 27.

⁷³ LDA, Art. 24(2).

⁷⁴ Chile, Ley 17.336 *sobre la Propiedad Intelectual*, August 28, 1970 (as amended).

⁷⁵ Chile, Ley N° 20.435 *que modifica la Ley N° 17.336 sobre la Propiedad Intelectual*.

⁷⁶ See additions to Art. 80, which amongst other things, impose fines on anyone who misappropriates a public domain work.

other forms of alienation of rights, such as a transfer of copyright. Article 73 of the Chilean IP Law states that the total or partial transfer of rights must be notarized in a public instrument and registered with the IP Register. To be on the safe side, authors might follow this procedure even if it is not specified in the Chilean IP Law.

All of these developments evidently make it possible for authors to exercise their voluntary relinquishment, but they also push forward the concept of the public domain itself as something worthy of protection by the State. Given the fact that authors can relinquish copyright, but also that any misappropriation of a work in the public domain may result in civil or criminal liability, it would be fair to say that Chile has the strongest laws protecting the public domain of all of the countries surveyed.

Despite the law having such a positive take on the common cultural heritage, experts interviewed by the author have not noticed any increase in dedications to the public domain in Chile. Most institutions and individuals that decide to make their works more available tend to use open licensing schemes instead of relinquishing their copyright.⁷⁷ With regard to moral rights, Article 16 of the Chilean IP Law is similar to most other systems reviewed as it makes moral rights inalienable and any agreement to the contrary is considered void.

3.3 CHINA

China is another country where the issue of voluntary relinquishment is not covered directly in its copyright legislation. Article 20 of the Chinese Copyright Law⁷⁸ allows for works to cease having protection when the term of copyright expires, but it does not contemplate voluntary renouncement of protection. Similarly, the Article of the Chinese Copyright Law contains what appears to be perennial protection of moral rights. The Article reads:

“No time limit shall be set on the term of protection for an author’s rights of authorship and revision and his right to protect the integrity of his work.”

However, economic rights can be transferred wholly or in part,⁷⁹ which could be interpreted to mean that authors have the capacity to dispose of their property as they see fit. Traditionally, Chinese copyright laws have been less concerned with economic rights and more with moral elements such as attribution.⁸⁰ As such, it would be fair to interpret the ambiguities so as to allow some sort of relinquishment, although this is not entirely clear.

3.4 COLOMBIA

Colombia is another country that specifically allows the voluntary waiver of economic rights resulting in the work passing into the public domain, joining Chile as another South American jurisdiction where this is possible. This might be surprising given the fact that Latin American countries in general have a rich tradition of protecting moral rights, which could be seen as an obstacle for relinquishment. The fact that there are two countries in the region that specifically allow it could be taken as an indication that moral rights can be separated from economic rights when dealing with waivers and renouncement.

⁷⁷ Personal communication with experts from the Chilean NGO Derechos Digitales.

⁷⁸ China, Copyright Law of the People’s Republic of China (as amended by the Decision of February 26, 2010, of the Standing Committee of the National People’s Congress on Amending the Copyright Law of the People’s Republic of China).

⁷⁹ Ibid, Art. 10.

⁸⁰ Alford WP, *To Steal a Book Is an Elegant Offense: Intellectual Property Law in Chinese Civilization*, Stanford, California, Stanford University Press, 1995.

Articles 187 and 188 of the Colombian Copyright Law⁸¹ set out the regime with regard to public domain works. Article 187.3 of the Colombian Copyright Law specifies that those “works whose authors have waived their rights” belong in the public domain. The Colombian Copyright Law goes further than its Chilean counterpart in setting out the formalities to be followed by those authors willing to make such waiver:

“For purposes of paragraph three of the previous article, the waiver by the authors or heirs to property rights of the work shall be in writing and published, provided that such waiver is not contrary to previous obligations.”⁸²

The Colombian Copyright Law itself is not clear with regard to what is meant by publication of the waiver. However, the application of other intellectual and industrial property publication requirements⁸³ leads one to conclude that this requirement will be met with the placement of the notice in one of the official journals where such announcements are made.

With regards to moral rights, the Colombian Copyright Law is also unique in the sense that it makes a clear distinction between the inalienable nature of moral rights and the possibility of transferring or waiving economic rights. Article 30 of the Colombian Copyright Law states:

“Art. 30 (1) The above [moral] rights may not be waived or transferred.

When authors transfer and authorize the exercise of their patrimonial rights they grant the enjoyment and disposal referred to in the respective contract, and retain the [moral] rights provided in this Article.”

While this refers specifically to transfer of rights, it can be understood as delineating a boundary between moral and economic rights, allowing copyright relinquishment to exist regardless of what happens to the *droit d’auteur* elements.

Finally, Colombia is also unique in that it has the only case law that we encountered relevant to the issue in all of the surveyed jurisdictions. This is case 3060-1991 of the Council of State.⁸⁴ The case does not deal with relinquishment, but rather with abandonment due to the omission of formalities, as discussed in previous sections in this report. Prior to the passing of the 1982 Copyright Law, copyright could only exist in Colombia through registration of rights. In the case, the Council of State was asked to declare some works that existed prior to the enactment of the law as being devoid of copyright due to the lack of formalities as set out by the copyright law of the time. The Council decided that the articles requiring registration were unconstitutional as copyright protection had been part of the Colombian Constitution since 1886. This meant that works that had been abandoned through omission in the fulfillment of formalities would still have copyright protection, hence removing some works from the public domain that had been placed there through omission or lack of formalities. Voluntary relinquishment was in no way affected by this ruling, but it is interesting to contrast the fate of abandoned works and those whose copyright had been waived.

3.5 EGYPT

Egyptian copyright law is not clear with regards to voluntary renouncement of rights. Unlike many other jurisdictions surveyed, Egyptian intellectual property law (the Egyptian IP Law)⁸⁵ actually sets out to define what is meant by the public domain but it does so in a negative manner. Article 138.8 of the Egyptian IP Law says that the public domain includes “all works

⁸¹ Colombia, Ley 23 de 1982 “Sobre derechos de autor” (as amended).

⁸² Ibid, Art. 188.

⁸³ See for example the Industrial Property Official Journal at <http://bit.ly/GRKEHU>.

⁸⁴ Colombia, *Redacción 3060-1991 del Consejo de Estado, Sala de lo Contencioso Administrativo*.

⁸⁵ Egypt Law on the Protection of Intellectual Property Rights, Law No. 82, 2002.

initially excluded from protection or works in respect of which the term of protection of economic rights expires". This would indicate that a work cannot enter the public domain other than by expiration, but the law only contemplates expiration after the term of protection has run its course.⁸⁶

Other provisions would lead one to believe that public domain dedications are not possible in Egypt. Article 149 of the Egyptian IP Law allows authors to transfer all or some of their economic rights to third parties and does not allow for relinquishment. Moreover, Article 153 of the Egyptian IP Law makes a blanket prohibition on any future disposal of works. It reads:

"Any disposal by the author of his future intellectual production shall be considered as null and void."

This clearly is talking about making decisions about works that have not yet been created such as alienating future works. However, this could also be read as declaring void future dealings with existing works. While the latter interpretation is farfetched, the fact remains that taking all of the Egyptian IP Law as a whole one could conclude that it might not be possible to abandon copyright voluntarily.

The provisions regarding moral rights are similar to most other countries, as these rights are "perpetual imprescriptible and inalienable"⁸⁷ and any disposal of any moral rights is null and void.⁸⁸

3.6 FRANCE

At first glance, French copyright law is ambiguous with regards to voluntary relinquishment. While France is a country where moral rights play an important role,⁸⁹ it does not go as far as being a fully monist country as it permits copyright transfer.

The ambiguity is present throughout the French intellectual property law (the French IP Law).⁹⁰ On the one hand, Article L131-1 of the French IP Law states that the total transfer of future works will be considered null and void; although this might refer only to a prohibition regarding works that have yet to be created. Nonetheless it indicates that there is a limit place on an author's will. On the other hand, Article L122-7-1 of the French IP Law reads:

"The author is free to make his works available free to the public, subject to the rights of potential co-authors and those of third parties and in accordance with the conventions it has signed."

This evidently falls short of transferring the rights to the work and placing it in the public domain, but it confers authors with the capacity of making decisions about their economic rights. Moral rights are treated much as they are in other jurisdictions where these are "perpetual, inalienable and imprescriptible".⁹¹

Because the French IP Law is uncertain with regard to renouncement, French (and francophone) doctrine as well as scholarly commentary has been one of the few dealing with the subject at any length, perhaps befitting a country and a sphere of influence that places

⁸⁶ Ibid, Arts. 160-161.

⁸⁷ Ibid, Art. 143.

⁸⁸ Ibid, Art. 145.

⁸⁹ Adeney E, *The Moral Rights of Authors and Performers: An International and Comparative Analysis*, Oxford, Oxford University Press, 2006.

⁹⁰ France Intellectual Property Code (as last amended by Decree No. 2012-634 of May 3, 2012).

⁹¹ Ibid, Art. L121-1.

great importance on both moral rights and public domain issues. Choisy⁹² in particular has made the strongest argument in favor of the possibility of authors assigning their work to the public domain under French IP Law by proposing to apply the concept of “*choses communes*” (*res communes*) to the public domain. This follows Article 714 of the French Civil Code which states that there are some things that “do not belong to anyone and their use is common to all.” In another work on “*choses communes*” Chardeaux⁹³ extends this concept by explaining that common goods are resources which are not subject to appropriation and offered to “common usage”.

In the end, it is possible that all of the above may soon prove to be nothing more than a historic footnote as a recent report by the French Government looking at overhauling copyright law has come out in favor of voluntary copyright relinquishment. The Lescure Report⁹⁴ for the French Ministry of Culture recommends amendments to the French IP Law to allow authors to authorize adaptations and put their works in the public domain in advance. In recommendation 76, the Report proposes:

“Amend the Intellectual Property Code to allow authors to authorize in advance the adaptation of their works and to place them in advance in the public domain.”

This proposition follows the work of COMMUNIA, which recommended the introduction of such provisions in future copyright amendments.⁹⁵

3.7 INDIA

Indian law permits authors to make a voluntary relinquishment of copyright. Such a public domain dedication requires notice, as well as registration by the Registrar of Copyright. Section 21 of Indian Copyright Act⁹⁶ states:

“(1) The author of a work may relinquish all or any of the rights comprised in the copyright in the work by giving notice in the prescribed form to the Registrar of Copyrights or by way of public notice and thereupon such rights shall, subject to the provisions of sub-section (3), cease to exist from the date of the notice.

(2) On receipt of a notice under sub-section (1), the Registrar of Copyrights shall cause it to be published in the Official Gazette and in such other manner as he may deem fit.

(2A) The Registrar of Copyrights shall, within fourteen days from the publication of the notice in the Official Gazette, post the notice on the official website of the Copyright Office so as to remain in the public domain for a period of not less than three years.

(3) The relinquishment of all or any of the rights comprised in the copyright in a work shall not affect any rights subsisting in favour of any person on the date of the notice referred to in sub-section (1).”

Subsection 2A of the Indian Copyright Act is particularly useful as it facilitates third party searches of the notifications to ascertain the level of adoption of this norm, and to deduce whether it has even been used at all. As this subsection was added by the *Copyright (Amendment) Act 2012*, any relinquishment taking place since then should be included and

⁹² Choisy S, *Le Domaine Public en Droit D'auteur*, Paris: Litec, 2002.

⁹³ Chardeaux M A, *Les Choses Communes*, Paris: LGDJ, Bibliothèque de droit privé, 2006.

⁹⁴ Lescure P, *Rapport de la Mission “Acte II de l’exception culturelle”: Contribution aux politiques culturelles à l’ère numérique*, 2013 at <http://bit.ly/16ZZjOc>.

⁹⁵ Dulong de Rosnay M, “COMMUNIA Positive Agenda for the Public Domain”, *COMMUNIA*, (December 5, 2012) at <http://bit.ly/1700Fsq>. Also see: <http://bit.ly/PXeBM3>.

⁹⁶ India *Copyright Act 1957* (as amended).

listed on the official website of the Copyright Office. Unfortunately, there is no indication that this is the case at the moment as we could not find any such notices in the Copyright Office's website⁹⁷ although there might not have been enough time for any voluntary relinquishment to show up in the system.

India is unique in comparison with all the other jurisdictions studied in the way it treats moral rights (referred to as "special rights"⁹⁸ in the Indian Copyright Act), as these are not completely inalienable as they are in the other jurisdictions. While both the law and case law specify that moral rights subsist after the economic rights have been assigned in whole or in part,⁹⁹ there are some circumstances in which moral rights might be considered to be waived. Saikia¹⁰⁰ for example cites the Supreme Court decision in the case of *Centrotrade Minerals v. Hindustan Copper*,¹⁰¹ where the court, admittedly dealing with a non-copyright situation, declared that "a person may waive his right. Such waiver of right is permissible even in relation to a benefit conferred under the law". Although it has been the premise of the present report that it is possible to treat economic and moral rights separately, the Indian example offers an interesting approach.

3.8 KENYA

Kenya is another country where it is possible for authors to renounce their copyright. Its copyright law (the Kenyan Copyright Law)¹⁰² allows as one of the ways in which a work can belong to the public domain the voluntary relinquishment by authors. Section 45(1) of the Kenyan Copyright Law reads:

"The following works shall belong to the public domain-[...] (b) works in respect of which authors have renounced their rights;"

As is common with countries that set out a similar system of dedications, the author's determination has to be set in writing and made public. Section 45(2) of the Kenyan Copyright Law states:

"(2) For the purposes of paragraph (b), renunciation by an author or his successor in title of his rights shall be in writing and made public but any such renunciation shall not be contrary to any previous contractual obligation relating to the work."

The most noteworthy aspect of the above section is that it creates the possibility of a successor renouncing copyright, which is something that is not specified in any of the other jurisdictions reviewed. This is a logical conclusion if one sees economic rights as entirely separate from the rights of personality and therefore to be dealt with by authors and their successors as they see fit.

With regard to the treatment of moral rights, Kenyan Copyright Law is similar to most of the preceding countries as moral rights are not subject to assignment during the lifetime of the author. However, Kenyan Copyright Law is different as it specifically permits the transmission of moral rights by testament. Section 32(2) stipulates:

"None of the rights mentioned in subsection (1) [moral rights] shall be transmissible during the life of the author but the right to exercise any of the said rights shall be

⁹⁷ There is an extended set of procedures and even a copyright relinquishment form available through the new Copyright Rules, 2013, see: http://copyright.gov.in/Documents/CRRules_2013.pdf.

⁹⁸ *Copyright Act 1957*, Section 57.

⁹⁹ *Smt. Mannu Bhandari v. Kala Vikash Pictures Pvt. Ltd. and Anr.*, [AIR 1987 Delhi 13].

¹⁰⁰ Saikia N, "Getting Moral Rights Waived", *Indian Copyright*, (15 July, 2010) at <http://bit.ly/1cL3b6U>.

¹⁰¹ *Centrotrade Minerals and Metal. Inc. v. Hindustan Copper Limited*, 2006, [(2006) 11 SCC 245].

¹⁰² Kenya, Chapter 130 - *The Copyright Act 2001*.

transmissible by testamentary disposition or by operation of the law following the demise of the author.”

Kenyan Copyright Law is therefore very specific with regards to the fate of rights after the death of the author and this specificity is a welcome addition to the comparative corpus of laws dealing with the subject at hand.

3.9 REPUBLIC OF KOREA

At first reading, the copyright law¹⁰³ of the Republic of Korea (the Republic of Korea Copyright Law) is unclear with regard to copyright relinquishment. In particular, the articles dealing with copyright term¹⁰⁴ and detailing the expiry of author’s property rights¹⁰⁵ do not include a provision on copyright relinquishment. There is good reason to believe that copyright renouncement might not be allowed because Article 49 of the Republic of Korea Copyright Law provides only two scenarios in which copyright might expire:

“1. Where, after the author's death without heir, author's property rights are to belong to the state according to provisions of the Civil Law and other laws and 2. Where, after the dissolution of a legal person or an organization who is the owner of author's property rights, author's property rights are to belong to the state according to the provisions of the Civil Law and other laws.”

However, expiration is not the same as renunciation, so the question remains open if one reads it as just making provisions with regard to possible avenues of non-voluntary entry into the public domain.

Interestingly, the Republic of Korea Copyright Law contains a stipulation by which authors may donate their property right to the government. Article 135 makes the following provision:

“(1) The owner of author's property rights, etc. may donate their rights to the Minister of Culture and Tourism.

(2) The Minister of Culture and Tourism may appoint the organization which is capable of managing the rights under works, etc. donated by the owner of author's property rights, etc.

(3) The organization appointed pursuant to Paragraph (2) shall not use works, etc. for profit-making purposes or against the intention of the owner of author's property rights, etc.”

While the above cannot in any way be classified as copyright relinquishment, it constitutes a situation in which an author can donate works to an organization that will be responsible for exploiting the work for non-profit purposes, which is somewhat analogous to a dedication into the public domain. The argument here is that while the Republic of Korea Copyright Law does not contemplate public domain dedications, by permitting authors to donate their work to a government department has a similar function if we see the public appropriation of the work as a form of collective use.

¹⁰³ Republic of Korea *Copyright Act of 1957* (Act No. 432 of January 28, 1957, as last amended by Act No. 9625 of April 22, 2009).

¹⁰⁴ *Ibid*, Art. 40.

¹⁰⁵ *Ibid*, Art. 49.

With regards to rights, the Republic of Korea is typical in the fact that they are inalienable and “shall belong exclusively to the author”.¹⁰⁶

4. THE PRACTICAL ELEMENTS OF COPYRIGHT RELINQUISHMENT

4.1 LICENSING

A conclusion that can be drawn from looking at the survey of national legislations presented above in the report is that while there are some countries where it is possible for an author to renounce his or her copyright such as Kenya, India, Colombia and Chile, the situation in other jurisdictions is not entirely clear. When we also consider the universal inalienable nature of moral rights and the possibility that other countries simply do not allow copyright relinquishment such as Germany, we are left with a clouded legal picture. It is possible to envision two possible situations emerging in the future: either the situation will remain as it is, or it will be the subject of copyright reform in the future.

In order to get beyond the current ambiguous nature of relinquishment, particularly in those countries where such practices are not mentioned specifically in copyright law, authors interested in making some form of dedication into the public domain may prefer to bypass the uncertainty and choose a licensing option that has similar effects to those that would take place if the work’s copyright protection had expired. This can be achieved through the use of open licensing schemes.¹⁰⁷

An open license is a legal document that allows a creator and/or owner to make work available to the public with terms and conditions that permit uses that would otherwise be infringing, such as granting the right to copy and publish the work.¹⁰⁸ The relevance of licensing to relinquishment is that some permissive licenses can have an effect that is very similar to offering the work under the public domain. For example, if one wanted to use an image for the cover of an open access journal and preferred to use a public domain image, the same effect could be achieved by looking for a picture that was licensed openly. The result would be similar.¹⁰⁹ This does not mean that licensing supersedes the need for the public domain, but it can act as a substitute if we are looking at effects rather than the strict letter of the law.

While there are various open licensing solutions, there are two systems that are of specific relevance to renouncement as they include licenses that are designed to facilitate public domain dedications. These are Creative Commons Zero (CC0) and the Open Data Commons Public Domain Dedication and License (PDDL) which are discussed below.

4.2.1 Creative Commons Zero

The CC0 is one of the latest additions to the CC open content license suite. CC is a non-profit organization founded in 2001 in the US with the aim of promoting science and the arts by making it easier for authors and creators to offer a flexible range of protections and freedoms to users of their works. It counters the “all rights reserved” tradition associated

¹⁰⁶ Ibid, Art. 14(1).

¹⁰⁷ Liang L, *Guide to Open Content Licenses*, Rotterdam, Piet Zwart Institute, 2004, Fitzgerald BF, Coates J, and Lewis S, *Open Content Licensing: Cultivating the Creative Commons*, Sydney, Sydney University Press, 2007, Guibault L and Angelopoulos C, *Open Content Licensing: From Theory to Practice*, Amsterdam, Amsterdam University Press, 2010, and Guibault L and van Daalen O, *Unravelling the Myth around Open Source Licences: An Analysis from a Dutch and European Law Perspective*, The Hague, TMC Asser Press, 2006.

¹⁰⁸ For a more detailed explanation of licensing in the open context, see: Guadamuz A, "The License/Contract Dichotomy in Open Licenses: A Comparative Analysis", *University of La Verne Law Review*, 30(2) (2009) p. 101.

¹⁰⁹ This is not really a hypothetical; the author has done precisely this in a recent issue of the open access journal SCRIPTed, see http://script-ed.org/?page_id=1025.

with copyright by introducing a set of licenses in which authors keep only “some rights reserved”.¹¹⁰ These licenses range from dedicating the work straight to the public domain to narrower licenses with several restrictions.

There are several versions of the licenses from the CC 1.0¹¹¹ to the latest version 4.0.¹¹² Besides these numbered versions, the CC licenses have been ported to comply with local legislation in over 50 jurisdictions and are in the process of localization in over 20 more countries, including a version for intergovernmental organization (known as CC IGO).¹¹³ All CC licenses work with copyright protection by maintaining a minimum set of grants and restrictions. Besides these, licensors can choose to mix and match four additional license elements:

- Attribution license element (BY): The user must attribute the work in any reproduction or redistribution of the work. This is known as the Attribution license element (BY), and it is common in all CC licenses after version 2.0.
- Non-commercial (NC): The work can be copied, displayed and distributed by the public, but only if these actions are for non-commercial purposes.
- No derivative works (ND): This license grants baseline rights but it does not allow derivative works to be created from the original.
- Share-Alike (SA): Derivative works can be created and distributed based on the original, but only if the same type of license is used.¹¹⁴

This creates a range of six CC license combinations going from the more restrictive to the more permissive. All CC licenses are presented in three formats: the first is a short and easy to read “Commons Deed” which explains the terms and conditions of the license in a simple manner; the second format is the “Legal Code” which is the full license; and the third is the “Digital Code” which provides a machine-readable version of the license in RDF¹¹⁵ format.

The CC0¹¹⁶ is not included in the above licensing suite as it is unique among all CC licenses in the sense that it is intended to work more as a public domain dedication and not so much as a license. The idea behind the CC0 is two-fold. First, it operates as a straightforward public domain dedication in which the author relinquishes all of the patrimonial rights to the fullest extent permitted by law. The CC0 does this in the form of a waiver which works as a public domain dedication and copyright relinquishment. This reads:

“To the greatest extent permitted by, but not in contravention of, applicable law, Affirmer hereby overtly, fully, permanently, irrevocably and unconditionally waives, abandons, and surrenders all of Affirmer's Copyright and Related Rights and associated claims and causes of action, whether now known or unknown (including existing as well as future claims and causes of action), in the Work (i) in all territories worldwide, (ii) for the maximum duration provided by applicable law or treaty (including future time extensions), (iii) in any current or future medium and for any number of copies, and (iv) for any purpose whatsoever, including without limitation commercial, advertising or promotional purposes (the "Waiver"). Affirmer makes the Waiver for the benefit of each member of the public at large and to the detriment of Affirmer's heirs

¹¹⁰ Lessig L, “The Creative Commons”, *Florida Law Review*, 55(3) (2003), p. 763.

¹¹¹ At <http://creativecommons.org/licenses/by-nc-nd/1.0/>.

¹¹² At <http://creativecommons.org/licenses/by-sa/4.0/>.

¹¹³ See for example the CC-BY IGO 3.0 at: <http://creativecommons.org/licenses/by/3.0/igo/>.

¹¹⁴ Goss AK, “Codifying a Commons: Copyright, Copyleft, and the Creative Commons Project”, *Chicago-Kent Law Review*, 82(2) (2007), p. 963.

¹¹⁵ Resource Description Framework (RDF) is a metadata format.

¹¹⁶ Text at <http://creativecommons.org/publicdomain/zero/1.0/>.

and successors, fully intending that such Waiver shall not be subject to revocation, rescission, cancellation, termination, or any other legal or equitable action to disrupt the quiet enjoyment of the Work by the public as contemplated by Affirmer's express Statement of Purpose."

The above waiver will work in all jurisdictions that permit voluntary relinquishment, such as Colombia, Chile, Kenya and India, as detailed in the second section of this report. An interesting feature of the CC0 is that it foresees the eventuality that such abandonment may not be legal. Therefore, the second objective of the CC0 is to act as a "no rights reserved" license in which the licensor grants all possible rights to the licensee wherever a waiver is not allowed by law. The CC0 contains both the waiver and a fallback license that reads:

"Should any part of the Waiver for any reason be judged legally invalid or ineffective under applicable law, then the Waiver shall be preserved to the maximum extent permitted taking into account Affirmer's express Statement of Purpose. In addition, to the extent the Waiver is so judged Affirmer hereby grants to each affected person a royalty-free, non-transferable, non sublicensable, non exclusive, irrevocable and unconditional license to exercise Affirmer's Copyright and Related Rights in the Work (i) in all territories worldwide, (ii) for the maximum duration provided by applicable law or treaty (including future time extensions), (iii) in any current or future medium and for any number of copies, and (iv) for any purpose whatsoever, including without limitation commercial, advertising or promotional purposes (the "License")."

The fallback clause is an elegant way to circumvent any pitfalls (such as the declaration of the illegality of such clauses) that may arise from the legal haziness surrounding relinquishment due to the fact that it operates almost as well as any voluntary renouncement.

Regarding the subject of irrevocability of copyright relinquishment, the CC0 could help to address some of the concerns voiced in the first section of this report as it could allow owners to change their minds. While it is prominently stated in the fallback license that the grant is irrevocable this only works for licensees that have already acquired the work. It would be possible for the author to release the work in future without a CC0 license and while there would be users that could still use it as if it were in the public domain, future licensees would not be able to do the same and "all rights reserved" would apply to them.

4.2.2 Open Data Commons Public Domain Dedication and License

The ODC is a set of licenses and dedications curated by the Open Knowledge Foundation (OKF). These are licenses that in many ways are akin to CC, but with the main difference that they are specifically directed towards protecting databases.¹¹⁷

As with CC, there are various types of licenses offered in this suite including the Open Database License (ODbL),¹¹⁸ the Open Data Commons Attribution License (ODC-BY)¹¹⁹ and the Open Data Commons Public Domain Dedication and License (PDDL).¹²⁰

The objective of the ODC is to cover databases as the drafters argued that CC was not covering the database right specifically. They believed that this would leave some institutions in Europe at potential risk due to market failure insofar as they could license only

¹¹⁷ Miller P, Styles R, and Heath T, "Open Data Commons, a License for Open Data", *Linked Data on the Web*, (2008) at <http://bit.ly/17E4mNI>.

¹¹⁸ Full text available at <http://opendatacommons.org/licenses/odbl/1.0/>.

¹¹⁹ Full text available at <http://opendatacommons.org/licenses/by/>.

¹²⁰ Full text available at <http://opendatacommons.org/licenses/pddl/>.

their copyright and not the database right. It was therefore felt that a set of database specific licenses was needed.

While the ODC suite covers the database right it also covers copyright. Interestingly, while this strongly implies that the license is applicable only within European jurisdictions that have the *sui generis* database right, the license specifies that it also constitutes a contract between the licensor and the user. The effect of this small legal trick is that it allows the license to extend the effects of the database right to jurisdictions through share-alike clauses where the right does not exist; the protection will therefore be contractual.

The PDDL is a public domain dedication in the same spirit as the CC0 but the result is a much more complex and lengthy legal document as the drafters had to contend not only with copyright, as the CC0 does, but also with the database right.

This being the case, the PDDL chose to issue a dedication to the public domain similar to the CC0 of both copyright and database rights. The waiver reads:

“The Rightsholder by using this Document, dedicates the Work to the public domain for the benefit of the public and relinquishes all rights in Copyright and Database Rights over the Work.”

The dedication is irrevocable. Once it has taken effect, the rights holder will have no further recourse and will have given up his or her rights.

Just like the CC0, the PDDL contains a license of those rights in case the relinquishment is not legally possible. The PDDL licenses the work with a broad, unrestricted grant clause that reads:

“The Licensor grants to You a worldwide, royalty-free, non-exclusive, licence to Use the Work for the duration of any applicable Copyright and Database Rights. These rights explicitly include commercial use, and do not exclude any field of endeavour. To the extent possible in the relevant jurisdiction, these rights may be exercised in all media and formats whether now known or created in the future.”

The effect of this clause should be similar to that found in the CC0, which is to license the work with “no rights reserved” so that any future licensee will be able to use it in the same manner as if the dedication had been effective.

Given that the PDDL is mostly drafted with databases in mind, it should be understood that most authors who would want to dedicate a work to the public domain through a license should probably use CC0 as the option of choice, but evidently this is something is something that will be up to the licensor to decide given their specific needs and requirements.

4.1 EXAMPLES OF COPYRIGHT RELINQUISHMENT

Given the legal uncertainties discussed above, it should not be surprising that the search for examples of copyright relinquishment produced few examples. Given the enduring narrative of the importance of copyright as an important element that sustains creativity and encourages creation, it is difficult to imagine that there are individuals and institutions that would willingly give up their property. Nonetheless, it is possible to find several examples of successful dedications of copyright to the public domain.

However, it is very difficult to get any sort of accurate statistic as to how common copyright relinquishment really is, and short of the implementation of a global registry of such works, it is unlikely that we will ever know the full extent of the phenomenon. The task of measuring the extent of public domain dedication is made more difficult by the fact that there is a

considerable level of confusion in the general population about the terminology. In common parlance, to release something into the public domain can mean simply to publish something online and it is not uncommon to find examples of creators who talk about releasing works into the public domain when it would seem that their intention is not to renounce copyright, but to make the work accessible to the public.¹²¹ Nonetheless, there are examples of individuals who use the right terminology and make informed decisions regarding their own work.¹²²

Given the possible confusion in terminology and the difficulty of getting real numbers about potential copyright relinquishment, it is conceivable that the number of works that have been so released is small. However, it should also be considered that there might be a non-negligible amount of abandonment through lack of enforcement.¹²³ The phenomenon of commercial abandonment of works is more likely to occur in technical fields, particularly in software. As technology constantly changes, operating systems get updated and hardware becomes faster and smaller, software made for specific equipment may simply be made obsolete when a new generation is released. In these cases, developers may continue to provide support to older programs or new versions and updates will be released, but the most likely scenario is that once a program has become completely obsolete it will not be commercially viable to enforce the rights in it and therefore it is abandoned. Khong classifies this type of abandonment in two main categories, commercial and strategic:

“Commercial abandonment is the simplest case of copyright abandonment. Here, the copyright owner ceases to supply a copyrighted work because it is no longer commercially viable to do so, and there is no new version being offered. This happens especially when a computer or gaming platform is no longer popular or in use. The demand for a particular work dwindles and the cost of supplying becomes prohibitive. [...] A strategic abandonment occurs when the copyright owner stops supplying software or a copyrighted work for the reason that he is selling an upgraded or newer version of the same or similar product. This typically happens in the computer industry when an older version has been superseded by a later version.”¹²⁴

Such omissions fall outside of the remit of the report because they are performed without a legal act, the owner simply decides not to enforce the copyright for whatever reason. Because there is not a specific renouncement of rights abandoned software still has copyright and therefore it cannot be classified as works that have been dedicated to the public domain. However, it is important to state that so-called “abandonware” could make up the bulk of what is usually considered to be copyright relinquishment¹²⁵ and the existence of these practices demonstrates that copyright owners and users may often work around legal complexities of their own accord.

It is possible to find examples of copyright relinquishment by individuals and institutions although it is difficult to gain a full picture of the extent of these practices.

Perhaps the most famous case of outright copyright relinquishment is the release to the public domain of the data surrounding the Human Genome project. The race for the sequencing of the entire human genome had been an important goal in the biotechnology field for years. By the start of the 1990s there had been several successful attempts to

¹²¹ Take for example, the case of technology writer Richard Scoble, who comments that he is placing pictures into the public domain, but they still have copyright: <http://scobleizer.com/2008/01/31/putting-photos-into-public-domain/>.

¹²² See for example <https://alexcabal.com/why-i-release-things-into-the-public-domain/>.

¹²³ Voluntary relinquishment through lack of enforcement may fall under the study of orphan works. For more on this subject, see: Van Gompel S, “Unlocking the potential of pre-existing content: how to address the issue of orphan works in Europe?”, *IIC* 6 (2007), p. 669.

¹²⁴ Khong DWK, “Orphan Works, Abandonware and the Missing Market for Copyrighted Goods”, *International Journal of Law and Information Technology*, 15(1) (2007), p. 54.

¹²⁵ There are websites with extensive lists of abandoned software available for download, see <http://bit.ly/19aQ7jl>.

obtain the sequences of many small organisms, including the nematode worm and the fruit fly.¹²⁶ By the middle of that decade, there were several groups attempting to crack the human genome. Most of the public efforts were made more evident in 1996 with the creation of the International Human Genome Sequencing Consortium, a collection of prominent genetic research institutions and individuals from around the world.¹²⁷ These efforts were geared towards the principle of sharing the information obtained with the ultimate common goal of decoding the human genetic sequences. During two meetings of the members of the Consortium, staged in Bermuda, a set of principles was agreed upon, known as the “Bermuda Principles”, which attempted to establish the spirit of the wider distribution and sharing of the results of the sequencing of the human genome for the benefit of humanity.¹²⁸ The Bermuda Principles clearly specified that the results of the research would be placed in the public domain and would be made available as soon as possible, even on a daily basis if such data were available. The Human Genome Organization (HUGO) was responsible for coordinating the data and for using the Internet for its release. The text of the Bermuda Principle reads:

“It was agreed that all human genomic sequence information, generated by centres funded for large-scale human sequencing, should be freely available and in the public domain in order to encourage research and development and to maximise its benefit to society.”

The effect of the release into the public domain of such a rich trove of information can be identified as one of the starting points of so-called open science¹²⁹ in that it is one of the most publicized and prominent situations in which the relinquishment of copyright resulted in concrete research outputs. The Human Genome Project prompted some other institutional releases of scientific data into the public domain. For example, the HapMap Project is an international effort to identify and catalogue genetic similarities and differences in human beings for health purposes. HapMap follows the example of other similar scientific endeavors by releasing its data without copyright. The website clearly states that “all data generated by the Project will be released into the public domain.”¹³⁰ Other important scientific projects that publish data in the public domain include the World Monthly Surface Station Climatology project¹³¹ and the ChemIDPlus database of chemical compounds¹³² just to name a few examples of a growing trend in open data.

The question is whether statements such as those present in scientific database sites constitute an unequivocal relinquishment of copyright. This is actually a rather complex issue as some scientific information in the shape of sequences may not even be subject to copyright protection.¹³³ Furthermore, in the European Union, the database *sui generis* right¹³⁴ may also cover the data. This is outside the scope of this report,¹³⁵ but an argument can be made that scientific institutions may be keen to release data to the public domain

¹²⁶ For a comprehensive account of the race for the human genome, see: Sulston J, “Intellectual Property and the Human Genome”, in Drahos P and Mayne P (eds), *Global Intellectual Property Rights*, London, Palgrave, 2002, pp. 561-73.

¹²⁷ These included the Wellcome Trust, the UK Medical Research Council, the US National Center for Human Genome Research, the German Human Genome Programme, the European Commission, the Human Genome Organisation and the Human Genome Project of Japan.

¹²⁸ For a summary of both meetings, see <http://www.ornl.gov/hgmis/research/bermuda.html>.

¹²⁹ Guadamuz A, “Open Science: Open Source Licences for Scientific Research”, *North Carolina Journal of Law and Technology*, 7(2) (2006), p. 321.

¹³⁰ At <http://hapmap.ncbi.nlm.nih.gov/datareleasepolicy.html>.

¹³¹ At <http://rda.ucar.edu/datasets/ds570.0/>.

¹³² At <http://1.usa.gov/17FAeBw>.

¹³³ See: Miller PH, “Life after Feist: Facts, the First Amendment, and the Copyright Status of Automated Databases”, *Fordham Law Review*, 60 (1991), p. 507, and Ginsburg J, “Copyright, Common Law, and Sui Generis Protection of Databases in the United States and Abroad”, *University of Cincinnati Law Review*, 66 (1997), p. 151.

¹³⁴ Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases.

¹³⁵ For a longer discussion of this subject, see: Guadamuz A and Cabell D, “Data Mining in UK Higher Education Institutions: Law and Policy”, *Queen Mary Intellectual Property Review*, 4:1 (2014), p. 3.

precisely because the data produced might not easily be protected under copyright and therefore it has little commercial value. Leaving out the arguments about whether the data can be subject to protection, the question of whether public domain dedications are legal will depend entirely on the jurisdiction in which the data is being released. However, looking beyond the mere legal arguments there is the fact that institutions are making a policy statement when they publish information abandoning copyright. It is highly unlikely that an institution that has done this will change its mind in the future and will start prosecuting bona fide users for copyright infringement. Besides this being a potential public relations disaster, such actions would probably result in a favorable result for any honest user acting in good faith.

Besides the scientific examples cited above, one field in which there is growing institutional interest in releasing works into the public domain is memory institutions. A highly publicized example of a release of images into the public domain took place recently as the Getty Trust announced the creation of its Open Content Program,¹³⁶ in which it would be making available in the public domain more than 10,000 digital images that it holds in its collection.

Similarly, a more accurate way of finding data with regards to copyright relinquishment is to look at the CC0 and CC in general. Since 2003, CC has been collecting linkback information from search engines,¹³⁷ that is, it uses the capacity of looking for links to the licenses from around the Web to try to get an estimate of who is using the licenses. While this type of metric can underreport usage, it can be used to measure trends and to make other similar analyses.¹³⁸ Looking at the raw data¹³⁹ from October 14, 2013, CC found 832 linkbacks marked under the CC0 and 1220 links marked under public domain. This does not give an accurate description of just how many people are releasing content under CC0 but it can give an indication that there are rights holders that are actually using CC0 to release content and that they are linking back to the CC license.

Interestingly, one of the most prevalent uses of the CC0 at the institutional level is for the release of data, perhaps mirroring what was discussed previously with regard to public domain dedications in the scientific environment. CC has published an impressive list of institutional adopters of the CC0 dedication in the area of databases.¹⁴⁰ Some of these are:

- **The British Library:** The British Library released a large set of its bibliographic data into the public domain with the CC0 public domain dedication. This set comes from the British National Bibliography which contains data on publishing activity from the UK and Ireland since 1950.
- **The European Organization for Nuclear Research (CERN) Library:** The CERN released its book catalog using the CC0.
- **Digital Public Library of America (DPLA):** The DPLA has pledged to make all of its metadata freely available under the CC0 and not to claim new rights over aggregated data.
- **Europeana:** Europeana is the European digital library, museum and archive co-funded by the European Union. It has adopted a new Data Exchange Agreement¹⁴¹ which releases metadata for millions of cultural works into the public domain using the CC0.
- **Genomes Unzipped:** Genomes Unzipped is a project that aims to inform the public about genetics via the independent analysis of open genetic data, volunteered by a

¹³⁶ At <http://www.getty.edu/about/opencontent.html>.

¹³⁷ At http://wiki.creativecommons.org/Metrics/License_statistics. It is important to note that the data itself is in the public domain.

¹³⁸ Linksvayer M, "Notes on CC Adoption Metrics from The Power of Open", *Creative Commons Blog* (June 27, 2011) at <http://bit.ly/GOZFL4>.

¹³⁹ At <http://labs.creativecommons.org/metrics/csv-dumps/2013-10-14/00:05:44/>.

¹⁴⁰ A long list of examples can be found at http://wiki.creativecommons.org/CC0_use_for_data.

¹⁴¹ At <http://pro.europeana.eu/web/guest/data-exchange-agreement>.

core group of genetics researchers and specialists. Its data is now available with the CC0.

- **German National Library:** The German National Library has begun publishing its standard data as public domain using the CC0.
- **Harvard Library:** Harvard Library has released 12 million catalog-records into the public domain using the CC0.
- **Netherlands Government:** The Netherlands Government launched an open data portal in March 2010. The default copyright policy for site content is that the works are dedicated into the public domain using the CC0 and therefore it relinquishes all copyright.
- **Sage Commons:** Sage Commons is a public resource and information platform for scientists, research foundations and research institutions to share and develop human disease and biological research. Sage Commons will enable the CC0 public domain dedication as an option for surrendering copyright in data hosted in the network.
- **Université de Montréal Biodiversity Centre:** The Biodiversity Centre has published its datasets at Canadensys via the CC0 public domain dedication and encourages the rest of its community to do the same.

The list above includes just some of the many examples of institutional use for the CC0, some of which involve important organizations with global reputations. Whatever one may think of copyright relinquishment, the fact that institutions of such caliber are releasing some of their data into the public domain should serve at least to legitimize the practice from a governance standpoint, although it does not affect the legal questions that have been discussed so far.

Unfortunately, the list of institutions dedicating works to the public domain does not include any examples from developing countries. This does not mean that there are none, but while the author was able to find a large amount of CC licensed material all around the world, CC0 adoption outside of Europe and the USA seems minimal. There might be an issue with lack of knowledge about such licensing tools. As one possible follow-up action to this report, the CDIP could try to chart a course for possible adoption of such tools in developing countries.

5. CONCLUSIONS

The topic of copyright relinquishment has been largely ignored in the literature, with the exception of few examples that have been cited in this report. This situation has certainly created some difficulties in the conclusion of the report, but it has ulterior implications. The relative lack of discussion is indicative of a subject that has not had great practical impact. We were not able to find any case law in the studied jurisdictions that dealt directly with the issue of copyright abandonment, which would hint at the fact that this is probably something that has not been litigated to a great extent. The few relevant cases cited were mostly related to analogous issues or dealt with the public domain in general.

It is possible to speculate about the causes of the remarkable lack of litigation dealing with copyright waivers. The main cause may simply be one of mathematics, as it would appear that the number of dedications remains low. It is also possible that in the great majority of cases we might be dealing with abandonment instead of voluntary relinquishment. There may also be an element of inertia, as those who are uninterested in enforcing their copyright do not initiate copyright infringement suits.

Therefore, most of the discussion surrounding the legality of copyright relinquishment tends to be academic in nature and while interesting, its relevance to everyday life is minimal. Those individuals and institutions that make a decision to waive all of their economic rights will be less likely to try to enforce their property rights in the future, hence leaving the legality of their expressed will as largely a moot point. The practical result will be the same, even if

we concede the argument that public domain dedications may not be legally valid in some jurisdictions.

The survey at the heart of the report conducted in nine countries found that in four of them the law permits voluntary declarations leading to the inclusion of a work in the public domain, while in the other five, the question was open to interpretation, with varying degrees of certainty, whether negative or positive. The only global trend that seems to emerge from the report is one of ambiguity. We found some countries where copyright relinquishment is not possible, some others where it is, but the majority does not contemplate the question in its copyright legislation.

We are in danger of polarizing the debate in a false dichotomy in which one must choose between the public domain and full intellectual property. While Member States may want to explore this issue further and commission future studies expanding the number of studied jurisdictions, such a study will probably just confirm the prevalent ambiguity. While it is not possible for the report to make recommendations in accordance to the terms of reference, the author would like to comment that further studies exploring the legal question will not bring clarity to an issue where it is lacking to begin with.

The interesting questions arising from the present report are not so much about relinquishment, but about licensing. As public institutions around the world continue to wake up to the benefits of sharing information and making data available to empower citizens and businesses, open content licensing has emerged as a viable tool that allows governments and publicly-minded organizations to make data accessible to the public.

Finally, there is no evidence that authors will be affected in any manner by the legal recognition of copyright renouncement. While it would be possible to imagine a situation in which individuals are duped into giving up their rights, we found no evidence that this is occurring in real life. Most of the cases of dedications to the public domain come from institutions, some of which probably have at their disposal specialized legal counsel. Consequently, Member States may want to consider exploring the subject of licensing further.

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APPENDIX

TERMS OF REFERENCE

I. BACKGROUND

These terms of reference shall govern the preparation of a Study ("the Study") in English, entitled *Comparative Analysis of National Approaches on Voluntary Copyright Relinquishment*. The Study is commissioned by the Organization at the request of its Member States. The WIPO General Assembly adopted in October 2007 a set of 45 recommendations (the Development Agenda) to ensure that development considerations form an integral part of WIPO's Work. In addition, a Committee on Development and Intellectual Property (CDIP) has been established, composed of all Member States of WIPO. This Committee meets twice a year, to monitor, assess, discuss and report on the implementation of all recommendations. During the Third Session of the Committee on Development and Intellectual Property (CDIP) in 2009, a thematic project on IP and the Public Domain (CDIP/4/3/Rev.) was approved, which contained components on patents, trademarks, traditional knowledge and copyright for implementation in the 2010/11 Biennium. The thematic project dealing with Recommendations 16 and 20 of the Development Agenda included a Scoping Study on Copyright and Related Rights and the Public Domain,¹⁴⁴ which was prepared by Mrs. Severine Dusollier, Professor at the University of Namur.

The Study had the objective of providing assistance to Member States by raising awareness of the increasing importance of the public domain for a balanced and effective distribution of creative content. Moreover, the Study provides information for the evaluation of the possible benefits of a rich and accessible public domain. Finally, the author formulates a number of recommendations in regard to future activities on the public domain that might be carried out by WIPO, particularly in three areas. The first area relates to the identification of the public domain, for example for the mutual recognition of the status of orphaned works. The second one presents activities in the area of the availability and sustainability of the public domain, for instance in the development of registration systems including the interconnection of national databases. The third one focuses on the field of non-exclusivity and non-rivalry of the public domain.

During the eighth session of the CDIP, Member States agreed that the Secretariat would prepare an information document¹⁴⁵ clarifying the scope and possible implications of three of the recommendations, including recommendation 1c) relating to the voluntary public domain, i.e. copyright relinquishment. The recommendation reads as follows:

1 c: "The voluntary relinquishment of copyright in works and dedication to the public domain should be recognized as a legitimate exercise of authorship and copyright exclusivity, to the extent permitted by national laws (possibly excluding any abandonment of moral rights) and upon the condition of a formally expressed, informed and free consent of the author. Further research could certainly be carried out on that point".

During the Ninth Session of the CDIP, from May 7-11, 2012, Member States decided to follow a recommendation made by the Secretariat to commission a Study on Voluntary Copyright Relinquishment. In this context, the Study needed to be balanced in catering for the interests of both users and right owners. Moreover, the Study should not promote any specific regime but merely showcase the different approaches implemented in different countries.

¹⁴⁴ Available at <http://www.wipo.inUmeetings/en/details.jsp?meetingid=22102>

¹⁴⁵ Available at http://www.wipo.inUedocs/mdocs/mdocs/en/cdip_9/cdip9inf2.pdf

II. STRUCTURE OF THE STUDY

The Study shall be accompanied by an executive summary, outlining its methodology, content, findings and conclusions.

The Study shall begin with a preliminary outline of the issues and questions arising from copyright relinquishment, including:

- The nature of copyright itself. If copyright is considered as a fundamental right, it is essential to determine whether it would be legal to abandon such right. However, if it is deemed to be a mere property right, the matter would be less complicated as it is possible in most legislation to renounce property itself. The Study will also focus on the additional complexities arising in Member States where copyright legislation grants unwaivable economic rights.
- The inalienability of moral rights merits special attention. Attached to the person of the creator, the protection of moral rights is deemed inalienable in many countries. This might be contradictory with the will of the author to abandon his/her copyright.
- The mechanisms to ensure that the author makes a free and informed decision about the relinquishment of her rights, knowing its consequences and absent any pressure distorting the expression of his/her will. These mechanisms might consist of formalities such as requirements that the abandonment of rights be expressed in writing or before a public authority. They could also be informational tools ensuring that information about the consequences of the decision be provided by public authorities or representatives of authors. These mechanisms could also have a remedial nature, consisting of remedies afforded to challenge any decision that does not derive from an expression of the free and informed will of the author.
- The irrevocable nature of relinquishment is important to consider, i.e. to determine whether the author should be able to change his/her mind and choose to exercise his/her exclusive right on the work again. In turn, the implications for the public at large and for specific third parties of any solution enabling this change of opinion need also be examined, especially in cases where use of the copyrighted material took place on the basis of the earlier renouncement.

The Study will also cover a detailed analysis involving three different stages:

1. The first stage will address the completion of a "Survey of National Legislation and Jurisprudence on Voluntary Copyright Relinquishment". The Study will be undertaken in regard to, at least, the following jurisdictions: France, Kenya, Republic of Korea, Chili, Egypt, Colombia, India, China and Brazil.
2. The second stage will look at the practice of copyright relinquishment in different contexts of distribution and use of creative material, including creative industries, the online environment, with reference to collaborative creativity and user generated content, and in regard to materials prepared by not for profit and public institutions.
3. Once the first and second stages are completed, the Subscriber will provide, as a third stage, the Conclusions of the Study. The Conclusions will outline the trends and common features identified in the previous stages in regard copyright relinquishment in the different national jurisdictions. It will address, on the one hand, the interests of users in voluntary copyright relinquishment, in particular from the perspective of the availability of the public domain and access to knowledge. On the

other hand, it will present the possible ways to protect the interests of the authors in the promotion of any such regime. It will also outline possible future activities to be undertaken by WIPO and Member States in this area; however no recommendations or normative solutions should be included in the Study.

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