‘Public rights’ in copyright: What makes up Australia’s public domain?

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I. Introduction

A. Aims

This article is predominantly a case study of Australia's copyright public domain. It proposes a way of defining the copyright public domain, and then examines how it can be used to justify a set of categories (fifteen, as it turns out) sufficient to describe the copyright public domain in the Australian legal jurisdiction. These categories are based on Australian law, particularly those aspects of Australian law which give a sufficient account of Australia's copyright public domain[1]. We also use these categories for the purpose of comparisons with definitions of the copyright public domain put forward by scholars in the USA, the UK and Europe, and applied in relation to other countries' public domains. This provides a useful means for analysing differences between these theorists. It also allows some comparisons between Australia's public domain and those of other jurisdictions, not enough for a comprehensive comparison, but enough to illustrate the point that public domains are substantially national in character (reflecting the territorial nature of copyright) despite their many common elements. The categories discussed in this article are therefore not proposed as universal (internationally comprehensive) but they do serve as a starting point for cross-jurisdictional comparisons, and could be developed further toward an internationally comprehensive account of copyright public domains.

The term 'public domain' is ambiguous. In its narrowest use it means those works in which copyright has expired due to the cessation of the applicable term of copyright. A slightly broader usage includes works that do not ever attract copyright protection, and those over which the author has renounced all claims of copyright. However, it has a more modern and expansive usage which encompasses all types of rights that allow members of the public to use copyright works without permission from copyright owners, such as statutory exceptions to copyright, uses outside the exclusive rights of the copyright owner, and uses allowed under compulsory licences. We adopt a version of this expansive approach, for reasons we will explain.

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[1] However, we do include a couple of categories which may arguably be empty in Australian law but are found in UK law.

Why is it important to attempt to clarify, define and categorise the public domain? First, a great deal of intellectual and organizational energy has been and is being spent on defending 'the commons' or 'the public domain', or advocating its expansion. However (as we will illustrate) there is often no clarity about exactly what is being defended or advocated. It would therefore be valuable to have a rational basis for determining what is within, and what is outside, the public domain. For this purpose we need a definition of what is within the public domain, one that is based on values we regard as worth defending, and also a set of categories that exhaustively explain the content of Australia's public domain. Suggested categories should help test whether the definition is adequate, and the definition should help us find aspects of our public domain that we might have ignored or under-rated. If the exercise is successful, it will help provide better arguments and justifications for defending or advocating protection of particular aspects of the public domain. It will help give the public domain a rhetorical basis to counter the ideology of copyright maximalism.[2]

B. Theorising Australia's copyright public domain

Public domains are best understood as being primarily jurisdiction-specific, but this was often not addressed in the predominantly United States literature that first emerged in this area, culminating in the seminal Duke Law School conference on the public domain in 2001 (discussed later). While many elements of the public domain have arguably been a part of Australian copyright law from its colonial beginnings,[3] there was little academic or judicial analysis of these provisions or doctrine, or of a specific Australian public domain, before the adoption of the Creative Commons licensing regime in Australia after 2001. One notable exception, three years before the Duke Conference, was that a number of Australian scholars recognized that the public domain was worthy of greater attention, culminating in the Griffith University 'Defining the Public Domain' conference in 1998. In their foreword to the resulting special edition of the *Journal of Law and Information Science,* Sherman and Thomas note that 'the notion of the public domain has not attracted much attention in Australia', although 'it is at the heart of copyright law's claim to balance public and private interests'.[4] Although only a passing comment, they were clearly taking an expansive view of the meaning of this term, referring to 'an array of doctrinal mechanisms – idea-expression; limited duration; exceptions; importation controls; fair dealing; infringement involving qualitative and quantitative guidelines – which attempt to protect the public domain'. They went so far as to consider that the 'public domain is a central concept in Anglo-Australian copyright law'.[5]

In the past decade there has been a growing body of scholarship addressing specific aspects of Australia's copyright public domain, but still little concerning the public domain as a whole. The literature covers areas such as technological protection measures, voluntary licensing, public sector information, orphan works, exceptions for cultural institutions, indigenous interests, privacy, and open scholarship. It has diverse origins, but was in part stimulated by conferences, research and publications arising from a number of University-

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[2] This rhetorical basis is well argued by J Boyle, 'The Second Enclosure Movement and the Construction of the Public Domain' (2003) 66 *Law and Contemporary Problems* 33, 68.

[3] See generally C Bond, *For the Term of His Natural Life … Plus Seventy Years: Mapping Australia's Public Domain* (PhD Thesis, University of New South Wales, 2010).

[4] B Sherman and J Thomas 'Introduction' (to a special issue on the public domain) (1998) 9(1) *Journal of Law, Information and Science* 5 (formerly *Journal of Law & Information Science*).

[5] Ibid.

based projects. Those centered on Queensland University of Technology (QUT) Law Faculty, included Creative Commons Australia and the Creative Commons Clinic[6], the Open Access to Knowledge (OAK) Law Project[7] (2005-9) and the associated Government Information Licensing Project (GILF) research[8]. At the University of New South Wales Faculty of Law the 'Unlocking IP' Project (2004-09) at the Cyberspace Law & Policy Centre hosted three conferences resulting in two journal special editions[9] focusing on Australian copyright public domain issues[10]. While there have therefore been some Australian contributions to general theorising about the public domain, little attention has been given to a specifically Australian public domain. National copyright public domains have been of limited interest as an area of research in any country.

C. Terminology – 'Public domain', 'Public rights', 'user rights' or something else?

It is still unusual for official bodies in Australia to define copyright partly in terms of its statutory exceptions. In 2002 Australia's Copyright Law Review Committee recognised 'that the exclusive rights of copyright are partly defined by the exceptions, in that the rights only exist to the extent that they are not qualified by the exceptions' and considered that 'the principal exceptions, such as those for fair dealing, are fundamental to defining the copyright interest'.[11] The Committee proposed protections of the copyright exceptions against encroachments by contract law based on this approach. In doing so, it recognised the value of the public domain, in the expanded sense, and sought legal protection for it. Successive Australian governments have ignored this call.

In Canada, such recognition has gone much further. The Supreme Court of Canada has stated that

> The fair dealing exception, like other exceptions in the Copyright Act, is a user's right. In order to maintain the proper balance between the rights of a copyright owner and users' interests, it must not be interpreted restrictively. As Professor Vaver … has explained … "User rights are not just loopholes. Both owner rights and user rights should therefore be given the fair and balanced reading that befits remedial legislation."[12]

As Tawfik puts it 'under Canadian law, user rights, manifesting themselves in a range of permitted uses, are to be accorded equal treatment to those of copyright holders'.[13] Other Canadian authors could have been considered too enthusiastic in claiming '*CCH* … affirms the irreducible centrality of the public domain in Canadian copyright jurisprudence',[14]

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6 Creative Commons Australia at <http://creativecommons.org.au/>

7 OAK Law Project at <http://www.oaklaw.qut.edu.au/>

8 GILF has now been renamed AUSGOAL, see <http://www.qsic.qld.gov.au/initiatives/gilf.html>

9 SCRIPTed 4:1, 2007 at <http://www.law.ed.ac.uk/ahrc/script-ed/issue4-1.asp> and SCRIPTed 6:2, 2009 at <http://www.law.ed.ac.uk/ahrc/script-ed/issue4-1.asp >

10 Unlocking IP Project at <http//www.cyberlawcentre.org/unlocking-ip/>

11 Copyright Law Review Committee (Australia), *Copyright and Contract*, Attorney-General's Department (Australia), 2002 [2.01].

12 *CCH Canadian Ltd v Law Society of Upper Canada*, 2004 SCC 13; [2004] 1 SCR 399.

13 M Tawfik 'International copyright law: W[h]ither user rights?' Chapter 3 in M Geist (Ed) *In the public interest: The future of Canadian copyright law*, Irwin Law, 2005, 67.

14 A Drassinow 'Taking user rights seriously', Chapter 16 in M Geist (Ed) above n **7**, 463.

although it certainly did represent a significant shift toward recognition of the importance of the public domain in copyright law. However, that was before the Supreme Court of Canada decided five copyright cases in July 2012.[15] Geist summarises[16] the effect of these decisions and the decade of decisions preceding them:

> The net effect is to firmly reject claims that users' rights is merely a metaphor. In the eyes of the Supreme Court of Canada, it is an essential component of Canadian copyright law that is integral to achieving the purpose of copyright it identified over a decade ago - a balance that "lies not only in recognizing the creator's rights but in giving due weight to their limited nature."

Canada has clearly recognized that the rights of users (or as we would say, the rights of the public), as well as the rights of creators, are at the heart of copyright law.

The technically correct way to refer to each of the fifteen components which we will characterise as part of Australia's copyright public domain – whether they are 'rights' 'liberties', 'powers', 'immunities', 'abilities' or something else – is a matter which would take considerable further discussion. The benefits that would result from such analysis are uncertain. One thing which it would help reveal is the extent to which the public domain is not protected by positive rights, and is therefore particularly vulnerable in practice to restrictions by contracts, technical protection measures and other means. Such analysis needs to be done, but is beyond the scope of this article.

In this article, we use the term 'public rights' to describe each of the constituent components (or categories) of copyright's public domain. Each category must satisfy the definition of the 'public domain' but be logically distinct in some way from the other categories. The copyright public domain then can be seen as a 'bundle of rights', similar in some ways to the exclusive rights of the copyright owner that make up copyright's private domain. We could call them 'public domain rights', but 'public rights' is better as it indicates who can exercise the rights. Of course, to use the term 'rights' at all is controversial, and deserves more discussion. We also use the expression 'public rights' without intending that too much be read into 'rights' as distinct from 'liberties', 'powers', 'immunities' or 'abilities'.[17]

The Canadian Supreme Court in the *CCH Case* was comfortable with 'rights language' when it says, 'The fair dealing exception, like other exceptions in the Copyright Act, is a user's right'. We also intend to keep using the expression 'public rights.' We prefer 'public rights' to the Canadian 'user rights' because we think it better captures a core element of the public domain that we wish to bring out. This can be seen from our answer to the rhetorical question 'what rights do users have to use copyright works?', to which we answer, 'they have two rights: to exercise permission-free rights, usually but not always for free; and to exercise proprietary rights, on the conditions of a contingently available licence, set by a copyright owner, and usually but not always for a fee'. However, if we ask 'what rights do the public have to use copyright works?' then the use of 'the public' suggests to us only the rights that a

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[15] See M Geist 'Supreme Court of Canada Stands Up For Fair Dealing in Stunning Sweep of Cases' at <http://www.michaelgeist.ca/content/view/6588/125/> for discussion of ESAC v. SOCAN, Rogers v. SOCAN, SOCAN v. Bell, Alberta v. Access Copyright, and Re:Sound (all available at http://scc.lexum.org/)

[16] M Geist < http://www.michaelgeist.ca/content/view/6588/125/>

[17] For example, Burrell and Coleman state that 'we believe that although copyright law *ought* to recognise "users' rights", it is a mistake to describe the current provisions in these terms': R Burrell and A Coleman, *Copyright Exceptions: The Digital Impact* (Cambridge University Press, Cambridge, 2005) 10 (emphasis in original).

person has by virtue of being a member of the public or a significant class of the public, and not any rights arising for a limited class of proprietary licensees. This is close to how we define 'public rights', and so 'public rights' fits our analysis better than 'user rights'. Using different terminology also avoids the misapprehension that what we are arguing derives from the Canadian 'user rights' approach, as it does not. Having said that, we expect that 'user rights' in Canada means much the same as what we mean by 'public rights', so we have no objection to that alternative, and politically persuasive, terminology.

Boyle's use of 'public domain' and Lessig's use of 'commons' are similarly not immune from criticism. They use those terms to some extent because of their rhetorical value. We take a similar liberty in using 'public rights'. Cahir asserts that '[t]he debate as to the proper place of the public domain in copyright law should obviously continue, but it is this author's hope that it can do so without mention of the 'R' word'.[18] Readers who are offended by our usage of 'rights' are invited to insert 'rights, liberties, immunities, powers, interests and abilities' whenever they see the 'R word', until further clarification of the correct terminology (perhaps by a Hohfeldian analysis) is available. Similarly, if readers would prefer (like Deazley) to keep the *de jure* and *de facto* public domains separate, while recognising the existence of both, that is understandable.

II. Attempts to define the copyright public domain and its categories

A. Expansive categories, and an initial definition, from the USA

Since David Lange's 1981 contribution titled 'Recognizing the Public Domain'[19] stated in part that 'the public domain tends to appear amorphous and vague, with little more of substance in it than is invested in patriotic or religious slogans on paper currency', scholars like him who support the importance of the public domain have made something of a habit of not defining it, nor being very precise about its contents. We find elusive statements such as 'the public domain…delineates an important sphere in which the people have equal rights, and ultimate power, over information, ideas and knowledge';[20] (Lange again, in 2003) 'the public domain would be a place like home, where, when you go there, they have to take you in and let you dance'; 'a sanctuary confirming affirmative protection against the forces of private appropriation'.[21] Sometimes, more attention seems to be paid to the rhetoric of the public domain than to its operation in reality.

By the time of the *Conference on the Public Domain* at Duke Law School in November 2001 much of the new theories of the public domain, mainly American, had come together. Pamela Samuelson, in various papers starting with the 2001 Duke conference, provided seven different maps indicating how different scholars see the broader notion of the public domain.[22] One map (Map 2) gave her own view, which was essentially a traditional narrow view of the public domain ('information resources free from intellectual property rights').

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18 J Cahir, 'The public domain: right or liberty?' in C Waelde and H MacQueen (Eds), *Intellectual Property: The Many Faces of the Public Domain*, Edward Elgar Publishing, Great Britain, 2007, 35, 52.

19 D Lange, 'Recognizing the Public Domain' (1981) *Law and Contemporary Problems* 147, 177.

20 E Lee, 'The Public's Domain: The Evolution of Legal Restraints on the Government's Power to Control Public Access Through Secrecy or Intellectual Property' (2003/2004) 55 *Hastings Law Journal* 91, 119.

21 D Lange, 'Reimagining the Public Domain' (2003) 66 *Law and Contemporary Problems* 463, 470, 466.

22 Last expressed in P Samuelson, 'Challenges in Mapping the Public Domain' in L Guibault and P B Hugenholtz (Eds), *The Future of the Public* Domain, Kluwer Law International, The Netherlands, 2006) 7-25.

She subsequently took a different approach,[23] recognising the value of many other conceptions of the public domain, and identifying thirteen distinct conceptions in the literature. Unfortunately, both her approaches mix copyright law with other forms of intellectual property, which is useful for other reasons (particularly for seeing how other IP rights can place further constraints on the copyright public domain), but makes it more difficult to discern her views of the public domain in relation to copyright. Samuelson explains that the first six of these conceptions, and the twelfth, can be clustered into two groups, 'information resources are or can be encumbered by intellectual property rights' and 'freedoms to use information resources even when works embodying these resources are protected by intellectual property rights', whereas the other six categories do not directly attempt to enumerate what makes up the public domain. Her explanation is as follows:

> Legal status definitions consider whether information resources are or can be encumbered by intellectual property rights. PD 1 (IP-free information artifacts), 2 (IP-free information resources), and 12 (the unpublished public domain) are three examples of this focus. PD 3 (the constitutional or mandatory public domain), in essence, revisits PD 2 with an eye to carving out what, as a matter of U.S. constitutional law, must be there and stay there. PD 4 (the privatizable public domain) was born of the recognition that PD 3 is not coextensive with the public domain of IP free information resources. The privatizable public domain needed to be recognized because PD 2 encompasses more than PD 3, and PD 4 is the realm of PD 2 that lies outside of PD 3. If Professor Reese, the discoverer of PD 12, is correct that the unpublished public domain can constitutionally be privatized, the unpublished public domain would itself be a subset of the privatizable public domain (i.e., PD 4).
>
> Six public domains focus on freedoms to use information resources even when works embodying these resources are protected by intellectual property rights. PD 5 (broadly usable information resources) is the clearest example. This public domain encompasses the whole of PD 2 (IP-free information resources), but also includes unregulated, implicitly licensed, unambiguously fair, and otherwise privileged uses of IP protected information resources. PD 5 builds on the insight that ordinary persons do not care if an information resource is IP-protected as long as they can freely use the resource.
>
> Richard Stallman and Professor Lawrence Lessig invoke freedom as the principal rationale for creating the contractually constructed commons of GPL and Creative Commons licenses (PD 6). These licenses provide greater freedoms to use are three examples of this focus. PD 3 (the constitutional or mandatory public domain), in information resources than default IP rules and common proprietary licensing practices generally permit, although GPL and CC-licensed content are certainly less free than IP-free information resources. These licenses have been conceived by some as a "partial dedication" of information resources to the public domain.[24]

These seven categories identified by Samuelson are probably the most detailed attempt to enumerate the elements of the public domain in US intellectual property law, including copyright law. We will compare them with our own categories when discussing those categories, and in the summary table at the conclusion of the article. What is lacking from Samuelson's description, for our purposes, is any definition or 'family resemblance' which brings out the common elements in all seven categories, and enables us to recognise what specific instances fall within and without those categories. We consider that other US authors have, however, taken useful steps down that path.

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23 P Samuelson 'Enriching discourse on public domains' (2006) 55 *Duke Law Journal* 783, 784.

24 Ibid, 816-817 (citations omitted).

James Boyle argued[25] against what he and others describe as a 'second enclosure movement', the use of a combination of technology, contracts and legislation by intellectual property maximalists to eliminate those aspects of common property found in intellectual property, just as the first enclosure movement eliminated common property in land. Now, as then, it is alleged that a 'tragedy of the commons' has taken place in the copyright arena, justifying this enclosure. Boyle (like others) argued that the economics on which arguments for greater intellectual property rights are based are very dubious: 'the idea that we must inevitably strengthen rights as copying costs decline doesn't hold water'.[26] The 'tragedy' is at best 'not proven'. Boyle then asks 'what is the alternative to the second enclosure movement?' and answers 'the construction of the public domain'.[27] He admits it sounds paradoxical, but argues that 'protection of the commons was one of the fundamental goals of intellectual property law'.[28] He argued, following previous work by David Lange, two decades earlier,[29] that what is needed, to counter the ideology of intellectual property maximalists is a positive articulation of the role of the public domain in intellectual property.[30] In his view, the 'public domain' in intellectual property should not be construed solely as works that are completely unprotected (often by expiry of the copyright term), but should also encompass '*aspects* of works that are unprotectable'.[31] Boyle further endorsed Litman's prior definition of the public domain as 'a commons that includes those aspects of copyrighted works which copyright does not protect'.[32]

Yet Boyle, while arguing that the public domain was being subjected to enclosure, was not precise about what was being enclosed, considering that 'the public domain will change its shape according to the hopes it embodies, the fears it tries to lay to rest, and the implicit vision of creativity on which it rests'.[33] He concludes that 'there are many "public domains",[34] an approach which has subsequently been adopted by Samuelson[35], and in relation to Canada's public domain by Craig.[36] Boyle's most recent book[37] is no more precise. Further, as discussed below, Lawrence Lessig offers a definition, but he does not define the contents of the public domain that follow from his definition.

However, while imprecise about its contents, both Boyle and Lessig take an approach to a definition of the public domain similar to that proposed by Litman in 1990, as restated by Lessig[38] (2006):

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25 Boyle, above n 4; see also, in abbreviated form, *Daedalus*, Spring 2002 Intellectual Property Issue.

26 Boyle, above n 4, 43.

27 Ibid, Part II.

28 Ibid, 40.

29 D Lange, 'Recognizing the Public Domain' (1981) *Law and Contemporary Problems* 147.

30 For a contrary view, that public domain is just the holes left in copyright, *see* E Samuels, 'The Public Domain in Copyright Law' (1993) 41 *Journal of the Copyright Society of the USA* 137.

31 Boyle, above n 4, 60 (emphasis in original).

32 J Litman, 'The Public Domain' (1990) 39 *Emory Law Journal* 965, 968.

33 Boyle, above n 4, 62.

34 Boyle, above n 4, 68.

35 Samuelson op cit 816-817; Samuelson's seven categories, using her numbering are: (1) 'IP-free information artifacts'; (2) 'IP-free information resources'; (3) 'the constitutional or mandatory public domain'; (4) 'the privatizable public domain'; (5) 'broadly usable information resources'; (6) 'the contractually constructed commons; and (12) 'the unpublished public domain'.

36 CJ Craig, 'The Canadian public Domain: What, Where and to What End?' (2010) 7 *Canadian Journal of Law and Technology*, 221, 241.

37 J Boyle *The Public Domain: Enclosing the Commons of the Mind*, Yale University Press, USA, 2009.

38 L Lessig 'Re-crafting a public domain' (2006) 18 *Yale Journal of Law and the Humanities* 56-83.

> This "public domain" is free. No one is paid for its use. It is also, and distinctly, "permission free". I do not need the permission of Disney to copy the ideas in *Steamboat Willie*. Nor do I need its permission to make a fair use of its foundational cartoon. In this sense, a resource is "permission free" if the right to use the resource does not depend on anyone's subjective will. ... The key freedom that "permission free" marks is the freedom from a subjective will.

His summation is that 'the public domain, technically, is the permission-free zone defined by the limits of copyright'. In our view, and that of other writers, 'permission-free' is indeed the touchstone, and (with some elaboration) does provide the correct basis for a categorisation of the contents of the copyright public domain.

From 2001 onward a considerable amount of attention of American and other scholars interested in the public domain focused on the development of voluntary licensing through the Creative Commons approach, which added a new dimension to the public domain in theory and in practice. Theories of 'peer production', particularly associated with Benkler, developed in tandem. Yet the boundaries of what constitutes the 'public domain' are still today contested, even by those scholars who argue for a positive and expansive view. For example, Benkler would exclude those aspects of fair use that can only be ascertained to apply in a particular case after a detailed factual enquiry.[39] Another area of potential dispute is the use of those copyright works where copying (or other protected use) is permissible on payment of a compulsory licence fee. Boyle thinks this is included.[40] These more expansive notions of public domain intersect with Lessig's notion of a commons as a resource that is 'free' for all to use, not necessarily at zero cost, 'but if there is a cost, it is a neutrally imposed, or equally imposed cost'.[41] If we include Lessig's notion of 'commons' as part of the public domain, then as Boyle suggests,[42] this approach answers the question of how the free software and open source software movements become part of the public domain. The use of source code under these paradigms does have a 'price of admission', acceptance of the conditions of the relevant software licence, and so is based on the existence of copyright. But it is a price that is equally open for all to pay, and it clearly does constitute an effective creativity-inducing part of the digital commons. Boyle's summary was that a new dividing line for the public domain is between 'the realm of individual control and the realm of distributed creation, management, and enterprise', whereas the old distinction was between what was property and what was not (the 'free'). [43]

Once Boyle and Lessig reached this point, 'public domain' or 'commons', like property itself (including intellectual property), starts to resemble a bundle of rights and privileges. Alternatively, in Boyle's paraphrase of Holmes' realist vision, it amounts to 'predictions of what the public can do freely and nothing more pretentious'.[44]

Yet in spite of the considerable amount of high quality scholarship concerning the public domain (or 'the commons' when used in a similar sense), and arguments for taking an expansive view of what it contains, it is surprising how few efforts are made in the United

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39 Y Benkler, 'Free as the air to common use: First Amendment constraints on enclosure of the public domain' (1999) 74 *NYU Law Rev.* 354, 361–362, as discussed by Boyle, 2003, above n 4, 33.

40 Boyle, above n 4, 62.

41 L Lessig, 'The Architecture of Innovation', Conference on the Public Domain, Duke Law School, Nov 2001, http://www.law.duke.edu/pd/papers/lessig.pdf.

42 Boyle, above n 4, 63-64.

43 Boyle, above n 4, 66.

44 Boyle, above n 4, 68.

States literature to categorise all of its components, and to propose a definition sufficient to cover all the proposed categories.

B. Deazley's categories of the (UK) public domain

The most systematic categorisation of what is comprised in the public domain is by Ronan Deazley, albeit from the perspective primarily of current UK copyright law.[45] His starting point, which we share, is to only consider the relationship between the public domain and the law of copyright, because to attempt to do so simultaneously for all forms of intellectual property is 'too problematic' given, for example, the totally different approaches taken by copyright law and patent law to the protection of ideas.[46]

We interpret Deazley as proposing the following eight elements of the public domain:[47]

1. 'those works which fail to meet whatever threshold requirements have been stipulated before protection will be attributed to them' ('non-original' works);
2. 'works whose periods of protection have expired';
3. 'ideas, generic plots, themes and so on, as well as certain unoriginal materials';
4. 'use of an insubstantial part of a work';
5. uses of a copyright work outside the 'acts restricted by copyright' (or 'private domain of what is copyright protected');[48]
6. 'any use which falls within the statutorily defined "acts permitted in relation to copyright works"';
7. 'use of works which the courts refuse to protect on the grounds of public policy';
8. uses of a work which would otherwise amount to copyright infringement which are authorised by the courts because they are in the public interest (which can be considered 'within the common law public interest defence').

Deazley also excludes from his definition of the public domain any uses of a work made under voluntary licences, such as Creative Commons or open source licences, but describes this as the '*de facto* public domain'. In addition, he refers to 'the perceived public domain' ('in practice the manner in which it functions'), as distinct from 'the legal reality of the public domain', but does not elaborate and leaves this outside his concept of public domain. He sums up his categorisation of the UK's public domain as follows:

> … within the context of UK law, copyright's public domain incorporates those works which do not qualify for copyright protection, those works which do but are out of the copyright term, as well as such use of those works which fall on the right side of the idea-expression line, which are allowed for within the statutory framework (use of an insubstantial part, the permitted acts), or which are permissible as a result of judicial

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45 R Deazley *Rethinking Copyright : History, Theory, Language*, Edward Elgar, Cheltenham, UK, 2006, Chapter 4 'Theory I: what copyright isn't … or, conceiving the public domain'; another version is Chapter 2 'Copyright's public domain' in C Waelde and H McQueen (Eds) *Intellectual Property: The Many Faces of the Public Domain*, Edward Elgar Publishing, Great Britain, 2007, 21-34.

46 Deazley, Ibid, 105–6: '… with patents, what receives protection is the new and inventive idea; by contrast, one of the fundamental doctrines of copyright law is that copyright subsists not in ideas but only in the expression of those ideas'.

47 This list is derived from Deazley, Ibid, 106–117. The quotations are from Deazley, but his footnotes have been omitted.

48 Deazley, Ibid, 106 implies this, but he does not explicitly list this as one of his categories of the public domain. However, he does include 'the permitted acts' as part of his summing-up, so he clearly means it to be included: see Deazley, Ibid, 118.

> intervention with that regime at common law (on public policy grounds, or as being in the public interest.[49]

C. A 'traditional' alternative: Dusollier's categories

Before we turn to attempt to categorise what makes up copyright's public domain in Australia, we must first consider an alternative, more conventional, point of view. The most comprehensive recent study of the public domain, by Dusollier,[50] adopts an avowedly 'traditional definition of the public domain':[51] 'The public domain is composed of elements that are by themselves unprotected, whatever the circumstances of their use. That public domain is free to use by nature as it is premised on the absence of an exclusive right therein'.[52]

This definition leads Dusollier to conclude that there are only five components of the public domain, which we summarise (using her terminology) as follows:[53]

(i) *Ontological public domain*: Matters not protected because they are not expressions according to the idea/expression dichotomy ('ideas, facts, style, methods, intrigue, mere information, concepts').

(ii) *Subject matter public domain*: These 'requirements for protection' are (a) originality; (b) fixation; and (c) nationality of the work. Subject matter that does not meet these requirements are part of the public domain.[54]

(iii) *Temporal public domain*: 'These days, all countries abide by the principles of limitation in time', according to the minimum periods provided by Berne or TRIPS. Because these are only minimum periods, the length of protection 'varies greatly from a country to another', and is further complicated by the term comparison rule.[55] Dusollier also notes that some countries provide lesser periods than prescribed by Berne for some specific categories of works.[56]

(iv) *Public policy domain*: Dusollier only admits under this heading the two categories provided for by Berne, namely (a) the mandatory exclusion of news of the day, and (b) the optional exclusion of official texts of a State. However, she notes that '[s]ome other types of exclusions can also be found in some national laws',[57] citing statutory examples from various countries to do with works by authors who die without heirs, works expropriated by the State, and derivative works in which pre-existing copyright works were unlawfully used.

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49 Deazley, Ibid, 118 (citations omitted).

50 S Dusollier, 'Scoping Study on Copyright and Related Rights and the Public Domain', WIPO, 2010, available at <http://www.wipo.int/edocs/mdocs/mdocs/en/cdip_4/cdip_4_3_rev_study_inf_1.pdf>.

51 Ibid, 6-7.

52 Ibid, 21.

53 Ibid, 23-36.

54 Ibid, 26: Of which she says, giving Australia as an example 'Many countries still provide in their laws for exclusion from copyright protection of works based on their nationality, reserving protection to the works created by their nationals or published in their territory, and to works the country of origin of which is a Member State of a Treaty to which they are themselves a party'.

55 Ibid, 27.

56 Ibid, 28, noting 'Brazil for instance confers a short protection of one year for the titles of periodical publications, including newspapers, and two years for annual publications. Costa Rica applies a term of 25 years after publication to works created by public authorities.'

57 Ibid, 31.

Unlike Deazley, she does not include restrictions on copyright on policy grounds which arise from non-statutory sources.

(v) *Voluntary public domain*: Dusollier includes as her fifth category 'relinquishment of copyright', noting that the laws of Chile and Kenya (of the countries studied) provide formal procedures for this in their statutes. She further notes that it may be possible in some other jurisdictions, but that 'the legitimacy and validity of copyright relinquishment raises many questions'.[58]

The reasons put forward by Dusollier for limiting the public domain to these categories are not convincing to us, as will be explained in the following sections.

III. Towards a definition of the copyright public domain

A. Dichotomies and continua: Relationships between public and private domains

Dusollier considers that her 'traditional' definition 'is primarily negative as its realm is the inverse of the scope of copyright protection'.[59] On her approach, there is a dichotomy of works: some works are in the public domain but only if they are old enough or fail to meet the minimum conditions for subsistence of copyright (or her other categories), and all other works are not. Each individual work therefore falls on one or other side of the line in its entirety: it is entirely public domain or private domain.

In contrast, on our approach and by our proposed definition, the relationship between copyright's public domain and private domain is not primarily the dichotomy that Dusollier suggests. Instead we suggest that this relationship needs to be considered at two levels of abstraction, and that the dichotomy between public and private is primarily found at a deeper level than Dusollier suggests, at the level of the exclusive rights which comprise the copyright in the work, not the work itself. On this view, as we will now explain, most works fall on a continuum (or, more accurately, several continua) somewhere between 'purely private domain' and 'purely public domain'[60]. A 'continuum' approach has also been adopted by Samuelson in her more recent work: 'the public domain literature views these concepts not as binary opposites, but rather as points along a continuum'.[61]

Once we adopt a more expanded version of the public domain (Deazley's, ours, or that of many American scholars), all works that fall in the private domain (according to Dusollier's dichotomy) contain both public and proprietary components, at least because all works are subject to some statutory allowed uses[62] but for other reasons as well. The better view is that

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58 Ibid, 34.

59 Dusollier, above n 42, 7.

60 For earlier statements of this 'continuum' approach from 2005, see G Greenleaf, D Vaile and P Chung 'Unlocking IP - National dimensions of public rights and the public domain in Australian copyright' (2005) *Canada-Australia Comparative IP & Cyberlaw Conference*, University of Ottawa, 2005, 11 pgs, section 'Terminology for public rights in copyright', at <http://www.cyberlawcentre.org/unlocking-ip/background.pdf>; and in more detail G Greenleaf 'National and International Dimensions of Copyright's Public Domain (An Australian Case Study)', (2009) 6:2 *SCRIPTed* 259, section '2.1 Avoiding a misleading dichotomy' at <http://www.law.ed.ac.uk/ahrc/script-ed/vol6-2/greenleaf.asp>.

61 P Samuelson, 'Enriching discourse on public domains' (2006) 55 *Duke Law Journal* 783, 785.

62 By which we include categories 8-10, 12 and (for most) 13. We put aside for simplicity's sake the possibility of common law exceptions in categories 7 and 11 above, and those in categories 14-15 which only arise because of choices by copyright owners.

all works (on both sides of the 'old' dichotomy) fall somewhere on a continuum between the extremes of works which are subject to 'private rights only' and those which are subject to 'public rights only'.

At the public rights end of the continuum it is easy enough to envisage public domain works such as the plays of Shakespeare[63] which are now comprised entirely of public rights. The exclusive rights in such works are all now situated at the 'purely public' end of the continuum, if the reader wishes to look at it that way.

We think that the proprietary extreme of the continuum (the work which is not subject to any public rights at all) is empty in theory and for most practical purpose. In Australia, all proprietary works are theoretically at least subject to some minimal 'fair dealing' exceptions in copyright law.[64] Even an unpublished work, which otherwise has an indefinite copyright term[65], is still subject to various statutory rights if a user can obtain a copy of it (eg fair dealing rights, or reproduction rights in relation to unpublished works held in libraries or archives[66]). Perhaps there are some extreme hypothetical cases at the 'purely private' end of the continuum. Technological protection measures do not provide such an example in Australia,[67] but might do so in other countries like the UK.[68] There is also the hypothetical possibility of a published work being completely withdrawn from any circulation,[69] but it would often be uncertain whether some copy of the work might still exist beyond the owner's control. A less hypothetical example is where the contractual relationship under which a work is made available seeks to exclude by contract the exercise of any statutory rights. Leaving aside the question of whether there might be some statutory rights in Australia which cannot be so excluded, such exclusions will only bind those subject to the contract, and if a person obtains a copy of the work without being bound by the contract they will still be able to benefit from the public rights. If any of the 'TPM example', the 'withdrawal example'[70] or the 'contract example' applied, then any public rights would then be merely formal but almost entirely ineffective. However, in Australia, all of these examples depend on factual circumstances in individual cases, and do not constitute any general category of works at the extreme private or proprietary end of the spectrum. They are examples of constraints on the effectiveness of public rights in certain situations.

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63 As examples of works in which copyright has expired by effluxion of time (or by some effective 'gifting' to the public), and in which the only copy is *not* effectively locked in a TPM.

64 See *Copyright Act 1968* (Cth) ss 40, 41, 41A, 42, 43,103A, 103AA, 103B, 103C, 104.

65 See *Copyright Act 1968* (Cth) ss 31(1)(a) and 32(1).

66 *Copyright Act* 1968 (Cth) s51

67 For a work to exist at the purely private end of the spectrum, it would have to be effectively locked within a technological protection measure (TPM) so as to effectively nullify any fair use rights which might otherwise apply (so any (public rights would be merely formal but ineffective). The jurisdiction concerned would also have to have no legislative exceptions under which TPMs could be overridden (for example by public archives), otherwise we would have to say that some minimal public rights still exist. In Australia, all use of TPMs are subject to some statutory exemptions.

68 Deazley notes that the UK's CPDA Regulations 2003, regulation 24 provides that '"where the application of any effective technological measure … prevents a person from carrying out a permitted act in relation to that work" that person can issue a *notice of complaint* to the Secretary of State who has available to him a number of courses of action to remedy the situation': see Deazley, above n 37, 125-126 (emphasis is original). So, the 'TPM example' also does not apply in the UK.

69 The copyright term would then be running and fair dealing exceptions etc apply, but in fact all copies of the work have been completely withdrawn from circulation, it cannot be found in any libraries, and all purchased copies have been bought back.

70 Cf Deazley, who uses two similar examples for different purpose: above n 37, 122.

If we put aside the extreme cases of both the purely public domain work, and the (hypothetical, perhaps illusory) purely private domain work, the normal nature of a work is to be a composite of public and private/proprietary rights, with each work situated at some point along a continuum between the two extremes of purely 'public domain' and purely 'private domain'. If it is useful to think of a dichotomy between public and private rights, it is one which exists within each work, rather than (as Dusollier posits) between works. The Creative Commons slogan 'some rights reserved' recognises this inherent duality in works and builds on it.

However, the description in the previous paragraph is still not precise enough. Most statutory public rights do not apply to a work as a whole, but only to certain exclusive rights of the author. For this purpose, thinking of a work as the 'bundle' of statutorily defined exclusive rights is most useful. For example the exclusive rights that make up a literary work in Australia are at present the rights to publish the work; reproduce it; communicate the work to the public; perform the work in public; and make an adaptation of it (for example, a translation or dramatic version of a literary work).[71] Some statutory public rights apply to all of these exclusive rights – for example, fair dealing for the purpose of parody or satire[72] - but others apply only to the right to reproduce – including section 43C, a statutory public right permitting the reproduction of an existing work in a different format, for private and domestic use. Therefore, to be precise, we would have to plot the public/private rights relationship on as many continua as there are exclusive rights for a particular type of work. For literary works, even seven continua (corresponding to the seven enumerated exclusive rights for such works) might not be quite enough, because some statutory public rights only apply to a particular sub-category of literary works, computer programs.[73]

These continua also change over time for a particular work, most obviously at the points (if any) when it is published, when the law concerning a particular exclusive right changes, when the work becomes subject to a voluntary licence, and when its copyright term expires. We are not suggesting that readers should lose sleep drawing such diagrams, only that the relationships between the public and private domains are as complex as such an exercise would require.

It remains the case that, as Deazley puts it 'the private domain of copyright and copyright's public domain necessarily share the same boundary – that which is not copyright protected is public domain and vice versa'.[74] We have only described this dividing line in a more complex fashion than he does.

This complexity strengthens his conclusion, which we share, that 'the actual limits and extent of that which is copyright protected is no more readily identifiable and subject to complete and coherent articulation than that which is public domain'.[75] Referring to the ever-present uncertainties in the meaning of boundary conditions such as 'substantial' and 'fair', he concludes 'The boundary between the two is, and always will be, inherently unstable and unknowable, but that it is unstable and unknowable does not operate to conceptually discredit

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71 See *Copyright Act 1968* (Cth) ss 10(1) and 31(1)(a).

72 See *Copyright Act 1968* (Cth) s 41A.

73 See *Copyright Act 1968* (Cth) ss 44E, 47B, 47C, 47D, 47E, 47F, 47G.

74 Deazley above n 37, 131.

75 Ibid.

either phenomenon'.[76] Dusollier also stresses the 'shifting boundaries' of each of her five categories.[77]

Choose your metaphor – 'Janus faced', 'Yin and Yang' – the public and private domains of copyright are inseparable and complementary. It is an over-simplification to say that copyright is a zero-sum game – that any increase in proprietary rights diminishes public rights in quantity, and *vice versa* – unless we take a static view of works that exist at any given time. The creation of a new copyright work increases the proprietary domain, does not diminish the existing public domain, but inevitably creates new public rights as well, thus increasing the public domain (in the sense that we use the term). Also, quantity is not the same as value or benefit, which is not necessarily a zero-sum game. Sometimes 'less is more' for copyright owners, in the sense that they benefit from some public rights existing in the work. This is quite obvious from situations where business models are built on copyright owners 'giving away' some or even all of their rights through voluntary licensing (eg some open source software businesses), but as we will argue also applies to the *de facto* benign public domain created by search engines. If Dusollier's traditional approach is adopted, most of these subtleties of the complex interdependencies between the public and proprietary domains are missing.

C. A proposed definition of 'public rights' and the public domain in copyright

We agree with Deazley that in relation to his categories (3)–(8), which represent the expanded notion of the public domain, that 'the touchstone of the public domain is use without permission', and so 'the public domain must also incorporate those aspects or features of copyright protected work that nevertheless do not require permission prior to such use'. This approach obviously has much in common with that of Litman, Lessig, Boyle and others.

However, we take a different view from Deazley as to how broadly we should interpret 'require permission prior to such use', which we explain later in relation to voluntary licensing. While we include all of Deazley's categories in our categorisation, we consider that (at least in relation to Australia) there are other categories of the public domain that his analysis does not capture, or which he rejects, or where his categories combine elements which it is valuable to disentangle. Also, we include the *de facto* public domain in our conception, and a broader version of it than Deazley suggests. We will explain our categorisation in the next section.

We propose to define the 'public domain', in relation to copyright, to be the ability of members of the public (including a significant class of the public, or intermediaries acting for their benefit) to use works, to do so on the same terms including costs (if any) as other members of the public, and where any licence is automatically available and on terms set by a neutral party. More briefly, we can describe the public domain in copyright as 'The public's ability to use works without seeking permission and on equal terms.' The substance of the definition is therefore consistent with those of Deazley, Litman, Lessig, Boyle and others, but it is more precise. It is a definition which is neutral on the question of whether the public domain is comprised of various 'rights', or of something else. The corollary of this definition

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76 Ibid, 131.

77 Dusollier, above n 42, 36.

is that the private or proprietary domain is the ability of the owners of copyright in works to refuse to allow other people to use those works, except on terms set (and changeable) by them.

The significance of some aspects of this definition will only become apparent when we discuss particular proposed categories of Australia's copyright public domain in the next section. For example, the inclusion of 'a significant class of the public, or intermediaries acting for their benefit' is mainly relevant to some statutory licences, and to collective licensing. The exclusion of licences obtained 'on terms set (or changeable) by a copyright owner' distinguishes between certain types of voluntary licences which are included (eg Creative Common licences) and the majority which are not. The requirement that terms and costs be non-discriminatory between those entitled to utilise a licence is particularly relevant to collective licensing. The requirement that any licence terms must be set by a neutral party excludes any licences which have their terms set (or changeable) by a copyright owner (including some open source licences) or other party such as a collecting society. The requirement that any licence be 'automatic' means that the user does not have to seek permission from anyone to avail themselves of the licence.

Such a definition is essentially descriptive, in that it attempts to define what is within Australia's public domain at any given time, rather than what Australia's public domain ought to contain. However, it does have a normative element, in that (if it is successful) then the categories that constitute it in Australia should be congruent with our intuitions about what Australia's public domain ought to contain. Categories which prompt the reaction 'that's not part of the public domain' should not be consistent with the definition. If the definition's description of the public domain is consistent with our intuitions of what the public domain should contain, it is a valuable definition.

B. Other advantages of the proposed definition

In addition to this key point on whether the work as a whole or the exclusive rights within the work should be the focus of a definition of the public domain, there are other reasons to prefer our proposed definition.

> *It is a 'user-centered' definition of the public domain and public rights*: A definition of 'public rights' should capture all the most important uses that members of the public can make of works. This is what is important to users, not whether they are somehow able to make use of all the exclusive rights that comprise the work, but whether they can use the work for the specific use they wish to use it for. We argue that the definition we proposed achieves that. A user-centred approach is a modern way of looking at the public domain.
>
> *The origin of the right should not matter*: It should not matter whether a public right originates in the Copyright Act; or because of an omission from it; or because it is provided in another statute; or because it is provided by the common law. Dusollier excludes statutory exceptions to copyright from the public domain because their 'free use is only circumstantial'. This argument is undercut by her own discussion of the 'temporal public domain', where she demonstrates how it is impossible to know exactly when the term of protection of a work will expire, because subsequent statutory

changes to the term may occur.[78] In fact, she allows that all five categories of her public domain have 'shifting boundaries'.[79]

Universality of rights is not the key question: Most significant public rights now only allow *some* uses of a work. Many of these uses of a work can only be exercised by *some* classes of the public. Dusollier asserts that these are reasons for excluding any such rights from the public domain.[80] Her main argument is that whereas '[t]he public domain is a given in copyright regimes', '[c]opyright exceptions are based on policy decisions and are still to be defined at an international level', and that a prior and 'primary task is to achieve a common definition of basic copyright exceptions'.[81] One problem with this argument is that her own argument shows that the public domain is not a given, but that all its elements are somewhat contingent. It is also not at all clear why, for the purpose of a useful definition of the public domain, a universal agreement on statutory definitions is needed, particularly where it is recognised that public domains are largely nationally–based.

Including 'ability' captures the reality of the public domain: 'Ability' (not only 'right') encompasses both the *de jure* and *de facto* public domain. If a use will not in practice be challenged then under some circumstances it is equivalent to, and may be as important as, a legal right.

The implications of each of these aspects of the proposed definition will become more apparent as we now analyse the different categories of public rights that make up Australia's copyright public domain.

IV. **What can the public do with works?: Categories of public rights in Australia's public domain**

Utilising our proposed definition, the different elements that make up a public domain can best be explained by answering a question: What rights do the public have to use works[82] without asking for permission?[83]

Assuming that the work in question is protected by copyright, this is the same as to ask 'what rights do persons other than the copyright owner have to make use of the work without

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78 Dusollier, above n 42, 26-30.

79 Ibid, 36.

80 Ibid, 10.

81 Ibid.

82 For convenience, we will use 'works' to include all forms of creative expression: not only literary, dramatic, musical and artistic creations, but also those that are audio-visual (films and sound recordings), new published editions of previous works, computer programs and other forms of digital creativity. We also include forms of creative expression less discussed (in copyright literature) such as flower arranging, fashion design, interior decorating, concocting attractive perfumes, and garden design. Any of these matters might be protected under some national copyright laws. However, in using 'works' in this way, we are not implying anything for the moment about protection by copyright law. It is only used to mean 'a form of creative human expression'. 'Creative' is included to draw a rough and ready line between such expressions and the design of a cunning chemical experiment, the intuition being to exclude a mathematical formula and other activities which might be called 'expression' but which are not so readily labeled 'creative'.

83 This is similar to Deazley's starting point for expanding the public domain: 'The question now is: which aspects of a copyright protected work is any individual free to use without having to ask the copyright owner for permission?' See Deazley, above n 37, 112. But we are not restricting the question to copyright protected works. He had considered works not protected by copyright before asking the question.

requesting permission from the copyright owner?' But we also have to ask which works are not protected by copyright at all, where there is no need to consider the rights of owners (only putative owners in contested cases).

We do not advance a universal set of categories. The public domain has a territorial basis because copyright has a territorial basis,[84] even though some elements of the public domain may be near universal, and some national public domains may have effects on other national public domains (matters beyond the scope of this article). We only suggest a set of categories that we consider necessary and sufficient to explain Australia's copyright public domain.

We distinguish fifteen categories of the public's ability to use works without permission, or, to put it another way, fifteen categories of the public domain. These categories are presented so that the first seven encompass the position where a work as a whole is not protected by copyright law at all (ie in relation to any uses by any persons), whereas the rest concern works currently protected by copyright. Categories 9–11 are uses outside the exclusive rights of the copyright owner, whereas categories 8, and 12–13 are uses within the owner's exclusive rights but which the law allows to the public or classes of the public under certain conditions. Category 14 is where the copyright owner, not the law, voluntarily puts certain uses of her works beyond her continuing control. Category 15 is where, by forbearance rather than positive licensing, copyright owners do something similar.

In making a categorisation of public rights that comprise a public domain, it is difficult to escape the influence of the particular copyright regime(s) of greatest familiarity. Our categories are primarily influenced by Australian copyright law, as Deazley's are by that of the UK, and those by Samuelson and many other authors are by US copyright law. However, we have attempted to reflect some elements of the public domain that are more visible in other public domains than that of Australia's copyright law. As a result we have included some categories for which it is uncertain whether there is any content in Australian copyright law (categories 6 and 8 following, and category 3, for which there is no content).

The categories are therefore briefly described as follows:

1. Works failing minimum requirements
2. Works impliedly excluded
3. Works expressly excluded
4. Constitutional exclusions
5. Copyright has expired
6. 'Public domain dedications'

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84 Dusollier, above n 42, 22 explains this as follows: 'The status of an intellectual resource depends on the law applicable thereto. The Berne Convention, like many national laws or case law providing for a rule determining the applicable law in copyright, provides that the enjoyment and exercise of copyright "shall be independent of the existence of protection in the country of origin of the work" and that "the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the *laws of the country where protection is claimed*" (article 5(2) of the Berne Convention). Where there is subject matter for the application of the Berne Convention, the law applicable to the existence of copyright is the *lex protectionis*. This rule of applicable law, that is inherent to the fundamental principle of territoriality in copyright, also applies to the duration of copyright protection, with some qualifications that will be addressed below. The only exception concerns expressions of folklore, by virtue of article 15(4)(a) of the Berne Convention.
As a consequence, the status of a copyrighted work shall vary according to the laws of the country in which protection is sought. A work can still be protected by copyright in one country but be considered as belonging to the public domain in another, based on the different rules applicable to copyright protection or duration'. (emphasis in original, footnote omitted).

7. Public policy refusals
8. Public interest exceptions
9. Insubstantial parts
10. Mere facts, ideas etc
11. Uses outside exclusive rights
12. Statutory exceptions
13. Neutral collective licensing
14. Neutral voluntary licensing
15. De facto public domain of benign uses

Our present purpose is only to explain these categories at a conceptual level, justifying them against the proposed definition, and in terms of the positive contributions they make to the idea of the public domain. We will do this with brief references to where they fit in Australian copyright law, but without the detailed discussion of Australian law that a full explanation would require.

1 Works which fail to meet minimum requirements for protection

Works that fail to meet the standard of originality required by statute but determined by the courts will not have any copyright protection.[85] In Australia the standard of originality required is minimal, requiring little more than that the work originate from a person, although a series of recent decisions of both the High Court[86] and Federal Courts of Australia[87] have overturned the limited, quasi-'sweat of the brow' doctrine approved by the Full Federal Court in *Desktop Marketing Systems v Telstra.*[88] Works that have not been reduced to a material form ('fixation') are also not protected, although the definition of 'material form' is very liberal.[89] Following the *Fairfax Media Publications v Reed International Book Australia*[90] decision, it also appears that works must need a 'de minimus' requirement in order to be protected; in that case, individual newspapers headlines were found not to be literary works for the purpose of copyright protection.[91] Australia also places restrictions on the protection of works by nationals of countries which are not party to copyright treaties, but the number of these is diminishing. Few works therefore fail to meet these conditions, and they do not significantly expand Australia's public domain.

As is often the case, it is important to notice what is absent, not only what is present, to gain understanding. As with all countries which are parties to the Berne Convention, in Australia no formalities, such as registration requirements[92] can be required for copyright to arise.[93]

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85 Pursuant to section 32(1) of the *Copyright Act 1968* (Cth), copyright subsists in 'original literary, dramatic, musical or artistic work[s]'. The requirement of originality was introduced into Australian law pursuant to section 1(1) of the *Copyright Act 1911* (Imp), adopted in its entirety in Australia pursuant to Schedule 1 of the *Copyright Act 1912* (Cth).

86 *IceTV Pty Ltd v Nine Network Australia Pty Ltd* [2009] HCA 14.

87 *Telstra Corporation Limited v Phone Directories Company Pty Ltd* [2010] FCA 44, affirmed on appeal to the Full Court of the Federal Court of Australia in *Telstra Corporation Limited v Phone Directories Company Pty Ltd* [2010] FCAFC 149.

88 (2002) 119 FCR 491; see also *Kalamazoo (Aust) Pty Ltd v Compact Business Systems Pty Ltd* (1985) 5 IPR 213.

89 'Material form' is defined in section 10 of the *Copyright Act 1968* (Cth) as 'in relation to a work or an adaptation of a work, includes any form (whether visible or not) of storage of the work or adaptation, or a substantial part of the work or adaptation, (whether or not the work or adaptation, or a substantial part of the work or adaptation, can be reproduced).'

90 [2010] FCA 984.

91 [2010] FCA 984, [28] – [50].

92 *Berne Convention for the Protection of Literary and Artistic Works,* Art 5(2).

The absence of any requirement of registration is perhaps the single most significant factor determining the size of a copyright public domain, because it ensures that the default status of works at the point of creation that they will be part of the proprietary domain rather than entirely in the public domain.

2 Categories of works impliedly excluded from copyright (statutory 'gaps')

The Berne Convention provides an inclusive definition of 'literary and artistic works'[94] as the basis for protection by State parties, and provides that '[t]he works mentioned in this Article shall enjoy protection in all countries of the Union'.[95] However, the practice of states varies, with some countries' laws containing a broad statement of the categories protected, followed by a list of examples (a non-exhaustive list), such as in France and Germany.[96]

In other countries such as the UK and many Commonwealth countries[97] (including Australia) there is instead an exclusive list of the only items of subject matter capable of protection. There could be, as in other jurisdictions, an all-encompassing definition through formulations such as 'all forms of original expressions reduced to material form', but there is not. In Australian, therefore, there is no over-arching (inclusive) definition of the subject-matter that will be protected under that legislation, only an exclusive list of eight categories.[98] The Act then defines some of the categories of subject matter, by either inclusive or exclusive definitions, and the courts continue the task of definition.[99] As a result, there is always the likelihood of gaps, where some forms of expression do not fit into any of the defined protected categories. The likelihood of such 'statutory gaps', where protection falls short of the full scope of the protection ostensibly required by Berne, is perhaps greater where exclusive definitions have been used (such as in Australia). The larger the gaps (whether settled by litigation, or only potential), the larger the public domain (actual or potential). We refer to these as 'implied' statutory exclusions for want of a better term.

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93 Registration was never a requirement for copyright protection in Australia, although previous statutes required registration before a copyright owner could either sue for infringement of avail themselves of certain remedies once infringement was established. This model ended with the introduction of the *Copyright Act 1968* (Cth): .See *Copyright Act 1869* (Vic) 33 Vict no 350, s 28; *Copyright Act 1878* (SA) 41 & 42 Vict no 95, s 27; *Copyright Act 1879* (NSW) 42 Vict no 20, s 17; *Copyright Act 1890* (Vic) 54 Vict no 1076, s 29; *Copyright Act 1895* (WA) 59 Vict no 24, s 13; *Copyright Act 1905* (Cth) s 74; *Copyright Act 1912* (Cth) ss 15, 16, 17.

94 Berne Convention, Article 2(1) 'The expression "literary and artistic works" shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science.'

95 Berne Convention, Article 2(6).

96 JAL Sterling *World Copyright Law*, 3rd edition, Sweet & Maxwell, London, 2008, [6.01].

97 Ibid.

98 Namely, literary, dramatic, musical and artistic works, plus sound recordings, cinematograph films, television and sound broadcasts, and published editions of work.

99 See *Copyright Act 1968* (Cth) s 32(1) (subsistence of copyright in original literary, dramatic, musical and artistic works); s 89 (subsistence of copyright in sound recordings); s 90 (subsistence of copyright in cinematograph films); s 91 (subsistence of copyright in sound and television broadcasts); s 92 (subsistence of copyright in published editions).

A different type of 'gap' between public domains occurs where a copyright law protects broader categories of subject matter than the Berne Convention requires.[100] In this case the additional protection reduces the scope of the public domain in that country.

Some examples of what may be protected in some jurisdictions but not in others (such as Australia) are a flower arrangement, or a garden design (which has not previously been reduced to a design drawing which would be an artistic work), or the smell of a perfume (as in some European jurisdictions).[101] In some countries non-original photographs are protected, the UK protects computer-generated works, Brazil protects sporting events, and Dutch law protects 'all other writings'.[102] Not all countries would protect videogames as cinematograph films, as Australia[103] and Japan do. In France, fashion garments are protected as such, irrespective of the existence of drawings as artistic works, and without need of a category like 'works of artistic craftsmanship'.

Deazley does not include this category in his public domain, but Samuelson seems to do so in her category 4 'Privatizable information resources', although she draws her examples from expansion of patent, *sui generis* (semiconductor chip) and passing off laws.[104]

One of the most significant features of the historical growth of copyright law is how the categories of protected subject matter have expanded over time (for the most part), usually accompanied by expansion of the scope of existing categories through both statutory and judicial intervention. Nevertheless, it is fundamental that copyright never has and still does not protect all forms of original creative expressions reduced to material form, and so there are (at least in theory) forms of expression, or categories of works (in the above non-technical usage) which are not protected by copyright at all, and are therefore part of the public domain, free for others to copy and use.

3 Categories of works expressly excluded from copyright

In many countries the nation's court decisions, legislation and various types of official documents are excluded from copyright protection,[105] with the USA's exclusion from copyright of works by its federal government employees being one of the most expansive and important examples.[106] In Australia the current *Copyright Act* does not exclude from copyright protection any categories of works[107], including legislation or case law,[108] although statutory provisions exempting categories of works from protection are historically not

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[100] The 'official texts' exclusion, discussed below, is one example. The Berne Convention also fails to explicitly name computer programs as deserving of protection, for example, but these are protected under both copyright law (and patent law) in many jurisdictions: see *Berne Convention for the Protection of Literary and Artistic Works Art 2(1)* and *Copyright Act 1968* (Cth) s 10(1).

[101] See Sterling, above n 87, [6.06], for the French and Dutch decisions concerning perfumes.

[102] These and the following examples are from Sterling, above n _, [6.06]-[6.22].

[103] See generally *Galaxy Electronics Pty Lt v Sega Enterprises Ltd* (1997) 75 FCR 8.

[104] Samuelson, above n 15, 795-798.

[105] See *Berne Convention for the Protection of Literary and Artistic Works,* Art 2(4), which provides that 'It shall be a matter for legislation in the countries of the Union to determine the protection to be granted to official texts of a legislative, administrative and legal nature, and to official translations of such texts'.

[106] See *Copyright Act 1976* (US) 17 USC § 105, which provides that 'Copyright protection under this title is not available for any work of the United States Government'.

[107] Its treatment of therapeutic goods may approach an exclusion, but is limited to certain uses.

[108] Part VII Division 1 of the *Copyright Act 1968* (Cth) expressly provides for the subsistence of copyright in works and other subject matter produced by the Crown, although such creations may also be protected under the general copyright provisions, or alternatively the Crown prerogative: see *Copyright Act 1968* (Cth) s 8A.

foreign to Australian law.[109] The relevant UK copyright legislation also fails to positively exclude any items from protection, which may be why Deazley does not include this as one of his (UK) public domain categories. The UK and Australia are exceptional, part of the UK-influenced rump of countries that have no such exclusions for court decisions and legislation. However, we think it is important to include in a description of the public domain elements that are included in the majority of the world's copyright regimes, even if they are missing from our own, so we have this as a category significant in Australia only for its current absence.

Australia does not also explicitly exclude 'news of the day' from protection, leaving this to the interpretation of the idea/expression dichotomy by the courts, as is done in other countries.[110]

Some countries may, despite Berne, explicitly exclude some other categories of works from protection that Berne implies should be protected.[111]

4 Constitutional restrictions on the scope of copyright protection

Some national constitutions, by the way in which they define the constitutional power under which copyright and other intellectual property laws can be enacted, or the limits they impose on infringements upon freedom of speech, impose limits on the statutory protection that is possible. *Eldred v Ashcroft*[112] and subsequent decisions[113] demonstrate the relevance of constitutional questions to the shape of the USA's public domain, and Samuelson's category 3 is 'The constitutionally protected public domain'.[114] Because the UK has an unwritten constitution and parliamentary sovereignty, this may not have appeared to Deazley as relevant to the UK. However, following the coming into force of the Lisbon Treaty and the obligation of European bodies to take fundamental rights into consideration, constitutional issues at the EU level could make such discussion relevant to the public domain, at least

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[109] See, eg, section 6 of the *Copyright Act 1905* (Cth), which stated that 'No copyright, performing right or lecturing right shall subsist under this Act in any blasphemous, indecent, seditious, or libellous work or matter'; see also C Bond, '"There's nothing worse than a muddle in all the world": Copyright complexity and law reform in Australia' (2011) 34(3)/17(2) *University of New South Wales Law Journal* 1145-1162.

[110] Cf Dusollier, above n 42, 32; see also *Berne Convention for the Protection of Literary and Artistic Works*, Art 2(8). During the 19th century some colonies actually provided protection for news of the day, where conveyed by telegram: see K Bowrey and C Bond, 'Copyright and the Fourth Estate: Does copyright support a sustainable and reliable public domain of news?' (2009) 4 *Intellectual Property Quarterly* 399 – 427; L Bently, 'Copyright and the Victorian Internet: Telegraphic Property Laws in Colonial Australia' (2004/2005) 38 *Loyola of Los Angeles Law Review* 71.

[111] Australia itself may fall into this category. There is continued controversy over whether Australia is in breach of Art 2(1) of the Berne Convention in relation to the requirement of protection for 'cinematographic works to which are assimilated works expressed by a process analogous to cinematography'. While the *Copyright Act 1968* (Cth) provides protection for 'cinematograph films' and 'dramatic works' (see ss 90 and 32 respectively), it has been argued that Australia is in breach of Berne by not protecting the rights of authors of 'cinematograph works' as a Part III work. The current definition of a dramatic work appears to exclude the possibility a film could also be a 'work': see s 10(1). See generally M Handler, 'Continuing Problems with Film Copyright' in F Macmillan, *New Directions in Copyright Law* (Vol 6, 2007) 173, 192-194. In a similar vein, the United States arguably only complied with the moral rights provisions of the Berne Convention to a certain extent, given that only the moral rights of visual artists are protected under the *Copyright Act 1976*: see 17 U.S.C §106A.

[112] 537 US 186 (2003).

[113] See *Golan v Holder* 565 U.S. (2012), the most recent United States Supreme Court case on this issue, in addition to *Kahle v Gonzales* 487 F.3d 697 (Cal, 2007), *Golan v. Gonzales* 501 F.3d 1179 (Colo, 2007), *Golan v. Holder* 609 F.3d 1076 (Colo, 2010).

[114] Samuelson above n 15, 792-794.

where legislation attempts to reduce existing rights under copyright law and thus expand the public domain.[115]

In those countries where the State's obligations under a treaty it has entered into become part of its domestic law without the need for domestic implementation legislation, it is possible that various types of human rights treaties could create rights which reduce the scope of copyright.[116] This is not the case in Australia, and any public rights originating in human rights treaty obligations would be implemented in Australia as statutory obligations. We have therefore not included 'Restrictions on the scope of copyright arising from treaty obligations' as a separate category of public right in this article, but the position might be different in relation to another country's copyright public domain.

In Australia, the only significant constitutional limitations on copyright are likely to be those arising from the implied right of free speech in relation to political matters and section 51(xxxi) of the Constitution, and regarding the acquisition of property on just terms, although there are some other limited possibilities, not fully tested.[117] The interpretation of the 'IP power' in Australia's Constitution was also considered in the context of a case on the legality of a 'blank tape levy' as part of copyright law, though the levy was ultimately decided to be invalid on the basis it comprised a tax.[118]

5 Works where copyright has expired

The narrowest, traditional, meaning of the term 'public domain' refers to works in which copyright has expired due to effluxion of time. Australia has adopted the same approach as the European Union and the United States, as a result of the *Australia-United States Free Trade Agreement 2004*, with a base rule of 'life of the author plus 70 years' applying to all published works protected by copyright at the time it came into effect, and all works to be created in future.[119] However, in contrast to the first of these copyright term extensions, in the European Union, the Australian legislation does not provide that this rule applies retrospectively to works where copyright had otherwise expired before the term extension provision ('life of the author plus 70 years') came into effect. Thus the new base rule contracted the public domain, but not to the extent that it would have if it applied retrospectively.[120]

Unlike Europe, there are no special rules granting a term of copyright for first publication of a work that had already entered the public domain,[121] so Australia's public domain is not diminished in that way[122].

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[115] As discussed in J Griffiths and L McDonagh 'Fundamental rights and European IP law– The case of Art 17(2) of the EU Charter', available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1904507>.

[116] See L Helfer and G Austin, *Human Rights and Intellectual Property*, Cambridge University Press, Cambridge, 2011, for a comprehensive analysis.

[117] See C Bond's PhD thesis for a full discussion of these possibilities: Bond (2010), above n 1; see also C Bond, 'Constitutional aspects of Australia's public domain' (2009) 27 *Copyright Reporter* 4 – 11.

[118] *Australian Tape Manufacturers Association Ltd v Commonwealth* (1993) 176 CLR 480.

[119] See *Copyright Act 1968* (Cth) s 33. Shorter, non-post mortem periods apply for the protection of sound recordings, television and sound broadcasts, cinematograph films and published editions: see *Copyright Act 1968* (Cth) ss 93, 94, 95, 96.

[120] See M Rimmer, 'Facing the music: the restoration of copyright', *incite*, May 2004, <http://archive.alia.org.au/incite/2004/05/free.trade.html>.

[121] Cf Dusollier, above n _, 28: ''The EU term directive of 1993 grants a copyright protection of 25 years after publication or public communication to the publisher of a public domain work which was previously unpublished', referring to article 4 of the EU Copyright Term Directive.

A significant factor diminishing Australia's public domain is that copyright in unpublished works will never cease by effluxion of time.[123] Unpublished works will therefore not enter the Australian public domain at any time. This also applies to government works.[124] In the USA, some unpublished works enter the public domain after 70 years, and Samuelson makes this a separate category 12 'The unpublished public domain'.[125]

6 'Public domain dedications': A contested category

Some commentators argue that works can also enter the public domain through a formal and intentional forfeiture of copyright, sometimes called a 'public domain dedication' or 'abandonment of copyright'.[126] There are statutory provisions in some countries providing for such relinquishment, including in Chile and Kenya[127] and in India.[128] In the United States, although there is no statutory provision allowing dedication of a work to the public domain, there is a judicially-developed doctrine permitting this type of action.[129] There is no statutory procedure for the relinquishing of copyright in Australia, and the position is also uncertain at common law, and further complicated by moral rights provisions.[130] In the UK, Johnson argues that copyright in works cannot be abandoned,[131] but Sterling considers the position unsettled.[132] Deazley would probably not include this as part of the legal public domain.[133]

7 Works which the courts refuse to protect on the grounds of public policy

There is a long history of English courts taking the view that the content of a work was objectionable to the extent that it was against public policy to allow copyright to be enforced. This, in effect placed these works in the public domain such that anyone was free to copy or publish or publish this content, but of course subject to such other laws as they may breach

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122 Compare the concept in some old European laws of 'paying public domain' ('domain public payant') in which a fee was payable for use after the copyright term had expired, rather like a compulsory licence fee covering any third party use. See further UNESCO 'Domain Public Payant', 1949, at <http://unesdoc.unesco.org/images/0014/001439/143960eb.pdf>, which noted that at that time the laws of only five countries (Uruguay, Bulgaria, Italy, Rumania and Yugoslavia) included such a concept. Thanks to Sam Ricketson for pointing out this comparison.

123 *Copyright Act 1968* (Cth) s 33(3).

124 For a detailed discussion and recommendations for change in relation to public sector information, see G Greenleaf and C Bond 'Reuse rights and Australia's unfinished PSI revolution' *Informatica e diritto- Rivista internazionale,* Vol. 1, No. 2, pp. 341-69, 2011 available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1951625>

125 Samuelson, above n 15, 809-811.

126 See Deazley, above n 37, 107 fn 26;

127 Mentioned by Dusollier in relation to her 'voluntary public domain'.

128 Sterling, above n 87 [12.16]: Indian *Copyright Act 1957*, s 21.

129 L P Loren, 'Building A Reliable Semicommons of Creative Works: Enforcement of Creative Commons Licenses and Limited Abandonment of Copyright' (2007) 14 *George Mason Law Review* 271, 319. The doctrine itself emanates from *National Comics Publications Inc v Fawcett Publications Inc* 191 F2d 594 (2d Circuit, 1952); see also Sterling, above n 87, [12.16].

130 The three moral rights provided by the *Copyright Act 1968* (Cth) in Australia – the right of attribution, the right against false attribution, and the right of integrity – cannot be waived by the author, although a breach of moral rights can be consented to in *limited* circumstances: see *Copyright Act 1968* (Cth) s 195AW.

131 P Johnson, '"Dedicating" Copyright to the Public Domain' (2008) 71 *Modern Law Review* 587. Johnson suggests that UK law would not appear to support attempts to 'divest ownership' of a work and such dedications may simply amount to licences that can ultimately be revoked.

132 Sterling op cit [12.16] considers 'the point has not been definitely settled'

133 He includes works where owners 'dedicate their work to the public' as part of his 'de facto public domain' (see Deazley above n 37, 107 fn 26). He may not have included it in his list for this reason.

by so doing. The cases start with *Burnet v Chetwood*,[134] where not long after the Statute of Anne, there was an injunction given against publication of a book containing 'strange notions'.[135] At the beginning of the 20th century Younger J reconfirmed the existence of this doctrine in *Glyn v Weston Feature Film Company*,[136] stating that 'copyright cannot exist in a work of a tendency so grossly immoral as this'[137] (the work in question was the novel *Three Weeks*, penned by risqué author Elinor Glyn). There is subsequently a line of cases up to the present day where claimants have been refused relief because their work is 'obscene or sexually immoral, defamatory, blasphemous or irreligious.'[138]

As noted briefly above, in Australia, section 6 of the *Copyright Act 1905* explicitly excluded such 'blasphemous, indecent, seditious, or libellous work or matter' from protection and, although this proviso was removed with the enactment of the *Copyright Act 1912* (Cth) in the 1917 High Court of Australia decision in *Sands & McDougall Pty Ltd v Robinson*[139] Isaacs J hinted in *obiter* at the continued existence of the doctrine, stating that '[a]ll literary works are protected if "original." That is the only condition - apart, of course, from certain disentitling considerations, as immorality and other disqualifications implicitly recognized by the law.'[140] In the most recent case to consider this issue, *Venus Adult Shops Pty Ltd v Fraserside Holdings Ltd*,[141] Finkelstein J stated that 'I do not accept that there is no copyright in a pornographic work. There is no such exception in the Copyright Act. In my opinion the court does not have the power to create the exception.'[142] Thus today, although there are no conclusive Australian authorities, cases have suggested that Australian courts may consider refuse certain types of damages on that basis, though will generally act in providing discretionary relief, for example, an injunction.[143]

8 Public interest uses allowed at common law (normally exclusive rights)

In the United Kingdom, as Deazley explains, 'the notion that the courts can authorise the use of a work which would otherwise amount to copyright infringement (so long as that use can be considered to be in the public domain)' had a 'tentative' foundation in *Lion Laboratories v Evans*[144] but has 'received a more substantive and coherent rationale with the coming into force of *Human Rights Act 1998* and the decision of the Court of Appeal in *Ashdown v Telegraph Group*[145]'.[146]

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134 (1721) 2 Mer 441.

135 Discussed by Deazley, above n_ 115–116; see also D Saunders, 'Copyright, Obscenity and Literary History' (1990) 57(2) *ELH* 431.

136 [1916] 1 Ch 261 and *Venus Adult Shops Pty Ltd v Fraserside Holdings Ltd* [2006] FCAFC 188, [78].

137 [1916] 1 Ch 261, 269-270.

138 Deazley, above n 37, 116.

139 (1917) 23 CLR 49.

140 (1917) 23 CLR 49, 57.

141 [2006] FCAFC 188.

142 [2006] FCAFC 188, [17].

143 *Acohs Pty Ltd v R.A. Bashford Consulting Pty Ltd & Ors* [1997] FCA 352; *A-One Accessory Imports Pty Ltd v. Off Road Imports Pty Ltd (No 2)* (1996) 34 IPR 332 at 334 per Drummond J; *Venus Adult Shops Pty Ltd v Fraserside Holdings Ltd* [2006] FCAFC 188.

144 [1985] QB 526.

145 [2002] Ch 149.

146 Deazley, above n 37, 116.

In Australia there is no equivalent to the *Human Rights Act*, and the judicial support for a public interest exemption from copyright is much more flimsy. In *Commonwealth v John Fairfax & Sons Ltd*,[147] a 1980 decision of a single-sitting justice of the High Court, Mason J considered the existence of a public interest defence to copyright infringement, in the context of the unauthorized reproduction of Crown copyright-protected documents. His Honour stated that '[a]lthough copyright is regulated by statute, public interest may also be a defence to infringement of copyright. … It makes legitimate the publication of confidential information or material in which copyright subsists so as to protect the community from destruction, damage or harm'.[148] However, in the subsequent decision of *Collier Constructions Pty Ltd v Foskett Pty Ltd*[149] Gummow J rejected this argument, finding that 'in my view, there is no legislative or other warrant for the introduction of such a concept into the law of this country'.[150] Comments made by His Honour regarding what we term 'public rights' are directly relevant to the present discussion:

> Divisions 3, 4, 5, 5A, 5B, 6 and 7 of Pt III of the Copyright Act 1968 (Cth) contain very detailed provisions specifying a range of activities which do not constitute infringement of copyright in various works. The provisions dealing with fair dealing are, of course, well known and have a legislative history beginning with s 2 of the 1911 Act ... Further, in Australia, the Copyright Act, since it came into force in 1969, has been amended substantially from time to time to provide for particular regimes where copying will be permitted. I refer in particular to the provisions relating to the copying of works in educational institutions, and in institutions assisting handicapped readers ... It would be an odd result if this complex of provisions, reflecting an accommodation by the legislature of a range of competing interests, were overlaid with some defence springing from the general law and defined with none of the precision apparent in the legislation.[151]

The full bench of the High Court of Australia is yet to consider this issue, and, as above with respect to express exclusions from protection, we include it in our definition of the public domain. The position is, however, unsettled under Australian law.

9–11 Uses outside the exclusive rights of the copyright owner

When members of the public make any of the uses of work which are outside the copyright owner's exclusive rights, they are using the work but not in breach of copyright. These public rights include three distinct categories of the public domain: (8) uses that fall short of using a substantial part of the work; (9) use of mere facts, information or ideas derived from a work; and (10) any uses of the work which do not fall within the statutorily defined exclusive rights of the copyright owner.

(9) *Substantial part*: In Australia, there is a general requirement that a 'substantial part' of a work must be used before there is infringement. Little can be copied without infringement: 'substantial part' can mean something close to 'insubstantial',[152] and this provides little scope for public rights. This is a different aspect of the public domain than category 1 (failure to meet the minimum requirements for a work) because it relates to uses of otherwise copyright works. Deazley includes it but Samuelson does not mention it.

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147 (1980) 147 CLR 39.
148 (1980) 147 CLR 39, 57.
149 (1990) 19 IPR 44.
150 (1990) 19 IPR 44, 57.
151 (1990) 19 IPR 44, 55.
152 See *IceTV Pty Ltd v Nine Network Australia Pty Ltd* [2009] HCA 14, [157].

(10) ***Mere facts etc*****:** As a general principle, uses of mere facts, information or ideas derived from a work are outside the scope of the exclusive rights of the copyright owner, and therefore remain part of the public domain. For example, in *Commonwealth v John Fairfax*, discussed above, Mason J noted that 'Copyright is infringed by copying or reproducing the document; it is not infringed by publishing information or ideas contained in the document so long as the publication does not reproduce the form of the literary work'.[153] However, the boundaries between each of these public domain categories and protected expressions is always contentious. In Australia the most important area where this is contested is in the extent to which compilations of works are protected, and whether that has the effect of providing protection to facts and information compiled into databases and the like. Such a distinction was highlighted in the most recent High Court jurisprudence on this issue, *IceTV Pty Ltd v Nine Network Australia Pty Ltd*,[154] where French CJ, Crennan and Kiefel JJ noted that '[s]ome compilations are no more than a selection or arrangement of facts or information already in the public domain.'[155] Both Deazley and Samuelson include it.

(11) ***Uses outside (not listed in) the exclusive rights*****:** Anyone can make use of a work in ways that do not fall within the statutorily defined exclusive rights of the copyright owner. This is in part another question of 'gaps'; the identification of uses of works that do not quite fit within any of the exclusive rights, though we might expect they would. But it also covers other uses of works which we do not expect copyright should cover, such as the right to read a work without any conditions (eg disclosure of identity of the reader), the right to lend our copy of a work to a friend, or the right to sell our copy of a work on the second-hand market once we are finished with it. In various countries these matters might be discussed under doctrines of 'first sale' or 'exhaustion of rights', but for our purposes they are uses of works which we do not expect copyright owners to have exclusive rights over (at least not by virtue of copyright law). These matters require an answer to the questions of what possible uses could be made of a work that are not covered by the statutorily defined exclusive rights for each type of work. As a practical matter, there is then the question whether any of these non-exclusive possible uses are useful or valuable. These exclusive rights differ between works, and they differ between countries, so this is a complex question that must be answered separately for each jurisdiction.

The most obvious and important examples of valuable uses outside the exclusive rights of the owner are that the copyright owner has traditionally not been able to use copyright law to restrict works being read or viewed, at least in relation to non-public uses of legitimate copies. Another example is the 'public' limitation on the performance and communication rights, which leave private performances and communications as acts beyond the exclusive rights of the copyright owner, and therefore as part of this aspect of the public domain. These traditional 'privacy-respecting' aspects of copyright are, paradoxically, part of its public domain.[156]

In addition, it was not within the exclusive rights of copyright owners to prevent works being lent (privately or through libraries), hired, or sold second-hand (privately or through dealers).

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153 (1980) 147 CLR 39, 58.

154 [2009] HCA 14.

155 [2009] HCA 14, [31].

156 For a discussion of these 'traditional' privacy aspects of copyright, see G Greenleaf, 'IP, Phone Home: Privacy as Part of Copyright's Digital Commons in Hong Kong and Australian Law' in L Lessig (ed) *Hochelaga Lectures 2002: The Innovation Commons* (Hong Kong: Sweet & Maxwell Asia, 2003).

However, in Australia some forms of hiring have been included in recent years in the exclusive rights, and have therefore been removed from the public domain,[157] but this has not gone as far as it has in the UK. In the UK the exclusive rights of the copyright owner now include the right 'to rent or lend the work to the public',[158] subject to exceptions for public libraries in relation to some classes of works only (for example, books but not sound recordings or films). The TRIPS Agreement, the WIPO Conventions and the EC Rental/Lending and Related Rights Directive, have all introduced new exclusive rights.[159]

Dusollier excludes these uses of works ['acts of mere reading, viewing, listening or enjoying a work'] from her definition of the public domain because 'the centre of attention for copyright is the *exploitation* of a work, where *exploitation* is defined as public diffusion. Copyright has never been about regulating *access* to or *use* of works.'[160] Libraries for which users had to pay a fee per book that was borrowed, or an annual subscription, had a very important place in the spread of literacy in the UK and Australia, and probably still do in some countries. They were based on the fact that the lending of books was beyond the exclusive rights of the copyright owner. But now the renting of some types of works is within the exclusive rights of the copyright owner. Why is this now 'diffusion' rather than 'access to or use of works'? This example shows both that Dusollier's distinction is not as clear as she suggests, and further that any of the customary limits on the scope of the exclusive rights can be changed by statute.

Furthermore, even the traditional accompanying conditions of reading a work or listening to it, such as the ability to do so free from surveillance, can now be removed both by laws and by practices of online surveillance (supported by TPM laws and by contractual means) which were not before possible. A definition of the public domain should be broad enough so that such fundamental interferences with the public's ability to use works are at least within its scope. So, in our view, uses of a work outside the exclusive rights of the copyright owner must be included in the concept of the public domain.

12 Free uses allowed by statute (exceptions to normal exclusive rights)

Most copyright laws include various statutory rights that are given to members of the public to use works in different ways that would otherwise be part of the exclusive rights of the copyright owner. Some such uses are free, requiring no payment, whereas others (discussed next) require payment for use. In the Australian legislation, the free use exceptions are numerous, including the narrowly-defined 'fair dealing' exceptions (similar to and derived from the UK) and numerous other precisely defined exceptions that continue to expand (such as recent exceptions for audio-visual 'format shifting' and 'time shifting').[161] In contrast,

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[157] See *Copyright Act 1968* (Cth) ss 31(1)(c) (copyright includes the exclusive right, 'in the case of a literary work (other than a computer program) or a musical or dramatic work, to enter into a commercial rental arrangement in respect of the work reproduced in a sound recording'); 31(1)(d) (copyright includes the exclusive right, 'in the case of a computer program, to enter into a commercial rental arrangement in respect of the program.')

[158] Section 18A; see Sterling, above n 87, [9.40].

[159] Sterling, above n 87, [9.08].

[160] Dusollier, above n 42, 8.

[161] See *Copyright Act 1968* (Cth) ss 40 (fair dealing for the purpose of research or study), 41 (fair dealing for the purpose of criticism or review), 41A (fair dealing for the purpose of parody or satire), 42 (fair dealing for the reporting of news), 43C (format shifting of works to another format for private and domestic use), 103A (fair dealing for the purpose of criticism or review), 103AA (fair dealing for the purpose of parody or satire), 103B (fair dealing for the purpose of the

some countries have a broadly defined free use exception, such as 'fair use' like the USA, where the scope of the exception is substantially left to judicial interpretation. The Australian free use exceptions which can be utilised by any member of the public are numerous.[162]

This is the public rights category that is likely to differ most in its content between jurisdictions, and often to be a source of expansion of the public domain. For example, Australia's statutory exceptions have expanded considerably in recent years in such areas as parody and satire, and time and format shifting. Canada's permission-free statutory exceptions have in 2012 expanded to include two rights beyond those available in Australia, the non-commercial user-generated-content (UGC) exception and the 'Internet publicly available material' exception for education[163].

Some of these free use exceptions are not able to be utilised by all members of the public, because only certain occupational classes can make use of the exception. Some examples in Australia include exceptions for educational uses available only to teachers and/or students;[164] some uses by galleries, libraries, archives or museums (the 'GLAM' sector), including for reproduction of material in collections;[165] and entertainment in premises where persons reside or sleep.[166] These exceptions create a closed commons[167] for the benefit of certain classes of users. We do not see this as detracting from their being part of the public domain, because whether a person comes within that class is not subject to the control of the copyright owner.

13 'Collective licences': Paid uses allowed by statute (normally exclusive rights)

'Collective licences' (not a term used in the Act)[168] are the only part of the public domain where the uses allowed by statute are intended to result in revenue flowing to the copyright owner. For this reason alone, they need separate consideration as a category of the public domain. As discussed above, Lawrence Lessig considered that 'permission free' resources could cost something, so long as the user had the right to buy access.[169] In his view, a commons is a resource that is 'free' for all to use, not necessarily at zero cost, 'but if there is

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reporting of news), 103C (fair dealing for the purpose of research or study), 109A (format shifting of music), 111 (recording of television broadcast for replaying at a more convenient time).

[162] See for example *Copyright Act 1968* (Cth) ss 40 (fair dealing for the purpose of research or study), 41 (fair dealing for the purpose of criticism or review), 41A (fair dealing for the purpose of parody or satire), 42 (fair dealing for the reporting of news), 103A (fair dealing for the purpose of criticism or review), 103AA (fair dealing for the purpose of parody or satire), 103B (fair dealing for the purpose of the reporting of news), 103C (fair dealing for the purpose of research or study).

[163] See M Geist 'The Battle over C-11 Concludes: How Thousands of Canadians Changed The Copyright Debate' June 18, 2012 at <http://www.michaelgeist.ca/content/view/6544/125/>

[164] *Copyright Act 1968* (Cth) ss 28 ('Performance and communication of works or other subject-matter in the course of educational instruction'); 44 ('Inclusion of works in collections for use by places of education'); 135E ('Copying and communication of broadcasts by educational institutions etc.').

[165] *Copyright Act 1968* (Cth) Div V 'Copying of works in libraries and archives'; s 200AB ('Use of works and other subject-matter for certain purposes').

[166] See, eg, *Copyright Act 1968* (Cth) ss 46 (public performance in places where persons reside or sleep); 109A (format shifting of music); 111 (recording of television broadcast for replaying at a more convenient time).

[167] P Drahos, 'Freedom and Diversity – A Defence of the Intellectual Commons' [2006] AIPLRes 1 available at <http://www.austlii.edu.au/au/other/AIPLRes/2006/1.html>.

[168] We use the expression 'compulsory licence' for only one of the two species of such licence.

[169] L Lessig, 'Re-crafting a public domain' (2006) 18 *Yale Journal of Law and the Humanities* 56-83.

a cost, it is a neutrally imposed, or equally imposed cost'.[170] James Boyle agreed with this approach, as do other authors.[171]

We consider that a more precise definition of the public domain is that whether a work subject to a collective licence is in the public domain depends on whether the fee for the licence is set by a neutral body (often a public tribunal such as Australia's Copyright Tribunal, but it could be a private arbitrator) and is set for reasons of public interest, as distinct from set by the copyright owner or their representative solely on private interest considerations. In Australia, the conditions of use of works (including licence fees) in statutory (or 'compulsory') licences are set by statute, and are therefore set by a neutral party for public interest reasons. Similarly, under the Australian system of 'blanket licences', the conditions of use of works which the Copyright Tribunal considers meet the conditions for such a licence, including the licence fees, are set by the Copyright Tribunal, which is a neutral party.[172] Because of these factors, and because the existence of the licence means that an eligible user does not have to ask for permission, works subject to collective licences (statutory/compulsory or 'blanket') are in our view clearly part of the public domain.

Ronan Deazley does not discuss paid compulsory licences, and his examples for the category covering all statutory exceptions are not informative,[173] probably because compulsory licensing is not of significance under UK copyright. His arguments for rejecting voluntary licensing (discussed below) would not apply here, because these licences do not depend on any permission given by the copyright owner.

Compulsory licences also share with some parts of the 'free use exceptions' category that only certain classes of the public are allowed to make use of the works in the ways allowed by the compulsory licence, and they therefore constitute a closed commons. For example, only a radio broadcaster can utilise the compulsory licence for public broadcasting of sound recordings (and pay for that), but the listening public as a whole obtains the benefits.

Australia's public rights created by compulsory licences are more extensive than those in many jurisdictions, including compulsory licences for the benefit of entertainment industries similar to some other countries. Lessig argued that these compulsory licences are the principal reason for the financial success of the recorded music, radio and cable TV industries of the USA.[174] Australia also has compulsory licences for educational purposes, both for reproductions of print works, and for reproductions and in-class uses of audio-visual works, which are much more extensive than are found in some other countries.[175] These compulsory

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[170] L Lessig, "The Architecture of Innovation", Conference on the Public Domain, Duke Law School, Nov 2001, <http://www.law.duke.edu/pd/papers/lessig.pdf>.

[171] Boyle above n 4.

[172] See eg *Reference by Australasian Performing Right Association Ltd* [2006] ACopyT 3 (application of licence scheme to sound recordings played as 'background music' in retail outlets); *Phonographic Performance Company of Australia Limited (ACN 000 680 704) under section 154(1) of the Copyright Act 1968 (Cth)* [2007] ACopyT 1 (licence fee for use of sound recordings in night clubs); *Phonographic Performance Company of Australia Limited (ACN 000680 704) under section 154(1) of the Copyright Act 1968* [2010] ACopyT 1 (licence fee for use of sound recordings in fitness classes).

[173] Deazley describes the category as 'any use which falls within the statutorily defined "acts permitted in relation to copyright works"': Deazley, above n 37, 113.

[174] L Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity* (New York: The Penguin Press, 2004), at ch 4.

[175] See eg *Copyright Act 1968* (Cth) ss 135E ('Copying and communication of broadcasts by educational institutions etc.'), 135F ('Making and communication of preview copies'), s 135ZJ ('Multiple reproduction of printed periodical articles by educational institutions'), 135ZL ('Multiple reproduction of works that are in hardcopy form by educational

licences, particularly those in the education sector, are a distinctive part of Australian public rights, creating a closed commons[176] for the benefit of certain classes of users. Compulsory licences may be the largest and most important limitation on the right of copyright owners to unilaterally determine the conditions of use of works, at least in Australia.

14 Uses voluntarily licensed to the public by the copyright owner under a neutral scheme

The most important expansion of public rights in copyright in the last two decades has been because of voluntary licensing of copyright works by copyright owners, using pre-designed licences not written by the copyright owner. These voluntary licences are at no cost to licensees, and are usually to the public at large, but they are subject to compliance with certain conditions set out in the particular licence. This category includes software licences (both open source software licences and the GNU General Public Licence), open content licences (such as the Creative Commons suites of licences) and many other licences.

James Boyle considers that the approach that Lessig and he both take to the question of 'equally imposed costs' answers the question of how the free software and open source software movements become part of the public domain. The use of source code under these paradigms does have a 'price of admission', acceptance of the conditions of the relevant software licence, and so is based on the existence of copyright.[177] But it is a price that is equally open for all to pay, and it constitutes an effective creativity-inducing part of the digital commons. As Boyle summarises, a new dividing line for the public domain is between 'the realm of individual control and the realm of distributed creation, management and enterprise', whereas the old distinction was between what was property and what was not (the 'free').[178]

Not everyone agrees that voluntary licensing is within the public domain. Samuelson originally put 'open source' software outside the public domain on her map (Map 2), but with no discussion except to note that Benkler probably would include it.[179] However, her later reconsideration includes category 6 'Contractually constructed information commons'.[180]

Deazley excludes voluntary licensing from his concept of the public domain because the materials covered by such licences 'only reside within the public domain as a result of a wide-ranging a priori permission – there is no need to ask for permission to use, as permission has already been granted'. However, he still considers that the 'appropriate touchstone' (at least 'in terms of legal doctrine') for defining the public domain is '*use without the need for permission*'.[181] In our view, there are two answers to Deazley's concerns.

First, why should the boundary of the public domain depend on the simple factor of whether use of an exclusive right depends on *permission* from the copyright owner? There are many

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institutions'), 135ZMC ('Multiple reproduction and communication of periodical articles that are in electronic form by education institutions').

176 Drahos, above n 153.

177 Boyle, above n 4, 65.

178 Ibid, 66.

179 Samuelson, above n 14, 13, fn 28.

180 Samuelson, above n 15, 799-802.

181 Deazley, above n 37, 107, fn 26 (emphasis in original).

other factors that distinguish Creative Commons licences and some categories of open source licences from voluntary licences negotiated between individual parties or their representatives. These factors include:

(i) the grant of the licence pre-exists the licensee's wish to use the work in accordance with it;
(ii) the conditions of the licence have been determined by a body which is independent of individual copyright owners and can reasonably be considered to be acting in the public interest in determining the licence terms;[182]
(iii) the conditions of the licence do not permit any variation by the copyright owner (they simply decide whether they will apply it to a work they own);
(iv) the licence cannot be revoked or changed in relation to any licensee already using the work under the licence, but can be revoked or changed in relation to future licencees.

If these conditions are met for a voluntary licence, as they are for Creative Commons licences, the GPLv3 and AEShareNet licences in Australia, and some other licences, then our view is that there is little to distinguish such licences from statutory licences in substance, and we should consider them as part of the (legal) public domain. Such voluntary licensing could also be available only to classes of the public rather than the whole public, but we do not see this as an impediment, any more than it is with statutory licences. We think that this category should not be disqualified from inclusion in the public domain simply because its legal basis is a contractual licence of a particular kind, rather than statute.

The corollary is that we would exclude from the public domain voluntary licences which do not meet all the above criteria, excluding not only normal private licensing of works but also some licences which might be considered 'copyleft'. For example, 'shareware' licences which allow some forms of distribution by anyone, and use by anyone provided they first pay a licence fee, are not included because such licences are revocable by the grantor at any time.

Our second answer to Deazley's concerns it that we do in any event argue for inclusion of the *de facto* public domain in our concept of the public domain, as discussed below. 'Neutral voluntary licensing' could be regarded as an additional category of the *de facto* public domain, but we do not consider it informative to group these categories together. The better view is that these are part of the legal public domain.

Voluntary licences, particularly Creative Commons licences and open source software licences, are now a major aspect of Australia's public domain. Creative Commons licensing has already become the basis of the reform of public sector information in Australia.[183]

15 *De facto* commons in benign uses of a work, with opt-outs

In order to obtain a full understanding of how the public domain works in practice, it is necessary to also recognise the *de facto* public domain. This is a narrower concept than 'tolerated use' which Tim Wu sees as involving:

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[182] There could be some need to consider here the position of long-standing licences originally developed by a copyright owner which has subsequently been adopted by very large numbers of licensors and licensees. But this is the exception, not the rule.

[183] Greenleaf and Bond, above n 114.

> … a giant "grey zone" in copyright, consisting of millions of usages that do not fall into a clear category but are often infringing. These usages run the gauntlet, from PowerPoint presentations, personal web sites, social networking sites, church services, and much of Wikipedia's content to well-known fan guides. Such casual and often harmless uses of works comprise the category of tolerated use …[184]

For inclusion in the public domain it is not sufficient that some significant uses of copyright works go undetected or that copyright owners do not think that enforcement action is worthwhile. To include all instances of tolerated uses would make the boundary between the proprietary domain and the public domain impossible to define, as it would depend on the individual decisions of millions of copyright owners, without any underlying principle as to why they have decided one way or the other.

For a category of tolerated uses to become part of the public domain, our view is that it must be such that the vast majority of affected copyright owners in a jurisdiction (or, more often, globally) consider that tolerating the otherwise infringing use is in their own interests. As a practical matter, for such a commons to be effective, there must also be sufficient disincentives for those copyright owners who do not hold this opinion, to dissuade them from litigating and thus destroying the tolerated commons. Alternatively, in particular cases (particularly with old content) there may be very little likelihood of there being very many copyright owners who are alive, locatable, or likely to become aware of the uses made of the work. The age and nature of the works and the public benefit of the uses (such as in museums, archives or libraries) may also reduce greatly the likelihood of any objections.

We therefore define the *de facto* public domain as consisting of situations where the public can make significant particular uses of works, which are (at least arguably) contained in the owner's exclusive rights, but which as a matter of practice or custom, go unchallenged, because copyright owners recognise that it is in their interests to let the practice go unchallenged, coupled in some cases with their being few such owners likely to be aware of the uses despite their being overt, and supported by the availability of opt-out facilities. This complex definition can be summed up as 'Non-objection to benign uses of works coupled with opt-outs'.

One of us (Greenleaf) has previously described this as a 'commons by friendly appropriation'[185] but we now use the expression 'a commons in benign uses'. This category is clearly not within the legal public domain, but we consider it very important as part of the whole picture of the public domain, and so we regard it as the *de facto* public domain. As will be explained in further works, it includes the operation of Internet-wide search engines, and may once have included browsing of the Internet (probably now in the legal public domain in most jurisdictions). The ways in which copyright has traditionally provided protection to privacy are also relevant.[186] New candidates such as Google Books deserve discussion concerning whether they fit here or somewhere else. The mention of the operation of search engines, and Google books, should be sufficient to indicate that this is not a minor category.

Such uses may sometimes be difficult to distinguish from, and may even overlap, implied licences to use a work for a particular purpose. Wu gives the example of newspapers that

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[184] T Wu 'Tolerated use' (2007-8) *Columbia Journal of Law and the Arts* 617, 617.

[185] G Greenleaf "Creating commons by friendly appropriation, (2007) 4:1 *SCRIPTed* 117 <http://www.law.ed.ac.uk/ahrc/script-ed/vol4-1/greenleaf.asp>

[186] G Greenleaf, 'IP, Phone Home: Privacy as Part of Copyright's Digital Commons in Hong Kong and Australian Law' in L Lessig (ed) *Hochelaga Lectures 2002: The Innovation Commons* (Hong Kong: Sweet & Maxwell Asia, 2003) 13-67.

place an icon above online stories to assist users to email copies of the article to others,[187] and there are plenty of offline examples such as a book of knitting patterns.[188] Implied licences do not, by themselves, fit into any of the categories we have described as constituting the public domain. They are not statutory exceptions to copyright.[189] Although their terms are set by business practices, as determined by a court,[190] they can at any time be defined and changed by a copyright owner (at which point they become an express licence), so they do not fit our restricted definition of 'neutral' voluntary licences. Obtaining a copy of the work is also not necessarily available to all for free or at the same price. However, if the circumstances (including other legislation) surrounding the business or other practices involved where a licence is implied are such that it is impractical for copyright owners to set or change licence terms, or charge differentially for a work, or it is simply not in their interests to do so, then the situation is similar to the *de facto* commons in benign uses of a work. The one notable difference, of course, is that the implied licensee, if sued for infringement, has a legal defence unless and until the implied licence is revoked. Perhaps some implied licences could be seen as a separate category of the public domain, but since this category would be contingent on non-revocation we consider it is better to leave implied licences as part of the *de facto* public domain, but only if and when they fit the conditions we have set out for the *de facto* public domain. The role of the implied licence then becomes one of an 'effectiveness support' for the *de facto* category of the public domain. There is no doubting the practical importance of some implied licences to the public domain in Australia, but that does not necessarily mean that they are a separate category. Where an implied licence can effectively and realistically be revoked, we do not consider that uses of a work made under it are part of the public domain, no matter how widespread and important they are. They are then part of the proprietary domain, just a different species of licence from express licences,

Another difficult to classify example of 'tolerated use' is some statutory immunities for 'benign' third parties, usually notice-based schemes and variously called 'safe harbour' or 'take down' schemes.[191] These schemes usually retain formal liability but limit the availability of remedies (in effect, to injunctions). The parties protected by such schemes include ISPs and institutional web hosts such as universities, museums etc, and there are significant examples in Australia law.[192] As with implied licences, we don't think that statutory immunities are in themselves a distinct category of the public domain, as they are usually terminable at any time by a copyright owner giving notice. However, when coupled with the conditions that support the existence of a *de facto* commons, they should be recognised as contributing to the *de facto* public domain. We therefore treat such statutory immunities as 'effectiveness supports' for *de facto* category of the public domain for which we argue[193].

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[187] Wu, above n 169.

[188] Under Australian law, a three dimensional reproduction of a two dimensional work is part of the exclusive rights.

[189] Australia's *Copyright Act 1968* does not mention them.

[190] See *Copyright Agency Limited v NSW* [2008] HCA 35 (6 August 2008).

[191] Discussed at length in T Wu N 55: 'The first and perhaps most important example is the usage covered by section 512 of the Copyright Act – the DMCA "safe harbor." Relevant to our purposes, section 512 immunizes search engines (like Yahoo) and hosts of user-directed content (like a web-hosting site) from copyright liability until they are sent explicit notice of the infringing use (notice) and until the entity fails to take down the content subject to notice. For this reason, section 512 is referred to as a "notice and takedown" system.'

[192] See, eg, *Copyright Act 1968* (Cth) Pt V Div 2AA ('Limitation on remedies available against carriage service providers').

[193] A full discussion of the matters that support the effectiveness of the various public domain categories is beyond the scope of this article.

V. Conclusions

A. Australia's public domain categories compared with others

This paper has proposed a way of defining the copyright public domain in Australia. By employing comparisons with previous definitions developed by Samuelson, Boyle, Lessig, Benkler, Deazley and Dusollier, this paper has also highlighted the differences between constructions of public domains and also the nuances in national public domains created by each. In this brief Conclusion, we highlight the differences that emerge between our proposed definition with those employed by Samuelson, Deazley and Dusollier.

In comparison with Deazley's eight categories of the copyright public domain (which is clearly most relevant to the United Kingdom) we have added in relation to Australia, categories (2) and (3), works expressly or impliedly excluded from copyright protection, (4) constitutional limitations, (6) public domain dedications (admittedly contentious), (14) voluntary licensing (his 'de facto public domain'), (15) our extension to *de facto* commons by acquiescence, but probably not the 'unreachable' category. We have also separated free and paid statutory allowed uses, thus adding (13) collective licences as a separate category. In most of these, the differences may be explained by differences between UK and Australian law, or by the difference between the public domain purely as a matter of law, and extending it to include some aspects of commons in practice.

The differences between our categories and those of Samuelson are somewhat less marked (although we assume she would include some categories she does not explicitly mention). The most significant differences are that she does not include the de facto public domain, nor the public domain created by collective licensing.

We have proposed a public domain wider than that proposed by either Deazley or Samuelson, but where the differences may be largely explicable by the different countries which are the focus of the analysis. We, like Deazley, propose a public domain considerably wider than that proposed by Dusollier, because of the different starting point for a definition that she adopts, and we reject. The differences are summarised in the following Table.

	Greenleaf/Bond (Aust)	***Samuelson (US)***	***Deazley (UK)***	***Dusollier (generic)***
1	Fails minimum requirements	√ (1)	√ (1)	√ Subject matter PD
2	Works impliedly excluded	√ (4)		
3	Works expressly excluded	?* (1)		√ Public policy PD
4	Constitutional exclusions	√ (3)		
5	Copyright has expired	√ (1), (12)	√ (2)	√ Temporal PD
6	'Public domain dedications'	? (6)		√ Voluntary PD
7	Public policy refusals		√ (7)	
8	Public interest exceptions		√ (8)	
9	Insubstantial parts	? (1)	√ (4)	
10	Mere facts, ideas etc	√ (2)	√ (3)	√ Ontological PD
11	Uses outside exclusive rights	√ (4)	√ (5)	*Excludes*
12	Statutory exceptions	√ (5)	√ (6)	*Excludes*

13	Neutral collective licensing			*Excludes*
14	Neutral voluntary licensing	√ (6)		*Excludes*
15	De facto PD of benign uses			

* Samuelson is not explicit on the points marked '*', but it can be implied that they are included

No doubt we have missed some categories important in other countries through lack of sufficient consideration of copyright law from a wide enough range of countries. So we only suggest that these fifteen categories are as comprehensive as seems to be needed for an analysis of Australia's copyright public domain.

We believe that there is much interesting work to be done in comparing national copyright public domains so as to ascertain their commonalities and differences, the reasons for these, and their implications for the nature of copyright. Dusollier's brief comparisons of a range of countries are a valuable start, but her categories of the public domain are so limited that it reduced the value of the exercise. What differences and similarities would appear from studies of all of the components of the copyright public domains of a diverse range of countries?

B. Unanswered questions and further work

Leaving national comparisons aside, there are many related questions that this paper leaves unanswered in relation to Australia's copyright public domain. We will conclude with some of the questions. What makes public rights effective or ineffective?[194] Are the components of the public domain 'rights' or something else? (as discussed earlier) Which aspects of copyright's public domain are most important and beneficial today (and most deserving of support)? What effect do other (non-copyright) laws have on the copyright public domain? What effect do other national public domains have on Australia's public domain? What 'global' factors have a similar effect on all national public domains? (Or to put it another way, to what extent is there a global public domain, and why?) Finally, where does an analysis such as ours, of the elements of the public domain, and the nature of the 'rights' it comprises, lead to in terms of policy analysis? How ought the public domain be protected? A lot of interesting work remains to be done in the analysis of Australia's copyright public domain, and in comparisons with other countries.

[194] Among the matters which increase the effectiveness of public rights are the existence of a statutory deposit system (particularly if it extends to audio-visual and digital works). Among the matters which reduce the effectiveness of public rights are some abilities or liberties of copyright owners situated outside copyright law's definition of the exclusive rights of the copyright owner, but the exercise of which can have an adverse effect on public rights. Examples include the ability of a copyright owner to encrypt all copies of a work, to protect it by some other TPM, to protect it by contract, or even to destroy copies.