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# Research Perspectives on the Public Domain

## Digital Conference Proceedings

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This document presents an edited transcript of the one-day event, 'Research Perspectives on the Public Domain', held at the University of Glasgow on 11<sup>th</sup> October, 2013. The public domain is a subject of vital interest to legal scholars, but its implications are far reaching – indeed, the public domain concept is germane to subjects as diverse as film and media studies, economics, political science and organisational theory. It was a central purpose of the workshop to arrive at a workable definition of the public domain suitable for empirical investigation. The traditional definition (1) takes the copyright term as the starting point, and defines the public domain as “out of copyright”, i.e. all uses of a copyright work are possible. A second, more fine-grained definition (2) still relies on the statutory provisions of copyright law, and asks what activities are possible with respect to a copyright work without asking for permission (e.g. because use is related to “underlying ideas” not appropriating substantial expressions, or because use is covered by specific copyright exceptions). A third definition (3) includes as part of the public domain all uses that are possible under permissive private ordering schemes (such as creative commons licences). A fourth definition (4) moves into a space that includes use that would formally be copyright infringement but is endorsed, or at least tolerated by certain communities of practice (e.g. machinima or fan fiction).

The conference was designed to test these definitional approaches, and national and international speakers from relevant disciplinary fields were invited to share their research projects, with a particular focus on the underlying concept of the public domain. This document is a citable documentation of those presentations, along with a panel discussion that followed. This event was funded through a Knowledge Exchange grant, 'Valuing the Public Domain', from the Economic and Social Research Council (ESRC ES/K008137/1) and the UK Intellectual Property Office (IPO). The digital resource was funded by CREATE, the RCUK Centre for Copyright and New Business Models in the Creative Economy (AH/K000179/1).

Slide presentations from the event can be downloaded at:

<http://www.create.ac.uk/blog/2014/01/24/research-perspectives-on-the-public-domain-transcript-and-presentations/>

**List of Participants (in order of appearance):**

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## Introduction

*Dr. Kris Erickson, University of Glasgow*

KE: Thank you all for coming here today for this research workshop entitled 'Research Perspectives on the Public Domain'. I must confess a selfish interest for inviting our fantastic speakers here to Glasgow, which is my personal interest in learning more about the public domain. It's an incredibly complex and multifaceted topic and the opportunity to have such a great array of multidisciplinary scholars in one place was too much to pass up. Thank you to Martin Kretschmer and the CREATe consortium for sponsorship of this event and thank you to the University of Glasgow and to all of our speakers who I will introduce shortly.

What is the public domain, why am I interested in it, and why should we all be interested in it? When I close my eyes and imagine the public domain I have a tendency to picture a stuffy library not unlike the stacks just up the road at the University library. I was in there the other day looking, funnily enough, for a book on copyright, trawling through dusty piles of books. Unfortunately that perception of the public domain is inaccurate because it doesn't capture the whole richness and the whole complexity of what the public domain is.

To come back to that incomplete definition, one could say that the public domain consists simply of works that are no longer in copyright, old books mainly. Because of the way that the copyright term works, books are the medium that we primarily find in the public domain. Newer technologies like films, broadcasts, video games have not yet had a chance to expire so there isn't a tremendously large public domain in things like TV programmes or video games. But copyright term doesn't exhaust the entire public domain: if you were yesterday at Professor Ronan Deazley's talk on writing in comic books, he spoke a great deal about those particular uses of a work which might constitute an additional part of the public domain. So, this could include those activities permitted by copyright law. For example, quotation or criticism and review are exceptions to copyright that enable certain kinds of use by the public. The dimensions and uses of a work available to you in such a public domain would depend on what sort of a user you were.

The public domain might also include works or ideas that were never protected by copyright law in the first place, ideas or works that didn't reach the threshold of originality to be protected by copyright; things like publicly available data, scientific discoveries, great plot ideas. And more abstractly then we might think about the public domain artistically as a kind of common reservoir of ideas that are available to inspire new authors and creators.

Getting away from copyright law and into other questions of public and private we might think about the public domain even more abstractly still, as all knowledge that is possessed by the public. So, for example through investigative journalism something goes from being a private secret to entering the public domain, becoming part of public knowledge.

That's all to say that the public domain then is multiple, contingent, complex and probably deserving of the kind of interdisciplinary questioning and query that we're going to undertake today. Some of the concerns – to maybe give away the ending a little bit – some of the things that we're going to talk about I'm sure in the speakers' presentations shortly are things like: what is the actual value of the public domain? What is the public domain's contribution to value generation in the creative industries? This is something that the CREATe consortium is particularly interested in. And of course the perennial debate: When is the appropriate time for copyright to expire? Linked to that first question.

Furthermore we might ask: should individuals have any sort of right to the public domain? Should the state or should public institutions have a duty to help care for, curate or expand the public domain and that's a question that I'll leave open for all of us and for the speakers to address. Thank you very much.

## **The Availability of Books in the Public Domain**

*Professor Paul Heald, University of Illinois*

KE: Our first speaker is Professor Paul Heald. Paul is Professor of Law at the University of Illinois. He is the author of numerous scholarly articles specifically on the public domain and he is well known internationally for his ground breaking, innovative empirical work. He has published recent articles such as 'More music in movies: What box office data reveals about the availability of public domain songs in movies from 1968 to 2008' and 'Do bad things happen when works fall into the public domain?: Empirical tests of copyright term extensions'. So that is the kind of exciting work that Paul does. I encourage you all to look at his articles in your own time and we're very thankful for Paul to be here, so please take it away.

PH: Well, thank you all for coming here today. I've presented some of this earlier, but I've got more data, so hopefully if you've seen some of these charts before, the supplemental data will make your coming worthwhile. Let me first talk about the sort of data mining that I did and then explain why I did it and then we can take a look at the data itself. As you know, copyright owners basically circle the globe asking for extended copyright terms for existing works, and because the works already exist, their argument isn't: "we need copyright protection to incentivize more works" (they already exist), but rather the argument is that "bad things happen when works fall into the public domain and works need always to have owners to prevent these bad things from happening." One of the bad things that they argue might happen is reduced availability and access and distribution caused by the lack of ownership of a work. So, I was challenged to take a look at what Amazon is currently selling to get a sense of what mix of public domain and protected books is actually available. And we did this by taking a random sample of 7000 fiction books initially. We were looking only at new books available from Amazon, no used titles at all. We just fed random ISBN numbers to Amazon for about five weeks, two thousand an hour because the hit rate when using a random 12-digit number is pretty low. We ended up getting 7000 titles. We wanted to get the initial publication dates of each of those titles, and we did that by

writing a software programme to crawl through the U.S. Library of Congress catalogue where we found about 2300 of the titles, and we just used the earliest publication date among the editions held by the Library of Congress. Notice that this biases the dates up a little bit because a book from 1920 may only be available there in a 1935 edition, but this actually makes our findings more dramatic.

What we might expect to see was maybe something like this. This is actually a look at what used books are available on Abebooks.com which is the largest seller of used books in the world. This counts actually all of the books for sale; it's actual volumes held by used book sellers and it's what you might expect. Here's the year 2000, got a lot of books from 2000 – 2010, a lot from the '90s, and then there's sort of a slow decline over time as books get older and lose their market share. I wanted to double check this, because the Abe's data isn't a title count, so I took a look at the Chicago public library database which actually counts titles in addition to the number of books held in the Chicago system, and you see much the same thing whether you're looking at the downtown library or all the Chicago branches.. You see again a lot of books from the 2000s, dips to the '90s and again the older the books get, the less likely they are to be in the library. So, I think probably all of us would sense that there is some sort of negative correlation between the age of the book and its availability.

The reason why I did the research is that Professors Landes and Posner, two very famous economists in the US who have produced scholarship which is quite friendly to the copyright industry, actually expect something like this: a lot of books from 2000-2010 a slow decline, and then we get to the magic year 1923 (in the United States all works published prior to 1923 are in the public domain) and they argue that once a book falls into the public domain it becomes less available. They would predict less copies for sale on Amazon, for example, and what I wanted to do was to test to see if this was true. When we started charting the dates of the initial publication of these books, would we see a sudden drop off of their availability on Amazon?

What you see is exactly the opposite. We have quite a few books from the decade 2000-2010, but a really significant drop off to the 1990s and massive drop off to the 1980s. Only 25 of 2300 books available on Amazon from our sample were initially published in the 1980s and it stays quite flat and quite low until you hit 1923, then suddenly the number of books goes up and until you have more from the 1900s and 1910s than you do from the year 2000. So, it looks like we have a very positive public domain effect here. Now, I showed this chart at a conference in Paris this summer and got this really devastating question which I should have anticipated and didn't (but this is why we go to conferences!). We were throwing random ISBN numbers to Amazon so what we're catching here is editions, numbers of editions of a book as

opposed to the number of titles. And if you're throwing random ISBN numbers at Amazon and catching editions, you would actually expect to find a disproportionate number of public domain editions, because public domain books have more editions. For example, there are six hundred different editions of *Paradise Lost* on Amazon.com, and for even famous new copyrighted best sellers there are often only two, a paperback and a hard back. So, if you throw random numbers into that pool of data you're much more likely to hit a book that has six hundred representatives in that pool as opposed to just two. This forced us to look at every single one of these two thousand plus books on Amazon, count the editions and try to come up with a ratio as to the number of public domain editions on average versus the number of copyright editions on average.

As it turns out, there's about four times as many editions of public domain books on Amazon as there are editions of copyrighted books. So, what you have to do is essentially cut the number of public domain editions down to a quarter because to adjust for the number of actual titles. So, this new chart is really quite realistic; it's an estimated number of titles. Again, it's quite dramatic, you still have a huge drop off, this doesn't change, but the effect is not quite so wildly dramatic. Even so, this is not quite an accurate representation of reality. Why? Because there were a whole lot fewer books published in the 1800s than in the twentieth century. So, compare 1980 and 1880, quite dramatic, quite interesting that there are twice as many new books from the 1880s available on Amazon.com as there are new books from the 1980s, but there was only a fifth as many books published in the 1880s as in the 1980s, so you need to adjust by the number of books published per decade to give a more accurate estimate, and we actually did this by doing a complicated search on the WorldCat international library database which has twenty-seven thousand libraries online. We came up with estimated numbers of total books published in each decade. If you adjust for that factor it spikes up quite understandably, normalizing to the decade of 1990, which is the decade when most books were published in world history, and this is actually what the scale ends up looking like.

The bottom line is that it doesn't seem like when a book falls into the public domain it's less likely to be available. It turns out quite clearly to be more likely to be available.

Now, one thing we can do, which is somewhat interesting, is to break down these books into fiction works and non-fiction works. First of all, we report something curious. When we fed our random ISBN numbers to Amazon, we queried via their browse nodes which lets you ask for works in particular categories. We asked for fiction works because we were initially interested just in novels quite frankly, so all the browse nodes we chose in their API were related to fiction. Yet, half the books

that we got were non-fiction. So, we're querying for fiction books, but we get half non-fiction books which was a complete mystery to me until I got an email from the chief researcher at Amazon. I got this email in my box, and I was sort of worried that Amazon had finally cottoned on that I was querying their database without permission, but this guy was very friendly and said "we're really interested in your research because we really don't have much of an idea what we have on our inventory." And I said come again?! So, it turns out Amazon keeps track only by ISBN numbers, so they're very good at knowing exactly where a particular volume is in their warehouse, they do not know the number of titles that they sell. They absolutely have no idea the number of titles that they sell in any particular category, just the number of editions that they're selling. And they rely primarily on self-reporting by the publishers whose books they sell, so if you sell a book on Amazon and you're a publisher you provide information categorising a book, giving a publication date etc. They don't do any independent checking of whether the genre categorisations are correct or not. When you do the random querying you get half non-fiction works thrown in with the fiction works due to sloppy record keeping.

Now interestingly, the non-fiction works were sort of fiction- related. They tended to be literary biography, literary criticism, literary history, some straight history and theology. It wasn't maths text books and stuff like that; it was sort of quasi-related. and whether the publishers just think that that is literature and put it in fiction or not I don't know. Thankfully, you don't get a radically different story here for non-fiction. You get the same sort of shape of the curve--down quite rapidly to the 80s through 30s and then back up again. It's a little bit more dramatic with fiction, especially towards the end of the twentieth century. Don't really have a theory for that; it just may be that in general works on literary biography and literary history were just not as frequently published towards the end of the twentieth century as towards the end of the nineteenth century, I don't know. But you don't get a fundamentally different story when you break it down into fiction and non-fiction.

That's the book story, which seems to be quite friendly to the public domain. Here's a final slide, which I'll explain. This is an overlay of the new books on Amazon in graph form and the used books on Abe. So here's the used books on Abe showing the sort of gradual decline that we pointed out and then this line is the new books on Amazon. So, if you want to think about negative and positive effects of copyright, then in area X, you might think of that as books missing. We know the used book market doesn't drop off so quickly, why does the new book market drop off so quickly? Well, new books are covered by copyright. Because of the first sale doctrine, right in used books are exhausted and a copyright owner can't affect the market for used books. So you might

think that the used book market is a market in the absence of copyright, and the Amazon market is a market in the presence of copyright. The difference we might categorise as the missing population caused by a copyright distortion effect. And we might think of area Y here as sort of rebound--a positive distortion that's caused by the public domain. If you want to be really ambitious, I drew this line here--this is pure speculation, but maybe in the absence of copyright the availability curve would look something like this for new books. So maybe X plus Z is the total distortion caused by the presence of copyright, but that's pure speculation.

I'll get to music just really briefly, and I'll jump to the bottom line. We wanted to do the same thing for music to see if we have the same sort of positive public domain effect for music. The problem there was to try to find data to mine. You'd think we'd just go to iTunes, because that's where most people buy their music, but iTunes is all digital music and we know from the Brooks study that copyright owners haven't digitised most of the best music of the twentieth century. Only fourteen per cent of old famous recordings from 1895 to 1965 has ever been digitised, so if we look at iTunes it's going to be highly distorted towards new music. If you look at other sources that exist it's highly biased towards vinyl and therefore old music. So what we thought we'd do is go through movie soundtracks and see what music appears or has appeared in films over time. We looked at the hundred top-grossing movies of all time and all the music that's in them and then a hundred and thirty four randomly selected movies. If you look at the top hundred grossing movies, this is the mix of public domain songs to copyrighted songs. Is that a lot or a little? I don't know. What we did was try to do the same kind of chart as with books, but do it by measuring the distance between the release date of the movie and the initial publication date of the song. So, how far backwards are directors looking to get the music that they put in their movies? Not surprisingly, most songs are actually written the year of the movie release date, they're actually written for the movie not surprisingly. Many more are written and released within a year of the movie release date. You see the same kind of dropping off as with books when you go looking at songs published ten years before the movie release date, twenty, thirty, forty, fifty years back because all these songs would be copyrighted at the time they appear in the movie. When you get to these songs that are in the public domain at the time of the movie release, you get a slight bump--the same shape of the curve you get with books, not nearly so dramatic. It turns out that this is statistically significant. However I've paid a statistician to crunch all the numbers, and it is statistically significant so we do see a positive public domain effect although it's not quite as dramatic as with books.

And rather than go into more slides, I would just speculate as to why the public domain effect with music is not so dramatic and stop there and if

people have more questions about music, I can answer them. The explanation I want to give is movie directors, unlike book publishers, don't save quite as much money when they choose public domain works. If you're a book publisher and you want to go into the business of publishing public domain books, you can get digital versions for free from Gutenberg project and package and sell your book in about a day and save you a whole lot of money and licensing fees. If you're a movie director and you choose a public domain song, there's some savings, but you still have to pay a group of musicians to play the song for the background of your movie, or you have to buy a licence for a recording that already exists of that song. So, if you get a public domain song and Frank Sinatra is singing it, and it was recorded thirty years ago, you still have to pay money to have it in the background of your movie. You save on the margin a little bit, but it's not the same sort of massive savings as with books because you still have to pay to get it into your movie soundtrack. That may explain why the bump up is not quite so dramatic.

I think that's my time to stop there but I can take questions on it.

[Applause]

KE: Let's hold all questions for the end, the follow up session will be a panel in which we'll take on these questions and we'll have all the speakers taking questions all together. So hold onto those questions. Except for Martin who has immunity.

MK: This is obviously all US data so the year 1923 is crucially important. Under US copyright law, copyright in all works published before 1923 has expired. So we have a clear cut off where we can attempt to measure effects for a whole category of works. We don't have this kind of data for any other jurisdiction. To do this kind of research in Europe (where you would have to establish the year of death of every author) would be quite a challenge. That's the only thing I wanted to say.

## Unlicensed Adaptations in International Cinema

*Dr. Iain Robert Smith, University of Roehampton*

KE: Our next speaker is Iain Robert Smith. He is a lecturer in film studies at the University of Roehampton. Iain is an expert in transnational cinema, cult television and remakes. His forthcoming 2014 book, with Edinburgh University Press, is entitled 'The Hollywood Meme: Transnational remakes of American Film and Television' and it looks to be fantastic. So, thank you very much Iain, please take it away.

IRS: Thank you Kris for inviting me. So as he said my research is on unlicensed adaptations of international cinema. My findings will be published in a book with Edinburgh next year titled 'The Hollywood Meme' and so today I'm going to talk a little about that research and some offshoots from that project. In terms of the relationship between film and the public domain, as was briefly mentioned earlier, strictly speaking in terms of the US it's 1923 that is the specific cut off point so it's mainly silent cinema that's within the public domain. There are also various films that entered the public domain due to a failure to renew copyright. What I'm interested in though is films that borrow and adapt footage, music, plot lines, and characters from films that are ostensibly in copyright. Rather than focus on a single case study, I'm going to offer a broad overview with a variety of case studies suggestive towards the richness of the topic and the potential for future research. One of the things that I hope therefore comes out of these discussions is a dialogue between my work on intertextuality in cinema and some of the broader discussions about copyright in the public domain today.

I should explain that this picture behind me is from a Turkish film *3 Dev Adam* from 1973 in which Captain America and Santo the Mexican Wrestler team up to battle an evil Spiderman who's leading an international smuggling syndicate, but we'll get to that later.

The Hollywood Meme - this is a study of unlicensed adaptations of American film and TV that appear in films around the world. I framed this in terms of globalisation looking at the debates around American popular culture and the way it circulates around the world. I was making an argument that by offering a historical overview of this

phenomenon, we can challenge prevailing notions of American cultural domination and provide a more nuanced understanding of global cultural exchange. But what was always in the background of my project was the issue of copyright and the public domain because my case studies were selected based on the fact that they were unlicensed adaptations. So I want to tease out some of the elements of this project that are most closely relevant to today's symposium.

My personal position is that cultural works are always drawing upon, building upon, and responding to other cultural works. All art involves taking, adapting, borrowing, imitating and this is standard practice. In the terms of Gerard Genette, any text is a hypertext grafting itself onto a hypotext, an earlier text which it imitates or transforms. Of course, to paraphrase George Orwell, 'all texts are hypertexts but some texts are more hypertextual than others'. So we have that kind of tension here between adaptation and plagiarism. And as Ian Condry argues in his work in Hip Hop Japan and the paths of cultural globalisation, this necessarily varies from culture to culture and from time period to time period.

In my research I was looking at the ways in which the expressions of American film and television, plots, characters, music and even footage were appropriated and made use of in other national film industries.

In terms of the legal case history on this topic there are two examples outwith my research but which I think are constructive. Many of you will be familiar with *Nosferatu*, Murnau's film from 1922 an adaptation of *Dracula* which originally sought the rights from the Bram Stoker estate and when this wasn't granted they then changed the name of the film, some of the characters, and changed some of the details of the story in order to try and avoid copyright infringement, yet shortly after the film was released, Stoker's estate filed a suit claiming the film was an infringement. The estate won that case and the judge ordered that all copies of *Nosferatu* be destroyed and initially there was only one print which survived and yet in the years after this has come to be regarded as one of the true masterpieces of cinema.

Similarly, we have a slightly lesser known example of *The Last Shark* filmed by Enzo Castellari, an Italian film also known as *The Great White*. Enzo Castellari is a director mainly known for making spaghetti westerns. He also made a number of crime films and he's also the director that made the original film *Inglorious Bastards* which Tarantino was paying tribute to in his recent work. There's a case University City Studios versus Film Ventures International in 1992 where Universal filed a civil action for copyright infringement, trademark infringement, trademark dilution and unfair competition against *The Last Shark*. So the claim was basically that Castellari had infringed the copyright in the motion pictures *Jaws* and *Jaws II*. Again the studio won that case, the

movie was pulled from American theatres. It's never been legally released on video in North America since that point, nor shown on American television although with the internet of course copies of the film do circulate.

So my research attempts to look beyond these cases which ended up in court to study a whole range of case studies beyond this. Throughout the 1970s, Turkish popular cinema, often known as Yeşilçam which is the main street in Istanbul where the production houses were based, is a cinema that is filled with remakes and adaptations of American film and TV, Indian film and TV, and a whole range of other cinemas being adapted.

So one of the main case studies which I've published an article on is *Turist Ömer Uzay Yolunda*, a 1973 film starring Sadri Alışık which remakes *Star Trek* as we can see from the poster. It actually remakes the episode 'Mantrap', adds a few extra scenes from other parts of the original series to basically take it to feature length. So this is a film which recreates plot very closely but also uses the credit sequence from *Star Trek* and the theme song with its own titles superimposed on top.

Many of you will be familiar with fan practices online and there are some parallels I think in the work that Henry Jenkins has done on fandom with what I'm doing on international cinema. We have *Şeytan*, a reworking of *The Exorcist* from the following year, again this is almost a shot for shot remake except Catholicism has now been replaced by Islam so of course there are changes in iconography, but it also uses the Tubular Bells, Mike Oldfield's soundtrack. I mentioned before *3 Dev Adam* but there are a large number of films based on comic books in this period including *Superman* and *Spiderman* but also the Italian comic book character 'Killing'. There are a number of film adaptations starring the Turkish character Killink and Fantomas also appears in this period so there's a whole range of films featuring comic book characters from outside of Turkey. But I think one of the most interesting examples from the Turkish period is '*Man Who Saves the World*', '*Dünyayı Kurtaran Adam*' which has come to be known as Turkish *Star Wars* even though the plot bears almost no resemblance to *Star Wars* at all. The reason that it's called that is that it uses footage from *Star Wars* as the special effects sequences in the film, so you have the star Cuneyt Arkin with footage from *Star Wars* projected behind him, along with music from various films including *Raiders of the Lost Ark* and *Battlestar Galactica*, so it was using a whole range of these materials. The Director has been interviewed when he admits that yes they basically went to the studio, got the print of *Star Wars* and just used that as special effects. His excuse was we couldn't afford to have such lavish special effects so why don't we just make use of this material, which is reminiscent again of the claims made in fandom. So as an aside there's a lot of interesting parallels with Henry Jenkins' work here. It's especially

interesting given how litigious Lucas Film was with fan works throughout the 1980s so it's interesting that this 1982 film was not noticed by Lucas.

Just a brief quote from Ahmet Gurata who explains that the notion of plagiarism in Turkey was not identical with that prevalent in the West where both adaptation and remake are usually defined by their legally sanctioned material whose rights the film maker should have purchased. In Turkey that was not the case. So Turkey had incorporated aspects of the 1948 version of the Berne Convention into law in 1951, but the law was rarely used, and it was only really with the possibility of media reproduction on a large scale and when external political pressure was exacted that the law was enforced. There's a history with Turkey and the relationship with the EU that plays into this so even though the 1986 law started to enforce copyright much more stringently, it's not really until 2001 and those negotiations with the EU that the law was substantially revised and courts were set up to tackle copyright infringement.

Just to briefly mention some other case studies before I start to wrap up. I also worked on cinema of the Philippines which had a very similar phenomenon throughout that period. There are many, many examples but I just want to mention this 1966 film, *'James Batman'*. There's a series of *Batman* films made in the Philippines in this period, *'Batman Fights Dracula'*, *'Fight Batman Fight'*, *'Alias Batman and Robin'* and then *'James Batman'*. This is also following up on a series of *James Bond* films like *'Doctor Yes'* and *'Dolpinger'*. Dolphy is the star and he previously played both Dolpinger and Batman so this is *'James Batman'* where James Bond and Batman team up to fight crime together and there's a lot of split screen work because Dolphy was playing both roles. Along with these borrowed characters, the film uses music from the sixties *Batman* TV series.

But what I want to end with is a focus on contemporary Indian cinema because I think this is instructive about the politics of this form of appropriation and the way it's actually been changing in recent years.

Indian cinema has a long history of borrowing from Hollywood yet since 2000 this has been changing. So when the Indian government allowed the foreign investment promotion board to approve foreign investment in film making. Up until that point US studios couldn't invest in the Indian production. Studios such as Columbia, TriStar, Paramount and Universal have all established offices in Mumbai so there's now an increasing presence of Hollywood in India. So as Toby Miller argued Indian remakes have long been a sore spot for Hollywood, particularly as the Indian industry had been the most prolific in the world, the most productive and there were protective measures to ensure that national dominance. And it's been estimated that Hollywood studios potentially

lost over a billion dollars in royalties and remake fees in India just with the hundreds of films that were being adapted from American material.

So the increasing presence and estimated loss of revenues meant that Hollywood studios have started to threaten legal action over these adaptations. So we've got 2007, this is the film '*Partner*' which was a remake of the Will Smith film '*Hitch*' and the Bollywood team received a threat of legal action so there wasn't actually a case put against it but there was a threat from Will Smith's production company so this didn't come to fruition, but the next year there was a court case with the film '*Hari Puttar*' which is interesting in that this case was based not on copyright but on trademark law, because actually the plot of the film is not at all like *Harry Potter* in any way. Incidentally, there is a reworking of *Harry Potter*, which is very close in terms of plot but under a different title. But with '*Hari Puttar*' the studio used trademark law to seek to restrain infringement. That was denied but this has led to a sea change in attitudes towards intellectual property. Very recently a production team have legally obtained the likes to remake the Warner Brother's Comedy '*The Wedding Crashers*'. This is the first time a Bollywood production company has legally obtained the rights to make a remake so it's too early to tell how this will affect the form of transnational adaptation I've been discussing, but as I've argued these forms of appropriation have slowly died out as industrial changes and alteration to the legal framework have imposed certain limitations, yet this phenomenon has now shifted onto the internet with borrowings continuing to flourish at the fringes of global copyright law, but no longer in theatrically released feature films.

Finally as Laikwan Pang has argued, 'the global expansion of copyright is connected to the political economy of capitalist development in general and the United States' national interest in particular. If the United States is the cultural empire, this empire is maintained largely through the global copyright regime ensuring that all players in the cultural industry comply with rules thereby guaranteeing profits from the exportation of copyrighted property around the world'.

So I think that it's important when we discuss and frame the notion of the public domain, that we consider the ways in which this is both nationally and historically contingent to some extent and we consider the relationships of power which underpin the history of IP and the creative industries. Thank you.

[Applause]

## **Experiments with Truth: Copyright and the Public Domain in India**

*Professor Mira T. Sundara Rajan, University of Glasgow*

KE: Our next speaker is Professor Mira T. Sundara Rajan. She was formerly Canada Research Chair in intellectual property law at the University of British Columbia. We're lucky to have her here in the School of Law at the University in Glasgow and CREATe. She is the author of several important books on intellectual property law, including recently 'Moral Rights, Principles, Practice and New Technology' with Oxford University Press. So, welcome Mira.

MSR: I was going to dedicate this short presentation today to India and I must say throughout the course of the last excellent presentation I was thinking about India and very gratified to see those examples at the end of a practice that has been so common in Bollywood for so long.

My presentation will be a little bit of a change of pace. I've actually entitled it 'Experiments with truth', which of course is inspired by the title of Mahatma Gandhi's autobiography, 'The Story Of My Experiments With Truth.' I'm going to be talking about copyright and the public domain in India, and, in particular, how copyright law has been treated as an instrument of cultural policy in India. And the reason that I chose this title was in order to convey the seriousness with which Indians view cultural matters. For them, in a sense, culture is truth, not only as a matter of aesthetics but also, tradition, history, society, and spirituality.

I thought I would begin immediately, appropriately enough, with the example of Gandhi, himself, who had a few things to say about copyright. He said that "copyright is not a natural thing," but he goes onto observe that it can be socially useful for certain purposes. The issue of Gandhi's attitude to copyright came up fairly recently because the copyright in his writings was supposed to expire in 2008. Of course, Gandhi was not a writer per se, but he was pivotally involved in the important historical political, and social movements [of his time] and wrote a great deal about his experiences. His writings are a treasure trove of information and knowledge about the history and society of that period.

So when the time came for the expiry of his copyright in 2008, there was widespread concern in India about the integrity of Gandhi's writings, and, in particular, what would happen when the copyright expired. The anticipation of a boom in the publication of Gandhi's writings was matched by concern about preserving the integrity of those works. And policy makers focused on a particular issue, which was whether an extension of copyright term in India would be a good way of avoiding this problem.

On the other hand, a few of you in this room know a little bit about the moral rights of authors, and I will comment that absolutely no mention of the moral rights of authors arose in the course of this discussion at all -- in spite of the fact that moral rights have been protected in Indian copyright law since the 1950s, and those rights are specifically designed to preserve the integrity of written works.

Why, then, was the focus on the term of copyright protection? Well, there is a very good reason for that. It's because a precedent exists in Indian law, and I've just summarised these two quotations to express the opposing positions that were involved when it came to Gandhi's works. First, that extending copyright term would go against the spirit of Gandhian thought -- a statement actually from the current holders of Gandhi's copyright, a publishing house founded by him called the Navajivan Trust. Secondly, we have another Gandhian scholar commenting, 'All scholars have the right to interpret the original, but no one has the right to tamper with the original text. The original must be available for reference for all future generations', but, interestingly, that scholar then concludes, 'but I don't think copyright is needed'.

So what is this precedent for extending copyright term in Indian law? Why was the issue of copyright term compelling? Well, that takes me to my second case study today, the example of Rabindranath Tagore who remains India's only Nobel Laureate in Literature. He won the [Nobel] Prize in 1913 and he is a poet of immense status in India, [particularly] for people who speak Bengali, which is the language in which Tagore wrote. In his case, his copyright was set to expire in 1992, and at that time, the term of protection for copyright in Indian law was lifetime of the author plus fifty years. The proposal was that it should be extended for ten more years to lifetime of the author plus sixty years -- still shorter of course than what we currently know [in the international community] as the [standard term of] lifetime of the author plus seventy years.

The discussion that happened at that time is very well summarised by this excerpt from the Statement of Object and Reasons to the Indian Copyright Amendment Act of 1992. The government writes: "Rabindranath Tagore died in the year 1941 and copyright in his published works which stood vested in Visva-Bharati was to expire on

31<sup>st</sup> December 1991". Visva-Bharati was actually a university that was founded by Tagore. It took over the copyright in his works when he died, and I should add that the publishing of Tagore's works was an important source of revenue for the Visva-Bharati university.

To continue: "There had been numerous demands for according extended protection to Tagore's works in view of their national importance. While it was not considered feasible and appropriate to extend the term of copyright in respect of one author alone, the Government reviewed the whole question of what should be the appropriate term of copyright and decided to extend the term of copyright generally in all works protected by the Copyright Act." And so, the goal of cultural preservation here was thought to be furthered by the extension of term by a ten year period, and, indeed, it applied globally to all copyright works.

I'll make a quick observation here that this is not by any means the first time in the history of international copyright that copyright term has been effectively extended for just one author. Another example would be the Russian copyright law, where term was extended at one point specifically to improve the protection of Pushkin's works -- at the behest of Pushkin's widow, in fact.

Here we have a situation where copyright protection was effectively increased in order to [protect works of cultural importance]. I would now like to offer you an example where an exactly opposing viewpoint was adopted: the situation of Mahakavi Subramania Bharati, the Indian National Poet who wrote in the Tamil language. Now, in his case, he lived a fairly short life and died in 1921 before India became an independent nation; he was part of the first generation of freedom fighters in South India. He died about twenty-five years before Indian independence. When the country became independent, the Indian Government was concerned that his works should be widely available to the post-Independence public because they were a treasure trove of patriotic songs and other knowledge about Indian culture. So, the government, through a series of processes, eventually "bought out" the copyright -- I say "bought out," but it was for a nominal sum of money. The important thing is, that after they had acquired the copyright, by whatever means, the [Government] then gave that copyright as a gift to the public of India. So what that meant was that every Indian citizen acquired the right to publish Subramania Bharati's works. And when that happened, again, you saw the growth of a huge publishing industry in South India, possibly the largest publishing industry in South India dedicated to the publication of [the] works [of a single author]. So the goal of dissemination of his works was very much achieved by that policy approach.

On the other hand, you saw an immense [level] of attacks on the integrity of the works; words being changed, poems being mis-attributed so that works written by other people were being attributed Bharati, and so on and so forth -- a situation where integrity was a serious issue and integrity concerns flowed directly from the policy approach that the Government had chosen to take to Bharati's works. And it is very interesting that, in the case of Tegore, the Bengali national poet, the approach had been to extend copyright in order to preserve this important cultural heritage; whereas, in the case of Bharati, the Tamil National Poet, the approach was effectively to get rid of copyright altogether in order to promote the dissemination of this important national literature. "Experiments" indeed.

The final example that I want to give you to think about actually applies to work that is still in copyright term because the artist, Amar Nath Sehgal, died recently, in 2007. The case began in 1979 with the damaging of a sculpture created by Mr Sehgal that had been on display in a government building in New Delhi, and was [owned] by the government. Eventually, the government wanted to move [the artwork], and in the process of dismantling and displacing it, some damage occurred – and, in fact, parts of the sculpture were actually destroyed in the process. So, Mr Sehgal brought a case asking that any further damage be prevented, and that whatever measures could be taken at this stage to protect and preserve the work would be undertaken by the government. That case was heard and an interim order issued for the first time in 1992, about fifteen years after the original problem occurred. In that interim order, the Court very much upheld the artist's perspective and said that under the moral rights provisions of the Indian Copyright Act, something should be done to conserve the integrity of this work as far as possible. The Government was subject to an injunction preventing it from doing things which might cause further harm to the artwork.

That was in 1992. The government, I speculate, became somewhat concerned about the possibility of liability under the provisions involving moral rights [under] the Indian Copyright Act. Those provisions were quite extensive; they exceeded international requirements for the protection of moral rights. So, in 1994, a series of amendments was initiated (and, of course only governments have the luxury of approaching copyright law in this way), and the goal of the amendments was to scale down the protection for moral rights to match international levels but not to exceed them.

Mr Sehgal's case finally was heard in 2005, many decades after the initial facts initially arose. At that point, we were dealing with new provisions in the Copyright Act where moral rights enjoyed significantly less protection. What is fascinating about this case is how the judges in the decision ultimately chose to deal with that fact. Rather than

interpreting Mr Segal's case in the light of the Government's trend towards diminishing moral rights protection, the court did exactly the opposite thing. What they said, instead, was that, regardless of what the Government had chosen to do with the moral rights in the Indian Copyright Act, there was a larger duty at stake, and that duty involved the obligation to protect cultural treasures. The view was, that the work which Mr Sehgal had done, which was very well recognised, was a national treasure of India and, therefore, some higher level imperative should be brought to bear [upon its treatment]. The work should be protected for the sake of the Indian public as well as for the artist.

And this is why I call this an example of copyright in the public domain, if you like. The work, technically, is in copyright protection -- copyright term -- but the Court treated it as if it were the property of the people of India. Accordingly, it imposed a requirement that the integrity of the work must be protected as the ultimate social objective in this case. So you can see, [highly] innovative and diverse dealings with copyright law in the attempt to promote cultural preservation, a very important goal in Indian society.

I'll make two quick conclusions, if I may, to wrap up. The first one is that we talk a great deal about "the" public domain, and I greatly appreciated Kris's comments at the beginning where he tried to address some of the different dimensions of what we mean when we actually deal with the terms of the public domain. I think one important thing that we could remember is that there is a difference between developed and developing countries when we think about the public domain. The issues that we confront in the developed countries are, of course, important issues for us; but for developing countries the public domain is key to [the acquisition of] basic necessities in society. Education, the development of culture, national identity -- all of these issues are intimately connected with access to knowledge and, therefore, dependent, to an extent, on proper recognition of the public domain. So let me just emphasise the urgency and importance of the concept of public domain in the developing world.

[My second conclusion], in terms of public domain and copyright is, therefore, that we have two issues which are at stake in developing countries, in a particularly intense way: on the one hand, the issue of access to culture and knowledge, and, on the other hand, the issue of promotion of culture and the promotion of innovation and development. [This is the appearance of] a classic copyright dilemma in a very pure form: balancing the protection of culture against the need for access to the public domain.

Thank you very much.

[Applause]

## The Public Domain and Creative Commons Licenses

*Dr. Leonhard Dobusch, Free University of Berlin*

KE: Our next speaker, Dr. Leonhard Dobusch is Junior Professor in organisational theory at the Free University of Berlin. I hope that my translation is accurate. He is an expert in business models, organisations, strategy and copyright. He has authored or co-edited a number of books including ones with such provocative titles as 'Windows Versus Linux' and another book entitled 'Free Networks: Free Knowledge'. His new 2013 co-edited volume is entitled 'Governance Across Borders: Transnational Fields and Transversal Themes'. Welcome Dr. Dobusch.

LD: Well thanks for inviting me and I have to apologise in the beginning because I won't present photos and pictures that you've seen so far. I want to start with some quotes, maybe some of you are familiar with those because the whole session was entitled 'Situated in the Public Domain' and I want to start very basic. This scholar says 'I will argue that the growth of intellectual property in recent years has been uncontrolled to the point of recklessness.' He continues with saying that the 'copyright law seemed suddenly to metastasise' and continues with 'the field of intellectual property can begin to resemble a game of conceptual PacMan in which everything inside is being gobbled up'.

So I'm not sure if you know who authored these lines but maybe some of you will subscribe to these lines as accurate depictions of what has happened over the last twenty years in copyright, that there was an expansion of international treaties and so on. The only problem with this is that the author of these lines is David Lang in his article 'Recognising the Public Domain' published in 1981. So he wrote these lines years before the TRIPS negotiation even started. And this brings me to first my argument because when I first read this paper, which was not so long ago, it reminded me of a concept that you may have heard of, it's called shifting baseline effects. It stems from environmental psychology and it was developed in the context of fisheries and the amount of fish in the sea. And Sáenz-Arroyo and others defined the concept that shifting environmental baselines are intergenerational changes in perception of the state of the environment. As one generation replaces another, people's perceptions of what is natural change even to the extent that they no longer believe historical anecdotes of past abundance or the size of species. And what I would

argue is that the article of Lang publicised in 1981 is an example of shifting baseline effect in the debate of intellectual property. I would say that we cannot even envisage how the much less restrictive IP regimes must have worked in the past and I would say that the perception of what is a natural level of intellectual property right protection has changed.

And this brings me to the main issue of my presentation which is that we can observe over the years a continuous reorganisation of the public domain; what is in the public domain? What fulfils the function of the public domain for art and for the economy is continuously changing and so I was also very grateful for the introduction by Kris when he mentioned what is in the public domain, but I think this depiction by David Lang also reminds us that we have to be aware not only of the geographical differences between the developing and developed nations in terms of the public domain but also of the historical contingencies. So these are the works that Kris mentioned but I also included some stuff from the patent law field because there's a public domain as well in the realm of technological ideas and these are the types of public domains, the part of the public domain that is regulated in the course of national and international law treaties. But at least in the last decade I would say we could observe a second field of public domain that is in a way intentionally created and organised by private actors in the form of open content licensing. We all know of the pioneers in the field of open source software licensing and more recently creative commons, and also in the field of patents we can observe approaches such as biological open source. And I think this is something that is maybe more debatable whether we should count this as part of the public domain when I'm talking about content that is widely usable without restriction online but I would say that Paul Heald when he talked...he didn't come to talk about secondary liability rules in the case of YouTube. But these are also private legal standards that in a way fulfil to a certain degree the function that previously the public domain had. So when the public domain was larger in the real sense there was no need – at least not to the extent – to focus on private standards for in a way recreating, reorganising what the function of the public domain is, or should be or could be.

Of course international law and private standards are independent from another so in a way, on the one hand, private standards build upon copyright law and these treaties but, on the other hand, they follow quite different dynamics. And actually that's what my research is about. I'm trying to focus on the processes of organising public domain. And I would argue that the organising processes or reorganising processes of the public domain differ quite a lot between these two arenas so to say. So in the arena of international law we have hard law and all these political dynamics and then we have mostly corporate lobbying but also,

on different sides of course, we have protest mobilisation, as we have recently seen in the anti-ACTA protests.

I would say in the field of private standards we can see, on the one hand, standard setting which is in a way similar to legislative processes but by non-state actors. What we also can see, we can find mobilisation there, we can find attempts to organise actors to adopt these standards and I would call this constructive mobilisation – constructive because if you're protesting against copyright law you may want the law to change, to take a certain turn but when you mobilise for users or corporations to adopt a certain private standard the so called private public domain is constructed and is generated in the way of adopting the standard itself. So the more successful you are in mobilising people to adopt your open content licensing standards, the wider and the broader the public domain becomes. So in a way the mobilisation immediately creates the public domain you are striving for.

In the second part of my talk I want to focus on this second arena because I think I will be the only one who will focus on these attempts at recreating a private public domain so to say, even though it sounds contradictory. And the type I want to have a look at and I suppose all you are familiar with is the US non-profit network or US non-profit organisation Creative Commons, which provides a set of alternative copyright licences. I am sure you are all familiar with the licence modules. But this is also the first thing which is interesting from a public domain perspective when we look at the attempt of Creative Commons to recreate a public domain with the help of a modularised, standardised licensing approach. Because there are of course strings attached with this modular approach. On the one hand the modularity of the licences broadens the scope of application. To give you just one example, the licence module that only allows non-commercial use and precludes commercial uses which is very controversial and I am sure many of you are familiar with this debate, but only this licence module makes the use of Creative Commons licences compatible with collecting societies for example. So there are a lot of collecting societies in the field of music that only allow, if they allow, the use of Creative Commons at all, they allow members only the use of Creative Commons licenses that include the non-commercial module. So if Creative Commons would not offer such a module, at least for example in Germany and the German collecting societies for musicians GEMA their members are still not allowed to use Creative Commons at all, but at least we are now debating whether those licences that have this module should be allowed, so in a way by providing different modules it allows different use cases in different contexts and it broadens the scope. On the other hand immediately connected to this is that licence modularity leads to incompatibility and thus so to say an imperfect public domain. Also the most known example Wikipedia uses the Creative Commons licence for

its content but it doesn't use the non-commercial module, it uses the attribution and share alike modules. So if you licence your material with a non-commercial module it cannot be integrated into the Wikipedia, even so if you don't have a problem or wouldn't have a problem with that because the licence regulation of Wikipedia precludes that and you cannot remix or easily remix works with these different licences.

So the net effect of the modularity of licences on the diffusion of licences and thus the power and how large this Creative Commons becomes is in a way unclear and actually we still have do much more research I would say on whether the attractiveness of choice is better or the price that you pay in terms of incompatibilities and smaller pools of works, which in turn decrease the attractiveness of the licences.

Of course, and this brings me to the dynamic aspects, Creative Commons is aware of these issues and they're constantly trying to work on it. So actually in the beginning they were so caught by their idea of modularising, because the Creative Commons licences resemble open source software licensing but there is no modularity there. You have to license but you can take the GPL licence or leave it but you cannot modularise it. So in the beginning Creative Commons even meant to be more modular, so there was a sampling licence and there was a developmental nation licence and so forth. Over time they recognised that okay, this is not the way to go but what we can see within a recent paper I did together with Sigrid Quack and Markus Lang, we looked at the recursivity in Creative Commons, how recursively their approach towards licence development changed and we distinguished three dimensions of regulatory recursivity: one is standardisation over time, or you can think of temporal recursivity. So we are already approaching version four of Creative Commons licensing, and whether Creative Commons tries to accommodate changes in the law that Creative Commons, in a way, wants to catch because law is changing so they also have to change the licences.

Then we have the issue of standardising across jurisdictions. So Creative Commons was also the first set of open content licences that were ported to different jurisdictions, but now after ten years they are also thinking about abandoning this approach again because actually I would say the reason is they have now learned enough about different copyright regimes in different countries that they are now able or better able or better prepared to develop generic or unported licences that should work everywhere. And they are also struggling with different adoption practices so they are not changing the licences but they are propagating guidelines or they recommend guidelines.

Let me end with a concrete example of what we mean with this recursivity and this is a very interesting one, the example of sui generis database rights. I am not sure whether many of you are familiar with

those. They are an interesting example because we have some sui generis database rights in the European Union but we don't have them in the US so there was a debate also within Creative Commons on how to deal with them. And in the first versions we have all these different dimensions in it. Temporal, we have changes in the different versions of the licence and we have changes across different jurisdictions and originally in the versions 1.0 to 2.5, database rights were simply not mentioned so Creative Commons completely ignored them.

In Version 3, all database rights were waived and this was a completely intentional strategic decision. So in the interview I made with one of the copyright lawyers involved in crafting the licences he said we waived the licences to give a clear signal against sui generis database rights and against their whole proliferation so in a way they thought by waiving them, they could make a statement; however, and this was a very recent interview, eventually this waiver has slowed down the acceptance of the licences, specifically in research institutions. So in the field of scientific commons, of licensing research data for example, people did not know, okay, but if we are waiving the database rights or if we are not sure whether licences were applicable and so on, so whether the licence clauses that we are applying, whether they are also covering the database rights. And so in Version 4.0, which is going to be published soon, the licence is not explicitly cover database rights in those jurisdictions that have some, or of course in those jurisdictions where there are none, the licences are not introducing these kinds of database rights.

But what you can see is that over time the scope of the public domain that you are in a way creating with using Creative Commons licences is continuously changing, continuously in debate and also with respect to the corresponding changes in copyright law.

So, last slide, just to sum up what I wanted to present today is that the public domain is organised and continuously recreated with significant (and this brings me to the shifting baseline argument) not always recognised changes. So there are sometimes changes that are significant but we are not even getting them because they are developing very slowly and because we take it as natural what twenty or thirty years before people would have thought to be crazy. We are changing both public law making and private standards setting which is also reciprocally related and for the special case of organising a private public domain with the help of standardising licences, one has to resolve the choice versus compatibility dilemma. So that's for Creative Commons. Thank you.

[Applause]

## The Disputed Public Domain Status of Sherlock Holmes

*Professor Roberta Pearson, University of Nottingham*

KE: Thank you to all of the speakers so far for not forcing my hand to show my time up card. I'm not saying Roberta that I'm going to need it now [laughter]. Roberta Pearson is Professor of Film and Television Studies at the University of Nottingham. She has published widely around what she calls her twin fandoms of *Sherlock Holmes* and *Star Trek*. One recent publication is provocatively titled 'Star Trek: Serialised Ideology' and I'm very interesting in hearing more about that, and another article entitled, 'Bachies, Bardies, Trekkies and Sherlockians'. To give you an idea of its importance, Henry Jenkins assigns her work on his course, 'Interactive Transmedia Storytelling'. Welcome Roberta.

RP: The paper addresses one of the issues that Kris raised at the beginning about what is the appropriate time for copyright to expire, and it does so through looking at Sherlock Holmes. I am speculating that what is interesting about Holmes is that in many ways he looks like a media franchise like *Star Trek* in that iterations of Holmes are scattered across multiple platforms producing multiple revenue streams, but unlike *Star Trek* or *Star Wars* or the other kinds of franchises that you're familiar with where IP is held centrally by a corporate entity that itself originates and distributes these multiple iterations, that doesn't work with Holmes. And I want to tell you today about a case currently awaiting judgement in the US federal courts that has wide-ranging implications for what I call the Holmes franchise as well as more generally for the copyright status of fictional characters<sup>1</sup>. Now there is copyright in some of the Holmes stories and it's held by the Conan Doyle Estate. The last copyright on Doyle's work in the UK expired in 1980, the only country in which there is still copyright as you might guess is the US. The Conan Doyle Estate was set up in 1981 when his last remaining child used the 1976 Copyright Act to reclaim her rights to material which had fallen into the public domain in the United States. But the estate actually does claim that Holmes is in copyright and it does ask and forcibly ask people to pay a licence fee when doing adaptations and many people do. Amongst the licensed adaptations are the CBS TV series 'Elementary' which updates Holmes to New York and gives him a female Watson, the Warner Bros. films with Robert Downey and the BBC's 'Sherlock' which had to be licensed for exhibition in the

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<sup>1</sup> *Klinger v. Conan Doyle Estate, Ltd.*, Case: 1:13-cv-01226 (N.D. Ill. Dec. 23, 2013)

US. It would be okay in this country since Holmes is out of copyright but not in the US and of course for any English language publication or work you want to have it distributed in the US.

There is now a legal case which claims that since the bulk of Conan Doyle's Holmes stories and novels are in the public domain in the US, the estate doesn't have the right to request licence fees for Sherlockian adaptations based on the public domain stories. The only Holmes stories still in copyright are those published in 1923 or afterwards and that's because of the US Copyright Term Extension Act of 1998. So all the Sherlock Holmes stories published in the US prior to 1923 (that's four novels and forty four stories) are out of copyright, that only leaves ten stories that are still in copyright and that copyright will expire on 1<sup>st</sup> January 2023.

So a guy called Leslie Klinger, who's a lawyer but also a very prominent Sherlockian who has written about Holmes, has filed a complaint against the Conan Doyle Estate, which has sought licence fees from him for two collections of new Sherlock Holmes stories that he has edited including high profile authors like Sarah Paretsky and Michael Connelly. He's claiming that the Estate goes around harassing people based on spurious grounds and people would really rather pay up because I think if you're Warner Bros. it probably costs you less to give five thousand bucks to the estate than it does to hire your lawyers for an hour to fight it, so people have been paying. But now Klinger has filed this complaint against the Estate and as his lawyer said, everyone's making a decision to pay for permission they don't need to avoid the costs and risks of litigation. So Klinger paid the estate for licensing the first one of his collections, which was published by Random House. He says in his complaint that Random House paid but in order to avoid the hassle with the Estate but without conceding the legal or factual merits of the position asserted by the Estate. He now wants to publish the second book, a sequel to his first one. The estate has come to him saying pay up and his publisher which is smaller than Random House has said sorry, we can't do it until you've got this sorted out. And this was as a result of a letter sent by the estate that said if he proceeded to bring out the book unlicensed, he could not expect "to see it offered for sale by Amazon, Barnes and Noble and similar retailers. We work with these companies routinely to weed out unlicensed uses of Sherlock Holmes and will not hesitate to do so with your book as well."

So the case is now awaiting the judge's decision. It's received very wide coverage in the press and in legal and technology blogs because it could be a landmark case with regard to the copyright status of fictional characters and as such have broad implications for the future. It's fascinating from a legal perspective because of what could be its far reaching implications. It's fascinating from an adaptation perspective because the case comes down to the definition of what constitutes a

fictional character and at what point a fictional character can be considered to be fully formed, and it's fascinating from a cultural studies perspective because the case that the estate is making involves distinctions between popular and high culture fictional characters.

I'll deal with the plaintiff first. He doesn't dispute that the estate has copyright to the ten stories published post-1923 but what he does claim is that the Sherlock Holmes character was fully constituted in the stories written prior to 1923 and that the ten stories still in copyright add nothing essential to the character. Therefore he says any representation of the character that doesn't draw upon elements introduced in those ten stories does not violate copyright. Anyone in the US has the right to create derivative works incorporating what he refers to as the Sherlock Holmes story character elements. So he has a theory of a fictional character. He claims that the story elements are the characters Mycroft, his landlady, Mrs. Hudson, Professor Moriarty, also the Holmes character, things like his birth date, his lodgings, his drug taking, his skill in Baritsu which is what he used to defeat Professor Moriarty at the Reichenbach Falls for those of you that don't know this, the Watson character etc. And he bases this argument on existing case law concerning copyright and character. He quotes the acknowledged expert on copyright, David Nimmer, who says that fictional characters are entitled to copyright protection, but while fictional characters are entitled to copyright protection, Nimmer says that protection lapses if earlier works featuring a series character enter the public domain. So he says where an author has used the same character in a series of works, some of which works subsequently enter the public domain, clearly anyone may copy such elements as they enter the public domain and no one may copy such elements as remain protected by copyright.

Klinger says that the courts have widely shared Nimmer's view and he cites in particular a case *Silverman versus CBS the American Network* from 1989. The case concerned the American radio show *Amos 'n' Andy* which was a radio sitcom concerning two black characters living in Harlem. It began in 1928 and Silverman wished to adapt the show into a musical. CBS owned the copyright from the post-1948 shows but not for the pre-1948 shows and the judge ruled that the radio shows in the public domain were available for use in derivative works without the consent of the copyright owner even though CBS still held copyright for the later shows. And actually a case concerning a Holmes adaptation on the USA network in 2002 specifically applied *Silverman* saying that only those elements of Holmes still under copyright protection were protected.

The estate claims that Holmes as a character is completely covered by copyright and that any derivative works must be licensed. And the essence of this was stated by their lawyer who said Holmes is a unified

literary character that wasn't completely developed until the author had laid down his pen. So while Klinger says the character was fully developed in the PD stories, the estate says no it really wasn't until those last final ten stories were written that we have the Holmes character that we know, therefore the Holmes character should enjoy complete copyright protection and anyone using Holmes in a derivative work should pay a licence fee. They say that Holmes kept changing, that Conan Doyle kept adding to the characters, that the last ten stories actually fill in narrative ellipses in their earlier lives. And it makes two further arguments, one about the consequences of Klinger's winning the case and the second as to why he should not win the case based on the existing case law. The estate says that if Klinger were to win, this would create multiple personalities out of Sherlock Holmes; a public domain version of his character attempting only to use public domain traits next to the true character Sir Arthur created. But there are not sixty versions of Sherlock Holmes in the sixty stories, there is one complex Sherlock Holmes says the estate.

Now this is really disingenuous on the part of the estate given that there are multiple personalities in circulation and that these multiple personalities have actually been licensed by the estate. So if you look at the differences between the Downy Holmes, the Cumberbatch Holmes and the Jonny Lee Miller Holmes, there are huge differences! But they're all licensed. They all have the estate's blessing. And in fact Conan Doyle himself who basically wrote Holmes for money really didn't care all that much, so back at the turn of the last century when American actor William Gillette was adapting the Holmes stories for the first theatrical production, he wrote to Doyle asking if he could marry Holmes and Doyle very famously sent back a telegram which said 'You may marry him, murder him or do anything you like to him'. But the estate doesn't think that. On the basis of the existing law, the estate claims that both Nimmer and Silverman Versus CBS are not relevant and it does so, and this is wonderful, it does so based on the distinction in narrative theory between flat fictional characters and rounded or complexly written characters.

They brought in these two experts including a guy called Larry Woiwode, he's published numerous books, he's been writer in residence at the University of Wisconsin, Madison and also writer Valerie Sayers, a novelist currently chairing the English department at Notre Dame. So they're bringing in these heavy culture kind of guys to argue the case for them. And these experts say that whereas the Silverman ruling was okay for Amos 'n' Andy, those were flat characters, they were pretty much established in the first one or two episodes, but Holmes is a rounded, complex, literary character who develops over the course of time.

And this distinction between flat and round characters seems to elevate Holmes from the status of popular culture to the status of high culture. It does so first by drawing on the opinions of experts who are valorised proponents of high culture and it also is supported by the experts' comparison between Holmes and the works of Faulkner and Roth and Updike that feature the same characters over a series of novels. But Holmes was popular culture. Many of the Holmes stories were first published here in the Strand Magazine which was a monthly magazine admittedly aimed at sort of literate middle class readers – it wasn't the penny dreadfuls, but they did publish Agatha Christie, Dorothy L. Sayers, E.W. Hornung stories about 'Raffles The Gentleman Thief' – so it wasn't high culture, it wasn't Roth or Updike. I'm not arguing that popular genre literature should be seen as inferior, nor that work created for a popular audience cannot be subsequently elevated to high culture, as is the case with Shakespeare for example, but as with Shakespeare it's important to take the original conditions of production into account when understanding the texts.

So the estate argues that Doyle created the complex character over the course of a substantial corpus, but as I said he wrote Holmes for money. It was his historical novels that he thought would cement his literary reputation. He killed Holmes off by throwing him over the Reichenbach and he rather implausibly revived him when his publishers kept saying come on, come on, it's a good little earner you've got here, and he brought him back. And it's the production of a serial character to order over many years that give rise to the inconsistencies in the stories that fascinates Sherlockians. So where exactly was Watson wounded when he was in the Afghan wars? How many wives did he have? What was his middle name? So it's a rather disingenuous argument to compare Doyle to Faulkner, Roth and Updike, but one I love of course.

So as you probably gathered my sympathies lie with the plaintiff rather than the defendant in this case, and according to the press coverage so do the sympathies of many Sherlockians.

Comments on the case by lawyers indicate that Klinger has the stronger case but were the estate's arguments to be accepted by the judge, the implications for the copyright status of serial characters would be profound. As lawyers commenting on the case have pointed out if a serial character is complete only after the last instalment in the series is written, then copyright could be perpetual. So there was a post on the Tech Dirt blog that said that if the estate is right and arguing that "at any given point in their fictional lives, the characters depend on copyright of character development, so long as you never complete the character creation they can never go into the public domain." So basically this guy's arguing it presents a way to make copyright on characters perpetual, you just need to have someone to continue to release new works that have some minor change to the character and

they get to pretend you have a new starting point for the public domain clock; that can't be what the law intended, according to this blogger. Of course American law has now several times restarted the public domain ticker even if that's not what the law originally intended and I'm hoping that this won't happen in this case. As the New York Times said in an editorial in 2010 relating to a dispute among Conan Doyle's descendants as to who owned the copyrights, "the public is better served if copyrights have a reasonable limit. Sherlock Holmes should belong to us all right now". And the website for the plaintiff in this case is called 'FreeSherlock.com' if you want to go and take a look, he's got all the cases posted up there. Okay, thank you very much.

[Applause].

## Public Rights in Copyright: Redefining the Public Domain

*Professor Graham Greenleaf, University of New South Wales*

KE: Our final speaker is Professor Graham Greenleaf, who comes to us all the way from Australia. Graham is Professor of Law and Information Systems at the University of New South Wales. He is co-founder and co-director of the Australasian Legal Information Institute. He is incredibly prolific – in 2013 alone I counted on his website he published more than a dozen items, primarily on data protection but also on public rights and the public domain, so please welcome Professor Graham Greenleaf.

[Applause]

GG: Thanks very much, just while my slides are coming up it's certainly a fascinating morning. I thought concerning Ian's comments about the makers of Jaws suing The Last Shark, that they were a bit precious when Jaws was just a remake of Death in Venice anyway. [Laughter]. Also Mira's talk made me wonder whether I am right in thinking there is perpetual copyright in Peter Pan owned by the London Children's Hospital? So there are some really interesting one off cases.

What this research is about is an attempt to create a comprehensive theory of the copyright public domain - a far larger topic than anything I can attempt to cover in fifteen minutes. So I'm going to concentrate today on the core elements: the definition of the copyright public domain and the categories of public rights in particular countries that I argue make up *a* public domain (not *the* public domain). The rest fits around that.

Thinking like this about any particular country starts from a vague intuition of what is valuable in copyright works that are also of use to the public. These logos are just some Australian icons and examples of themes that are available for public use and institutions involved in that use. They all involve the public's ability to use works in which copyright owners usually still have some exclusive rights, and the building of business models around those allowed public uses.

So, you start off with intuitions like that, but when you come to anything like definition, well: defining what? There are so many overlapping terminologies in this area that it's sometimes even difficult to know where to start. Here are some of the more common ones, and some of the more unusual ones like James Boyle's 'information environmentalism', or (my favourite) David Lange's 'a place where they have to let you come in and dance'. David is never very precise in his notions of the public domain.

It's fair enough to say that the most important people who supported the notions of the public domain don't attempt to define it in any precise way. I think there are disadvantages in that. So as part of this research project I've been trying to work on a definition of the public domain, which can briefly be stated as the public's ability to use works on equal terms without seeking prior permission. And in that sense it's consistent with the approaches taken by Litman, Boyle, Lessig and particularly Ronan Deazley, in using lack of permission as the key element in defining what the public domain is.

But it's a lot more complex than that really to try to give some precision in individual cases of what falls inside and outside of the public domain. I'm not going to attempt to read out that long definition on screen – just look at it and I hope it will become clearer as I go through a few examples. But I'd stress that there's nothing profoundly original about the basic point, that a lot of other scholars have used the same jumping off point. But in what we need to do, the key part is to look at public rights as being the logically distinct components or categories that make up a public domain, and perhaps make up *the* public domain. By that I mean that each of these categories must satisfy the public domain definition that I'm proposing (or one that anyone else would propose). Each category must be distinct from each of the other categories in the public domain. Once you do that you have the public domain equivalents of the exclusive rights of the copyright owner. You have a bundle of rights which make up the other side of copyright. And in fact each public right relates to one or more of the exclusive rights of the copyright owner – usually to many of them. So the public domain in this conception is the sum total of these public rights.

While it is possible that my definition (or other definitions) of the public domain may be universal, their content (what is in each category of the public domain) is certainly not universal. It's part of this argument that public domains in reality are jurisdictionally specific – which usually means nationally specific – and vary a great deal between each national public domain. Another part of the argument, is that there is still some sense in talking about something we could call the global public domain, and it makes up part of the public domains of each national jurisdiction. But it's not the core part, the core part is really the national differences. Also, this is a descriptive theory, not a

normative one. The normative theory of what should be in the public domain is a separate matter.

Applying this approach to Australia [we get the 15 categories shown on the screen]. Ronan Deazley was working on his article about the public domain as I was starting this, and all of Ronan's categories are included here plus about half a dozen or so more than he included. To me, this is a comprehensive set of categories that describes Australia's public domain. It hasn't been utilised in other countries so I don't know how universal a set of categories it is or whether there are significant other categories needed for other countries. If we break it down a bit, in Australia there are at least five of these categories that are either empty or unimportant in Australia [as shown in the slide]. As Ronan said last night the insubstantial parts of works basically don't exist because judicial case law has written them out. In Australia we have no constitutional protections for freedom of speech and the like that have any significant effect on the public domain and these three are basically still yet unknown in Australian case law. So in any public domain certain potential theoretical categories will be either empty or unimportant, as these happen to be in the jurisdiction I'm looking at.

In other cases some categories are unimportant but relatively well understood [as are these categories listed in the slide]. These include the originality or material form requirements – if they're lacking then material is in the public domain; the idea expression dichotomy – dividing line between copyright works and some aspects of the public domain; the vast number (in Australia at any rate) of statutory exceptions to copyright; and of course the traditional 'public domain equals dead copyrights' approach.

So, that then leaves those that I think are more interesting and important in the Australian context [as shown in the slide], but in many other jurisdictions not so interesting, or certainly not so important. So I'm going to have a look in the time available at as many of these as I can.

To start with a relatively stark example: traditionally, uses outside the owner's exclusive rights are one of the gaps in copyright protection. I call these 'traditional public rights' and they are fundamental to the enjoyment of works. Reading or viewing and providing (not in public), listening to, performing, or playing works, lending privately or through libraries, hire rent, sell second-hand etc., – these are usually summed up in US terminology as the first sale doctrine (but not so much here ) or parts of it anyway. In recent years the UK and Europe have taken a much narrower position on many of those things, including contracting the public domain by making lending and rental rights now exclusive for all types of works with some exceptions for public libraries and alike. In Australia by contrast, we only have rental rights for sound recordings

and computer programmes only and we still don't have any restrictions on lending, so even there you can see considerable divergences.

Now as Leonard was pointing out earlier this is a real example of generational shifts in perceptions. Many people now doing things with works wouldn't even know, as a matter of generational change; that these things were once the norm.

You may wonder why collecting societies, such as Copyright Agency Limited and AMCOS are appearing here. The reason is that on the definition of public domain that I use, some of these 'collective licences' (as I've called them although that's not a statutory term) fit the definition and are part of the public domain. This is only so if the licence conditions and fees concerned are set by a neutral body on public interest grounds and are uniform for all users. So none of those things are under the control of copyright owners. But once they are outside the control of copyright owners, there are enormous amounts of use of copyright works that may be made by members of the public or by intermediaries, ultimately benefiting the general public. In Australia we have two types: a wide range of compulsory licences where the act defines the licence and the fee mechanism, such as music on radio, or blanket licences where a licensing practise empowers our Copyright Tribunal to set uniform conditions and license fees across an industry where it perceives that there are common practices developing. So the conditions under which music can be played in gyms and the fees to be paid are set by the Copyright Tribunal and are taken out of the hands of individual owners of musical works and recordings.

This happens in Australia but I gather not so in the UK. It is an enormously significant part of the Australian public domain and there are lots of complicated arguments that arise from that discussion. We've heard discussion of Creative Commons and the like already, and Wikipedia and open source software like Rsync. In my view these are squarely part of any notion of the public domain, but only for certain types of licences, namely those that fulfil almost exactly the same conditions as the compulsory licences I've just been talking about, in other words licence terms set by a neutral body not by individual copyright owners. A big tick for Creative Commons [referring to slides]. Copyright owner can't choose who can't use the licence, ditto. Copyright owner can't vary or revoke existing licences, ditto. And so we have a wide range of different licences and (as has been said) the adoption of them greatly expands the public domain simply by their usage. This is particularly so with viral licences: anything under the GPL, anything to do with Wikipedia. Viral licences are the tar-baby of copyright: as soon as you touch one with your content, your content is stuck to it, to the same licence terms. The public domain expands like a great big snowball rolling downhill – to use a mixed metaphor.

So that's essential to the modern public domain. Finally the last one I'll have time to mention is about Google. This is the largest component of the public domain ever created. What I'm talking about is the de facto public domain in what I call 'benign uses of works with opt outs' – the meaning of that will become clear. The requirements for how it fits into this definition is that you have some situations where there is near universal non-objection by copyright owners to benign uses that are made of their works, plus a sufficient effective means of opting out for the minority that do object so that the whole system doesn't fall apart. The biggest example is the Google example, the effect of internet search engines creating a searchable commons of works despite the fact that they constitute the largest and most systematic infringements of the exclusive rights of copyright owners that has ever occurred.

The trick is to work out under what circumstances can such benign appropriation work. A set of about eight conditions comprise the basic conditions for when benign appropriation can create a de facto public domain. These include where you have law being somewhat unclear differing between countries where most of the copyright owners are either unaware of what the law says, or consider that the use that's being made of their works is in their interests. If they do object there are effective means for them to opt out, by use of the robot exclusion protocol and various other things, and where only a manageable number of those copyright owners do in fact opt out. When these things happen you can have vast new areas of the public domain created by these practices.

I think that gives at least an idea of this more general approach to the public domain. I'll finish by saying that if one symbol symbolises it well, it is the Yin-Yang symbol [shown on screen]: that's the proprietary domain, that's the public domain, there is a border between them. They are completely complementary and there's a lot of interesting things to be explored in determining what is the relationship between the two halves of copyright. Thank you.

[Applause]

## **Panel Discussion: Interdisciplinary Research and the Public Domain**

*Chair: Professor Martin Kretschmer, University of Glasgow*

MK: The main beneficiary from this session really will be the research team here [Erickson, Kretschmer, Homberg, Mendis], because we are part of a group that is working on an empirical project 'Valuing the Public Domain', responding to a call by the UK Intellectual Property Office for research with the following aims. Number one: mapping the nature of works available in the public domain and the frequency of their use. Two: analysing the role of public domain works in both direct and indirect value creation of UK firms and by the economy. Three: benchmarking and comparing ways of exploitation, value creation both in public and private domain works for example using time-series analysis and other economic methods. Four: assisting the UK's newer companies in identifying and developing business models that will benefit from public domain material. Five: understanding the role of new digital technologies in the dissemination of public domain works and proposing policy directions alongside European initiatives. Five impossibly wide-ranging aims for a project to be delivered in a few months.

So we got together and we wrote a bid which was more modestly structured as a research concept and we managed to get matched funding from both the Economic and Social Research Council (ESRC) and from the IPO. Today's session is part of a process to formulate our approach for a more focussed, academically rigorous project.

All of the points raised by the IPO in its call for research somehow presupposed that we knew what the public domain was. But how can we measure something if we don't yet know what we're attempting to measure? We have this very complex list from Graham Greenleaf which is a very technical and precise definition under Australian law. Do we adopt something similar, and measure the UK equivalent? Or, do we have a starting point such as Iain's which focuses on what people in the media actually do with story ideas?

In some ways, you have almost three positions. The first position is to use copyright law to define the public domain and then use technical

legal criteria to draw lines around behaviour that is possible without asking for permission. The second one would include what is possible under private ordering schemes including for example Creative Commons licences, or similar types of mechanisms.

And the third one, which is probably the most interesting one, is not to use legal boundaries as the starting point, but focus on communities of practice. As we have seen, attitudes and behaviour seem to be sectorally specific, culturally specific and they change all the time. So if you look at works produced in the 1960s and 1970s in this country they will be the result of a quite liberal approach to what they take without actually asking. Different sectors deal with it in a different way. For example, many aggregation services on the internet appear to rely on what they assume to be implied consent of the sources they copy.

All of this makes it very difficult to actually conceive an empirical project which would map and value the public domain because we don't quite know what we're looking for.

The format of this session is a kind of *Question Time* (if you are familiar with the TV format) so each of our team members will start asking one question of the panel and then at least two panel members will try to answer it, and I would like them to come from different disciplines. So we're not allowed for example to have two lawyers answering in sequence.

After the end of the first round we will open it to the floor. Okay, so I wonder who wants to take the first shot. I think Dinusha had a very ambitious question?

DM:

First of all thank you for your very interesting presentations and it was interesting to hear the kind of different angles from which you all approached the public domain. I was interested for example in Iain's and Mira's presentations, looking at the public domain from the point of view of developed and developing countries, some of them aren't compatible with Western legal definitions. It's territorial, so even the limitations of public domain calculators is that we can't really know in some ways to where the public domain extends. Taking that uncertainty one step further, even if something falls out of copyright, it still might be trade marked. Some of the presenters talked about that aspect. And also there are the exceptions and looking at public domain from that point of view, and I could go on. But I guess my question to at least two members of the panel is, can you define what is the public domain from the angle that you're coming from. And actually what kind of works can be used from this public domain? I find the word public domain ambiguous and it has made me wonder whether this is even what we should be calling it?

PH: I'll say one thing answering your question of course: a good, postmodern view is the public domain is what the people who use the word think it means, that probably just means something like being used for free. I'd like to draw a distinction between the status and privilege here. So for me, the public domain refers to the legal status of the work. It's open to be freely used by anybody. So I wouldn't talk about fair use at all because fair use is about things you can do with protected objects that are privileged. Same thing with a lot of expression about consent which allows for the use of protected objects. So as an economist I would be really precise and use the term only to refer to the status of the work as opposed to whether it might in fact be used without permission in some context but not in others. But that's really for the convenience of the economist and that's not a prescriptive statement necessarily about what the world as a whole should think it is.

RP: I guess based on what I've heard today, for somebody interested in media, the public domain is a source of ideas, really. It's a source of ideas that can be put into particular expressions and I think that there's a distinction in copyright law between the ideas and the expressions, so it's kind of a grey area whether you're actually infringing or not. Iain's wonderful example of *The Great White* or *The Last Shark*, so you could argue that both *Jaws* and *The Great White* are indebted to *Moby Dick*, that's just PD right? But what is it about *The Great White* that makes it actually infringe on *Jaws*, so that if it's not considered to be drawing on an idea that's freely available within the public domain it's seen as drawing upon something that doesn't enjoy copyright protection. So I guess for me, my particular interest in the public domain is what is freely available and when does the law kind of find, make one as a comparison in a way and that's why I understood as somebody who's interested in narrative theory I'm interested in copyright because it tends to as in my example, it tends to actually stray into areas of literary theory and narrative theory because it has to in order to say whether something is infringing or not.

That's not really a definition of the public domain but that's a definition of how I think a lot of us in my field would think.... our interest in the public domain would be as a kind of source of inter-textual expressions.

MK: And both are obviously quite difficult to measure, yours is quite a challenge.

PH: That's my point. Copyright owners have a real easy task dealing with legislators and media. We lost one point two million dollars in Malaysia last month due to copyright piracy, and unless we adopt a definition that we can similarly quantify the benefits of the public domain we can't even play the game.

- GG: Can I criticise the question Martin? [Laughter] Both in Dinusha's question and Paul's answer there's a category error in that there is not a dichotomy between works that are in the public domain and works that are in the proprietary domain. There's a dichotomy within each and every work between the public domain aspects and the proprietary aspects so that makes the answer much more complicated of course but I do think that's where the real answer to this lies. The old fashioned view of the public domain was those things that had fallen out of copyright because copyright had expired. But as soon as you take into account something like Creative Commons, the slogan of Creative Commons is 'Some Rights Reserved', in other words all Creative Commons licensing is built on the continuing existence of copyright within every work that is licensed. So if you take the dichotomy between in- and out-of-copyright works you're abandoning every modern aspect of public rights. As I have said, I think the question isn't quite right.
- MK: So you could call that the behavioural approach, basically what activities you can do or can't do, so a regulation of behaviour rather than original creation.
- MSR: Sorry Martin, because that question is so vast, do you think we could have an opportunity to comment as well because I think...
- MK: It is such a crucial question that I'm happy to, yes.
- LD: I would just like to add one minor thing because it reminded me of yesterday's inaugural lecture by Ronan, which I enjoyed a lot. He made the point it's not even so easy to identify what is a work. So yes there is the box but even today, what we were talking about copyright protection of Sherlock Holmes, the character, and when is the character work finished. So that's why I think Graham's stance might look more complicated on the outside, but if you want to really do justice to the concept and if you want to really accurately ...it's more workable but maybe not so easy to get the numbers. And the last point, and I'm not criticising the question but I'm handing it back over to you because Popper once said 'what is?' is not a scientific question, it's always a combination, so you have to decide, not me. In your words, in the outset of the work, you define what is in your work the public domain and then please use it consistently at least in your work, so that's what you have to do, and don't ask us how to define it, you define it.
- MSR: I have three things to say and I'll try to do it in three sentences. The first one is that I want to play the devil's advocate and answer this question by saying that the public domain is everything in terms of immaterial knowledge because copyright law is always for a fixed duration, that's the definition of what copyright is so at some point in a life cycle of every work it becomes part of the public domain so in that

sense it is the entirety of human knowledge. And actually I'm always quite disturbed by the extent to which copyright scholars definitely increasingly talk about the public domain as being exceptions or spaces carved out of copyright because that's actually not how the theory of the law works is it? It's just the opposite; that human knowledge is the grand circle like in your last diagram, the yin and yang, human knowledge is the entirety and copyright is what we carve out of that and we do that for purposes of public interest. So that's my attempt at answering that.

The second point that I wanted to make is that something else interesting to think about regarding the public domain, we're talking very much in terms of definitions of the public domain but I think it's good to remember, there's not only a conceptual legal, definitional side, but there's also the practical reality of what the public domain is and that reality is something very much larger than what the legal side is. Because beyond copyright restrictions and all of that we have the circulation of works through technology which has created a vast amount of knowledge that is available whether or not it's lawfully available, we may not know but it's definitely out there so there is a real public domain that's even larger than what we would define as a public domain.

The last point because you mentioned about developing countries and I don't think they should be forgotten in the discussion, I think what there is to add is that there is a normative dimension to the public domain that developing countries might sense that doesn't necessarily appear to us in such an obvious way, although it does appear to us because for developing countries historically the public domain is what is accessible for educational purposes, it's what's good for society and it might also be what's indigenously produced versus what's imported. So there is that conflict built into copyright law and into the international, because we've been talking a lot about public domain as something globally international and there is that controversy or conflict built into it where historically knowledge that's restricted that is not in a public domain is something that is inaccessible for the developing countries and I think that that still very much exists. Take a country like India where people talk about the high level of development in India, that's great three hundred million people at a high level of development, what about the remaining seven hundred million, these are to me very much concerns that are alive. Thank you for the time.

IRS: For me I find the definition difficult and, in fact, being invited to come here by Kris my initial gut response was that my research has little to do with the public domain because my case studies are all in copyright, although on reflection I can see the great relevance of these ideas to my research. If we return to Graham's split, I find it very useful to consider how within a certain work you can have some elements which are PD

and some of which are copyrighted. Because if we take again that case study of the Italian film *The Last Shark*, also known as *The Great White*, there are many films which borrow elements and are influenced by *Jaws*, there are articles written on this, one by IQ Hunter on 'Jawsploitation' so they trace through all the hundreds and hundreds of films from revenge of nature films like *Grizzly* through to *Piranha* through to *Deep Blue Sea* through to innumerable films around the world. Yet we then have the issue of what can be copyrighted? Some films actually use the music from *Jaws*, so is the music then the copyrighted element whereas everything else is public domain? Well *The Last Shark* was seen as being an infringement without using the music just by being so close to the plot line of *Jaws* so I think part of my interest in the public domain would actually be along those lines, to look within a work itself and see that balance between the two.

- FH: I was fascinated by the case studies you described and then I was wondering in your research have you come across something that you would consider best practice on how to deal with those issues? For example when I remember your case *Mira*, it seemed at first very arbitrary how they decided each of the cases, so given the state of knowledge on the public domain law that you have now, what would you consider the best practice or what's your opinion having also listened to all these talks? What's the best practice that you see emerging?
- MK: Again we should clarify that Dinusha is a lawyer, Fabian is organisational behavioural scholar with an economics background so just so you can place the nature of the question. So who wants to take that?
- FH: Roberta, you have described the *Sherlock* cases and I guess in your other research you have come across others and you have described to us how the judges ruled in certain cases, so what's your point of view on that? And you said you sympathised with one side or the other in some senses, so what makes you sympathise with one side? Is there any systematic pattern behind it that should be applied in for example the Indian cases?
- RP: I guess it goes back to what we said before that if the public domain is a source of ideas and if the basic idea of letting things lapse out of copyright is to permit future expressions to emerge based on previous expressions as I understand it, and indeed if there are perceived to be social, cultural or economic benefits in that, that's the idea of the public domain I think, then I suppose I would argue – and I'm making it up as I go along – but I do a lot of work on fan studies and I would argue that the kind of cultural and social benefits in terms of people, quality of life in engaging in the kinds of practices that fans engage in, so writing fan fiction or making YouTube videos or all those kinds of things has a

certain value, has a social and cultural value and particularly a value to individuals' and collectives quality of life so that I would want to side with, and I'm not anti-copyright because I've actually written things that I've actually earned a couple of quid from.

It's not that I'm a complete radical public domain person, but I think there's social and cultural value there, and also just to say quickly so we can move on in terms of another project that I'm working on or maybe about to work on, got a project in its initial stages on digital Shakespeare and it looks like I'm going to be doing some work with the RSC around that and I've also worked with the British Film Institute and what I've found with these cultural institutions is that copyright is so restrictive in terms of what they can do, these are holders of vast resources in terms of cultural benefits and yet they're hampered by copyright so that's why I would side in many cases with a much less protective regime I would guess.

GG: Can I make one brief comment? Because you're looking for valuable case studies, there are five cases handed down by the Canadian Supreme Court early last year where they fully consolidated the notion of 'user rights' as they call them in Canadian copyright law as being as intrinsic to copyright law in Canada as the rights of copyright owners. They said that as such the notion of user rights has to be given, I think the words they used were something like 'the full credit of beneficial legislation'. In other words, user rights have to be taken as seriously as authors' rights in Canadian copyright law. I think the Canadians in the courts are miles ahead of everyone else in developing this jurisprudence, and they've been doing so for ten years now.

In the middle of last year there was a whole slew of cases – search for Michael Geist to find commentary on them.

MSR: I thought the question was an incredibly important question, I had to think about it for a while. You were asking about the Indian cases and I think what we saw in those examples is that it's all over the map in the sense that they try sometimes diametrically opposed strategies to promote the preservation of culture and at the same time encourage the public domain. So I think in some sense your question is very easy to answer, strategies like extending copyright term don't make sense at all because all that does is it generates revenue for the copyright holder, it doesn't help the public domain, and arguably it doesn't do anything directly to improve the status of cultural heritage either. It indirectly protects cultural heritage by maintaining a form of censorship over it, but that to me is not the most straight-forward way of approaching the policies. So maybe the answer to your question is that we need to be purposive in thinking about these things and look at the goals you actually want to accomplish so for the Indian government in all those examples I cited, the goal was the preservation of important cultural

heritage and so something like, and I'm sorry to be boring but, something like the moral right of the author actually makes a lot more sense because there you don't have any restrictions in terms of permissions that you require or royalties that you would have to pay and those sorts of things, so in a sense the works do fall into the public domain but there are certain things you need to maintain in terms of the correct attribution of authorship and also maintaining the integrity of the work itself. And ultimately that would be decided on a case by case basis before a court if necessary so that might give us a more nuanced approach to the cultural policy.

Can I just add as a footnote since there was quite a bit of talk about the Creative Commons, it's interesting when you think about the Creative Commons system, in the American sense of public domain, works that are licensed under Creative Commons don't really fall into the public domain because what the US understanding of public domain is that that's an area where you can do anything but Creative Commons system whether or not they would like to think of it that way is actually built on moral rights because attribution is the foundation of the system and then you have various gradations of restrictions on use for the purpose of preserving the integrity of the information. So maybe that's a useful thing to think about in terms of cultural policy.

KE: Thank you all very much for the presentations. My question, having done some research on user behaviour and derivative uses of original works, is this: if we think in many accounts the public domain is conceived as oppositional or competitive to the commercial exploitation of works; one side wins and the other loses. But I think in Leonhard's talk, in Graham's talk and in both of your talks we got a whiff of a sense that maybe if only the rightsholders could be convinced that in certain cases the public domain actually serves their interests – many of you used the terms interests – maybe the picture would look different. So my question is for those of you who care to answer, what sort of evidence do you think that you could muster if you had a budget and grad students and resources? What evidence would you bring to the table to convince or help to convince commercial rightsholders that the public domain offers potentially economic interest to them?

PH: Convincing to whom again? Who's the audience that needs to be convinced?

KE: I think it's fairly easy to convince the platform owners, which your evidence could do for Amazon, that public domain works sell a lot. But what about rightsholders? What about authors?

PH: It's difficult to convince a rights holder that losing your rights is in their interest. If you're talking about business in general they understand it already, you have this print on demand publishing and the whole

platform is built on waiting for things to fall into the public domain and exploiting them as quickly as possible. I have a friend who runs a music publishing business exactly the same way so there are corporate commercial interests who see the value in having a healthy public domain, but if you're just talking about rights holders, stasis seems to be their business strategy and it seems difficult to convince them that giving up their rights is somehow in their interests.

LD: But I would say of course it all depends on the definition 'them' because if you define this...if all of the rights are waived then a whole work is in the public domain, then you may be right. But maybe define the public domain as also dominating some rights or reducing some of the rights, I think you can make a better case.

PH: Now I know why you were nodding at me. Okay so for example my YouTube research shows that YouTube is this platform for reducing transactions cost between people who have access to copies of works and the copyright owner. So it's amazing how many people had cameras trained on televisions in the forties, fifties and sixties so if you have this copy of Jacques [Reve] performing on a television show in the 1950s and you would like to get it to the public and you've got to ask for permission they won't even talk to you, it's not that they won't give you the licence, there literally is no door for you to go to, you can't engage in negotiation whatsoever. What you can do is you can post it on YouTube and become an infringer and then you'll be noticed, that's actually what gets you in the door and a bizarre negotiation sort of happens whereby YouTube will then stand on the side of the consumer and ask the rights holder do you want us to leave it up and let us monetise it, maybe make some money? And many of the times the rights holder says yes, so this is a situation where rights holders actually are directly benefiting from infringement. They understand that they are benefiting from infringement and if you want to define the public domain as implied authorised uses or the realm of privileged uses then it looks like that's a situation where maybe rights holders have actually been convinced that letting at least aspects of their work fall into the public domain.

RP: I can give you an example I was engaged in this project on digital Shakespeare and we had a couple of workshops over the summer including people from the RSC and the Globe and there was this young chap from the Globe, I forget the position he was in, anyway he was telling us the story about how there had been some publicity pictures taken of and I can't remember his name now but he's an actor in Merlin the BBC show and he has a huge fan-girl community and these fan girls had taken that picture and they'd transformed him, I forget what they did, usual kind of Tumblr sorts of practices. And the guy wrote to them and said you can't do this, this work is in copyright and you're hurting the artist by doing this, you're decreasing his revenues. And I said two things, would these fan-girls ever hurt this guy? If it hadn't been for this

particular conjunction of getting their beloved actor in a globe production and this guy taking the photos so in fact isn't it that this guy's public profile or the photographer's public profile is being enhanced by what these people are doing, by posting on Tumblr, Facebook or whatever. And secondly, isn't that exactly why you cast the guy in the first place because that's what you do if you're a theatrical organisation you go out and you get well known people precisely because they have a fan base and then you want to appeal to their fan base, but then you can't really turn around and say hey we don't want the fan base to do what the fan base usually does. I think within the media industry and of course from reading Henry's work, within the media industry there is some recognition of the value of fan productions although they want it to take place within their own closed gardens and they want to control that very carefully, but I think maybe with cultural organisations certainly like the RSC, the Globe, the BFI to some extent from talking to these people, they're the ones that I think that need to be convinced about the need to reach spreadable media, the need to understand what the benefits of not letting go of copyright or trademark completely, but of being a bit willing to innovate.

KE: Or creating these kinds of spaces that are quasi-public domains, or closed public domains where generative things can happen. During the break we talked about the expert witnesses on the other side in the Sherlock case so on one side they've got the head of the English Department at Notre Dame University who is an expert on narrative or whatever, on the plaintiff side they have super fans, and you get the sense that super fans as you described them know more about Sherlock Holmes than the Sherlock Holmes' Estate.

RP: Yeah one of them is in his seventies now, he wouldn't call himself a fan because of all his cultural distinctions but he's been doing this for fifty odd years and writing scholarly works and of course he knows much more. So the experts on the plaintiff's side actually know a hell of a lot more than the so called experts on the other side.

KE: And I think it's interesting in light of the economic theory that would suggest that these had fallen into the public domain or somehow been neglected and not kept with as much care as they would be under private ownership. Your example suggests that is not the case.

IRS: Maybe just a brief example of what you're saying in terms of YouTube and monetising, are the Downfall parodies, the 'Hitler reacts to' videos, because I've made a couple of those and I went through that process where they put adverts up on my video so they get revenue. So originally when I did one they did the take down notice and I said no this is fair use and then it goes back up but then later they've moved away from that process where they just challenged everything that goes up and now they make money from you making remix videos, so yes

that is definitely an example where the copyright holders changed their position towards one in which they encourage the remix productions.

- MK: Okay, so now it's Nicola Searle, Nicola Searle is an economist at the Intellectual Property Office and a former academic.
- NS: Good introduction, so I'm an economist and I'm going to ask an economics question. We've had a really good analysis of the supply side today and what is available, how producers are using, donating etc., however we have got a survival bias here in that we're really only what is going to be commercially available now is likely to be what is still culturally relevant and there's demand for still. So the question that I have is how is the demand side which we're not necessarily looking at as much, how is that affecting our understanding of public domain?
- RP: Can somebody answer who understands what she means by demand side?
- NS: So, basically we looked at the push that what is available commercially is all supply driven. In the marketplace the commercial organisations or non-commercial organisations in some cases are responding to what is enacted, right? So the supply responds to the demand, and everything we've looked at this morning has been on the supply side. We've not looked at what consumers are actually looking for. So basically my premise would be that everything we're seeing available right now is available because there is consumer demand for it.
- LD: I think this is what YouTube shows that there is again, secondary liability what Paul is writing in his papers that a lot of songs that are not commercially available are uploaded on YouTube and are now commercialised and monetised with the help of YouTube because now there is demand, so I would say it's very difficult to really sharply divide because very often supply creates its demand. And specifically when you reduce transaction costs, demand emerges and was latently there but was not actualised because it was not feasible in terms of the protection costs that would have been necessary. So that's the problem with the question.
- PH: Some of these markets are really bizarre because they're not really satisfying consumer demand. So if you look at YouTube, a lot of old songs that I've been charting on YouTube have like no views, it's one person who's obsessed with the greatest hits of 1919 and has found records of every single one and just shows the picture of the records playing on the turntable and it's the top seventy songs from 1919. As far as I know there's very little demand because it's ten views, fifteen views, twenty views and yet the supplier wants to keep supplying it. And it's the same with the print on demand business model though you can get any print available from the Gutenberg project which is several tens of thousands of books now many of which the demand is close to

zero, but the cost of supplying them is close to zero also. There's a commitment to actually supply stuff that they may not actually get consumed. It makes it a strange market.

GG: In contrast to that, don't the long tail studies show that Amazon and maybe it's iTunes as well but certainly Amazon show that there's a certain amount of supply side provision – 'greatest hits' if you like – and then a long tail that goes on and on and on and on forever. If you aggregate all stuff that's in the tail, the very small demand items, what you get is a greater amount than what's in the short head. The volume of the long tail is greater than the volume of the short head in lots of instances. So the demand side does give really bizarre results but it's not quite the full story: people supply things to which there is almost no demand – that's true – but the aggregate of those tiny amounts of demand is vast, or at least that's how I understand the long tail research.

NS: Am I allowed to come back? So I guess one of the answers you're suggesting is that the delineation between supplier and consumer is much more fluid than it used to be in some of these cases which internet platforms such as YouTube would suggest, but actually the long tail theory and the idea that copyright is hits driven, that people like watching things that are popular because they get network effects and then there are social advantages, this culturally relevant tends to be that kind of distribution, also affects the demand side and hence the supply, and again we're questioning that. But I think long tail theory has actually been coming into question more these days so I'm not really sure where we are on that. I keep hearing different sides on it.

MK: Okay I think this may be the moment where we open it to the Audience. Start with Andrew Black.

Andrew Black: We've heard fascinating perspectives on what the public domain might be and the nuances of it, but how would you measure it? Because the advantage of Paul's perspective is that it's very measurable. So when it comes to actually doing any research into your more nuanced perspectives of the public domain how would you measure it? What factors do you think you could explore as measurements of what the public domain is?

GG: It's almost impossible. I had a PhD student who unfortunately didn't complete his PhD who was doing a study on that, trying to quantify the public domain in areas such as freely accessible photographs with Creative Commons licences or some sort of licence like that. Much of the content was inside databases that he couldn't get spiders inside to count the number of things that were there. Even with the number of programmes that were out there on the web that used particular open-source licenses, it was incredibly difficult to do any automated counting

of those things. If you want to access this work, there are a couple of papers on the web that were published a few years ago now by Ben Bildstein.

LD: I agree with most of what you said today but not with this one, because it's as hard as measuring anything else. We're always working with estimates, we just talked about inflation rates, what is the inflation rate? Inflation rate is a basket of goods and you make a survey and you estimate what inflation is and you predefine the basket of goods and what is in the basket of goods is a convention, and everything we are discussing in economics has to do with inflation but anyway in reality it's conventions that's what we're talking about. And I think that because we think that it's all in the internet and we should be able to count it exactly. You can make a survey. You ask people have they ever used Creative Commons licences? Or you can survey people who have used Creative Commons licenses and ask them how much they have licensed. You can look at databases that are acceptable and you can generalise and make an estimate, that's what people have done. The only thing that you have to do I would say is you have to decide what's your focus. What is impossible probably is to calculate or measure the whole public domain, of course you can do that but this will then resemble in the end the estimates that we all hate of the copyright industries that say oh we earn trillions of dollars with copyright, we all know these are stupid studies, they have nothing to do with reality and if we want to calculate the worth of the whole public domain, we would arrive at similar estimates. So I would not advise doing that, but of course you could do that as well if you wanted.

There are lots of methodologies and not only quantitative ones and once you...you know the colleague from the COUNTER project, the previous new project, Domen Bajde, he was doing work on YouTube and people putting stuff on there, it was more qualitative, netnographic and he looked at for example hundreds of videos where people wrote below "no copyright intended". Actually I still find it on YouTube, so when I'm looking, I'm doing work on mash-ups for example, and in a mash up of course they are breaking the law always, and they write "no copyright intended", but what they mean is no commercialisation intended, I don't want to profit from it I'm just doing it for the fun. But I think it's not a quantitative unit he just chose to investigate dozens, hundreds, thousands of videos and millions of people are watching it and I think that's enough to make statements about the value and the importance of the certain phenomenon.

RP: It's exactly the same for fan fiction, a standard disclaimer has been since, oh I guess since fan fiction really went on the net, late eighties, 1990s, it's a standard fan practice – no infringement intended, not using this for any commercial purposes. And I guess it's what I would...the reason why I said did you want quantitative or qualitative, I guess I

want to shift the grounds a bit away from the purely economic, from revenue streams onto the grounds of kinds of quality of life issues that are notoriously hard to measure. For instance when you get urban regeneration schemes it all tends to be footfalls and how many people go to restaurants and that kind of thing and those are the unquantifiable indices of the success rather than does it improve people's quality of life? Now do you want, in terms of what I was arguing earlier about to put it more clearly the existence of a public domain that exists because of fans engaging in practices that produce transformative works and therefore are taken into the public domain by virtue of the transformative effect. I'd say there's already evidence within fan studies and media studies about the way in which that works in fan communities and basically makes people happy. So does happiness count? I don't know.

PH: One of the nice things about the panel is it does show the power of narrative and stories about the public domain to the extent that copyright owners are pushing term extensions based on stories of Cole Porter's starving grandson who needs the royalties stream and they're making a narrative argument. We've seen several more powerful counter-narratives in this sort of qualitative research which might not rebut the monetary quantifiable arguments, but it can at least rebut that very strong copyright narrative which we're getting tired of hearing.

MB: Maurizio Borghi, Bournemouth University. I was reading my assignment, the questions you were asking the panel to prepare, so I actually wrote mine out [laughter].

KE: I take responsibility for that.

MB: And I'm trying to figure out not only one but two socially important questions so let's see if these are so important, I'm not sure. One thing has to do with the name 'public domain' and the concept of public domain because I'm always being surprised that when you read the textbooks of the nineteenth century, the word public domain is rarely used in a legal sense, normally public domain means the fact that the work is accessible to the public so it is published meaning that at that point any use of the work is free, is unrestricted, unless you are a publisher or a derivative author. And if you are not a publisher or a derivative author which at that time were considered not to be widespread categories probably, you do not care about the legal status of the work, why would you care if the work is on copyright or not. You read and you enjoy, you read and you learn and you maybe think. So what happened, why now that the legal meaning of public domain has taken such a prominence and social meaning of public domain has gone in the foreground. This is the first socially important question.

I would like to have a historian or cultural historian explain this to me, besides the explanation well now we are in a world where every author is using others' creativity etc., etc., but besides these commonplace explanations I would like to hear an historian explain it.

The other question is about what Professor Greenleaf was talking about in the very last slide: 'benign uses'. I think this is a crucial element of the public domain today and I would encourage the project on public domain to explore more deeply this aspect of copyright because as you know these areas have received some judicial attention for example from the German Supreme Court which has adopted the term of 'implied licence' to these kinds of uses. The Spanish Supreme Court has resuscitated the concept, they do not go so far as to call it benign use, but at least innocuous, the fact of crawling websites in order to facilitate search. However I'm not so sure that this corresponds automatically to an enlargement of the public domain, because when I see that for example Google when digitising books imposes two libraries fifteen years preferential uses meaning that no other search engines has the capacity of crawling the content, no other user has the capacity of doing data analysis or text mining on these books for fifteen years, this means that perhaps another layer of enclosure is created over these public domain resources and this is something that is worth exploring in a project on public domain.

LD: They are all very challenging questions, on the first one, yes, I would be reluctant to accept that delivering the project if you get a historian to analyse the shift in the role, if we could reconfigure the project from a public domain project into an empirical project on implied consent, that's a very interesting approach, you could do it and I think you could probably arrive at something very valuable. Who wants to take up some of these challenges?

RP: All I can really say is that you should get in touch with Professor Graham Murdoch at Loughborough University who does cultural studies and media studies who just gave a wonderful talk at Nottingham on the notion of the commons and enclosure going back to the sixteenth century and kind of tracing it through Anglo law in terms of, I can't remember the whole argument, but starting with notions of physical enclosures and where the notion of the public domain actually comes from in the law and he's got a long project on that in fact so he could be very helpful.

GG: I think to some extent the answer to that first question lies in the way the question was phrased. As you're pointing out back in the nineteenth century once a book was published, unless you were another publisher, if you were just a member of the public you could basically do anything you liked with that book because the exclusive rights of the copyright owner by and large only extended to re-publication, not the myriad of

other exclusive rights that have grown up since the late nineteenth century. They now mean the nature of the proprietary domain – the exclusive rights – has changed completely as the copyright maximalists progressively got their way. Consequently, the public domain has shrunk and shrunk and shrunk and shrunk. While that's not a historical answer, it's the reason overall why we now talk about the public domain in a vastly more technical way than used to be the case because the proprietary domain is vastly more complex and technical than it was a hundred and twenty years ago.

- MB: I'm not fully convinced because the reproduction applied to limitation back in the eighteenth century, the adaptation right, translation right, were introduced in the second part of the nineteenth century.
- GG: The technologies didn't exist to make that a significant threat to the interests of copyright owners. Until the photocopier and various other reproductive technologies arrived, it didn't really matter because ordinary users couldn't do those things.
- PM: My name's Pauline McBride, I'm one of Ronan Deazley's PhD students, if I can pick up on the historian thing it does seem to be Ronan's domain and some of his works comment extensively on that. My question is not really for the panel. The panel has proved to be quite tough on the questions [laughter], so I'll aim it straight at the CREATe team. It seemed to me that you have quite a number of problems, it seems that you have a problem with identifying what counts as value and that's been flagged up quite nicely with what Roberta had to say and the economic approach on the other hand, and I settled that are you valuing the public domain merely in relation to access or are you valuing it in relation to adaptation, do you need to make a choice between those two things? The value almost certainly is completely different. But also in the public domain I think the panellists have flagged up various nuanced meanings of that as well and I think there's quite a distinction between copyright public domain which is very much what Graham has focused on and Paul has focused on and something which is much broader, a knowledge public domain which is I think what was alluded to. Those must be two different things with a very different value, so my question for the team is what choices do you think you're making when you talk to value and the meaning of public domain? Have you outlined an idea of where you want to go with it?
- MK: I think we can risk floating a few ideas, I think it would be fair I think. The whole ambition of what the IPO asked is impossible to achieve, you can't. But it looks like you need to do both, we both need to find some measures for specific definitions which produce results, maybe in a narrow field, but be specific and that may include tracking the transition of works into public domain and developing measures on price and derivative works and that kind of thing. So I think we need to

do something of that type, but I think we also need to do something related to the implied consent stream or something relating to communities of practice, and we probably also need to do something about finance.

KE: I think that presently much of the political rhetoric is about the UK creative industries. So when we bid for funding on a public domain project, some of the reviewers very helpfully pointed out to us that we seemed to be picking winners, saying we're going to help certain industries and we're going to disadvantage others. They believe that by promoting the idea of the public domain, we're going to take licensing revenue away from rightsholders and maybe we'll produce research that only helps re-direct revenue to let's say new media platforms or digital SMEs that are making adaptations of Sherlock Holmes, depriving the commercial owners. So I think there's that issue, that problem that we have to confront and we have the additional problem of the scope of the study. I think a solution is to try to satisfy the funding bodies and the IPO by focusing on selected sectors within the creative industries, so one idea that we've looked at is perhaps looking at video games because video games operate under a seemingly different sort of IP regime that a lot of the content of video games appears to be appropriable by subsequent video game designers, so we want to explore whether or not there might be a market for video game mechanics, or trying to at any rate establish the contribution of UK video game creators to a kind of market for creativity.

Another potential project we might look at involves independent creators on Kickstarter and trying to measure the contribution of PD content. This is about addressing the part of the value that's produced economically by some work being in a public domain, so we would look at for example what proportion of Kickstarter projects that are successfully funded incorporate PD storylines in the new derivative work, to try to get a sense of at least in one market what proportion of it comes from public domain ideas, the rationale being to try to convince people that look, when something is in the public domain that doesn't mean that it stops producing revenue for the creative industries.

MK: We may find the opposite, we certainly don't know.

NS: I'm feeling the need here to defend the IPO research, I was not involved in this one but it would have been my team. It's a little bit designed by committee some of this research, it's not just the IPO it's across government and to actually get the will to get these projects commissioned, we end up in this situation always so it's a catch twenty two. The good thing is it does leave the researchers scope to narrow things down. One other comment from the economics perspective is that there's appreciation that value has cultural aspects too so it's not always just a financial thing.

MK: Well we arrived pretty much at one o'clock. It was an excellent morning, and I think we developed an appealing spectrum of approaches. I feel confident that we have covered now the possible starting points for analysis. In some ways it's an example of what we try to do at CREATE: we try to encourage people to talk to each other who would normally not do so, and we believe this really can change the way we approach research.

Let's have lunch. Thank you.

[Applause]

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