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DIE GEMEINFREIHEIT: BEGRIFF, FUNKTION, DOGMATIK (THE PUBLIC DOMAIN: CONCEPT, FUNCTION, DOGMATICS), by Alexander Peukert. Mohr Siebeck, 2012. 321 pp. Paperback. €89.00.

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It is perhaps characteristic of the internet generation that it does not ask what it cannot do; if it asks at all, it asks what it *can* do. This behavior translates into an increased interest in the scope of the public domain – all the results of intellectual activity that are free for anyone to use without a license or permission. The internet has increased the public's interest in the public domain because the internet has made so many of us not only frequent users but also regular creators of publicly accessible works that often build on the creations of others. But the internet has certainly not been the only impetus for the increased interest in the public domain; the emphasis on the knowledge economy and the fact that many developed countries rely on the creations resulting from their intellectual capital as the major, or at least one of the major, outputs of their economies leads these countries to focus on the protection of intellectual property and the enforcement of intellectual property rights. The more that these countries concentrate on protection and enforcement, the more acutely the public is interested in defending the scope of the public domain.

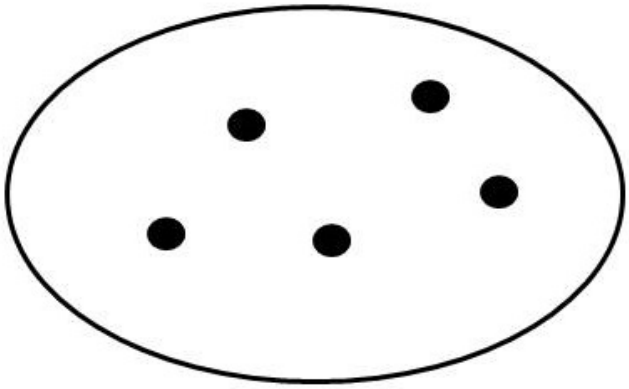
Alexander Peukert, a professor of civil and commercial law who specializes in international intellectual property law at Goethe University in Frankfurt am Main, Germany, has responded to the general interest in the public domain and devoted his latest book to the goal of defining its limits. As opposed to the situation in the United States, where the contours of the public domain have been discussed and where, as Professor Peukert has observed, the discussion has become somewhat of a fashion wave (p.18), in Germany the problem of delineating the public domain has not received much attention (p.16). In addition to filling the gap in the German

intellectual property literature, Professor Peukert works to alleviate the global lack of contextual discussion about the future shape of the public domain because, as he says, if one continues to look at particular legal issues and the future of the public domain from outside of the context of particular issues, the discussion "remains sterile and without consequences" (p.18).

The title of the book might surprise some German-speaking readers; although "Gemeingut" is the term that is typically used to translate the English term "public domain,"[1] Peukert chose the title "Die Gemeinfreiheit" for his book. The term "Gemeinfreiheit" is becoming more frequent than "Gemeingut" in current German legal practice, including in the decisions of German courts.[2] Peukert guides the reader through a useful review of the etymology of the two terms and the history of the terminological competition between them (pp. 8-18), and explains his preference for the term "Gemeinfreiheit." While "Gemeingut" refers to the classification of a public domain work, "Gemeinfreiheit" emphasizes the relationship between the user and the public domain work—the user's ability to freely enjoy that public domain work.

Defining the public domain is not a simple task; commentators typically use a negative definition that describes the public domain as everything that is not protected by intellectual property (see Figure 1).[3] Peukert points out that international intellectual property law supports this prevailing practice of delineating the public domain with a negative definition because international law provides for minimum standards for protection of intellectual property rights and for exceptions to the rights, thereby ignoring the fact that being in the public domain should result from the default rule and that protecting a work with intellectual property rights should be understood as an exception to the default rule (pp.75-76).

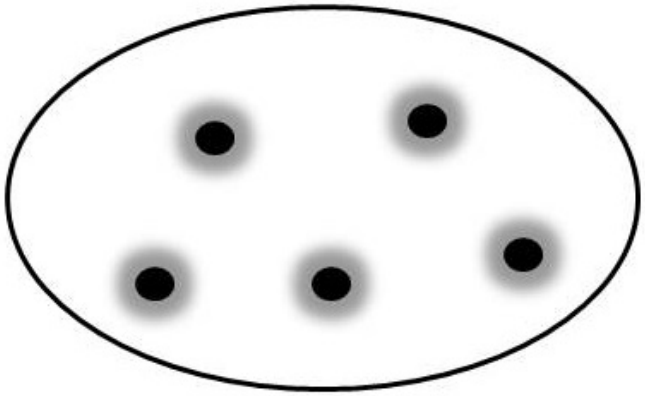
Figure 1: A simple image of the commonly-used negative definition of the universe of intellectual creations, where the public domain (white area) is defined as everything that is not intellectual property (black circles).



● Intellectual creations protected as intellectual property (e.g., patented inventions, works protected by copyright).

One difficulty with the common negative definition of the public domain that Peukert does not discuss is that it only depicts rights with their positive "footprint"—rights that right owners can transfer, license, etc. The negative definition ignores the fact that intellectual property rights produce a larger footprint for a work than simply that which is contained in the copyrighted work itself or in the text of a patent. In infringement actions, doctrines such as the doctrine of equivalents in patent law or the substantial similarity doctrine in copyright law enlarge, de facto, the scope of the protected right beyond the letter of the patent or the image or sound of the copyrighted work. Therefore, a negative definition of the public domain would be better expressed as shown in Figure 2, where the footprint of the intellectual property is enlarged by the effect of the doctrines and the edges of intellectual property are blurry—thus reflecting the impact of the doctrines, which neither result in consistent decisions, nor offer a particularly high degree of predictability.

Figure 2: A more complex image of the universe of intellectual creations, which starts from the commonly-used negative definition; now the public domain (white area) is defined as everything that is not intellectual property (black circles), but the line between the two is blurry.

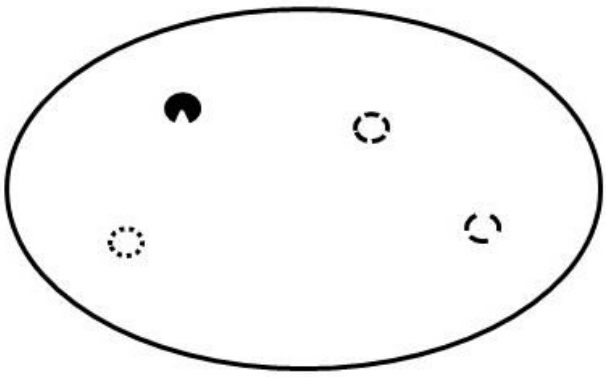


Intellectual creations protected as intellectual property – including extensions of the scope of the rights through the doctrine of equivalents, the substantial similarity doctrine, etc.

Peukert strives to present a positive definition of the public domain; his approach aligns his work with other authors who have suggested that the public domain should be viewed from the perspective of the rights of users who seek to utilize the intellectual creations of others.[4] Peukert's analysis leads him to identify four dimensions of the public domain: a "structural dimension," a "time-determined dimension," a "consensual dimension," and a "specific dimension." The structural dimension (pp.19 ff.) consists of intellectual goods that have never been subject to intellectual property, such as basic knowledge and small improvements. The time-determined dimension (pp.28 ff.) covers works that were once protected as intellectual property but whose term of protection has expired. The consensual dimension (pp.30 ff.) includes works that are protected as intellectual property, but the owner of the property decided to forfeit, or not to enforce the right. While this dimension is somewhat more clearly defined in the case of registered works (where a decision to forfeit the right might translate into a non-registration), the contours of the domain are more blurry in cases of non-registered rights, such as copyright, where replacements for registration, such as the system of Creative Commons licenses, strive to bring more certainty to the dimension. Finally, the specific dimension of the public domain (pp.32 ff.) is defined as a set of legally defined exceptions that allow the use of the works by a specific user in a specific manner.

Through his analysis of the four dimensions of the public domain Peukert offers a much richer picture of the contours of the public domain than does the negative definition. Peukert's model is illustrated in Figure 3.

Figure 3: An image of the universe of intellectual creations based on Professor Peukert's positive definition.



Intellectual creations protected as intellectual property (e.g., patented inventions, works protected by copyright) with a carve-out of exceptions from the circle.

Intellectual creations for which protection was claimed but the protection was invalidated (an empty circle).

Intellectual property for which the rights owner has forfeited his rights or does not enforce the rights he has (a different empty circle).

Intellectual creations that used to be protected as intellectual property but the term of protection has expired (a third empty circle).

While Peukert's definition as illustrated in Figure 3 provides a much more accurate picture of the public domain (the white area) than the commonly-used negative definition depicted in Figure 1, to capture the full complexity of the picture of the public domain, Peukert's definition should be completed with the blurry edges of intellectual property—the extended scope of intellectual property rights protection pictured with blurry edges in Figure 2.

In practice, the complex public domain can maintain its shape only if it is properly safeguarded. Peukert reviews the various means of safeguarding the public domain and emphasizes the "careful attention to the limits of exclusive rights" (p.129) that courts need to pay to protect the public domain from unlawful extensions of intellectual property rights. Procedurally, the public domain is protected through the registration obligations imposed on some types of intellectual property; additionally, proceedings for a declaration of invalidity can help to correct registrations

that should not have been granted (pp.130 ff.). Attacks on validity in infringement proceedings can also help to clarify the contours of the public domain. Substantive law should protect the public domain from unlawful claims of exclusive rights and permit a right owner to forfeit his rights if he so chooses (pp.201 ff.). In a non-contractual context the public domain needs to be protected when unlawful cease and desist letters are used to claim nonexistent rights, or when technological protection measures are used to protect works beyond the boundaries of intellectual property rights.

Peukert not only describes the history and current state of the public domain, he also looks to the future and offers several proposals for changes in German and EU law. For example, after reviewing the proposal for the EU patent litigation system, he suggests that Germany consider abandoning its bifurcated system—in which different bodies decide on patent infringements and validity—and adopt a model similar to the proposed EU patent litigation system by creating a special federal court to adjudicate patent infringements and validity issues in one forum (p.168). Peukert's most intriguing proposal is for the creation of the positions of public domain protection officers—at both the EU and national levels.

Peukert proposes that a public domain protection officer be established to solve the enforcement deficit that he perceives in the current environment (p.276). He emphasizes that actions for enforcement of the public domain should not rely solely on the actions of individuals, who will act only when they have "significant commercial or other interests," or actions by consumer protection organizations and business organizations (p.275). The public domain officer would be an independent governmental officer whose position would be similar to the position of data protection officers in the EU and in the EU member states.[5] In Germany, establishing the position would be easier because of the previously existing function that is fulfilled by the Federal Commissioner for Data Protection and Freedom of Information, who is in charge of assisting with requests based on the freedom of official information act (p.277), as well as matters related to data protection.

Peukert outlines an agenda for the public domain officer, summarizes the budgetary requirements for running the office, and explains that the resources allocated for the position would pay off in increased freedom of movement of knowledge and innovation (p.279). His proposed agenda does not include any activities addressing potential future individual acts of limiting the public domain, which differs from the agenda of the data protection officers in the European Union, where the officers have been

responsible for the examination of data processing prior to the commencement of the processing—a responsibility that has been an important component of the officers' agenda and a role that has helped define the EU's approach to personal data collection and processing.[6] However, it is not surprising that Peukert does not include such prospective activities in the public domain officer's agenda because it is difficult to imagine that a similar prospectively-directed agenda concerning individual acts could exist to safeguard the public domain. As for the budgetary considerations, they would have to be accompanied by a full impact assessment that would need to clarify what greater level of freedom would be achieved if the independent officer were to take actions to supplement private actions by individuals with "significant commercial or other interests"; the question would be whether safeguarding the public domain outside of the "significant commercial or other interests" of individuals would warrant the expenditure of state funds.

Although Peukert's proposals are directed at German and EU law, Peukert also offers a valuable comparative perspective on the public domain that reaches beyond EU borders. The comparative perspective is an important feature of the analysis; even though Peukert's positive definition describes the four dimensions of the public domain generally as they exist in every country, the particular contours of the public domain vary logically country by country (p.18). In addition to sharing his extensive expertise in German and EU law, Peukert draws on his thorough knowledge of U.S. and other non-European literature and case law to explain the perception of the public domain in the works of numerous commentators, analyze differences in national contours of the public domain, and discuss various means of enforcement of the public domain. A reader unfamiliar with German law will learn about the German system from the book. A reader with limited knowledge of German intellectual property law will expand his knowledge and appreciate, for example, Peukert's detailed discussion of Germany's bifurcated proceedings in patent matters (in which issues of validity and infringement are decided not by a single institution or court but by separate institutions and courts) (p.166 ff.), and Peukert's explanation of the monist system in copyright law, which does not allow a copyright owner to transfer or forfeit his copyright, thus creating a particular difficulty in the consensual dimension of the public domain (pp.205-211).

Peukert refers to current developments in intellectual property law, such as the extension in the European Union of the term of protection from 50 to 70 years for rights of performers and producers of phonograms, which EU member states must implement by November 1, 2013,[7] and the proposal for

an EU patent and an EU patent litigation system (p.167). With an up-to-date picture of the trajectory of intellectual property protection and the public domain, Peukert offers an important snapshot of a moment in the global history of intellectual property law and development of the public domain. In addition to being a current review, the book is timeless because of its conceptual approach to the problem of defining the public domain.

Professor Peukert introduces a system for thinking about the public domain and promotes an understanding of its functions and the importance of various means to safeguard the public domain. While Peukert offers a positive rather than negative definition of the public domain, he maintains its reference to intellectual property and does not attempt to encompass the larger area of "commons" (pp.46 ff.).[8] Peukert's definition does not align with Professor Samuelson's notion of the continuum of various legal states (which starts with intellectual property rights on one end and finishes with the "constitutional public domain" on the other end),[9] but rather emphasizes the multidimensional character of the public domain, which does not lend itself to a linear gradation from the most to the least restrictive legal states. Some of Peukert's proposals might be controversial, such as creating the position of public domain officer; however, his proposals are useful impeti, in any case, for considering positive steps that could be taken to create a counterbalance to the actions of supporters of stronger protection for intellectual property.

ENDNOTES

[1] See, e.g., Berne Convention for the Protection of Literary and Artistic Works, Article 18(1).

[2] See, e.g., the decision by the German Federal Supreme Court in Neuschwanstein, BGH, I ZB 13/11, March 8, 2012.

[3] Pamela Samuelson characterized the definitions as providing for "the public domain of the ineligibles and the expireds." Pamela Samuelson, Enriching Discourse on Public Domains, 55 Duke L.J. 783, 790 (2006).

[4] See, e.g., David Lange, Recognizing the Public Domain, 44 Law & Contemp. Probs. 147 (1981) ("[N]o exclusive interest should every [*sic*] have affirmative recognition unless its conceptual opposite is also recognized. Each right ought to be marked off clearly against the public domain."); Jessica Litman, The Public Domain, 39 Emory L. J. 965, 968 (1990) ("The public domain should be understood not as the realm of

material that is undeserving of protection, but as a device that permits the rest of the system to work by leaving the raw material of authorship available for authors to use."); Tyler Ochoa, Origins and Meanings of the Public Domain, 28 U. Dayton L. Rev. 215 (2002); Carys J. Craig, The Canadian Public Domain: What, Where, and to What End?, 7 Can. J. L. & Tech. 221, 229 (2010) ("[T]he public domain should be understood as the domain of free use and unrestrained creativity, which furthers society's long-term interest in future innovation."). Professor Peukert lists provisions in German and EU legislation to show the grounding of the public domain as a positive right in the laws (pp.65 ff.).

[5] E.g., Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data.

[6] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, Article 20.

[7] Directive 2011/77/EU of the European Parliament and of the Council of 27 September 2011 amending Directive 2006/116/EC on the term of protection of copyright and certain related rights, Article 2.1.

[8] See also Samuelson, *supra* note 3, 815 ("IP-free definitions of public domain seem too dull, too tired, too old, too isolated, and too passive to express the positive values of the public domain that scholars who have been studying it perceive it to have.").

[9] See Samuelson, *supra* note 3, 821.

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