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RESEARCH ARTICLE

HUANG Hui

On public domain in copyright law

Abstract Public domain is a core rule of copyright law, under which various creative materials are available for an author to use without charge or liability for infringement, hence ensuring the effective implementation of copyright law. Public domain is characterized by openness, public ownership, irrevocability and formality. Based on the premise that the author's work will not be interfered, public domain ultimately aims at the enlargement of its own universe and prosperity of the culture of human society. Its introduction into copyright law satisfies both historical and logical demands. Without its acknowledgement, copyright cannot be justified. In that sense, public domain and copyright can be deemed as twins. Public domain is not only an existing institution, but also an ideological tendency or a methodology. It has evaluative and inspective values towards copyright. It is an important precondition of copy-rights, and what is more, an important measure for controlling the expansion and realizing the purpose of copyright.

Keywords concept of public domain, naissance of public domain, function of public domain

摘要 公共领域是版权法的核心，它是保证作者有效运用各种创作素材从而使版权的其余部分得以良好运转的工具。公共领域具有开放性、有主性、不可撤销性和程序性等特征，它以保证作者的创作为前提，却最终以自身的不断扩大和人类社会的文化繁衍为依归。公共领域在版权法上的生成既是历史的，更是逻辑的。没有公共领域的被承认，也就没有版权的正当性可言，因此公共领域和版权实际上一同诞生。公共领域不仅是一种制度存在物，它更是一种思想倾向和方法论，公共领域对版权具有评价和检视功能，它既是版权运行的重要前提，又是控制版权扩张和实现版权

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Huang Hui (✉)
School of Civil and Commercial Law, Southwest University of Political Science and Law, Chongqing 400031, China
E-mail: hhlaw@sohu.com

目的的重要手段。

关键词 公共领域的概念，公共领域的诞生，公共领域的功能

Nowadays when people are still critical about the "Enclosure Movement" starting from the 1470's in the history of England that was said to have "robbed the poor to help the rich", another "enclosure movement" is taking place quietly in the area of copyright. If "the first enclosure movement" in England's history was to privatize public land, and while depriving farmers of their farms, cultivated land, housing, courts and yards, it facilitated the early industrial revolution in England and even the rise of the whole capitalist world (North, Thomas, 1999), "the second enclosure movement" that has started from the late 20th century in the area of copyright for the purpose of possessing human beings' public knowledge and public information is only of deconstructive meaning. (Boyle, 2003) It not only sacrifices the freedom of human knowledge and information, but also starts the continual desertification of the reproduction oasis of human culture; the former public land of human cultural prosperity is being trampled by the increasingly growing copyright mechanism. If the first enclosure movement in the history of England is constructive to some extent, this enclosure movement featured by the expansion of copyright is purely pathological. What it triggers is not only the overall questioning of copyright as a property, but also an "ecological salvation" campaign targeting at knowledge and cultural environments. (Huang, 2005) The birth of the concept of "public domain" that exists as the important opposite of the copyright regime, together with its ideological functions, has become a core part of such salvation campaign.

1 Concept of public domain in copyright law

Faced with the increasing expansion of the copyright regime, public domain is like a dike across a long river, effectively preventing possible disasters that copyright expansion may bring to mankind. (Bollier, 2002) Then, what is public domain, what is its relationship with copyright after all, and how does it deter the onrush of copyright expansion? The study in public domain did not originate in the area of intellectual property and it can be traced back to the ancient Roman Law as a preset system included in the property right system. While establishing a huge property right system, Romans defined many things that cannot be privately owned, including without limitation to res communes, res publicae and res universitatis. Res communes meant things that could be commonly enjoyed by mankind, such as air, sunlight and ocean that could not be solely owned by

anybody; res publicae were shared by all the citizens in Rome like rivers, roads and pastures, which were open to all the citizens in Rome but could not be solely owned by any person; while res universitatis belonged to the municipal authorities of Rome, such as theatres and colosseum, which were open to the citizens of Rome only when necessary. The theory of public property in the Roman Law is considered the earliest source of human beings' cognition of "public domain", and the construction of public domain in copyright law can probably be traced to this from in historical view. (Wu, 2008) However, according to the textual research of scholars, the fate of public domain is unfortunate in the world of tangible property; during several centuries when the Roman Law were codified and interpreted, people had no longer developed any non-exclusive properties. As of the 17th century, the attention on the non-exclusive properties in the world of tangible property was even gradually disappearing from the thoughts of western laws. Famous British expert of legal history Daniel R. Coquillette has named this phenomenon as "the end of public domain". In the view of Coquillette, the rise of the enclosure movement in the west was the culprit. (Coquillette, 1979)

The conception of public domain in copyright law can be traced to the Statute of Anne of 1710, but "public domain" as a terminology of statute law began to be adopted in France in the mid 19th century. It was later spread to England and American countries via Berne Convention, and was fully developed in the US. (Ochoa, 2002) However, what the concept of public domain in copyright really means has remained an issue of controversy since inception. It is generally believed that the initial meaning of public domain in copyright law was "the status in which the term of right protection expires". (Ginsburg, 2006) Later, there have been some positive definitions of public domain. For instance, some scholars including Patterson and Linberg believed that "public domain is a concept rather than a territory and public domain is like things free to everyone such as sunlight, air and water that are indispensable to man's life". (Patterson, Lindberg, 1991) Jessica Litman holds the same idea, believing that "public domain should not be interpreted as the scope of creative materials that are not worthy of protection but as a tool that enables authors to effectively utilize such materials, hence enabling the remaining part of copyright to function well." (Litman, 1990) Of course most of the scholars defined public domain from the opposite side of copyright protection. For example, James Boyle thought that "public domain is generally used to refer to those materials that are not protected by copyright". (Boyle, 2003) Caenegem also held that "traditionally, public domain has been passively defined as the area that is not under intellectual property protection" (Caenegem, 2002), while Edward Samuels thought that "public domain is not a theory but an ideological tendency that addresses the issue of the boundary of non-protection rather than protection of intellectual

property". (Samuels, 1993)

According to the understanding of scholars, if reviewed from the negative perspective of non-protection of copyright, public domain includes the following contents at least: (1) Intellectual products already existed before the implementation of copyright law, which mainly refer to some prehistoric works, such as the early Homeric Epic and fables of the Ancient Greek times. (2) Works whose term of copyright protection expires, which is the initial meaning of public domain. (3) Works that have been placed into public domain by copyright owners purposefully, such as the works generated by the so-called "creative commons" in today's network environment. (4) Works that are not protected due to lack of copyright protection elements, such as the works that are not of originality, as well as the works that can only obtain copyright after they complete certain formalities such as registration process as required by the early copyright law, which would be placed in public domain if the creators do not complete the relevant formalities. (5) Works and elements that should be commonly owned by human beings. The former includes current affairs and news, national legislation, general numerical tables and general calendars and the latter cover thoughts, procedures, processes and methods that are not protected by copyright. In the view of some people including Jessica Litman, they are the core part of public domain. (Litman, 1990) (6) Public domain produced on the basis of fair use. Reasonable use is part of the enrichment of public domain within the copyright regime. The existence of fair use gives public domain dynamic amplitude. (Benkler, 1999)

Nonetheless, even if public domain is defined in a negative meaning, its scope still changes. For example, the US Copyright Act of 1790 only grants copyright owners "the right of printing, reprinting, publishing and selling works", which does not give the public any room for fair use. This is because that unless the public have the conducts of "printing, reprinting, publishing and selling", any other use belongs to the scope of "public domain". Therefore, the reason why the Copyright Act of 1790 does not specify fair use is that it is not necessary. As what Edward Samuels says, "With the elimination of copyright registration procedures by Berne Convention, an important part of public domain in copyright law is vanishing." (Samuels, 1993) For this reason, Samuels claims that we should reconsider the theory of public domain and holds that it is not sufficient to define public domain only from the negative perspective.

Corresponding to Samuels' viewpoint, David Lange followed by putting forward his theory of public domain regarding the diminishing of public domain caused by copyright expansion. Lange thought that in order to maintain a healthy and vigorous public domain, two most basic principles should always be adhered to: "Firstly, judgment in favor of the defendant should be made in the difficult and complicated tort cases; secondly, unless the corresponding public domain is

recognized, no new property rights should be granted." (Lange, 1981) Lange's theory mainly proposed specific control means for the judge in granting new property rights and maintaining the stability of public domain from the perspective of due process. At a later stage, some scholars like Jessica Litman pointed out the inadequacy of the traditional "public domain" theory from within copyright law. Litman believed that if defining "public domain" from the negative perspective of non-protection of copyright, the first question that comes up would be "what should be protected by copyright law after all?" At last, Litman even directed criticism to the concept of "originality", thinking that "originality is nothing but a ghost. In essence all works are obtained by means of 'infringing on' public domain; works that are solely originated from authors do not exist. Consequently most creations will become illegal if they leave public domain." (Litman, 1990) Thus in the eye of Litman, "public domain is the real premise and basis of copyright law; without public domain, human beings can never tolerate the existence of the copyright regime." (Litman, 1990)

With regards to the inadequate capability of traditional theory of public domain in the negative sense in resisting copyright expansion, Tyler T. Ochoa further pointed out in his article in 2002 that public domain in copyright law should be of the following important characteristics: "Firstly, public domain is not the unclaimed territory in the sense of Grotius or Pufendorf but should be the territory owned commonly by human beings in the sense of Locke. The entire public is the owner of that common territory." (Ochoa, 2002) Ochoa studied the source of "public domain" from the linguistic angle, believing that "public domain" was formerly "public property" and "common property", and those terms could be traced back to "publici juris" in the Roman laws, which meant "public ownership". When "public domain" replaced "public property" and became popular in the US, "public" in fact "retains the exclusivity of ownership contained in property." (Ochoa, 2002) Therefore, when "public domain" was used in intellectual property area, it did not mean "unclaimed territory" but should contain all the interest of the public in the relevant materials in the area. Ochoa also quoted Jack Valenti in saying that "if public domain belongs to nobody, works in this domain are like orphans without parents and nobody will be responsible for their lives; everyone will use it in a pillaging way till it becomes shriveled, ill and barren. And if there is no subject to have ownership of such a territory, who is willing to cultivate and nurture its life of future?" (Subcomm, 1995) The second characteristic that Ochoa thought public domain should have is that "public domain is irrevocable or irreversible." (Ochoa, 2002) After works enter public domain for reasons such as voluntary waiver by the author or failure to satisfy the conditions for copyright protection, no one can withdraw them and bring them back to private domain again. Works that have entered public domain are like "gifts presented to the public by the author and

once they become public property, they are absolute" (Ochoa, 2002), and "any one who wants to take them away will face the due process clause of the Constitution". (Ochoa, 2002) The viewpoints of those represented by Litman and Ochoa regarding public domain reflect the latest research on the issue, and are new insights into public domain after people's reassessment of the excessive expansion of copyright.

Then, what is public domain? The author is inclined to the definition of Prof. Jessica Litman and believes it is relatively scientific to define public domain as "a tool that enables authors to effectively utilize the materials, hence the remaining part of copyright can function well". However, the author differs from Litman in believing that public domain is not only a set of systems but more a theoretical tendency and a way of thinking. Public domain is conditioned on ensuring the possibility of creation of authors, but its ultimate goal is for its own continuous expansion and the cultural prosperity of human society. Besides the aforesaid features of historical nature, ownership and irrevocability, public domain is also characteristic of openness, interactivity and formality, especially formality. It will be parochial to deem public domain only as a static collection of authors' elements to create; in fact, public domain is more a set of steps and methods for ensuring the functioning of copyright, controlling the expansion of copyright and realizing the purposes of copyright. Consequently, only by putting public domain and copyright in an organic and dialectical framework, and reviewing them from the perspective of dynamic methodology and the theory of knowledge can we really grasp the essence of the theory of public domain. This will be further elaborated in the following part.

2 Naissance of public domain in copyright law

After understanding the concept of public domain, the next topic to be discussed is how public domain came into being, whether it is dispensable as compared with copyright, or whether it is indispensable as long as the copyright regime exists. The answer to this question not only is related to the historical reply regarding the developing process of public domain in the development history of copyright, but also helps form the cognitive conclusion that public domain actually came into being together with copyright and that its existence in copyright law was not only historical but also logical. To acknowledge the existence of copyright, the existence of public domain has to be proved first.

To answer the question how public domain was formed in copyright law, we may have to start from the scratch and go back to the debate on the legality of copyright in the middle and late 18th century. Before looking back to the debate on various details of literary property, we have to touch on the Statue of Anne of

1710. Though scholars have different opinions on the Statute of Anne, in the author's view, from the perspective of the contribution to the construction of copyright regime and the generation of public domain, the Statute of Anne opens up the "public domain" that benefits the public audience rather than creates an "author right domain" in the era of statute law. The contribution of the Statute of Anne to public domain is reflected in the following aspects: Firstly, the Statute of Anne is the first to explicitly specify in the form of statute law that the right of authors and publishers need to have time limits. Before the Statute of Anne had the chance to review other systems that ensure the existence of public domain such as the idea-expression dichotomy, the system of protection term can be seen as the earliest symbol of the naissance of public domain in copyright law.[1] Secondly, to ensure that works protected by copyright are really worthy of protection, the Statute of Anne also stipulates creation conditions that need to be met for obtaining copyright, consequently guaranteeing that the contribution of authors to public domain is essential. Thirdly, and the most importantly, the Statute of Anne has always highlighted the facilitation of a limitlessly expanded knowledge domain in the legislative philosophy. The Statute of Anne denies the view of copyright as right in common law, and defines copyright, authors and publishers as tools to "facilitate knowledge and learning", which is exactly the important philosophical precondition that guarantees the existence of public domain. Today, the increasing expansion of copyright and the increasing shrinkage of public domain are to a large extent directly related to the reverse understanding of the relationship of both of them and the coverage of public domain in the copyright context. In fact, as two important poles of the copyright law regime, copyright and public domain are interdependent and inseparable and public domain is not an exception of copyright but the core of copyright law. Only thus can the virtuous circle of the copyright mechanism and the construction of a healthy and vigorous public domain become possible. This is exactly the biggest conceptual contribution of the Statute of Anne to the construction of contemporary public domain.

Though the legislative concepts of the Statute of Anne are highly charming, the actual development is not as expected. In the few decades after the adoption of the Statute of Anne, public domain still did not exist in the British society since major book dealers in London treated the works of England's classic writers as perpetual property. The book dealers believed that authors should enjoy perpetual property right over their works in common law and when the

[1] According to the provisions of the Statute of Anne, "for works that have been published, the protection term of the copyright of the original draft enjoyed by the author is only 21 years, while if it is a newly published book, the protection term is 14 years, and if the author is still alive after the first 14 years, the protection term can be extended for another 14 years."

works were sold to the book dealers, this property right was transferred with the works; and authors' right stipulated in statute law was complimentary to the right in common law, and the latter would not be affected by the publishing of the works or by the Statute of Anne. (Sherman, Bently, 2006) The claims of book dealers led to another legal struggle regarding copyright in the following 60 years, and at the same time resulted in the two famous cases the influence of which can still be felt today, namely Millar v. Taylor and Donaldson v. Becket. (Rose, 2003) It was in such two cases that various basic issues of public domain were widely and fully discussed again.

After the adoption of the Statute of Anne, the case that first re-reviewed public domain was Millar v. Taylor,[2] which was tried by the King's Bench.[3] The public domain issue to which the case was directly related was that after literary works were published, should the author or his assignee keep perpetual property right specified in common law or should the right be affected by the fate of public domain (i.e. should have time limits)? Although the King's Bench finally ruled by vote of the majority of judges in favor of copyright of common law, the debate on whether copyright in common law was reasonably forced the supporters of literary property right to change their path of argumentation; and as an important by-product of the debate, a new path was opened up for the two important systems of "idea-expression dichotomy" and "fair use" that guarantee the existence of public domain.

With respect to the perpetual copyright in common law, opponents had a very clear position that "if authors have complete control of their intellectual labor before their works are published, it will be ridiculous and unreasonable to grant authors after the same are published the same right as those before the works are published, and it runs against any thoughts on public utility".[4] Encountered with the opponents, in order to uphold their viewpoints, literary property right supporters were forced to adopt a new way of thinking in defense of the legitimacy of literary property right as below:

Firstly, in order to refute the view that perpetual literary property right would bring about knowledge monopoly, supporters proposed to split the works into public domain (knowledge, thoughts, principles) and private domain (literary form, style or expression) and suggested that the former become publicly owned with the publishing of the works and anyone could freely use it, while for the

[2] Millar v. Taylor (1769), 98 ER 201.

[3] The basic facts of the case were as follows: Defendant Robert Taylor copied the poetry Four Seasons for the purpose of sales without permission of Plaintiff Andrew Millar who owned the copyright of the poetry. But according to the Statute of Anne, the copyright of Four Seasons in statute law expired as early as 1757. For this reason, Millar placed his only hope of winning in proving that he still enjoyed the right of the poetry in common law.

[4] F. Hargrave, An Argument in Defence of Literary Property (1774), 3.

latter, even if the works were published, it still remained the property of the author or his assignee. By demonstrating that books "are publicly owned in a certain sense and are privately owned in another sense,"[5] supporters of literary property right could defy the view the "acknowledging perpetual literary property right will adversely affect the progress of literature and talents."[6] And the practice of dividing works into private domain and public domain has actually touched on the core of public domain in copyright law, on which the theory of "idea-expression dichotomy" of the current copyright law is based. According to the demonstration and study of scholars, the principle of "idea-expression dichotomy" established in Millar v. Taylor is not only 100 years earlier than Baker in the US, but more authentic, since strictly speaking, what Baker v. Selden distinguished was the works and the techniques described by the works, while what Millar v. Taylor really touched on was a "idea-expression dichotomy".[7]

Secondly, facing the opponents, supporters of literary property right had another new way of thinking in the debate, which claimed that "the scope of literary property right is limited to the printing right and reprinting right of the works."[8] Though supporters of literary property right originally hoped to reach their goal of enabling readers to freely use the knowledge and thoughts of the works by limiting the rights of authors and publishers, in doing so they had to open up a road for another important system of public domain — fair use. This is because though the restriction could enable authors and publishers to regulate various forms of pirate printing, it could not control other forms of copying not related to the original text, which include use of the works by excerption, compilation, or translation. However, translation, compilation and excerption of the existing works out of the purpose of individual learning, study and commentary were obviously a copying use of the works. Therefore, when supporters of literary property right limited the scope of literary property right to the right of reprinting of the original form of the works, they actually had to leave a way for fair use of the works by others.

No matter how the supporters of literary property right wound their ways in their argument, the issue of public domain had always been unavoidable before literary property right emerged. That is to say, to acknowledge the legitimacy of literary property right, is should be admitted that works have the dual features of

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[5] D. Rae, Information for John Hinton (1773), 18–19.

[6] In addition, they even thought that "literary property right can help other authors give better play of their capabilities. This is because literary property provides incentive for authors' creation, and they can enable authors to integrate their talents into these works, hence improving the understanding of other authors."

[7] Baker v. Selden, 101 U. S. 99 (1880).

[8] Millar v. Taylor (1769), 98 ER 251.

being private and being public; facts, knowledge and thoughts contained in works must be given up so that they are in the state of public ownership, and while restricting the exclusive ownership of authors to the reprinting right of works, the fair use of works by the public must be allowed. As a result, public domain cannot be avoided before the birth of literary property right. The reason is that the crux of the issue does not lie in the ethical power of the argumentation of the opponents of literary property right and the basis of the issue is "what authors lose is what the society needs" — knowledge, thoughts and even facts in public domain are indeed gifts given to all the creatures by the God,[9] and they are just like naturally flowing water that everyone is entitled to enjoy.[10] Once works are publicized, they cannot be regarded in isolation but should be seen as part of the complicated communication network that connects authors and readers, and authors and authors. (Wang, Huang, 2006) Therefore, admitting the existence of public domain is definitely not moral preaching, the basic reason of which is the appeal of public domain.

Though Millar v. Taylor was strongly objected by those who deny literary property right, most of the judges at that time were influenced by the thought of Locke's natural law, and thus eventually, the court slanted towards supporting the views of copyright in common law. As a result, another critical issue of public domain, that is, the issue of copyright protection term could only be resolved completely by a later case Donaldson v. Becket. As Donaldson v. Becket involved the same works (Thomson's poetry "Four Seasons") as that involved in Millar v. Taylor, the former can actually be seen as the actual appeal of the latter.

The final trial of Donaldson v. Becket was made by the House of Lords of the British Parliament. Through voting, the House of Lords finally supported the claim of Defendant Donaldson by a majority of 22 to 11, and thus completely negated the claim of perpetual copyright in common law. The House of Lords had a very clear position when trying Donaldson v. Becket, holding that copyright was the creation of the Statute of Anne after careful consideration and was property right in statute law; the role of the Statute of Anne was to deprive published works of their copyright in common law and to keep the corresponding right of the unpublished works. The reason why the House of Lords recognized the view of the Statute of Anne that "copyright is a right in statute law" is that it was influenced by the following factors:

Firstly, the influence of the viewpoint of "the Principle of Society First" of the time, of which Lord Camden was a representative. According to study, after judges of the court of common law expressed their opinions, Lord Camden made the final speech to the House of Lords. He questioned the social essence of man

[9] Mohl v. Lamar Canal Co., 128F. 776, 778 (C.C.D. Colo. 1904)
[10] E.g. Kan. v. Colo.， 206 U.S. 46, 103(1907).

from the perspective of rhetoric. He said, "Why do we enter society: Is it for the common welfare of mankind, for enlightening each other's minds, for improving our own capabilities, or just for benefiting from the society and sharing all the improvements made by the society on its way to perfection?" (Cobbett, 1813) In the view of some people like Camden, "to the public, even to authors themselves, confirming copyright to be a perpetual right will prove to be more destructive than the second invasion of Goths and Vandals, since it will condemn the public to the slaves of publishers forever…." (Cobbett, 1813) Camden's speech was widely circulated in the then major media of England, and his view was generally seen as a key factor in the denial of perpetual copyright by the House of Lords.

Secondly, the influence of "the view of co-creation". According to this theory of creation, human beings should not overestimate the capability and legal status of individual authors; instead, they should recognize that individuals actually exist in the complicated network connection tradition, thoughts, authors and readers, and the relationship among authors is more of benefaction and affiliation relationship. (Brewer, Staves, 1995) As what the famous European writer Shortt said, "Every book of literature, science and arts must borrow and must borrow a great deal of things previously known and used by the public. Nobody creates a language for himself when writing a book, at least when he is still a sensible person." (Shortt, 1871) It was pushed by those two powers that the House of Lords of the British Parliament eventually adopted the view of copyright of limited term. The judgment of Donaldson v. Becket was considered the end of an important historical period in the copyright history of the world.

Through investigation on the aforesaid historical process of copyright, we can see that public domain has always been a critical issue unavoidable in copyright law. To admit the existence of copyright requires the recognition of the existence of public domain first, which forces authors to give up exclusive ownership of knowledge, thoughts and facts; and once works are publicized, they should keep in an open status to receive review, comments and even rebuke from the public. Even after the copyright is recognized, the right of authors still needs to be subject to a higher right of others, meaning the right of others to have the privileges of monopoly that points to the object and even cause the works of author's copyright to completely return to public domain and become a subject that can be freely referenced by others. In a nutshell, "copyright and public domain are actually twins." Only when public domain is recognized, can the legitimacy of copyright be established; without the recognition of public domain, copyright is not justified.

3 Role of public domain in copyright law

As above, we have mainly revealed the logical inevitability of public domain in

relation to the existence of copyright mainly form the perspective of the development history of copyright. Next, we will conduct some theoretical analysis on the role of public domain in the copyright law mechanism from the perspective of the unique value of public domain. In the above-mentioned discussion, we have already indicated that public domain is not purely a system but more importantly, it should be deemed as a theory and method. At the level of system, theory or method, public domain has its own unique role and values. We will discuss them one by one as follows:

3.1 Public domain as a system and its function

Public domain is first of all a system, and a set of rules and it is the basic collection of the elements that are not protected by copyright law. As an existing institution, public domain has its values as follows:

Firstly, it is the legal premise of the generation of works with copyright. For any creation activity, the author needs to borrow from the thoughts of predecessors when developing his own thoughts. The so-called individual and heroic author concept in the creation of copyright is a fantasy, which is unrealistic. Regarding the creation process of mankind, Williams once pointed out that "creation is in essence a process of interpreting, grouping, transforming and reinterpreting the existing information. This process starts with the existing information, and such information contains the author's own experience, including stories, values and ideas available to the author in a social cultural background. Therefore, the process of creation is of both creation and giving." (Williams, 1997) Jessica Litman directly compared creation to translation and restructuring. She said, "The creation of music by composers is a process of restructuring melodies they have heard previously; the writing of scripts by playwrights is a process of combining real characters and roles of other plays and adding different understanding; software developers also use logics discovered in other software usually…; in a word, any creation behavior has to borrow one way or another from stuff existing on 'the other bank of public domain'. This is not parasitism but exactly the essence of creation." (Litman, 1990) Consequently, the primary function of the existence of public domain is to solve the issue of place of input and output of creative materials between authors and potential authors, and between authors and readers, which is dedicated to offer the supply of creative elements; meanwhile, based on the creation philosophy of the doctrine of equality, it enables authors to compensate one another, and to leave abundant room for their individual creation activities. Conversely, without the recognition of public domain, "if every author claims ownership of any element in his works, almost every work will be prohibited at the request of authors of other works…." (Deazley, 2006)

Therefore, the most basic function of the introduction of "public domain" lies in the exemption of the "joint liability" in creation among authors. The result of this exemption is that every author can freely and unlimitedly absorb and borrow the thoughts, information, knowledge and facts reflected and carried in the works of others, and nourish his own works with these important materials. (Yen, 1990) Accordingly, without public domain all creation activities are impossible.

Secondly, the function of public domain as an existing institution is also demonstrated in the fact that it is not purely a static combination of the creative elements of mankind and its goal is to facilitate the accumulative expansion of these elements. Public domain is an exchange place for creation elements, and through such exchange, it realizes its own dynamic enrichment. This function of public domain can be described with a term often used by literary writers, i.e., "intertextuality", meaning that "the exchange among authors can often produce results much more than that of their individual efforts. When a work conducts a 'dialogue' with other works, the dialogue itself is more valuable than individual works." (Rose, 2003) That is to say, the existence of public domain is dynamic, which is not a simple overlapping of elements that are not protected by copyright, and on the contrary, it aims at facilitating the unlimited expansion and accumulation of knowledge of mankind, and eventually achieving a cultural deposit. This function of public domain was once remarked by Mr. Lawrence Lessig when evaluating an important system of public domain — fair use as follows: "The system of fair use is not in total confrontation with the right of authors, which ensures that readers can comment on the works without the consent of the authors, hence enabling us to obtain more and more extensive opinions on the works. And the more the comments, the more the knowledge and information on the books…hence, it can be seen that the system of fair use will eventually benefit all the readers even though a certain author may not benefit from it." (Lessig, 2004) Placing thoughts in public domain has even more significant value to the expansion of public domain itself. As what people often say, "When two people exchange one apple each other, each of them still has only one apple; but if two people exchange their thoughts, they will gain two kinds of thoughts." (Feng, 2006) In fact, if two people exchange their own thoughts, a third thought may be generated. Just as what Hayek says, "Only by giving the soul to the corner where two theories with contradictory conclusions but with equally sensible groundings can the generation of a new thought become possible." (Liang, 2007)

Therefore, the existence of public domain actually follows a theory of "network effect", that is, the more the elements in public domain, the more the people who use it, the more the value of public domain, and the easier for it to expand. Certainly, the value of the increasing expansion of public domain is also obvious to the "creation" behavior and it will directly broaden the vision of

authors, enabling them to stand on the shoulders of "giants" while having a clearer and farther view than the giants. Only in this way can cultural innovation become possible.

3.2 Public domain as theory and its function

Public domain is not only a set of system but also a set of theories and a tool of voices. As a theoretical form, public domain has the following functions:

Firstly, it can highlight the status of public domain as an existing institution in copyright law, bringing it from the long term position as exception of copyright law to the heart of copyright law. Though, some scholars think that "The biggest benefit of considering the scope and nature of public domain is not the recognition of public domain itself, but the recognition of copyright. That is to say, the process of understanding the nature and applicability of public domain provides us an opportunity to explore copyright as a developing and artificial systematic construction, and enables us to realize the nature of copyright, including its functions and limitations." (Deazley, 2006) Generally speaking, though this viewpoint is without major defects, it has obvious weaknesses. Not to mention that this view does not consider the unique status and value of "public domain" as a set of rules and system, it can easily obstruct public domain in the context of copyright and cause it to lose its independence. In fact, one of the important values of the theory of public domain is to help people realize that as an existing institution, public domain is not an exception of copyright law but the core of copyright law. Public domain to copyright is just like the spine of man to the body, with the former supporting the functioning of the latter. If the "spine" — public domain — gets smaller and smaller while the "body" — copyright — gets bigger and bigger, the result will be that the latter will collapse in no time. (Chiang, 2005) Consequently, rather than reminding people how to understand copyright, public domain as a theory draws more attention to the significance of public domain in copyright regulation and makes people realize the value of destiny of public domain towards copyright.

Secondly, as a theory, public domain also has ideological function that enables it to resist the inappropriate expansion of copyright. The theory of public domain is to a great extent put forward in the background of the tendency of "dominating intellectual property right", the unlimited expansion of copyright and the diminishing of public domain. But once proposed, the theory has strong ideological function that can unify specific systems of various subjects scattering in the public domain system and turn them into a mechanism that ensures the "identity" of thinking, hence counterbalancing the attack of the words with moral meaning that are adopted by the copyright expansionists such as "property right is sacred" and "copyright is a human right that is inalienable". To quote Boyle,

the theory of public domain is of important rhetorical significance. It is like in the campaign of environmental protection, the reason why such terms as "environment" or "environmental damage" are used is that they can unify such issues as "clean water, beautiful scenery, biodiversity, rising of sea level, attributes of species preservation, and accountability for the next generations…" to have a uniform interpretation of the concepts including environment and nature, and then, with the power of rhetoric, their moral sense is enhanced so as to fight against such ideas of "progress", "growth" and "modernization". (Boyle, 2003) Though the theory of public domain is still not perfect, it is worse to have no relevant theory than to have an imperfect theory, as an imperfect theory has the chance to be rectified, while without any theory of public domain, how can we reflect on "how copyright devours public domain step by step"? Therefore, granting the theory of public domain with the power of legitimacy helps enhance our moral strength in the fight against copyright expansion and resist the moral attack of copyright expansionists.

Thirdly, as a theory, public domain has also an important evaluative value towards the copyright mechanism. Public domain to copyright is like natural law to positive law; the former has transcendental and critical nature with regards to the latter. Since the ultimate goal of the development of copyright is public domain, it should still aim at the dynamic enrichment of public domain (in which fair use is a representative) even during the period when copyright exists. Therefore, any transformation of copyright, whether an extension of the protection term, or addition of new right objects, or enhancement of right protection measures, or extension to new environment (such as network environment) of rights, should be based on ensuring the necessary existence of public domain and its openness and alternative. That is what David Lange said, "Unless the corresponding public domain is also recognized, no new property rights should be granted." That is to say, when evaluating whether a copyright reform measure is necessary, and whether the reform is successful, the evaluation criteria should be whether it helps the unlimited opening up of public domain. For anything that helps the expansion of public domain, even if the expansion is potential, the grant of new rights is considered indispensable. Otherwise, "as an evil, copyright should not exist one more day than necessary to safeguard the interest." (Macaulay, 1897)

3.3 Public domain as a method and its function

Finally, public domain is also a set of methods. The author believes that to really realize public domain in copyright law and to turn it to stable mechanism from theory, we need to change it to a system of specific procedures and steps. However, in order to enable the real establishment of this set of procedures and

make public domain a routine state of copyright mechanism, what we need in the first place is a system of values and belief, and in the view of the author, the establishment of this system of belief should be composed of the following indispensable propositions at least: Firstly, be convinced that public domain and authors' private domain are the constituent parts of the copyright law system, which are interdependent and inseparable; Secondly, be convinced that individual creation activities depend on not only the efforts of authors, but also their virtuous relationship with public domain; Thirdly, admit that every subject has the potential for creation and the right for free innovation based on established cultural traditions; Fourthly, admit that copyright as a necessary evil does not have priority over public domain in terms of existence.

Under the support of such a system of belief, an ideal public domain can really be constructed, and the copyright mechanism can have a virtuous development under its value guidance only with assistance by a set of specific methods, e.g., firstly, providing for the statutory doctrine of the existence of copyright to have a clear boundary between public domain and authors' private domain; secondly, explicitly specifying that unless public domain is recognized, no new rights can be created at will; thirdly, conducting real-time assessment of the state of existence of public domain and timely adjusting copyright policies based on the assessment; fourthly, clarifying the irreversibility of public domain, where no person may freely withdraw elements in public domain without completing the due process; and finally, forming a mainstream social ideology that respects public domain in the whole society, and at the same time in the litigation mechanism allowing anyone to initiate legal proceedings when infringed in public domain.

4 Conclusion

The study in public domain has just started in China. Limited by the length of this article, much exploration regarding the topic cannot be developed here in a comprehensive way. However, the introduction of the way of thinking in public domain provides a new perspective for observing the issues in copyright and even the overall intellectual property right, which is both a starting point for us to understand the whole copyright regime and the end in this respect. This article intends to serve as a modest spur for more valuable contributions to the topic. It is hoped that more people will pay attention to the issue of public domain and contribute their wisdom and power to the virtuous development of the copyright regime and even the whole intellectual property system.

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Author

Huang Hui, Ph.D, is a lecturer of civil law at Southwest University of Political Science and Law. Till now, he has released over 20 research articles in academic journals in China, such as Modern Law Science, Legal Forum, Academic Forum, etc. His magnum opus includes: Legal Philosophy Exposition of Unreasonable Outstretch in Intellectual Property Rights, Interpretation & Transfer: An exposition of de-intelligence of intellectual property rights, research on the protection of works in public domain, etc.