



The Digital Public Domain

Relevance and Regulation

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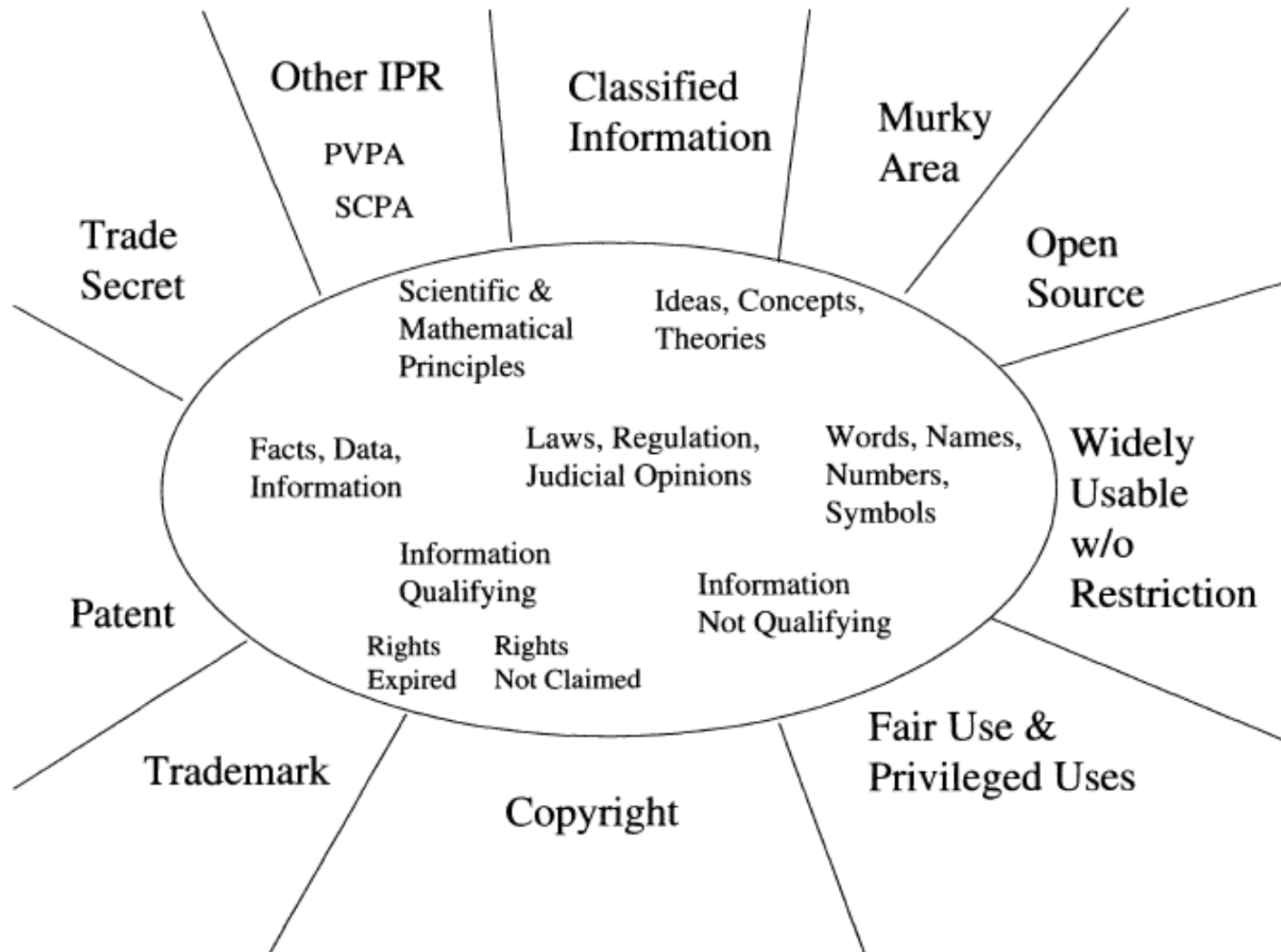
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Part 1

Clarification: What ist (in) the „Public Domain“?

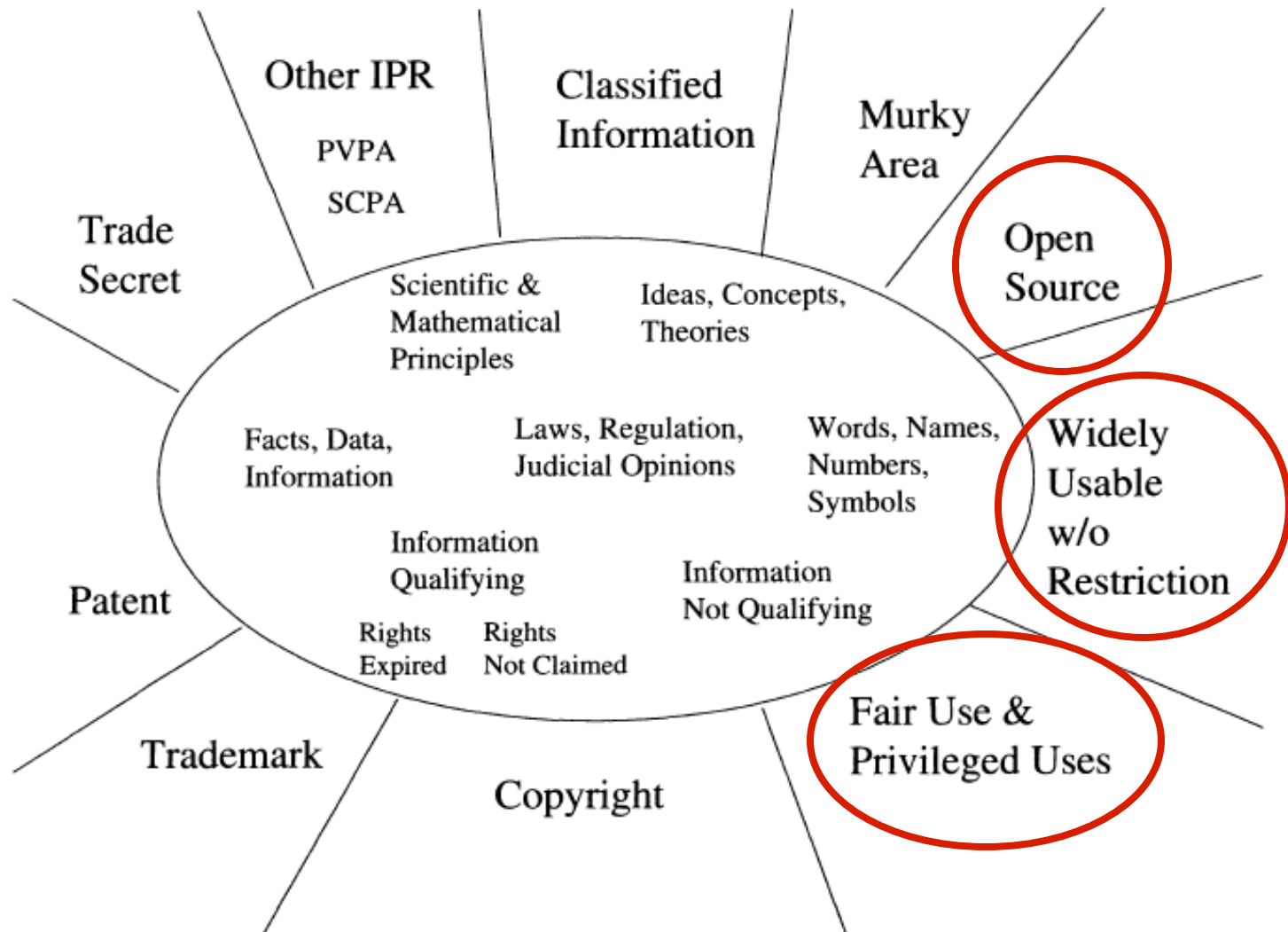
What is (in) the public domain?



Taken from: Samuelson (2003)



What is (in) the public domain?



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What is (in) the public domain? (ctd.)

Public Domain phenomenon

Example

Core public domain works and inventions

- Ideas, concepts, theories
- Rights expired
- Information not qualifying

Privileged uses

- Parody
- Quotation

Compulsory licenses and liability rules*

- pharmaceutical patents in case of a national state of emergency

Open content licensing

- Creative Commons
- GNU General Public License

Content that is widely usable without restriction*

- freely available website contents

*disputed

Open Research Questions I

Mapping the Public Domain empirically:

What areas of the Public Domain are most relevant in different fields?

Research strategy:

Step 1: Identify fields using different types of public domain rights and works based upon secondary data

Step 2: In-depth case studies/ethnographies of usage of PD material in creation and innovation processes



Part 2

Societal and economic relevance of the Public Domain



Why care? Societal Relevance

1. Inherent relevance: public domain as a precondition for authorship

Why care? Societal Relevance

„All works of authorship, even the most creative, include some elements adapted from raw material that the author first encountered in someone else’s works. [...]

Because we have a public domain, we can permit authors to avoid the harsh light of a genuine search for provenance, and thus maintain the illusion that their works are indeed their own creations.“

(Litman 1990)

Why care? Societal Relevance

1. Inherent relevance: public domain as a precondition for authorship

2. Free speech and democratic dialogue:

- Centralizing effect of strong IP protection because of rising information input costs
- Transformative usage practices depend on public domain privileges

Why care? Economic Relevance

Preliminary note: economic relevance \neq economics

- *Enabling competition: „mere“ copying keeps innovators on their toes (Schumpeter 1912)*

Why care? Economic Relevance

*„Aber er [der erfolgreiche Unternehmer] hat auch für andre gesiegt, für andre die Bahn gebrochen und eine Vorlage geschaffen, die sie kopieren können. Sie können und werden ihm folgen, zunächst einzelne, dann ganze Haufen. Wieder tritt jener Reorganisationsprozeß ein, dessen Resultat die Vernichtung des Kostenüberschusses sein muß, wenn die neue Betriebsform dem statischen Kreislauf eingegliedert ist. Aber vorher wurden eben Gewinne gemacht.“
(Schumpeter 1912)*

Why care? Economic Relevance

„But he [the successful entrepreneur] has also won for others, has paved the way and provided a blueprint, that those can copy. They can and will follow him, few at first, then crowds. And again this readjustment process emerges, whose result has to be the elimination of profits, when the new mode of business has become part of the static economic cycle. But before, profit has been made.“

(Schumpeter 1912; translation L.D.)

Why care? Economic Relevance

Preliminary note: economic relevance \neq economics

1. Enabling competition: „mere“ copying keeps innovators on their toes (Schumpeter 1912)

- Empirical example: donating patentable knowledge to the public domain >> „a pre-competitive landscape“ (Barnes et al. 2009)

2. Raw material for economic innovation:

- Innovation is cumulative and recombinant
- Empirical example: the contribution of strong public domain to Germany's industrial rise in the 19th century (Höffner 2010)

Open Research Questions II

Public Domain and free speech:

How have technological and regulatory changes of the public domain affected democratic dialogue?

Research strategy:

Cross-country comparisons, law and political science

Public Domain and economic innovation:

How are public domain materials and rights utilized in (inter-)organizational innovation practices?

Research Strategy:

Comparative ethnographies of (anti-)innovation practices



Part 3

Regulating the Public Domain

Regulating the public domain

Three regulatory dimensions

1. Temporal dimension:

- Length of intellectual property protection influences the size of the public domain

2. Territorial dimension:

- „a-territorial character of the intellectual community“ (Salzberger 2006) vs. jurisdictional diversity and borders

3. Scope:

- New fields of application for IPRs (e.g. databases) diminish the public domain

Regulating the public domain (ctd.)

Two regulatory modes and arenas

1. State regulation via (inter-)national legislation:

- Multiple fora (WTO, WIPO, EU, nation states), „a giant squid, whose many national law tentacles emanate from but depend on a large common body of international norms” (Ginsberg (2000))

2. Private regulation via legal or technological standards:

- Depend on IPRs, e.g. Digital Rights Management (DRM) or open content licensing

Open Research Questions III

Public Domain, governance and innovation:

How do different forms of public domain governance impact innovative processes?

Research Strategy:

Longitudinal study of innovation practices under different forms of public domain governance

Public Domain and regulation:

What are the consequences of interactions between different types of public domain regulation over time?

Research Strategy:

Comparing countries with differences in public domain regulation (e.g. Kretschmer (2011) on copyright levies)

Thank you for the attention.

Draft paper available online:

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1934231

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