

## **The WIPO Development Agenda and the Public Domain**

### **UNCTAD/ICTSD Side-Event at the WIPO Committee on Development and Intellectual Property**

**30 April 2009**

#### **REPORT**

UNCTAD and the International Centre on Trade and Sustainable Development (ICTSD) organized a side-event on 30<sup>th</sup> April 2009 during the third session of the WIPO Committee on Development and Intellectual Property (CDIP).

The side event provided delegates, staff of international organizations and non-governmental organizations participating in the CDIP meeting the opportunity to discuss the concept of the "public domain", in preparation for their debate on the implementation of recommendations no. 16 and 20 of the WIPO Development Agenda. These respective recommendations cover the need to:

- Consider the preservation of the public domain within WIPO's normative processes and deepen the analysis of the implications and benefits of a rich and accessible public domain.
- Promote norm-setting activities related to IP that support a robust public domain in WIPO's Member States, including the possibility of preparing guidelines which could assist interested Member States in identifying subject matters that have fallen into the public domain within their respective jurisdictions.

The side event was attended by around 65 participants including the media. Kiyoshi Adachi, Legal Officer-in-charge of the Policy Implementation Section of UNCTAD chaired the meeting and introduced the speakers.

Initiating the discussion, Ms. Uma Suthersanen, Lecturer in IP, School of Law, Queen Mary, University of London, presented the importance of public domain in the governance of innovation and creativity, access to knowledge movement and development dimension of IP rights, based on the findings of UNCTAD-ICTSD [Policy Brief no.1](#). She identified the need to consider the three-step test under the TRIPS Agreement for the adoption of exceptions to rights conferred by copyright in light of the present day conditions. In her view the [Munich Declaration](#) on the three-step test is an example of norm-setting activity that can help in developing guidelines, declarations and explanatory memorandum on the public domain. She believes it is possible to define and delineate what is the public domain and suggested for the establishment of an international register of public domain.

The keynote speaker, Professor **James Boyle**, William Neal Reynolds Professor of Law, Duke University School of Law at the outset introduced the participants his recent book on “[the Public domain: Enclosing the Commons of the Mind](#)”. He stated that the book is also available online under a Creative Commons attribution. He noted that the free access to his book has not reduced sales of the book by the publisher.

Professor Boyle described himself as defender of the IP right system. His basic premise was ‘achieving balance’- as too little or too much protection is not the solution. Reviewing the developments on IP protection, he stated that much of the twentieth century knowledge is locked up due to the recent developments on copyright protection, and with proportionally little benefits. When the United States maintained requirements for renewal of copyright, almost 85 per cent of right holders never bothered to renew their rights. When US did away with the formal requirement for renewal, it lost the reference guide for commercial viability of works. As a result, most of twentieth-century culture is still under copyright but unavailable commercially. He went to describe the fear of Thomas Jefferson on expansion of patent to less inventive fields, and the results of the fear of the rather unknown internet in the 1990s in shaping the copyright law. He presented two propositions to address the problem of IP rights protection.

First, it should be recognized that it is the balance between IP and the public domain, one should not be focusing on the rights alone. There should not be expansion of rights without actual evidence. The burden of proof should always be on those seeking expand the exclusive rights. Secondly, limitations and exceptions should be just as important as the rights themselves. He concluded by strongly recommending for impact assessment, since whenever empirical analysis is done on specific aspect of IP rights, the results have been disturbing.

The presentations were followed by series of questions and comments. H.E. Alberto Dumont, Ambassador, Permanent Mission of Argentina to the WTO presented the challenges in making progress at the WIPO on recommendations pertaining public domain and the importance developing countries attach to the issue. Many participants of the meeting welcome the discussion and provided their comments.