The Law and Economics of the 'Domaine Public Payant'

A case-study of the Argentinian system

Een rechtseconomische analyse van het betalende publieke domein

Een case-study van het Argentijnse systeem

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Dedicated to my parents, Drs María Angélica Battaglia and Geraldo D. Marzetti.

πάντες ἄνθρωποι τοῦ εἰδέναι ὀρέγονται φύσει.
(Aristotle, Metaphysics, Book I, Part 1)

Ea enim quae scribuntur tria habere decent,
Utilitatem praesentem,
Certum finem,
Inexpugnabile fundamentum.
(Hieronymus Cardanus)

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[1] Unless stated otherwise, all graphs belong to the author.

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LIST OF ABBREVIATIONS

AADI	*Asociación Argentina De Intérpretes (Argentinian Association of Performers)*
ADAMI	*Société de Gestion Collective des Droits des Interprètes (France)*
AGADU	*Asociación General de Autores del Uruguay*
ALAI	*Association Litéraire et Artistique Internationale*
ARGENTORES	*Sociedad General de Autores de la Argentina (Argentinian Society of Authors)*
ADC	*Asociación por los Derechos Civiles*
ASCAP	*American Society of Composers, Authors and Publishers*
Berne Convention	*Berne Convention for the Protection of Literary and Artistic Works*
BIT	*Bilateral Investment Treaty*
BT	*Bilateral Treaty*
CADRA	*Centro de Administración de Derechos Reprográficos (Managing Centre for Reprographic Rights)*
CAPIF	*Cámara Argentina de Productores de Fonogramas y Videogramas (Argentinian Chamber of Phonographic and Videographic Producers)*
CARE	*Copyright Act Revised Edition (Singapore)*
CCIA	*Computer and Communications Industry Association*
CD	*Compact Disc*
CNDL	*Caisse Nationale Des Lettres (France)*
CNL	*Centre National du Livre (France)*
CPI	*Consumer Price Index*
CRM	*Customer Relationship Management*
CTEA	*Copyright Term Extension Act*
DDoS	*Distributed Denial of Service*
DMCA	*Digital Millennium Copyright Act*
DPP	*Domaine Public Payant*
DRM	*Digital Rights Management*

DSB	*Dispute Settlement Body (WTO)*
DSU	*Dispute Settlement Understanding (WTO)*
DVD	*Digital Video Disc*
EU	*European Union*
FNA	*Fondo Nacional de las Artes (National Fund for the Arts) (Argentina)*
FTA	*Free Trade Agreement*
GDD	*Gale Directory of Databases*
GDP	*Gross Domestic Product*
GRUR	*Gewerblicher Rechtsschutz und Urheberrecht*
IIPA	*International Intellectual Property Alliance*
IGT	*Interest Group Theory*
INCAA	*Instituto Nacional de Cine y Artes Audiovisuales (Argentina) (National Institute of Cinema and Audiovisual Arts)*
INDEC	*Instituto Nacional de Estadística y Censos (Argentina) (National Institute of Statistics and Census)*
IP	*Intellectual Property*
IPC	*Intellectual Property Committee (US)*
IPR	*Intellectual Property Rights*
ISP	*Internet Service Provider*
MOOC	*Massive Open Online Course*
MPAA	*Motion Picture Association of America (US)*
MPIA	*Motion Picture Industry Association (US)*
MSP	*Music Service Providers*
NAFTA	*North American Free Trade Agreement*
NGO	*Non-Governmental Organization*
Paris Convention	*Paris Convention for the Protection of Industrial Property*
PCT	*Public Choice Theory*
PIPA	*Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act (US)*
PMA	*Post Mortem Auctoris*
PRODE	*PROnóstico DEportivo (Argentina) (Sports Lottery)*
PPD	*Paying Public Domain*

RIIA	*Recording Industry Association of America*
SACEM	*Société de Gestion Collective des Auteurs de la Musique (France)*
SADAIC	*Sociedad Argentina de Autores y Compositores (Argentinian Society of Authors and Composers)*
SAVA	*Sociedad de Artistas Visuales Argentinos (Argentinian Society of Visual Artists)*
SGDL	*Société des Gens de lettres (France)*
SME	*Small and Medium Enterprise*
SRE	*Société Représentant les Écrivains (France)*
SOPA	*Stop Online Piracy Act (US)*
TCE	*Traditional Cultural Expressions*
TK	*Traditional Knowledge*
TPM	*Technical Protection Measures*
TRIPS	*Agreement on Trade Related Aspects of Intellectual Property Rights*
UNESCO	*United Nations Educational, Scientific and Cultural Organization*
USD	*United States Dollar*
VCR	*Video Cassette Recorder*
WIPO	*World Intellectual Property Organization*
WTO	*World Trade Organization*
WTA	*Willingness to Accept*
WTP	*Willingness to Pay*
WW2	*Second World War*

1. INTRODUCTION

1.1. BACKGROUND

According to accepted economic theory, intellectual property rights provide incentives for the creation of new useful information (inventions, literary and artistic works, etc.). In the absence of any legal means of protection anyone could appropriate the intellectual production of somebody else, a free riding problem that would discourage investments to create new intellectual works.

That is in a nutshell the economic justification for the existence of IPR in general, and copyright law, in particular. However, copyright protection must be balanced with other public policy goals. That is the reason why copyright has a limited duration.

After copyright expires works enter the public domain and are freely appropriable by third parties without the authors consent. Moreover, that access is free in most countries of the world.

However, in the few legal systems that enforce a so-called *domaine public payant*, access, use and transformation of works in the public domain requires the payment of a license, fee or, more properly, a tax.

Unlike copyright, under a *domaine public payant* regime the proceeds collected neither accrue to the author of the work, neither to her heirs or other rightholders but to a state agency (in most cases)

The *domaine public payant* alters the necessary balance between incentives and access.

Few countries in the world enforce a *domaine public payant*, most of them are developing nations from francophone Africa and the Southern Cone of Latin America.

Because is a paradigmatic case and I am familiar with its laws and legal praxis, I provide a case studied based in the Argentinian dominio público pagante.

The crucial question I try to answer in dissertation, is whether there is any sound economic justification for the existence of a *domaine public payant* regime.

In addition, I explain why the *domaine public payant* is still enforced in a handful of developing countries, while either never existed or had been abolished in the majority of nations.

1.2. SCOPE OF THIS DISSERTATION

Under the current international framework of knowledge and cultural rights management the *domaine public payant* is a *rara avis*. To most contemporary ears the term may sound like an oxymoron. After all, the public domain is generally understood as a communal space where, works are freely accessible.

Copyright law and the *domaine public payant* pursue similar goals, in the end they incentives the creation of new works. The evolution of both institutions is connected; the *domaine public payant* begins after copyright has expired. For this reason I begin by study copyright law. It would be impossible to understand *the domaine public payant* without a thorough understanding of how the copyright system works. To that end, I also review the historical evolution of both institutions. Legal institutions are historically-dependent.

The scientific paradigm for writing this thesis is law-and-economics, that is to say, I study the consequences of legal institutions in the real world, or *law-in-action*, borrowing Roscoe Pound's terminology (Pound, 1910).

Finally, the final goal of this dissertation is not merely descriptive, I suggest some policy recommendations and avenues for future research.

1.3. WHY THIS TOPIC?

The topic of this dissertation may seem strange to many readers. There are other doctoral dissertations written on the *domaine public payant,* although none from a law-and-economics perspective, to my knowledge.

In any case, the *domaine public payant* is an anomaly in the international panorama of cultural management institutions. This is the reason why I have chosen it as the object of this dissertation, because the DPP defies economic logic but is enforced in many jurisdictions. I believe scholars committed to legal realism, for whom real-world consequences are the benchmark to evaluate good and bad legal institutions, must search for and analyse such anomalous institutions.

Nowadays, the *domaine public payant* may not be a trending topic but it has been the object of serious debate for at least two centuries. The current scholarly neglect coupled with its subsistence in a handful of developing countries have spurred my intellectual curiosity. We are not discussing here about a defunct legal institution but about one that is still in force, although in a minority of jurisdictions.

The countries that still enforce the *domaine public payant* produced little literature about it. For instance, Argentina uninterruptedly enforces a *dominio público pagante since 1958*. However, not many academic studies focused on it, and the few ones are panegyric.

Why? The answer has to do with how legal academia operates in Argentina. Most law professors at Argentinian universities, whether public or private ones, are also legal practitioners (lawyers, judges, prosecutors, etc.). The full-time law professor is almost non-existent at Argentinian universities. The reason is simple, incentives (money).

In most developing countries the compensation of university professors is insufficient to pay the monthly ills. For a legal scholar, the legal profession is more profitable. Yet teaching at university brings a halo of prestige, that also brings more clients. So lawyers indirectly subsidise university education with their private practice.

However, going to Law School to teach a course is one thing and devoting painstaking hours to do rigorous legal research another. Legal research is expensive and not rewarded. As a Latin American legal scholar put it, developed countries are producers of legal theories while developing countries are recipients, albeit with contextualized and even diverging interpretations among different interpreters (Medina, 2004).

This double commitment leads to conflicts of interests. For instance, a lawyer that sits at the board of a collecting agency will not write against copyright extension. The Gospel says, "no man can serve two masters: for either he will hate the one, and love the other; or else. he will hold to the one, and despise the other" (Matthew, 6:24). These, and other shortcomings of the Argentinian legal academia had been extensively discussed by Carlos Nino (Nino, 1988, 2005).

The IP field is a peculiar branch of legal scholarship. Perceptions towards IPR are shaped by legal culture. However, contrary to common belief, geographical location, i.e. the so-called *North-South divide* in is not a determinant factor to shape those perceptions. Rather, professional affiliation is.

According to a research IP scholars tend to have a *minimalist* approach towards IP law. For instance, IP scholars are more willing to criticize IPR expansionism, regardless of their geographical location. Whereas practicing IP lawyers tend to favour a *maximalist* approach; i.e. supporting the extension of IPR both in term and scope, whether located in the Northern or Southern hemispheres (Morin, 2013).

The *domaine public payant* is a characteristically (continental) European institution. Lately there have been attempts to reinstate the *domaine public payant* in Europe. Moreover, as I discuss at the end of this doctoral dissertation, a more balanced variety of the *domaine public payant* could even supersede copyright law.

The insights from this dissertation are useful both to developed and developing nations.

1.4. METHODOLOGY

This thesis is grounded in positive law-and-economic analysis, of the eclectic type borrowing the terminology of a colleague (Arcuri, 2008). In the end some normative claims are included.

In addition, I have added a case study of the Argentinian dominio público pagante. To that end I have reviewed financial statements, to give a more accurate description of the

functioning of the *domaine public payant.* A survey with opinions from taxpayers is also included.

When it was possible, according to my capabilities, I have added graphs, charts and designs to reinforce the message.

1.5. ACADEMIC ACTIVISM

In this doctoral dissertation I have taken a proactive role. We required to access the financial statements of an enforcing authority. Access was denied, so we had to sue, and we won.

I am convinced there are occasions when a scholar must become an activist scholar. There is nothing wrong in academic activism for the pursuit of scientific truth.

Max Weber famously defended that that social science requires a particular calling, (Weber, 1922) well sometimes that calling may require to take up (legal) arms.

1.6. THESIS' STRUCTURE

The remainder of this thesis is structured as follows. After this introduction (Chapter 1) the traditional economic justifications for copyright law will be provided (Chapter 2), as well as a history of its evolution (Chapter 3) and the politics involved (Chapter 4). Next the phenomenon of the public domain will be analysed in further detail (Chapter 5) in order to turn to a historical and competitive analysis of the paying public domain (Chapter 6). Then the phenomenon of the paying public domain is put to a test based on economic insights whereby justifications for this paying public domain are critically assessed (Chapter 7). Then Chapter 8 examines the legal framework of the *dominio público pagante* in Argentina as well as the details of the working of the system. Chapter 9 then provides the, difficult to obtain, quantitative data and also the results of a limited qualitative study. Chapter 10 attempts to explain why the paying public domain is still persistent in Argentina while it has been largely rejected in other legal systems. Chapter

11 concludes, makes policy recommendations and ventures new creative areas for further research.

2. COPYRIGHT LAW

2.1 SOME THOUGHTS ON REGULATION

In democratic societies under the rule of law lawmakers are required to justify the raison d'être of new regulation. Law conditions human behaviour. Law is normative, prescribing a certain conduct or allowing it, failure to comply is sanctioned by coercion, (e.g. fines, reclusion, etc.).

To justify is to give good arguments for doing or believing something. Arguments can be intrinsically good or bad (in their formal aspect), extrinsically sound or unsound (regarding the truthfulness of the premises). Persuasion is another thing, it can be attained even with flawed arguments. Pseudo arguments (they seem like good or sound, but they are not) are called fallacies.

Sometimes, good and/or sound arguments may not be sufficient to convince others, these may not be acceptable to a certain audience, an aspect rescued by the so-called *new rhetoric* (Perelman & Olbrechts-Tyteca, 1969).

Legal history is ripe with examples of good arguments being rejected and bad ones prevailing. Socrates' defense before the Athenian judges at the *Heliaia* is but one example, at least according to Plato's account (Nevill, 1901).

From a positivistic perspective, law is not a science. Von Kirchmann famously said, "only three words of the legislature can destroy whole libraries" (Kirchmann, 1848). To justify legal rules one most resort to other disciplines (like law and economics, among other competing approaches).

Like any piece of regulation copyright law has been justified by different arguments. The prevailing one seems to be of economic nature, it is grounded in cost-benefit analysis. In the common law tradition the justification is usually made explicit. For instance, the British *Statute of Queen Anne* of 1710 and the US Copyright Act 1790 both justify

authorial rights for "*the encouragement of learning*", i.e. a private incentive is given for the good of the collective (*bonum commune communitatis*).

But the utilitarian cum economic justification of IPR and copyright is not the only one, neither. There are other justifications for copyright law subsumed in the regulation.

2.2. THE PHILOSOPHIES OF COPYRIGHT LAW

Many times facts precedes theories. Social needs precede, and are the reason of, new regulation. That happened to copyright law, which is a historical construct.

In the middle of the 16th century Gutenberg's movable-type printing press was a game changer. For the first time in history copying books was cheap and fast. A change that forever alter the status quo and the course of mankind.

However, two different regulatory approaches to the making of copies quickly emerged, the Anglo-American copyright law, rooted in utilitarian doctrine, and the continental *droit d'auteur*, based on natural rights. Even today, some minor differences still subsist between these two distinct legal approaches (for instance, in common law's treatment of fair use or fair dealing and civil law's system of exceptions and limitations). These differences are based on philosophical standpoints. So, it becomes important to understand them.

Following Fisher we can distinguish three main theories of IP law, four including Fisher's very own, namely labour theory, personality theory, utility theory and social planning theory (Fisher, 2001).

The labour theory of property is based in the ideas of John Locke. According to the Lockean theory of property individuals are naturally entitled (i.e. even in the absence of state-sanctioned law) to the fruits of their labour, whether these are physical or intellectual. Thus, for example, the author of a novel acquires property over his oeuvre because of her intellectual labour.

The Lockean theory had partial reception in US copyright law, at least until recently. According to US law, under the *sweat of the brow doctrine*, given certain circumstances, personal effort was sufficient to obtain copyright protection, regardless of its originality. The *sweat of the brow doctrine* was repealed in 1991 by the Supreme Court of the United States in re *Feist Publications, Inc., v. Rural Telephone Service Co.* (499 U.S. 340. 1991)

Personality theory (also self-actualization theory) posit that the author's personality is so intertwined in the work itself that it becomes her property. The work is considered an extension of the personality of the author, and as such it can only belong to her. This theory has been expressed first by Kant (Immanuel Kant, 1785) and later by Hegel ((Hegel, 1821).

Kant's was particularly opposed to utilitarianism, according to which the best course of action is that which maximises utility. Utilitarianism comes in different versions, for instance act utilitarianism and *rule utilitarianism*. What utility is, however, is hotly debated by utilitarian thinkers, from Stuart Mill to Richard Posner. Economics is not free from philosophical underpinnings, actually it is tributary to utilitarianism. The determination of utility is particularly relevant for policymaking. For instance, according Jeremy Bentham's the benchmark should be his *felicific calculus*, i.e. "*the greatest good for the greatest number*".

Richard Posner, in his earlier works, defended *wealth maximization* as the only desideratum for all public policy. A claim that the author himself softened over the years (Posner, 1985; Salama, 2010) especially after a famous diatribe by Richard Dworkin (Dworkin, 1980)

Law-and-economics, a spin-off of economics, is also associated to utilitarian philosophy and consequentialist in reasoning. To the lawyer-economist what matters most is not blackletter law but its consequences in society.

William Fisher proposes his own theory which he calls *social planning theory*. According to this view IPR are means, not ends in themselves and as such should be subordinated to a higher goal. According to Fisher such is, "*the construction of a just and attractive culture*" (ibid.).

Locke's, Kant's and Hegel's theory are based in natural law, i.e. rights that predate the state and are independent of state-recognition. The utilitarian conception of IPR and Fisher's own "*social planning theory*" are positivistic and teleological, i.e. these rights are human creations and have a clear objective, whether some measure of utility or other goal determined by political agreement.

Drahos' *Theory of Information Justice* (Drahos, 1996) shares some similarities with Rawls' *Theory of Justice* (Rawls, 1971). Both authors adopt a contractarian and instrumentalist approach to property rights. As such they are means, not ends in themselves. Drahos suggests the subordination of IPR to morality and prefers to refer to them as *monopoly privileges*, a phrase that more clearly conveys the idea they are granted with some sort of social duty. According to Drahos, the state grants *monopoly privileges,* to foster social objectives such as the encouragement of learning, the advancement of the arts and sciences, the promotion of economic development, etc.

Drahos' *monopoly privileges* are similar to Tullio Ascarelli's *beni immateriali* (in English, *immaterial goods*) (Ascarelli, 1960). The Italian jurist considered IPR a misnomer because, (a) property rights over tangible objects are perpetual whereas IPR are not; (b) IPR ultimately become cc, this does not happen to property rights; (c) IPR can be enjoyed simultaneously by more than one individual at a time without any detriment to the work itself or lessening to the enjoinment of others, this is not possible in the case of property rights.

Ascarelli concluded *immaterial goods* are *de iure privileges* granted by the state to promote welfare. For Ascarelli too, IPR are means and not end in themselves. In a similar vein, a recent book by Tom Bell is titled, *Intellectual Privilege: Copyright, Common Law, and the Common Good* (T. W. Bell, 2014).

There are other philosophical understandings of IPR. Marxist philosophy considers private property the root of class struggle. The bourgeoisie control of the means of production allows the expropriation of the working class' *Mehrwert* or surplus value. Moreover, Marx considered knowledge of general interest and as such it should not be privately appropriated (Marx, 1858).

Critical appreciation of IPR also come from the opposite spectrum of the political map. Stephen Kinsella, a libertarian, openly advocates the abolition of all IPR (Kinsella, 2008). He claims there is no empirical basis to support the claim that IP rights are efficient and the market, not regulation, are sufficient to spur innovation and creativity.

A similar claim has been made by "Austrian" economics, including Nobel laureate Friedrich Hayek, who was sceptical about copyright to incentive the creation of new works.

> "*The difference between these and other kinds of property rights is this: while ownership of material goods guides the user of scarce means to their most important uses, in the case of immaterial goods such as literary productions and technological inventions the ability to produce them is also limited, yet once they have come into existence, they can be indefinitely multiplied and can be made scarce only by law in order to create an inducement to produce such ideas. Yet it is not obvious that such forced scarcity is the most effective way to stimulate the human creative process. I doubt whether there exists a single great work of literature which we would not possess had the author been unable to obtain an exclusive copyright for it; it seems to me that the case for copyright must rest almost entirely on the circumstance that such exceedingly useful works as encyclopaedias, dictionaries, textbooks and other works of reference could not be produced if, once they existed, they could freely be reproduced* (F. A. Hayek, 1988) (p. 35).

Michele Boldrin and David K. Levine are two economists. They wrote a book against IPR titled *Against Intellectual Monopoly* (Boldrin & Levine, 2010). According to them IPRs are inefficient as the overall costs of the IP system outweighs possible benefits. They claim IPR (patents and copyrights) are not a necessary evil to solve a market failure, but an unnecessary one (an obstacle to cumulative innovation that leads to wasteful rent-seeking activities). Paraphrasing Lord Acton's famous dictum, Boldrin and Levine state "*monopoly corrupts, absolute monopoly corrupts absolutely*" (ibid.).

They justify their conclusions with historical analyses. The authors claim Boulton and Watt's steam engine 1769 patent was used strategically, i.e. to block cheaper, simpler and more efficient technologies. It is also, they state, an early case of rent seeking, as the inventors lobbied Parliament to get an extension of the original patent term.

Boldrin and Levine also fire at copyright. After Italy passed a copyright law Giuseppe Verdi's production slowed down, they claim, as Verdi was able to collect royalties from performances and the selling of music scores, thus becoming a disincentive to creative activities. These, and other historical arguments found in the book of Boldrin and Levine can be accused of cherry picking (a formal fallacy).

Behavioural economics is a relatively new strand in economic science; it incorporates, psychology, cognitive sciences and empirical methods to neoclassical analysis (Thaler & Mullainathan, 2000). It is still not clear whether it will become lead to *scientific revolution*, in Kuhnean terms, or become incorporated to mainstream economics (Kuhn, 1962).

The application of behavioural economics to legal institutions has led to a new sub-discipline, *behavioural law and economics* (Jolls, 2011; Sunstein, 2000) and more recently to *nudge theory* (Alemanno & Sibony, 2015; R.H. Thaler & Sunstein, 2009).

The few behavioural law and economic studies that have touched upon IPR have provided interesting new evidence, albeit fragmented and difficult to incorporate into a general theory (a general criticism of behavioural economics).

For instance, contrary to neoclassical predictions, increasing the cost of pecuniary sanctions against copyright infringers may, in certain situations, have no deterrent effect. Moreover, increasing pecuniary sanctions against certain type of infringers (heavy downloaders of copyrighted content) may increase illegal behaviour. This has been called a *backlash effect* (Depoorter, Vanneste, & Van Hiel, 2010).

Another study suggests actors are prone to a species of the *endowment effect*, renamed *creativity effect*. Actors tend to be over optimistic about the value they attach to their creations, which may distort market valuations and lead to market failure (Buccafusco & Springman, 2010, 2011).

Lastly, I would like to note that before the hype of behavioural economics psychologists had pioneered studies that defied the neoclassical theory of external rewards (i.e. monetary incentives) as the main driver of creation. Edward Deci et al. also recognized

the importance of *intrinsic motivation* (i.e. non-monetary) to incentivise creative activities (E. Deci, 2012; E. L. Deci, 1971; E. L. Deci, R. Koestner, & Ryan, 1999).

2.3. COPYRIGHT & *DROIT D'AUTEAUR*

In countries that belong to the common law tradition the utilitarian nature of copyright law is clearer than in civil law ones. In the former, copyright law is seen as a tool to advance important social policies (welfare). Private rights are granted not only to enrich the right holder, but also to enrich society, through the dissemination of new works.

A balance between these two goals, which I will call the *Copyright-Public Domain System* is fundamental to achieve all the intended goals, private and societal.

Chief Justice Lord Mansfield expressed this idea in an old opinion regarding copyright of navigational charts:

> "*[t]he rule of decision in this case is a matter of great consequence to the country. In deciding it we must take care to guard against two extremes equally prejudicial; the one, that men of ability, who have employed their time for the service of the community, may not be deprived of their just merits, and the reward of their ingenuity and labour; the other, that the world may not be deprived of improvements, nor the progress of the arts be retarded*" (Mansfield, 1785).

Civil law jurisdictions in continental Europe, Latin America and elsewhere have followed the French model *droit d'auteur,* which is based in an explicit utilitarian rationale but in natural law. Even if in practice, differences between copyright law and *droit d'auteur* are small, they are still significant.

The different philosophical origin may explain why the continental *droit d'auteur* grants authors many *droits moraux* (*moral rights*), i.e. non-economic rights that are inalienable, perpetual and non-waivable, not even with the consent of the right holder herself (*res extra commercium*).

It is not my intention to argue against *droit moral*, moreover, it plays an important economic role as a catalyst of authorial reputation, for instance in Creative Commons licenses. However, its raison d'être differs from the utilitarian rationale.

The absence of formalities for the birth of *droit d'auteur* is also contrary to the copyright tradition, which had always required some sort of formality for granting the right.

It is because of this association with natural rights that the *droit d'auteur* is considered a human right in some international documents.

How could we explain such a different philosophical approach between English copyright law and French *droit d'auteur* (*propriété littéraire*)? Perhaps the reason has to do with different historical events.

When the Statute of Anne was passed (1710) the British monarchy was no longer supreme. After the *Glorious Revolution* of 1688 and the passing of the *Bill of Rights* of 1689 true power was in Parliament, controlled by the bourgeoisie. Whereas in France absolutism lasted longer and the shift of power was more radical. In 1789 royal heads rolled and the monarchy was abolished. However *the terror* lasted until 1794.

So, under the rule of absolutist kings like Louis XIV (*le Roi Soleil*) or during the *terror years* of the French Revolution, and even later, being a writer, printer or publisher was a risky business. Spreading antimonarchic, revolutionary or republican ideas was punishable by death. The micro-histories of Robert Darnton offer interesting insights into the daily life and the risks faced by authors, publishers and printers in France during those years, constantly subject to both royal and religious censorship apparatuses (Darnton, 1982, 1996, 2011). These historical events may justify that, after the Revolution, the new republican government granted *sacred* rights to authors and elevated the social status of the *écrivain* in 1791.

After the French Revolution, the 4 of August of 1789 all privileges granted by the *ancien régime* were overturned, including those of authors and stationers (*privilèges d'auteur et*

de librairie). So, French authors were left without legal protection over their works, until 1791.

The first French *loi* of *droit d'auteur* was passed on January 13, 1791 (Le Chapellier), took a jusnaturalist stance and considered literary and artistic property as sacred:

> *"[l]a plus sacrée, la plus légitime, la plus inattaquable, et, si je puis parler ainsi, la plus personnelle de toutes les propriétés, est l'ouvrage fruit de la pensée d'un écrivain ; c'est une propriété d'un genre tout différent des autres propriétés. Lorsqu'un auteur fait imprimer un ouvrage ou représenter une pièce, il les livre au public, qui s'en empare quand ils sont bons, qui les lit, qui les apprend, qui les répète, qui s'en pénètre et qui en fait sa propriété."*

Later, on 19 July 1793, came a second *loi*. The Decree of the National Convention, with the report of Lanai (*Décret du 19 juillet 1793 relatif aux droits de propriété des auteurs d'écrits en tout genre, compositeurs de musique, peintres et dessinateurs; avec le rapport de Lanai*), stated :

> *"[a]authors of writings of any kind, composers of music, painters and draughtsmen who shall cause paintings and drawings to be engraved, shall throughout their entire life enjoy the exclusive right to sell, authorize for sale and distribute their works in the territory of the Republic, and to transfer that property in full or in part" (Article 1) and "[t]heir heirs or transferees shall enjoy the same right for a period of ten years following the death of the author" (Article 2).*

Unlike British copyright at the time, first French regulation of *droit d'auteur* was more extensive in scope, granting exclusive rights not only to authors of literary texts but also to music composers, painters and draughtsmen. Its duration was also longer, the *droit d'auteur* spanned during the entire life of the author and was passed to the heirs for another ten years.

During the 19th century the existence of the *droit d'auteur* was a passionately debated topic in France. Libertarian disciples of Bastiat suggested *droit d'auteur* should be perpetual (Modeste, Passy, & Prosper Paillottet, 1858) and so did Jobard, but he called it *monoautopole* instead (Jobard, 1844). These ideas were vigorously opposed by Proudhon, who compared the suggested perpetual *droit d'auteur* to a medieval right of

primogeniture (*majorats littéraires*) (Proudhon, 1863). The utilitarian perspective of *droit d'auteur,* i.e. limited in time not perpetual, was defended by none other than Léon Walras, in particular in his second text on the subject, dated from 1880 (L. Walras, 1859; Walras L., 1880).

Today natural law, even if not explicitly stated, remains the main underlying justification for *droit d'auteur* in civil law jurisdictions. Natural rights are absolute and sacred, so they do not lend themselves to cost-benefit analysis. Before the sacred, profane consequentialist reasoning is impotent. This may be another reason why it is so difficult to advance copyright law-and-economics scholarship in civil law jurisdictions.

As said supra, the Anglo-American common law always thought of copyright as a useful tool for social progress, a means to an end. The full title of the *Statute of Queen Anne* of 1710 is self-explanatory:

> *"An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, during the Times therein mentioned."*

Further ahead the *Statute* adds:

> *"...and for the Encouragement of Learned Men to Compose and Write useful Books."*

The utilitarian rationale of copyright is present in the US Constitution of 1776. Article I, Section 8, Clause 8 authorizes Congress:

> *"To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."*

The US Congress and Courts have repeatedly upheld the utilitarian and welfare dimensions of copyright law.

A1909 Report of the US Congress states:

> "*The enactment of copyright legislation by Congress under the terms of the Constitution is not based upon any natural right that the author has in his writings, for the Supreme*

> *Court has held that such rights as he has are purely statutory rights, but upon the ground that the welfare of the public will be served and progress of science and useful arts will promoted by securing to authors for limited periods the exclusive rights to their writings. The Constitution does not establish copyrights, but provides that Congress shall have the power to grant such rights if it thinks best. Not primarily for the benefit of the author, but primarily for the benefit of the public, such rights are given. Not that any particular class of citizens, however worthy, may benefit, but because the policy is believed to be for the benefit of the great body of people, in that it will stimulate writing and invention, to give some bonus to authors and inventors. In enacting a copyright law Congress must consider, as has been already stated, two questions: First, how much will the legislation stimulate the producer and so benefit the public; and, second, how much will the monopoly granted be detrimental to the public. The granting of such exclusive rights, under the proper terms and conditions, confers a benefit upon the public that outweighs the evils of the temporary monopoly*" (US Congress, 1909).

A recent decision by the US Court of Appeals for the Second Circuit said:

> "*The ultimate goal of copyright is to expand public knowledge and understanding, which copyright seeks to achieve by giving potential creators exclusive control over copying of their works, thus giving them a financial incentive to create informative, intellectually enriching works for public consumption. This objective is clearly reflected in the Constitution's empowerment of Congress "To promote the Progress of Science (...) by securing for limited Times to Authors (...) the exclusive Right to their respective Writings." Thus, while authors are undoubtedly important intended beneficiaries of copyright, the ultimate, primary intended beneficiary is the public, whose access to knowledge copyright seeks to advance by providing rewards for authorship*" (*Authors Guild v. Google, Inc., United Court of Appeals for the Second Circuit.*, 2015).

The utilitarian nature of US copyright has endured the passage of time.

2.4. THE ECONOMICS OF COPYRIGHT LAW

The economic theory of IPR is based in the *incentive paradigm*. The building blocks of this paradigm are theories of diverse origin, from information economics, to property rights theory and ecology.

Information economic scholars highlighted the shortcomings of the market mechanism to provide incentives for the creation of new information under uncertainty. Worth mentioning are Nelson's *The Simple Economics of Basic Scientific Research* (Nelson, 1959) and Arrow's *Economic Welfare and the Allocation of Resources for Invention* (Arrow, 1962).

The *property rights theory*, originally devised to explain the origins of property rights as mechanisms to internalize externalities that affected corporeal goods, usually of the *commons* type, like grazing land (Alchiam, 1965; Demsetz, 1967) was later extended to incorporeal goods.

Garret Hardin, a biologist, advocated property rights as an effective mechanism to avoid overconsumption of communal resources in his famous piece The *Tragedy of the Commons* (Hardin, 1968). However, Nobel laureate Elinor Ostrom pioneered research and gathered empirical evidence to challenge Hardin's solution, proposing alternative models of governance to efficiently manage *the commons* (Ostrom, 1990).

We should not forget Alois Schumpeter, who argued in favour of some sort of "limited monopoly" to incentivise entrepreneurs to innovate (Schumpeter, 1942).

But not all economists agree. In the first half of the 20th century Plant alerted about the weaknesses of the copyright system.

> *"There is, of course, no system of economic calculus which supports the contention that output of the type which monopoly induces is "preferable" to that which emerges from the different disposition of the same scarce productive resources resulting from the competitive bidding of the open market. One special weakness of copyright monopoly as an administrative device is the non-discriminatory nature of the encouragement it affords to ventures which are too risky to be embarked upon in a free market"* (Plant, 1934b).

He added,

> *"To the economist who studies the statements of the case for and against the copyright system as we know it, there is no document more satisfying in its logic than the minority report in which Sir Louis Mallet, a member of the Royal Commission on Copyright of I*

> *876-8, stated the arguments against the continuance of the monopoly. His conclusion was that in the absence of copyright " it will always be in the power of the first publisher of a work so to control the value, by a skilful adaptation of the supply to the demand, as to avoid the risk of ruinous competition, and secure ample remuneration both to the author and himself"* (ibid.).

Friedrich Machlup, an economist of Austrian origin residing in the US, was asked report to the US Congress in 1958 to assess the US patent system. It was the time of the *Cold War*; both the US and the USSR knew that innovation would be key to victory. There was no margin for error.

Machlup report was concluded with this famous line,

> "*If one does not know whether a system "as a whole" (in contrast to certain features of it) is good or bad, the safest "policy conclusion" is to "muddle through"—either with it, if one has long lived with it, or without it, if one has lived without it. If we did not have a patent system, it would be irresponsible, on the basis of our present knowledge of its economic consequences, to recommend instituting one. But since we have had a patent system for a long time, it would be irresponsible, on the basis of our present knowledge, to recommend abolishing it. This last statement refers to a country such as the United States of America—not to a small country and not a predominantly nonindustrial country, where a different weight of argument might well suggest another conclusion*" (Machlup, 1958).

Machlup was far from categorical and did not close the door to alternative models, especially for developing nations.

In the absence of empirical evidence IPR should not be expanded irresponsibly. Until then, to *muddle through* seems to be the best we can hope for.

The *incentive theory of IPR* departs from a market failure, that of public goods (information, knowledge, etc.). Public goods are non-rival and non-excludable, so under market conditions its provision would be suboptimal as the investor would not be able to recover sunk costs pricing at marginal cost. So the innovator needs some kind of reassurance, such as an e*x ante* exclusive legal right to guarantee the recovery of his sunk costs (e.g. time, money, effort, etc.).

Under the economist's lens IPR are legal monopolies. All monopolies impose a deadweight loss to society. This loss can be substantial in the case of patents and also copyrights; it is not quite like that in the case of trademarks and other distinctive signs (also species of the IPR genus). The legal monopoly on a semiotic sign creates no deadweight loss to society.

So despite the legal taxonomy, economists usually distinguish between those IPR that create deadweight loss, patents and copyright (also utility patents, designs and plant breeder's rights), and those that do not, such as trademarks, other distinctive signs like geographical indications and unfair competition (Menell & Scotchmer, 2005).

The grant of IPR is one mechanism to solve the market failure of public goods but is by no means the only regulatory solution available. Alternative solutions include subsidies, prizes and procurement contracts. In fact, all of these alternative incentive schemes coexists with IPR, especially to subsidise basic science. There is no superior mechanism in absolute terms, the best solution will depend on the variables at stake (Gallinim & Scotchmer, 2002).

Critics of regulation suggest that sometimes the remedy can be worse than the illness. Regulatory failure should not be taken lightly (Amato & Laudati, 2001; Dolfsma, 2013; Ogus, 2004). In addition, some surveys suggest that firms may prefer market mechanisms instead of IPR, such as lead time advantage, complementary manufacturing and secrecy, as their best strategies to appropriate returns in intangible assets (Cohen, Nelson, & Walsh, 2000).

Patents, utility models, copyrights, neighbouring rights, design rights, plant breeder's rights, mask works, etc., are some of the different types of IPR. Despite differences in subject matter, scope and duration their essence is the same, giving the right holder the right to exclude third parties from using or profiting in any way from an information good (this is known in legal scholarship as the right to exclude everybody else, or *ius excludendi omnes alios*). The exclusivity is meant as an incentive to solve the free rider problem. Also, it allows the right holder to price above marginal cost and, a way to recover sunk costs.

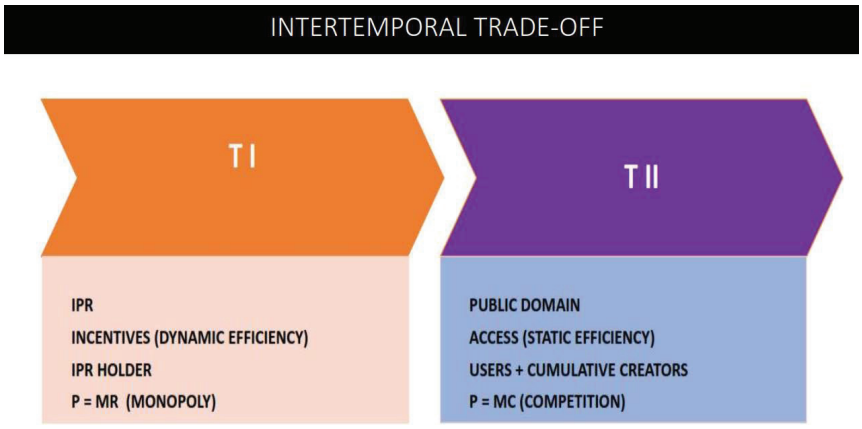
Legal monopolies may help firms innovate but they represent an additional cost to society (the above-mentioned deadweight loss is one of those social costs). For instance, a patent allows its right holder to raise the price and limit production, in order to maximise profits (pricing close to marginal revenue).

Hence, the regulator is faced with a trade-off, how to maximise incentives to authors and inventors (dynamic efficiency) and, at the same time, disseminate knowledge among most citizens (static efficiency)?

Both variables (incentives and access) cannot be maximised at the same time. So, the solution, is a sort of inter-temporal trade-off between public policies.

This is what I call the *IPR (copyright law)-public domain system*, which requires the existence of two subsequent periods of time. The first (I), to incentivise the creation of information goods; the second (II), to disseminate those goods at the lowest possible cost and among the greatest number of people.

I. During the first period IPR are enforced. The main policy objective is to achieve dynamic efficiency. The legal monopoly allows the rightholder to price close to marginal revenue to recover her sunk costs.
II. During the second period two information enters the public domain. The policy objective here is to achieve the widest possible dissemination, use and re-use of that information, at the lowest possible price, i.e. close to marginal cost.



Graph no. 1: Intertemporal trade-off of public policies (incentive-access).

The most important tool the regulator has to balance (I) incentive and (II) access is the time, the term of duration of the IPR. To get the time right is of fundamental importance to achieve, subsequently, both goals. If the first period (I) is too short there will be not sufficient incentive effect. If the second period (II) arrives too late, the knowledge spillover will be unduly deferred, with losses of welfare. However, the term of duration of each IPR is not uniform and related to specific characteristics (usually 20 years for patents, life of the author plus 50/70 years *post mortem auctoris* for creative works and 10 years for trademarks, the only IPR that is renewable).

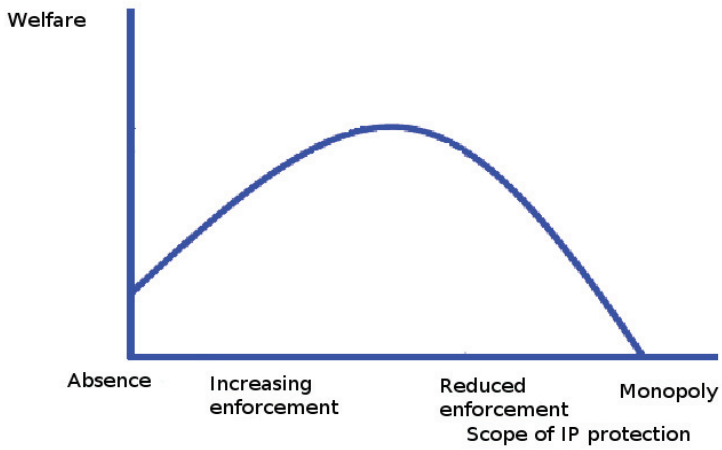
The strength of an IPR (of which the main determinant is the term of duration) has a direct impact on welfare, as it is shown in the graph below taken from the work of Mackaay and Rousseau in an exercise of a limitation to copyright, the *droit de courte citation* (Mackaay & Rousseau, 2008).

The far left extreme of the graph represents a situation of total absence of monopoly. The far right, at the point where the curve intersects the horizontal axis, we have a case of a perpetual monopoly. Both extremes depict suboptimal normative choices; under and over protection, respectively.

According to the graph, even in the absence of IPR (far left) there is some amount of creativity. This seems a realistic assumption. There countless examples of authors that created masterworks before copyright existed (Homer, Herodotus, Xenophon, etc.) and of inventors before patent law (Archimedes, Ctesibius, Hero of Alexandria, etc.).

The curve, seen from left to right, shows a progressive increase, up to a certain maximum point (its zenith) after which it begins to decrease. The highest point is where welfare is maximized and that should be the regulator's aim. The highest point of the curve requires a certain degree of exclusive rights but not complete, neither its absence. It is a difficult but not impossible equilibrium between the cost and benefits of IPR. (Law)-and-economics reasoning, unlike legal dogmatics, avoids absolute solutions and favours thinking at the margin, like Ward Farnsworth reminds us (Farnsworth, 2008).

Equilibrium between extremes, incentives and access, is also at the foundation of Western legal philosophy. Aristotle defined fairness or justice, in the fifth book of his *Nichomachean Ethics*, as an intermediate point (or *mesotes*) between two inefficient extremes, excess and want (Aristotle, n.d.).



Graph no. 2: Relationship between the scope of IPR and (total) welfare.

Source: Mackaay & Rousseau, 2008.

2.5. THE FUTURE

Law-and-economic scholarship has been more critical than other approaches to legal scholarship in relation to extending IPR/copyright law protection (Breyer, 1970, 1972; Elkin-Koren & Salzberger, 2012; Mackaay, 2011, 2015, Posner, 2005, 2006; Richard A. Posner, 2012; Salzberger, 2006). The perception of many lawyer-economists suggest that copyright law has been extended way too far, both qualitatively (types of works protected) and quantitatively (term of protection), negatively affecting the delicate *copyright law-public domain* equilibrium described *ut supra*.

Also, criticism is more common in common law jurisdictions, perhaps because of the explicit utilitarian character of patents and copyrights in those jurisdictions. After the decision of the Supreme Court of the United Sates in *Eldred v. Ashcroft* (vid. infra), Landes and Posner suggested a radical solution (*de lege ferenda*). These authors proposed a perpetual copyright based on a registration basis, subject to ever-increasing renewal fees. In this way, the author expected to expand the public domain and avoid congestion externalities at the same time (Landes & Posner, 2002).
Other innovative solutions include the payment of a unique fee for unlimited online access to films, songs and books called by one author the *celestial jukebox* (Goldstein, 2003). Other criticisms were targeted to specific niches of copyright law, like academic publishing.

Shavell, a famous economist, became an advocate of *open access* for academic works and suggests the *ex lege* abolition of copyright in academia (Shavell, 2010). Other scholars have suggested the reintroduction of formalities to mitigate the negative externalities consequence of the recurrent extension of the copyright term, such as orphan works (Mazzone, 2011; Patry, 2012). Other authors suggest to reinvent the patent and copyright system by adopting a pricing mechanism (A. Bell & Parchomovsky, 2014)

All of these creative suggestions to reform IP/copyright law face a high if not unsurmountable hurdle; they go against the accepted international IP law.

Any alteration of these standards would imply, for the country daring to implement radical reforms, to denounce Berne and Paris Conventions, additional WIPO-administered copyright and neighbouring rights-related agreements, the TRIPS agreement and FTA; to abandon WIPO and even the WTO. Truly, a high price to pay. International IP law acts as a legal barrier to reform and reinforces the status quo .

2.6. CHAPTER'S SUMMARY

In this chapter we have reviewed the philosophical underpinnings of IP/copyright law, natural rights and utilitarianism. Different philosophical conceptions and historical events serve to explain the different regulatory approaches between common law's copyright law and civil law's *droit d'auteur*.

The *incentive theory of IPR* is consequentialist and utilitarian in nature. It strives to solve the market failure in the market of public goods (non-rival and non-excludable) by granting legal monopolies (regulation). Thus, copyright becomes an incentive for the author to create works under ex ante uncertainty, by guaranteeing an exclusive period of time for the exclusive exploitation of her work, in order to recover investments and to fend-off against free-riders.

The regular cannot maximise incentives (dynamic efficiency) and access (static efficiency) at the same time. To strike a balance between to equally desirable public policy goals to set the efficient duration of IPR becomes important.

According to many law-and-economics scholars the current levels of IPR/copyright protection have gone too far, beyond an ideal efficient threshold. The many proposals to fix or ameliorate the IPR system crash against international IP obligations.

3. HISTORICAL EVOLUTION OF COPYRIGHT LAW

3.1. WHY HISTORY MATTERS

Mainstream (neoclassical) economists consider economic history and/or the history of economic thought either irrelevant and unnecessary. This is a consequence of its adherence to the postulates of logical positivism. From a logical-positivist standpoint, all historical insights have already been incorporated into the latest mainstream paradigm. This epistemological view, that Roncaglia calls *cumulative* (Roncaglia, 2006), disregard alternative epistemological approaches, historically less linear, as proposed by Kuhn and Lakatos, inter alia (Kuhn, 1962; Lakatos, 1978).

Ron Harris suggests five different uses of history in law and economic scholarship (Harris, 2003). Two of them, *public choice analysis of the origins of modern legislation* and *how did we arrive to the prevailing law*, the 4th and the 5th respectively, are of particular importance to this thesis.

Legal institutions are dynamic; they evolve and change over time because of countless exogenous factors (social, political and economic). Given certain conditions, efficient laws may supersede inefficient ones. But institutional evolution is not linear neither deterministic, and sometimes institutions that were efficient in origin cease to be, or become obsolete by technological change or get co-opted by some group or elite.

In the 18th century patents and copyrights were a decisive step forward in the direction of industrialization and education, both in Europe and the New World. Patents and copyrights, in recently-established parliamentary monarchies as well as democratic republics, replaced the preceding practice by absolutists monarchs of granting discretionary monopolies in exchange of financial assistance or other benefits, such as assistance in censorship. Times change and so do institutions. What was efficient yesterday may stop being so tomorrow.

Douglas North said,

"*Today, most of what patents and copyrights are about is the protection of monopolies, not the encouragement of more rapid development [Omissis] Clearly, what has happened now is that an elaborate structure of law and rules has developed so that intellectual property rights systems are becoming unrecognisable compared to their original form and to their intent of promoting innovation*" (D. C. North, 2009).

History teaches us that not only socially efficient institutions endure over time, sometimes inefficient ones may endure as well. Random historical events, path dependency and vested interests interreact and influence the process of institutional change, and permanence.

I conjecture that today, almost two decades after the beginning of the 21st century, having an already overstretched copyright system, the *domaine public payant* may be one of those inefficient but enduring institutions.

Let us start by analysing the historical origins and evolution of copyright law.

3.2. ANCIENT CIVILIZATIONS

Some scholars claim proto forms of copyright law existed in ancient civilizations, for instance in ancient Rome (García, 2009) or imperial China (Alford, 1995). I respectfully disagree. These, and similar interpretations, see ancient facts through contemporary lenses.

Even if ancient cultures punished the unlawful copying of creative works, it was so for reasons and according to principles totally different from the ones that inspire modern copyright law.

Indeed, there was a market for creative works in the past, as archaeological evidence demonstrate (papyruses, vellums, frescoes, sculptures, etc.).
The *book* market was well developed in ancient Greece, Rome and China in spite of the absence of modern forms of copyright protection. This was possible because the publishing business in ancient times relied on costly copying technologies (manual

labour) and did not require additional legal protection. The cost of copying acted as a mechanical barrier to infringement.

Roman law was the most advanced legal system of its time and influenced the development of modern civil law, modelled after Justinian's *Corpus Iuris Civilis* centuries later. However, the idea of copyright protection was absent.

Roman jurisconsults did distinguish between *res corporales* and *res incorporales*. The former included things that can be touched and the latter those that cannot be touched (*qua tangi non possunt*). However, the *res incorporales* category did not refer to anything remotely similar to what we understand them today as IPR. For instance, Gaius enumerates the following *res incorporales*: inheritances, usufructs and easements, nothing else.

The *failure* of Roman jurists to develop IPR or copyright protection was not because of short-sightedness; the technology of the day, the *mores* and culture are probable reasons why it was not necessary.

An interesting case is the way in which Roman jurists solved conflicts between the owner of the material and the creator of an intellectual work. In general terms, Roman law gave preponderance to the tangible medium in which a creative work was incorporated than to the creative work itself. For instance, a literary work written on a parchment or papyrus belonged to the owner of the parchment or papyrus and not to the author of the text, a legal principle known as *litterae chartis cedunt* which was a refinement of a broader legal principle, *accesorium sequitur principale*. This example suggests the subordination of the intellectual work to the physical medium in Roman times (Bartocci, 2009).

If authors had no exclusive rights over their works, what incentives did they have to create literary masterpieces that have survived until our days? Authors and artists in ancient times were subject to other types of economic incentives.
Much like the state directly subsidises basic research today, private patrons (like Maecenas)[2] subsidised the arts and letters. The relationships between patron and artist

[2] Gaius Clinius Maecenas (70 C.E. - 8 C.E.) was a Roman patron of the arts. We must thank him for works such as the *Aeneid* or the *Odes*, as he sponsored Virgil and Horace, among others. So important was his

were regulated by Roman law. *Locatio conductio* was a contract to create a specific work, and *extraordinario cognitio*, a form of public procurement.

Historical evidence suggests some authors became quite wealthy as a consequence of this scheme of direct subsidization, Terence received 8000 sestertii for selling (today we would say assigning) his play *The Eunuch*. A significant sum at the time, sufficient to buy eight slaves.

Ideas about crime and punishment were also radically different from ours (as they are influenced by changing culture, mores and religious practices). Infringement of the creative works per se was rarely punishable. Stealing the tangible medium where a creative work was embodied was a crime punishable by law (Putnam, 2010).

Plagiarism is another concept that evolved over time. What Romans understood for plagiarism is not what we understand today. Literally speaking, plagiarism comes from *plagiarius*, i.e. the kidnapper of somebody's son or slave.

At some point in time the poet Martial started to use the word *plagiarism* to refer, by analogy, to the act of literary theft. Only later this new meaning of plagiarism became punishable, by extensive interpretation of the crime of *furtum* (stealth theft of tangible things).

A plagiarist became a thief of another author's ideas and as such could be sued by way of the *actio furti*. In addition, an authors' good name and reputation were protected under another action, the *actio iniurarum* (slander). This last action was also used in cases where an individual did not acknowledge the authorship of the actual author of a work (today we would call it an infringement of the right of paternity, a species of moral right).

3.3. THE CLASSICAL WORLD

legacy that in Romance languages the private patronage of arts and *belles lettres* is named after him (eponym), *Mecenazgo* (Spanish), *Mécénat* (French), *Mecenato* (Portuguese) and *Mecenatismo* (Italian).

Besides technological barriers, there were cultural constraints to the legislation of IPR in ancient times. It is still a debated topic whether the idea of individual authorship and/or of the author as proprietor is a modern one, a creation of romantic authors (Rose, 1993; M Woodmansee, 1994; Martha Woodmansee & Jaszi, 1994) and whether this idea still holds today (Barthes, 1968; Michel Foucault, 1969).

Classical culture understood work differently that we do. To both Greeks and Romans salaried work, whether manual or intellectual in nature, was not worthy of a free man. Among Romans, only the liberal arts were worthy of a free man (*artes quae sunt libero dignae*, according to Cicero) and as such they should be performed *ad honorem*, not for profit. With some notable exceptions, arts, crafts and works for hire (including literary works for hire) were activities left to slaves, *liberti* or foreigners.

Views about aesthetics and the creative process were also different. First, Greek authors were influenced by the platonic theory of the form, i.e. the world we know is but an imperfect copy of another, the perfect world of pure ideas or forms. Later, Aristotle presented his aesthetic theory of *mimesis*, or imitation of nature. Thus, according to ancient canons proper authors were either those that copied the ideal forms or imitated nature.

Dionysius of Halicarnassus redefined the Platonic-Aristotelic canon. According to Dionysius the creative act must imitate, not an ideal world or nature itself, but the works of other authors. The Dionysian concept of *imitatio* was progressive, cumulative. Authors became better authors by a process of emulation; adapting and improving the works of other authors. Social norms did not penalise *imitatio*, on the contrary. Copying another author's work was a welcomed form of praise, as it increased the reputation of the author copied.

During the Middle Ages the focus of life shifted from men (homocentrism) to God (theocentrism). God was the creator of the universe and of everything contained therein. So, human authors could play a limited role. Artists became re-creators; human creativity was subordinated to Divinity.

During the Middle Ages knowledge was considered a divine, a gift (*donum*) from God, and as such it was not a traded commodity (*res extra commercium*). Knowledge should not be sold, "*scientia donum Dei est, unde vendi non potest"* (Post, Giocarnis, & R. Kay, 1955). The gratuity of knowledge was stated in the Gospel, "*gratis accepistis, gratis date*" (Matthew 10:8), the highest source of authority at the time.

Only later, after secular universities superseded cathedral and palatine schools as the centres of higher learning, were professors able to charge for their lectures and receive a wage or stipend from the civil or religious teachings. Law professors quickly developed theories to justify the payment of fees or receiving gifts from their students to support their earthly needs. Knowledge was still a gift from God, and as such unsalable, but it was considered fair and necessary to compensate a professors' effort (today we would say opportunity cost). Later, theologians from the Salamanca School will use similar economic arguments to justify banking activities and charging interest for loans, against the biblical prohibition against usury (Grice-Hutchinson, 1952; Rothbard, 1995).

Theocentric ideas were gradually abandoned during the Renaissance. According to some historians the *Black Death* (14th century) was a pivotal event towards a more secular European culture. The Catholic church failed to stop the plague (called "the wrath of God") with prayers. Moreover, it killed pious and sinners alike, including many priests (Alcock, 2016; Capinera, 2008). Renaissance humanism was a reaction, a return to homocentric ideals modelled after the classical past.

Later, with the romantic movement, a new notion of authorship will take hold; an autonomous, original and individualistic.

3.4 THE MIDDLE AGES

Like in ancient times, during the middle ages texts were copied by hand, the amanuensis, a monk, replaced the scribe. Monastic orders considered any work, including intellectual work, a way to commune with God (thus *ora et labora,* the motto of the Benedictine Order).

Amanuenses monks spent long hours back-bent over the *scriptorium* copying sacred and profane texts or working on illuminations with the conviction what they did was a pious duty. Copying was an expiatory action, a way to purify oneself. The correctness and exactness of copies was also safeguarded on religious grounds, as typos and errors were sinful acts to be avoided at all costs.

The secularization of the craft of book copying began at universities. These new institutions of higher learning, that appeared in Europe during the 12th and 13th centuries (the University of Bologna is credited to be the first university in the world, founded in 1099 C.E.) and eventually superseded palatine, cathedral and monastic schools, required books for their students. The first regulations for the copying of books appeared in Bologna in 1259 C.E.

Like in the classical past, during the Middle Ages there was no such institution like modern copyright law. Like in Roman times, property of the medium (e.g. a book) entitled property of the intellectual work reproduced therein; and by analogy with tangible property, intellectual property was perpetual.

All this elements are present in a famous medieval judicial case. Columba or Colmcille (521-597 C.E.) was an Irish saint, warrior and monk; he is considered one of *Ireland's 12 Apostles*. He was also a prolific amanuensis, it is believed he copied more than 300 books during his lifetime. In a visit to Finnian in Moville, a former master, Columba found a Psalter of St. Jerome (other sources said what he found was the first copy of the Vulgate to have arrived to Ireland).

Without asking permission from his owner and host, Columba surreptitiously began copying the sacred text at night. He was caught *in flagrante,* and Finnian requested the copy to be handed over to him. Columba declined. The matter was solved by King Diarmait. Finnian argued the book was his property and Columba had breached his trust. Columba said books should not be hidden and everyone must be free to read and copy them (a bold idea, way ahead of its time). In addition, Columba made an interesting economic argument, he pointed out that his copy did not deprive Finnian of his book

neither decreased its value. He also said he copied it out of necessity, as at the time there were few Christian books in Ireland.

After hearing both parties King Diarmait uttered his verdict: "*To every cow belongs its calf; to every book its child-book*" (an argument by analogy). So, Columba's was forced to give his copy of the book to Finnian.

Columba went to Scotland and after years of missionary work he converted the Picts to Christianity, then he returned to Ireland and had his revenge. A disagreement between Diarmait and Columba led to the battle of Cooldrumman in 561 C.E. According to the chroniclers the king Diarmait lost 3000 men and Columba only one (this attributed to the protection of Archangel Michael).

3.5. GUTENBERG'S REVOLUTIONARY MACHINE

For centuries to copy a book took weeks, months or years of painstaking and patient work to complete. Then a new technology change it all, forever. Circa 1450 in Mainz C. E. Johannes Gensfleisch zur Laden zum Gutenberg (1398-1468 C.E.) printed a text using the first movable-type printing press. The Chinese had knew the printing press long before, but it was not that useful for reproducing text in a language that needed to be written using thousands of different ideograms.

Indo-European languages were different, with a finite number of letters per alphabet that repeated as needed to form infinite numbers of words. Besides, Gutenberg's true innovation was to add to it movable metal typesets, making the process much faster and economic.

In 1455 Gutenberg printed the first Bible, at 42 lines per column, and in 1280 pages. The new technology had a tremendous socio-economic impact, it is no exaggeration to say it changed the history of mankind.

The movable-type printing press significantly lowered the production costs of reproducing books and texts. Gutenberg's press allowed written knowledge to reach a

wider readership, for the first time in history. Somehow the printing press democratised access to knowledge and laid the foundations to more open societies.

The Reformation, the Enlightenment, the Industrial Revolution and all other revolutions of the 17th and 18th centuries would be unthinkable without a cost-effective machine to rapidly spread knowledge in vernacular languages. The threat did not pass unaware to the ruling classes of the time; censorship was an immediate reaction.

Sooner than later, imitators copied Gutenberg's machine. Printing presses were established in Cologne (1464), Basel (1466), Rome (1467), Venice (1469), Nuremberg, Utrecht, Paris (1470), Florence, Milan, Naples (1471), Augsburg (1472), Budapest, Lyon, Valencia (1473), Krakow, Bruges (1474), Lübeck, Breslau (1475), Westminster, Rostock (1476), Geneva, Palermo, Messina (1478), London (1480), Antwerp, Leipzig (1481), Odense (1482) and Stockholm (1483) (Ferguson, 2011).

Before the printing written knowledge was only available to the higher echelons of society, nobility and clergy; only them could afford the cost of a manuscript. In addition, the medieval language of learning was Latin, which was unknown by the masses. The printers, looking to reach a wider readership (creating its own demand), started printed text in vernacular languages.

At the early stages, prices of printed texts did not drop dramatically. The earlier printed texts were expensive, almost as a manuscript. From 1454 to 1800 C.E the European output of printed texts skyrocketed.

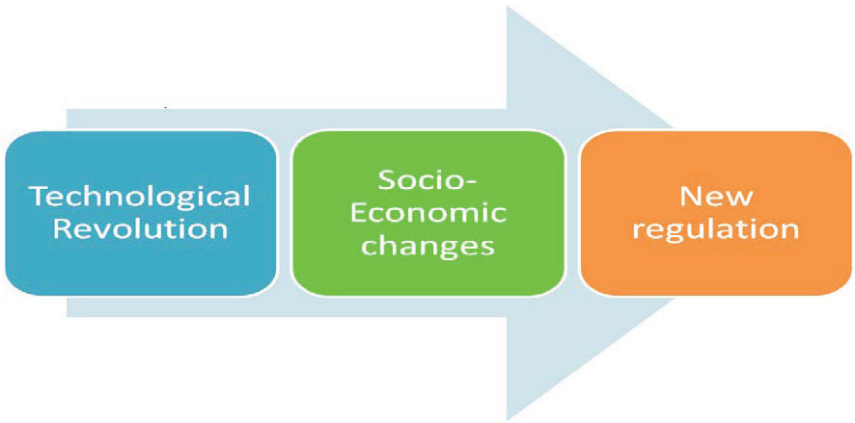
According to Buringh and Van Zanden,

"*After 1454 the invention of movable type caused output growth to accelerate even more. Whereas during the sixth and seventh centuries on average only about 120 books were produced annually in Western Europe, in the peak year of 1790 total production was more than 20 million books*" (Buringh & Zanden, 2009).

In the end, amanuenses were put out of their jobs; they were victims of *creative destruction*. However, the extinction of the craft of the scribe, like that of the dinosaurs,

did not occur overnight. It was a long process in which, for many years, both copying methods coexisted. Following Yu, we must distinguish two phases: (a) coexistence and (b) overtaking (Yu, 2006). The coexistence phase (a) teaches us a very important lesson about technological change. At first printed books were more expensive than books copied by hand, so competent scribes kept their jobs of copying books by hand until the 16th century. At some point in time the cost of the printing press dropped enough and copying books by hand became too expensive. The more entrepreneurial scribes found a way to survive by specialising and finding a niche that the printing presses could fill, decorating and illuminating books, calligraphic services for personal letters for noblemen, clergy and kings. These copyists kept their jobs until the 18th century. Some of them even became printers. The overtaking process was gradual, and many scribes managed to make the transition successfully.

As it seems a pattern in the history of innovation, when a new technology threatens the status quo the first response is to reject it (i.e. protectionism). In 1474 C.E. scribes petitioned the authorities of Genoa to expulse all printers. The Genoese authorities refused.



Graph no. 3: Technological disruption and the role of regulation.

3.6. THE ITALIAN RENAISSANCE

The Renaissance marks the return of the homocentric cosmovision of classical antiquity, humanity returns to be the measure of all things (*homo mensura*). Between the 14th to the 17th centuries the Italian peninsula was not a country as we know today, but a patchwork of independent kingdoms, republics, *signorie* and papal territories. Italy ultimately became a state in 1861 (the idea of the sovereign states was also knew, it emerged after the Peace of Westphalia of 1648).

The Venetian Republic and the Papal States where the first to grant monopoly rights in the Italian peninsula, as a tool to attract human capital (authors, artists and inventors) as well as investments (the resources needed to install the initially expensive printing presses). In the following paragraphs I will follow Witcombe's account of the historical evolution of these early legal monopolies, called *privilegi*. (Witcombe, 2004)

3.6.1. VENETIAN *PRIVILEGI*

To attract authors, artists and publishers the Republic of Venetia offered them *privilegi*. In 1469 C.E. the first *privilegio* was granted to a printer named Johannes von Speier (Italianized as Giovanni da Spira).
In 1486 C.E. for the first time a *privilegio* was granted to an author, Marcantonio Sabellico. In 1566 another *privilegio* was granted to Tiziano Vecellio over an engraving he had acquired from Cornelius Cort (*privilegi*, like other forms of earlier protection against unauthorized copying, were usually granted to proprietors of works created by others and rarely to the original author).

As seen, Venetian *privilegi* were granted to inventors, publishers, owners and authors Sanctions in case of infringement were mostly pecuniary, rogue printers faced fines of up to 500 ducats.

Privilegi could be given to any legitimate owner of an original artistic or literary work, whether authors, translators or publishers (original rightholders) or publishers and merchants (subsequent rightholders). They were petitioned to the authority, expressing the reasons for the request and asking for a specific time frame of exclusivity.

The authority was free to grant the privilege or not, and in case of granting to set the term it pleased. Granting of privileges was discretionary to the authority, a political matter, not subject to substantive or procedural law. These two characteristics, the absence of objective criteria for the grant and the discretionary nature of the granting decision, were common to earlier printing privileges and only changed with the Statute of Anne in 1710.

In addition to attracting bright minds and capital, *privilegi* gave secular and religious authorities the opportunity to control what contents were being printed. In Venice censorship had different stages. First, it was necessary to get approval from the *Riformatori dello Studio di Padova*. Second, a license from the *Capi del Consiglio dei Dieci* was needed. Only then a *privilegio* could be requested to the Senate.

There was no specific term for the concession of a *privilegio*. In most cases a Venetian *privilegio* would be granted for 10 years but there are records of *privilegi* granted for 6 and 15 years. In case of infringement sanctions included the seizure of infringing copies and the payment of a fine. The fine was either a fixed sum, usually ranging from 200 to 500 ducats, or a variable one calculated over each unauthorized reproduction (in some cases, 25 ducats per infringing copy).

Enforcement of copyright infringement was and still is difficult to detect. To improve the chances of enforcement of the privileges Venetian authorities devised and ingenious mechanism. In case infringement was found, the fine was to be divided in three equal parts, as follows, 1/3 to the whistleblower (*accusatore*), 1/3 to the supplicant (holder of the *privilegio*) and 1/3 to the intervening magistrate. It would sound strange today to split awarded damages with the judge awarding them. Sometimes even lawyers' fees were paid from the proceeds of the fine (a quadripartite arrangement).

3.6.2. PONTIFICAL *PRIVILEGI*

The pope for centuries had large states in the Italian peninsula where he ruled like any other temporal ruler. This ended in 1870 with the conquest and annexation of Rome by the newly established Italian government.

The Pontifical States during the renaissance granted *privilegi* to publishers, owners and authors of texts. The process was somewhat different from the one in force in the Republic of Venice. In this case, the supplicant (the name itself tells a lot about the process) had to address the Pope himself, directly or indirectly. There were two possibilities, either requesting a *breve* to the Secretariat of Latin Briefs, or requesting it from the Pope himself acting *motu proprio*.

The practice of granting *privilegi* was started by Pope Alex VI (1492-1503 C.E.). The first papal *privilegio* is believed to have been granted in 1498 C.E. but the first papal recorded *privilegio* dates from 1509 C.E. Under the papacy of Julius II (1503-1513) *privilegi* became common practice. Even some papal bulls were printed under *privilegi*.

Like in Venice, the purpose of papal *privilegi* was to provide economic incentives to recover the costs of setting up a printing press. The usual duration of the papal *privilegio* was 10 years but there are records of *privilegi* granted for up to 15 years. Papal courts enjoyed long arm jurisdiction over the enforcement of *privilegi*: violations committed outside the Papal States were prosecutable in Rome (as long as the place where the offense was committed was under the temporal jurisdiction of the Roman Catholic Church).

In case of infringement counterfeiters were punished with fines, which were also split according to the tripartite rule seen in Venice. But papal *privilegi* carried an extra punch; the infringer was automatically excommunicated *latae sententiae*, i.e. without further ado and effective from the moment the offence was committed. Excommunication in 16th century Europe was a most severe form of punishment.

According to Canon Law an excommunicated offender was severed from the Church and could not receive the Holy Communion. But, in more terrene terms an excommunicated individual was de facto banned from social, civic and economic affairs (similar to the secular French *mort civile*).

3.7. CENSORSHIP

The ruling elite, both spiritual and terrene, quickly realized printing presses represented a threat to their power and the status quo and obviously decided to control them, using the legal system.

The right to censor texts was recognized in the Papal brief *Accepimus Literas* (1479 C.E.). This practise later became known as *imprimatur* or *approbatio* and was a sine qua non requirement to obtain a *privilegio*. The bull *Inter Multiples* (1487 C.E.) legitimized censorship on religious grounds in all the Christendom.

Publishers of censored materials were punished with fines and automatic excommunication. In addition, books that were found heretical, i.e. those that contradicted the Bible or the doctrine of the Church, were destroyed. In 1515 C.E. Leo X enacted *De Super Impressione Librorum* commanding all censored books (heretical and not) had to be burnt. Local bishops were entrusted with the enforcement of this bull. In 1542 C.E. Pope Paul III issued the bull *Licet ab Initio*, creating the *Congregation for the Doctrine of the Faith*, infamously known in more prosaic terms as the Inquisition.

In 1570 C.E. Pope Pius V created the *Congregrazione dell'Indice*, entrusted to publish a list of forbidden books (the *Index Librorum Prohibitorum*). The *Index* was abolished in 1966, at the II Vatican Council. However, the Catholic Church still enforces the canonical rights of *nihil obstat*, *imprimi potest* and *imprimatur*.

In Venice a decree of 1491 C.E. required consent from the bishop to obtain a printing license. The *Capi del Consiglio dei Dieci* were entrusted with political censorship whereas the *Riformatori dello Studio di Padova* dealt with religious and moral censorship. In 1537 C.E. another censoring entity was created, the *Esecutori contra la Bestemmia*, specifically entrusted to check for blasphemy in printed texts.

Esecutori could impose monetary fines, order whipping, imprisonment and even banishment. Unlicensed books were confiscated or burnt. In 1566 C.E. it became mandatory to include all texts to be printed in a registry. In 1569 C.E. the register was substituted by the deposit of two copies of the book, to discourage alterations at the printing stage. Mandatory deposit of copies of any new book in one or more designated

libraries is still a legal requirement in most jurisdictions, although the rationale has changed.

The Tudor kings are credited with the creation of an efficient censorship system in England. Censorship became more stringent under the reigns of Henry VIII (civil and religious censorship after becoming head of the newly-created Church of England) and Elizabeth I (Siebert, 1965).

3.8. THE STATUTE OF QUEEN ANNE

In Medieval times there was no such thing as free enterprise. Access to trade was governed by guilds. To practice a certain craft or profession one had to become an initiate in a guild. The apprentice was put under the pupillage of a master. This lasted many years. Not all apprentices made it to masters. Once accepted, the guild decided where the new member should work, fixed the selling price, established work conditions and imposed the use of collective signs (*merchants' mark*s, antecedent of today's collective marks). Output, price, quality, etc. was determined by the guild, not the market. The city of London's *Livery Companies* are (in name) colourful remnants of those medieval guilds, but today they're subject to competition.

The *Worshipful Company of Stationers and Newspaper Makers* was one of those guilds. It was created by Royal Charter in 1403 C.E. The *Stationer's Company*, for short, governed the trades of book writers, illuminators, bookbinders and booksellers all over England. Later it also included the printers.

Its name comes from the fact that its members were required to establish in one particular place, to become stationary (*stationarius*) not itinerant, a rudimentary form of market segmentation. Most stationers established their working offices in London, near the walls of Saint Paul's Cathedral.

The first printing press arrived in England in 1476. The *Stationer's Company* quickly adopted the new technology and became the only institution authorized to publish printed

texts in England. The ownership of a text was established by recording it at a register kept by the *Stationer's Company*. At that time, ownership not authorship was the criteria for right attribution.

As mentioned supra, Henry VIII tightened censorship control. First, censorship functions were held by the Privy Council. In 1643 the *Licensing Order* delegated censorship faculties to the *Stationer's Company*. This was a sort of convenient marriage; the *Company* reinforced its monopoly on printing all over England and the king got the *Company* to carry out censorship duties on his behalf.

In application of the above-mentioned *Licensing Order* John Milton's *Paradise Lost* was censored, albeit partially. This motivated Milton to write one of the most eloquent pieces against censorship of all times, the *Areopagitica*. In 1663 the *Licensing Order* was superseded by the *Licensing Act*, which reassured the Company's censor faculties.

The *Company* guaranteed that no text against the theological doctrine of the Church of England, or the interests of the English Crown, would be printed in Britain. The *Licensing Act* had a limited duration, but it was in practice renewed every two years, again and again.

Unlicensed presses, those outside the control of the *Stationers' Company*, were forbidden. In case an unlicensed press was found it had to be destroyed. The *Company* enjoyed a total monopoly all over England, only their presses could print.

In the 17th century winds of change began to blow. The English monarchy political power was dwindling. English kings and queens had been weakened by a series of social and political reforms. The *Glorious Revolution* of 1688 and the *Bill of Rights* of 1689 definitely shifted power from king to Parliament, the political bastion of the ascending class, the bourgeoisie.

John Locke was one of the greatest critics of *Stationers' Company* monopoly. He wrote several letters to convince Members of Parliament that the monopoly (and censorship) of *Company* was ruining England. At last, in 1694, the English Parliament decided not to renew the Stationer's Company monopoly established in the *Licensing Act*. The

Stationers' Company days were numbered. The final blow would be the Statute of Queen Anne in 1710. But the *Stationers* would not go down without putting a good and protracted fight.

After the *Stationers'* monopoly was abolished, new printing presses were set up in the provinces and entered in direct competition with the well-established ones of the City of London. New and more books were published and the ban against imported books (also established by Henry VIII) was lifted. The British market for printed books became more competitive.

However, authors still no rights. They have been neglected for centuries. Daniel Defoe suggested the introduction of authorial rights in the *Pyrate Printer*, a work in which he argued that the author should be justly rewarded for his efforts. To the other side of the English Channel, Dennis Diderot was proselytising to convince the French judiciary to protect authors like himself from piracy (Diderot, 1763).

As mentioned supra, the *Stationers' Company* was not planning to lose its monopoly quietly. First it tried to lobby Parliament to regain the lost monopoly. It did not succeed, times were definitely changing. So, the *Company* changed strategy. Then, for the first time in history the *Stationers' Company* teamed-up with the forgotten authors and joined their fight for the recognition of authorial rights.

In April 1710 a new Act of Parliament was passed, known to us as the *Statute of Anne*, after the ruling queen at the time. It was given royal assent on 5 April 1710 and entered into force on 10 April 1710.

The *Statute*, for the first time, to put the right to authorize copying on the head of the author instead of that of the printer (today we would say the publisher) as it had been the practice before.

Section II of the *Statute* states:

"*the author of any book or books already composed, and not printed and published, or that shall hereafter be composed, and his assignee or assigns, shall have the sole liberty of printing and reprinting such book*

and books for the term of fourteen years, to commence from the day of the first publishing the same, and no longer."

Copyright was created by the *Statute of Anne*, which can be truly called the first modern copyright piece of legislation of the world.

"*Not until after the Statute of Anne did the modern idea of copyright as a right of the author develop*" (Patterson, 1968).

Another innovation of the *Statute* was to relate the newly born *copyright* to a public policy, "*the Encouragement of Learning*". The rubric of the *Statute* reads:

"*An Act for the Encouragement of Learning, by vesting the Copies of Printed Books in the Authors or purchasers of such Copies, during the Times therein mentioned*."

Sanctions in case of infringement included seizure and destruction of infringing materials and fines, to be split in two between the author and the government. The *Statute* also established the obligation to register any new book in a registry and to deposit one or more copies in designated public libraries (the rationale of the deposit had shifted, from a way to prove heresy or treason to encouraging education).

A third innovation of the Statute was the establishment of a uniform term of duration, equal for all types of protected works. Duration was going to be one of the most disputed areas of copyright, since its inception until today.

The copyright term of duration for works that that had been created before the *Statute* came into force (i.e. before 10 April 1710) was 21 years; for works created after that date the term of protection was 14 years.

It was only possible to renew copyright for another 14 years for works created after the *Statute*, if and only if the author was still alive and requested so. According to the Statute's literal interpretation, copyright could not be extend further from a potential of 28 years. After copyright protection expired, works entered the public domain (which was coherent with the goal of encouraging learning)

The Statute allowed authors to choose the publisher or printer they preferred. In addition, authors could sell their copyrights (in modern copyright terminology, assignment of economic rights) to another person in exchange of consideration.

Originally, the Statute granted copyright only to texts and not to images. The *Engraving Copyright Act* of 1734 extended copyright protection to original designs. Copyright protection of musical works will arrive much later.

Putting copyright on the head of authors changed the rules of the game. Legal reform affect the existing incentive scheme, as a consequence player's behaviour change which leads to social and market alterations.

William Shakespeare (1564-1616 C.E.) wrote mostly plays probably because they were difficult to copy (a copycat would have to take notes while the work was being performed on stage). Would *The Bard* have written novels had he was born after 1710?

3.9. MUSICAL WORKS

As mentioned supra, the *Statute* did not protect musical works. Why composers and musicians did not run to lobby Members of Parliament to resolve this omission? Well, one hypothesis is because they probably did not want it. Unlike what happened with the press in relation to texts and images there was no technology able to record and play music without musicians.

Musicians changed their opinion, however, when technologies for the recording and mechanical reproduction of recorded music appeared (Carroll, 2005).

The economic compensation of musicians was different too. Musicians were paid to play per session. Composers were usually under the tutelage of a rich a patron or received a lump sum for the composition of a specific piece, proportional to their musical quality and reputation.

The great symphonies of Mozart, Beethoven, Brahms, Tchaikovsky and many others were completed under patronage or subsidisation. Performing musicians were remunerated per performance, either by an impresario or by the public, after admission tickets became a popular way to attract a bourgeois audience. Before (palace) chamber music was a pastime reserved for the royalty and was not based in the payment of any entrance fees (it was subsidised by the king).

During the time of Queen Anne music could only be enjoyed live. Musicians and later also a conductor had to be present, there was no other way to play music. The only thinkable substitute was imperfect, the training birds to repeat melodies.

Disruption arrived in late 19th century. The phonograph (invented by Thomas Alva Edison in 1878), the gramophone (invented by Emile Berliner in 1888) and the radio (invented by Guglielmo Marconi in 1896) were game changers.

Returning to *Statute* of 1710, did it also protect music sheets (music score)? This was a debated topic at the time, as the *Statute* did not specify what types of texts were copyrightable. Case law decided the issue in favour of composers. In 1777, in re *Bach v. Longman*, an English magistrate stated that written musical compositions were also protected by the *Statute*.

Finally, Musical works were explicitly included in statutory law by the *Copyright Amendment Act* of 1842. A bit earlier the *Dramatic Copyright Act* of 1833 extended copyright to the performance of dramatic works.

It is interesting to note at this point that the first edition of the Berne Convention (1886) did not refer to the mechanical reproduction of copyrighted musical works (at the time possible using *music boxes*) as a case of copyright infringement. Even if makers of music boxes did not pay any royalties for the tunes their boxes played.

A *music box exception* was explicitly included in Section 3 of the Protocol of the 1886 edition of the Berne Convention. It was only after the revision of Berlin in 1908 that Section 3 of the Protocol was abrogated (vid. Art 13.1 of Berne) and since then the

unauthorised reproduction of musical works, including musical boxes, became a case of copyright infringement.

3.10. EARLY GERMANY, POETS, THINKERS AND NO COPYRIGHT?

Eckard Höffner advanced an interesting thesis in his work (Höffner, 2010). He compared the copyright laws of England and Germany during the 1710-1837 period, what becomes a natural experiment of comparing strong and weak copyright enforcement and knowledge spillover effects in society.

Höffner, like law-and-economic scholars, is interested in determining the effects of regulation in society. In that regard he made a strong statement, I absolutely share,

"A theory which is not at least to some extent reflected in reality is worthless how evident the theory may appear" (Höffner, 2009).

IN 1710 England was already a pacified and unified nation-state (Wales had been incorporated in the 16th century and Scotland in 1707, by the *Act of Union*). In contrast, at the time Germany was not Germany but a collection of independent kingdoms, baronies and free-cities (*Hansestädte,* like Hamburg) speaking a similar language and sharing a Germanic cultural heritage.

Germany did not become a state until 1871. During the period *sub studio* Prussia became the most powerful German-speaking state and eventually it led the struggle for German unification. Prussia became the first German state to pass a copyright law in 1837, i.e. 127 years after England had passed the Statute of Queen Anne.

According to historical sources cited by Höffner, in spite of the Prussian copyright its enforcement was lax because in practice, because to enforce the law it was usually required to get the collaboration of judges and police forces from other German states, not always inclined to comply with the request of a "foreign" rival .

Höffner thesis is bold and somewhat counterintuitive. He suggests that during the period in which copyright law was loosely enforced in Germany, i.e. 1710-1837, the nation become more educated.

He claims the abundance of cheap and diverse books in German (consequence of no or lax copyright enforcement) was the cause of a positive spillover, the diffusion of knowledge, which in the long run will become a coadjutant factor of German industrialization.

Höffner also says that because of the absence of effective copyright enforcement, German publishers had to compete, by selling cheaper books and extending the diversity of titles and topics.

Either because of absence of a generalised (federal, in today's terms) copyright law or lax enforcement, book prices in Germany during above-mentioned period were lower than in Britain. Then, the author asks himself, what were the incentives to write new books?

According to historical records, Höffner found that between 1770 and 1790 German writers earned more money than their British counterparts. At the time the preferred payment mechanism for authors was a lump sum in advance. The average lump sum payment per written book in Britain was roughly equivalent to 10% of an academic salary while in Germany it was equivalent to 25-50% of an academic salary.

Thus, German authors were better paid than English ones, and this somehow explains German authors wrote more books. In addition, in absolute terms, there were more authors in Germany than in England. German publishers, in the absence of effective copyright enforcement, had to compete in price and quality dimensions, contributing to the dissemination of knowledge in the German states, according to Höffner.

Contrary to a famous dictum (*de gust bus non disputandum est*) Höffner suggests difference in reading tastes between Germans and Britons had an impact on development. According to the historical data the author provides, while Britons preferred classics, fiction, philosophy and theology books, Germans favoured texts about chemistry,

mechanics, engineering, agriculture and applied science in general. Höffner explain the difference in literary tastes by the social extraction of readers in both countries.

In England, books were expensive so only wealthy citizens could afford them. To the English working class books were a sumptuary good. Whereas books were cheaper In Germany, so the working class could afford to buy them. While privileged classes saw literature as a leisure activity, the working classes saw it as a way to climb the social ladder. Wolfgang Menzel said Germans during those times were "*a people of poets and thinkers*" (Thadeusz, 2010).

To sum up, Höffner controversial thesis suggests that the absence of a generally-applicable copyright law during Germany's *Gründerzeit* (foundational period) favoured education and knowledge spillover in the German states. Thus, Germany became a *Land der Dichter und Denker* (a country of poets and thinkers) and an industrialised economy.

3.11. THE CENTURY-LONG US POLICY OF DENYING COPYRIGHT TO FOREIGN AUTHORS

The US is perceived today as a paladin of international IPR enforcement. The *Special 301 Report* published annually by the United States Trade Representative reviews the global state of IPR protection and enforcement and urges US trading partners to redress any issues, with a focus on the countries included on the Watch List and Priority Watch List.

At the moment, the US economy has a lot to gain from higher levels of IPR protection and enforcement worldwide, as a net exporter of patented inventions and copyrighted works.

However, US foreign IP policy has not always been consistent to its current policy. As said supra (Harris, 2003), to fully grasp the dynamics of IPR regulation over time it is important to read history.

The first US copyright law, the *Copyright Act* of 1790, was inspire in the famous British Statue of 1710. This similarity transpires even the subtitle of the Act,

"*an Act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned*."

However, it is important to say that those rights were reserved to US (citizens or residents) "*authors and proprietors"* and not to foreigners. The US Copyright Act of 1790 legally sanctioned foreign copyright piracy (unauthorised copying and reproducing of foreign works) (Z. Khan, 2004b).

The US Copyright Act of 1790 implicitly denied copyright protection to foreign authors. Sec. 5 reads,

"[Omissis] That nothing in this act shall be construed to extend to prohibit the importation or vending, reprinting or publishing within the United States, of any map, chart, book or books, written, printed, or published by any person not a citizen of the United States, in foreign parts or places without the jurisdiction of the United States."

The previous paragraph implies that works by foreign authors could be freely copied and distributed within the US, without requesting any license or paying any royalty to the foreign author or right holder. Charles Dickens toured the US in 1842 to try to convince US authorities to recognise international copyright, to no avail. The discrimination against foreign authors ended in 1891.

De facto, the US became a "pirate nation", according to Lawrence Lessig,

> *"Between 1790 and 1799, 13,000 titles were published in America, but only 556 copyright registrations were filed. More than 95% of published work therefore fell immediately into the public domain—including, of course, 100% of foreign work. Our outrage at Chinese piracy notwithstanding, we should not forget that until 1891, foreign copyrights were not protected in America. We were born, in other words, a pirate nation"* (Lessig, 2002b).

Ochoa adds,

"the principal effect of this restriction was that books by British authors could be freely copied and disseminated in the U.S., which provided U.S. citizens and residents with a large quantity of reading material at cheap prices" (Ochoa, 2008).

The US 1790-1891 period is a perfect natural experiment. Zorina Khan decided to assess the effects of this chauvinistic and its impact on domestic welfare during that period with the aid of historical datasets and regression analysis (Z. Khan, 2004a, 2008).

The US Copyright Office stated in its webpage that the denial of copyright to foreigners in the US during the 1790-1891 period was detrimental to the US economy. Khan's conclusions go in the opposite direction.

Khan concludes that the choice of a copyright policy is endogenous to the level of economic development; a finding that seems to contradict the actual one-size-fits-all international IP standards.

According to Khan the decision to deny copyright to foreigners in the US during the 1790-1891 period was beneficial to the US, since US readers could acquire copies of British books (perfect substitutes to the original) at a cheaper price than in England.

Khan's study found no evidence that American writers did suffer from the competition with cheaper foreign (British) works. During the 1790-1891 period US authors specialised in nonfiction works, while most of the foreign works were of the fictional genre.

Khan suggests additional explanations, (a) US readers preferred to evade from their local reality reading foreign works (such as Charles Dicken's The Pickwick Papers and *Oliver Twist*); (b) US authors were stylistically not prepared to write quality fictional works.

Khan found no evidence to support the claim that the availability of cheap foreign fictional works was responsible for the absence of American novels in the 17th and 18th centuries. Famous US authors wrote fiction during that period, Washington Irving (*Rip van Winkle*, 1819), James Fennimore Cooper (*Last of the Mohicans*, 1826) and Edgar Allan Poe (*The Raven*, 1845), inter al.

Khan found no evidence either that US publishers suffered lower profits. US publishers protected their interests by entering into private arrangement to limit competition. US

publishers created de facto cartels, trade customs and *synthetic copyrights*, i.e. a contractual copyright that was sometimes enforced by Courts and always respected by the market (social norms). Khan suggests these contractual solutions were successful as publishers had all at state to find a suitable and cost-effective solution.

The downside of the denial of copyright to foreign authors during the 1790-1891 period was an increase in rent seeking activities (socially, wasteful). During this period US book publishers, printing companies and even the Democratic Party constantly lobbied Congress to keep foreign works outside the scope copyright protection.

It is interesting to compare the US copyright policy with the US patent policy during the same period. The US Patent Act of 1790 allowed foreign inventors to obtain patents in the US, while the Copyright Act did no. How to explain this discrepancy? Well, both policies were convenient to the US. No foreign copyright meant cheaper copies of foreign books in the internal market. Granting patents to foreigners implied they would invest in the US economy.

In another book Khan suggests the (early) US patent system was a key factor of the US' economic success (B. Z. Khan, 2005). While in 19th century Europe patenting was expensive and complicated; to get a patent in the US was cheap and simple. Khan says US law *democratised* patents. Historical data seems to corroborate that during that period most US patents were filed by individual inventors. At the same time, US diplomacy was securing foreign markets for American patented products.

The US strategic attitude towards IPR was imitated by other new nations. One way to do so was by copying the US constitution, like most Latin American countries did. For instance, Article 17 of the Argentinian Constitution of 1853 is almost a literal copy, in Spanish, of the so-called US *Progress Clause*.

According to the correspondence of two founding fathers of the Argentine Republic, Juan Bautista Alberdi (whose work inspired the Constitution) and Domingo Faustino Sarmiento (president from 1868 to 1874), the copy was deliberate.

Commercial privileges and patents of invention were granted to foreigners not with the intention to disclose new technical information (that no local would be able to develop) but to attract foreign investment and human capital (Vidaurreta, 2007).

So, taken together, the "patents to foreigners yes, copyright to foreigners not" policy was a coherent strategy for a young US. The US publishing industry free rode British authors for more than a century. What somehow unites the US pirate past with its new role today as the global IP policeman is its pragmatism.

In 1891 the US Congress passed the *International Copyright Act* that gave limited copyright protection to foreign authors. In practice the *International Copyright Act* had limited effects given the existence of *manufacturing clauses* in favour of local printers.

These *clauses* stated that to protect a foreign work it should be published in the US before or concomitantly with the publication in the country of origin, and had to be printed in the US, using US typesets or US plates.

Because the *US Copyright Act* of 1790 was still in force in 1883, when the Berne Convention was approved, the US did not sign it (it was a breach of one of Berne's pillars, the *national treatment clause*, enshrined in Articles 5(1) and 5(2)).

At last, the US joined Berne in 1988. The *Berne Convention Implementation Act* was passed in 1989.

3.12. THE BRITISH FOREING REPRINTS ACT AND THE COLONIES

The British Empire, at the peak of its power, extended over almost one quarter of the earth's territory (aptly called "the empire on which the sun never sets"). Copyright law had been created in the metropolis, however its enforcement in overseas dominions was subject to a specific policy.

Under the *Foreign Reprints Act* of 1847 British colonial territories were allowed to import unauthorized foreign reprints subject to the payment of an import duty, that was meant to compensate British publishers.

The effect of the *Foreign Reprints Act* was to make books overseas cheaper than in England (Z. Khan, 2002). This exception to copyright enforcement was inspired in principles of "*responsible government*", the taking into account the different GDP per capita and purchasing power in the colonies vis-à-vis in Great Britain and the fact that access to texts was considered a necessary "*blessing*" for the intellectual development of her Majesty's subjects abroad (Deazley, 2008).

3.13. CHAPTER'S SUMMARY

In this chapter I have tried to show that law is contingent, dependent on (random) social, economic and technological change. For centuries technological barriers were sufficient to deter copycats. Without Gutenberg's press there would be no need for copyright law.

Without a proper understanding of the historical process it is not possible to understand why legal systems are the way they are.

Countries have used IPR strategically, when they could do it (like US copyright during the 1790-1891 period). This is no longer possible or has become too costly in a world with multilateral obligations setting minimum standards of protection.

Historical analysis, however, display some recurrent patterns, such as resistance to change (to disruptive technologies affecting the status quo) and interest group activity, for and against a new technology.

Regulation is the outcome of complex forces. It is shaped by vested interests, efficiency concerns and aspirations of fairness.

Moreover, copyright law is not written on stone. New technologies, social and economic changes may force the current system to evolve or to be replaced.

4. THE POLITICAL ECONOMY OF COPYRIGHT LAW

4.1. LAW, ECONOMICS AND POLITICS

Laws are created by humans, not gods. Human behaviour is, most of the time, self-interested (a consequence of being a rational being with pre-coded instincts, like that of survival). Self-interested behaviour is not the only behaviour displayed by humans, or there would never have been martyrs and patriots, however is the most prevalent. Then, an individual that is naturally self-interested does not become ipso facto altruistic because, let us say, she or he is elected president, member of parliament or judge.

Public Choice Theory is a subfield of economic science that applies analytical tools to issues traditionally discussed in political science. Public Choice Theory, as a distinct school of economic thought, is said to have begun with a seminal work of James Buchanan, Gordon Tullock, et al., *The Calculus of Consent* (Buchanan, Tullock, & Rowley, 1962).

Public Choice scholars rejects romantic visions of politics and politicians. The *homo politicus* is as self-interested as the *homo oeconomicus*. From these lenses, the politician will behave as rationally as the businessman. In addition, these *disenchanted* view of politics (Zaremberg, 2008) captures a variable rarely taken into consideration in more traditional economic discourse, power, which, as Foucault had stated, "is everywhere" (Foucault, 1991).

A particular interesting subfield of Public Choice Theory scholarship, particularly useful to the topic of this dissertation, is *Interest Group Theory*, which studies the functioning of *interest groups*, more prosaically known as lobbies (Olson, 1965).

From a public choice perspective, politics functions like an implicit market (like law, from the law-and-economics viewpoint). *Interest groups* are active in many political markets, for instance the market for legislation (at Congress) or for legal decisions (at the Judiciary).

Interest Group Theory posits that the preferences of the majority of citizens, as expressed through the voting mechanism in democratic societies, is not the true driver of public policy. *Interest groups* are more effective to influence the political agenda of policymakers than the disaggregated mass of citizens. The Rousseanian *volonté générale* then becomes a romantic delusion.

The majority of citizens are clueless about the power dynamics that occur in the *lobbies* (hence the name) of congresses, parliaments and even courthouses. The determination of cohesive well-coordinate interest groups trump the general will of the uncoordinated majority of citizens.

Law, ontologically, is also information and as such shares all the characteristics of a public good. The state is the supplier and the citizens consumers. The market for laws is a monopolistic one by constitutional design. Only the state, whether national, provincial or municipal, can supply laws.

A law is applicable *erga omnes*, i.e. to all citizens, whether they want it or not; whereas contracts are voluntary legal relations (*Rechtsakt* according to the German doctrine) but they only have *inter partes* effect.

New laws or legal reforms changes the rules of the game (the incentive scheme) and the status quo of social actors. Think for example of the potential socio-economic effects of a reform that shortens or extends the term of *usucapio* (adverse possession). Legislative change can *ipso iure* create new winners and losers.

Therefore, finding a way to influence the lawmaker to pass legislation in one's favour becomes a very profitable endeavour. All socio-economic actors, moral and natural persons alike, can be said to compete for favourable legislation, however some persons are more effective than others.

A naive view suggest that legislators will pass new legislation or reform existing laws to cater for the preferences of the majority of the population. *Interest Group Theory* suggests otherwise, lobbies are more efficient at influencing the legislator because their interests

are concentrated, they can raise sufficient resources and eventually discipline their uncooperative members (Azfar, 2001).

Interest groups privatise the benefits and collectivise the costs of their actions. The direct costs of lobbying (e.g. paying professional lobbyists, campaign contributions, donations, lunches, dinners, gifts or outright bribery) are contributed by group members and, all in all, they seem tiny in comparison to the expected benefits.

The indirect costs of interest group activity (e.g. favourable legislation such as subsidies, monopoly rights, legal barriers of entry, etc.) are borne by the bulk of society. Stigler suggests that firms invest in rent-seeking activities that either result in subsidies or protectionism. If able to choose, companies would prefer any form of protectionism (subsidies attract new entrants while legal barriers deters them) (Stigler, 1971).

Individual citizens, with some exceptions (such as activism in sensitive areas) are rationally apathetic and rarely campaign in favour or against legal reform. For the individual citizen the expected benefits are low and the costs high. In addition, free-riding acts as an additional disincentive, i.e. in case of success other individuals of the same category of would benefit without having contributed.

Interest groups are involved in rent-seeking activities. Rent-seeking is a term whose creation is attributed to Gordon Tullock and Annette Krueger (Krueger, 1974; G. Tullock, 2008; G. C. Tullock, 1993; Gordon Tullock, 1967).

Rent seeking basically implies the use of resources to obtain benefits from government activity, without a positive impact on social welfare. From a macro level is socially undesirable because it dissipates scarce resources. Most of the times rent-seeking is redistributive, it transfers wealth from one sector to another without creating new increasing the size of the pie. Rent-seeking activities translate into political support for incumbent government officials and bureaucrats, who will tend to favour and incentivise them (Peltzman, 1976).

From a micro level, to the rent-seeker, it is rational behaviour as the return from rent-seeking activities (if successful) greatly exceeds any other alternative use. Ideally, scarce resources should be allocated to socially productive activities.

Rent-seeking, if widespread, can become an obstacle to innovation and creativity as firms find it more profitable to invest in lobbying that in research and development (Boldrin & Levine, 2004).

Interest group activity and rent seeking may lead a country to stagnation, stagflation and overall economic decline (Olson, 2008).

4.2. INTEREST GROUP ACTIVITY

IP law seems an attractive target for rent-seeking activities. After all, it is about obtaining a legal monopoly from the state. The economist Arnold Plant clearly stated that patents and copyrights may incentivize the allocation of resources to rent-seeking activities(Plant, 1934b, 1934a). Scotchmer suggest rent-seeking activities at the multilateral level (Scotchmer, 2004) and Aretz in copyright lawmaking, in particular (Lev Aretz, 2012).

Rent-seeking is not only the goal of interest groups lobbying at the legislative branch. Landes and Posner suggest it is also common in the judiciary, as the passing of a judgment may be as important as the enactment of a new law, especially if the judgement is rendered by a high court and it leads to the creation or reaffirmation of a precedent. Documents submitted by interest groups as *amici curia* are a tool that can be exploited with rent-seeking potential, low cost and high expected benefit, according to the authors,

"*amicus curiae briefs provide a rough clue to interest-group activity*" (Landes & Posner, 2004).

Even if in theory anyone individual with a legitimate interest in the outcome of a case may submit an amicus curia brief, the activity is costly. In practice, mostly big companies or an association representing them pay lawyers to write amicus curiae briefs, rarely NGO and never individual citizens.

The expected benefits derived from a favourable high court decision that becomes a precedent for lower courts can be enormous, whether under the binding common rule of *stare decisis* (case law as formal source of law) or the civil law doctrine of *jurisprudence constante* (case law as material source of law).

It seems evident that cultural or creative industries (e.g. films studios, recording companies and publishing houses, etc.) may benefit from rent-seeking activities to influence the development of copyright law and related rights. Successful interest groups, according to Olson (op. cit.), are composed of a small number of members and share identical interests. Moreover, the market structure of the cultural industries may favour lobbying efforts.

At first sight two of the most important sectors in the cultural or content industry, film and phonographic producers, appear to be oligopolistic markets. The main actors in these industries have coalesced in trade associations representing their interests in the US and abroad.

Since the incipit of economic science trade associations were seen with distrust by classical economists. Adam Smith in a famous passage found in Chapter X, Part II of the *Wealth of Nations* warns,

"People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices. It is impossible indeed to prevent such meetings, by any law which either could be executed, or would be consistent with liberty or justice. But though the law cannot hinder people of the same trade from sometimes assembling together, it ought to do nothing to facilitate such assemblies; much less to render them necessary" (Adam Smith, 1776).

The *Motion Picture Association of America*, founded in 1922, promotes the interests of US film studios, the so-called big six, Sony, Times-Warner, The Walt Disney Co., Comcast-General Electric, Viacom and News Corporation. The *Recording Industry Association of America*, founded in 1952, promotes the interests of US recording companies.

The global publishing market is also dominated by another big six players, *Simon and Schuste*r, *Harper-Collins*, *Random House*, *Macmillan*, *The Penguin Group*, and *Hachette*. Recently these publishing houses have acquired small competitors in different countries, increasing market concentration.

Unlike the film industry, which is dominated by Hollywood, the global publishing market is shared between two US and four European firms. The *Association of American Publishers* and the *Author's Guild* promote the interests of US publishers at home. To protect the economic interests of their represented, these two trade associations sued the *Google Book Project*, what can be seen as a strategy of rent-seeking aimed at the judiciary.

All in all, the oligopolistic structure of cultural industries (films, phonograms and books) and the strong participation of trade industries such as MPAA, RIAA, the *Association of American Publishers* and the *Author's Guild,* to name a few, seem coherent with the above-mentioned framework of interest group activity as described by Olson and others.

In 2002 Google began digitizing books. In 2004 it launched *Google Search*, a service that allowed web searchers to view snippets of copyrighted works and granted full access to publications in the public domain. In 2005 the *Author's Guilds* initiated a class action against Google (*The Authors Guild, Inc. v. Google, Inc*.). Later that year it was joined by the *Association of American Publishers* (*The Authors Guild Inc., et al. v. Google, Inc*.). Both interest groups accused Google of "*massive copyright infringement"*.

Google defended itself claiming that the snippets showed in Google Search were covered by US fair use. In 2008 a *First Settlement Agreement* was reached, in it Google agreed to pay US$125 million in damages. This settlement was later dismissed because the Federal Trade Commission considered it against US antitrust law.

In 2009 an *Amended Settlement Agreement* was proposed but the Court also rejected it in 2010. In 2013 the United States District Court for the Southern District of New York, dismissed the case. It was the first of a series of victories for Google.

The District Court accepted the argument that the snippets were covered by fair use. The *Author's Guild* and the *Association of American Publishers* appealed. In 2015 the United States Court of Appeals for the Second Circuit denied the appeal. The *Author's Guild* and the *Association of American Publishers* petitioned the Supreme Court to review the case. In April 2016 the Supreme Courte rejected the petition. Google had won.

Here it would like to make a side note regarding the open-ended construction of US fair use. Unlike the system of exceptions and limitations prevalent in civil law countries, US-style fair use is more flexible, easily adaptable to new technologies and social mores. I conjecture that one, of many, reasons why the US is more innovative than Europe is because of this generous interpretation of its fair use clause, lacking in continental Europe.

US fair use not only balances the interests of producers and consumers of creative works, but also encourage entrepreneurs to bring to the market new products and services in new formats and business models.

The *Google Book* case is one example. How much value does *Google Book* create for individuals looking for bibliographic references? It surely creates profits for Google in the form of paid advertising allow. Probably it also increases the profits of publishing houses, as the individual interested in a particular book found through *Google Book* may be inclined to buy it (digitalisation of the book is limited to, usually, 20% of its contents). A priori, the welfare gains from *Google Book* seem to be enormous and they will not be possible without a generous clause, and supporting judicial doctrine, like Us-style fair use.

Interest groups and rent seeking in the area of copyright law are an old phenomenon (as it is the economic logic behind this game, that has not changed that much through time). Already a few years after the *Statute of Anne* had been passed we can spot some early attempts of rent seeking.

In 1731 C.E. protection for works created before the entry into force of the *Statute* lapsed (these works were protected for a 21-year term). English publishers, the former members of the *Stationers Company*, went to Court and claimed that although the *Statute* copyright

term has lapsed, the *common law copyright* did not, as it was -they argued- perpetual. *Common law copyright* was understood as a kind of natural right.

So early in the 18th century the English book publishers argued the coexistence of two distinct copyright systems: statutory copyright, limited in time to 21 or a maximum of 28 years; and common law copyright, that was perpetual.

The lawsuits brought about for and against common law copyright are known to legal historiography as the *Battle of the Booksellers*. In the decision *Donaldson v. Becket* (Eng. Rep. 837, 1774) the House of Lords put a definitive end to the *Battle*, stating there was no such thing as a perpetual *common law copyright*.

This decision also meant a triumph for the utilitarian rationale of copyright law. After *Donaldson v. Becket* natural rights claims to copyright were unheard of in British Courts.

But booksellers did not give in, they changed their strategy. The prolonged saga of copyright term extension had begun.
In 1837 Thomas N. Talfourd introduced a bill to extend statutory copyright duration. His first attempt was unsuccessful. Then, in 1841 he submitted another bill. Talfourd's second bill became the *Copyright Amendment Act* of 1842. This Act changed the way copyright term was computed.

The finite term of the 1710 Statute was replaced, for the first time in history, by a mixed system. Since 1842 copyright duration will be the result of a variable term (*remaining* life of the author) plus a finite number of years after the demise of the author (the so-called *post mortem auctoris* part).

The *Copyright Amendment Act* of 1842 set the term according to the (remaining) life of the author plus seven years *post mortem auctoris*. However, the overall copyright duration could be no than 42 years (i.e. the Act established a minimum *floor*). For posthumously published works, the copyright term was 42 years.

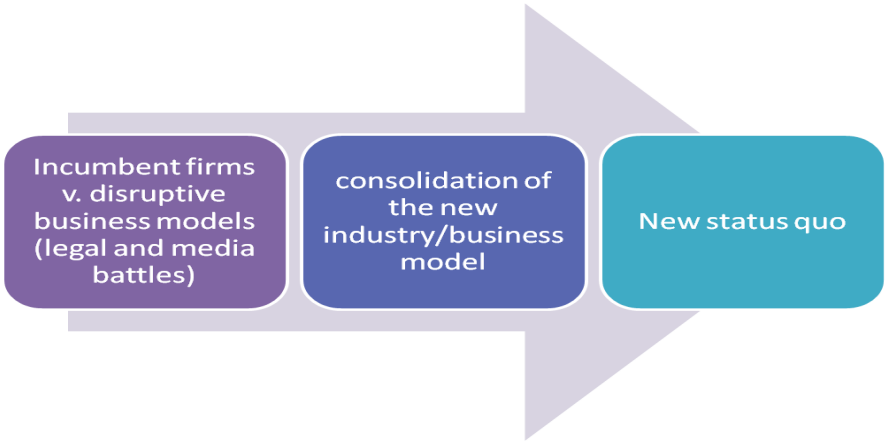
At this point is opportune to remember the memorable words uttered by one of Belford's most fervent opponents, Thomas Babington Macaulay. His speech delivered in the House

of Commons on the 5th of February 1841 against Talfourd's second bill will prove insufficient to dissuade his peers from passing the1842 Act. However, his words reflect an impeccable underlying economic logic and are as current today as they were then,

> "*Copyright is monopoly, and produces all the effects which the general voice of mankind attributes to monopoly [Omissis] It is good that authors should be remunerated; and the least exceptionable way of remunerating them is by a monopoly. Yet monopoly is an evil. For the sake of the good we must submit to the evil; but the evil ought not to last a day longer than is necessary for the purpose of securing the good*" (Macaulay, 1932).

Rent-seeking behaviour, which is perfectly rational from the perspective of copyright holders, provides a feasible explanation for the continual and periodical extension of the copyright term. As seen supra, it is impossible to justify copyright term extension on efficiency grounds.

Another indirect way to point at the probable causator or originator of policies that tend to extend copyright and related rights is to ask, *who benefits?* This is a very old heuristics. Cicero in *Pro Roscio Amerino* suggested that, in the absence of better evidence, the culprit of a crime may be whom she/he benefits most from it (Cicero, 80BC) (in Latin, *cui bono?* or *cui prodest?*). *Mutatis mutandis*, we can ask the same question. Who benefits from t copyright term extension? Direct beneficiaries are copyright holder and their intermediaries, such as collecting societies.



Graph No. 4: Incumbent and disruptive business model dynamics.

4.3. THE SAGA OF COPYRIGHT EXTENSION

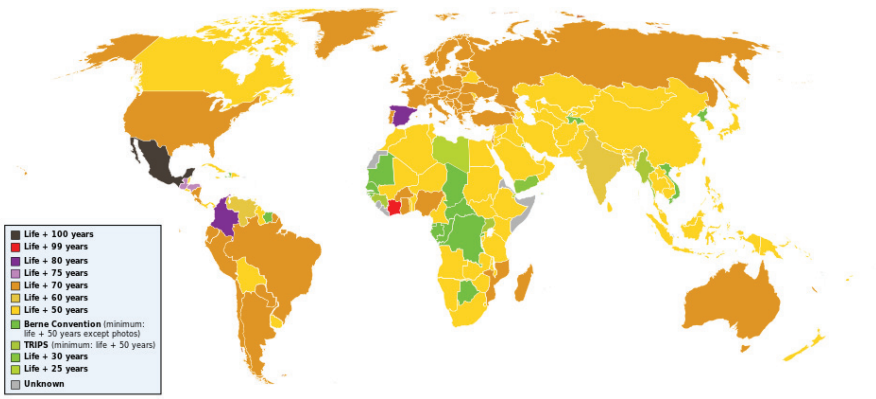
As seen, the Statute of Queen Anne of 1710 established two different copyright terms; one of 21 years for works published before the Statute came and another of 14 years for works created after the Statute came into force. The first term could not be extended. The second yes, once, for another period of 14, in case the author was still alive and requested so.

Today, more than two centuries after the birthday of the Statue, the most popular copyright term worldwide is life of the author plus 70 years *post mortem auctoris*. Some countries have gone even further, for instance Colombia provides a copyright term of life of the author plus 80 years *post mortem auctoris* and Mexico a copyright term of life of the author plus 100 years *post mortem auctoris* (the longest copyright term to date).

Current advances in medicine and healthcare contribute to extend copyright duration, as human life tends to be extended as well.

It is interesting to highlight that "life of the author plus 70 years *post mortem auctoris*" is a standard that goes beyond the minimum protection required by the Berne Convention and the TRIPS Agreement (a so-called *TRIPS plus* standard).

The TRIPS Agreement, by incorporating of Sections 1 to 21 of the Berne Convention, requires all WTO member countries to establish a minimum copyright term equal to life of the author plus 50 years post mortem auctoris (Art. 12 of the TRIPS Agreement). The TRIPS agreement does not establish a ceiling, countries are free to raise the minimum standards, and so most of them did. But why?



Graph no. 5: Comparison of copyright terms in different jurisdictions.

Original image by Balfour Smith at Duke University. Vectorised by Badseed using BlankMap-World6 as a basemap. CC BY 3.0, [https://commons.wikimedia.org/w/index.php?curid=20388347].

One common argument to justify copyright term extension are longer life expectancy rates. This argument seems to me unconvincing. Let us go back to the times of the Statute. In 18th century England the average life expectancy of a male citizen was 40 years and copyright protection lasted 14 years, with a potential one-time extension of another equal term (Lambert, 2015).

Today the average Briton can expect to live 79 years and the copyright term in force in the UK is life of the author plus 70 years *post mortem auctoris*. While life expectancy in the UK doubled in the last three hundred years, the term of copyright protection at least tripled (calculating 30 years of "life" after the work has been crated, i.e. 100 years in total). This calculation is arbitrary, but plausible.

Now let us turn our attention to the *post mortem auctoris* part of the copyright term. Why was it incorporated to the calculus of copyright duration to begin with? There is no such thing in any other IPR (patents, trademarks and designs, for instance, have fixed terms independent of the life of the inventor, owner or designer).

A *post mortem auctoris* copyright term has any incentive effect has on a living author? Probably not or not much. It is said the *post mortem* part should be long enough to financially support two generations of the author. Why two future generations of an author should be able to enjoy royalties from a work they did not contribute to create? It is unclear why, to say the least.

Moreover, the *post mortem auctoris* copyright term can become an anti-incentive for the successors of successful authors. For them it is easier to fall in complacency and cash a check for the works of a parent or grandparent than to create original works of arts themselves, like the character played by Hugh Grant in the film *About A Boy* (2002) illustrates. This is somewhat puzzling and contradicts the traditional rationale of copyright as an incentive mechanism (to the author only, not to her future generations?).

Then, the most plausible rationale for the addition of the *post mortem auctoris* part of the copyright term as well as the recent extensions of such term may have to do with other reasons. These reasons can be found understanding the political economy of copyright law and rent-seeking activities and asking the old but still relevant question, *cui bono?*

4.4. THE QUEST FOR THE HOLY GRAIL: HOW LONG SHOULD COPYRIGHT LAST?

The (law and) economic approach to IPR in general and copyright law in particular is concerned with finding a balance between static (incentives) and dynamic (access) efficiency in the provision of information goods.

The recent legislative trend (e.g. worldwide copyright term extension) seem to go against economic insights. Many law-and-economic scholars have suggested that the current copyright term of protection has gone beyond an optimal threshold and suggest its

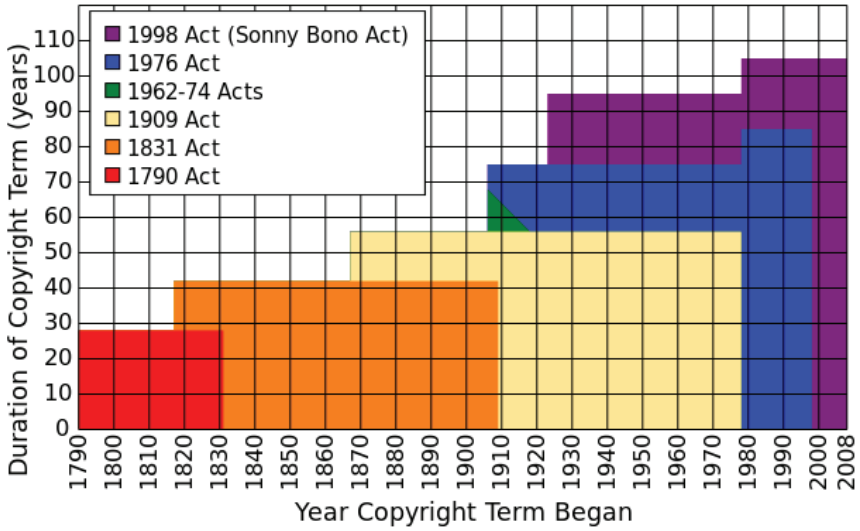
reduction (Elkin-Koren & Salzberger, 2012; Landes & Posner, 1989; Mackaay, 2011, 2015; Posner, 2005).

Some economics-minded author have even suggested alternatives de lege ferenda to improve the overall efficiency of the copyright-public domain system, such as Landes and Posner's *infinitely renewable copyright* (Landes & Posner, 2002).

Pollock, an economist, devised a formal model that suggests, with an interval of confidence of 99%, that copyright duration should not exceed a total duration of 15 years for the purpose of providing incentives to authors (Rufus Pollock, 2009) Landes and Posner also agree on a similar term of 15 years or less (Posner & Landes, 2003).

Let us now see the dynamics and interests that affect copyright law in a concrete case. The *Copyright Term Extension Act* (CTEA) was passed in the US in 1998, it is also known as the Sonny-Bono Act after their proponents.

The CTEA extended copyright duration from "life of the author plus 50 years *post mortem auctoris*" to "life of the author plus 70 years *post mortem auctoris*". In addition, the CTEA also extended copyrights retroactively, i.e. works that had passed into the public domain became copyrighted again by a pass of the legislator's magic wand.



Graph no. 6: Copyright term extension in the US.

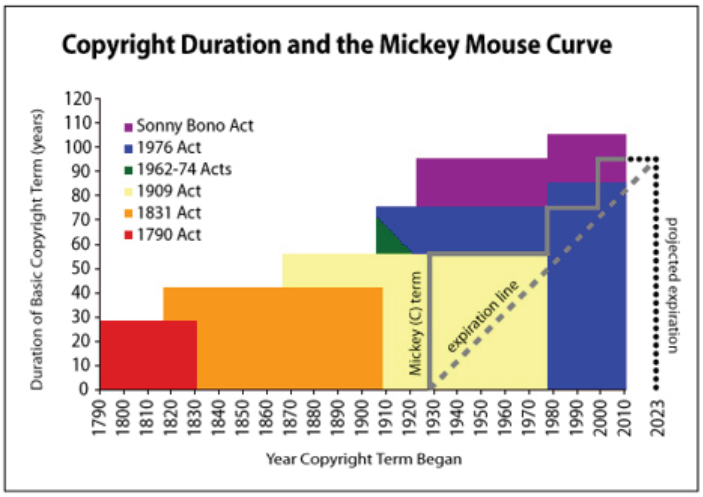
Original image: Tom Bell. - Image: © Term by Tom Bell.gif, CC BY-SA 3.0, [https://commons.wikimedia.org/w/index.php?curid=26316308]. Vectorization: Clorox (diskussion).

Critics to the CTEA hinted at the interesting coincidence that it was passed just in time to avoid the earliest Mickey Mouse character from falling into the public domain. This character was *Steamboat Willie*, created in 1928 was subject to a 55-year corporate copyright term. Without the CTEA *Steamboat Willie* should have fallen into the public domain in 2003.

For this reason, detractors of the CTEA dubbed it the *Mickey Mouse Protection Act*. Ironically, *Steamboat Willie* was a cartoon parody of a real-life character, *Steamboat Bill Jr.* played by Buster Keaton in a homonymous mute film of 1928. *Steamboat Willie* was born thanks to fair use (a legal exception) of a copyrighted character.

The *Mickey Mouse Curve*, depicted below, displays the interesting coincidence mentioned supra. In it one can see that every time *Steamboat Willie* was about to fall into the public domain a legal reform extended the term of copyright protection and kept *Willie*

copyrighted. Suspicious minds see behind these extensions the visible hand of Walt Disney Company (T. Bell, 2009; Masnick, 2009; Schlackman, 2014).



Graph no 7: Copyright term and the Mickey Mouse curve.

Source: Tom Bell (T. Bell, 2009).

Mr. Eldred decided to challenge the constitutionality of the CTEA and went to Court. Mr. Eldred ran a website that published contents in the public domain. He claimed the CTEA affected his legitimate interests, as he had to withdraw and refrain from publishing works that had lawfully fallen into the public domain according to the 1976 Copyright Act but became copyrighted again after the passing of the CTEA (under the 1976 Act copyright term in the US was life of the author plus 50 years *post mortem auctoris*).

Mr. Eldred argued the CTEA was unconstitutional because successive copyright extensions amounted in practice to a perpetual copyright, in violation of the US Constitution's *Progress Clause* (which clearly states that Congress can grant copyright for *limited times*).

Publishers public domain works sided with Eldred, as also did some legal and economic scholars. Lawrence Lessig became Mr. Eldred's first legal counsel. To the other side of

the ring there were heavyweights, John Ashcroft, US Attorney General, the MPAA, RIIA, ASCAP, Disney Corporation, and other cultural industry giants.

The *thema decidendum* to the Court was not economic efficiency but the interpretation of the US Constitution's *Progress Clause*, which authorizes Congress,
"*To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries*."

Was the CTEA extension compatible with this clause?

In first and second instance Courts upheld the constitutionality of the CTEA. In 2002 the Supreme Court of the United States granted writ of certiorari to hear the case. Amicus curiae briefs were submitted both in support of the petitioner and defendant.

The *Free Software Foundation* and the *Intellectual Property Law Professors* submitted briefs in support of Eldred. But here I would like to discuss another amicus curiae brief signed by seventeen economists including five Nobel prize recipients, namely: George A. Akerlof, Kenneth J. Arrow, Timothy F. Bresnahan, James M. Buchanan, Ronald H. Coase, Linda R. Cohen, Milton Friedman, Jerry R. Green, Robert W. Hahn, Thomas W. Hazlett, C. Scott Hemphill, Robert E. Litan, Roger G. Noll, Richard Schmalensee, Steven Shavell, Hal R. Varian and Richard J. Zeckhauser (G A Akerlof, Arrow, Bresnahan, Buchanan, & Coase, 2002).

The 17 economists justified their submission saying they were "*concerned about the role of government in promoting economic progress*" (ibid). Most of them have different views on economic methodology and macroeconomic approaches, however they all agreed the CTEA was inefficient and detrimental to social welfare.

The 17 economists gave two economic reasons against the CTEA.

1) "*It is highly unlikely that the economic benefits from copyright extension under the CTEA outweigh the costs"* (ibid).

According to the incentive narrative, the stronger the IPR the stronger the incentives for the creator or innovator. However, the economists showed this is not a lineal argument because of the value of money in time (or net present value).

Thus, incentive-wise, they concluded, "*the Act provides at most a very small benefit to innovation*" (ibid.).

Curiously, they prove their point with a mathematical example, taking into account the following variables.

Pre CTEA-scenario.

- Average copyright term of 80 years (30 years of remaining *life* plus 50 years *post mortem auctoris*).
- Profit (royalty) $1 per annum
- Annual interest rate of 7%

Net value present of $1 p.a. x 80 years = $14.22.

Post CTEA scenario.

- Average copyright term of 100 years (30 years of remaining *life* plus 70 years *post mortem auctoris*)
- Profit (royalty) $1 per annum
- Annual interest rate of 7%

Net value present of $1 p.a. x 100 years = $14.267.

From the mathematical proof they conclude,

"*The additional compensation provided by the CTEA amounts to a 0.33% increase in present-value payments to the author, compared to compensation without the twenty-year term extension*" (ibid).

In other words, the net present value of $1 profit p.a. from years 81 to 100 is only $0.047, which represents a 0.33% increase with respect to the pre CTEA scenario (with a shorter copyright term, equivalent to remaining *life* plus 50 years *post mortem auctoris*). This is

because the farther ahead in time the profit is, the weaker the incentive effect it has today. In sum, the CTEA extension has a negligible effect on incentives.

In addition, the CTEA cannot incentivise the creation of works that have already been already created. The retroactive extension is a "*windfall*" profit (ibid.) to copyright holders.

At the same time, "*the CTEA increases the social cost of monopoly*" (ibid). Because the longer the copyright duration, the longer the deadweight loss derived from monopoly.

2) "The Act reduces innovation by restricting the production of new creative works that make use of existing materials" (ibid).

According to the 17 economists, the CTEA increases the costs of creating (new) derivative works, by extending the copyright holder' exclusive right to authorise them.

They end their brief by saying:

> "[c]*omparing the main economic benefits and costs of the CTEA, it is difficult to understand term extension for both existing and new works as an efficiency-enhancing measure. Term extension in existing works provides no additional incentive to create new works and imposes several kinds of additional costs. Term extension for new works induces new costs and benefits that are too small in present-value terms to have much economic effect. As a policy to promote consumer welfare, the CTEA fares even worse, given the large transfer of resources from consumers to copyright holders*" (ibid).

Few economists disagreed with the 17 economists. One of the few were Liebowitz and Margolis, who allegedly found some inconsistencies, such as not considering the elasticity of supply of creative works, the network effect in the market for derivative works and lack of empirical evidence (S.J. Liebowitz & Margolis, 2003).

In 2003 the Supreme Court of the United States reached a split (7-2) decision (*Eldred v. Ascroft (01-618) 537 U.S. 186 239 F.3d 372, affirmed, U.S.S. Court*, 2003). The majority of the Justices found the CTEA copyright term extension to be consistent with the US Constitution' *Progress Clause* since it had been accorded for a limited *time*. They

reasoned, quite literally, that a 70 years *post mortem auctoris* copyright term was as finite one, as it had been the previous of 50 years *post mortem auctoris*. The economic arguments, such as those made by the 17 economists, were mostly ignored. This highlights an alarming shortcoming of law-and-economics scholarship in practical matters, but this is not the place to discuss such important matter.

Lawrence Lessig took part of the blame for the loss of the case. In his *mea culpa* he admits he made a strategic mistake, he had relied too much on economic arguments and did not develop good legal arguments, he said (Lessig, 2004).

Many important lessons can be learn from Eldred v. Ashcroft. Pure economic arguments rarely fare well in Court. Powerful lobbies seem to be more convincing than NGO and well-intended economists, and so on.

The saga of copyright term extension might be over, for now. However, if the *Mickey Mouse Curve* is accurate, before 2023 we might expect to hear again about extending the copyright term.

Rent-seeking efforts to extend copyright law is not an isolated US phenomenon. The market is global, rent-seeking it is global as well. It Not long ago the European Commission decided to review Directive 2006/116 EC on related rights (to copyright), i.e. rights of performer-artists and phonogram producers.

Related rights are similar but not identical to copyright. They are also called neighbouring rights (a calque from the French, *droit voisins du droit d'auteur*). Related rights are specific to civil law jurisdictions (in common law countries they are all copyrights).

Related rights play a subsidiary role; they contribute to the dissemination of creative works. In civil law countries only performance-artists, phonogram producers and broadcasters have related rights. Performance-artists are physical persons that play a creative or artistic role, interpreting their own or third-party expressive works. Phonographic producers and broadcasters are usually legal persons that play a commercial and technical role.

Related rights were internationally recognized for the first time in the *Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations* of 1961.

The European Commission said it wanted to improve the economic situation of performers-artists, in particular session musicians, i.e. those hired *ad hoc* for live performances or studio recordings. Because session musicians do not belong to a larger music group or ensemble they sit at the weak side of the bargaining table.

The Commission also said phonographic producers needed stronger rights because their revenues have decreased as a consequence of the increase in illegal downloads over the Internet.

European Commission proposed to extend the duration of related rights from 50 to 95 years. According to the European Commission such extension would generate more revenue thus giving stronger incentives to performers and phonographic producers.

A feasibility report was requested to the *Institute for Information Law* at the University of Amsterdam. The report backfired, it suggested the Commission's reform proposal was unnecessary and would not serve to attain the intended goals (Institute for Information Law, 2006).

In addition, economists were concerned against the Commission's proposal to extend the duration of neighbouring rights (Helberger, Dufft, Van Gompel, & Hugenholtz, 2008; Kretschmer, 2008). The arguments of the European economists were similar, mutatis mutandis, to the ones of their 17 US counterparts in the brief in *Eldred v. Ascroft*.

The Max Planck Institute for Intellectual Property, Competition and Tax Law of Munich (today, Max Planck Institute for Innovation and Competition) stated in a position paper that the regulatory changes proposed by the Commission to redress the weak bargaining power of session musicians and to curb illegal downloads were inadequate (Hilty, 2008)

Oblivious to the criticism received the European Commission passed Directive 2011/77/EU amending Directive 2006/116/EC on the term of protection of copyright and

certain related rights, effectively extending the rights of performers and sound recordings from 50 to 70 years. [3]

Cui bono with Directive 2011/77/EU? Phonographic producers (companies) and collecting societies benefited by a longer term to reap monopoly gains. It is unclear how the Directive improved the bargaining power of session-musicians. After all, recording companies and phonographic producers (employers) usually request the assignment of all economic rights of session-musicians to them.

Copyright term extension rent-seeking also reaches developing countries. In 2006 three Argentine Members of Parliament, viz. Nemirovsci, Fernández and Monayar, presented bill proposal no. 1.640-D-2006 to extend copyright duration from life of the author plus 70 *post mortem auctoris* to life of the author plus 80 *post mortem auctoris*. In the end the bill did not prosper.

However, in 2011 the same proponents managed to pass Law No. 26.570 that added *article 5 bis* to the Argentine Copyright Act no 11.723, extending the term of duration of neighbouring rights from 50 to 70 years. Like the US CTEA, Law No. 26.570 applied retroactively, making copyrightable again works that were placed in the public domain. Critics of the reform, including this author, consider the reform amounted to an unjustified transfer of wealth from consumers of creative goods to their producers; from a welfare perspective costs without benefits (Marzetti, 2011).

It is worth noting at this point that the Argentine Copyright Act is one of the most restrictive in the world. According to the 2012 Consumers' International *IP Watchlist* the Argentine copyright act was considered to be the second most restrictive copyright law (in-the-books) of the world (Consumers International, 2012).

Moreover, a recent WIPO report (Kenneth D. Crews, 2015) found out of 184 countries only 21 have no specific limitations and exceptions for libraries and archives. Argentina is one of those 21 countries.

[3] Instead of 95 years, as had been proposed.

The Argentine Copyright Act recognizes a very limited set of exceptions and limitations to copyright. It explicitly mentions the *droit de courte citation* (Section 10) exclusively for text or music, with a maximum of 1000 words or eight musical compasses, only in justified cases and for educative or scientific purposes only; news reporting (Section 28); non-for-profit publication of parliamentary debates (Section 36), performance of literary or artistic works within the premises of schools with free entrance and unpaid artists, free performances of musical works by state bands or choruses and the reproduction and distribution of literary and artistic works in special systems for blind and visually impaired people if done by authorized institutions (Section 36 in fine). There are no other exceptions and limitations, neither for libraries and archives, nor for Internet Service Providers and other online intermediaries. Most reforms to the Argentine Copyright Act (that dates from 1933) were meant to extend its term of duration (the first term was life of the author plus 30 years post mortem auctoris) and the scope of copyrightable works.

Unlike US fair use, exceptions and limitations are restrictively construed by judges and cannot be extended by analogy.

4.5 KNOWLEDGE DIPLOMACY AND TRADE-RELATED INTELLECTUAL PROPERTY LAW

Knowledge diplomacy, or the international negotiations over IPR, has become a key area of international relations (Ryan, 1998). What are the drivers of the proliferation of multilateral, bilateral and plurilateral treaties related to IPR? The official story tells about development, technology transfer and economic growth. However, some scholars challenge this story and suggest international intellectual property law is shaped or at least influenced by interest groups.

Susan Sell argues that interest groups representing US cultural industries were at least, partly responsible for the global trend of heightening the minimum standards of IPR that began in the 1980s. According to the author these interest groups pushed for and eventually succeeded to relate intellectual property to international trade, a vision that coalesced for the first time ever in the TRIPS Agreement (Sell, 2003).

During the early 1980s the US government was worried about the country's staggering economy and loss of global competitiveness. Interest groups representing technology, entertainment and pharmaceutical corporations convinced the US government that the culprit of the US economic ruin were foreign copycats and countries.

The narrative of blaming foreign pirate firms and developing countries that did not enforce IPR suited well both the US administration and US corporations; the former was not to blame for bad economic policy and the latter could expect governmental collaboration to enforce their IPR abroad.

The corporations convinced the government that the solution was to elevate IPR standards worldwide and to aggressively push for more stringent enforcement. As a consequence, the Department of Commerce and the US Trade Representative included, for the first time, IPR to their respective international trade agendas.

In 1984 a new powerful lobby was created, the *International Intellectual Property Alliance*. It was formed by seven trade associations, namely: *Association of American Publishers*, *Business Software Alliance*, *Entertainment Software Association*, *Independent Film & Television Alliance*, *Motion Picture Association of America*, *National Music Publishers' Association* and the *Recording Industry Association of America*.

Also in 1984 the US Congress amended Section 301 of the US Trade Act; since then foreign countries doing business with the US without a strong IPR system and effective enforcement mechanisms were considered could be accused of unfair competition practices, which may lead to lawful retaliatory measures.

In 1986 thirteen US corporations, viz. Bristol-Myers, DuPont, FMC Corporation, General Electric, General Motors, Hewlett-Packard, IBM, Johnson & Johnson, Merck, Monsanto, Pfizer, Rockwell International and Warner Communications coalesced into another powerful lobby, the *Intellectual Property Committee*.

IIC and IIPA actively lobbied the US government and contributed to delineate the future framework of international intellectual property law. Later these two US interest groups

managed to convince European and Japanese regulators, also with staggering economies at the time, to join the cause. According to Sell, "*twelve corporations made public law for the world*" (ibid.).

Since the end of WW2 the GATT had been the forum for multilateral trade negotiations. During the 8th round of multilateral trade negotiations, the so-called Uruguay Round, IPR were discussed for the first time in the context of trade meetings.

At the Uruguay Round the WTO was created and replaced the GATT in 1995. Annex 1 (C) was approved; called the *Agreement on Trade-Related Aspects of Intellectual Property Rights*. The TRIPS Agreement was one of the mandatory multilateral documents countries had to accept to become part of the WTO.

To the corporations represented by IIPA and IIC, the TRIPS Agreement was a tremendous gain. It required WTO-member countries to heighten the minimum levels of IPR protection and enforcement, increasing their IPR profits at the expense of developing nations (private benefits and public costs, the perfect outcome of rent-seeking). According to Archibugi and Filippetti, "the real winners from TRIPS are not advanced countries, but rather the large corporations that pressed for its adoption" (Archibugi & Filippetti, 2010).

Moreover, in case a WTO-member country did not comply with their IPR obligations as stated in the TRIPS Agreement the *Dispute Settlement Understanding* could be applied. This implies that, in the end (after a series of panels) the prevailing country is allowed to lawfully impose trade sanctions (quotas, tariffs, etc.) against a country found to be non-compliant with its TRIPS obligations.

Developing nations did realise the TRIPS Agreement was against their national interests. Antonio Trombetta, the Argentine negotiator during the Uruguay Round, said in an interview the main proponent of the TRIPS Agreement were US, European and Japanese pharmaceutical companies, the Motion Picture Association of America and discography companies (Trombetta, 2007).

Trombetta claims most of the TRIPS Agreement provisions were never accepted at the negotiation table. Unlike previous rounds, the Uruguay Round had a different *modus operandi*. Presidents of the different negotiation groups and the Director General had the prerogative to propose solutions to points that had not yet been accepted by country delegations.

Trombetta recalls Argentina, Brazil and India did not accept the 20-year term of patent protection, the prohibition to exclude certain types of inventions from patentability or the inversion of the *onus* probandi to prove infringement of process patents. These and other provisions that ultimately were included in the TRIPS Agreement were made by the Director General.

Under GATT's *single undertaking rule*, adopted in Punta del Este in 1986, agreements were either wholly approved or not at all. Developing countries knew stronger IPR and stringer enforcement were contrary to their national interests, as net importers knowledge-intensive goods.

To developing nations unable to compete on an equal footing in pharmaceutical, technological and entertainment markets a low level or selective IPR protection was a better policy, in order to free-ride and catch-up with developed nations over time.

Copying has been a pervasive human strategy. Jared Diamond claims the alphabet was independently invented by two or three civilizations, viz. Sumerian, Mesoamerican and (perhaps) Chinese. All others civilization copied the alphabet from any of these three civilizations; either directly (*blueprint copying*) or indirectly (*idea diffusion*) (Diamond, 1999)

After WW2 ended the *Asian Tigers*, epithet applied to Japan, Singapore and South Korea, started copying foreign technology (and at a later stage, improving it). This process allowed these countries to catch-up and eventually develop their own technological and creative base. These states were actively involved in the economic development of their companies and industrial conglomerates, a new form of *developmental state* (Woo-Cumings, 1999).

For developing countries stronger IPR meant to transfer of wealth (e.g. royalties) to developed countries.

The TRIPS Agreement was a game changer. It required developing nations to raise the minimum levels of IPR protection and to allow patenting of subject matter that was not patentable before (e.g. pharmaceuticals patents). The new trade-related international intellectual property law framework meant countries were no longer free to determine their own policies (Correa, 1998, 2007).

This was done under the auspices of the WTO and not WIPO, the specialized UN agency for the protection of IPR. Only after the work was done and Uruguay Round was over did the WTO enter into a collaboration agreement with WIPO (WIPO-WTO Collaboration Agreement of 1995).

The TRIPS Agreement also created frictions with other areas of international law, in particular human rights, biodiversity, development and health (Abbott, Breining-Kaufmann, & Cottier, 2006). The Doha declaration on *TRIPS and public health*, adopted on November 14, 2001 is a compromise between conflicting goals.

Unlike previous IPR treaties, the TRIPS Agreement incorporated a mechanism to induce compliance. In case of any violation of the TRIPS' provisions or failure to comply with its obligations, WTO member countries were bound by the Dispute Settlement Understanding (Annex 2 of the WTO Agreement). The DSU incorporates a Dispute Settlement Body composed of panels of experts, mediators and arbitrators. In case the DSB panel finds that a member country has breached an obligation arising out of the TRIPS Agreement the panel may allow the claimant country to retaliate by applying unilateral sanctions in retaliation (e.g. tariffs, quotas, etc.). The TRIPS agreement has "*teeth*" and can bite (Helfer, 2003).

If developing countries knew the TRIPS Agreement was contrary to their national interests. why they sign it? They were not ignorant of the consequences. However, developing nations had a different strategy in mind. Developing countries expected to compensate the losses caused by stronger IPR with freer access and new markets for their textiles and commodities, where they had the upper hand.

Key to that expectation was the promise of developed countries to lower subsidies to their farmer's and to remove barriers of entry for textiles coming from developing countries. These promises would not materialise, at least not in the measure expected by developing countries. Their bargain at the Uruguay Round backfired.

During the Uruguay Round developing nations expected GATT rules to remain in force afterwards. Those rules allowed developing nations to apply differential policies vis-à-vis developed ones. This proved to be another unfulfilled expectation.

4.6. CHAPTER'S SUMMARY

In this chapter I provide a *realpolitik* dimension to international intellectual property law and the so-called knowledge diplomacy. Therefore, I dismiss naïve preconceptions and concentrate in discovering winners and losers.

Foucault said, "*power is everywhere*", I would add specially were laws are made and treaties negotiated. Interest Group Theory suggests lobbies are more successful than the disaggregated majority of citizens to influence legislator's agendas.

Rent-seeking behaviour, a waste of resources from the welfare perspective, is perfectly rational for individual firms. IPR, a form of legal monopoly, is particularly prone to rent-seeking activities. It is more profitable for firms to lobby the government to obtain new legal monopolies or extend existing ones that to engage in more invest in quality, lower production costs or R&D.

The many episodes of copyright extension around the world provides strong evidence of rent-seeking behaviour. In spite of the absence of empirical supporting evidence and academic consensus against copyright extension, regulators have looked the other way. This may suggest the limits of law-and-economics scholarship beyond academic discourse.

The international intellectual property law framework that came to be after the Uruguay Round and the TRIPS Agreement is, at least in part, the result of rent-seeking activities of strong lobbies of creative and cultural industries from developing countries.

5. THE PUBLIC DOMAIN

5.1 THE IMPORTANCE OF THE PUBLIC DOMAIN

According to Boyle "[*o*]*ur markets, our democracy, our science, our traditions of free speech, and our art all depend more heavily on a Public Domain of freely available material than they do on the informational material that is covered by property rights. The Public Domain is not some gummy residue left behind when all the good stuff has been covered by property law. The public domain is the place where we quarry the building blocks of our culture*" (Boyle, 2010).

Certainly, the public domain represents an almost endless source of materials for the creation of new works. No author or artists create *ex nihilo*, creativity is the daughter of inspiration, imitation and emulation of other's peoples work. This is human behaviour, since we are babies we learn by imitating our parents (*tabula rasa*).

Some copyright scholars consider the public domain as subsidiary, and define it by exclusion, i.e. public domain is everything that is not copyrighted. This conception implicitly downplays the importance of the public domain.

Salzberger considers the public domain a fundamental rather than a subsidiary space, a key reservoir of the knowledge economy (Salzberger, 2006), opinion that I share entirely. The public domain should no more be considered by exclusion, i.e. a worthless or second class space where there are no copyrights. As a source of value per se, and a necessary complement to copyright law in a balanced knowledge economy, it is necessary to valorise and revitalise the public domain. To achieve that end, positive definitions of the public domain are necessary, to protect it against undue interference such as the placing of TPM or DRM on digital public domain works that limit access and reuse.

In that sense, are worth citing are COMMUNIA International Association on the Public Domain' *Contribution to the Definition of a Positive Agenda for the Public Domain,*

"The Public Domain deserves a positive recognition to better identify works and usages which are available for creators and users to build upon. It should not be defined as a mere non "Intellectual

Property" protection zone. This would be consistent with the history of "Intellectual Property", which used to consider the Public Domain as the rule and copyright as the exception, as a temporary and limited monopoly of exploitation. This crucial balance should be clearly reintroduced within the copyright regulatory framework" (COMMUNIA International Association on the Public Domain, 2012a);

and Proposition no. 74 of the *Rapport Lescure*,

"Renforcer la protection du domaine public dans l'univers numérique: établir dans le code de la propriété intellectuelle une définition positive du domaine public; indiquer que les reproductions fidèles d'œuvres du domaine public appartiennent aussi au domaine public, et affirmer la prééminence du domaine public sur les droits connexes" (Lescure, 2013).

5.2. COMPONENTS

No IP law treaty states what the public domain is; so the task is left to scholars.

The public domain

"*… is the wealth of information that is free from the barriers to access or reuse usually associated with copyright protection, either because it is free from any copyright protection or because the right holders have decided to remove these barriers*" (De Rosnay & De Martin, 2012).

I will follow this definition for the purposes of this dissertation.

Following COMMUNIA's Manifesto (*the European Thematic Network of Scholars on the Digital Public Domain*), the public domain is composed of two building blocks, each of them with two components, the *structural public domain* and *voluntary commons and user prerogatives* (Frosio, 2011).

5.2.1. STRUCTURAL PUBLIC DOMAIN

5.2.1.1. WORKS NEVER SUBJECT TO COPYRIGHT

This category include ideas, mathematical formulas, methods and every other intellectual creation excluded from copyright. Following the ideas-expression dichotomy, only the latter are copyrightable, ideas are not.

This rule is usually explicitly stated in copyright laws (e.g. Section 102 (b) of the US Copyright Act). Some scholars refer to this category under another name, *original public domain* (Abrão, 2002).

The rationale for not granting copyright to ideas is based in efficiency concerns. Landes and Posner say the idea-expression dichotomy is in the best interest of authors themselves; they would be agreed in such a rule behind a veil of ignorance à la Rawls (Landes & Posner, 1989). If ideas were copyrightable the cost of creating new works would be much higher. The *scènes à faire* doctrine seems to be inspired by the same economic rationale.

5.2.1.2. WORKS WHOSE COPYRIGHT HAS LAPSED

These works were once copyrighted but then entered the public domain. Everywhere copyright has a limited duration, even it copyright terms have been steadily extended all over the world in the last decades So far, no jurisdiction has a perennial copyright. Another name for this category is *subsequent public domain* (Abrão, 2002).

5.2.2. FUNCTIONAL PUBLIC DOMAIN

5.2.2.1 VOLUNTARY RELINQUISHMENT

Some jurisdictions allow authors to voluntarily relinquish some or all of their economic rights over a work, this practice is usually called *copyleft*.

Another case are works licensed under a *Creative Commons* license. These licences allow the licensor to retain some rights (usually moral rights such as paternity, renamed "*attribution*" by Creative Commons) while relinquishing other rights (thus the Creative Commons motto, "*some rights reserved";* compared it to the traditional copyright notice

"all rights reserved"). *Creative Commons* licenses are usually favoured by authors who want to disseminate their works rather than to exclude access to them.

However, few countries in the world explicitly incorporate rules allowing the voluntary relinquishment of author's economic rights, a study has found (Guadamuz, 2014). It is also important to consider how the international framework of copyright law operates, according to the Berne Convention copyright must be granted automatically (the exception are the countries that, in addition, require fixation in their domestic laws) and cannot be subject to any to any formality, such as mandatory registration. This feature, that we may call copyright by default, makes much more difficult the relinquishment of certain rights, even by the author herself.

5.2.2.2. EXCEPTIONS AND LIMITATIONS TO COPYRIGHT LAW

This last category refers to uses of copyrighted works by third parties that fall beyond the sphere of control of the right holder. In spite of copyright protection, under certain circumstances the right holder must tolerate the use of her works by third parties, free of charge and without authorisation.

Limitations to copyright law are derived from the general civil law principle that no right is absolute. Limitations are common in (tangible) property law, for instance easements or servitudes.

A more controversial thesis posits that all private rights must serve social goals. French jurist Léon Duguit (Duguit, 1923) stated that property has a social function and could and should be limited to tend to those functions (Duguit, 1923).

There are two different approaches here, on the one hand the common law fair use and fair dealing doctrines; on the other hand the civil law system of exhaustive lists. Both systems achieve similar results (they allow limited free uses of copyrighted works) but the scope of each of them is radically different.

Another argument for the existence of exceptions and limitations and fair use is rooted in economics. Landes and Posner consider the raison d'être of fair use to reduce transaction costs, especially in situations in which values can be created without imposing a loss to the copyright holder (such as quoting someone's works). Another economic justification for fair use doctrines is based in the so-called tragedy of the anticommons. Depoorter and Parisi posit that even in the case of zero transaction costs fair use would be efficient to avert strategic behaviour by the copyright holder (Depoorter & Parisi, 2002).

5.3. EXCURSUS: US-STYLE FAIR USE

The fair use doctrine is strictly a US phenomenon. Other common law jurisdictions such as Australia, Canada, New Zealand, UK, etc. follow a similar approach called fair dealing. In many ways, fair use and fair dealing are radically different from the civil law system of exceptions and limitations.

Fair dealing and fair use doctrines were the creation of judges. In re *Gyles v. Wilcox* (1740) the Court of Chancery had to decide whether the unauthorized abridgement of a copyrighted work infringed the *Statute of Anne* of 1710. The *Statute* contained no provision in that regard.

In the judgement Lord Hardwicke made an interesting distinction between *true abridgements* and *coloured shortenings*. Lord Hardwicke argued that only the former infringed copyright and not the latter. The demarcation criterion seem to have been the degree of the creative in the creation of the derivative work (the abridgment).

Coloured shortenings were original and require personal effort and so did not infringe copyrighted works. This was perhaps the first exception that was allowed to use copyrighted works. From *Gyles v. Wilcox* the judicial doctrines of fair dealing and fair use would evolve at both sides of the Atlantic.

Time after time fair use and fair dealing became enacted law. US fair use is codified at 17 USC § 107 and fair dealing provisions can be found in Sections 29 and 30 of the UK

Copyright, Designs and Patents Act 1988 and Section 29 of the Canadian Copyright Act, respectively. However, there are differences between fair dealing and fair use.

The US fair use is not a closed list of non-infringing uses of but rather a standard loosely defined by four factors that are left to the interpretative criteria of the judge.[4] Thus, the US judge has more room for flexibility to assess a supposedly copyright infringing conduct and can extend the fair use defense to new uses by analogical reasoning. Whereas fair dealing is applicable to a finite set of situations as defined by statute and cannot be analogically extended.

Then, what makes US fair use so special? In short, flexibility and adaptability. For instance, in the famous "Betamax" case (*Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417*, 1984) the US Supreme Court stated that tape recording copyrighted contents from TV or cable to watch at a later time (*time shifting*) was fair use and not copyright infringement. This leading case made possible the development of the then nascent video recording technologies such as Betamax and VHS (the standard that in the end would prevail).

The civil law system of exceptions and limitations is close-ended or *numerus clausus*, the law list all non-infringing uses. Moreover, civil law judges construe it in a restrictive manner thus it cannot be expanded by analogy.

Unlike IPR, public domain has never been the subject of any multilateral treaty. Thus, what constitutes the public domain can largely differ from country to country. For instance, the parody of a copyrighted work can be deemed a case of fair use in a common law jurisdiction but may be considered copyright infringement (an unauthorized derivative work) in most civil law countries.

[4] 17 U.S. Code § 107 - Limitations on exclusive rights: Fair use [Omissis] In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include— (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.

Another example is the copyright protection of works created by state agencies. In most countries bills, drafts, parliamentary debates, acts of Parliament or laws of Congress, judicial decisions (once they become *res judicata an*d unless they contains sensitive personal data) are placed ex lege in the public domain.

This seems necessary and congruent with the legal fiction that assumes all citizens know all the applicable law; therefore ignorance of the law is never an acceptable legal defence (*ignorantia iuris non excusat*). However, in the UK official documents are still subject to *Crown Copyright*. To stimulate the use of public documents the UK introduced in 2010 *Open Government Licenses,* though parliamentary records remain under *Crown Copyright*.

Last but not least, this flexibility countries have to determine some elements of the public is the reason why some nations have decided to enforce a *domaine public payant*, as we will discuss infra.

5.4. THE VALUES OF THE PUBLIC DOMAIN

A priori, we believe the public domain seems to have valuable *in se.* The value the public domain provides to society come from two main sources, (a) lower prices, a consequence of the absence of a legal monopoly to keep prices over marginal cost; and, (b) positive externalities that occur when and because copyright has expired (e.g. knowledge spillover).

For these reasons, the public domain is considered a positive and necessary element of a creative, open and sustainable democratic society,

"*The presence of a robust public domain is an essential precondition for cultural, social and economic development and for a healthy democratic process*" (Guibault & Hugenholtz, 2006).

Guibault et al. also mention eight positive externalities that occur when works enter the public domain, namely, (1) works become building blocks for the creation of new works,

(2) it enables competitive imitation, (3) follow-on innovation, (4) low cost access to information, (5) access to cultural heritage, (6) promotes education, (7) public health and (8) safety and democratic process and values (Guibault & Hugenholtz, 2006). Note that all these positive externalities rest on the assumption that access and exploitation of works in the public domain is free and gratuitous (that is not the case where a *domain public payant* is in place).

Is it possible to objectively measure the value the public domain? According to some economist, yes. Rufus Pollock has proposed a formula to assess the value of the public domain (R. Pollock, 2006). The value of the public domain looks like this,

Value of the Public Domain = User's Value – Costs

Let us see Pollock's formula with an example. Let us assume the price of a copyrighted book is $10 and consumer's willingness-to-pay $15. In that case the total value created is $15 [$10 price (producer's surplus) + $5 value (consumer surplus)].

Now let us assume that the book price falls from $10 to $2 as a consequence of copyright expiration (i.e. it has been empirically demonstrated that prices drop when books enter the public domain). Some non-economics-minded IP scholars would say in this case wealth has been lost because of the lower selling price, i.e. the forgone profits ($10 - $2 = $8 lost profits). This, however, is incorrect. Actually, value (which is composed of more than the selling price) has been increased by the drop in price. These non-economics-minded IP forgot to compute consumer's welfare.

Let us assume now a reader's willingness-to-pay is $15. In that case a price drop from $10 to $2 increases consumer surplus ($15 WTP - $2 effectively paid = $13 increase in value to the consumer). Considering the consumer overall value remains the same, what has changed is the distribution of value (consumer surplus $13 + producer surplus $2 = aggregated value $15).

Now let us take into account the consumers that were not able to buy the book at the selling price of $15 (copyrighted), either because of budget constraints (poor people) or

a lower WTP. The price drop from $10 to $2 in this scenario would imply that consumers with at least $2 in their pocket and the same WTP can now afford to buy the book.

It is self-evident that a book priced at $2 will sell more copies than the same book priced at $15. Thus, a drop in price can have a multiplying effect on the total social value derived from the book.

Economic science is supposed to be value-free. However the desirability of a conduct is appreciated from a utilitarian standpoint (whether act or rule utilitarian, wealth maximization à la Posner or more holistic forms of welfarism).

From a Kaldor-Hicks perspective we may say this in the last case the increase in consumer's value outweighs profits forgone by the publisher. Besides, the sunk cost of creating the work were compensated during the copyright period.

Even if overall value remains the same and the effect is only redistributive, extending access to creative works can provide positive externalities (e.g. knowledge spillover). These externalities should not be discarded altogether because of the impossibility of their measurement. There are positives externalities in extending access to literary, scientific and artistic works. People gets educated. People acquire knowledge, an input for the creation of new original works and also derivative ones (e.g. adaptations, translations, compilations, mash-ups, etc.).

Is it possible to empirically prove the value of the public domain? It is by no means simple, but it is sometimes possible when data is available, as we will see infra.

In 2010 Sigmund Freud's works entered the public domain in Italy. Nine months later 36 works written by the founder of psychoanalysis were published by ten different Italian editors. An editorial boom compared to the total of sixteen Freud's works that had been published in Italy between 1999 and 2009 (R. Pollock, Stepan, & Välimäki, 2010).

In 2007 the works of French organist and composer Louis Vierne entered the public domain. Vierne's original compositions were plagued with errors, this was a well-known fact by the cognoscenti. Understandably, Vierne has been near blind since birth. During

the copyright period nobody corrected the many obvious mistakes found in his compositions for fear of being sued of copyright infringement. After Vierne's works entered the public domain in 2007 not only these errors were corrected but also more editions of his works were published than during the copyright period (ibid.).

Another study, by Buccafusco and Heald found that,

> *"Audiobooks made from public domain bestsellers (1913–22) are significantly more available than those made from copyrighted bestsellers (1923–32). In addition, the experimental evidence suggests that professionally made recordings of public domain and copyrighted books are of similar quality. Finally, while a low quality recording seems to lower a listener's valuation of the underlying work, the data do not suggest any correlation between that valuation and the legal status of the underlying work"* (Buccafusco & Springman, 2010).

Moreover, there is no risk of losing value once a work enters the public domain,

> *"There seems little reason to fear that once works fall into the public domain, their value will be substantially reduced by the amount or manner of their use. Although there may be costs associated with movement into the public domain, allowing open access to public domain works will yield considerable benefits. These benefits should dramatically outweigh the costs"* (ibid).

Merges suggests the existence of additional benefits (positive externalities) from the public domain, that are derived from firms deciding to place information in the public domain instead of protecting under some form of IPR with the purpose of pre-empting competitors from propertizing valuable intangible assets, which has the effect of making the market more competitive,

> *"Firms and individuals are increasingly injecting information into the public domain with the explicit goal of preempting or undermining the potential property rights of economic adversaries. Biotechnology firms invest millions of dollars in public domain gene sequence databases, to prevent hold-ups by firms with patents on short gene sequences. Major software firms fight entrenched rivals by investing millions of dollars, contributing to open source operating systems. In both cases, property-preempting investments (PPI's) are made to offset the effects of competitors' property rights. Individuals and nonprofits are joining in too, with initiatives such as the Creative Commons project"* (Robert P. Merges, 2004).

5.5. THE PUBLIC DOMAIN ECONOMY

Not only the public domain can be a source of knowledge spillover but can also be very profitable. The term *fair use economy* refers to a burgeoning sector of the US economy. The *Computer and Communications Industry Association (CCIA)* has published two reports in relation to the fair use economy (Rogers, 2007; Rogers & Szamosszegi, 2010).

These CCIA reports recognise four types of *fair use industries*,
a) Manufacturers of consumer devices that allow individual copying of digital works (e.g. hard drives, flash drives, blank CDs, blank DVDs, etc.);
b) Educational institutions (e.g. e-learning, distance learning, MOOC, etc.);
c) Open source software developers (e.g. Red Hat);
d) Internet search engines and web hosting providers (e.g. Google, Bing, Yahoo, etc.).

The CCIA 2010 report suggests that profits from the US fair use industries are equal, if not exceed, those of the copyright industries (ibid.). Total revenue of US fair use industries during the 2008-2009 period is estimated at $4.7 trillion dollars, which represents an increase of 35% compared to 2002 figures. In addition, US fair use industries employ 17 million Americans, according to the report.

Moreover, the report suggests the fair use sector may be incidental to the development of other sectors of the economy, like hardware manufacturers (e.g. fibre optics, routers, etc.), service and business support firms (e.g. communications, consultancy, procurement, etc.) and the like.

A similar study was carried out in Europe by SEO, a Dutch consultancy firm, also under commission of the CCIA. The study is aptly titled *The economic contribution of EU industries relying on exceptions and limitations to copyright*, because most EU countries belong to the civil law tradition, the only exception being the UK (Akker, Noll, Poort, & Tewes, 2010).

According to SEO's report in 2007 the value generated by EU industries relying on exceptions and limitations to copyright amounted to €1.1 trillion or 9.3 % of the EU's GDP. The firms relying on exceptions and limitations to copyright employ 9 million Europeans, or 4% of the EU workforce. And the aggregated salaries paid by the *EU exceptions and limitations economy* amounts to €307 billion, and that figure only considers the educative sector.

A working paper published by Roya Ghafele and Benjamin Gibert, titled *the economic value of fair use in copyright law: counterfactual impact analysis of fair use policy on private copying technology and copyright markets in Singapore*, calculated the economic effects of recent reforms in Singapore law that have expanded the scope of fair dealing in relation to copyrighted works in that country (Ghafele & Gibert, 2012).

The authors analysed the functioning of two sectors of the Singaporean economy: (a) the traditional copyright industries, i.e. reproduction, distribution, publication, sale and public communication of films, audio and visual works; and (b) the copying technology industries, i.e. manufacturers and retailers of digital video recorders, TiVo boxes, MP3 players, PC, hard drives, etc.

Singapore amended its Copyright Act in 2005 (Ch. 63, Act 2 of 1987) and in 2006 incorporated an additional amendment which resulted in the *Copyright Act Revised Edition (CARE)*. The latter introduced a new set of flexibilities to Singaporean copyright law (vid. clause III.35 *Fair dealing in relation to works*).

CARE added specific provisions that allow the use of copyrighted material for the purpose of criticism, review and reporting as well as for reproduction during judicial proceedings. CARE introduced a US-style fair use (though it was named fair dealing, following the received British model) that enables Singaporean Courts to determine on a case-by-case basis which uses of copyrighted material are infringing and which ones are to be tolerated as fair ones.

Similar to their US counterparts, Singaporean judges rely on a five factor test (the US fair use follows a four factor test, vid. supra) in order to determine whether the use of a copyrighted content is to be considered fair or not, namely: (1) the purpose and character

of the use, (2) the nature of the work, (3) the amount of the work copied, (4) the effect on the potential market and (5) the possibility of obtaining the work in reasonable time and at an ordinary commercial price. The last factor is absent in US legislation.

Ghafele and Gibert conclude that the new flexibilities to copyright law may lead to economic growth in Singapore,

> "[*t*]*he counterfactual impact analysis of fair use amendments in Singapore undertaken here demonstrates that flexible fair use policy positively influences growth rates in private copying technology industries. In 2010, five years after the policy intervention, Singapore's fair use amendments are correlated with a 3.33% increase in value-added (as % of GDP) for private copying technology industries. Prior to the amendment of fair use policies, private copying technology industries experienced - 1.97% average annual growth. After the changes were introduced, the same industries enjoyed a 10.18% average annual growth rate. This resulted in a total increase of € 2.27 billion in value-added for private copying technology industries in that period. The results show that, prior to fair use amendments, the private copying industries in Singapore were in recession. After fair use amendments, this group experienced a rapid increase in growth rates and continued to exhibit strong growth over the five year period*" (ibid.).

Last but not least, the authors point out that the Singaporean *fair dealing economy* does not cause loses to the traditional *copyright economy*, but is an enlargement of the pie,

> "*The counterfactual impact analysis results in Singapore indicate that the growth of private copying technologies has had a negligible impact on copyright industry revenue. For 20r use policy was correlated with a -0.23% reduction in value-added (as % of GDP) for copyright industries. The copyright group enjoyed an average growth rate of 14.16% before the amendments were introduced (a total increase of over € 274 million in value-added). This slowed to 6.68% for the period after the amendments were introduced and resulted in a total increase of over € 158 million in value-added. There was no significant change in growth rates for the copyright group before and after fair use amendments when measured in terms of real economic growth (value added as % of GDP). While growth certainly slowed down in absolute terms, the industry group nevertheless continued to grow after the intervention. Moreover, the magnitude of the change was minimal in comparison to the private copying group*" (ibid).

5.6. SOCIAL-MEDIA, DISCONTENT AND A NEW LOGIC OF COLLECTIVE ACTION?

February 24, 2004 is remembered as the *Grey Tuesday*. In 2004 DJ *Danger Mouse* released the *Grey Album*, a mash-up of the Beatles' *White Album* and Jay Z's *Black Album*.

To promote himself DJ *Danger Mouse* released thousands of copies through the Internet. EMI, copyright holder of the Beatle's *White Album*, sent thousands of cease-and-desists letters to the websites from where the *Grey Album* could be downloaded. As an apparently spontaneous act of reprisal, on February 24, 2004 the *Grey Album* appeared in more than 170 websites for free download. It is claimed that more than 100.000 copies of the *Grey Album* were downloaded that single day alone.

On January 18, 2012 the largest online protest in history (to date) took place. The so-called *Internet Blackout* (or *Internet Strike*) became a spontaneous and decentralized act of digital disobedience. What was the reason? To protest against two bills that at the time were being (secretly) discussed at the US Congress: the *Stop Online Piracy Act* (SOPA) and *Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act* (PIPA).

Internet activists considered these bills threatened individual liberties online, because they made it easier for copyright and trademark holders to block access to websites with suspicious contents, even outside the US (i.e. extraterritorial application), and required a low burden of proof (for instance, a simple notice of infringement). The strategy of criminalising the intermediary makes sense for the rights holders, as it is less expensive and easier to target ISPs, search engines and social media companies than individual users.

However, SOPA and PIPA threatened the interests of millions (if not billions) of users worldwide. According to Olson's *Theory of Collective Action* (discussed supra), coordination among netizens should have been impossible, as the costs of taking part in

a campaign (coordination) exceed the expected private benefits. However, in this case the theoretical prediction did not materialise. The Internet, social media, cheaper smartphones and faster broadband access are lowering coordination costs of previously disconnected individuals with shared goals. Can these changes lead to a new logic of collective action?

Collective action did happened and at large scale. Wikipedia, Google and other 115.000 websites denied access to more than a billion people in protest. Ten million people signed petitions against SOPA and PIPA; in a very short period of time US Congress received eight million calls and four million emails expressing dissent ("http://sopastrike.com/numbers/," n.d.). In the end, US lawmakers decided to postpone the discussion of both bills, indefinitely.

Similar online demonstrations of civil discontent were repeated in other latitudes. On June 28, 2011 Argentine senators were preparing to pass a law that would have created a new tax applicable to certain copying and storing devices (e.g. blank CD, DVD, hard drives and pen drives). The tax, called in Spanish *cánon digital* (*digital fee* in English), was meant to compensate copyright holders from eventual loss profits due to the suspicion that these devices were mostly used to make unauthorised copies of copyrighted contents.

Internet activists complained the bill had not been thoroughly discussed and society and stakeholders have not been heard in the legislative debate.

In practice, the *digital fee* would have meant a 5% increase in the price of pen drives, a 10% increase in the price of DVD players and hard drives and a 75% increase in the price of blank CD and DVD.

The day the Act was meant to be voted in the Argentine Senate, the coalition that had proposed the new tax had all the votes needed to pass the law. However, the voting session that day was cancelled. What happened? One possible answer, congressmen perhaps became afraid of the potential negative consequences of organised digital collective action.

The same day, June 28, 2011, NGO's, bloggers, and netizens flooded social media and official websites with comments against the *digital fee*. Moreover, *Anonymous*, a global network of hacktivists launched a DDoS attack that took down the webpage of the Argentine Senate during whole day.

Politicians are rational people. They probably gauged the costs and benefits from passing the law vis-à-vis the loss or reputational capital as a consequence of pressing a policy that was disfavoured by the vast majority and, at least that time, good broad media and social-media coverage.

Therefore, it seems plausible that technology, by lowering the costs of millions of individual citizens to coordinate and pursue common goals, may change the logic of collective action, as described by Mancur Olson (op. cit.).

5.7. CHAPTER'S SUMMARY

In this chapter I explained what the public domain, its main components and its value in a knowledge society.

The public domain has value in se, it is a source of wealth and positive externalities to society. This evidence has been empirically validated in a few studies.

Both, well-defined and effectively enforced IPR and a public domain space are necessary to the functioning of a sustainable knowledge ecosystem. The economic approach suggests an efficient equilibrium between IPR and the public domain.

6. THE "DOMAINE PUBLIC PAYANT"

6.1. OVERTURE

The *Teatro Colón* in Buenos Aires, Argentina, is considered one of the best opera houses in the world (Basso, 2017). Like any opera house, most of the works performed therein are in the public domain (e.g. classical and romantic chamber music, *bel canto* operas, etc.).

However, unlike opera houses in other countries, every time *Teatro Colón* preforms, broadcast, publishes or communicates to the public an opera by Giuseppe Verdi or a symphony by Ludwig Van Beethoven (i.e. works in the public domain not subject to any copyright) it must pay a fee (*rectius*, a tax) to a state agency for such use. This system is known as *domaine public payant*.

6.2. AN OXYMORON?

The *domaine public payant*, in French, *paying public domain,* in English, *dominio pubblico pagante*, in Italian, *dominio público pagante*, in Spanish, *domínio público oneroso* in Portuguese or *Urhebernachfolgevergütung* in German, is a system in which a fee, compulsory license, or levy must be paid to an institution (usually of to the state) to use or re use (e.g. publish, perform, broadcast, or communicate to the public) works in the public domain.

In this work I will use the different translations alternatively. However, I will use the French denomination more often, since it is the terminology more widely understood. I will reserve the Spanish translation to refer to the specific system in force in Argentina.

The *domaine public payant* is not an alternative to copyright law but rather a complement to it. In most cases, the *domaine public payant* commences to be enforceable after copyright has expired. However, unlike copyright law, the *domaine public payant* is usually perpetual.

In Argentina, where the *dominio público pagante* is still in force, it requires the payment of a fee to a state agency. In other countries, like in France before the *domaine public payant* was abolished, it was levied by a private entity.

However, to readers of most countries the *domaine public payant* sounds like an oxymoron, a *contradictio in terminis*. Almost universally, the domain public payant is free. Moreover, the definitions included in the previous chapter assume the public domain is free. However, such an assumption should not be generalised.

In any jurisdiction with a (normal) public domain individuals are free to use and re use works in the public domain. The existence of the *domaine public payant* is a rara avis in the comparative landscape of cultural law and policy. Such anomaly has prompted me to choose this topic for a doctoral dissertation. It strikes this author why a handful of countries still enforce a policy that has been considered inefficient or undesirable in most countries of the world. In a global economy, efficient institutions are quickly transplanted from one legal system to another, while inefficient ones are avoided or repealed (Ewald, 1995; Mattei, 1994).

The *domaine public payant* is mentioned in several WIPO documents. In one of them it is defined as follows,

> *"The Domaine Public Payant is a system by which a user of materials in the public domain is required to pay a compulsory license fee in order to reproduce or publicly communicate the work, despite its status in the public domain* (WIPO Committee on Development and Intellectual Property (CDIP), 2012).

According to another WIPO report:

> "[*u*]*nder a system of domaine public payant, or "paying public domain," a fee is imposed for the use of works in the public domain. Generally, the system works like a compulsory license: the use is conditioned on payment of the prescribed fee but not upon the securing of a prior authorization. The public domain to which such a regime applies is usually only composed of works the copyright of which has expired (except in countries applying it to expressions of folklore, as further detailed below). In some countries, only the commercial or for-profit exploitation of public domain material is subject to payment*"

(WIPO, Intergovernmental Committee on Intellectual Property and Genetic Resources, 2010).

The same report states that the paying public domain is still in force in the following nations:

> "*Algeria, Kenya, Rwanda, Senegal, Republic of the Congo, Côte d'Ivoire and Paraguay. The pre-eminence of African countries can be explained by the Bangui Agreement of the OAPI and its Annex on literary and artistic property that provides for such a regime for the exploitation of expressions of folklore and works or productions that have fallen into the public domain*" (ibid.).

WIPO's list is incomplete. Surprisingly, it omits Argentina and Uruguay, two countries where the paying public domain is most actively enforced, uninterruptedly since 1958 and 1934, respectively.

During much of the 20th century the paying public domain enjoyed more success. It was an institution actively promoted by UNESCO and WIPO (UNESCO, 1949; WIPO & UNESCO, 1982) and the idea was championed by European scholars (Dietz, 1990; Dillenz, 1983; Recuel Sirey & Jean Vilbois, 1929).

In 1976 WIPO unveiled the Tunis Model Law on Copyright for Developing Countries, which in Section 17 included a "domaine public payant" (World Intellectual Property Organization, 1976). Later, WIPO and UNESCO created a *Committee of Non-Governmental Experts on the Domaine Public Payant* that met in Geneva, from April 26 to April 30, 1982 (WIPO & UNESCO, 1982). According to indirect sources the aim of the Committee was to extend the paying public domain regime to countries that did not have one, a legal transplant that did not happen. In WIPO's website the link that is supposed to host the report of the above-mentioned meeting is broken.

Incidentally, it deserves to be commented that UNESCO' support of the *domaine public payant* seems to this author to contradict to its mandate (as the *United Nations* Specialised Agency for *Education, Science and Culture*). A *domaine public payant* acts like a sort of tax, thus increasing the costs to access to educational, scientific and cultural works.

In 1996, the European Parliament commissioned a report to study the legal feasibility of the *domaine public payant* according to the European Union law.

"In the EU the duration of copyright is (since the formal acceptance of the EC Directive on the harmonisation of duration of copyright protection (O.J. 1993, L 290/9) 70 years after the death of the author. The issue of whether or not the concept of a "domaine public payant" should be introduced, is, however part of a challenging legal debate to which no easy or straight forward answer can be given. The scope of the study is therefore to analyse whether, in theory, it is feasible to provide a degree of sustenance for living authors in the EU through the introduction of the concept of "domaine public payant". In other words, the main question which this legal study addresses is the relevance and acceptability of a legal theory for granting financial support to living authors where such finances are derived from the economic benefits of literary works which have fallen into the public domain" (Inge Govaere & Sheena, 1996).

The report concludes suggests there are no legal obstacles for the *domaine public payant* in the EU, and recommends its adoption. A recommendation that seems not to have resonated among EU Member States.

From the perspective of international intellectual property law, there seems to be no obstacle to its implementation. The Berne Convention or the TRIPS Agreement establish obligations to its members to guarantee minimum levels of protection, the *domaine public payant* is an additional mechanism that is optional for countries to implement.

"Dietz, who situates the domaine public pay ant in the field of copyright, also argues that there is nothing in the international copyright treaties which specifically prevents the introduction of a system of domaine public payant protecting the rights of the community of living authors. International copyright treaties merely lay down minimum standards and norms and States may, while still complying with those treaties, introduce more rigorous standards which would extend protection similar to or akin to copyright to the community of living authors. Regardless of the legal nature of the system of domaine public payant there thus does not appear to be an incompatibility with international law." (Inge Govaere & Sheena, 1996)

In a similar vein, the UNESCO/WIPO Committee of non-governmental experts on the domaine public payant stated that the international obligations regarding copyright law does not affect the *domaine public payant*, either positively or negatively.

However, it is debatable these copyright treaties and for a such as WIPO and the WTO (today) favour the adoption of the *domaine public payant*. In particular after WIPO's commitment to implement the 45 Recommendations contained in its *Development Agenda* (vid. infra).

"No existing international conventions impose domaine public payant, although amendments to include domaine public payant protection have been suggested by UNESCO to both the U.C.C. and Berne Conventions. International draft documents, like the Tunis Model Law on Copyright, have encouraged the implementation of domaine public payant to help developing countries fund copyright systems, stimulate creative activities, and preserve their rich cultural heritages. One scholarly commentator has even offered domaine public payant as a solution for the copyright duration problems facing the European Economic Community as it consolidates." (Inge Govaere & Sheena, 1996)

However, at the moment, the *domaine public payant* does not seem to be a trending topic anymore. A quick search in *Google Trends*, a search analysis tool provided for free by Google Inc., shows the following result for the search term "*domaine public payant*" (and its English and Spanish translations, "paying public domain" and "*dominio público pagante*") from 2004 to date:

> *Hmm, your search doesn't have enough data to show here. Please make sure everything is spelled correctly, or try a more general term.*
> (Google Trends, https://trends.google.com/, last search July 9, 2018).

Moreover, in most developed countries the *domaine public payant* may become an inconvenient topic. The encroachment of the *commons of the mind* (Boyle, 2010) and the defense of the (free) public domain occupies many scholars (Guillaume Champeau, 2004)and NGO (e.g. Free Software Foundation, Creative Commons, Wikimedia Foundation, Communia Network, etc.)

Lawrence Lessig in a 2002 lecture spoke like this,

> "*We speak of a commons as if it is only a tragedy; we recall the public domain as if it were simply an echo from some romantic past; we embrace, (...), the idea that the whole world is best managed when divided among private owners, and we proceed to divide the world among private owners. Most Americans agree with the Walt Disney Corporation that Mickey Mouse is Disney's now and forever; they don't even notice the irony then when Disney can make millions off of Victor Hugo's creation, the Hunch Back of Notre Dame, or Sergei Prokofiev or Pocahontas. So invisible is public domain that we don't even see it when it is everywhere around; so invisible is the idea that the free might matter to creativity, that when it is enclosed, we are convinced this is progress*" (Lessig, 2002a).

The idea of a paying public domain has recently re-surfaced at international for a, usually proposed as a solution to the ongoing discussions around Traditional Knowledge or Traditional Cultural Expressions (similar but not identical concepts) (Graber, Kuprecht, & Lai, 2012).

In a similar vein, also at WIPO, US folk musician Peter Seeger proposed the creation of a *Public Domain Commission*, in practice means the instauration of a paying public domain to support folkloric works (WIPO, 2006).

Gervais is sceptical the *domaine public payant* could be a workable solution to either TK or TCE,

> "*A domaine public payant (literally "paying public domain") could also be established to collect funds to compensate holders of traditional knowledge. [omissis], however, the main difficulty would be identifying the proper rightsholders and the uses to cover, especially in light of the importance of public domain principles. A domaine public payant solution would, at least in the eyes of certain groups of users, take the form of a "tax," which may be politically difficult to establish in certain countries, particularly the United States*" (Gervais, 2002).

Another WIPO report suggest the *domaine public payant* could be used to fund the digitization of works,

> *"The idea of the domaine public payant can be envisaged as a way to fund the preservation of public domain works by sharing the burden of financing the public availability of public domain works, namely by digital libraries, with the commercial exploiters thereof. It could therefore enhance the preservation and availability of the public domain, particularly in providing incentives to digitize public domain material"* (WIPO Committee on Development and Intellectual Property (CDIP), 2012).

However, successful initiatives like *Google Books* and the *Gutenberg Project*, private and transnational, suggest that digitization and preservation of works in the public domain can also be achieved in another way, without imposing any onerous burden to the reader. *Google's* business model is based in third-party advertising whereas *Gutenberg Project's* on donations.

The *domaine public payant* seems to have multiple uses. An Indian scholar suggested a paying public domain could serve to subsidise the publication of works of deceased Indian poets (Rajan, 2001)

In Argentina, where the *dominio público pagante* has been uninterruptedly in force since 1958 few local scholars have written about it (D. Lipszyc, 2014, 2016; Delia Lipszyc, 1983; Delia Lipszyc et al., 2010; Mouchet, 1983). Moreover, the existence of the *domaine public payant* is totally unknown to the common citizen, and even to some publishers, public libraries and archives (based on anecdotal evidence).

From a comparative perspective, not many foreign authors referred to the Argentine *dominio público pagante.* One of them is Harvey, writing under the auspices of UNESCO (Harvey, 1979, 1994),

"*A special and prominent place must be given in this study to the establishment, in February 1958, of a complete system for the application in Argentina of the institution known as 'payment for the use of works in the public domain' (domaine public payant), in view of its institutional implications of profound socio-cultural content, its sophisticated legal and conceptual elaboration and the considerable sense of pride in it felt by the Argentine legislator, who has surpassed all experiments in any similar field*" (Harvey, 1979).

However, none of these works have applied a law-and-economic analysis to the *domaine public payant.* The few studies and reflections on the subject adopt a purely legal approach (formalistic). This is, to my knowledge, the first comprehensive study of the *domaine public payant* from a legal and economic perspective.

6.3 KEY FEATURES OF THE "DOMAINE PUBLIC PAYANT"

The *domaine public payant* can take many forms, as it has not been applied equally in all countries. For instance, it may be applicable to all types of works or only some of them, it can be managed by a state or private agency, etc.

6.3.1 LEGAL NATURE

There are two main theories about the legal nature of the *domaine public payant.*

I. The *domaine public payant* as an extension of the copyright term. According to this thesis the author's economic rights are transferred to the state. There are two variations. The first posits a kind of eminent domain of the state (*domain d'état*) on the economic right of the author. The second one refers to the "rights of the community of authors", a concept ascribed to Dietz (A. Dietz, 1990). According to Dietz' idea, this "community" is a collective body with legal status subject to private law.

II. The *domaine public payant* is a type of tax, excised by the state in exercise of its imperium. This thesis, to which I subscribe (vid. infra), posits the fiscal or parafiscal nature of this institution.

According to the last thesis, the *domaine public payant* would be an indirect tax, a special one with a specific purpose. General taxes are levied to provide for public goods for the benefit of all citizens (e.g. for defence, public health, public education, etc.). The proceeds from the *domaine public payant* will only accrue to one group of citizens. For instance, in the case of the Argentine *dominio público pagante*, national authors and artists.

A study commissioned to the *Max Planck Institut* in 1968 accepted the fiscal nature of the *domaine public payant*, and defended the prerogative of the state to pass legislation in that direction,

"The distinction which is essential for the qualification of domaine public payant relating to the law has to be made according to the financial source from which the means for the help can be gained. The financial source in the first place can be a tax or another tribute, which has to be paid for the enjoyment or the professional use of a work of literature [or] art. In principle the legislature is free to impose taxes on any feasible enjoyment or professional use of such a work" (Max-Planck-Institut für Auslandisches Patents Urheber & Wettbewerbsrecht, 1968).

Any tax, whatever its type or purpose, will have a distortive effect on consumer preferences, having distributive and allocative consequences (Posner, 2003) (vid. Chapter 17, Taxation). A tax creates an incentive to substitute the taxed good or service by another non-taxed. In the case of the *domaine public payant*, at least according to the opinion of the supporters of the so-called *unfair competition* thesis (see infra), the idea is to make

the consumer of creative goods indifferent between copyrighted and uncopyrighted goods. In other words, the *domaine public payant* tax has the deliberate intention of artificially (i.e. by way of the law not the market) increasing the cost of works in the public domain.

6.3.2. AUTHORIZATION REQUIREMENT

In some regimes the use of a work in the *domaine public payant* requires previous authorization from the governing body, in addition to the payment of a fee. This feature has been criticised as it entails the risk of *dirigisme intellectuel*, i.e. the state agency may decline authorization to use works that may be critical to the current administration.

The use of works in the *dominio público pagante* in force in Argentine and Uruguay does not require prior authorization. However, some African countries do (or did) require previous authorization in addition to the payment of the fee. For instance, Cameroon in relation to works in the public domain considered to belong to the cultural patrimony of the country,

"Une logique similaire gouverne le cas où la production du patrimoine culturel est tombée dans le domaine public, c'est-à-dire l'hypothèse où la période de protection par le droit d'auteur est arrivée à son terme. Dans ce cas qui concerne également au premier chef le patrimoine culturel, l'article 39, alinéa 2 de la loi 2000 subordonne l'exploitation de l'œuvre à une déclaration préalable adressée au Ministre en charge de la Culture et au paiement d'une redevance dont le montant est fixé par l'article 8 du décret d'application à la moitié de celle qui était habituellement versée"(Fometeu, 2004).

6.3.3. DURATION

Copyright has a finite duration, life of the author plus either 50, 70, 80 or 100 years *post mortem auctoris*. Conversely, *the domaine public payant*, is usually perpetual (at least in the systems reviewed in this dissertation).

For instance, perpetual is the *dominio público pagante* in force in Argentina and Uruguay. However, the French *Caisse National des Lettres* was financed by a *domaine public*

payant limited only to 15 years (today both the *Caisse* and the *domaine public payant* have been abolished in France) (Mollier, Régnier, & Vaillant, 2008) (p. 58).

According to an old report by the Max Planck Institute, copyright extension should have no incidence on the duration of the domaine public payant, as the two institutions have different goals (I do not subscribe to this view),

The extension of the copyright protection term from 50 to 70 years after the death of the author is thought as a partial compensation for the cancellation of the regulations about the domaine public payant. However, one must keep in mind that such a compensation can only be achieved to a very limited extent. The social purposes aimed at by the domaine pubic payant, to support needy authors and their relatives, and the promotion of promising authors, cannot be achieved by an extension of the term of protection. The benefits of the extension of the term of protection only affects the heirs of deceased authors and the exploiters of their works. Therefore the idea of a domaine public payant for achieving its commendable purposes must be further promoted" (Max-Planck-Institut für Auslandisches Patents Urheber und & Wettbewerbsrecht, 1968).

6.3.4. FOREIGN WORKS

Shall the domaine public payant tax applicable to foreign authors? If so, this implies foreign authors subsidise local ones, because the beneficiaries of the tax are only national authors and artists. As it is applied in Argentina and Uruguay, for instance, the *dominio público pagante* does not discriminate between works by nationals and foreigners.

The argument to justify taxing foreign works is the constitutional power of the state to impose and collect taxes within its territory (which implies to accept the fiscal nature of the *domaine public payant*),

> "*When the State imposes a charge on foreign works that have fallen into the public domain, it is not necessarily claiming to be the owner of the work or the author's heir, but is exercising a prerogative over the purely economic content of certain activities within its jurisdiction: publication of a book, performance of a work, broadcasting by radio or television, etc.*" (Mouchet, 1983)

The same criterion was suggested for the creation of *domaine public payants* in the EU,

> "*As the personal link between the author and his work is irrelevant for the purpose of domaine public payant, which is a major distinction with copyright, there is no valid reason to distinguish between national and foreign works.*" (Inge Govaere & Sheena, 1996)

So, in practice, the performance of works by W. A. Mozart in Argentina must pay the *dominio público pagante* fee, even though Mozart was Austrian and died before Argentina declared its independence from Spain (1810-1816).

According to indirect sources, Croatia had o still has in place a domaine public payant applicable exclusively to folkloric works of national authors.

6.3.5. NON-COPYRIGHTED WORKS

In Argentina and Uruguay, for instance, the *dominio público pagante* also applies to works that were never copyrighted, for instance works created before copyright laws were enacted.

Thus, the Argentine Fondo Nacional de las Artes can require an editor the payment of the DPP fee for new editions of works by Sophocles, Tacitus or Xenophon.

The retroactive application of the *domaine public payant* has been justified in the *efficiency* of the institution,

> "*Any limitation in time would affect the unity of the institution, and also its efficiency. If a quantity of works were in the free public domain, they would automatically compete with works in the domaine public payant; furthermore, on what criterion would a limitation in time be based- fifty years past, a hundred years? Why include Balzac and exclude Shakespeare?*" (Mouchet, 1983).

6.3.6. NATURE OF THE WORKS

It seems obvious, if the aim of the *domaine public payant* is to obtain fiscal revenue, that the broadest definition of the taxable activity will be preferred. Then it is not surprising

that usually the *domaine public payant* is applicable to every type of literary or artistic works,

For instance, in Argentina the following public domain works are taxable, viz. theatrical, lyrical, literary, and scientific works, choreography, ballet, poetry recitals, speeches, films, paintings, sculptures, architectural drawings, etc.

6.3.7. ENFORCING AUTHORITY

Regarding what type of institution is in charge of collecting the tax on the *domaine public payant*, there are two possibilities, either,

I. A state agency manages, in which case public (administrative) law applies. This is the case of Argentina, where collection of dominio público pagante is entrusted to the *Fondo Nacional de las Artes*, an autarchic entity under the aegis of the Ministry of Culture; and also in Uruguay, where it is administered by the *Consejo Nacional de Derecho de Autor*.

II. A private body manages, usually a legal entity under private law. This is the suggestion of Dietz for his "*right of the community of authors*" (A. Dietz, 1990).

6.2.8. DROIT DE SUITE

The so-called *droit de suite* (a literal English translation would be *right to follow*), is an economic right granted to artists on the resale of original works of arts (usually works of graphic or plastic nature, such as pictures, collages, paintings, drawings, engravings, prints, lithographs, sculptures, tapestries, ceramics, glassware and photographs).

The EU has regulated certain aspects of the *droit de suite* in Directive 2001/84/EC of September 27, 2001 *on the resale right for the benefit of the author of an original work of art*. However, the *droit de suite* is not universally recognized neither it is an obligation under international copyright law. Much like the *domaine public payant*, the *droit the suite* is an additional institutional layer that countries may adopt or not as part of their

own cultural policy. However, like the *domaine public payant*, the *droit the suite* is also disputed from the economic standpoint as it may become a competitive disadvantage to the countries that implement it (for instance, auction houses tend to favour countries without *droit the suite*).

The only jurisdiction I know where both *domaine public payant* and *droit de suite* are enforced. In Uruguay the *droit de suite* is recognized in Art. 30 of Law no. 18.046. Accordingly, once an original work of art enters the public domain, the *droit de suite* for the resale of original works of arts falls within the scope of the *domaine public payant*. Thus, the Uruguayan *Consejo Nacional de Autor* can also collect a 3% fee from the resale price of original works of art in the public domain. ~~In Argentina there is no *droit de suite*.~~

6.3.8. COLLECTION

The collection of the *domaine public payant* tax can be entrusted to the governing body, whether public or private, or delegated to third parties. Delegation of tax collection (so-called *tax farming*), which is a constitutional prerogative of the state, is sometimes seen with suspicion (like the *publicans* at the times of the New Testament).

In Argentina, the governing body, *Fondo Nacional de las Artes*, collects only a small amount of the *domaine public payant* tax. Most of the collection has been delegated to collecting societies. Dietz in his proposal suggests a similar strategy (A. Dietz, 1990). However, it must be noted that in most countries collecting societies are legal entities of private law, not agencies of the state.

6.3.9. DETERMINING THE QUANTUM

The governing body is usually free to determine the quantum of a tax. Here two there are two theories. To those authors that justify the *domaine public payant* according to a sui generis interpretation of *unfair competition*, inter alia Delia Lipszyc, the quantum of the tax should be equal to the royalty of an equivalent copyrighted work. Their underlying idea is that works in the public domain should not be cheaper than equivalent copyrighted ones, the leveller being the amount of the tax (otherwise, these authors claim, there would

be a case of *unfair competition* of the former against the latter – a claim I reject, more infra). This is the criterion applied by the *Fondo Nacional de las Artes* in Argentina. In addition, it must be mentioned that the FNA is an autarchic institution, as such it does not receive funds from the Ministry of Culture or other government agencies. Therefore, the FNA must collect all the necessary resources to pay its own costs. The main source of revenue of the FNA is the tax collected on the *domaine public payant,* so the operative and administrative costs of the bureaucratic machinery are certainly taken into account at the moment of setting the quantum of the tax.

The Report of the EU Parliament did not accept the "unfair competition hypothesis" and suggested a lower base for the calculus of the fee,

"Lipszyc argues that the fees levied on works in the public domain pursuant to a system of domaine public payant should be equal to and not less than those levied on works pursuant to copyright as otherwise works in the public domain would compete unfairly with works subject to the payment of copyright royalties. This argument can hardly be accepted for even if it were the purpose of the domaine public payant to eliminate "unfair competition" between protected and unprotected works, which it is not, it could not possibly achieve that result. (Omissis) Instead of focusing on the elimination of such alleged unfair competition prevailing in the market, it seems more appropriate to take into account the public interest in having works available at a reasonable cost. In this respect, the ceiling established by certain participants to the UNESCO/WIPO Committee of non-governmental experts on the domaine public payant seems to be acceptable. They held that the fees levied under the domaine public payant should not be more than 50% of the royalties obtained under copyright." (Inge Govaere & Sheena, 1996).

The UNESCO/WIPO Committee of non-governmental experts on the *domaine public payant* has expressed a different view, accepting that even after the tax works in the *domaine public payant* should be cheaper than copyrighted ones. Firstly, because works in the public domain are not protected by an exclusive right so they must be subject to competition, so their price must necessarily fall as an effect of market competition. Secondly, to take into account the public interest to access these works at a reasonable price.

A general problem to the centralised determination of the price of a good or service, in lieu of the market, has been discussed by Hayek (F. Hayek, 1945). This is a problem that

permeates all centralised bodies that must unilaterally determine the quantum of taxes, fees, etc., ex ante facto.

The problem is twofold. For instance, let us assume the FNA determines a tax quantum that is too low, then it may be insufficient to fulfil its intended role (i.e. redistribution among its intended beneficiaries and/or even to cover institution's operating costs). If the tax quantum is set too high, the disincentive to exploit works in the public domain may increase to a point at which nobody is willing to pay for it, which a similar financial impact as the previous case.

6.3.10. BENEFICIARIES

The proceeds from taxing works in the *domaine public payant* go to a specific group of people, usually authors, artists but sometimes even publishers (as it was the case of the *Caisse Nationale des Lettres* from 1956 to 1976 (see infra). In Argentina, the intended beneficiaries of the *dominio público pagante* are living national authors and artists. However, the proceeds from the Italian *diritto demaniale* went to the general treasury and were used to finance general expenses.

6.4. THE ORIGINS OF THE "DOMAINE PUBLIC PAYANT"

The most famous advocate of the *domaine public payant* was Victor Hugo. Together with Honoré de Balzac, Alexandre Dumas, George Sand and others *écrivains* he founded the *Société des gens de lettres* in 1838. This society has survived to this day and still promotes authorial economic and moral rights. However Hugo did not *invent* the idea of the *domaine public payant*, he borrowed it from Pierre-Jules Hetzel, a jurist who had published *La propriété littéraire et le domaine public payant* in 1858 (Hetzel, 1858).

Victor Hugo promoted the institution of a *paying public domain* regime in France in two speeches delivered before the *Congrès Littéraire International* held in Paris in 1878; the first one was delivered on June 21 and the second on June 25 (Hugo, 1885). To put Hugo's words in context, he spoke at a time when there was no such thing as an *international*

copyright; the Berne Convention for the Protection of Literary and Artistic Works would be signed eight years later, in 1886.

Moreover, at the time of delivering the speeches, French copyright was granted for a fixed period of time, since the date of publication, and there was no *post mortem auctoris* term. The reader should bear such contextual information in mind, and compare it to the current standard term of copyright protection of (remaining) life of the author plus 50, 70 or more years *post mortem auctoris*.

Hugo's proposal of a *domaine public payant* was conceived to harmonize three different sets of rights: (a) the rights of the author over her works (moral and economic); (b) the rights of society (to access the works); and (c) the rights of the author's heirs (only economic).

Hugo advocated that the author should have absolute control over her economic and moral rights during the span of her lifetime. However, after the demise of the author only limited economic rights should be passed to the heirs, so anyone could publish the works without prior authorization. The only requirement, according to Hugo, should be the payment of a fee to the author's direct heirs and only to them (that he called a *redevance perpetuelle*). Direct heirs were first generation descendants, i.e. daughters and sons only, not granddaughters and grandsons.

He said this *redevance perpetuelle* should be proportionate. Moreover, it should be moderate. According to Hugo's tripartite scheme mentioned supra, the economic wellbeing of the author's heirs is subordinated to the superior interest of society to access the works. In that regard he wrote,

> "[Omissis] *je veux que la loi soit absolument juste. Je veux même qu'elle incline plutôt en faveur du domaine public que des héritiers. [Omissis] Ce droit [the right of the heirs], messieurs, ne l'oubliez pas, doit être très modéré, car il faut que jamais le droit de l'héritier ne puisse être une entrave au droit du domaine public, une entrave à la diffusion des livres. [Omissis]".* And he concluded his first speech by saying: *"1° Il n'y a que deux intéressés véritables: l'écrivain et la société; l'intérêt de l'héritier, quoique très respectable, doit passer après. 2° L'intérêt de l'héritier doit être sauvegardé, mais dans*

> *des conditions tellement modérées que, dans aucun cas, cet intérêt ne passe avant l'intérêt social*" (ibid.).

In his second speech Hugo clarified how this system should work. The *domaine public payant* begins immediately after the death of the author. Hugo's *domaine public payant* did not rest on a *droit d'auteur* that included a *post mortem auctoris* term. This should be contrasted to the current regimes of *dominio público pagante* in force in Argentina and Uruguay that begins after copyright has expired (life of the author plus 70 and 50 years *post mortem auctoris*, respectively), and that are, in addition, perpetual. Hugo's conception of the domaine public payant seems much more balanced and quite different to the ones still enforced today.

Hugo was contrary to give the author's heirs, or any other subsequent right holder, exclusive economic rights over the works. To make this point he drew a distinction between *heirs of the blood* (successors) and *heirs of the spirit* (society) and favoured the latter over the former. According to Hugo the main beneficiary of an author's creative genius should be the society and not her heirs:

> *"L'héritier du sang est l'héritier du sang. L'écrivain, en tant qu'écrivain, n'a qu'un héritier, c'est l'héritier de l'esprit, c'est l'esprit humain, c'est le domaine public"* (ibid.).

Hugo was aware of ancient Roman and French legal rules and so understood that property, including literary property, is not absolute an absolute right in itself. Under certain circumstances even exclusive rights like property must be limited to serve the common good,

> "La propriété, il y a des jurisconsultes qui m'entendent, est limitée selon que l'objet appartient, dans une mesure plus ou moins grande, à l'intérêt général. Eh bien, la propriété littéraire appartient plus que toute autre à l'intérêt général; elle doit subir aussi des limites" (ibid.).

Hugo was commensurate in his claims for a term of duration for authorial rights. He suggested a finite term, *droit d'auteur* should last 50 years, without any not *post mortem auctoris* term). In this sense he said,

> *"La loi peut [Omissis] accorder à l'auteur, par exemple, au maximum cinquante ans. Je crois qu'il n'y a pas d'auteur qui ne se contente d'une possession de cinquante ans"* (ibid.).

However, Hugo's *droit d'auteur* ended once the author died and thus domaine public payant begun, immediately.

The *redevance perpetuelle* was a kind of personal right, limited to ~~the benefit only of~~ the next of kin (*héritier direct*) only and to transferable to anybody else. After de demise of the direct heirs or in case of their absence, the *redevance* should go to a fund managed by authors (by peers and not by state bureaucrats) that should be used to subsidise younger authors. Therefore, according to Hugo moral authorial rights ended with the life of the author herself and were not passed to the direct heirs.

Hugo's *domaine public payant* was indeed perpetual, but as a liability rule (authorisation to use was not required, just the payment of a fee) not a property rule, as during the validity of *droit d'auteur* (where the right holder has an exclusive right, whether to authorise or not uses of her work).

Hugo believed successful authors had a moral duty to help new generations of their craft. He said,

> "[Omissis] *vous rien de plus beau que ceci: toutes les œuvres qui n'ont plus d'héritiers directs tombent dans le domaine public payant, et le produit sert à encourager, à vivifier, à féconder les jeunes esprits! [Omissis] Nous sommes tous une famille, les morts appartiennent aux vivants, les vivants doivent être protégés par les morts. Quelle plus belle protection pourriez-vous souhaiter?*" (ibid.).

In sum, Victor Hugo's conceptions of *droit d'auteur* and *domaine public payant* were temperate and balanced seen in the proper historical context. Moreover, he took into account the interests of all the stakeholders and gave preponderance to the society over the heirs of the author. It is important to read the original historical sources to avoid tergiversated interpretations, abundant nowadays. However, it should also be said that Hugo wrote at a historical time where few people wrote, and the act of writing made them ipso facto members of a profession (*les écrivains*). A *domaine public payant* à la Hugo

becomes more complex and perhaps less desirable in a world in which most of us are writers, scholars, bloggers, photographers, musicians, etc.

6.5. THE DOMAINE PUBLIC PAYANT IN THE 21ST CENTURY

By the mid-20th century the *domaine public payant* was a widespread cultural policy mechanism and a regular topic of discussion at international fora. A 1949 UNESCO study mentioned the *domaine public payant* was, at the time, in force in Uruguay, Bulgaria, Italy, Romania and Yugoslavia (UNESCO, 1949).

The list of countries mentions both centralised-economy and market-economy countries. In 1949 Bulgaria, Romania and Yugoslavia (today Slovenia, Serbia, Macedonia, Montenegro, Croatia, Bosnia and Herzegovina and Kosovo-sovereignty disputed) were socialist (communist) countries, satellites of the U.S.S.R.

Of all the countries mentioned in the 1949 report, only Uruguay still enforces a *domaine public payant*, the other ones (then communist countries, today market-economies) have abolished it.

Recently the discussion of the *domaine public payant* has resurfaced at WIPO in relation to *traditional knowledge* (an area where there has been little progress in the last decades). In relation to a *domaine public payant* for TK a recent WIPO report cast doubts about its efficacy,

> "[…] *the operation of such a system may constitute an impediment to the free use of public domain works. The extent of such interference depends, at least in part, on the level of the fees. The system has been proposed as a model to protect TCEs, directed at indigenous arts councils, for the nurturing of traditional works by providing monetary compensation for indigenous communities. The idea was investigated in the early 1980's by WIPO and UNESCO. Some developing countries actually apply the system to exploitation of folklore material. However, the effectiveness of such a system has not really been assessed and the extent to which it can protect traditional works has been questioned. Indeed, the administration and collection of such fees can be a great burden for collective societies, particularly in developing countries. What is more, it has been contended that it would not be a satisfactory solution for communities whose priority is*

control over their TK and TCEs rather than remuneration" (WIPO, Intergovernmental Committee on Intellectual Property and Genetic Resources, 2010).

At the moment, only a handful of countries effectively enforce a *domaine public payant,* as we will discuss below.

6.5.1. COUNTRIES ENFORCING A DOMAINE PUBLIC PAYANT

According to the (incomplete) list of countries included in the WIPO *Scoping Study on Copyright and Related Rights and the Public Domain* (Dusollier, 2011) and my own research, the *domaine public payant* is at the moment in force in the following countries: Algeria, Argentina, Bolivia, Cameroon, Croatia, Ivory Coast, Guinea, Kenya, Madagascar, Republic of the Congo, Rwanda, Senegal, Togo, the Slovak Republic, Paraguay and Uruguay. However, because not in every case was I able to check current sources I cannot guarantee any of the above-mentioned countries had abolished their *domaine public payant*.

A) ALGERIA

According to indirect sources, Algeria has a *domaine public payant* in force since 1973, as it is mentioned in the *Scoping Study on Copyright and Related Rights and the Public Domain* (Dusollier, 2011).

A) ARGENTINA

Argentina's *dominio público pagante* is in force since 1958. The Argentinian system has been the object of a case study and so it will be discussed infra.

B) BOLIVIA

Section 58 of the Bolivian Copyright Act no. 1322 establishes a limited *domaine public payant*, it excludes from the payment of the fee non-commercial uses of works. To make

any commercial use of a work in the *domaine public payant* it is required to pay a fee equivalent to 10-50% of the equivalent copyright license to the enforcement authority.[5]

C) CAMEROON

At least until 1982 Cameroon enforced a *domaine public payant* in force. However, such a system may still be in force in relation to works in the public domain that are considered to be part of the national patrimony (Fometeu, 2004).

D) CROATIA

According to an Act of 2003 Croatia enforces a limited *domaine public payant* that requires the payment of a fee for public communication of folk literary and artistic creations.[6]

E) IVORY COAST

Ivory Coast had a *domaine public payant* in force at least until 1978. This author could not get more recent information.

F) GUINEA

[5] *Art. 58: (2) La utilización bajo cualquier forma o procedimiento de obras del Patrimonio Nacional y del dominio público será libre, pero quien lo haga comercialmente, pagará al Estado, de acuerdo con lo establecido en los reglamentos, una participación cuyo monto no será menor del diez por ciento (10%) y no mayor del cincuenta por ciento (50%) que el que se pague a los autores o sus causahabientes por utilización de obras similares sujetas al régimen privado de protección. (3) Los montos recaudados por concepto de utilización de obras del Patrimonio Nacional, se aplicarán únicamente al fomento y difusión de los valores culturales del país.*

[6] Copyright and Related Rights Act no. 167 (2003). Article 8 (3) Folk literary and artistic creations in their original form shall not be the subject matter of copyright, but their communication to the public are subject to the payment of remuneration, as for the communication to the public of protected copyright works. The remuneration shall be the revenue of the budget and shall be used for improving the creativity in the field concerned.

Guinea included a domaine public payant in Section 45 of its Law Adopting Provisions on Copyright and Neighbouring Rights in the Revolutionary People's Republic of Guinea of 1980.[7]

G) KENYA

in the Scoping Study on Copyright and Related Rights and the Public Domain (Dusollier, 2011).

H) MADAGASCAR

In 1998 Madagascar established a limited *domaine public payant* limited to folkloric works.[8]

I) DEMOCRATIC REPUBLIC OF THE CONGO

Another country mentioned in the *Scoping Study on Copyright and Related Rights and the Public Domain* (Dusollier, 2011).

J) RWANDA

Also mentioned in the Scoping Study on Copyright and Related Rights and the Public Domain (Dusollier, 2011). Section 202 of Rwanda's *Law on the Protection of Intellectual Property* no. 31/2009 of October 26, 2009 refers to a *domaine public payant.* [9]

K) SENEGAL

Also mentioned in the Scoping Study on Copyright and Related Rights and the Public Domain (Dusollier, 2011). Section 157 of Senegal's Law on Copyright and Neighbouring

[7] Law Adopting Provisions on Copyright and Neighbouring Rights in the Revolutionary People's Republic of Guinea No. 043/APN/CP, of August 9, 1980 (Art. 45).

[8] Decree no. 98-435 of June 16, 1998.

[9] Law on the protection of intellectual property no 31/2009 of October 26, 2009 (Art. 202).

Rights no. 2008-09 of January 25, 2008 provides for the creation of a domaine public payant for the use of folkloric works.[10]

L) SLOVAK REPUBLIC

Law 13/1993 of the National Council of the Slovak Republic of December 21, 1992 created different Arts Funds (Literary, Music and Plastic Arts) that are funded, among other sources, by imposing a fee on the use of "free works" (according to the English translation).[11] This law came into effect on January 1, 1993.

M) PARAGUAY

Paraguay included a *domaine public payant* in Section 55 of Law No. 1328/1998 on Copyright and Related Rights.

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[10] Law on Copyright and Neighboring Rights in Senegal No. 2008-09 of January 25, 2008 (Art. 157 et seq.). *Loi de droit d'auteur au Sénégal*, *Quatrième Partie, Folklore et domaine public payant ; Art.157. Exploitation du folklore et d'œuvres du domaine public. 1. L'exploitation du folklore ou d'œuvres inspirées du folklore, ainsi que celle des oeuvres tombées dans le domaine public à l'expiration des délais prévus par les articles 51 à 55, donnent lieu à déclaration auprès de la société de gestion collective agréée à cette fin, et au paiement d'une redevance. 2. Le taux de la redevance est fixé par le Ministre chargé de la Culture. Il ne peut excéder 50% du taux des rémunérations habituellement allouées aux auteurs d'après les contrats ou usages en vigueur. Art.158. Affectation du produit de la redevance. -1. Les sommes provenant de la redevance prévue à l'alinéa précédent sont réparties ainsi: a) Collecte sans arrangement ni apport personnel: 50% à la personne ayant réalisé la collecte, 50% à la société de gestion collective agréée; b) Collecte avec arrangement ou adaptation: 75% à l'auteur, 25% à la société de gestion collective agréée. 2. Les sommes revenant à la société de gestion collective sont consacrées à des fins sociales et culturelles.*

[11] Law of December 21, 1992. Contributions for using free works, Section 10 (1) A legal entity and a physical person entitled to engage in entrepreneurial activities according to special regulations who use literary, scientific or artistic work which is from the point of view of the copyright free, 5) is obligated to deduct a contribution for each use of the work. (2) Contributions for using free works will be collected by the Funds; Section 17, For the sale of free sound and sound-pictorial records of non-theatrical works produced, their producer will pay from the total author´s fees for use of literary or musical works a contribution that is for free works a) of a literary kind including musical works with a text) 5 %, b) musical works without a text 15 %; Section 18, (1) For use of free works during the public projection of films or other commercial use of films, a user will pay a contribution in the amount of a) 15 % of the total author´s fees for projection and other commercial use of films for authors of their literary portion, b) 10 % of the total author´s fees for projection and other commercial use of films for authors of their musical portion, c) 2 % of total author´s fees for authors of plastic artworks, including photographic ones, for use of their works during the production of films charged in a current calendar year [Translated to English by Limbecková Kristína].

N) TOGO

Sections 64 and 65 of Togo's Law No. 91 of 12 of June 10, 1991 on the Protection of Copyright, Folklore and Related Rights refer to the *domaine public payant*. [12]

O) URUGUAY

Section 42 of the Uruguayan Copyright Act no. 9.73, of December 17, 1937 (that entered into force in 1938) established a *domaine public payant*.[13] The governing body is the *Consejo de los Derechos de Autor* (*National Copyright Council*). On August 13, 2003 the *Consejo* delegated the faculties to collect the fee on works in the paying public domain to the *Asociación General de Autores del Uruguay* (AGADU), the collecting society that represents authors in Uruguay.

According to a study by *Creative Commons Uruguay* the *Consejo* collects per year a sum between USD 100.000 to USD 130.000, of which 50% is contributed to by other dependencies of the Uruguayan state. The study suggests that between USD 30.000 to 48.000 of the money levied comes from private sources. AGADU charges for its collection services a commission fee of 25% (Creative Commons Uruguay, 2014).

In addition, the National Copyright Council is also entitled to collect the 3% tariff for the *droit de suite* (pursuant to Section 9 of Act No. 9739, of 17 December 1937; and Section 6 of Act No. 17.616, of 10 January 2003) on the resale of pictorial or sculptural works in the public domain.

[12] Law No. 9112 of June 10, 1991 on the protection of copyright, folklore and related rights (Art. 64 and 65); Decree No. 91-199 of August 16, 1991 on the organization and operation of the Togolese Copyright Office (Art. 32).

[13] *Article 42: Cuando una obra caiga en el dominio público cualquier persona podrá explotarla con sujeción a las siguientes limitaciones: a) Deberá sujetarse a las tarifas que fije el Consejo de los Derechos de Autor. El Poder Ejecutivo, en la reglamentación de la ley, velará para que las tarifas que se adopten sean moderadas y generales para cada categoría de obras; b) La publicación, ejecución, difusión, reproducción, etc., deberá ser hecha con fidelidad. El Consejo de los Derechos de Autor velará por la observación de esta disposición sin perjuicio de lo establecido en el artículo siguiente.*

An Uruguayan scholar suggest the collection of the *domaine public payant* and *droit de suite* by the National Copyright Council is illegitimate, as it was entrusted by an Executive Decree and not by an Act of Parliament as it should have been the case, given the fiscal (tax) nature of both institutions, which is a violation of the *principle of legality* in tax law (Chalkling Majó, 2012).

6.5.2. COUNTRIES THAT HAD REPEALED THE DOMAINE PUBLIC PAYANT

The following list might be incomplete, since there is no specific database of countries that enforce or had enforced the *domain public payant*. However, no country enumerated below enforces such a system at the moment.

A) BRAZIL

Section 93 of Act no. 5988 of December 14, 1973[14] established a paying public domain (called *domínio público remunerado*) system in Brazil. The governing body was the *Conselho Nacional de Direito Autoral* (National Copyright Council). It required the payment of a fee to exploit works in the paying public domain which amounted to 50% of a copyright license for the same type of use.

The institution was short-lived. Some Brazilian IP scholars considered the *domínio público remunerado* an unjustified tax created to the benefit of collecting societies (Oliveira Ascensão, 1980). Other criticised how the *Conselho* operated, which did not even have a database listing the works in the paying public domain (M A Cozer Dias, 2006).

Ten years after of its establishment the Brazilian *domínio público remunerado* was abrogated by Law no. 7123 of September 12, 1983 (M Uyeda Ogawa, 2007).

[14] *Art. 93: A utilização, por qualquer forma ou processo que não seja livre, das obras intelectuais pertencentes ao domínio público depende de autorização do Conselho Nacional de Direito Autoral. Se a utilização visar a lucro, deverá ser recolhida ao Conselho Nacional de Direito Autoral importância correspondente a cinquenta por cento da que caberia ao autor da obra, salvo se se destinar a fins didáticos, caso em que essa percentagem se reduzirá a dez por cento.*

According to Abrão the Brazilian paying public domain was finally cancelled because of the pressure of the local publishing industry, which was forced to pay the tribute.

> *"Entre 1973 e 1983 vigorou no Brasil um sistema, ainda existente em alguns países do mundo, chamado de dominio público remunerado, ou domínio público (...) Desapareceu em virtude de forte pressão da industria editorial e de difusão, inconformada com esse pagamento"* (Abrão, 2002).

Since then, Brazil has advocated and implemented policies to expand the public domain and limit IPR. In 2003 the (then) Brazilian Minister of Culture, the famous musician Gilberto Gil, expressed that limiting the duration of exclusive rights is an essential tool to promote welfare (Gilberto Gil, 2003).

B) CHILE

Chile had a paying public domain regime in force between 1970 and 1992. It has been abrogated.

C) CONGO

Zaire, as the current Democratic Republic of Congo was named from 1971 to 1997, abrogated its paying public domain regime in 1986. However, the payment of a fee may still be required to exploit folkloric works.[15]

D) COSTA RICA

Costa Rica repealed the *domaine public payant* in 1982.

[15]Agreement Revising the Bangui Agreement of March 2, 1977 on the Creation of an African Intellectual Property Organization (Bangui [Central African Republic], February 24, 1999). Article 59: Paying Public Domain and Exploitation of Expressions of Folklore (1) The exploitation of expressions of folklore and that of works or productions that have fallen into the public domain on expiry of the terms of protection referred to in Chapters V of Part One and Part Two of this Annex shall be subject to the user entering into an undertaking to pay to the national collective rights administration body a relevant royalty. (2) In the case of works or productions that have fallen into the public domain, the royalty shall be equal to one half the rate of remuneration normally agreed in the contracts or by usage with respect to authors and holders of related rights in protected works and productions. The revenue from the collection of such royalties shall be devoted to welfare and cultural purposes. (3) A part of the royalties collected with respect to the exploitation of expressions of folklore shall be devoted to welfare and cultural purposes.

E) CUBA

Cuba repealed the paying public domain regime in 1977.

F) FRANCE

The *Caisse Nationale des Lettres*, created in 1946 did not have an effective source of funding until 1956, when a limited *domaine public payant* was created by law (only applicable to literary works) and with a finite duration of fifteen years. Eventually, it was abrogated in 1976. The *Caisse* was created in 1946 with the aim of assisting French authors and publishers but there was no agreement as to how to fund it. In 1946 it was proposed to raise a 5% tax on author's royalties, but it was rejected. In 1948 a *domaine public payant* was proposed but it was later rejected by the *Conseil de la République*, for the following reasons,

> *The Conseil felt that because the public domain generally begins fifty years after the death of the author, very few books will be profitable; secondly, when a book is published such a long time after the author's death, it is very often a scholarly or school book. Furthermore, the paying domain is not desirable because the authors in the public domain are often the best ones; the public domain would be a tax paid by the reader of good literature and would be unfair, if not unjust* (Baudel, 1969).

The *Caisse* enforced a *domaine public payant* for only 20 years, from 1956 to 1976.

In addition, according to Séverine Dusollier, Section L111-4 of the *Code de la Propriété Intellectuelle* establishes a sort of *domaine public payant* for works published in France whose authors belong to countries that do not sufficiently protect the *droit d'auteur* of French nationals (Orsi, Rochfeld, & Cornu-Volatron, 2017) (vid. entry "domaine public payant").

G) GERMANY

Germany never had a *domaine public payant* (known in German as *Urhebernachfolgevergütung*) in force. However, in 1962 the German government

proposed a draft bill that included paying public domain provision (*Regierungsentwurf*, Section 73 S.). The bill was never passed.

H) HUNGARY

Hungary had a paying public domain regime in force,

> *Following resolution 14/1994. (II. 10) AB, instead of a decree in a statute, it regulated legal institutions of "right to follow" (droit de suite) and "paying public domain" (domaine public payant) important in terms of fine arts and applied arts* (Notari, 2014).

According to the same source, it was abolished in 1994.

I) ITALY

Italian Law no. 1012 of September 19, 1882 established a copyright term of life of the author plus 40 years *post mortem auctoris*, after which came another period of 40 years during which the work was under control of the state (*dominio pubblico oneroso*). Sections 33 and 35 of Law no. 1950 of November 7, 1925 extended copyright duration to life of the author plus 50 years *post mortem auctoris* but removed any subsequent term of paying public domain (Greco & Vercellone, 1974).

The fascist government in Italy reintroduced the paying public domain under the name of *diritto demaniale*, pursuant to law no. 633 of April 21, 1941. Another decree, 95 of February 6, 1942 established the fee (*tangente*) to be paid to the state for the use works in the paying public domain. For instance, 5% of the income from the performance or public communication of dramatic and musical works; 3% of the selling price for printed works, etc. (Jarach, 1968). The *diritto demaniale* was abolished pursuant to article 6 of Law-Decree no. 699, of December 31, 1996 (Auteri et al., 2012). Italy was the last developed country to abolish a paying public domain regime.

J) MEXICO

Mexico had a paying public domain regime in force between 1963 and 1993. The Mexican Copyright Act of January 11, 1982 had a Section (82) on the *dominio público remunerado*.

In 1993, in order to implement the *North American Free Trade Agreement* (NAFTA), Mexico discussed a draft bill that amended different pieces of legislation, among them the Copyright Law. During the parliamentary debate it was decided to abolish the *dominio público remunerado*.

The following are the reasons for the repeal of the *dominio público remunerado*, according to the records of the Mexican House of Representatives (*Cámara de Diputados*, 1993).

a) The paying public domain must be repealed to balance copyright holders and user's rights;

b) The limited duration of copyright is necessary to foster access to cultural works. Such a desideratum is frustrated by the existence of an onerous public domain;

c) The public domain is a kind of tax;

d) The administrative costs of the paying public domain system probably exceed its benefits; and

e) Most countries never had such a regime and the few that did have repealed it.[16]

The 2003 Mexican Federal Copyright Act did not include any reference to the paying public domain. In this manner, the *dominio público remunerado* was indirectly repealed.

[16] *Decreto que reforma, adiciona y deroga disposiciones de diversas leyes relacionadas con el Tratado de Libre Comercio de América del Norte, presentada por el Ejecutivo federal el martes 25 de noviembre de 1993 (in relation to the Ley Federal de Derecho de Autor): [Omissis] en aras* del *equilibrio entre los autores y los usuarios, conviene también considerar la derogación del régimen de dominio público pagante que consiste en entregar a la Secretaría de Educación Pública un 2% del ingreso total que produzca la explotación de obras del dominio público. En la actualidad muy pocos países mantienen un régimen de dominio público pagante ya que el límite temporal de los derechos patrimoniales de autor tiene por objeto promover la difusión de la cultura y pagar por el uso de obras intelectuales o artísticas cuyos derechos patrimoniales ya se extinguieron dificulta la circulación de la obra y las encarece. El pago al Estado en ese caso, se constituye en un verdadero impuesto.* [Omissis] *Por otra parte, para que la explotación de obras del dominio público fuese debidamente supervisada y cobrada se requeriría de una infraestructura que, para ser eficiente, necesitaría en sí misma recursos mayores a los que se proyecta podrían recaudarse.*

K) MALI

Mali repealed the paying public domain regime in 1977.

L) POLAND

It is unclear, according to the sources consulted, to determine whether Poland still enforces its paying public domain, as it is provided for in its copyright legislation. According to Sterling,

> *In some national laws there are systems under which payment is made (usually to a fund for cultural purposes) in respect of the use of works and productions after the period of protection by copyright or related rights has expired. An example is provided by the Polish Law on Author's Right and Related Rights establishing the Fund for Promotion of Creation, into which payments from levies on public domain material are made (articles 40, 111–114)* (Sterling, 2008)

M) PORTUGAL

Portugal repealed the paying public domain in 1980.

N) RUSSIA

The Russian copyright act of 1993 instituted a paying public domain, but according to scholarly sources it seems it was never actually implemented (Rajan, 2011).

O) TUNIS

Tunis probably repealed the domaine public payant it had in force, applicable only to folkloric works.

We cannot the above list is neither complete nor accurate, given the scattered and out-of-date sources that refer to the *domaine public payant*. However it is highly unlikely more countries than those mentioned supra enforce such a system.

It is interesting to point out that most of the countries that still enforce or at some point in time had enforced a *domaine public payant* in force belong to the civil law tradition. Kenya, a mixed jurisdiction with both elements of English common law and Islamic law, is the only exception.

6.6. *DE RETOUR?*

In the early decades of the 21st century the domaine public payant, that was a forgotten issue in Europe during most of the second half of the 20th century, is making a shy comeback. This trend is more noticeable in France, the birthplace of this institution.

A 2004 report by the French *Conseil Économique et Social*, an advisory body to the legislative branch representing the interests of professional organizations, suggested the creation of a limited *domaine public payant*, i.e. only applicable to digital works to subsidise a fund to encourage the creation of new works (Guillaume Champeau, 2004).
In 2008 French independent editors gathered around the association *L'autre LIVRE* suggested the creation of a new tax applicable to books in the public domain (~~which was~~ elliptically named *pourcentage de droit*[17]). This tax was one of many urgent measures necessary that, according to the association *L'autre LIVRE,* were necessary to save the French independent books market (L'autre LIVRE, 2008).

In 2009 French editors suggested the instauration of a limited paying public domain to subsidize social security for authors and artists and the restoration or digitization of works, etc. (Robin, 2009). A report by *LeMOTif*, an observatory of French reading habits and the French book market, found that in France the market for books in the public domain represented less than one percent of the total book market. Such a small taxable base would be insufficient to provide sufficient revenue to subsidise the intended goals of the institution.

[17] Proponents of the *domaine public payant* are careful not to call it a tax but use instead some other term (e.g. *droit* in France, *derecho* in Argentina).

In 2010 a report financed by the French Ministry of Culture and Communication (known as the *Zelnick Rapport*) suggested the creation of a tax applicable to films in the public domain to fund the digitalization and preservation of French film heritage (Zelnik, Toubon, & Cerutti, 2010)

French collecting societies have recently showed their support to the reintroduction of the *domaine public payant*. For instance, ADAMI (*Société de Gestion collective des Droits des Interprètes*) supported the idea in a 2014 meeting (Marc Rees, 2014).

The SGDL (*Société Représentant les Écrivains*) went farther and suggested the creation of a tax applicable to books in the public domain to fund retirement pensions for French authors (Gary, 2014). In another meeting, Wally Badarou, a member of SACEM (*Société de Gestion Collective des Auteurs de la Musique*), said a reduction of copyright term would be acceptable in case a *domaine public payant* would be (re)established (Oury, 2015).

In a recent paper, Latil considers that given recent developments in French and EU law they may be favourable to the adoption of the *domain public payant* (Latil, 2014).

In German-speaking countries the semantic equivalent to *domaine public payant* is *Urhebernachfolgevergütung*. In 1962 a draft copyright bill proposed the incorporation of a paying public domain regime in Germany (*Bundestags-Drucksacke IV/270*). In the end the bill did not become law and time after time the idea of establishing an *Urhebernachfolgevergütung* in Germany was abandoned.

However, the *domaine public payant* was not completely uprooted from the minds of some German scholars, with sporadic articles being written (Katzenberger, 1982), even featured in the *GRUR* journal (Dillenz, 1983). The *Urhebernachfolgevergütung* was the topic of a doctoral dissertation, in comparison to an ever-longer copyright term (Jean-Richard-Bressel, 2000).

Of all German scholars Adolf Dietz is the staunchest advocate of the *domaine public payant* or *Urhebernachfolgevergütung,* both in Germany and at the EU level (Adolf Dietz, 1982). He called for the creation of a *right of the community of authors,* a sort of

perpetual tax that begins after copyright expires and serves to provide for the material needs of living authors (Dietz, 1990). Dietz's *right of the community of authors* is to be managed by a collecting society or association of authors, not by a state agency (in a similar vein to Hugo's original idea).

In 2000 Dietz asserted his idea (including also *performers*) with the support of the German Writer's Union:

> *"[omissis] to create a "community right of authors and performers" which will allow funds to be collected from public domain works and performances, and given to living artists in support of their work. The proposal and its long pedigree - dating from German government proposals of 1962 Its economic justification lies in the simple idea that more money from the "copyright cake" should directly favour the living generation of authors (and performers),... in the form of grants for young authors and performers, in the form of financing complementary old age and pensions systems, and partly in financing less profitable, but highly cultural editions, communications to the public and other events.... [A]uthors are indeed members of an (in legal terms: fictive) artistic community (past and present). That could mean that authors whose works are successful only long after their death, by way of a general (once more: fictive) testament, contribute to financing and developing the creativity of living authors who are, to a certain degree, paid in advance and will on their own pay back such credits by later income from their works long after their own death. This is what Hubmann, a fierce defender of paying public domain, called the revolving system of authors' remuneration"* (Adolf Dietz, 2000).

During the sixth working session of the 2010 edition of ALAI (*Association Litéraire et Artistique Internationale*) held in Vienna from September 9 to 11, 2010 one of the panels was titled *Domaine Public Payant and alternatives* (ALAI Study Days Vienna, 2010). Among the speakers were Delia Lipszyc from Argentina (*Different Systems of Domaine Public Payant - General Report*) and Adolf Dietz from Germany (*A Modern Concept for the Right of the Community of Authors and Performers - Paying Public Domain*), inter al. (Delia Lipszyc et al., 2010).

6.7. WHY THERE IS NO *DOMAINE PUBLIC PAYANT* FOR INVENTIONS?

Delia Lipszyc is a fervent defender of the Argentinian *dominio público pagante*. She even suggested the Argentinian-style *domaine public payant* should be transplanted to other countries.

However, the limited adoption of the *domaine public payant* and the vast majority of countries that had abolished it suggest some shortcomings. In our contemporary interconnected world rarely a legal institution that is successful in one country is not replicated in other countries (i.e. legal transplants).

To date WIPO has 191 member countries[18] of which only nine of them, or 4,7%, enforce a *domaine public payant* according to WIPO's *Scoping Study on Copyright and Related Rights and the Public Domain* (Dusollier, 2011).

Why there is no *domaine public payant* for inventions? This is a question rarely asked by the proponents of the *domaine public payant*. by analogy. However, if we assume for the sake of argument, that the *domaine public payant* is an effective mechanism to encourage and subsidise authors and artists, why should it not be used also to encourage and subsidise inventors?

After all, literary, scientific and artistic works share the same economic features of inventions; they are all public goods, i.e. non rivalry and non-excludability, as inventions. What works to incentivise new creative works should also work to incentivize new inventions.

However, to my knowledge no country had ever set up a *domaine public payant* for inventions. Scholars and policymakers do not suggest creating a *domaine public payant* to subsidise the activities of inventors, innovators or entrepreneurs.

Then, why the *domaine public payant* is suggested as a mechanism to subsidise authors and artists but not inventors? What is the reason for this divergence? Today both authors artists and inventors work for big corporations (e.g. media conglomerates, film and music production companies, R&D departments in pharmaceutical and IT companies, etc.).

[18] Source: http://www.wipo.int/members/en/ (last accessed 23 May 2018, 20:43).

There seems to be no clear rationale to justify such divergence of policy. If we assume that legal monopolies such as copyrights and patents are insufficient to incentivise authors, artists and inventors, then an additional incentive mechanism (such as the *domaine public payant)* should complement both copyrights and patents.

The very fact that there never was a *domaine public payant* for patents, in the absence of any other explicit justification, suggest that the underlying motives for a setting up a *domaine public payant* may not necessarily be motivated on economic efficiency or a utilitarian role of IPR.

Moreover, as I argue in this dissertation, economic analysis suggests there are no efficiency reasons to justify the creation of a *domaine public payant*, of any kind.

The large majority of countries still enforcing or that had enforced a *domaine public payant* belong to the civil law tradition. Not only its name is French, it also sounds alien to the mindset of the common law operator, that according to many scholars is more prone, by institutional design, to adopt and maintain efficient institutions (a strong version of this thesis was defended by Richard Posner, however it was later moderated) (Posner, 1972).

I would like to mention the so-called *Law & Finance* literature, however controversial that, among other claims, suggest that civil law jurisdictions are more paternalistic, i.e. the role of the state in the economy is more active; whereas, in principle, common law jurisdictions the role of the state in the economy is less prominent (La Porta, Lopez-de-Silanes, Shleifer, & Vishny, 1997; Porta, Lopez-deSilanes, Shleifer, & Vishny, 1999).

State paternalism lead to the creation of state agencies that, for instance, subsidise certain activities deemed worthy or strategic, in spite of the market (such as the *domaine public payant*) or even to insulate them of market forces (like the French *exception culturelle*). Conversely, copyright law is a market-based inducement or encouragement. This is an important conceptual difference between both regimes I will discuss in more detail infra.

6.8. IS THE *DOMAINE PUBLIC PAYANT* COMPATIBLE WITH WIPO'S DEVELOPMENT AGENDA?

In 2004 Argentina and Brazil sent 111 recommendations to WIPO in relation to IP and development. Since day one developing nations felt the TRIPS Agreement was insufficient to address the developmental needs of developing nations.

Those 111 recommendations became the seeds of WIPO's *Development Agenda*, which was presented in 2007 along with the creation of a *Permanent Committee on Development and Intellectual Property*. The *Agenda* receipted 45 of the original provisions and grouped them into six thematic clusters(WIPO, n.d.).

The idea behind the *Agenda* is to reject the one-size-fits-all approach to IPR which had been indiscriminately applied to developed and developing nations alike, making no distinctions among them (Basheer & Primi, 2009). One scholar suggests characteristics of the *Agenda* are malleability, complexity, opportunity and gravity (Netanel, 2008).

Nowadays, the fruits of WIPO's *Development Agenda* are difficult measure

In this section, I will refer to the Agenda's provision that relate the public domain.

Cluster B of the *Agenda* is titled "Norm-*setting, flexibilities, public policy and public domain*". Pertaining to it, proposition no. 16 reads: "*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*".

Proposition no. 20 reads: "*To 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*."

To what extent desiderata such as "*a rich and accessible public domain*" and "*a robust public domain*" are compatible with a domain public payant?

Seen from the perspective, taking into account both literal and teleological interpretations, requiring the payment of a fee to access works in the public domain seems to contradict the Agenda's goals. The *domaine public payant* is an unnecessary barrier towards a *rich, accessible and robust public domain*.

It is clear that a *domaine public payant* limits access and exploitation to works already compensated during the copyright term, without clear welfare benefits. It seems to me a *domaine public payant* is contrary to the core objectives set forth by WIPO's *Development Agenda*.

Argentina enforces a *domaine public payant*. By doing so it impairs the fulfilment of the very same *Development Agenda* it has proposed (in particular, propositions nos. 16 and 20). The Argentinian position of proposing *a Development Agenda* that promotes a "*rich and accessible public domain*" at the international level while enforcing a *domaine public payant* at home seems schizophrenic.

6.9. CHAPTER'S SUMMARY

In this chapter I have reviewed the origins of the *domaine public payant*. The historical account is necessary to put this institution in context, as it was proposed at a time where there was no such thing as an international copyright or a post mortem auctoris copyright term. This helps to realise most contemporary interpretations of the *domaine public payant* are essentially different from the original one advocated by Victor Hugo, inter alia, whose words are usually intentionally twisted at debates.

I also showed evidence that the domaine public payant is not dead, but survives in a bunch of developing countries, mostly in Latin America and francophone Africa. However, the majority of countries that had a *domaine public payant* in force at a point in time have abolished it.

In developed nations, particularly Europeans, the *domaine public payant* is timidly making a comeback, at least at academic events. Moreover, the discussion about the *domaine public payant* never completely vanished from UNESCO and WIPO.

I also mentioned why there is no *domaine public payant* for inventions and that such a system may be incompatible with WIPO's Development Agenda, although not necessarily contrary to international copyright and IPR treaties.

7. THEORETICAL SUPPORT FOR THE DOMAINE PUBLIC PAYANT

7.1 JUSTIFICATORY ARGUMENTS

Arguments serve mainly two reasons, to convince and to justify (Sinnott-Armstrong & Fogelin, 2014). In any democratic state under the rule of law legal rules and institutions ought to be rationally justified. Even a de facto governments feel compelled to justify their decisions paying lip service to lofty ideals. In the following paragraphs I will review the main arguments advanced in support of a *domaine public payant*.

Law is not a science, but an argumentative or rhetorical discipline (although both terms are not exact synonyms). Argumentation is about finding sound arguments, avoiding formal fallacies and, more importantly for the practising lawyer, to convince and persuade her interlocutors. Legal argumentation gained track after WW2 and the crisis of legal positivism (Nazi Germany laws were, from a positivist perspective, valid norms), in particular with Perelman and Olbrechts-Tyteca wrote their treatise on the New Rhetoric, rediscovering and updating the Aristotelic model (Perelman & Olbrechts-Tyteca, 1969). There is a growing literary corpus on legal argumentation, in particular in countries that belong to the civil law tradition, like Alexy in Germany, Atienza in Spain and MacCormick in Scotland (Alexy, Adler, & MacCormick, 2009, 2010, Atienza, 2006, 2013; MacCormick, 1994). It is sometimes forgotten than the father of modern economic science also taught rhetoric (Adam Smith, 1763).

So now let us turn our attention to the analysis of the arguments in support of the *domaine public payant*, as well as those against it. As I have mentioned supra, the *domaine public* payant as it is enforced today relies on a paternalistic view of the state and a distrust in the market economy, as I will explain infra. Also, the *domaine public payant* requires treating authors and artists like a special class or subclass of citizens, either deserving additional protection like employees under employment law (where the interpretative principle *in dubio pro operario* applies) or consumers in consumer law (where the general

interpretative rule of consumption agreements is *pro consumatore*) or specialised financial institutions, like authors and artists that benefit from the *domaine public payant.*

7.2 ARGUMENTS FOR THE "DOMAINE PUBLIC PAYANT"

7.2.1 AUTHORS AND ARTISTS REQUIRE SPECIAL FINANCIAL ASSISTANCE

One explicit rationale for the creation of a domaine public payant is the alleged need to finance the promotion of authorial and artistic activities, usually through a specialised public financial institution, such as it occurs in Argentina,

"*That our financial regime does not have an organization that because of its purpose and specific structure arbitrate the economic means for the promotion of national artistic activities in general, including those with an industrial sense, placed in commerce and cultural media; That it is, therefore, necessary to create a financial system that contemplates the required assistance, establishing at the same time the means to be used to materialize it and the resources that will be applied to said purposes*;" (Decree No. 1224/58, Recitals, first and second paragraphs).

This argument rests on the implicit assumption, rarely made explicit ~~by its supporters~~, ~~which is~~ that copyright law is insufficient to incentivise authors and artists. Therefore, the argument goes on, an additional mechanism is necessary to finance these activities.

For instance in Argentina, the FNA, state agency enforcing the domaine public payant, is known as the "*National Bank for the arts*", however is not a financial institution neither it is subject to the Act of Financial Institutions, no. 21.526.

According to the institutional webpage, the FNA was created in 1958 as,

"*… a bank for artists; a bank without accounts or complex tools, an entity that helps without profiting (como un banco para artistas; un banco sin cuentas ni herramientas complejas, una entidad que ayuda sin lucrar)*"[19]

Lofty ideals this author has nothing against, but such a *bank* is funded by a tax on access

[19] https://fnartes.gob.ar/novedades/60-anos-junto-a-los-artistas

to works in the public domain, which limits knowledge spillover, the creation of derivative works and new business models based in new types of exploitation.

While authors and artists deserve a special parafinancial public institution subsidised by users, a grocer, a baker and an entrepreneur must get funding through commercial banks or the capital market according to market rules.

The *raison d'être* of copyright is similar to that of the *domaine public payant*, in the end both incentivise authors and artists to produce new intellectual works. The difference between these two incentive mechanisms are to be found, then, not in their ends but in the means each one of them employ. I will deal in more detail about these differences below.

The aim of this dissertation is not to criticise an institution like the FNA, neither to deny any state mechanism to subsidise the letters, arts and science.

Both in developed and developing countries the state must assume an active role to promote the arts and sciences, this specially so in the case of basic science (e.g. the National Science Foundation, National Institute of Standards and Technology, and the National Aeronautics and Space Administration, to name a few, in the US).

However, the *domaine public payant*, as a *public bank* for authors and artists, subsidised by the users and reusers of works in the public domain is a distortive, inefficient and ineffective mechanism.

7.2.2 UNFAIR COMPETITION

Unlike copyright law, the *domaine public payant* is not justified in the correction of a market failure.

The most common argument to support the domaine public payant is a sui generis interpretation of unfair competition. In the case of the Argentinian *dominio público pagante*, local scholars justify the tax to avoid unfair competition; i.e. the cheaper price

of public domain works (e.g. because publishers do not need to pay royalties to copyright holders) *vis-à-vis* copyrighted works (e.g. for which the publisher must pay royalties to copyright holders) amounts to a situation of unfair competition (D. Lipszyc, 2014, 2016; Mouchet, 1983). In other words, the cheaper price of the public domain work is unfair. A stunning conclusion, to say the least.

According to an author, the *domaine public payant* becomes a

"... levelling device to ensure that works protected by copyright can compete economically with those in the public domain" (Mouchet, 1983).

The argument as proposed in relation to copyrighted works seems a rather stretched interpretation of unfair competition, which is a concept borrowed from *industrial property*. Unfair competition is not mentioned in the Berne Convention, but it is in the Paris Convention.

Unfair competition is different from competition law, and so are their respective goals. Unfair competition is not meant to protect competition, its goal is "*the legal protection of the competitor*" (Hilty & Henning-Bodewig, 2007).

The *Paris Convention* defines an act of unfair competition as one "…*contrary to honest practices in industrial or commercial matters*..." (Art. 10 bis (2)). The next paragraph provides some examples, "…*confusion by any means whatever with the establishment, the goods, or the industrial or commercial activities, of a competitor*; *false allegations in the course of trade of such a nature as to discredit the establishment, the goods, or the industrial or commercial activities, of a competitor*; *liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity, of the goods*". (Art. 10 bis (3)). Lastly, Members of the Union are obliged to provide "*effective protection against unfair competition*"(Article 10 bis (1)).[20]

[20] *Paris Convention for the Protection of Industrial Property (1979 version). Article 10bis (Unfair Competition). (1) The countries of the Union are bound to assure to nationals of such countries effective protection against unfair competition. (2) Any act of competition contrary to honest practices in industrial or commercial matters constitutes an act of unfair competition. (3) The following in particular shall be prohibited: (i) all acts of such a nature as to create confusion by any means whatever with the establishment, the goods, or the industrial or commercial activities, of a competitor; (ii) false allegations in the course of trade of such a nature as to discredit the establishment, the goods, or the industrial or commercial activities, of a competitor; (iii) indications or allegations the use of which in the course of trade is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity, of the goods.*

From the previous definition, it seems difficult to consider public domain works "*contrary to honest practices*" or capable to "*create confusion by any means whatever with the establishment, the goods, or the industrial or commercial activities, of a competitor*" or to be taken as "*false allegations in the course of trade of such a nature as to discredit the establishment, the goods, or the industrial or commercial activities, of a competitor*" or "*liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity, of the goods*".

The unfair competition (pseudo) argument may operate as a disguised form of protectionism. It reminds this author of Bastiat's famous satire, the petition of the French candle makers to the king, asking for a law ordering all windows to be sealed during daylight hours to protect them from an unfair competitor… the sun! (Bastiat, 1863).

Hermeneutics aside, there are economic problems with the unfair competition argument for works in the public domain. From an economic perspective, for a public domain work to compete successfully with a copyrighted one, they must be substitute goods, i.e. to the consumer (user) to acquire one or the other work should be indifferent. Rarely this is the case with creative works; moreover the consumer of universal literature works (in the public domain since centuries) is probably looking for a totally different type of work and reading experience than the consumer of current (copyrighted) best sellers.

For example the sake of example, the unfair competition argument of public domain works supposes that "Justine, or The Misfortunes of Virtue" by Donatien Alphonse François (Marquis) de Sade is a perfect substitute to "Fifty Shades of Grey" by Erika Mitchels (pen name, E. L. James). These works do not compete among themselves, their target public is different, so they cannot be considered perfect substitutes. Moreover, even if the sui generis unfair competition argument would be true (it is not, as seen), completely disregards consumers' utility.

Last but not least, the *sui generi*s unfair competition claim completely disregards total welfare (it could be argued it is an unjustified transfer of wealth from the user to the producer) and prevents the many positive externalities that occur when works enter the (gratis) public domain from happening.

Where works in the public domain are taxable forever (like in most systems where the paying public domain is perpetual) society never realizes the full benefits of the two-time system.

IPR, to work properly, require a delicate balance. Some policymakers forgot that the rule in a market economy should be competition, not monopoly. Some (legal) monopolies, like copyrights and patents, are necessary in certain situations, like in the case of the market failure of information goods.

To curb the negative side effects of legal monopolies (e.g. deadweight loss) the legislator strikes a sort of intertemporal compromise, in two different phases, (1) copyright phase, during which the author or rightholder has exclusive but temporary rights to exclude all third parties; ius excludendi omnes alios); and (2) public domain phase, in which, use, reuse and access of those works is free, what creates positive externalities (knowledge spillover, more derivative works, new formats and business models, etc.).

7.2.3 PUBLIC BENEFIT

WIPO and UNESCO reports suggesting the instauration of the *domaine public payant* mention its benefit the general public, without much explanation of why it happens (UNESCO, 1949; WIPO & UNESCO, 1982).

Actually, the effect of the *domaine public payant* is the opposite. Consumers of works in the paying public domain are worse off, since the effect of the policy is to raise the price of these works.

As a consequence, consumer surplus diminishes. Also, because of the many inefficiencies associated to the operation of the *domaine public payant* (that I will discuss infra) the increase in producers' surplus is not equivalent to the consumer's loss. Wealth is dissipated between the taxpayer and the intended beneficiary of the *domaine public payant.*

7.3 ARGUMENTS AGAINST THE "DOMAINE PUBLIC PAYANT"

7.3.1 PRICE INCREASE AND DECREASE IN TOTAL WELFARE

As mentioned supra, the intertemporal balance between (1) copyright protection and (2) public domain is essential to a sustainable knowledge economy.

While copyright is meant to encourage authors and artists to create because its monopolistic nature (*ius excludendi*) allows right holders to recover sunk costs (dynamic efficiency); the public domain is meant to favour dissemination and access to works at prices close to marginal cost (static efficiency).

The *domaine public payant* alters this delicate balance, as it increases the cost to access works that have already been compensated during the copyright term.

From a welfare perspective this is undesirable, for two reasons. Firstly, a *domaine public payant* increases the cost of works in the public domain. Moreover, because literary, artistic and scientific works are inputs for new works, the *domaine public payant* becomes a hurdle to the creation of new knowledge. This problem is exacerbated in developing countries, in which GDP per capita is lower vis-à-vis developed ones, so the budget to allocate to education is lower too. As seen supra, the *domaine public payant* is mostly still enforced in developing nations.

Not only citizens in developing countries have less money to allocate to education, but in those developing countries that enforce a *domaine public payant* the costs of works in the public domain are artificially higher (a consequence of the tax). Then, the *domaine public payant* contributes to aggravate, the knowledge gap between developing and developed countries.

Secondly, it is a self-evident truth that no author creates out of the blue (*ex nihilo, nihil*). Existing works are the germ of new ones. The *domaine public payant* makes acquiring

that germ more expensive, increasing the cost of creating new original and derivative works.

From a welfare perspective, there seems to be no valid reason to tax access works that have already been compensated during the copyright term.

7.3.2 DISTORTIVE EFFECT ON CHOICES

It is well known in economic literature that taxes have a distortive effect. This is so because a tax affects consumers' purchase decisions. For instance, a consumer may decide to buy less of a taxed good or switch to a cheaper substitute one. The *domaine public payant is* intended to create a substitute effect (Posner, 2003) (p. 489 et seq.).

According to some scholars, by artificially increasing the price of works in the public domain it is sought to steer consumer decisions to buy copyrighted works. Thus, the paying public domain has mostly a redistributive effects, consumers' utility decreases while copyright holders and collective societies gains increase.

To properly assess the substitution effect we should determine whether works in the public domain and copyrighted ones are perfect substitutes and the cross-elasticity of demand between them. However, even without that assessment it is to be expected that the consumption of works in the public domain, subject to a *domaine public payant* tax, would be lower than without it. The same can be said of the use of those works for the creation of derivative ones.

7.3.3 NEGLIGIBLE INCENTIVE TO CREATE NEW WORKS

Every author gets copyright over his original work, ipso facto with the creation of the work and without any formality being required, according to Art. 5 (2) of the Berne Convention. However, not all authors will get a subsidy from the agency enforcing the *domaine public payant*.

Where a domaine public payant is enforced the author has no ex ante certainty of her chances of been awarded a subsidy, prize or loan. Thus the *domaine public payant*, unlike copyright, may have a trivial or none incentive effect whatsoever.

The *domaine public payant* does not help to incentivise authors and artists to create new works. Mere knowledge of an unknown chance of getting state financial assistance in the future would rarely be considered an incentive to create more works.

Copyright law gives authors the exclusive right to exploit their works for a limited period of time as a way to recover their time, money and effort. From an economic perspective this incentive should take into account the costs of the copyright system, i.e. a cost-benefit analysis,

> *For copyright law to promote economic efficiency, its principal legal doctrines must, at least approximately, maximize the benefits from creating additional works minus both the losses from limiting access and the costs of administering copyright protection* (Landes & Posner, 1989).

> *Once it is determined that the incentive benefits of propertizing expressive works exceed the access costs, the length of the copyright term—the duration of the property right—becomes a device for preventing the copyright owner from being overrewarded* (Posner, 2005)

In countries where a *domaine public payant* in force, some authors would request financial assistance to the enforcing agency; only a few of them would receive assistance, probably less than what is expected, given the human tendency to over-optimism and the limited resources of financial institutions.

Moreover, in some rare cases overcompensation may occur. For example, let us think of a successful author that gets a regular stream of royalties from her copyright that is entitled to a subsidy or soft loan by the state authority that enforces the *domaine public payant*.

Of course, literary prizes operate in a similar fashion, like the *Man Booker Prize* for books written in the English language, but they are privately paid not subsidised by taxing readers,

7.3.4 REJECTION OF A DOMAIN D'ÉTAT FOR CREATIVE WORKS

Where a *domaine public payant* is in force usually the state becomes an *ex lege* successor to the author's economic rights, after the copyright term has expired. As seen supra, one way to justify this transfer is by claiming a *domain d'état* (public property) on intellectual creations. This implies that the state owns these works, but not immediately, only after the copyright term has lapsed.

However, the theoretical framework required to justify the validity of such transfer is non-existent. I am not aware of any Constitution saying that the state is entitled to the economic rights over the intellectual creations of their citizens, after some time. Moreover, in countries like Argentina and Uruguay, it would be even more problematic as the state's claim to economic rights extends to works by foreign authors.

Therefore, the only basis left for a *domaine public payant* is the tax authority of the state.

7.3.5 COMPETITIVE DISADVANTAGE

In the current global market, cultural industries enforcing a *domaine public payant* may found themselves at a competitive disadvantage. For instance, an Argentinian publisher willing to publish a new edition of "*The Gaucho Martín Fierro*" by José Hernandez (who died in 1886) would have to pay the tax to the FNA; this extra cost will be then passed onto the selling price. Whereas, a Spanish publisher willing to publish the same work in Spain will not have to pay this extra cost. Assuming similar production and distribution costs, the Argentinian edition in a third-party foreign market (e.g. Mexico) would be more expensive than the Spanish one.

The domaine public payant is also a disincentive to creative industries and cultural entrepreneurs that would like to market contents public domain in new formats or through new commercial channels (e.g. documentaries using archival sources, digitization of analogic works, restoration and colorization of black and white films and sound recordings, etc.).

7.3.6 HIGH COSTS

A *domaine public payant* requires a centralised bureaucratic machinery, to levy the tax, police its functioning, sue infringers and distribute loans, prizes and subsidies to the intended beneficiaries. Those activities require to pay for rent, wages, supplies, etc. How expensive running a *domaine public payant* is I will discuss in more detail with the case study of the Argentinian FNA.

In the meantime, let us say that keeping operating cost low is fundamental to the efficacy of the system. Operating costs for institutions implementing a *domaine public payant* tend to be high. In the case of the Argentinian FNA, operating costs during 2014 consumed 63,50% of the total revenue collected from taxing work sin the public domain (Fondo Nacional de las Artes, 2015).

7.3.7 PROBABLE CONFLICTS OF INTERESTS

The bureaucratic bodies that enforce the *domaine public payant* are prone to the principal-agent problem or agency-problem, *i.e. "… a conflict of interest inherent in any relationship where one party is expected to act in another's best interests*" (Investopedia, n.d.).

FNA bureaucrats are expected to act in the best interest of the beneficiaries. However, they are in a position to use resources to pursue self-interest goals (e.g. salary and budget increase). This problem is exacerbated by the lack of transparency, accountability and external oversight of the institution.

Unlike corporate governance and corporate law, public law has not created effective antibodies to curtail the agency problem and the opportunistic behaviour bureaucrats in the public administration. I will discuss this problem in more detail at the end of this dissertation.

7.3.8 RISK OF CENSORSHIP AND "DIRIGISME INTELLECTUEL"

In some countries the use of works in the *domaine public payant,* in addition to the payment of a fee, requires permission from the governing body. This requirement, apart from increasing transaction costs and uncertainty (with the associated deterrent effect), may favour governmental censorship and may lead to a sort of *dirigisme intellectuel*, in which the government may be tempted to use the system to favour works that make the administration look good and censor the critical ones.

However it seems this variation of the *domaine public payant* has almost disappeared[21] (it may be requested for use of certain types of public domain works, usually those classified as national patrimony, in some African nations). The Latin American variety of the *domaine public payant* (as in force in Argentina and Uruguay) does not require prior authorization, only the payment of a fee to the enforcing authority.

Nevertheless, the act of requesting a free use of a work in the paying public domain (in the few exceptional cases admitted by the regulation) must be communicated to the FNA in advance, increasing the transaction costs of the requester.

7.4 WEIGHING THE ARGUMENTS

Taking into account all arguments, pro and contra the *domaine public payant*, from an independent perspective, there seem to be no valid economic reasons to suggest the implementation of a domaine public payant. Simply, the many costs associated to running the system seem, a priori, to outweigh any potential benefit.

Unlike copyright law, the *domaine public payant* is not directed to solve any market failure. The claim that artists require a specialised state agency to provide them with financial support (a.k.a. a state bank for artists) has never been proven. Why not normal commercial banks? If there is another kind of market failure that prevent authors and artists to resort to normal commercial or investment banks, why not to address the cause of that failure instead of creating an institution that operates insulated from market forces?

[21] Such a system was probably in force in Algeria, according to indirect sources.

The unfair competition argument in favour of the domaine public payant is fallacious, an ad hoc interpretation of a concept taken from industrial property and extended beyond its logical limits.

Despite rhetorical claims that the *domaine public payant* in the end benefits consumers, it actually increase the cost to access and use these works for them.

In addition, the costs of operating the system are high, it is prone to agency problem (bureaucratic opportunistic behaviour), may put cultural industries and innovative entrepreneurs at a competitive disadvantage, and -in extreme versions- may facilitate censorship and *dirigisme intellectuel*.

All things considered, copyright seems like a much better policy tool. If copyright is not sufficient to incentivise authors and artists or as a tool of cultural policy, would not be better to fix it than to create an additional, costlier institution that supplements the former?

Let us now compare the *domaine public payant* with copyright law, two legal institutions with identical or very similar goals (in the end, to incentivise the creation of new original works) but via different means.

7.5. COPYIRIGHT VIS-A-VIS THE *DOMAINE PUBLIC PAYANT*

According to the Argentine Law-Decree that created the FNA and the *dominio público pagante*, its *raison d'être* is to provide,

"*… the economic means for the promotion of national artistic activities (in Spanish, … los medios económicos para el fomento a las actividades artísticas nacionales)*" (Law-Decree 1224/58).

The goal of creating economic incentives for authorial, artistic and cultural activities is identical to that of copyright law. Compare the previous citation to the US Constitution so-called Copyright Clause, that gives the US Congress the prerogative to pass legislation,

"*To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries*" (Article I, Section 8, Clause 8).

The Copyright Clause states the policy goals of Acts of Congress, letting Congress decide how those Acts ought to be implemented.

However, there are substantial differences between copyright and the domaine public payant in its respective implementations, which, from a cost-benefit perspective, makes the former more desirable than the latter. I will summarise these similarities and dissimilarities, pros and cons in the table below.

Copyright is a regulatory solution to a market failure (public goods)	The *domaine public payant* is not proposed as a solution to a market failure but as a financial institution to aid authors and artists
Copyright is a private right	The *domaine public payant* is a collective right, e.g. the right of a more or less loosely-defined community (of authors, artists, etc.)
Every author is ipso facto entitled to copyright in her original work (certainty)	Not every member of a more or less loosely-defined community (of authors, artists, etc.) is entitled to the proceeds of the *domaine public payant* at the discretion of the enforcing agency (random)
Copyright has an ex ante incentive effect on the author or artists	The *domaine public payant* is insufficient to create an ex ante incentive for the creation of new works, it functions more like an ex post random reward for some (lucky) authors and artists

Copyright is directly managed and enforced by the right holder	The *domaine public payant* is administered by a third party, usually a state agency (risk of agency problem)
Operating costs are borne by the right holder	Operating costs are borne by the enforcing agency
Copyright is a market-based mechanism (property right)	The *domaine public payant* is a tax (in practice, similar to a liability rule)
The price of a license (royalty) is determined in the market	The quantum of the *domaine public payant* is determined in the absence of a market, by the centralised bureaucracy which is always less efficient than the market (F. Hayek, 1945)
Copyright has a finite duration (remaining life of the author plus 50/70/80/100 years post mortem auctoris)	The *domaine public payant* is usually perpetual (e.g. Argentina and Uruguay)
Copyright is individualistic, its success depends on the right holder's actions (negotiation of licenses, actions against infringement, collection of royalties, etc.)	The *domaine public payant* is paternalistic, the state intervenes to subsidise certain authorial, artistic and cultural activities outside the traditional market for credit (e.g. commercial and investment banks)
The beneficiary is the right holder	The intended beneficiary of the *domaine public payant* are some (lucky) members of a loosely-defined community (of authors, artists, etc.)

To the table one must add that copyright law is an international obligation for most countries (e.g. members of the Berne Convention or the WTO) whereas the *domaine public payant* is not mandatory under any international treaty, is an optional mechanism to support a country's cultural policy.

The relationship between copyright law and the *domaine public payant*, in theory could be either of complementarity or replacement. As it was originally proposed by Victor Hugo, the *domaine public payant* was meant in lieu of a post mortem auctoris copyright term. However, as it is enforced today in a handful of developing countries the *domaine public payant* is an additional mechanism in support of authors and the arts that begins after copyright has expired.

To sum up the comparison, copyright law seems a more direct, less costly and more efficient mechanism to financially support authors and artists than the *domaine public payant.* The ideological factor, not a favourite of most economics-minded scholars, should not be omitted from the analysis. The *domaine public payant* is a paternalistic-type of institution, currently in force in developing countries where markets may not work properly for different reasons (ranging from rampant inflation to rampant corruption). These countries should address these economic issues to make markets more efficient, including the market for creative works.

In case copyright law is deemed to be insufficient or incapable to attain its intended and ultimate goal, for instance because of macro or micro economic issues, it is suggested to fix the copyright system instead of creating another institution that is even more problematic to manage.

The different attitude between pro-market vis-à-vis anti-market countries can be observed in the gradual development of IP finance in the former, although its pace is still slow. A case worth mentioning are the so-called *Bowie Bonds*, asset-backed securities using current and future royalty revenue streams from albums recorded by musician David Bowie as collateral, issued by Prudential Insurance Company in the US in 1997 (Investopedia, n.d.). Securitisation of IPR is growing, but requires developed and efficient markets, and also effective IPR enforcement to function.

7.5. CHAPTER'S CONCLUSIONS

In this section I have reviewed most of the arguments for and against the *domaine public payant*.

The arguments favouring the creation of a *domaine public payant* are neither supported by economic theory nor by evidence. Moreover, arguments like unfair competition are clearly fallacious. Last but not least, most justifications for the *domaine public payant* completely neglect the user. The *domaine public payant* has a negative impact on welfare, in spite of a justificatory rhetoric that states otherwise.

All in all, the objections or arguments against the *domaine public payant* seem to this author to be logically stronger. Moreover, to promote economic and financial incentives to authors copyright law is a better alternative.

In case copyright law is insufficient or affected by economic problems, it would be better to tackle these issues rather to create a new and less efficient institution.

8. CASE STUDY: THE ARGENTINIAN "DOMINIO PÚBLICO PAGANTE"

8.1. SPURIOUS BEGINNINGS

Let us now turn our attention to one specific application of the *domaine public payant*, the Argentine dominio público pagante. I have chosen this regime for the analysis because is one I know well, that has been in force uninterruptedly since 1958 to date, it has elicited discrete scholarly attention, specially from a comparative legal perspective, and, perhaps the most important reason, I could easily access its sources and other relevant documentation, or so I though at the beginning (more on this matter infra).

Executive Decree-Law no. 1.224/58 created the *Fondo Nacional de las Artes* (National Funds for the Arts) and with it the *dominio público pagante* in Argentina. Before this Decree, the public domain had been free from any tax in Argentina.

The abovementioned Decree-Law was signed by de facto president general Pedro Eugenio Aramburu, whom had led the *coup* that ousted Juan Domingo Perón in 1955. The Decree-Law issued by a de facto president was later ratified by Act of Congress no. 14.467 in 1958, without further debate.

Hence, the Argentinian *dominio público pagante* did not have a democratic origin. It was created by an Executive Decree-Law, an exception for situations of urgency and need to the rule that states that laws must be passed by Congress (pursuant to Section 67 of the Argentine Constitution of 1853-60, in force at the time the Executive Decree-Law was issued; Section 75 of the current Constitution). Furthermore, Aramburu, the president that signed the Executive-Decree law had not been democratically elected.

At the time Executive Decree-Law no. 1.224/58 was issued the Argentine Congress had been dissolved. Therefore, there was never any parliamentary debate or discussion on the merits or convenience to establish a *domaine public payant*. It was decided by the signature of one man, who became president by the force of arms.

To find some related congressional records we must go back to 1933, the year when the second Argentinian copyright act (no. 11.723, still in force today) was passed. According to parliamentary reports of that time some members of Congress wanted to include a provision establishing a *domaine public payant*. In the end this provision was rejected by the socialist block and Act no. 11.723 was passed without any *domaine public payant* ("Journal of Sessions of the Honorable Chamber of Deputies of the Argentine Nation. 57th Meeting. Continuation of the Special Session. September 25th.," 1933; "Journal of Sessions of the Senate of the Argentine Nation. September 18, 39th Meeting. 28th Ordinary Session.," 1933).

In 1933 the a *domaine public payant* was rejected for legal reasons (still legitimate today). The view of the majority of Congressmen at the time was the state had no economic claim to the works of deceased authors (economic rights on creative works are not state's public property). However, in 1958 decisions were taken without concerns for legality or the democratic process.

Together with the domaine public payant Executive Decree-Law no. 1.224/58 created a new state agency, the *Fondo Nacional de las Artes* (*National Funds for the Arts*), an autarchic organism under the aegis of the (then) *Secretaría de Cultura de la Presidencia de la Nación* (*Secretary of Culture of the Nation's Executive*), today Ministry of Culture.

The FNA was born with a specific mandate, to finance, encourage and protect cultural activities by Argentine artists. Executive Decree-Law no. 1.224/58 provided the FNA different funding sources, one of them being the concomitantly created *domaine public payant* (pursuant to Art. 6 (c), which the Decree-Law called erroneously called copyright,

> *"...the author's rights that must pay the works fallen in the public domain, which becomes by this law a "domain public payant" ("...los derechos de autor que deberán abonar las obras caídas en dominio público, el que se convierte por la presente ley, en "dominio público pagante"* (Art. 6 (C) Executive Decree-Law no. 1.224/58).

In 1958 the FNA had also other sources of funding, such as taxes applicable to entrance tickets and for the broadcasting of publicity in radios. However, today the *dominio*

público pagante remains as the sole source of funding for the FNA (also, technically, the fund is also entitled to some fines for infringement of the Copyright Act no. 11.723 but according to the financial documents reviewed, these are negligible).

To carry out its legal mandate the FNA is authorized to provide loans, grants, scholarships and to organize contests to encourage national artistic creation. The way to fund those activities is by collecting a fee for the use of works in the public domain (*dominio público pagante*).

In 1977 Decision No. 15.850/77 (*Resolución Nº 15.850/77, T.O. 1978*) consolidated the many Executive-Decrees, Laws and Decisions that regulate governed both the FNA and the *dominio público pagante* into a single legal corpus (*Cuerpo Legal sobre Derechos de Dominio Público Pagante - Texto Ordenado 1978*). This consolidation occurred under the rule of another de facto government (known as *National Reorganization Process*, in Spanish: *Proceso de Reorganización Nacional*, a military dictatorship that ruled Argentina from 1976 to 1983).

It is interesting to note that all legal norms that refer to the *dominio público pagante* call it a *right* or an *encumbrance*, (in Spanish *derecho* or *gravamen*, respectively) but never a tax. The choice of words was probably not arbitrary. As briefly mentioned supra, there are constitutional constraints to legislate new federal (nation-wide) taxes as well as regarding collection (e.g. delegation).

The *tax power* is the right of the state to tax its citizens. The primordial constitutional guarantee for the citizens is the principle of legality that simply means no tax without a previous and general law (remember the reader the famous pronouncement of "*no taxation without representation*" of the American Civil War).

In Argentina federal taxes must be created by laws passed by the National Congress. However, the FNA and the *dominio público pagante* were created by an Executive Decree-Law of a de facto government.

Outsourcing the collection of a federal tax to private individuals, in the case of the *dominio público pagante* the bulk of the collection is carried out by collecting societies (constituted as legal persons subject to private law) could also be problematic.

According to local tax experts consulted the *tax power* of the state cannot be delegated, which includes the prohibition of delegating the collection of the tax. Because this is not a purely legal thesis, I will leave this and other similar legal arguments aside, but I will not omit mentioning them.

8.2. USES THAT REQUIRE THE PAYMENT OF A FEE

According to the *Corpus*, the following uses of a work in the paying public domain requires the payment of a fee to the FNA,

Section 1: Copyright (sic)[22] *to be paid for the use of works in the public domain, as set out in Section 6, paragraph c), of Decree 1224/58 and Section 6 of Decree 6255/58, shall be applied according to the following rules:*
a) Representation:
1. Theatrical, lyrical, literary and choreographic works, ballets, poetic and oratorical recitals transmitted or disseminated publicly in direct form or reproduced by any means, known or to be known.
2. Theatrical, lyrical, literary and choreographic works, ballets, poetic and oratorical recitals, transmitted or broadcasted by radio, either directly or reproduced by any medium, known or unknown.
3. Theatrical, lyrical, literary and choreographic works, ballets, poetic and oratorical recitals, transmitted or broadcasted on television, either directly or reproduced by any means, known or to be known.
b) Inclusion:
1 Theatrical, musical, cinematographic, literary, lyrical, literary and choreographic works, videotaped ballets, films of all kinds including advertising.

[22] The *corpus* also incorrectly refers to the fee on the paying public domain as copyright.

c) Exhibition:

1. Theatrical, musical, literary, lyrical, and choreographic works, ballets in films.

d) Performance:

1. Musical works of any kind performed in public places either directly or reproduced by any means known or to be known.

2. Musical works of any genre transmitted or broadcasted by radio, either directly or reproduced by any means known or to be known.

3. Musical works of any genre or transmitted broadcast on television, either directly or reproduced by any means known or to be known.

e) Reproduction:

1. Theatrical, literary, lyrical, and cinematographic works, ballets and musical, reproduced in disk, tape, wire, "video-tape", cable or any other system known or to be known.

2. Architectural and sculptural works made by calque, casting or any other procedure known or to be known.

f) Publishing:

1. Literary, musical and scientific works.

2. Plates, photographs, slides reproducing paintings, sculptures, drawings and / or maps.[23]

8.3. AUTHORS' NATIONALITY

As mentioned supra, the paying public domain fee is applicable to works by national and foreign authors alike.

Section 2: The rights mentioned above shall apply equally to works by national or foreign authors (ibid.).

8.4. EXEMPTIONS

[23] Unless stated otherwise, all translations belong to the author.

The only uses exempted from paying the fee on the domaine public payant are exclusively related to cultural or educational purposes, must take place in venues with free admission, without any display of commercial advertising. These requirements are cumulative. In addition, to be exempted from paying the fee the *Corpus* requires to request permission to the FNA at least fifteen days in advance from the date of the intended use. Approval of the request is discretionary to the FNA.

Section 6: The use of works in the public domain exclusively for cultural or educational purposes in places with free access to the public where there is no commercial advertising of any kind, by direct or indirect means, will be exempted from the payment of fees. This exception includes works in the public domain broadcasted in federal, municipal, university or private radio and television stations, in which normally and in a permanent basis commercial advertising is broadcasted, either for free or for profit. In all cases the requestor must apply for this benefit to the FNA with no less than fifteen days from the date in which the repertoire will be broadcasted (Ibid.)

8.5. CURRENT FEES

The amount of the fee for using works in the dominio público pagante is determined in Title IX - Annex to Decision No. 15.850/77 and is regularly updated at the FNA webpage.

8.5.1. REPRESENTATION RIGHTS

Theatrical, lyrical, literary and choreographic works, ballets, poetic and oratorical recitals

- *Live: Same tariff in effect for works in the private domain (copyright).*
- *Radio: Same tariff in effect for works in the private domain (copyright).*
- *TV: Same tariff in effect for works in the private domain (copyright).*
  Collecting entity: ARGENTORES (Argentine General Society of Authors).

8.5.2. INCLUSION RIGHTS

Theatrical, musical, cinematographic, literary, lyrical, literary and choreographic works, videotaped ballets, films of all kinds including advertising

- *Musical part: Same tariff in effect for works in the private domain (copyright). Collecting entity: SADAIC (Argentine Society of Music Authors and Composers).*
- *Literary part: Same tariff in effect for works in the private domain (copyright). Collecting entity: ARGENTORES (Argentine General Society of Authors).*

8.5.3. EXHIBITION RIGHTS

Theatrical, musical, literary, lyrical and choreographic works, ballets in films.

- *Tariff: 30% of the tariff in effect for works in the private domain (copyright). Collecting entity: ARGENTORES (Argentine General Society of Authors).*

8.5.4. PERFORMANCE RIGHTS

Applicable to:

- *Musical works of any kind*
- *In public places (dance music): 5% of the tariff in effect for works in the private domain (copyright).*
- *In public places (concerts): Same tariff in effect for works in the private domain (copyright).*
- *Radio: 10% of the tariff in effect for works in the private domain (copyright).*
- *TV: 10% of the tariff in effect for works in the private domain (copyright).*
- *Collecting entity: SADAIC (Argentine Society of Music Authors and Composers).*
- *Other works: 30% of the tariff in effect for works in the private domain (copyright).*
  Collecting entity: ARGENTORES (Argentine General Society of Authors).

8.5.5. REPRODUCTION RIGHTS

Theatrical, literary, lyrical, cinematographic, musical works and ballets.

- *Musical part: Same tariff in effect for works in the private domain (copyright). Collecting entity: SADAIC (Argentine Society of Music Authors and Composers).*
- *Literary part: Same tariff in effect for works in the private domain (copyright). Collecting entity: ARGENTORES (Argentine General Society of Authors). Architectural and sculptural works made by calque, casting or any other procedure known or to be known.*
- *Tariff: 10% of the sale price per work.*

8.5.6. PUBLISHING RIGHTS

Literary, musical and scientific works, plates, photographs, slides reproducing paintings, sculptures, drawings and / or maps

- *Literary, musical and scientific works, plates, photographs, slides reproducing paintings, sculptures, drawings and/or maps: 1% of the sale price, per work.*
- *In case the medium is a CD or diskette the minimum is Ar$150*[24] *per work.*
- *For derivative works of works in the paying public domain: 0,80 % of the sale, price per work.*
- *For derivative works of works in the paying public domain of the genre childhood literature: 0,50 % of the sale price per work.*
- *Collecting entity: FNA.*

As seen above, in most cases the fee for the dominio público pagante is set equal to the licensing fee for a copyrighted work. Thus, although indirectly, is the respective licensing society who determines the quantum of the fee to use works in the *dominio público pagante*.

It is also worth mentioning that E-books did not exist at the time the Argentine *domain public payant* was created. Therefore, they are not explicitly mentioned in the Corpus. Then, according to the principle of legality, publishing public domain works in e-book

[24] Equivalent to approximately USD 10 at the time of writing this section of the dissertation.

format is exempted from paying the levy to the FNA (at least until the law is amended). This was confirmed to this author by FNA staff.

However, it is unknown to this author whether the levy is collected for works in the public domain in other electronic formats (e.g. digitised photographs, films, music, etc.). For instance, it is not clear YouTube, the Gutenberg Project or Spotify (which offers a large repertoire of works in the public domain, e.g. baroque, classical and romanticism) contribute to the FNA. Also the *Archive General de la Nación* (National Archive) publishes a monthly e-magazine (*Revista Legado*) with photographs and other resources in the public domain.

This author conjectures that these formats are also excluded from the payment of the levy because they are not explicitly mentioned in the *Corpus*. In case this were true, multinational media and entertainment companies (including some of the wealthiest companies in the world like YouTube or Spotify) would contribute nothing to the Argentine paying public domain. Then, the levy on the Argentine *dominio público pagante* is almost exclusively borne by local cultural institutions, in traditional formats and using analogical technologies (paper-based publications, TV and radio broadcasts, live performances, etc.). One example would be the state-run *Teatro Colón*, the biggest debtor of the tax on the *dominio público pagante* (see infra).

With the exception of the tax for publishing works in the *dominio público pagante*, directly collected by the FNA, the collection of the tax for any other use of works in the public domain (e.g. representation, inclusion, exhibition, performance and reproduction) has been delegated to collecting agencies (see supra). Pursuant to Section 35 of Decision no. 15850/1977, these collecting agencies are ARGENTORES, SADAIC and, more recently, AADI, CAPIF and SAVA (all of them, civil associations under private law).

Collecting societies do not provide their services for free, including the collection per delegation of the levy on the *dominio público pagante*. However, this author was not able find out the commission charged by these societies for carrying out these collection services on behalf of the FNA.

8.6. ADDITIONAL RULES

Over time, the rules governing the Argentine *dominio público pagante* grew considerably in size. Below is a non-exhaustive list of the most significant ones, retrieved from INFOLEG, the repository of Argentine legal norms of the Ministry of Justice and Human Rights (Ministry of Justice and Human Rights (Argentina), n.d.)

- 1958. Executive Decree-Law no. 1.224. Renamed Act ACU-0483 in 2014. The Act creates the FNA, repeals Act no. 12.227 and articles 69 and 70 of Act no. 11.723 (the Copyright Act).
- 1958. Regulatory- Decree no. 6.255, implementing Decree-Law no. 1224/58.
- 1977. Decision no. 15.850 (FNA) Re-arranges the paying public domain corpus and establishes the tariffs.
- 1984. Decision 17.168 (FNA) Partial amendment of the paying public domain corpora and tariff annex.
- 1985. Decision 17776 (FNA) Amending Resolution no. 15.850 (1977).
- 1991. Decision 21.516. Approving a (new) 0,3% tax on the final sale price of cinematographic works in the public domain edited on magnetic media (videocassette) or any other procedure known or to be known, present or future.
- 1996. Executive Decree no. 1.481. Approving the (new) organizational structure of the FNA.
- 1997. Decision no. 3456, 3457 and 3458 (FNA). Determining the quantum of the fee for the performance and broadcasting of cinematographic works; for the reproduction in diskettes, CD-ROMs or other media of literary, pictorial and sculptural works, drawings and maps; and for the publishing of literary, photographic and artistic works; paintings, sculptures, prints, drawings, images, etc. The quantum is determined at 0,3% of the sale price, with a minimum of $150.
- 1997. Decision no. 15.850. Delegating the collection of the paying public domain fee to two licensing societies: ARGENTORES and SADAIC. The commission the licensing societies charge for this service is unknown.
- 1998. Amendment of the Fiscal Procedure Act no 11.683, which allows the FNA to impose tariffs for the use of works in the public domain. This can be interpreted as an implicit acceptance of the tax nature of the paying public domain.

- 2002. (Undisclosed) agreement between the FNA and two new licensing societies: AADI-CAPIF and SAVA. Another delegation of the faculties to collect the paying public domain fee. The commission the licensing societies charge for this service is unknown.
- 2010 (April 13). Decision no. 11.190 (FNA): Summons to Public Hearing pursuant to articles 119, 120 and 121 of Decree No. 467/99, held on May 19, 2010, to determine the liability of former FNA employees that did not prosecute or abandoned prosecution of legal actions against defendants accused of tax fraud for not paying the paying public domain fee.
- 2010 (December 2). Decision no. 11.711 (FNA). Approving an administrative inquiry (*sumario administrativo*) ordered by Resolution No. 2.365 of August 22, 2006, in reference to Decision no. 13 of July 14, 2006.
- 2012. Executive Decree no. 846. Published in the Official Gazette on June 6, 2012. Approving the new organizational structure of the FNA and abrogating Decree no. 1.481 of 1996. It was later repealed by article 4 of Decree no. 846 (2012).

8.7. AMENDING THE "DOMINIO PÚBLICO PAGANTE"

The Argentine *dominio público pagante* has never been challenged. This author knows of no serious attempt to abrogate it. However, there has been one noteworthy attempt to amend it.

In 2014 a draft bill was presented to exempt theatres under administration of the Autonomous City of Buenos Aires from having to pay *representation rights* for works in the *dominio público pagante* (Bertol, Triaca, & Cáceres, 2014). (Bertol, Triaca, & Cáceres, 2014). The emblematic *Teatro Colón*, as mentioned supra the biggest debtor to the FNA for unpaid fees pertaining works in the *domaine public payant*, is one of those theatres administered by the Autonomous City of Buenos Aires. The draft bill was not discussed in due time and lost parliamentary status. The bill was reintroduced on December 19, 2014 without further success.

This bill is suggestive. The only attempt to reform the Argentinian *dominio público pagante* was meant to subtract one dependency of the state from paying a fee (or tax) to another dependency of the state.

8.8 CHAPTER'S SUMMARY

Argentina is one of the few countries in the world that still enforces a *domaine public payant*, uninterruptedly since 1958. The Argentine *dominio público pagante* and its enforcing authority, the FNA, were created by an Executive Decree-Law of a de facto government.

Almost every thinkable use of a work in the public domain is taxed by the FNA. The collection of the tax has been, in most cases, delegated to a copyright collecting society. There have been no attempts to abrogate the Argentine *dominio público pagante* to date.

9. THE FINANCES OF THE "FONDO NACIONAL DE LAS ARTES"

9.1. ACCESSING FINANCIAL DATA

Emerges from this dissertation that economic theory does not support a *domaine public payant*. However, I decided to go one step further and access financial information to assess the efficacy of the FNA, i.e. the relationship between intended goals and applicable means. Could real-world data show that economic theory is wrong? Perhaps I could find empirical information to validate the *domaine public payant*.

I wanted data to answer the following questions. How much money does the FNA collect from taxing works in the public domain every year? What are the costs of running the system? What percentage of the proceeds are effectively transferred to authors and artists? In order to answer these, and other related questions, I needed to access the FNA's financial documents.

Publicity of the acts of government is a basic pillar of republicanism. In most countries access to public sector information is guaranteed by law. Legal rules guarantee citizens' rights to access information held by the government[25], including financial data. After all any government under the rule of law should be accountable for the way it manages taxpayer's money.

[25] For instance, US Freedom of Information Act of 1966, UK Freedom of Information Act of 200, Article 10 of the European Convention on Human Rights, Regulation (EC) No 1049/2001 of the European Parliament and the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, Directive 2003/98/EC of the European Parliament and the Council of 17 November 2003 on the re-use of public sector information, etc.

At the time of my request, to access this information in Argentina was problematic. Governmental agencies are not used to disclose information. The absence of transparency may facilitate corruption. According to some NGOs limited, selective or no access at all to public sector information is a clear indicator of corruption.[26]

At the time of carrying out this research Argentina had no federal law guaranteeing its citizens access to public information, i.e. *freedom of information laws*. [27] Yet there was an Executive Decree applicable to my case, no. 1172 of 2003, which mandated all agencies belonging to the executive branch to grant citizens access to public information.

The FNA is under the Ministry of Culture, which is part of the Executive. So, the FNA was bound by Executive Decree no. 1172 of 2003 to grant me access to its financial statements. However, having a right and effectively enforcing it are two different things.

I began by requesting access to the FNA' financial statements, in an informal way. I sent various emails to the FNA explaining the scope of my research, objectives and justifying the need to access their financial documents.

The first email was sent on July 9, 2015. I sent a reminder a week later. Then more emails. None of my emails got a reply.

[26] According to Transparency International's 2015 edition of the Corruption Perception Index Argentina was ranked 106 out of 162, with an overall score of 32 (100 being the best). See: https://www.transparency.org/cpi2015/.

[27] After my research was finished, in September 29, 2016 Law no. 27275 was passed. This law guaranteed citizens the right to access public information held by the federal government. Before existed law no. 104 of 1998of the Autonomous City of Buenos Aires. This law was not applicable to my case, as the FNA was not under the jurisdiction of the Autonomous City of Buenos Aires.

Then I sent a letter to the FNA using the post (snail mail). The first letter was sent on April 24, 2015. This letter received no reply. I submitted a second letter on November 17, 2015.

I knew that in case my letters received no reply I could apply Executive Decree no. 1172 of 2003. According to the regulation, the FNA had to reply my request within ten administrative days; after those days I was entitled to file a lawsuit requesting a judge my right to access public information.

The law also mandated to explicitly determine the information sought after. In my emails and letters I requested access to the following information,

a) Taxable uses that require the payment of the tax on the *dominio público pagante*;

b) The criteria used to determine the amount of the tax;

c) Enumeration of the mechanisms used to collect the tax;

d) The latest list of fees;

e) The percentage of the tax on the *dominio público pagante* in the FNA's total revenue;

f) The annual revenue report for the tax on the *dominio público pagante* for the last ten years (2005-2015);

g) A detailed distribution of the proceeds, according to the goals set forth in Art. 2 of Decree-Law No. 1224/58;

h) Details on how the tax on the *dominio público pagante* is distributed to national authors and artists;

i) Access to the FNA's accounting statements of the last ten years, as well as their supporting documents;

j) A list of debtors that failed to pay the tax on the *dominio público pagante* and a list of the lawsuits filed against debtors, not affected by the statute of limitations;

k) A list of the lawyers entrusted with the prosecution of debtors as well as an explanation on the selection criteria of outside counsel;

l) A list of all grants, loans and subsidies given by the FNA to national authors and artists in the last ten years, with their respective amounts and repayment score (if applicable);

m) The criteria used for allocating those grants, loans and subsidies;

n) The number of staff, composition of the payroll and salaries paid to FNA's staff;

o) The identification of all collecting societies that collect the tax on the *dominio público pagante,* how are they monitored and compensated;

p) Any corrective measures taken after Decision No. 227/2010 by the General Audit Office (a decision that found some anomalies in the FNA's financial records).

Although I am a practising lawyer, litigation against the state is a subtle art I do not master. Therefore, I decided to request the assistance of a professional. I contacted the *Asociación por los Derechos Civiles* (ADC), an NGO that promotes civil rights in Argentina. ADC accepted to take my case, pro bono. Without the assistance of ADC I doubt I would have accessed the data needed to support this conclusions.

The legal strategy was to initiate an action based in the violation of a constitutional guarantee (*acción de amparo,* in Spanish). We argued the FNA did not comply with the provisions of Decree 1172 of 2003. The case was filed on December 28, 2015 (*Marzetti, Maximiliano c/ Fondo Nacional de las Artes s/ amparo ley 16.986*, case no. 83610/2015).

In February 2016, the Federal Administrative Court no. 10 (*Juzgado Contencioso Administrativo Federal N° 10*) passed judgement in my favour and ordered the FNA to comply with the information request. As a result, in March 7, 2016 the FNA sent to my domicile several envelopes with documents. After assembling, reading and analysing documents, I informed the Court that the FNA response had been insufficient.

Below, a table summarizing the information requested and that effectively received, after judgement of the Court of February 2016.

Information requested	***Information received***
a) Uses that require the payment of the tax on the dominio público pagante	*a) Complied*
b) Criteria used to determine the amount of the tax	*b) Partial compliance*
c) Enumeration of the mechanisms used to collect the tax	*c) Partial compliance*
d) Updated tax price list per category of use	*d) Complied*
e) Percentage of the tax on the dominio público pagante in the FNA's total revenue	*e) Partial compliance*
f) Annual revenue from collecting the tax on the dominio público pagante for 2005-2015 period	*f) Partial compliance*

g) Destination of the proceeds accrued from the tax on the dominio público pagante, according to the objectives set forth in Art. 2 of Decree-Law No. 1224/58;	*g) No compliance*
h) Details on how the tax on the dominio público pagante effectively reaches national authors and artists	*h) No compliance*
i) Access to the FNA's accounting statements and supporting documents for 2005-2015 period	*i) No compliance*
j) A list of debtors that failed to pay the tax on the dominio público pagante and a list of the lawsuits filed against debtors (not affected by the statute of limitations)	*j) Complied*
k) List of the external lawyers entrusted with the prosecution of debtors as well as selection criteria for outside counsel	*k) No compliance.*
l) A list of all grants, loans and subsidies given by the FNA to national authors and artists during the 2005-2015 period, amounts and repayment score (if applicable)	*l) No compliance*

m) Criteria for allocating grants, loans and subsidies to beneficiaries	*m) No compliance*
n) Total number of employees, payroll and salaries paid to FNA's staff	*n) No compliance*
o) List of all collecting societies that collect the tax on the dominio público pagante, how are they monitored and compensated	*o) Partial compliance*
p) Any corrective measures (if any) taken after Decision No. 227/2010[28] *by the General Audit Office*	*p) Partial compliance*

I informed the Court I have not received all the information requested. In April 2016 I sent an additional note to the FNA requesting access to the missing documents and statements. The FNA accepted to grant me access to its premises and to allow me to review the documents in situ and to make copies of them.

When I arrived to the FNA I was informed the photocopying machine was not available. Therefore, I had to take the original documents and statements outside the FNA premises to a nearby photocopying shop, escorted by an FNA official. The cost of the copies was borne by this author.

[28] This decision that found some anomalies in the FNA's financial records.

9.2. REVIEW OF FINANCIAL STATEMENTS

I had access to the following FNA financial statements: *Annual Balance Sheets*, *Statement of Changes in Net Worth*, *Statement of Resources and Current Expenditures* and *Statement of Cash Flows*.

The most useful statement to the ends of this investigation is the *Statement of Resources and Current Expenditures* (*Estado de Recursos y Gastos Corrientes*) so I will omit the analysis of the many other ones for the sake of brevity.

The *Statement of Resources and Current Expenditures* shows the amount of money collected by the FNA by taxing works in the paying public domain fee (*resources*) and the amount of that money that actually reaches authors and artists in the form of loans, grants and subsidies (*expenditures*).

I wanted to know sources of the revenue collected, i.e. how much money came from public and private institutions, respectively. The statements did not provide this information; I would have to had reviewed every single invoice for the 2005-2015 period to get it. I had no time neither resources for such a task.

I think unnecessarily transferring resources from one public institution to another is a waste of resources, even in case the process is streamlined and efficient (e.g. administrative costs, collection fees, etc.).

According to a 2014 presentation by the legal counsel of the *Uruguayan Copyright Council* approximately half of the revenue obtained from the Uruguayan paying public domain tax is paid by different institutions of the Uruguayan state (Rodríguez, 2014).

9.3. STATEMENT OF RESOURCES AND CURRENT EXPENDITURES

9.3.1. INTERPRETING THE ENTRIES

The first challenge was to interpret the entries. It was not easy an easy task because FNA's accounting entries are vague, broad categories such as *rights*, *obligations*, *expenditures*, etc. In addition, the accounting statements have no glossaries or appendixes, all I could find were footnotes and some ad hoc explanations. The FNA staff helped me to construe the meaning of the entries.

9.3.1.1 TAX REVENUE (*INGRESOS TRIBUTARIOS*)

In the past, apart from the tax on the paying public domain the FNA was entrusted with the collection of other taxes. However, recently these other tax resources either have been cancelled or collection has been entrusted to another government agency.

For instance, the FNA used to collect a percentage from a tax on cinema tickets, now that percentage of tax is collected by the INCAA. The FNA also lost other sources of tax revenue such as a percentage from TV and radio licenses and another from the selling price of a football lottery ran by the government (called PRODE, now discontinued).

9.3.1.2 NON-TAX REVENUE (*INGRESOS NO TRIBUTARIOS*)

This category is divided into two sub-sets: *fees* and *rights*. Together, they represent the bulk of the FNA income.

1. *Fees* (*tasas*). The Argentine Copyright Law no. 11.723 includes criminal sanctions. Some of these crimes are punished with a fine. For instance, pursuant to Section 30 of Copyright Law no. 11.723 periodical publications must be registered before the Copyright Office, failure to do so results in a fine; pursuant to Sections 60 and 61 editors must make a deposit of a copy of every work they publish, failure to do so results in a fine; pursuant to Sections 73 and 74 copyright infringement results in a fine; and pursuant to Section 83 violations of authorial moral rights also results in a fine. A percentage from what is collected from these fines accrue the FNA and, apparently, also does a percentage of the fee charged by the Copyright Office for the registration of published or unpublished works. All in all, the total revenue derived from these sources is comparatively very low vis-à-vis the revenue from the levy on the paying public domain.
2. *Rights* (*derechos*). This entry refers to the income derived from the collection of tax on the *dominio público pagante*.

Oddly, proceeds from the *dominio público pagante* are labelled *rights* (like *copyrights*) and listed as a non-tax source of revenue in the accounting statements. I have hinted supra why the tax denomination is avoided in the law and the statements. For instance, to delegate the collection of *rights* poses no constitutional challenge.

In the graphs below I have excluded from the base of the calculation both *Tax Revenue* and *Fees - Non Tax Revenue* because they are not directly related to the dominio público pagante. All in all, their percentage is negligible.

Therefore, to calculate the proceeds from the tax on the dominio público pagante I take into account one entry only, *Rights* (*Non Tax Revenue*).

9.3.1.3. EXPENDITURES

Expenditures are divided into three categories.

1. *Transfers to the private sector (Transferencias al sector privado, 6.1.5.1)*

   This is the money the FNA transfers to artists and authors in different ways, e.g. subsidies, loans, grants, etc.

2. *Contributions granted (Contribuciones otorgadas, 6.1.6.1)*

   Under this entry the relevant source is labelled *Contributions to the Central Administration (Contribuciones a la Administración Central)*. Apparently, in the past, the FNA received direct contributions from the government, and those were listed under here. This is not the case anymore (as an autarchic entity it must fund itself).

3. *Consumables (Bienes de consumo, 6.1.1.2)*

   These are goods regularly consumed by the FNA in order to carry out its functions.

9.4. REVIEW OF THE FISCAL YEARS 2005-2015

9.4.1 INTERANNUAL REVENUE

YEAR	Rights (PPD)	Other sources	Total revenues
2005	$5.841.506	$1.496.258	$7.337.765
2006	$6.632.077	$2.966.857	$9.598.934
2007	$8.737.895	$2.096.423	$10.834.318
2008	$10.288.231	$1.797.783	$12.086.014
2009	$10.950.321	$2.610.817	$13.561.138
2010	$12.976.839	$2.966.110	$15.942.950
2011	$17.121.919	$5.728.567	$22.850.485
2012	$17.563.241	$7.483.184	$25.046.425
2013	$23.377.960	$13.522.876	$36.900.836
2014	$39.964.626	$16.997.368	$56.961.994
2015	$51.881.663	$23.662.665	$75.544.327

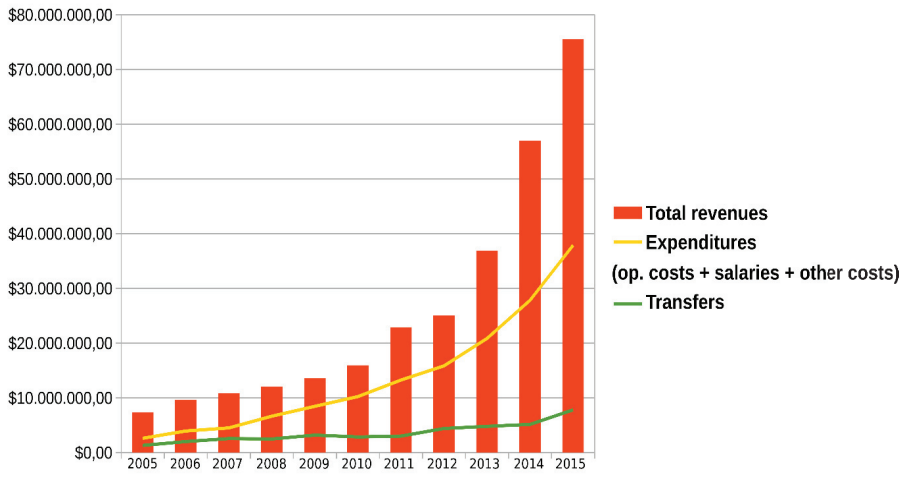
9.4.2 INTERANNUAL EXPENDITURES

Here we must distinguish between operating costs, i.e. the costs of running the system (rent, salaries, administrative costs, etc.) from *transfers to the private sector* that is the money effectively transferred to the intended beneficiaries in the form of loans, subsidies, etc.

YEAR	Operative Costs	Salaries	Other costs	Transfers to the private sector	Total expenditures
2005	$1.322.932	$1.287.373	$1.821.117	$1.308.864	$5.740.288
2006	$2.062.293	$1.874.790	$619.231	$2.006.183	$6.562.497

2007	$2.006.023	$2.491.786	$1.000.244	$2.551.647	$8.049.701
2008	$3.174.202	$3.467.117	$205.022	$2.476.065	$9.322.406
2009	$3.684.683	$4.762.332	$135.913	$3.185.558	$11.768.486
2010	$4.152.607	$6.078.336	$358.176	$2.854.900	$13.444.019
2011	$4.837.110	$8.410.352	$514.906	$3.006.460	$16.768.828
2012	$5.709.556	$10.129.080	$93.251	$4.399.501	$20.331.387
2013	$6.470.451,85	$13.286.735,65	$1.091.013	$4.789.845	$25.638.045
2014	$8.376.151	$19.455.085	$56.839	$5.143.914	*$33.031.989*
2015	$12.915.444	$24.947.755	$18.568	$7.799.361	$45.681.128

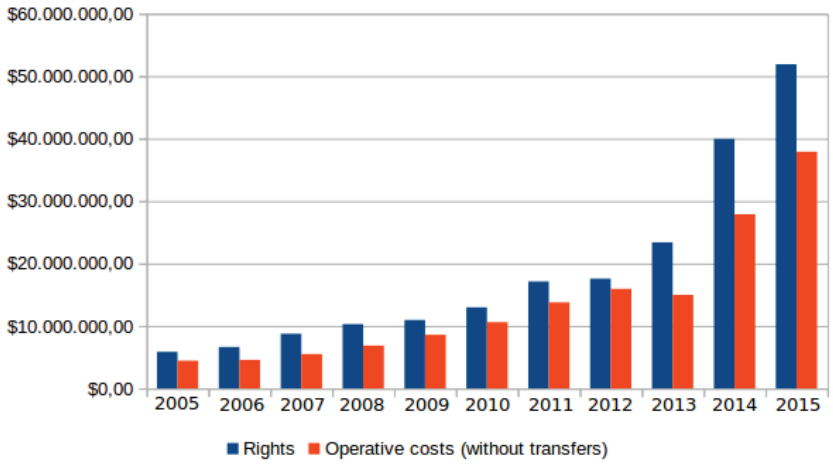
9.5 VISUAL REPRESENTATION



Graph no. 7: Relationship between total revenue, operating costs and transfers.

In the graph above, we can see how the portion of *expenditures* allocated to the beneficiaries (*transfers to the private sector)* remained quite steady over the years. While

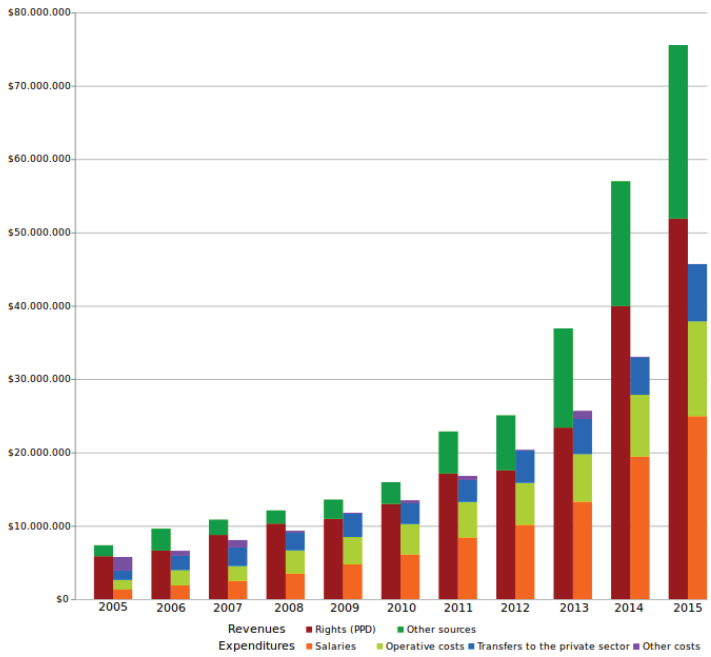
the total amount of *expenditures* increased at a much higher rate; i.e. the increase in staff salaries was proportionately higher than that of resources transferred to the beneficiaries.



Graph no. 8 revenue vis-à-vis operating costs.

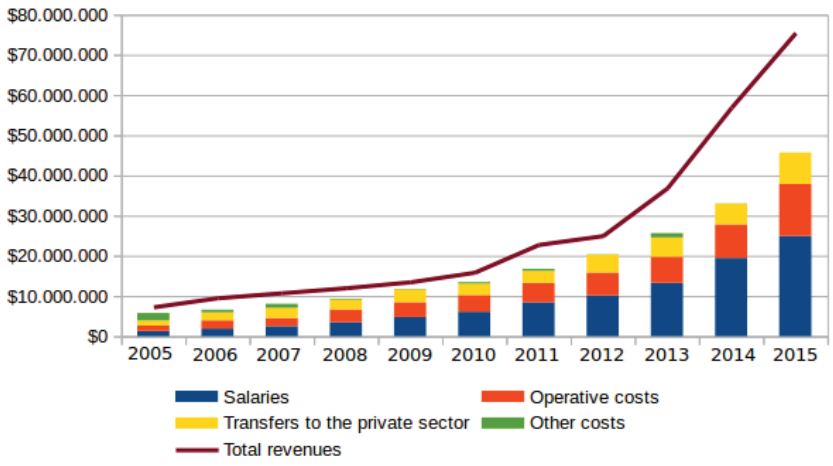
The graph above illustrates the relationship between the money collected by taxing works in the paying public domain vis-à-vis the resources spent to keep the system running. In other words, this is similar to a cost-to-income ratio, which is a common benchmark to measure the efficacy of for-profit institutions. I considered it a valid benchmark for an autarchic entity as well.

The graph shows the FNA cost-to-income ratio is high, i.e. most of the income is consumed to pay operating costs (of which the highest one is *salaries*) and only a limited portion is transferred to author and artists (*transfers*).



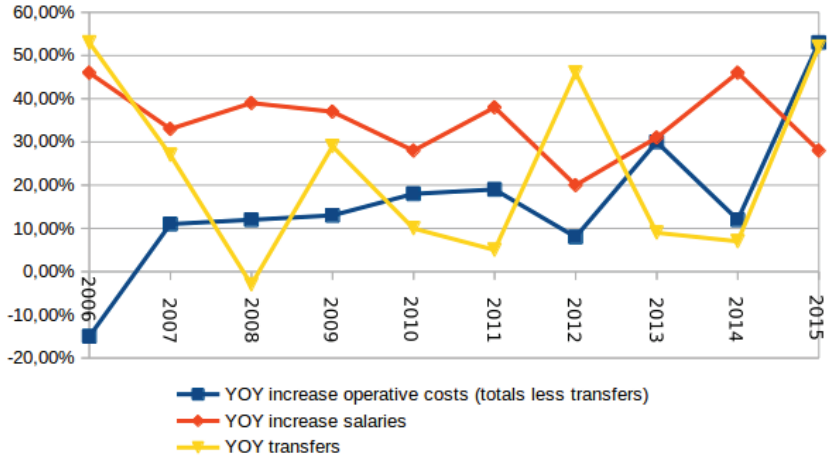
Graph no. 9: Composition of revenues and expenditures.

In the graph above we can visualize all the components of FNA'S revenues and expenditures. Clearly, the main source of income is the tax on the dominio public pagante and the biggest source of expenditure the salaries paid to FNA staff.



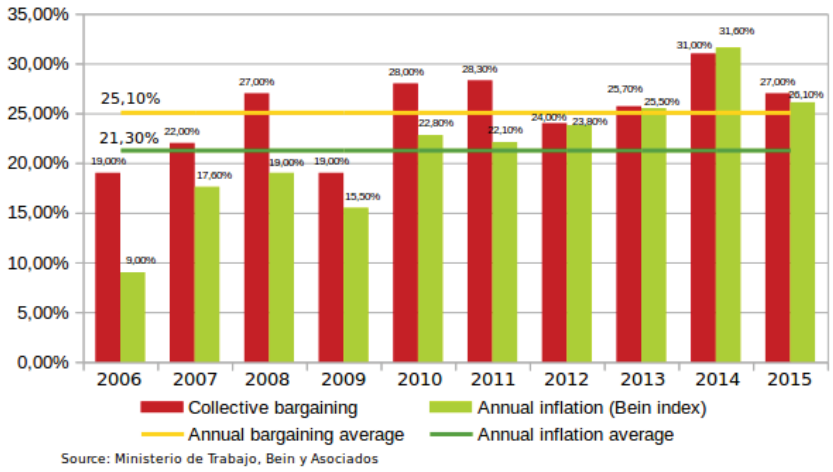
Graph no. 10: Evolution of total revenue vis-à-vis expenditures.

As seen in the graph above, since 2012 there is an exponential increase in revenue and expenditures. This increase can be better explained by the high rate of inflation that Argentina suffered during this period (close to 40% annually) than to gains in efficiency.



Graph no. 11: Interannual increase of operative costs, salaries and transfers.

As we can see in the graph above, during the period under analysis salaries remained stable, whereas operative costs and transfers show a more erratic behaviour.



Graph no. 12: Collective bargaining and annual inflation rates in Argentina (2005-15).

The graph above illustrates the inflation rates in Argentina during the period 2005-2015, using two benchmarks: the average of collective bargaining (used to renegotiate employees' salaries yearly) and a private index (the *Bein Index*). Inflation rates may explain the increase in revenue during the last years.

9.7. DISAGGREGATING REVENUE AND EXPENDITURES

Fiscal Year 2015

TOTAL REVENUE *Ar$75.544.327,16*

- *Rights (PPD)* *Ar$51.881.662,51*

TOTAL EXPENDITURES *Ar$ 45.681.128,27*

- *Operative costs* *Ar$ 37.863.199,31*
    - *Of which salaries* *Ar$ 24.947.755,13*
- *Transfers to the private sector* *Ar$$ 7.799.361,25*

- ✓ *The operating costs of the FNA represents more than 50% of the total revenue and almost 73% of the revenue obtained from the paying public domain regime tax.*
- ✓ *The resources spent in salaries to FNA staff represent 33% of the total revenue and more than 62% of the revenue from the paying public domain regime tax.*
- ✓ *The resources transferred to authors and artists (in the form of grants, loans and subsidies) represent 10% of the FNA total revenue and 15% of the revenue from the paying public domain regime tax.*

Fiscal Year 2014

TOTAL REVENUE *Ar$56.961.993,95*

- *Rights (PPD)* *Ar$39.964.625,89*

TOTAL EXPENDITURES *Ar$ 33.031.989,33*

- *Operative costs* *Ar$ 27.831.235,35*
    - *Of which salaries* *Ar$ 19.455.084,70*
- *Transfers to the private sector* *Ar$$ 5.143.913,98*

- ✓ *The operating costs of the FNA represents almost 50% of the total revenue and more than 69% of the revenue obtained from the paying public domain regime tax.*
- ✓ *The resources spent in salaries to FNA staff represent 34% of the total revenue and more than 42% of the revenue from the paying public domain regime tax.*
- ✓ *The resources transferred to authors and artists (in the form of grants, loans and subsidies) represent 9% of the FNA total revenue and almost 13% of the revenue from the paying public domain regime tax.*

Fiscal Year 2013

TOTAL RESOURCES	*Ar$ 36.900.836,07*
- *Rights (PPD)*	*Ar$ 23.377.960,00*
TOTAL COSTS	*Ar$ 25.638.045,51*
- *Operative costs*	*Ar$ 19.757.187,50*
o *Of which salaries*	*Ar$ 13.286.735,65*
- *Transfers to the private sector*	*Ar$ 4.789.845,01*

- ✓ *The operating costs of the FNA represents more than 53% of the total revenue and more than 84% of the revenue obtained from the paying public domain regime tax.*
- ✓ *The resources transferred to authors and artists (in the form of grants, loans and subsidies) represent almost 13% of the FNA total revenue and more than 20% of the revenue from the paying public domain regime tax.*

Fiscal Year 2012

TOTAL RESOURCES	*Ar$ 25.046.424,66*
- *Rights (PPD)*	*Ar$ 17.563.240,61*
TOTAL COSTS	*Ar$ 20.331.387,01*
- *Operative costs*	*Ar$ 15.838.635,51*
o *Of which salaries*	*Ar$ 10.129.079,81*
- *Transfers to the private sector*	*Ar$ 4.399.501,00*

- ✓ *The operating costs of the FNA represents almost 63% of the total revenue and more than 90% of the revenue obtained from the paying public domain regime tax.*
- ✓ *The resources spent in salaries to FNA staff represent 40% of the total revenue and more than 57% of the revenue from the paying public domain regime tax.*
- ✓ *The resources transferred to authors and artists (in the form of grants, loans and subsidies) represent more than 17% of the FNA total revenue and almost 25% of the revenue from the paying public domain regime tax.*

Fiscal Year 2011

TOTAL RESOURCES	*Ar$22.850.485,43*
Rights (PPD)	*Ar$17.121.918,80*
TOTAL COSTS	*Ar$ 16.768.827,78*
- *Operative costs*	*Ar$13.247.461,65*

- *Of which salaries* *Ar$ 8.410.351,65*

- *Transfers to the private sector* *Ar$3.006.460,00*

The operating costs of the FNA represents almost 58% of the total revenue and more than 77% of the revenue obtained from the paying public domain regime tax.

The resources spent in salaries to FNA staff represent 39% of the total revenue and 49% of the revenue from the paying public domain regime tax.

The resources transferred to authors and artists (in the form of grants, loans and subsidies) represent more than 13% of the FNA total revenue and more than 17% of the revenue from the paying public domain regime tax.

Fiscal Year 2010

TOTAL RESOURCES *Ar$15.942.949,61*

- *Rights (PPD)* *Ar$12.976.839,27*

TOTAL COSTS *Ar$ 13.444.018,86*

- *Operative costs* *Ar$ 10.230.942,85*
  - *Of which salaries* *Ar$ 6.078.336,08*
- *Transfers to the private sector* *Ar$ 2.854.900,00*

- ✓ *The operating costs of the FNA represents 64% of the total revenue and more than 79% of the revenue obtained from the paying public domain regime tax.*
- ✓ *The resources spent in salaries to FNA staff represent 38% of the total revenue and almost 47% of the revenue from the paying public domain regime tax.*

- ✓ *The resources transferred to authors and artists (in the form of grants, loans and subsidies) represent almost 18% of the FNA total revenue and 22% of the revenue from the paying public domain regime tax.*

Fiscal Year 2009

TOTAL RESOURCES	*Ar$13.561.138,25*
- *Rights (PPD)*	*Ar$10.950.320,87*
TOTAL COSTS	*Ar$ 11.768.485,53*
- *Operative Costs*	*Ar$ 8.447.014,98*
o *Of which salaries*	*Ar$ 4.762.331,51*
- *Transfers to the private sector*	*Ar$3.185.558,00*

- ✓ *The operating costs of the FNA represents 62% of the total revenue and more than 77% of the revenue obtained from the paying public domain regime tax.*
- ✓ *The resources spent in salaries to FNA staff more than 23% of the total revenue and more than 43% of the revenue from the paying public domain regime tax.*
- ✓ *The resources transferred to authors and artists (in the form of grants, loans and subsidies) represent almost 18% of the FNA total revenue and 29% of the revenue from the paying public domain regime tax.*

Fiscal Year 2008

TOTAL RESOURCES	*Ar$ 12.086.013,92*
- *Rights (PPD)*	*Ar$ 10.288.230,80*

TOTAL COSTS *Ar$ 9.322.405,53*

- *Operative costs* *Ar$ 6.641.318,78*
    - *Of which salaries* *Ar$ 3.467.116,91*
- *Transfers to the private sector* *Ar$ 2.476.064,98*

- ✓ *The operating costs of the FNA represents almost 55% of the total revenue and more than 64% of the revenue obtained from the paying public domain regime tax.*
- ✓ *The resources spent in salaries to FNA staff represent 20% of the total revenue and more than 24% of the revenue from the paying public domain regime tax.*
- ✓ *The resources transferred to authors and artists (in the form of grants, loans and subsidies) represent more than 20% of the FNA total revenue and more than 26% of the revenue from the paying public domain regime tax*

Fiscal Year 2007

TOTAL RESOURCES *Ar$ 10.834.318,25*

- *Rights (PPD)* *Ar$ 8.737.895,09*

TOTAL COSTS *Ar$ 8.049.701,00*

- *Operative costs* *Ar$ 4.497.809,79*
    - *Of which salaries* *Ar$ 2.491.786,41*
- *Transfers to the private sector* *Ar$ 2.551.647,00*

- ✓ *The operating costs of the FNA represents more than 41% of the total revenue and more than 51% of the revenue obtained from the paying public domain regime tax.*

- ✓ *The resources spent in salaries to FNA staff represent almost 23% of the total revenue and more than 28% of the revenue from the paying public domain regime tax.*
- ✓ *The resources transferred to authors and artists (in the form of grants, loans and subsidies) represent more than 23% of the FNA total revenue and more than 29% of the revenue from the paying public domain regime tax*

Fiscal Year 2006

TOTAL RESOURCES	*Ar$ 9.598.934,29*
- *Rights (PPD)*	*Ar$ 6.632.077,06*
TOTAL COSTS	*Ar$ 6.562.496,71*
- *Operative costs*	*Ar$ 3.937.082,71*
o *Of which salaries*	*Ar$ 1.874.789,71*
- *Transfers to the private sector*	*Ar$ 2.006.183,00*

- ✓ *The operating costs of the FNA represents more than 41% of the total revenue and more than 51% of the revenue obtained from the paying public domain regime tax.*
- ✓ *The resources spent in salaries to FNA staff represent almost 21% of the total revenue and more than 28% of the revenue from the paying public domain regime tax.*
- ✓ *The resources transferred to authors and artists (in the form of grants, loans and subsidies) represent more than 23% of the FNA total revenue and more than 29% of the revenue from the paying public domain regime tax.*

Fiscal Year 2005	
TOTAL RESOURCES	*Ar$ 7.337.764,51*
- *Rights (PPD)*	*Ar$ 5.841.506,44*
TOTAL COSTS	*Ar$ 5.740.288,00*
- *Operative costs*	*Ar$ 2.610.305,16*
o *Of which salaries*	*Ar$ 1.287.372,84*
- *Transfers to the private sector*	*Ar$ 1.308.864,87*

- ✓ *The operating costs of the FNA represents more than 35% of the total revenue and more than 44% of the revenue obtained from the paying public domain regime tax.*
- ✓ *The resources spent in salaries to FNA staff represent 15% of the total revenue and more than 22% of the revenue from the paying public domain regime tax.*

9.5. FINDINGS

What do the analysis of the financial statements and figures contained therein tell us about the Argentine FNA and the *dominio público pagante*?

From a cost-effectiveness perspective, i.e. the relationship between financial means and institutionally-set goals, the Argentinian *dominio público pagante* seems ineffectual. In

the end few resources are actually allocated to the intended beneficiaries of the *dominio público pagante*, i.e. national authors and artists, whereas most of the resources are consumed to run the costly bureaucratic machine required for the functioning of the system.

The costs of running the FNA- *dominio público pagante* system are the main source of expenditure, consuming from 60% to 86% of total revenue, depending on the year. Those percentages are way above average operating costs for similar institutions, i.e. copyright collecting societies.

In the UK the ratio total revenue/operating costs for collecting societies is around 20% (Towse, 2012) whereas in Argentina is between 25 to 30% (Sáenz Paz, n.d.).

The resources actually transferred by the FNA to the intended beneficiaries of the *dominio público pagante*, i.e. national authors and authors, represents between 10% to 23% of total revenue, depending of the year.

In sum, expensive operating costs and scarce transfer of revenue actually reaching the intended beneficiaries. It seems to this authors the cost of the system outweigh any potential benefit for the national letters, arts and culture.

The tax on the *dominio público pagante* is the main (almost the only) source of income for the FNA. Therefore, it is to be expected a very strong intra-institutional opposition to any intent to modify or abrogate the *dominio público pagante* in Argentina.

9.5. ADDITIONAL REMARKS

In addition to cost-effectiveness analysis, I consider important to reflect on other features that may contribute either to increase transaction costs for the use of works in the public domain in Argentina or add to the inefficacy of the system.

9.5.1. RANDOM ENFORCEMENT

Although there exists a general legal obligation for anyone publishing, broadcasting, communicating to the public, etc., works in the paying public domain to declare it to the FNA and pay the tax, the level of self-compliance seems to be low.

Salient cultural institutions, like the main theatres alongside *Corrientes* street in Buenos Aires, national TV stations, radios, etc., may be easier to monitor. However, the biggest debtor of the fee on the *dominio público pagante* is a public institution, the *Teatro Colón*.

In a recent journalistic piece (Bertolini, 2017) the *Teatro Colón*, a state-owned opera house inaugurated in 1908, was syndicated as the biggest debtor to the FNA for unpaid fees on the *dominio público pagante* for the performance of musical and lyrical works.

The *Teatro Colón* owes the FNA Ar$ 60.000.000 (approximately USD 3.5000.000[29]) for performance of works in the public domain (operas, ballets, symphonies, etc.) during the 2010-2015 period. In other words, the *Teatro Colón*, a state-run institution that belongs to the Autonomous City of Buenos Aires, is the biggest debtor of another public

[29] At the time the journalistic article was published.

institution, the FNA under the aegis of the (federal) Ministry of Culture. Rent transfer from one public institution to another is, a priori, undesirable as loses of efficiency due to red tape and transfer costs are to be expected

Anecdotal evidence suggest that the strategy of *Teatro Colón* would be not to pay the tax and wait for the statute of limitation to render the debt unenforceable (after five years). It seems the FNA is not inclined to initiate lawsuits against a famous opera house that belongs to the Autonomous City of Buenos Aires.

For smaller institutions, small publishing houses, theatres, radios and TV stations in the provinces, far away from the long arm of the FNA (whose seat is in the Autonomous City of Buenos Aires) tax avoidance may be feasible, and rational taking into account the low probability of being caught (G. Becker, 1974; G. S. Becker, 1976).

The FNA does not have a large enough staff to police the payment of the tax on the *dominio público pagante* all over the country (such is its jurisdiction, as a federal agency). This coupled with low detection makes me suppose a low level of self-compliance.

Even in the case of being detected, the economic sanction may not be sufficiently high to have a deterrent effect. Lawsuits to recover unpaid levies tend to protract for years. Moreover, for individuals that are judgement proof the threat of a lawsuit means nothing.

According to information provided by the FNA, detection of tax evasion is manual work. FNA employees periodically review catalogues of publishing houses, music labels, TV guides, carry out online searches and even buy products that they suspect may incorporate contents in the paying public domain. For this reason a above-mentioned journalistic

article called FNA staff "*educated bloodhounds*" (*sabuesos cultos*, in Spanish) given the detective work they must carry out to detect tax avoidance (Bertolini, 2017).

So, seen under this light, the payment of the tax on the dominio público pagante in Argentina seems not uniform. Probably many small users get away without paying the tax, especially if the reside far away from the Autonomous City of Buenos Aires. Bigger cultural institutions seem easier to police, moreover, they tend to be concentrated in the Autonomous City of Buenos Aires. However, even prominent institutions like the state-owned Teatro Colón maintain a big debt with the FNA for unpaid taxes on the *dominio público pagante*.

9.5.2. LITIGATION

The FNA does prosecute taxpayers that avoided or evaded their obligation to pay the tax. Pursuant to Law no. 24.156 for every unpaid debt of at least AR$ 712 (approx. USD 40[30]) the FNA must initiate legal actions. After the amount due is computed and preliminary administrative measures taken the cases are handed over to external lawyers.

The FNA has lawyers but they do not directly prosecute taxpayers, this is done through external counsel. How external counsel are chosen could not be determined. According to general principles of Argentinian procedural law, the losing party must pay legal fees of the winning side. The FNA does not compensate external lawyers in any additional way, I was told (but probably some expenses are covered). This scheme suggests small tax debts, even if must be prosecuted according to administrative law, would rarely be

[30] At the time of writing this section, July 2017.

actively pursued as the costs of the proceeding would probably exceed expected gains, even more so taking into account the possibility of the losing party becoming judgment proof.

9.5.3. DETECTION OF TAX AVOIDANCE

As any federal agency the FNA has jurisdiction all over the country, but its headquarters (and only seat) is located in the Autonomous City of Buenos Aires. Policing the payment of the tax on the *dominio público pagante* in the provinces, especially in the most distant ones, seems unlikely.

This conjecture was confirmed after taking a look at the list of lawsuits. Most defendants were domiciled in the Autonomous City of Buenos Aires and, to a lesser degree, in other main cities of the central region (e.g. Rosario, Córdoba, Mendoza, La Plata, etc.).

In the journalistic piece mentioned above (Bertolini, 2017) interesting anecdotal evidence is given in relation to tax how tax evasion is detected. The journalist tells the story of an FNA official who, watching a TV advertisement at home on Christmas' Eve, detected an adaptation of *Silent Night* (a work in the public domain). Later a formal request was sent to the advertised company requesting the payment of the tax on the paying public domain. What the journalist did not tell is how many other adaptations of works in the public domain are never detected given the FNA's limited resources.

9.5.4. TAX PROCEDURAL RULES

The FNA's procedure is regulated by Law No. 11.883, on tax procedure. This reinforces the hypothesis of the tax nature of the so-called fee on the *dominio público pagante*, in spite of the *nomen iuris* used.

9.5.5. THE FNA'S ROLE AS A CONTENT PRODUCER

In addition to giving loans, subsidies and grants to authors and artists, the FNA also uses resources to directly publish books, produce videos, CDs and DVDs.

In these roles the FNA competes with publishing houses, video and phonographic producers, etc. (but unlike the former, the latter is subsidised with taxes). Off the record, an FNA official justified these roles saying the FNA only publishes contents that are "*not commercial*." However, FNA's books, CDs and DVDs are not given away for free, they are sold at a price that allows to recover reproduction costs (I was told).

So, I believe the FNA official meant the FNA publishes books, CDs and DVDs that may not be appealing to a profit maximising firm. Then, however, the question arises which is the criteria to decide which work to publish or produce? Is it aesthetic value? And according to whom?

An FNA official told me *in voce* that publishing decisions are based in "*artistic quality*". However, there is no standing selection committee. Instead, an *ad hoc* jury integrated by FNA officials, authors and artists assembles when it is required to decide which works to publish directly.

I cannot omit to say at this point the risk that a state agency like the FNA may use its role as publisher and phonographic producer to favour works that are sympathetic to

the current administration, disregarding those that are critical or voice discontent (*dirigisme intellectuel?*).

9.5.6. NO DATABASE

The FNA'S Financial and Legal Director told me there is no database for works in the paying public domain. Therefore, FNA "*bloodhounds*" (and users) must check the status of every work on a case by case basis.

Pursuant to the Berne Convention Art. 5 (2) formalities are not required for copyright to exist. The absence of formalities, and a central registry, increases uncertainty about the status of a work. The longer the copyright term, the more the uncertainty (in particular to the so-called *orphan works*).

This problem may be minimised regarding most uses of works in the public domain in Argentina, with the exception of *publishing rights*, directly managed by the FNA (for which there exists no central database of works in the public domain). Collecting societies collect copyright licenses' fees and the tax on the *dominio público pagante* (as per delegation of the FNA); these societies have large databases (repertoires).

9.5.7. ADJUSTING FOR INFLATION

The Argentine *Consumer Price Index* is measured by the *National Institute of Statistics and Censuses of Argentina* (INDEC). This index lost credibility after the INDEC was intervened by the Executive in 2007 (to show a lower inflation rate than the real one; some sovereign bonds were adjusted based on INDEC's inflation rate).

Some authors suggest from 2007 onwards INDEC's inflation measures of the CPI were spurious (Cavallo, 2013). Alberto Cavallo and Manuel Bertolotto suggest the Argentinian inflation rates during the 2005-2015 period was one of the highest in the region (second only to Venezuela) (Cavallo & Bertolotto, 2016).

So, to take into account the effect of the inflation rate in the analysis of the FNA revenues and expenditures for the period 2005-2015 I decided to discard INDEC's figures. Instead I used private CPIs measurements and indirect proxies, such as collective interannual salary increases. Galloping inflation rates may explain FNA's increase in revenue and expenditures (see supra, graph no. 12).

9.6. SURVEY

To make a more complete assessment I decided to gather information from the taxpayers' side, i.e. those obliged to pay the tax on works in the *dominio público pagante*.

This task proved as difficult as getting the financial statements from the FNA. This type of taxpayer is difficult to identify (since not all pay *motu proprio*; tax evaders would not like to self-incriminate themselves), scattered across different industries (i.e. publishing houses, radio and TV stations, theatres, opera houses, etc.) and not united in a representative collective.

So, I decided to set up an anonymous online a survey, in the hope of reaching as many taxpayers as possible.

To advertise the survey I sent emails to institutions I knew made use of works in the public domain and announce it through social media.

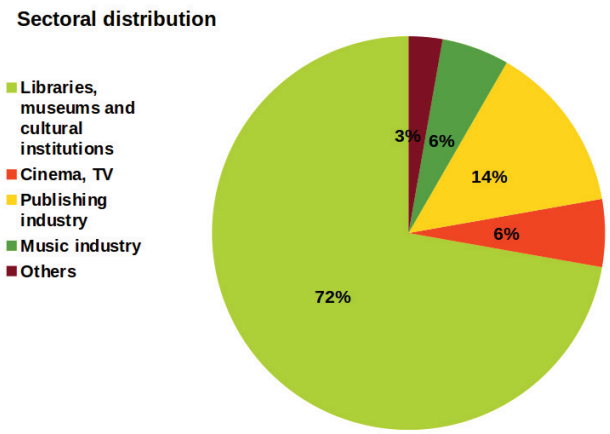
A few months later, I had received thirty-six answers to the online survey. The small number of respondents is probably the greatest liability of the survey, although 36 is better than nothing.

The little participation may be due to the limited advertising and even the ignorance of the existence of the *dominio público pagante* (it may sound surprising but anecdotal evidence made me realise most individuals one would expect to know about the paying public domain are totally unaware of it).

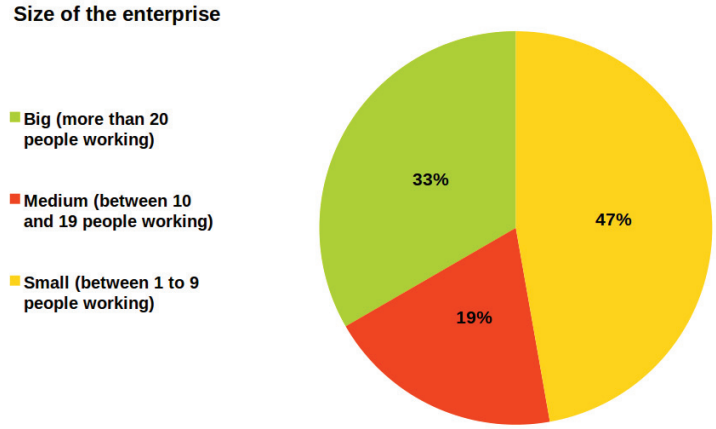
9.6.1. QUESTIONS AND ANSWERS

To segment the participants of the survey I followed the "*creative industries*" classification of the *Observatory of Cultural Industries* of the Autonomous City of Buenos Aires.

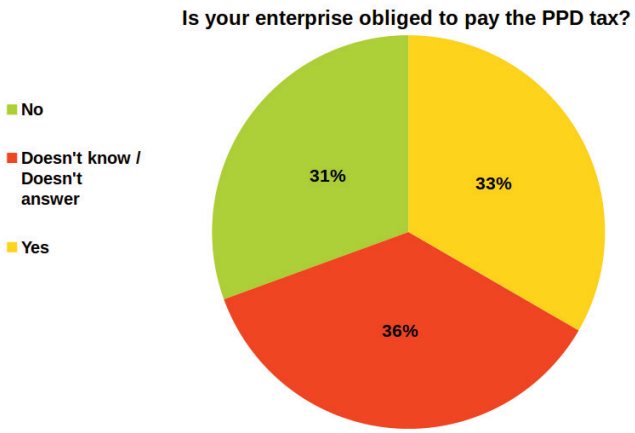
We asked four questions. The idea was to keep it short and simple. Below I reproduce the questions and their respective answers, in pie charts.



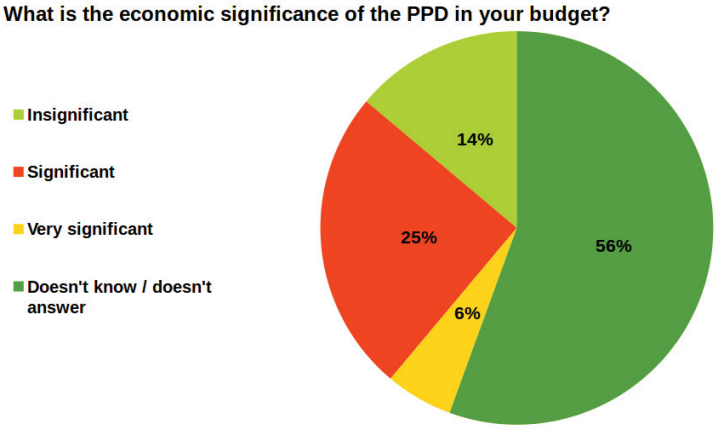
Graph no. 13: Sectors of the creative industries represented in the survey.



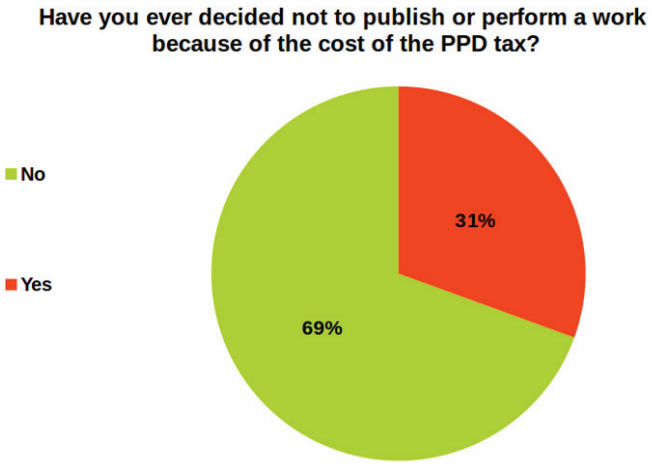
Graph no. 14: Size of survey's participants.



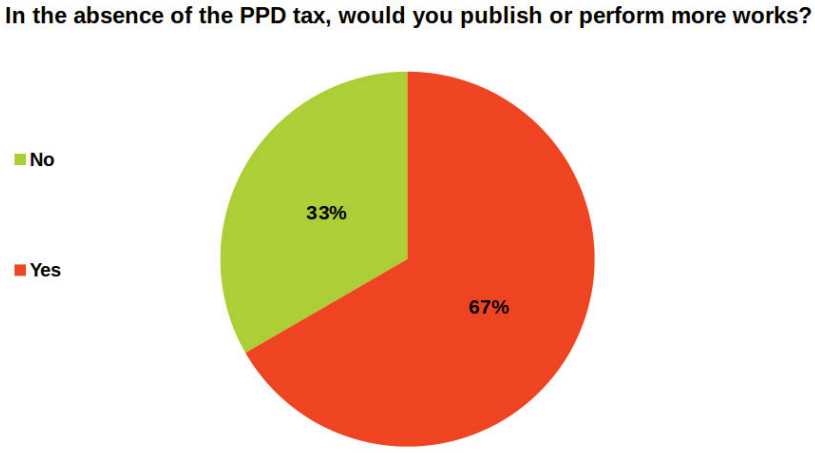
Graph no. 15: Answers to the first question.



Graph no. 16 Graph: Answers to the second question.



Graph no. 17: Answers to the third question.



Graph no. 18: Answers to the fourth question.

9.6.2. SURVEY'S RESULTS

Extracting conclusions from a discrete number of answers shall be approached cum grano salis. However, I believe the survey adds meaningful information, especially if we take into account correlated answers.

Participants who answered that the weight of the tax in their budget was "significant" or "very significant" (*What economic significance has the PPD in your budget?*), 11 out of 36 replies, represent 63,60 % of the affirmative answer ("yes") to question number three (*Have you ever decided not to publish or perform a work because of the cost of the PPD tax?*), seven answers out of a total of 11 affirmative answers.

Participants who answered that the weight of the tax in their budget was "significant" or "very significant" to question two (*What is the economic significance of the PPD in your budget?*), 11 out of 36 total replies, correspond to 33.3% of those who would, in the absence of the tax on the *dominio público pagante*, publish or perform more works (question four), 23 answers out of 36 total answers.

Few participants suggested the tax on the *dominio público pagante* is a significant cost to their budget. However, they would prefer not to pay it. This led me to hypothesise that the low incidence of the paying public domain tax may be a coadjutant factor to explain why taxpayers do not coordinate to lobby against it.

This may be so because of the limited enforcement of the tax. As I said supra, it seems plausible that only big cultural institutions pay the tribute. Small or distant institutions or one-time users of works in the public domain may get away without having to pay the tax.

Participants that pay the tax, including those that said it is not a significant cost, agreed they would publish more works in case the paying public domain would be cancelled. This answer, even within the limited scale of this survey, suggest the *dominio público pagante* has a disincentive effect for the dissemination of works.

9.7. CHAPTER'S SUMMARY

In this chapter I analysed financial statements of the Argentinian FNA to assess its efficacy, i.e. the relationship between means and goals. In short, financial information suggests the costs of the system exceed its benefits.

I also realised a small online survey to ask the opinion of the taxpayers. They all agree that in case of absence of the tax on the *dominio público pagante* they would publish, broadcast, perform, etc., more works; which proves the disincentive effect this tax has on the dissemination of creative works.

10. EXPLAINING THE PERSISTENCE OF THE DOMAINE PUBLIC PAYANT

10.1. WHY THE DOMAINE PUBLIC PAYANT IS STILL ENFORCED?

Economic theory suggests the *domaine public payant* is an inefficient mechanism to subsidise culture in any country. In short, it cancels out the many positive externalities derived from the free access to works in the public domain.

Moreover, the review of the financial information of the Argentinian enforcing authority (FNA) suggests it is a very costly and inefficacious mechanism as well.

For many reasons mentioned supra, copyright law is a better mechanism to incentivise authors and artists to create new works. Moreover, if like most economics-minded copyright scholars suggests copyright law has been extended beyond the optimal threshold, it may already overcompensate creators (Landes & Posner, 2003; Mackaay, 2011; Rufus Pollock, 2009). Therefore, a fortiori, a subsequent *domaine public payant*, as an additional incentive mechanism, becomes even less desirable.

To date, only a handful of developing countries enforce a *domaine public payant*, most of them found in francophone Africa and the Southern tip of the Latin America. Other countries that had a *domaine public payant* in force at some point in time, had abolish it in the second half of the 20th century. In spite of some sporadic comeback, the *domaine public payant* has lost tract at international fora and as academic topic, for the moment.

Then, why some countries still enforce a domaine public payant in the 21st century? This is a difficult question to tackle. I am afraid the best I can do is to offer a convincing conjecture, but perhaps not convincing enough.

A rule of thumb suggest that if neither logic nor economic efficiency can provide an adequate answer for the existence or subsistence of a controversial legal institution, probably a vested interest lies at the heart of the matter.

Let us remember also here the sage question posed by Cicero more than 2000 years ago, *cui prodest?*

In the following paragraphs I will developed a political economics (public choice) conjecture for the subsistence of the domaine public payant in these countries.

10.2. INSTITUTIONS AND DEVELOPMENT

Institutions are responsible for economic development, a straightforward insight from the so-called neoinstitutional school of economics (Galiani & Sened, 2014; D. North, 2005; D. C. North, 1981, 1990; D. C. North & Thomas, 1976). However, institutions are also responsible for the decline and poverty of nations. In his last work Mancur Olson stated that when a country's economy is hostage of interest groups such economy is doomed (Olson, 2008).

Acemoglu and Robinson made a similar point. They distinguished societies with mostly extractive or mostly inclusive institutions (Acemoglu & Robinson, 2012). Countries that fail to develop inclusive institutions will fail, no matter how abundant their natural resources or glorious their past.

Inclusive institutions promote open economies, wealth distribution and democratic forms of capitalism. Extractive institutions lead to closed economies, concentration of wealth in few hands and despotic forms of government. All developing nations have mostly extractive institutions in place, of different sorts.

It is an observable fact that some inefficient institutions endure in time, because of different reasons (e.g. vested interests, social inertia, indolence, corruption, etc.). Inefficient institutions prevent or delay development. Most developing countries have inefficient institutions in place, that are both the cause and the consequence of their sub-optimal level of development.

10.3. A PUBLIC CHOICE FRAMEWORK OF BUREAUCRATIC BEHAVIOUR

> "*Public choice has been defined as the application of economics to the study of politics*" (Mueller, 2004).

Not having found economic reasons to support a domaine public payant in the 21st century, let us turn our attention to other motives.

I have hinted before at Cicero's cui bono? In our study, who benefits from the existence of a *domaine public payant*? Let us anchor the answer to this question to the insights obtained from the case study on the Argentinian *dominio público pagante*.

Do the majority of Argentinian authors and artists benefit from the *dominio público pagante*? Some do, but not many. Unlike copyright law, that is available to all authors of original works without any formalities; the subsidies, loans and other benefits granted by the FNA must be requested according to certain procedural rules and there is no guarantee to obtain what is requested. Moreover, one must also factor in budget constraints. Most authors and artists will never receive a dime from the FNA.

Do Argentinian users of works in the public domain benefit from the *dominio público pagante*? Categorically not. Actually, the *dominio público pagante put* them in a worst situation. It is because of the paying public domain tax that users or consumers will end up paying more than they would had the tax do not exist (because any publisher will pass the extra cost of the tax onto the selling price).

Some may say the general public benefit from the *dominio público pagante* as the proceeds encourage the creation of new cultural works. However, this argument is not convincing. Not only any incentive effect from a random grant or subsidy in the future is heavily discounted, but the *domaine public payant* means access to works will never be free.

In addition, there may be subtler, unobservable losses. I refer to all the derivative works that require to access works in the public domain as an input that will not be created because of the added cost of the tax (e.g. documentary films, poetry anthologies, photographic compendiums, etc.).

Do FNA staff benefit from the *dominio público pagante*? Undoubtedly yes, In case the *dominio público pagante* would be repealed they would have to find a new job, since the DPP is the only source of funding for the FNA. Also, according to our case study the main component of FNA expenses are staff salaries. Therefore, it would be rational for FNA workers to defend the system and to oppose any attempt to repeal it.

FNA workers, staff, public officials are bureaucrats. They are as rational and self-interested as everyone else. However, unlike everyone else, bureaucrats are in a better position to defend their source of income and perks.

Ludwig von Mises referred to bureaucrats in the following terms,

> "*The bureaucrat [omissis] is in a peculiar position: he is both employer and employee. And his pecuniary interest as an employee towers above his interest as employer, as he gets much more from the public funds than he contributes to them. This double relationship becomes more important as the people on the government's payroll increase. The bureaucrat as voter is more eager to get a raise than to keep the budget*" (Mises, 1944)

Niskanen developed a *budget-maximizing model*, according to which bureaucrats try to maximize their budget in order to capture more rent in the form of salaries, perquisites, reputation, etc. (W. Niskanen, 1968; W. A. Niskanen, 1971, 1975).

Johnson et al. suggest the US federal bureaucracy has produced a system characterized by salaries insulated from fluctuating political and economic conditions which compensate bureaucrats more than their counterparts in the private sector. Legal protection effectively grant bureaucrats a kind of "*tenure*" because dismissal is extremely difficult and costly. Moreover, promotion rules weigh seniority over merit in promotion decisions (Johnson & Libecap, 1994).

Bureaucrats serving the FNA benefit from maintaining the status quo. The difficulties this author faced to access the FNA's financial statements can be interpreted as protective measures taken by FNA bureaucrats to safeguard their source of income, as a negative report may put those jobs at risk. Bureaucracy is related to the agency problems we will discuss infra.

What another sector does benefit from the Argentinian *dominio público pagante*? Certainly copyright collecting societies. As explained supra some Argentinian collecting societies collect the tax on the dominio público pagante by express delegation of the FNA (e.g. SADAIC, ARGENTORES, AADI, CAPIF, etc.). Collecting societies charge a fee or a commission for this collecting service (this information was not disclosed). So it is also expected that collecting societies would favour the perpetuation of the *dominio público pagante*, although not as strongly as the FNA, since the former have additional and larger sources of income (royalties for licensing copyrighted works).

There is another group to whom the *dominio público pagante* represent a net loss, to cumulative creators (i.e. creators that use works in the public domain as input for the creation of new derivative works), cultural entrepreneurs and SME, including independent publishers, theatres, TV and radio stations, phonographic producers offering mainly works in the public domain. These individuals must pay the fee to publish, reproduce, perform, etc.; which represents and extra costs and as such has to be transferred to the selling price or ticket. The increase in price do not represent an increase in gains, to the contrary, it implies a loss given consumer's budget constraints.

The results of the survey also suggest that in the absence of the tax these producers would publish, perform, broadcast, etc., more works in the public domain. However, it seems because of collective action problem these heterogeneous group fails to coordinate to work together against the *domaine public payant*, at least in Argentina.

In countries where this sector of the economy is more import important, coordinated action to repeal the *domaine public payant* is possible, as the Brazilian case seems to suggest (see supra).

10.3. PATH DEPENDENCY

The Argentinian *dominio público pagante* has been uninterruptedly in force since 1958. Path dependency may be a coadjutant factor to understand why in it still remains in force,

> *"path dependence means that where we go next depends not only on where we are now, but also upon where we have been. History matters"* (Stan J. Liebowitz & Margolis, 1999).

Path dependency does not imply that it is impossible to undo a given *status quo*, but rather that there are costs associated to change direction. At some point in time, after many decades going in one (perhaps, wrong) direction the costs to undoing the road travelled become very costly.

This suggests that institutions should not be put in placed lightly, without due consideration of their pros and cons. Once a path has been chosen, after some point, going back may become prohibitively costly. Thus, path dependence has a lock-in effect and increases switching costs. After some point in time it is difficult to break free from this dynamic.

Keyboard standards provide an interesting illustration. The QUERTY keyboard configuration was designed to deliberately slow down fast typing to prevent typewriter malfunction (this was before computers, printers and text processors were invented). Today nobody uses a typewriter any more (well, perhaps a few people still do, but computers are ubiquitous). The DVORAK keyboard configuration was meant to aid faster typing. Using computers there is not risk of typewriter jamming. However, no computer manufacturer configured the keyboards according to the DVORAK setting. The QUERTY keyboard remains the standard. People got used to the (now) less efficient QUERTY keyboard. However, sticking to QUERTY is the right thing to do. To most people switching keyboard patterns would be too costly.

Path dependence may also capture the divergent paths of legal systems, which are historically-dependent. Differences between the English Common Law and continental Civil Law can be explained by a series of path-dependent historical events (Hathaway, 2001).

Path dependency may lead to complacency and sub-optimal outcomes, especially after disruptive technological changes. A thoughtful leader must realise when, in spite of the odds, switching costs may be worth paying.

Institutions also have a lock-in effect. Moreover, efficiency is dynamic concept. Institutions that were once efficient and promoted economic and social progress may, at some point in time, become inefficient, inconducive or morally reproachable.

Existing institutions would reject change,

"The direction of change is determined by path dependence. The political and economic organizations that have come into existence in consequence of the institutional matrix typically have a stake in perpetuating the existing framework" (C. North, 1995).

Institutional choices, if gone wrong, would be difficult to rollback. In the area of IPR an interesting case is the sui generis *European Database Right*. Only the EU, to my knowledge, has a sui generis right for the protection of unoriginal databases (however in most countries original databases may be protected by copyright law).

The database right was created by Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996, establishing a new *sui generis* right for the legal protection of non-original databases. The Directive stated the following objectives,

a) To harmonize divergent norms across Member States, in particular the different scope of protection of databases under English copyright and continental droit d'auteur. The threshold of originality was lower under English copyright, where the sweat of the brow doctrine (i.e. effort or investment) was sufficient to qualify for copyright protection. In contrast, no analogous doctrine existed in continental droit d'auteur.
b) To encourage creation and investment in databases to favour the development of a European database market.
c) To balance the interests of manufacturers and users of databases.
d) To obtain a competitive advantage over U.S. database manufacturers.

The Directive reaffirms that an "*original*" database is copyrightable (Art. 3); in addition, it creates a sui generis right for non-original databases if "*there has been quantitatively*

and/or qualitatively a substantial investment in either the obtaining, verification or presentation of the contents to prevent extraction and/or reutilisation of the whole or of a substantial part" (Art. 7). The duration of the new database right is 15 years (Art. 10).

Almost ten years after the Directive was passed, the EU Commission requested a report to assess its effects (Commission of the European Communities, 2005).

The Report found that,

a) The Directive failed to harmonize divergent norms across Member States. Member States' case law created uncertainty in relation to key concepts such as substantial investment, spin-off databases and deep linking. Moreover, the European Court of Justice limited the scope of application to databases that have used substantial resources for the obtaining of data. Thus, resources invested for the creation of data do not qualify for protection under the database sui generis right (Cases C-46/02 Fixtures Marketing Ltd v. Oy Veikkaus Ab; C-203/02 The British Horseracing Board Ltd and Others v. William Hill Organisation Ltd; C-338/02 Fixtures Marketing Limited v. AB Svenska Spel; and C-444/02 Fixtures Marketing Ltd v. Organismos prognostikon agonon podosfairou AE -"OPAP").
b) The Directive failed to encourage creation and investment in databases and to develop a European database market. According to the Report empirical evidence suggests "not proven impact on the production of databases." In 1998, there were 3092 European databases registered at the GDD. In 2004, only 2095.
c) The Directive failed to balance the interests of manufacturers and users of databases.
The Report expressed confusion among users about the scope of database rights, particularly in the academic and scientific communities, which negatively affects research and development. In addition it highlights the risk of information lockup, particularly in the case of single source databases, i.e. those where the database maker and proprietor of the underlying data is the same entity.
d) The Directive failed obtain a competitive advantage over U.S. database manufacturers.

Moreover, the Report stated, "*the economic gap with the US has not been reduced*". Actually, the gap widened. According to *Gale Directory of Databases* during the 2002-2004 period, EU's market share reduced from 44% to 33% while US' increased from 62% to 72%. In 1996 the EU/US ratio for databases was 1:2; in 2004 1:3.

The Report concludes that sui generis database rights are difficult to understand, comes close to protecting data as property and the empirical evidence available suggests no positive economic impact whatsoever. To improve the status quo the Reports suggests: (a) to repeal the Database Directive; (b) to keep the Directive but to do away with the sui

generis database rights; (c) to amend the sui generis database right to make it more efficacious. In a similar vein, European academics stated the Directive could be detrimental to European businesses (Masnick, 2008) and may hinder the *Open Data strategy* (Moody, 2013). To date, Directive 96/9/EC remains in force.

The US has no *sui generis* right for databases. In the US copyright is only available for original databases. In a famous leading case (*Feist Publications, Inc., v. Rural Telephone Service Co., 499 U.S. 340,* 1991) the US Supreme Court definitely barred the copyrightability of that non-original databases.

Directive 96/9/EC may be an example of what Liebowitz et al. call *second-degree path dependence*, i.e. a decision taken with imperfect information (at its inception) that proves inefficient by later events (S.J. Liebowitz & Margolis, 1995)

The Argentinian *dominio público pagante* and the FNA may also be "*lock-in by historical events*" (Arthur, 1989). Economic theory, comparative law, the case study provided in this thesis all suggest point out in direction of its undesirability, taking into account total welfare and the goals its intended to promote. However, there seems to be no attempts to reform or repeal these sets of institutions.

10.4 AGENCY PROBLEMS

A principal-agent problem may arise in any situation in which one party (the agent) manages resources that belong to another (the principal) and the latter cannot oversee the actions of the former. The FNA (agent) manages resources from taxpayers (principals) who cannot monitor how those resources are managed and distributed, to the benefit of third parties (authors and artists). In this type of situation, a principal-agent conflict (of interests) is to be expected.

Jensen and Meckling,

> "*define an agency relationship as a contract under which one or more persons (the principal(s)) engage another person (the agent) to perform some service on their behalf which involves delegating some decision making authority to the agent. If both parties to*

the relationship are utility maximizers, there is good reason to believe that the agent will not always act in the best interests of the principal" (Jensen & Meckling, 1976).

The principal-agent problem relates to *moral hazard*, which is a special case of asymmetric information described by Akerlof in his seminal paper about *cherries and lemons* (George A Akerlof, 1970). The underlying conflict arises because the agent has information that the principal does not have, and which the latter can use strategically for her own benefit.

The principal-agent problem has been largely studied in the corporate governance literature, since Berle and Means determined it was a common trait of the modern publicly-traded corporation, where ownership and control are separated (Berle & Means, 1932). New variations and solutions have been, since them, been advanced by many famous authors (Fama, 1980; Jensen & Fama, 1983; Jensen & Meckling, 1976; Marris & Mueller, 1980; Ross, 1973; Williamson, 1964). However, the agency problem is not circumscribed to the corporate world, it affects any type of institution, public or private, for profit or not.

FNA staff are agents, while taxpayers and, to some extent, beneficiaries are principals. Assuming human beings tend to behave rationally, and virtuous behaviour is rather the exception than the rule, bureaucrats may be tempted to use public resources to pursue self-interest goals (e.g. higher salaries, increased budget, more perquisites, etc.).

The problem aggravates in the public sector because, as recognised by Niskanen, it is more difficult to measure bureaucratic output than corporate output, so it may become impossible to monitor their behaviour (W. A. Niskanen, 1971).

One way to solve or mitigate the principal-agent problem in the public sector would be to establish governance mechanisms that curtail the strategic behaviour of bureaucrats, analogous to private corporate governance rules.

For instance, in the specific case of the FNA, some suggestions could include giving more participation to the beneficiaries of the system, allowing authors and artists to oversee and participate in the decision-making process. Also more transparency in the financial

management of the institution would be desirable, for instance financial statements could be easily available online.

In addition, the compensation of FNA staff could be subject to performance thresholds or the attainment of certain objectives, at least partially, However, I am aware the implementation of these and other best practices will collide with legal barriers, such as administrative law and public employment law.

10.5. STATE PATERNALISM

The origins of the Argentinian FNA and its *dominio público pagante* was an Executive Decree-Law by *de facto* government. There was no democratic debate. It was the decision of a paternal military junta.

According to the Decree-Law the Argentinian *dominio público pagante* rest on an underlying (implicit) economic assumption, that the private credit market is not suitable or capable to fund artistic and cultural activities. This tacit assumption may or may not be wrong, however it must be empirically assessed. Private mechanisms to fund artistic and authorial activities exists, like securitisation of IPR, as the so-called *Bowie Bond* case suggests (see supra).

Any legislator promoting a *domaine public payant* is assuming a paternalistic role. The implied message is that the state is in a better position than the market to fund authors and artists. This claim is not made explicit neither has been empirically validated.

Public policies in support of the arts may be justified in case the market does not work or to promote *extra commercium* objectives, such as the French *exception culturelle* promoted by Andre Malraux in post-war France. Another example of state activism in the arts and culture is cinema. Most European and some Latin American countries subsidise the creation of new cinematographic works through public funding, e.g. the *Centre National du Cinéma et de l'Image Animée* in France, the *Instituto de la Cinematografía y de las Artes Audiovisuales* in Spain, the INCAA in Argentina, etc. This is not the place to evaluate the pros and cons of this sort of policies.

Paternalism may lead to *populism*, this is a concept different to define, where a *duce*, *führer* or *caudillo* is believed to be the person to understand the true needs of her people and provide for them. Populist leaders distrust institutions and rationalism.

Perhaps it is not a coincidence de *dominio público pagante* was instituted in Argentina. According to many scholars Juan Domingo Perón was the first modern populist leader (Finchelstein, 2018; Zanatta, 2013).

García Hamilton suggests that Argentina's sub-optimal economic development can be explained by an ethos that is hostile to free-markets and freedom of thought, whose roots can be traced back to the colonial period, during which a totalitarian and authoritarian culture was brewed, a consequence of the Catholic Church's monopoly over ideas and the Spanish Crown's monopoly over trade (Hamilton, 1998). Other author suggests teh Peronist welfare state cemented an anti-market mindset, that still permeates Argentinian society (Lewis, 1992).

The influence of ideas on the economic structure of a society has been proposed by Max Weber in his famous work *The Protestant Ethic and the Spirit of Capitalism* (Weber, 1905). More recently, and in a similar vein, McCloskey suggests our idea of markets, capitalism and, what she calls, *bourgeois virtues* are fundamental to economic progress (McCloskey, 2010, 2011, 2016).

This paternalistic and anti-market mindset is somewhat capture in the latest 2018 edition of the *Index of Economic Freedom*,

> *Argentina's economic freedom score is 52.3, making its economy the 144th freest in the 2018 Index. Its overall score has increased by 1.9 points, led by improvements in the indicators for judicial effectiveness, tax burden, and government spending. Argentina is ranked 26th among 32 countries in the Americas region, and its overall score remains below the regional and world averages* (Miller, Kim, & Roberts, 2018)

The point I am trying to make is that paternalistic and non-market institutions such as the *domaine public payant*, in which the state plays a preponderant role, are more likely to occur in countries with low indices of economic freedom. Most of the countries still

enforcing a domaine public payant have low scores in the above-mentioned, and similar, indices.

10.5. CHAPTER'S SUMMARY

The persistence of the *domaine public payant* in Argentina and elsewhere can be explained resorting to political economy or public choice-type of arguments.

Bureaucrats, and to a lesser degree, collecting societies benefit from the system so they would oppose any attempt to repeal or modify it. Path dependency and agency problems reinforce its continuity.

State paternalism, inefficient markets and low levels of economic freedom may be additional factors to consider.

11. FINAL CONCLUSIONS

11.1 THE COSTS OUTWEIGHT THE BENEFITS

This doctoral dissertation began with the question whether there was an economic justification for the *domaine public payant*.

The law and economics literature reviewed suggests there are no sound reasons to establish or maintain a *domaine public payant* system. It may have little incidence in the creation of new works and imposes a heavy burden on users or consumers of creative works as well as on cumulative creators, entrepreneurs and creative industries that use works in the public domain as inputs for the creation of new original or derivative works, in new formats or using innovative business models.

Moreover, the copyright term has an indirect but crucial impact on the *domaine public payant.* Copyright term has been extended considerably in the last decades. The longer copyright gets, the less an additional and subsequent incentive mechanism, like the *domaine public payant*, is required to incentivise authors.

When the Argentinian *dominio público pagante* was set up in 1958 the copyright term in Argentina was life of the author plus 30 years *post mortem auctoris*. Today is life of the author plus 70 years *post mortem auctoris.* This situation has been overlooked.

If copyright or licensing markets do not work properly, it would be better to take action to improve their functioning rather than creating an additional institution to provide financial aid at the expense of users.

The analysis of the financial statements of the Argentinian FNA was taken as a case study. Despite its particularities, the conclusions may be extrapolated to analogous systems. From the analysis of the FNA financial statements we could conclude that the *domaine public payant* is not a cost-effective institution, most of the revenue is consumed to pay for the operating costs and few resources actually reach the intended beneficiaries of the system, national authors and artists in need of financial aid.

From the analysis of the financial statements for the 2005-2015 period we conclude that between 60% to 86% of total revenue is consumed to pay operating costs; and only between 10% to 23% of total revenue is actually transferred to the intended beneficiaries of the system, i.e. national authors and artists, in diverse ways (loans, grants or subsidies). From this perspective, the costs of running the *domaine public payant* seem to outweigh its benefits.

A survey of taxpayers obliged to pay the tax for works in the public domain demonstrated that, in the absence of the tax, most of them would publish more works. This shows that the *domaine public payant* operates as a disincentive to the dissemination of public domain works and also to creation of new derivative works from them.

Then, if both theory and practice suggest its undesirably, why some countries sill enforce a *domaine public payant* system? The best plausible explanation is based in public choice arguments. Vested interests, path dependency and agency problems conspire to reform or repeal the system.

However, many countries did manage to abolish their respective *domaine public payant* systems. So it is reasonable to assume the power distribution between bureaucrats (pro DPP) and publishers (against DPP) is dynamic and asymmetric between countries. In countries where interest groups representing bureaucrats are stronger the status quo is upheld, conversely, in countries where interest groups representing bureaucrats are stronger the domaine public payant may be amended or repealed (like was presumably the case in Brazil and Mexico).

11.2. POLICY SUGGESTIONS (LEX FERENDA)

I

The policy suggestion to countries still enforcing a *domaine public payant* system is to abrogate it (*abrogatio legis*, i.e. to repeal a law by enacting a superseding one; *lex posterior derogat legi priori*).

Explicit derogation is to be preferred to implicit one, to make the message clear and cast away any doubt.

There are no legal impediments, whether domestic or international, to substitute a *domaine public payant* for a *free public domain*.

The expected consequences from such substitution are efficiency and welfare gains.

My conclusion is similar to Rutschman's,

> *There is no legal or practical reason that would prevent a transition from the current system into a truly open public domain. For instance, Chile switched in 1992 from a paying public domain regime for folklore to a public domain proper, and there have been no reports of adverse effects on the vitality of Chilean folklore music. This article therefore argues that countries that currently codify paying public domains should consider their removal* (Rutschman, 2015).

II

Countries that had a *domaine public payant* in force at a time but not anymore, as well as countries that never had one, should do well to stay that way.

Recent proposals to reinstate a limited paying public domain system either to pay for author's pensions, for the digitisation of analogical cinematographic works, or as a mechanism to compensate the use of traditional cultural expressions should equally be rejected. There are better ways, or at least less distortive ones, to solve the above-mentioned problems.

III

In countries where the abolition of the *domaine public payant* would lead to the extinction of the only or main source of income of a cultural institution deemed necessary to the

progress of national arts and letters, new and less distortive avenues of funding should be found.

This policy recommendation is specifically tailored to the Argentinian case. The FNA relies on the *dominio público pagante* to fulfil its role as a *bank for artists*. If the Argentinian government retains this role worth pursuing, the suggestion is to replace the *dominio público pagante* tax for another source of revenue, perhaps another less distortive tax; one that does not disincentivise access and transformation of works in the public domain. However, no tax is neutral, as every tax imposes some degree of deadweight loss and substitution effect.

An example to follow for Argentina could be the French *Caisse Nationale des Lettres*, renamed *Centre National du Livre* in 1975. The *Caisse Nationale des Lettres* enforced a *domaine public payant* from 1956 until 1976 (when it was annulled). Today the CNL grants subsidies and awards prizes to encourage French authors, translators and publishers to publish new books, both in paper and electronic format. The CNL source of funding are fiscal taxes; a tax on the sale of reproduction and printing equipment and another on the turnover of publishing companies (CNL, n.d.).

IV

Last but not least, if possible, it should be given a positive status to the public domain and provide legal remedies to safeguard it from private appropriation or enclosure; see in this regard Communia's *Policy Paper #4: A Positive Agenda for the Public Domain* (COMMUNIA International Association on the Public Domain, 2012b).

11.3. AVENUES FOR FUTURE RESEARCH

11.3.1. PROPERTY RULE, LIABILITY RULE AND CREATIVE WORKS

When dealing with lex ferenda propositions we must avoid the so-called *Nirvana fallacy,* i.e. to compare a real-world institution with an idyllic one (Demsetz, 1969). Then, are there better real-world alternatives to promote the creation and dissemination of creative

works than copyrights and related rights? To attain these goals, would a liability rule be better than a property rule?

To answer this question let us forget for a moment existing international commitments that act like legal barriers to radical innovation in the area of IPR, e.g. the Berne and Rome Conventions, the TRIPS Agreement and a myriad of BT, with chapters on intellectual property.

Calabresi and Melamed define a property rule in the following terms,

"*An entitlement is protected by a property rule to the extent that someone who wishes to remove the entitlement from its holder must buy it from him in a voluntary transaction in which the value of the entitlement is agreed upon by the seller*" (Calabresi & Melamed, 1972);

And a liability rule in these terms,

"Whenever someone may destroy the initial entitlement if he is willing to pay an objectively determined value for it, an entitlement is protected by a liability rule. This value may be what it is thought the original holder of the entitlement would have sold it for" (Calabresi & Melamed, 1972).

A creative work, e.g. a novel, a song or a film (*corpus mysticum*) must be distinguished from its medium, e.g. a book, a CD, or a DVD (*corpus mechanicus*). IPR, including copyrights, are based in the logic of a property rule (so the *ius excludendi omnes alios*).

Some scholars have suggested to replace the property rule by a liability one, the rationale behind the switch would to favour dissemination and cumulative creativity, without sacrificing the incentive effect.

Jerome Reichman et al. have proposed to replace IPR (a property rule) for what they call a *compensatory liability regime* (a liability rule) (Reichman, 2000, 2011; Reichman & Lewis, 2005). These authors believe a *compensatory liability regime,* which allows third parties to use a work without requesting previous authorization but that is subject to the obligation to compensate the right holder, may solve many of the problems affecting current IPR, viz. patent evergreening, patent thickets, tragedies of the anticommons, etc.

Other authors have proposed similar ideas, for instance Goldstein's *celestial jukebox*, an on-demand repository of musical works freely available upon payment of a fee (Goldstein, 2003). Burkart and McCourt added that for the celestial jukebox to work, it should rely on technological barriers such and other strategies such as CRM, DRM and MSP (Burkart & McCourt, 2004).

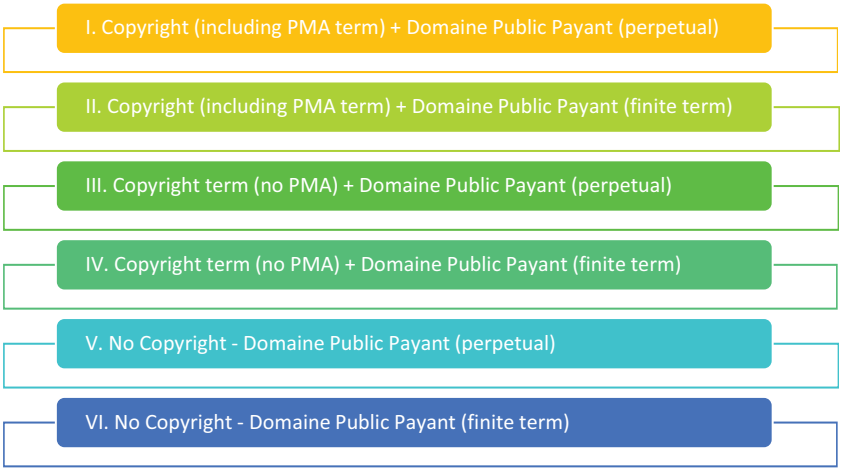
When is a property rule to be preferred to a liability rule and vice versa? This is a question that has occupied many law-and-economics scholars (Kaplow & Shavell, 1996; Krauss, 1999; R P Merges, 1996).

In general terms we could say that there seems to be consensus that in situations of low transaction costs a property rule should be preferred. Conversely, in situations of high transaction costs a liability rule must be favoured. Certain IP markets show some signs of high transaction costs due to anticommons problems, i.e. market failure due to too many IPR and different right holders (Heller, 1998). However, the feasibility of the proposal rest on an empirical assessment of the transaction costs.

To some extent, the *domaine public payant* is based on a liability rule. It is worth exploring the potential of the *domaine public payant* to replace, *in toto* or *in parte,* the current copyright system. The different possibilities are discussed below.

11.3.2. POSSIBLE COMBINATIONS OF COPYRIGHT LAW AND THE "DOMAINE PUBLIC PAYANT"

There are, theoretically, six different possibilities to combine a *domaine public payant*, with and without copyright, namely,



Graph no. 19: Thinkable relationships between copyright law and the DPP.

In Argentina, Uruguay and the francophone African countries still enforcing the *domaine public payant*, type I is in force. This is perhaps the worst combination of them all. Copyright law *post mortem auctoris* term has been regularly extended while the *domaine public payant* is perpetual. Under this scheme public domain works will never be freely accessible and usable, perpetuating the negative effects on welfare.

I will not review all the possible combinations. However, relationships III and IV in which a perpetual or finite *domaine public payant*, respectively, replaces the *post mortem auctoris* part of the copyright term might be worth considering as an alternative to the current system (even if it is not compatible with the Berne Convention and the TRIPS Agreement). Some French collecting societies have suggested they could agree to a reduction of the PMA copyright term in case that a domaine public payant is established (see supra).

Victor Hugo's domaine public payant proposal falls into situation IV. He proposed a *domaine public payant* instead of the current PMA term of copyright. The advantage of III and IV is the *domaine public payant* encourages access and reuse of the works, as it is not required to negotiate a license with the right holder every time. However, to work

properly the owner of the work must be properly compensated, which is not simple to determine in the absence of a property right tradable in a market.

Relationships V and VI are also worth exploring. I personally do not believe a perpetual duration is good idea, for instance because of the possibility of anticommons problems. A finite *domaine public payant* term may favour access and transformative uses (i.e. derivative works). However, one must make sure to add antibodies to mitigate some of the problems that affect current *domaine public payant* systems, e.g. principal-agent problem, high operating costs, etc.

I hope to develop some of these relationships in future publications. The regulation of creative works calls for creative legal solutions and thinking outside-the-box.

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Summary

In general terms, this thesis is about the delicate relationship of copyright law and the public domain. In particular, it analyses a rare institution that it is still enforced in a handful of countries, the so-called *domaine public payant* or paying public domain, by which I mean a system according to which the payment of a fee (*rectius* tax), usually to the state, is required in order to exploit works in the public domain (i.e. reproduction, publishing, performance, broadcasting, etc.).

Such a system has uninterruptedly been in force in Argentina since 1954 (*dominio público pagante*). Despite the fact that the institution and its enforcement authority (*Fondo Nacional de las Artes*) were created by decree of a military de facto government and did not undergo any parliamentary debate whatsoever, it has received little attention from Argentinian scholars.

In this thesis, I apply insights from the economic analysis of the law to the paying public domain regime as it is enforced in Argentina today. I strive to determine if such a system is aimed at solving an additional market failure, i.e. in addition to the public goods one that justifies copyright law, or any other economic problem. I also deconstruct and criticize the main argument advanced by the proponents of the paying public domain, the supposed *unfair competition* situation in which producers of copyrighted works are placed because of the existence of works in the public domain.

In addition, I engage in a cost-effectiveness analysis on how the institution functions (a relationship between means and intended goals). To this end, I rely on financial data obtained, after protracted litigation, from the *Fondo Nacional de las Artes.* The analysis of the financial documents suggests a high cost-to-income ratio, even for a non-for profit governmental institution. Most of the income derived from the tax levied upon the exploitation of works in the paying public domain are used to keep the system running (administrative and operative costs) while only a small percentage actually reaches the intended beneficiaries of the system (grants, prizes and subsidies to Argentinian authors and authors).

The persistence of the Argentinian *dominio público pagante* is explained resorting to public-choice arguments. On the one hand, the small financial impact on those obliged to pay the tax; given the low probability of being detected evading the payment of the tribute given the limited resources of the enforcing authority to police compliance (only prominent cultural institutions are actively monitored, most of them belong to the Argentinian state). On the other hand, bureaucrats and collecting societies (that collect the tax per delegation, against an undisclosed commission) capture most of the rent of the system. Because they benefit from maintaining the status quo it is expected they would reject any attempt to reform or abrogate the system. In addition, the system is afflicted by a serious agency problem.

In conclusion, as a policy implication, the abrogation of the Argentinian *dominio público pagante* may lead to welfare gains (i.e. lower costs to access works in the public domain, enhanced dissemination, digitization, format shifting and preservation, new forms of

exploitation of existing works and incentives to create derivative works, inter alia). In case the government decides to maintain the *Fondo Nacional de las Artes*, it is suggested to explore less distortive sources of revenue to sustain it. Other countries, with a *domaine public payant* still in force, would also do well to abrogate it.

As topics for further research, it is suggested to explore the potential of the *domaine public payant* as a substitute incentive mechanism, i.e. instead of copyright law and not as a supplement of it. In this regard, it seems promising to study the potential effects of substituting the current property rule (copyright law) by a liability one (or compensatory liability regime, according to some scholars). This is expected to mitigate problems derived from high transaction costs, oligopolistic markets and anticommons concerns. A change of rule will face high legal barriers, as such a system goes against the current international intellectual property law system of minimum standards enshrined in several multilateral treaties. In addition, the *domaine public payant* has been indicated as a possible mechanism to regulate access to Traditional Knowledge and Traditional Cultural Expressions, an area that has seen little advance in last decades.

Samenvatting

In algemene zin gaat dit proefschrift over de gevoelige verhouding tussen de bestudering van het auteursrecht en het publieke domein. Meer specifiek analyseert deze studie een zeldzame wetgeving die in enkele landen nog steeds wordt gehandhaafd: het zogenaamde *domaine public payant* of betalende publieke domein. Dit is een systeem waarin het betalen van een vergoeding (*rectius*-belasting) wordt vereist, meestal aan de staat, om werken in het publieke domein te mogen exploiteren (d.w.z. reproduceren, publiceren, uitvoeren, uitzenden, etc.)

Zo'n systeem is in Argentinië al sinds 1954 ononderbroken van kracht (*dominio público pagante*). De wet en zijn handhavende autoriteit (*Fondo Nacional de las Artes*) zijn destijds per decreet in het leven geroepen door een militaire de facto regering zonder dat hierover ooit enig parlementair debat heeft plaatsgevonden. Desondanks hebben Argentijnse wetenschappers hier nooit veel aandacht aan besteed.

In dit proefschrift pas ik inzichten uit de economische analyse van het recht toe op het betalende publieke domein zoals dat tegenwoordig in Argentinië van kracht is. Ik wil onderzoeken of dit systeem werkelijk is gericht op het oplossen van nog andere vormen van marktfalen dan bijvoorbeeld de publieke goederen, die het bestaan van het auteursrecht rechtvaardigen, of van enig ander economisch probleem. Hiertoe zal ik het belangrijkste argument deconstrueren en bespreken dat door de voorstanders van het betalende publieke domein naar voren wordt gebracht: de veronderstelde positie van *oneerlijke concurrentie* waarin de makers van auteursrechtelijk beschermde werken worden geplaatst door het bestaan van het publiek domein.

Ook voer ik een analyse uit van de kosteneffectiviteit van het functioneren van de wet (de verhouding tussen de middelen en de beoogde doelen). Ik ga daarbij uit van de financiële gegevens die na langdurige procesvoering zijn verkregen van het *Fondo Nacional de las Artes*. De analyse van de financiële documenten wijst op een hoge kosten-batenratio, zelfs voor een not-for-profit overheidsinstelling. Het blijkt dat het grootste deel van de inkomsten uit de belasting die wordt geheven op de exploitatie van werken in het betalende publieke domein wordt gebruikt om het overheidssysteem draaiend te houden (overheadkosten en operationele kosten) terwijl slechts een klein percentage daadwerkelijk de mensen bereikt voor wie het systeem was bedoeld (beurzen, prijzen en subsidies voor Argentijnse auteurs en auteurs).

Het voortbestaan van het Argentijnse *dominio público pagante* wordt verklaard op basis van de public choice theorie. Enerzijds is het financiële effect op degenen die deze belasting moeten betalen gering; er is een lage kans op ontdekking wanneer men de bijdrage niet betaalt doordat de handhavende autoriteit slechts beperkte middelen heeft om toezicht te houden op de naleving (alleen prominente culturele instellingen worden actief gemonitord, en de meeste daarvan zijn eigendom van de Argentijnse staat). Anderzijds profiteren ambtenaren en innende organisaties (aan wie de invordering van de belasting tegen een niet-openbare provisie is gedelegeerd) het meest van het systeem. En omdat zij voordeel hebben van het handhaven van

de status quo is te verwachten dat zij elke poging om het systeem te hervormen of af te schaffen zullen afwijzen. Daarnaast werkt het systeem het principaal-agentprobleem in de hand.

Als beleidsconsequentie kan worden geconcludeerd dat het afschaffen van het Argentijnse *dominio público pagante* zeker welzijnswinst zou kunnen opleveren (bijvoorbeeld in de vorm van lagere kosten voor de toegang tot werken in het publieke domein, een betere verspreiding en digitalisatie van de werken, de mogelijkheid tot omzetting naar andere formaten, een beter behoud van de werken, nieuwe exploitatievormen, en een grotere stimulans om afgeleide werken te creëren, etc.). Mocht de regering besluiten om het *Fondo Nacional de las Artes* te handhaven, dan is het advies om hiervoor inkomstenbronnen te verkennen die minder ondermijnend zijn. Ook andere landen waarin de *domaine public payant* nog steeds bestaat zouden er goed aan doen om deze regeling af te schaffen.

Voor verder onderzoek wordt voorgesteld om het *domaine public payant* als vervangend stimuleringsmechanisme te verkennen, d.w.z. in de plaats van het auteursrecht en niet als aanvulling daarop. Het lijkt wat dit betreft veelbelovend om de potentiële effecten te onderzoeken van het vervangen van het huidige eigendomsrecht (auteurswetgeving) door een vorm van aansprakelijkheidsrecht (door sommige wetenschappers ook wel compenserend aansprakelijkheidsrecht genoemd). Dit zal naar verwachting de problemen terugdringen die ontstaan door hoge transactiekosten, oligopolistische markten en anticommons-gedrag. Echter, bij het tot stand brengen van een wetswijziging zullen aanzienlijke juridische barrières moeten worden overwonnen. Aanpassingen zullen namelijk altijd ingaan tegen het huidige internationale rechtssysteem voor intellectueel eigendomsrecht, waarvan de basis-standaarden in diverse multilaterale overeenkomsten zijn verankerd. Bovendien wordt het *domaine public payant* nog steeds gezien als mogelijk reguleringsmechanisme voor de toegang tot traditionele kennis en cultuuruitingen, een terrein waarop in de afgelopen decennia weinig vooruitgang is geboekt.

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Short bio

Maximiliano Marzetti is a qualified lawyer, industrial property agent, and lecturer. He obtained his law degree from the Pontificia Universidad Católica Argentina where he also taught commercial law. He earned two master of law degrees, one from the Università degli Studi di Torino in intellectual property and another from the Universität Hamburg in law and economics. He was awarded an Erasmus Mundus grant by the European Commission, a semi-senior research grant by the Latin American Council of Social Sciences (CLACSO), served three times as foreign scholar (Stipendiat) at the Max Planck Institut für Geistiges Eigentum, Wettbewerbs- und Steuerrecht in Munich, and provided legal counsel to the XX Winter Olympic Games Organizing Committee in Turin. He regularly lectures at the Latin American School of Social Sciences (FLACSO) and is visiting lecturer at other Argentinian and Latin American universities. In 2016, he was appointed assistant researcher at the Centre of Interdisciplinary Studies of Industrial and Economic Law (CEIDIE), University of Buenos Aires, and assistant director to the LLM in Intellectual Property at Università degli Studi di Torino.

Education	
EUROPEAN MASTER IN LAW AND ECONOMICS (BOLOGNA/HAMBURG)	2006
MASTER OF LAWS IN INTELLECTUAL PROPERTY (TURIN/WIPO)	2005
SPECIALIST IN INTELLECTUAL PROPERTY AND COMPETITION LAW (SANTIAGO DE COMPOSTELA)	2004
UNIVERSITY PROFESSOR (CATHOLIC UNIVERSITY OF ARGENTINA)	2003
LAW DEGREE (CATHOLIC UNIVERSITY OF ARGENTINA)	1999
Work experience	
IP LAWYER, Ambrosini & Asociados Abogados, Buenos Aires, Argentina	2011-TO DATE
LECTURER, Economics II "Economic Analysis of IP Rights", Master in Intellectual Property, FLACSO – Argentina	2008-TO DATE
ASSISTANT DIRECTOR, Turin Law School-WIPO LLM in Intellectual Property	2016-2017

ASSOCIATE RESEARCER, Centre of Interdisciplinary Studies of Industrial and Economic Law, Law School, University of Buenos Aires	2016-TO DATE
Prizes and awards	
Stipendiat, Max Planck Institute for Innovation and Competition – Munich, Germany	2007, 2013 and 2014
Semi-Senior Scholar Research Grantee, Latin American Council of Social Sciences (CLACSO)	2012
Erasmus Mundus Scholarship holder, European Commission	2005-2006
Scholarship Holder, Turin University	2004-2005
Publications	
Is the Argentinian paying public domain an efficient institution? A law and economics perspective, EL DIAL, Intellectual Property Law Review, 28 June, 2016	2016
Proposals to extend access to public goods in Argentina – Establishing the necessary balance between intellectual property rights and the public domain (ISBN 978-987-1891-81-8), Latin American Council of Social Sciences (CLACSO), Argentina	2013
Synergetic Interaction between Intellectual Property and Consumer Protection: A Pragmatic Law & Economics Proposal, in D. Beldiman (Ed.) Access to Information and Knowledge: 21st Century Challenges in Intellectual Property and Knowledge Economy, Edward Elgar, Cheltenham (UK) 2013, pp. 189-207, (ISBN-13: 978-1783470471) (With A. Stazi, A.)	2013
Antagonism or Complementarity? A brief comment on the complex and understudied relationship between Intellectual Property and Competition Law, Latin American Competition Bulletin, European Commission, 2012 & Revista de Derecho Comercial, del Consumidor y de la Empresa, Vol. III, No. 3, Buenos Aires, June 2012 (reprinted)	2012
Others	

European Doctorate in Law & Economics

EDLE PhD Portfolio

Name PhD student : Maximiliano Marzetti
PhD period : 2006-2018
Promoters : Prof. Dr. Michael G. Faure LL.M.
Prof. Dr. Klaus Heine

PhD training

Bologna courses	*year*
Game Theory Prof. Lambertini	October - December 2006
Economics of Intellectual Property and Competition Law Prof. Denicolò	October - December 2006
Mathematics Prof. Pasotti	October - December 2006
Seminars in Behavioral Law and Economics Prof. Carbonara	October 2006 - March 2007
Seminars and workshops	*year*
CopyrightX Program Harvard University	2016
Summer School in Computer Law European University Institute	2009
Summer School in Law & Economics Hamburg University	2007
Presentations	*year*
Rotterdam Fall seminar series	2012
Attendance (international) conferences	*year*
Moderator WIPO Development Agenda for Academics, Singapore University, Singapore	08/2011
Colloquium for Teachers of Intellectual Property WIPO Geneva	2011

Teaching	*year*
Associate Lecturer "Economic Analysis of Intellectual Property Rights" Master in Intellectual Property, FLACSO, Buenos Aires, Argentina	2008-to date
Adjunct Lecturer "Corporate Governance" LLM in Private Law, Law School, Palermo University, Buenos Aires, Argentina	06/2016-08/2016
Adjunct Lecturer "Copyright Law, Neighbouring Rights, Collective Right's Management and Publishing Contracts" LLM in Intellectual Property Catholic University of Santiago de Guayaquil, Ecuador	01-02/2014
Adjunct Faculty "International Intellectual Property Law" Master in International Commercial Law, University of Greenwich & University of New York –Tirana, Albania	08-09/2010
Others	*year*
Assistant Director Turin Law School-WIPO LLM in Intellectual Property	08/2016-to date
Associate Researcher Centre for Interdisciplinary Studies of Industrial and Economic Law, (Dr. Carlos Correa), Law School, University of Buenos Aires	05/2016-to date
Semi-Senior Research Fellow CLACSO, Buenos Aires, Argentina	12/2011– 03/201
Academic Coordinator (pro tempore) Intellectual Property Centre, Law School, Austral University, Buenos Aires, Argentina	07/2006-09/2006