

# Copyright Term in the European Union:

## A Discussion on the Public Domain

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Prohlašuji, že jsem esej na téma “Copyright Term in the European Union: A Discussion on the Public Domain” zpracovala sama a uvedla jsem všechny použité prameny. Dávám souhlas s prvním zveřejněním své eseje vyhlášovatelé soutěže nebo spolupracujícími institucemi v papírové či elektronické podobě.

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## 1 Introduction

Copyright, belonging to the group of intellectual property rights, has come through a turbulent development in the last decades. One of the reasons is for sure the fact that it is a relatively new branch of law. Apart from that, however, there are other factors, mainly of social and economic character, that caused that copyright has got to the centre of attention of the legislative efforts of developed countries in the last century. The standard of protection in the European countries has increased rapidly and it can be said with absolute certainty that this trend will continue in the following years.

Especially with the recent boom of information technology and the deepening of globalization which we experience these days the international agreements have become an inherent part of the copyright legislation. Also the legislation of the European Union influenced radically the copyright legislation of its member states.

One of the fundamental copyright-related issues which are harmonized at the European Union level is the term of copyright protection of literary and artistic works, which has been set at 70 years after the death of the author. Although it has been more than 20 years since this rule started to apply in the European Union member states, there are still loud critical voices saying that the current standard is excessively high and it does not serve its purpose anymore. On the other hand, there is also a big number of proponents of longer copyright term who from time to time manage to open a discussion suggesting making the current term even longer.

It is clear that the defendants of long copyright term have a much bigger lobbying potential than its opponents; therefore their arguments are much more to be heard. For this reason the author of this essay decided to discuss the arguments of both sides and to point out the advantages that the public domain status of a work can bring to the society and economy. A special emphasis will be placed on the empirical studies which have been conducted with respect to this issue and which, as will be shown in the following text, have the capacity to disprove some of the most often used arguments of the advocates of the copyright term extensions. However, it is to be noted that this essay by no means intends to find an optimal legislative solution.

This paper contains an overview of the legislative development in respect to the copyright term in the European Union followed by description of the most often mentioned arguments explaining the economic rationale behind the countries' efforts to ensure the protection of literary and artistic works. Subsequently, the arguments of proponents and opponents of extension of the copyright term are presented and discussed and conclusions are drawn on the basis of empirical studies conducted with respect to the issue of public domain.

## 2 Copyright term in the European Union

### 2.1 The Berne Convention

The first and only universal international agreement concerning the term of copyright is the Berne Convention for the Protection of Literary and Artistic works, originally signed in 1886. This convention, which is with its total of 181 signatories<sup>1</sup> considered the most significant document in the international copyright law, is also of a big importance to the European Union, although it is not a product of the EU legislative efforts and the EU is not even its contracting party. It is so because the European Union has become a party to the WIPO Copyright Treaty<sup>2</sup>, according to which all the signatories shall abide by the articles 1-21 and the Appendix of the Berne Convention. Therefore, by means of the WIPO Copyright Treaty the Berne Convention is binding for the European Union as a whole as well.<sup>3</sup> In addition to that, all the member states of the European Union themselves are nowadays contracting parties to the Convention.

However, the clause regarding the term of protection had not been enacted in the original text of the Berne Convention until the Brussels revision in 1948 which made it obligatory for the states to abide by the rule setting the length of the copyright protection at minimum 50 years after the death of the author.<sup>4</sup> In the case of joint authorship the term shall be counted as from the death of the last surviving author.

Exceptions are possible in case of anonymous and pseudonymous works, where the author cannot be identified (fifty years after the work has been lawfully made available to the public), photographic works and works of applied art (twenty-five years from its making) and cinematographic works (fifty years after the work has been made available to the public, for unpublished works fifty years after their creation).<sup>5</sup>

As the 50-year rule represents only a minimal standard that the states must ensure, nothing prevents them from affording the authors even a longer protection. The term is to be governed by the legislation of the state where protection is claimed, however, according to the Berne Convention no state should be forced to grant protection to works of foreign

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<sup>1</sup> The total number refers to the total number of parties which acceded to the Paris Act of 1971. The list of the countries can be found on the website of the World Intellectual Property Organization: [http://www.wipo.int/treaties/en/ActResults.jsp?act\\_id=26](http://www.wipo.int/treaties/en/ActResults.jsp?act_id=26)

<sup>2</sup> WCT deals mainly with the protection of works in the digital environment, computer programs and databases.

<sup>3</sup> Moreover, it is to be noted that also the TRIPS Agreement and the Universal Copyright Convention make reference to the Berne Convention, therefore substantial part of its provisions are applied also in countries which are parties to one of them, even though they have not ratified the Berne Convention.

<sup>4</sup> MASOUYÉ, Claude. Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971). *World Intellectual Property Organization* [online]. Geneva, 1978, p. 45. Available: [http://www.wipo.int/edocs/pubdocs/en/copyright/615/wipo\\_pub\\_615.pdf](http://www.wipo.int/edocs/pubdocs/en/copyright/615/wipo_pub_615.pdf), [cited 2016-07-14].

<sup>5</sup> Art. 7 of the Berne Convention for the Protection of Literary and Artistic Works, as amended by the Paris Act (1971).

origin, while the term of protection thereof in their country of origin has lapsed.<sup>6</sup> This provision of the Convention expresses the so called “principle of the shorter term” or “principle of comparison of terms”. As a result, the term of protection applied to an individual work is always either the term afforded by the country where the protection is claimed or the term afforded by the country of origin of the work, whichever is shorter. However, each state alone can decide to grant its own term of protection to all works with no exceptions if it expressly states so in its national copyright law.

The discussions regarding the duration of copyright have always triggered controversies. Already the agreement on the 50-year rule was preceded by a lengthy discussion on the appropriateness of such a long term. On the other hand, as many states decided to use the possibility to prolong the term of protection or to introduce exceptions for certain groups of authors or works, the discussion opened soon after that and resulted in a recommendation to negotiate a new rule setting the standard higher, which was adopted at the Stockholm Conference in 1967.<sup>7</sup> However, this recommendation has not been followed up, so the “patchwork” of different provisions remains in existence in the international copyright law.

## **2.2 Building on the Berne Convention – the EU harmonization**

Finally, in the 1980s the EU decided to harmonize the copyright term within the territory of its member states. The reason for this decision is the above mentioned clause of the Berne Convention which allows the contracting parties to grant the authors a term which is longer than the minimum set by the Berne Convention. According to this provision some states were very generous and granted the authors the copyright protection lasting up to 70 years after their death.<sup>8</sup> In Spain the copyright term used to be even 80 years *pma*. On the top of that, many countries introduced various exceptions in order to afford a longer term to certain categories of authors or works.<sup>9</sup>

However, as for the European Union it is necessary to be entrusted with the power to legislate by the fundamental treaties in order to be able to harmonize certain subject, the differences between the member states’ legislations by themselves could not serve as a basis for harmonization at the EU level. It was the impact of these differences on the internal market of the European Union which forced the Union to take actions in this respect:

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<sup>6</sup> Art. 7(8) of the Berne Convention

<sup>7</sup> MASOUYÉ, Claude. Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971). *World Intellectual Property Organization* [online]. Geneva, 1978, p. 45. Available: [http://www.wipo.int/edocs/pubdocs/en/copyright/615/wipo\\_pub\\_615.pdf](http://www.wipo.int/edocs/pubdocs/en/copyright/615/wipo_pub_615.pdf), [cited 2016-07-14].

<sup>8</sup> For example Germany and Greece

<sup>9</sup> STAMATOUDI, Irini a Paul TORREMANS. *EU Copyright Law: A Commentary*. Cheltenham: Edward Elgar Publishing Limited, 2014, p. 250-258.

The problems started to arise in the 1980s, especially with regards to the quantitative restrictions of importation which resulted from disparities between national legislations. This issue was addressed by the Court of Justice for example in the case *EMI v Patricia*<sup>10</sup>, where the Court held that the restrictions of importation of sound recordings from Germany to Denmark stemming from the fact that the sound recordings were already in public domain according to the German legislation, but still under copyright according to the legislation of Denmark, were justified under the article 30 of the Treaty establishing the European Community. In other words, as long as the disparities between the national legislations persisted, the intra-European trade could have been restricted in order to ensure the rights of authors guaranteed by the national legislations. For that reason in 1993 a directive harmonizing the term of protection was adopted.<sup>11</sup> The respective directive was later repealed by the currently effective directive 2006/116/EC.<sup>12</sup>

The term of protection is thus currently set by the directive at 70 years within the whole territory of the European Union, which eliminates difficulties caused by fragmentation of the legislation of the EU member states. The directive applies to all the works which were protected in at least one of the countries of the European Union on the 1<sup>st</sup> of July 1995, which is also the deadline for implementation of the previous directive.<sup>13</sup> The effect of this provision was restoration of copyright in the countries the laws of which had set a shorter term of protection and a unified date when the works would fall into the public domain in all the member states of the European Union.

Nevertheless, it is worth mentioning that some member states kept longer terms or copyright exceptions which stem from the requirement of non-retroactive effect of the directive. For example in Spain the authors who died prior to 7 December 1987, which is the date of entry into force of a new copyright act which shortened the term from 80 to 60 years *pma*, still enjoy the copyright protection of 80 years *pma*. Moreover, in accordance with the principle of non-discrimination, not only Spanish works, but all the works originating<sup>14</sup> in the EU territory and works of all the EU nationals enjoy this longer term under the Spanish jurisdiction.<sup>15</sup>

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<sup>10</sup> Judgment of the Court (Sixth Chamber) of 24 January 1989 in case C-341/87, *EMI Electrola GmbH v Patricia Im- und Export and Others*.

<sup>11</sup> Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights, as further amended and supplemented.

<sup>12</sup> Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights, as further amended and supplemented. In the following text referred to as "the term directive".

<sup>13</sup> Art. 10(2) of the directive 93/98/EEC

<sup>14</sup> Origin of a work is determined according to the Berne Convention.

<sup>15</sup> Judgment of the Court (Fifth Chamber) of 6 June 2002 in case C-360/00, *Land Hessen v Ricordi & Co. Bühnen- und Musikverlag GmbH*.

See also judgement of the Supreme Court of Spain of 13 April 2015 in case 177/2015, *The Royal Literary Fund v Enokia SL*.

Apart from the Spanish exception there are countries which introduced wartime extensions for authors who died in the world wars or whose works were published during that time, extensions for posthumously published works or previously unpublished works.<sup>16</sup> On the top of that there are some very specific cases to be found in some legislations like for example the diary of Anne Frank, which is in public domain in some countries (e.g. Poland) and still under the copyright in other countries (e.g. The Netherlands),<sup>17</sup> or the Peter Pan play in the United Kingdom.<sup>18</sup>

### 3 The rationale behind the copyright protection

Copyright is an exclusive right over a piece of work which creates a monopoly of its holder allowing him to prevent others from copying, modifying or otherwise using his work without authorisation. In order to be able to understand the nature of copyright and the economic rationale behind its existence, it is necessary to clarify that it is neither an idea which is protected, nor a tangible object which captures the idea and makes it possible to be transmitted to the audience. What is protected by copyright is an “intellectual creation”, an expression of author’s creativity in an original manner.<sup>19</sup>

The value hidden in such intellectual creations is basically twofold – it can be seen as a value for the society, which can benefit from variety of creative works due to the information and knowledge contained in them or simply due to their originality and inventiveness, which can support education and enhance cultural development. Geiger asserts that the copyright law is a product of a kind of a “social contract” between the author and the society. According to him the society has a need for intellectual productions in order to ensure its progress and therefore it grants the author a reward in the form of a monopoly over his creation which

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<sup>16</sup> ANGELOPOULOS, Christina. The myth of European term harmonisation: 27 public domains for the 27 Member States. *International Review of Intellectual Property and Competition Law*. 2012, 43 (5), p. 567-594.

<sup>17</sup> Dutch court confirms that manuscripts diary Anne Frank remain protected in 2016 and beyond. *Anne Frank Fonds* [online]. 2015. Available: <http://www.annefrank.ch/234/items/dutch-court-confirms-that-manuscripts-diary-anne-frank-remain-protected-in-2016-and-beyond.html>, [cited 2016-07-08].

<sup>18</sup> The status of the Peter Pan play is however a bit different. The rights to the play belong to the Great Ormon Street Hospital, a children’s hospital in London, which is entitled to royalties for use of the play. As it has already passed more than 70 years from the death of J. M. Barrie, the GOSH is only entitled to royalties for the use, but cannot prevent anyone from using the play. Strictly speaking the right currently belonging to the GOSH is not a copyright anymore.

Peter Pan and the Copyright that Never Grew Up. *Plagiarism Today* [online]. 2015. Available: <https://www.plagiarismtoday.com/2015/10/21/peter-pan-and-the-copyright-that-never-grew-up/>, [cited 2016-07-08].

<sup>19</sup> Judgment of the Court (Fourth Chamber) of 16 July 2009 in case C-5/08, *Infopaq International A/S v Danske Dagblades Forening*.

enables him to exploit his work and to draw benefits from it. In return the author enriches the community by means of disseminating the work and rendering it publicly available.<sup>20</sup>

We can also see the value of intellectual creations from the economic point of view. Production of creative works nowadays forms the whole industry which generates jobs and profits not only for the authors, but also for many other people involved in making, distributing and selling copies of respective works. For both these reasons there is a public interest in encouraging authors to create new books, movies, songs, musicals and other creative works, which is also the objective of the copyright protection.

Granting copyright to the authors provides for a possibility to control over copying of their works and the price of the copies and therefore allows them to retrieve their initial investment. The main objective of the copyright protection is thus to avoid free-riding on author's expression and in this way maintain the incentives to create.

The economic explanation for the monopoly artificially created by copyright is based in the nature of the object of protection, which is often described as having the aspect of a "public good". Once a work has been created, it is very difficult to exclude someone from using it as users can lend the copies to each other and create them with very low marginal cost. Without existence of copyright the price of a copy would inevitably have to fall down to the marginal cost of copying, which could possibly prevent the infringers from copying, but on the other hand it would not allow the author to recoup the "costs of expression", i.e. the costs of creating the original work, which include not only the costs of creation itself, but also costs of publishing and which are usually fairly high given the time and effort that the author had to invest in his creation.<sup>21</sup> In the digital world it is even possible to satisfy an infinite number of users at the same time with only one copy of a work with practically no marginal cost. In that case the authors have effectively no possibility to control over copying of their creations and they are not able to charge the users for using their work.<sup>22</sup>

This "investment protection" reasoning increasingly appears also in the recitals to the EU directives. The directive 2001/29, for instance, states that the initial investment which is required to produce any type of creative works is considerable and therefore it is necessary to enable the authors to get an appropriate reward for the use of their work.<sup>23</sup> Geiger opposes to this pointing out that protecting the simple investment reverses the initial logic in the sense that the investment by itself does not necessarily have to create any added

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<sup>20</sup> The social function of intellectual property rights, or how ethics can influence the shape and use of IP law. GEIGER, Christophe. *Methods and Perspectives in Intellectual Property*. Edited by Graeme B. Dinwoodie. Cheltenham: Edward Elgar Publishing Limited, 2013, p. 153-176.

<sup>21</sup> LANDES, William M. a Richard A. POSNER. An Economic Analysis of Copyright Law. *The University of Chicago Press*. 1989, 18 (2), 325-363.

<sup>22</sup> BOYLE, James. The second enclosure movement and the construction of the public domain. *Law and contemporary problems*, 66 (1/2), p .33-74.

<sup>23</sup> Art. 10 of the recital to the directive 2009/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, as further amended and supplemented.



value and therefore it is not *per se* worth protecting.<sup>24</sup> This argument is undoubtedly valid, although it is clear that if we decided to follow this theory, we would have to decide in each and every case whether the work really has the required protectable value. Moreover, if the work had absolutely no value then it probably would not matter whether it is protected or not because with or without existence of copyright protection there would be no demand for such a piece of work. If there was nobody (or almost nobody) who would be willing to pay for the access to the work, the author could not recoup his initial investment in any case. The consequence of the lack of demand would of course be unavailability of the work to the public, but given the lack of demand the society would not suffer any kind of loss resulting from this situation.

On the contrary, the opponents of the copyright protection have come up with counterarguments, according to which the nature of creative works and the market itself provide for measures which can allow the authors to prevent the others from copying or to get sufficient revenues even without the existence of copyright, and thus it is not necessary to impose legal restrictions on using creative works in order to maintain incentives to create. Some of such arguments can be as follows:

1. The copier needs to have an access to a work before he starts to copy it. Therefore the authors can set the initial price very high in order to gain their investment back in a shorter time. Also, as copying takes some time, they will not face competition during a certain period of time after publication of their work.
2. Copying might also involve positive costs of expression when it is not a literal copy, therefore the price of the copy might be higher than marginal costs of copying and the author can still compete with such a copy. Moreover, copies are often of a worse quality than the original, which gives the author a competitive advantage.
3. For some authors it is also possible to recoup their investment using other sources. As publishing their creative works might help them to increase their prestige, it might help them to get a better job position, increased salary or a better position in negotiation.<sup>25</sup>

Another argument of the copyright opponents is that copyright also involves administration costs which the authors have to bear in order to be able to enforce their rights. These administration costs must be recouped by the author together with the costs of expression, which results in higher prices for the users of the works and leads to restricting of the access to the creative works. However, although these arguments are undoubtedly valid and to a certain extent present in practice they are generally not considered to be a persuasive argument against the existence of copyright as a whole.

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<sup>24</sup> The social function of intellectual property rights, or how ethics can influence the shape and use of IP law. GEIGER, Christophe. *Methods and Perspectives in Intellectual Property*. Edited by Graeme B. Dinwoodie. Cheltenham: Edward Elgar Publishing Limited, 2013, p. 153-176.

<sup>25</sup> LANDES, William M. and Richard A. POSNER. An Economic Analysis of Copyright Law. *The University of Chicago Press*. 1989, 18 (2), 325-363.

Last but not least, some authors have contested the effect of the copyright monopoly on the availability of works.<sup>26</sup> Apparently, if an author can control over the dissemination of his works and offer his works only to those who have paid him in return, the effect will be that the availability will be somewhere in the middle on the scale between “not available” and “freely accessible”. In other words, it is likely that the work will be to be found somewhere but not everyone will have the resources to access it, obtain a copy or to use it in any other way. The challenge for the legislators then lies in striking a fair balance between limiting the free access to the work and ensuring the incentives to create new creative works.

## 4 Copyright term discussion – in favour of further extensions?

### 4.1 The Berne Convention considerations

It is generally not a very difficult task to find arguments supporting long copyright protection. To accomplish that it is enough just to examine the two documents presented above – the Berne Convention and the EU copyright term directive.

The Berne Convention itself does not contain any reasoning of the choice of the 50-year rule, however, according to the WIPO Guide to the Berne Convention most countries felt it “fair and right” that the average lifetime of the author and his direct descendants should be covered, i.e. in total three generations.<sup>27</sup> This argument is repeated in the recital to the copyright term directive where the 70-year rule is justified based on the fact that the average lifespan in the EU has grown longer and therefore the minimum set by the Berne Convention is not enough to cover two generations of descendants anymore.<sup>28</sup>

The question whether the author’s descendants will or will not be able to enjoy economic rights connected to his work for sure influences his decision to create. On the other hand, as some authors point out, it is questionable whether prolonging the copyright term from 50 to 70 years *pma* has any impact on the creator’s decision. Some authors even mention the possibility that the argument of a general consensus on the necessity to subsist two generations of author’s descendants has been fabricated *ex post*, pointing out that no other historical resources describe the discussion on this topic.<sup>29</sup>

The guide also adds that taking into account the modern means of exploiting the works (apart from books and certain dramatico-musical works) the copyright status of a work is of a little importance to the users because they usually negotiate blanket licenses with the

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<sup>26</sup> For example Paul Heald, described in the following text.

<sup>27</sup> MASOUYÉ, Claude. Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971). *World Intellectual Property Organization* [online]. Geneva, 1978, p. 46. Available: [http://www.wipo.int/edocs/pubdocs/en/copyright/615/wipo\\_pub\\_615.pdf](http://www.wipo.int/edocs/pubdocs/en/copyright/615/wipo_pub_615.pdf), [cited 2016-07-14].

<sup>28</sup> Art. 6 of the recital to the copyright term directive

<sup>29</sup> See for example RICKETSON, Sam and Jane C. GINSBURG. *International Copyright and Neighbouring Rights: The Berne Convention and Beyond*, vol. 1. Oxford: Oxford University Press, 2<sup>nd</sup> edition, 2006, p. 41-133.

authors' representatives and the fact that the works have lapsed into the public domain makes little difference to the amount of money they pay. This argument is questionable for more reasons: firstly, it is basically only applicable to musical works – in case of any other literary or artistic works (books, paintings, musicals, plays, movies...) the users often have to negotiate with the rights holders in order to obtain the licence. The second deficiency of this argument is the fact that not only that the use of a work costs money which usually is of an importance to the users, the existence of copyright implies other costs which the users have to bear – they not only have to pay for the licence, but also bear the transaction costs necessary to negotiate it, i.e. to make the effort to find the right holder or the competent person to negotiate with and invest time money to the negotiations. It is then hard to conclude that (non-)existence of copyright protection is of a minor importance to the users of the works.

Most interestingly, the Guide to the Berne Convention mentions a very interesting argument which, in fact, comes in handy to the defendants of the public domain. According to the Guide “experience has shown that, when an author is dead, his works sometimes fall into a sort of limbo from which they may or may not emerge some time later”.<sup>30</sup> Claiming that the works tend to disappear after the author's death to reappear again when the term of copyright protection lapses is actually an argument often used to fight off the efforts of the copyright proponents. In this case the existence of copyright protection serves the opposite purpose to what it is intended – instead of ensuring the availability of a work to the audience it actually prevents the users from getting access to it.

#### **4.2 EU fragmentation as a reason for extensions**

Another argument for extension of the current copyright term can be the above mentioned fragmentation of the legislation of the EU member states. Although the term is considered to be harmonized, when we look at it closer we can see that the real situation is far from being considered a harmony.

Not only from the perspective of the internal market of the European Union, but also from the perspective of consumers and companies it would be desirable to unify the copyright term completely within the whole territory of the Union. The impediments to the free movement of goods are not the only inefficiency caused by the fragmentation of the national legislations. This situation, where there are still lots of exceptions and special and interim provisions, increases the costs of transaction for the potential users who, in order to obtain a licence to a work of a foreign author, have to consult international and national legislation of the respective country in order to find out whether the work is still under the copyright or already in the public domain.

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<sup>30</sup> MASOUYÉ, Claude. Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971). *World Intellectual Property Organization* [online]. Geneva, 1978, p. 46. Available: [http://www.wipo.int/edocs/pubdocs/en/copyright/615/wipo\\_pub\\_615.pdf](http://www.wipo.int/edocs/pubdocs/en/copyright/615/wipo_pub_615.pdf), [cited 2016-07-14].

If we wanted to simplify the current system, assuming the states should ensure legitimate expectations of the authors, a complete unification of the copyright term for all groups of works could serve as an argument for prolonging the current term. It is so because only moving the current standard higher could possibly result in an unexceptional harmonization without having to resort to violation of the authors' legitimate expectations, i.e. without the retroactive effect of the less favourable legislation.

### 4.3 The use-based arguments

#### 4.3.1 Over-exploitation – the tragedy of the commons

Arguments based on the assumptions that works will not be used optimally once they fall in the public domain are very popular among the proponents of the term extensions. According to them the works need to be “properly husbanded” by their owners in order not to be overused, underused or misused.<sup>31</sup>

The main basis for these arguments is the potential of a creative work to become a basis for another creative work. As the right to authorise adaptations is one of the exclusive rights of the author, as long as the work is still copyrighted he has the right to control over or prohibit the use of his creation in other creative works. On the contrary, after the respective work falls in the public domain there is nothing that would prevent anyone from using the work in any manner.<sup>32</sup> As a result, after the copyright expiry the creators of works derived from such works will rush to use it in their own creations, which in the upshot will cause diminishing of their value. This argument, however, builds on the assumption that an intellectual creation has its optimal level of use and that its value is finite and exhaustible.<sup>33</sup> As it is not clear whether the assumption is correct, it should be considered more a theory which should be empirically tested rather than a strong argument in favour of extensive copyright.

Furthermore, not only the derivative use of a work is mentioned with respect to the overuse argument. Just a plain repeated use of a certain work could possibly result in diminishing of its value. For example, if a song is repeated again and again, at a certain point the audience will most likely become “fed up” with this song and it will not benefit anymore from listening to it. On the other hand, it can be opposed that this “market saturation” is only temporary and after a certain period of time the audience can start drawing benefits from the use again.

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<sup>31</sup> HEALD, Paul J. and Christopher BUCCAFUSCO. Do Bad Things Happen When Works Enter the Public Domain? Empirical Tests of Copyright Term Extension. *Northwestern Pritzker School of Law* [online]. 2013. p. 15-17. Available: [https://www.law.northwestern.edu/research-faculty/searlecenter/workingpapers/documents/Heald\\_Buccafusco\\_Audiobooks\\_Final.pdf](https://www.law.northwestern.edu/research-faculty/searlecenter/workingpapers/documents/Heald_Buccafusco_Audiobooks_Final.pdf), [cited 2016-07-08].

<sup>32</sup> With the exception of use which might violate moral rights of the author. In most of the countries the moral rights are perpetual.

<sup>33</sup> *Ibid.*, p. 15-17.

#### **4.3.2 The misuse hypothesis**

According to the misuse hypothesis the creations which cannot be properly fostered by their authors fall under the threat of being used in an offensive, degrading or debasing way. For instance, if a classical work is used in pornography or in any other vulgar manner the image will most certainly stay in the minds of the public and it will reappear again with every subsequent use of the original work. On the top of that, such a use of an intellectual creation in a work derived from it not only diminishes the value of the creation itself but also harms the society which cannot possibly benefit from creation and dissemination of such works.<sup>34</sup>

On the contrary, it can be argued that the misuse can be by a large part avoided by applying the author's moral rights. According to the Berne Convention the author has the right to "object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honour or reputation".<sup>35</sup> This treat is thus groundless in the countries where the authors enjoy perpetual protection of moral rights. Alternatively, in the countries where it is not the case the problem can be solved by extending only the term of protection of moral rights of the author.

#### **4.3.3 Under-exploitation – the investment risk?**

Another argument which is very often used by those who advocate for a long copyright term is that of the necessity for a work to be properly fostered in order to ensure its availability to the public. According to some authors works which do not have any owner would disappear after the death of their author and without existence of copyright there would not be any motivation for anyone to invest in their dissemination.<sup>36</sup> The costs which would have to be borne by the one who would decide to sell the work as the first one would most likely not be recuperated, because after the investment would have been done anyone could freely copy and further spread the work with minimal marginal costs. This lack of incentives to invest in such works would inevitably lead to vanishing of most of them.

In connection to the overuse there is one more threat which the public domain status can bring along. Being aware of the possibility for anyone to use the work which is already in public domain, authors will lack incentives to invest in creation of derivative works based on the respective public domain creation because given that there is no guarantee of exclusivity which a licence could provide them with, there can appear an infinite number of works building on the original work. As a result the competition might not allow them to recoup their initial costs of expression. According to this theory it is eventually the society as

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<sup>34</sup> See LIEBOWITZ, Stan J. and Stephen MARGOLIS. Seventeen Famous Economists Weigh in on Copyright: The Role of Theory, Empirics and Network Effects. *Harvard Journal of Law and Technology*. 2005, 18(2), p. 435-457.

<sup>35</sup> Article 6bis(1) of the Berne Convention

<sup>36</sup> For instance GINSBURG, Jane C., GORDON, Wendy J., MILLER, Arthur R. and William F. PATRY. The Constitutionality of Copyright Term Extension: How Long is Too Long? *Cardozo Arts and Entertainment Law Journal*. 2000, 18. p. 651-693.

well who suffers loss from the fact that the lack of motivation to build on the original creation impedes the authors to further exploit it.

#### **4.4 Neglected considerations – the derivative value of public domain**

Contrary to the previous considerations Landes and Posner claim that beyond some level copyright protection might actually be counterproductive. The importance of the function of a work which lies in its ability to serve as a basis of creation of another work is, according to them, often overlooked. Creating a new work very often involves borrowing pre-existing content or certain amount of copying together with adding author's original expression to it.<sup>37</sup> The more extensive the copyright protection is, the more costly it becomes for the author to make a new creation as he would either have to be careful not to infringe anyone else's right or he would have to pay a royalty to the previous copyright owner.

The effect of a copyright which would last too long would then be increase of the initial costs of expression and thus paradoxically decrease of the number of new works created.<sup>38</sup>

#### **4.5 Crisis of legitimacy – public acceptance**

It is a matter of fact that copyright nowadays experiences a severe crisis of legitimacy. It has become a part of everyday life of many (especially young) people to download content from the internet illegally and it is not generally considered a serious delict to do so. One of the reasons can be that there is no transparency with respect to the true beneficiaries of copyright and the overall mood in the society implies that people are convinced that the profit goes to big companies rather than individual authors.<sup>39</sup>

The excessive copyright protection, generally perceived by the wide public as resulting from lobbying of the big companies, disrupts people's trust in law and therefore deprives the copyright law in general of authority. Thus it can be concluded that the legislator should not only try to find an economically optimal level of protection but also a level of protection which would be socially acceptable.

#### **4.6 Costs of transaction**

Finally, it is obvious that the more years pass after the death of the author the higher the transaction costs will be. Firstly, as the author's rights predominantly pass to his heirs (and

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<sup>37</sup> This phenomenon is present typically in the music industry.

<sup>38</sup> LANDES, William M. and Richard A. POSNER. An Economic Analysis of Copyright Law. *The University of Chicago Press*. 1989, 18 (2), 325-363.

<sup>39</sup> The social function of intellectual property rights, or how ethics can influence the shape and use of IP law. GEIGER, Christophe. *Methods and Perspectives in Intellectual Property*. Edited by Graeme B. Dinwoodie. Cheltenham: Edward Elgar Publishing Limited, 2013, p. 153-176.

heir of his heirs) the number of right holders grows exponentially over the time. Furthermore, due to the fact that copyright is not a compulsorily registered right it is sometimes very difficult, if not impossible, to find and contact the current right holder.

This issue is partially resolved by the regulation of orphan works, i.e. works for which right holders are objectively indeterminate or uncontactable. However, a work author of which is only reachable with difficulties is not considered to be orphan. In such a case the user either has to give up the possibility to use the work or bear the high transaction costs.

## 5 Empirical testing – the value of public domain

A number of studies has been conducted in order to test some of the arguments described above. The reason for that is that many of the discussions are held only on the theoretical basis and build on assumptions which need to be proved in order for the argument to be valid.

### 5.1 Exploitation arguments

The under- and over-exploitation arguments were tested by a series of studies done by Paul Heald. Although both theories obviously do not lack certain logic and sound quite reasonable, Heald's research shows that there is actually no factual basis which would support them.

One of Heald's studies analysed a sample of bestselling novels published between 1913 and 1932. According to his findings the public domain status significantly increases the chance that a book would be in print and increases the number of its publishers.<sup>40</sup> A following similar study shows that a significantly higher number of the public domain books has audio versions for sale on *www.audible.com*. Finally a study of a sample of songs from the years 1913-1932 used in movies proved that the public domain songs are no less likely to be used in a movie than their copyright-protected counterparts.<sup>41</sup>

The over-exploitation argument was addressed by Heald in a study of audiobooks which aimed at examining the hypothesis that increased availability negatively influences perception of a work by its readers. Heald related the public domain/copyright status of a

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<sup>40</sup> HEALD, Paul J. Property Rights and the Efficient Exploitation of Copyrighted Works: An Empirical Analysis of Public Domain and Copyrighted Fiction Bestsellers. *Researchgate.net*. [online]. 2007. 32 p. Available: [https://www.researchgate.net/publication/228214199\\_Property\\_Rights\\_and\\_the\\_Efficient\\_Exploitation\\_of\\_Copyrighted\\_Works\\_An\\_Empirical\\_Analysis\\_of\\_Public\\_Domain\\_and\\_Copyrighted\\_Fiction\\_Best\\_Sellers](https://www.researchgate.net/publication/228214199_Property_Rights_and_the_Efficient_Exploitation_of_Copyrighted_Works_An_Empirical_Analysis_of_Public_Domain_and_Copyrighted_Fiction_Best_Sellers), [cited 2016-07-08].

<sup>41</sup> HEALD, Paul J. and Christopher BUCCAFUSCO. Do Bad Things Happen When Works Enter the Public Domain? Empirical Tests of Copyright Term Extension. *Northwestern Pritzker School of Law* [online]. 2013. p. 15-17. Available: [https://www.law.northwestern.edu/research-faculty/searlecenter/workingpapers/documents/Heald\\_Buccafusco\\_Audiobooks\\_Final.pdf](https://www.law.northwestern.edu/research-faculty/searlecenter/workingpapers/documents/Heald_Buccafusco_Audiobooks_Final.pdf), [cited 2016-07-08].

sample of books to their user reviews on *audible.com*, *amazon.com* and *barnesandnoble.com*. The results however show that the public domain audiobooks were rated as highly as the copyrighted audiobooks and that both categories of audiobooks were equally well read.<sup>42</sup>

Heald's findings thus clearly disprove both under- and over-exploitation argument.

## 5.2 Performance of public domain inspired projects

The theory presented by Landes and Posner claiming that public domain works actually have an inherent "derivative value" was subject to a study conducted by the Intellectual Property Office of the United Kingdom (UK IPO). The study focused on performance of works inspired by content already in public domain on Kickstarter.<sup>43</sup>

The study analysed a sample of projects which ended their funding period in the first quarter of 2014, which amounts to 1993 projects. Out of these 1993 projects 83 % were wholly original, 11 % were based on copyrighted content and 6 % were based on public domain content.

The findings of the analysis suggest that Landes and Posner's theory has a rational basis: copyright-based projects generate approximately 70 % less funds than original projects while public domain-based projects generate 56 % more funds than the original ones. Furthermore, according to the study both copyright-based and public domain-based projects are positively associated with successful pitches, although copyright boosts the odds of success.<sup>44</sup>

Interpretation of the results is quite simple. The advantage of projects based on a pre-existing work reflects risk reduction which is connected to use of already known and tested material. The fact that a project is based on copyrighted content implies that to bring the project to life requires permission of the right holder. This seems to be perceived as a complication by potential investors and therefore they prefer public domain to copyright.

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<sup>42</sup> <sup>42</sup> HEALD, Paul J. and Christopher BUCCAFUSCO. Do Bad Things Happen When Works Enter the Public Domain? Empirical Tests of Copyright Term Extension. *Northwestern Pritzker School of Law* [online]. 2013. p. 15-17. Available: [https://www.law.northwestern.edu/research-faculty/searlecenter/workingpapers/documents/Heald\\_Buccafusco\\_Audiobooks\\_Final.pdf](https://www.law.northwestern.edu/research-faculty/searlecenter/workingpapers/documents/Heald_Buccafusco_Audiobooks_Final.pdf), [cited 2016-07-08].

<sup>43</sup> Kickstarter is an on-line crowdfunding platform focused on creative projects such as films, music, comics, stage shows, video games etc. The purpose of it is to bring to life projects which would otherwise not be carried out because their inventors do not have enough resources to fund them, by offering the right to royalties in exchange for the initial investment.

The project is successful on Kickstarter when it collects a desired amount of money in a given period of time. If it does not manage to collect sufficient funds, the offer is off the table and no investor has the right to his share.

<sup>44</sup> ERICKSON, Kris, HEALD, Paul, HOMBERG, Fabian, KRETSCHMER, Martin and Dinusha MENDIS. Copyright and the Value of the Public Domain. Study 2: Performance of Public Domain Inspired Works on Kickstarter. *Intellectual Property Office of the United Kingdom* [online]. 2015, 26 p. Available: [http://www.create.ac.uk/wp-content/uploads/2016/04/Public\\_Domain\\_Kickstarter\\_Study\\_2.pdf](http://www.create.ac.uk/wp-content/uploads/2016/04/Public_Domain_Kickstarter_Study_2.pdf), [cited 2016-07-14].



All in all the public domain content seems to play an important role for the starting companies which confirms the theory that works in public domain have the potential to serve as a basis for newly created works and to a certain extent fulfil the function of a risk-reducer.

### 5.3 IP perception

The argument of copyright losing its legitimacy was examined by the EU Observatory on Infringement of Intellectual Property Rights in its “IP Perception Study”.

Authors of this study interviewed a sample of respondents from all the EU member states about their attitude to the intellectual property rights. With regards to copyright 96 % of respondents agreed that it is important that inventors, creators and performing artists can protect their rights and be paid for their work.

On the other hand, 22 % of respondents agreed with the statement that it is acceptable to download content from the internet when there is no legal alternative in their country, while in the age category of 15-24 years it was even 42 %. When asked who benefits the most from the protection of IP, only 11% of respondents mentioned consumers and less than 20% mentioned small and medium enterprises. On the contrary, over 40% labelled large companies and famous artists and inventors as the primary beneficiaries of the IP protection.<sup>45</sup>

These results absolutely prove the existence of the crisis of legitimacy of copyright. Although the EU citizens recognized the necessity to protect copyright in order to allow the authors to recoup their investment and get a fair remuneration for the job they have done, they generally do not consider illegal downloading a serious delict because they feel like copyright benefits the “mean” big companies rather than individual creators. This situation shows that a reform of the copyright system is necessary in order to change this negative attitude to the current concept of copyright as a whole.

## 6 Conclusion

It is undisputable that there is a necessity to protect intellectual creations in order to ensure social, cultural and economic development. The authors’ rights certainly deserve a lot of attention from the side of legislators. However, the aim of this essay was to show that not only works protected by copyright, but also works with public domain status incorporate

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<sup>45</sup> European Citizens and Intellectual Property: Perception, Awareness and Behaviour. *European Union Intellectual Property Office*. [online]. 2013. p. 8-14. Available: <https://euipo.europa.eu/ohimportal/documents/11370/80606/IP+perception+study>, [cited 2016-07-08].

substantial value and potential to benefit various categories of users and thus are also of a big importance to the society.

Especially the research presented in the last part shows that a number of arguments against the copyright term extensions has a rational basis. The presented studies show that there is strong evidence that the public domain status of a work positively influences its availability on the market and contributes to creation of new works which after all makes public domain a valuable asset which deserves attention of lawmakers equally as copyright.

Furthermore, the author of this study suggests that with respect to the unfavourable results of the IP perception questionnaire the policy makers should rather focus on quality and not quantity of the copyright protection. A shorter copyright supported by a strong enforcement infrastructure would most certainly do much more good than excessively long term which does not enjoy any respect from the side of the citizens. In addition to that, a shorter term could possibly motivate the authors to exploit their works more intensively which would benefit the society by increasing the rate of availability of creative works on the market together with earlier entry into the public domain allowing the others to freely build upon the existing content.

Although the discussions will most definitely continue in the following years and decades, it is probable that their course will change a bit in the direction of scientific evidence. We could see demonstrated on the developments with respect to the Berne Convention that the nature of the talks has changed over the last century. Purely abstract considerations regarding the necessity to subsist two generations of descendants, objectively not based on any verifiable hypothesis, transformed into quite sophisticated economic arguments. This gives us hope that the future debate on the copyright term extension will be of a more scientific nature.

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