**PAYING for THE PUBLIC DOMAIN?**

**the “*domaine public payant”* in the 21st century[[1]](#footnote-1)**

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ABSTRACT

*In this essay the author explores the “domaine public payant” (in English, paying public domain), traces its origins, reviews the current state of the art and analyses from a law and economics perspective different rationales that have been put forth to support it. In addition, the Argentinian “regimen del dominio público pagante” (in English, paying public domain system), uninterruptedly in force since 1958, is the case of an empirical study. The essay concludes by suggesting some policy recommendations and avenues for future research.*

KEYWORDS

Intellectual Property – Copyright Law – Public Domain – Domaine Public Payant

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1. **OVERTURE**

The *Teatro Colón* in Buenos Aires, Argentina, is considered one of the best opera houses in the world (Basso, 2017). Most of the repertoire of operas and pieces of classical music performed therein is in the public domain. However, unlike other opera houses in other countries, every time *Teatro Colón* preforms an opera by Giuseppe Verdi or a symphony by Ludwig Van Beethoven, i.e. a work that has been in the public domain for a very long time, it must pay a fee (*rectius*, a tax) to the *Fondo Nacional de las Artes* (National Fund for the Arts, hereinafter FNA), a state agency in charge of collecting a tax on the exploitation of works in the public domain. This system is known as *domaine public payant*, in respect of its French origins (in Spanish, *dominio público pagante*; in English, paying public domain, hereinafter DPP).

In almost every other country in the world the exploitation of works in the public domain is free, no royalty, fee or tax of any kind must be paid, to nobody. In Argentina is different, all works in the paying public domain, whether from national or foreign authors, are subject to the payment of this levy to the state. Exploitation includes publishing, performance, broadcast, communication to the public, etc.

A journalistic piece that recently appeared in a famous Argentinian newspaper claims the biggest debtor of the *dominio público pagante* tax is the *Teatro Colón*, which owes the the FNA a sum of around of AR$ 60.000.000 (approximately US$3.500.000 at the time of beginning to write this article) for the performance of works in the public domain during the 2010-2015 period.[[3]](#footnote-3)

The *Teatro Colón* is a state-owned theatre under control of the Ministry of Culture of the Autonomous City of Buenos Aires. Thus, in Argentina, the main debtor to a state agency (the FNA) is another institution of the state (Teatro Colón), an outcome that is ironic, to say the least. 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.

But, in addition, there are other costs the DPP imposes to society, rarely addressed by scholarship. In the following sections I will explain what the DPP, its origins, its purposes and costs.

1. **THE FREE AND THE ONEROUS PUBLIC DOMAINS**

Unlike patents, trademarks, copyrights and other IPR the public domain has no positive definition. At best, it is referred to in a negative sense, i.e. everything that is not protected by IPR. Therefore, there is no universal definition of what constitutes the public domain. Moreover, as we will see infra, the scope of the public domain varies from country to country, and its access can be free or subject to the payment of a fee or tax (e.g. the *domaine public payant*).

Absent a workable definition of the public domain in international treaty, I turn to scholarly definitions. According to *Communia[[4]](#footnote-4)*, a network of public domain scholars, the public domain encompasses four categories of works: (a) those whose copyright expired, (b) works that were never subject to copyright, (c) whatever falls within the exceptions and limitations to copyright law (known as *fair use* or *fair dealing* in common law countries) and, (d) works for which the author has relinquished her exclusive economic rights rights (Frosio, 2011), however the latter category is not universally accepted as copyright law operates by default in most jurisdictions and there is no possibility to opt-out (Guadamuz, 2014).

That the public domain is a valuable per se seems obvious. However, it is rarely stressed in IP textbooks. In truth, no author creates *ex nihilo*. Every new author gets inspired by the works of predecessors or contemporaries. Moreover, works in the public domain became inputs for the creation of new copyrighted content. According to James Boyle, “[*t*]*he public domain is the place where we quarry the building blocks of our culture*” (Boyle, 2010).

So far so good. Most readers are familiar with the notion of a public domain. However, the *domaine public payant* or paying public domain may seem to most readers a *contradictio in terminis*. However, it is an institution still alive and kicking in some countries, yet in the 21st century. Moreover, nothing in the international IP legal landscape precludes a country from setting up an onerous system to access and use works in the public domain. For instance, a report suggests there are no legal obstacles for the creation of a domaine public payant within the European Union (Inge Govaere & Sheena, 1996).

But, what is a DPP (also known as *Urhebernachfolgevergütung* in German, *dominio público pagante* in Spanish)? According to a 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…). In some countries, only the commercial or for-profit exploitation of public domain material is subject to payment*” (WIPO, 2010).

The same report states that the paying public domain is still in force in “*Algeria, Kenya, Ruanda, 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.). Surprisingly, the author of the above-mentioned report omits Argentina and Uruguay, two jurisdictions where the paying public is actively enforced, uninterruptedly since 1958 and 1938, respectively.

Another WIPO report defines the *domaine public payant* 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).

Until not long ago, the *domaine public payant* was a common topic at international fora, actively promoted by UNESCO and WIPO. According to a UNESCO report, in 1949 the paying public domain was in a force in Uruguay, Bulgaria, Italy, Romania and Yugoslavia (UNESCO, 1949). Nowadays, with the exception of Uruguay, all other countries (and their spinoffs) have repealed the paying public domain system.

 In 1976 WIPO published the Tunis Model Law on Copyright for Developing Countries, whose Section 17 included a “*domaine public payant*” (World Intellectual Property Organization, 1976). A joint-report by UNESCO and WIPO included a model law for countries willing to establish a paying public domain regime (WIPO & UNESCO, 1982).

The *domaine public payant* has not lost its appeals in the 21st century; it has been proposed as a mechanism to compensate traditional knowledge:

“*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).

The *domaine public payant* still lingers at WIPO, where a Committee has suggested its implementation as a mechanism to pay for the digitalization of works in the public domain:

*“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)*.*

In academia, the DPP has interested many scholars (Dillenz, 1983; Gary, 2014; Harvey, 1994; Jean Vilbois, 1928; Katzenberger, 1982; Latil, 2014; Max-Planck-Institut für Auslandisches Patents Urheber und & Wettbewerbsrecht, 1968; Moe, 1952; C Mouchet, 1984).

For instance, Dietz repeatedly suggested the creation of a sui-generis DPP he calls a *right of the community of authors,* a sort of social security for artists and authors (A. Dietz, 1990; Adolf Dietz, 1982). Rajan suggested to set to up a DPP to subsidize the publication of works of deceased Indian poets (Rajan, 2001). Lipszyc is so convinced of the virtues of the Argentinian DPP that she suggests it should be transplanted to other countries (D. Lipszyc, 2014, 2016; Delia Lipszyc et al., 2010); however this never happened, which may suggest its inadequacy, in an era when countries are willing to transplant alien legal institutions in order to obtain some competitive or efficiency gain (Ewald, 1995; Mattei, 1994, 1997).

What all of the previous works on the DPP share is a purely legalistic (*legal dogmatics*) approach. Moreover, they tend to be partial, they try to benefit or improve the situation of artists and authors. Rutschman is one of the few authors that has adopted an economic standpoint; she says “*paying public domain provisions have the potential to generate a cultural gridlock economy, with chilling effects on every kind of creative industry, and affecting also semi-formalized non-industrial cultural manifestations*” (Rutschman, 2015).

The consumer, or user, and even re-user, of public domain works is absent from their picture. This aims to be a more balanced paper, from a law and economics standpoint. Thus I will take into account both the costs and benefits to producers (authors and artists) but also of consumers (users) and cumulative creators, in order to provide a picture of aggregate welfare effects of such a policy. In sum, to my knowledge, this is the first attempt to make a law and economic analysis of the *domaine public payant*.

1. **a brief economics analysis of the public domain**

Copyright, like other forms of IPR, are a regulatory solution to a market failure (that of information goods). The claims of a patent application and the original expression of music composer are, reduced to their essence, nothing but information.

However, the regulatory solution of the market failure in information goods is not free from downsides (for these reasons sometimes they are referred as a *second best* solution). Legal monopolies like patents and copyrights, like any monopoly, impose certain societal costs, e.g. temporary limited access to goods with close to zero marginal cost, deadweight loss, risk of rent-seeking behaviour, etc. All in all, in spite of limited information and absence of empirical data, we believe having IPR is better that not having them or, a most modest claim, that to muddle-through is the best we hope for, for now (Machlup, 1958).

To curb the negative side effects of IPR the legislator strikes a sort of intertemporal compromise in two subsequent phases because it is not possible to maximise both the incentives to create and to disseminate, works, contemporarily. As a society, we recognise the value of both these two equally important and interdependent public policy goals.

So, in phase one, the author or rightholder has exclusive temporary rights to exclude all third parties from accessing, using or modifying her work (in legal jargon, *ius excludendi omnes alios*). This is meant to incentivise dynamic efficiency; monopoly power gives the right holder the possibility to compensate his sunk creation costs, something which will be impossible in a competitive economy, where price will be set near to reproduction cost and thus any R&D expenditure would be irrecuperable.

During phase two (public domain), copyrights expires so works are freely accessible, usable and modifiable. This is meant to incentivise static efficiency; now the *ratio* is to favour the dissemination of the works among the broadest possible group of people. Because there is no monopoly right in force, the price of the works should be close to marginal cost.

The two-phase system described assumes access to work during the public domain phase is free. If that is not the case, for instance when a *domaine public payant* is in force, many of the downsides of the IPR phase are not expurgated; moreover, many upsides that come with a (free) public domain will not realise.

This is so because the public domain, as said supra, has value *in se*. There are positive externalities associated to the free public domain. For instance, Pollock et al. have empirically demonstrated that when works enter the public domain effectively its price decreases while different editions multiply, all of which suggest an increase in dissemination and access (Pollock, 2006). In addition, other positive externalities verify in a free public domain. Empirical evidence also suggest errors found in copyrighted editions are quickly corrected during the public domain phase since the fear of a lawsuit for copyright infringement is removed (Pollock, Stepan, & Välimäki, 2010).

Critics of the public domain suggest, without providing any supporting evidence, that when works enter the public domain they loss value. This is wrong in many levels, first of all because it implicitly equates price with value (disregarding welfare gains by consumers that can more than offset the loss of profits by producers). In addition, the public domain also incentivises new and creative re-uses of works (so-called derivative works during the copyright term), because the work is removed from the sphere of control of the copyright holder and no royalty needs to be paid. Along these lines, Buccafusco et al. find there is no dramatic loss in value once a work enters the public domain, while there seems to be positive gains from new and more creative forms of exploitation and dissemination of those works (Buccafusco & Heald, 2012).

Guibault et al. mention eight good things that happen when works enter the (free) public domain, namely, works become building blocks for the creation of new works, enables competitive imitation, follow-on innovation, low cost access to information, access to cultural heritage, promotes education, public health and safety and democratic process and values (Guibault & Hugenholtz, 2006).

All of the above-mentioned upsides (positive externalities) of the paying public domain are precluded, or at least greatly reduced, in case of a *domaine public payant*.

The DPP, in spite its *nomen iuris* (fee, right, etc.), has the nature of a tax. As such, it has a distortive effect on consumers’ choices and a substitute effect (Posner, 2003). Actually, this seems to be the intended purpose of the DPP according to Argentinian authors (D. Lipszyc, 2014, 2016; Carlos Mouchet, 1972), i.e. to make uncopyrighted works as expensive as copyrighted ones. This relies in an *ad hoc* interpretation of unfair competition.

Unlike copyright law, the creation of the domaine public payant has not been justified in the correction of a market failure, at least not explicitly. The main argument advanced by some proponents of the paying public domain is a sui generis interpretation unfair competition (D. Lipszyc, 2014; 2016; Mouchet, 1983; 1984). The said argument goes as follow, a work in the public domain is cheaper than a copyrighted one, because no royalties are due to the author, which constitutes a case of unfair competition. According to these authors, the price difference is unfair. Therefore, the DPP becomes a “… *levelling device to ensure that works protected by copyright can compete economically with those in the public domain*” (Carlos Mouchet, 1983).

In the field of IPR, unfair competition is a concept derived from industrial property (related to trademarks, patents and utility models) which is mentioned in the *Paris Convention for the Protection of Industrial Property*. However, unfair competition seems alien to copyright and related rights; the Berne Convention for the Protection of Literary and Artistic Works does not refer to it.

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)). [[5]](#footnote-5)

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*”.

Leaving aside treaty hermeneutics, there are economic problems with the unfair competition argument for public domain works. 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.

In addition, the DPP is a disincentive to creative industries and cultural entrepreneurs that would like to market public domain works combined into new collections, new formats or through innovative commercial channels (e.g. digitisation of analogical works, restoration of films and sound recordings, colourisation of black and white films, streaming of classical music, e-books collections of classic or world literature, etc. ).

Moreover, in a globalised market, the DPP may put local cultural industries at a competitive disadvantage. For instance, an Argentinian publisher, where the *dominio público pagante* is still enforced, willing to publish a new edition of Shakespeare’s Complete Works would have to pay the DPP tax to the FNA. Whereas, an English, Chilean or Indian publisher willing to publish the same work will not have to pay this extra cost. Assuming similar production and distribution costs, the Argentinian edition will be more expensive than those published in other countries.

Last but not least, if a country would like to encourage education, the DPP seems an unnecessary hurdle. The effect of the DPP is to make works more expensive. The cost of the DPP tax will be passed to the selling price. So, given budget constraints, consumers (users) would access less works where a DPP is in force than where it is not. In a developing country this problem is exacerbated (lower GDP per capita vis-à-vis developed ones). Therefore the DPP seems even less desirable for a developing country. However, in practice, all countries that still enforce a DPP are developing. I will attempt to explain this a priori counterintuitive fact with a public choice argumentation, infra.

1. **historical origins and evolution OF THE *DOMAINE PUBLIC PAYANT***

The *domaine public payant*, as one can infer from its *accent*, was born in France. One of it most famous advocates was Victor Hugo, however apparently the idea was the creation of a French jurist, Pierre-Jules Hetzel (Hetzel, 1858).

In 1838 Victor Hugo, together with Honoré de Balzac, Alexandre Dumas, George Sand and others, founded the *Société des Gens de Lettres*, an organization to advance the cause of authors’ economic and moral rights, which still exists today. Victor Hugo suggested the creation of a *domaine public payant* in two speeches delivered before the *Congrès Littéraire International* held in Paris, the first one on the 21st of June of 1878 and the second one on the 25th of June of the same year (Hugo, 1885).

To place Hugo’s proposal in context, his speeches calling for a domaine public payant were delivered eight years before the *Berne Convention for the Protection of Literary and Artistic Works* (signed in September 9th, 1886).

According to Hugo, the *domaine public payant* was a way to harmonize a tripartite order of rights: (a) those of the author (moral and economic rights); (b) those of society (to access and enjoy published works); and (c) those of the author’s heirs (limited to economic rights).

According to Hugo’s scheme, the author had absolute economic and moral rights over her works during her entire lifetime, but *post mortem* anyone could freely publish her works, upon one condition, the payment of a percentage of revenue, for perpetuity, in favour of the author’s heirs (which he called *redevance perpetuelle*).

Hugo stated the right of the society to access and enjoy the works of a deceased author were superior and trumped the economic rights of the author’s heirs. Thus, he made a distinction between *heirs of the blood* (relatives) and *heirs of the spirit* (the general public) and favoured the latter over the former.[[6]](#footnote-6) Moreover, he added that the *redevance perpetuelle* should be modest and subordinated to the interest of the general public.[[7]](#footnote-7) Literary property, he said, ought to be limited in order to benefit society as well[[8]](#footnote-8). The sums collected from the *redevance perpetuelle* were to be used to help future generations of authors, in other words, to Hugo it was meant as mechanism of social security for writers (that at the time had none).[[9]](#footnote-9)

It is fundamental to highlight that unlike the *domaine public payant* systems in force today (e.g. those in force in Argentina and Uruguay) Hugo’s version was not meant to begin after the full copyright term had expired. Actually, Hugo’s *domaine public payant* was meant instead of the *post mortem* part of the copyright term! Presumably, according to his writings, Hugo would never have accepted a *post mortem auctoris* copyright term that gave heirs (and non-heir successors) absolute rights in detriment to society.

It was said before that the domaine public payant had seen golden days and, for the most parts, those days are gone. The *domaine public payant* was never a universal institution, the majority of countries favoured a (free) public domain. However, most of the countries that at some point of the 20th century had a *domaine public payant* in force have abrogated it*.* Why that happened? I can offered conjectures and some factual sources that point out to the unnecessariness and inefficiency of the institution.

Brazil, Italy, France and Mexico are some, of the many countries that at some point had a *domaine public payant,* but later abolish it.

1. Brazil.

 Section 93 of Act no. 5.988 of 14 December 1973 created a paying public domain regime (domínio público oneroso). It was repealed after only one decade in force, by Act no. 7123 of 12 September 1983, according to one author because of the pressure of Brazilian publishers (that had to bear the burden of the tax) (Uyeda Ogawa, 2007).

1. Italy

Italy had a *domaine public payant*-like system in force twice. Italian Act no. 1012 of 19 September 1882 established a copyright term equal to life of the author plus 40 years *post mortem auctoris*. After the end of this term, and for another 40 years, the authorial economic rights were transferred to the Italian state. This first Italian paying public domain regime was derogated in 1925 (Greco & Vercellone, 1974).

A similar system was later reintroduced, pursuant to Act no. 633 of 21 April 1941, but under a new name: *diritto demaniale* (i.e. a general term for rights that belongs to the state). The *diritto demaniale* was repealed by section 6 of Law-Decree no. 699, of 31 December 1996 (Auteri et al., 2012).

1. Mexico

Mexico had a paying public domain system in force since 1963. The Mexican Copyright Act of 11 January 1982 incorporated a specific Section (82) referring to the “*dominio público remunerado*”. According to records of the Mexican Chamber of Deputies, the *dominio público remunerado* was considered an inefficient institution and it was repealed at the time the new Federal Copyright Act of 1993 came into force (Cámara de Diputados, 1993). However, the same Mexican legislators decided to establish the longest copyright term in the world, life of the author plus 100 years *post mortem auctoris*.

1. France

The *Caisse Nationale des Lettres* was created in France in 1946 but, for different reasons, it had no funds until 1956, when a limited *domaine public payant* was created (only applicable to literary works) and restricted to a period of fifteen years. It was abolished in 1976. In its country of origin the actual influence of the *domaine public payant* was ephemeral.

1. **THE ARGENTINIAN *DOMINIO PÚBLICO PAGANTE***

A *domaine public payant*, called *dominio público pagante*, has been uninterruptedly in force in Argentina since 1958. In spite of this lengthy time, it flew under the radar and was not even mentioned in a WIPO Report on the *status quaestionis* of the *domaine public payant* (Dusollier, 2011).

In Uruguay a *dominio público pagante* had been in force for even longer, since 1938 (pursuant to Section 42 of the Uruguayan Copyright Act no. 9.739 of 17 December 1937, that entered into force one year later). It is also in force today and was equally omitted in the above-mentioned WIPO Report. The collection of the Uruguayan DPP tax is entrusted to the Uruguayan National Copyright Council (*Consejo de los Derechos de Autor*).

The DPP and its enforcing authority the *Fondo Nacional de las Artes* (in English, *National Art Fund*, hereinafter FNA), a state agency under the aegis of the Ministry of Culture, were created in 1958, pursuant to Executive Decree-Law no. 1.224/58. According to the recitals of the Decree-Law, the DPP was created as a specific financial institution for the promotion of national artistic activities and the diffusion of culture. Currently, the DPP tax is the only source of income of the FNA.

The Argentinian DPP requires the payment of a fee, more properly, a tax, to the FNA for any use of works in the public domain. These uses include reproduction, publishing, inclusion, performance, broadcasting, etc. (see Annex …). There are a few exempted uses from payment of the tax, usually only available to state institutions (see Annex…). However, these uses are not exempt from high transaction costs (sometimes requiring a complex notification process in advance). [[10]](#footnote-10)

This DPP tax is levied upon all types of works (theatrical, lyrical, literary, scientific, choreography, ballet, poetry recitals, speeches, films, paintings, sculptures, architectural drawings, etc.), whether by national or foreign authors (including foreign authors that were never granted copyright in Argentina).

Executive Decree-Law 1224/58 was signed by army general Pedro Eugenio Aramburu, de facto president of Argentina, whom had lead the coup d’état that ousted another general, Juan Domingo Perón in 1955. Therefore the Argentinian DPP, offspring of a *de facto* government that had timely dissolved Congress, was never subject to any parliamentary discussion. Executive Decree-Law 1224/58 was later ratified by Act of Congress no. 14.467 in 1958, without further debate.

The Argentinian DPP, unlike Victor Hugo’s brainchild, begins after the expiration of the copyright term, that at the moment lasts the (remaining) life of the author plus 70 years *post mortem auctoris* (pursuant to Section 5 of the Argentinian Copyright Act No. 11.723). However, unlike copyright, the Argentinian DPP has no definitive term, it is perpetual.

The FNA’s uses the revenue collected through the DPP tax to give loans to Argentinian authors and artists, to finance artistic competitions, exhibitions and displays of works within the country and abroad, awards fellowships and prizes.

Unlike copyright law, that is a mechanism that operates within a market, the Argentinian DPP requires a centralized machinery to collect the tax, pay its costs and allocate the revenue to its intended beneficiaries. The FNA carries no database of the works that have fallen into the public domain.

However, in practice, the FNA does not collect most of the DPP tax. Pursuant to section 35 of Decision no. 15850/1977 the FNA has delegated the collection of the levy to copyright collection societies, viz. ARGENTORES (*Sociedad General de Autores de la Argentina*; Argentinian Society of Authors), SADAIC (*Sociedad Argentina de Autores y Compositores*; Argentinian Society of Authors and Composers), AADI (Asociación Argentina de Intérpretes; Argentinian Association of Performers), CAPIF (*Cámara Argentina de Productores de Fonogramas y Videogramas*; Argentinian Chamber of Phonographic and Videographic Producers) and SAVA (*Sociedad de Artistas Visuales Argentinos*; Argentinian Society of Visual Artists).

These collecting societies are legal persons under private law that benefit from state-granted monopoly (there is only one recognised collecting society per type of right) (Vignoli & Freitas, 2007). The above-mentioned collecting societies charge a commission to the FNA for their services. Despite diverse attempts, this author was not able to obtain the percentage or sums of those commissions. At the moment, the FNA only directly collects the DPP tax for publishing rights.

1. **empirical evidence from the argentinian system**

Another dimension that deserves scrutiny are the operating costs of running a DPP system. Copyright law, an institution that also encourages actors and artists, relies on the market system and so most of its costs are privatised.

Any DPP regime requires a bureaucratic machinery to operate. Thus, putting aside the theoretical criticisms mentioned earlier, a cost-effectiveness analysis is necessary. In other words, how efficacious is a DPP system, in practice? To answer this question one most analyse real-world data that makes possible to take into account the means required to achieve the intended goals of the system.

Because of proximity and familiarity, I used the Argentinian *regimen del dominio público pagante* (paying public domain system) as a case study. To assess its efficacy, i.e. how efficaciously the means meet the ends of the system, I required to access financial data, total revenue, total costs, how the money was distributed among the intended beneficiaries, etc. This information proved to be difficult to obtain.

First, I requested these information informally, by mail The FNA never answered them. At the time Argentina had no law guaranteeing citizens access to public information[[11]](#footnote-11). However, there was an Executive Decree, no. 1172 of 2003, that was useful to my case at it was applicable to Executive agencies, like the FNA.

On April 24th, 2015 I sent a letter by post requesting access to FNA accounting documents. It went unanswered. I sent a second letter on November 17th, 2015. I went unanswered too. Two letters was all I needed to resort to Executive Decree no. 1172 of 2003.

With the priceless (and cost-free) assistance of *Asociación por los Derechos Civiles* (in English, Association for Civil Rights, hereinafter, ADC), an Argentinian NGO promoting civil and constitutional rights, I requested access to the FNA’s accounting records in Court.

In December 2015 we filed an *acción de amparo*, an expeditious legal remedy for the enforcement of constitutional rights, in this case, related to the republican form of government which requires the publicity of acts of government. The case (*Marzetti, Maximiliano versus Fondo Nacional de las Artes in re amparo ley 16.986*, case no. 83610/2015) was filed on December 28th, 2015 before the Federal Administrative Court no. 10 (*Juzgado Contencioso Administrativo* *Federal* *N° 10*).

In February 2016, the Federal Administrative Court passed judgement in our favour and ordered the FNA to provide the information requested. As a result, to comply with the Court order, in March 7, 2016 the FNA sent several envelopes containing many documents. The first batch of information received was either irrelevant or insufficient. So we informed the Court. Another Court oder was granted. In the end the FNA granted me access to its premises to make copies of their accounting statements and other financial documents. Upon arrival we were informed the FNA photocopying machine was out of order, so we had to go out and make copies in a nearby copy shop, at our expense and escorted by an FNA official.

In the following paragraphs I will refer to the information obtained from the Statement of Resources and Current Expenditures (in Spanish, *Estado de Recursos y Gastos Corrientes*), for the period 2005-2015. From the analysis of this and other financial records I could conclude the following.

As an autarchic institution, the FNA must be able to self-sustain itself. At the moment the levy on works in the paying public domain is the main source of income of the FNA. In the past the FNA had other sources of income, taxes and direct subsidies had been abolished or whose management was transferred to other state agencies.

In relation to expenditures, the main two entries are *operating costs* (of which the main component are *salaries*) and *transfers to the private sector*, i.e. the money effectively transferred to the intended beneficiaries of the system, Argentinian authors and artists, in the form of grants, loans, subsidies, etc.

For the period examined, 2005-2015, the FNA’s main expenditure had been, constantly, *operating costs* consuming between 60% to 86% of total revenue depending on the year. Those figures are way above the average operating costs of the next similar institution, copyright collecting societies. In the UK the copyright collecting societies ratio total revenue/operative costs is about 20% (Towse, 2012) and in Argentina they range between 25/30% (Sáenz Paz, n.d.).

The resources actually transferred to the intended beneficiaries (*transfers to the private sector*) ranged between 10% to 23% of total revenue, during the same period.

To sum up, from the analysis of the FNA’s accounting statements and financial documents for the 2005-2015 period, it is possible to conclude that the costs of running the system are the main source of expenditure. These costs consume a higher percentage compared to similar institutions, e.g. collecting societies. Moreover, the resources effectively transferred to the intended beneficiaries of the system represent a much lower percentage. In other words, most of the levy collected from taxing works in the paying public domain in Argentina are used to pay operating costs and a little percentage actually reaches the intended beneficiary of the system.



Graph No. 1 Relationship between total revenue, operating costs and transfer to the private sector (loans, subsidies, etc. to Argentinian authors and artists).



Graph No. 2 Disaggregated revenues and expenditures.

1. **EXCURSUS: WIPO’S DEVELOPMENT AGENDA**

In 2004 Argentina and Brazil sent 111 recommendations to WIPO to align IP policy with development goals. Some of those recommendations were incorporated into *WIPO’s Development Agenda*, which was officially presented in 2007 together with the creation of a *Permanent Committee on Development and Intellectual Property*.

*WIPO’s Agenda* contains 45 of the original 111 provisions, grouped into six thematic clusters (WIPO, n.d.). The *Agenda* aims at making compatible IP rights with the specific needs of developing countries (Basheer & Primi, 2009). The *Agenda* is characterized by its malleability, complexity, opportunity and gravity (Netanel, 2008).

Cluster B of the *Agenda* is titled “Norm-*setting, flexibilities, public policy and public domain*”. Pertaining to it, proposition no. 16 says: “*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 says: “*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*.”

Propositions 16 and 20 do not seem compatible with the existence of a paying public domain. Phrases such as “*a rich and accessible public domain*” and “*a robust public domain*” seem not compatible with a system that requires the payment of a fee to access and use works in the public domain. Argentina, by advocating a rich, robust and accessible public domain at international fora but taxing it at home displays a seemingly schizophrenic behaviour.

1. **A PUBLIC CHOICE EXPLANATION for THE SUBSISTENCE OF the *DOMAINE PUBLIC PAYANT***

Economic theory seems not to support the existence of a domaine public payant, at least not as a supplementary incentive mechanism that begins after copyright law has expired. The empirical evidence gathered shows that it is a costly institution to maintain and it deliver meagre results (little resources are actually transferred to the intended beneficiaries). Then, why is still the *domaine public payant* enforced in some countries?

An old legal tool may come handy at this point. Cicero in *Pro Roscio Amerino* argued that sometimes, in the absence of other evidence, the culprit of a crime could be whom benefits most from it (Cicero, 80BC). This rule of thumb became known as *cui bono* (also, *cui prodest* or to whose benefit, in English). The same rule can be applied to other fields and it resembles the approach of the so-called Public Choice Theory, that has been “… *defined as the application of economics to the study of politics* (Mueller, 2004). Both Cicero and public choice theorist believe people are rational and tend to act in their self-interest.

For instance, in Argentina, who benefits from the DPP? Cultural industries, cumulative creators and cultural entrepreneurs, do not. Actually they are the ones that must pay the DPP tax. Consumers (users) of creative works neither, since they also pay a higher price as a consequence of the tax. Some Argentinian authors and artists may benefit, but the process to obtain a loan or request a subsidy is too random and uncertain to be generalised. After all, only a very small percentage of all domestic authors and artists ever request financial aid to the FNA, and even fewer obtain it.

Certainly, FNA officials and staff do benefit from maintaining the *status quo*. In the absence of a DPP the FNA would not have any other source of income and these people may found themselves without a job. To a minor degree, collecting societies benefit too, since they perceive a fee to collect the tax by delegation but, unlike the FNA, collecting societies have other and better sources of income (collecting royalties on behalf of its associates). So I do not think collecting societies would strongly oppose the abolition of the DPP.

Then, if the majority of citizens certainly is hurt by a DPP, why they do not request its abolition? These problem was well described by Olson (Olson, 1965). Taxpayers, consumers and users do not have sufficient incentives to campaign against it, due to rational apathy and free riding problems (on an individual basis, they face private cost and potential benefits may accrue to all, those that contributed and those that did not). The FNA can be seen as an interest group, where all its members (a discrete number), share identical objectives (preservation of their jobs, salary increase and perks). From this perspective, the FNA may have strong incentives to maintain the status quo and lobby government against making any changes.

This *public choice*-type of hypothesis seems consistent with the only attempt to modify the Argentinian paying public domain regime that has occurred since its inception in 1958. In 2010 two deputies of the Autonomous City of Buenos Aires (Bertol and Obiglio) introduced to the Argentinian Congress a bill (no. 0016-D-2010) aimed at modifying the DPP. The bill was not meant to repeal the *dominio público pagante*, its aim was far less radical and its scope much narrower. Bill no. 0016-D-2010 was aimed to exempt national, provincial, municipal and theatres under control of the Autonomous City of Buenos Aires (like the *Teatro Colón*) from paying the DPP tax. In the end the bill did not prosper.

1. **CONCLUSION and avenues for future research**

The *domaine public payant*, a curiosity to many readers, is still alive and kicking in a few countries in the world even in the 21st century, namely in Algeria, Argentina, Côte d’Ivoire, Kenya, Republic of the Congo, Ruanda, Senegal and Paraguay and Uruguay (there may be more countries enforcing different varieties of DPP, this author had not the time neither the resources to carry out a more comprehensive research). Still, there have been recent attempts to reinstate a DPP in countries where it had been timely abolished, like France (Cayron & Albarian, 2006; Gary, 2014).

This limited reception confirms the large majority of countries have opted for a free public domain system (both options are compatible, in principle, with international intellectual property law). The position of the majority of countries also tells much about the desirability of a DPP system. In a global market for legal transplants, useful and efficient institutions are quickly adopted (useless and inefficient ones are not).

However, as seen supra, from an economic standpoint, the DPP seems to be, at least an unnecessary institution, at most quite an inefficient one. Unlike copyright law the *domaine public payant* is not justified in solving a market failure, moreover it discourages access and reuses of works that had already been compensated during the copyright term. In addition, at least in countries like Argentina, it is a costly machinery to operate that bear scarce fruits. All in all, the costs of the DPP seem to exceed its benefits, which may explain why most countries that once enforced such a system have abolished it and, contrary to the desiderata of some authors, no country that never had it in force has decided to transplant it.

At this point is also interesting to point out that there has never been nothing similar to a *paying public domain for inventions*, neither, to my knowledge, no scholar has proposed one. Once a patent expires inventions are freely appropriable. If the DPP is a good institution to incentivise authors and artists, it should work too to incentivise inventors. After all both patents and copyrights share the same underlying economic rationale (information goods).

The persistence of the paying public domain, in the few countries where it remains in force, is difficult to explain purely in abstract terms, without taking into account power in a Foucauldian sense. In the case of Argentina, it may be consequence of a confluence of vested interests, path dependency and collective action problems.

In consequence, a humble policy suggestion to countries still enforcing a *domaine public payant* would be to abrogate it (abrogatio legis, i.e. to repeal it expressly or tacitly; e.g. *lex posterior derogat legi priori*). Countries that never enforced a DPP would do well to stay that well.

If Argentina would like to keep the FNA’s role as a *bank for the arts*, the suggestion would be to find less distortive sources of funding.

Last but not least, the DPP deserves to be studied in a different light. Not as a complement but as a substitute, total or partial, to copyright law. In most countries, the *domaine public payant* begins after copyright has expired and it is perpetual. A whole different story would be to discuss, at least theoretically, the plausibility to substitute (instead of complementing) copyright law by a universal paying public domain.

In principle, six different combinations are possible: I. Copyright (with PMA term) + Domaine Public Payant (perpetual); II. Copyright (with PMA term) + Domaine Public Payant (finite term); III. Copyright term (without PMA term) + Domaine Public Payant (perpetual); IV. Copyright term (without PMA term) + Domaine Public Payant (finite term); V. No Copyright + Domaine Public Payant (perpetual); and, VI: No Copyright - Domaine Public Payant (finite term).

That would require to reassess the pros and cons of property rules vis- à-vis liability rules, as discussed in the law and economics literature (Calabresi & Melamed, 1972; Kaplow & Shavell, 1996; Krauss, 1999). Some IP scholars have already suggested to replace IPR by a *compensatory liability regime* (Reichman, 2000, 2011; Reichman & Lewis, 2005). It seems, a priori, like a promising avenue for future research even if existing international commitments are legal barriers to radical legal innovations in the area of IPR (e.g. the Paris, Berne and Rome Conventions, the TRIPS Agreement and a myriad of Bilateral Trade Agreements).

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1. **appendix**

Regulation of the Dominio Público Pagante(Argentina) [[12]](#footnote-12)

Fees (Title IX - Annex to Decision No. 15.850/77)

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 institution: ARGENTORES (Argentine General Society of Authors).*

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 institution: SADAIC (Argentine Society of Music Authors and Composers).*

* *Literary part: Same tariff in effect for works in the private domain (copyright).*

*Collecting institution: ARGENTORES (Argentine General Society of Authors).*

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 institution: ARGENTORES (Argentine General Society of Authors).*

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 institution: SADAIC (Argentine Society of Music Authors and Composers).*
* *Other works: 30% of the tariff in effect for works in the private domain (copyright).*

*Collecting institution: ARGENTORES (Argentine General Society of Authors).*

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 institution: SADAIC (Argentine Society of Music Authors and Composers).*

* *Literary part: Same tariff in effect for works in the private domain (copyright).*

*Collecting institution: 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.*

*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[[13]](#footnote-13) 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 institution: FNA.*
1. This article is based in the author’s (unpublished) doctoral dissertation. [↑](#footnote-ref-1)
2. Argentinian-qualified lawyer, mediator and industrial property agent. Currently, Deputy Director of the Turin University-WIPO LLM in Intellectual Property and visiting professor of Business Law at ESCP – Europe and IESEG, Paris and Lille. The author can be contacted at: [maximiliano.marzetti@alumni.ip.mpg.de]. [↑](#footnote-ref-2)
3. Anecdotal evidence has stressed the inefficiency and unfairness of the Argentinian DPP. According to some sources, the FNA in practice does not prosecute other public institutions that owe the DPP tax. The strategy of these debtors seems to be to do nothing and wait for the statute of limitations to kick-in, after which the debt becomes unenforceable. [↑](#footnote-ref-3)
4. [https://www.communia-association.org/]. [↑](#footnote-ref-4)
5. *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.*  [↑](#footnote-ref-5)
6. «*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.]. »  [↑](#footnote-ref-6)
7. « [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] *1º 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.].» [↑](#footnote-ref-7)
8. «*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.].*»* [↑](#footnote-ref-8)
9. «[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.]*. »* [↑](#footnote-ref-9)
10. 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. (The translation belongs to this author). [↑](#footnote-ref-10)
11. Later, on 29 September 2016, Act no. 27275 was passed, guaranteeing Argentinian citizens the right to access public information in all three branches of government. [↑](#footnote-ref-11)
12. All translations belong to the author. [↑](#footnote-ref-12)
13. [↑](#footnote-ref-13)