

# Don't Think Twice, It's All Right: Towards a New Copyright Protection System

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**Abstract:** Legal scholars and economists often debate in the literature about current terms of copyright protection. Those terms seem unwarranted and disproportionate, leading to a market failure on the effective life of works. The *de lege ferenda* proposal which is here formulated, based on a simple system of short and renewable protection periods, find serious benefits from both economic and social perspective. Major parts of our cultural heritage have been digitalized, but are not accessible on line to the general public because of excessive copyright protection. The effective exploitable life of the vast majority of artistic creations is brief, and the question that arises is how we can turn that deadweight loss into profit, with incentive for creators and least social cost. It then seems logical that after that period of exploitation works should enter the public domain. Furthermore, the proposed system provides greater protection to the original authors besides eventual intermediaries as rights holders, with a revertible formula which may strength their position at the time of negotiating over the ownership of their works. With the technological advances of the digital age, economic analysis of copyright should no longer be concerned on incentivizing creation, which in itself is already unstoppable, but to facilitate the dissemination of works. That contents' diffusion would be hugely advantageous for the society and, moreover, for the copyright holders who, ideally, should remain the authors themselves.

**Key words:** copyright law; intellectual property; law & economics; public policy; behavioral economics

**JEL code:** K11

I ain't sayin' you treated me unkind  
You could have done better but I don't mind  
You just kinda wasted my precious time  
But don't think twice, it's all right\*\*

## 1. Introduction

No author, artist or production company invests creativity or resources with a view of recoupment in 50 or 100 years. To encourage creativity, copyright creates intellectual property rights for original works of authorship in literature and music, computer software, web content and many other important sectors of the digital economy. Extensions in the length of copyright have emerged as a key policy lever by which national governments attempt to strengthen property rights in ideas. For example, the U.S. Copyright Act of 1998 and the U.K. Copyright Act of

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\*\**Don't think twice, it's all right*, Bob Dylan, 1962. Song released on the 1963 album *The Frewheelin' Bob Dylan*.

2011 extended the length of copyright protection for music from “life of author plus 50 years” to “life of author plus 70 years”. Proponents of longer copyright argue that such shifts encourage creativity by increasing expected profits from works. Systematic evidence on the effects of stronger copyrights on the profitability of authors, however, is scarce because data on payments to authors is typically not available to the public.

There are number of costs to granting overbroad intellectual property rights. First, intellectual property rights distort markets away from the competitive norm, and therefore create static inefficiencies in the form of deadweight losses. Second, intellectual property rights interfere with the ability of others creators to work, and therefore create dynamic inefficiencies. Third, the prospect of intellectual property rights encourages rent-seeking behavior that is socially wasteful. Finally, overinvestment in research and development is in itself a distortion. The ultimate result of these costs is that what we want is not a mere incentive but the right incentive.<sup>1</sup>

Although it seems difficult to draw the right economic line on copyright law, we can take some minimum guidance from the likelihood that the relationship between intellectual property protection and innovation is not monotonic. Because of the above mentioned costs, adding more and more intellectual property protection not only has diminishing marginal benefits, but at some point has a net negative impact on innovation, because the strengthening of existing rights stifles more new innovation building on those rights than further expansion encourages.

At a bare minimum, increases in intellectual property protection that restrict more innovation than they encourage cannot be economically justified.<sup>2</sup> An obvious example is the retroactive extension of copyright term in the Sonny Bono Copyright Term Extension Act<sup>3</sup>, which provided no new incentive to authors and complicated efforts to make use of a large number of existing works.<sup>4</sup> With that policy tendency we are at danger of ending on a system of perpetual protection. This paper tries to combat that drift with a simple proposal bias economic efficiency.

## 2. Reviewing the Policy and Economics of Copyright Protection: From Incentive to Disseminate

Copyright protection, which is the right of copyright's owner to prevent others from making unauthorized copies, trades off the costs of limiting access to a work against the benefits of providing incentives to create the work in the first place. Striking the correct balance between access and incentives is the central problem in copyright law but, as polar opposites-attract, perhaps the best option would be that of incentivizing access in a way that ends to be beneficial also to the authors. For copyright law to promote economic efficiency its principal legal doctrines must, at least approximately, maximize the benefits from creating additional works minus both the losses from limiting access and the costs of administering copyright protection.<sup>5</sup>

The incentive theory of copyright aims to provide incentives to two kinds of actors in the economy: creators and intermediaries. Copyright law grants certain exclusive rights to creators of original works that are fixed in a

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<sup>1</sup> Lemley Mark A., “Property, intellectual property and free riding”, *Texas Law Review*, Vol. 83, p. 1031, 2005.

<sup>2</sup> Wagner R. Polk, “Information wants to be free: Intellectual property and the mythologies of control”, *Columbia Law Review*, 2003, Vol. 103, p. 995. Wagner argues that since control over intellectual property is imperfect, increasing intellectual property rights will encourage new creation that will have spillover benefits to the public. While this is certainly true up to a point, beyond a certain level of control the costs of marginal increases in control outweigh any such benefits. Wagner simply assumes we haven't reached that point. We think there is substantial evidence to the contrary in copyright law.

<sup>3</sup> 17 U.S.C. 302

<sup>4</sup> For an economic critique of the Act, see *Eldred v. Ashcroft*, 537 U.S. 186, 242 (2003) (Breyer J., dissenting).

<sup>5</sup> Landes William M. and Posner Richard A., “An economic analysis of copyright law”, *The Journal of Legal Studies*, Vol. 18, No. 2 (Jun., 1989), p. 326 *et seq.*

tangible medium of expression.<sup>6</sup> If we take the music industry as a case study, this means both compositions and sound recordings, which are separate types of copyrightable subject matter. Creators may, of course, release their own works to the public, but in practice the copyright system is designed with the expectation that many creators will contract with intermediaries to exploit their works commercially.<sup>7</sup>

Intermediaries offer the prospect of capital investment, marketing, promotion, and wider distribution, which together generate larger financial rewards than the creator could collect on his own. In return, the creator must transfer either copyright ownership or a large royalty share to the intermediary. For example, in the music industry, recording artists typically transfer their sound recording copyrights to record labels in return for royalties.<sup>8</sup> Composers and songwriters typically sell or license their composition copyrights to publishing companies, which will administer the copyright in return for a percentage of the proceeds. Thus, intermediaries often own the copyrights and receive a medium to large share of the proceeds from exploiting the works, the creators receive royalties and the listening public benefits from the works that reach them.

### 2.1 The Classic Economic Approach to Copyright Protection: The Incentive Theory

The incentive theory contemplates a chain of value, as outlined above, from creator to distributor to the listening public. It also contemplates money flowing in the opposite direction, from the consumers to distributors to creators, so we'll have to take into account very seriously the nature of the financial rewards that authors receive from their works in order to assess whether particular changes to copyright legislation would encourage more creative activity or, if so, how much more.

It has been well established in the economic literature that copyright is a trade-off between opposing forces—the economic incentive to create works of art, literature, music, etc. as against the disincentive it causes to users, whether intermediate producers or final consumers. It is a second best solution to market failure and there is no best answer; all we can do is to aim for features of the law that maximize net benefits and deal with externalities. In common with other second best situations facing policy-makers, empirical evidence on costs and benefits is needed to establish these net benefits in specific cases as there is no general answer.

The so-called “copyright standard” consists of the duration of the term of its many rights and their scope as well as the degree to which it is enforced. Almost all economists are agreed that the copyright term is now inefficiently long with the result that costs of compliance most likely exceed any financial benefits from extensions. At this initial point it is worth remembering that the term of protection for a work in the 1709 Statute of Anne was 14 years with the possibility of renewal as compared to 70 years plus life for authors in most developed countries in the present, which means a work could be protected for well over 150 years. Moreover, difficulties of tracing copyright owners and orphan works has prevented access to copyright material and inhibited both future creation and access to culturally valuable material by the public. It is well known that the vast majority of copyright works is out of print or has long been unavailable on the market and this tendency is exacerbated by extending the term.<sup>9</sup> One point on which economists agree is that there can be no possible justification for

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<sup>6</sup> DiCola Peter C., “Money from music: Survey evidence on musicians revenue and lessons about copyright incentives”, January 9, 2013, *Arizona Law Review*; Northwestern Law & Econ Research Paper No. 13-01.

<sup>7</sup> Litman Jessica, “Real copyright reform”, 2010, *Iowa L. Rev.*, Vol. 96, No. 1, pp. 10-12, explains how copyright law contemplates that creators will transfer their copyrights to intermediary distributors.

<sup>8</sup> See Kembrew McLeod and DiCola Peter, “Creative license, The law and culture of digital sampling”, 2011, Vol. 76, pp. 79-82, summarizing the role of record labels in the music industry and their contractual relationship with recording artists.

<sup>9</sup> Breyer S., “The uneasy case for copyright: A study of books, photocopies and computer programs”, *Harvard Law Review*, 1970, Vol. 84, pp. 281-351.

retrospective extension to the term of copyright for existing works since it defies the economic logic of the copyright incentive, which nevertheless has been enacted on several occasions.<sup>10</sup>

In addition, the scope of copyright is very broad and nowadays covers many items of no commercial value that were never intended to be commercialized, as is the case with a great deal of material on social networking sites. This raises the question of the incentive role of the scope of copyright since it offers the same coverage for every type of qualifying work. In general, the lack of discrimination in this “one size fits all” aspect of copyright is another subject on which economists are agreed: in principle, the incentive should fit the type of work depending upon the investment required, the potential durability of the work and other heterogeneous characteristics. This applies as much to the term as to the scope of copyright; only few works retain their value over a very long period while most of them lose it very quickly. The rationale for this lack of discrimination, however, is that individualizing incentives would be prohibitively costly both to initiate and to enforce. As it is, that copyright is recognized to have become excessively complex and therefore very costly for users and authors.

A further aspect of the incentive value of copyright has to do with practicalities. Copyright law only stipulates the copyright standard and the rights that protect authors, but authors almost always have to contract with an intermediary or distributor in order to market their work and it is the terms of the contract between them that determine the eventual financial reward to the author. That outcome is uncertain, though, as the contract usually only lays down the royalty rate, not the value of the revenue of which it is a percentage. For many rights, such as the public performance right, individual authors and performers cannot contract with all users and the solution is through collective rights management. That minimizes transaction costs for both copyright holders and users of copyright material but introduces monopoly pricing and blunts the individual incentive, which is actually another trade off. Technical alternatives, such as digital rights management that are supposed to enable individual control, even if feasible, do not solve the problem of setting the royalty rate. Most economists agree that collective rights management is necessary in those circumstances in order for copyright to be practicable.<sup>11</sup>

Economists have made some headway in estimating earnings from copyright, which is significant for the question of the importance of the incentive it offers to creators. Research on royalty earnings of individual creators and performers has been limited because by and large, it has been on earnings from specific rights rather than on the entire bundle: for example, we know what composers earn from performing and mechanical rights for their compositions but not what they earn from performers—rights as well, as players or conductors. Research on artists' total earnings including royalties shows that only a small minority earns an amount comparable to national earnings in other occupations and only superstars make huge amounts. Copyright produces limited economic rewards to the ordinary professional creator; on the other hand, what the situation would be like absent copyright protection cannot be estimated. There has also been recent work on estimating the asset value of original works of art to which copyright applies that is a notable set forward in the measurement of the economic contribution of the products embodying these copyright works but again, it does not tell us what incentive role copyright had in stimulating that production.<sup>12</sup>

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<sup>10</sup> Perhaps the most notorious case was the CTEA (*Sonny Bono or Mickey Mouse*) extension in the USA, which was also followed up by the European Union, thereby handing out economic rents to the *rich and famous* of the entertainment world and, more likely, to their descendants.

<sup>11</sup> Towse Ruth, “What we know, what we don't know, and what policy-makers would like us to know about the economics of copyright”, December 31, 2011, *Review of Economic Research on Copyright Issues*, Vol. 8, No. 2, pp. 101-120.

<sup>12</sup> For the UK, see Farooqui S., Goodridge P. and Haskel J., *The Role of Intellectual Property Rights in the UK Market Sector*, Newport, UK, Intellectual Property Office, 2011. For the US, Soloveichik R., “Artistic originals as a capital asset”, Working Paper for the Bureau of Economic Affairs, Washington DC; or Soloveichik R. and Wasshausen D., “Copyright protected assets in the national accounts”, Washington DC, U.S. National Academies of Science.

In this context, it is generally accepted by economists that piracy has adversely affected sales in creative industries that did not anticipate effects of digitalization, P2P, MP3 and other such means of using the Internet to obtain unauthorized copied, especially in sound recording. We do not know the true size of the effect—how much of the loss in sales is actually due to piracy, and how much to other effects—nor do we know the real cost to the industry—losses in profit rather than sales. Nor has there been research on the distribution of the loss of potential revenue to authors and performers.

Economists have responded to the apparent threat to copyright posed by digitalization by suggesting that copyright law is anyway excessively complex and unnecessary if suitable business models are developed that would enable the market alone to reward the owner. Some have gone further and argued that copyright inhibits the development of these models.<sup>13</sup> One solution to the difficulties of enforcing copyright in the digital age that has been widely adopted is the copyright levy, which has been almost universally opposed by economists on the grounds that its remuneration to creators bears no resemblance to the market value of the works and therefore could not act as a valid incentive to creators. Its only merit is that it reduces transaction costs of obtaining remuneration for right holders, though it is argued that it acts as a tax on goods, such as computers, that are not directly responsible for the uses or abuses to which they are put.

Finally, economists have had long concerns that copyright has a moral hazard effect on incumbent firms, including those in the creative industries, by encouraging them to rely on enforcement of the law rather than adopt new technologies and business models to deal with new technologies. Many economists espouse the Schumpeterian view of the process of creative destruction of technical progress, whereby incumbent firms are replaced by new firms/industries that have developed the ability to exploit new technologies.<sup>14</sup> It is well-known that creative industries have spent huge amounts of money lobbying governments for increased copyright protection both through strengthening the law and stronger enforcement, not only within national boundaries but also through international treaties.

## 2.2 The Unknown Optimal Scope and Duration of Copyright

Economics scholars have found it very difficult to provide empirical evidence on the impact of copyright as there are no obvious counter-factual, that is, situations comparable to those in which copyright does apply to one in which it does not. Given the widespread application of copyright, its impact cannot be distinguished. Copyright's scope is universal with the definition of the law. Even where copyright may not be regarded as useful in the production of some cultural goods or services, it still applies. For instance, few choreographers need to rely on enforcing copyright to protect their work as reputation will do the job but nevertheless, choreography falls within the scope of the law as it cannot be ruled out that copyright plays a role in stimulating creativity in dance. There is evidence from surveys of firms that some regard copyright as not only not useful to their enterprise but actually that it even imposes costs on some.<sup>15</sup> Moreover, economics does not deal easily with all or nothing states of the type envisaged by the impact of the whole system; its strength is in analyzing marginal changes.

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<sup>13</sup> See Varian H., "Copying and copyright", *Journal of Economic Perspectives*, 2005, Vol. 19, No. 2, pp. 121-138; and Boldrin M. and Levine D., "The case against intellectual property", *The American Economic Review*, 2002, Vol. 92, No. 2, pp. 209-212.

<sup>14</sup> Aghion P. and Howitt P., *Endogenous Growth Theory*, Cambridge, MA, MIT Press, 1997; Metcalfe S., *Evolutionary Economics and Creative Destruction, Graz Schumpeter Lectures*, 1, London, Routledge, 1998. For relevance to the music industry, see Liebowitz S., "File-sharing creative destruction or just plain destruction?", *Journal of Law and Economics*, 2006, Vol. 49, No. 1, pp. 1-28, and Handke C., "Plain destruction or creative destruction? Copyright erosion and the evolution of the record industry", *Review of Economic Research on Copyright Issues*, 2006, Vol. 3, No. 2, pp. 29-51.

<sup>15</sup> See Handke C., "Plain destruction or creative destruction? Copyright erosion and the evolution of the record industry", *Review of Economic Research on Copyright Issues*, 2006, Vol. 3, No. 2, pp. 29-51.

Even if some feasible scenario can be found, the absence of registration of copyright works makes direct research on the effects of copyright impossible, unlike the position with patents. By direct research we mean where works can be identified and their exploitation trace through the market. As the requirement of compulsory registration of works contravenes the Berne Convention, signatories therefore have had to abandon registration if they require it prior to joining.<sup>16</sup> Consequently, researchers must use either old registrations or abandon the attempt to work with direct data in copyright works and substitute instead products that contain a strong element of copyright material, such books and sound recordings. That has been the most common approach to measuring the effect of the copyright incentive. The reasoning can be circular: the creative industries are mostly defined in terms of their reliance on copyright so cause and effects become confused.<sup>17</sup> Even where they measure value added to national economies by the creative industries, benefits are overestimated by omitting the balance of payments of royalties, for which data barely exist and of overseas transfer of profits by multi-national corporations which dominate the publishing, music and film industries, among others. Moreover, in cost benefit terms, these measures fall as they concentrate entirely on the supposed benefits but completely ignore the costs of copyright to users and consumers and the deadweight loss of administrative costs.

It has been argued that the advent of digitalization provides a natural experiment for researching the economic importance of copyright and that measuring the value of lost sales and other revenues due to unauthorized use of copyright works is evidence of the value of copyright. Experience with empirical testing of piracy has shown difficulties of this research<sup>18</sup> and although there is a consensus now that it has had a significant impact, particularly in sound recording as the industry most researched by economists, it has taken almost a decade for that consensus to emerge and during this time, not only has the technology changed, especially of distribution, but the players in the industry have changed too. This suggests how much more difficult it would be to measure a value for copyright in the whole economy.

The genius of the competitive market is precisely that while no individual producer has the incentive to fill market demand perfectly, collectively producers will meet that demand. This is not because they capture the full social surplus from their behavior, which by definition is never true in a competitive market. It is because they have enough incentive to produce what consumers demand. The reason we can generally rely on private ordering to produce desirable outcomes is not because property has some inherently moral virtue that leads to efficient conduct, nor because individual companies can eliminate free riding, but because individual companies are constrained by the discipline of a competitive market.<sup>19</sup>

### **2.3 Not Only to Encourage But to Spread: From Incentivize to Disseminate**

Copyright law also presents another trade-off, this one not between authors and consumers, but between authors and other authors. It is a commonplace that new works draw from and build upon old ones.<sup>20</sup> No work is

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<sup>16</sup> Some interesting studies on this field can be seen in Khan Z., "Does Copyright Piracy Pay? The Effects of US International Copyright Laws on the Market for Books, 1790-1920", *NBER Working Paper* 10271, 2004; or Heald P., "Bestselling musical compositions (1913-32) and their use in cinema (1968-2007)", *Review of Economic Research on Copyright Issues*, 2009, Vol. 6, No. 2, pp. 31-60.

<sup>17</sup> See Towse R., "Creativity, Copyright and the Creative Industries Paradigm", *Kyklos*, 2010, Vol. 3, pp. 483-500.

<sup>18</sup> See Handke C., "The economic effects of copyright: The empirical evidence so far", *Report to National Academies*, Washington DC, 2011.

<sup>19</sup> See Lemley Mark A., "Ex Ante versus Ex post justifications for intellectual property (February 2, 2011)", *University Chicago Law Review*, 2004, Vol. 71, p. 129, UC Berkeley Public Law Research Paper No. 144.

<sup>20</sup> See Goldstein P., "Derivative rights and derivative works in copyright", *30 J. Copyright Soc'y U.S.A.* 209, 218, 1983; or Jaszi P., "Toward a theory of copyright: The metamorphosis of 'authorship'", *1991 Duke L. J.*, pp. 455, 457-463.

purely and completely new. All works draw upon prior works, to at least some extent. Thus, by increasing protection for initial works, we may increase the incentives for producing such works, but we also increase the cost of producing works that draw upon these initial works<sup>21</sup>. If protection is too great, we may in fact decrease the number of total works, that is, the sum of both original and follow-on works. If our aim is to provide adequate incentives for both initial and follow-on works, the strength of copyright protection needs to reflect this balance.<sup>22</sup>

The length of the copyright term is one way—among many ways—in which this balance is struck. Too short a term, and the incentives may not be sufficient to spur initial creation, since authors may not have enough time to obtain sufficient compensation for their efforts. Too long a term, and the work may not be widely disseminated or built upon over time.<sup>23</sup>

Copyright seeks a diversity of expression. It is designed to permit variations, new expressions built upon existing ideas. We are not disturbed by the idea that anyone can make a movie re-telling, in any form, the story of Rome and Juliet or record a new interpretation of a Beethoven Symphony—indeed, this is generally seen as a good thing. At the same time, society's interest in seeing different perspectives and re-interpretations of the original works increases over time. Furthermore, copyright must do more to actively support an interest in the re-interpretation and fair use of copyrighted works. People must have some degree of freedom to play with intellectual goods, to re-cast them, to imbue them with meanings independent of the ones that the original author intended, in order to make sense of them. These transformative activities are an essential part of what it means to consume an intellectual good. The longer a work has been published, the more desirable it becomes as material for discussion or re-casting. The longer a work has been out, the more likely it is that other authors will have encountered it and wish to build upon it or incorporate it into their own subsequent works.

Copyright provides control over the production of derivative works based in part on copyrighted material. In certain circumstances, this control results in monopoly higher costs and lower production of new creative works. Many new creative works are built in part out of materials from existing works.<sup>24</sup> Improvements in the technology of search and recombination continue to expand the economic importance of new creation based upon old materials.

As Ronald Coase and many others have pointed out<sup>25</sup>, economic efficiency is best promoted by legal arrangements that minimize transaction costs. Here, a limit on the duration of control rights over derivative works tends to reduce transaction costs, which give new creators less incentive to produce.<sup>26</sup>

Why will authors themselves, for-profit publishers, the recording industry or the motion picture industry give away their products when they can renew the protection? The free access to those works which would only produce further anecdotal incomes might stimulate sales of other future or even past and still-protected works from the same author. This can be easily seen with the key role that free digital giveaways are playing in the

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<sup>21</sup> See Brief of George A. Akerlof et al. as Amici Curiae in Support of Petitioners, *Eldred v. Ashcroft*, 122 S. Ct. 1170 (2002). (no. 01-618), pp. 12-13; or Landes W., and Posner R., "An economic analysis of copyright law", *J. Legal Stud.*, 1989, Vol. 18, pp. 325, 333.

<sup>22</sup> See Landes W. and Posner R., "An economic analysis of copyright law", *J. Legal Stud.*, 1989, Vol. 18, pp. 325, 333; or Netanel N., "Copyright and a democratic civil society", *Yale L.J.*, 1996, Vol. 106, No. 283, p. 295.

<sup>23</sup> See Liu Joseph P., "Copyright and time: A proposal", *Michigan Law Review*, 2002, Vol. 101, No. 2.

<sup>24</sup> For example, new fiction re-tells old stories, new documentaries re-use historical footage, and new music re-mixes and transforms old songs.

<sup>25</sup> See Coase R., "The problem of social cost", *L. & Econ.*, 1960, Vol. 3, No. 1.

<sup>26</sup> See Alfaro J., "La infatigable extensión del derecho de autor: un poco de análisis de los costes y beneficios", *Blog Derecho Mercantil*, 15 Nov. 2011, available online at: <http://derechomercantilespana.blogspot.com/2011/11/he-encontrado-el-escrito-de-alegaciones.html> (13 Aug. 2013).

promotion of exhibitions, motion pictures, music or books, in which artists participate for free in certain activities in order to get their popularity increased and, indirectly, achieve eventual sales.<sup>27, 28</sup>

Copyright protection gives incentives for creation but at the same time monopoly rents cause both static and dynamic welfare loss to society. Copyright provides owners of the copyrighted material with the opportunity to earn returns. These returns must be generated at the expense of consumers. Copyright safeguards the incentive to create works generating creation fixed costs, at the expense of the potentially marginal costs of dissemination of works and creative re-use.<sup>29</sup>

#### **2.4 Wife Says He Was Cleaning Weapon: Why Enlarging the Public Domain Is Not a Suicide**

Copyright law already recognizes the necessity of disseminating the works freely, to some extent, through the limited copyright term. As their copyright terms expire, works pass from protected status into the public domain where they can be freely built upon, transformed, re-cast and re-imagined by others. The eventual passage of works into the public domain is an essential feature of our existing copyright structure.

All authors generally benefit from being able to build upon the ideas of others, and that they all share an obligation of some kind to prior authors. Thus, the eventual passage of an author's work into the public domain can be seen as part of the bargain that the author strikes in creating a work that inevitably builds upon the creative labor of those who have preceded him. To the extent that an author himself has built upon the creative labor of others before him, he has a moral obligation to similarly permit those coming after him to build upon his labor. The idea is that authors have a moral obligation to help replenish the public domain.

There seems little reason to fear that once works fall into the public domain, their value will be substantially reduced based on the amount or manner in which they are used. We do not claim that there are no costs to movement into the public domain, but, on the opposite side of the ledger, there are considerable benefits to users of open access to public domain works. We suspect that these benefits dramatically outweigh the costs.

The academic literature tells two stories about what happens to works when they fall into the public domain. First, some economists suggest that an absence of copyright protection for intangible works may lead to inefficiencies because of impaired incentives to invest in maintaining and exploiting these works.<sup>30</sup> Why sell a work that others can also exploit for free and erode your market? Together with this under-exploitation hypothesis, others have argued instead, from a behavioral economics perspective, that when works fall into the public domain, they become attractive targets for exploitation because no license fee need be paid to the former owner of the work. Despite potential competition, exploitation will occur, just as it does in other markets where no one has a monopoly over the object of exploitation, e.g., the markets for string, milk or pencils. The data collected by platforms like Amazon demonstrates the power of the second hypothesis: that books and music become more attractive targets for exploitation after they fall into public domain.<sup>31</sup>

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<sup>27</sup> See Lessig L., *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity*, New York, The Penguin Press, 2004.

<sup>28</sup> See Harfoush R., "JK wedding dance—The evolution of viral marketing", available online at: <http://www.rahafharfoush.com/2009/08/jk-wedding-dance-the-evolution-of-viral-marketing/>.

<sup>29</sup> See Hugenoltz P. B. and Senftleben Martin, "Fair use in Europe: In search of flexibilities" (November 14, 2011).

<sup>30</sup> Landes W. and Posner R., "Indefinitely renewable copyright", *U. CHI. L. REV.*, 2003, Vol. 70, pp. 471-475.

<sup>31</sup> See Heald P., "How copyright makes books and music disappear and how secondary liability rules help resurrect old songs", *Illinois Program in Law, Behavior and Social Science Paper No. LBSS14-07*, 2013.



### 3. Allocational Goals vs Distributional Points: Take the Money and Run

Copyright itself is not an incentive mechanism, but it does allow an incentive mechanism, namely contracts, to operate. If the relationship between creator and investor—publisher/producer—with respect to duration, royalties and options can be negotiated as a bilateral legal relationship “sans droit d’auteur” (without copyright), it is only by conceptualizing the further relationship of right holders to competitors and consumers that the regulatory function of copyright statutes become visible. In limiting competition, copyright statutes may enable right owners to charge higher prices. Empirically, it still remains an open question if this translates into higher earnings for the creator.

One of the most important arguments or rationales of copyright reflects notions of natural justice: authors’ rights are not created by law but always existed in the legal consciousness of man.<sup>32</sup> This rationale presupposes that copyright vests in the author as creator of the work. This natural allocation principle is, indeed, reflected in the general rule that copyright originates with the originator of the work. In fact, in most countries of the world, copyright is “author’s right” by definition, if not by name.

What is surprising then is that in practice nothing much of this allocation principle remains. Professional authors only rarely own the copyrights in the works they professionally produce. This is true not only for the millions of intellectual workers producing works under employment contracts, or otherwise “for hire”, but also for independent creators.

However, the intermediaries have never managed to deprive the authors from the one right that, more than anything else, represents the ethical core of the droit d’auteur (copyright): the moral right. The droit moral offered the authors at least a modicum of protection against abusive producer practices, such as unauthorized first publication, incorrect crediting or mutilation of the work. In some European countries, the moral right also provided the foundation for a number of further reaching author-protective provisions.<sup>33</sup>

#### 3.1 Some Historical Background

Thanks to the printing privileges that were granted by the public authorities of pre-copyright days, the printer-publishers enjoyed strong, but short-lived monopolies in the “privileged” editions they produced. Inspired by emerging notions of natural justice, in the eighteenth and nineteenth century the idea gradually became accepted that it were the creators, rather than the printers, that deserved the protection of the law. At the same time, the emancipation of the bourgeoisie that culminated in the French revolution signaled the end of the privilege system. Thus, printing patent was replaced by copyright, an exclusive right of reproduction that originated with the author of the work.

But the authors were hardly better off. Under the first copyright laws that emerged in continental Europe, transfer of title to a manuscript automatically implied a grant of copyright. As a result, author’s rights remained publisher’s rights in practice, until in the second half of the nineteenth century the exclusive right was, at long last, made independent of the manuscript. With that, the paradigm shift of copyright was complete, at least on paper. Intellectual property was born; the printer-publishers had lost their privilege, apparently forever. In the future, for protection against pirates, competitors and other unauthorized users, producers—intermediaries—would be largely dependent upon the authors’ economic rights.

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<sup>32</sup> Ploman E.W. and Clark Hamilton L., *Copyright: Intellectual Property in the Information Age*, London, 1980, p. 13.

<sup>33</sup> Both in Austria and Germany the moral rights inspired doctrine of monism—economic and moral rights are two sides of the same coin—led to the rule, still existing, that copyrights cannot be assigned or transferred.

In the course of the nineteenth and twentieth century, the producers have managed to overcome this legal catastrophe with remarkable ease. The panacea was “freedom of contract”. If the legislature had bestowed upon the authors certain exclusive rights, nothing prevented the publishers from relieving the authors from their legal rights by contractual means. Indeed, this occurred on a grand scale almost immediately, a practice made easy by most authors’ timid behavior vis-à-vis their publishers. Until well into the nineteenth century, many authors considered it not done to benefit financially from the proceeds of their works. The true author created *Gloria et fama*, not for material profit. Untroubled by earthly matters, such as rights and royalties, the relationship between authors and publishers often took on an almost idyllic nature. The amount of the honorarium that a publisher would award his author, therefore, rarely reflected the commercial success of published book. For most writers, authors’ rights were merely moral rights; the pecuniary side of the coin began to prevail only much later—with the advent of the “enterprising” author. But even today, many authors still struggle with the dilemma between mind and matter.

The publishers, from their part, quickly discovered that their derivative legal position yielded some unexpected benefits. Because the copyright laws now focused on the person of the author, the term of protection followed the life of the author, plus an “alimony period” to the benefit for the author’s descendants. As a result, by acquiring the copyrights of the authors, the publishers had in fact obtained a legal monopoly that far exceeded the duration of the former printers’ privileges, or even the—neighboring—publisher’s right that European publishers would lobby for, in vain, in the 1970’s and 1980’s.

Politically, the publishers and producers also drew substantial benefits from the copyrights of their “partners”, the authors. Expansion of author’s rights proved to be a much easier “sell” than the introduction of a purely capitalist publisher’s right. The authors were easily persuaded to act as stalking horses for the producers;<sup>34</sup> a practice that has continued until today.

### 3.2 Authors and Intermediaries: In Search of Equilibrium

It is one of the ironies of the Internet, that now “publishing without publishers” is finally becoming a reality; authors are forced to assign their rights to publishers and other producers on an unprecedented scale. In the digital era, author’s rights have become the authors’ only by name. The producers have run away with the rights—so the money—, as in the early days of copyright. High timer to change the course of history once again, and return the rights where they belong: with the authors of works of literature, science and art.

Doesn’t the existing repertoire of remedies under private law provide sufficient protection? Indeed, depending on the law applicable to the contract, several instruments available under general contract law may protect authors against unfair provisions in copyright contracts:

- the principle of “fairness” or equity, that may supplement, or even an override, unfair contractual terms in certain jurisdictions;
- rules prohibiting unfair terms in standard agreements, or unconscionable contracts; and
- provisions allowing the revision or rescinding of a contract if unforeseen circumstances would make unaltered execution of the contract unjust.

However, even if authors might benefit from these rules in a given situation, general private law suffers from a fundamental flaw: its normative content is minimal. Contract law does not inform authors or intermediaries of the (un)reasonable nature of a specific contractual provision. Authors with a grievance may take a publisher to court after the fact, but in practice will be very hesitant to do so.

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<sup>34</sup> See Tebbel J., *A History of Book Publishing in the United States*, New York Bowker, 1978, Vol. III, p. 420.

Collective bargaining—on behalf of employed authors, or even “organized” freelance creators—may restore the lack of balance in copyright contracting, and lead to a more equitable allocation of rights among authors and producers. However, in some countries, including United States and Germany, freelance authors are barred from collective bargaining for reasons of anti-trust law. Moreover, even absent such restrictions, freelance authors are often hesitant to organize themselves in guilds or unions. Many authors have elected to live the life of an independent creator not out of social or economic necessity, but as a matter of principle.

What measures would be appropriate? A lot can be learned from the rules on copyright contract presently codified in number of European countries. Depending on local legal tradition, legislatures might opt for a scheme of detailed, sector-specific provisions, e.g., regarding publishing, broadcasting, advertising, etc., such as those existing in France, Spain or Belgium. Alternatively, legislatures more comfortable with open rules might prefer introducing a set of general rules, phrased in media-neutral terms. Either way, the statutory rules on copyright contracting should be imperative, and preferably immune to a choice of foreign law.

Rules to be considered must include:

- an “automatic” termination of transfer or grant of rights in case of non-use within a given period of, say, three years;
- a “bestseller” provision, requiring contract renegotiating if the work becomes an unexpected success;
- a purpose-of-transfer- rule; and possibly
- a prohibition on the transfer or grant of rights in respect of uses unknown at the time of contracting.

So far, the international copyright conventions do not provide for any such author-protective measures. Obviously, in view of the globalization of the information and entertainment industries, there is much to be said for international solutions. An internationally harmonized regime of copyright contract law would benefit both authors and producers. It would prevent choice of law clauses from undermining author-protective provisions, and create a “level playing field” for intermediaries all over the world.

Copyright’s structural function as the engine of free expression has in the past been effective in fostering a plurality of voices in the media. Whether copyright can maintain this function in the years to come, and thereby justify its prolonged existence for future generations, will depend largely on the proper allocation of rights between authors and intermediaries.

#### **4. Towards a Renewable and Revertible Copyright Protection System: A Proposal**

As indicated above, copyright law awards exclusive rights that now often last more than 100 years. Furthermore, these rights are typically transferred by authors to third parties who accumulate back-catalogues of rights. A large percentage of works in these back-catalogues are not available for cultural, social and commercial innovation. We have reliable indicators of the scale of the problem. Studies conducted in the United States at the time of the constitutional challenge to the Copyright Term Extension Act<sup>35</sup> found that only 2.3% of in-copyright books and 6.8% of in-copyright films released pre-1946 remained commercially available.<sup>36</sup> A study for the Library of Congress on the reissues of U.S. sound recordings found that of a random sample of 1521 records issued between 1890 and 1964, only 14 percent were available from rights owners.<sup>37</sup> For a large number of

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<sup>35</sup> *Eldred v. Ashcroft*, 537 U.S. 186 (2003).

<sup>36</sup> Mulligan D. K., and Schultz J. M., “Neglecting the national memory: How copyright term extensions compromise the development of digital archives”, *Journal of Appellate Practice & Process*, 2002, Vol. 4, No. 2, p. 451.

<sup>37</sup> See Brooks T., “Survey of reissues of U.S. recordings”, *Council on Library and Information Resources/Library of Congress*,

in-copyright books, the owner is unknown.<sup>38</sup> For photographic collections of museums and archives, the number rise to 90% of all items. These so called “orphan works” could not be lawfully reissued even if the will was there. The concentration of back-catalogues of rights is an oligopolistic industry structure, as an unintended side-effect of copyright law, may also create a barrier to entry for new firms and artists.<sup>39</sup>

It is an empirical question what length of term would provide sufficient incentives for the production and distribution of culture. Some have argued that the correct approach to setting the copyright term would be to reduce it step by step, until creative production starts to fall, while some others prefer to continue extending the terms of protection.<sup>40</sup>

#### 4.1 The Proposal

Empirical data indicates that the investment horizon in cultural industries is well below 10 years.<sup>41</sup> There is also compelling evidence that the most intensive commercial exploitation takes place at the beginning and the end of the exclusive term.<sup>42</sup> However, setting a term that rationally balances under-production and under-use of copyright works is closed as a policy option, as international and European law stands. Still, the idea that works that are not being exploited should lose protection to the degree that they can be used by others is consistent with general principles of law. We find similar principles in the law of real property—landowner may lose title if rights are not asserted—, in competition law—compulsory licenses, or contract law—revision and termination.

Compulsory registration of copyright works contravenes the Berne Convention, and altering that would be extremely cumbersome, but it does not prevent the development of a national voluntary scheme.<sup>43</sup> In fact, there are many “private-national” registration systems, such as ISBN for books that already requires information from authors by publishers and copyright libraries. Right holders who have published works often register them with collecting society and collecting societies exist for all the valuable rights protected by copyright law. There are also private companies that have register works for the author in order to establish prior creation and provide evidence in the event of a dispute.

A registration system would enable the eventual introduction of a renewal system into the copyright term. Copyright could become more similar to a patent by having an initial term of protection of a work, say 10 years, renewable for further terms.<sup>44</sup> The advantage of this is twofold: it enables a “use-it-or-lose-it” regime to function and, more relevant to the economics of copyright, it enables the market to function better in valuing a work. The vast majority of works are anyway out of print because they are deemed to have no commercial value while the

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Washington, D.C. (2005).

<sup>38</sup> The European estimates differ between 13% and 43%. The 13% figure is a conservative estimate from a study for the European Commission. See Vuopala A., “Assessment of the Orphan works issue and costs for right clearance”, *European Commission, DG Information Society and Media*, Unit E4 (Access to Information), 2010. A rights clearance study for the British Library produced orphan figures of 31% for all books in the sample, and 43% for the sub-sample of “in-copyright” books. See Stratton B., *Seeking New Landscapes: A rights clearance study in the context of mass digitalization of 140 books published between 1870 and 2010*, *British Library*, London, 2011.

<sup>39</sup> See Tschmuck P., “Copyright, contracts and music production”, *Information, Communication and Society*, 2009, Vol. 12, No. 2, pp. 251-266.

<sup>40</sup> “Ten years may be still longer than necessary”, says Stallman R., “Misinterpreting copyright”, *Software Free Society: Selected Essays of Richard M. Stallman* (2nd ed.), 2010.

<sup>41</sup> See Breyer S., “The uneasy case for copyright: A study of copyright for books, photocopies, and computer programs”, *Harvard Law Review*, 1970/71, Vol. 84, No. 2, pp. 281-351.

<sup>42</sup> See St. Clair W., *The Reading Nation in the Romantic Period*, Cambridge University Press, 2004.

<sup>43</sup> Now, unless you know for sure that something is in the public domain, you dare not use it, even if you can't locate the author in order to take a license. This has created a rights-clearance nightmare for any conscientious person who wants to build upon pre-existing works or make them available.

<sup>44</sup> This was the provision in the Statute of Anne, with 14 years renewable terms.

copyright is still valid. Knowing that renewal would be necessary would also alter contractual terms between creators and intermediaries, thereby improving the efficiency of contracting and the prospect of fairer contracts.<sup>45</sup>

A more drastic version of this scenario has been proposed by Landes and Posner<sup>46</sup>: in keeping with trademarks, copyright would become perpetual with renewal required at stated intervals. But the incentive to renew only exists for protecting works that the right holder considered to be valuable. Unrenewed, so lacking value, works would go into the public domain, thereby overcoming the widely recognized problem of orphan works. Landes and Posner were already concerned with the considerable waste of resources employed in lobbying for extensions to copyright something that would be preempted by their scheme.

Other changes that could be considered relate to altering the focus of copyright more towards protecting the initial creator than subsequent right holders; this might be done by raising the requirement of originality, which has a very low threshold. With the development of social networking and other internet-based activities, the explosion of user-created copyright material has surely altered copyright law's intention of encouraging of learning, as well as leading to considerable unauthorized use of other's copyright material. Again, registration of works would reduce the problem of the excessive quantity of protected material and might deter unauthorized use too.

The regulation of collective rights administration could well be informed by more intelligent economic thinking than has so far been applied. That is a complex process that includes fragmentation of rights in a particular medium, such as music, art, literature, broadcasts, setting license fees for specific rights for their use in widely varying circumstances and developing formulae for distribution of revenues to individual right owners, including remunerations from levies and compulsory licenses and the like, registering lists of works provided by members or others who wish to license them collectively, maintaining a database of details of right owners and distributing monies to nationals and transfer credit to sister collective rights organizations abroad. Regulation and any moves to introduce competition needs to take all these activities into account.

It seems that, finally, copyright does not always ensure a fair return for creators and performers. We should then revise the foundations for the ownership of rights, not the reward they gain. Copyright's rewards always come through the market, even where institutional arrangements have been put in place by the state to ensure that copyright is administered fairly. And so do its costs.

Our *de lege ferenda* proposal then is to legislate a simple rule that copyright should be registered for an initial term of 10 years, upon a fee, after which it will revert again to creator, in case he has transferred the rights. After those 10 years, the author would have the "opt in-opt out" choice of:

- paying again the fee for another period of protection; or
- abandoning the work.

The challenge for the legislator will be to create a simple and transparent scheme which would reduce the frictional costs of licensing for both exploited and non-exploited works.

#### **4.2 Economics of the Proposal**

From my point of view, economic efficiency ought to be the fundamental criteria for evaluating protection efforts. Because from a behavioral perspective society has limited its resources to spend, benefit-cost analysis should help illuminating the trade-offs involved in making different kinds of social investments on the intellectual

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<sup>45</sup> See Kretschmer M., "Copyright term reversion and the 'use-it-or-lose-it' principle", *International Journal of Music Business Research* (IJMBR), Vol. 1, No. 1, April 2012.

<sup>46</sup> Landes W. and Posner R., "Indefinitely renewable copyright", *University of Chicago Law Review*, 2002, Vol. 70, No. 2, pp. 471-518.

creation business. In practice, there are significant challenges, in large part because of inherent difficulties in measuring benefits and costs, so the exact scope of copyright, which just demonstrates the weakness of its present configuration. In addition, concerns about fairness are triggered, because public policies on the field inevitably involve winners and losers, even when aggregate benefits exceed aggregate costs.

To deal with those eventual losers, the Pareto efficient model offers a well-known normative criterion for judging whether a social change makes the world better off: a change will result efficient according to Pareto's model if at least one person is made better off, and no one is made worse off. This criterion has considerable normative appeal, but virtually no public policies meet the test of being true Pareto improvements, since there are inevitably some in society who are made worse off by any conceivable change.

The Kaldor-Hicks seems a criterion much more likely to apply: a change would be along its lines defined as welfare-improving if those who gain from the change could in principle fully compensate the losers, with at least one gainer still being better off. Seeking for a test of whether total social benefits exceed total social costs, Kaldor-Hicks criterion is my choice as theoretical foundation for the use of the analytical device known as benefit-cost, or net present value, analysis. Neither the Pareto efficiency criterion nor the Kaldor-Hicks criterion calls for support for any policy for which benefits are greater than costs. Rather, the key is to identify the policy for which the positive difference between benefits and costs is greatest; otherwise it would be possible to identify another policy that would represent a further potential Pareto improvement.

If the objective is to maximize the difference between benefits and costs—net benefits, then the related level of copyright protection should be defined as the efficient level of protection:

$$\max_{\{q_i\}} \sum_{i=1}^N [B_i(q_i) - C_i(q_i)] \rightarrow q_i^*$$

Where  $q_i$  are potential losses for limiting the term of protection  $i$  ( $i = 1$  to  $N$ ),  $B_i(\cdot)$  is the benefit function for the work entering the public domain,  $C_i(\cdot)$  is the cost function for the source, and  $q_i^*$  is the efficient level of protection. The key necessary condition that emerges from the maximization problem of Equation (1) is that marginal benefits should be equated with marginal costs.

In our case, the Kaldor-Hicks improvement model can yield Pareto's optimality when combined with appropriate compensation of losers by winners. With shorter terms of copyright protection the public domain will largely increase, improving social welfare—winners—and causing positive externalities like eventual re-uses of previous works and dissemination of works that (i) already lost their efficiency; or (ii) protection, bringing back those deadweight-works creators—losers—into the market compensation.

### **4.3 We Shall Overcome: Resurrecting Copyright Formalities**

Constitutive and renewal formalities would play an important role in our model, as filtering instruments between works for which authors desire copyright protection and those for which they do not. If authors must fulfill a formality before their works are eligible for protection, they are obliged to make an initial assessment of whether or not their works sufficiently commercially valuable to warrant protection, i.e., whether the expected revenue of royalties would exceed the costs of completing the formality. The same assessment must be made if copyright is subject to a renewal formality. If the assessment appears favorable, authors are likely to fulfill the formality so as to secure protection for their works. If not, they most likely would refrain from doing so and the work will enter the public domain. Thus, in their capacity as filtering instruments, formalities may greatly enhance the free flow of information, in contrast to the present situation, in which each and every original work of

authorship is automatically covered by copyright, constitutive and renewal formalities may substantially enlarge the number of works in the public domain<sup>47</sup>.

Second, formalities may fulfill important signaling functions for the public. If, in a system where copyright protection relies on formalities, works for which no protection is desired are easily identifiable as being unprotected (e.g., if no notice is attached to the work or if the work has not been registered or deposited in a public registry), it is instantly recognizable when a work resides in the public domain and thus can be used without prior authorization. This will significantly increase legal certainty for prospective users. More legal certainty will also be established if formalities provide indicators that facilitate the calculation of the duration of protection (e.g., if they would require authors and/or right owners to make relevant information concerning the author or date of first publication publicly available).

In the same vein, formalities may help to define and identify copyright-protectable subject matter. Constitutive formalities could provide the public with a clear indication of works for which authors claim protection. Obviously, this would not imply that these works automatically satisfy the substantive requirement(s) for protection. That will always be a matter for the courts to decide. Moreover, if copyright depended on registration, it is likely that registering bodies are given the discretionary power to refuse registering creations that obviously do not qualify as 'literary or artistic works' or lack sufficient originality (which should of course be subject to appeal by the applicant). This would help preventing all kinds of trivial works from entering the copyright arena. Likewise, it is possible that in cases of highly complex and technical works, applicants would be required to clearly indicate the elements of information for which they seek protection. Requirements of this kind are not uncommon in other fields of intellectual property law. In a patent specification, for example, the subject matter which the applicant regards as his invention must be particularly pointed out and distinctly claimed and, if necessary, be accompanied by a drawing.<sup>48</sup> Likewise, the registration of a design typically takes no legal effect unless the filing of a design sufficiently reveals its characteristics.

Even if only declarative of the right, formalities may grant a few key benefits. In general, they fulfill important evidentiary functions. The receipt of deposit or entrance in the registers, for instance, may establish prima facie proof of initial ownership of copyright.<sup>49</sup> Moreover, if the law requires a compulsory recordation of assignments or licenses, this may produce prima facie evidence of the legal transfer of ownership of copyright.<sup>50</sup> This enables authors and copyright owners to easily assert their rights and claim the title of property in a work. This may be particularly useful in conflicts where the anteriority of authorship and/or the priority of a claim to the title must be resolved. In addition, even if the prima facie status of the claim allows the recorded facts to be rebutted by other proof, formalities may facilitate the exercise of rights by providing more certainty concerning the claim of copyright ownership.

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<sup>47</sup> See Van Gompel S., Formalities in the digital era: an obstacle or opportunity?, *Global Copyright: Three Hundred Years Since the Statute of Anne, from 1709 to Cyberspace*, Cheltenham: Edward Elgar 2010, pp. 395-424.

<sup>48</sup> §§112 and 113 of the US Patent Act (35 U.S.C. §§112 and 113). Likewise, art 83 of the European patent convention requires a patent application to disclose the invention in a manner sufficiently clear and complete for it to be carried out by a person skilled in the art.

<sup>49</sup> Under the nineteenth-century French legal deposit scheme, for instance, the receipt that was given upon deposit constituted prima facie proof of the property right on the work deposited. See art 9 of the French Ordinance of 24 October 1814. Currently, voluntary registration schemes often provide for the same. See e.g., art 53(2) of the Canadian Copyright Act (R.S., 1985, c. C-42): "A certificate of registration of copyright is evidence that the copyright subsists and that the person registered is the owner of the copyright".

<sup>50</sup> See e.g., 17 U.S.C. §205 under c and art 53(2.1) and (2.2) of the Canadian Copyright Act.

Finally, formalities may constitute an indispensable source of information relevant to the clearance of rights. If authors and copyright owners were obliged to register their copyrights in a publicly accessible register and to duly record each assignment of rights, this would increase the availability of information identifying the work, its author(s) and current right owner(s) and other valuable information (e.g., about the date of first publication). To a greater or lesser degree, the same information would become available if authors were obliged to mark the copies of their works with a copyright notice. As a result, formalities may contribute noticeably to lowering transaction costs, to providing adequate legal certainty and to alleviating rights clearance problems, such as those of “orphan works” (i.e., works the copyright owners of which cannot be identified or located). Hence, formalities may perform a key role in facilitating the licensing of copyright, thereby stimulating the legitimate use of copyright protected content.

## **5. Conclusion**

The Berne Convention for the Protection of Literary and Artistic Works, from 1886, prescribe a term of life of author plus 50 years. The U.S. acceded to Berne in 1989. In 1994, the Berne Convention was integrated into the WTO Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS), which is all 153 members of the World Trade Organization are now bound by it. The EU Copyright term was harmonized to life plus 70 years with the 1993 Council Directive (93/98/EEC, codified as 2006/116/EC). The U.S. Sonny Bono Copyright Extension Act, from 1998, extended the term by 20 years to life plus 70 years, or 95 years for works created under employment by corporations, or “works for hire”. In Europe, sound recordings, broadcasts and performances are only protected as neighboring or “related rights”. For phonogram producers and performers on music recordings, the term will change from 50 to 70 years with the implementation of the 2011 Copyright Extension Directive amending Directive 2006/116/EC (2011/77/EU). It seems already stated above that those terms seem way too long to us, mainly because they do not correspond with the true efficient life of works.

It is apparent that creative industries interest groups regard copyright as a right that must be maintained or preferably strengthened rather than as a privileged granted for the wider benefit of society.

Copyright is essentially pragmatic and based on perceived net social benefit. However, focus by policy makers on the benefits of the creative industries in the form of their size and contribution to national economies emphasizes financial benefits and ignores cultural benefits as well as costs. Net social benefit is contingent on the state of technology and on cultural perceptions and therefore needs reviewing as technologies and consumptions habits change but so far this has just led to additions to statutes and extensions of copyrights duration and scope. Moreover, copyright is a line in the sand, and moving the line by changing the law redistributes costs and benefits between producers, intermediaries and consumers.

Resurrecting copyright formalities may be one of the most salient ways of dealing with the current needs. Because of their inherent capacities to enlarge the public domain, to define and facilitate the recognition of copyright-protectable subject matter, to improve the licensing of copyright protected works and to enhance legal certainty for users and copyright owners alike, formalities seem fit to address the challenges that copyright is presently facing.

At the end of the day, the success of copyright, and on author's rights which do not rely on economic justification, depends upon how well markets function for products embodying creative works. That depends upon the good old laws of supply and demand. Copyright is an intervention in the market that should help not hinder them. Our initial choice for that help is to encourage registration and renewal of copyright rather than to forever



strengthen copyright law.

Intellectual property, then, is not a response to allocative distortions resulting from scarcity, as real property law is. Rather, it is a conscious decision to create scarcity in a type of good in which it is ordinarily absent in order to artificially boost the economic returns to innovation. Economic theory offers no justification for awarding creators anything beyond what is necessary to recover their average fixed costs.

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