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VICTOR HUGO BETRAYED: THE DOMAINE PUBLIC PAYANT AS INTENDED IN THE 19TH CENTURY AND AS IMPLEMENTED TODAY

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ABSTRACT. This article traces the origins and evolution of the *paying public domain* (or *domaine public payant*), from its foundations in 19th century France, particularly as exposed in two famous speeches delivered by Victor Hugo, to its current versions in force in a handful of Latin American and African countries. We analyse the economic aspects of the copyright-public domain relationship. We emphasise the contrasts between original and contemporary versions of the paying public domain and provide a hypothesis to explain its mutation and subsistence.

1. INTRODUCTION

To most readers, a *paying* public domain may sound oxymoronic, a *contradictio in terminis*. That is because, in most countries, exploiting works in the public domain, or the *commons* (Boyle, 2010; Mitchell, 2005),[1] such as by publishing, remixing, or communicating them to the public, are exempt from the payment of any royalty, fee or tax. However, this is not a universal norm. Assuming that exploiting works in the public domain is free or gratuitous is a Northern-centric conception of the copyright- public domain system that overlooks the situation in some countries of the Global South. In some Latin American and African countries, the exploitation of works in the public domain is not gratuitous but subject to tax payment. This system is known as *paying public domain* or, *domaine public payant*. For historical reasons, as we will see, the French denomination is commonly used.[2]

A WIPO document defines the paying public domain as "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, 2012). Another WIPO document (WIPO, 2010) states a similar definition,

All translations are by the author and follow the functionalist approach.

[1] The public domain, the commons of the mind and intellectual commons are similar albeit not identical concepts. However, their common denominator is that all definitions implicitly assume free and gratuitous exploitation.

[2] In this paper, I use both English and French expressions alternatively, as synonyms.

> "[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 securing a prior authorisation. The public domain to which such a regime applies is usually only composed of works the copyright of which has expired (except in countries applying it to expressions of folklore, as further detailed below)."

The analogy to a compulsory license seems inaccurate, since it limits the copyright holder's economic rights. The paying public domain begins after the copyright has expired or even in its absence for anonymous or folkloric works and, unlike the former, is perpetual.

The same document adds 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."

However, this enumeration is incomplete, there are even more countries still enforcing the paying public domain than those listed by WIPO.

The choice between a paying and a non-paying public domain is not anodyne. Different economic effects stem from this choice, as an intimate relationship exists between copyright law, the public domain, and social welfare.

2. The economics of copyright and the public domain

From an economics perspective, copyright law is a regulatory solution (a legal monopoly) to solve an economic problem (the market failure of public goods). An intellectual or creative work, such as an essay, a musical composition, or a blockbuster film, are in essence *public goods*, i.e., non-rival and non-excludable (or costly to exclude). Economic theory also suggests that, absent an exclusive right to exploit the work, authors would not have

sufficient incentives to create them in the first place due to their inability to recover their costs, in particular the fixed cost involved in the creative process (Landes and Posner, 1989) and the free-rider problem. Certainly, there are other, non-economic, rationales to justify intellectual property rights (Fisher, 2001). However, rooted in philosophical utilitarianism and social engineering, the economic or welfare rationale remains the most adhered to.

Legal monopolies such as patents and copyrights provide incentives to firms and entrepreneurs to innovate and create. Copyright in particular provides an extrinsic reward for creativity. An author that knows ex-ante that he will have an absolute right to exploit and control of her work will create more works, since she has a legal reassurance (but not a market reassurance) that she will recover the fixed cost of her creative process (talent, time, effort, etc.). Thus, copyright allows the author, or rightsholder, to maximise profits by pricing her work close to marginal revenue. This model relies on an individual, rational and utility-maximising author. Some scholars have questioned the accuracy of such an archetype (Rose, 1993). At the same, time it downplays the importance of intrinsic motivation to create (Deci, 2012). At the same time, intellectual property rights impose some costs to society, such as deadweight loss, i.e., lower output and higher prices than in a hypothetical competitive scenario. Others are administrative and enforcement costs and rent-seeking behaviour (Landes and Posner, 2004).

The legislator strikes an intertemporal trade-off between providing incentives to authors to create new works and facilitating dissemination and access to those works. Let us call it the *Copyright-Public Domain System*, which comprises two Periods (I and II). During Period I, copyright is in force, which is intended to provide incentives to authors to create new works (dynamic efficiency prevails). Period II begins after the copyright has expired, thus works already created enter the public domain. The public domain facilitates the dissemination, access and modification of the works among a greater number of people at a lower cost, as the price is determined by competitive forces in a market economy, at marginal cost (static efficiency prevails). This system works well to balance the interests of

producers and consumers of creative works, assuming it is well-calibrated. Most economics-minded copyright scholars agree the ever-expanding tendency of copyright term (Helberger et al., 2008; Mackaay, 2011; Pollock, 2009) affects the balance of the *Copyright-Public Domain System*. However, to subject the exploitation of works during Period II to the payment of a tax also alters the balance of the *Copyright-Public Domain System*. The presumption that the public domain is always gratis, as most common law copyright scholars think, ignores that in some parts of the world the exploitation of works in the public domain is onerous and subject to the payment of a tax to the state.

Adding an extra pecuniary instance to the exploitation of works after the copyright term has expired, this time for the benefit of the state and not the copyright holder, put consumers and creators of derivative works at a disadvantage, decreasing the overall welfare effects of the *Copyright-Public Domain System*, without any clear social gain. The fact that the public domain is mainly in force in developing countries exacerbates the welfare loss, by making access to works in the public domain more costly than in developed countries where it is gratuitous.

3. Victor Hugo's immediate but paying public domain

The 19th century showcased passionate debates around intellectual property rights. It was an era before the intellectual property dogmas solidified, where no right was sacred, and everything could be discussed under the light of reason. For instance, during the so-called *patent controversy*, which extended from 1850 to 1880, patent rights were the subject of public scrutiny in the US, England, France and Germany. It led to postponing the introduction of patent legislation in Germany and the abolition of patents in Switzerland, at least for some time (Machlup & Penrose, 1950). Copyright was fiercely contested too. Before the Berne Convention and the triumph of copyright law as we know it today, the competition between arguments was intense. Libertarian thinkers advocated perpetual copyright modelled upon supposed natural rights (Jobard, 1854), moderate economists proposed time-constrained legal monopolies (Walras L., 1880), and socialists claimed its abolition (Proudhon, 1863).

It was during this effervescent intellectual moment that Victor Hugo came up with an original proposal. The author of *Les Miserables* had a penchant for social issues, but also for the cause of author's rights. Certainly, he had skin in the game in such discussion. To promote authorial rights, he founded together with Honoré de Balzac, Alexandre Dumas, and George Sand, the Société des gens de lettres in 1838 which still exists under a different name today.

In two speeches before the *Congrès Littéraire International* held in 1878 in Paris, Victor Hugo advocated the introduction of a *paying public domain*. The first speech was delivered on the 21 June and the second one on the 25th of June (Hugo, 1885). At the time Hugo delivered his speeches, France had in force a system of *literary property* (*proprieté literaire*),[3] which granted absolute economic and moral rights to the author during his lifetime. After the author's death, copyright was transferred to her heirs for a limited time.

France had enshrined property rights in article 17 of *The Declaration of the Rights of Man and the Citizen* of 1789, which were declared "inviolable and sacred". In 1791, Le Chapelier stated that "the most sacred, the most legitimate, the most unassailable and, if I may say so, the most personal of all property is the work which is the fruit of a writer's brain." Two laws passed after the French Revolution, one of 13 January and the other of 19 January 1791, granted playwriters the exclusive right to perform their works during their lifetime and passed it to their heirs for five years *post mortem auctoris*. Another two laws passed on 19 and 24 July 1793 extended the exclusive rights to all authors regardless of the type of work and lengthened the *post mortem auctoris* term to ten years. The law of 14 July 1866 elevated the *post mortem auctoris* term to 50 years.

In his first speech, Hugo expressed his disagreement with the system of literary property in force at the time. He considered the *post mortem auctoris* term doubly bad. Firstly, a *post mortem auctoris* term trumped the right of the public to access works at competitive prices. Secondly, since rights were commonly transferred to publishers during the author's

[3]Ginsburg provides a comparison of post-revolutionary France literary property and US copyright law (Ginsburg, 1989).

lifetime, the author's heirs did not benefit from them. Aware of these issues, Hugo proposed replacing the *post mortem auctoris* term with something different, a *paying public domain*.

Hugo did not invent the paying public domain. He took this idea from a work by Pierre-Jules Hetzel (Hetzel, 1858). Hetzel defended the absolute right of authors to control their works during their lifetime (*proprieté literaire*). However, upon the author's death, he suggested replacing the *post mortem auctoris* term by a paying public domain, which was to be managed by a revenue office (*bureau de perception*) that would collect and distribute a royalty based on a percentage of the selling price of books to the benefit the author's heirs.

During the Literary Congress, Hugo was talking to his peers. In his speeches, he argues authors should have the right to determine the laws that will govern their profession, not the politicians. He was critical of the laws passed by legislators that did not know nor understand authors' needs. To Hugo the *post mortem auctoris* term had no reason or logic, it was a "capricious and bizarre invention by ignorant lawmakers."[4]

Moreover, he added, nobody can justify why *post mortem auctoris* terms differ across jurisdictions. Hugo also disagreed with transferring exclusive rights to the author's heirs. It was inconceivable to him that someone that had not contributed to the creation of the work would be able to decide its fate, such as whether to publish it or not, with what publisher, for what price, etc. Instead, Hugo proposed an immediate paying public domain. This proposal was not only meant to benefit authors, but society as a whole, which was aligned with his political ideas. In his view, the paying public domain would serve to harmonise the rights of three groups of people: (I) authors, (II) society, and (III) the author's heirs.

Hugo believed the author should have absolute control over her work during her lifetime, i.e., economic, and moral rights. However, after the author's death, her heirs should enjoy limited economic rights. Hugo rejected the idea of giving the author's heirs, or any other

[4]Hugo (1885, pg. 100). In the French original, "capricieuse et bizarre invention de législateurs ignorants."

subsequent rightsholder, exclusive rights over a deceased author's work. Hugo's proposal gave heirs a limited right to receive a small emolument which he called *perpetual royalty* (*rédevance perpetuelle*).

Hugo stated the perpetual royalty must be proportionate, moderate, and not to trump the rights of the public. In this regard he said,

> "I want the law to be absolutely fair. Moreover, I want the law to favour the public domain over the heirs. [Omissis] The right of the heir [omissis] must be moderate. The right of the heir must never become an obstacle to the public domain, it must never become an obstacle to the distribution of books."[5]

Hugo's proposal was meant to be balanced, for the benefit the authors and the public, while facilitating dissemination and access to the works in the public domain. He stated it clearly,

> "There are only two real stakeholders: the writer and society. The interests of the heir, while very respectable, must come after the former. The interest of the heir must be safeguarded, but under such moderate conditions that, in any case, her interest does not take precedence over the interest of society."[6]

Hugo suggested the perpetual royalty be paid at the moment of requesting the publication of a new edition, based on the benefits obtained in previous ones. This royalty should be a percentage, he suggested ten per cent, based on actual, not estimated profits. Hugo considered it fair that the perpetual royalty was calculated ex-post, after profits for a book edition have been made. To disincentivise cheating, he suggested adding sanctions, even criminal, in case of false profit declarations.

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[5]Hugo (1885, pg. 97). In the French original, "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, 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."

[6]Hugo (1885, pg. 98). In the French original, "1° Il n'y a que deux intéressés véritables: l'écrivain et la société; l'intérêt de l'héritier, quoique très respectable, doit passer après. 2° L'intérêt de l'héritier doit être sauvegardé, mais dans des conditions tellement modérées que, dans aucun cas, cet intérêt ne passe avant l'intérêt social."

Hugo distinguished between "heirs of blood" (author's relatives) and "spiritual heirs" (society at large). He declared the rights of the latter, to access the works, should prevail over the rights of the former, to receive economic support. In this sense, he said, "the heir of blood is the heir of blood. The writer, as a writer, has only one heir; it is the heir of the spirit, it is the human spirit, it is the public domain."[7]

Moreover, the right to receive these royalties was only limited to direct heirs, i.e., parents, siblings, children, and surviving spouse. Everybody else was excluded from Hugo's *rédevance perpetuelle*. However, what happens if there are no direct heirs, or if they subsequently perish? Hugo did not support, in such situations, to look for distant heirs. He considered it a waste of time and resources. However, Hugo neither suggested cancelling the perpetual royalty. In case of death or absence of direct heirs, the perpetual royalty must benefit the collective of authors, a universality of people defined by the practice of literature. Thus, Hugo's paying public domain becomes a system of private welfare for authors.

Hugo did not have faith in the public pension system, which he considered of little use to authors. Authors should have their own social welfare fund, he said, managed by authors and for the benefit of authors. The perpetual royalty was meant to provide the means for such a fund. Hugo never mentioned in his speeches how this fund should be run. Neither how the monies collected should be distributed nor the requirements to qualify as an author deserving financial aid. Arguably, the operating costs of running such a system may not be negligible.

All things considered, Hugo's objectives are doubly laudable. A paying public domain, in lieu of the *post mortem auctoris* term of copyright, benefits society and also provides support for future generations of authors, which in turn will create new works for the benefit and enjoyment of the public. Hugo believed writers had a moral obligation towards their peers and felt there was some inter-generational link between them. After all, no

[7]Hugo (1885, pg. 100). In the French original, "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."

writer creates alone but stand on the shoulders of past ones. In this sense he said, "the living [authors] must be protected by the dead [authors]", later, he added,

> "[omissis] there is nothing more beautiful than this: all works that no longer have direct heirs fall into the paying public domain, and the proceeds are used to encourage, to vivifier, to fertilise young minds! We are all family, the dead belong to the living, the living must be protected by the dead. What better protection could you wish for?"[8]

His second speech was on the defensive. Hugo received many criticisms after his first speech. Hence, the apologetic tone of his second peroration. In it, he vehemently defended his paying public domain against their critics, using logic not only rhetoric. One of the criticisms he received referred to the situation of publishers that have acquired the rights to work via an agreement assigning an author's economic rights, in case of the author's death. Hugo knew well the economic incentives of publishers. Deprived of exclusive rights *post mortem auctoris*, publishers may not have incentives to acquire those rights during the author's life. The death of the author and the reversion of all economic rights to the public domain would hang like a Damocles' sword over the publisher. Furthermore, Hugo realised this situation was also detrimental to authors, who find it more difficult to sell works to make a living during their lifetime. Thus, he suggested a viable solution.

Hugo suggested that in these cases, *inter vivos* voluntary transfers of rights must be respected after the author's death. In other words, if a contract was signed during the life of the author assigning all or some economic rights to a publisher, then the paying public domain will not begin immediately after the author's death but only at the end of the contractual term. That is to say, an *inter partes* contract acquires *erga omnes* effects after the death of one party. Because such a proposition contradicts the relative effect or privity of the contract, it must be established by law.

[8]Hugo (1885, pg. 104). In the French original, "[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?"

Then, in the way of a prolepsis, Hugo addressed another critique. Knowing that contractual provisions had to be respected and have priority over the paying public domain after the author's death, what would stop publishers from requesting *inter vivos* assignments of all economic rights for hundreds of years?

To overcome this objection, Hugo resorted to a legal argument. Even if he was not a lawyer, he seems to have been well aware of Roman law and French law principles, anticipating the doctrine of the social function of property (Mirow, 2018). Hugo said property rights, even over land, are not unlimited. Under certain circumstances, exclusive rights, must cede to serve the common good. *Mutatis mutandis*, it was also applicable to literary property. In this sense he said,

> "[O]wnership, there are jurists who can hear me, is limited depending on whether the object belongs, to a greater or lesser extent, to the general interest. Well, the literary property belongs more than any other to the public interest; she must also suffer limits."[9]

Thus, to avoid contractual abuse and denaturalisation of the paying public domain, Hugo suggested limiting *inter vivos* contractual assignments of economic rights to a maximum of 50 years, a term he considered reasonable. He said, "the law can [omissis] grant the author, for example, a maximum of fifty years. I believe that no author is not satisfied with the possession of fifty years."[10] Here, Hugo's suggestion seems contradictory. There seems to be little difference between a *post mortem auctoris* term of 50 years and a contractual assignment of all economic rights for 50 years made by an author on his deathbed, moved to benefit her heirs. Rational publishers with bargaining power would impose the longest possible contractual terms for the assignment, effectively delaying the entrance of works to the paying public domain.

Then, Hugo addressed a second objection, that a paying public domain would create too much competition among the publishers, also hurting the authors. The implicit assumption

[9]Hugo (1885, pg. 101). In the French original, "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."

[10]Hugo (1885, pg. 101). In the French original, "la loi peut [omissis] accorder à l'auteur, par exemple, au maximum cinquante ans. Je crois qu'il n'y a pas d'auteur qui ne se contente d'une possession de cinquante ans."

is the erosion of the publisher's profit due to the absence of exclusive rights, i.e., pricing close to marginal cost not marginal revenue. Again, Hugo disagrees. He said competition should never be a disincentive to honest and competent publishers. Competition, he adds, is of the essence in the publishing business. Perhaps, also here, Hugo was a bit too innocent in his retort. Publishers, like any other rational economic agent, want to maximise profits. Any modification of the status quo that would erode their profits will not be welcome by publishers. This iron law was valid when Hugo made his speech as well as it is today.

However, Hugo got the economics right. An immediate paying public domain would increase competition in the book market, thus favouring readers who would enjoy a larger pool of works to choose from, at lower prices (than under a *post mortem auctoris* exclusive rights system). In an aside, Hugo suggests publishers should compete in other dimensions than prices to increase their profits (while adding value), such as quality editions or novel formats.

For a literary genius, Hugo had an excellent intuitive understanding of publishing economics (transaction costs, marginal cost, marginal revenue, etc.). In the end, Hugo's proposal was never adopted. The 1886 *Berne Convention for the Protection of Literary and Artistic Works* definitely buried the idea of the immediate and paying public domain, universalising a system of *post mortem auctoris* exclusive rights instead. However, the paying public domain would be rediscovered and introduced in some countries in the 20th century, albeit in a mutated form, denaturalising the system Hetzel and Hugo had proposed in the 19th century.

4. The rediscovery of the paying public domain in the 20th century and its current implementation

According to Lipszyc, in 1948, during the work of the Brussels Diplomatic Conference for the Revision of the Berne Convention the Hungarian Delegation proposed studying the possibility of instituting the paying public domain in member countries (Lipszyc, 2016). A 1949 UNESCO report stated the *domaine public payant* was in force in Uruguay, Bulgaria,

Italy, Romania, and Yugoslavia (UNESCO, 1949).[11] During the deliberations of the International Conference of Artists convened by UNESCO and held in Venice in September 1952, several recommendations referred to introducing the public paying domain. Over the years, more countries adopted the institution. However, in a comparative perspective, the paying public domain remained a *rara avis*, circumscribed to developing countries, most of them belonging to the civil law legal tradition. Today, the following countries enforce a paying public domain of some sort: Algeria, Argentina, Bolivia, Cameroon, Croatia, Ivory Coast, Guinea, Kenya, Madagascar, Democratic Republic of Congo, Rwanda, Senegal, Paraguay, Togo and Uruguay.[12] Moreover, the following countries had a paying public domain in force but have later repealed it: Bulgaria, Brazil, Chile, Costa Rica, Cuba, France, Hungary, Italy, Mexico, Mali, Poland and Portugal.

During much of the 20th century, UNESCO and WIPO promoted instituting paying public domain systems, particularly in developing countries. The official rationale to support the paying public domain was to provide financial incentives to authors and, sometimes, also to preserve folkloric works. There seem to be overlapping objectives between copyright law and the paying public domain. Copyright law also aims to provide economic incentives to authors, which may suggest some bureaucrats did not believe it or the market were suitable or adequate mechanisms to developing countries.

The majority if not the entirety of countries that still enforce or had enforced a paying public domain system are developing ones. As mentioned earlier, intergovernmental organisations have promoted it. For instance, Section 17 of WIPO's 1976 *Tunis Model Law on Copyright for Developing Countries* incorporates the following paragraph

> "the user shall pay to the competent authority [omissis] per cent of the receipts produced by the use of works in the public domain or their adaptation, including works of national folklore. The sums collected shall be used for the following purposes: (i) to promote institutions for the benefit of authors [and of performers], such as societies of authors, cooperatives,

[11] Today, Slovenia, Serbia, Macedonia, Montenegro, Croatia, Bosnia and Herzegovina and Kosovo.

[12] Uruguay was the first Latin American country to set up a paying public domain. According to Gemetto (2015), it was at the instance of the Executive at the time, to control the circulation of works in the public domain.

guilds, etc. (ii) to protect and disseminate national folklore." (WIPO, 1976).

In 1982 WIPO and UNESCO convened the *Committee of Non-Governmental Experts on the Domaine Public Payant*, in Geneva, (WIPO & UNESCO, 1982).

Below, is a list of countries that still enforce a paying public domain:[13]

Country	Scope	Date since in force	Still in force
Algeria	All works	1973	Yes
Argentina	All works	1958	Yes
Bolivia[14]	All works	1992	Yes
Burundi	All works	2005	Yes
Cabo Verde	All works	2009	Yes
Madagascar	Fockloric works	1998	Yes
Rwanda[15]	N/A	2009	Yes
Senegal[16]	Folkloric works		Yes
Slovak Republic[17]	N/A	1992	Yes
Paraguay[18]	All works	1998	Yes
Democratic Republic of Congo	Folkloric works		
Togo	Folkloric works	1991	Yes
Uruguay[19]	All works	1937	Yes

The presence of many French-speaking African countries in the list can be explained by their accession to the *Bangui Agreement Instituting an African Intellectual Property Organization*. All three versions of the *Bangui Agreement* (1977, 1999 and 2015) include a paying public domain provision. Its current version (Act of December 14, 2015) states the following:

[13]This list is for information only and does not perport to be exhaustive; it may be incomplete and not up-to-date.
[14]Section 58 of the Bolivian Copyright Act, no. 1322.
[15]Article 202 of Rwanda's Law on the Protection of Intellectual Property no. 31/2009 of 26 October 2009.
[16]Article 157 of Senegal's Law on Copyright and Neighbouring Rights no. 2008-09 of 25.
[17]Law 13/1993 of the National Council of the Slovak Republic of 21 December 1992.
[18]Article 55 of Paraguay's Law No. 1328/1998 on Copyright and Related Rights.
[19]Article 42, Uruguayan Copyright Act no. 9.73, of December 17, 1937.

> "Chapter II – Exploitation of works in the public domain, Article 68. Paying public domain. (1) The exploitation of works or objects of related rights that have fallen into the public domain at the end of the term of protection shall be subject to an undertaking by the exploiter to pay the relevant royalties to the national collective rights management organisation. (2) The royalties referred to in paragraph (1) above shall be equivalent to one half of the rate of remuneration normally paid to authors and holders of neighbouring rights for their protected works and productions, pursuant to the applicable contracts or the prevailing practice. The revenue generated from such royalties shall be devoted to social and cultural purposes. (3) A part of the royalties collected concerning the exploitation of expressions of folklore shall be devoted to the welfare and cultural purposes."

In total, 17 African countries have ratified the *Bangui Agreement*, hence, presumably all of them still enforce the paying public domain" (Bangui Agreement Instituting an African Intellectual Property Organization, 2015).

In 1996 the EU European Parliament commissioned a report to assess the compatibility of a paying public domain with international and European Union law. The report concludes there were no legal obstacles and recommends its adoption (Govaere & Sheena, 1996). However, the EU decided not to go in that direction.

Below, is a list of countries that once enforced and later repealed the paying public domain.[20]

[20]This list is for information only and does not pretend to be exhaustive; it may be incomplete and not up-to-date.

Country	Scope	Date of institution	Date of repeal
Brazil[21]	All works	1973	1983
Bulgaria	N/A	N/A	N/A
Chile	All works	1970	1992
Italy		1882[22]	1925
Italy		1941[23]	1996[24]
France[25]	Literary works	1956	1976
Mexico	All works	1963	1993
Costa Rica	All works	N/A	1982
Cuba	All works	N/A	1977
Portugal	All works	N/A	1980
Hungary	N/A	N/A	1994
Mali			
Poland	All works	1994	2015[26]

The countries that have repealed the paying public domain have done so for similar reasons. The Polish legislator mentioned that paying public domain did not generate sufficient revenues, it was not an international or EU commitment, and there was consensus to abolish it (Parliament of the Republic of Poland, 2014).

The Mexican Congress repealed the paying public domain for considering it detrimental to the interest of users, an unnecessary tax on the circulation of cultural works and a costly system to operate (Cámara de Diputados, 1993). In the case of Brazil, Abrão suggests publishing firms lobbied the government to repeal the paying public domain, since they bore the burden of the tax (Abrão, 2002). Oliveira Ascensão adds that, because the governing body had no database of works in the public domain, the system increased uncertainty for publishing firms (Oliveira Ascensão, 1980).

[21]Section 93 of Brazilian Act no. 5988 of 14 December 1973.
[22]Law no. 1012 of September 19, 1882 (dominio pubblico oneroso).
[23]Law no. 633 of April 21, 1941 (diritto demaniale).
[24]Law-Decree no. 699, of December 31, 1996.
[25]National Fund for Letters (Caisse Nationale des Lettres).
[26]Repealed by Dz.U.2015.1639 of 11 September 2015.

An NGO report from Uruguay, a country that still enforces the paying public domain, stresses its small impact and limited efficacy. According to *Creative Commons*, the paying public domain proceeds in Uruguay are modest, between USD $100,000 to USD $130,000 per year, of which approximately half is contributed by state institutions (Creative Commons Uruguay, 2014).

From the available literature on the matter we may conclude the most common arguments to justify repealing the paying public domain are its ineffectiveness (i.e., the relationship between intended goals and actual results), inefficiency (i.e., the distortive effect of the tax on the tax payers and welfare loss on consumers) and high administrative costs to run the system.

The idea of instituting a paying public domain resurfaces from time to time in international fora. In the 21st century, the paying public domain has been suggested as a solution to different issues, from financing the protection of traditional cultural expressions (Graber et al., 2012), folkloric works (WIPO, 2010), the digitisation of works (WIPO, 2012), or the publication of work of deceased authors (Rajan, 2001).

In France, where the paying public domain was originally proposed, the idea still lingers in the minds of some publishers, collective management organisations and politicians. A 2004 report by the French Social and Economic Committee (*Conseil Économique et Social*) suggested establishing a *domaine public payant* covering only digital works (Champeau, 2004). In 2008 an NGO suggested creating a tax applicable to books in the public domain (called *pourcentage de droit*) to subsidise independent book publishers (L'autre LIVRE, 2008). In 2009 French publishers suggested instituting a limited paying public domain to pay for the social security for authors and artists and to restore and digitise works (Robin, 2009). In 2010 a report by the French Ministry of Culture and Communication (known as the *Zelnick Rapport*) suggested establishing a tax applicable to films in the public domain to finance the digitalisation and preservation of the French film heritage (Zelnik et al., 2010). In 2014, the *Société Représentant les Écrivains*, a collective management organisation representing literary authors, suggested creating a tax applicable to books in the public domain to finance a pension scheme for authors (Gary, 2014). Melenchon, the

head of the political party *La France Insoumise*, presented a draft bill to modify French copyright law, including a paying public domain to provide social protection and economic stability to French artists and cultural professionals (Emmanuel Pierrat, 2021).

In Germany, Dietz has been a steadfast advocate of the paying public domain, which he named a right of the community of authors and performers, in German *Urhebernachfolgevergütun* (Dietz, 1990; Dietz, 1982; Lipszyc et al., 2010). Dietz's proposal is closer to Hugo's in one aspect, intergenerational solidarity,

> "[A]uthors are indeed members of an (in legal terms: fictive) artistic community (past and present). That could mean that authors whose works are successful only long after their death, by way of a general (once more: fictive) testament, contribute to financing and developing the creativity of living authors who are, to a certain degree, paid in advance and will on their own pay back such credits by later income from their works long after their own death." (Dietz, 2000).

Yet, Germany never instituted a paying public domain.

5. Comparing Hugo's paying public domain with current versions

The 20th-century version of the public domain departs from Hugo's proposal in many ways. As enforced in some Latin American and African countries, the paying public domain does not replace the *post mortem auctoris* part of the copyright term, but adds up to it. In these countries, when copyright law expires (life of the author plus 50 to 70 years *post mortem auctoris*), the paying public domain begins. This is in stark contrast to Hugo's proposal for a domaine public payant as an *alternative*, i.e., instead of the *post mortem auctoris term*.

Both Hugo's and contemporary versions of the paying public domain are perpetual. However, in Hugo's proposal, the paying public domain was to be managed by an association of authors, presumably a private or semi-private organisation. Hugo considered public officials incapable of properly managing the paying public domain to the authors' and societies' best interests. The contemporary version of the public domain are managed

by bureaucrats working in state agencies. By removing state intervention in the institution's management, Hugo's proposal averted the risk of political manipulation of the system, i.e., using rewarding authors that are sympathetic to the government and denying financial support to punish those that are critical to it.

Moreover, Hugo's perpetual royalty was modest, no more than 10 per cent of profits and the base of the calculus was the sale price of past editions, payable afterwards. Conversely, in the contemporary versions of the paying public domain, the quantum of the tax tends to equate to the royalty rate of a similar copyrighted work and the tax has to be paid before the work is exploited.

The intended goals differ too. Hugo suggested the paying public domain, as a tool to balance the interests of all parties involved but primarily for the benefit of society. In economic terms, a *property rule*, i.e., after the author's death, her heirs or other rightsholders have absolute control over the work, is replaced by a *liability rule*, i.e., unrestricted exploitation of the work subject to the payment of a fee (Krauss, 1999). In a situation of high transaction costs, such as when it is too costly to find the author (orphan works) or negotiate a license, a liability rule may be more efficient to incentivise the exploitation of works, assuming administrative costs are low.

Hugo's paying public domain was grounded on the idea of intergenerational solidarity between a community of authors, where the older generation financially supports the younger one. According to Hugo, the proceeds collected by the paying public domain are to be used to provide financial aid to the author's heirs and support younger generations of authors. Conversely, contemporary versions of the paying public domain do not accrue to the author's heirs (who enjoy the *post mortem auctoris* part of the copyright term). Contemporary versions of the paying public domain provide financial assistance to authors, which is determined by public officials, but also have other goals, such as preserving folkloric works and national heritage.

To illustrate the contrast, let me explain how the paying public domain works in Argentina (*dominio público pagante*). Executive Decree-Law no. 1.224/58[27] introduced the paying public domain in Argentina and created its governing body, the National Funds for the Arts (*Fondo Nacional de las Artes*), an agency under the aegis of the Ministry of Culture. The Argentinian paying public domain begins after the copyright has expired (currently life plus 70 years *post mortem auctoris*). It is perpetual and the tax applies to works by national or foreign authors alike.

The Argentinian paying public domain is considered a tax, the law of fiscal procedure applies, payable to the National Fund for the Arts for any reproduction, distribution, broadcast, performance, synchronisation or communication to the public of any work in the public domain. The webpage of the National Fund for the Arts clarifies,

> "the reproduction of a movie like Frozen, by Disney, must pay the paying public domain tax since it is an adaptation of The Snow Queen by Hans Christian Andersen; and the use of a work like Michelangelo's Creation of Adam in a video game, must pay it too." (*Fondo Nacional de las Artes*, n.d.)[28]

If the tax is not paid, legal actions are taken against the defaulter.

The amount of the paying public domain tax is equivalent to a licensing royalty rate for a similar copyrighted work. The National Fund for the Arts has delegated the tax collection to collective management organisations, for which they charge a collection fee. The Argentinian paying public domain has been justified in a peculiar way, a *sui generis* interpretation of unfair competition between works in the public domain and copyrighted ones (Lipszyc, 2014) Mouchet states the paying public domain is a "levelling device to ensure that works protected by copyright can compete economically with those in the public domain" (Mouchet, 1984). The justification for the state to impose a perpetual tax

[27]The Decree-Law was signed by a de facto president, general Pedro Eugenio Aramburu, after a coup d'état in 1955. The paying public domain still in force in Argentina was never discussed in the Congress, which had been dissolved before the Decree-Law was passed.

[28]In the Spanish original, "la reproducción de una película como Frozen, de Disney, también debe pagar, ya que su historia es una adaptación de La reina de las nieves, de Hans Christian Andersen; y el uso de una obra como La creación de Adán de Miguel Ángel en un videojuego, también".

on the exploitation of works in the public domain relies on an expansive interpretation of the doctrine of eminent domain. According to Mouchet,

> "[W]hen the State imposes a charge on foreign works that have fallen into the public domain, it is not necessarily claiming to be the owner of the work or the author's heir, but is exercising a prerogative over the purely economic content of certain activities within its jurisdiction: publication of a book, the performance of a work, broadcasting by radio or television, etc." (Mouchet, 1984)

After deducting operating costs, the National Fund of the Arts distributes the remaining proceeds in the form of awards, subsidies, prizes, and loans to local authors and artists. The National Fund of the Arts has the discretion to determine who receives financial support. Previous research by this author suggests that only a fraction of the proceeds, between 10% to 23% of total revenue, are actually distributed among local authors and artists; the operating cost consume between 60% to 86% of total revenue (Marzetti, 2018).

6. Conclusion

Hugo's proposal was an honest attempt to balance the interests of authors, their heirs, and society. His proposal of an immediate paying public domain never materialised, at least not as he intended. The 20th-century versions of the paying public domain denaturalised Hugo's proposal, by adding an additional financial burden to the exploitation of works in the public domain and to the creation of derivative works from them, after the copyright has expired. The paying public domain has never been used to replace the *post mortem auctoris* part of the copyright term, as originally intended.

From a purely economic perspective, there seem to be no arguments to support the paying public domain as enforced in a handful of Latin American and African countries today. A paying public domain that begins after an already too long copyright term has expired (life of the author plus 50 to 70 years *post mortem auctoris*) increases the cost to exploit works and to modify them, without any tangible countervailing benefit.

Like any tax, the paying public domain is distortive and the transaction costs associated with it add another layer of discouragement to the exploitation of works already (over)compensated during the copyright term. All in all, a paying public domain discourages the exploitation of works and the creation of derivative works from them, with presumably negative effects on welfare. Moreover, the countries that have repealed the paying public domain showed no adverse effect after its disappearance (Rutschman, 2015). In addition, many studies have found the existence of positive externalities and welfare gains when works enter the public domain, which authors assume to be free from any tax (Buccafusco & Heald, 2012; R. Pollock et al., 2010).

Current versions of the paying public domain seem inconsistent with contemporary international calls to enlarge and favour access to works in the public domain. In particular, it seems difficult to reconcile with Cluster B, "Norm-setting, flexibilities, public policy and public domain", and propositions 16 ("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") and 20 (" 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 the interested Member States in identifying subject matters that have fallen into the public domain within their respective jurisdictions") of WIPO's Development Agenda (WIPO, 2007).[29] Moreover, it is difficult to imagine initiatives like *Google Books* or the *Gutenberg Project* under a system that requires the payment of a tax for the publication of works in the paying public domain.

Prima facie, the persistence of the *domaine public payant* seems difficult to understand. Copyright law and current versions of the paying public domain have similar if not identical goals, to provide economic incentives to authors to create. One may reasonably ask the reason *d'être* of this overlap. As hinted earlier, the existence of the paying public domain may suggest a belief, whether real or not, that copyright law or the market system do not work properly everywhere, in particular in developing countries. Decades of paternalistic governments and closed economies may reinforce this belief. However, if the problem is

[29]Strangely enough, Argentina was one of the proponents of the Development Agenda, together with Brazil.

copyright law or the market, the logical step would be to try to find solutions to improve their functioning, not adding a distortive tax to the exploitation of creative works after copyright law has expired.

However, the persistence of the paying public domain can be explained by resorting to public choice, in particular *Collective Action Theory* (Olson, 1965). In the current versions of the paying public domain, public officials and collective management organisations control and collect the proceeds. Thus, they benefit from maintaining the status quo and presumably oppose any change. According to the anecdotal evidence mentioned earlier, in countries where taxpayers are able to coordinate and lobby effectively, the tax is repealed (such seems to have been the case in Brazil). Whereas, in countries where the lobby of public officials and collective management organisations is more effective, the paying public domain remains in force (that seems to be the case of Argentina).

To conclude, is worth considering whether Hugo's original proposal is still feasible today and whether it would be an improvement to our current copyright system. Would we be better off replacing the *post mortem auctoris* part of the copyright term with an immediate paying public domain? At this point, I cannot suggest a definitive answer. However, I would like to mention some of the challenges that would need to be overcome to institute an immediate paying public domain. The most obvious one, it would require modifying international copyright law (the Berne Convention, the TRIPS Agreement, various WIPO treaties, etc.). A priori, this task seems titanic and unsurmountable. Assuming the legal barrier is overcome, other key issues to tackle would-be properly determining the amount of the tax and limiting the operating costs of running such a system, including policing and enforcing it. Perhaps here, technology may lend a hand.

When Victor Hugo proposed the paying public domain, international copyright law was in its infancy. The situation is quite different today. Legal barriers, path dependency and stakeholders' inertia, are serious obstacles to any radical change in the copyright system. However, at least in academia, we should remain creative when thinking about regulating creativity. Sometimes, looking back to the past can be interesting and, hopefully, also thought-provoking.

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