

## Summary

In general terms, this thesis is about the delicate relationship of copyright law and the public domain. In particular, it analyses a rare institution that it is still enforced in a handful of countries, the so-called *domaine public payant* or paying public domain, by which I mean a system according to which the payment of a fee (*rectius* tax), usually to the state, is required in order to exploit works in the public domain (i.e. reproduction, publishing, performance, broadcasting, etc.).

Such a system has uninterruptedly been in force in Argentina since 1954 (*dominio público pagante*). Despite the fact that the institution and its enforcement authority (*Fondo Nacional de las Artes*) were created by decree of a military de facto government and did not undergo any parliamentary debate whatsoever, it has received little attention from Argentinian scholars.

In this thesis, I apply insights from the economic analysis of the law to the paying public domain regime as it is enforced in Argentina today. I strive to determine if such a system is aimed at solving an additional market failure, i.e. in addition to the public goods one that justifies copyright law, or any other economic problem. I also deconstruct and criticize the main argument advanced by the proponents of the paying public domain, the supposed *unfair competition* situation in which producers of copyrighted works are placed because of the existence of works in the public domain.

In addition, I engage in a cost-effectiveness analysis on how the institution functions (a relationship between means and intended goals). To this end, I rely on financial data obtained, after protracted litigation, from the *Fondo Nacional de las Artes*. The analysis of the financial documents suggests a high cost-to-income ratio, even for a non-for profit governmental institution. Most of the income derived from the tax levied upon the exploitation of works in the paying public domain are used to keep the system running (administrative and operative costs) while only a small percentage actually reaches the intended beneficiaries of the system (grants, prizes and subsidies to Argentinian authors and authors).

The persistence of the Argentinian *dominio público pagante* is explained resorting to public-choice arguments. On the one hand, the small financial impact on those obliged to pay the tax; given the low probability of being detected evading the payment of the tribute given the limited resources of the enforcing authority to police compliance (only prominent cultural institutions are actively monitored, most of them belong to the Argentinian state). On the other hand, bureaucrats and collecting societies (that collect the tax per delegation, against an undisclosed commission) capture most of the rent of the system. Because they benefit from maintaining the status quo it is expected they would reject any attempt to reform or abrogate the system. In addition, the system is afflicted by a serious agency problem.

In conclusion, as a policy implication, the abrogation of the Argentinian *dominio público pagante* may lead to welfare gains (i.e. lower costs to access works in the public domain, enhanced dissemination, digitization, format shifting and preservation, new forms of

exploitation of existing works and incentives to create derivative works, inter alia). In case the government decides to maintain the *Fondo Nacional de las Artes*, it is suggested to explore less distortive sources of revenue to sustain it. Other countries, with a *domaine public payant* still in force, would also do well to abrogate it.

As topics for further research, it is suggested to explore the potential of the *domaine public payant* as a substitute incentive mechanism, i.e. instead of copyright law and not as a supplement of it. In this regard, it seems promising to study the potential effects of substituting the current property rule (copyright law) by a liability one (or compensatory liability regime, according to some scholars). This is expected to mitigate problems derived from high transaction costs, oligopolistic markets and anticommons concerns. A change of rule will face high legal barriers, as such a system goes against the current international intellectual property law system of minimum standards enshrined in several multilateral treaties. In addition, the *domaine public payant* has been indicated as a possible mechanism to regulate access to Traditional Knowledge and Traditional Cultural Expressions, an area that has seen little advance in last decades.