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WORKING PAPER

LITERARY WORKS IN THE PUBLIC DOMAIN- COPYRIGHT AND RELATED RIGHTS

"Education and Culture" Series

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Constructing A Theory on *Domaine Public Payant : a step-by-step approach*

PREFACE

The College of Europe has been asked to undertake a study on literary works in the public domain for the Directorate General for Research of the European Parliament.

The dominant economic rationale of the European integration process has led to a full application of the economic theory of a free market economy to the development of the European Community. However, this neo-functional approach to European integration demonstrates certain shortcomings when the ultimate legitimacy of the further development of Europe is based on its cultural dimension.

At the time of its foundation, the European Community did not have any competence in the field of cultural policies. The European Community was to become an economically integrated area in which each Member State remained in full control of its cultural policy. Economic integration had to be achieved without standardization of cultures. In other words, the uniqueness of the European societal model implies economic and political integration while maintaining cultural diversity.

However, the dynamic development of European Community law illustrates the tense relationship between economy and culture in the European integration process. There have been tensions between the European market integration, which aims at achieving non-discrimination and elimination of barriers, and the various cultural policies which Member States have been developing. These tensions have often been strengthened by the dominant legal and economic approach to the process of further integration in Europe.

The creeping influence of economic reasoning on culture has put strain on the European model which is characterised by economic and political integration while at the same time respecting cultural diversity. There are a number of conflict areas in which the tension between market integration and cultural policy has been visible such as government support for specific cultures and cultural activities, the media policy and language policies.

Faced with the combined process of increasing internationalization of economies and the growing individualization of societies, countries and regions increasingly stress the need for the preservation of their identities. Although neo-functionally based economic integration has led to some standardization of cultural behaviour and practice, the Treaty of Maastricht attempts to preserve the specificity of the European model with a formal and juridical anchorage of Community action in the cultural field. The EC Treaty acts on the basis of this double preoccupation by

combining measures to strengthen the economic and social cohesion of the Union while maintaining and encouraging its cultural diversity.

Article 128 of the EC Treaty reads : *"The Community shall contribute to the flowering of cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common heritage to the fore."* One of the subparagraphs of Art. 128 refers to the area of *"artistic and literary creation"*. This area is considered as a priority by the Council and by the Ministers Responsible for Cultural Affairs and is of vital importance to the overall cultural sector (see *"Etude concernant les modifications apportées par le Traité sur l'Union politique en ce qui concerne l'education, la formation professionnelle et la culture"*, in : L'Europe des citoyens, Parlement Européen, W 2, April 1992).

The ensuing confrontation between economy, society and culture very much deals with the sensitive problems related to the cultural and moral dimension of economic activities. In particular, these challenges relate to the distribution of money in the cultural sector as well as to the underlying value patterns shaping legal and economic behaviour. This is an open ended debate characterised by a number of scientific and conceptual tensions.

Literary works in the public domain illustrate very well the tension between techno-economic solutions which follows the market integration logic and the cultural and moral values attached to the different expressions of intellectual creation. In other words, copyright provides a legal protection to the author of a creative work and temporarily *"distorts"* the market economy logic. In the EU the duration of copyright is (since the formal acceptance of the EC Directive on the harmonisation of duration of copyright protection (O.J. 1993, L 290/9) 70 years after the death of the author. The issue of whether or not the concept of a *"domaine public payant"* should be introduced, is, however part of a challenging legal debate to which no easy or straight forward answer can be given.

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The scope of the study is therefore to analyse whether, in theory, it is feasible to provide a degree of sustenance for living authors in the EU through the introduction of the concept of *"domaine public payant"*. In other words, the main question which this legal study addresses is the relevance and acceptability of a legal theory for granting financial support to living authors where such finances are derived from the economic benefits of literary works which have fallen into the public domain.

The study has been conducted by Dr. Inge Govaere and Ms. Eileen Sheehan, respectively lecturer and teaching assistant in the legal department of the

College of Europe in Bruges. The study is divided into three main parts. The first section succinctly introduces the concept of *"domaine public payant"* and analyses its relationship with copyright and related rights as they have developed in the EU.

In a second part a critical analysis is presented of the existing legal theories dealing with the concept of *"domaine public payant"*. These theories refer either to a modification of existing copyright law or to an introduction of a parafiscal charge. In this section the study focuses on the respective merits and shortcomings of these two legal approaches. Research was undertaken in specialised libraries and interviews were held with some experts. The authors are most grateful to the Max Planck Institute in Munich and in particular to Prof. Dr. Adolf Dietz.

In the last part an extrapolation of a possible legal theory, specifically with respect to literary works is proposed. It identifies a number of specific issues in relation to the role of collecting societies, the literary works to which the proposed legal theory should apply, the exceptions to the proposed system of Domaine public payant, the percentage of economic revenue from literary works in the public domain which should be used to support living authors, etc.

For the sake of clarity of the legal arguments presented, it is pointed out that the study did not deal with the legal basis in the TEU for action to be taken in this field. In addition, due to the lack of reliable data available, no comparative study between the different systems in the Member States or economic and empirical analysis were undertaken as part of the commissioned study.

The College of Europe was honoured to undertake this study as part of its emerging research activities and hopes that this report on the elaboration of an acceptable legal theory for literary works in the public domain will serve as a basis for ongoing discussion.

Prof. Dr. Léonce Bekemans

PART I : COPYRIGHT AND THE *DOMAINE PUBLIC PAYANT*

INTRODUCTION

The essence of the *domaine public payant* is to provide a sustance for living authors, which is derived from fees levied on works which have fallen into the public domain. It is only after the expiry of copyright and related rights that literary works fall into the public domain. In the EC the duration of copyright is 70 years after the death of the author although, contrary to the economic rights, the moral rights inherent in copyright subsist after that date. The issue of the domaine public payant is in principle thus only posed when the economic rights inherent in copyright no longer exist.

Copyright protection and the different theories on the *domaine public payant*[1] may nonetheless be said to have a common rationale. One of the objectives of copyright and related rights is to allow the author, and his successors, to make a living from his work. As the Commission recalled in its proposal for a Council directive on rental rights, lending rights, and certain rights related to copyright :

> "..Copyright is a basic instrument of cultural policy, as there is a vital commercial component in the aims it pursues and the ways in which it is applied. The primary purpose of copyright is to guarantee the originators of creative literary works a living from their intellectual activity by giving them an exclusive right to the use made of their work and a right to a fair share in the income which others, particularly publishers, derive from it, thereby encouraging literary production and protecting authors".[2]

A temporary exclusive right is thus granted in the form of copyright in order to provide an incentive to invest in creative activities and to make it possible to obtain a remuneration, i.e. royalties, for the literary work. However, copyright does not guarantee that a remuneration will always be obtained nor that the level of royalties will be sufficient to live off literary works. In particular, young and relatively unknown authors may find it difficult to make ends meet on the basis of their income in form of royalties alone. On the other hand, literary works often continue to be read far beyond the lifetime of their author and continue to be economically beneficial even after they have fallen into the public domain and thus have become subject to competition. The works of Shakespeare are a prime example in this respect. It is precisely with regard to those literary works which have fallen into the public domain and where royalties are no longer payable to the author or his successors that the theory of the *domaine public payant* raises

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1 On the different existing theories, see infra part II.

2 OM (90) 586 final of 24 January 1991. For the directive, see O.J. 1992 L 346/61.

the following fundamental issue : could or should some part of the economic benefits which others, in particular publishers, continue to enjoy after the expiry of the copyright be reallocated in order to contribute towards the sustenance of living authors ? In other words, should there be a system complementary to that of copyright protection which shares the objective of providing some form of sustenance for authors ?

MAIN DIFFERENCES BETWEEN COPYRIGHT PROTECTION AND THE *DOMAINE PUBLIC PAYANT*

Although both the copyright system and the *domaine public payant* may share the objective of providing sustenance for authors, there are important differences to be noted between the two systems which could justify the introduction of the latter system parallel to copyright.

Private right v. collective right

Copyright essentially confers a temporary exclusive right on the original manner in which an idea is expressed. The copyright holder may either be the author of the creative work or those who took the risk to exploit the creative work, according as to whether one looks at the droit d'auteurs systems of continental Europe or at the Anglo-Saxon copyright systems respectively.[3] However, there is always a clearly identifiable personal link between the creative work and the person(s) benefiting from the exclusive copyright protection. In other words, under copyright one may in principle only draw the benefits from one's own creative work.

The purpose of the *domaine public payant* is to the contrary aimed at letting the collectivity of living authors benefit from the creative effort of predecessors whose works have fallen into the public domain. In other words, the private right of the author over his work would, upon expiry of the copyright, at least in part be substituted by a collective right of living authors. The latter would thus not only be able to benefit from the cultural heritage from their predecessors but also, to a certain extent, from the financial implications this cultural heritage continues to represent and to which they will also, presumably, contribute in time.

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3 There is currently a tendency towards a merger of the philosophies underlying these two legal systems. On this issue, see COHEN JEHORAM, H., "Critical reflections on the economic importance of copyright", I.I.C. (1989) 485-497, at pp. 496-497; STROWEL, A., "Droit d'auteur et copyright : divergences et convergences (1983) Bruylant.

Incentive and reward functions

The concept of a *domaine public payant* can by no means replace the copyright system for the latter fulfils a specific function which the former cannot. The temporary exclusive right conferred by copyright has both a reward and an incentive function which are intrinsically linked. The copyright holder may prohibit certain acts which would be "free" in the absence of legal protection (and which become free once the work has fallen into the public domain), namely the unauthorized reproduction of the original manner in which his ideas are expressed, the importation of such reproductions, etc. . It is generally acknowledged that such a temporary restraint on public access to the work is necessary to stimulate innovation in the creative or cultural field.[4] The exclusive right thus encourages creativity by protecting the author against unauthorized copying thus creating the possibility for the author to gain a livelihood from his work.

The fact that copyright creates the conditions which are indispensable in order to give the author the possibility of obtaining a reward in the form of royalties does not imply, however, that copyright suffices to guarantee that the author will also be able to live off his work. The level of reward which the author may obtain will be largely dependent on the willingness of consumers to pay for the ideas expressed in one way rather than another, which in turn will often largely be influenced by the reputation the author already enjoys[5]. The example of Van Gogh, who mainly enjoyed a post mortem reputation, is highly illustrative in this respect.[6]

If copyright exclusivity should definitely continue to exist in order to provide the necessary incentives to engage in creative activity, the question nonetheless arises whether other complementary means should not be sought in order to redistribute the resources in the cultural sector. In this respect, the idea underlying the theory of the *domaine public payant* could be seen as the complementary mirror reflection of copyright. Its purpose is not to grant exclusive rights to the collectivity of living authors, hereby enabling the latter to prevent the reproduction and distribution of works that have fallen into the public

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4 In this respect, Groves writes: "The law of copyright is one big balancing trick. It exists to deal with an economic problem, to trade off the costs of limiting access to the works it protects against the benefits of providing incentives to create the work in the first place", see GROVES,P., Copyright and designs law: a question of balance, Graham & Trotman, London, 1991, at p. 1.

5 See GOVAERE I., "The Use and Abuse of Intellectual Property Rights in EC Law", Sweet & Maxwell 1996, at p. 22-24.

6 On the significance of this example, see DIETZ, A., "Le droit de la communauté des auteurs: un concept moderne de domaine public payant", Unesco Copyright Bull. (1990) 14-27, at p. 14.

domain. Rather the purpose of the *domaine public payant* would be to ensure a minimal income to all living authors on the basis of their contribution to the cultural heritage, in contrast to copyright which only offers the possibility, and no guarantee, that a remuneration will also be obtained.

It would thus seem that the two systems could be perfectly complementary. In so far as the *domaine public payant* only offers a minimal financial contribution to living authors, the incentive to engage in creative activity and the possibility to reap a reward as provided under the copyright exclusivity system would maintain its full purpose. Conversely, the *domaine public payant* could be extremely helpful under those circumstances where copyright protection does not fully attain its objective to provide a sustenance for living authors and in particular, but not only, in relation to young and relatively unknown authors.

Duration

The duration of copyright protection in the EC was recently extended to 70 post mortem auctoris (pma).[7] The rationale underlying the EC harmonization directive was essentially the need to eliminate distortions to intra-Community trade and competition due to the divergent terms of copyright protection offered in the Member States. Two additional arguments advanced in favour of the extension of the duration of copyright in the EC nonetheless need to be mentioned in the discussion concerning the need to introduce the *domaine public payant.*[8] Firstly, the duration of copyright is inspired by the concern to allow the author and his direct descendants to enjoy the fruits of his creation. In this respect, the Commission points to the minimum duration provided in the Berne Convention of 50 pma and the discussions in WIPO to extend this minimum duration to 70 pma in view of the increase in average life span.[9] Secondly, it is argued that the lengthening of the duration of copyright protection strengthens the negotiation position of the author concerning the assignment of his rights.

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7 See the EC directive on the harmonisation of the duration of copyright protection, O.J. 1993, L 290/9. Article 7 of the directive provides, however, that in so far as the country of origin of the work is a third country, within the meaning of the Berne Convention, or in so far as the rightholder is not a Community (now EEA) national, the extension of the duration of copyright to 70 pma should be linked to a requirement of reciprocity.

8 See COM (92)33 final of 23 March 1992, at pts. 48 and 49.

9 This argument is strongly contested in legal writings. See for instance PARRINDER, P., "The dead hand of European copyright", E.I.P.R. (1993) 391-393; DWORKIN, G., "Authorship of Films and the European Commission proposals for harmonising the term of copyright", E.I.P.R. (1993) 151-155; COHEN JEHORAM, H., "The EC copyright directives, economics and authors' rights", I.I.C. (1994) 821-839, at p. 834. It seems that the main reason for taking 70 years PMA as the basis for harmonisation, which only existed in Germany, was so as not to affect already vested rights (see recital 9 of the directive).

Considering that the directive thus increases the protection offered to authors, the question may arise whether, once the directive is implemented in all Member States,[10] there is still a need to introduce the *domaine public payant*. In order to answer that question it is necessary to look at the potential implications of the directive for the authors. The main consequence is the introduction of an extension of the duration of posthumous copyright. It will therefore in the first place have important financial implications for the direct descendants of deceased authors who will be able to enforce the monopoly rights in order to exclude public access to, and reap the royalties of, the work for a longer period of time. The main concern of the *domaine public payant*, on the contrary, is to improve the conditions of the living authors. It may of course be true that the living authors themselves will be put in a stronger negotiating position because of the increase in the term of copyright protection in most Member States. This is still subject, however, to the above-mentioned principle that the level of reward an author may obtain to a large extent is proportional to the reputation of his work. The distinction between well-established and relatively unknown authors is likely to become all the more evident in this respect. For the latter, it will most likely not carry much weight in negotiations, for instance with a publisher, that the term of copyright protection has been extended if there is no guarantee as to whether the work will be profitable at all. If the directive on the harmonisation of copyright duration may prove to be beneficial to some authors, it is to be expected that it will not improve the financial situation of all authors, as is the concern of the *domaine public payant*. The latter should be beneficial especially to those authors who do not (yet) make a proper living out of their own creative activities.

Another question is whether or not the adoption of the directive on the extension of the copyright duration prejudices the possible introduction of the *domaine public payant*.[11] The former has been strongly criticized on the basis that it neglects the public interest by unduly restricting public access to creative works beyond the time of exclusivity needed to stimulate creative activity.[12] It was in particular pointed out that consumers are thus unjustifiably precluded from benefitting from competitively priced or quality products. Since the domaine public payant does not imply granting an exclusive right to the collectivity of living authors, the main objection to the harmonization directive, namely the restriction of public access to the work, does not arise. Once the work has fallen

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10 The directive should have been implemented by 1 July 1995 at the latest.

11 In Germany, for instance, the project to introduce the domaine public payant was abandoned after the extension of the duration of copyright protection to 70 pma On this issue, see also infra, part III, at pt. 13.

12 See the articles mentioned in n. 9. See in particular KURLANTZICK, L., "Harmonization of copyright protection", E.I.P.R. (1994) 463-464, where he strongly opposes the introduction of a similar copyright duration in the U.S.A.

into the public domain, the normal competitive conditions prevail in the market. The public interest may nonetheless be said to be affected in the sense that, for instance, a percentage of the selling-price would be reserved for the collectivity of living authors. This is a cost which will most likely be passed on to the consumer.

Compared to the situation prevailing under copyright protection the cost to the public of introducing the domaine public payant should nonetheless be minimal considering that the works should be freely available and thus competitively priced. On the other hand, it seems difficult to dispute that it is in the public interest to maintain a broad cultural basis so that the domaine public payant not only acts in the relatively short-term interest of living authors but, in particular, in the long-term interest of the public at large. It remains to be determined, however,
under what form the domaine public payant should be introduced in order to serve best the interests of both living authors and the public at large. The next section gives an overview of the existing theories on the domaine public payant thereby indicating both their respective merits and shortcomings.

PART II : THEORIES ON THE *DOMAINE PUBLUC PAYANT*

Theories on the *domaine public payant* abound. Despite however the proliferation of these theories, particularly during the course of this century, they may be divided into two main groups or schools of thought[13]. The first group considers the *domaine public payant* as an extension of the copyright system while the second group believes that the *domaine public payant* should be of a fiscal or parafiscal nature. In this regard the first group may also be divided into two sub-groups or categories namely the *domaine d'état* and the *rights of the community of living authors*. It will also become apparent however that many of the problems or criticisms relating to the establishment of the *domaine public payant* are common to all the abovementioned theories. In this regard therefore the distinctive features of the abovementioned systems will be dealt with below. Subsequently, the advantages and disadvantages which are common to these systems will be enumerated and discussed. The purpose of this analysis is to ascertain which system or indeed which aspects of the above systems display features which are suitable for transposition on a Europewide level.

Despite the divergence of opinion on the legal nature of the *domaine public payant* concerning its financial source and the practical implementation of such a system one issue remains common to these systems namely the objects or the purposes of the *domaine public payant*. These objectives were spurred by the a growing realisation on the part of authors and their representatives that State and private investment in the cultural field was wholly inadequate and where such investment existed it was subject to the vagaries for example of the annual debate on the State's budget or the benevolence and profitability of a private firm and was therefore uncertain and unsatisfactory. The introduction of the *domaine public payant* is politically very delicate however, special laws do exist in some member States relating to cultural funds and copyright.[14] There is also the so called 10% rule established under the auspices of CISAC[15]. Collecting societies which are members of CISAC are allowed to deduct up to 10% of their revenue for social and cultural purposes. GEMA and SACEM apply such rules to varying extents. The CISAC rule technically has nothing to do with *domaine public payant* as the rule only applies to copyrighted works but it provides a concrete example of how *domaine public payant* could function if established.

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13 Such categorisations may always be considered arbitrary but it is clear from an examination of the literature that despite differences in matters of detail there are in effect only two schools of thought on the *domaine public payant*.

14 See for example Article 8 of the German law on Collecting Societies law. A system of deduction is not directly proscribed by this article, it merely favours such a deduction.

15 Confédération internationale des sociétés d'auteurs et compositeurs.

To a certain extent it is simplistic to state that the objects of the *domaine public payant* are common to all the theories thereon. The theories on the *domaine public payant* did not emerge in isolation but rather evolved against the backdrop of the different social and living conditions of authors and their heirs or beneficiaries and the legal system in a given country at a given period in time and therefore the detailed aims of given theories differed as a consequence[16].

It is nevertheless possible to distil one common factor running through all these theories on the *domaine public payant* and that is, on the expiry of the term of copyright protection the exploitation of a work in the public domain should be subject to the payment of a fee. The revenue from such fees should then be spent on the promotion of the arts and culture. The exact destination however of such fees may be somewhat different in accordance with the scheme established and its particular aims.

In a study undertaken by the Max Planck Institute in 1968 it was pointed out that :

> "The supporters of the *domaine public payant* have always argued [about] the unfavourable situation of authors and their relatives and maintained that it is necessary to help authors who are no longer able to work, needy survivors of authors and young talented authors. They consider the assistance granted to authors and their survivors as an important task of cultural and social policy.
>
> Many opponents of the *domaine public payant* acknowledge this too. There are only [a] few people who put forward the argument that the *domaine public payant* favours only mediocrity in literature and art and that it can be expected of every artist to carry on a non-artistic main profession. To these it is opposed that the financial success of an author is no reliable measure for his cultural importance."[17]

It is of the utmost importance to constantly keep in mind in any debate on this topic the raison d'être of the *domaine public payant*. Once support and consensus has been achieved for the concept and its aims the actual structure and legal nature of the system established is a matter of secondary importance. If consensus is achieved on the necessity for such an institution its

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16 See for example the official draft of a copyright act, issued by the Federal Ministry of Justice of the FDR of Germany in 1959. The draft law outlined that moneys collected by the proposed *domaine public payant* system would be paid into a fund and used for (a) honorary salaries for authors whose merits and living circumstances justified such a measure; (b) the assistance of needy dependants of deceased meritorious authors; (c) grants to talented authors. The moneys were to be distributed where possible to the authors of that species of literature and art from which they originated. For greater detail of all the legislative initiative in the FDR and the GDR prior to 1968 see; Legal study: The *domaine public payant* in Germany, prepared at the request of Prof. Nimmer of the University of California, Los Angeles by the Max- Planck-Institut für auslandisches und internationales Patents, Urheber und Wettbewerbsrecht, Munich. January 1968.

17 Op cit, (max p), p. 43.

establishment should not be hampered by formal and technical arguments on its exact structure. That is not to say that such issues are irrelevant, on the contrary criticisms of the structure of draft *domaine public payant* systems have resulted in their not being adopted in an overwhelming number of instances. If the political will exists therefore for the introduction of the *domaine public payant* it is important to examine the technical problems which may arise under the abovementioned theories in order to meet possible future criticisms.

Theories based on copyright law

Domaine d'État

The theory of domaine d'état is characterised by the premise that on the expiration of the period of copyright pertaining to the author, his heirs or beneficiaries copyright in the work rather than expiring and falling into the public domain is transferred to or devolves upon the State. Copyright in the work is therefore perpetual in nature with the law ascribing certain periods of ownership to the creator of the work[18] with the remainder being enjoyed by the State for cultural purposes. This particular theory has not found favour in the literature as many commentators believe that it could lead amongst other things to censorship and cultural dirigism on the part of the State.

One of the principle problems with the theory domaine d'état is the belief on the part of commentators that succession by the State to the rights of the author, his heirs and beneficiaries would also entail that the State would enjoy the same exclusive rights as the former namely the right to exclude others from exploiting the works in question. In this regard Lipszyc outlines :

> "The State's authorisation prior to the use of works in the public domain is contrary to the very nature of the public domain. The State should not take the place of the author's heirs or beneficiaries in their capacity as holders of economic rights in a work. If it did, "public domain" would be the same as juridical institutions such as State ownership and State inheritance of unclaimed estate. The principle foundations of public domain, which involves an exceptional sacrifice of rights on the part of the author in comparison with holders of other categories of rights lie in the need to facilitate access to intellectual works and to reincorporate them into the collective patrimony, given that authors have drawn upon this patrimony in order to create them. Another argument against State authorisation is that it permits State control and covert censorship"[19]

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18 Together with his heirs or beneficiaries.

19 Lipszyc: Intellectual works in the public domain: [1983] 4 EIPR 100.

Moe criticised the domaine d'état on the basis that it was "[]characterised by a complete elimination of the public domain, with the State incorporating into its patrimony the exclusive right of the author forever".[20] He argued that such a system was indeed contrary to the concept of the *domaine public payant* as contemporaneous with the works in question becoming free from the author's right to control their exploitation that power to control the exploitation of the work would be transferred to the State. Another fear connected with this system is the fear that the revenue raised by the State pursuant to its "inheritance" would become part of the general budget of the State and therefore subject to deviation away from its "rightful" cultural purposes. As will be seen below these legitimate fears and criticisms have been levied against all systems of *domaine public payant* not just one in particular. The particular targeting therefore of the State and the concept of domaine d'état in this regard may be ascribed to subjective and legal reasons which on analysis appear to be overwhelming. It is suggested therefore that the introduction of a system of domaine d'état not be attempted. The particular advantages and disadvantages of this system will not be mentioned below, this is because firstly this system does not recommend itself and secondly as outlined above the pros and cons of this system are generally common to all systems.

In connection with the theories following below it is apparent from the literature that the advocates of each theory remain diametrically opposed to the structure and format of the other. It is important to note however that it is solely this structure or format, rather than the purpose and objects of such schemes, which is the target of their criticisms.

The rights of the community of living authors

This theory is based on the premise that the problems encountered by living authors today may be remedied by an extension of the period of copyright protection in favour of those authors.[21] The community of living authors' interests would be represented by a body having legal status, established by law to protect their interests and imbued with the necessary powers and competencies to carry out this task.

The underlying rationale of this theory is that profits derived from the exploitation of works which have fallen into the public domain should benefit not only the exploiters of those works but also the community of living authors, who should be "considered as the intellectual heirs of deceased authors". In accordance with this

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20 Moe: Le *domaine public payant*: Inter- auteurs. Vol I 1952.

21 For an excellent article on this issue see Dietz : Le droit de la communauté des auteurs : un concept moderne de domaine public payant, Unesco Copyright Bull (1990) 14.

theory it is believed that the interest of the community of living authors are the interests with the closest nexus to the interests of deceased authors.

Dietz argues that such a system has many advantages due to the fact that it is based on private law and "is situated within the framework of the copyright regime"[22]. The new holder of the rights in question merely replace the authors, their heirs and beneficiaries after the expiry of the term of copyright. He argues that other forms of *domaine public payant*, indeed the term *domaine public payant*, itself are inadequate and misleading as they are too reminiscent of fiscal or parafiscal measures levied by States, all be it for cultural objectives, the revenues from which are controlled by the State. "The right of the community of living authors" in contrast refers to the concept of a right of participation in the exploitation of works which have fallen into the public domain granted to the community of living authors. This right, which is based on private law and is akin to the system of copyright, may also be invoked and defended in proceedings before the civil courts.[23] The proponents of this system highlight in particular the lack or low level of remuneration of authors during their lifetime and the huge profits which are made in connection with works of art or literary works after the expiry of copyright protection. The right of the community of living authors is believed to be the method by which that community can equitably participate in the benefit derived from works in the public domain and also serves as a form of compensation for the untimely expiration of copyright protection before the authors or their heirs and beneficiaries have realised the true benefit of their creations.

The critics of this system believe that it is both "misleading and pointless" to place the *domaine public payant* within the field of copyright[24]. They submit that upon the expiration of the term of copyright protection granted to the author, his heirs or beneficiaries, the works in question fall into the public domain and therefore it is a fundamental contradiction in terms to relate the *domaine public payant* to a system of extended copyright protection granted to the community of living authors. Mouchet has strongly criticised the coherency of this theory as he believes that royalties may not be levied on works which have fallen into the public domain. Once a work has fallen into the public domain copyright ceases ipso facto to apply with respect to it.[25] The only aspect of copyright which should survive the copyright protection period therefore are the non economic rights namely the moral rights. It has also been argued that "this form of the *domaine public payant* [gives rise to]

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22 DIETZ, op. cit., p. 16.

23 DIETZ, op. cit., p. 16.

24 See for instance Mouchet:Problems of the "*Domaine public payant*": Art & the Law 1983 Vol 8 No.2.

25 "[] those people who support the view that "royalties" should be paid for the use of works in the public domain are implicitly accepting a contradiction of principles. If the work has passed out of the private domain, it is because the copyright has lapsed in the economic sphere. No doubt however, they consider it appropriate that the State, as administrator and collector for the *domaine public payant*, should benefit from the prestige and facilities deriving from copyright. If it is a case of strategy, it is unjustified, erroneous and ineffective", Mouchet p.145.

theoretic difficulties, if it is extended to such works which never have been protected by copyright"[26] In so far as the *domaine public payant* should apply to all works of the public domain regardless of whether or not they had been subject to copyright it is indeed difficult to conceive of it as some sort of extension of copyright in favour of the community of living authors.

The *domaine public payant* as a parafiscal measure

This theory of *domaine public payant* requires the imposition of, and collection by the State or another statutory empowered body of taxes/charges which are levied following certain acts of exploitation of works in the public domain. The revenues collected are required to be lodged not in the general budget of the State in question but rather in a fund specially set up for the promotion of the arts/cultural activity. There does not appear to be any legal impediment to the levying of fees on the exploitation of works in the public domain. A State is free to levy taxes on the exploitation of a work in the public domain provided it does so on a non-discriminatory basis. As was pointed out by the Max Planck Institute in 1968 :

> "The distinction which is essential for the qualification of the *domain public payant* relating to the law has to be made according to the financial source from which the means for the help can be gained. The financial source in the first place can be a tax or another tribute, which has to be paid for the enjoyment or the professional use of a work of literature [or] art. In principle the legislature is free to impose taxes on any feasible enjoyment or professional use of such a work."[27]

This form of revenue raising measure must be distinguished from revenues originating from general taxes and the general budget. It has been argued that financing from the general budget "has the taste of an alms and does not [do] justice to the intellectual performance of the authors"[28]. In addition such form of financing is at best precarious and subject to the vagaries of political will and expediency. Moreover financing from the general budget is also subject to annual approval and renewal. A public fund which is financed from charges levied on

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26 Legal study: The *domaine public payant* in Germany, prepared at the request of Prof. Nimmer of the University of California, Los Angeles by the Max- Planck-Institut für auslandisches und internationales Patents, Urheber und Wettbewerbsrecht, Munich. January 1968 p.4.

27 Legal study: The *domaine public payant* in Germany, prepared at the request of Prof. Nimmer of the University of California, Los Angeles by the Max- Planck-Institut für auslandisches und internationales Patents, Urheber und Wettbewerbsrecht, Munich. January 1968 p.3.

28 Legal study: The *domaine public payant* in Germany, prepared at the request of Prof. Nimmer of the University of California, Los Angeles by the Max- Planck-Institut für auslandisches und internationales Patents, Urheber und Wettbewerbsrecht, Munich. January 1968 p.44.

literary works and which is "earmarked" for the fixed purpose of aiding and encouraging living authors avoids the abovementioned drawbacks and difficulties.[29]

It is clear that this theory by its very simplicity and familiarity has much to recommend it. Nevertheless the legal nature of this theory has also been the subject of criticism. Given that the predominant motive for introducing a system of domaine public payant is to encourage literary creativity by supporting living authors with the proceeds collected on works of deceased authors many theoreticians believe that such a system should be based on or be analogous to the legal concepts and precepts of copyright.[30]

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29 See also Lipszyc: Intellectual works in the public domain: [1983] 4 EIPR 102 where it is stated "As has already been indicated, "public domain" does not mean that the state takes the place of the author' heirs or beneficiaries as holder or owner of rights in a work. For this reason the monies collected for the use of works in such conditions are not in the nature of royalties, as in the case of works in private ownership, but are in the nature of taxes."

30 "Differences of opinion emerged as regards the legal nature of such a system, since some considered it to be an extension of the copyright arrangements whereas others felt it to be of a marginal nature when compared with copyright and to have fiscal or socio-fiscal character. Some of the participants noted that the main aim pursued was for living authors to be able to enjoy the fees collected when works of deceased authors were used. If authors' collective bodies were to fully enjoy this system and intellectual creation were to be furthered, they felt that it should be closely linked from a legal point of view with the concept of copyright." UNESCO/WIPO/DPP/CE/I/4 p.2.

PART III : PROPOSAL FOR *DOMAINE PUBLIC PAYANT*

Considering the disagreement prevailing concerning the way in which the *domaine public payant* should be put into effect, the challenge is to elaborate a theory on the domaine public payant which combines the positive features of existing theories and which could be introduced on Europe-wide level. In order to do so it is first considered to what extent the concerns expressed by certain categories of persons who most object to the very idea of a domaine public payant need to be taken into account. The theory is then constructed by way of a step-by-step approach which analyses the main practical issues that need to be resolved.

Categories of persons which traditionally object to the *domaine public payant*

There are basically five categories of persons which traditionally object to the *domaine public payant.*[31] There are those with vested interests such as publishers; those who adhere to the traditional idea of free use of works in the public domain; those afraid that *domaine public payant* will become an instrument of "dirigisme intellectuel"; those who consider it as an obstacle to the diffusion and dissemination of intellectual works and foreign authors who may not benefit from the system. Before elaborating upon the system of *domaine public payant* it is necessary to consider whether and to what extent the objections expressed should be taken into account.

(i) Those with vested interests - Publishers etc.

Publishers and commercial users of works in the public domain tend to object to the introduction of a system of domaine public payant as the exploitation of works which they were formerly entitled to use free of charge would under such a system become subject to the payment of a fee. In addition publishers etc. fear that the rise in their costs consequent on the introduction of a system of domaine public payant may put pressure on there profit margins. Although publishers can pass on the extra cost to the consumer, under competitive conditions they may themselves elect to absorb the increase in costs thereby also suffering a loss in profits.

The introduction of a system of Domaine public payant would clearly go against the vested interests of publishers and commercial users who are used to the idea of being able to exploit the 'basic raw material', if we can call creations of the intellect

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31 Op. cit. Mouchet, p. 138. Mouchet only mentions the first four categories of objectors. The issue of a fifth category was raised by Prof. Dr. A. Dietz in an interview.

so, without charge once copyright has expired. It should however be kept in mind that contrary to the other 'raw' materials needed such as paper and ink, intellectual creations in the public domain are currently the only raw materials which are free of charge. There seems to be no imperative economic reason why this should be so. The fact that one needs to pay for other raw materials, and that the price thereof may fluctuate and accordingly increase, seems to be generally accepted. As Mouchet pointed out :

> "..it is surprising that there are people who are unwilling to pay for the use of the real and irreplaceable raw material, which is what intellectual creation really is - without which books would be piles of blank sheets..".[32]

A vested interest of some, which moreover seems difficult to justify in economic terms when compared to other raw materials, does not of itself seem to suffice to challenge the well-foundedness of a system such as *domaine public payant.*

(ii) Those who consider *domaine public payant* as an obstacle to the diffusion and dissemination of intellectual works.

This argument is related to the previous one. Although in this case it is the likely increase in the price of the book rather than the reduction of the publisher's, etc., profit margin that is emphasized. It is thus believed that an increase in the selling price could act as a deterrent to those wishing to buy and read books. This position mirrors to some extent the previously held belief by some that the payment of royalties pursuant to copyright and the control which an author may exercise over his work acts as an impediment or obstacle to the dissemination and circulation of intellectual works. Although the need for copyright protection is no longer seriously contested nowadays the introduction of a system of domaine public payant could thus be criticised on the basis that the continued requirement to pay fees after a work has fallen into the public domain further aggravates a pre-existing problem.

This argument is not so much invoked by the public in general but rather by publishing houses etc. and it is submitted that they will not face liquidation if they have to pay modest fees for the exploitation of works to the *domaine public payant.* As noted above, in any event the publishing houses can pass on this extra cost to the ultimate consumer. Given that the real raw material in literary works is the author's inspiration there is grounds to maintain that this raw material should be

32 Mouchet, o.c., at p. 139.

paid for even after the expiration of the copyright period *per se*.[33] The argument does however need to be considered carefully from the consumer's point of view who will most likely bear the financial implications of the introduction of the system of *domaine public payant*. In particular, it needs to be considered what level of fees under the *domaine public payant* system would be reasonable to fulfill the objectives of the *domaine public payant* while not unduly burdening the consumer. As for copyright protection a balance has to be found also under the system of the *domaine public payant* between the short term and the long term public interest. Copyright is merely a *temporary* restraint on public access to the work in order to stimulate creative activity. The general rule is that in the absence of -or after the expiry of- copyright protection, literary works may be freely appropriated at little or no cost.[34] In this respect a *modest* increase in the cost of literary works that have fallen into the public domain should however generally prove irrelevant.[35] In the unusual event however that the cost and corresponding price increase proves detrimental for some categories of works or consumers for example learning institutions, charitable organisations, etc., the *domaine public payant* system established should be flexible enough in order to find a way of exonerating them in whole or in part from contributing to the domaine public payant.[36]

(iii) Those who adhere to the traditional idea of free use of works in the Public Domain.

The introduction of a system of domaine public payant has also been criticised by those who believe that works which have fallen into the public domain should per se be free, thus also free of charge and the payment of fees. The merit of this argument is that it draws attention to the fact that, contrary to copyright, no prior authorization should be required for the use of a work which has fallen into the public domain. The exclusivity inherent in copyright protection is temporary in

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33 See pt. (ii) above. The full citation by Mouchet is as follows : "The most elementary and simplified argument raised by opponents of the *domaine public payant* system is that it obstructs or hinders the circulation of literary and artistic works, and accordingly the dissemination of culture, because a price has to be paid for the use of such works. The arguments one can adduce in rebuttal are valid for works in the public domain just as they are for works in the private domain. First of all, it should not be forgotten that such use is not made by each member of the community individually; but through the major users - in other words, publishers, impresarios, record manufacturers, radio and television networks, film producers, etc. None of these users cries out loudly when there is an increase in the price of printing paper, or in the cost of labour, or of machinery and equipment. They simply shift the increase onto the prices charged to the general public. On the other hand, it is surprising that there are people who are unwilling to pay for the use of the real and irreplaceable raw material, which is what intellectual creation really is - without which books would be piles of blank sheets, the stage would be empty, a gramophone record would be inert matter, and radio and television would merely transmit news and advertising." See Mouchet op. cit. p. 139.

34 See also infra, pt. (ii).

35 Even with respect to the new tendency to produce classical works cheaply (e.g. the Penguin 60p series) modest increases in prices and costs shouldn't prove to be so problematic.

36 By for example defining a list of categories which are exempt or to which reduced rates would apply.

nature and conferred on the author in order to give him the possibility to obtain a reward for his work. As the system of domaine public payant in itself ensures an income to living authors it would by far be exceeding its objectives if an exclusive right were also attached to it, let alone the practical problems that would arise when trying to determine who would be able to exercise the exclusive right. As mentioned above, this finding does not necesarily imply that a fee could not be charged for the use of works which have fallen into the public domain, provided that the fee is modest and that the system of domaine public payant is flexible enough to exonorate certain works and groups of consumers in whole or in part.[37]

(iv) Those afraid that *domaine public payant* will become an instrument of "dirigisme intellectuel".

There are also those who have voiced the realistic concern relating to the possibility of State control over intellectual works and the possibility of the State misdirecting or channelling monnies collected in order to favour certain classes or categories of literary works or authors etc.[38] In elaborating a system of *domaine public payant*, particular attention should therefore be paid as to who should pay the fees and how they should be collected as well as to how and for what purposes the funds should be used.

(v) Foreign authors who may not benefit from the system.

Foreign authors and their representatives also argue against the introduction of a system of *domaine public payant* as they believe that it is unlikely that the former will benefit from such a system while it is likely that the exploitation of works of foreign authors which have fallen into the public domain will be subject to the payment of fees if such a system is introduced.[39] This is an issue which should be addressed carefully when elaborating the system of domaine public payant.

CONSTRUCTING A THEORY ON *DOMAINE PUBLIC PAYANT* : a step-by-step approach

1. Objectives and nature of *domaine public payant*

The commendable objective of the *domaine public payant* is to provide a minimal sustenance for living authors, to that end a fee is levied on the use of works that have fallen into the public domain. Although the existing theories on the *domaine public payant* tend to situate it either in the field of copyright or tax legislation,

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37 See supra, pt (ii)

38 This was one of the main arguments in FDR. in the 1962 when the introduction of *domaine public payant* was mooted.

39 The US for example has voiced opposition to its introduction. Strictly speaking no legal arguments have been raised against it. Rather the system is attacked from an economic point of view.

neither approach fully satisfies the specific features of *domaine public payant. Domaine public payant* is closely related to copyright but, for the reasons set out above, it is complementary to rather than part of that system.[40] Similarly, although *domaine public payant* may at first sight have certain features in common with tax legislation its main purpose and objectives are alien to the latter. It therefore seems necessary to elaborate a *sui generis* approach to *domaine public payant* as an instrument to promote the redistribution of money in the cultural sector.

2. *Domaine public payant* : need for prior authorisation ?

The essence of the *domaine public payant* is that a fee would be charged upon the use of works which have fallen into the public domain. The main question that needs to be addressed is whether the prior authorisation of the body responsible for the administration of *domaine public payant* is required with respect to the use of a given work.

The literature on this matter is overwhelmingly in favour of not requiring prior authorisation for the use of works subject to the *domaine public payant* and that only remuneration for such use should be required.[41] Making the use of such works subject to prior authorisation would be tantamount to conferring an exclusive right which might limit public access to the works. As mentioned above, the latter is only justifiable within the context of copyright protection and would clearly exceed the objectives of the *domaine public payant.*[42] This view was also shared by the UNESCO/WIPO Committee of non-Governmental experts on the *domaine public payant.* In the draft report prepared in April 1982[43] they conducted an analysis of a number of States which have a system of *domaine public payant* and which require prior authorisation for the use of a work and those which do not. The experts unanimously considered that the exploitation of works in the public domain should remain free from authorisation but be subject to the payment of a fee.

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40 See supra, part I.

41 "Some of the participants emphasized that the requirement of authorization would prejudice the aim pursued in instituting a *domaine public payant* since it afforded to the State or to the body responsible for giving such authorization discretionary powers and would limit public access to unprotected works. Following a lengthy exchange of views, the Committee unanimously considered that the use of works in the *domaine public payant* should not be subjected in any way to the need for prior authorization. It supported the principle of any use of works that had fallen into the public domain remaining free, subject to the user declaring the works he intended to exploit and paying the required fees" UNESCO/WIPO/DPP/CE/I/4 p.5. See also for another example Lipszyc: Intellectual works in the public domain: [1983] 4 EIPR 102.

42 See supra, pt. (iii).

43 op cit UNESCO/WIPO/DPP/CE/I/3p4.

Dietz also argued that:

> "We must however admit that it would be difficult to justify the discretionary use of this new right as a right to prevent the use of the works in question, particularly because the "personal link" between the author and his work no longer exists. The exclusive nature of this new right cannot therefore be used as a means of negotiation".[44]

Public use of works which have fallen into the public domain can thus only be restricted on the basis of the exercise of the moral rights inherent to copyright, as is the case now, and not on the basis of the system of *domaine public payant.* In order to monitor the use made of unprotected works and to make sure that the fees due under *domaine public payant* are also paid a mere declaratory statement could be asked of the user of the work and adequate remedies could be foreseen in case of infringement.[45]

3. Who should collect the funds ?

There is an obvious danger of State dirigism in a system of *domaine public payant.* In addition the dangers of preference, discrimination and interference with culture etc. are indeed real dangers. In order therefore to meet and remedy such problems strict control and monitoring of the system established should be maintained. For the above reasons this should not be done by public authorities but rather by bodies which administer the authors' interests. As Dietz[46] points out, the system should be organised where possible through collecting societies[47]. Whatever system is set up it is clear that there is a need to have built in mechanisms to control abuses and excesses. The representation of a cross section of authors etc. on the boards of such societies should control abuse. Dietz pointed to the examples of the Music Council in Bonn, Germany and the Endowment of Art in the US as successful

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44 Dietz p. 22.(translated)

45 On the remedies, see infra, pt 11.

46 "In summary, it appears obvious to me that, if it is established the domain public payant should be administered at least in part by collecting societies as they have experience and professional expertise in the fields of controlling the use of works and recovering and distributing monnies due to authors". Dietz p.17.

47 See also in this context Lipszyc: Intellectual works in the public domain: [1983] 4 EIPR 103 where she states that "It is advantageous to assign the task of *collecting* payments for the use of works in the public domain to societies of authors. This allows the state to take advantage of administrative structures already in existence, thus permitting lower costs and facilitating control of use. In an indirect manner this arrangement also benefits authors, whose contribution is, ultimately, the source of the public domain. The commission charged by societies of authors for the collection of payments for the use of works in the public domain helps to lower their administrative costs and provides funds for mutual aid activities of the kind generally undertaken by societies of authors.

examples of organisations which receive money on behalf of authors/artists and distribute it.[48]

The tasks of the collecting societies have so far mainly concerned the enforcement of copyright but there is no apparent reason why they could not use their experience to the profit of the system of the Domaine public payant, although this would imply that a (minor) part of the funds collected under the Domaine public payant will need to be used to finance the extra costs those collecting societies will incur. Dietz did however raise one problem which arises in this area namely that the activities of collecting societies are not very transparent. In this regard it is important that if such societies are entrusted with the role of collecting and administering the funds of the *domaine public payant* that their activities in this field become more transparent.

Where countries do not have collecting societies the *domaine public payant* can be run through author's societies. Although this might add to the administrative cost of running the system it should not in theory prove prohibitive.

4. For what purposes should the fees collected be used ?

The main objective of *domaine public payant* is to redistribute money in the cultural sector and in particular to give financial support to living authors who may not yet make a living on the basis of their copyright royalties alone. As was pointed out by the UNESCO/WIPO Committee of non-governmental experts on *domaine public payant*, the way in which this objective could be achieved could be direct or indirect and could take different forms. The funds collected could for instance be used to finance authors' welfare funds, to promote cultural and artistic activities, to award loans to young authors wishing to publish their works themselves and to award prices to encourage young talent.[49] Whereas it seems that the emphasis should lie on the establishment of authors' welfare funds it cannot be excluded that part of the

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48 This issue was raised in an interview with Prof. Dr. A. Dietz. See also Mouchet where he highlights as an example of a mechanism to control excessive State intervention a Norewegian project on the *domaine public payant*. "When a preliminary draft of this subject was under consideration in Norway, the committee to which it had been referred for examination, composed of representatives of the university and of professional organisations recommended the inclusion of the following safeguards by governmental administration of the *domaine public payant*:
1.the directorate of the body responsible for administering the funds should comprise , in addition to representatives of the State, persons elected by the authors themselves, so that the said body would not be affected by changes of government:
2. the works concerned must not be used solely with a view to realizing the largest possible amount of profits, but with a view to general protection of the cultural interests of the community as a whole;
3. the directorate of the body must take special care not to overlook the "moral right" aspect of copyright in the works entrusted to its administration;
4. in order to prevent any "censorship", it would be necessary to provide that any private individual is entitled to demand permission to publish the works concerned, subject to a fixed amount of remuneration, where the said works have not been accessible to the public for a specified period." Mouchet p. 140-141.

49 Report, pt. 40.

funds collected (which could be expressed in fixed percentages) could be used for the other purposes mentioned.

5. Application to some or all categories and uses of works ?

The study commissioned by the European Parliament only concerns literary works which have fallen into the public domain although there is no apparent reason why, in principle, a similar system should not cover both literary and artistic works. If in principle the system of *domaine public payant* could be introduced for both literary and artistic works the important issue remains whether it should apply to all categories of works and to all types of uses. Mouchet answers this fundamental question as follows:

> "Should the *domaine public payant* be absolute, including all intellectual works and all ways of using them, or should it be limited to only certain categories thereof?[] The tendency is towards general application []. From a theoretical viewpoint, there is nothing to prevent general application."[50]

Dietz argues to the contrary that the system established should be flexible and not too fundamentalist, in this regard one should look at the economic consequences of excluding certain works.[51] This indeed seems to be a more realistic approach when considered from the standpoint of the public at large. Exceptions to the application of *domaine public payant* should be established in the public interest on the basis of objective criteria which do not give rise to discrimination between works. One could for instance envisage introducing the criterion mentioned by the UNESCO/WIPO Committee of non-governmental experts on *domaine public payant* namely the application of *domaine public payant* only to use for profit making purposes.[52]

In any event it seems that the system of *domaine public payant* should not have a greater impact on consumers than the copyright system so that it would seem to be logical to introduce at least the same exceptions as exist under copyright law. In this respect, Article 10 and 10 bis of the Berne Convention for the Protection of Literary and Artistic Works (Paris Act 24 July 1971) outlines a number of situations in which free use may be made of certain works, these include for example quotations and illustrations for teaching (provided the source and the author are indicated) and the use of works "seen or heard in connection with current events". It is submitted that the coherency of a system of *domaine public payant* would also benefit from the application of the same exemptions relating to the free use of protected works contained in the copyright legalisation of the Member States.

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50 Mouchet p.144.

51 This issue was raised in an interview with Prof. Dr. A. Dietz.

52 Op. cit. UNESCO/WIPO/DPP/CE/I/4, pt. 24, although this was only presented as an alternative to the point of view that DPP should apply to all types of use.

6. Duration of *domaine public payant* ?

The question next arises whether the system of *domaine public payant* should be limited in time, similarly to copyright, or whether it should be perpetual. Considering that the *domaine public payant* does not confer an exclusive right and that public access to the work remains free, subject to payment of a fee, the same rationale underlying the temporary nature of coypright does not arise.

Under the system of *domaine public payant* the public at large should benefit from the perpetual duration of the system as the potential financial impact of *domaine public payant* on consumers and on the dissemination of the works stands in close relation to the length of time that the system is in force. If the system of *domaine public payant* is perpetual then a lesser amount of fees can be charged on any individual work in order to obtain the objectives of *domaine public payant.* Conversely, if the *domaine public payant* is limited in time then higher fees will need to be charged in order to obtain the same result.

7. Application of the *domaine public payant* to past works ?

A difficult question is whether or not the system of *domaine public payant* should have retroactive effect in the sense that it should also apply to unprotected works which are freely available at the time of the introduction of the system of *domaine public payant.* Mouchet states that any system of *domaine public payant* introduced should apply to all categories of works both past and future otherwise it would lead to illogical results.[53] Dietz on the other hand recognises that there may be psychological problems in applying the system to very old books which were written before copyright was established or to some religious books like the Bible or the Koran. He therefore recommends that a cut off date around the 15th Century when books started to be printed[54] should be fixed and that all earlier works should be excluded. The financial effects and administrative problems placed on the system would be negligible.

In order to be effective the system of *domaine public payant* should in principle apply without discrimination to both past (perhaps with the cut off date of around the 15th Century), present and future works. It nonetheless seems necessary to introduce a transitional period for those works which were already manufactured and put on sale at the time the system of *domaine public payant* is introduced.

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53 "Any limitation in time would affect the unity of the institution, and also its efficiency. If a quantity of works were in the free public domain, they would automatically compete with works in the *domaine public payant*; furthermore, on what criteron would a limitation in time be based - fifty years past, a hundred years? Why include Balzac and exclude Shakespeare?" Mouchet p. 143.

54 This issue was raised in an interview with Prof. Dr. A. Dietz.

8. Application to foreign works ?

In order to avoid discrimination between domestic and foreign works it is indispensable that the system of *domaine public payant* should apply to both domestic and foreign works. If not, the system of *domaine public payant* could entail the unwarranted result that instead of being an instrument of promoting European culture it becomes an obstacle thereto. If foreign works which have fallen into the public domain may be used for free whereas a fee is charged upon the use of domestic works then European works would not only be placed in an unfavourable competitive position in so far as their price is concerned but furthermore publishers might refrain from publishing European works to the advantage of foreign works.[55]

Since the system of *domaine public payant* only applies once the works have fallen into the public domain it would not interfere with the rights of a copyrightholder regardless of whether he is an EU national or a third country national. As Mouchet pointed out :

> "When 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, performance of a work, broadcasting by radio or television, etc.".[56]

As the personal link between the author and his work is irrelevant for the purpose of *domaine public payant*, which is a major distinction with copyright, there is no valid reason to distinguish between national and foreign works.

9. Beneficiaries of *domaine public payant* ?

The beneficiaries of the system of domaine public payant should obviously be the collectivity of living authors. By virtue of Article 6 EC nationals of an EC Member State should be accorded non-discriminatory treatment[57].The EEA agreement also extends this fundamental principle to nationals of an EEA country.[58]This would imply that EC and EEA living authors should benefit equally from the system which should apply throughout the EEA.

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55 See also Mouchet, p. 143: "If foreign works were excluded from the domain public payant, there is not the slightest doubt that the major users would actively endeavour to use those works in preference to, and in place of, those by national authors."

56 Mouchet, p. 143.

57 See Phil Collins case, Joined Cases C-92 & 326/92, ECR (1993) I-5145.

58 Article 4 EEA.

In the event that the fees collected under the *domaine public payant* are distributed on a national basis not only a requirement of either EU or EEA nationality could be imposed. In addition a residence requirement of six months to a year, in the EU or EEA country from which benefits are claimed, immediately prior to applying for such benefits could also be envisaged.

In the event that the fees are distributed on an EU or an EEA wide basis a requirement of EU or EEA nationality may also be imposed here. In addition a residence requirement of six months to a year in *any* EU or EEA country immediately prior to applying for benefits under the *domaine public payant* system could be imposed.

The main question is whether foreign authors other than nationals of an EEA country should be beneficiaries of the *domaine public payant* system. In this regard it is very important to remember, as has been maintained above[59], that fees should also be charged upon the use of foreign works which have fallen into the public domain. Although it would at first sight be tempting to give an affirmative answer to this question it is nonetheless submitted that there is no direct relationship between the two. The *domaine public payant* is not part of the copyright system so that the principle of national treatment as laid down in the Berne Convention (which in itself may under certain circumstances be subject to the principle of reciprocity) does not confer economic rights to foreign living authors with respect to works which have fallen into the public domain. On the other hand, the objective of the system of *domaine public payant* would primarly be to promote European culture and thus to let European authors only benefit from the system. It clearly could not be the purpose of the *domaine public payant* to provide a minimum sustenance to all living authors worldwide.

If in principle foreign living authors should not be considered as beneficiaries under the system of *domaine public payant* the issue might be raised whether they could nonetheless be included on the basis of the principle of reciprocity. Whereas this is an accepted and useful criteria in the field of copyright[60] it does not seem to be suitable for the system of *domaine public payant* where the personal link between the author and the work which is subject to *domaine public payant* is lacking. For example, it would be inconceivable that a country such as Malta, if it introduced the *domaine public payant*, would need to consider the collectivity of living European authors as beneficiaries of that system for that would deprive it of its main objectives.

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59 See supra pt. 8.

60 For a practical illustration, see for instance Article 3 of the duration of copyright harmonization directive which in relation to third country works introduces a comparison of terms of protection with those of the country of origin.

10. Criteria to be used to establish the amount of sums resulting from *domaine public payant*

The question arises as to what amount should be levied pursuant to a system of *domaine public payant*. Would the amount be levied as a fixed flat rate or would it be a levy based on a percentage of the price of works ? Would there be maximum or minimum percentage rates to be paid and if so what would those percentage rates be? These issues are matters of political choice and there is a priori no optimal amount. This does not mean that a certain number of points should not be kept in mind. In particular, the fee charged upon any indivual work should be modest and not be such as to affect the dissemination of the work[61]. In any event it should place no greater financial burden on the consumer than copyright does.

Lipszyc argues that the fees levied on works in the public domain pursuant to a system of *domaine public payant* should be equal to and not less than those levied on works pursuant to copyright as otherwise works in the public domain would compete unfairly with works subject to the payment of copyright royalties.[62] This argument can hardly be accepted for even if it were the purpose of the *domaine public payant* to eliminate "unfair competition" between protected and unprotected works, which it is not, it could not possibly achieve that result. The main reason is that a work that has fallen into the public domain is no longer protected by exclusive rights and may thus be subject to competition for instance from another publishing house publishing the same work. This will inevitably lead to a decrease in price, regardless of whether or not a charge is levied for the use of the work. It may thus reasonably be expected that works that have fallen into the public domain will always be potentially cheaper than protected works.

Instead of focusing on the elimination of such alleged unfair competition prevailing in the market, it seems more appropriate to take into account the public interest in having works available at a reasonable cost. In this respect, the ceiling established by certain participants to the UNESCO/WIPO Committee of non-governmental experts on the *domaine public payant* seems to be acceptable. They held that the fees levied under the *domaine public payant* should not be more than 50% of the royalties obtained under copyright.[63] The question remains how this can be translated in practical terms.

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61 Cf. supra pt. (iii).

62 Lipszyc argues that "Given that free works compete unfairly with others and have the potential to displace works for which a payment must be made, avoidance of this situation requires that the cost of the works in the public domain be the same as those in private ownership." in Intellectual works in the public domain: [1983] 4 EIPR 102.

63 See UNESCO/WIPO/DPP/CE/I/4, pt. 36. See also Dietz, on the other hand, who does not specifically advocate a given sum or amount which should be introduced pursuant to a system of domaine public payant but he recognises that that amount or sum could foreseeably be a percentage of and therefore less than the amount normally collected under copyright.

In theory it would be possible to calculate the fee payable under the *domaine public payant* in terms of a percentage, for instance 30 or 50%, of the royalties obtained under copyright. The problem however lies in the fact that the amount of copyright royalties is usually determined in each case by contract and may thus vary from one work to another. Taking copyright royalties as the basis for calculating the fees payable under the *domaine public payant* would obviously not be very transparent and might prove to be unworkable in practice.

It therefore seems to be better to establish a fixed percentage levied on the sales price of the work. In so far as copyright royalties often constitute 10% of the selling price of a protected work (at least of books) it would seem reasonable to charge 3 to 5% of the selling price of an unprotected work under the system of domaine public payant. The determination of the level of the fees to be paid under the *domaine public payant* is intrinsically linked to decisions taken regarding the other matters mentioned. If for instance the *domaine public payant* applies to both domestic and foreign works and if it is perpetual then the percentage levied could be lower while still stafeguarding the objectives of the *domaine public payant.* On the other hand, if the *domaine public payant* only applies to European works and is limited in time then of course a higher fee per work will be needed to attain the same results. One should also not disregard the fact that a percentage of the collected fees will need to go to cover the administrative expenditure of the collecting societies entrusted with the task of putting the *domaine public payant* into effect.

11. Remedies

There is no purpose in creating a new system if it is not accompanied by effective control and enforcement mechanisms. In so far as the system of the *domaine public payant* would be situated under private law it would seem reasonable to provide for civil sanctions in case of non-compliance.

12. The compatibility of *domaine public payant* with international treaties?

It may be argued that this question as to the compatibility of the *domaine public payant* is after all a false question. International conventions only deal with copyright, they do not specifically deal with *domaine public payant.* This however does not imply that *domaine public payant* is prohibited or outlawed under such conventions it merely means that international conventions are not concerned either positively or negatively with the issue. This was also the point of view adopted by the UNESCO/WIPO Committee of non-governmental experts on the *domaine public payant*:

> "Some of the participants wondered whether the institution of *domaine public payant* was not incompatible with the spirit of the international copyright conventions. Others questioned whether the introduction of such a system within a State party solely to the

> Universal Copyright Convention which ensured a minimum level of protection of 25 years post mortem auctoris, would not tend to discourage such State from extending that term of protection in order to accede to the Berne Convention. Following a broad exchange of views, it was noted that the introduction of those arrangements into domestic law would in no way prevent States from fulfilling their obligations under those conventions."[64]

Dietz, who situates the *domaine public payant* in the field of copyright,[65] also argues that there is nothing in the international copyright treaties which specifically prevents the introduction of a system of *domaine public payant* protecting the rights of the community of living authors.[66] International copyright treaties merely lay down minimum standards and norms and States may, while still complying with those treaties, introduce more rigorous standards which would extend protection similar to or akin to copyright to the community of living authors. Regardless of the legal nature of the system of *domaine public payant* there thus does not appear to be an incompatibility with international law.

13. Extension of period of copyright protection and *domaine public payant*

In the past the main argument against the introduction of a system of *domaine public payant* was that it would hinder future extensions of the copyright period of protection. It was on this basis for instance that the *domaine public payant* was not introduced in Germany but that instead the copyright term was extended to 70 post mortem auctoris.[67] Although it is a fundamental misconception that the two are incompatible,[68] this issue is no longer of great relevance or weight for the moment in the European Union given that the period of copyright protection has been recently extended from 50 to 70 years under the 1993 Directive and is not likely to be extended further in the foreseeable future.[69] The issue could nonetheless be raised whether there is still a need for the *domaine public payant* now that the term of copyright protection has been extended. This question was already answered in the affirmative before.[70] In this respect it is useful also to draw the attention to the following remark made by the Max Planck Institute in 1968 in relation to the German debate on this issue :

> "The extension of the copyright protection term from 50 to 70 years after the death of the author is thought as a partial compensation for the cancellation of the regulations about

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64 UNESCO/WIPO/DPP/CE/I/4 p.4.

65 See supra part II.

66 This issue was raised in an interview with Prof. Dr. A. Dietz.

67 This issue was raised in an interview with Prof. Dr. A. Dietz.

68 Nonetheless, as a precaution against this anxiety Mouchet argues that if authors are correctly represented in the collecting societies or other bodies which would administer the *domaine public payant* system established then future extensions of the copyright period of protection should not be unjustly hindered as a result of a system of *domaine public payant*. Op cit. Mouchet p.141.

69 It is interesting to note in this regard that the main opposition to the extension of the period of copyright protection from 50 to 70 years in the 1993 Directive was voiced by publishers.

70 See supra Part I.

the domaine public payant. However, one must keep in mind that such a compensation can only be achieved to a very limited extent. The social purposes aimed at by the domaine pubic payant, to support needy authors and their relatives, and the promotion of promising authors, cannot be achieved by an extension of the term of protection. The benefits of the extension of the term of protection only affects the heirs of deceased authors and the exploiters of their works. Therefore the idea of a domaine public payant for achieving its commendable purposes must be further promoted".[71]

It is obvious that in order not to distort competition between works that have fallen into the public domain and in order to achieve its main objectives the idea of the *domaine public payant* should be promoted and applied uniformly on a Europe wide level.

[71] Max Plank Insitute Munich, Legal Study on the Domaine Public Payant in Germany, January 1968, p. 56.

CONCLUSION

The idea of the *domaine public payant* has in the past suffered from fundamental misconceptions about its alleged inhibiting nature in so far as the extension of the duration of copyright protection is concerned. Now that the main obstacle to its introduction has been removed by the adoption of the directive on the extension of the term of copyright protection it should be possible to evaluate the idea upon its proper merits.

Allowing living authors to benefit financially from the culturage heritage, to which they will presumably contribute themselves in time, does not only entail that money is redistributed in the cultural sector. A whole new impetus may be given to the promotion of culture in Europe. This will be to the benefit of the public at large whereas the financial burden posed on the users of unprotected works should be minor. From a theorectical point of view there seems to be no reason why a similar system should not be introduced. It is in fact remarkable that it has not yet been seriously considered in a Community context.

If the idea of the *domaine public payant* is likely to find widespread support due to its commendable objectives consideration should nonetheless be given to the way in which it is put into effect. Attention should in particular be paid to ensuring that the system *domaine public payant* is complementary to and does not interfere with copyright protection and also to the avoidance of State interference in the cultural sector. The above theory, which deals with the major issues step by step, was drafted with these concerns very much in mind and above all in the knowledge that any proposition made should be defendable from the point of view of the public interest.

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