https://doi.org/10.7592/FEJF2024.93.ikonomi

# PAYING PUBLIC DOMAIN AND THE ALBANIAN PROTECTION OF FOLKLORE

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**Abstract:** Paying Public Domain (PPD) is probably a contradictory phrase for everyone firmly attached to the idea of free-access and no-remuneration public domain. With French origin, the *domaine public payant* is an incentive to creativity, applied to creations already in the public domain because of their expired copyright protection or rather when they are legally excluded from it. This paper aims to explain the PPD regimes still standing and analyze how they are applied. Albania is among the countries with the PPD related to an important cultural heritage: folklore. The paper clarifies the role of the PPD and its characteristics and highlights the need to activate it by proposing concrete legal measures in achieving this goal.

**Keywords:** copyright, folklore, Paying Public Domain, term of protection, free access

## INTRODUCTION

It is believed that the public domain originates from Roman law, although it did not exist *ipso jure* as a legal concept. Like many other concepts of Copyright Law, it was created through judicial practice. Its abstract existence or the idea of it was recognized in England through a series of court cases (Ochoa 2002: 223–224) up to 1774, when in *Donaldson v Beckett* the House of Lords decided that the copyrights were, in fact, limited (Lessig 2005) and that after the term of protection copyrighted works could be freely copied for all to enjoy.

The principle that all works would enter the public domain was reaffirmed by the US Supreme Court (Ochoa 2002: 224) in the case *Wheaton v Peters* (1834), when it was ruled that there was no right of an author to perpetual copyright, like the inventor's rights on the patent. Thus, the copyright must naturally transpire. Also, the French Decree of 1791 stated that works of the authors who

had been dead for five or more years were *propriété publique*. According to the Decree, the protection of the author's dramatic work and the recognition and enlargement of the public domain were equally important (Guibault 2006: 89). In the court case *Veuve Buffon v F. Behmer*, the Court of Cassation in France, especially referring to the territorial character of copyright, highlighted that a work of a French author could be counterfeited and published with impunity whenever it crossed the national borders (Peeler 1999: 439), thus implying the creation of a foreign public domain for it.

The French origin is also attributed to a particular regime, the Paying Public Domain. The idea can be retraced to Hugo's speech in 1878, when he argued about setting up the *domaine public payant* that would consist of paying a small fee for each exploitation of a public domain work into a fund devoted to the encouragement of young writers and creators (Dusollier 2011: 40).

Currently, there are a few countries with PPD regimes and lately Albania has become one of them. The PPD regime is appliable only to crucial cultural heritage – folklore, with the primary objective to preserve it and guarantee that traditional creativity is passed through generations. The paying regime is not popular, but there is no legal impediment to applying it, even though it seems to overthrow the rules of a classic public domain. As stated by UNESCO and WIPO (1985), folklore is an important cultural heritage of every nation, a means of people's self-expression. It is still developing as a living, functional tradition rather than a mere souvenir of the past.

It is understandable that Albania is interested in folklore and its protection as still a good part of modern art and literary works are not only inspired by folklore but expressly contain its unchanged elements, intertwined with new ones. Thus, the publishers reap profits without compensating the nation's culture as the creator. Folklore, because of its evolutionary and unfixed form, is subject to many threats, like integrity violations, when used outside its natural habitat (Berryman 1994: 311–312). The PPD was recently introduced into Albanian law, to be applied only to folklore's communication to the public. There is a total absence of other provisions necessary to govern its effects. Thus, this turns the PPD into a "dormant" institution, unable to fulfill the purpose for which it was introduced into law.

The paper is divided into two major parts. The first part of the paper analyzes the characteristics of the PPD and the way it works in those countries where it is still alive. The second part of the paper discusses the Albanian legal provisions for copyright and folklore and their common point: the PPD. It points out the lack of national adequate measures to profit from the PPD and offers practical and reasonable suggestions to enable its activation in Albania.

## DEFINING PAYING PUBLIC DOMAIN

There is no public domain definition in the Berne Convention text or other copyright international treaties or conventions. WIPO (2010) has described the public domain as an elastic, versatile, and relative concept not susceptible to a uniform legal meaning. Rightfully or not, based on its specifics, the public domain makes you think of something for free. Generally speaking, the public domain related to copyright is considered a big pool of free access to intellectual materials or everyday cultural heritage objects. This is the traditional view of the public domain associated with the subject matter never protected or not protected by copyright anymore (Dusollier 2011, annex 6). It is regarded as a wealth of information, free from the barriers to access or reuse, which acts as a mechanism that ensures its availability and which all members of society can build upon (De Rosnay & De Martin 2012: xix). Free access to works already in the public domain implies no authorization and no remuneration for use and further exploitation. Still, there is at least the PPD as an exception to the rule. Under the Berne Convention and TRIPS Agreement provisions, countries may introduce statutory remuneration rights outside the scope of the minimum exclusive and remuneration rights provided by these treaties in their national copyright legislation (Geiger & Bulayenko 2020: 23).

According to WIPO (2003), the Paying Public Domain is explained as the legal requirement of national copyright laws of some countries to pay specific amounts for works and objects of related rights in the public domain. These amounts, contributions from the proceeds from the sale of copies of public domain works, must be paid to state-controlled funds responsible for promoting creative productivity in society (Angelopoulos 2012: 21) and for the social purposes of authors. The main objective of the PPD is to provide minimal sustenance for living authors; to that end, a fee is levied on the use of works that have fallen into the public domain (Govaere & Sheena 1996: 28). Dietz (1990: 14) called it a "revolving system of authors' royalties" where incomes from the use of the works of the dead generations of authors serve to support a generation of living authors.

Copyright, public domain, and Paying Public Domain have an exciting relationship with each other. There lies the idea that the public domain is enriched with a new work at the exact moment its copyright protection term expires, thus implying that copyright and public domain are two different spaces that follow each other and that make impossible the existence of the same work both in copyright protection and in the public domain. In addition to this, while it lasts, copyright protection is characterized by two elements of use and exploitation

of the work: (prior) authorization and royalties, whereas the public domain offers the possibility of free access. The PPD approaches a bit of both. On the one hand, the PPD regime implies the same rules to its filling as the classic public domain. On the other hand, even though the objectives are different, it seems similar to copyright due to the need to pay a fee, similar to royalty payments to authors. Paying Public Domain is a *sui generis* regime based on the idea of the continuance of paying small amounts of money, beyond the term of protection, which is intended to be used generally as incentives for intellectual productivity and preservation of cultural heritage. The PPD as a remuneration right (Guibault 2006: 90) is an alternative to the public domain, which imposes certain conditions for the use of works already fallen into the public domain, such as the payment of fees that are generally destined to promote intangible cultural heritage (ICH) practices in the country licensing the manifestation of heritage. The PPD thus provides financial means for safeguarding and protecting intangible heritage (Lixinski 2013: 199).

The system of the PPD works like a compulsory license: the use is conditioned on payment of the prescribed fee but not upon securing prior authorization. The operation of such a system may constitute an impediment to the unrestricted use of public domain works. The extent of such interference depends, at least in part, on the level of the fees, which vary considerably (WIPO 2010: 12). It is a reasonable expectation that the fee for the use of works in the public domain has to be cheaper than the royalties paid for the use of copyrighted works. In theory, it seems easy to determine the fee for works in the PPD in terms of percentage, like 30–50 percent of the royalties payable under copyright. In practice, the royalties are privately set by contracts, and it is difficult to calculate the PPD fee and so it might prove to be unworkable in practice. So, a fixed percentage is recommended to be levied on the sales price of the work. As copyright royalties often constitute 10 percent of the selling price of a protected work, it would seem reasonable to charge 3 to 5 percent of the selling price of an unprotected work under the system of the PPD (Govaere & Sheena 1996: 36–37).

The PPD is primarily applicable in African countries such as Algeria, Rwanda, Kenya, Senegal, the Republic of the Congo, and Côte d'Ivoire (Dusollier 2011: 39). In Algeria and Rwanda, only the commercial or for-profit exploitation of public domain material is subject to payment, and in Algeria even prior authorization is required (Dusollier 2011: 40). The best part of Latin American countries, such as Mexico, Bolivia, Chile, Argentine, Paraguay, Uruguay, Brazil, and Costa Rica, established *dominio público pagante*. With time some of them abrogated the PPD; others like Paraguay and Bolivia kept it in the law, but not applicable in practice (Lipszyc 2016: 24–25). In Argentine, the

use of a material in the public domain must be preceded by filling out a form to declare that use at the *Fondo Nacional de las Artes* (National Endowment for the Arts – FNA) and to pay a fee, which will be returned to contemporary artists through scholarships, subsidies or loans granted by the entity. This obligation extends to the use of all intellectual works in the public domain or part of them, original or derivative works (Dirección Nacional del Derecho de Autor 2021). Like in Argentine, the national law in Uruguay provides the extension of payment to all the works in the public domain, both domestic and foreign ones (Lipszyc 2016: 27). While Italy was the most recent country to repeal its PPD in 1996, only a few European countries, for example Hungary, still provide some forms of the PPD for the resale of the original works of art, and Norway for the broadcasting of phonograms (Geiger & Bulayenko 2020: 25). Croatian copyright law (Copyright and Related Rights Act, CRRA), Article 18, §7, provides for the payment of remuneration for the communication in public of unprotected creations, such as folk literary and artistic creations:

> *Folk literary and artistic creations in their original form are not subject to copyright, but for their communication to the public a remuneration is paid as for the communication to the public of protected copyright works. The remuneration shall be used to encourage appropriate artistic and cultural creativity of a predominantly non-commercial nature and cultural diversity in the relevant artistic and cultural field…*

This mechanism that covers communication to the public of folk literary and artistic creations requires mandatory collective management of the right to remuneration for using these works in the public domain (European Commission 2021).

Usually, the PPD does not require prior authorization, but the use of the works in it is conditioned upon (a low) payment. This payment is what put the PPD at the center of the debate. There are at least two categories that disagree with the PPD concept: (1) all persons and industries which derive their profits from using ex-copyrighted or not-copyrighted materials, and (2) all persons who cannot get used to the idea that after the expiration term of the copyright, financial obligations are imposed to them instead of free access. The most recent case (just 25 years ago) of a repealed PPD sends a clear message about the difference in the intensity of the use of public domain material. In Italy, before repealing the PPD, the use of a work in the public domain was preconditioned by the payment of a tax which discouraged the desire to disseminate useful "cultural tools".

After the repeal, the operation of the publishing market was facilitated and encouraged, particularly with respect to the "great classics", ensuring enormous savings both to publishers and consumers, on whom the cost of the work inevitably fell (Innocente 2018). The publishers or users of commercial works tend to object to the PPD. They are vested with direct financial interests and used to the idea of being able to exploit intellectual material for free. They basically fear the rise in costs. Even though they can pass on the extra cost to the consumer, under competitive conditions, they may themselves choose to absorb the increase in expenses, thereby also suffering a loss in profits (Govaere & Sheena 1996: 25). The second category does not object to the PPD based only on their beliefs that the public domain has to guarantee free access to any ex-copyrighted or never copyrighted creation, but mainly to the perception that the PPD is a barrier to further and wide knowledge dissemination because of the application of the fee.

## ALBANIAN FOLKLORE, A(N) (UN)PROTECTED DIVERSITY OF CREATIONS

The PPD derived from the idea of a French mastermind, and it was later materialized in different national laws. Afterward, part of them repealed the PPD for a classic public domain of public free access. The previous Albanian laws on the author's rights did not recognize protection for expressions of folklore. The new law on author's rights (ALAR) entered into force in 2016, on the example of the Croatian Copyright Act. ALAR, *quasi-fully* approximated with European directives, for the first time aligns Albania on the side of the PPD countries.

The Albanian legal definition of the public domain states that the public domain of copyright is the typology or the regime of free public use of works whose term of protection has expired or which have never been protected by the copyright law. From the definition, ALAR ensures free access to ex-copyrighted works and never-copyrighted creations. The first category incorporates the non-exhaustive list of the intellectual creations considered works, thus copyright-protected within the term of protection. The expiration of the specific term of protection of economic rights of authors marks the fall of works into the public domain, implying public free access, yet obliged to regard the author's perpetual moral rights. The second category refers to the list of creations that do not have the status of works and lack copyright protection. Among other intellectual creations, which are expressly excluded from copyright protection, are folk literary and artistic creations in their original form. After the two last revisions of

the Berne Convention, the direct result is its Article 15, § 4, which is the only international legal instrument concerning copyright protection of folklore but that does not define folklore (Collins 2018: 6). The Tunis Model Law on Copyright for Developing Countries defines folklore to be "all literary, artistic and scientific works created on national territory by authors presumed to be nationals of such countries or by ethnic communities, passed from generation to generation and constituting one of the basic elements of the traditional cultural heritage" (WIPO & UNESCO 1976: 19). There is no specific legal definition of folklore in Albania, probably because of the diversity of creations it contains. Still, Article 5 of the Albanian law on cultural heritage and museums provides specific and smaller definitions for different parts of folklore, like oral folklore, instrumental folklore, vocal folklore, and choreographic folklore.

The absence of adequate protection for the creators of genuine folk art is particularly disadvantageous, especially considering the spectacular development of technology and the newer ways of using it abusively. Folklore is not only frequently commercialized without due respect for the cultural and economic interests of the communities in which it originates but it is often distorted or mutilated to better adapt it to the needs of the market, without returning their fair share to the communities that have developed and maintained it (WIPO 2003: 93). It has been suggested that some aspects of folklore could be regulated by copyright laws based on the similarities between folklore and copyrighted works, such as creativity and similar means of exploiting them (Kuruk 1999: 792).

Although folk creations do not convincingly differ from other copyrighted works, their similarities refer only to the final result, without considering the differences between their creative processes. The long and continuous process that creates and shapes folklore relies on different contributors and the original ways of passing it to next generations. Copyright-based protection of folklore requires certainty over the creations' elements and attribution, which a "living creature" like folklore cannot offer. It seems that copyright law is not the right kind of law to protect folklore possibly because "whereas an expression of folklore is the result of an impersonal, continuous and slow process of creative activity exercised in a given community by consecutive imitation, works protected by copyright must, traditionally, bear a decisive mark of individual originality" (UNESCO & WIPO 1985: 5). If expressions of folklore were fully copyright-protected, this could almost have the effect of casting it in concrete. Thus, folklore may not be able to evolve and may risk its very existence as it would lose one of its main features: its dynamics (WIPO 2010: 17).

Like other copyright laws, ALAR cannot protect folklore creations as works, so it introduced the Paying Public Domain regime, which ensures an indirect way of protecting and promoting folklore. ALAR does not protect folk literary and artistic creations *per se*, but it imposes that their communication to the public is subject to payment of remuneration. The exclusive economic right of communication to the public means doing one or more actions, which in accordance with the works' genre and characteristics, intend to make them available to the public or enable public access to them. This right includes the traditional ways of communication to the public, such as live (stage) performances and exhibitions of visual artworks, or public communications through broadcasting and re-broadcasting by radio or television program-carrying signals, intended for reception by the public, either by wireless means (including satellite) or by wire (including cable or microwave systems). Communication to the public is an expression of the use of the rights of a monopolistic nature with which the copyright law provides the rightsholders who have a legitimate expectation for financial benefits. Following this logic, ALAR justifies the payment of remuneration for communication to the public of folklore creations similar to copyrighted works, in the sense that if remuneration is required for the communication to the public of copyrighted works, it is also required for the communication to the public of folklore creations. The Albanian legal framework relating to folklore is silent about regulating every aspect of the PPD. This situation is similar to Paraguay. Even though the PPD is incorporated into its copyright act of 1998, it is still ineffective due to the lack of publishing the specific implementing regulation (Marzetti 2021). So, the Albanian PPD does not share the same fate, and there are at least three important issues that need to be addressed as soon as possible.

First, since 2017 the National Council for Author's Rights (NCAR) has approved the methodology and the fees only for the use of copyrighted works, thus neglecting to set the fee applicable for folklore creations. Nor has it determined some way of calculating the amount of remuneration payable for folklore creations referring to the approved fees for copyrighted works, defining it as a percentage of the copyrighted work's fee. As a result, this precise lack of provision means that in theory folklore creations and copyrighted works, when communicated to the public, are both, and to the same extent, subject to payment of remuneration. The NCAR needs to determine the fee (or the way of calculating it) applicable when folklore creations are communicated to the public. It might be recommendable that the fee, in such a case, be half the usual fee applicable to copyright-protected works. The ratio behind this difference, as mentioned above, lies in finding a proper balance between the demand for

the public communication of folklore and the collection of remuneration from this activity. In short, applying an excessive fee (equal to the fees for other copyrighted works) is a real obstacle to the public communication of folklore and achieving the PPD's goal.

Second, ALAR defines the purpose of the PPD regime by specifying that the income will be used for artistic and cultural encouragement and stimulation of a non-profit nature, as provided by the rules of distribution of remuneration by collective management agencies for copyright and other related rights. Despite no other ALAR provision regarding the PPD, there is also no specific regulation or decision which comprises rules for the activation of the PPD. The national body responsible for its proper implementation is the NCAR, which has left without attention the way of collecting and distributing the remuneration from the communication of folklore creations to the public. Thus, the Albanian PPD and its management are both unclear and ineffective until the NCAR determines the responsible body for collecting the remuneration. To make the situation more difficult, the collective management of folklore communication to the public is not obligatory but optional, unlike the Croatian copyright act. On the other hand, the Albanian Directory of Author's Rights does not act as a collective management organization. In these conditions, especially in the absence of an identified rightsholder, even if the fee is determined, there is no authority to collect it. This situation demands law amendments. Either ALAR has to be amended to further provide for the obligatory collective management of folklore communication to the public like in Argentina and Uruguay (Marzetti 2021), or authority has to be given to the National Council of Intangible Cultural Heritage to collect the fee. This solution is in accordance with what is expressly proclaimed by Section 6 of the Tunis Model Law on Copyright for Developing Countries, regarding the limitless protection and exercise of moral and economic rights by a competent national authority to prevent any improper exploitation and to permit adequate protection of folklore (WIPO & UNESCO 1976: 9–10).

Third, ALAR states that the remuneration "will be used for cultural and artistic promotion and encouragement of a non-profit nature in the respective artistic and cultural fields". It is a broad and general provision that requires the determination of how the collected fees will be used, to avoid any abuse. ALAR provides that the collected fees shall be distributed in accordance with the remuneration distribution rules by collective management organizations. The optimal solution for the administration of the collected fees could be the creation of a national fund that can be depleted each year to be used as a prize in young creators' contests or for funding small projects for promoting folklore

to young generations, in collaboration with the National Council of Intangible Cultural Heritage, which has the power to approve the strategy, activities, and educational programs in the field of intangible cultural heritage. Although Albania provides for a narrow application of the PPD only to the communication to the public of folklore creations, it already has the legal basis to create a new copyright holder – *the community of living and creating authors* as proposed by Dietz (1990: 14), to directly profit from this income, which would change the PPD perspective from a kind of tax or charge into the form of a right of participation in the exploitation of folklore creations.

## CONCLUSIONS

Folklore "works" are an essential part of cultural heritage, which constitute the hallmark of cultural identity. Folklore creations are intellectual literary and artistic creations, similar to copyrighted works, though lacking the possibility to establish authorship over them. This is the most crucial feature of folklore that makes it unique. Folklore is not the work of someone, but a work in process through generations, thus becoming the treasure of its community. As folklore does not meet the criteria set by copyright laws, it cannot receive fixed-term copyright protection. On the other hand, countries protect folklore as part of their cultural heritage by specific rules. In this way, folklore has perpetual protection.

The classic public domain, characterized by free access and no authorization, is a real incentive to a further exploitation of ex-copyrighted works or not-copyrighted creations and other derivative works. But there are different shades of public domain, as recognized by some countries. These are often called PPD, meaning that the public domain is not an absolute free zone. According to some PPDs, after their term of protection has expired, revitalization of works needs to be charged; others establish charges despite the type of the creation exploited. Among them stands the Albanian PPD, which requires the payment of remuneration every time folklore creations are communicated to the public. This regime strengthens the legal approach towards the protection of folklore, in addition to the specific protection of the law on cultural heritage and museums. The PPD regime does not provide for copyright protection of folklore. Still, it enables revenue collection by (not expressly) requiring equal remuneration for the communication of folklore and other copyrighted works in public.

Behind the PPD regimes like the Albanian one, there lies a good intention, generating incomes through the exploitation of folklore, which is not envisaged in any way from the law on cultural heritage and museums. Whilst it is easier to exploit tangible cultural property, generating a steady income, most commonly used to preserve, maintain and promote it, this is not possible for folklore as intangible cultural property. But law provisions should be activated; they should not be left in oblivion or sleep. The PPD in Albania is not further regulated except for the sole ALAR provision, which identifies this regime. Since the adoption of ALAR in 2016, the NCAR, the body responsible for launching the PPD, has not proposed concrete and appropriate regulations to enable the collection of remuneration from the public communication of folklore. For this reason, the Albanian PPD is inactive, hampering the goal achievement for which it was introduced to ALAR.

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