

# The true impact of shorter and longer copyright durations: from authors' earnings to cultural creativity and diversity

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## ABSTRACT

In the mainstream, there has been a strong advocacy to prolong copyright duration. This makes it an important task to rigorously examine if a longer copyright duration is helpful in guaranteeing the earnings of authors from their works as well as the promotion of cultural creativity and diversity. In contrast to many previous studies that have been rooted in law-based perspectives, this paper addresses these issues by adopting a business and economic analysis. By exploring the true impact of different copyright durations, this paper scrutinizes why a longer duration does not improve the author's earnings, and in fact, impedes cultural creativity and diversity. As a solution, this paper proposes to shorten the copyright duration and analyzes why this is likely to increase the earnings of authors from their works and to enhance cultural diversity and creativity. This study provides a complementary asset to understand more clearly copyrights and its effects.

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## Introduction

Over the last twenty years, the debate on cultural industries within European policy circles has tended to favor a longer duration for copyright protection. It is commonly believed that this will not only strengthen the earnings of authors, but also enhance cultural creativity and diversity. The last two aspects have long been identified as important goals for the European Union (EU). In 1993, an EU Directive standardized the copyright duration to 70 years after the death of the author (*post mortem auctoris* or pma) which is derived from German law (EU 1993; Giblin 2017), the longest of its kind in Europe. In 1998, the US Copyright Term Extension Act, the so-called 'Sonny Bono Act,' matched the EU's new duration limit. In the years after, 70 years pma has been mimicked across various countries, largely due to the increasing number of preferential trade agreements negotiated with either the EU or the United States.

When the copyright duration was extended from 50 to 70 years for photographers in 2006 and for performers and sound recorders in 2011, this new legislation was considered to be a remarkable achievement for artists. However, it is important to note that eight of the EU's twenty-seven Member States were against this extension. Some of their reasons include: (i) it mainly benefits recording labels, not performing artists; (ii) it has a negative impact on the pockets of consumers and their accessibility to cultural materials; and (iii) it does not help with the development of future talent, but rather orientates the recording industry to capitalize on its past investments (Kretschmer 2008; Theofilos 2013).

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In order to understand better the impact of copyright duration upon cultural works, it is worth considering the fundamental purpose of copyrights as reflected in the mandates of key international institutions. The World Intellectual Property Organization (WIPO 2017) focuses on protecting (i) the economic rights which allow the owners to derive financial rewards from the use of his/her works by others and (ii) the moral rights that preserve the non-economic interests of the author.<sup>1</sup> The United Nations Educational, Scientific and Cultural Organization (UNESCO 2017) is more interested in enhancing cultural creativity and diversity for society as a whole rather than individual economic interests, although it does mention about the economic ‘incentives’ for creation. Finally, national enforcing bodies such as the United States Copyright Office (2017) mainly deal with the usage of copyrighted works such as reproductions, derivatives, and distributions, thus it is concerned with business and economic factors.

These mandates demonstrate how copyrights seek to guarantee the earnings of authors – derived from the revenues generated by their works – as well as to promote cultural creativity and diversity. Although the importance of culture has been frequently highlighted in policy discussions, the notion of cultural creativity and diversity is in fact linked to economic factors. This is due to two main reasons. First, as recognized by UNESCO and the United States Copyright Office, authors need economic incentives through their earnings in order for them to create further works and therefore promote cultural creativity and diversity. Second, the WIPO has identified the fact that such a cultural development can be enhanced by producing many original works without imitation or copying.

Given this context, we adopt a business and economic analysis to scrutinize conceptually the true impact of two different copyright durations instead of merely asserting that a certain copyright duration is more beneficial. Only through this approach can we accurately examine whether a longer copyright duration has either a positive or a negative impact on the earnings of authors. And more importantly, it can also demonstrate the effect it has on cultural creativity and diversity. Due to the wide range of copyright protections, this paper focuses on books, music, films, and paintings which are consumed by the public on a regular basis. For simplicity sake, it uses the terms ‘authors’ (of books, music, and other productions), ‘publishers’ (book publishers, record labels, and other production houses), and ‘works’ (books, music, films, and other productions) in their generic sense.

This paper recognizes that the creative and cultural industries of today have become more complicated with digitization and the advent of the Internet, specifically through streaming services, video-sharing websites, and other digital platforms. However, it should be stressed that most of these new providers operate under licenses from the traditional publishers for all copyright-protected works. As a result, in order to focus on the fundamental issue of copyrights and to understand the true impact of different durations, this paper places these technological advancements and their impact aside. This allows for them to be used for further studies based on the findings presented here.

The contents of this paper are organized as follows. The first section deals with the literature review on copyright duration and highlights the need for a new perspective that this paper undertakes. The second section sheds light on the true origin of copyright issues which is derived from the private contracts signed by authors and publishers. The third section shows that the current copyright duration is detrimental to the actual earnings of authors from works as well as hindering cultural creativity and diversity. The fourth section examines the impact of a shortened copyright duration on the earnings of authors as well as cultural creativity and diversity. Lastly, the concluding section summarizes the main findings and the implications to be drawn from these analyses.

## Literature review

Copyright duration has often been frequently extended since the birth of copyright law and there are still those who advocate for it to be longer. Although the voices arguing for it tend to dominate the political decision-making process, a large part of the academic discourse and several groups of

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not increase by much through the additional earnings occurring in a far-away future – for example, between fifty to seventy years after the death of the author. Therefore, longer duration is very unlikely to reflect positively upon the earnings of authors. Buccafusco and Heald (2013) take this a step further when arguing that the essential purpose of a limited copyright duration is not to increase the earnings during the copyright period, but rather to ensure the existence of a productive ‘public domain.’<sup>6</sup>

This brief literature review raises three crucial points. First, it is necessary that any copyright duration must ensure that authors reap a significant share of the benefits. Second, the low bargaining power of authors caused by the private contract requires changes in order to create a healthier environment. Third, more broadly, it must also help boost cultural creativity and diversity for society. All of these factors should be taken into account when assessing the impact of copyright duration and this is the main focus for this paper.

### The fundamental issues: ‘copy’-rights and private contracts

In order to delve into the fundamental issues of copyrights, it is important to review the original goal as well as the evolution in its duration and then to analyze its significance based on these facts. The United Kingdom was the first country to introduce copyrights with the Statute of Anne or the Copyright Act of 1710. This law is known to have two very important points: (1) it granted exclusive rights to the authors in order to prevent publishers to distribute, modify, or abuse the works without a private contract with the authors; (2) it imposed a copyright duration, which was fourteen years for books published after 1710 and twenty-one years for those published before that date. Out of this emerged the concept that copyrights would protect authors as well as help to enhance cultural creativity and diversity. Still, the rhetoric behind this should be carefully analyzed in order to understand exactly how it was applied in the real world.

First, the exclusive rights granted to authors – previously, publishers ‘secured’ the right to copy works and even alter them – would seem to offer them protection. However, the Copyright Act was actually designed to protect the rights of English publishers to copy works by securing a private contract with authors while limiting those of non-English publishers, particularly Scottish and Dutch ones, in the English book market (Balázs 2011; Baldwin 2014; Johns 2009). This is why the term ‘copy’-rights was used rather than ‘author’-rights. As a result, private contracts have been anchored and geared toward supporting this process which protects publishers rather than authors.

Second, as the initial conceptualization of copyrights was opposed to a ‘proper right,’ it instead sought to promote the progress of science and useful arts by securing for a limited time the exclusive rights for authors and investors to their respective writings and discoveries. In addition, the notion of copyright duration was initially introduced not to protect publishers or authors, but to put a time limit on the monopolistic power of publishers. This was intended to enhance the competition among them.

Third, copyrights and its limited duration were in fact designed to incentivize creativity and scientific discovery as well as to encourage learning and contrasts which led to the ‘outcome’ of the intellectual property right regime that exists in our time (Kretschmer and Kawohl 2004; Rose 1993; Vaidhyanathan 2001). In particular, during the eighteenth century, the Enlightenment was prevailing and the importance of education and knowledge diffusion was popularized. In this context, any measures that hindered this societal trend of diffusing and sharing knowledge and education were seen as an infringement of the Enlightenment’s core principles (Lessig 2004). It is interesting that even three centuries ago, there were efforts to limit copyright duration for the betterment of society.

It is important to stress that the copyright duration was only extended because publishers sought to secure their rent-seeking business by reducing competition and achieving a longer copyright term or even to hold the rights permanently. In particular, from 1731 to 1775, they developed ‘coalitions’ with authors under the guise that they were helping them.<sup>7</sup> Under this

condition, authors had to transfer through private contracts the effective use of their 'sole and exclusive' copyrights to publishers chosen for printing and selling the works. In short, once the private contract has been signed, a 'very unequal bargaining' situation prevails in most cases between the author and the publisher (Towse 1999, 2003). All of these changes have placed publishers in a superior position vis-à-vis authors.

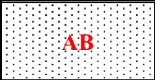
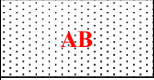
Despite the significant structural problems of the above-mentioned publisher-centered operational and value creation system, this fact has often been overlooked (Schlesinger 2017; Schlesinger and Waelde 2012). The vast majority of existing studies within the current debate on copyrights follows the notion of a 'coalition' by perceiving authors and publishers as one entity. The situation regarding copyrights is then framed as a conflict between 'authors-publishers' and 'consumers' (AC and BC in Table 1). In actual fact, this is very different from what the Statute of Anne initially focused on (BB in Table 1).

Today, the general belief is still that copyright law places the author at the epicenter of the industrial chain which then goes down to the consumer (see left in Figure 1). In doing so, the law would prohibit copy or imitation of the original work in order not to harm its revenues and to promote cultural creativity and diversity. However, in reality, once the private contract has been signed, the publisher becomes the epicenter of the industrial chain due to the exclusivity terms included (see right in Figure 1). The author is *de facto* 'integrated' into the publisher-led industrial chain, and it brings about two very critical problems.

First, the publisher-centered industrial chain has a direct impact on the printing, distribution, and sales of works, hence on their revenues. From a business and economic perspective, private contracts limit the bargaining power of authors and make them the weakest actor in the chain, with only a few exceptions in regard to superstar authors. The author's 'monetary benefits' or earnings thus depend crucially on the business capacities of the publishers with an assumption that the quality of the works among various authors are similar. At the same time, the contracted publishers may not do their best to diffuse the works as widely as possible as they have already secured exclusive rights of other works in great quantities, hence the other possible 'reputational benefits' earned through wide distribution will also be limited. Eventually, all of these consequences reduce the authors' earnings as well as the incentives for new creations – the opposite of the stated goal of copyright law.

Second, there is a principal-agent problem. In order to boost the earnings for the author, the overall revenues of the work should be maximized. Under private contracts and the publisher-centered industrial chain, the author has a number of limitations to monitor whether the contracted publisher is doing its best to maximize revenues from the work. Such a situation affects directly the

**Table 1.** Comparison: focus of copyright conflicts.

	<b>Authors (A)</b>	<b>Publishers (B)</b>	<b>Consumers (C)</b>
<b>Authors (A)</b>	AA	 AB	AC
<b>Publishers (B)</b>	 AB	BB	BC
<b>Consumers (C)</b>	AC	BC	CC

Notes: (1) The shadowed panels represent the main focus of the current conflicts on copyright duration; (2) The polka dot panels represent the focus of this study.

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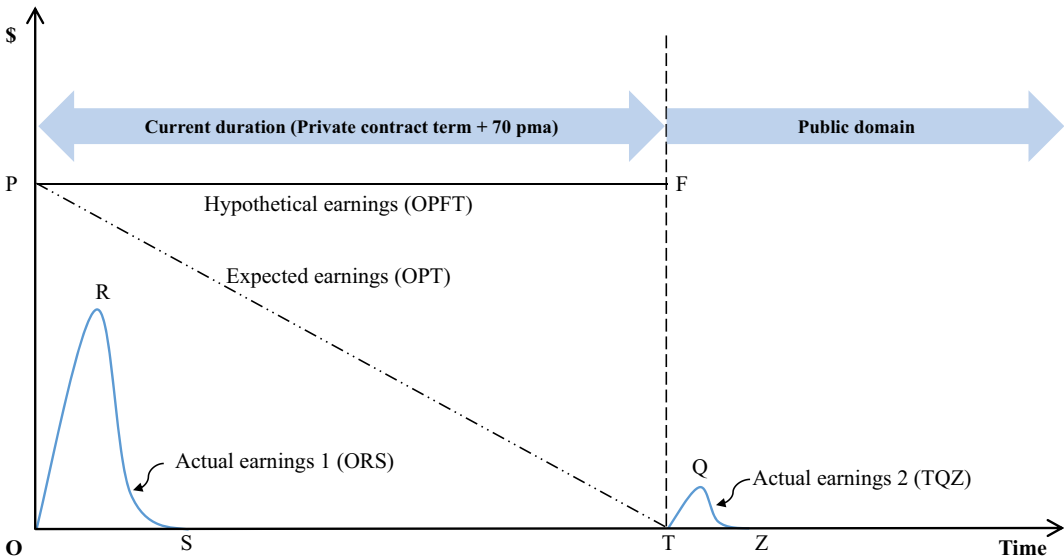
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### The actual earnings of authors under the current duration

Contrary to what authors and publishers may wish, the actual commercial life of a work is relatively short. According to the Australian Productivity Commission (2016), musical works have two to five years of commercial life on average. Within this short period, 70 percent of music generates no more revenues from the second year after release. The commercial life of books lasts between 1.4 and five years on average. Furthermore, 75 percent are unavailable after the first year and 90 percent of original publications are out of print within two years. The average commercial life of films is between 3.5 and six years and only very few films generate revenues after the sixth year. Lastly, most visual artistic works, such as spectacles and events, generate no revenues after two years from their release. This context brings about a very different result on the earnings of authors from what the copyright regime originally sought.

As these facts are not well known, it is often assumed that, under the current duration of copyright protection or 70 years pma, a work will generate annual revenues  $OP$  during the whole protected period  $OT$  (see Figure 2); hence total revenues can be illustrated as  $OPFT$ . Yet, in the real world, popularity or demand for a work will eventually fade away over time. Thus, the expected revenues from a work should be more realistically assumed as  $OPT$ . However, the revenue derived from the actual commercial life is very different. The typical revenue from a work appears as a bell-shaped path  $ORS$  (Gowers 2006). At Time  $T$ , the copyright expires and the work enters the public domain. This allows the existing publisher, non-contracted publishers, and any other business operators to utilize and diffuse the work without paying copyright fees to the author or the rights holder, thus less legal constraints. In this respect, a new commercial life is given to the work and it generates the revenues  $TQZ$ . It should be noted that under the current copyright regime defined on a post-mortem basis, authors have no chance to benefit from the revenues  $TQZ$ .

As a result, most of the authors' earnings, received during their life time, currently depend upon the revenues  $ORS$  which ends far too quickly. The magnitude of this revenue principally depends on the quality of the work, but after its release in the market the revenue also relies crucially upon



**Figure 2.** The actual earnings from a work under the current (or long) copyright duration. Notes: (1) For the sake of providing a clear illustration, Figure 2 does not represent exact time proportions. The length  $OS$  is very short since Period  $OS$  is only around six years at best (The Australian Productivity Commission 2016), whereas the length  $ST$  is much longer since it reflects more than 70 years (remaining lifespan of author after the end of a work's commercial life plus 70 years pma); (2) A similar observation can be applied to Period  $TZ$ .

the publisher's business activities, such as marketing and sales to maximize ORS – to make it higher and/or longer. This then becomes the main source that affects the total revenue. Under these conditions, the weak bargaining power of the authors and the principal-agent dilemma hamper the ability of works to generate their optimal (or maximal) revenue. Instead they induce the structural under-performance of the publishers which does not help authors to enjoy 'proper' earnings from their works. It is noteworthy that as time goes by the structural under-performance is likely to amplify. Hence, the incentives for authors to create more works will clearly deteriorate. This disadvantageous effect can be worse with a longer copyright duration.

### **Cultural creativity and diversity under the current duration**

Under the current copyright duration, produced works face a very long 'hibernation' period (ST). Due to their short commercial lives, most works are not available in the market during the period ST which is roughly 95.4 percent of the current duration OT. This calculation is based on the assumption made by European Commission (2008) that the average life expectancy is 80 years and a work is created when the author is 20 years old. In addition, the commercial life of this work only lasts 6 years and the author survives 54 years after the creation of this work, plus 70 pma (see note 8). When in hibernation, the cultural potential of most works cannot be fully enjoyed by society that impacts negatively upon cultural diversity in a severe way. Moreover, the fact that most publishers are actively engaged in discovering new artists and distributing newly created works makes it even less interesting for them to promote existing copyright-protected works. At the same time, established authors and their works are being held hostage by longer duration and private contracts. Despite their interest in these 'underutilized' works, non-contracted publishers cannot revitalize the works until they enter the public domain unless the copyrights are handed over. This sequence of events shows how the longer the copyright duration and the longer the hibernation period, the greater the loss of cultural diversity will be.

In general, it is believed that copying or imitating existing works discourages cultural creativity and diversity as it is considered to be immoral and often even illegal. At the same time, a large number of hibernating works do not help cultural creativity either. This is because certain authors happen to produce similar works to the ones that are copyright-protected but in hibernation; thus, not widely known. These authors can be 'inhibited' to produce their works for fear of being accused of copying those hibernating works – in other words, to avoid any possible economic, emotional, or even moral damage. Hence, the longer the copyright duration, the higher the level of inhibition, and the higher the loss in terms of cultural creativity. As a result, this vicious circle caused by a longer copyright duration brings about a lower level of earnings. This eventually discourages the creativity of authors.

In contrast to previous views, Parc (2020) and Parc et al. (2016) argue that copying or imitating existing works can promote cultural creativity and diversity. The cases of Vincent Van Gogh, Pablo Picasso, and other well-known painters clearly demonstrate that they did not feel any shame or immorality for copying or imitating existing works. Furthermore, their actions did not hinder cultural creativity and diversity (Parc 2020). It is important to note here that during the copyright term imitating works without permission is illegal, however imitating other works that are in the public domain is not. This fact shows that illegality has ties with the juridical term, not the act of copying or imitation *per se*. Clearly this means that copyrights are a pecuniary issue, not one related to cultural creativity or diversity.

### **Shortened copyright duration and its consequences**

The previous section demonstrated that the longer duration has neither a positive impact to increase the earnings of authors nor does it enhance cultural creativity and diversity. In order to make copyright protection more author- and culture-friendly, this section proposes to shorten the



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In this respect, these changes could potentially create a more author-centered industrial chain; thus, more earnings for authors.

Second, a shortened duration is also likely to change the business behavior of contracted publishers during the copyright term. Compared with operating under a longer copyright duration, publishers will need to seek out more effective business activities and to develop better strategies in order to maximize profits within this shortened period, leading to a greater utilization of the works they are in charge of. Such a propensity is very common in business (Narayanan 1985). In this context, publishers would offer greater earnings to authors in order to secure their newly released works. This is all the more the case because the reputational benefits of their previous works under the public domain can have a positive impact on the leverage of the authors when they negotiate the private contracts of their new works. Furthermore, with shortened duration, the performance outcome of business activities among publishers can be easily checked and compared as authors monitor it with their own eyes during their lives. Therefore, the private contracts can be more in favor of authors, thus significantly reducing the principal-agent problem. [Figure 3](#) illustrates the consequence of these effects: the revenues generated by the works could shift from ORS to OR'S' – bringing more revenues over a longer period. This shortened duration tends to increase the overall performance of the cultural industries.

### ***Cultural creativity and diversity under shortened duration***

While contracted publishers have more motivation to develop effective business strategies and activities in order to maximize the utilization of copyrighted works, authors will also have greater incentives to produce more works at a faster rate than before. The shorter hibernating period either ST' or S'T', instead of ST under long duration, ensures existing works enter the public domain earlier. At the same time, there are increasing reputational earnings through other media contents as shown with the case of Psy. The result is that cultural diversity can be more enhanced under a shortened copyright duration.

In this environment, authors have less fear of copyright infringement as there is a decreased risk of hurting moral rights. As shown in [Figure 3](#), authors face unintended infringement only during Period ST' at the longest or Period S'T' at the shortest, both of which are significantly shorter when compared with Period ST. Therefore, authors can concentrate on their creations with significantly less worry about negatively affecting the moral rights since many of the works are in the public domain and their existence is more widely known; thus, easy to avoid potential risks. As a result, more works will be created and available than before, a process that will unleash further cultural creativity and diversity.

In particular, it is easier for authors to be aware of various existing works that are in the public domain as they are utilized more often by various other media operators. Authors are able to observe and perceive trends and market preferences from the large number of works, regardless of their popularity or utilization, that are available under the period of public domain; this can enrich inspiration for new works. As many 'inspired' works can be freely produced, authors become more creative in order to generate wider appeal and differentiate their works more effectively. All of these processes are in fact crucial toward enhancing the next generation of works (Benkler 2006; Gillespie 2009). Furthermore, this aspect is clearly demonstrated by a number of exemplary cases throughout the history of art (Parc 2020). This enhanced productivity places authors in a more advantageous position when they sign a private contract. As a result, incremental improvements in the dissemination of works are likely to have a considerable aggregate economic value despite a short commercial life.

## Conclusion

There is a widely held belief that a longer duration in copyrights ensures higher earnings for authors. In emphasizing the critical role of authors, this paper argues that a longer duration with private contracts hinders an increase in the revenues from works, hence the earnings of authors. This is because the very limited bargaining power of authors and the principal-agent dilemma induce publishers to be structurally under-performing – that is, not effective enough at optimizing (or maximizing) the full cultural potential of the works they are responsible for.

As a solution, this paper suggests that, if well designed, a shortened copyright duration will clearly bring benefits to the vast majority of authors as well as society. This shortened duration induces publishers to develop more impactful business activities coupled with effective strategies in order to maximize the utilization of contracted works. Furthermore, authors can benefit from the reputational earnings of their works that enter the public domain much earlier than under the current system. More activities under the public domain period will allow authors to be more at the center of the industrial chain. They will also be able to concentrate on their creation without any fear of copyright infringement. Another benefit is that due to the earlier public domain period, many works that are not too outdated will become more readily available. In such a case, this availability would inspire authors to produce better works. Through various measures such as internet platforms and media outlets, they can be diffused faster and wider than before. Therefore, this system can contribute toward enhancing cultural creativity and diversity.

Some might argue that digitization has ruined a number of cultural industries as internet piracy and copyright infringement have been more prevalent than before. As this paper places these issues related to digitization, technological advancements, and their impact aside, they can be further analyzed in order to draw important implications that can be applicable during this period. In this regard, several real-world examples such as the emergence of Netflix or even the Korean music industry with K-pop can hint at ways to overcome copyright issues in the era of digitization (Parc and Kawashima 2018; Parc and Kim 2020). This task can be synergistically undertaken by utilizing and applying the findings of this paper.

There is no doubt that culture and its diversity should be protected and preserved. Culture consists of tradition and modernity in terms of the period in which it was developed. In other words, they can be described as either ‘accumulated’ or ‘accumulable’ heritages (Parc and Moon 2019). Surely, these accumulated heritages were once accumulable ones and have survived over time while being very prosperous. In our time, the value of the past shines on the presence of an accumulated heritage. If we are thinking about the future as well as the present, the value of accumulable heritages should not be neglected. In this regard, the role of copyrights is very critical. Without much restriction such as a long duration of copyrights, they can further promote prosperity and the wider availability of accumulable cultural contents which will be part of accumulated culture later.

## Notes

1. Refer to Rajan (2011) for further details regarding the aspect of moral rights in copyrights.
2. Regarding the voice of authors, there are many perspectives toward this issue especially since the rapid diffusion of digital technologies (refer to Spender [2009]). Still, it is often the case that well-known authors support a longer duration of copyrights, while others have a more neutral stance or even oppose it.
3. In fact, there is a third ‘in-between’ position. For instance, Chamberlain (2016) argues that a unified duration may not be an optimal solution because the various media outlets of culture (book, music, and film) do not possess the same commercial time horizon. Accordingly, he proposes tailoring duration by cultural medium. In the same vein, Landes and Posner (1989, 2003) propose to create an ‘indefinitely renewable’ copyright regime which gives authors the right to ‘renew’ at specific times the private contracts they signed with their publishers; thus giving back by the same token to these authors some bargaining power vis-à-vis their publishers. While Landes and Posner (1989, 2003) are based on economic rationales such as tracing costs, transaction costs, benefits of public

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goods, discount of the work's value, and rent-seeking behavior, this paper has at its center not only economic rationales but also the cultural dimension – from author's moral rights to cultural creativity and diversity.

4. There is a conventional understanding – emanating from industry, policy, and media circles – that file-sharing severely hurts artists and labels over many years. Yet much of the academic research conducted on this is conflicting and fails to arrive at any consensus (refer to Rogers [2013]). More importantly, this view has ignored new and alternative income sources of revenue such as concerts and sales of other derivative goods (Parc and Kawashima 2018; Parc and Kim 2020).
5. Regarding the private contract, a similar concept on 'contract' between author and agent has been dealt with by Caves (2000) and Thompson (2010). In those works, an agent is a third party that stands between the author and publisher and is viewed positively. By contrast, the contract mentioned in this paper stays between the author and publisher. Hence, here the agent means publisher and it is considered as an untrustworthy entity. In other words, the concept on contract in this paper is completely different from Caves (2000) and Thompson (2010).
6. Public domain is the period beginning after the expiration of the copyright where any firm or individual can utilize and disseminate formerly copyrighted works without paying copyright-based fees to the authors or copyright holders.
7. The English publishers thought that their rights to publish books under exclusivity was common law and should be perpetual. This led to the Battle of the Booksellers which lasted for thirty years and involved a series of legal cases pressing for their rights to prohibit other publishers from printing the works they were in charge of (Rose 1993).
8. The timespan of authors is covered in the impact assessment study prepared by the European Commission (2008) for the adoption of the 2010 Directive, which reads: 'This impact assessment shows that many European musicians or singers start their career in the early 20's. That means that when the [...] 50-year protection ends, they will be in their 70's and likely to live well into their 80's [...]. As a result, performers face an income gap at the end of their lifetimes.'

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