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Reclaim the state: public interest in copyright and Modern Monetary Theory

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Abstract

The literature indicates that the current copyright system does not fit in with the digital reality. The proposed solutions to these problems often come down to only minor modifications to the system. It is assumed that the copyright model resulting from international agreements, for some reasons or other reasons, is essentially appropriate and in practice will not be subject to any significant changes. This study proposes a very radical approach. First, it should be recognized that the copyright system is only a tool for achieving certain social goals - not an end in and of itself. From this perspective, it is important to conduct an analysis in the field of regulatory policy, as it serves the implementation of certain public goals. Second, the article shows that apart from the market model of creating and distributing intangible goods, such as works, there is a model based on the action of the state. Against this background, incentive

theory was presented, which is sometimes used to justify the system of copyright based on exclusive rights. Third, the article tries to recognize the role of the state, both as the entity financing the production of creation and organizing its process. The perspective of the Modern Monetary Theory and the concept of a Mission-Oriented Economy were helpful in this respect. Due to this, it was possible to break two basic myths. The first is that states cannot afford to finance creativity, and the second is that states are never the proper organizers of creative processes.

1. Introduction

Copyright is a mechanism supporting the market process for the production and distribution of cultural and intellectual works. In other words, copyright, as a system, is supposed to rely on markets as a means for rewarding creativity, locating in the users of a given work the very source of its financing. This model of production, however, is not the only existing one. Recognizing works as public goods, as well as their significance as indispensable building blocks of culture — and not only as ordinary commodities — while accepting the right to culture as a human right, raises the issue of considering the role of the public finance system in providing an alternative to the existing market-based model. Unfortunately, as often occurs in discussions concerning the use of public finances, debate tends to be limited to state budget constraints and the problem of public debt. In practice, this leads to the conclusion that we cannot do anything because states simply cannot afford the costs. As it turns out, this approach is inappropriate from both a theoretical and a strategic (political) point of view.

2. A brief history of the birth of exclusivity

To start with, copyright is not a natural law. Copyright — like any other human-made regulation — is the result of a political decision taken by society for a specific purpose, and only began to really shape up with the development of capitalism and its needs. Initially, copyright secured the business model of book production, and over time began to form the basis for the functioning of other creative industries.

Disputes about copyright, about the scope of exclusivity and permitted uses, their duration, and methods of protection, are basically disputes about the distribution of profits from the use of works — profits generated as part of the market method of producing and distributing works. A central myth of copyright law is that it was created to protect authors against those who commercially exploit the results of their work. Nevertheless, examining the history and development of copyright, and its importance within a capitalist mode of production, leads us to a completely different conclusion. Authors, although formally the primary recipients of copyright protection, were only a convenient excuse for the creation of the regime that is currently supported by copyright law (Gliściński 2016).

Exclusive rights, because they are the essence of this system, facilitate the operation of producers, publishers, and other capitalists who can run their business based on other people's works. At the production stage, the collection of appropriate rights makes it easier to obtain capital from investors, and at the operating stage, the appropriation of benefits. By purchasing rights from authors, producers obtain exclusivity in return for remuneration. From this perspective, it seems that the interests of authors and publishers are completely convergent. The former receives the money, the latter the tool of legal control over the work. Thanks to exclusivity, they can deal with the commercial exploitation of a given work without fearing that someone else, a competitor, will copy the goods they have produced, and start making money on it without having to bear the costs of their creation. From an economic point of view, regarding a given work, they are monopolists. Therefore, they can freely determine the price of their goods and decide who can use the work, where, when, and how. They can also limit the amount of a good available on the market and raise its price.

At this point, it should be emphasized that, from the very beginning of the system of exclusive rights, alongside the rights-owning producers there were competitors who did not accept the imposed rules. These competitors considered that the creation of artificial exclusivity by law did not in fact prevent the use of the intangible nature of the works. They knew that, once created, a work could be reproduced any number of times, which resulted in a different business model for the distribution of works. This business model gave the masses access to the latest literature at lower prices. Therefore, to combat such competition, it was not enough to state that competitors were disobeying the law. To deal with this situation, the rhetoric of the “sacred copyright”, “poor author”, and the “evil pirate” was born, and publishers tried to convince their customers that buying books from illegal sources is not only illegal, but also morally wrong. This approach also gave them arguments in negotiations with the authors. As a result, they could justify that the low remuneration offered to authors in exchange for acquired rights was caused by strong and unfair competition from pirates. The reason was simple: if only there were not those bad pirates who pay authors nothing at all, and thus can sell books at lower prices, the situation would be radically different.

Consequently, the mass publishing market, from the beginning, was based on two different business models. The official one was based on contracts between authors and publishers, high book prices, and a limited number of copies sold. The unofficial, pirated one ensured their wide distribution. The mass availability of illegal books was enormous and had a real impact on the cultural development of contemporary Europe, A. Johns even stating that there would be no Enlightenment without piracy (Johns, 2009, p. 50).

The creation of copyright was to enable the emergence of a new profession, the writer,

who now could make a living based on the creation of works free from the whims of patrons. Copyright, as a tool to support the emerging class of professional writers, was in line with the values of emerging free market capitalism, an ideal based on the work of a multitude of small producers. The problem is that the claim that copyright law made it possible for authors to live only from the fruits of their creative work is unfounded. This is a convenient myth that shows that if you are a good creator, copyright will “protect you”. The copyright system made it possible for some authors to become financially independent of the patronage of aristocrats, “Yet, ironically, the copyright system produces a new form of patronage—that of the market— which now subjects authors to commercial forces as their new patron” (Ng, 2008, p. 423). This means that not all creators can use this system equally. For many producers, it is only a supplementary source of income (cf. Kretschmer et alii, 2018).

3. The theory of incentives (or the simplified justification of exclusivity)

The justification for the existence of exclusive rights argues that without such a system works would not be produced at a socially optimal level. Neoclassical economics explains that the protection of intangible goods with exclusive rights serves to solve the problem of market failure, which relates to the fact that works meet the criteria for public goods. According to this approach (called the theory of incentives), it is assumed that intangible goods, due to their *non-excludable* and *non-rivalrous nature*, will not be produced at the socially optimal level. This is because goods such as intellectual

and cultural works, the production of which is expensive, can be cheaply and easily copied by illegal entities (the so-called pirates) and then sold at lower prices than those of the rights holders. Consequently, rights holders would not be interested in producing such goods, which means that new works will not be created. Authors acting as rational individuals do not create for their own or someone else's pleasure: they create only to be able to earn money from their work. Therefore, exclusive rights ensure the supply of intellectual goods.

This well-known reasoning has several shortcomings. It is based on a variety of assumptions, and as Micha Kalecki pointed out: "If you make stupid assumptions, you come to stupid conclusions"¹. The theory of incentives is an incomplete application of the neoclassical theory of public goods to the problem of the production of intangible cultural works. While it is often emphasized that strengthening the system of intellectual property rights will lead to better results, this is not based on the theory of public goods. As some economists stress, intellectual property rights, as a system regulating the production and distribution of intangible goods (i.e., works) through exclusive rights, do not constitute an optimal mechanism. Protecting intangible goods with exclusive rights, while solving the problem that these goods do have features of public goods, also generates new ones, and can be economically ineffective. As mentioned by J. E. Stiglitz: 'It is more efficient to distribute knowledge freely to everybody than to restrict its use by charging for it' (Stiglitz 2008, p. 1700). Here, we come to the heart of the problem of the relationship between the incentive theory and the theory of public goods as justifications for copyright. The neoclassical theory of public goods is based on the logic of efficiency. For this reason, this theory, unlike the theory of incentives, by no means indicates that the best (most effective) way to solve the problem

of public goods is (always and under all circumstances) to privatize them (Gliściński 2018). Regardless, the proponents of the incentive theory advocate a policy that transforms information into an object of monopoly control, treating it as intellectual property: "However, practically every economics textbook goes to great lengths to show that the monopoly is inefficient. In fact, monopolies are antithetical to the ideal markets that markets supposedly represent because monopolies annihilate the very competition that supposedly acts as the lifeblood of markets" (Perelman 2002, p. 182).

4. Platform capitalism: the savior of techno- optimists

The existing strategies related to the use of copyright as a tool to ensure open access to culture have undoubtedly broadened the field of discussion. Ultimately, however, one can conclude that openness strategies are not always able to ensure stable financing, even if it is possible to point out that a means of financial security for creators can be extracted from modern technologies through *disintermediation*, *hybrid transactions* (Ricolfi 2015, p. 150) *crowdfunding*, *crowd-sourcing*, or other models of participatory creative production (Poujol 2019). These models are supposed to provide authors with other sources of income, bypassing the old intermediaries. Proponents of this approach place copyright conflicts in the context of the civil liberties of Internet users, more than in terms of remuneration rights. That is why Lawrence Lessig focuses on amateur creativity — for fun and for the sake of self-realization — without thinking about rewarding for it. Such creativity and such motifs to a large extent undermine the neoclassical

assumptions about *homo oeconomicus*, and while this approach is important, it does not solve all the problems. Technology by itself will not give creators real independence, both in terms of freedom of speech and financial autonomy.

First of all, both the old capitalism of the creative industries and the new capitalism of platforms are still different forms of the same phenomenon, based on the exploitation of authors' labor. The techno-optimist approaches, as pointed out by Gavin Mueller, "neglect or mystify the role of labor as a source of antagonism" (Mueller 2018, p. 28). It must not be forgotten that, even in a digital environment, people need to meet their basic needs for food or sleep. "In our world, this means that almost everyone must work, and that work exists in an economy structured in specific ways" (Mueller 2018, p. 2). When there is no financial security for survival, any additional nonfinancial value (e.g., recognition, fame) becomes less important. In this new phase of capitalism, a new creative workforce is emerging, geared toward risk and flexibility of employment. In return for freedom and the possibility of avoiding routine work, cognitive office representatives are forced to give up social security. The main source of value is no longer routine work, but new (innovative) ideas. Therefore, giving such workers a certain degree of freedom is a necessary condition for creative production (Mueller 2018, p. 45-46).

Some online platforms can function thanks to the creativity provided by the authors, and some self-employed creators can make a living from their creativity distributed through them. The question is whether it is a stable and fair earning model for everyone. Perhaps creators who live from income gained outside of creative work, or who have already gained financial independence and have free time that they can devote to creative production, are best served by this model: "Free time for personal development turns into a new source of value that can be extracted" (Zygmuntowski,

2020, p. 94). The appropriation here is therefore not due to exclusive rights, but due to the fact that the platform is necessary for communications between creators and their audiences. The availability of technology provided by the platform becomes a necessary condition for the elimination of traditional intermediaries (producers, publishers).

There is no complete disintermediation here, but the replacement of traditional intermediaries with new ones. Both have the capital necessary for creators to reach audiences for their works. The former based their business models on the acquisition of rights from authors and exclusive control the use of works, while the latter do not need such rights. The former, by collecting rights from creators, take the risk of organizing the entire enterprise in exchange for potential residual profits. The latter, at the production stage, enable creators to access the capital necessary for production through crowdfunding and the work of specialists (crowdsourcing). Platforms, like old intermediaries, also play an important role in the distribution stage. At the same time, the production and distribution models of works are being transformed. In the case of participatory models, this means a different way of organizing and distributing capital than the traditional one. Thus, there may be a process of democratization of production consisting of enabling independent creators to obtain funds for production outside traditional channels, thus bypassing financial censorship, i.e. the inability to create due to the lack of access to cash. At the same time, such platforms receive a commission on each transaction, which is sometimes referred to as a form of parasitic capitalism.

Most importantly, at present, the profit sharing rules for sharing works on platforms remain non-transparent (Poujol 2019, p. 43, 285-287, 343-359, 380).

Secondly, all these solutions, as they are based on the methods of decentralization,

are not appropriate for every type of creative activity and for every purpose behind the use of creative works. Not every type of creativity that is socially desirable will find its financing in the market — both in the traditional version of creative industries based on the “old” copyright system and in the version of platform capitalism. Moreover, treating works as objects of copyright implies the recognition that only this model of organization of production, financing, and dissemination is appropriate or desirable.

A good example of a case in which such a model, based on the logic of property rights, is not an appropriate way to regulate creativity, is that of works of cultural heritage. In such cases, works constituting cultural heritage should be viewed through the prism of the right to culture as part of the human rights system: “When such an approach is taken, copyright (and other IP rights) is important, but not as an end in itself; rather it becomes a means for the realization of the goals of cultural rights and of the right to culture” (Waelde, Cummings, 2014, p. 8). None of the international legal instruments provides a definition of a ‘right to culture’ or ‘cultural rights.’ The literature identifies various rights that are collectively referred to as rights to culture, which, in general, can be defined as part of the human rights system, including the ‘right to access, participation in and enjoyment of culture’². From this point of view, public funding seems to be a necessary complement to the system of financing creative creation through copyright or platform capitalism. The contemporary right to culture requires not only that public authorities ensure that they refrain from interference in the sphere of artistic expression and access to artistic culture, but also that they fulfill a “number of positive obligations, in particular regarding fair and universal access to financing of artistic life” (Młynarska-Sobaczewska 2018, p. 208).

Of course, the issue of public financing of the creation and distribution of works is not limited to the cases of exercising the right to culture. Generally, it is about all kinds of merit goods. These are goods the consumption of which is assessed as socially desirable, and access to them should not depend on level of income or willingness to pay. At the same time, the lack of consumption of such merit goods is detrimental not only to the person who has no access to them, but also to society as a whole (Stiglitz 2000, p. 86-88). The classic examples of such works, which are socially desirable goods, are educational materials or scientific literature. The outputs of creating educational resources or research projects are, *inter alia*, publications, monographs or other types of teaching aids. However, the financing of their creation is not always accompanied by compliance with the principle of the prohibition of double financing. Therefore, society pays twice for the production of these materials — first directly in the form of public funds, then indirectly through the rent from the copyright monopoly. Regardless of that, from the perspective analyzed in this article, it is more important to assess whether a given socially desirable good should be created or not due to budget constraints of public finances. It is often repeated that the state simply cannot afford to provide support for creative activity at the appropriate level. Accepting such a narrative, however, means that there is no other way to secure financing for the creation of works than private financing, such as the copyright system or the mechanism of platform capitalism. In other words, a system of private organization of the processes of production and distribution of these goods remains the only option.

5. The regulation of intangible goods from the perspective of the public interest

Regulatory policy in the field of intangible goods such as works (and inventions) requires the assumption that the content of rights must be adapted to the purpose for which these rights are created. Copyright (or other intellectual property rights) do not have a predetermined shape. Their content is solely the result of a political decision which should be based on scientific research (Washington Declaration on Intellectual Property and the Public Interest, 2011). We need to start treating copyright as a tool for achieving social goals, which is to provide the public with access to works, and not as an end in and of itself. At the same time, the concept of public interest is itself not clear. From a normative point of view, the public interest or general interest clause is known in various legal systems, and this clause is applicable under Article 1 of Protocol 1 to the European Convention on Human Rights (Grgic, Mataga, Longar, Vilfan, 2007). As it turns out, it is not possible to clearly distinguish between public and private interests. This occurs, *inter alia*, because there are different ways of defining interest, which translate into different conclusions. The public interest is sometimes equated with the interest of the state or nation (Aristotle, Hegel, Fichte), the sum of the interests of individual individuals (Bentham, Adam Smith, John Stuart Mill) and finally with the interest of all mankind (Geiger, 2013, p. 163-164). The concept of public interest does not fit neoclassical economics, which assumes that optimal results for society are achieved when individual individuals maximize their utility. Under this

school, it is assumed that governments cannot “actively and productively contribute to society, with actions that exceed the mere role of fixing market failures” (Ehnts and Höfgen, 2020, p. 7). In contrast, another concept can be found within the framework of heterodox schools, as shown, for example, by William Mitchell, L. Randall Wray, Martin Watts:

Public purpose is inherently a progressive agenda that strives to continually improve the material, social, physical, cultural, and psychological well-being of all members of society. It is inherently ‘aspirational’ in the sense that there is no end because its frontiers will continually expand (Mitchell, Wray, and Watts, 2019, p. 11).

From the perspective of this study, the notion of public purpose, despite the lack of clarity, should be understood as an expression of democratic choices, which essentially depend on social context and may change over time. Generally speaking, “the public interest refers to the outcomes best serving the long-run survival and wellbeing of a social collective construed as a ‘public’” (Bozeman, 2007, p. 12). It seems appropriate to indicate that providing remuneration to authors and ensuring the protection of investments made by producers through copyright are merely one method of achieving the public goal, which is to provide society with wide access to works and inventions. Since copyright also generates several social costs (including limiting the freedom of speech or creating the appearance of fair remuneration for authors), other solutions should be sought.

5.1. In search of a mission (i.e. beyond the theory of public goods)

Obviously, treating privatization via copyright as the only appropriate solution to these problems has its origins in the triumph of the neo-liberal approach to economic policy. In this context, it is of strategic importance to recognize that the role of the state in supporting access to culture is not strictly solving the so-called market failures problem resulting from treating works as public goods. The theory of public goods points to situations in which private markets are unable to provide specific goods at the socially optimal level, but, as already mentioned, the solution to this problem is not always the transformation of such goods into private goods (e.g. by making them exclusive to copyright): “While people can use economic theory to oppose interference with the market for private goods on the grounds of efficiency, they should also accept the logic of economics to support the public provision of public goods, unless they are just being hypocritical and only invoke considerations of efficiency for purely ideological reasons” (Perelman 2002, p. 166).

A good example of such an approach is the issue of public funding of research and the model of making it available to the public. For many years, it was considered that the results of research financed from public funds should be directly in the public domain “for all to access and use in commercial developments and applications” (Greenhalgh, Rogers 2010, p. 94). With the dominance of free-market rhetoric and the TINA (“there is no alternative”) argument, this approach has changed. This way of thinking can be clearly noticed in the so-called Bayh-Dole model, named after

an American statute of 1980 which introduced new rules for the use of inventions financed with public funds. From then on, what was once considered to be in the public domain — because it was financed with public money — could become the subject of patents sold and licensed to private entities for their exclusive use. Although this model does not bring the benefits assumed by its supporters, it is commonly accepted as a method of managing intangible goods created at universities (Sampat 2009; Mowery, Nelson, et al., 2004). Obviously, such an approach contradicts the logic of public goods theory. Since funds were provided for the creation of goods such as research results, there is no justification for the subsequent protection of exclusive rights. Consequently, this leads to a breach of the principle of the prohibition of double financing.

This problem must be viewed from a broader perspective. The neoclassical theory of public goods, although it constitutes a justification for public financing, only do it in a narrow selection of cases. That is, in situations where there is a so-called market failure. But the point is not that the state should only enter where the market is unable to provide financing. As **Mariana Mazzucato** points out, what is needed is a mission-oriented economy. In this approach, the role of the state is not only to fix market failures, but to shape them generally. Neoliberal policy assumes that government intervention in the economy is ineffective, though this does not mean that the complete transition *from the state to the market* follows as a consequence: “[T]he system the neoliberals allegedly aspire to – (...) a strictly market-based order entailing the extension of the market and the market-making mechanism into all areas of life – requires a strong state structure to institute, maintain, and enforce ‘the market’” (Mitchell, Fazi, 2017, p. 97). This can be clearly noticed in specific regulations, such as public procurement rules or

expenditure rules that determine the levels of public debt. From a copyright perspective, the most important example of such a regulation is the TRIPS agreement. As emphasized by F. Block and M.R. Somers, one can clearly notice the tension between the ideological support by international corporations of the so-called free market and their practical striving to create regulations corresponding to their interests (Block, Somers, 2014, p. 40).

On the one hand, there is messaging indicating that any state intervention is ineffective, or that we cannot afford it; on the other hand, the state is still active and supports the projects it chooses. Therefore, the perspective that Mazzucato proposes seems to better structure the role of the state, by situating it within a mission-oriented approach: “It means choosing directions for the economy and then putting the problems that need solving to get there at the center of how we design our economic system” (Mazzucato, 2021, p. 8). Selecting missions is a highly complex task, and in Mazzucato’s opinion, such a mission must meet several criteria, the most important being that it should *be bold, inspirational, and of wide societal relevance*.³

5.2. Limiting exclusive rights

It seems that one of such missions may also be to provide society with mass (and inclusive) access to culture, educational resources, or scientific works. By access to these goods, I mean not only ensuring the possibility of passive acquaintance with works, but also their reuse and transformation. Adopting such a perspective means the need to change — and limit — the current scope of exclusivity. Copyright is a method for achieving certain social goals and should not be considered an end in and of itself. This is why statements included, for example, in the InfoSoc directive,

highlighting the need to ensure the ‘highest level of protection’, are rhetorical. At the same time, they influence the shape of the copyright system and constitute the basis for the formulation of interpretative prescriptions with actual legal consequences. Therefore, it must be concluded that the level of copyright protection should not be “the highest”, but the one most adequate to the intended purpose⁴. In other words, exclusivity in the case of intangible goods should be ensured only to the extent necessary for the purposes sought (Kur and Schovsbo 2009). Some works are created as commodities, some are publicly funded, and some are simply expressions of creativity. Regardless of the reasons for which the works were created or who financed them, they constitute — at least potentially — material for new works. Copyright, like other intellectual property rights, is not inherently exclusive, and we need to re-examine what uses of works should be covered by exclusive rights, which only by a right to remuneration, and which should be left entirely in the public domain. One of the proposed solutions is complete replacement of the system based on exclusive rights with non-exclusive rights (e.g. rights to remuneration), or at least increasing the situation in which the use of intangible goods is not protected by exclusive rights. (Ricolfi 2015, Frosio 2015, Gliściński 2018). Following that line of reasoning, it can theoretically be concluded that the use of works, to a certain extent, should be covered by: 1) exclusive rights, 2) nonexclusive rights (e.g., the right to remuneration), or 3) remain entirely in the realm of freedom, i.e., in public domain.

International regulations currently restrict the freedom of states to choose the proportions in which these three spheres of use may be regulated: “TRIPS is a clear attempt to remove IPRs from the realm of global politics and to (re)define them as only subject to arcane and technical legal debate” (May, Sell, 2006, p. 162). This,

nonetheless, does not mean that since a specific type of intellectual property right was created due to political will in the past, it cannot be reshaped into a different one in the future. The return of the state to the field of copyright and, more broadly, intellectual property rights, depends on a change in international law.

Proper shaping of intellectual property rights requires accepting the fact that in some situations exclusivity as a mechanism supporting the market financing of works may be desirable, while in others that may not be the case. It should be stressed that what is “good for the entitled person” is not always desirable from the “social point of view”. Leon Petrażycki more than 100 years ago in ‘Introduction to the Science of Legal Policy’ emphasized this fact by pointing out that there is no doubt that rights grant certain benefits to individual subjects, but the assessment of rights only from the perspective of the rights holder is incorrect, because it leads to “unilateral consideration of the private and economic interests of one party in the account of the interests of the other party and to ignore the socioeconomic point of view” (Petrażycki, 1968 [1897], p. 47). This approach is not surprising in the field of private rights. Even Rudolf Ihering himself, opting for the “social theory of property”, affirmed that “[a]ll rights of private law, even though primarily having the individual as their purpose, are influenced and bound by regard for society. There is not a single right in which the subject can say, this I have exclusively for myself, I am lord and master over it, the consequences of the concept of right demand that society shall not limit me” (Ihering, 1913, p. 396). In this context, following Oscar Lange, it should therefore be indicated that “The source of numerous errors in the reasoning regarding economic issues is the confusion of the private-economic and social-economic points of view” (Lange, 1937, p. 307). This perspective opens the way to recalibrating the system. Perhaps the basis for building a system

of regulating intangible goods should not be exclusive rights at all? Perhaps it is the current knowledge about the economics of the functioning of such goods, the recognition of their importance as an element shaping culture, or finally a real strengthening of freedom of speech, access to education, and the freedom to conduct scientific research that should support the system based on the model of nonexclusive rights?

5.3. The entrepreneurial state

An exclusive rights market, then, is not the only way to provide financing for creativity: the state can and should actively participate in this area. The state-funded organization of the production and distribution processes of works should be treated as equivalent to the market model, and an informed political decision should decide when (and to what extent) works are to be produced and distributed through the market mechanism or through the public system. These mechanisms cannot be treated as a zero-sum game, where the growth of one must take place at the expense of the other (Mitchell, Fazi, 2017, p. 98-101). The so-called free market can only function with undervalued, albeit important, state support. This was already pointed out by Karl Polanyi in *The Great Transformation*: “The road to the free market was opened and kept open by an enormous increase in continuous, centrally organized, and controlled interventionism” (Polanyi 2001 [1944], p. 146). Mazzucato, researching various sectors of innovative industries — ranging from smartphones, the pharmaceutical market, biotechnology, and nanotechnology companies — pointed out that behind all these areas, which are considered to be the work of free market and Silicon Valley entrepreneurship,

there was actually significant state intervention. This is because the role of the state is not limited to the co-financing of these innovations. In many cases, the state bore the risk of organizing these processes and played the role of an entrepreneurial state. In this way, Mazzucato refutes the myth built on the simple dichotomy of the entrepreneurial private sector and the bureaucratic (non-innovative) state (Mazzucato, 2014). Of course, the state does not have to do all of this “in person”. Quite often, it chooses other players to bet and to invest in. And, as with private investors, sometimes the public sector succeeds and sometimes it fails: “The question is not then whether governments can pick winners, as they obviously can, but how to improve their ‘batting average’” (Chang, 2010, p. 135).

5.4. Yes, we can afford it

Modern Monetary Theory (MMT) provides a theoretical framework showing why it is not money, but resources, that constitute the real constraints of public policy (Kelton 2020, Wray 2015). The concept of monetary sovereignty and its implications for the size of the policy space available to a government are vital (Ehnts and Höfgen, 2020, p. 7). The basic misconception, which Stephanie Kelton calls a myth, is treating the state budget like a household budget. This logic assumes that, as in the case of households, the state cannot spend more than it earns. If the state decides to take such a step, it must borrow just as a household. Consequently, a public debt is created that will have to be repaid, i.e., our public expenses will have to be reduced in the future. This line of thought, however, confuses the position of the currency user with that of the currency issuer. The “[I]ssuer of a currency faces no financial constraints (...) a country that issues its own currency can never run out and

can never become insolvent in its own currency’ (Mitchell, Wray, and Watts, 2019, p. 13). MMT demonstrates that the government is not dependent on revenue from taxes or borrowing to finance its spending in its own currency. “The government is the only supplier of what it demands in the payment of taxes. Hence, the government has to spend its currency into existence first, before non-government actors can use it to pay taxes or purchase bonds” (Ehnts, Höfgen, 2020, p. 9). A different situation occurs when the government borrows a foreign currency; in that case, it only acts as the user of that currency, and many analyses of the household budget may apply. But the issuer of a sovereign currency creates money “exclusively through keystrokes on a computer controlled by the government’s fiscal agent” (Kelton 2020, p. 28), that is, the central bank: “As former Fed chair Alan Greenspan testified, ‘There’s nothing to prevent the federal government from creating as much money as it wants and paying it to someone.’ His successor, Ben Bernanke, went further, describing how the government actually pays its bills: ‘It’s not taxpayer money. We simply use the computer to mark the size of the account.’” (Kelton, 2020, p. 256).

Another myth is that deficits are evidence of overspending: “Fiscal surpluses drain money out of the economy. Fiscal deficits do the opposite” (Kelton, 2020, p. 96). That is why public finances should not be balanced but based on the assumption of functional finance: “The central idea is that government fiscal policy, its spending and taxing, its borrowing and repayment of loans, its issue of new money and its withdrawal of money, shall all be undertaken with an eye only to the results of these actions on the economy and not to any established traditional doctrine about what is sound or unsound” (Lerner 1943, p. 39). Any self-imposed procedural regulations (e.g., in constitutional regulations determining the permitted level of public debt) “that constrain

the government in its ability to spend are to be considered as economically unnecessary in the context of currency-issuing governments and can only be grounded in political reasons” (Ehnts, Höfgen, 2020, p. 10). Currently, governments around the world have created unprecedented amounts of money “out of thin air” to combat the COVID-19 pandemic. In the same way, money was introduced into the banking system in connection with the 2008 financial crisis (Kelton, 2020, p. 13, p. 28; Mazzucato, 2021, p. 185). MMT, it bears mentioning, is not a crisis theory, since it does not describe how governments can deal with extreme situations. MMT is a theory that describes how issuers of a sovereign currency spend, under all circumstances.

But isn't all this just a utopian wish? Could it be that governments have no limits and can spend as much as they want? Repeating after L. Randall Wray: “Domestically, government can buy anything for sale if it is for sale in terms of its own currency” (Wray, 2015, p. 55). Restrictions appear when some goods are not available or are available only for a foreign currency. In the first case, we are dealing with limitations related to existing resources, and in the second, with the need to exchange currencies. The first case is the one associated with the phenomenon of inflation as a real constraint.

Neoclassical economics, through the Quantitative Theory of Money, argues that inflation is a purely monetary phenomenon. According to this approach, money creation as described above will automatically lead to inflation. This theory “has intuitive appeal and is not very different from what we might expect the average layperson to believe: that growth in the money supply causes the value of money to decline (that is, causes inflation)” (Mitchell, Wray, Watts, 2019, p. 262). Without going into further considerations, from the point of view of MMT, inflation can occur when governments spend more than the real resources

existing in the economy would allow them to (labour, natural resources, productive capacity — factories, raw materials, know-how and so on). So, if the government wants to buy more protective masks than there are currently available for sale, assuming that the factories producing them are working at maximum capacity (assumption of full utilization of production resources), the price of these masks will go up. At the same time, it should be reminded that the supply of these resources is not static: “Investments in physical capital (machinery, factories) and the underlying organizational and technological innovation can expand capacity” (Mazzucato, 2021, p. 187).

From this perspective, it seems clear that fiscal policy has an important role to play in achieving the public goal of ensuring public access to intellectual goods. The role of a democratic decision is which class of works — created with public funding — should be available, and under what terms. Scientific works produced with the backing of a grant? Maybe educational materials created by teachers? Works of pure entertainment? The important thing is that we can afford to provide the public with access to these goods whenever a public goal supports bypassing the expensive copyright system. To that end, we can use various models of cultural policy which aim, at the same time, to ensure access to public funds and freedom of speech (Młynarska-Sobaczewska 2018, p. 172-184). We can also look for other solutions, better suited to the digital reality. We could adopt, among other examples, Dean Baker's idea for Artistic Freedom Vouchers⁵ — each citizen would receive a voucher of a certain amount, which could be transferred to the implementation of a certain creative project: “Such an approach would improve financial security for creative workers and increase the size and value of the creative commons for future artists. Moreover, this approach is inherently biased towards community art, as a local artist

can pre-fund her next album with seed money from a few dozen friends and relatives' vouchers" (The Modern Money Network, 2014).

5.5. If we can afford it, how much should we pay?

If we recognize that there are different models for the organization and financing of the creation of cultural and intellectual works, this will mean the need to define when market financing — based on copyright, in some form — is appropriate and when public financing is better. In this respect, it should be helpful to recognize that certain uses of works are carried out in the public interest, and consequently the costs of their financing should be covered by the public finance system. If so, what mechanism should be adopted to determine the appropriate remuneration paid from public finances?

The simplest answer would be the one that indicates that regardless of the source of financing, the amount of remuneration should be the same. Orthodox economists insist that the market sets all prices, and the system of exclusive rights is based on a subjective valuation made by the parties to the transaction. This subjective valuation is sometimes referred to as the "market valuation". The system thus offers a chance to the rights-holder (the "poor author") to ban the use of his work if it considers that the proposed price is low. This is a standard approach based on the assumption that social wealth is created through voluntary exchange in a free (competitive) market. According to this approach, exclusive rights, both in relation to tangible and intangible goods, constitute the legal basis for free exchange, "which achieves allocative efficiency by moving goods from people who value them less to people

who value them more" (Cooter, Ulen, 2014, p. 94). So if Milton wants to buy something that belongs to Friedrich for an amount not higher than 100 (e.g. a pencil), then, to Milton, the pencil is worth 100. If Friedrich is willing to sell this pencil for any amount greater than 90, it is worth 90 for him. Under such conditions, the deal could be between 90 and 100. If the pencil is sold for 100, social wealth will increase by 10. Why? Simple: before the deal, Milton had 100 cash and Friedrich had a pencil worth (to him) 90, so the total value of wealth to society is 190. After the deal, the total value of wealth to society is 200. "So what is wealth? It is the sum of all goods, the value of which is measured in money, and revealed through the willingness to pay" (Stelmach, Brożek, 2006, p. 138).

Free exchange, told in this way, seems convincing. The real problem is that most people, including creators, are not faced with this voluntary choice: "An analysis of the essence of social relations leads Marx to the conclusion that behind the veil of formal equality before the law and freedom of contracting lies the capitalist monopoly on ownership of the means of production and the consequent need for workers to sell their ability to perform work" (Osiatyński, 1978, 249). Therefore, for a wage exchange to be in fact voluntary, the employee should not only be formally able to choose the job he/she wants to do (and not be forced to do so), but at the same time "have the real capacity (a) to independently work for her/his own account and (b) to simply not work" (Sindzingre A., Tricou F., 2021, p. 31). In addition, "[w]hen initial conditions are unequal, voluntary, informed, and mutually beneficial exchanges, they will be coercive and lead to inequitable outcomes even if exchanges take place under competitive conditions" (Hahne, 2014, p. 274).

If we deviate from such a subjective (and imaginary) determination of remuneration, we may realize that, in reality, "[b]usiness enterprises and governments set most prices – the

former with increasingly vast market power and the latter with the power of the public purse” (Tcherneva, 2000, p. 51). Contrary to neoclassical thinking, there are no mechanisms in capitalism that allow creators, understood as factors of production, to be paid in line with their productivity. Determining the amount of remuneration, as in any other case in capitalism, is a derivative of bargaining power. This state of affairs raises a number of problems related to the determination of remuneration for the use of works for public purposes. On the one hand, if we put the creator and the state against each other, it turns out that the former is in a worse negotiating position. On the other hand, if the state invests in the creative process, then — following Mazzucato — one can ask: “how the state can reap some return from its successful investments (the ‘upside’) to cover the inevitable losses (the ‘downside’) — not least, to finance the next round of investments” (Mazzucato, 2018, p. 264). Consequently, it seems necessary to look for some form of objective determination of this remuneration. What elements should be considered when determining such remuneration, and what procedure should be used for this purpose are open questions, and not merely technical ones: “[C]ivil servants are not just market fixers but value co-creators and shapers” (Mazzucato, 2021). Understanding the state not as a mechanism to correct market failures, but as a mechanism for carrying out a public mission, also means the need to develop a public mechanism for determining appropriate remuneration for using works in the public interest.

6. Conclusions

The current copyright system requires a thorough reconstruction. The starting point for designing a new system should be a clearly

defined public goal. For the purposes of this study, I have understood that this goal is to ensure public access to works, and that remuneration is an important means for achieving said access. This does not mean that the system must necessarily be based on exclusive rights. This shape of these rights was developed along with the development of capitalism and for its needs. However, this method of production is neither the one nor the most desirable. Recently, platform capitalism has emerged as an alternative to the “old” way of producing works, but it also does not solve all the problems that copyright has as a model, especially those related to the fair remuneration of authors. A possible alternative seems to be creating production and distribution models for works based on public funds — models that we can afford, as MMT teaches us, with the state financing the creation and distribution of works unconstrained by exclusive rights. Otherwise, as is often the case today, we will have to continue to deal with the problem of double financing, while an alternative exists: “Creating publicly funded, decentralized systems of cultural production in parallel to the existing proprietary system of copyright subsidies would enable the public to compare, for the first time, the merits of proprietary versus non-proprietary culture” (The Modern Money Network, 2014).

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Notas finais

1 I quote after J. Osiatyński, in the film: J. Miklaszewski (director), Kalecki. Genius Forgotten, 2012, 10 minutes 18 seconds to 10 minutes 40 seconds.

2 http://www.unesco.org/culture/culture-sector-knowledge-management-tools/10_Info%20Sheet_Right%20to%20Culture.pdf

3 Today, one of the most important problems facing humanity is the issue of global warming. Therefore, Mazzucato proposes applying this approach to Green New Deal policies (Mazzucato, 2018).

4 See further on the development of legal policy, including Civil Law Policy, in: Petrażycki L., Wstęp do nauki polityki prawa, Warszawa 1968, Wróblewski J., Teoria racjonalnego tworzenia prawa, Wrocław 1985, Wróblewski J., Zasady tworzenia prawa, Warszawa 1989,

5 <https://cepr.net/report/the-artistic-freedom-voucher-internet-age-alternative-to-copyrights/>