екологічних ризиків спонукає до здійснення правового втручання у господарські відносини з метою збереження довкілля для нинішнього і прийдешніх поколінь.

Зазначеним проблемам і викликам присвячена панельна дискусія щодо перспектив розвитку господарського, повітряного та космічного права.

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THE ORPHAN WORKS PROBLEM AND THE FUTURE OF INTELLECTUAL PROPERTI

Economic analysis has always played a central role in the development of Intellectual Property (IP) law. The monopoly rights granted to IP right (IPR) holders can be viewed as a form of subsidy intended to avert market failure. Since information exhibits characteristics of a public good, such as non-rival consumption and non-exclusivity, in the digital environment, the tendency to market failure increases, as information is more susceptible to copying and distribution with neither significant costs nor loss of quality. This makes information markets prone to market failure and, correspondingly, requires a policy response in the form of a government subsidy or direct provision. If a subsidy is in fact provided, granting a legal protection to the resulting information can be seen as a double subsidy.

The market failures are most evident in the cases of ‘autonomous’ art and ‘pure’ science. The latter, according to Michael Polanyi, depend on “tacit knowledge” and cannot be planned [1]. This also means that it cannot support itself. To “relieve inventors from the necessity of earning their rewards commercially”, Polanyi proposed to abolish IP and to replace it with “a system of appropriate governmental action”, whereby tribunals of experts would be evaluating inventions’ worth and disbursing public funds according to a graded scale of authorial contribution [2].

Direct government provision for the autonomous art, or *l’art pour le art*, has been advocated on similar grounds. According to the artistic world’s ethics, an artist seeking to win recognition among peers must not align his or her work with the tastes of the masses and produce mainstream works in the hope of commercial success. As a result, the field of literary and artistic production generates a peculiar reverse economy: an artist can only win professional recognition by losing on the territory of monetary rewards and *vice versa*, the

one who loses in economic terms, wins in professional terms [3]. Since their works are not made for the tastes of the masses in the first place, autonomous artist do not have the bargaining power to derive substantial economic benefit from copyright [4]. Government subsidies for art creation are not strange around the world, including Europe, but due to the shrinking state budgets, there are calls to 'recalibrate' copyright law [5].

Of course, only time will show if such views will prevail. At this point, I see my scientific task in looking into the possible ways to fundamentally reform the carefully crafted for centuries and deeply rooted in international treaties system of IP, a process that will depend on a broad consensus in the society on the ills of the current legal protection regime and the prevailing benefits of the alternative system(s) of public financing of innovation and art creation.

The traditional IP policy is based largely on the utilitarian theory of incentivising creativity. The picture of IP that "rewards creativity and investment in creative content", according to which "a high level of protection is the basis of the global competitiveness of Europe's creative industries" [6] has long become the EU policymakers' mantra. One of the key factors, seen as both a prerequisite and an incentive for innovation and art creation, is a significantly long term of IPR protection. For copyright, the term of protection in the EU has reached the staggering lifetime plus 70 years *post mortem auctoris* [7].

My research interest in this regard is, by looking into the recent industry-specific studies, to better understand the relationship between the presumed incentives and the IP creation in practice. One such study is an empirical research by Professor Paul J. Heald of the University of Illinois College of Law. By analysing current distribution patterns of books and music, Heald tests the assumption that works would be under-exploited unless they are owned and therefore questions the validity of arguments in favour of copyright term extension. A qualitative analysis of a random sample of more than 2000 new books for sale on Amazon.com, along with a random sample of almost 2000 songs available on new DVDs, has demonstrated that "[c]opyright status correlates highly with absence from the Amazon shelf. Together with publishing business models, copyright law seems to deter distribution and diminish access" [8].

These and similar findings of other studies bring me to the conclusion that a differentiation among various industries in terms of the duration of protection is needed. In any event, I believe it is a "relevant question" to ask, "whether in today's society there is actually a need for an author to provide for his or her (grand) children past his or her demise" [9]. Moreover, I am of the opinion that for products with a lifespan of several years, such as computer programs and electronic databases, even the patent law's 20 years and the database right's 15 years of protection seem excessive, let alone the copyright's 70.

The issue of copyright duration is intimately related to the orphan works problem. Orphan works are works that are still protected by copyright, but whose authors or other rightholders are not known or cannot be located or contacted to obtain copyright permissions. The prohibition of formalities made obtaining and maintaining copyright protection substantially easier and rendered any central recording system to track and identify copyright holders unnecessary. This also made it difficult to find or contact the holder of the copyright in a work, if the person or organisation was not readily known. The inability to request permission from the copyright owner often means orphan works cannot be used in new works or digitised, except when exceptions and limitations to copyright apply. Potential users of orphan works are often not willing to take on that risk of copyright violation, so they have to investigate the copyright status of each work they plan to use, which drives up transaction costs, or abandon the idea of a use altogether [10].

The Orphan Works Directive provided for a copyright exception, whereby publicly accessible libraries, educational establishments, museums, archives, film or audio heritage institutions and public service broadcasters may digitise orphan works and make them publicly available online after a "diligent search" does not yield the identity or location of the copyright holder(s). Two legislative bills to the same effect have been considered by the U.S. Congress, but without success.

The solution based on the diligent search has been criticised for not providing enough legal certainty and presenting a significant practical burden for memory institutions [11]. Moreover, the solution offered by the U.S. bills have been described as "both unfair and unwise" for making no distinction between old and new works and foreign and domestic works and for creating "a drain on library budgets" [12].

I am an advocate of putting into practice in the EU the ideas of Prof. Laurence Lessig of Stanford Law School who proposes to address the orphan works problem, along with the problem of the excessive duration of copyright, by going back to the idea of the original copyright and the subsequent copyright renewal embedded in the Statute of Anne. After the initial 14-year term of automatic protection, the rightholder would be required to register the work "with an approved, privately managed and competitive registry" for a marginal fee to be grated another 14-year protection term [12]. The system would result in the creation of a publicly searchable database, similar to those that exist under patent law.

Putting Prof. Lessig's proposal into practice would require a significant reform of the system of international copyright protection treaties, all of which are based on the principle of the abandonment of formalities. At the same time, it should be realised that the reasons why the registration requirement was dropped at the time when the Berne Convention was concluded do not exist

anymore and that the very same technologies that make copying on the Internet so simple and cheap are used by a growing number of private registries around the world to simplify and cheapen registration and search for registered works [13]. Moreover, with the development of the blockchain technology, many of these registries could become distributed ledgers [14], which would further increase their security and trust in their services.

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ПРО МІЖНАРОДНІ ТА НАЦІОНАЛЬНІ АСПЕКТИ БАНКРУТСТВА

Європейська конвенція про деякі міжнародні аспекти банкрутства ETS № 136 від 5 січня 1990 року заклала мінімальні гарантії правової співпраці шляхом регулювання деяких міжнародних аспектів банкрутства, таких як повноваження конкурсного управляючого діяти за межами національної території, можливість відкриття другого банкрутства на території інших держав – учасників Конвенції і можливість для кредиторів заявити свої вимоги у справах про банкрутство, відкритих за кордоном [1].

Відповідно до Конвенції № 136 процедура банкрутства підприємства-боржника охоплює його ліквідацію, призначення конкурсного управляючого, розподіл конкурсної маси між кредиторами. Проте її норми не застосовуються до процедур банкрутства страхових компаній чи кредитних установ.

Досліджуючи транскордонне банкрутство В. Козирєва запропонувала виділити такі його ознаки: неплатоспроможність міжнародних корпорацій; неспроможність з іноземним елементом; транскордонне провадження у справі про банкрутство; неспроможність, що характеризується юридичним зв'язком з декількома національними правовими системами [2].

Прийнята у 1990 році вище зазначена Конвенція за своїм змістом спрямована врегульовувати відносини неспроможності/банкрутства суб'єктів, які господарюють, – підприємств/корпорацій. Проте з часу вступу у дію цього документа пройшло більше 30 років. За цей період урізноманітнилися економічні відносини, сталися суттєві зміни у