OLIVARES

Perpetual Copyright?

LUIS C. SCHMIDT
JOSE MANUEL SANTIN
DIEGO TREJO

OLIVARES®
we know

Perpetual

Luis C. Schmidt
Partner

Jose Manuel Santin
Attorney

Diego Trejo
Attorney

I. INTRODUCTION

1.1. Statement

The author's economic rights have always been subject to limits in both time and form. Time limits are not just an external restriction; they are essential to maintaining a fair balance between private and public interests. From a legal perspective, and from others as well, temporality is part of the very structure of these rights. The public domain is the natural result of that limitation. It plays a necessary role in completing the system as a whole. This principle is recognized by many constitutions and by international treaties.

On the other hand, there have been formal requirements for copyright[1] protection. Their origin and context are historical. In earlier times, protection depended on compliance with specific legal procedures, mainly for reasons of legal certainty. Failure to meet these requirements could cause works to fall into the public domain. In general, the law imposed formalities such as registering works, recording contracts, or depositing copies in libraries. Additional steps were also required to preserve or prove rights, for example by including legal notices. Yet, despite their practical value, these formalities conditioned the protection of works—something undesirable at best, and a violation of human rights at worst. International treaties have consistently sought to avoid such requirements.

The purpose of this study is twofold yet complementary: (a) to examine whether in Mexico there are still works protected under the —possibly unlimited— provisions of previous laws, which may prevent those works from entering the public domain; and (b) to assess whether, in light of constitutional and international developments, the thesis that authors' economic rights could be perpetual can be sustained. To address these questions, the study will analyze whether Mexico has ever had a system of unlimited duration for such rights and whether that position is compatible with the current national and international legal framework.

II. UNLIMITED DURATION OF AUTHORS´ ECONOMIC RIGHTS AND THE PUBLIC DOMAIN

Authors' economic rights cannot last forever. There are economic, cultural, ethical, and legal reasons to support this position. A work cannot be exploited ad infinitum: permanent protection creates a dysfunction within the system and undermines the necessary balance between providing incentives to the author and ensuring collective access to the public domain.

1 **Translation Footnote**: *In this translation, the term "copyright" is used as the most common rendering of the Mexican concept of "derecho de autor." It should be noted, however, that the Mexican system follows the droit d'auteur tradition, which differs from the Anglo-American copyright system. In Mexico, copyright in the strict sense (the right to make copies) is only one of several forms of author's economic rights through which a work may be commercially exploited. Accordingly, whenever "copyright" is used here, it refers to the Mexican legal framework, which carries its own distinct nuances.*

The public domain is a healthy expression of the system. It is fair that society should gain free access to works once authors have already enjoyed a lengthy period of exclusive use. There must be an inherent balance between the author's exclusive right over their works and the interest of humanity —or of other creators in the same or in different fields than the original author— to use them for learning, without the need for authorization or payment.

Rights become fragmented once the author dies and transmits them through multiple generations. This practice, in which copyright is divided among numerous heirs, only creates legal uncertainty. The use of works becomes impossible or at least highly difficult. This problem becomes even more severe if the right were perpetual —that is, if authors' economic rights were understood to last indefinitely without ever expiring.

This risk of generational monopolies directly conflicts with constitutional principles and with Mexico's international commitments, all of which require that authors' economic rights be limited in time.

2.1. Economy, culture, and ethics: why a work cannot be exploited *ad infinitum*.

The thesis that seeks to establish authors' economic rights as perpetual not only lacks economic justification but is actively contrary to the very purposes that the copyright system—understood as an economic system—is designed to achieve.

> *"First, the economic incentive to create may be undermined by the imposition of additional costs on subsequent creators wishing to use material from existing works. Subsequent creators may be dissuaded from creating new works incorporating existing works for which the owner cannot be found because they cannot afford the risk of potential liability or even of litigation."* [2]

2 Duke Center for the Study of the Public Domain, Analysis and Proposal Submission to the Copyright Office: Proposal on Orphan Works, March of 2005, p. 2, available at: https://web.law.duke.edu/cspd/pdf/cspdproposal.pdf

The multiplicity of heirs or rights holders would aggravate this phenomenon. Perpetuity would mean that, for anyone seeking to use a work, costs would only increase over time. The transactions required to obtain authorization would become progressively more burdensome. Creating art would be impossible without infringing upon someone else's rights. Far from fostering incentives, the direct implication would be a complete prohibition of artistic freedom. The public domain is not merely a legal construct; it represents the cultural and ideological heritage of societies.

This difficulty in accurately identifying rights holders—especially when decades have passed since the work's creation and the rights have gone through multiple hereditary or contractual transfers—creates growing legal uncertainty. As these diffuse links in the chain of ownership accumulate, it becomes increasingly difficult—and in many cases impossible—to locate the legitimate owners. The costs in both time and money would rise with each successive generation.

We reiterate: these growing economic difficulties are equivalent to creative blockages for authors. Copyright law seeks to balance an individual creative incentive with a collective cultural benefit. Article 1 of the Federal Copyright Law ("LFDA") clearly establishes that its purpose is "…the safeguarding and promotion of the Nation's cultural heritage…". The way in which this collective dimension of protection is achieved is precisely through the institution of the public domain.

The public domain fulfills an essential function: it guarantees free access to works that are no longer subject solely to private exploitation. This accessibility enables their educational use, artistic reinterpretation, and cultural preservation. Perpetuity blocks such access, stifling the circulation and renewal of the collective cultural heritage.

The economic benefit of a small group of individuals, at the expense of the collective culture of future generations, would mean unethically sacrificing one of the very two objectives that copyright protection itself seeks to uphold.

III. HISTORICAL EVOLUTION OF ECONOMIC RIGHTS IN MEXICO

The evolution of authors' economic rights in Mexico reflects a complex trajectory in which legal progress, omissions, and reinterpretations coexist. From the earliest laws in the field to contemporary reforms, the temporality of economic rights and their relationship with the public domain have been subject to constant adjustments, which allows us to identify both moments of clarity and periods of ambiguity. It is important to delineate these latter stages, as they gave rise to debates on the possible perpetuity of such rights.

What follows is an analysis of the different Mexican provisions on economic rights throughout the years.

3.1. Protection before 1821: background in New Spain

In New Spain, up until 1821, the printing of books operated under a system of prior censorship and printing privileges granted by the Crown and the Catholic Church, rather than under any notion of the author's economic rights.

The right to print or reprint works was not conceived as a right of the author, but rather as a privilege granted by the civil or ecclesiastical authorities. Publication was subject to prior censorship[3], in which moral, religious, and ideological criteria were evaluated, in addition to the technical aspects of printing itself. Once that filter was passed, a printing privilege was granted. This privilege in no way constituted a right in favor of the author, and it was certainly not perpetual.

> *"This cautious policy lasted for three hundred years, and it can be said that its starting point in Spain was the Pragmática issued by the Catholic*

3 Andrea Mariel Pérez González, "La censura previa y la formación del juicio crítico lector: la evolución de un paratexto," [*Prior Censorship and the Formation of the Critical Reader's Judgment: The Evolution of a Paratext*], *Bibliographica* 1, no. 2 (05-09-2018). Available at: https://doi.org/10.22201/iib.bibliographica.2018.2.27

Monarchs on July 8, 1502, in the city of Toledo, addressed to printers and booksellers. In it, for the first time, the obligation was established to submit manuscripts to prior censorship: before a book could be commercialized, a printing license was required. The 1502 Pragmática also set out the division of territory and the institutions involved in censorship, assigning this role to religious authorities —the Archbishop and the Bishop— as well as to civil authorities —the Presidents of the Audiencias."[4]

It was not until June 10, 1813, that an explicit recognition of copyright was established. With the aim that "such fruits of intellectual labor should not one day be buried in oblivion to the detriment of national learning and literature"[5], the Spanish General and Extraordinary Courts decreed the Rules to Preserve Writers' Property in Their Works. This brief decree granted authors the exclusive right to print their writings during their lifetime, and extended that right for ten years solely to their heirs. Once those terms expired, the works entered the public domain.

It is clear that, from its very conception in New Spain, authors' economic rights were never perpetual. On the contrary, from their first incorporation into our legal system, they have always been limited for the sake of collective benefit.

3.2. Protection regime in early Independent Mexico (1821-1857)

During the transition to an independent Mexico, the field was reorganized through instruments on freedom of the press: first, the Supplementary Regulation on Freedom of the Press of December 15, 1821[6], issued by the Sovereign Provisional Governing Junta, which set out the foundations and procedures for the exercise of and liability for printed materials; and later, the

4 María del Carmen Utrera Bonet, "LA PRAGMÁTICA DEL 1558 SOBRE IMPRESIÓN Y CIRCULACIÓN DE LIBROS EN CASTILLA A TRAVÉS DE LOS FONDOS DE LA BIBLIOTECA DE LA UNIVERSIDAD DE SEVILLA". [*The 1558 Pragmatic Sanction on the Printing and Circulation of Books in Castile through the Holdings of the Library of the University of Seville*] Available at: https://www.ucm.es/data/cont/docs/446-2013-11-29-j-2013_maq_utrera%20bonet.pdf

5 Rangel Medina, D. (1992). *Derecho de la propiedad industrial e intelectual* (2ª ed.) [Reproducción electrónica] [*Law of Industrial and Intellectual Property*]. Universidad Nacional Autónoma de México, Instituto de Investigaciones Jurídicas. Retrieved from Biblioteca Jurídica Virtual del Instituto de Investigaciones Jurídicas de la UNAM. Available at: https://archivos.juridicas.unam.mx/www/bjv/libros/4/1912/4.pdf

6 Available at the following: https://www.memoriapoliticademexico.org/Textos/1Independencia/1821DRL.html

Regulation on Freedom of the Press to Be Observed in the Mexican Republic (1828)[7], which consolidated this framework at the national level. Both regulations governed the circulation of publications and the liability arising from them, but not the author's economic rights.

Subsequently, on December 3, 1846, José Mariano Salas issued a Decree on Literary Property[8]. This document represents the first genuine conceptualization within the Mexican legal system of "copyright" in a form similar to how we understand it today.

Said decree required that the rights acquired by each author, publisher, translator, or artist for their "valuable" occupations be clearly established, and to that effect it followed the line of the 1813 decree[9] by setting rules on how works would pass into the public domain. It provided that the right to "literary property"[10] would last for the author's lifetime plus 30 years for their heirs. Likewise, this document laid the foundations for the tension that would later arise in Mexico between the rights granted to authors and the formalities required to enforce them. Article 14 stipulated that, in order to acquire literary or artistic property, "the author shall deposit two copies of the work with the Ministry of Public Instruction".

Taken together, these precedents show that from its origins in New Spain and during the early years of independent Mexico, copyright protection was always understood as a temporary, limited, and conditioned privilege—never as a perpetual right. Temporality has been a structural feature from the outset, as the aim has consistently been for the individual's creative work to benefit the community. It is worth briefly noting that neither the Ley Lares (April 25, 1853), with its rigid regime of suppression, nor the Reglamento Lafragua (December 28, 1855), with its greater openness to freedom of expression, granted authors perpetual rights in any case.

7 Available at the following:chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.coljal.mx/wp-content/uploads/2021/06/18.-Reglamento-de-Libertad-de-Imprenta.pdf
8 Available at the following: https://digital.utsa.edu/digital/collection/p15125coll6/id/49270
9 Through which the aforementioned *Rules to Preserve Writers' Property in Their Works* was issued
10 The first two articles of the document define this right as "…the power to publish it or to prevent others from doing so".

At this formative stage in the regulation of intellectual property, the 1857 Constitution took a clear stance against perpetuity. Although the constitutional text does not expressly mention authors, Article 28 establishes that inventors would enjoy the "privileges that, for a limited time, the law may grant…".

This reference shows that temporality was already a structural principle in the field, even when the category of copyright was still in development. The absence of any mention of authors cannot be understood as an implicit concession in favor of perpetuity, since such an interpretation would contradict the historical context and the earlier instruments that had affirmed the limited duration of these rights. Rather, it confirms that temporality was a shared feature of the emerging system of intellectual property, even though the 1857 Constitution focused on inventors and reserved for authors the guarantee of freedom to write and publish enshrined in Article 7.

IV. COMPARATIVE LAW

The principle of temporality was not exclusive to Mexican law. On the contrary, many countries have historically established limits to the individual rights of authors. If we place ourselves in the period during which the idea of perpetual protection of economic rights allegedly arose in Mexico (1870–1884), we see that, internationally, the trend was precisely the opposite: it was one of limitation and temporal restriction.

In Spain—and in a particularly innovative way within the emerging field of copyright—the Law of June 10, 1847, which recognized the property right of authors and translators of literary works and established the appropriate rules for its protection (in force until January 10, 1879)[11], expressly introduced the temporal nature of literary property.

In Article 2, it provided that the property right belonged to the authors of original writings for the duration of their lifetime and was transmitted to their legitimate or testamentary heirs for a term of 50 years.

11 Available at the following: https://www.boe.es/gazeta/dias/1847/06/15/pdfs/GMD-1847-4657.pdf

This provision broke with prior tradition. In Law 25, Book VIII, Title XVI, which contains a Royal Order of October 20, 1764, issued during the reign of Carlos III, it was stated as follows[12]:

> *"I have come to declare that the privileges granted to authors should not be extinguished by their death, but should pass on to their heirs, provided these are not Communities or Mortmain institutions; and that these heirs should continue to enjoy the privilege as long as they request it, out of regard for those men of letters who, after having enlightened their homeland, leave their families no other inheritance than the honorable wealth of their own works and the incentive to imitate their good example."*

Particularly relevant to our discussion is the fact that the issue of the temporality of literary property was one of the most debated questions during the enactment of the aforementioned 1847 law. It was argued that literary property, by its very nature as genuine property, ought to be perpetual. Below is a fragment of the counterargument set forth in the very Preamble of the 1847 law, which we transcribe here given the interest of its content[13]:

> *"From the moment a work is published, it already passes, to a certain extent, out of the exclusive jurisdiction of the author, and becomes part of the patrimony of society with regard to its use and enjoyment. A book, for example, cannot be equated with a jewel that is left to the heirs, who may lawfully bury it or destroy it at their whim, just as its original owner could have done; the State itself has the right not to be deprived of the benefits of a work through the negligence, caprice, or perhaps even the ill will of those who have come to hold the power to dispose of it. For this reason, the legislators of other countries—and likewise the Government in the project now presented—have found it necessary to temper the rigidity of the principle of literary property, without fully equating it with other forms of property…. Thus, while preserving the absolute right of ownership*

12 Cámara Águila, M. A. P. *La Ley por la que se declara el derecho de propiedad a los autores y a los traductores de obras literarias, y establece las reglas oportunas para su protección, de 10 de junio de 1847* (pp. 1-26) [*The Law Declaring the Property Right of Authors and Translators of Literary Works, and Establishing Appropriate Rules for Its Protection, June 10, 1847*]. GestiónColectiva. Excerpt available at the following link: https://gestioncolectiva.com/wp-content/uploads/2021/10/Ley-de-Propiedad-Literaria-de- 1847.pdf

13 Idem.

during the author's lifetime, it has been made transferable after his death for a term of fifty years, which roughly corresponds, by approximate calculation, to two generations. It cannot be conceived as just and equitable that the children and grandchildren of an author, his heirs and successors in right, should be deprived of the fruit of his labor, and perhaps reduced to indigence. Once this term has elapsed, it is proposed that the work enter the public domain, whether to facilitate its circulation ever more widely, or to avoid the inconveniences that might arise from binding it perpetually; for it is clear that as time goes by, the advantages diminish, and the right of property in relation to the work would necessarily become ever more subdivided."

The foregoing argument shows that the notion of the perpetuity of copyright has already been surpassed for nearly 200 years.

Subsequently, in Spain, the Law of January 10, 1879 on Intellectual Property (in force in 1884)[14], continued the limitations on literary rights through its Article 6:

"Intellectual property belongs to authors during their lifetime, and is transmitted to their testamentary heirs or legatees for a term of eighty years. It may also be transferred inter vivos, and shall belong to the acquirers during the author's life and for eighty years after the author's death, if the author leaves no compulsory heirs. But if such heirs exist, the rights of the acquirers shall end twenty-five years after the author's death, and the property shall pass to the said compulsory heirs for a period of fifty-five years."

Likewise, in France, during the period 1870–1884, the Law of July 14, 1866 on the rights of authors' heirs and successors[15] was in force. This instrument extended the duration of protection to fifty years after the author's death (post mortem).

Its first article stated verbatim:

14 Available at the following: https://www.boe.es/buscar/doc.php?id=BOE-A-1879-40001
15 Available at the following: https://www.legifrance.gouv.fr/loda/id/JORFTEXT000000522551/

"The duration of the rights granted by previous laws to the heirs, irregular successors, donees, or legatees of authors, composers, or artists is extended to fifty years, counted from the death of the author."

Finally, in Germany, the Law on Copyright in Written Works, Illustrations, Musical Compositions, and Dramatic Works of June 11, 1870[16], provided in its Article 8:

"The protection afforded by the present law against reprinting is granted, subject to the following special provisions, during the lifetime of the author (§§ 1 and 2) and for thirty years after his death."

V. THE MEXICAN DEBATE ON PERPETUITY.

The debate over the alleged perpetuity of authors' economic rights in Mexico finds one of its most controversial points in the Civil Codes of 1870 and 1884. Both statutes incorporated, for the first time within a codified body of law, an organic regime on literary and artistic property; yet they did so with formulations that have given rise to divergent interpretations.

The technical ambiguity of certain articles, together with the omission of express terms for specific categories of works, created a fertile ground for the mistaken idea of a possible indefinite duration of works produced between the period of the Civil Code of 1884 and that of 1928.

An example of this is Eduardo de la Parra Trujillo, who stated:

"In 1870, our first Civil Code, under the influence of Portuguese legislation, regulated "literary, dramatic, and artistic property," assimilating them to ordinary property, imposing mandatory registration, and establishing, as a general rule, the perpetual duration of the right."[17]

16 Available at the following: https://copyrighthistory.org/cam/pdf/d_1870_1.pdf

17 Eduardo de la Parra Trujillo, *Derechos humanos y derechos de autor: las restricciones al derecho de explotación*, 2ª ed. (México: Universidad Nacional Autónoma de México, Instituto de Investigaciones Jurídicas, 2015), Serie Estudios Jurídicos núm. 721, disponible en Biblioteca Jurídica Virtual de la UNAM mediante el siguiente link: https://biblio.juridicas.unam.mx/bjv/detalle- libro/3975-derechos-humanos-y-derechos-de-autor-las-restricciones-al-derecho-de-explotacion

and

> *"…Given the assimilation that was made between copyright and real property rights, several 19th-century laws enshrined the perpetuity of exploitation rights, as was the case in Mexico with our Civil Codes of 1870 and 1884."*[18]

The following commentary explains why the analysis of these two legislative bodies—the Civil Code of 1870 and that of 1884—together with their historical context, demonstrates the lack of foundation and historical coherence, as well as the unconstitutionality of any interpretation that seeks to attribute to them a perpetual character.

5.1. Civil Codes of 1870 and 1884: A legislative Gap

The Civil Code of 1870 for the Federal District and the Territory of Baja California (which entered into force on March 1, 1871) devoted its Title Eight ("On Labor") to all matters relating to literary work in general. This Title established provisions applicable to dramatic, literary, musical, and artistic works.

The 1870 Code was significant as it was the first in Mexico to systematically and organically incorporate a legal regime on literary and artistic property within a codified body of law, marking a starting point for subsequent legislative development regarding authors' economic rights.

For its part, the Civil Code of 1884 reproduced in its entirety Title Eight of the Civil Code of 1870, likewise calling it "On Labor." It is peculiar that many arguments concerning the supposed perpetuity begin their analysis with the Civil Code of 1884, when this simply reproduced what had already been established in the 1870 Code.

18 Eduardo de la Parra Trujillo, *Derechos humanos y derechos de autor: las restricciones al derecho de explotación*, 2ª ed. (México: Universidad Nacional Autónoma de México, Instituto de Investigaciones Jurídicas, 2015), Serie Estudios Jurídicos núm. 721, disponible en Biblioteca Jurídica Virtual de la UNAM mediante el siguiente link: https://biblio.juridicas.unam.mx/bjv/detalle- libro/3975-derechos-humanos-y-derechos-de-autor-las-restricciones-al-derecho-de-explotacion

If such a position were to be upheld with genuine historical solidity, it would have to be acknowledged that the true starting point is not 1884, but rather the Civil Code of 1870, where for the first time the wording appeared that gave rise to such an interpretation.

With these two Codes arises the central controversy that has fueled the historical debate on the possible perpetuity of authors' economic rights in Mexico. The starting point lies in Article 1380 of the 1870 Code and its equivalent, Article 1264 of the 1884 Code, which provide that: "The property that is the subject of this title shall be considered as movable, subject to the modifications that, due to its special nature, the law establishes in respect thereof." This wording led some to interpret that, by assimilating it to the property of movable goods, the economic right could enjoy a perpetual character. However, as will be argued from this point onward, such an interpretation cannot be sustained in light of the historical and legal context, in which temporality has always been an inherent element of copyright protection.

At first glance, provisions such as the one above, as well as Article 1253 of the Civil Code of 1870 and its counterpart in the 1884 Code[19] —" The author shall enjoy the right of literary property during his lifetime; upon his death, it shall pass to his heirs in accordance with the law"—could be interpreted as granting an indefinite, almost perpetual right. However, that impression fades when this provision is read in conjunction with the rest of Title Eight, devoted to literary, dramatic, and artistic property.

Once again, the Codes under discussion distinguished three categories of copyright—literary, dramatic, and artistic—and for each they provided a specific regime of terms and time calculations. This diversity would even allow us to argue that it was not the legislator's intention to enshrine a single rule of "perpetuity," but rather to adapt the duration to the nature of each creation.

The following are some examples of how Title Eight placed limits on the notions of "property"[20]:

19 Article 1138
20 References taken from Civil Code of 1870

“Article 1284. The author shall enjoy this right during his lifetime; upon his death, it shall pass to his heirs, who shall enjoy it for thirty years.”

“Article 1286. Once the terms established in the preceding articles have elapsed, the works shall enter the public domain with respect to the right of being performed.”

“Article 1379. Literary and artistic property shall lapse after ten years, counted in accordance with Article 1282; dramatic property shall lapse a fter four years, counted from the first performance or execution of the work.”

As can be seen from these examples, despite the ambiguity of certain provisions—particularly those relating to literary property—the legislation under discussion clearly contemplates scenarios for the termination of copyright and, in that sense, also incorporates the concept of the public domain, inherent to this field since its origins. Thus, it is impossible to extract a categorical and singular interpretation of an alleged enshrined perpetuity.

Historical analysis shows that the author’s economic right in Mexico has never been perpetual nor truly indefinite. Even prior to civil codification, the laws in force—including the Spanish decree of 1813, the decree of 1846, and the printing regulations—established clear terms of duration and expressly provided for the incorporation of works into the public domain.

The Constitution of 1857 reinforced this limiting principle by elevating to constitutional rank the temporal character of rights over inventions, a related figure within the nascent intellectual property system. Although it did not expressly refer to authors, the reference to “privileges for a limited time” for inventors confirms that temporality was a structural element of the field, not an exception: the author’s economic right has always been limited in order to benefit the community after having incentivized the individual. Furthermore, as will be developed in the analysis of the 1917 Constitution, an interpretation of perpetuity under the Civil Code would be unconstitutional, since a norm of

lower hierarchy cannot establish something manifestly contrary to the foundational norm of a legal system.

The omission of a term of duration in the Civil Code of 1870 and, later, in that of 1884, cannot be understood as the establishment of perpetuity. Rather, it was a legislative gap resulting from the technical ambiguity with which the regime of literary property was incorporated into the civil code. At best, this omission may have created the appearance of indefinite duration; however, this falls far short of implying an express recognition of perpetuity, since the same codes contained provisions establishing concrete limits for various categories of creation.

Consequently, these considerations lead to a solid conclusion: either a perpetual copyright never truly existed in the Civil Codes of 1870 and 1884, or, at best, it could only have been arguable prior to 1917; but even then, such "perpetuity" is undermined when the normative system is considered in its entirety.

5.2. Constitution of 1917 and Civil Code of 1928: The Unconstitutionality of Perpetuity

The Civil Code of 1884 remained in force until the entry into effect of the Federal Civil Code of 1928 (hereinafter, the "Civil Code of 1928"), which marked a significant change by establishing a protection term of thirty years, further conditioned on compliance with formalities such as registering the work within three years of its publication. From that point forward, the legal framework for authors' rights evolved into a more specialized regime.

The perpetuity argument is often presented as a phenomenon in force since 1884—when in fact, by that logic, it should be traced back to 1870—and said to have subsisted until the enactment of the Civil Code of 1928, at which point the duration of the exploitation right over works was clearly established.

However, even assuming the validity of such a hypothesis (which must be dismissed, among other reasons, due to its contradiction with the Constitution of 1857), it is equally essential to take into account the entry into force of the Constitution of 1917, a document whose very existence likewise stands in opposition to the thesis of perpetuity.

5.2.1. Constitutional Hierachy and Supervening Invalidity

Every system requires a hierarchy or order. To operate effectively, a system requires a clear delineation of the principles and imperatives that serve as guides for its coherent development.

The legal system is a clear example of this need for hierarchy. It is in the Constitution where the constituent power enshrined the guiding vision that must direct both lower-ranking norms and state policy. The Constitution itself expressly acknowledges this in its Article 133, which establishes:

> "*This Constitution, the laws of the Congress of the Union enacted pursuant to it, and all treaties that are in agreement with it, entered into and to be entered into by the President of the Republic with the approval of the Senate, shall be the Supreme Law of the entire Union. The judges in each federal entity shall conform to this Constitution, the laws, and the treaties, notwithstanding any provisions to the contrary that may exist in the Constitutions or laws of the federal entities.*"

From the content of Article 133 it is clear that our legal system is structured around a fundamental norm that grants validity to the rest of the legal order. This basic norm—the Constitution—forms the pillar upon which the legal system and the organization of the State are built. Every creation, interpretation, or application of norms presupposes the existence of this foundation; therefore, no provision may oppose its principles or contradict its content.

In this sense, the study of the development of any branch of law necessarily requires consideration of its constitutional context.

No norm can be analyzed in isolation, but only as part of a legal system whose ultimate foundation is the Constitution.

Let us assume, without conceding, that the Civil Codes of 1870 and 1884 did in fact grant "perpetual" protection to works. Even in that case, such protection could not have remained in force between 1917 and 1932 (the year in which the Civil Code of 1928 entered into effect). At most, the mistaken interpretation of "perpetuity" could be said to apply only between the years 1870 and 1917; under no logical reading could such an interpretation be admitted after 1917.

As stated above, a legal system must have a delineation of principles and imperatives that serve as a guide for state development. These structures, generally described as pyramids, are composed of the following levels: (i) Constitution, (ii) Legislation, and (iii) Regulations. This structure is sustained by the rules of normative production, which generate order and unity because they refer the creation of lower elements to a rule of production described in a higher element, successively, until reaching the Constitution.

Between 1870 and 1932, Mexico underwent a profound transformation in its legal framework with the promulgation of the Political Constitution of the United Mexican States of 1917 (hereinafter, "CPEUM"). It is essential to take this text into account, since its entry into force —as well as subsequent reforms to secondary legislation and regulations— incorporated into the legal system social law figures that influenced the entirety of state activity; the field of copyright law was no exception.

To understand the impact of the entry into force of the CPEUM on the rules enacted prior to its issuance, it is necessary to consider how normative validity is understood within the legal system[21]:

> *"In this way, "validity" is presented as a relationship of conformity between norms; specifically, it is predicated when lower-ranking norms conform to higher-ranking ones. Broadly speaking, a norm is "valid" when*

21 Agüero-Sanjuan. S. y Paredes, F. (2019). Derogación tácita o inconstitucionalidad sobrevenida. Explorando la utilidad del argumento del derecho comparado. [*Tacit Repeal or Supervening Unconstitutionality: Exploring the Usefulness of the Comparative Law Argument*] *Anuario Iberoamericano de Justicia Constitucional,* 23(2), 369-399. Available at: https://doi.org/10.18042/cepc/aijc.23.11

its act of production complies with the metanorms that confer normative power and regulate its exercise (formal validity), and, in addition, when there is compatibility between the norm and the metanorms that determine the scope of competence and the content of regulation (material validity) (Guastini, 1992: 123; Guastini, 2014: 245). Therefore, a provision cannot lose its formal validity, but it can lose its material validity. The latter occurs when the higher-ranking norms change and, as a result, the provision no longer responds to the material validity criteria that were in force at the time of its enactment. This is what is referred to as supervening invalidity (Guastini,1999 [1996]: 372-378; Guastini, 2010: 282-283)"

We consider that the aforementioned "supervening invalidity" is what occurred in the case of the supposed "perpetuity" of protection over authorial activity under the Codes of 1870 and 1884.

In the CPEUM, Article 28 was very clear in delimiting the "privileges" derived from creative activity by establishing that: "In the United Mexican States there shall be no monopolies or state monopolies of any kind; nor tax exemptions; nor prohibitions under the guise of protecting industry; with the sole exceptions of those relating to the minting of currency, postal services, telegraphs and radiotelegraphy, the issuance of banknotes through a single bank controlled by the Federal Government, and the privileges granted for a determined period to authors and artists for the reproduction of their works, and to those granted to inventors and improvers of any innovation for the exclusive use of their inventions." (emphasis added).

By virtue of the foregoing, even if—assuming without conceding—the articles of the Civil Codes of 1870 and 1884 had provided for "perpetual" protection of works (an interpretation whose constitutionality was already debatable under the 1857 Constitution), such a provision became incontrovertibly and undeniably incompatible with the new constitutional framework as of the entry into force of the CPEUM in 1917.

Article 28 is categorical in expressly limiting the privileges that may be granted to authors and inventors to a “determined period of time.” Consequently, any interpretation that seeks to extend copyright protection beyond that temporal limit is not only contrary to the hierarchical structure of the normative system but also results in an unconstitutional interpretation. This gives rise to what legal doctrine refers to as “supervening invalidity,” insofar as a norm remains in force that contradicts a hierarchically superior provision.

5.2.2. Social Approach of the CPEUM, Human Rights, and Contemporay Arguments Againt Perpetuity

From its inception, the 1917 CPEUM stood as the first constitutional text to explicitly incorporate social constitutionalism, by combining individual guarantees with social rights aimed at collective well-being. “For the first time in history, social guarantees acquired constitutional status in Mexico, after the Revolution, which began in 1910, gave rise in 1917 to the promulgation of a new Constitution intended to meet the popular demands that had sparked the armed conflict.”[22]

This revolutionary spirit gradually permeated secondary legislation, including the field of copyright law, which ceased to be understood as a purely patrimonial privilege and came to be linked as well to a social objective: the dissemination of culture and education.

This shift toward a social vision of copyright law finds express embodiment in the Exposición de Motivos (Explanatory Memorandum) of the 1928 Draft Civil Code, where the legislator emphasized the following:

> *“To transform a Civil Code in which the individualistic criterion predominates into a Social Private Code, it is necessary to substantially reform it, repealing everything that favors private interest exclusively to*

22 Suprema Corte de Justicia de la Nación, Las garantías sociales [Social Guarantees], Centro de Consulta de Información Jurídica, primera edición, noviembre de 2004, pp. 2–3. https://sistemabibliotecario.scjn.gob.mx/sisbib/Publicacion_o﷿icial/000022341/Las_garantias_sociales_pte_1.pdf

the detriment of the community, and introducing new provisions that align with the concept of solidarity." [23]

And

"It was deemed fair that the author or inventor should enjoy the benefits derived from their work or invention; but not that they should transmit such property to their most remote heirs, both because society has an interest in ensuring that works or inventions of clear utility enter the public domain, and also because such works and inventions draw upon the experience of humanity and the knowledge of our predecessors, so that it cannot be maintained that they are the exclusive creation of the author or the inventor." [24]

Within this framework of social and legal transformation, it is incongruous to defend an interpretation of perpetuity in the field of copyright law, insofar as such a position contravenes the principles of cultural promotion and public access that inspired the legislation derived from the 1917 Constitution.

At present, the Federal Copyright Law (LFDA) continues with the constitutional mandate of cultural promotion by establishing in its Article 1 that the purpose of the subject matter is, among others, "…the safeguarding and promotion of the Nation's cultural heritage, …" which is achieved, among other means, through the public domain and the free access it grants the public to the creative activity of our great Mexican artists.

It is important to recall that the right to culture and education is recognized as part of the core of human rights:

"Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits." [25]

23 Exposición de Motivos del Proyecto de Código Civil para el Distrito y Territorios Federales (26 de mayo de 1928) [Explanatory Memorandum of the Draft Civil Code for the Federal District and Federal Territories (May 26, 1928)], Biblioteca Jurídica Virtual del Instituto de Investigaciones Jurídicas, UNAM. Available at: https://archivos.juridicas.unam.mx/www/bjv/libros/7/3075/3.pdf

24 Exposición de Motivos del Proyecto de Código Civil para el Distrito y Territorios Federales (26 de mayo de 1928) [Explanatory Memorandum of the Draft Civil Code for the Federal District and Federal Territories (May 26, 1928)], Biblioteca Jurídica Virtual del Instituto de Investigaciones Jurídicas, UNAM. Available at: https://archivos.juridicas.unam.mx/www/bjv/libros/7/3075/3.pdf

25 Universal Declaration of Human Rights, Artículo 27.1

At the national level, the CPEUM likewise enshrines the right to education in its Article 3 and obliges the State, in its Article 1, to protect, respect, and promote all human rights, including cultural and educational rights, with a focus on progressivity.

Under the principle of progressivity[26], enshrined in Article 1 of the CPEUM ("All authorities, within the scope of their competencies, have the obligation to promote, respect, protect, and guarantee human rights in accordance with the principles of universality, interdependence, indivisibility, and progressivity"), the interpretation of any norm must be oriented toward expanding, and never diminishing, the effective enjoyment of those rights, unless there is reasonable justification.

Applied to copyright law, this principle requires favoring free and open access to cultural creations to the greatest extent possible. Attempting to reinstate a regime of perpetual protection for works published between 1884 and 1932—many of them key pieces of Mexico's cultural and historical heritage—would have as its immediate consequence the restriction of the public domain. A limitation of this nature would not only hinder the circulation of essential works for education and research but would also curtail the very human rights at issue enshrined in the LFDA and the CPEUM.

Thus, a return to "perpetuity" would represent a normative regression incompatible with progressivity and with the constitutional mandate to guarantee the cultural rights of the population[27].

26 See the following case law: **Tesis 1a./J. 86/2017 (10ª Época). PRINCIPIO DE PROGRESIVIDAD. ES APLICABLE A TODOS LOS DERECHOS HUMANOS Y NO SÓLO A LOS LLAMADOS ECONÓMICOS, SOCIALES Y CULTURALES.** Registro digital: 2015306. Primera Sala. *Gaceta del Semanario Judicial de la Federación*, Libro 47, Octubre de 2017, Tomo I, pág. 191. Available at: https://sjf2.scjn.gob.mx/detalle/tesis/2015306

27 We recommend taking into consideration the following criteria:
ACCESO A LA CULTURA. DEBE CONSIDERARSE COMO UN DERECHO INTERGENERACIONAL RESPECTO DEL PATRIMONIO CULTURAL, QUE IMPLICA IDENTIFICAR, PROTEGER Y CONSERVAR EL PATRIMONIO CULTURAL –MATERIAL E INMATERIAL– Y TRANSMITIRLO A LAS GENERACIONES FUTURAS, A FIN DE QUE ÉSTAS PUEDAN CONSTRUIR UN SENTIDO DE PERTENENCIA. Tesis I.3o.C.7 CS (10ª) Registro digital: 2024055.Instancia: Tribunales Colegiados de Circuito Materia: Constitucional
Gaceta del Semanario Judicial de la Federación, Libro 9, Enero de 2022, Tomo IV, p. 2943. Available at: https://bj.scjn.gob.mx/documento/tesis/2024055

VI. ADDITIONAL ARGUMENTS

In sum, the historical and constitutional trajectory demonstrates that the perpetuity of author's economic rights lacks foundation in the Mexican legal system. Temporality has been an inherent element of the subject matter, indispensable for balancing individual interest with collective access to knowledge for a considerable number of years.

By way of conclusion, it is worth noting two final considerations: on the one hand, the evolution of international law, which since its origins has confirmed the need for limited terms; and on the other, the pursuit of an internal balance that preserves the function of the public domain in the face of the excesses of perpetuity and the risks of disproportionate formalism.

6.1. International Provisions

It was precisely in response to the trend in multiple countries to limit the duration of economic rights that, at the international level, this very limitation was recognized as a guiding principle. The Berne Convention of 1886 made this clear in its Article 7.1, stating that: *"The term of protection granted by this Convention shall be the life of the author and fifty years after his death".*

It is also important to recall that, pursuant to Article 133 of the Political Constitution of the United Mexican States, international treaties such as the Berne Convention form part of the Supreme Law of the Union. Therefore, any interpretation that seeks to confer perpetual status upon author's economic rights not only lacks historical foundation but is also unconstitutional and incompatible with Mexico's international obligations.

6.2. Balance of the Public Domain

An interpretation that granted author's economic rights a perpetual character would mean that no work would ever enter the public domain, creating an excess of protection incompatible with the social function of intellectual property. At the opposite extreme, construing the formalities set forth in the 1870 and 1884 Codes (such as the deposit of copies or registrations) as constitutive and rigid requirements would produce the opposite effect: practically all works would lose protection prematurely and artificially at the slightest technical noncompliance.

The design of the system therefore requires a point of balance: temporality as the structural limit of author's economic rights, and formalities as instruments of publicity and legal certainty, not as an automatic mechanism of expiration. Only under this interpretation is the public domain preserved as a natural and necessary space for collective access, avoiding both perpetual overprotection and the premature loss of works.

OLIVARES

Luis C. Schmidt

Jose Manuel Santin

Diego Trejo Zárate


OLIVARES®
we know