The Author's Right to Intellectual Property

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Increasingly in certain circles the idea is growing up that 'intellectual property is theft'.[1] With companies being concentrated into multimedia groups, literary works being captured electronically, products being created for a mass-media culture, commercial exchange on a worldwide scale, the legitimacy of the creator's literary and artistic property is being challenged. Originally the 'droit d'auteur' or copyright were mainly protective rules laid down by law to regulate the author's status. The legal system of literary and artistic ownership still ensures that creators receive revenue each time their works are reproduced, adapted or communicated to the public. In addition the *droit d'auteur* has another aspect through the existence of moral right, which establishes a personal link between author and work. It is true that moral right, which is sometimes seen as an obstacle to economic development, is almost non-existent in the systems of law recognizing copyright, which do not incorporate the same balance of interests as between the author and the company. On the other hand, in its formulation the *droit d'auteur* takes a more human approach and to say that intellectual property is theft would be equivalent to weakening, or even eradicating, a system that protects individual creators facing the reality of the exploitation of their work. This is why this criticism of legitimacy should, in my view, be considered in the context of a debate about the status of the author. The electronic capture of creative works has meant that the general public has easier access to them. The media that support these creative works have now become consumer items like any other. They make it possible to record texts, films or music with a degree of compression of data that allows one to store thousands of books, even entire libraries.[2] Thus the fact that users can acquire reproduction techniques poses a major problem for those who hold the rights, since they are less and less able to control the exploitation of their works; today a copy is just as good as the original. Because the memory of these media is growing year on year, the use of copies is damaging to publishers, producers and authors, who until now were part of a market economy based largely on the sale of copies of the works. Bearing all this in mind, it is not hard to come to the conclusion that it is in fact intellectual property that is being stolen. The legitimate right of the author to intellectual property will be analysed here in the light of the historical basis of the two systems, copyright and *droit d'auteur*. The evolution of the legal status of author in the direction of protection of investments in the context of artistic products will also be studied in detail since, with the advent of new dissemination methods, the law has been persuaded to grant the *droit d'auteur* or copyright to the promoters of creative works, rather their actual creators, in order to simplify the management of rights and make investments as profitable as possible. Finally the digitization of works on media such as CD-ROMs or computer memories and transmission of these works over telecommunications networks

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are revolutionizing the exploitation of creative products. This explains the current trend to transfer protection to producers, a development that has definitely gathered speed with the new creative techniques and is tending to distort the function of the *droit d'auteur* as the eighteenth-century philosophers conceived it – a natural property at the service of the creative mind – thus inspiring those who drafted the law.

The origin of a *jus naturalis* right

The origin of the *droit d'auteur* must be considered alongside methods of production and distribution of literary works. In the Renaissance the system of privileges arose[3] and they were granted first to publishers who printed texts by ancient authors, for which they provided a translation and a commentary in order to establish which was the best version.[4]

Bestowed by the royal power on publishers and authors, a privilege was, in both France and Great Britain, an exclusive right to print and sell a literary work and included permission for theatre performance in the case of dramatic works.[5] In the eighteenth century the consideration given by some philosophers to the economy promoted a recognition of the author's work which, according to Locke's axiom, is the source of a natural law giving rise to a property right. Locke's notion of property/work influenced the spirit of the laws and the declarations of human rights that were passed in France and America and according to which the recognition of a property right constitutes a natural right.

In Britain the demands of London publishers were based on the economic need to protect the investor against forgeries. This was the origin of Anne's law of 1710. This law recognized for the first time that authors had an exclusive right to authorize the printing and sale of their works for a renewable period of fourteen years. Furthermore it stressed in its title that it was a 'law to encourage learning' and it formed the basis for all future American laws.[6] Thus the idea of 'copyright' started to appear as part of an exclusive right to copy, authorizing the publication and sale of copies of manuscripts reproduced through the financial efforts and organization of a corporation of publishers. This early English law granted the right to copy to authors as a reward for the progress they were offering to the people and the public interest.[7] Publishers would have liked this right of authorization to be granted to authors so that, once this ownership was transferred to publishers, it would ensure they had a perpetual monopoly against forgers. According to Locke's notion this right, which departed from common law, was justified by the natural character of property, pertaining to all who received the fruits of their work. English law came down in favour of perpetual protection in 1769 in the first case, Millar/Taylor,[8] but five years later the House of Lords refused to grant this right to the publisher claiming that a perpetual monopoly would constitute an obstacle to the public's access to the works.[9]

The value of granting the author a right of ownership as a natural right was also clear to French publishers, who were trying to ensure their privileges in perpetuity in order to combat pirating and remain in control of publishing the work in question. The idea of literary property was influenced by Locke's theory of natural law, revived and developed by Louis d'Héricourt in his treatise published in 1725 with the title 'Whether it would be fair and equitable to grant provincial booksellers permission to print books that are the property of Paris booksellers by virtue of the fact that they acquired the manuscripts from

the authors'.[10] He was legal representative for the privileged Parisian booksellers, defending the publisher's property by demanding perpetual ownership of the work. At the same time Diderot[11] argued for a privilege for booksellers and considered that ownership of rights should be exclusive to the publisher. In his view the work should be treated simply as merchandise that the author could pass on at will.[12] Diderot continued by demonstrating that authors became economic actors by virtue of the fact that the literary value of their work was transformed into commercial value when publishers printed and distributed the books. However, what concerned authors such as Diderot and Kant[13] was the dissemination of thought and the respect due to it. Indeed authors were more likely to base rejection of forgery on failure to respect the letter of the text than the loss of income resulting from the offence. In their view the book's economics was the business of publishers, who already found it very difficult to enforce their privileges in the face of pirate editions. There were many disputes and legal decisions along the road that Louis d'Héricourt had opened up and also Diderot's more liberal route, and they led to a reform of the privilege system enshrined in the orders issued by the King's Council in 1777 and 1778.[14]

The creative sector in the USA had not had to struggle free from corporate structures in publishing and so faced a lively demand for knowledge.[15] Those who framed the law gave priority to the promotion of culture and the dissemination of books among the American people.[16] Thus the American Declarations of Rights proclaiming the ex-colonies' independence stated in their preambles that 'a civilization's progress depends on the work and learning applied by minds from the arts and sciences'. The law was considered one of the main sources of encouragement for the arts. For this reason the law should ensure protection for the fruits of creators' work as a natural legitimate right, which should be expressed in the principle that 'there is no property owned by man that is more personal that the one he acquires by the work of the intellect'. The preamble to the Massachusetts Declaration of 17 March 1783 was reiterated by other states, and expressed the new ideas emanating from French philosophy of the period, but it is the American Constitution alone that still today expresses the idea of a right belonging to the 'promoter'.

Indeed the 1787 American Constitution authorizes Congress to adopt a law on the protection of authors in order to guarantee their exclusive right to their writings. The aim of this protection is thus stated in Article 1, § 8, Cl. 8, viz. that there is a duty to: 'promote the progress of the sciences and useful arts by granting authors and inventors, for a limited period, the exclusive right over their respective writings and discoveries'.

In the USA intellectual property therefore rests on this constitutional basis. But the American doctrine, which creates a very broad concept of the author, allowed organizations promoting works to assume the title in the belief that the company holding the copyright is by that very fact useful to the expansion of creation of literary works. It is probably for that reason that some of those companies have reached such a powerful position through this early granting of rights over the creations they reproduce.

On the other hand, the Continental (European) concept of literary and artistic property, such as that adopted in France, has remained faithful to the idea of individual ownership which has its origin in a natural right.[17] The object of protection is not only to promote the progress of the arts or sciences but to establish a legal framework that protects the human being as a creative mind. The humanist spirit of the Encyclopedists

thus opened up the path for a personal doctrine that led to recognition of authors' moral rights over their works. We find this notion again in the Declaration of the Rights of Man and the Citizen of 26 August 1789, which lays down as a fundamental principle the individual's right to property and freedom of expression[18] (in Articles 17 and 11 respectively). With this foundation of property and freedom of expression and opinion, raised to the level of a human right, Le Chapelier, rapporteur to the Constitutional Assembly for the decrees of 13 and 19 January 1791, picked up the word 'property' and defined authors' rights thus: 'the most sacred, the most inalienable, the most personal of all properties is the literary work, the fruit of a writer's thought.'

In the same way Lakanal, rapporteur for the law of 19 and 24 July 1793, stated that 'of all properties the least open to challenge, the one whose increase can neither offend against equality, nor harm freedom, is indisputably the products of the intellect'. Thus the *droit d'auteur* was originally presented as a new form of property during preparatory work in Le Chapelier's report for the 1791 law and Lakanal's for the 1793 law. But the idea of protecting the author's status through exploitation of the work gradually took hold in case law, which from the early nineteenth century attempted to establish clearly the shape of the *droit d'auteur* and make it into a moral right. Thus this right gave authors the opportunity to defend the work's integrity and their authorship.

Kant was one of the early defenders of this concept of an 'ownership of an intellectual nature that authors have in relation to their work', which should hold good despite its dissemination.[19] According to Kant the function of the *droit d'auteur* should be to protect the book as 'discourse' and express an ownership that would be physically inseparable from the author. Later, in an 1841 note addressed to the Members of a Parliamentary Committee responsible for examining the revision of the law on literary property, Honoré de Balzac asked the question: 'who on earth can prevent the recognition of the only property that human beings create without earth or stone, and which is as durable as earth and stone?'

And so the late nineteenth century was imbued with this thinking which insists on the very essence of the literary work. The argument was carried over by lawyers from German and French personalist beliefs, and supported by legal experts such as Kohler, Gierke and Morillot, who felt the law had produced a right that was too material and did not allow the existence of the author's moral right to appear. These experts defended the author's right purely on the grounds of his individuality.[20] Moral right became the legal attribute together with ownership rights composed mainly of the right of reproduction and the right of performance. In France case law gradually accepted this new right and the law of 11 March 1957 established it as a right that should serve authors' interests via their relationship to their work, whether present, future or posthumous. The prerogatives of moral right allow authors, their heirs or their representatives to prevent any damage to their work (right to respect), to have their status as authors acknowledged (right to the name), to have the ability to decide when the work shall be made public (right of publication) or else to be able to take the work off the market (right of withdrawal). By virtue of these legal characteristics moral right became the keystone of the whole edifice of the French *droit d'auteur*, since this right is absolute (inalienable, imprescriptible) and may be appealed to at any moment (perpetual).

On an international level the notion of moral right was introduced by the Berne Convention of 9 September 1886 for the Protection of Literary and Artistic Works. In order

to gain the support of a good number of countries with copyright laws, its definition remained limited to authors' right to claim 'paternity and oppose any deformation, mutilation or any other harm to their work which damages their honour or reputation' (Article 2.2). However, some countries such as Britain and the USA allow authors to give up this prerogative. Thus in France the *droit d'auteur* offers double protection, being a financial right that allows creators to benefit from the fruits of the exploitation of their work and a moral right giving them the opportunity to preserve its authenticity and spirit.

Moral right, an effective weapon to defend the status of author

Moral right is an effective weapon for authors in the defence of their works' integrity, and respect for their name and position, against anyone who might not respect this 'sacred' right, which is a guarantee of authenticity and of resistance to the commercial intentions of those who would exploit them. The group of attributes of moral right demonstrates the individualism of the French law of 11 March 1957,[21] which prioritizes the needs of authors in relation to their body of work, or those of their heirs or even a third party they may have appointed to see that their memory is respected.[22] The right to integrity and the right to paternity are the main object of moral right according to Article L. 121-1, which lays down that 'the author enjoys the right to respect for his name, position and work'. Furthermore this right attached to the author's person is 'perpetual, inalienable and imprescriptible' and may be exercised by the author's heirs even though the work is in the public domain. Finally, because it must be applied, any foreign company may find itself subject to it. In law moral right is the author's exclusive prerogative, a protection against commercial exploitation that might be dictated solely by the company's imperatives. Moral right is also the basic determinant of the 'individuation' of creation that distinguishes French law from the American concept, which makes it possible for commercial entities to be seen as authors in the context of commissioned works or those written by employees.

Among the attributes of moral right, the right of publication is granted to the author and may prevent the commercial use of the work where this was not provided for by a contract or is contrary to the author's wishes. Indeed this decision, which is up to authors alone, determines the creation of patrimonial right and the ways in which their work may be communicated to the public. In respect of the law of 11 March 1957 the right of publication is the compulsory point through which the work must pass into the public domain. According to Professor Sirinelli,[23] when authors decide to proceed to disseminate their work, it becomes 'goods and opens the way to rights and obligations of a monetary nature, which in principle compels anyone exploiting the work to obtain the author's consent in order to decide the conditions on which the work shall be exploited'. Only authors or their representatives would thus be in a position to exercise this right by virtue of Article L. 121-2 of the Intellectual Property Code (CPI). But in practice authors will have difficulty in imposing their right of publication when, for instance, they are employees, given the subordinate position they are in with regard to their employers. Furthermore, some legislation allows moral right to be given up and even in France, where authors are very well protected, some legal provisions weaken or do away with

prerogatives of moral rights in the case of authors. This is true for authors working on a collaborative project (a dictionary, for example), a piece of software or a film.

For this reason certain legal experts have raised questions about moral right and exercising it, which is sometimes more theoretical than actual in the new information society. Given the extent of the new communication and distribution media and the many opportunities for digital manipulation of literary works, the question has been asked as to whether we should not aim to give commercial entities the possibility of exercising moral rights so as to defend the work's authenticity and integrity in the name of the author's and the public's interests. In France this type of relationship would seem like a departure from the true nature of moral rights and their *raison d'être*, which is to protect the author as an individual. So the moral right of a commercial entity is unacceptable. By law it is reserved exclusively for individual creators or their representatives, since the law was originally designed to defend the honour and reputation of authors.[24] The monistic interpretation, as in Germany, that sees patrimonial right and moral right as a single principle, could perhaps allow intellectual and moral interests to co-exist for the producer in the same terms. In that case there would be a quasi moral right that would be able to protect a work's integrity, which is likely to be seriously compromised with the advent of electronic media.

In recent years there has been a weakening of the prerogatives of the moral right of authors of technical works. Indeed those who drafted the law of 3 July 1985 restricted considerably moral right in order to bring software within the ambit of the *droit d'auteur*. Thus the right of withdrawal and the right to respect for the work were not given to software writers. The law of 3 July 1985, amended by the law of 10 May 1994, laid down that these rights did not apply to software authors, who, according to Article L. 121-7, may not 'oppose the alteration of the software by the assignee [. . .] when this does not damage either their honour or their reputation'.[25] The new conception of moral right related to software is comparable to what we find in American law on the right to the integrity of works in the visual arts (see Article 17 USC § 106 (2)): this right may be given up to the assignee with the author's agreement. This moral right of authors of works in the visual arts, which is restricted to the right to the work's paternity and integrity, may be given up by the author or modified within the limits laid down by the law (in Article 106 c 1), which contains exceptions to the application of moral right relating to factors that do not involve deformation or mutilation.

Renunciation of the author's moral right also exists in the Belgian law applying to authors who are employed or carrying out a commission that is intended for a non-cultural industry or for advertising; Article 1, § 2 of the law of 30 June 1994 states that 'moral rights may be given up by the author'.

Finally, other instances of the erosion of moral right in favour of assignees occur in practice quite frequently because of the power of business or the influence of custom. Indeed moral right is diluted or restricted according to the circumstances in which the creative work is carried out[26] or what it is intended for.[27] Nowadays lawyers advising companies try to avoid an absolute respect for moral right. Thus use of the notion of a collaborative work[28] is naturally resorted to for a multimedia product[29] which, at various stages in its exploitation, is likely to be contrary[30] to the author's moral right, since such works are designed to be interactive.

In addition, with regard to contract, a substantial portion of the prerogatives associated with moral right would be weakened by authors themselves if they agreed to transpose their works to media different from those the work uses conventionally. Some contract models occasionally contain clauses in which the publisher will be 'sole judge, with the author's consent, as to significant alterations necessary for the work's inclusion in a multimedia product'. Here contractual adjustment of moral right in favour of granting it to the multimedia publisher looks like infringement of the principle that this right cannot be transferred.

Given this need to adapt to the requirements for transposing literary works to computer, we are likely to see a dilution of moral right. Of course this phenomenon is more evident in countries with copyright laws. In Britain, the 1988 reform of authors' rights (Copyright Designs and Patent Acts 1988) henceforth allows those exploiting works to require authors to give up contractually their moral right over their works.[31] But in my view, given the existence of such legal manoeuvres, there will still be the question as to who – producers, publishers or promoters? – will be able to safeguard the integrity of literary works in the future.[32] For this reason we may wonder whether the exercise of moral right by commercial entities should not be considered.[33]

In the USA creative artists are denied the exercise of this moral prerogative, except for visual art works, since copyright is a purely financial right to copy. However the famous Huston case demonstrated that it was possible for American authors to claim this right when their works are exploited outside America and that the country concerned acknowledges the right. In fact the heirs of John Huston (the director of the film *The Asphalt Jungle*) had, by virtue of their moral right, opposed the distribution of the film's colour version in France. Although the true legal author, in American law, was the producer (in this case Ted Turner), the Cour de Cassation[34] decided not to apply American law, the law of origin.[35] The court stated that moral right was included in the laws on international public order, a statute that allowed it to opt for the application of the heirs' moral right, against the film's producer, as a rule that must be applied. Because of its perpetual character and its connection with public order, moral right seems once more to be a basic element of the status of author.[36]

This moral right could also be invoked to defend works in the public domain whose fame is still alive and so arouses publishers' interest (an example is the sequel to Victor Hugo's *Les Misérables*, which was written by François Cérésa in 2001 at the instigation of Editions Plon). Without the restraint of this moral right the confusion of genres and origins might very quickly[37] bring about what Foucault[38] unwisely called 'the death of the author'.

In France professional bodies could act together with authors, as Article L. 331-1 of the CPI indicates, to defend interests they are statutorily responsible for. The existence of the moral right of the producer, which is inconceivable in the traditional European doctrine, will become more and more pressing for, in the absence of heirs or representatives, the protection of a work can no longer be effective. But the exercise of moral rights is still denied to societies of authors.[39] On several occasions case law has also challenged the actions of societies of authors, which by virtue of their statutes have nevertheless intervened to defend the moral rights of authors as a profession,[40] even though, as regards literary work, the competence to intervene where heirs are absent was explicitly granted,

by a decree of 14 June 1973, to the Centre National des Lettres.[41] Could we imagine that a legal provision might allow for the author or his representatives to so delegate, without violating the principle of inalienability, by deciding, for example, to entrust the safeguard of moral right to the entities that are in direct control of exploiting the work, under a fiduciary agreement, or else to those bodies that more generally protect authors' patrimonial and moral interests in accordance with their statutes? This question is also touched on by Professor Goutal in relation to the collective management of rights suggested by societies of authors;[42] he warned them against a possible share in the responsibility where the author claimed that the licensee had not respected his work or his right to distribute it. 'Societies of authors,' he writes, 'thus cannot ignore matters of moral right and seem to have assumed that authors will use the right very sparingly.'[43]

In my view this individualist conception of moral right is justified in our humanistic cultural approach to the *droit d'auteur*; I feel it should be retained as a counterbalance to the sometimes over-commercial conception of copyright that I think has an influence on how creative writers express themselves and how their creativity is realized. Thus the European conception of *droit d'auteur* at least has the merit of preserving moral right as the unique natural and legitimate bond with the author as individual, so that the work's originality is preserved and external pressures are prevented from making it public.

I think this dual framing of protection is crucial nowadays. Moral right is one of the central elements in the personalization of rights and it ensures that the author is the creator not the promoter or publisher. The status of author attached to the human being nevertheless seems too fragile since the lawmakers, influenced by industry, included within the protected area categories of creation such as software or databases, both classes far removed from the arts and letters. This inclusion in the field of literary and artistic property has created real upsets. The legitimacy of intellectual protection for authors comes down to proving that their work is original. This eligibility for protection rests on the single criterion of the work's originality. Its subjective definition is closely linked to the person of the creator. But recent legislation in the area of *droit d'auteur* tends to move away from that when it approaches the question of the new creations coming out of the electronic media.

Objective or subjective originality, the criterion for protecting works and the legitimacy of authors' rights

Originality, which is an expression of personality, is the legal condition for the protection of works considered as such by Article L. 112-2 of the CPI. A decision on the works is of necessity accompanied by a decision on the author. 'By this word the law must mean a human being',[44] but, although the status of individual does not appear explicitly in the law of 11 March 1957, it is implied, and both doctrine and legal practice are unanimous: legally it would not be conceivable to grants author's rights to a machine, however advanced.

The principle of the natural ownership of author's rights, which are economic rights, and of moral right springs from the act of creation in accordance with the article. Article L. 111.2 of the CPI lays down that the work 'is considered to be created by virtue of the realization, even unfinished, of the author's idea'. Creation implies an original idea in

order to claim protection by the *droit d'auteur*. Thus a work issuing from the mind of necessity arises from living components.[45] This personal essence is realized as an expressive form, a style, ideas, topics, matter, information that will make up the work. Creation, viewed as a fundamental requirement for the existence of author's rights, is therefore contained in a subjective meaning and can be broken down into three parts, in accordance with the majority view: idea, composition, expression. According to Professor Yvan Cherpillod this subjective interpretation of the notion of originality and creation is based on the principle that literary and artistic ownership protects a product of the author's person and consequently exclusive right should apply solely to products bearing the stamp of their creator's individuality.[46]

We should stress that in France protection for the author's person was the main concern of those who drafted the 1957 reform of the revolutionary laws of 1791 and 1793. In his commentary on the law of 11 March 1957[47] Marcel Boutet wrote: 'for some time French doctrine had given preference to the tendency attributing priority to the human person rather than the tendency dealing primarily with the transmission of the work.' This conception of *droit d'auteur*, which had become the traditional one and was incorporated into the law of 11 March 1957, is based on the humanistic spirit that American writers sometimes call 'romantic'.[48] The romantic idea of the author could be defined on the basis of the interpretation given to the originality of the work's form, which should be inspired by the creative genius in which the expression of the artist's unique personality is reflected. Taking as a basis a text by Michel Foucault,[49] Peter Jaszi offered this idea of the author as 'romantic', that is, rather too outmoded in the context of the new technologies. However, the reference to Michel Foucault is significant because, when he spoke in New York in 1960 on the subject 'What is an author?', he proclaimed the death of the author. Foucault's argument was based on 'the author function', which in his view is 'characteristic of the mode of existence, circulation and functioning of certain discourses within a society' and it is the name of the author that classifies the work and gives it its status. According to Michel Foucault this author function may very easily disappear in a culture where 'works would come about in the anonymity of a murmur and only the sound of indifference would be heard: "What does it matter who is speaking?" '.[50] It appears, and I personally feel, that this quite deconstructivist view of the idea of the author, which we could call post-humanistic, has influenced some American lawyers, who from this perspective are able to find a legitimate argument for linking this idea of the author to a legal entity or a person other than the true creator. Michel Foucault says that this author function 'is related to the legal and institutional system that surrounds, determines, articulates the world of discourse [. . .] It does not simply refer to a real individual, it can give rise simultaneously to several egos, several subject positions that different classes of individuals can occupy, thus supporting a sort of "cultural cloning".'

The erasure of the flesh-and-blood author in favour of 'promoters of cultural goods': a post-humanistic conception of the *droit d'auteur*

In European law this post-humanistic conception is tending to spread, to the advantage of commercial entities promoting certain types of creation. Indeed this is the position adopted by the new Belgian law of 30 June 1994, according to which the rules governing

assignment of the rights of employed authors, or those working on commissions for non-cultural industries or advertising, have been relaxed,[51] and a simple presumption of authorship applies to anyone who appears as such on the work by virtue of the mention of their name or initials that make it possible to identify them.[52] In his commentary on the new Belgian law Professor Berembom[53] describes very clearly this new environment of economic change for creation: 'alongside individual creation there has grown up mass-produced creation where several authors are involved whose role is to adjust a project they are commissioned to write so that becomes a satisfactory "product" for the cultural market', and he is furthermore of the opinion that 'the standardization of "cultural products", and authors' dependence on the economic and financial forces that are the necessary intermediaries between them and the public, are likely to increase with the development of the new techniques'.

Nevertheless the originality criterion has moved on with the introduction of new means of expression that increasingly dematerialize the living contribution made by creation. As anthologies and collections of works are protected if 'the choice and arrangement of the material constitute intellectual creations', and following the adoption of the European directive concerning the protection of databases, the French law of 1 July 1998,[54] in transposing the directive, allowed databases to be included among works of the intellect.

Would not this new approach to this type of work, which could be called composite since it is put together from pre-existing works created without the author's collaboration, have the effect of leaving the way open for an objective notion of originality? Indeed, by focusing on choice, the systematic or methodical arrangement of the works could very easily originate from an artificial intelligence, for instance that of a computer. The traditional criterion of originality as the imprint of the personality would no longer reflect that romantic idea of the individual 'possessed by the muses', but rather a new form of creation whose condition would be the criterion of 'selection', as used to be the case with anthologies and now is with databases.

Subjective originality had already naturally replaced 'intellectual effort' so as to bring software and databases[55] within the categories of works able to take advantage of the protection of *droit d'auteur*. In my opinion the objective conception of originality viewed in this way introduces a new consideration of a company's role in the creative act. Indeed the question could be raised with regard to computer-aided creations.[56] However some legal experts, in spite of supporting the subjective theory, are still reluctant to see works created by chance or random systems benefiting from this protection.[57]

We know that software designed by creators, such as search engines whose function is to find information that is accessible thanks to the new information technologies, facilitates linking by theme or name of different sites scattered around the network. So could it not be thought that the machine, because of the way it is programmed, contains enough of an element of creativity to benefit from the protection of the law?[58] Maître Bertrand, a barrister specializing in intellectual property, raises this possibility in the case of works created by computer, such as photos taken by satellites, and stresses that 'the photo so obtained is the result of a succession of operations carried out at the "instigation" of a company that is going to publish and exploit it. Thus the *droit d'auteur* is likely no longer to serve an individual creator but instead a promoter/creator. In France only the provision for works known as "collaborative" allows commercial entities to hold author's rights directly.'[59] This French exception was introduced for dictionary and encyclopedia

publishers. The applied arts industries and multimedia publishers would very much like to be included in this category since it simplifies the legal transfer of the rights of the creator they employ, which they find extremely restrictive for the company. But the excessive use of this provision (which has been the subject of a number of appeals) has resulted in a re-examination of the status of employed authors as regards their relationship with their employer. Criticisms attacked a legal system seen as too protective of authors because of the complexity and inflexibility of rules that were often inappropriate.

In 1999 a Conseil d'Etat report by Mme Falque Perrotin[60] on the *droit d'auteur* and the Internet encouraged the government to consider the definition of 'author' itself in the context of salaried creative work. Since then a Commission for Literary and Artistic Property has been given the task of examining the appropriateness for companies of the rules on authors' rights.

The desire of businesses to be able to hold full creator's rights when they have made the investment reflects this new phase for creation in its confrontation with industry, where economic interest is foremost and players in this creative area wish to move towards the doctrine of copyright, which considers the company as the creator when works are created by its employees. This is the case in the USA, where film producers, newspaper publishers and indeed all employers are treated in this way. This status of promoter exists in all the countries with a copyright system. However English law has blurred the circumstances in which the investor can take on the status of author.[61] It has gone so far as to grant those financing the work the status of author:[62] 'when a literary, dramatic, musical or artistic work is created by computer, the persons who make the necessary arrangements for the creation of the work will be considered its author',[63] which means that they can get the most out of their investment.[64]

It would appear that in the USA a certain degree of human creativity was still seen as necessary in order to investigate whether the proprietor of a database containing a telephone directory might be eligible for copyright protection, even though this was product that did not require any original creation.[65]

In France one sometimes finds cases where this confusion occurs between person and company as regards establishing protection for a software title. Thus the decisions of the 1st civil court of the Cour de Cassation in December 1987[66] criticized the investigating judges for not having examined whether a company had not made a 'personal work' or discovered 'what intellectual contribution was attributable to a company'. Similarly we should note in this regard the exceptional decision of the 4th court of the Paris Appeal Courts on 5 March 1987,[67] which stated, in relation to a software title, that it bore 'the mark of personality' of the Apple company, which held author's rights by virtue of American law. The judges defined originality by saying that its creation, far from being limited to the expression of an automatic and restricted logic, had involved a subjective choice between various modes of presentation and expression. The court adopted a purely objective conception of originality in referring not to an individual's person but instead to the personality reflected by the brand of the manufacturing company (Apple), which constituted a business's identity. In law there are legal fictions that allow those who draft the text to depart from the principle that only an individual can carry out acts of creation. Since the economic act is becoming the main factor triggering protection, the legal presumption or fiction thus allows a change in the source of property rights in order to grant the company the status of author, which, with regard to new forms of creation, can

lead, as we have just seen, to the birth of the 'cyborg' author. This conception of the status of author, which favours commercial entities promoting works, does have repercussions for the balance of interests where literary and artistic property rights are concerned.

The consequences of the legal fiction of economic author and the legitimacy of the author's right to intellectual property

In French law this legal fiction of the 'economic author', or granting the ownership of all rights to the head of a commercial entity, constitutes a misapplication, as we have seen, of the rules on collaborative works or software. On the international level assimilation of intellectual rights to economic investment was proposed at the 1988 negotiations on the GATT agreement, but we should remember that these proposals, which were vigorously contested by authors, were not successful. In general the agreement was attempting to promote the exchange of cultural goods and services. In France experience of the radical application of the *droit d'auteur* from a purely patrimonial viewpoint and in favour of business[68] could have the effect of standardizing the act of creation or at least making it conform to marketing standards that would reduce the works' originality. This might not be desirable for the promoters, who would thus be likely to weaken their chance of creating a unique image and would enter a phase of dumbing down creation. It is true that the American system's choice was to wish to promote, through its constitutional principles, the progress of the arts and sciences, sometimes to the detriment of creators, who may lose their author's status and their independence. Thus promoters are encouraged to invest in creation because they will get the major benefit from a legal status that will make the most of their investment. Ejan Mackaay,[69] a Canadian professor, explains this economic function of intellectual rights, which are without a doubt an incentive for the cultural industry. He says that 'among the structures promoting prudent management and creativity, intellectual property is the foremost'. Should this prize of property rights go to those who provide the material means, rather than those who use their imagination and create? In accordance with the 1961 Rome conventions on the protection of record producers, French lawmakers chose to adopt the system called ancillary to the *droit d'auteur* to safeguard promoters' investments against pirates or forgeries.

American law does not have this dual system of protection for cultural industries, since copyright can become the company's property without the hindrance of a possible moral right of the creator. Therefore, given these economic forces strengthened by company mergers, American lawmakers have tended to see the balance of interests with regard to protection as between the users of the works and the companies owning the rights. The new law of 8 October 1998, labelled the Digital Millennium Copyright Act,[70] adapting copyright law to the new information technologies, has strengthened the public's right to have access to culture. In exchange for a payment decided by a representative authority this DCMA sets up a system of legal licences for recording producers that authorizes the transmission of digital sound recordings to suppliers of content.

So my view is that the economy of works of art is now radically different from the one where a *droit d'auteur* was levied on the sale of a copy or, in the case of copyright, the user was required to pay for reproduction rights. The economy based on profits generated by unit sales of records, films, games or books is threatened to the extent that music,

film or text have for some time been capable of being distributed through networks and recorded on recording media that are available to any user, and this sometimes occurs without permission (see Napster). Thus we are confronted with a clear theft of intellectual property at the very time that the electronically captured work raises technical problems as far as monitoring and controlling its exploitation is concerned. Therefore those who hold the rights are forced to invest in protective measures of a technical nature to safeguard the content against illicit copying.[71]

The multimedia companies that bring together publishers of content or producers of containers, distributors and electronic communicators, are creating a network that is so dense that soon American or European lawmakers will be naturally forced to watch out for the public interest in gaining access to works on the basis of the tolerated use of the private copy or, in accordance with the Anglo-American doctrine, the fair use of works.[72]

However, in France the *droit d'auteur* was a right intended to protect individual creators. The balance sought has always been to protect authors negotiating these rights with their publishers, who represent a powerful deterrent economic force.[73] The fact that a legal entity or company cannot become the source of the *droit d'auteur*, but only the assignee, maintains this balance, since authors can always take back their rights and thus reduce companies' monopolistic power over their creations. However, by altering this balance of interests, that is, by granting author's rights more easily to businesses in France, shall we not lay ourselves open to criticisms such as the one currently in the press: 'Intellectual property is theft', and thus reinforce the idea that the *droit d'auteur* works against the creator, because it has been concentrated by the economic power of the rights' owners who, once they control the creators' content and minds, will have no vision but a totally commercial one?

As a result, in order to preserve creators' rights over their works and stop the *droit d'auteur* being transformed into an original ownership for commercial entities, it would seem fairer that protection of investments should be covered by a right *sui generis* similar to what has been introduced in Europe to protect databases or the ancillary right for producers of sound and video recordings. Nevertheless, if we are too anxious to protect investments other than creation, we risk doing away completely with the traditional, humanistic system of authors' rights that we have in Europe, and at the same time weakening the legitimacy in users' eyes of the *droit d'auteur*.[74]

Industry's intervention in legislative or consultative institutions, citing market forces and economic imperatives in order to face up to global competition, has produced this distortion, and the desire to replace the notion of authors' rights with a purely financial right in the 1998 AMI agreements. Within both the European Union and international bodies (OECD, OMPI), commercial entities, publishers or producers, are pushing the argument for a purely economic right in order to encourage the dissemination of artistic works and facilitate the sale of rights without asking the permission of the author. We should not forget that the OMPI treaty on authors' rights adopted in 1996 stresses in its preamble the need to maintain a balance between the rights of authors and the general public interest, in particular where education, research and access to information are concerned. Similarly the European directive of 22 May 2001 harmonizing authors' rights in the information society[75] refers to a fragile safeguard that might weaken in favour of the public interest. Indeed this directive provides the member states with the opportunity to transpose into their legislation more than 20 exceptions to authors' rights.

So at the dawn of the twenty-first century, which is already marked by this dazzling surge in the digitization of art works so that they can be disseminated worldwide, although some people advocate the demagogic idea of a general interest in free access to culture, others support the notion of a single copyright for multinational legal entities. The latter, who include multimedia businesses and telecommunications companies, will thus be able to respond to the expectations of some while taking the profits away from the others, since the network economy depends more on the flow of telecommunications (paid for by Internet user) than payment for access rights to works. In view of this movement of cultural businesses into the new technologies, the very existence of the authors' rights system seems to me to be threatened.[76]

*

The modification that is desired to the *droit d'auteur* in favour of cultural businesses is likely to lead to the introduction of the principles of copyright law into the French legal system. This recognition would mean that we would be resolutely turning our backs on the protection of authors and entering an environment of strictly commercial or industrial ownership that would subsequently need to be regulated by laws on competition (see the Microsoft case) or by defence of the public interest in access to works. In that case we would have come very far from a *droit d'auteur* protecting creators. The only obstacle to that pessimistic vision is to retain a fair remuneration for authors and levy royalties from those who provide the means to copy, record, scan or download works in order to avoid stripping authors and their representatives of their income in the name of freedom of information and access to knowledge. For in this economy some players, such as telecommunications businesses, take advantage of the fact that works of art are out there on the networks and Internet users adore accessing free sites. Payment for a private electronic copy is one of the systems that have already been introduced by certain French and German laws relating to the sale of recording or memory media, and this involves levying a royalty fixed by law to pay for this kind of exploitation, as has already been done with audio and video recording media and equipment.

Finally I am of the view that the status of author granted solely to individual persons should be preserved, since it is the very basis of the legitimacy of the right to artistic and literary property. It should be the same for moral right, which is an indispensable rule in the public interest, for when works cross the borders of a less protective legal system and enter the territory of European authors' rights, their creators will always be able to make sure that their rights are acknowledged.

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Notes

1. Joost Smiers (2001), La propriété intellectuelle, c'est le vol! Plaidoyer pour l'abolition des droits d'auteur, in *Le Monde diplomatique*, September, p. 3.

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2. Jean-Gabriel Ganascia (1999), *2001, L'odyssée de l'esprit* (Flammarion), p. 144, quoting the example where a byte can encode a typographic character and CDs can hold more than 600 million characters; at the rate of 1500 typographic signs per page on average for each book, that makes 1000 books.
3. The first privileges granted are thought to date back to the late fifteenth century and the publisher Jean de Spire, who obtained one from the College of Venice in 1469, but legal experts such as Planiol believe that it was in 1495 that the first recorded privilege was granted by the Senate of Venice to Alde Manuce for an edition of Ariosto. In France the first privilege was granted by Louis XII in 1507 to the publisher Antoine Vérard for an edition of *St Paul's Epistles* (M.C. Dock (1962), *Contribution historique à l'étude des droits d'auteur* (Paris, LGDJ), pp. 63–64).
4. Mme Dock is of the opinion that in this respect these scholars showed sufficient originality in carrying out this work for them to earn the title 'author' today; she gives the example of an opinion of the Appeal Court of 11 January 1942 (in Egypt), which states that when reissues of ancient works contain amendments, additions, commentaries or classifications, they constitute an intellectual activity protected by authors' rights (*Droit d'auteur*, 1944, p. 141).
5. In Britain the London publishers (Stationers Company) had obtained privileges during the reign of Mary Tudor, who by a decree of 1556 also gave them the task of censor, alongside the Star Chamber, which involved rooting out seditious or heretical works. The privilege of making and selling a work by an author was made more widespread in France by the letters patent of 20 December 1649, which banned any printing of a work without the king's privilege and condemned all French and foreign forgeries. Mme Dock does not agree with the dominant belief of the late nineteenth century, which takes the 1566 ordinance of Moulin creating the privilege system as the origin of protection of the creations of the mind. In France theatrical performances were from 1680 the prerogative of the Comédie Française and remained so until the 1789 Revolution.
6. On 31 May 1790 the American Congress adopted the first copyright law with the same aim of encouraging learning.
7. 'Whereas printers, booksellers and other persons have of late frequently taken the liberty of printing, reprinting and publishing [. . .] books and other writings without consent of the authors or proprietors [. . .] to their very great detriment, and too often to the ruin of them and their families', Preamble to Anne's law of 1710 giving the reasons for the law.
8. Millar/Taylor, Burr (4th ed.), 2303, 98 Eng. Rep. 201 (K.B. 1769).
9. Donaldson/Becket, 4 Burr (4th ed.), 2408, 2417, 98 Eng. Rep. 257, 262 (H.L. 1774); see Jacqueline Seignette (1994), *Challenges to Creator Doctrine* (Kluwer), p. 15.
10. Mémoire, in Laboulaye & Guiffrey, *La Propriété littéraire au XVIIIe siècle: recueil de pièces et documents*, p. 13 et seq.
11. D. Diderot (1984), *Lettre sur le commerce de la librairie* (Paris, Librairie Fontaine). On the change in status, see pp. 88–89.
12. The publisher is essential to the process of getting the author recognized. Cf. Diderot thinking that the owner's right is the true measure of the acquirer's right, op. cit., p. 90.
13. E. Kant (1995), *Qu'est-ce qu'un livre?* (Paris, Quadrige/PUF).
14. These orders set out the aim of the privilege, which, when it was granted, would be either a return for authors on the fruit of their labours, or else the publishers' quid pro quo for the costs incurred in the printing and distribution of manuscripts. The privilege granted directly to authors was perpetual (for authors and their heirs), whereas that granted to publishers lasted at most for the author's lifetime: publishers' privileges were in proportion to their advance and the scale of their business.
15. Noah Webster, *Origins of the Copyright Laws in the United States*, describes the desperate position of American education in 1782 and thus its attempts to get the state legislatures to protect publishers. 'School textbooks were scarce and almost impossible to get hold of', reports J. Ginsburg (1991) in *Histoire des deux droits d'auteur* (RIDA), January, p. 142.
16. In his note (*Histoire des deux droits d'auteur: la propriété littéraire et artistique dans la France et l'Amérique révolutionnaire*) Ginsburg stresses the fact that this aim of encouraging creativity is also found among French barristers and judges applying the 1791 and 1793 decrees. This analysis concludes that art glorified the Revolution and defended its ideals. So, without denying the presence in revolutionary laws of a definite current in favour of authors' rights, it would seem that in general the revolutionary lawmakers

had resolved the opposition between public and private, seeing the *droit d'auteur* as an aid to the improvement of public education (RIDA, 147, January 1991, p. 176).

17. Article 2 of the 1789 Declaration of the Rights of Man defines the natural imprescriptible rights of man, which are: 'liberty, property, security and resistance to oppression'.
18. Article 11: 'The free communication of thoughts and opinions is one of the most precious rights of man; every citizen may therefore speak, write, publish freely, except that he must answer for the abuse of this freedom in cases laid down by the law', and Article 17: 'Since property is an inviolable and sacred right, no one may be deprived of it, unless public necessity, legally proven, clearly requires it and on condition of fair prior compensation'.
19. E. Kant, op. cit.
20. Some of them made a distinction between ownership rights and the rights of the individual, but others did not separate them.
21. The law of 11 March 1957 confirmed the right to literary and artistic property, which is now codified in the law of 1 July 1992 in the Code de la propriété intellectuelle (CPI – Intellectual Property Code).
22. Article L. 121-1 clauses 3 & 4 relating to moral right: 'It may be transmitted because of death to the author's heirs. Its exercise may be entrusted to a third party by virtue of instructions contained in the will.'
23. P. Sirinelli (1985), *Le Droit moral et le droit commun des contrats* (Paris, thesis), p. 27.
24. At first legal practice merely defended the moral right associated with the person of the author.
25. Article 121-7, amended by the law of 10 May 1994, Article 3 concerning the moral right of the software writers, who cannot oppose the alteration of their software or exercise a right of withdrawal.
26. Cour de Cassation, 1re ch. civ., 7 April 1987, State of Gabon/Antenne 2 in the case of the execution of a commission the Cour de Cassation accepted that the artist's freedom may be restricted in order to conform to the requirements of an advertising commission (RIDA, October 1987, no. 134, p. 97. See note in E. Derrieux, *Oeuvre de commande, liberté de création et droit moral de l'auteur* (RIDA, no. 141, pp. 199–233).
27. The nature of an architectural work is such that it is one of the types of work that are entirely designed to be appropriated by man. Location, space and time are inherent factors giving rise to alterations, and it is only buildings listed as historic that are protected against alterations or destruction. Cour de Cassation law (1re ch. civ. of 7 January 1992, bull. civ., 1, no. 7) recognizes that the work's owner has 'a right to carry out alterations when it turns out to be necessary to adapt it to new needs'.
28. Article L. 113-2 of the CPI defines a collaborative work as 'a work created on the initiative of an individual or entity, who edits, publishes and distributes it at his own instigation and under his own name, and where the personal contributions of the different authors contributing to it become blurred in the whole for which it was conceived, in such a way that it is impossible to attribute to each of them a separate right to the final work', and Article L. 113-5 of the CPI lays down its application: 'A collaborative work is, in the absence of proof to the contrary, the property of the individual or entity under whose name it is distributed . This person or entity possesses author's rights.'
29. This refers to the French exception attributing author's rights directly to an individual or entity other than the real creator. Originally this status was designed for dictionary or encyclopedia editors. Strict interpretation requires a limited application. However precedent accepts this status for publishers of Web pages, multimedia products, video games, newspapers, catalogues raisonnés, and holders of databases.
30. J.-L. Goutal, *Multimédia et réseaux: l'influence des technologies numériques sur les pratiques contractuelles en droit d'auteur*, D., 1997, chron., p. 357. Looking at practice in audiovisual and publishing contracts relating to the inclusion of a work within a multimedia product, he writes that 'the trend is indeed towards using collaborative work, moving from management by a individual to collaborative management and restriction of moral right'.
31. On this matter compare the French report by Gerald Dworkin, *Le droit moral dans les pays de 'common law'*, which refers to Professor Ginsburg's criticism that the provisions in Britain on moral right 'seem cynical or at the very least timid' (ALAI, Antwerp conference on *Le droit moral de l'auteur*, 19–24 September 1993, p. 106).
32. An example is the case of Nintendo of America Inc./Camerica Corp. (1991) 34 CPR (3d) 193, 199 affd. (1991) 36 CPR (3d) 352 (Fed. CA) where, in order to defend the creation of a video game, the company accused the pirate of misuse of its brand, but also used its employee's moral right to oppose the violation of his computer game's integrity.

33. ALAI conference, June 1996, in Amsterdam, where M. Dietz looked at the demand for a moral right for the producer.
34. Huston case, Cass. 1re ch. civ., 28 May 1991, RIDA, July 1991, no. 149, p. 197, and Versailles Appeal Court, ch. civ. réunies, 19 December 1994, RIDA, April 1995, 369 (renvoi de cassation).
35. The law of origin was prescribed by the rules of international private law when there was a conflict between jurisdictions. On the other hand, the Berne Convention on the international protection of author's rights, in Article 14b (2) (a), states that the law where protection is applied for should decide who holds the *droit d'auteur* for a cinema work.
36. Huston case. The Huston heirs were permitted by the Cour de Cassation to defend their moral right to stop the distribution in France of a colour version of *The Asphalt Jungle* by the director John Huston, given that moral right is a public order question and a compulsory rule, even though American law applicable to deciding the owners of rights said that the producer was the author, since it was a work created according to a contract relating to hiring of a service; op. cit. supra.
37. Advertising is a prime area for the exploitation of works by a company in the service of product promotion (cf. the case of Vermeer's milkmaid used by a brand of yoghurt). The risk of dumbing down culture is ever-present in our societies, and respect for the work's authenticity and its creator's person should be accepted by all systems and not be limited to certain works considered by American law as works of pure art. But the moral right principle comes up against the fact that it is granted only to the creator as an individual.
38. M. Foucault (1969), *Qu'est-ce qu'un auteur?, Bulletin de la Société française de philosophie*, vol. LXIV, session 22 February 1969, in *Dits et écrits* 1954–1988 (NRF, Gallimard), Bibliothèque des sciences humaines.
39. TGI Paris (1 Ch.), case of the sequel to *Les Misérables*, Consorts Hugo, SGDL c/Editions Plon, 12 September 2001. The heirs to the Hugo estate challenged a publisher's action in issuing a sequel to *Les Misérables*, claiming that this continuation infringed the moral right of Victor Hugo. The SGDL intervened on the side of the Consorts Hugo and defended the recognition of respect for this right given that it is in accordance with the wishes of the author, who did not plan any other ending to his work. The judges refused to look in detail at the request of the Hugo heirs because they had no proof of their status as heirs and thus they were judged to have no case.
40. The Société des Gens de Lettres (SGDL) intervened to defend the moral right of the author Pierre Choderlos de Laclos and challenge the use of the title *Les Liaisons dangereuses* by the film director Roger Vadim (1re ch. civ., 6 December 1966, D. 1967, 381, note Desbois) and again to ensure that the integrity of Paul Féval's work *Le Bossu* was respected (1re ch. civ., 16 April 1975; bull. civ., I, no. 134). The Cour de Cassation did not accept the society's action since it cannot defend the specific exercise of an author's moral right.
41. Centre national des lettres, décr. no. 73–539, 14 June 1973, aims to 'ensure respect for literary works, whatever their country of origin, after the author's death and even after they have entered the public domain'.
42. Societies that collect and distribute royalties avoid defending moral rights as they are associated with the exclusive prerogatives of authors or their heirs.
43. J.-L. Goutal, op. cit., p. 362.
44. Bertrand (1999), *Le Droit d'auteur et les droits voisins*, 2nd ed. (Dalloz), p. 464.
45. It is a moot question as to whether computer-aided creations or those dependent on artificial intelligence techniques are genuine creations, since they are produced by machines that are 'replacing' the human mind.
46. Yvan Cherpillod (1985), *L'Objet du droit d'auteur* (CEDIDAC – Centre for company law, University of Lausanne), p. 63.
47. M. Boutet, commentary in RIDA, vol. XIX, p. 121.
48. Peter Jaszi (1992), On the author effect: contemporary copyright and collective creativity, in *Benjamin N. Cardoso School of Law, Art and Entertainment Law Journal*, p. 293.
49. M. Foucault, op. cit.
50. The writer is borrowing Beckett's phrase: 'What does it matters who is speaking, someone said, what does it matter who is speaking.'

51. Article 3 § 3 imposes a more flexible regime (implicit assignment) than the one that governs assignment of author's rights in general.
52. Article 6 of the Belgian law of 30 June 1994, concerning author's rights and associated law.
53. Berembom, *Le Nouveau Droit belge*, § 5 and § 132 et seq. The criteria separate out all industries other than those that produce cultural goods and grant them unlimited assignment of rights for any mode of exploitation (Article 3 § 3).
54. Law no. 98-536 of 1 July 1998 amended Article L. 112-3 and brought in a specific protection in Articles L. 341-1 of the CPI for the producers of these databases by giving them the right to stop the extraction or reuse of a substantial part of their content.
55. Cass. ass. Plén., 7 March 1986: JCP 86, ed. G, II, 20631, note J. Mousseron, B. Teyssié & M. Vivant.
56. A. Lucas, Les créations assistées par ordinateur, in *Le Droit de l'informatique* (PUF), 311–324. M.C. Piatti & Y. Gaubiac (1983), *La Création artistique assistée par ordinateur. Problème de droit d'auteur*, RIDA, no. 118, October.
57. According to Y. Gaubiac and M.C. Piatti 'the computer is not strictly speaking "creative"; it is much more an additional medium of aesthetic expression in the extremely wide range of artists' traditional tools, just like the sculptor's chisel, the painter's brush, the draughtsman's pencil or the composer's instrument', in op. cit.
58. Former Article 3 of the law of 11 March 1957. I. Calander (1996), Le Media Lab aux avant-postes du cybermonde, in *Le Monde diplomatique*, 21 August: 'Increasingly computer specialists are working on "cyborgs", which are the cross between human and machine (called cybermen) on which their discoveries are based.'
59. Bertrand (1999), op. cit., pp. 464–468.
60. F. Perrotin (1998), *Conseil d'Etat, Internet et les réseaux numériques* (Paris, La Documentation Française), p. 141.
61. Law of 15 November 1988 on authors' rights, designs, models and patents. Reported in *Le Droit d'auteur*, October 1988, Lois et traités, p. 1.
62. The 1988 law contains provisions permitting others, including commercial entities, to be considered as authors: Article 9-2 lays down clearly the persons entitled to be considered the author: 'a) The person who makes the arrangements necessary for the execution of a sound recording or film; b) The person who produces a programme for radio broadcasting; c) The person who provides a cable service; d) The publisher of a typographic presentation.'
63. Since the work created by computer is made, in accordance with Article 178, in conditions that exclude all human intervention.
64. 'More generally,' writes Professor Alain Strowel (1993), 'it seems quite clear that these different provisions have the effect of subtly modifying the meaning of the notion of author, which, from being a creator, becomes synonymous with entrepreneur', in L'auteur comme créateur et entrepreneur, *Droit d'auteur et copyright* (Paris, LGDJ), p. 377.
65. In the USA the concept of 'authorship' implies that the author is a human being at least when it is a case of establishing a work's originality (Feist/Rural Telephone Service 111 S. Ct. 1282 (1991); see RIDA, October 1991, no. 150, p. 99, note Paul Geller).
66. Two Cour de Cassation judgments of 1 December – Sté Huet/S.A. Decelet – and 8 December 1987 – S.A. André Hayat/S.A. Bendji. These cases concerned the originality of products that had been pirated: RIDA, April 1988, no. 136, p. 140, JCP, 88, IV, p. 67.
67. C.A. Paris, 4e ch. civ.; sect. B, 5 March 1987: SARL Masci Informatique/Sté Apple Computer Inc. and others. JCP, 1987, ed. E, II, 14931, p. 261, note A.L. Vincent. Commenting on this decision, Michel Vivant and André Lucas take the view that the originality argued by the Paris Appeal Court refers more to patent law that authors' rights when the court mentions the deposit of the work to discover whether the marketing of the Masci company's software was not subsequent to the software produced by Apple, JCP, ed. E, 1987, 16607, *Actualité droit et gestion* on informatics-related law.
68. A concept developed by the multilateral agreement on investment proposed for April 1988 by OECD (Organization for Economic Cooperation & Development), stating that intellectual rights should be defined as investments and included within this agreement's ambit, which rejects any obstacle that might have the effect of constraining foreign investors in any of the OECD countries.

69. E. Mackaay (1986), Les droits intellectuels entre propriété et monopole, in *Revue internationale de droit économique*, 10, pp. 43–88.
70. This law follows on from the report on the recommendations of the September 1995 white paper designed to adapt American authors' rights with a view to the problems thrown up by Internet and network development. DCMA § 1201 (k), see commentary by Jane Ginsburg, *Chronique des Etats-Unis*, RIDA, no. 179, pp. 207–211.
71. Paul Goldstein (1997), Copyright and its substitutes, in *Journal of the Copyright Society of the USA*, vol. 45, no. 2, winter, on technical measures of protection for artistic works and how to evade them.
72. *Libération*, 8/10/2001, Le CD inviolable, bientôt dans les bacs, p. 25, which makes a distinction between 'private copy' (legal) and 'private piracy' (illegal). Indeed software exists to ensure payment for the work and also to monitor its use and inform the user of the rights system (copyright management information), see http://www.sdmi.org. See also the article by M. Buydens & S. Dussolier (2001), Les exceptions au droit d'auteur dans l'environnement numérique: évolutions dangereuses, in *Communication commerce électronique* (Editions Juriclasseur), no. 9, September, p. 10.
73. On this point it is interesting to note that the European directive on lending and hiring rights, no. 92/100, Council of Ministers, 19 November 1992 (*Code de la propriété intellectuelle*, Dalloz, 2000, p. 574), whose application was strongly criticized in France, since this payment is against the public's interest in free access to books in libraries assisted by a policy of public reading. The Ministry of Culture is planning to introduce this lending right by a system of legal licence (*Libération*, 12 October 2001).
74. In Professor Pollaud-Dulian's opinion, this conception seems a dangerous one, since it means appropriating every kind of non-material investment, ignoring the conventional conditions for recognizing intellectual rights, the boundaries of these rights, and eroding the public domain (*Droit de la propriété industrielle*, Montchrétien, 1999, p. 5, n. 11).
75. Directive 2001/29/CE, European Parliament and Council of Ministers, 22 May 2001, *Sur l'harmonisation de certains aspects du droit d'auteur et des droits voisins dans la société d'information*, JO CEE, 22.6.2001; L 167/10 considérant 14 stating that 'the directive should promote the dissemination of knowledge and culture through the protection of works and other protected objects, while providing for exceptions or limitations in the public interest for educational or teaching purposes'.
76. Maître Cohen-Tanugi (1999) writes on this topic that 'the exploitation of works in the electronic world is tending to increase the number of cases relating to ownership for commercial entities, block payments, near-compulsory use of collective handling of rights and a weakening of authors' moral prerogatives. All this is still within the formal framework of the *droit d'auteur*, but borrows increasingly from the copyright system, which is better suited to complex economic exploitation' (in *Le Nouvel Ordre numérique*, Odile Jacob).