

**BRITISH AND FRENCH COPYRIGHT:  
A HISTORICAL STUDY OF AESTHETIC IMPLICATIONS**

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## **INTRODUCTION**

St. Paul: 'You are not your own property; you have been bought and paid for' (1 Cor. 6:19-20, Jerusalem Bible)

'Le gach buin a laogh' : 'To every cow its calf – to every work its copy', Diarmid, King of Ireland c. 550, settling a dispute between St Columba and Finnian.

From an aesthetic perspective a reading of the laws on literary and artistic property is likely to occasion some surprise. Terms familiar in aesthetics, such as 'originality', 'work', 'author' and 'reproduction', are at the heart of copyright but, as will become clear, these terms are not to be interpreted in their usual meaning:

It is a common-place that legal wording is not what the general reader of English is used to, and it is sometimes held that this results from an act of wilful obscurantism by lawyers. It would perhaps be less fanciful to relate this state of affairs to the historical contingency whereby –

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unlike the moral and, increasingly, the aesthetic systems – the legal system has not been internalised by the majority of citizens. Legal expertise, we must say, happens to have remained on the outside.<sup>1</sup>

David Saunders ascribes the divergence between legal and aesthetic and common usages of such terms to the closedness of the legal system. Legal concepts, in his view, live a life independent of the outside world. No popular infiltration of the law has ‘harmonised’ everyday and legal language. However, this picture of two isolated sets of usage of such terms as ‘originality’, ‘work’, ‘author’ and ‘reproduction’ is somewhat dubious. First of all, the legal terms must derive from somewhere; and sure enough, they are adopted from their older counterparts in aesthetics. Second, there is always good reason to be suspicious of claims concerning the existence of an unpolluted terminology. Language cannot be controlled. And there are at least three important ways in which legal terms continue to rely upon the aesthetic discourse. First, copyright language borrows heavily from the prestige associated with the spheres of ‘art’ and ‘literature.’ Peter Jaszi observes:

‘authorship’... continued (and continues) to be strategically deployed to extend copyright protection to new kinds of subject matter. At several crucial junctures in the later development of copyright, ‘authorship’ has been invoked to justify additional legal appropriation of creative (and not-so-creative) efforts.<sup>2</sup>

It adds a certain glory to a timetable to call it a work of authorship and it seems more justified to protect the design of a chocolate wrapper for a hundred years if it is categorized as a work of art. The name matters: in particular in law where rhetoric is everything.

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<sup>1</sup> David Saunders, *Authorship and Copyright* (London: Routledge, 1992), p. 10

<sup>2</sup> Peter Jaszi, 'Toward a Theory of Copyright: The Metamorphoses of "Authorship"', *Duke Law Journal*, no. 1 (1991): 455-502, p. 480.

Second, legal classification of ‘works’ depends upon specific aesthetic categories. More specifically, copyright reproduces an Aristotelian categorization such as can be found in Gotthold Ephraim Lessing’s *Laocöon* (1767). In accordance with Lessing’s distinction between the temporal arts and the plastic arts copyright sustains a system of classification that separates literary works from artistic works.<sup>3</sup>

Third, legal analytical approaches to ‘original works’ (in the legal sense) build on norms developed in literary and aesthetic criticism. Whether inadvertently or not legal analysis draws upon literary and aesthetic criticism. Concepts such as plot, composition, character, metaphor, theme, realism and motif are all frequently employed. There is nothing to suggest that these concepts are applied as part of a general endorsement of a specific literary or aesthetic theory. But each application of a term will inevitably situate the analysis in a particular tradition.

Another point of interest for an aesthetic-minded onlooker is the way literary and artistic property relates to its material. It is the notion of what Bernard Edelman—in his discussion of the concept of ‘the over-appropriation of the real’—designates as ‘the *contradictory content* of literary and artistic property. Literary and artistic property has the strange, unique, original characteristic of being acquired through superposition on an already established property.’<sup>4</sup> It is remarkable how this inner contradiction of copyright has its roots in early Roman law. Gaius, on the topic of ‘everyday issues,’ sums up the discussion:

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<sup>3</sup> Today various other types of works are distinguished, including for example: musical works, architectural works and cinematographic works. Anne Barron discusses how the classification of works has unfortunate consequences for the protection of contemporary art, which may not fit into the defined categories. If a work cannot be placed in any legal category it is not protected by copyright. See Anne Barron, ‘Copyright, Art and Objecthood,’ in *Dear Images. Art, Copyright and Culture*, ed. D. McClean and K. Schubert (London: Ridinghouse ICA, 2002), 277-306, p. 279. Meanwhile, the existing categories have been expanded by corporate pressure for protection of industrial products. As Laddie J puts it ‘The law has been bedevilled by attempts to widen the field covered by copyright, and there was no reason why the word “sculpture” in the Copyright, Patents and Designs Act 1988 should be extended far beyond the meaning which it had to ordinary members of the public.’ Laddie J in *Metix (UK) v. G.H.Maughan (Plastic) Ltd* in the patent court, March 10, 1997 [1997] Fleet Street .Reports, October, p. 718-724. The case concerned the subsistence of sculpture copyright in manufacturing moulds.

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When someone makes something for himself [for example a vase of gold] out of another's materials, Nerva and Proculus are of the opinion that the maker owns that thing because what has just been made previously belonged to no one. Sabinus and Cassius, on the other hand, take the view that natural reason requires that the owner of the materials should be the owner of what is made from them, since a thing cannot exist without that of which it is made. [...] There is, however, the intermediate view of those who correctly hold that if the thing can be returned to its original components, the better view is that propounded by Sabinus and Cassius but that if it cannot be so reconstituted, Nerva and Proculus are sounder.<sup>5</sup>

With particular reference to literary property a rule is set up in Justinian's Institutes:

Writing, even in letters of gold, becomes part of the paper or parchment, just as fixtures on or in land merge in the land. Suppose Titius writes a poem or a history or a speech on your paper or parchment. A judge will find that you, not Titius, are owner. But if you vindicate the books or papers and are not prepared to pay him for the expenses of writing, Titius will have the plea (exception) of deceit. That assumes he acquired possession of the paper or parchment in good faith.<sup>6</sup>

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<sup>4</sup> Bernard Edelman, *La propriété littéraire et artistique*, 3 ed., *Que sais-je?* (Paris: Presses Universitaires de France, 1989), p. 38.

<sup>5</sup> Gaius, second book: 'Everyday issues or Golden words.' Cited from Ditlev Tamm, *Roman Law and European Legal History* (Copenhagen: DJØF Publishing, 1997), p. 91. On this topic see also Max Kaser, *Römisches Privatrecht*, 14 ed. (München: C.H.Beck'sche Verlagsbuchhandlung, 1986), especially pp.122-124; Michel Villey, *Le droit romain. Son actualité*, 6 ed., *Que sais-je?* (Paris: Presses Universitaires de France, 1972) and Peter Stein, *Roman Law in European History* (Cambridge: Cambridge University Press, 1999).

<sup>6</sup> Institutes of Emperor Justinian, book 2, title 1, §33-34. Cited from Ditlev Tamm, *Roman Law and European Legal History* (Copenhagen: DJØF Publishing, 1997), p. 92.

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In both art and literature an opposition is assumed to exist between the work, as created by an artist or a poet, and the material base of the work. In order to resolve ownership the one has to exclude the other. No synthesis between artwork or literary work and its material seems possible within the framework of the law of property. Yet precisely this synthesis is what gives rise to aesthetic admiration. A work cannot be reduced to the idea of the work. It is to be appreciated in its texture, colours, composition and proportions, generally in its *facture*: ‘manufacturedness.’ Literary works too sustain their existence in format, type, layout, chapter divisions, punctuation, illustrations: all add to the aesthetic experience. From an aesthetic point of view, then, it is important to maintain that literary and artistic expression can only be appreciated fully in its material incarnation.

The aim of the present dissertation is to give a characterization of copyright from an aesthetic viewpoint.<sup>7</sup> In so far as art and literature are the objects of the law, and because so many central concepts are drawn from aesthetics, this approach should yield some new insights.<sup>8</sup> However, such an interdisciplinary venture requires that certain conditions be made clear. Importantly this study should not be read as a text in the genre of jurisprudence (although a certain familiarity, on the part of the reader, with the texts of copyright law will enhance the understanding of the issues under scrutiny). Legal analytical traditions will not be rigorously adhered to, and categories of the law will sometimes be transgressed. Primarily, art and literature will here refer

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<sup>7</sup> As such it is related to studies by Carla Hesse, Mark Rose and Martha Woodmansee: Carla Hesse, *Publishing and Cultural Politics in Revolutionary Paris, 1789-1810*, ed. V.E. Bonnell and L. Hunt, *Studies on the History of Society and Culture* (Berkeley: University of California Press, 1991); Mark Rose, *Authors and Owners. The Invention of Copyright* (Cambridge MA: Harvard University Press, 1993); Martha Woodmansee, *Author, Art, and the Market. Rereading the History of Aesthetics* (New York: Columbia University Press, 1996). More broadly it can be placed within a field of interdisciplinary studies of law that includes such works as: Rosemary J. Coombe, *The Cultural Life of Intellectual Properties. Authorship, Appropriation, and the Law*, ed. S. Fish and F. Jameson, *Post-Contemporary Interventions* (Durham NC: Duke University Press, 1998); Celia Lury, *Cultural Rights. Technology, Legality and Personality*, ed. J. Urry, *International Library of Sociology* (London: Routledge, 1993); Peter Brooks, *Troubling Confessions. Speaking Guilt in Law and Literature* (Chicago: University of Chicago Press, 2000); Peter Brooks and Paul Gerwitz, eds., *Law's Stories: Narrative and Rhetoric in the Law* (New Haven, London: Yale University Press, 1996) and Jane M. Gaines, *Contested Culture: the Image, the Voice, and the Law* (Chapel Hill: University of North Carolina Press, 1991).

to what is ordinarily designated by that name. In addition, the data selected for the study will relate to art and literature in the non-legal sense. There is no analysis of the meaning of ‘artistic’ and ‘literary’ in copyright law.<sup>9</sup> In fact such an analysis would be to no avail in an aesthetic perspective. No aesthetic discrimination is made by the law: it protects all sorts of mundane things far removed from the world of art. As will become clear, a strict legal terminology cannot be kept; terms such as ‘reproduction’ and ‘originality’ will necessarily be used in both their legal and their aesthetic denotation. Furthermore, in the course of pursuing this study, the author has been almost continuously aware of the issue of translation. Connotations get lost in the process of translating both aesthetic and legal terms. There are *false friends*: ‘reproduction’, for example, gives rise to different associations in English and in French, and it does not have the same import in British as in French copyright law. The term ‘copyright’ is a problem in itself; it refers to a specific Anglo-American tradition. Therefore, it has been necessary to use it in both a specifically British and in a generic sense.

With all these qualifications in mind, we attempt here to outline the possibilities of an aesthetic study of copyright. In a general way this dissertation aims to supply a context for the law’s application of its own concepts. By the same token an external view of the law makes possible an account of the way concepts appear in a *Wechselwirkung* (Gadamer’s term) between copyright and the aesthetic and social spheres. It is not only the law that affects authors and artists in a socio-economic way. Literary and artistic discourse also infiltrates the law at the level of conceptualisation. This does not happen in a consistent way; and the spheres of art and literature, as we know, may well be victims of the return of altered versions of their own concepts. What can be achieved by an aesthetic analysis in this respect is that the ‘unconscious’ of copyright can be exposed in the shape of the connotations

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<sup>8</sup> A chronological survey of copyright cases is a piece of cultural history in itself. Many of our most important artists and authors can be found among the parties of the cases.

<sup>9</sup> Such an analysis as can be found in for instance Paul Kearns, *The Legal Concept of Art* (Oxford: Hart Publishing, 1998) and David L. Booton, ‘Art in the Law of Copyright: Legal Determinations of

suggested by legal concepts in areas beyond the law. Such an exposure may point to the underlying contradictions that create terminological confusions in copyright, but which cannot be described within a purely legal framework.

Another significant element of the aesthetic analysis of copyright is its diachronic view. An aesthetic analysis is a contribution to the writing of the intellectual history of intellectual property. In a way the law can be said to be the crystallization of social assumptions and received ideas. Yet the law in itself cannot account for the development from one paradigm of understanding to the next; it can only be a mirror of the beliefs and norms of a society at a given time. As it is, the law is always already synchronic in its approach. Therefore it must be the concern of a meta-analysis of the law to describe the conceptual movements and changes within the law.<sup>10</sup>

In order to carry out the aesthetic study of the law, the appropriate data—or in the literary jargon: texts—need to be found. As it is, legal cases that concern artworks or literary works are the ideal material for our purpose. With a historical selection of cases it is possible to follow developments in the application by courts of concepts such as ‘reproduction’, ‘copy’, ‘author’, ‘work’, ‘original’, etc. By the same token changes in the rhetoric surrounding these concepts can be registered in the speeches of the judges. Shifting perceptions of art and literature in the law can also be made visible. In practice the choice of this data has implied certain decisions and tasks. Although copyright law is built on the same fundamental principles in all countries, there are significant divergences between national codes. We must always be aware of the jurisdictions that govern the cases we consider. Thus it was decided to make a comparative study and to pick cases from two prominent traditions of copyright, namely the Anglo-American and the Continental. Moreover, the specific choice of British and French cases meets the requirement that we have access to a large and

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Artistic Merit under United Kingdom Copyright Law,' *Art, Antiquity and Law* 1, no. 2 (1996): 125-139.

<sup>10</sup> Such a meta-analysis does not necessarily require an aesthetic approach. An excellent example of a critical historical analysis of copyright is found in Benjamin Kaplan, *An Unhurried View of Copyright* (New York: Columbia University Press, 1967).

continuous body of historical material. The United Kingdom's Statute of Anne (1710) is the world's first copyright act and British copyright law has served as a model for all common law countries. French copyright dates back to the Revolutionary Act of 1793 and a well-established system now exerts a great influence via the EU and the Berne Convention, especially with regard to *les droits moraux*: 'moral rights.'

A major task here has involved the selection of cases. This has entailed going through legal commentary and law reports from the nineteenth and twentieth centuries<sup>11</sup> in order to find the significant cases, and to make sure that they deal with art and literature in the non-legal sense. Once the selection was completed, the cases were systematized and analysed. Finally some of the more speculative questions arising from the material were addressed. Taking such an 'empirical' approach has meant that the data in itself has, to a large extent, directed the study. Focus has been on the points of interest that turn up along the way rather than on a number of prescribed issues. The strength of this method is that it has enabled us to arrive at a number of sound *a posteriori* conclusions, rather than merely providing us with a checklist of what we had already postulated. A disadvantage is that the comparison between British and French law is not symmetrical. There are simply many more cases in France that are of aesthetic interest and that deal with art and literature (rather than with industrial products).<sup>12</sup> The asymmetry is repeated in the fact that the French cases that have been selected are moral rights cases while the British cases mostly concern economic rights. Aesthetically speaking, moral rights make more sense than pecuniary rights. If only a few British moral rights cases have been included, this is due to the scarcity of material. Moral rights were introduced as late as 1988 in the UK. A further lack of balance that characterizes both traditions is that, historically, artworks have been the centre of more legal disputes than have literary texts. Besides, art disputes, as has become clear, tend to be more complex and therefore take up more space, both in legal reports and in this dissertation.

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<sup>11</sup> Only a few cases, in the British section, date from before 1800.

<sup>12</sup> Notice that the selection of neither French nor British cases is meant to be exhaustive.

The *a posteriori* observations that have been brought about in this study relate to six general issues. First, exchanges of meaning between ‘reproduction’, ‘copy’ and ‘imitation’ took place in the nineteenth century. A remarkable change in the definition of each concept in copyright has furthermore occurred between the nineteenth century and the present.<sup>13</sup> Second, the literary devices of citation and allusion are central to the conflicts in many copyright infringement cases, but these remain unaccounted for in copyright. Third, an implicit theory of literary and artistic representation is the underpinning of many decisions. There are, however, theories of representation that are better suited for resolving the particular questions that appear in copyright. Such alternative theories will be pointed out and their explanatory powers will be tried. Fourth, a general change in the rationale of copyright has occurred between the nineteenth and the twenty-first centuries. Once referred to as an instrument to regulate competition in the market, copyright has become articulated as a protection of an authorial or artistic ‘personality.’ This development is linked to a change in the legal perception of art and literature. This ‘biographisation’ has, for instance, caused the category of the work to lose its status as an analytical tool (particularly in France). Fifth, because the law of copyright defines a literary work and an artistic work as immaterial, copyright is incapable of addressing, in a satisfactory way, issues that concern the material instantiations of artworks. There is for example no means of preventing the destruction, by their ‘owners’, of original artworks according to French and British moral rights. Sixth, a source of numerous confusions in copyright is a classificatory problem. Art and literature, despite their placement in separate classes in copyright, continue to be treated as if they were of equal ontological status. But the differences between art and literature are so many that ideally they should have each their own law. In the present circumstances, a mix-up of the properties of a work of art and a work of literature can be detected in almost all cases.

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<sup>13</sup> Imitation, for example, was a legal term in the 1862 Fine Arts Act, but has more or less disappeared today.

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The dissertation is divided into four parts. Part One, 'Background', provides a framework for understanding the historical and theoretical contexts of the cases to be analysed. A summary of the history of copyright in Britain and France is provided. In both countries copyright is built on a tradition of royal privileges dating back to the sixteenth century. Since its introduction in the eighteenth century, copyright has undergone many changes. The definition of the owner of copyright, copyright's subject matter and the term of protection have all been subjected to numerous amendments. A range of philosophical approaches to copyright have furthermore developed. Theories of personality rights and of property rights; economic analysis; cultural arguments and critical approaches will all be described here, together with the basic concepts of copyright: the author, the work, and infringement of copyright. Essential aesthetic concepts, in a similar vein, are presented. In separate chapters, the concept of the author and the literary and artistic device of imitation are studied in a historical perspective. It should be kept in mind that, at an analytical level, these preliminary explications are to serve as background knowledge. The central definitions and arguments of the dissertation are developed through analyses of cases.

Part Two, 'To copy or not to copy - a British question', looks at the treatment of art and literature within British copyright. In Britain, literary and artistic works are protected against unauthorized copying. As it is, the concept of copying is a key factor in understanding the approach to art and literature in British copyright law. Defining that which can be copied has shaped the perception of what represents the original (copyrightable) element of an artwork or a literary work. Moreover, the notion of what constitutes a copy has set the criterion for infringement. Importantly, the legal concept of copying has relied upon the idea of copying as a literary technique as well as on the idea of imitation as an aesthetic practice. At the same time reproduction has figured in the law as a technological process. The notion of substantial taking (which implies both causality and similarity) in copyright has served as an elastic device through which these different conceptions of copying have been applied. Cases examined in this part begin with *Millar v. Taylor* (1769), which granted copyright in perpetuity to London book-sellers, and end with the

issuing of a reprimand in *Antiquesportfolio.com v. Rodney Fitch & Co Ltd* (2000) to webdesigners who had used copyright material without permission.

Part Three, ‘Metamorphoses of moral rights in France’, focuses on moral rights.<sup>14</sup> Moral rights in France represent an approach to art and literature which is rather different from that of British copyright. Our special concern will be with the right of integrity, the ‘oldest’ among the moral rights. While moral rights were ratified in French statutory law by the 1957 Act, the legal foundation for the rights was well established already in the nineteenth century.<sup>15</sup> The first decision in France to recognise the principle of the right to the integrity of the work took place in 1814.<sup>16</sup> Later the right of paternity,<sup>17</sup> the right of disclosure,<sup>18</sup> and the right of change and withdrawal were all recognised in case law. We are particularly interested in the right of integrity because it is the one among *les droits moraux* which deals most explicitly with aesthetic issues. Definitions of authorship, of the creative process and of the work, for example, are presented in integrity rights cases. Moreover, a large body of case material renders possible a thorough analysis of the development of such aesthetic arguments within the law.

Moral rights disputes do not revolve around the question of similarity between an original and a copy, as do the British cases that relate to infringement of the right to copy. Rather, moral rights infringement arises from a significant difference between an original work and a (re)presentation of it. With regard to this

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<sup>14</sup> It should be noticed that ‘moral’ in ‘droit moral’ is not synonymous with ‘moral’ in English, despite the fact that ‘*droit moral*’ has been translated into the English as ‘moral right.’ ‘*Les Droits moraux*’ do not concern ethics or conscience. Rather, ‘moral’, in moral rights, is to be understood in as ‘Relatif à l'esprit, à la pensée’: relating to spiritual and intellectual—as opposed to material and physical—life. See *Le Petit Robert* CD-ROM. Version électronique du nouveau Petit Robert. Paris: 1997. The term ‘*droit moral*’ in the sense it has in copyright was introduced by *Le Moniteur* in 1841. See Stig Strömholm, *Le droit moral de l'auteur en droit allemand, français et scandinavie avec un aperçu de l'évolution internationale*, 2 vols., vol. 2:1 (Stockholm: P. A. Norstedt & Söners Förlag, 1966), p. 169.

<sup>15</sup> The moral right as an aspect of authorial rights was brought up in the *Chambre des Député* by Lamartineon as early as 1841. See Jean Matthyssens, ‘Les projets de loi sur le droit d'auteur en France au cours du siècle dernier,’ *RIDA* IV, no. Juillet (1954): 15-57, p. 44.

<sup>16</sup> Trib. Civ. Seine 17 août 1814. See Stig Strömholm, *Le droit moral de l'auteur en droit allemand, français et scandinavie avec un aperçu de l'évolution internationale*, 2 vols., vol. 1 (Stockholm: P. A. Norstedt & Söners Förlag, 1966), p. 124.

<sup>17</sup> *Gaillardet c. Harel*, Trib. Comm., Paris 26 juin 1832. See *ibid*, p. 143.

there is, moreover, a notable distinction between the nature of integrity rights cases that involve works of literature and those involving works of art. Integrity rights in literary works generally serve to protect authors against unauthorized modifications of their texts. Integrity rights in artworks tend to protect a broader set of interests: they control the contexts in which (physical) artworks appear and the ways in which pieces of art are represented, both as physical works and in the shape of reproductions.

The first case in our investigation of integrity rights in France is the aforementioned 1814 decision, which concerned an editor's unauthorized modifications of an article. Our most recent decision, by the *TGI de Tarascon* in 1998, was occasioned by the destruction of Marcel Duchamp's celebrated urinal on display in an exhibition of modern art.

Part Four of the dissertation, 'Moral rights in Britain', considers two decisions that relate to moral rights in Britain: only two cases involve works of art. Rather than taking these few cases to indicate anything about the future influence of moral rights upon the treatment of art and literature in British copyright law, we use these cases for comparison with their French counterparts. It will be considered whether, in any way, aspects of the view of art and literature in French copyright can be said to be developing in Britain with the adoption in English law of moral rights.

Before moving on to our survey of early copyright we should, for a moment, consider the nature of these concepts of copying and the copy:

Copying is pedestrian. Copying is peculiar. On the one hand, copying makes us what we are. Our bodies take shape from the transcription of protein templates, our languages from the mimicry of privileged sounds, our crafts from the repetition of prototypes. Cultures cohere in the faithful transmission of rituals and rules of conduct. To copy cell for cell, word for word, image for image is to make the known world

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<sup>18</sup> The first confirmation of the right to disclose a literary work to the public is found in a court case from 1828. *Affaire Vergne*, Paris 11 janv. 1828; S.1828-1830. 2.5. The case concerned the disclosure

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our own. On the other hand, we are not identical, nor do we wish to think of ourselves as clones. Copying is ultimately imperfect, our errors eventually our heirs. The more widespread the act of copying, the greater the likelihood of significant mistranscription. Genetic slip or evolution, scribal mistake or midrash, whatever we call it, miscopying raises hard questions about identity, security, and integrity. The same technical advances that render our skill at copying so impressive also intensify the dilemmas of forgery. We use copies to certify originals, originals to certify copies, then we stand bewildered.<sup>19</sup>

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of a manuscript. *Ibid.*, p.118.

<sup>19</sup> Hillel Schwartz, *The Culture of the Copy. Striking Likenesses, Unreasonable Facsimiles* (New York: Zone Books, 1998), p. 212f.

# **PART ONE**

## **BACKGROUND**

### **1. HISTORICAL OVERVIEW**

This survey of British and French copyright should serve as a frame of understanding for the close analyses of cases in subsequent chapters. Early British and French copyright legislations have in common that both replaced a system of privileges. Thus our survey starts with a brief history of printing privileges. The accounts of the development of copyright law and authorial rights will focus upon legislation and landmark cases.

#### **I Printing privileges**

The regulation of the press in fifteenth and sixteenth century Venice, after printing began in 1460, offers a pioneer history of the introduction of book-privileges and copyright. In 1469 the Cabinet of Venice started to grant temporary monopolies to print,

called ‘privilegii’.<sup>20</sup> This lasted until 1 August, 1517, when the Venetian Senate passed a law revoking all earlier privileges. Works in cancelled privileges were to be free; new works alone could be monopolized. The law was to correct the problem that publishers’ privileges for whole classes of works prevented all others from issuing editions of the works. Inasmuch as slight alterations to old works made them qualify for new privileges, however, the problem remained. The Senate for that reason decreed that all printers and publishers were obliged to print works with privileges within a year or otherwise lose those privileges.<sup>21</sup>

Before legislation, Venetian printers had held that literary property was created in a work by the act of obtaining a privilege to it. Irrespective of this, in the year 1544-45, a decree was issued, making it obligatory to include documentary proof of the consent of the author or his heirs with every published work.<sup>22</sup> Accordingly the rights in a work were recognized to be vested *ipso facto* in the author of that work. When, in 1603, the Senate ceased to deal with printing privilege matters and the guild of printers took its place, an end was put to this bit of early copyright history.<sup>23</sup> But, as we shall see, it prefigured the course of events in Britain and France in the eighteenth century.

Before copyright the French and British book markets were regulated by a system of book-privileging. Book-privileges were issued by the crown or the state to printers or book-sellers, granting them exclusive permission to publish certain works or types of works for a limited period.<sup>24</sup> It is however disputable whether privileges are ancestors of copyright.<sup>25</sup> Indeed a number of significant differences exist between, on the one hand, the book-privilege systems in Britain and France in the sixteenth and seventeenth centuries, and, on the other hand, the systems of copyright and author’s rights. These

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<sup>20</sup> Horatio Forbes Brown, *The Venetian Printing Press. An Historical Study Based upon Documents for the most Part Hitherto Unpublished* (London: John C. Nimmo, 1891), p. 51f.

<sup>21</sup> *Ibid.*, p. 76.

<sup>22</sup> *Ibid.*, p. 79.

<sup>23</sup> *Ibid.*, p. 176.

<sup>24</sup> See Elizabeth Armstrong, *Before Copyright. The French Book-Privilege System 1498-1526*, *Cambridge Studies in Publishing and Printing History* (Cambridge: Cambridge University Press, 1990), pp. 1-20.

<sup>25</sup> Elizabeth Armstrong, for example, argues that the royal privileges in France were not precursors of modern copyright. See *Ibid.*, p. 206f.

differences highlight certain important features of modern law. One difference is the efficient link between censorship and privilege granting that characterized the early book market.<sup>26</sup> Thus, in France the printing of books, begun in 1470, was controlled from 1498 by a system of book-privileging. In 1566, Charles IX made a further legal requirement that new books should obtain both a license and a privilege from the Chancery.<sup>27</sup> All books were to show on their title-page the obligatory imprint ‘Avec permission et privilège du Roi’. By a Royal Decree of 27 February 1683 the penalty for printing without royal approval was death by hanging or strangling.<sup>28</sup> Book guilds played a central role in the censorship of books. Thus the Paris Book Guild (*Chambre Syndicale de la Librairie et Imprimerie de Paris*), a self-regulating organisation of printers and booksellers who enjoyed a monopoly over the book trade in Paris, granted to them by a royal privilege, assumed a function as a prepublication censor in the seventeenth and eighteenth century.<sup>29</sup>

The book-privilege system worked until the revolution of 1789, when all privileges were abolished with the declaration of the freedom of the press. The *Chambre Syndicale*, though, had already lost much of its power when, in 1777, six regulations, ‘arrêts du conseil d’état’, from the King’s council had made it clear that privileges were an emanation of the king’s grace alone.<sup>30</sup> By the same decree authors’ privileges, not

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<sup>26</sup> For a discussion of the link between censorship and privileges see: Wolfram Siemann, ‘Normenwandel auf dem Weg zur "modernen" Zensur: Zwischen "Aufklärungspolizei", Literaturkritik und politischer Repression (1789-1848),’ in *Zensur und Kultur. Zwischen Weimarer Klassik und Weimarer Republik mit einem Ausblick bis Heute*, ed. J.A. McCarthy and W.v.d. Ohe, Studien und Texte zur Sozialgeschichte der Literatur. Band 51 (Tübingen: Max Niemeyer Verlag, 1995), 63-87; John Feather, *Publishing, Piracy and Politics. A Historical Study of Copyright in Britain* (London, New York: Mansell Publishing, 1994); Mark Rose, *Authors and Owners. The Invention of Copyright* (Cambridge MA: Harvard University Press, 1993); Paul Kaller, *Druckprivileg und Urheberrecht im Herzogtum Nassau: zur Bedeutung des Edikts über die Pressefreiheit von 1814*, *Europäische Hochschulschriften* (Frankfurt am Main: Peter Lang, 1992); Lyman Ray Patterson, *Copyright in Historical Perspective* (Nashville: Vanderbilt University Press, 1968), chapter 6, pp. 114 - 142; and Augustin-Charles Renouard, *Traité des droits d’auteurs dans la littérature, les sciences et les beaux-arts*, 2 vols., vol. 1 (Paris: Jules Renouard, 1838).

<sup>27</sup> Elizabeth Armstrong points to a few exceptions in *Before Copyright*, pp. 115f.

<sup>28</sup> Marie-Claude Dock, *Étude sur le droit d’auteur*, ed. P.-C. Timbal, *Bibliothèque d’histoire du droit et droit romain* (Paris: Librairie Générale de Droit et de Jurisprudence. R. Pichon et R. Durand-Auzias, 1963), p.130.

<sup>29</sup> Carla Hesse, *Publishing and Cultural Politics in Revolutionary Paris, 1789-1810* (Berkeley: University of California Press, 1991), p. 55 *Ibid.*, see chapter II: ‘The Fall of the Paris Book Guild, 1777-1791.’

<sup>30</sup> 30 août 1777. See Augustin-Charles Renouard. *Traité des droits d’auteurs dans la littérature, les sciences et les beaux-arts* (Paris: 1838), vol. 1, p. 101f and p. 166ff. The ‘arrêts’ furthermore concerned the duration of privileges and the nature of contrefaçons.

printers', were made perpetual.<sup>31</sup> This anticipated the revolutionary laws fourteen and sixteen years later when the 'droit d'auteur' was first recognised in France.<sup>32</sup>

In England a similar conglomerate of royal privileging and censorship was in force in the sixteenth and seventeenth centuries.<sup>33</sup> In 1476 William Caxton introduced the first printing press in England. By 1487 the Court of Star Chamber was established, one of its main purposes being to control the press. Half a century later, in 1534, Henry VIII announced the crown's prerogative to rights in printing, with the possibility of assigning or reserving printing patents and privileges, thereby keeping royal control of the press.<sup>34</sup> From 1557 the guild of booksellers<sup>35</sup> in London, the Stationers' Company, enjoyed a monopoly on publishing, granted by the crown, with the Court of Star Chamber as the underlying instrument of authority. Privileges to publish, from then on, were issued by the Stationers' Company to its members only, securing for the government an efficient surveillance of the book trade. The registration of books was a vital part of this surveillance. In 1643 the House of Parliament declared that 'no Book, Pamphlet nor Paper, nor Part of Such Book, Pamphlet or Paper, shall from henceforth be Printed, Bound, Stitched or put to sale by any Person or Persons whatever, unless the same be entered in the Register-Book of the Company of *Stationers*, according to *ancient Custom*'<sup>36</sup>

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<sup>31</sup> See Marie-Claude Dock, *Étude sur le droit d'auteur* (Paris: 1963), pp.130f and Robert L. Dawson, *The French Booktrade and the 'permission simple' of 1777: Copyright and Public Domain; with an edition of the permit registers*, ed. H.T. Mason, vol. 301, *Studies on Voltaire and the eighteenth Century* (Oxford: The Voltaire Foundation at The Taylor Institution, 1992), p.18ff.

<sup>32</sup> For the prehistory of authorial rights in France see furthermore Marie-Claude Dock, *Étude sur le droit d'auteur* (Paris: 1963).

<sup>33</sup> Generally on this topic see Joseph Loewenstein, *The Author's Due: Printing and the Prehistory of Copyright* (Chicago: The University of Chicago Press, 2002)

<sup>34</sup> Harry Ransom, *The First Copyright Statute. An Essay on An Act for the Encouragement of Learning, 1710* (Austin: University of Texas Press, 1956), chapter II, '1476-1559', pp. 17-32.

<sup>35</sup> Stationers' Company consisted of 97 publisher referring to themselves as booksellers. (For the history of the Stationers' see for instance Cyprian Blagden, *The Stationers' Company. A History, 1403-1959* (Stanford: Stanford University Press, 1977) and Marjorie Plant, *The English Book Trade. An Economic History of the Making and Sale of Books*, 2 ed. (London: George Allen & Unwin Ltd., 1965 (1939)). Until the nineteenth century publishers usually sold their books at their own retail bookshop. In the late seventeenth century this practice gradually began to be replaced by a system of wholesaling and general retail bookselling. See John Feather, *A History of British Publishing* (London: Routledge, 1988), p. 61.

<sup>36</sup> Wednesday, 14 June 1643. Cited from 'The Case of Authors and Proprietors of Books' in Stephen Parks, ed., *English Publishing, the Struggle for Copyright and the Freedom of the Press: Thirteen Tracts 1666-1774*, 42 vols., vol. 1, *The English Book Trade 1660-1853. 156 Titles Relating to the Early History of English Publishing, Bookselling, the Struggle for Copyright and the Freedom of the Press. Reprinted in*

In 1662 Charles II strengthened the licensing system with an ‘Act for Preventing the frequent Abuses in printing seditious, treasonable and unlicensed Books and Pamphlets, and for regulating of Printing and Printing-Presses.’<sup>37</sup> By this act the number of printers was limited; all books were to be registered with the Stationers, and a requirement was made to print the names of the printer and the author on all publications. The privilege-system in England lasted until 1694 when the Licensing Act, which had authorised the Company of Stationers’ monopoly over the book trade, was not renewed.<sup>38</sup>

Apart from the censorship issue, another essential difference between privileges and copyright exists: the former favours the publisher the latter protects the author. Booksellers would often treat works for which they had printing privileges as if they were their own property;<sup>39</sup> however privileges are merely granted as (conditional) exclusive permissions to print, while rights are ‘recognised and protected by a rule of law, respect for which is a legal duty, violation of which is legal wrong.’<sup>40</sup>

## **II Copyright since the Statute of Anne**

The Statute of Anne, entitled ‘An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, during the Times therein mentioned’, was the first British copyright act.<sup>41</sup> The Act was passed in 1710,<sup>42</sup> and provided for ‘a sole Right and Liberty of Printing such Book and Books for the Term of One and twenty Years’ to stationers who had already had privileges in

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*Photo-Facsimile in 42 Volumes.* (New York: Garland Publishing, 1975). A similar decree had been issued from the Star Chamber in 1637 by House of Commons order.

<sup>37</sup> 13 & 14 Car. II, c. 33.

<sup>38</sup> The Licensing Act had been in force since 1637. However, the Star Chamber had been abolished in 1641. See Lyman Ray Patterson, *Copyright in Historical Perspective* (Nashville: Vanderbilt University Press, 1968), p. 125.

<sup>39</sup> In last wills and testaments, for instance, bequest of the value of ‘copies’ would be made. See A. V. Avis, *The First English Copyright Act* (London: Glenview Press, 1965), p. 5.

<sup>40</sup> L. B. Curzon, *A Dictionary of Law* (Estover: Macdonald and Evans, 1979), p. 299.

<sup>41</sup> (1709) Anne c. 19. (The Statute of Anne 1710).

<sup>42</sup> As the Statute of Anne was enacted in February there has been some confusion as to whether the proper date is 1709 or 1710. The simple answer is that until 1752, when England went over to the Gregorian calendar, the legal year began on 25 March.

existing published works. A further copyright of fourteen years was offered to ‘the Author of Any Book or Books already Composed and not Printed and Published, or that shall hereafter be Composed, and his Assignee, or Assigns’. After this fourteen-year term renewal was possible for a second period of the same duration, if the author was still alive.<sup>43</sup>

L. R. Patterson has pointed out that, even if ‘construed to have provided an author’s copyright [...] the statutory copyright provided in the Statute of Anne was a publisher’s copyright.’<sup>44</sup> Thus the act was, to a large extent, a trade regulation act one main purpose being to break the monopoly of the Stationers. ‘The battle of the booksellers’—the conflict between mainly Scottish printers and the Stationers—was to continue after 1731 when the 21-year-term expired, however. The Stationers claimed to have a perpetual right to their books in common law, and this matter was not to be resolved until *Donaldson v. Beckett* in 1774.<sup>45</sup>

Authors were acknowledged by the Act inasmuch as they were enabled to acquire copyright of their own works, but their rights remained undefined.<sup>46</sup> In the Act, moreover, ‘authors’ are only mentioned alongside ‘proprietors’ and ‘assignees,’ all

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<sup>43</sup> (1709) Anne c. 19.

<sup>44</sup> Lyman Ray Patterson, *Copyright in Historical Perspective* (Nashville: Vanderbilt University Press, 1968), p. 144.

<sup>45</sup> (1774) 2 Bro PC 129. The Irish booksellers were a special case. British law did not outlaw reprinting in Ireland. This was tolerated and book publishing in Ireland was not necessarily synonymous with cheap reprints. Some Irish booksellers made quality editions, corrected typographical errors, added commentaries and notes, and illustrations. See Richard Cargill Cole, *Irish Booksellers and English Writers 1740-1800* (London: Mansell Publishing Ltd., 1986).

<sup>46</sup> Still, as Lyman Ray Patterson notes, the ‘radical change in the statute [...] was not that it gave authors the right to acquire a copyright—a prerogative until then limited to members of the Stationers’ Company—but that it gave that right to all persons.’ *Patterson* (1968), p. 145. The legal deposit required by *Anne* has been used as an argument against the idea that copyright inheres in the author. The role of the legal deposit is seen as either constitutive or declarative of copyright. The requirement of a legal deposit continued into the nineteenth century. Eleven copies were required but as it was argued in 1813 ‘it will be expedient to modify some of the existing provisions,—As to the quality of paper, which may be fairly reduced from the finest sort and the largest size [...] Your Committee would however suggest one exception to these rules, in favour of The British Museum; this National establishment, augmenting every day in utility and importance, ought, in the opinion of Your Committee, to be furnished with every publication that issues from the press, in its most splendid form.’ ‘Report from the Select Committee on the Copyright Acts of 8 Anne, C. 19; 15 Geo. III, C. 107; and 54 Geo. III, C. 116, respecting Copyright of Books,’ (London: Ordered by The House of Commons, to be Printed 5 June 1818, 1813), p. 7 (Appendix, N<sup>o</sup> 2). The 1842 reduced the number of legal deposit libraries to The British Museum (which was to have a copy of the best of a work); The Bodleian Library at Oxford; The Public Library at Cambridge; The Libraries of the Faculty of Advocates at Edinburgh; and Trinity College Dublin.

equally qualified as copyright owners.<sup>47</sup> Even so, in their campaigns before the passing of the bill, book guild members had strategically deployed the metaphor of the author's paternity of his writings.<sup>48</sup> The author was proclaimed the master of his own writings and, when conveying this mastery to the bookseller, the right to the work would, justly, belong to the latter in perpetuity.<sup>49</sup> This alleged common law property right was what publishers claimed to have bought. Even so, the Stationers got the twenty-one-year copyright of *Anne*, while the author was merely recognised as one of a number of possible persons who could obtain rights to copy for fourteen years.

The Statute of Anne has become known for its imprecision. According to John Feather: 'Nowhere does the 1710 Act define "copies" or "books" or "rights"; it merely assumes an understanding of them.'<sup>50</sup> A number of central concepts as well as the scope of copyright, accordingly, were to be negotiated in the centuries to come. Not until the landmark case, *Donaldson v. Beckett*, in 1774,<sup>51</sup> which reversed the earlier decision of *Millar v. Taylor*,<sup>52</sup> was it decided that there was no perpetual copyright in common law. Numerous acts concerning designs, drama, sculpture, and lectures were passed in the eighteenth and nineteenth centuries, a few of which can be mentioned here: engravings were protected in 1735<sup>53</sup>, designs in 1787,<sup>54</sup> sculptures in 1798,<sup>55</sup> and

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<sup>47</sup> 15 George III, c. 56.

<sup>48</sup> For example Richard Atkyns in 1666: 'It is humbly conceived, First, That the Author of every *Manuscript* hath (in all reason) as good right thereunto, as any Man hath to the Estate wherein he hath the most absolute pproperty; and consequently the taking from him the one (without his own consent) will be equivalent to the bereaving him of the other, contrary to his Will. Secondly, Those who purchased such Copies for valuable considerations, having the Authors right thereby transferred to them (and a due Licence and Entrance according to Law) 'twill be aprejuici to deprive them of the benefit of their Purchase, as to Desseise them of their Freehold.' Richard Atkyns, 'The Case of the Booksellers and Printers Stated; with *Answers* to the *Objections* of the Patentee,' (1666). See Stephen Parks, ed., *English Publishing, the Struggle for Copyright and the Freedom of the Press: Thirteen Tracts 1666-1774*, 42 vols., vol. 1, *The English Book Trade 1660-1853. 156 Titles Relating to the Early History of English Publishing, Bookselling, the Struggle for Copyright and the Freedom of the Press. Reprinted in Photo-Facsimile in 42 Volumes.* (New York: Garland Publishing, 1975).

<sup>49</sup> See the discussion in Mark Rose, *Authors and Owners. The Invention of Copyright* (Cambridge MA: Harvard University Press, 1993), chapter 3. See furthermore Joseph Loewenstein, *The Author's Due: Printing and the Prehistory of Copyright* (Chicago: The University of Chicago Press, 2002).

<sup>50</sup> John Feather, *Publishing, Piracy and Politics. A Historical Study of Copyright in Britain* (London, New York: Mansell Publishing, 1994), p. 63.

<sup>51</sup> (1774) 2 Bro PC 129.

<sup>52</sup> (1769) 4 Burr. 2303.

<sup>53</sup> 8 Geo. II, c. 13 (1735 Engraver's Act).

<sup>54</sup> 27 Geo. III, c. 38 (1787 Calico Printers' Act).

the 1814 Copyright Act<sup>56</sup> extended duration of copyright to 28 years or the life of the author, whichever was longer. The Copyright Act 1842, titled ‘An Act to Amend the Law of Copyright,’<sup>57</sup> gave protection for the life of the author plus seven years, the prominent place of the author anticipating contemporary copyright law.<sup>58</sup> Fine arts, including paintings, drawings, and photographs, were protected by the 1862 Act: ‘An Act for Amending the Law Relating to Copyright in Works of the Fine Arts, and for Repressing the Commission of Fraud in the Production and Sale of Such Works.’<sup>59</sup>

The Copyright Act of 1911<sup>60</sup> repealed all previous literary and artistic copyright statutes (except musical) and made amendments according to the Berlin 1908 modifications of the Berne Convention of 9 September 1886. In its first two paragraphs, moreover, common law copyright was abolished. By the same measure, unpublished works, hitherto under perpetual copyright by common law, were for the first time given statutory protection. The 1911 Act was repealed by the Copyright Act 1956, which, among others, added sound recordings, cinematographic films, and published editions of works to its subject matter. In 1977 the Whitford Committee could note that technical developments—photocopying, tape recorders and computer technology, in particular—called again for changes in copyright law.<sup>61</sup> A new law, however, was not to come until the Copyright, Designs and Patents Act 1988. The 1988 Act with a number of amendments is still in force.<sup>62</sup>

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<sup>55</sup> 38 Geo. III, c. 71 (1798 Sculpture Copyright Act).

<sup>56</sup> 54 Geo. III, c. 156 (1814 Copyright Act).

<sup>57</sup> 5 & 6 Vict. C. 45 (1842 Copyright Act).

<sup>58</sup> On the making of the 1842 Act and on Thomas Noon Talfourd’s role in this, see Catherine Seville, *Literary Copyright Reform in Early Victorian England. The Framing of the 1842 Copyright Act*, *Cambridge Studies in English Legal History* (Cambridge: Cambridge University Press, 1999).

<sup>59</sup> 25 & 26 Vic., c. 68.

<sup>60</sup> 1 & 2 Geo. V, c. 46.

<sup>61</sup> Justice Whitford, ‘Copyright and Designs Law. Report of Committee to Consider the Law on Copyright and Designs,’ (London: Her Majesty’s Stationery Office, 1977), p. 22.

<sup>62</sup> On copyright historiography see Kathy Bowrey, ‘Who’s Writing Copyright’s History,’ *European Intellectual Property Review* 6 (1996): 322-329.

### III 'Le droit d'auteur' since 1a loi du 19 juillet 1793'

After privileges to print had been abolished in August 1789, when freedom of the press was declared, and later, in 1791, when the Paris book guild had been abolished, legal control of printing rights ceased to exist. As a result Paris was flooded with pirate publications from an increasingly disorganized book trade; authors as well as publishers were deprived of any protection against unauthorised printing of their works. With the passing of the Revolutionary Laws of 13 -19 January 1791 and 19 - 24 July 1793 the situation changed. The 'loi du 13-19 janvier 1791' concerned dramatic works,<sup>63</sup> while the 1793 Act on literary and artistic property granted authors an exclusive reproduction right for their lifetime plus ten years for the heirs.<sup>64</sup> The 'declaration of the rights of genius', as the law was called on a famous occasion,<sup>65</sup> was to constitute the foundation of the French literary property law.

The 1793 Act continued with only minor amendments until the Law on Literary and Artistic Property of 11 March 1957.<sup>66</sup> Introduced eighty-three years after

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<sup>63</sup> See Augustin-Charles Renouard. *Traité des droits d'auteurs dans la littérature, les sciences et les beaux-arts* (Paris: 1838), vol. 1, pp. 301-316 and Marie-Claude Dock, *Étude sur le droit d'auteur* (Paris: 1963), pp. 150-158.

<sup>64</sup> La loi du 19-24 juillet 1793, article 1: 'Les auteurs d'écrits en tout genre, les compositeurs de musique, les peintres et dessinateurs qui feront graver des tableaux et dessins, jouiront, durant leur vie entière, du droit exclusif de vendre, faire vendre, distribuer leurs ouvrages dans le territoire de la République, et d'en céder la propriété en tout ou en partie.' J. B. Duvergier, ed., *Collection Complete des Lois, Décrets, Ordonnances, Réglemens, Avis du Conseil-d'état. (Depuis 1788, par ordre chronologique)*, 2 ed., 28 vols., vol. 22 (Paris: A. Guyot et Scribe, 1838), p. 35. For a discussion of the debates before the law and its coming into being see Carla Hesse, *Publishing and Cultural Politics in Revolutionary Paris, 1789-1810* (Berkeley: University of California Press, 1991), pp.119-134 (end of chapter 3 - beginning of chapter 4). The very first attempt, by the National Assembly, to re-regulate the book market was the passing of a law in 1791, protecting the property rights of playwrights for five years. For a discussion see *Ibid.* pp. 117ff and Claude Colombet, *Propriété littéraire et artistique et droits voisins* (Paris: Dalloz, 1990), p. 7.

<sup>65</sup> By Joseph Lakanal, member of the Committee on Public Instruction, in his speech to the National Convention on the day of the passing of the law, July 19, 1793: 'de toutes les propriétés, la moins susceptible de contestation, c'est sans contredit celle des productions du génie; et quelque chose doit étonner, c'est qu'il eut fallu reconnaître cette propriété, assurer son exercice par une loi positive.' Quoted from Colombet, *Ibid*, p. 7. The interpretation 'the declaration of the rights of genius' derives from the title of Hesse's third chapter of *Publishing and Cultural Politics in Revolutionary Paris, 1789-1810*. See also Carla Hesse, 'Enlightenment Epistemology and the Laws of Authorship in Revolutionary France, 1777-1793,' *Representations*, no. 30 (1990): 109-137.

<sup>66</sup>Mainly, amendments were made to increase the term of protection after the author's death. For a list of amendments see Sam Ricketson, ed., *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986* (London: Centre for Commercial Law Studies, Queen Mary College, University of London, 1987), 'Table of National Laws', p. xxxix. For the development of the law in the first part of the nineteenth century (until 1838) see also Augustin-Charles Renouard. *Traité des droits d'auteurs dans la littérature, les sciences et les beaux-arts* (Paris: 1838), vol. 1, pp. 301-431.

their British equivalents, the first French literary property rights, sufficiently well-defined and broad in scope, remained in their almost original formulation for more than one hundred and fifty years.

The key position of the author—in this sense the 1793 Act was distinct from the Statute of Anne—possibly explains the durability of the French Act. Throughout the nineteenth century literary property was justified with an increasing reference to the personality of the author or to his capacity for original composition.<sup>67</sup> This romantic notion of authorship had, in a sense, been anticipated by the Revolutionary Act, which rewarded authors' creativity with an exclusive right to their works.<sup>68</sup> In the nineteenth century the development of moral rights added further to the

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<sup>67</sup> See for example *Renouard*: 'Le droit au privilège est le prix du travail; c'est une rémunération dont la loi garantit la jouissance exclusive comme prix d'échange et dette de reconnaissance, par lesquels la société paie l'utilité et le plaisir qu'elle retire de l'ouvrage. Il derive de la qualité d'auteur.' vol. 1, p. 203.

<sup>68</sup> Claude Colombet has been much cited for the view that the creative faculty of authors justifies authorial rights and on tracing this justification back to the revolution: 'Un droit exclusif est conféré aux auteurs parce que leur propriété est la plus justifiée puisqu'elle procède de leur création intellectuelle.' Claude Colombet, ed., *Propriété littéraire et artistique et droits voisins*, 3. ed. (Paris: Dalloz, 1990), p. 8. He cites one of the draftsmen of the 1793 Act, Le Chapelier, to document the early recognition of this bond between author and work: 'de toutes les propriétés, la moins susceptible de contestation, c'est sans contredit celle des productions du génie, et quelque chose doit étonner, c'est qu'il eut fallu reconnaître cette propriété, assurer son exercice par une loi positive.' (p. 7). This passage from Le Chapelier's Report has become well known evidence in support of the argument that authors' right were established as natural rights during the French revolution. However, André Kerever and Jane Ginsburg have both pointed out that there has been a misconception of the report. LeChapelier refers to unpublished works only when he states that the fruits of the imagination are the most personal of properties. Once a work has been published, according to LeChapelier, the public is being made a party to the author's property. Ginsburg notes that Le Chapelier 'is often quoted as a great exponent of author-oriented rationales for copyright. Almost invariably, the passage quoted is taken out of context.' Jane C. Ginsburg, 'A Tale of Two Copyrights: Literary Property in Revolutionary France and America,' in *Of Authors and Origins. Essays on Copyright Law*, ed. B. Sherman and A. Strowel (Oxford: Clarendon Press, 1994), 131-158, p. 144. Kerever argues that in its early drafting American copyright law can be said to be more personalist than French law. In fact, 'authors' rights as they emerged from the French Revolution were inspired above all by legal and economic considerations. It was the 19<sup>th</sup> century which, through the case law endorsed by the law of 11<sup>th</sup> March 1957, was to begin to shape out the personalist aspect of authors' rights by extending the duration of what is known as literary and artistic property and by affirming the indissoluble bond between the author and the work, underlying the moral right and the power to control acts of exploitation of the work.' André Kerever, 'Révolution française et droit d'auteur,' *RIDA* 141, no. Juillet (1989): 3-8, p. 10. This opens a new perspective on the traditional account of French revolutionary legislation as author-centered, contrasting with British instrumentalist copyright law. Kerever and Ginsburg argue that the wide protection of the creative person, now a familiar trait of French law, is a product of nineteenth century law, rather than of the Revolutionary Acts. Carla Hesse has also studied the early conception of the author in French copyright. She finds that 'the revolutionaries explicitly intended to dethrone the absolute author, a creature of privilege, and recast him, not as a *private* individual (the absolute bourgeois), but rather as a *public* servant, as the model citizen', Carla Hesse, 'Enlightenment Epistemology and the Laws of Authorship in Revolutionary France, 1777-1793,' *Representations*, no. 30

recognition in French law of the special bond, not only economic, between an author and his work.<sup>69</sup> Another reason why, probably, the law had such a long life was the inclusion, from the beginning, of rights holders of diverse subject matter: ‘authors of all genres, composers, painters, designers, and engravers’<sup>70</sup> were to have the exclusive rights to their works. And the broad definition attached to authors (of books) applied to other creators too: artists and designers of all genres could have their works protected.<sup>71</sup>

Even if the 1793 Act recognized literary and artistic genius, authors’ rights were not given in perpetuity. An axiom of the law of 19 July 1793 was the author’s social function as an educator, enlightening his or her fellow citizens.<sup>72</sup> After just reward—i.e. a limited period of protection—the creator of a work should give up his or her monopoly and let the work fall into the public domain for the common good. A public domain had already been created—under protest from the book trade—by the time of the Royal Decree of 1777, when the so-called ‘*permission simple*’ gave the people access to print works that had formerly been monopolized by the Paris book guild.<sup>73</sup> In the Act of 1791 the principle of the public domain was reiterated in its

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(1990): 109-137, pp. 121f. Thus ‘The revolutionary legislation did redefine the author’s privilege as property, but not as an absolute right.’ (p. 121)

<sup>69</sup> French courts began to protect ‘droit moral’ in a piecemeal way in the early nineteenth century. German law offered some protection beginning from 1870. For a discussion of moral rights in Germany see Eric Marcus, ‘The Moral Right of the Artist in Germany,’ in *Copyright Law Symposium. Number Twenty-Five* (New York: Columbia University Press, 1980), 93-120. The Berne convention has recognised moral rights since the Rome Act 1928. See Sam Ricketson, ed., *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986* (London: Centre for Commercial Law Studies, Queen Mary College, University of London, 1987), p. 455ff.

<sup>70</sup> My translation from article 1 of La loi du 19 juillet 1793: ‘Les auteurs d’écrits en tout genre, les compositeurs de musique, les peintres et dessinateurs’. J. B. Duvergier, ed., *Collection Complete des Lois, Décrets, Ordonnances, Réglemens, Avis du Conseil-d’état. (Depuis 1788, par ordre chronologique)*, 2 ed., 28 vols., vol. 22 (Paris: A. Guyot et Scribe, 1838), p. 35. Photographs and other technical inventions became protected by French courts in the second half of the nineteenth century.

<sup>71</sup> Augustin-Charles Renouard observes that: ‘Les produits des arts du dessin, en tous genres, sont des objets de privilèges. La jurisprudence a reconnu les droits de leurs auteurs avec la même latitude d’interprétation que ceux des auteurs d’écrits en tous genres.’ See Augustin-Charles Renouard, *Traité des droits d’auteurs dans la littérature, les sciences et les beaux-arts*, (Paris: 1838), vol. 1, p. 190.

<sup>72</sup> See Daniel Becourt, ‘La Révolution française et le droit d’auteur pour un nouvel universalisme,’ *Revue internationale du droit d’auteur* 143 (1990): 231-287, p. 255f.

<sup>73</sup> Robert L. Dawson, *The French Booktrade and the ‘permission simple’ of 1777: Copyright and Public Domain; with an edition of the permit registers*, ed. H.T. Mason, vol. 301, *Studies on Voltaire and the eighteenth Century* (Oxford: The Voltaire Foundation at The Taylor Institution, 1992), pp. 71-87. The public domain created in 1791 diverted from that established in 1777. The former made public access to all works after a term of protection, the latter recognised a perpetual right of all living authors but relocated classic works by authors (already dead) to the public domain.

second article, declaring plays by authors dead for more than five years to be public property.<sup>74</sup> Newer plays, by a decree of 30 August 1792, were protected until ten years after publication. The 1793 Act, in the interest of the French people, let literary and artistic works fall into the public domain ten years after the death of their authors.<sup>75</sup>

A feature differentiating the French 'droit d'auteur' from its British counterpart was the way the author became a legal instrument in censorship matters. The 1789 revolution had put an end to prepublication censorship. An urgent need to regulate the publishing trade, nevertheless, had followed in the wake of the streams of inflammatory writings. Consequently, a system of surveillance started in 1800 and in 1810 a General Regulation of the Printing and Book Trades was promulgated. A deposit of five copies of each printed book was required; this enabled the monitoring of the book trade. The name of the author on the title pages of books<sup>76</sup> made it possible for the authorities to identify a person liable to punishment: prosecuting authors became a favoured way of controlling the press. Accordingly, a remarkable number of amendments to the law on literary property in the nineteenth century dealt equally with censorship. Typical was a Decree of 5 February 1810, linking press control and the protection of literary and artistic property, stating the aim of the law on the book trade to be to protect literary and artistic property *and* to prevent the publication of writings which might disturb public order or corrupt morals.<sup>77</sup>

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<sup>74</sup> In this way more radical than the public domain created by the Statute of Anne where a public domain would be established by the end of exclusive rights after twenty-one plus fourteen years.

<sup>75</sup> The transfer of power from the Constituent to the Legislative assembly on 1 October 1791 was part of a reorganization which meant that jurisdiction over the question of literary property passed from the Committee on Agriculture and Commerce to the newly formed Committee on Public Instruction, the question thus become one of education and encouragement of learning. (EE125) Gillian Davies, *Copyright and The Public Interest*, ed. F.-K. Beier and G. Schrickler, *Studies in Industrial Property and Copyright Law* (Munich: Max Planck Institute for Foreign and International Patent, Copyright and Competition Law, 1994). For further documentation see C. Hippeau, ed., *L'instruction publique en France pendant la révolution. Discours et rapports de Mirabeau, Talleyrand-Périgord, Condorcet, Lathenas, Romme, Le Peletier, Saint-Fargeau, Calès, Lakanal, Daunou et Fourcroy* (Paris: Librairie Académique, Didier et Cie, Libraires-Éditeurs, 1881).

<sup>76</sup> This was made a legal requirement in 1789 but had also been required by an At of 1551. See Roger Chartier, *The Order of Books. Readers, Authors, and Libraries in Europe between the Fourteenth and Eighteenth Centuries*, trans. Lydia G. Cochrane (Stanford CA: Stanford University Press, 1994).

<sup>77</sup> Gillian Davies, *Copyright and The Public Interest* (1994), pp. 82ff. On this issue see furthermore Carla Hesse, *Publishing and Cultural Politics in Revolutionary Paris, 1789-1810* (Berkeley: 1991), chapter 6 and Yvan Leclerc, *Crimes Écrits. La littérature en procès au XIXe siècle* (Paris: Plon, 1991). More generally on the development of the droit d'auteur in the nineteenth century see Jean Matthyssens,

In the early twentieth century a few amendments to the revolutionary law were made. Thus the Law of 11 March 1902 put the works of sculptors and designers under the Law of 19-24 July 1793.<sup>78</sup> Although case law to some degree had afforded protection to photographic works in the last half of the nineteenth century, statutory protection became available only in 1957. The adoption of '*la loi du 11 mars 1957*' happened more than 150 years after the revolutionary law.<sup>79</sup> Consolidating existing legislation and case law, the 1957 Law introduced moral rights, included cinematographic works as well as photographs of an artistic or documentary character. The most recent French law on author's rights, '*la loi du 3 juillet 1985*', amended, but did not replace the 1957 Law. New subject matter was added—computer programs and graphic works, for example—and the protection of photographic and cinematographic works was extended.<sup>80</sup> Other changes concerned neighbouring rights, including the rights of performers and producers of phonograms and videograms.

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'Les projets de loi sur le droit d'auteur en France au cours du siècle dernier,' *RIDA* IV, no. Juillet (1954): 15-57.

<sup>78</sup> On the history of protected subject matter under French law see Olivier Laligant, 'La révolution française et le droit d'auteur ou pérennité de l'objet de la projection,' *Revue Internationale du Droit d'Auteur* 147, no. Janvier (1991): 3-123.

<sup>79</sup> On the preparation of the 1957 Act see Jean Escarra, 'Le projet de loi français sur la propriété littéraire et artistique,' *Revue Internationale du Droit d'Auteur* V, no. Octobre (1954): 3-33.

<sup>80</sup> For a discussion of the changes introduced by the 1985 law see: Colloque de l'IRPI, ed., *Droit d'auteur et droits voisins. La loi du 3 juillet 1985, Le droit des affaires Propriété intellectuelle* (Paris: Libraries Techniques, 1986). See also special issues of *RIDA* volumes 127 and 128 (1986) on the 1985 Act.

## 2. THEORIES OF COPYRIGHT

Francis J. Kase, in his *Copyright Thought in Continental Europe*, lists ten different theories of copyright.<sup>81</sup> The list sums up the development of European—chiefly French and German—copyright thinking. Theories span from understandings in which copyright is approached as a means of controlling the press—that is, not as an author’s right at all—to unreserved endorsements of authors’ personal rights to total dominion over their works. Some theories are of principally historical interest. Those pertinent to current British and French law will be looked at here.<sup>82</sup>

In general, three dominant types of justifications of copyright—or *droit d’auteur*—exist today: the argument of natural right, the cultural argument, and the economic argument. By natural right is meant ‘a right considered to be conferred by natural law’, natural law being ‘a body of law or a specific principle of law that is held to be derived from nature and binding upon human society in the absence of or in addition to positive law.’<sup>83</sup> According to the principle of natural justice, authors deserve the fruits of their labour: they should justly be masters of their own intellectual creations. The cultural argument promotes the idea that writers and artists serve the interest of the state and the public: royalties are rewards and encouragements to create. The urge to protect investments and to prevent unfair competition combined with the analytical tool of cost / benefit analysis constitute the main components of the economic argument. Copyright is seen as a legislative means of protecting and inciting economic investments in works of, for example, literature, architecture, art and music.

Theorists put emphasis on one or more of these arguments to justify copyright. Four general arguments for copyright will be looked at here: the theory of literary property, personality rights, the cultural argument, and the economic argument. Finally various critical views of copyright will be discussed.

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<sup>81</sup> Francis J. Kase, *Copyright Thought in Continental Europe: Its Development, Legal Theories and Philosophy. A Selected and Annotated Bibliography*. (South Hackensack, NJ: Fred B. Rothman & Co, 1967), pp. 1-15.

<sup>82</sup> Note that the categories to follow do not altogether correspond to those in Kase.

<sup>83</sup> Definitions quoted from <http://dictionary.lp.findlaw.com>. Merriam-Webster's Dictionary of Law (1996).

## I The theory of literary property

In the second of his *Two Treatises on Civil Government* (1690) John Locke (1632-1704) develops his famous labour theory of property.<sup>84</sup> Locke's theory is based on the supposition that God has given the world to men in common, for them 'to make use of it to the best advantage of life and convenience.'<sup>85</sup> Originally, Locke says, nobody had any private dominion over anything. He continues:

Though the earth and all inferior creatures be common to all men, yet every man has a property in his own person; this nobody has any right to but himself. The labour of his body and the work of his hands we may say are properly his. Whatsoever, then, he removes out of the state that nature has provided and left it in, he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property. It being by him removed from the common state nature placed it in, it hath by this labour something annexed to it that excludes the common right of other men. For this labour being the unquestionable property of the labourer, no man but he can have a right to what is once joined to, at least where there is enough and as good left in common for others. (15)

Mixing one's labour with what in the beginning belonged to all can turn it into individual property. Thus the act of making or appropriating something, of removing it from its natural state, can create the foundation of ownership. In other words, from self-ownership—property rights in one's own body—one can move to world-ownership.<sup>86</sup>

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<sup>84</sup> Creating the ideological foundation of the Berne Convention and being represented in Article 27 (2) of the Universal Declaration of Human Rights, this theory of copyright has been highly influential.

<sup>85</sup> John Locke, *The Second Treatise of Civil Government and A Letter Concerning Toleration*. Edited by J. W. Gough, ed. C.H. Wilson and R.B. McCallum (Oxford: Basil Blackwell, 1948 (1690)), p. 15.

<sup>86</sup> Arguably self-ownership is more often, as it were, a personal right than a property right. This is discussed in Stephen R. Munzer, *A Theory of Property*, ed. J. Coleman, *Cambridge Studies in Philosophy and Law* (Cambridge: Cambridge University Press, 1990), pp. 37-58. The terms 'self-ownership' and 'world-ownership' come from G. A. Cohen, "Self-Ownership, World-Ownership, and Equality," in *Jusitce and Equality Here and Now*, ed. F.S. Lucash (Ithaca: Cornell University Press, 1986). For an analysis of body rights and the theory of labour and desert in Locke see Matthew H. Kramer, *John Locke and the origins of private property. Philosophical explorations of individualism, community, and equality* (Cambridge: University of Cambridge, 1997).

C. B. MacPherson has remarked that, in this way, Locke shows how ‘the natural right to property can be derived from the natural right to one’s life and labour.’<sup>87</sup> Still, there are limits as to how much one man can make his own. Enough should always be left for others, and Locke adds the further restriction that what is taken from the common state must not go to waste. Therefore one man can own only so much: ‘as much as any one can make use of to any advantage of life before it spoils, so much he may by his labour fix a property in; whatever is beyond this is more than his share, and belongs to others. Nothing was made by God for man to spoil or destroy.’(17)

The labour theory of property is concerned with land and goods more than intangibles.<sup>88</sup> Still, the theory has been readily applied to the concept of literary property in both case law and legal treatises since the eighteenth century: intellectual labour substitutes manual, and the products of the mind pass for more corporeal makings.<sup>89</sup> A systematic application of the labour theory to literary and artistic property, though, can be found with Justin Hughes. Discussing the philosophy of intellectual property, Hughes declares that:

we can justify propertizing ideas under Locke’s approach with three propositions: first, that the production of ideas requires a person’s labor; second, that these ideas are appropriated from a ‘common’ which is not significantly devalued by the idea’s removal; and, third, that ideas can be made property without breaching the non-waste condition.<sup>90</sup>

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<sup>87</sup> C.B. MacPherson, *The Political Theory of Possessive Individualism. Hobbes to Locke* (London, Oxford, New York: Oxford University Press, 1962), p. 199. MacPherson adds how ‘Locke’s astonishing achievement was to base the property right on natural right and natural law, and then to remove all the natural law limits from the property right.’ (199)

<sup>88</sup> MacPherson notes that while a wide definition of property—as ‘Lives, Liberties, and Estates’—is used in Locke, the usual sense of the term is land and goods. *Ibid.*, p. 198. It has been argued that while the labour theory of property acquisition has been used as justification for specific properties, such as title to land or to the produce from land, there is not much serious thinking ‘about how it is that labor can entitle anyone to anything.’ Lawrence C. Becker, *Property Rights. Philosophic Foundations* (London: Routledge & Kegan Paul, 1977), p. 32.

<sup>89</sup> Famously in *Millar v. Taylor* the argument for common law copyright: ‘it is just, that an author should reap the pecuniary profits of his own ingenuity and labour.’ (1769) 4 Burr. 2303, at 2398.

<sup>90</sup> Justin Hughes, “The Philosophy of Intellectual Property,” *Georgetown Law Journal* 77, no. 2 (1988): 287-366, p. 300.

Arguing that literary and artistic works are the products of intellectual labour, that the appropriation of ideas does not altogether deprive others from using them, and that the waste condition is of less relevance Hughes concludes that the labour theory is applicable to incorporeal property. One general objection, however, is that Lockean property rights might explain and justify the property of one generation, but not of any subsequent ones. Hughes, though, finds this objection overcome by the limited term of intellectual property rights. After their expiry incorporeal products can be repropriated.

Seventeen years earlier than Locke's *Two Treatises of Civil Government*, Samuel Pufendorf's (1632-1694) *On the Duty of Man and Citizen According to Natural Law*, dated 1673, had offered an alternative justification for ownership. Referring to natural law Pufendorf declared that:

Ownership is a right, by which what one may call the substance of a thing belongs to someone in such a way that it does not belong in its entirety to anyone else in the same manner. It follows that we may dispose as we will of things which belong to us as property and bar all others from using them, except insofar as they may acquire a particular right from us in agreement.<sup>91</sup>

A person's dominion over and occupancy of something secures him or her the right to it. Yet, everything need not have an individual owner: if a thing belongs to many persons in this manner it is common to them. Moreover, Pufendorf makes the restriction that not all things are to be property: 'it was not necessary for each and every thing to become property, but some things could, and others should, remain in what we might call primitive communion without detriment to the peace of the human race.' (85) In copyright law individual ownership is the principal form of property. The author or creator's first possession of his or her work can serve as justification for individual literary and artistic property. Joint ownership of intellectual property, things held in common where everyone has a well-defined share, seems more rare. Works of joint

authorship are mostly treated as a special case in copyright law. Heirs of literary and artistic property are perhaps the most typical holders of jointly owned rights in copyrighted works. Each heir has his or her own share, yet any disposition of the work must have the consent of all the other owners. Things held in common in the second way (available to everyone and owned by no one) come close to what is designated as the public domain. It is unsettled, then, how taking possession of something from the public domain can create a property right in it. Only ‘actual’ possession justifies property in something: it is not enough merely to declare something one’s property. A purpose of appropriation is required.<sup>92</sup>

It is not uncommon to refer to more than one type of justification of literary property at the same time. Thus, in his treatise on copyright law, George Ticknor Curtis (1812-1894), calling upon both Lockean and Pufendorfian arguments, finds himself able to declare literary works an ideal form of property:

The author, then, has in his possession a valuable invention, which he may withhold or impart to others at his pleasure. His dominion over his written composition is perfect, since it is founded both in occupancy or possession, and in invention or creation. No title can be more complete than this.<sup>93</sup>

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<sup>91</sup> Samuel Pufendorf, *On the Duty of Man and Citizen According to Natural Law*. Edited by James Tully, ed. R. Geuss and Q. Skinner, trans. Michael Silverthorne, *Cambridge Texts in the History of Political Thought* (Cambridge: Cambridge University Press, 1991 (1673)), p. 85.

<sup>92</sup> See discussion in Lawrence C. Becker, *Property Rights. Philosophic Foundations* (London: Routledge & Kegan Paul, 1977), p. 26ff.

<sup>93</sup> George Ticknor Curtis, *A Treatise on The Law of Copyright in Books, Dramatic and Musical Compositions, Letters and Other Manuscripts, Engravings and Sculpture, as enacted and administered in England and America; with some Notices of the History of Literary Property* (London: A. Maxwell and Son, 1848), p. 12. Later, nevertheless, he adds that: ‘The actual legislation on this subject is to be regarded as a compromise. The claim of authors, resulting from the principles of natural right, involves the perpetual duration of the property.’(23) So ‘as the price of its active protection by stringent enactments, [...] the author and his representatives should surrender a part of their full right.’ p.24.

## II Personality rights

The natural law theory which regards copyright not as a property right but as a right of personality is based on the idea that literary and artistic works are parts of their creator's personality. The artist or author hence has a personal right to his work.<sup>94</sup> While the philosophy of Kant is often considered its foundation,<sup>95</sup> the thinking of Edward Young (1683-1765) and Denis Diderot (1713-1784) has also been widely invoked in support of the idea that authors' rights are personality rights.

An eminent influence upon the debates over author's rights in Europe issued from Edward Young's *Conjectures on Original Composition* of 1759. The importance of Young's *Conjectures* is less that his ideas were new—they were not—than the force of his expression.<sup>96</sup> Young spelled out literary composition as an organic process the product of which was original works:

An *Imitator* shares his crown, if he has one, with the chosen Object of his Imitation; an *Original* enjoys an undivided applause. An *Original* may be said to be of *vegetable* nature; it rises spontaneously from the vital root of Genius; it grows, it is not *made*: *Imitations* are often a sort of *Manufacture*

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<sup>94</sup> Where personality rights are strong, as under French law, they themselves may even become a threat to literary and artistic creation. See André Francon, "Des limitations que les droits de la personnalité apportent à la création littéraire et artistique," *RIDA* LXVIII, no. avril (1971): 149-205

<sup>95</sup> For a critical discussion of this, see Stig Strömholm, *Le droit moral de l'auteur en droit allemand, français et scandinavie avec un aperçu de l'évolution internationale*, 2 vols., vol. 1 (Stockholm: P. A. Norstedt & Söners Förlag, 1966), pp. 182-195 and pp. 240-248. See also Francis J. Kase, *Copyright Thought in Continental Europe: Its Development, Legal Theories and Philosophy, A Selected and Annotated Bibliography*. (South Hackensack, NJ: Fred B. Rothman & Co, 1967). The first to draw attention to Kant in French doctrine was Renouard. He writes that 'Les principes de Kant n'ont pas été adoptés par tous les publicistes et jurisconsultes de l'Allemagne; et là, comme en France, on dispute encore sur la théorie du droit qui nous occupe. Mais j'ai pensé que, dans un traité sur une matière que Kant a discutée, il n'est pas permis de passer son opinion sous silence.' Augustin-Charles Renouard, *Traité des droits d'auteurs dans la littérature, les sciences et les beaux-arts* (Paris: 1838), vol. 1, p. 261. For Renouard on Kant see *ibid.*, pp. 251-261. In Germany Kant's ideas were adopted by numerous theorists of copyright in the nineteenth century (e.g. Danz, Neustetel, Bluntschli, Dahn, Beseler, Kramer, Jolly, Harum), albeit not always uncritically. See Stig Strömholm, *Le droit moral de l'auteur en droit*, pp. 195-211.

<sup>96</sup> See Roland Mortier, *L'Originalité. Une Nouvelle Catégorie Esthétique au Siècle des Lumières*, (Genève: Librairie Droz S.A., 1982), pp. 75-86. See also Joel Weinsheimer, "Conjectures on Unoriginal Composition," *The Eighteenth Century: Theory and Interpretation* 22 (1981): 58-73.

wrought up by those *Mechanics, Art, and Labour*, out of pre-existent materials not their own.<sup>97</sup>

Original writers are not merely craftsmen, they are creators of unique and authentic works that are produced by an inherent source of genius: the author, deserving sole credit for what springs from his personality. Whereas Young seemed initially to have little impact in England, two German translations came out within two years of the publication of *Conjectures*. The book rapidly affected prominent theorists—Herder, Goethe, Kant, and Fichte—and discussions of originality, creativity, and the ‘Kraftgenie.’<sup>98</sup> In France—where the first translation was published in 1769-70—Young’s ideas had a less profound impact. Even so, thinking along similar lines had been developing in spite of the stronghold of the classical ideal of mimesis in French literature. Authorial originality was becoming an argument for authorial rights in France. The philosophy of Denis Diderot was central in French debates over literary property.<sup>99</sup> Diderot considered ideas the most inviolable form of property and in his ‘Lettre historique et politique adressée à un magistrat sur le commerce de la librairie’ from 1763 he argued:

What form of wealth *could* belong to a man, if not a work of the mind...if not his own thoughts...the most precious part of himself, that will never perish, that will immortalize him? What comparison could there be between a man, the very substance of man, his soul, and a field, a tree, a vine, that nature has offered in the beginning equally to all, and that an individual has only appropriated through cultivating it?<sup>100</sup>

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<sup>97</sup> Edward Young, *Conjectures on Original Composition in a Letter to the Author of Sir Charles Grandison*. (Leeds: The Scholar Press Limited, 1966 (1759)), p. 11f.

<sup>98</sup> See Roland Mortier, *L'Originalité* (Genève: Librairie Droz S.A., 1982), pp. 94-128.

<sup>99</sup> See Alain Berenboom and Jan Baetens, eds., *Le combat du droit d'auteur* (Paris: Les impressions nouvelles, 2001) and Carla Hesse, *Publishing and Cultural Politics in Revolutionary Paris, 1789-1810* (Berkeley: 1991).

<sup>100</sup> Denis Diderot, “Lettre historique et politique adressée à un magistrat sur le commerce de la librairie,” in *Oeuvres complètes*, ed. R. Lewinter (Paris: Club Français du Livre, 1970 (1763)), 299-381, p. 331. Translations are cited from Carla Hesse, “Enlightenment Epistemology and the Laws of Authorship in Revolutionary France, 1777-1793,” *Representations*, no. 30 (1990): 109-137, p. 114.

Not even corporeal property ought to benefit from a protection comparable to ideas. Locke's appropriated property is after all no more than cultivated common land and goods whereas the creations of the individual mind, authentic parts of man's personality, can be genuinely owned. The legal implication of Diderot's position—authors' perpetual right to their works secured by the state—were formulated by Simon-Nicolas-Henri Linguet in 1774 and advanced during the 1790s debates over literary property in France.<sup>101</sup>

The philosophy of Immanuel Kant (1724-1804) was an important inspiration for personality rights theory in Germany. In 'Von der Unrechtmäßigkeit der Büchernachdrucks', a 1785 contribution to an ongoing German debate on piracy and printing, Kant states his view of copyright.<sup>102</sup> He sees books as dual-natured. The material copy, '*das Exemplar*' belongs to whoever has bought it, but the book's expression, '*die Rede*', cannot be bought and sold. The author—to whose name the book is tied—has an exclusive right to his '*Rede*'; what he utters in public, what he is to answer for, that is. (406) An author has a natural obligation to his work and is therefore entitled to decide at what time and for what public he wishes to publish. A publisher trades in physical copies. As the author's representative, he engages in '*die Führung eines Geschäftes im Namen eines andern, nämlich des Verfassers*'. (404) The publisher, hence, merely brings forth '*Buchstäblich*' what the author wants to communicate to the public. '*Die Rede*', the immaterial element of a book, then, is the author's addressing the public. Accordingly, '*In einem Buche als Schrift redet der Autor zu seinem Leser; und der, welcher sie gedruckt hat, redet durch seine Exemplare nicht für sich selbst, sondern ganz un gar im Namen des Verfassers.*' (406) The author authorizes a publisher to print and disseminate his writings – the publisher is the '*Werkzeug der Ueberbringung einer Rede des Autors ans Publikum an.*' (407) Thus the publisher gains his right to print from the consent—the '*Vollmacht*'—of the author. There is even an

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<sup>101</sup> The chief opponent to this position was the Marquis de Condorcet. See Carla Hesse: "Enlightenment Epistemology and the Laws of Authorship in Revolutionary France, 1777-1793."

<sup>102</sup> Immanuel Kant, "Von der Unrechtmäßigkeit der Büchernachdrucks," *Berlinische Monatsschrift* 5, no. May (1785): 403-417

obligation (*Verbindlichkeit*) towards the public that what has been addressed to them should reach them, even after the death of the author. In other words, a publisher does not have the right ever to suppress what he has been authorized to print.

Pirate publishers have no right to print: without the authorization of the author they speak in his name but against his will. The author has a personal right to address the public in his own name – and to exclude others from doing so. His consent must be given to every mediator of his '*Rede*'. It is, thus, by violating the author's right that the pirate invades the monopoly of the authorized publisher.

In the debate over the book that took place between 1783 and 1794 Kant's view was taken up and developed by Johann Gottlieb Fichte (1762-1814).<sup>103</sup> In '*Beweis der Unrechtmässigkeit des Büchernachdrucks. Ein Rasonnement und ein Parabel*' from 1793 Fichte declares that a book can be divided into two, its parts being: 'das körperliche desselben, das gedruckte Papier; und sein Geistiges.'<sup>104</sup> The physical part of a book is what a publisher can sell to a reader. The ideal part of a book is subdivided into its content: 'den Inhalt des Buchs, die Gedanken die es vorträgt' and its form: 'die Form dieser Gedanken, die Art wie, die Verbindung in welcher, die Wendungen und die Worte, mit denen es sie vorträgt.'(447) When a book has been published its content ceases to be owned by a single master. It will be the common property—'gemeinschaftliches Eigenthum' (450)—of the author and the readers. What, in turn, no one is allowed to seize is the form of the presented thoughts, the connection of ideas, and the signs used to represent them. When someone takes in the thoughts of another he or she changes their form in the process to appropriate them. But the particular form the author has given his thoughts remains his sole property.<sup>105</sup>

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<sup>103</sup> See Martha Woodmansee, 'The Genius and the Copyright: Economic and Legal Emergence of the "Author",' *Eighteenth-Century Studies* 17, no. 4 (1984): 425-448 and Martha Woodmansee, *Author, Art, and the Market. Rereading the History of Aesthetics* (New York: Columbia University Press, 1996), especially pp. 47-55.

<sup>104</sup> Johann Gottlieb Fichte, '*Beweis der Unrechtmässigkeit des Büchernachdrucks. Ein Rasonnement und ein Parabel*,' *Berlinische Monatsschrift* 21 (1793): 443-483, p. 447.

<sup>105</sup> 'Niemand kann seine Gedanken sich zueignen, ohne dadurch daß er ihre Form verändere. Die letztere also bleibt auf immer sein ausschließendes Eigenthum', p. 451.

In the early twentieth century Otto von Gierke (1841-1921), in his treatise on copyright *Deutsches Privatrecht*,<sup>106</sup> promoted the view that copyright is a personal right of the author to control the destiny of his work. It was to a large extent through Gierke that the theories of Kant and Fichte achieved their influence upon German *Urheberrecht* and French *droit d'auteur*.<sup>107</sup>

### **III The cultural argument**

The cultural argument approaches copyright in terms of positive law. The central idea is that society can assign temporary monopolies to artists and writers as an encouragement to creativity and dissemination and as a just reward. Copyright is seen as a means to promote the production of useful art and knowledge. This view of copyright found one of its finest proponents in the French revolutionary Marquis de Marie-Jean-Antoine Caritat Condorcet (1743-94). In his 'Fragments sur la liberté de la presse' (1776) he argued that

there can be no relationship between property in ideas and that in a field, which can serve only one man. [Literary property] is not a property derived from the natural order and defended by social force, it is a property founded in society itself. It is not a true right, it is a privilege.<sup>108</sup>

Condorcet attacked the natural rights claim on literary property. Ownership of land can be justified inasmuch as land cannot serve many at the same time. Knowledge, on the contrary, can easily be shared: one person's possession of an idea does not prevent another's appropriation of it without loss to the former. Hence no individual right in

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<sup>106</sup> Otto Friederich von Gierke, *Deutsches Privatrecht*, ed. K. Binding, 2 vols., *Systematisches Handbuch der deutschen Rechtswissenschaft* (Leipzig: Duncker & Humblot, 1895-1905).

<sup>107</sup> Hegel's theory of the author is of importance too. Hegel's idea is that a sculptor or a painter physically embodies his will in the work of art. The right to economic value is a personal right; it is not necessary to create an analogy to physical property. See Justin Hughes, "The Philosophy of Intellectual Property," *Georgetown Law Journal* 77, no. 2 (1988): 287-366.

ideas can exist. Literary property, then, is no more than a temporary privilege conferred upon a person by society. Furthermore, as there is no social value in individual claims on ideas, according to Condorcet, society should provide protection for the form and style of writing only.<sup>109</sup>

From this point of departure Condorcet speculated as to how to organize the publishing trade. Hesse remarks how Condorcet imagined ‘an authorless world of free manipulation and circulation of information and ideas.’ He wished for a commercial publishing industry that ‘sold ideas rather than authors, substance rather than style,’ that could be structured ‘according to the principles of periodical rather than book publishing, as was the publication of proceedings of the Académie des sciences or the *Encyclopédie*: through reader subscription to a genre of knowledge rather than through the marketing of unique works.’<sup>110</sup>

Condorcet and Diderot represented two opposing positions in the enlightenment debate upon literary property. This division answers for the compromise, reflected in the French revolutionary law, that in France authors and artists have exclusive ownership of their creation – only, this property right is of limited duration. The law accordingly had been informed by the principle of natural justice as well as by the cultural argument.

The cultural argument has also been prominent in Anglo-American copyright. As in the title of *Anne*: ‘An Act for the Encouragement of Learning’, the limited term of the 1710 Act and the termination of the Stationers’ monopoly were installed in order to promote public instruction.<sup>111</sup> The US Constitution contains a

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<sup>108</sup> Marie-Jean-Antoine Caritat Marquis de Condorcet, “Fragments sur la liberté de la presse (1776),” in *Œuvres de Condorcet*, ed. M.-F. Arago (Paris: Didot, 1847), 253-314, pp. 308-311. Cited from: Carla Hesse, *Publishing and Cultural Politics in Revolutionary Paris, 1789-1810* (Berkeley: 1991), p. 103.

<sup>109</sup> See Carla Hesse, *Publishing and Cultural Politics in Revolutionary Paris, 1789-1810* (Berkeley: 1991), p. 103f.

<sup>110</sup> Carla Hesse, “Enlightenment Epistemology and the Laws of Authorship in Revolutionary France, 1777-1793,” *Representations*, no. 30 (1990): 109-137, p. 116.

<sup>111</sup> Note, however, that the title was by no means uncontroversial. One commentator, Maclaurin, remarks that ‘Here it is material to advert, that the Title given to the Bill when engrossed, and the Title the House resolved it should bear, when they passed it, is extremely different from the Title the Bill had when presented by Mr. Wortley, (11<sup>th</sup> January) and till it was engrossed: For the Title it had, when presented by Mr. Wortley, and till its engrossment, was, ‘A Bill for the Encouragement of Learning, and *for Securing the Property of Copies of Books to the Rightful Owners thereof.*’ which plainly supposes, and implies, that the Authors or Purchasers of Books, had *abante* a rightful Property in the Copies; whereas the Title

copyright and patent clause which states the purpose of intellectual property to be to support culture and education: 'The Congress shall have power [...] To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Inventions'.<sup>112</sup> Recently the preamble of the WIPO Copyright Treaty has been '*Emphasizing* the outstanding significance of copyright protection as an incentive for literary and artistic creation.'

Lyman Ray Patterson spells out how copyright involves three groups of interests. The author's concern is to make an income from his or her work and to secure the work's integrity. The publisher generally hopes to profit from an edition. The public's interest subsists on an individual and a collective level: 'The individual interest is to be able to make proper use of copyrighted works on reasonable terms for himself. The collective interest is that all other persons have the same right, for such a right is necessary to the development and dissemination of knowledge.'<sup>113</sup> In the logic of the cultural argument, authors and artists are given economic rights over their works—which can be sold to a publisher—and possibly moral rights to incite creation. The price the public pays to get new inventions and works of art is that creators and their heirs get monopolies and power to suppress and make works unavailable. This is why the importance of ensuring diffusion ought also to be emphasized by the cultural argument. Only insofar as works are being offered to the public do they constitute a common asset.<sup>114</sup> This was taken into account in for example the 1842 Copyright Act. With the introduction of a post-mortem term of protection in 1842, specific measures were taken

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given to the Bill, when ingrossed and passed, viz. 'A Bill for the Encouragement of Learning, by *vesting* the Copies of printed Books in the Authors or Purchasers of such Copies, during the Times therein mentioned,' as plainly supposes, and implies, that the Authors or Purchasers had no Rights of Property, but what was vested by this Act, and would have none after the Times mentioned therein should expire.' John Maclaurin, Lord Dreghorn, *Considerations on the Nature and Origin of Literary Property. Wherein the Species of Property is clearly Proved to Subsist no longer than for the Terms fixed by the Statute 8vo Annæ* (Edinburgh: Alexander Donaldson, 1767), p. 10. See Stephen Parks, ed., *Freedom of the Press and the Literary Property Debate: Six Tracts 1755-1770*, 42 vols., vol. 15, *The English Book Trade 1660-1853* (New York: Garland Publishing, 1974).

<sup>112</sup> Article 1, Section 8 (8) of the 1787 United States Constitution.

<sup>113</sup> Lyman Ray Patterson, "Copyright and the Public Interest," in *Copyright. Current Viewpoints on History, Laws, Legislation*, ed. A. Kent and H. Lancour (New York: R. R. Bowker Company, 1972), 43-49, p. 48.

<sup>114</sup> In a similar vein exceptions to copyright such as 'fair use' and 'fair dealing' protection must be regarded.

to prevent a work being withheld from the public after the death of the author.<sup>115</sup> In that way the law of copyright is constructed as a compromise. As expressed by a prominent critic of literary property rights of the time of the 1842 Act, Thomas Babington Macaulay, who on another occasion had called copyright a tax on the public: a limited monopoly is the unavoidable price for promotion of socially useful work.<sup>116</sup>

#### **IV The economic argument**

William Cornish has remarked that ‘No serious student of intellectual property law can today afford to ignore the economic arguments for and against the maintenance of these rights.’<sup>117</sup> According to the economic argument, copyright exists in order to stimulate investment in the production and distribution of books. The ultimate end is economic growth. Authors require compensation for the time they spend writing, publishers for the expenses of printing and dissemination. In the interest of economic growth, however, too extensive protection must be avoided. Broad copyright restrains the production of new (non-infringing) works and creates monopolies, damaging to the dynamics of a national economy. High prices on books, moreover, can lead to decreasing sales, weakening business in general.

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<sup>115</sup> ‘The long term of copyright conceded by the new act might lead, in some instances, to the suppression of books of importance to the public. To prevent this, a complaint may be made to the judicial committee of the Privy Council, that the proprietor of copyright in a book, has, after the death of the author, refused to make or allow a republication; and that in consequence, such book may be withheld from the public. The judicial committee, on hearing this, may grant a license to the complainant to publish the book under such conditions as they may think fit, and the complainant may then publish the book according to their license.’ Vict. Parliament. Acts, *The Law of Copyright, regarding Authors, Dramatic Writers, and Musical Composers; as altered by the Recent Statute of the 5 & 6 Victoria, analysed and simplified with an Explanatory Introduction, and an Appendix, containing, at full, the New Copyright and the Dramatic Property Acts. By a Barrister* (London: James Gilbert, 1842), p. 14.

<sup>116</sup> See Catherine Seville, *Literary Copyright Reform in Early Victorian England. The Framing of the 1842 Copyright Act* (Cambridge: Cambridge University Press, 1999), especially pp. 60-68. With the technological possibilities of our days some rightly wonder why there cannot be more promotion of knowledge and less monopoly. As the contributors to a volume on the future of libraries note, with the electronic archive the enlightenment idea of encyclopaedism and the dream of a universal library would be a real possibility were it not for excessive copyright terms. See R. Howard Bloch and Carla Hesse, *Future Libraries*, vol. 7, *Representations Books* (Berkeley: University of California Press, 1993).

<sup>117</sup> William Rodolph Cornish, *Intellectual Property. Patents, Copyright, Trade Marks and Allied Rights* (London: Sweet & Maxwell, 1996), p. 28.

Copyright protection should ensure fairness in trade. It motivates publishers to bring out what Kaplan calls work ‘so easy of replication that incentive to produce would be quashed by the prospect of rampant reproduction by freeloaders.’<sup>118</sup> Hence the preamble of *Anne*, stressing the trade-regulating element of the Act, highlighting the competition issue that copyright policy deals with: ‘Whereas Printers, Booksellers, and other Persons have of late frequently taken the Liberty of printing, reprinting, and publishing, or causing to be printed, reprinted and published, Books and other Writings, without the Consent of the Authors or Proprietors of such Books and Writings, to their very great Detriment, and too often to the ruin of them and their Families.’

For the advancement of economic growth a balanced protection of literary and artistic works is required. Recently a full-scale analysis of the economics of copyright has been made by Richard Watt. He defines the basis functions of his analysis in the following way:

The optimal intensity of legal copyright protection should depend upon the substitutability between originals and copies, the cost functions with which both originals and copies are produced, the transactions costs involved in operating and maintaining the legal copyright system, and the degree to which new creations are improvements on existing creations.<sup>119</sup>

By way of this analysis Watt demonstrates that piracy does not always imply social costs, sometimes not even to the producers of originals and copyright holders in particular. But while it is not optimal to operate without protection it is also not optimal to operate with maximum protection. The conclusion must be that ‘Social welfare will be maximised, in all reasonable cases, by an ‘intermediate’ level of protection, that correctly weighs the social costs and benefits implied by piracy.’ (159) In other words the economics of copyright is not restricted to the profits and losses of the individual

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<sup>118</sup> Benjamin Kaplan, *An Unhurried View of Copyright* (New York: Columbia University Press, 1967), p. 74.

<sup>119</sup> Richard Watt, *Copyright and Economic Theory. Friends or Foes?* (Cheltenham, UK: Edward Elgar, 2000), p. 136.

producer. Making the calculation and deciding for thick or thin protection requires the taking into account of the costs and benefits of many parties.

## **V Critical arguments**

Arguments critical of copyright tend not to reject it altogether. Few commentators argue that copyright should be abolished. Among these few Joost Smiers counts as one of the most prominent. In his book *Arts under Pressure*<sup>120</sup> he argues—on the basis of convincing empirical research—that ‘The once sympathetic concept of copyright is turning into a means of control of the intellectual and creative commons by a very limited number of cultural industries’(60). Such control is at the expense of cultural democracy and diversity. Artists, third-world countries and the public domain all suffer from a copyright that has been turned into a trade tool. The only solution to this undesirable state of affairs, Smiers argues, is the abolition of the present dysfunctional system and the invention of a new short-term protection. The new system would give equal opportunities to western and third-world countries; it would support ‘The essence of our artistic communication as human beings—the whole gamut of words, signs, tones, images, colours and movements of the body’ and liberate it ‘from the control of the corporate holders of the property rights on these forms of artistic expression’(208). David Nimmer, without quite reaching the same conclusions, confirms Smiers’ observations and is concerned that ‘Copyright, it seems, now has a new master. Rather than there being an inherent value in serving “to promote the Progress of Science and the Useful Arts” [U.S.Const., Art.1,§8, cl.8.] copyright has been transformed into an instrumentality towards (what Congress perceives to be) a greater good. The orchestrator of that instrumentality, of course, is the law of trade.’<sup>121</sup>

Various radical approaches to copyright exist as ‘practices.’ The ‘copyleft movement’, for instance, promotes an open source type form of creation of software code on the internet. A unilateral license makes it free for anyone to copy from the

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<sup>120</sup> Joost Smiers, *Art under Pressure: Promoting Cultural Diversity in the Age of Globalization* (London, New York: Zed Books, 2003).

original code as long as the new code is again made available to the public. In a similar vein the ‘open source’ approach applies to arts with the *Creative Commons License* and the *Free Art License* where identical conditions are applied to artistic creations.<sup>122</sup>

Some commentators see the dysfunctions of copyright to have technological rather than ethical causes. Thomas Vinje, in ‘Should we begin digging copyright’s grave?’ mentions a striking example, namely the way EU copyright policy fails to deal with temporary copies that are created when we view a digital work.<sup>123</sup> In a famous essay from 1994, ‘The Economy of Ideas (Everything you know about intellectual property is wrong)’, John Perry Barlow argued that ‘Intellectual property law cannot be patched, retrofitted, or expanded to contain digitised expression any more than real estate law might be revised to cover the allocation of broadcasting spectrum.’<sup>124</sup> Digital information is fundamentally different from expression made physical in, say, books or artworks. Copyright has worked well for centuries, Barlow contends, because, notwithstanding Gutenberg, ‘it was hard to make a book. Furthermore, books froze their contents into a condition which was as challenging to alter as it was to reproduce. Counterfeiting and distributing counterfeit volumes were obvious and visible activities – it was easy to catch somebody in the act of doing.’ It is an entirely different matter with digitised information. Therefore, Barlow suggests, copyright should be replaced with a technical solution for protection, namely encryption.

Apart from the more radical criticism there has been a variety of attacks on copyright. Historically, opposition has been directed with particular force at 1) copyright’s creation of monopolies, 2) the term ‘literary property,’ 3) the widening of protected subject matter and 4) the extension of copyright duration. Early and fierce attacks upon the monopolies created by copyright law appear in eighteenth century Scottish piracy case decisions. In a case from 1776—featuring the London bookseller

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<sup>121</sup> David Nimmer, “The End of Copyright,” *Vanderbilt Law Review* 48, no. 5 (1995): 1385-1420, p. 1412.

<sup>122</sup> See [www.copy-art.net](http://www.copy-art.net) and [www.artlibre.org](http://www.artlibre.org) and ‘The great Giveaway’ (2002) by Graham Lawton at [www.newscientist.com/hottopics/copyleft/copyleftart.jsp](http://www.newscientist.com/hottopics/copyleft/copyleftart.jsp).

<sup>123</sup> Thomas C. Vinje, “Should We Begin Digging Copyright's Grave?,” *EIPR* 22, no. 12 (2000): 551-559.

<sup>124</sup> John Perry Barlow, “The Economy of Ideas. A framework for patents and copyrights in the Digital Age. (Everything you know about intellectual property is wrong),” *Wired*, no. 2 (March) (1994): 3.

Daniel Midwinter *contra* the Edinburgh publisher Gavin Hamilton—the Judge maintained that the monopolies introduced by the Statute of Anne were contrary to natural liberty, creating a favouritism of certain persons, namely the London booksellers. To extend copyright in perpetuity—as the London booksellers wished—would be gross injustice. It would, the Judge held, be ‘abridging natural liberty without the authority of law, which is worse than private violence’<sup>125</sup>. As many people to this day have pointed out, for society to allow one person a monopoly upon something that might serve more people demands very good reasons. Rightful title, of course, can justify a monopoly. But the Judge of Midwinter *contra* Hamilton questions what kind of property a literary work—in other words a book—can be:

When a man composes a book, the manuscript is his property, and the whole edition is his property after it is printed. But let us suppose that this whole edition is sold off, where is then his property? As property by all lawyers, ancient and modern, is defined to be *jus in re*, there can be no property without a subject. The books that remain upon hand, are, no doubt, the property of the author and his assigns: but after the whole edition is disposed of, the author’s property is at an end: there is no subject nor *corpus* of which he can be said to be proprietor.<sup>126</sup>

An author’s property right in his manuscript is acknowledged. Accordingly he can affect the terms upon which the first edition is published; he can profit from the sale of each copy of the book. Apart from that, as held by the Scottish judge, there is no property left, no *corpus* for the author to be the owner of. The buyers of the books own each their copy. And there is nothing to prevent another publisher from issuing a new edition – *except* for the exclusive privilege that has been granted to the author or

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<sup>125</sup> “Daniel Midwinter and Other Booksellers in *London contra* Gavin Hamilton and Others. “Damage and Interest”. 7th June 1748,” in *Kame's Remarkable decisions of the Court of Sessions* (Edinburgh: A. Kincaid and J. Bell, 1766). See Stephen Parks, ed., *English Publishing, the Struggle for Copyright and the Freedom of the Press: Thirteen Tracts 1666-1774*, 42 vols., vol. 1 (New York: Garland Publishing, 1975), p. 156.

<sup>126</sup> *Ibid*, p. 157.

publisher by the Statute of Anne. It is, therefore, wrong to designate the right to copy as a property right: it is a privilege, a monopoly created by statute law.<sup>127</sup>

Later, this view received the support of an English court. In *Donaldson v. Beckett* the following analysis was presented:

Incorporeal property is of two sorts: 1st, It is a right relating to some substance, as a right to take the profits of land, without having the possession of the land or a title to it. 2dly, It is a right to exercise some faculty, or to do some particular thing for profit. The perception of the profits, is a taking of some substance or corporeal property; and hence the incorporeal right is metaphorically called property.<sup>128</sup>

Property is a metaphor for the right to copy. Copyright is not the possession of or title to something, it is the right to profit from a thing without title to it. A nineteenth century French commentator, Augustin-Charles Renouard, argues along similar lines, but on the level of terminology. He finds that the term 'literary property' should be avoided in legal language as it obscures the idea of the '*droit d'auteur*'. The author's exclusive right, it must be remembered, is society's '*juste prix*' for his or her service to the public.<sup>129</sup> Renouard, thus, denies that literary works can be owned like real property. He

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<sup>127</sup> The Judge of Midwinter *contra* Hamilton argues: 'It is true, this monopoly or exclusive privilege is named a *property* in the statute: and so it is in one sense, because it is *proper* or peculiar to those whom it is given by the statute. But then it was not intended to be made *property* in the strict sense of the word; for we cannot suppose the legislature guilty of such a gross absurdity, as to establish property without a subject or a *corpus*: these are relative terms which cannot be disjoined: and property in a strict sense can no more be conceived without a *corpus* than a parent without a child.[...] It is a statutory property, and not a property in any just sense to be attended with any of the effects of property at common law. And indeed this argument is so conclusive against the supposition of real property, that the pursuers have been obliged to yield in some measure to it, by admitting that this is not a real property in any subject or *corpus*, but only a *quasi* property. This is admitting that all is demanded; for let them convert this law-term into common language, and they will not be able to make it into any thing different from that monopoly or exclusive privilege which is established in the statute.' p. 157-158.

<sup>128</sup> (1774) 2 Bro. 129 134.

<sup>129</sup> The term 'literary property' has no place in copyright: 'On n'est dit *propriétaire* que des objets sur lesquels c'est *par appropriation* que l'on a droit [...] quand on parle de la propriété comme un objet de droit, ce mot, dans le sens legal et juridique, ne désigne que le droit exclusif dérivant de l'appropriation: c'est de la propriété ainsi entendue que les lois s'occupent. L'expression *propriété*, prise comme designation des qualités et de l'essence intime de l'être, n'a point place dans la langue du droit.' Augustin-Charles Renouard, *Traité des droits d'auteurs dans la littérature, les sciences et les beaux-arts* (Paris: 1838), vol. 1, p. 456. See furthermore pp. 433-472.

warns against the misunderstandings created by the term ‘literary property’ as the designation for what is really a state-granted privilege. Indeed, in the mid-nineteenth century, the term ‘property’ was removed from the legal vocabulary of French official texts concerning the *droit d’auteur*.<sup>130</sup> Several commentators, however, have made the point that this did not modify or change the nature of the law itself.<sup>131</sup>

Benjamin Kaplan presents a more pragmatic view of this alleged terminological abuse. He remarks that

To say that copyright is ‘property,’ although a fundamentally unhistorical statement, would not be baldly misdescriptive if one were prepared to acknowledge that there is property *and* property with few if any legal consequences extending uniformly to all species.<sup>132</sup>

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<sup>130</sup> On 14 July 1866 the term literary property was officially abandoned; it would no longer be part of the vocabulary of *droit d’auteur*. See Jan Baetens, ed., *Le combat du droit d’auteur: Lesage, Voltaire, Diderot, Mercier, Baumarchais, Rétif de la Bretonne, Balzac, Vigny, Nerval, Lamartine, Hetzel, Proudhon, Hugo* (Paris: Les impressions nouvelles, 2001), p. 4. This was anticipated by Vicomte Siméon—a central figure in copyright in nineteenth-century France—who on 20th May 1839 brought in a law on copyright entitled ‘Loi relative aux droits des auteurs sur leurs productions dans les Lettres et les Arts’ a title thought to be more appropriate than ‘Loi sur la Propriété littéraire’ See Jean Matthyssens, “Les projets de loi sur le droit d’auteur en France au cours du siècle dernier,” *RIDA* IV, no. Juillet (1954): 15-57, pp. 37f. A main question of the Commission of 1825-26 had been whether the *droit d’auteur* enforced a ‘véritable propriété.’ See Strömholm vol 1, pp 165f. The term *propriété littéraire et artistique* was again adopted in the 1957 Act.

<sup>131</sup> See for instance Eugène Pouillet. *Traité théorique et pratique de la propriété littéraire et artistique et du droit de représentation*. Paris: Marchal et Billard, 1879. Pouillet notes that, in fact, in 1866 the term of copyright protection was prolonged. Pouillet, furthermore, argues (against Renouard) that the question of whether the *droit d’auteur* is property is of purely theoretical interest (p.17f). Then he goes on to make the point that: ‘si nous recherchons la propriété dans ses origines, nous découvrons bientôt que le droit d’auteur procède de la même source, la travail ; nous reconnaissons même que la propriété a ici quelque chose de plus certain, de plus indéniable, car, dans son origine ordinaire, la propriété consiste dans l’appropriation d’une chose déjà existante sous la forme où le possesseur se l’approprie, tandis qu’ici elle consiste dans une création, c’est-à-dire dans la production d’une chose qui n’existait pas auparavant, et qui est tellement personnelle qu’elle forme comme une partie de lui même [...] Qu’importe que cette espèce de propriété ait été inconnue à l’origine des sociétés, qu’elle soit le résultat de nos mœurs nouvelles ; elle n’est pas moins une propriété’, p.19.

<sup>132</sup> Benjamin Kaplan, *An Unhurried View of Copyright* (New York: Columbia University Press, 1967), p. 74. See also Stephen L. Carter, “Does it Matter whether Intellectual Property is Property?,” *Chicago-Kent Law Review* 68, no. 2 (1993): 715-723, who specifies that property is only a legal conclusion. It refers not to any necessary set of legal rights. Rather, the term refers to a bundle of rights defining a relationship of an individual to a resource. In ordinary language, however, the term property tends to mean a thing, which has an owner, (p. 716).

In any given situation it is to be determined what rights are attached to a ‘piece of so-called property.’ Kaplan adds that ‘In the same way we might make do with “personality” or some other generalization of copyright.’(74)<sup>133</sup> This attitude to two major legal frameworks of understanding of authors’ right or copyright is justified inasmuch as it is true that the law treats material property and intellectual property—as well as authors’ rights and personality rights—differently. Still, the risk of confusion persists. And strong proponents for property rights in intangibles *will* use analogy to claim broader protection and longer duration of copyright.<sup>134</sup> In fact, as Max Lange, a German critic of copyright, had already noted in 1858, the constant attempt to equate literary property with land and chattel, to assimilate, has distorted authorial rights legislation. Lange complains that rights generally incompatible with intangibles have been attached to literary and artistic works.<sup>135</sup> Moreover, the result has been that

Dabei versäumten fast alle Deduktionen über der Natur des neuen Rechtes, sein eigentliches Objekt mit nötiger Schärfe zu prüfen; ja sie versuchten aus dem Umstand, das die Schöpfung des Autors von äußerer Grundlage möglichst frei erscheint, ein um so stärkerer Eigentumsrecht herzuleiten, während gerade hierin die eigentümliche Sondernatur des literarischen Eigentums sich bekundet.<sup>136</sup>

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<sup>133</sup> The concept of intellectual property also gets attacked from the standing point of personality rights Frédéric Pollaud-Dulian, “Droit moral et droits de la personnalité (3780),” *Le Semaine Juridique (JCP)* 1 Doctrine, no. 29-30 (1994): 345-352.

<sup>134</sup> Arguments in favour of the concept of ‘incorporeal property’, moreover, tend to ignore the issue of exhaustibility in relation to property. See for example François Hepp, “Le droit d’auteur “propriété incorporelle”?”, *RIDA* XIX, no. Avril (1958): 161-191.

<sup>135</sup> ‘Eine vergleichende Prüfung der zusammengestellten Ansichten führt zu dem Resultat , dass im allgemeinen der Theorie vom literarischen Eigentum das Bestreben zugrunde lag, aus dem echten Eigentum, welsches ein ausschließliches Recht enthält, das ähnliche Recht des Autors zu begründen und zu diesem Zwecke jenes Eigentum aus dem Rechtssatz, der Erzeuger einer Sache sei ihr Eigentümer herzuleiten. Bei diesem Verfahren beging man zunächst den Fehler, das fragliche Recht viel zu weit zu suchen und statt dasselbe, so wie es in der allgemeinen Rechtsüberzeugung lebte, einfach zu fassen, es auf dem Umweg künstlicher Argumentation zu deduzieren.’ Max Lange, “Kritik der Grundbegriffe vom geistigen Eigentum (1858),” *UFITA Archiv für Urheber-Film-Funk-und Theaterrecht (Sonderdruck aus band 117/1991)* (1991): 169-248, p. 176.

<sup>136</sup> *Ibid.*

Opportunities to define the specific nature of literary and artistic property have been missed, resulting in a failure to define a more appropriate set of rights to be attached to works of art and literature. As soon as artistic or literary works are designated intellectual property they have foreign properties attributed to them. The term intellectual property is itself an example of this attribution of alien qualities. The Belgian lawyer Picard developed the idea of '*biens intellectuels*' in his work *Embrogie juridique. Nouvelle classification des droits* (Clunet, 1883). The term was to shape an idea of a bond between '*l'âme d'auteur*' and the artistic or literary object.<sup>137</sup> Among others, this would create a basis for moral rights. The employment of the term, however, has gone in a different direction. Today, 'intellectual property' tends to be something multinational corporations invest in.

Concern over the shrinking public domain has led to criticism of the way copyright law has developed in the twentieth century.<sup>138</sup> The public domain consists of what cannot be protected as literary or artistic property, what has fallen out of copyright, and what, for whatever reason, has not been copyrighted. The public domain is under threat from several elements of intellectual property law. First, the copyright term is getting ever longer. Before the British 1911 Copyright Act, literary works were protected until seven years after the death of the author. Today there is a post-mortem protection of 70 years in most European countries. With a life expectancy that has increased during the twentieth century this means that works can be monopolised for a very long time. Long enough for it to be 'fatal to the interest of letters, and the same for every valuable author' – and long-term monopolies would cause the bookseller to become 'the author's leave-giver.'<sup>139</sup> Furthermore, attention has been drawn to the fact that only a very small percentage of published books remains in print.<sup>140</sup> This, on the one hand, means that a long term of protection is not a real incentive for authors to

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<sup>137</sup> See Bernard Edelman, *La propriété littéraire et artistique*, 3 ed., *Que sais-je?* (Paris: Presses Universitaires de France, 1989), p. 38.

<sup>138</sup> See in particular Lawrence Lessig, *The Future of Ideas. The Fate of the Commons in a Connected World* (New York: Random House, 2001)

<sup>139</sup> As was held in *Donaldson v. Beckett* in an argument against perpetual copyright. (1774) 2 Bro. 129 142.

<sup>140</sup> Stephen Breyer, "The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs," *Harvard Law Review* 84, no. 2 (1970): 281-351, p. 324.

write. On the other hand it means that for a very long time some publisher might ‘sit on’ a work which is out of print. Copyright in the work prevents other from reprinting it; this can be a serious drawback for both the author and the public.<sup>141</sup>

Second, there has been a remarkable increase in new subject matter in copyright law.<sup>142</sup> The list of protectible matter has become longer and definitions have been broadened: literary and artistic works refer to much more than learned writings and marble busts. Laddie J, commenting on *British Leyland Motor Corp v Armstrong Patent Co Ltd*,<sup>143</sup> observes that

In *British Leyland*, some of the drawings sued on, and accepted by a hostile House of Lords as being copyright works, consisted of simple depictions of a short straight length of tube. The law reports of the last 90 years are full of trite and insubstantial works being protected by copyright.<sup>144</sup>

And Laddie J continues: ‘The fact that a trite subject-matter can be arrived at independently is no reason for giving it a monopoly. We should not be handing out monopolies like confetti muttering “this won’t hurt.”’<sup>145</sup> In fact, copyright has probably come to deal less with learning and fine arts than with chocolate wrappers and football coupons.<sup>146</sup> A further point is that works of art or literature are protected by a still wider scope of rights. Moral rights, film rights, access rights, distribution rights, adaptation rights, translation rights, and many other rights give creators extensive control over works long after they have let them out into the public sphere.

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<sup>141</sup> Especially as digital technologies have made print on demand a real possibility.

<sup>142</sup> Compare for instance national laws as discussed above with the list of protectible matter by WIPO.

<sup>143</sup> *British Leyland Motor Corp v Armstrong Patent Co Ltd* [1986] RPC 279, [1986] AC 577.

<sup>144</sup> Laddie J, “Copyright: Over-strength, Over-regulated, Over-rated?,” *European Intellectual Property Review* 5 (1996): 253-260, p. 259.

<sup>145</sup> *Ibid.*, p. 260.

<sup>146</sup> Laddie J describes how this tendency has developed: ‘The commercial reality was that from the early 1970s onwards many sectors of British industry had learned the pleasure of being able to prevent their products being copied. Under the protective wings of copyright they were able to fend off the attentions of cheap imitators. Trading without such competition is much more relaxing than having to meet the competition on price and quality.’ *Ibid.*, p. 255.

An early French observer of British copyright criticized the English for not appreciating the principle of the public domain.<sup>147</sup> Issac-René-Guy LeChapelier, who was on the Committee on the Constitution, stressed the importance of a strong public domain in a passage on author's rights in a Report from 1791. The first part of this passage, taken out of its context, has been much quoted in support of natural rights.<sup>148</sup> LeChapelier has become associated with the view that 'The most sacred, most legitimate, most unassailable, and if I may put it this way, the most personal of all properties, is a work which is the fruit of the imagination of a writer.' But as the passage continues, LeChapelier declares:

however, it is a property of a kind quite different from other properties. When an author has delivered his work to the public, when the work is in the hands of the public at large, so that all educated men may come to know it, assimilate the beauties contained therein and commit to memory the most pleasing passages, it seems that from that moment on the writer has associated the public with his property, or rather has transmitted it to the public outright; however, during the lifetime of the author and for a few years after his death nobody may dispose of the product of his genius without his consent. But also, after that fixed period, the property of the public begins, and everybody should be able to print and publish the works which have helped to enlighten the human spirit.<sup>149</sup>

LeChapelier explains how when a book has been published there is nothing to keep the public from appropriating passages from it: the thinking belongs to everybody. The author has to accept that published works become public property. However, in line

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<sup>147</sup> Issac-René-Guy LeChapelier criticized British copyright law in a report of the Committee on the Constitution. *Le Moniteur universel*, 15 Jan. 1791, cited in Jane C. Ginsburg, "A Tale of Two Copyrights: Literary Property in Revolutionary France and America," in *Of Authors and Origins. Essays on Copyright Law*, ed. B. Sherman and A. Strowel (Oxford: Clarendon Press, 1994), 131-158, p. 145.

<sup>148</sup> See note 67.

<sup>149</sup> LeChapelier's Report of 13 January 1791 can be found in *Archives Parlementaires de 1787 à 1860, Recueil complet des débats législatifs et politiques des Chambres françaises* (Paris: 1887), vol. xxii, p. 210. Cited from *Davies*, p. 79.

with the cultural argument, the public should acknowledge and reward the effort of the creator for a number of years.

Authors and artists, on their part, have to acknowledge that they both contribute to and benefit from the public domain.<sup>150</sup> A shrinking public domain has various unhappy consequences for the public. Circulation of new works may be less efficient, the use of them restricted, and prices higher. Creators of new works may suffer too. A ‘generation problem’ can arise. If established artists want to prevent younger ones from exploiting their works they deny them benefits they themselves enjoyed under a (probably) less strict copyright law. Furthermore, the very concept of copying has changed. While in the nineteenth century copying was ‘literal copying’, today copying may be found to have taken place where, for instance, a change of media has taken place, in adaptations, or in translation. As David Vaver observes, even caches and accessing websites, albeit temporary and technically necessary, constitute copying.<sup>151</sup> This wide-ranging definition of copying means that the techniques of appropriation and imitation, fundamental throughout the history of fine arts and literature, may now produce infringing copies. Parody is a case in point. While French *droit d’auteur* explicitly permits parodies, British law makes no special exception. Parody, thus, may constitute infringement in the United Kingdom. A related issue is the extent to which literary property rights can effect censorship. The rights to free speech and copyright at first glance appear to be equally important. But, as David Vaver notes, ‘treat copyright as property, and the balancing exercise changes. We now have a mere freedom conflicting with a property right.’ (634)<sup>152</sup> Vaver warns against treating intellectual property as an absolute value. Intellectual property should be ‘a means to the end of stimulating desirable innovation,’<sup>153</sup> not an end in itself. And he concludes that ‘There are calls for the public to become better educated about IP – but such a public

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<sup>150</sup> Whether the French have succeeded in creating such a strong public domain is questionable. Protection is in many cases more far-reaching in France than in Britain.

<sup>151</sup> David Vaver, “Intellectual Property: State of the Art,” *Law Quarterly Review* 116 (2000): 621-637, p. 625.

<sup>152</sup> *Ibid.*, p. 634. See also Peter O Chotjewitz, “Das Plagiatsvorwurf als Eingriff in die Freiheit der Literatur. Beiträge zur Literaturfreiheit und Zensur,” in *Literatur vor dem Richter*, ed. B. Dankert and L. Zechlin (Baden-Baden: Nomos Verlagsgesellschaft, 1988).

<sup>153</sup> David Vaver, “Patently Absurd,” *Oxford Today* Michaelmas (2000), p. 22.

would surely demand a greater coherence and persuasiveness from the system than it presently exhibits.<sup>154</sup>

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<sup>154</sup> *Ibid.*

### 3. COPYRIGHT ABC

Some of the central concepts of copyright will be outlined in the following. Firstly, the legal concept of the author; secondly, the coverage of subject matter, and, thirdly, the basic rules of infringement.

#### I Authorship and ownership of copyright

According to British law, the author is the first owner of copyright.<sup>155</sup> Section 9(1) of the British Copyright, Designs, and Patents Act 1988 defines the ‘author’ of a work as ‘the person who creates it’. As is noted in a recent textbook, ‘There are no general principles as to who is the author of a literary, dramatic, musical or artistic work because Parliament did not consider it to be a difficult task to identify the author in the case of those works.’<sup>156</sup> In certain cases an exact definition is essential. The owner of the ‘typographical arrangement of a published editions,’ diverges from the general definition: here the author is the publisher.<sup>157</sup> Section 9 (3), furthermore, defines the author of computer-generated works—works possibly without a human creator—as ‘the person by whom the arrangements necessary for the creation of the work are undertaken.’

According to French law the author of literary or artistic works—‘*les oeuvres d’esprit*’—is the person (or persons) under whose name (or names) the work has been published, (unless proved otherwise).<sup>158</sup> Authorship in France is confined to physical persons (‘*personnes physiques*’). Under both British and French law initial ownership belongs to the author. The author is granted an exclusive right of

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<sup>155</sup> Copyright, Designs, and Patents Act 1988, Sec. 11 (1)

<sup>156</sup> Michael F. Flint, Clive D. Thorne and Alan P. Williams, *Intellectual Property - The New Law. A Guide to the Copyright, Designs and Patents Act 1988* (London: Butterworth, 1989), p. 21. The 1956 Copyright Act, likewise, gave no definition of authorship – except in relation to photographic works where the author is the person who owns the material on which the photograph is taken. See Copyright Act 1956, s. 48 (1). This exceptional definition was abandoned with the 1988 Act.

<sup>157</sup> Section 9 (2)(d). Authorship of sound recordings, films, broadcasts, and cable programme services as well as of joint, anonymous or pseudonymous is determined according to various different rules.

<sup>158</sup> Code de la propriété intellectuelle. Titre 1<sup>er</sup>, Chapitre III, Art. L. 113-1. Special rules apply in the cases of collaborative, collective, pseudonymous, and anonymous works – as well as in the cases of videograms, phonograms, audiovisual works, and software programs.

reproduction, distribution, and performance.<sup>159</sup> Authorship in both countries is linked to particular types of works (literary, artistic, musical, etc). Post-mortem terms of protection have existed since the eighteenth century in France. The term of protection was thus always attached to the life of the author. In the UK post-mortem protection was introduced in the nineteenth century.

The creator doctrine has been central in the French tradition of author's rights. It produces an idea of authorship, which requires a flesh-and-blood author: the natural person who created the work, from whose personality the work derives.<sup>160</sup> The British view, in contrast, is that a work of original authorship need not originate in an individual.<sup>161</sup> Anglo-American copyright also invites the creator to give up his rights completely, as for instance in 'works made for hire' where the employer of the creator becomes the 'author.'<sup>162</sup> Since the beginning, British copyright law has made it possible for authors to sell their copyright outright. In France rights have traditionally been more closely attached to the author.<sup>163</sup> For example, copyright in future works cannot be given up.<sup>164</sup> Authors of graphic and three-dimensional works, furthermore, have an

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<sup>159</sup> By British law the following acts are restricted and exclusive to copy the work; to issue copies of the work to the public; to perform, show or play the work in public; to broadcast the work or include it in a cable programme service; to make an adaptation of the work or do any of the above in relation to an adaptation. (Sec. 16 (1)). In France the *droit d'exploitation* consists of the reproduction and the representation right (Art. L. 122-1)

<sup>160</sup> Commissioned works may cause problems: is it the 'executor' or the person who had the idea for the work who stands as author? See Jacqueline M. B. Seignette, *Challenges to the Creator Doctrine. Authorship, copyright ownership and the exploitation of creative works in the Netherlands, Germany and the United States*, ed. E.J. Dommering and P.B. Hugenholtz, vol. 3, *Information Law Series* (Deventer: Kluwer Law and Taxation Publisher, 1994). Seignette explains how 'According to the creator doctrine, copyright vests in the "author", and the "author" is the natural person who created the work.' But she argues that 'As logical as this may seem, this attribution rule is not always easy to apply in practice. Many works are commissioned by a person who has certain wishes and ideas as to what the work should look like or do.' (p. 58). German law also belongs to the author's rights tradition and Adolf Dietz writes 'German copyright starts, without any exceptions, from the principle that the author as the creator of the work must always be a natural person.' Adolf Dietz, "Copyright Law of the Federal Republic of Germany (Contribution to "Nimmer & Latman, World Copyright and Practice")," (München: 1983), p. 45.

<sup>161</sup> Artificial persons can be authors.

<sup>162</sup> A discussion of 'work made for hire' can be found in Neal Orkin and Karen Yarsunas, "Whose Photograph is it Anyway?," *Copyright World*, no. 1 (1988): 24-26.

<sup>163</sup> It has been argued that, in France, authors allow the exploitation of the economic rights in their works in a way comparable to licensing. See Andreas Rahmatian, "Non-Assignability of Authors' Rights in Austria and Germany and its Relation to the Concept of Creativity in Civil Law Jurisdiction Generally: A Comparison with U.K. Copyright Law," *Entertainment Law Review*, no. 5 (2000): 95-100.

<sup>164</sup> The transfer of rights by the author can be partial or full (Art. L. 131-4); conveying global rights over future works, however, is null and void (Art. L. 131-1).

inalienable right to a 3% royalty of the selling price each time their work is resold.<sup>165</sup> Moral rights by French law are attached to the author—the natural person—and they are perpetual and inalienable.<sup>166</sup> *Les droits moraux* by French law refer to a number of rights: notably the right of paternity and the right of integrity,<sup>167</sup> the right of disclosure<sup>168</sup> and the right to change or withdraw a work after publication.<sup>169</sup> The rights of paternity and integrity and the right to object to false attribution were introduced by the Copyright, Designs and Patents Act 1988 in Britain.<sup>170</sup>

## II The work

The scope of protectible subject matter has increased steadily over the years in Britain and France. Generally works receive protection irrespective of their merits. According to British law, skill, labour and judgment is enough to make a work original. Novelty is not a requirement.<sup>171</sup> Novelty is no requirement in France either. But a certain discrimination against banal works has been practised. Until 1985, for example, photographs, due to their mechanical nature, were protected only if they were of an ‘artistic’ or a ‘documentary’ character.

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<sup>165</sup> *Ibid.* Art. L. 122–8. This is known as the ‘droit de suite’ and exists also in Germany. Britain will introduce a similar right from 2006.

<sup>166</sup> The rights can be conveyed to the heirs, however, at the death of the author. *Code de la propriété intellectuelle*. Titre II, Chapitre 1<sup>er</sup>, Art. L. 121-1. For a discussion of how the fact that moral rights are perpetual and inalienable works in practice, see Jean Matthyssens, “Le droit moral contre les faux-monnayeurs de génie,” *RIDA* 106, October (1980): 3-23.

<sup>167</sup> *Code de la propriété intellectuelle*, Titre II, Chapitre 1<sup>er</sup>, Art. L. 121-1 L’auteur jouit du droit au respect de son nom, de sa qualité et de son œuvre. Ce droit est attaché à sa personne. Il est perpétuel, inaliénable et imprescriptible. Il est transmissible à cause de mort aux héritiers de l’auteur. L’exercice peut être conféré à un tiers en vertu de dispositions testamentaires.

<sup>168</sup> Art. L. 121-2 L’auteur a seul le droit de divulguer son œuvre. Sous réserve des dispositions de l’article L. 132-24 [concerning audiovisual works], il détermine le procédé de divulgation et fixe les conditions de celle-ci.

<sup>169</sup> Art. L. 121-4 Nonobstant la cession de son droit d’exploitation, l’auteur, même postérieurement à la publication de son œuvre, jouit d’un droit de repentir, ou de retrait vis-à-vis du cessionnaire. Il ne peut toutefois exercer ce droit qu’à charge d’indemniser préalablement le cessionnaire du préjudice que ce repentir ou ce retrait peut lui causer. Lorsque, postérieurement à l’exercice de son droit de repentir ou de retrait, l’auteur décide de faire publier son œuvre, il est tenu d’offrir par priorité ses droits d’exploitation au cessionnaire qu’il avait originellement choisi et aux conditions originellement déterminées.

<sup>170</sup> Before the 1988 Act the laws of passing off and defamation to some degree protected the rights of attribution and integrity.

<sup>171</sup> See *University of London Press Ltd v. University Tutorial Press Ltd* [1916] 2. Ch. 610.

The distinction between work and copy is very important. The owner of the copyright of a literary work has no control over the material copies; they can freely be sold and resold. Conversely, purchasing a copy of a book is not accompanied by a right to reproduce its contents. Copyright is independent of any property rights in the physical object.

In most countries published and unpublished work are treated differently by copyright law. In the United Kingdom, for example, their terms of protection differ: unpublished works are protected for 50 (not 70) years *post mortem auctoris*. Diverging rules as to fair dealing also apply. It should be noticed that generally in copyright 'work' refers to a published work.

United Kingdom copyright protects original literary, dramatic, musical and artistic works; sound recordings, films, broadcasts and cable programmes; and the typographical arrangement of published editions.<sup>172</sup> Categories are broadly defined. A literary work can mean for instance a table, a compilation and a computer program.<sup>173</sup> In a similar vein an artistic work refers to 'a graphic work, photograph, sculpture or collage, irrespective of artistic quality, [...] a work of architecture being a building or a model for a building, or [...] a work of artistic craftsmanship.'<sup>174</sup>

The French intellectual property code protects the exclusive incorporeal property rights of authors in all works of the mind ('*les œuvres de l'esprit*'), regardless of kind, form of expression, merit, and purpose.<sup>175</sup> Exemplary *œuvres de l'esprit* include books, lectures, dramatic works, choreographic works, musical compositions, cinematographic works, drawings, paintings, architectural works, sculpture, engravings, graphic and typographical works, photographs, applied arts, illustrations, maps, (geographical) plans, software, and articles of fashion.<sup>176</sup> Translations and adaptations

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<sup>172</sup> Copyright, Designs, and Patents Act 1988, Sec. 1 (1)

<sup>173</sup> *Ibid.*, Sec. 3 (1).

<sup>174</sup> *Ibid.*, Sec. 4 (1).

<sup>175</sup> Code de la propriété intellectuelle. Titre II, Chapitre 1<sup>er</sup>, Art. L. 112-1.

<sup>176</sup> *Ibid.* 112-2.

are given protection without prejudice to the author of the original works.<sup>177</sup> Original titles are protected too.<sup>178</sup>

### **III Infringement**

The author of an original work has the exclusive rights to perform a number of acts in relation to his or her work. British law defines exclusive rights as the rights to copy the work; to issue copies of the work to the public; to perform, show or play the work in public; to broadcast the work or include it in a cable programme service; to make an adaptation of the work or to do any of the above in relation to an adaptation.<sup>179</sup> According to French law the author of a work has the sole right of representation and reproduction.<sup>180</sup> The right of representation includes the rights to public recitation and presentation, and to broadcasting.<sup>181</sup> The right of reproduction refers to the right to fix the work in any material form with the purpose of communicating it indirectly to the public. Means of fixation can be printing, drawing, engraving, photography, casts, graphic and sculptural arts, and mechanical, cinematographic, or magnetic recording of the work.<sup>182</sup> Entire as well as partial representations and reproductions of the work, including translations, adaptations, transformations and arrangements of the work, are covered by the exclusive right.<sup>183</sup> Committing any of the mentioned acts without permission from the copyright holder constitutes infringement.<sup>184</sup>

Establishing that infringement has occurred takes place on the basis of certain basic rules. First, it must be tested whether the copied material is, in fact, in copyright. Here the dichotomy between idea and expression generally accepted in British and French law serves the purpose of excluding ideas, concepts, and principles

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<sup>177</sup> *Ibid.* 112-3.

<sup>178</sup> *Ibid.* 112-4.

<sup>179</sup> Copyright, Designs, and Patents Act 1988, Sec. 16 (1).

<sup>180</sup> The 'droit de représentation et le droit de reproduction.' Code de la propriété intellectuelle. Titre II, Chapitre 1<sup>er</sup>, Art. L. 122-1.

<sup>181</sup> *Ibid.* Art. L. 122-2.

<sup>182</sup> *Ibid.* Art. L. 122-3.

<sup>183</sup> *Ibid.* Art. L. 122-4.

<sup>184</sup> Furthermore, dealing in unlawful copies constitutes secondary or indirect infringement.

from copyright protection. Only the taking of the ‘expression’—the reproduction of a work in any material form—is an infringement.<sup>185</sup> ‘Causality’—which refers to evidence that the alleged infringer has had access to plaintiff’s work—is also a criterion. Similarity on its own is not prohibited, only the act of copying is: unoriginality is still legal. Violation of moral rights occurs if the rights to be identified as author, to object to derogatory treatment, to avoid false attribution and to the integrity of the work, are not respected.<sup>186</sup>

Exceptions to the exclusive right exist in both British and French law. The Copyright, Designs, and Patents Act 1988 lists a number of acts of ‘fair dealing’<sup>187</sup> such as research and private study,<sup>188</sup> criticisms or reviews,<sup>189</sup> reporting of current events,<sup>190</sup>

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<sup>185</sup> The distinction between idea and expression can be rather problematic in practice as discussed in Gunnar W. G. Karnell, “The Idea/Expression Dichotomy - A Conceptual Fallacy,” *Copyright World*, no. 7 (1989): 16-17.

<sup>186</sup> In France there are a few more moral rights as shall be discussed later.

<sup>187</sup> Fair dealing is a possible defence also in the case of unpublished works in the UK, but if the using of extracts of unpublished material is unjustified it constitutes a more serious breach of copyright. Gillian Davies, *Copyright and The Public Interest*, ed. F.-K. Beier and G. Schriker, *Studies in Industrial Property and Copyright Law* (Munich: Max Planck Institute for Foreign and International Patent, Copyright and Competition Law, 1994), p. 40.

<sup>188</sup> Section 29 (1).

<sup>189</sup> Section 30 (1).

<sup>190</sup> Section 30 (2).

ncidental inclusion of copyright material,<sup>191</sup> or things done for purposes of instruction or examination.<sup>192</sup>

In a similar vein, the French Intellectual Property Code, specifies certain acts that the author cannot veto after the publication of a work. The permitted acts include 1) private and free performances of a work within a family circle; 2) copying strictly for the use of the copier; 3) short quotations, reviews, and news coverage: in all cases provided that the name of the author and the source is clearly stated; and 4) parodies, pastiches, and caricatures.<sup>193</sup>

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<sup>191</sup> Section 31 (1).

<sup>192</sup> Section 32 (1).

<sup>193</sup> Code de la propriété intellectuelle. Titre II, Chapitre 1<sup>er</sup>, Art. L. 122-5. A number of further rules apply to the rights and use of software.

## 4. AESTHETIC KEYWORDS

### I The history of the author

For some time the main inspiration for exploring the history of the author without basing the analysis on an a priori definition of the concept has come from Michel Foucault. Critical investigations of authorship of the 1980s and 90s have been modelled on his genealogical method. In his vastly influential article ‘What is an author?’<sup>194</sup> Foucault suggested that ‘in a civilization like our own there are a number of discourses that are endowed with the ‘author function,’ while others are deprived of it.’ Accordingly, the author function is ‘characteristic of the mode of existence, circulation, and functioning of certain discourses within a society.’ (267) Tracing the birth of the author Foucault then argued that ‘Texts, books, and discourses really began to have authors (other than mythical, ‘sacralized’ and ‘sacralizing’ figures) to the extent that authors became subject to punishment.’(286) The moment when our modern notion of authorship came fully into being, though, was when the author was ‘placed in the system of property that characterizes our society.’(268)<sup>195</sup> Today we inevitably see authors as individual creators and proprietors or owners of *their* texts. Foucault also noted that ‘the author function does not affect all discourses in a universal and constant way.’(268) Historically the kinds of texts attributed to an author have changed. While in our times literary texts, for example, are always connected to an originator, other types of texts (one could mention advertisements, instruction manuals, dictionaries, and limitation pages) are typically not. A third characteristic pointed out by Foucault is that authors are constructed in dissimilar ways. The individual designated as an author has attributes projected onto him or her, but in diverse ways. Philosophers, poets, academic writers, and other authors are conceptualised each in their fashion; they have different modes of ‘creative powers’ or ‘inner motives’. What Foucault so productively achieved

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<sup>194</sup> Michel Foucault, “What Is an Author?,” in *Contemporary Literary Criticism*, ed. R.C. Davis and R. Schleifer (New York, London: Longman, 1989), 263-275. A revised version of a lecture from 1969  
Michel Foucault, “Qu'est-ce qu'un auteur? (1969),” in *Dits et Écrits. 1964 - 1988*, ed. D. Defert, F. Ewald and J. Lagrange (Paris: Éditions Gallimard, 1994), 789-812.

by this article—which in fact offered inspired suggestions more than evidence as to the genealogy of the author—was to motivate a number of empirical studies, testing the validity of his theses. Explicit responses came from Molly Nesbit, Carla Hesse, Mark Rose, and Martha Woodmansee; these scholars have investigated the link between authorship and copyright in France, Britain and Germany.<sup>196</sup> Their explorations of legal and literary history have tended to confirm one main hypothesis of Foucault's, namely that our modern notion of the author came into being when he was made a proprietor of his work.

Another outcome of Foucault's argument was that the author as a critical concept—banned from literary theory by New Criticism and Structuralism—was given new life. One commentator, Roger Chartier, has remarked that the Foucault-inspired New Historicism

reconnect[s] the text with its author; the work with the intentions or the position of its producer. This is of course not a restoration of the superb and solitary figure of the romantic figure of the sovereign author whose primary and final intention contains *the* meaning of the work and whose biography commands its writing with transparent immediacy. As he returns in literary criticism or literary sociology the author is both dependent and constrained.(28)

Once freed of the romantic universalistic conception of authorship, the author had, prematurely, been declared dead. But as Chartier observes, a critical methodology that neither took for granted nor completely ignored the author came to define a new

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<sup>195</sup> Foucault thereby suggested a link between copyright and censorship. For more on this link see Stina Teilmann, "Flaubert's Crime: Trying Free Indirect Discourse," *Literary Research/ Recherche Littéraire. International Comparative Literature Association* 17, no. 33 (2000): 74-87.

<sup>196</sup> Carla Hesse, "Enlightenment Epistemology and the Laws of Authorship in Revolutionary France, 1777-1793," *Representations*, no. 30 (1990): 109-137; Molly Nesbit, "What Was an Author," *Yale French Studies* 73 (1987): 229-257; Mark Rose, "The Author as Proprietor: *Donaldson v. Becket* and the Genealogy of Modern Authorship," *Representations*, no. 23 (1988): 51-86; Martha Woodmansee, "The Genius and the Copyright: Economic and Legal Emergence of the "Author"," *Eighteenth-Century Studies* 17, no. 4 (1984): 425-448.

approach. This analytical stance—which is in accordance with Foucault’s premises—is the common ground in the following survey of the history and theory of authorship.

In the middle ages the human *auctor* came into being. The earliest example in the Oxford English Dictionary of ‘auctor’ designating the composer or writer of a book or a treatise dates from 1380.<sup>197</sup> While possessing individual authorship (his ‘sins’ and his ‘manner’) and being recognised for his stylistic characteristics, the auctor, nevertheless, was not ascribed personality.<sup>198</sup> Besides, if the *auctor* was seen to be responsible before God for his sins he was not responsible for a reader’s (mis-)interpretation of his work. (109f) A. J. Minnis has described how

God, who had guaranteed the superlative *auctoritas* of Scripture, was the *auctor* of all created things as well as an *auctor* of words.[...] He could deploy words by inspiring human authors to write, and deploy things through his creative and providential powers.(36)

In this way, meaning, earlier regarded as hidden deep in the Biblical text, was thought to be expressed by the human *auctores* of the Scriptures, in individual ways.

The regulatory régime of authorship, of which Foucault speaks, becomes manifest in French law after the invention of the printing press. The edict of Chateaubriand of 27 June 1551 ordered all printed books to carry the name of the printer and the author.<sup>199</sup> In Britain a similar parliamentary edict of 29 January 1642, requiring the name of the author to be put on the title page, worked partly in the interest of authors. Printers were to obtain the consent of the author of a book before publishing

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<sup>197</sup> The earliest example of ‘Autour’ in the sense ‘the creator of all things’ is from about the same time (1374).

<sup>198</sup> See A. J. Minnis, *Medieval Theory of Authorship. Scholastic Literary Attitudes in the Later Middle Ages* (London: Scolar Press, 1984), chapter 4, pp. 118-159.

<sup>199</sup> See Roger Chartier, *The Order of Books. Readers, Authors, and Libraries in Europe between the Fourteenth and Eighteenth Centuries*, trans. Cochrane, Lydia G. (Stanford: Stanford University Press, 1994), p. 49f.

it; failure to do so would make the printer solely responsible for the content of the book if it were deemed libelous or blasphemous.<sup>200</sup>

Distinguishing the author for the purpose of liability became linked to a more affirmative recognition of authorship. Contracts between printers and authors constitute proof of some degree of control exercised by authors in the sixteenth century. Cynthia Brown describes how along with the commodification and commercialization of books, writers became more self-conscious. While still depending on patrons, readers became part of the strategy of address. Brown demonstrates, accordingly, that there is

evidence of an increasing use of self-promotional strategies – such as more author-centered images, more prominently publicized names, more directly accessible signatures, and a more author-identified narrative voice – which underscore the author’s development from a conventionally medieval secondary stance to a growing authoritative presence.<sup>201</sup>

Increasingly self-assured authors, moreover, occasionally filed suits against printers for printing their works without their consent. Decisions in favour of authors were significant, implying that: ‘An author’s right to the publication and dissemination of his work gained legal priority over those of a printer for the period of one year.’(33) This time limit would gradually be extended.

In the Renaissance, authorship was considered a kind of workmanship; writers trained in rhetorical arts and the classics were citing sources for readers to recognise.<sup>202</sup> But while a writer was always a rewriter he still had to face the problem of

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<sup>200</sup> See Mark Rose, *Authors and Owners. The Invention of Copyright* (Cambridge MA: Harvard University Press, 1993), p. 22.

<sup>201</sup> Cynthia J. Brown, *Poets, Patrons, and Printers. Crisis of Authority in Late Medieval France* (Ithaca: Cornell University Press, 1995), p. 6f.

<sup>202</sup> See Thomas Greene, *The Light in Troy: Imitation and Discovery in Renaissance Poetry* (Berkeley: University of California Press, 1982)

Jeffrey A. Masten, “Beaumont and/or Fletcher: Collaboration and the Interpretation of Renaissance Drama,” in *The Construction of Authorship. Textual Appropriation in Law and Literature*, ed. M. Woodmansee and P. Jaszi (Durham NC: Duke University Press, 1994), 361-381; Earl Miner, “Assaying the Golden World of English Renaissance Poetics,” *Centrum* 4, no. 1 (1976): 5-20; Ann Moss, *Printed Commonplace-Books and the Structuring of Renaissance Thought* (Oxford: Clarendon Press, 1996); Stephen Orgel, “The Renaissance Artist as Plagiarist,” *English Literary History* 48 (1981): 476-495

differentiating and authenticating the rewriting. Thus a writer's name—his honour and reputation—would become attached to a published work even if the writer was unlikely to claim an exclusive right to it.<sup>203</sup> A general shift of literary values took place at this time. In his investigation of Renaissance poetics, David Quint has argued that 'The Renaissance author emerged as original at the moment when a traditional and authoritative canon was historicized and relativized.'<sup>204</sup> It became increasingly common to accredit writers with originality and to recognize individual proprietorship of texts. A new historical consciousness allowed texts to be read as exclusive creations of their human authors. In a similar vein, the perception of the literary text as an allegorical representation of transcendent truth was changing into one of individual creation and contribution, the personality of the author thereby gaining significance.

Seventeenth century writers came to endorse the notion of authorial originality which was their claim to literary property. Laura Rosenthal has argued how women writers—who found themselves excluded from the literary establishment in early modern Britain —used 'originality' as a strategy for ownership 'in response to reconceptualizations of property that emphasized individual ownership but limited who would inhabit the position of owner.'<sup>205</sup>

Enlightenment aesthetics continued along similar lines. And, importantly, the aesthetic values of originality and authenticity became correlated. Edward Young added an almost existential character to originality by attaching it to authenticity: 'dive deep into thy bosom; learn the depth, extent, bias, and full fort of thy mind'.<sup>206</sup> In *Conjectures on Original Composition*, Young, by the same token, recommends every poet to:

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Terence Cave, *The Cornucopian Text: Problems of Writing in The French Renaissance* (Oxford: Oxford University Press, 1979).

<sup>203</sup> For a discussion of this in relation to the concept of plagiarism see Max W. Thomas, "Eschewing Credit: Heywood, Shakespeare, and Plagiarism before Copyright," *New Literary History* 31, no. 2 (2000): 277-293.

<sup>204</sup> David Quint, *Origin and Originality in Renaissance Literature. Versions of the Source* (New Haven, London: Yale University Press, 1983), p. 220.

<sup>205</sup> Laura Jean Rosenthal, *Playwrights and Plagiarists in Early Modern England. Gender, Authorship, Literary Property* (Ithaca, NY: Cornell University Press, 1996), p. 4.

let not great Examples, or Authorities, browbeat thy Reason into too great a diffidence of thyself: Thyself so reverence as to prefer the native growth of thy own mind to the richest import from abroad; such borrowed riches make us poor. The man who thus reverences himself, will soon find the world's reverence to follow his own. His works will stand distinguished; his the sole Property of them; which Property alone can confer the noble title of an *Author*; that is, of one who (to speak accurately) *thinks*, and *composes*; while other invaders of the Press, how voluminous, and learned soever, (with due respect be it spoken) only *read*, and *write*. (53-54)

Young had emphasized already in 1728 the importance of being an original: 'Originals only have true life, and differ as much from the best imitations as men from the most animated pictures of them.'<sup>207</sup> In the *Conjectures* of 1759 he furthermore presented his definition of the author as the individual creator and, accordingly, owner of original literary compositions. Authors—original writers who express their personality in their works, that is—add something new to the world: 'they are great Benefactors; they extend the Republic of Letters, and add a new province to its dominion; *Imitators* only give us a sort of Duplicates of what we had.'<sup>208</sup> The metaphors, here, of occupation and land, match the central ideas of seventeenth century theories of property. Worthy of notice, however, is the significance of distinguishing between what Mark Rose has called 'matters of propriety from matters of property'<sup>209</sup> in eighteenth-century debates on authorship and authors' rights. Rose argues that many commentators were concerned more with the former than with the latter. Similarly, Young's author conquering new literary territory, appropriating what is justly his, may not necessarily personify the one to benefit economically from a composition. All the same the notions of propriety and

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<sup>206</sup> Edward Young, *Conjectures on Original Composition in a Letter to the Author of Sir Charles Grandison*. (Leeds: The Scolar Press Limited, 1966 (1759)), p. 53.

<sup>207</sup> Edward Young, "On Lyric Poetry (1928)," in *Eighteenth-Century Critical Essays*, ed. S. Elledge (Ithaca: Cornell University Press, 1961), p. 414.

<sup>208</sup> Edward Young, *Conjectures on Original Composition in a Letter to the Author of Sir Charles Grandison*. (Leeds: The Scolar Press Limited, 1966 (1759)), p. 10.

<sup>209</sup> Mark Rose, *Authors and Owners. The Invention of Copyright* (Cambridge MA: Harvard University Press, 1993), p. 18.

property were intermingled—‘propriety’ in the eighteenth century was often used to refer to what we call property—but this, as Rose notes, only stresses ‘the way that matters of ‘ownness’ flow into matters of “ownership” in the early modern period.’<sup>210</sup>

Although he was not the sole advocate of these ideas, the circulation and reception of the *Conjectures*—in Germany, France, and Britain—made Young possibly more important than any other thinker associated with them. Young’s poetics of originality, ‘authenticity’ and ‘spontaneity’, anticipates the romantic idea of inspiration.<sup>211</sup> In the nineteenth century such notions helped shape what Raymond Williams has called romantic self-representation. Romantic poets saw themselves as original innovators; solitary self-expressing figures whose writings were genuine products of the individual imagination. This self-understanding implied that each poet should maintain supreme mastery—including economic mastery—over his works.

The inspired genius whose powers of spontaneous creation founded his claim to profit from his writings is exemplified by William Wordsworth. In the copyright debates of the late 1830s, Wordsworth was lobbying to extend the term of copyright protection – to secure the material interests of authors and to protect their (posthumous) reputations.<sup>212</sup> Undertaking this, the poet assisted Thomas Noon Talfourd, a central figure in the creation of the British 1842 Copyright Act.<sup>213</sup> Talfourd had presented a bill in 1837 revising the subject-matter and system of registration of copyright. He had, moreover, proposed an increase of the term of 28 years to the life of the author plus 60 years. The 1842 Act, however, gave protection for the life of the author and a post mortem period of seven years only. Wordsworth’s involvement in the campaigns can be seen as symptomatic of the extent to which the author became an

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<sup>210</sup> *Ibid.*, p.18n4.

<sup>211</sup> See Roland Mortier, *L'Originalité. Une Nouvelle Catégori Esthétique au Siècle des Lumières*, vol. 207, *Histoire des Idées et Critique Littéraire* (Genève: Librairie Droz S.A., 1982), p. 92.

<sup>212</sup> See Susan Eilenberg, *Strange Power of Speech. Wordsworth, Coleridge, and Literary Possession* (Oxford: Oxford University Press, 1992); Paul M. Zall, “Wordsworth and the Copyright Act of 1842,” *PMLA* 70 (1955): 132-144, chapter 8: ‘Mortal Pages: Wordsworth and the Reform of Copyright’, p. 192-212, Stephen Gill, “Copyright and the Publishing of Wordsworth, 1850-1900,” in *Literature in the Marketplace. Nineteenth-Century British Publishing and Reading Practices* (Cambridge: Cambridge University Press, 1995), 74-92, and Richard G. Schwartz, “Wordsworth, Copyright, and the Commodities of Genius,” *Modern Philology* 89, no. 4 (1992): 482-514.

<sup>213</sup> For more on this see Catherine Seville, *Literary Copyright Reform in Early Victorian England. The Framing of the 1842* (Cambridge: Cambridge University Press, 1999).

interested economic agent in the nineteenth century. Romanticism has indeed been seen as a response to the emergence of commodity culture. Richard G. Schwartz has argued that in his writings on copyright Wordsworth ‘reveals the possibility that Romantic aesthetics and the logic of commodification are mutually implicated (and perhaps mutually constitutive) phenomena.’<sup>214</sup> The economic and the aesthetic dimensions of authorship become inextricably intermingled.

A French counterpart to Wordsworth—the professional author claiming his rights by law—was Victor Hugo. As president of the *Association Littéraire et Artistique Internationale* he organized an international convention for the protection of literary and artistic property. Hugo’s endeavours were, undeniably, rewarded by the creation of the Berne Convention on 9 September 1886.<sup>215</sup>

The significance of the author as a legal subject and as a means of interpreting texts—notably literary ones—increased throughout the nineteenth century.<sup>216</sup> This tendency carried on in the early twentieth-century, and authorship continued to be perceived in terms of individuality, subjectivity, personality, and psychology. In the mid-century, however, the concept of the author became more controversial. The received idea of the relationship between text and writer was contested; the figure of the author was denied legitimacy as a device for the understanding of texts.<sup>217</sup> New Criticism deemed the author’s intrinsic values—his biography, psychology, ideology—irrelevant for the reading of literary works. The idea of authorial intention was challenged: no necessary identity between an author’s intention and a work’s meaning was recognised. Structuralism went further and rejected

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<sup>214</sup> Richard G. Schwartz, “Wordsworth, Copyright, and the Commodities of Genius,” *Modern Philology* 89, no. 4 (1992): 482-514, p. 487.

<sup>215</sup> See <http://www.alai.org/> Association Littéraire et Artistique Internationale.

<sup>216</sup> The way pseudonymity and anonymity were made feasible objects of study as special cases of authorship can be interpreted as indicative of this. See for instance J. Querard, *Les Ecrivains pseudonymes et autres mystificateurs de la littérature française* (Paris: l’Éditeur, 1854) and E. Collin, *Anonymer og Pseudonymer i Den Danske, Norske og Islandske Litteratur* (Copenhagen: Jac. Lund, Thieles Bogtrykkeri, 1869). On the history of pseudonymity and anonymity in literature see Catherine Gallagher, *Nobody’s Story. The Vanishing Acts of Women Writers in the Marketplace 1670-1820*, (Berkeley, Los Angeles: University of California Press, 1994); Robert J. Griffin, “Anonymity and Authorship,” *New Literary History* 30, no. 4 (1999): 877-895 and Gérard Genette, *Seuils* (Paris: Éditions du Seuil, 1987).

<sup>217</sup> Famously so in W.K. Wimsatt and Monroe C. Beardsley, “The Intentional Fallacy,” in *20th Century Literary Criticism*, ed. D. Lodge (London: Longman, 1972 (1946)), pp. 334-344.

the entire notion of a single originator of a text. Roland Barthes famously declared the author dead in 1968.<sup>218</sup> If there was no place for the romantic genius in Structuralism, Barthes preferred to abandon the author altogether. So writing was identified as the ‘destruction of every voice’(142) and the writer as someone not preceding or exceeding the text: ‘there is no other time than that of the enunciation’(145). Perhaps more than anything Barthes was concerned with a new strategy of reading, stressing the indeterminability of (literary) texts and the futility of interpreting them in order to recount the author’s intention. Removing focus from the author the reader was ascribed the role of ‘the space on which all the quotations that make up a writing are inscribed’(148).

Foucault’s contribution to the authorship debate paved the way for a reappraisal of the concept – especially after Barthes. Criticism of author-centered reading strategies and the notion of authorial intention continued<sup>219</sup> but the author returned in literary theory in, for example, discussions of subjectivity, gender, and class. The social history of authors has become another field of research. It is noteworthy, for instance, how the abolition of the privilege system and the introduction of copyright affected writers and thereby literature. The history of authorship, by the same token, reveals how writers of different kinds—men of letters, essayists, poets, translators, novelists, serial writers, diarists, and others—all came to be designated as authors, with various consequences for the institution of literature.<sup>220</sup>

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<sup>218</sup> Roland Barthes, “The Death of the Author,” in *Image, Music, Text*, ed. S. Heath (New York: Hill & Wang, 1977 (1968)), pp. 142-148.

<sup>219</sup> See Seán Burke, *The Death and Return of the Author. Criticism and Subjectivity in Barthes, Foucault and Derrida* (Edinburgh: Edinburgh University Press, 1992).

<sup>220</sup> See for instance Molly Nesbit, “What Was an Author,” *Yale French Studies* 73 (1987): 229-257, Adrian Johns, *The Nature of the Book. Print and Knowledge in the Making* (Chicago: University of Chicago Press, 1998); Marlon B. Ross, “Authority and Authenticity: Scribbling Authors and the Genius of Print in Eighteenth-Century England,” in *The Construction of Authorship. Textual Appropriation in Law and Literature*, ed. M. Woodmansee and P. Jaszi (Durham NC: Duke University Press, 1994), 231-257 and Victor Bonham-Carter, *Authors by Profession* (London: The Society of Authors, 1978).

## **II Imitation in the arts**

Norms and attitudes towards legitimate and illegitimate appropriation have changed over time. In Plato's *Republic*—where poets and writers are rendered altogether suspect and unwanted for telling falsehoods—a hierarchy of truth is set up. Three categories of reality exist: 1) the eternal and unchanging ideas: the essences; 2) the world of phenomena: the appearances, reflecting the ideas; and 3) reflecting the second category: shadowy images like mirror reflections and the fine arts. Art and literature being imitations of appearances and not of essences are merely second-degree simulations of truth. In the tenth book art is argued to have a lower status than other things in the world. In the case of a bed there is, first, the bed in nature, which god makes, and then there is an individual bed that the carpenter manufactures. Finally, there is the bed that the painter makes. A painting however is merely an imitation of the appearance of the bed, not of reality:

The art of imitation therefore is far removed from the real, and, it seems, achieves all its results because it grasps only a small part of each object, and an image at that.<sup>221</sup>

A painter, whose art is at third remove from the truth, is capable, at best, only of deceiving his audience into believing that he is a workman who has made a real thing. But the art of imitation is an inferior thing and artist and writers have no real knowledge of what they create:

The painter will make a semblance of a cobbler, though he knows nothing about cobbling, and neither do his public—they judge only by colours and shapes. (42)

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<sup>221</sup> Plato, "The Republic," in *Classical Literary Criticism*, ed. D.A. Russell and M. Winterbottom (Oxford: Oxford University Press, 1972), 14-50, p. 39.

There is every reason thus to be suspicious of imitation. Artists can present images, not reality they know only the appearance of things and nothing about the goodness or the badness of what is imitated.

Aristotle, like Plato, defines literature as imitation in the *Poetics*: ‘epic and tragic poetry, comedy and dithyrambic, and most music for the flute and the lyre are all, generally considered, varieties of *mimēsis*.’<sup>222</sup> Yet, imitation—or *mimēsis*—has a different sense in the *Poetics* than in the *Republic*. Human beings have a natural instinct for *mimēsis*: ‘indeed we differ from the other animals in being most given to *mimēsis* and in making our first steps in learning through it – and pleasure in instances of *mimēsis* is equally general.’<sup>223</sup> We enjoy seeing represented in the arts things we do not like to see in real life – the lowest animals, or corpses, for instance. The object of *mimēsis* is ‘people doing things’,<sup>224</sup> and this can be shown in different modes: narrative, dramatic, or as a mixture of the two. The media of *mimēsis* can be colours and shapes—when portraying things—or the voice.

It is significant, in the *Poetics*, that there is nothing dubious about the fact that art is imitation. This same attitude is made evident in Eduard Stemplinger’s investigation of plagiarism in classical Greek literature. Stemplinger examines the concept of plagiarism by philological analyses as well as in rhetorics and aesthetic theory. He makes records of accusations of plagiarism in various genres: comedy, philosophy, and medical sciences;<sup>225</sup> but he finds that the Ancients had a different perception of plagiarism from ours. The material of literature (*‘der Stoff’*) was seen as common property like air and water.<sup>226</sup> Hence plagiarism was limited to actual cribbing. Only servility, derivative copying, that is, was considered misappropriation. In fact, imitation was the most widespread strategy of writing – not in order to usurp, however, but for the reader’s pleasure of recognition. Accordingly, Stemplinger, in his analysis of the Greek practice of using parallel columns in poetry analysis—a familiar trait of

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<sup>222</sup> Aristotle, “Poetics,” in *Classical Literary Criticism*, ed. D.A. Russell and M. Winterbottom (Oxford: Oxford University Press, 1972), 51-90, p. 51.

<sup>223</sup> *Ibid.*, p. 54.

<sup>224</sup> *Ibid.* p. 52.

<sup>225</sup> Eduard Stemplinger, *Das Plagiat in der griechischen Literatur* (Leipzig: Verlag von B.G.Teubner, 1912), p. 16ff.

<sup>226</sup> „Der Stoff [...] ist wie Luft und Licht Gemeingut’ *Ibid.*, p. 167f.

Greek philology—notes that parallelling was intended not to censure similarities but to admire them.<sup>227</sup>

Similar traits can be found in Renaissance literature. Harold Ogden White, in his classic study from 1935, has demonstrated how, in sixteenth- and seventeenth-century English literature, imitation was practiced without defence or explanation.<sup>228</sup> Invention would be an author's first principle: 'invention' meant finding quotations right for the occasion, not 'fabrication' as such. The best features of the best authors were imitated. Improvements, reinterpretation, blending, digestion were all common principles of writing. Imitation was not done with the devious intentions of plagiarism. Readers were meant to recognise, not to expose. Even so, Ogden White argues that outright piracy was increasingly rebuked during the English Renaissance. He records how Ben Jonson would use the term plagiary censoriously – yet only to denounce cases of verbatim copying<sup>229</sup> and (unacknowledged) translations, which at the time, slowly ceased to be considered new works.<sup>230</sup> The principle of imitation was a fundamental component of French Renaissance poetics, too, until the Romantic period.<sup>231</sup> According to the prevailing idea of mimesis in sixteenth-century French literature, one should represent and interpret nature by imitating model authors and classical works. Yet, as in Britain, attitudes began to change in the seventeenth century: comparisons between imitation and plagiarism became increasingly common in French literature.<sup>232</sup> Plagiarism—improper borrowing—was seen to occur when literary loans were used superficially and not given a new and personal form by the borrower.<sup>233</sup>

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<sup>227</sup> *Ibid.*, p. 7ff.

<sup>228</sup> Harold Ogden White, *Plagiarism and Imitation during the English Renaissance. A Study in Critical Distinctions*, vol. 12, *Harvard Studies in English* (New York: Octagon Books, 1973 (1935)).

<sup>229</sup> *Ibid.*, p. 120-145.

<sup>230</sup> *Ibid.*, p. 68ff.

<sup>231</sup> See Erich Welslau, *Imitation und Plagiat in der französischen Literatur: von der Renaissance bis zur Revolution, Romanistik 8* (Rheinfelden: Schäuble Verlag, 1995).

<sup>232</sup> *Ibid.*, p. 94f.

<sup>233</sup> For more on imitation in Renaissance literature see Reuben Brower, *Mirror on Mirror. Translation, Imitation, Parody, Harvard Studies in Comparative Literature 34* (Cambridge MA: Harvard University Press, 1974); Terence Cave, *The Cornucopian Text: Problems of Writing in The French Renaissance* (Oxford: Oxford University Press, 1979); Giles Constable, "Forgery and Plagiarism in the Middle Ages," *Archiv für Diplomatik, Schriftgeschichte, Siegel- und Wappenkunde* 29 (1983): 1-41; Thomas Greene, *The Light in Troy: Imitation and Discovery in Renaissance Poetry* (Berkeley: University of California Press, 1982); William Keach, "Verbal Borrowing in Elizabethan Poetry: Plagiarism or Parody?," *Centrum* 4, no.

Max W. Thomas, commenting on the conceptualisation of plagiarism before the eighteenth century and before copyright, has argued that the division between legitimate imitation and plagiarism concerned personal honour, social standing, and public reputation, more than property rights.<sup>234</sup> Purloining passages from other writers was disapproved of not because it was equated with stealing material property but because it ‘renders it impossible to know just what the coin of that writer is made of, and one must take it on credit.’<sup>235</sup> Maintenance of one’s name, one’s ‘cultural capital’ in an economy of patronage, would become impossible were texts not published under the right name.

In what has become known as the ‘Quarrel of the Ancients and the Moderns,’ the imperative of imitation in writing came under attack in both England and France. The authority of the classics was being challenged. Jonathan Swift’s *The Battle of the Books* from 1704 is an allegory of the quarrel.<sup>236</sup> In *The Battle* a spider, creating its web out of itself, representing the Moderns, and a bee, collecting material outside of itself, representing the Ancients and their followers, dispute literary values. The Moderns want to make way for new knowledge, promoting originality in the modern senses of self-sufficiency and novelty. The Ancients admit their debt to tradition and prescribe learning and knowledge of classical literature. Swift wrote in support of the Ancients but could not prevent the values of the Moderns from gaining increasing influence. The Romantics were great endorsers of the modern idea of self-sustained creation. Resisting Plato’s degradation of writers and artists as second-degree imitators of nature, poets, from at least Wordsworth (in his preface for *Lyrical Ballads* of 1800) onwards, claimed their works to be the projection of their own thoughts and feelings, the results of spontaneous imaginative processes of the poet, that is. The purpose of

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1 (1976): 21-31; Earl Miner, “Assaying the Golden World of English Renaissance Poetics,” *Centrum* 4, no. 1 (1976): 5-20; Ann Moss, *Printed Commonplace-Books and the Structuring of Renaissance Thought* (Oxford: Clarendon Press, 1996). See also Henry Abelove, “John Wesley’s Plagiarism of Samuel Johnson and Its Contemporary Reception,” *Huntington Library Quarterly: A Journal of English and American History and Literature* 59, no. 1 (1997): 73-79 and Peter Hughes, “Originality and Allusion in the Writings of Edmund Burke,” *Centrum* 4, no. 1 (1976): 32-43.

<sup>234</sup> Max W. Thomas, “Eschewing Credit: Heywood, Shakespeare, and Plagiarism before Copyright,” *New Literary History* 31, no. 2 (2000): 277-293.

<sup>235</sup> *Ibid.*, p. 285f.

<sup>236</sup> See Jonathan Swift, “The Battle of the Books,” in *A Tale of a Tub and other Satires*, ed. K. Williams (London: Everyman’s Library, 1975 (1704)), 137-165.

creation was not to represent the world. According to the doctrine of the creative imagination, creators, like God, have internal purposes and sources of motion.<sup>237</sup> Art, then, must be regarded in its capacity of being genuine and sincere: expressive of the artist's qualities and sentiments, rather than true to nature; or a reflexion of the external world. Imitation in this context becomes a misdeed in its implication of robbing a creator of the expression of his or her most intimate life.<sup>238</sup>

Romantic ideas continued to be prevalent into the twentieth century. Expressive, psychological, and personality theories of art and literature viewed creation as an internal process, rejecting imitative practices.<sup>239</sup> A shift happened in the second half of the twentieth century. Theories of influence, intertextuality, and cultural recycling began to predominate. The principle of appropriation became rehabilitated and the practice of imitation as a strategy of writing and creating was celebrated in post-modern conceptualisations of art and literature. Imitation has been explored in literary theory in terms of 'influence' and 'intertextuality.' The literary critic Harold Bloom has argued that the writing of poetry happens as an effect of the anxiety of influence that 'comes out of a complex act of strong misreading.'<sup>240</sup> In the act of composing poets are carrying out creative or idiosyncratic interpretation of their predecessors, their works

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<sup>237</sup> See M.H. Abrams, *The Mirror and the Lamp. Romantic Theory and the Critical Tradition* (Oxford: Oxford University Press, 1953), especially pp. 21-26 and pp. 70-99. See also Georges Maurevert, *Le livre de plagiats. Montaigne, Pascal, La Rouchefoucauld [e.a.]* (Paris: A. Fayard & cie, 1922).

<sup>238</sup> Coleridge has become known as one of literary history's greatest plagiarists; he notoriously failed to acknowledge his sources. See Norman Fruman, *Coleridge. The Damaged Archangel* (London: George Allen & Unwin Ltd., 1971); Norman Fruman, "Originality, Plagiarism, Forgery and Romanticism," *Centrum* 4, no. 1 (1976): 44-49 and René Wellek, *A History of Modern Criticism 1750 - 1960. The Romantic Age*, 8 vols., vol. 2 (Cambridge: Cambridge University Press, 1981 (1955)).

<sup>239</sup> See for instance Whitfield Jenks Bell, *Thomas Anburey's "Travels through America": A Note on Eighteenth-Century Plagiarism* (New York: Bibliographical Society of America, 1943); William Allan Edwards, *Plagiarism. An Essay on Good and Bad Borrowing. Le Bas Prize Essay for 1932* (Cambridge: G. Fraser. The Minority Press, 1933); J. Labaurie, *L'usurpation en Matière Littéraire et Artistique* (Paris: E. De Boccard, 1919); Georges Maurevert, *Le livre de plagiats. Montaigne, Pascal, La Rouchefoucauld [e.a.]* (Paris: A. Fayard & cie, 1922); Harry Major Paull, *Literary Ethics. A Study in the Growth of the Literary Conscience* (Port Washington, NY: Kennikat Press, 1968); Hyder E. Rollins, "Notes on Brian Melbancke's *Philotimus*," *Studies in Philology. Extra Series* 1 (1929): 40-57; Maurice Salzman, *Plagiarism: The "Art" of Stealing Literary Material by Maurice Salzman...* (Los Angeles: Parker, Stone & Baird co., 1931) and M. P. Tilley, "Further Borrowings from Poems in *Philotimus* (1583)," *Studies in Philology* 17, no. 2 (1930): 186-214.

<sup>240</sup> Harold Bloom, *The Anxiety of Influence. A Theory of Poetry*, 2 ed. (Oxford: Oxford University Press, 1997 (1973)), p. xxiii. See also Roland De Chaudenay, *Dictionnaire des Plagiaires* (Paris: Perrin, 1990) T. S. Eliot, "Tradition and the Individual Talent," in *The Sacred Wood: Essays on Poetry and Criticism* (London: 1920).

becoming manifestations of poetic misreadings. The literary theorist Gérard Genette has analysed imitation as a kind of intertextuality. He has mapped out five categories of transtextual relationships.<sup>241</sup> Allusions, plagiarism, caricature, quotations, pastiche, and forgery are all examples of the kind of textual transcendence that Genette—following Julia Kristeva—labels intertextuality. In continuation of Genette another literary scholar, Hélène Maurel-Indart, has developed a typology of appropriative writing practices. Maurel-Indart divides literary and artistic appropriation into categories according to whether they are direct or indirect; voluntary or involuntary; and concealed or disclosed.<sup>242</sup> Significantly the basic assumption of such theories of influence and intertextuality is that any writing is a rewriting, that texts are always palimpsests, whether their function is to transform or to imitate other texts. In other words, the division between proper and improper textual linking is to be understood as a pragmatic measure taken by the literary institution – and the law.

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<sup>241</sup> The five types are intertextuality, paratext, metatextuality, hypertextuality, and architextuality. The category of intertextuality, which includes imitation and plagiarism, is of most relevance in here. Gérard Genette, *Palimpsests. Literature in the Second Degree*, trans. Channa Newman and Claude Doubinsky (Lincoln and London: University of Nebraska Press, 1997 (1982)). See also Raymond Federman, “Imagination as Plagiarism: An Unfinished Paper,” *New Literary History* 7, no. 3 (1976): 563-78  
Julie C. Hayes, “Imitation, Copying, Plagiarism: Intricacies of Textual Transmission,” in *Studies on Voltaire and the Eighteenth Century. Transactions of the Eighth International Congress on the Enlightenment*, ed. H.T. Mason (Oxford: The Voltaire Foundation at The Taylor Institution, 1992), 1007-1011.

<sup>242</sup> Hélène Maurel-Indart, *Du Plagiat*, ed. R. Jaccard, *Perspectives Critiques* (Paris: Presses Universitaires de France, 1999), pp. 171-199.

# **PART TWO**

## **TO COPY OR NOT TO COPY**

### **A BRITISH QUESTION**

#### **1. THE ACT OF COPYING IN LITERATURE**

‘Originality means to remain faithful to the originals’ Zissimos Lorenzatos, cited by Andrew Louth, *St John Damascene: Tradition and Originality in Byzantine Theology* (Oxford, 2002) p. [vi]

A rare instance of French praise of British copyright is found in Augustin-Charles Renouard’s treatise from 1838 on authors’ rights. Renouard criticises the use in France of the term ‘literary property’ and expresses the view that

L'expression *droit de copie*, employée par les Anglais et les Allemands, est beaucoup plus juste. Elle ne confond, ni l'émission première de la pensée avec sa reproduction, ni la propriété matérielle de chacun des exemplaires d'un ouvrage avec la possession intellectuelle de leur contenu.<sup>243</sup>

'Copyright' as an expression is more appropriate than 'literary property', Renouard maintains. It does not muddle up the first issue of an original work with the reproduction of it, nor does it confuse the material property of each copy of a work with ownership of the work's intellectual content.

In fact, at the time, the right of property was more generally recognised as a rationale for copyright in Britain than in France where personality rights played an vital role. Even so, an important implication of Renouard's observation is that the term 'copyright' serves to stress that it is a right to the act of copying. The holder of copyright has permission to copy and to distribute the copies; infringement means to make and disseminate unauthorized copies.<sup>244</sup> This is evident in two of the most important decisions in British copyright history: *Millar v. Taylor* (1769)<sup>245</sup> and *Donaldson v. Beckett* (1774).<sup>246</sup> Both cases dealt with the question of an eternal common law copyright. *Millar v. Taylor* confirmed perpetual copyright, while the House of Lords rejected it in *Donaldson v. Beckett*. Discussions of the nature of literary property—whether copyright is a natural right or a privilege—form the major part of the court hearings. The rulings are widely celebrated for this. It can be noted from the sidelines, however, that although literary property was the central concern, this term,

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<sup>243</sup> Augustin-Charles Renouard, *Traité des droits d'auteurs dans la littérature, les sciences et les beaux-arts* (Paris: 1838), vol.1, p. 454

<sup>244</sup> For more on this topic see Mark Rose, *Authors and Owners. The Invention of Copyright* (Cambridge MA: Harvard University Press, 1993) and Brad Sherman and Lionel Bentley, *The Making of Modern Intellectual Property Law. The British Experience, 1760-1911* (Cambridge: Cambridge University Press, 1999).

<sup>245</sup> *Millar v. Taylor* (1769) 4 Burr. 2303.

<sup>246</sup> *Donaldson v. Beckett* (1774) 2 Bro PC 129

significantly, referred merely to the limited right of publishing a whole work. It did not include a broader range of rights in the ‘property.’

*Millar v. Taylor* (1769) and *Donaldson v. Beckett* (1774) both concerned disputes over the publication of James Thomson’s *The Seasons* (1729). Thomson had sold the right to print the book to Mr. John Millar. In June 1738 Andrew Millar purchased the right from Millar. In 1763, after the expiry of the 28-year term of statutory protection granted by the Act of Anne, the Edinburgh bookseller Taylor published and sold an edition of *The Seasons*. This caused Andrew Millar to sue.<sup>247</sup> *Millar v. Taylor* was heard by the Court of King’s Bench. The case tried whether a perpetual copyright existed:

the author’s title to the copy depends upon two questions: 1st. Whether the copy of a book, or literary composition, belongs to the author, by the common law; 2d. Whether the common law-right of authors to the copies of their own works is taken away by 8 Ann. c. 9.<sup>248</sup>

At the time the general view of the Stationers was that the Act of Anne had been not a restrictive but an accumulative law. After the expiry of statutory protection, they argued, a work would continue to be protected under common law.<sup>249</sup> This was agreed by a majority in *Millar v. Taylor*. A perpetual common law right of property in literary works was accordingly upheld. *Donaldson v. Beckett* (1774), which was heard by the House of Lords, again concerned Thomson’s *Seasons*. Thomas Beckett was one of a

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<sup>247</sup> It seems that Millar did not fight solely for the sake of his own profit. James Thomson had died in 1748. In 1762 the erection of a funeral monument in Westminster Abbey was proposed. Andrew Millar simultaneously published by subscription an edition of Thomson’s works ‘the entire profits of which he cheerfully dedicated to this purpose.’ James Thomson, *The Seasons* (London: Suttaby, Evance & Fox; and Crosby & Co., Stationers Court, 1812), p. xiv. Andrew Millar did not live to learn the outcome of his court case. He died on 8 June 1768, the morning after the first court hearing.

<sup>248</sup> *Millar*, 2311

<sup>249</sup> For a discussion of this see Edward Law who observes that ‘The present Act then appears to be neither *accumulative* nor *restrictive* of any antecedent right properly so called; but rather *creative* of a full, clear one for a determinate time, and under certain Conditions’ (14) Edmund Law, *Observations Occasioned by the Contest about Literary Property* (Cambridge: J. Archdeacon, Printer to the University, 1770). See Stephen Parks, ed., *Freedom of the Press and the Literary Property Debate: Six Tracts 1755-1770*, 42 vols., vol. 15, *The English Book Trade 1660-1853. 156 Titles Relating to the Early History of*

number of holders of the right to print the volume of poetry. Alexander Donaldson, an Edinburgh bookseller, had published an unauthorized edition of the popular work and had an injunction made against him in 1772. He appealed and the case went to the House of Lords. Here it was held that

a right at common law must be founded on principles of conscience and natural justice. Conscience and natural justice are not local, or municipal. [...] Copies of books have existed in all ages, and they have been multiplied; and yet an exclusive privilege, or the sole right of one man to multiply copies, was never dictated in any age or country.<sup>250</sup>

In other words the judgement of *Millar v. Taylor* was reversed and an end was made to the right of perpetual common law in literary property.

The major quarrel in *Millar v. Taylor* and *Donaldson v. Beckett* was over the nature of literary property. Yet, it is significant that both suits were occasioned by the grievance that *The Seasons* had been ‘injuriously printed without license or consent.’<sup>251</sup> The scope of literary property right was restricted to what was prescribed by the Statute of Anne. And *Anne* simply prohibited printing and disposing of copies. In that way ownership of ‘literary property’ was no more than a right to the profits from publishing a work. Infringement consisted of reprinting a work without permission: thereby to earn money from it illegitimately. This definition of copyright infringement is what Benjamin Kaplan has labelled the ‘printing-reprinting formula’ of the Statute of Anne.<sup>252</sup> *Millar v. Taylor* and *Donaldson v. Beckett* are typical examples of the formula. Both are infringement cases where a literary work is reissued by an unauthorized publisher. Kaplan, looking further into the development of the concept of infringing copying, observes that in the nineteenth century

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*English Publishing, Bookselling, the Struggle for Copyright and the Freedom of the Press. Reprinted in Photo-Facsimile in 42 Volumes.* (New York: Garland Publishing, 1974).

<sup>250</sup> *Donaldson*, 134

<sup>251</sup> *Millar*, 2305

the notion of prohibited taking became more sophisticated. Lord Chancellor Cottenham developed the thought—which soon influenced Justice Story in a leading American case—that the question of the substantiality of an infringement was not necessarily a quantitative matter but might involve a qualitative judgment as to the importance of the part appropriated.<sup>253</sup>

In *Bramwell v. Halcomb* (1836)<sup>254</sup> Lord Cottenham had argued that exactly what had been taken from a book was often more crucial in terms of infringement than was how much of it had been copied:

One writer might take all the vital part of another's book, though it might only be a small proportion of the book in quantity. It is not only quantity, but value, that is always looked to. It is useless to refer to any particular cases as to quantity.<sup>255</sup>

In the nineteenth century the criterion of infringement was shifted from quantitative to qualitative. This is illustrated by the remarkable change in the definition of infringement from the nineteenth century to today. The 1842 Copyright Act repeats the gist of *Anne* and defines infringement as 'the printing or causing to be printed, either for sale, or exportation, any book in which there is a subsisting copyright, without having the written consent of its proprietor.'<sup>256</sup> The 1842 Act simply protects 'books' against being

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<sup>252</sup> Benjamin Kaplan, *An Unhurried View of Copyright* (New York: Columbia University Press, 1967), p. 20

<sup>253</sup> *Ibid.*, p. 20.

<sup>254</sup> *Bramwell v. Halcomb* (1836) K.B. (3 My. & Cr. 737, 40 Eng. Rep. 889).

<sup>255</sup> Cited from F. E. Skone James and E. P. Skone James, *Copinger and Skone James in Copyright*, 9 ed. (London: Sweet and Maxwell, 1958), p.146. Earlier Lord Eldon had said that 'There is no doubt that a man cannot, under the pretence of quotation, publish either the whole or part of another's book although he may use, what in all cases is difficult to define, fair quotation.' *Wilkins v. Aitken* (1810) 17 Ves. 422

<sup>256</sup> Vict. Parliament. Acts, *The Law of Copyright, regarding Authors, Dramatic Writers, and Musical Composers; as altered by the Recent Statute of the 5 & 6 Victoria, analysed and simplified with an Explanatory Introduction, and an Appendix, containing, at full, the New Copyright and the Dramatic Property Acts. By a Barrister* (London: James Gilbert, 1842), p. 17. This is the definition of 'direct' infringement. There may also be 'indirect' infringement, which means to deal in infringing copies for example by import, export, sale or hire.

printed without consent and makes no general prohibition of partial copying. *Dicks v. Yates* (1879),<sup>257</sup> which rejected the notion that copyright had been infringed by the re-use of a title, adheres to this rule.<sup>258</sup> Lord Justice James here made the following observations about copyright infringement:

Literary property can be invaded in three modes, and, as I believe, in three modes only. First, where a publisher in this country publishes an unauthorized edition of a work in which copyright exists, or where a man introduces and sells a foreign reprint of such a work, that is open piracy. The second mode is where a man pretending to be the author of a book illegitimately appropriates the fruit of a previous author's literary labour, and that is literary larceny. Those are the two modes of invasion against which the Copyright Act have protected an author. There is another mode which to my mind is wholly irrespective of any copyright legislation, and that is where a man sells a work under the name or title of another man or another man's work; that is not an invasion of copyright, it is Common Law fraud. (90)

Lord Justice James sets up a clear distinction between three different types of violations of literary property. Only two of them fall under copyright law. Piracy, which is to reprint a volume without authorization or to sell such a reprint, is one type. Literary larceny—which is a type of total plagiarism—is another. Wrongful attribution of a work is not a copyright problem as it belongs under common law fraud. Characteristic of Lord Justice James's categories is that an infringing copy of a literary work—whether the work has been reprinted or plagiarized—is always a copy of the complete work.

Today the qualitative measure of 'substantial part' is central.<sup>259</sup> The concept of substantial taking appeared in relation to literary works with the 1911 Act,

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<sup>257</sup> *Dick v. Yates* (1881) 18 Ch. D 76.

<sup>258</sup> C.H.Hazlewood was the author of the book which carried the title *Splendid Misery; or, East End and West End* (1874-75). When copyright in the title was denied the Chancery Division noted that a novel called *Splendid Misery* published in 1802 had not attracted copyright in the title.

<sup>259</sup> 1988 Act, sec. 16 (3)

but ‘substantial part’ already existed in relation to artistic works. Indeed the term ‘colourful imitation’ had figured in the Fine Arts Act, 1862. Colourful imitation or substantial taking implies the idea that infringement may occur even when an original work has not been copied *in toto*. That is, if the copied work contains alterations or reproduces only in part the original work (or a combination of these).<sup>260</sup> In line with this the 1911 Act replaced the term ‘book’ with ‘literary work,’ a term still used in the 1988 Copyright Act. Infringement today is defined in relation to ‘acts restricted by copyright,’ a formulation that came in with the 1956 Act. ‘Infringement of copyright by copying’ is defined in section 17 of the 1988 Act.<sup>261</sup> It states that ‘Copying in relation to a literary, dramatic, musical or artistic work means reproducing the work in any material form,’<sup>262</sup> and ‘The copying of the work is an act restricted by the copyright in every description of copyright work’<sup>263</sup> This definition has markedly increased the likelihood of infringement. The number of infringements to occur has gone up simply because the definition of infringement has become more wide-ranging. An illustrative example of this is the application of the ‘substantial taking test’ in *Ravenscroft v. Herbert* (1980).<sup>264</sup> Judge Brightman found that substantial taking from an original work—and accordingly copyright infringement—had taken place. Plaintiff, the well-known author Trevor Ravenscroft, had published a volume entitled *The Spear of Destiny* (1973). His work was a historical study of a spear, which constituted part of the Hapsburg treasure in the Hofburg Museum in Vienna. The defendant, Herbert, had written a novel on the basis of the historical work but denied having taken a substantial part. Judge Brightman nonetheless concluded:

Having studied the two books and heard the evidence, I have no shadow of doubt that the defendant has copied from *The Spear of Destiny* to a substantial extent. In the prologues I have mentioned he had deliberately

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<sup>260</sup> See Kevin Garnett, Jonathan Rayner James and Gillian Davis, *Copinger and Skone James in Copyright*, 14 ed. (London: Sweet and Maxwell, 1999). According to modern law to cite from a copyright work is to ‘copy’ it. Therefore special exemptions for citation have been formulated in copyright.

<sup>261</sup> As opposed to infringement by e.g. issuing copies to the public, or adaptation.

<sup>262</sup> Copyright Designs and Patents Act 1988, sec. 17 (2)

<sup>263</sup> Sec. 17 (1)

<sup>264</sup> *Ravenscroft v. Herbert* (1980) R.P.C. 193

copied the language of the plaintiff on many occasions. To a more significant extent he has adopted wholesale the identical incidents of documented and occult history which the plaintiff used in support of his theory of the ancestry and attributes of the spear, of Hitler's obsession with it and also General Patton's. He did this in order to give his novel a backbone of truth with the least possible labour to himself. In so doing he annexed for his own purposes the skill and labour of the plaintiff to an extent which is not permissible under the law of copyright. The defendant has clearly infringed the plaintiff's copyright. I am only sorry that so much time, effort and money has had to be spent on the trial of this action.<sup>265</sup>

Reading 'against' the rhetoric of Brightman J, the submitted fact that 'the language of the plaintiff' had been copied on 'many occasions' inevitably implies that generally the novel *did not* repeat the historical work verbatim. We then learn that copying word-for-word was not the most serious part of the violation. Rather, the novel writer had infringed the historical writer's copyright by recounting the same historical events. What seems to have vexed the judge appears to have been not so much the likeness between the works as the reliance of the novel upon the labour and skill of the historical study.

*Ravenscroft v. Herbert* is a patent demonstration of the much wider scope of the 'substantial taking' criterion for copying compared with the 'print-reprint' criterion. The idea of 'substantial taking' in effect poses a general broadening of the meaning of the verb 'to copy.' The Oxford English Dictionary lists the primary and earliest meaning of to 'copy' to be 'To make a copy of (a writing); to transcribe (*from* an original).' The first recorded use is listed as 1387.<sup>266</sup> In a quotation from 1667 an important schism is set up: 'An Ode of Horace, not exactly copy'd, but rudely

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<sup>265</sup> *Ibid.* Cited from W. R. Cornish, *Cases and Materials on Intellectual Property*, 2 ed. (London: Sweet & Maxwell, 1996), pp.282f

<sup>266</sup> Only in an additional and more recent sense is the verb defined as 'To make an imitation of (anything); to imitate, reproduce, follow.' This denotation is dated back to the seventeenth century. The first record is from 1647.

imitated.<sup>267</sup> To copy implies a relation of strict causality. It also entails that the repetition is accurate. A copy is supposed to give a precise and truthful image of its original. In that sense copying is contrasted with imitation. The primary use of ‘imitate’ is given by the OED to be ‘To do or try to do after the manner of; to follow the example of; to copy in action.’ Its first recorded use is dated 1534. To imitate does not suggest the same degree of fidelity as copying. It serves a different purpose. Rather than repetition for the sake of dissemination (as has been the first function of copying) to imitate is to attempt to create a new ‘original.’ An imitation may bear little likeness to its original while remaining an imitation. A copy ceases to be a copy if there is no positive similarity. Faced with this distinction between copying and imitation, ‘substantial taking’ appears to rely more on an idea of imitation than of copying. In support of this claim it is worth mentioning the infringement test developed in *Billhöfer Maschinenfabrik GmbH v. T H Dixon & Co Ltd* (1990).<sup>268</sup> The test delineates the concept of copying as consisting of two elements: 1) sufficient resemblance; and 2) a causal connection. ‘To copy’ in this sense suggests nothing of the accuracy retained in the idea of copying. Similarity is defined negatively as ‘sufficient resemblance.’ The causal connection here is merely a criterion that serves to exclude accidental likenesses that are not infringing copies. In *Ravenscroft v. Herbert*, however, the problem was not the novel’s status as an ‘effect’ of the historical work. Actually the judge might have sanctioned a work which was the ‘effect’ of several historical accounts of the same events. It was rather the single dependency on *The Spear of Destiny* that the judge took exception to. He punished the *imitative* praxis.<sup>269</sup>

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<sup>267</sup> OED quotation from Cowley Ess., *Greatest Works*, 125

<sup>268</sup> *Billhöfer Maschinenfabrik GmbH v. T H Dixon & Co Ltd* [1990] FSR 105

<sup>269</sup> A similar analysis could be made in relation to French copyright. The matter will not be pursued in the French section of this thesis because it is of less importance compared with other issues in *droit moral*. However it is worth paying some attention to the French terms ‘reproduction’ and ‘copier’ as a *footnote* to our discussion of British law. Thus, according to *Le petit Robert* (Version électronique du nouveau Petit Robert. 1997, Dictionnaire Le Robert, Paris) ‘reproduction’ in its earliest sense (1690) meant ‘action par laquelle une chose renaît’ – the act by which something renews itself, such as the reproduction of the living species by generation. The verbe ‘reproduire’ is even earlier in its sense of ‘produire de nouveau’ (1539). A later denotation (1758) was ‘action de recréer, de reconstruire’: the act of reproducing as imitation or repetition. For instance the reproduction of nature by art and with it the idea of truthful representation. ‘Reproduire’ in the eighteenth century usually meant to ‘Répéter, rendre fidèlement, donner l'équivalent de (qqch.).’ To repeat, to remake accurately and to produce the equal of something. In the nineteenth century (1839) an additional meaning of reproduction was born: ‘Le fait de

As becomes clear, to ‘copy’ has (not surprisingly) adopted a distinct meaning in copyright. In the early days of copyright it was a technological term that referred to the act of mechanical printing. A reminiscence of this understanding of the term exists in the right of ‘typographical arrangement in published editions.’<sup>270</sup> This right protects against someone’s ‘making a facsimile copy of the arrangement.’<sup>271</sup> The Publishers’ Association originally called for the need for copyright in typography to stop the production of cheap facsimiles of editions of works wherein the copyright had expired.<sup>272</sup> In a recent decision by the House of Lords, *Newspaper Licensing Agency Ltd v. Marks & Spencers PLC* (2001) it was clarified that this right applies to whole works ‘in the language of the publishing trade.’<sup>273</sup> Only the layout of an edition in its entirety is protected. This repeats the substance of the Statute of Anne: publishers are secured against reprints. Today copyright, of course, is much more complex. Therefore in order to distinguish ‘copying’ of typographical arrangement in published editions from ‘copying’ of literary works, it is said that the former protects the ‘image of the page.’ The right of typographical arrangement protects an edition in its iconic quality. This is not exactly the formula of *Anne*, which prohibited the publication of a similar volume, a substitution, not of a visually indistinguishable edition. Yet the right of typographical arrangement and the Statute of Anne have in common that they conceive of literary

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reproduire (un original), d'en multiplier les exemplaires par un procédé technique approprié.’ The notion of *reproduction as multiplication* followed upon the recognition of rights of reproduction. As a central concept of the ‘droit d’auteur’ and the notion of reproduction became associated with new meanings: ‘Droit de reproduction, pour des passages cités. Reproduction interdite, réservée.’ ‘Reproduire’, at the same time, became synonymous with ‘copier.’ ‘Copier’, since the fourteenth century, had been the term for duplicating or transcribing a text: ‘Copier fidèlement un texte, un passage important.’ By the nineteenth century not only texts were ‘copied’ or ‘reproduced’, but also, for instance, keys (1870): to copy or reproduce meant to ‘Faire que (une chose déjà produite) paraisse de nouveau’: to make something, which has been made already, appear anew. To create identical counterparts, and to make something according to a model.

<sup>270</sup> 1988 Act, sec. 1 (5). This right was introduced by the 1956 Act where it was labelled ‘copyright in published editions of works’. See for example R.F.Whale, *Copyright. Evolution, theory and practice* (Edinburgh: Longman, 1971)

<sup>271</sup> Sec. 17 (5)

<sup>272</sup> See the Copyright Committee 1951 *Evidence and Memoranda*. Notes from a meeting held on 17th July 1951

<sup>273</sup> *Newspaper Licensing Agency Ltd v. Marks & Spencers PLC* (2001) UKHL 38 LTL 12/7/2001; TLR 12/7/2001; (2001) 3 WLR 290; (2001) 3 All ER 977; (2001) IPD 24055; IPD 29/10/2001

works (or ‘books’) as ‘paratextual’ entities. The concept of the ‘paratext’ was introduced in 1987 by the literary theorist Gérard Genette.<sup>274</sup> Genette argues that a

text is rarely presented in an unadorned state, unreinforced and unaccompanied by a certain number of verbal and other productions, such as an author’s name, a title, a preface, illustrations. And although we do not always know whether these productions are to be regarded as belonging to the text, in any case they surround it and extend it, precisely in order to *present* it, in the usual sense of this verb but also in the strongest sense: to *make present*, to ensure the text’s presence in the world, its ‘reception’ and consumption in the form (nowadays, at least) of a book... [The paratext] is what enables a text to become a book and to be offered as such to its readers and, more generally, to the public.<sup>275</sup>

Paratextual features include cover, format, title page, author name, titles, dedications, epigraphs, prefaces, intertitles, notes, etc. These are aspects of a book that mediate between the publisher, the writer, the book and the readers. For example, the paratext indicates genre and it directs the reception of the work and its placement within the institution of literature.

Both the right of typographical arrangement and pre-1900 copyright law acknowledge that a literary work always takes a material form; it is not a sheer metaphysical entity. A work of literature gains positive distinction from its material qualities.<sup>276</sup> Thus when it is said that the right of typographical arrangement protects the ‘image of the page’ it does not mean that a textual work should be understood and protected as a pictorial work. Rather it points to the materiality of the work. The work as it presents itself to us on the page—and not the literary work *an sich*—gets protection. Today this conception of the work is very different from that of literary

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<sup>274</sup> Gérard Genette, *Seuils*, ed. G. Genette and T. Todorov, *Collection Poétique* (Paris: Éditions du Seuil, 1987)

<sup>275</sup> Gérard Genette, *Paratexts. Thresholds of Interpretation*, trans. Jane E. Lewin (Cambridge: Cambridge University Press, 1997 (1987)), p.1.

copyright. As we have already noted, the concept of infringement in relation to literary works has changed from being (unauthorized) copying, strictly speaking, to be (unauthorized) imitation, labelled ‘substantial taking.’ And this change in the notion of copying, it must be kept in mind, is closely related to a change in the perception of a ‘literary work.’ The emergence in copyright of the concept of the work as an abstraction, separate from manuscripts and physical copies, is recorded by Peter Jaszi to have been in the mid-eighteenth century.<sup>277</sup> He also notes that ‘In effect, the “work” was the commodity form or objectification of the “author’s” labor.’<sup>278</sup> A literary work was a materialisation of the author’s efforts and as such it could manifest itself in several physical instances. But it was always thought of as an indivisible unity. To copy it was to print or reprint it in its entirety.<sup>279</sup> Today, in copyright a ‘literary work’ is conceived of as a composite entity that is approached by immanent analysis. Courts, as in *Ravenscroft*, adopt methods of analysis that focus on meaning, theme, narration, etc. to perform the test of ‘substantial taking.’ This is a conventional method of twentieth century modernism in literary studies.<sup>280</sup> Yet, the lesson of Genette is that any textual work<sup>281</sup> is presented to us with a number of paratextual indicators. This paratextual

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<sup>276</sup> See also D.F.McKenzie, *Making Meaning. 'Printers of the Mind' and Other Essays*, ed. P.D. McDonald and M.F. Suarez (Amherst: University of Massachusetts Press, 2002).

<sup>277</sup> Citing *Blackstone's Commentaries* first edition (1765-69) where the concept of the work began to develop. Peter Jaszi, “Toward a Theory of Copyright: The Metamorphoses of "Authorship",” *Duke Law Journal*, no. 1 (1991): 455-502, p. 475

<sup>278</sup> *Ibid*, p. 473

<sup>279</sup> The idea/expression dichotomy is not considered in detail here. The division is pragmatic rather than theoretical. And as Gunnar Karnell puts it: ‘an idea is nothing other than its expression or expressions. Ask for an idea and you will get an expression!’ Gunnar W. G. Karnell, “The Idea/Expression Dichotomy - A Conceptual Fallacy,” *Copyright World*, no. 7 (1989): 16-17, p.17. Bernard Edelman defends the usefulness of the distinction. It serves to prevent too much copyright: ‘l’auteur, qui utilise la nature humaine comme son unique matériau, ne peut s’en approprier l’essence. C’est pourquoi le droit nous dit, d’une part, que la nature humaine ne peut être appropriée, d’autre part, que l’idée, qui exprime cette inaliénabilité, est banale et, partant, non protégeable.’ Bernard Edelman, “Création et banalité,” *Recueil Dalloz Sirey*, no. Chronique (1983): 73-77, p. 76.

<sup>280</sup> New Criticism, formalism, structuralism each perform immanent analysis with a basis in each of their sets of fundamental beliefs. See for instance W.K. Wimsatt and Monroe C. Beardsley, “The Intentional Fallacy,” in *20th Century Literary Criticism*, ed. D. Lodge (London: Longman, 1972 (1946)), 334-344, Erich Auerbach, *Mimesis. The Representation of Reality in Western Literature*, trans. Willard R. Trask (Princeton: Princeton University Press, 1953); Roland Barthes, *S/Z*, trans. Richard Miller (New York: Hill and Wang, 1974); Peter Brooks, *Reading for the Plot. Design and Intention in Narrative* (Cambridge MA: Harvard University Press, 1984) and Seymour Chatman, *Story and Discourse. Narrative Structure in Fiction and Film* (Ithaca: Cornell University Press, 1978)

<sup>281</sup> Even in the vocabulary of copyright it may be expected that ‘literary works’ are always textual.

aspect is totally disregarded by immanent analysis. More specifically: in, for instance, *Ravenscroft* the judge mastered a form of narrative analysis that served to emphasize the similarity of events, sequence and theme of the two works. And this analytical method was the foundation for his conclusion that there was infringement. Had he also analysed the paratextual features of the works he would have been able to stress the difference of genre, reader appeal and literary status. He might then have come to a different conclusion. As it were, Brightman J all but accused the novel writer of plagiarism; to appropriate another's labour and then publish it under one's own name with a new title thus constituted criteria for infringement. This recent development has taken us a long way from the beginnings of copyright. Traditional 'piracy' repeated everything: paratext as well as text. Besides it was an act perpetrated by a publisher, not by an author.

As we have seen the conception of 'copying' and of 'the work' is decisive in the assessment of infringement. Only with a critical and historical understanding of these concepts is it possible to appreciate the literary work for what it is: a text. And a text is not just a dead product: 'a text (from Latin *texere*, to weave) is something woven, which has warp and weft and goes sideways and back as well as forward and across: and readers of texts must always be about their weaving.'<sup>282</sup>

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<sup>282</sup> John Lennard and Mary Luckhurst, *The Drama Handbook. A Guide to Reading Plays* (Oxford: Oxford University Press, 2002), p. 37.

## 2. REPRODUCTION AND IMITATION IN ART

Compared with literature copyright in fine arts came late. Moreover, when the foremost genres of high art—sculpture, painting, drawing—came to be protected, a typical form of ‘copy’ had been long under copyright. The 1735 *Engravers’ Act* ensured engravers rights in their works.<sup>283</sup> Sculptures have been protected since 1798 by the *Sculpture Copyright Act*.<sup>284</sup> This act provided a characteristic ‘subject-specific’ stipulation that busts and statues of human figures and animals were only to be copied with the written consent of the proprietor.<sup>285</sup> When the act was amended in 1814 it was added that sculptures of animals or humans in whole or in parts, ‘clothed in drapery or otherwise’ were protected.<sup>286</sup> Only with the 1862 *Fine Arts Act* were reproduction rights in paintings and drawings (and photographs) introduced.<sup>287</sup> It was made unlawful to ‘repeat, copy, colourably imitate, or otherwise multiply for Sale, Hire, Exhibition, or Distribution’ copyrighted paintings, drawings or photographs without the consent of the proprietor.<sup>288</sup> Significantly, copyright in art was born with an idea equivalent to the modern notion of ‘substantial taking.’ From the start to ‘colourably imitate’ was as much of an infringement as wholesale copying of a painting or a drawing. Thus a

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<sup>283</sup> An Act for the Encouragement of the Arts of designing, engraving and etching historical and other Prints, by vesting the Properties thereof in the Inventors and Engravers, during the Time therein mentioned. Geo. II c.13 (1735)

<sup>284</sup> An Act for encouraging the Art of making new Models and Casts of Busts, and other things therein mentioned. 38 Geo. III c.71 (21 June 1798).

<sup>285</sup> As Bentley and Sherman designate it. The various types of subject-specific protection of the arts were later turned into a branch of law: ‘copyright law’ see Brad Sherman and Lionel Bentley, *The Making of Modern intellectual Property Law. The British Experience, 1760-1911* (Cambridge: Cambridge University Press, 1999), p.17.

<sup>286</sup> 54 Geo. III c. 56

<sup>287</sup> *An Act for amending the Law relating to Copyright in Works of the Fine Arts, and for repressing the Commission of Fraud in the Production and Sale of such Works* 25&26 Vict. C.68 (29th July 1862). The *Fine Arts Act* was occasioned by a number of factors. Reviewing the historical context of the act, Lionel Bentley points to three essential elements in the making of the act. First, the mid-nineteenth century witnessed a coincidence between the cultural understanding of writing and painting. The rhetoric surrounding the act adopted notions of creativity from romantic aesthetic theory. Writers and painters were equally nominated as creative geniuses; their works were ‘works of authorship’. Art thus became as worthy of copyright protection as literature. Second, a modern concept of copyright law emerged also in the mid nineteenth century. To include fine arts in copyright fulfilled a logic of perfection of the law. Third, a new demand for regulation had occurred after the invention of photography as photographic reproductions posed an economic threat to both artists and print-sellers. See Lionel Bentley, ‘Art and the Making of Modern Copyright Law,’ in *Dear Images. Art, Copyright and Culture*, ed. D. McClean and K. Schubert (London: Ridinghouse ICA, 2002), 331-351.

<sup>288</sup> 25 & 26 Vict., c. 68, s. 6

picture is seen to be principally reproducible in an altered form.<sup>289</sup> This was already evident in a decision under the Engravers' Act, *West v. Francis* (1822).<sup>290</sup> Although the copied print varied in various respects from the original design the Court held that there was infringement: 'there may be a copy of a print with small variations, although it be not an exact copy.' (739) The idea that a non-exact duplicate is a copy is readily accepted.

'Substantial taking' began to figure as a concept in case law in the late nineteenth century. It implied either reproduction of a work in a modified form or the taking of a 'share' of an original work. The difference between taking a share (or an 'extract') of a book and an artwork respectively is illustrated in the decision of *Bradbury v. Hotten* (1872).<sup>291</sup> In this case infringement of the copyright in nine woodcuts was tried under the 1842 Copyright Act.<sup>292</sup> The woodcuts fell under literary copyright because they had been published in a 'book.' Defendant was the publisher of a book about Napoleon III, *The Man of his Time* (1871), who had reproduced, without consent, a selection of woodcuts of cartoons from the periodical *Punch*.<sup>293</sup> The woodcuts depicting caricatures of Napoleon III had originally been published between the years 1849 and 1867. It was tried whether reproduction of nine cartoons (some of them with captions) constituted literary infringement. The plaintiff claimed so inasmuch as each number of *Punch* was

A "sheet of letterpress" and a "book" within the meaning of 5 & 6 Vict. C. 45, s.2. The cartoon is part of and parcel of the sheet of letterpress, and to take out the cartoon either with or without the descriptive writing is piracy. (3)

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<sup>289</sup> Apparently the idea of 'colourful imitation' was not treated as problematic. See for instance Reginald Winslow, *The Law of Artistic Copyright* (London: William Clowes and Sons, Ltd, 1889), especially 33ff.

<sup>290</sup> *West v. Francis* (1822) 5B. & Ald. 737

<sup>291</sup> *Bradbury v. Hotten* (1872) LR8 Exch. 1

<sup>292</sup> An Act to Amend the Law of Copyright 5 & 6 Vict. C. 45

<sup>293</sup> *Punch* was a popular Victorian periodical. It began publication in July 1842 and soon became famous for its radical satire of contemporary events.

The Court, albeit with hesitation, found that there had been infringement of copyright in the cartoons. While underlining that this case was on the border-land between piracy and no piracy, Bramwell, B confirmed that

The statute protects any books or sheets of letterpress, and here the plaintiff's publication consists of a sheet of letterpress, folded like a book, and made up partly of printed matter and partly—to use a generic term—of pictures, which are in many cases illustrated or explained by a small portion of letterpress underneath them. Nine of these pictures the defendant has copied, in some instances alone, in others with the addition of the printed words underneath them. If they have been so copied as to amount to a copy of a material part of the plaintiff's publication, and the defendant has thus obtained a profit which would or might otherwise have been the plaintiff's, then there has been a piracy for which the defendant is responsible. (5)

First, it is debated whether the cartoon constitutes a 'book.' This is established materially: the cartoon is part of and parcel of the sheet of letterpress. Hence it is protectible by copyright as a book. Next, it is determined whether there is infringement. The test for this is whether a 'material part' of plaintiff's publication has been taken, depriving him of his rightful profits. Generally, the judges are somewhat cautious in their responses. Kelly, C.B. states that 'it is difficult to lay down any fixed principle with regards to [the questions raised].'(4) And Bramwell, B: 'I am [...]not without some doubt—doubt which it is natural to feel in a case like this, which is on the borderland between piracy and no piracy.'(6) As it is, the cautiousness of the judges may well be ascribed to a problem with the conflicting criteria of infringement of books and art. Measured as takings from nine volumes of the periodical, nine woodcuts, some even without their captions, hardly amounts to 'material' taking. Viewed as art, however, a series of cartoons about Napoleon III is taken in its entirety. Bramwell, B's designated 'border land' between piracy and no piracy may thus be interpreted as the border land between the woodcuts perceived as extracts of a book or as whole artworks. Had the

judges restricted themselves to evaluating whether plaintiff's 'book' had been infringed by defendant's 'book' it would have been hard to uphold that nine 'extracts' constituted infringement. If, on the contrary, plaintiff's works in *Punch* were considered works of art the woodcuts were to be regarded as wholes in themselves. To take nine entire woodcuts is positively more 'substantial' than taking nine extracts. It may be suspected that a tendency towards the latter approach determined the case in favour of plaintiff.

The 1862 Fine Arts Act granted copyright to

the Author [...] of every original Painting, Drawing, and Photograph [...who] shall have the sole and exclusive Right of copying, engraving, reproducing and multiplying such Painting or Drawing, and the Design thereof, or such Photograph, and the Negative thereof, by any means and of any Size.<sup>294</sup>

The meaning of copying by 'any means' has occasioned some efforts of interpretation. *Hanfstaengl v. Empire Palace* (1894)<sup>295</sup> is a central decision in this respect. This case revolved around a *tableau vivant* representing a painting wherein the claimant held the copyright. The figures, the way they were dressed, their positions as well as the background had been reproduced in the *living picture*. It was rejected unequivocally by the judges, however, that copyright in the picture had been infringed. The *living picture* was simply found not to be a copy or a reproduction. As Lord Justice Lindley observed:

We are asked to say that the words "copying and reproducing by any means" include reproducing in the sense of imitating or representing by means not equivalent to drawing or painting or photographing or any such means, but by totally different means, by the exhibition of living figures. Is that what is aimed at? It appears to me that obviously and plainly it is not. (5)

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<sup>294</sup> 25 & 26 Vict., c. 68, s. 1

<sup>295</sup> *Hanfstaengl v. Empire Palace* (1894) [1894] 2 Ch 1 (CA)

To 'copy' or to 'reproduce' a work of fine art requires that techniques equivalent to drawing, painting and photography be employed. In other words, the exclusive right of the Fine Arts Act to copy and reproduce a work did not include a universal prohibition against representations of it. Rather, Lindley, L.J. concludes, the Legislature had in mind to 'restrain people from producing something which would compete in the market with the originals or with authorized copies of them.'<sup>296</sup> Copying is not banned for the sake of banning copying. Rather the law serves to prevent a kind of unfair competition resulting from unauthorized copying and distribution of a work.

In *Hanfstaengl v. H.R. Baines & Co Ltd* (1895)<sup>296</sup> the House of Lords confirmed the view of *Hanfstaengl v. Empire Palace*. Sketches of the same *tableau vivant* had been made for the *Daily Graphic* newspaper. And this time Hanfstaengl claimed that the sketches infringed copyright in his painting. The House of Lords discarded any talk of infringement. First of all, as Lord Herschell notes 'It is not accurate to say that the Living Pictures were copies of the paintings.'<sup>297</sup> Secondly, he argues that when comparing the painting and the sketch 'considering the design of the painting as a whole, I cannot avoid the conclusion that the sketch is not a copy of the painting or of the design thereof, and therefore that there has been no infringement.'<sup>297</sup> This was the general view of the Lords. Lord Ashbourne made the additional reflection that 'It is well to bear in mind that the sketches were intended to represent what could be seen at the Empire Theatre, and were not intended as copies or to reproduce the designs of the plaintiff's pictures. (29) As in the previous decision, the sketches were not considered copies of plaintiff's paintings.

*Hanfstaengl v. Empire Palace* was remedied by the 1911 Copyright Act. 'Copyright' by the 1911 Act was defined as the 'sole right to produce or reproduce the work or any substantial part thereof in any material form whatsoever.'<sup>297</sup> The formulation 'in any material form whatsoever' had as a result that living pictures became potential subjects

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<sup>296</sup> *Hanfstaengl v. H.R. Baines & Co Ltd* (1895) [1895] AC 20

<sup>297</sup> Section 1 (2)

of infringement of the copyright in a picture. Accordingly, in *Bradbury, Agnew, and Company v. Day* (1916)<sup>298</sup> it was held that a *tableau vivant* that reproduced a cartoon was an infringement.<sup>299</sup> Substituting the language of section 6 of the Fine Arts Act with the ‘in any material form whatsoever’ of the 1911 Act accented the wrongfulness of copying in itself rather than its effects (on, say, market competition.)

There is a distinction between ‘art’ and ‘nature’ running through art copyright from its beginning till today. Art in the sense of ‘human skill as an agent’ and ‘human workmanship’ is contrasted to nature, which is ‘the creative and regulative physical power which is conceived of as operating in the material world and as the immediate cause of all its phenomena.’<sup>300</sup> The OED traces this distinction back to Chaucer in 1386. More recently the conception that ‘Nature is a revelation of God; Art, a revelation of Man’ has given rise to the notion that ‘nature is reproduced in art.’<sup>301</sup> Art can be praised for being ‘true to nature.’ In any event, nature is the material free for all to create original works from. Decisions implicitly draw on this notion of representation.<sup>302</sup> Thus for instance in the *Hanfstaengl* decisions it is tacitly understood that a living picture is ‘nature.’ A depiction of it, accordingly, is an original.

In the famous *Graves’ Case* (1869)<sup>303</sup> the defendant insisted that an original work of art must be a representation of nature. It was tried whether there could be copyright in a third-order representation: photographs of an engraving of a painting. The defendant claimed that this was impossible. There could be

no copyright in the photographs which are taken from the engraving of a picture. The words of [section] 1 are “the author...of every original

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<sup>298</sup> *Bradbury, Agnew, and Company v. Day* (1916) 32 TLR 349

<sup>299</sup> Four other cartoons that had been reproduced as living pictures were found not to be ‘reproductions in a material form of the whole or a substantial part of the original cartoons.’ (349) But this was merely due to a lack of similarity. Had they been more ‘accurate’ as reproductions they would have been infringements too.

<sup>300</sup> As defined by the Oxford English Dictionary.

<sup>301</sup> Longfellow, (1839) *Hyperion* III, v, 165. Cited from OED.

<sup>302</sup> The distinction also serves as a basis for the development of a legal definition for art in P.H.Karlen, “What is Art?: A Sketch for a Legal Definition,” *Law Quarterly Review* 94, no. 383-407 (1978).

painting, drawing, and photograph.” These photographs are not original photographs, as they have been taken from a work of art. They are mere copies of the engraving, and not original in the sense intended by the first section. (720)

The argument is that a picture is not an original work of art if it simply repeats another work. No piece of nature has been transformed into art in that case. The judges disagreed, however. Applying a different criterion Judge Blackburn stated that:

All photographs are copies of some object, such as a painting or a statue. And it seems to me that a photograph taken from a picture is an original photograph, in so far that to copy it is an infringement of this statute. As I have already pointed out, by s.2, although it is unlawful to copy a photograph or the negative, it is permitted to copy the subject matter of the photograph by taking another photograph. (723)

It is confirmed that paintings and statues as well as engravings thereof can perform as ‘nature’ in photographs. A photo of such existing works may in itself come to constitute an original work. Moreover, another photograph of the same art piece constitutes a new original work even if the photographs are indistinguishable.

*Kenrick & Co v. Lawrence & Co* (1890)<sup>304</sup> also relied on the category of ‘nature’ as the material for original works. The main concern of the judge was to keep this material free for all. Plaintiff of the case claimed copyright in a ballot card, which represented a hand holding a pencil in the act of completing a cross within a square. The purpose of the card was to instruct illiterate voters in the marking of their ballot papers. Judge Wills was sceptical as to the subsistence of copyright in as simple a drawing as this:

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<sup>303</sup> Graves’ Case (1869) LR 4 QB 715. For a further discussion of this case see Simon Stokes, *Art and Copyright*, 2 ed. (Oxford: Hart Publishing, 2003 (2001)), pp.101-113.

<sup>304</sup> *Kenrick & Co v. Lawrence & Co* (1890) LR 25 QBD 99

For there is nothing which by any flight of imagination can be called artistic about either the plaintiffs' or the defendants' representation of a hand making the mark of a cross. It may also be noted that the coarsest, or the most commonplace, or the most mechanical representation of the commonest object is so far protected on registration that an exact reproduction of it, such as photography for instance would produce, would be an infringement of copyright. But in such a case it must surely be nothing short of an exact literal reproduction of the drawing registered that can constitute the infringement, for there seems to me to be in such a case nothing else that is not the common property of all the world. (102)

The crux of the matter in *Wills, J's* speech is that to protect the picture of a hand as a work of art may be near to bestowing a monopoly upon the representation of hands. Hands making the mark of a cross look more or less the same. To protect such an image against reproduction and colourful imitation would make it close to impossible to create new original works of hands making the mark of a cross. Only an 'exact literal reproduction' of the picture should therefore amount to infringement. In order to prevent a monopolization of 'nature' *Wills, J* is thus seeking remedy in a literary—or 'literal'—concept of copying.

*Bauman v. Fussel and Others* (1953)<sup>305</sup> is a case which tests many received ideas about the relationship between art and nature and between original and copy. The anomaly is contained in the fact that a painting (the paradigm case for original creation) was accused of being a reproduction of a photograph (the result of a technique of mechanic reproduction). Moreover, at no point did the painter deny having used the photograph in his work. Fascinated by the motif of a cockfight, he reproduced it in paint. According to the photographer, this amounted to making an infringing copy of the photographic work. The first court rejected this, although it was acknowledged that the two pictures were alike. In particular, the birds were interlocked in a similar way. Yet, as it was announced, 'any birds fighting would get similarly interlocked.' A number of

differences, especially in light and colour, were sufficient to make the first judge determine that ‘the effect [of the painting] is entirely different from the photograph (488). The conclusion was that the painting was not a copy of the photograph. At the Court of Appeal, Lord Justice Somerwell and Lord Justice Birkett agreed with the first judgement. Lord Justice Romer on the contrary, objected that ‘the inquiry should be rather as to what has been reproduced than what has not.’ (491) Finding similarities in composition, dimensions, action and idea, Romer, L.J. argued that the painting constituted a reproduction of a substantial part of the photographer’s work. He asked rhetorically, what if a photographer is skilled and lucky enough to catch a rare incident, ‘for example, a battle between a tiger and an elephant; would the figures of the animals be at the disposal of any artist who wanted to paint a similar incident but was reluctant to visit the jungle for his material?’(492) With two against one, however, Lord Justice Romer’s line of reasoning was dismissed. A distinction between the art of painting and the art of photography is drawn in *Bauman*. Photography can perform the function of ‘objective recorder’ of real life scenes. This distinguishes photography from painting as a form of representation. And this is why a photograph of a cockfight can be granted the status of ‘nature’ in relation to another representation. The painter is not required to go out and find a cockfight for himself: the motif of the photograph remains ‘nature’ to a degree that when the painter uses it he represents nature rather than the photographic work. Nowadays paintings are not perceived as objective ‘recordings’ of nature. This is why the opposite—the photographer legally reproducing the painting—cannot be imagined. It is symptomatic that Romer, L. J. disagrees with his fellow judges. He does not endorse the distinction between painting and photography. He views them as equivalent forms of representation of nature (literally: tigers and elephants).

*Krisarts S.A. v. Briarfine Ltd* (1977)<sup>306</sup> also concerns reuse of the motifs of other copyright works. An agreement had been made between the owner of copyright in a series of paintings of well-known views of London by the painter M. Maurice Legendre and a company that wished to reproduce the pictures on postcards. The company got

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<sup>305</sup> *Bauman v. Fussel and Others* (1953) [1978] RPC 485

<sup>306</sup> *Krisarts S.A. v. Briarfine Ltd* (1977) FSR 577 (Interlocutory judgment on the issue of infringement.)

permission to reproduce the painting for a limited period. When their permission expired the postcard company engaged another artist, Mrs. Gardner, to paint versions of the same views: Houses of Parliament with Westminster Bridge in the foreground, Windsor Castle, Westminster Abbey, Tower of London, Tower Bridge, etc. These are popular scenes, as the Court allowed, and the defendants were perfectly entitled to repaint them. Mrs. Gardner's work, however, had derived from Legendre's paintings rather than from the views, according to plaintiff. The defendants on their part ascribed any similarity to the use of identical source material. Judge Whitford considered both 'views' of the case. If copyright is to subsist in well-known views, he argued, it is

the choice of viewpoint, the exact balance of foreground features or features of the middle ground and features in the far ground, the figures which are introduced, possibly in the case of a river scene the craft may be on the river and so forth. It is in choices of this character that the person producing the artistic work makes his original contribution. (562)

As is customary among artists, both M. Legendre and Mrs. Gardner had made their works largely from sketches, photographs and view cards. Judge Whitford, on this basis, observed that most artists still make some 'distinctive contribution' to a scene. Despite a number of original elements, Mrs. Gardner, however, had made a use of M. Legendre's work 'sufficiently substantial to base a claim of infringement of copyright.' (562)<sup>307</sup>

As is revealed in *Krisarts* artists are necessarily dependent on other representations—for artistic and practical reasons—to make their own depiction of a view or a scene. Furthermore, there is a long tradition of dilettante painting where the work of an established artist is relied upon to help compose a new painting. In this light Mrs. Gardner's paintings may well be said to have been her own original works, in a legal sense. Only she might not have been a very *original* painter.

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<sup>307</sup> Whitman, J refused interlocutory relief however.

The Copyright, Designs and Patents Act 1988 protects ‘original’ artistic works.<sup>308</sup> This includes photographic works irrespective of artistic quality.<sup>309</sup> The requirement of originality in photographs is problematic: a photograph is by definition a copy—‘a recording of light’<sup>310</sup>—of something. Thus it is still held that a photograph of a photograph is not an original work. The *Graves Case* dealt with the issue of originality in photographic works and in 2000 a similar case was heard. *Antiquesportfolio.com v. Rodney Fitch & Co Ltd* (2000)<sup>311</sup> tested whether photographs of a ‘single static item’ were sufficiently original to attract copyright. Rodney Fitch & Co, a design consultancy, had been commissioned to design website, stationary, brochures and business cards for *Antiquesportfolio.com*. In carrying out the job, the design consultancy had used material based on photographs of antiques (furniture and glassware) in *Miller’s Antique Encyclopedia* (Reed Consumer Books, 1998). *Antiquesportfolio.com*, therefore, took legal action on the claim that Rodney Fitch had infringed a third-party’s copyright, thereby making *Antiquesportfolio* party to the crime. Mr. Justice Neuberger confirmed that copyright subsisted in photographs of a single static item: ‘the positioning of the object, the angle at which it was taken, the lighting and the focus were all matters of judgment, albeit in many cases, at a very basic level.’ Even so, the design consultancy was awarded fees and legal costs, despite their use of infringing material. They were merely given a mild reprimand. Web designers were ordered to take care, in the future, not to include copyright material. The decision thus sends out a double message. On the one hand there can be copyright in a banal photograph. On the other hand this copyright is not very ‘strong.’ As in *Kenrick*, protection is divided into degree. While the imperative of the law is to protect ‘regardless of artistic merit,’ *Antiquesportfolio.com v. Rodney Fitch & Co* suggests that in effect some photographs are more protectible than others. In practice there are photographs that are somehow deemed too vague as works

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<sup>308</sup> Sec. 4

<sup>309</sup> Section 4(2)

<sup>310</sup> *Ibid.*

<sup>311</sup> *Antiquesportfolio.com v. Rodney Fitch & Co Ltd* (2000), *The Times*, 21 July, 2000. A similar US case turned out differently. In *Bridgeman Art Library v Corel* photographs of of tredimensional art works were granted copyright. Simon Stokes, “*Graves’ Case* revisited in the USA: The Bridgeman Art Library, Ltd v Corel Corporation (1999),” *Entertainment Law Review* 5 (2000): 104. On the problem of photographs of other works see also Kevin Garnett, “Copyright in Photographs,” *EIPR* [2000], no. 5 (2000): 229-236.

to be said to function as the origin of copies. And photographs that depict original artworks belong to this class. They are parasitical upon the originality of their motifs rather than contributors of any element of originality themselves.

Influence plays a major role in the history of art.<sup>312</sup> With copyright, however, too much influence may cause a legal conflict. Thus threats of legal action were in the air when the short-listed candidate for the 2000 Turner Prize, Glenn Brown, was accused of having appropriated another artist's image.<sup>313</sup> His painting *Loves of Shepherds 2000* was a manipulation of the jacket illustration of Robert A. Heinlein's novel *Double Star* (Pan, 1973) made by the artist Anthony Roberts. The picture depicted a spaceship on the background of a sun and deep space. On the question of whether there was infringement Robert's solicitor told the press that 'A speeding moron would identify the two works. In fact, the Brown copy appears to have been traced round a transparency projected onto his canvas.'<sup>314</sup> Coming to Brown's defence the Tate Gallery announced that his 'images are never direct replicas, but have been cleverly manipulated' and that the technique used by Brown 'is comparable to Constable looking at a piece of Suffolk landscape.'<sup>315</sup> Glenn Brown, himself, acknowledged the dependency and announced his original title of the work to have contained the epithet 'after Tony Roberts.'<sup>316</sup>

Damien Hirst created a similar scandal in 2000 with his sculpture *Hymn*.<sup>317</sup> *Hymn* was an exact copy of the toy 'Anatomy Man' designed by Norman

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<sup>312</sup> New works always build on the tradition, either by endorsing it or rejecting it. See for instance T. S. Eliot, "Tradition and the Individual Talent," in *The Sacred Wood: Essays on Poetry and Criticism* (London: 1920) and Harold Bloom, *The Anxiety of Influence. A Theory of Poetry*, 2 ed. (Oxford: Oxford University Press, 1997 (1973)).

<sup>313</sup> No case is reported to have been heard.

<sup>314</sup> Cited from Henry Lydiate, "Art, Law and Originality," *Copyright world*, no. March (2001): 22-24, p. 24

<sup>315</sup> *Ibid.*, p. 22

<sup>316</sup> An earlier work by Glenn Brown *Ornamental Despair* (painting for Ian Curtis) (1994), featured at the Sensations exhibition, had also been accused of being an unacknowledged reproduction of a book jacket illustration: the sci-fi writer Chris Foss' cover of *Diarisofa Space Person* (1991). See mention at [www.artnewspaper.com](http://www.artnewspaper.com).

<sup>317</sup> *Hymn* is part of the Saatchi collection and was acquired for the sum of £1,000,000.

Emms for *Humbrol's* toy series 'Young Scientist.'<sup>318</sup> While Hirst's bronze sculpture was five times the natural scale, it reproduced the original colours and all details. Without ever publicly admitting his artistic debt, Hirst settled the copyright matter with Humbrol and Norman Emms out of court by donating an undisclosed sum to the charities *Children Nationwide* and *Toy Trust*. A court might well have found infringement of copyright in both these cases. Brown had chosen a book cover depicting an *imagined* 'spacescape' for a motif, not an actual Suffolk landscape. Hirst had used a previous representation of a human body to make his anatomical sculpture. Both artists had turned art into art rather than acknowledging that 'Art is the perfection of Nature...Nature has made one World, and Art another.'<sup>319</sup>

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<sup>318</sup> Hirst has also acted the part of the claimant in a copyright dispute. In the late 1990s he sued British Airways' lowcost airliner GO for using designs with dots for an advertisement campaign. The dots allegedly looked like dots that Hirst has become famous for mass-producing.

<sup>319</sup> T. Browne, (1643) *Religious Meditations* I §16. Cited from OED

### 3. ART & COPYRIGHT

Historically, the view of art in British copyright is characterized in three ways. First, from the beginning, reproduction of images has been seen as not necessarily synonymous with wholesale copying. The notions of partial copying and colourful imitation have always been integral parts of the legal understanding of what it means to reproduce in art (*West v. Francis*; *Bradbury v. Hotten*). This distinguishes artistic copyright from literary copyright where the idea of ‘substantial taking’ matured only with time.

Second, the Fine Arts Act 1862 did not stipulate a universal prohibition against representation of copyright works. To ‘copy’ or to ‘reproduce’ a work of fine art ‘by any means’ was qualified by the understanding that ‘any means’ referred to techniques equivalent to those described by the law (*Hanfstaengl v. Empire Palace*; *Hanfstaengl v. H.R. Baines*). However, the 1911 Act dismissed the language of the Fine Arts Act and made unauthorized copying ‘in any material form whatsoever’ an infringement. Any act leading to the making of an unauthorized copy became prohibited (*Hanfstaengl v. Empire Palace*). The legal concept of reproduction thus took a considerable step away from an early notion that copyright exists to prevent a work from being reproduced and disseminated in a way to compete with the authorized version. At this point reproduction of art works in its legal sense came to include artistic dependency, not only replication (*Bradbury, Agnew, and Company v. Day*).<sup>320</sup>

Third, a tacit understanding of the character of artistic creation has had its effect upon artistic copyright decisions. Original works have been conceived of as representations of ‘nature.’ Nature here is the raw material that artists transform into art. This process of transformation is what *makes* a work of art. Copies and reproductions, on their part, are not transformations of anything. They are mere repetitions of an original work. In a word: they are second-order representations (even third-order, in the Platonic sense). This understanding of creation, however, has complicated rather than clarified many rulings. The relationship between original and

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<sup>320</sup> See also Celia Lury’s discussion of the shift from a regime of repetition to one of replication as the dominant mode of reproduction. This shift, she argues, enabled a separation of cultural works from their

copy is not always straightforward. In *Bauman*, for instance, the painter admitted to have copied the photograph. The diverse effects of the painting and the photograph could probably have been ascribed to the difference in media. Still, the majority of judges held the painting not to be a reproduction. The photograph was allotted the role of ‘nature’ to support this argument. In *Kenrick* the picture of a hand was balancing on the border between original artwork and ‘nature.’ If an exact copy were to be made of it, the drawing of the hand would be defined as an original work. To all other representations the drawing would constitute ‘nature.’ *Krisart* offers the opposite view. A realistic painting of a scene in London was not allowed to play the part of influence upon another painting of the same scene. Buildings, figures, streets, etc. represented in the painting were allegedly transformed irrevocably into art.

As these cases illustrate, the aesthetic framework set up by courts is not fully functional. There is no coherent line in its application. But it gets more complicated still. *Graves’ Case*, *Antiquesportfolio.com* as well as the disputes over Glenn Brown’s *The Love of Shepherds* and Damien Hirst’s *Hymn* all have in common that a work of art has been created from a work of art or manufacture. And questions raised in these cases are simply unresolvable within the given framework of the nature-art dichotomy. This shows in the rulings. Indeed *Antiquesportfolio* is an ambiguous decision, as were Brown and Hirst’s responses to the accusations of copyright infringement (Brown carrying on a year-long practice of appropriation while explaining that he had considered adding an explanatory epithet; Hirst donating money to charity but admitting no artistic debts.) What is really required here is a change of analytical approach. Many problems would be resolved in that way. Art and nature are not as separable as courts would like them to be. So, rather than relying on such an opposition, courts would be better off describing artworks in terms of their ‘framing.’<sup>321</sup>

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context of production. Celia Lury, *Cultural Rights. Technology, Legality and Personality*, ed. J. Urry, *International Library of Sociology* (London: Routledge, 1993), chapter 2.

<sup>321</sup> A nineteenth century German copyright theorist, J. Kohler, expresses similar ideas in his definition of the artistic work which consists of ‘das imaginäre Bild’—the imaginary image—that the author or artist creates. According to Kohler ‘Das imaginäre Bild’ is something between the motif and the concrete representation of the artwork. It is characterized as ‘die individuelle Weise, in welcher der Künstler seinen Stoff idealisirt, in Idealweise gebildet hat; das imaginäre Bild ist das Idealisierungswert des Künstlers.’ J. Kohler, *Das literarische und artistische Kunstwerk und sein Autorschutz* (Mannheim: Drud und Verlag von J. Bensheimer, 1892), p. 48.

In *The Critique of Judgment* Kant characterizes the frame as merely an external complement to an artwork, it belongs to ‘what we call *ornaments (parerga)*, i.e., what does not belong to the whole presentation of the objects as an intrinsic constituent, but [is] only an extrinsic addition.’<sup>322</sup> The view, that the frame is no essential element of an artwork, has been largely predominant until challenged by Jacques Derrida in the essay ‘Parergon’ in *La vérité en peinture* (Paris: Flammarion, 1978). Derrida takes Kant as a starting point for a nuanced critical understanding of the role of the frame. In the collection of essays *The Rhetoric of the Frame* thinking about the frame is developed further in various different aspects, that go much further than to conceive of it as merely a physical boundary. For our purpose a definition of the frame as a perceptual positioning of an image (or a text) is helpful. Louis Marin offers the following reflection:

The frame renders the work autonomous in visible space; it puts representation into a state of exclusive presence; it faithfully defines the conditions of visual reception and of the contemplation of representation as such [...] Through the frame, the picture is never simply one thing to be seen among many: it becomes the object of contemplation.<sup>323</sup>

An artist presents something to us. The frame, his framing, constitutes the conditions (or paratext) of our perception of it. Thus it is the artist’s framing that delineates what is represented and directs the way we contemplate it. And the artist shares his vision with us. The framing also singles out something for particular attention. And as Marin further argues:

Representation, in its reflexive dimension, presents itself to someone. Representative presentation is caught in the dialogic structure of sender and receiver, whoever they may be, for which the frame will furnish one

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<sup>322</sup> Immanuel Kant, *Critique of Judgment*, trans. Werner S. Pluhar (Indianapolis: Hackett Publishing Company, 1987 (1790)), p. 72.

<sup>323</sup> Louis Marin, “The Frame of Representation,” in *The Rhetoric of the Frame. Essays on the Boundaries of the Artwork*, ed. P. Duro (Cambridge: Cambridge University Press, 1996), 79-95, p. 82.

of the privileged spaces of producing “knowing, “believing” and “feeling,” of the instructions and injunctions that the power of representation, representing, addresses to the spectator-reader. (82-83)

The frame, as defined here, is not merely a boundary; it is the arrangement of something represented. A representation is as much *a way of being represented*, namely a framing, as it is a reference to the represented. The representation thus exists in a space between the artist and the ‘spectator-reader’ of the artwork. The framing is a means of giving the representation existence by presenting it to its audience.<sup>324</sup>

The notion of framing helps explain why in *Graves’ Case* and in *Antiquesportfolio.com* there was resistance towards characterizing a photo of a ‘single static item’ as an original work. (In *Graves’ Case* the judge had to infer backwards: inasmuch as a copy of the photo would be an infringement, the photograph must be an original work. In *Antiquesportfolio.com* the judge formulated an ambiguous ‘copyright light’.) The point was that, in both cases, the motifs of the photos were works already framed. By the same token, the works of Glenn Brown and Damien Hirst were not Brown and Hirst’s own framings of a ‘spacescape’ or of an anatomical figure. Brown and Hirst had presented their audiences with the artistic visions of artists other than themselves. In this perspective, it would be more appropriate to designate all four works in question as ‘artistic allusions’ rather than independent works. The problem in doing this, however, is that there is no such legal category. Either a work is a ‘citation,’ which puts rather strict limits upon any creative use of the ‘cited’ work. Or it is an original work, which seems unfair here insofar as the framing or the artistic substance of all four work stems from previous works. Yet, if our four works are found not to be ‘original works’ they are at risk of being accused of infringement.<sup>325</sup> This is a fundamental dilemma of copyright. There are cases like *Bauman* where the general sentiment is that the artist has made a socially and artistically acceptable use of another work and where it is recognised that he has supplied considerable creative effort. Yet for judges to

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<sup>324</sup> An effort to include an aesthetics of reception into the legal analysis of infringement in relation to literary work can be found in Robert H. Rotstein, “Beyond Metaphor: Copyright Infringement and the Fiction of the Work,” *Chicago-Kent Law Review* 68, no. 2 (1993): 725-804.

<sup>325</sup> To the extent that copyright subsists in these works and is owned by someone else.

express this sentiment does not seem have much legal effect. Rather, courts have to deliver certain ‘well-intentioned lies’<sup>326</sup> to spare the artist from conflict with the law. Thus the actual degree of similarity between the two works in *Bauman* had to be concealed. Only then could the painting be classified as an original work, rendering it, by definition, not an infringing copy.

The notion of the frame also enlightens the rulings of *Kenrick* and *Krisart*. In *Kenrick* the attitude seems to be that there was simply not sufficient framing to argue that any other picture of a hand making a cross would be a reproduction of it. *Krisart* takes a different stance. The court showed a general willingness to define Mrs. Gardner’s paintings as copies of Maurice Legendre’s, notwithstanding her use of several sources and the fact that her paintings—although they depicted the same views—were different in a number of ways. The crux of the matter here is that Legendre’s paintings of the famous views were perceived as not just referential works. They were also recognized in their capacity of being a way of seeing and presenting, of being a particular artist’s framing. This is what Mrs. Gardner’s work, regardless of any difference in detail, appears to have copied.

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<sup>326</sup> The phrase originates from Paul Vanderham’s study of the *Ulysses* trials in the US. In order to save Joyce’s novel from the censors Judge Woolsey delivered a series of well-intentioned lies concerning the ‘harmlessness’ of the work. See Paul Vanderham, *James Joyce and Censorship. The Trials of Ulysses* (New York: New York University Press, 1997); Paul Vanderham, “Lifting the Ban On Ulysses: The Well-Intentioned Lies of the Woolsey Decision,” *Mosaic* 27, no. 4 (1994): 179-198

#### **4. ART, LITERATURE AND COPYRIGHT**

In general, the meaning of ‘to copy’ and ‘to reproduce’ in artistic copyright has undergone as marked a transformation as in literary copyright. To copy a literary work originally meant to reprint a book. This has changed into our notion that covers appropriation of extracts and imitation of non-manifest elements (e.g. structure or theme). In the course of this development the paratextual components of a literary work have been excluded in legal analysis.

To copy or to reproduce an artistic work has always included non-exact and partial imitation. But two other major changes in the legal concept of reproduction in art have taken place. The first is the abolition of a technical criterion for reproduction. Under the 1862 Fine Arts Act the understanding was that to reproduce meant to employ techniques equivalent to drawing, painting and photography. This naturally restricted the output of ‘reproductions.’ With the 1911 Copyright Act the technique of reproduction was rendered irrelevant. This was the first step towards a general suppression of the significance that the invention of mechanical reproduction had had for copyright.<sup>327</sup> In Britain, artistic copyright is a product of what Walter Benjamin has named *the age of mechanical reproduction*. Benjamin contends that the new techniques of reproduction in the nineteenth century changed the nature of art. Along with that, pictorial reproduction gained a distinctly new meaning. In contrasting the mechanical technologies of reproduction with old-fashioned manual reproduction, Benjamin brings to light this new meaning of reproduction. He observes, first of all, how a mechanical reproduction can never replace an original:

Even the most perfect reproduction of a work of art is lacking in one element: its presence in time and space, its unique existence at the place where it happens to be. This unique existence of the work of art determined the history to which it was subject throughout the time of its existence. This includes the changes which it may have suffered in physical condition over the years as well as the various changes in

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<sup>327</sup> See Lionel Bentley, “Art and the Making of Modern Copyright Law,” in *Dear Images. Art, Copyright and Culture*, ed. D. McClean and K. Schubert (London: Ridinghouse ICA, 2002), 331-351.

ownership. The traces of the first can be revealed only by chemical or physical analyses which it is impossible to perform on a reproduction; changes of ownership are subject to a tradition which must be traced from the situation of the original.<sup>328</sup>

In the age of mechanical reproduction there is a polar opposition between an original artwork and reproductions of it. Originals have authenticity, or 'aura' as Benjamin designates it. Reproductions—as was always the case—are functions of originals.<sup>329</sup> But mechanical reproductions are further characterized by their ostentatious lack of authenticity: by their anti-authenticity. Due to the techniques of reproduction it is possible to manipulate the representation of the original work. Mechanical reproductions, thus, signal in all sorts of ways that they are reproductions and not originals. And as Benjamin notes:

process reproduction is more independent of the original than manual reproduction. For example, in photography, process reproduction can bring out those aspects of the original that are unattainable to the naked eye yet accessible to the lens, which is adjustable and chooses its angle at will [...]technical reproduction can put the original into situations which would be out of reach for the original itself. (222)

A reproduction in the new *Zeitalter* may contain potential and properties, which are essentially different from its original. The opposition between original and reproduction that exists due to specific mechanical techniques defined reproduction in a new way. This concept of reproduction was the context of the introduction of artistic copyright in 1862. When the 1911 Copyright Act rendered the means of reproduction irrelevant it

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<sup>328</sup> Walter Benjamin, 'The Work of Art in the Age of Mechanical Reproduction' (1936), in *Illuminations*, ed. H. Arendt (London: Collins/ Fontana Books, 1968), 219-253, p. 222.

<sup>329</sup> One might also say that an original work is incorporeal precisely by virtue of its being reproducible. A reproduction is all material and therefore not reproducible. In terms of origin another difference between an original work and a reproduction subsists. An original work originates in the personality of the author (a creative process) while a reproduction originates in an original work (a technological process).

was a way of suppressing copyright's association with mechanical reproduction. The consequence was an anachronistic application of the term reproduction in copyright.

A second major change in the legal concept of reproduction in art is the fact that multiplication has ceased to be the norm for reproduction. In literary copyright the implication of 'to copy' was from the beginning the production of multiple copies for dissemination. Traditionally to reproduce a work of art has not implied manifold duplication: a 1:1 ratio has been typical. Replicas and imitations tend to come in limited numbers. Indeed forgery, which forms an essential part of the legal past of art before copyright, required nothing more than a single 'reproduction.'<sup>330</sup> When art came under copyright there were thus two lines to follow. Arguably, the one with the least strong root in copyright tradition has prevailed. As the accusations against Brown and Hirst clearly illustrate, there is no expectation today that reproduction means multiplication. Indeed in contemporary artistic and literary copyright neither multiplication nor dissemination (intent to exploit commercially) are criteria of infringement.<sup>331</sup> In that way literary copyright may be said to have been polluted by an artistic criteria of reproduction. There is a continual exchange of criteria of reproduction between art and literature. This is in spite of their ontological difference and separate classification in copyright. An obliteration of differences is part of a strong trend away from specificity in copyright. While it is only natural that influence should take place between branches of copyright there is also a justified fear that this lack of specificity may lead to less appropriate protection. There are, for instance, many reasons why copyright designed for literary works does not fit art. As Donald Millinger observes

the fine artist usually intends each work to be the sole embodiment of a particular artistic vision. Consequently, much of the value of a fine artist's work lies in its uniqueness. Even when a sculptor or a graphic artist

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<sup>330</sup> See George Savage, *Forgeries, Fakes and Reproductions. A Handbook for Collectors* (London: Barrie and Rockliff, 1963)

<sup>331</sup> See William R. Cornish: 'Copies in UK Copyright' in J.H. Spoor, W.R. Cornish and P.F. Nolan, *Copies in Copyright*, ed. H.C. Jehoram, trans. Bernard Noble, *Monographs on Industrial Property and Copyright Law* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980).

creates multiple copies of a single work, generally the value of each copy is inversely related to the size of the edition – the more limited the edition, the greater the value of the artist’s work. The fine artist thus remains one of the few producers who does not profit from mass production and distribution of his work.<sup>332</sup>

Unlike poets, fine artists do not necessarily increase their economic benefit by ‘selling reproductions of each work in the highest volume possible.’(355) Furthermore, the functionality of copyright is not wholly compatible with art’s valuation of uniqueness. Many art collectors, dealers and artists, for example, have the feeling that a © on a work suggest the availability of multiple copies.<sup>333</sup> These are good reasons to preserve distinct definitions of the various types of works protected by copyright.

As we have seen, the way in which art and literature is perceived, and the way copying and reproduction are conceptualised in copyright law has moved a long way since the beginning of copyright law. At a glance one thing seems to unite all changes. Every reconceptualisation and every new definition has led to an increasingly stringent law of copyright.

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<sup>332</sup> Donald M. Millinger, “Copyright and the Fine Artist,” *The George Washington Law Review* 48, no. 3 (1980): 354-376, p. 355.

<sup>333</sup> *Ibid*, p. 374.

# PART THREE

## METAMORPHOSES OF MORAL RIGHTS IN FRANCE

Art. L. 121-1 L'auteur jouit du droit au respect de son nom, de sa qualité et de son œuvre. Ce droit est attaché à sa personne. Il est perpétuel, inaliénable et imprescriptible. Il est transmissible à cause de mort aux héritiers de l'auteur. L'exercice peut être conféré à un tiers en vertu de dispositions testamentaires.<sup>334</sup>

The author of an original work enjoys a right of 'respect' for it. This right is known as the right of integrity. In the nineteenth century French courts began to recognise such a right. Today the right of integrity has matured into a protection against many types of modification as well as against a range of acts done in relation to the work. The study of

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<sup>334</sup> The first of the moral rights defines the author's right to his name, his 'properties' (for example titles) and his work. The right is attached to the person of the author. It is perpetual and inalienable and cannot be given up in advance. The basis for the perpetuity of the right is that the work survives its author, while remaining an imprint of his personality. Upon the death of the author moral rights are transmissible to heirs – who can be testamentary heirs and who are not necessarily the heirs of the exploitation rights. Inherited moral rights, arguably, are a duty more than a right. (See Sylviane Durrande, 'Les "héritiers" du droit au respect,' *Recueil Dalloz Sirey Chronique XXVIII*, no. 28 (1989): 189-192) It is the late author's wishes that have to be followed, not the heir's. Moral rights are, anyway, seldom exercised after an author's death. Either the exploitation rights are still in force to accommodate control or heirs simply abstain from lawsuits. See Jean Matthyssens, 'Le droit moral contre les faux-monnayeurs de génie,' *RIDA* 106, October (1980): 3-23. The perpetuity of droit moral, in that sense, is theoretical. The inalienability of the right means that it is non-transferable and that even when not exercised it cannot be lost.

the right of integrity as dealt with by courts from the early nineteenth century until today offers an excellent insight into the evolution of this right. In the following a large selection of representative cases will thus be analysed. Cases are presented in two groups: from before and after 1957, when statutory protection of moral rights was introduced. There is a further division into cases that concern literary works and cases that concern artistic work. Cases are arranged chronologically under these headings. Importantly, as the focus of this study is the legal approach to literature and art, only cases that actually deal with such works have been picked out for analysis. At the beginning of each section some general trends and developments in integrity right protection are identified in order to formulate a typology of cases. As will be evident the early cases are generally given more space. More elaborate arguments are prompted by the lack of statutory law. Such explicit reasoning lays bare the early shaping of moral rights.

## 1. THE RIGHT OF INTEGRITY IN WORKS OF LITERATURE

### I Before statutory protection

A considerable number of cases dealing with the right of integrity in texts took place during the nineteenth century. The earliest decision recognising the principle of the right to the integrity of a work occurred in 1814.<sup>335</sup> The author of a book complained that the editor of his work had made changes and had added a supplementary text. While this particular author was unsuccessful in his claim, the *Tribunal civile de la Seine* decided that, in general, a book is to be printed in the state in which it has been delivered, save for the correction of typographical and orthographical and punctuation errors.

It had been generally acknowledged that publishers had a right of revision. With increasing frequency, however, courts ruled that editors did not have permission to ‘distort,’ let alone ‘destroy,’ the thought of author. Pouillet cites a number of decisions in support of this. In 1842 a court ruled that a publisher does not have a right to make any suppression in or additions to a literary work without the formal authorization of the author.<sup>336</sup> Likewise, in 1858 a publisher was found not to have the right to suppress a dedication or modify the title in the second edition of a book.<sup>337</sup> In 1859 a court decided that the publisher of a literary work did not have a right to make any changes, additions or corrections without the consent of the author.<sup>338</sup> A judgment from 1888 declared that the respect for the work included protection of the frontispiece, the preface, the introduction and the title.<sup>339</sup>

Six cases from the period stretching from 1845 to the turn of the twentieth century have been selected for close examination here. Analyses aim to highlight the scope of

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<sup>335</sup> Trib. Civ. Seine 17 août 1814. See Stig Strömholm, *Le droit moral de l'auteur en droit allemand, français et scandinavie avec un aperçu de l'évolution internationale*, 2 vols., vol. 1 (Stockholm: P. A. Norstedt & Söners Förlag, 1966), pp. 124f and Eugène Pouillet, Georges Maillard and Charles Claro, *Traité théorique et pratique de la propriété littéraire et artistique et du droit de représentation*, 3 ed. (Paris: Marchal et Billard, 1908), p. 364.

<sup>336</sup> Trib.comm.Seine, 29 déc. 1842. *Pouillet*, 1908, pp. 354ff

<sup>337</sup> Trib.comm.Seine, 16 sept. 1858. *Ibid.*

<sup>338</sup> Paris, 5 juill. 1859. *Ibid.*

protection and the justifications for integrity rights. Courts change their analytical approaches over time and employ varying theoretical frameworks. This means that the conceptualisation of the subject and object of moral rights undergoes a transformation. By arranging the cases in chronological order attention is called to the evolutionary character of the concept of the right of integrity.

*Marle c. Lacordaire*,<sup>340</sup> was a Lyon appeal case from 1845 concerning an abbé's right in his own sermons.<sup>341</sup> In the month of May 1845 the writer, Charles-Louis Marle, edited and published a work called *Les Conférences de l'abbé Lacordaire* consisting of sermons by the abbé Lacordaire. Lacordaire had given his sermons in Lyon and Grenoble where they had been taken down in shorthand without the abbé's consent. The Court of Appeals decided that this was a violation neither excusable by the religious character of the reproduced work—the sermon—nor by the ecclesiastic status of Lacordaire. The Court accordingly ruled that an oral discourse is a work subject to protection by copyright, with a double interest.<sup>342</sup> From a pecuniary point of view the author the right to profit from his own work.<sup>343</sup> And, secondly, from the point of view of what they call the author's 'personnalité morale' the court confirmed that: 'the author should always preserve the rights to revise and correct his own work, to survey the fidelity of the reproduction and to choose the time and mode of publication.'<sup>344</sup> The oral nature of the work was judged to be without importance: 'What does it matter whether an intellectual performance appears in one form or the other, whether it manifests itself in speech or in writing?' the court asked rhetorically and went on to declare that 'what

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<sup>339</sup> Paris 1<sup>er</sup> mai 1888, Ann., 1889, p.329-330. See Henri Desbois, *Le droit d'auteur en France* (Paris: Dalloz, 1966 (1950)), p. 487.

<sup>340</sup> Cour de Lyon, 17 juillet 1845. D.1845.2.128

<sup>341</sup> Jean-Baptiste-Henri Dominique Lacordaire (1802-1861) was one of the most famous pulpit orators of the Roman Catholic church in France.

<sup>342</sup> 'L'auteur a un double et légitime intérêt à conserver le droit exclusif d'éditer son ouvrage ou d'en céder la propriété.' (128)

<sup>343</sup> 'Qu'au point de vue pécuniaire, il ne peut être permis au premier venu de s'attribuer, sans égard pour les droits du travail et de la création, le profit matériel dont un ouvrage, même religieux, peut être susceptible.' (128)

<sup>344</sup> 'Au point de vue de sa personnalité morale et dans l'intérêt même de ses doctrines, l'auteur doit toujours conserver le droit de revoir et de corriger son œuvre, d'en surveiller la fidèle reproduction, et de choisir le moment et le mode de la publication.' (128)

matters even less is whether a speech—before it is delivered—is written down or not.<sup>345</sup> In general, the court remarked, it would be desirable to found the distinctions of the rights of property of authors on the particular procedures of elaboration and on the different practices of the preparatory work. In its judgment the court explained the reason for bestowing such extensive rights upon the author: ‘Because in effect the orator delivers his *speech* only, without giving up the power of disposal of his *thought* through printing; on the contrary it is essential for him to preserve the fruits of his labour, to remain the sole judge of the opportune moment for its publication and to keep guard against potentially damaging (*dangereuse*) alterations of his work.’<sup>346</sup> Charles-Louis Marle was found guilty of *contrefaçon* and was ordered to pay 100F in damages. The infringing copies were recalled and the court ordered that the judgement was to be published in two Paris journals, to be chosen by Abbé Lacordaire.

An appeal case from 1847, *Girard et Guyet c. Fabvier*,<sup>347</sup> confirms that a publisher does not have the right to change the mode of publication in the second edition of a book. Eugène Fabvier was the author of a two-volume history of Lyon and the town’s old provinces of Beaujolais and Forez; this had been published as a feuilleton in 65 issues. The work contained four ‘views’ and two maps. The first edition of six hundred copies had been sold by the author to the Lyon publisher *Girard and Guyet*. A proviso of the deal had been that a second edition would be published after the first edition had been sold out.<sup>348</sup>

The publisher, shortly after the sale of the first edition, announced subscriptions for a new edition of the work. The second edition deviated from the first in two ways: 1) it was published in 16 booklets at 1 F 25 c. whereas the first edition had

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<sup>345</sup> ‘Qu’il importe donc peu que le travail intellectuel ait revêtu telle forme plutôt que telle autre, qu’il se soit manifesté par la parole ou par l’écriture; qu’il importe encore moins qu’un discours ait été écrit ou non avant d’être prononcé.’ (129)

<sup>346</sup> ‘Qu’en effet, l’orateur livre seulement sa parole, sans donner le pouvoir de disposer de sa pensée à l’aide de l’impression; qu’il lui importe, au contraire, de conserver le fruit de son travail, de rester juge de l’opportunité de sa publication, et de se mettre en garde contre une altération dangereuse.’ (129)

<sup>347</sup> Cour de Lyon, 23 juin 1847, D. 1847. 2. 152

<sup>348</sup> Copies of *Histoire de Lyon ed. Populaire* (2 vol. Text encadré par motif décoratif) by Eugène Fabvier are still for sale at the price of 104 Euros at the *Librarie du Bât d’Argent* in Lyon through the internet site [www.livre-rare-book.com](http://www.livre-rare-book.com).

been published in 60 parts at 25 c.; 2) Twenty-two engravings had been added to the text. As an indicator of the changes, the prospectus was labelled ‘nouvelle édition illustré’ while the previous edition had been designation ‘édition populaire’. Fabvier complained that his authorial rights were violated in three ways. The publisher had no right to announce a new edition for sale before the first one had been sold out and he had no permission to change the prospectus and the form of subscription not to add engravings to the work.

The *Tribunal de Commerce de Lyon*<sup>349</sup> as well as the Court of Appeal in Lyon agreed that by announcing a new edition, prematurely, Fabvier’s rights had been violated. Accordingly, the author was awarded damages of 500F (not the 3000F that he had demanded). The other matters—the changing of the designation on the front of the prospectus from ‘édition populaire’ to ‘nouvelle édition illustré’; the addition of engravings and the altered terms of subscription—were all found not to ‘attaquer le fond de l’ouvrage vendu’ (152). Such alterations did not cause damage to the substance of the work. However, they did cause ‘prejudice to its author and harmed the new edition that he had the intention of publishing.’<sup>350</sup> Hence the Court decreed that all copies of the new edition were to be destroyed.

Two rulings, in 1859 and 1860, confirm that the transfer or expiry of an author’s copyright would be irrelevant to the question of the protection of a work’s integrity. In *Picot c. Pick*<sup>351</sup> it was ruled that a publisher who has acquired the copyright of a literary work does not have the right to make additions to the work. In 1853, J.-B.-C. Picot, author and plaintiff in the case, had sold to the defendant, the publisher, Pick the copyright of a work entitled *Le manuel pratique du code Napoléon*. The transfer had taken place under the condition that the purchaser—in order to enhance the sales of the book—had permission to change the book’s title.

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<sup>349</sup> 26 mars, 1847

<sup>350</sup> ‘Porter préjudice à son auteur et nuire à la nouvelle édition qu’il a l’intention de faire paraître’ Cour de Lyon, 23 juin 1847, D. 1847.2.152, p. 152

<sup>351</sup> Trib.civ. de la Seine 14 déc. 1859. D.1860.3.16

In 1854, Pick, without the authorization of Picot, added a collection of other areas of law.<sup>352</sup> The attachment of a compilation of one hundred pages to Picot's five-hundred-page volume, amounted to a considerable alteration of the work. Pick, in vain, tried to justify his act by reference to the agreement that he had been free to change the title. The court, however, ruled fully in favour of the plaintiff. It was announced that 'the publisher does not have the right to place material which is alien to an author under this author's name, and the author does not have the right to attribute his work to a stranger.'<sup>353</sup> In both cases there is a violation of the principle of literary property, which for an author is to 'jouir seul de son œuvre comme à ne jamais encourir la responsabilité des œuvres d'autrui.'(16) The author, alone, has the right of enjoyment of his work as much as he has the right not to be ascribed the responsibility—or credit—for another's work. The outcome of the case was that the assignment of the copyright to Pick was annulled. Pick was thus sentenced to give up all his copies of the work and to hand over the printing blocks to Picot.

In *Peigné c. Garnier*<sup>354</sup> the court settled that the author of a literary work which had fallen into the public domain had a right to have it published in its exact and complete form. Peigné, the plaintiff, was the author of an award-winning 'tableaux de lecture' which had fallen into the public domain in 1835 after a bankruptcy. The author claimed that the defendant, a publisher, was responsible for a 'publication incomplète et défectueuse de ses tableaux en forme de volume'(16) – an incomplete and defective publication of his tables in a volume. The court agreed and ruled that Garnier's mode of publication—low-cost—due to its deficiencies, discredited the invention. Furthermore, it harmed the general publication of the author's method. The faulty version might threaten the sale of editions from other publishers who were taking it upon themselves to publish at greater expense his work in ways to secure reproduction of the tables in their entirety.

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<sup>352</sup> *Code Napoléon, nouveau manuel pratique et complet du Code Napoléon expliqué et mis la portée de toutes intelligences à l'usage des familles, de la Propriété, de l'Agriculture, du commerce et de l'industrie.*

<sup>353</sup> 'L'éditeur n'a pas plus le droit de placer sous le nom d'un auteur des matières qui lui sont étrangers, qu'il n'a le droit d'attribuer son œuvre à un étranger.' (16)

<sup>354</sup> Trib. Civ. de la Seine, 14 mars, 1860. D.1860.3.16

Peigné was awarded damages of 600 F; the defendant was required to destroy the infringing copies and was banned from printing and selling the incomplete tables in the future.

A dispute between a news editor and the publisher of a journal, *Delprat c. Charpentier* lasted from 1864 to 1868. The journalist's right of integrity in his work was first confirmed in 1864 and then rejected by the Imperial Court of Paris in 1865. The *Cour de Cassation* annulled the decision of the Court of Paris in 1867 and returned the case to the Court of Orléans, which in *Delprat c. Charpentier* (1868) affirmed the author's right of integrity.

The principal characters of the case were M. Charpentier, the director and owner of a journal called *Revue nationale* and M. Delprat, who was the journal's political editor.<sup>355</sup> In July 1864 the latter, Delprat, delivered a manuscript for the forthcoming issue. The article, however, was too long for the assigned space and the director, Charpentier, made a number of suppressions and modifications. This took place without Delprat's consent or knowledge. Delprat found the changes to have distorted the idea and form of his article. The author demanded that a letter be inserted in the following issue of the *Revue* with a disclaimer, declaring that Delprat's name had wrongly appeared under the article, and that the content of the article was not his authentic work: considerable cuts and alterations had distorted his article to a degree that made it necessary for him to renounce it. But Charpentier refused to insert such a letter.<sup>356</sup> The first court decided that an editor, in principle, has a right to modify articles. However, this right is to be exercised only under the condition that the editor, before publication, notifies the author of modifications of any significance. Because otherwise, 'la loi qui exige que tout article soit signé par l'auteur ne recevrait plus son exécution, puisque l'écrit n'émanerait plus entièrement et uniquement de l'auteur dont

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<sup>355</sup> Gervais Charpentier (1805-1871) was a bookseller. He has become famous for introducing a convenient English format in France. He used the format, named after him as *Format Charpentier*, for his *Bibliothèque Charpentier* which contained French and foreign literary classics. The founding of the *Revue Nationale* was another of Charpentier's achievements along with his being the publisher of Emile Zola.

<sup>356</sup> At a later stage he did nonetheless agree to print the letter.

la signature se trouve au bas de l'article.<sup>357</sup> The law prescribes that articles are signed by their authors. If there is no guarantee that a piece of writing is entirely and uniquely by the author whose name appears below it, it is no longer possible to execute the law. Therefore, the Court declared,

il est établi que Charpentier a, sans l'autorisation et le consentement de Delprat, supprimé des parties importantes de son article et modifié des expressions, et a ainsi changé la pensée et l'esprit de cet article.<sup>358</sup>

Charpentier, without the approval of Delprat, had modified expressions and suppressed important parts of Delprat's article, thus altering its idea and character. Delprat, accordingly, was awarded the right to have his letter of renouncement published in the *Revue Politique* and to have the decision published in five Paris newspapers.

Charpentier appealed against the judgment at the Court of Paris, and this court overturned the decision of the Tribunal. The Court held the view that the suppressions were dictated by the formal need to fit a long article into the assigned space. Moreover, only passages without significance had been suppressed, and the adjustments—small in number—were of no consequence to the article. Thus the Court ruled that

aucune de ces modifications n'a pu avoir pour effet de dénaturer le sens et l'esprit de l'article, ni de compromettre la responsabilité ou la réputation de l'écrivain; que l'intimé n'en ayant éprouvé aucun préjudice, est sans droit pour demander, à titre de réparation, l'insertion de sa lettre dans la *Revue Politique*.<sup>359</sup>

None of the modifications were found to prejudice the meaning and character of Delprat's article. His responsibility and reputation remained uncompromised. Having

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<sup>357</sup> Trib. Civ. De la Seine, 5 août 1864. D.P. 65. 2. 214.

<sup>358</sup> *Ibid.*

<sup>359</sup> *Charpentier c. Delprat*. Cour de Paris, 16 mars 1865. D. 1865. 2. 213, p. 214.

failed to prove any prejudice, the author could not be granted the right to have his letter printed in the *Revue* in reparation.

The case was then taken by Delprat to the Cour de Cassation. The Supreme Court annulled the judgement of the Court of Paris.<sup>360</sup> The Court ruled in favour of Delprat and confirmed that a writer is absolute owner and master of his work. The publisher of a work is not authorized to ‘se substituer à l’auteur dans les actes dérivant du droit de propriété’ (371f). He may not put himself in the place of the author and modify, without the consent of the author, the manuscript to be published. If the work needs to be modified, say for reasons of space, the author must be consulted. A modified article, like that at the centre of the dispute here, must appear with the names of all authors and editors subjoined. It must be presented as ‘l’œuvre collective de la rédaction,’ and not—as was the case with Delprat’s article—with the single name of Delprat under it. This had implied that it was his individual and exclusive work: ‘comme l’œuvre individuelle et exclusive de Delprat dont la signature figurait au bas de l’article’ (372).

While the editor of a journal may be allowed to make necessary modifications to contributed material, the corrections must be approved by the writer who signs the piece; he is after all the person legally responsible. The Court of Paris—the second hearing—had failed to appreciate the rules of authorial rights when they denied Delprat his right to protest against cuts and corrections done without his knowledge. The case was therefore send back to the Court of Orléans. The Cour d’Orléans ruled, once more, that the editor of a journal does not have the right to modify a contributed article without the consent of its author.<sup>361</sup> The first judgment was confirmed; Delprat’s right to have his disclaimer printed was recognised.

The *Affaire Flaubert* (1890) concerned a contract about the adaptation of a novel into a play. The dispute was over the obligation to respect the integrity of the literary work.<sup>362</sup> Ernest Octave Commanville, the defendant of the appeal case, was the husband of

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<sup>360</sup> *Delprat c. Charpentier*. Cour de Cassation, 21 août 1867. D.1867.1.369.

<sup>361</sup> *Delprat c. Charpentier*. Cour d’Orléans, 15 mai 1868. D. 1868. 2. 128.

<sup>362</sup> *Taylor c. Commanville*, Cour de Paris, 4 nov. 1890, D.1891.2.303

Caroline Hamard, who was the niece and heiress of Gustave Flaubert (1821-1880), the famous author of the novel *Madame Bovary* (1857).<sup>363</sup> In 1886, Commanville was approached by one Taylor, a playwright, who wished to make a theatrical piece on the basis of that novel. In the course of a correspondence, which was to become evidence at court, Commanville gave his authorization to Taylor. It was agreed that Taylor write the play under the condition that Commanville would be allowed to control and correct it. In 1887 when Commanville read what Taylor had written the former stated his point of view to be that the play was well composed and seemed interesting. The style of writing however was the difficult part; it had to be changed and modified.<sup>364</sup> Later letters by Commanville expressed increasingly grave objections to the script. Furthermore, the play—without Commanville’s consent—was accepted by a small independent theatre and not by the *théâtres de première rang* in Paris as Taylor had implied in the beginning.

The principal question of the case was whether Commanville, as the representative of the author of the novel, had authorized Taylor to make a theatrical adaptation of *Madame Bovary* with or without reservations. The correspondence confirmed Commanville’s claim. Moreover the Court declared that Commanville ‘au nom et comme représentant de l’auteur de *Madame Bovary*, est en droit de s’opposer à la représentation théâtrale de la pièce tirée au roman.’<sup>365</sup> As representative of Flaubert, the author, Commanville had the right to object to the performance of an adaptation of the author’s work. It is even his duty as the representative of the deceased to guard the

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<sup>363</sup> Caroline Desirée Hamard, born in 1824, was Gustave Flaubert’s favorite niece; she shared household Gustave and his mother before her marriage. When Commanville, who was a timber importer, was on the brink of bankruptcy in 1875 Flaubert spent his entire (modest) fortune, gave up his apartment in Paris and sold a share of his land in order to save the business. For this, Flaubert spent the rest of his life in financial trouble. Caroline was Flaubert’s literary executor. After the author’s death she edited his *Nachlass* which was published as *Bouvard et Pécuchet* in *La nouvelle revue* in 1880-1881. Flaubert had another major encounter with the law. When *Madame Bovary*, his first novel was published in 1857 the censors tried to suppress it. For more on this see Dominick LaCapra, “*Madame Bovary*” on Trial (Ithaca, London: Cornell University Press, 1982) and Stina Teilmann, “Flaubert’s Crime: Trying Free Indirect Discourse,” *Literary Research/ Recherche Littéraire. International Comparative Literature Association* 17, no. 33 (2000): 74-87.

<sup>364</sup> Letter of 13 February 1887 from Commanville to Taylor cited by the Court: ‘Qu’assurément la pièce qu’il avait lue était bien agencée et lui parassait intéressante, du moins il le pensait ainsi; mais que l’écueil était le style qu’il faudrait changer, modifier.’ *Ibid.* p. 303.

<sup>365</sup> *Ibid.*, p.304

work.<sup>366</sup> The Tribunal of the Seine ruled in favour of Commanville. Under appeal the Court of Paris upheld the decision.

## **II After *La loi du 11 mars 1957***

Since the affirmation of moral rights by the 1957 Act, integrity rights have been exercised in relation to classes of works defined by the Act. Architectural and cinematographic works have thus become quite regular objects of dispute in this branch.<sup>367</sup> However, violations of the integrity of literary and artistic works are still the most common source of complaint. Cases that concern literary works typically fall under one of three different headings.<sup>368</sup> Firstly, litigation that relates to *adaptations*: typically novels turned into films, or popular editions of classics. Secondly, complaints over *cuts and modifications*, as seen in the early cases. Thirdly, protests against *the quality and accuracy of the publication*, a type of offence familiar from earlier cases. Our selection of ten cases is representative of the three categories.

### **a) Adaptations**

Adaptations necessarily diverge from the works they emanate from. Nevertheless, there are kinds of alteration where changes may be necessary, say, due to a change of media, and therefore permissible, while other changes may be taken to violate the integrity of the adapted work.<sup>369</sup> In *Héritiers Bernanos c. Soc « Champs-Élysées Productions »* (1961) the Court decided against infringement although the adaptation of a novel into a film had involved changes that were regrettable in a literary perspective.<sup>370</sup> The

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<sup>366</sup> *Ibid.*, p.304

<sup>367</sup> See Georges Bonet, Pierre Sirinelli, Frédéric Pollaud-Dulian and Sylviane Durrande, eds., *Code de la Propriété Intellectuelle. Texte du code, textes complémentaires, jurisprudence, annotations*, 3 ed. (Paris: Dalloz, 2002) See also André Lucas and Henri-Jacques Lucas, *Traité de la Propriété Littéraire et Artistique*, 2 ed. (Paris: Édition Litec, 2001), pp.338.

<sup>368</sup> This claim is based on a survey of the records of the documentation centre of Institut de Recherche en Propriété Intellectuelle Henri-Desbois.

<sup>369</sup> Apart from the cases discussed below see also *V.A.A.P. C. Le Lucernaire* TGI de Paris 7 févr. 1984; D.1985.313.(IF) (concerning a play). See furthermore Paris 31 mai 1988; D.1990.235 and Civ 1er, 12 juin 2001; Bull.civ. 1, no 171; Propr. Intell., oct. 2001, p.62 (concerning an animation of *Le petit prince*).

<sup>370</sup> *Héritiers Bernanos C. Soc. «Champs-Élysées Productions»* Tribunal de grande instance de la Seine, 15 juin et 30 nov 1961, D.1962.173.

defendant had produced a film on the basis of the film script *Dialogue des Carmélites* (Seuil, 1949) by Georges Bernanos telling the story of sixteen nuns martyred during the French Revolution.<sup>371</sup> Bernanos' heirs maintained that the film was not faithful to the written script. Essential themes had been ignored, numerous passages had been left out, little dialogue of the film originated from the book and the characters had been deformed. Consequently, the film ought not to be allowed to carry the same title as the book, indicating that it derived from Bernanos' work. Several leading literary critics supported this point of view. The Court acknowledged that the film was not a worthy representation of the book. It disregarded its aesthetic character. However, the filmmaker was justified in ignoring this because the film was a sincere attempt to relate the same historical events as the written work to a film audience: the guillotining of the Carmelite nuns in 1794 on the Place de Genève. In this perspective the differences were justified. Faced with a 'public de cinéma dont les réactions sont loin d'épouser celles d'un public de lecteurs'—a cinema audience whose reactions were far from those of a reading public—one could not expect appreciation of the 'ton et les traits de l'œuvre littéraire' (176): of the tone and characteristics inherent in a literary work. On this basis the Court declared defendant entitled to use the title of Bernanos' novel and to present it as an adaptation of his work. The film did not constitute an infringement of the claimant's right of integrity.

*Soc. des gens de lettres c. Soc. des films Marceau et autres* (1966) did not actually concern an adaptation; rather it dealt with the usurpation of a famous title. The Supreme Court heard the case where the right to the title '*Les liaisons dangereuses*' was contested.<sup>372</sup> Pierre Choderlos de Laclos' classic title of 1782 had been used to name a

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<sup>371</sup> Georges Bernanos is one of the most important Roman Catholic writers in France in the twentieth century. He received the *Grand prix de Roman* from the French Academy in 1936. *Dialogue des Carmélites* has led a rather intricate legal life. Bernanos had written it under commission shortly before his death. *Dialogue des Carmélites* was based on Gertrud le Fort's (1876-1871) historical novel *Die Letzte am Schaföft*. The story goes that when Gertrud le Fort was presented with Bernanos' film script she expressed sadness that it did not follow her novel more strictly! An opera has also been made on the basis of *Dialogue des Carmélites*. The opera of the same name was composed by Francis Poulenc (1899-1963) in 1955. Bernanos' heirs approved of Poulenc's work but the adaptation right in Bernanos' work had been sold to an American lawyer, Emmet Lavers, after the author's death. Lavers sanctioned the opera only when the composer had agreed to put Lavers' name on the program and on the printed score.

<sup>372</sup> Cour de Cassation, 6 December 1966, D.1967.381.

film whose plot bore no relation to the novel. The first court had authorized the seizure of the film while the Court of Appeal had rejected protection of the title because the 1782 work was in the public domain. The *Cour de Cassation* finally found that the Court of Appeals had made a false application of the text of the law. It was ruled that, after the expiry of copyright, the author's *droit moral* protects the title of a work. The right of integrity in Laclos' classic had thus been infringed when a modern filmmaker reused the name as the title of his own work.

*Charteris et autre c. Soc. Intermondia-Films* (1968)<sup>373</sup> is a decision that concerns a novel turned into a film.<sup>374</sup> Its author claimed that the film prejudiced his right of integrity. The Court affirmed that the 'adaptateur a le devoir, pour traduire sans trahison, l'esprit, le caractère et la composition de l'œuvre originale, de découvrir une expression nouvelle de la substance de celle-ci.' (744) While the 'adaptor' is to find a novel expression, distinct from the substance of the original work, he is also obliged to remain faithful to its idea, character and composition. Nevertheless, as the Court declared, when signing a contract of adaptation—as the author had done—he explicitly or implicitly accepted a number of necessary amendments in the transposition of the original work to the new work. Besides

une certaine liberté doit être reconnu à l'adapteur de cinéma, dont le rôle consiste, par des formes et des moyens en harmonie avec le mouvement d'images qui est l'essence de cet art, à rendre l'œuvre accessible à un public composé de spectateurs et non de lecteurs.(744)

A certain liberty was to be recognised for adaptors of literary works into cinematographic works, where the purpose is—through the means of moving images, which is the essence of this art—to make the work comprehensible to a public of

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<sup>373</sup> *Charteris et autre c. Soc. Intermondia-Films* Tribunal de grande instance de la Seine, 8 March 1968, D.1968.742.

<sup>374</sup> Another aspect of the case concerned a registered trademark, a stylized silhouette called the 'Saint.' The author Leslie Charteris had registered the 'Saint' for use on a series of books, films, and paper articles. Charteris was found justified in his action concerning the trademark.

cinema-goers, not readers. In its decision the *Tribunal de grande instance de la Seine* thus found the film-maker not to have prejudiced the author's right of integrity.

*Christopher Frank c. Société Sofracima*<sup>375</sup> (1979) ruled that a scriptwriter had violated the right of integrity of the author of the adapted work. Sofracima, a film company, held the adaptation and exploitation rights in a literary work *La plus longue course d'Abraham Coles, chauffeur de taxi* by Claude Brami. In February 1978 Christopher Frank was commissioned by the Society to write a screenplay on the basis of the book. In October 1978 Sofracima informed Frank that in their opinion his adaptation constituted a corruption of Brami's work. While the original work was primarily a psychological description of the character Abraham Coles, the adapted work concentrated on scenes of physical violence and 'action.' Frank maintained that he had merely exercised his liberty to transform a work of literature into a viable work in a different media. Changes were allegedly dictated by technical considerations. This liberty of transformation had been confirmed in a number of recent decisions, for instance *Bernanos* and *Charteris*.

*Sofracima*, on their part, presented as evidence a letter from the author—Brami—stating:

A la lecture de ce début d'adaptation, j'ai été stupéfait de voir qu'elle était sans rapport avec mon roman dont elle trahissait gravement l'esprit, les personnages et les événements. J'atteste formellement que si un film devait voir le jour sur la base de ce que j'ai pu lire, je considérerais le dit film comme une atteinte à mon droit moral d'auteur.(180)

The author had been shocked to read the adapted work. It did not conform to the novel. Ideas, characters and events of the adaptation seriously betrayed those of the original work. Hence if a film were to be made on the basis of the script, Brami would consider it an infringement of his moral rights as an author. This letter impressed the Court

sufficiently to resist the recent trend which had allowed quite an extensive liberty of transformation from book to film. Accordingly, the Tribunal annulled the contract between the parties, finding Frank at fault for having produced a defective work for the claimant. The Court of Appeal confirmed the decision, in addition ordering Frank to pay damages of 30,000F.

In *Caisse nationale des Lettres c. Soc. d'Éditions et de Diffusion artistiques, Agence parisienne de distribution et Marcireau* (1964) an adaptation of a different kind was the cause of another legal battle over moral rights.<sup>376</sup> Victor Hugo's (1802-1885) novel *Les Misérables* (1862) was out of copyright and the publisher *Société d'Éditions* had published an edition of the novel. *Caisse nationale des Lettres*, the plaintiff, was an institution established in 1946 'd'assurer le respect des œuvres littéraires quel que soit leur pays d'origine, après la mort de l'auteur et même après leur chute dans le domaine public.'<sup>377</sup> This institution existed in order to assure that the integrity of literary works remained intact after the death of their authors and after the works had fallen into the public domain. Hugo's famous work, the *Caisse nationale des Lettres* maintained, had suffered derogatory treatment in the new edition. While still carrying the title of *Les Misérables* and the authorial name of Victor Hugo on the cover page, the text had, effectively, been changed. Only on the fly-leaf was it revealed that the present text was an 'adaptation aux besoin du lecteur moderne' (747) arranged by Jacques Marcireau. Intended for the needs of the modern reader, the edition was an adapted version of the text not to be confused with a merely abridged edition – let alone with the complete work. According to the *Caisse* the adaptator was responsible for a scandalous deformation of Hugo's work. Political and social contexts of the story had been amputated, historical events had been altered, as had wordings and syntax. And not only had Hugo's classic work been deprived of its social and and political character, it had also lost its poetry and style. Another noticeable fact was that while the adaptation

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<sup>375</sup> *Christopher Frank c. Société Sofracima* Trib. de grande instances de Paris, 18 avr. 1979; RIDA oct. 1979, p.175. Appeal case *Christopher Frank c. Sofracima*, Cour d'Appel de Paris, 29 avril 1982; 114 RIDA oct., 1982, p.172.

<sup>376</sup> *Caisse nationale des Lettres c. Soc. d'Éditions* TGI de Paris 15 avril 1964, D.1964.746

<sup>377</sup> La loi du 11 oct. 1946, article 2 (as amended by L. 25 févr. 1956).

contained a mere 740,000 typographical characters and punctuation signs, by comparison, *Misérables* encompassed 4,500,000.

The Tribunal recognised that Marcireau's adaptation was published in a way to make readers believe that it was the intact work of Hugo even though this was not the case. Due to the prejudice caused to the memory of Victor Hugo by the publication of a 'texte tronqué et déformé' (748) the *Caisse*, thus, had legitimate reason to take legal action. However, the Court had learned that two descendants of Hugo were alive, rendering them rightful heirs and protectors of Hugo's work. These heirs declined to take legal action and the Court judged the claims of the *Caisse* inadmissible.

#### **b) Cuts and modifications**

Complaints over editors' cuts and modifications first incited courts to recognise moral rights. While, nowadays contracts usually settle the extent of editorial interference, courts are still registered to deal with disagreements between writers and editors from time to time. One such case is *S.A. Librairie Larousse c. André Hodeir* (1986),<sup>378</sup> which was heard by the Court of Appeal. In 1976 *Larousse*, the publishing house, was making preparations to publish an encyclopedia of music, *Larousse de la Musique*. André Hodeir was a contributor to the section on jazz. When the first volume of the work came out in 1982 Hodeir found that several of his articles had been omitted. Moreover, offensive cuts as well as erroneous additions had marred his remaining work. The first Court acknowledged that *Larousse de la Musique* was an *œuvre de collaboration*, implying that the editor retains a right of modification in order to preserve a unity of style and tone (as was also stated in the contract between the parties).<sup>379</sup> It was clear however, as the Court noted, that the foremost goal of the editor had been to popularize ('*vulgariser*') the text. And the changes to Hodeir's contribution were extensive. Mention of minor jazz musicians had been cut out. Articles on famous musicians—like Louis Armstrong—had been prolonged out of proportion in a way not justified by their role in the history of jazz music. In general the texts had been edited to focus less on jazz music in itself than on other aspects of the careers of famous jazz musicians. On

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<sup>378</sup> *Cour d'Appel de Paris*, 6 novembre 1986, 136 RIDA avril 1988, p. 149. Appeal from TGI de Paris, 17 mai 1984

top of that several mistakes had been added by the editor. The first Court had granted the author damages, finding that the modifications had infringed his moral rights. Yet, the Court of Appeal was not satisfied that the amendments exceeded what was allowed by the contract. Instead the Court of Appeal attempted an estimation of whether Hodeir's reputation had suffered any harm as a result of the alterations. It had not. On the contrary, the musical encyclopedia had been well received by the musical world, and had been given numerous favourable reviews. Hence, the Court concluded, 'les fautes commises par Larousse n'ont pas gravement porté atteinte à la réputation et au prestige de Hodeir.'(150)

However, another detail made the Court of Appeal decide that Hodeir's right of integrity had been infringed. In the preface to the first volume of the encyclopedia the editor declares that 'il va de soi qu'une totale liberté dans l'interprétation historique et critique a été laissée à chacun des spécialistes dont les initiales figurent en fin d'article.'<sup>(151)</sup> The editor's assurance that each contributor was at a total liberty to present his own historical and critical interpretations and the indication that subjoined initials guaranteed the authenticity of the contributed views were unacceptable to the Court. It was found that

en attribuant à Hodeir des articles qu'il n'avait pas rédigés et en affirmant dans la préface de l'ouvrage qu'il avait joui d'une totale liberté, la Librairie Larousse a commis des fautes génératrices d'un préjudice moral pour André Hodeir.(152)

The author's right of integrity was prejudiced by the fact that the editor had attributed an amended text to the author while assuring the reader that the author enjoyed the full liberty of expression. Hodeir was awarded damages of 50,000F.

Another case from the 1980s dealt with modifications of a literary text. *Soc. Éditions des Femmes c. Mme Farny* (1988) confirmed the right of integrity of a translator.<sup>380</sup>

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<sup>379</sup> *Ibid.*, p.150

<sup>380</sup> Cour de Paris, 8 December 1988, D.1990.53 (SC). Appeal from TGI de Paris 27 nov. 1986

Mme Farny had been commissioned to translate a work by the publisher *Soc. Éditions des Femmes*. Without informing the translator, the publisher had allowed another person to revise her translation – while still publishing it with her name on it. The Court of Paris found this to be an infringement of the translator's 'droit de ne pas signer cette traduction et de ne pas apparaître comme responsable du texte modifié.'<sup>(53)</sup> As had been stipulated in the contract, the translator retained a right not to sign and not to figure as the person responsible for an amended text.

A 1987 decision, *Moritz c. Soc. anon. Éditions Denoël*,<sup>381</sup> established that a preface is 'une adjonction à une œuvre'(46). Prefaces are seen not as integral parts of a literary works but as supplementary. Regardless of the content and 'neutrality' of the preface, it has a disturbing effect upon the way the work is perceived. Accordingly, the author's consent must be obtained.

### **c) The properties of the published volume**

A decision from 1993, *Chambelland et autre c. Paseyro*<sup>382</sup> by the Court of Appeal affirms that an author has a right of influence upon the design of his book. In this case the publisher of a collection of poems printed the book without the final approval of the poet. About the printed book the Court declared that 'l'ensemble est dépourvu de tout caractère homogène' and 'l'ouvrage offre un aspect négligé' (158). The volume lacked uniformity and had a negligent look. This prejudiced the author's moral right. His reputation and his incentive to promote the publication had both suffered harm. Especially as the work in question was a collection of poems where 'le lecteur est sensible à l'esthétisme de la présentation.' (158) Readers of poetry would be expected to appreciate the aesthetic presentation of a work. The author was granted damages and interests of 20,000F.

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<sup>381</sup> TGI, 25 November 1987, D.1989.46 (SC)

<sup>382</sup> *Chambelland et autre c. Paseyro* Cour de Paris, 1 February 1993, D.1993.158. Partial affirmation of judgment from TGI de Paris, 30 May 1991

*Sté Edita et Sté Le comptoir du livre c. Jean Fondin et Jaques Remise* (1994)<sup>383</sup> is a case about the reprinting of a scholarly work entitled *L'Age d'Or des Jouets* by Jean Fondin and Jacques Remise. The work was first published in 1967 by the publisher Société Edita. In 1990, the publisher, without the authorization of the authors, brought out a reprint of the volume. As the publishing contract had expired the reprinting of the work was a breach of the authors' copyright. This was confirmed by the first Court and by the Court of Appeal. An additional question was that of the moral rights of the authors who claimed their right of integrity to have been violated. The Courts agreed on this matter too. The Court of Appeal remarked that 'l'ouvrage a été réimprimé par utilisation de la technique offset au lieu de celle de l'héliogravure utilisée en 1967 ce qui lui confère un aspect moins luxueux.' (397) The reprinted volume had been printed using offset rather than complicated technique of heliogravure<sup>384</sup> as in the 1967 edition. This granted the new printing a less luxurious appearance. Moreover 'l'index mentionnant les noms des propriétaires des objets photographiés n'ayant pas été mis à jour il en ait résulté pour les auteurs une atteinte à leur réputation.' (397) The reputation of the authors had been prejudiced as the book's index of names of owners of the photographed objects had not been updated. Readers of an erudite work, such as the one in question, would expect a republication of a work to bring such information up to date. An unrevised version of the book would give readers the impression that the authors were seeking easy profit. The court moreover conjectured that collectors would assume the reprinting to be an attempt to devalue the 1967 edition. Altogether this amounted to infringement of the moral rights of MM. Fondin and Remise; the Court of Appeal gave judgment for 250,000 F in damages to the authors.

### **III Principles for integrity rights in work of literature**

Specific professional relations give rise to the violation of integrity rights violations. Three types are typical: 1) A relationship between an editor and a contributor of a text to

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<sup>383</sup> *Sté Edita et Sté Le comptoir du livre c. Jean Fondin et Jaques Remise* Cour d'Appel de Paris, 21 November 1994, 164 RIDA, April 1995, p. 374

a journal or a volume; 2) A relationship between a publisher and an author whose work is under publication; 3) A matter between two authors: the author of a work of which an adaptation is made and the author of the adaptation. Among our selection of early decisions all but one affirm that the author's right of integrity have been infringed. The first reported ruling on integrity rights from 1814 rejects the author's claim. However, as we have seen, the principle is established that the work of an author is to remain intact. Since 1814 a substantial number of decisions have helped shape the nature of the right of integrity. Even before the 1957 Act only a minority of authors had their appeals for protection of their right of integrity rejected.<sup>385</sup> At an early stage in the formation of moral rights, a distinction was made between pecuniary rights and rights deriving from the author's 'personnalité morale.' Authors were granted a right of control over their works independent of the pecuniary rights. This would protect authors from alterations of their works which might be 'dangerous' or disadvantageous (*Marle c. Lacoredaire*, 1845). The mode of publication was put under the control of authors: labels and illustrations were to receive their authorization (*Guyet c. Fabvier*, 1847). Furthermore, the general quality and style of a publication was also to be approved of by the author (or his heirs), as readers would associate the author's name with the standard of the publication (*Peigné c. Garnier*, 1860 and *Affaire Flaubert*, 1890). At a later stage, literary property was defined as, on the one hand, a sole right of the author to the pecuniary enjoyment of his work; on the other hand literary property conferred the right to control over the presentation of a work, over modifications and adaptations of it (*Picot c. Pick*, 1859). This distinction was confirmed by the principle that a writer must remain the absolute master of his work. Two reasons were given for this. First, a writer who signs his piece becomes liable for it. Second, the public needs a guarantee that the one who signs the article is the one who is responsible (*Delprat c. Charpentier*, 1868).

Protection by statutory law in 1957 did not notably change the character of integrity rights disputes. Alterations and cuts and adaptations remained the main causes

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<sup>384</sup> The technique of heliogravure, as described in the Rouault section, consists of making preliminary drawings and afterwards to transfer them onto copper plates by the means of photography.

<sup>385</sup> See Stig Strömholm, *Le droit moral de l'auteur en droit allemand, français et scandinavie avec un aperçu de l'évolution internationale*, 2 vols., vol. 1 (Stockholm: P. A. Norstedt & Söners Förlag, 1966), pp.294ff

for legal action. Among the cases described here, two refute protection of an author's right of integrity. The reasons for dismissal are important. It is contended that the expectations and reactions of cinema audiences differ from those of a reading public. This is why filmmakers are allowed a liberty of transformation. In other words, changes are justified because readers and cinema-goers consume and interpret a work in diverse ways (*Héritiers Bernanos c. Soc. « Champs-Élysées Productions »*, 1961 and *Charteris et autre c. Soc. Intermondia-Films*, 1968). Later, this justification for changes was overturned when the author of a work which had suffered an unfaithful adaptation, stepped forward to express his grievances (*Christopher Frank c. Société Sofracima*, 1979).

In general to represent a defective publication as an authentic work and thereby to mislead readers, is a violation of the right of integrity (*Caisse nationale des Lettres c. Soc. d'Éditions et de Diffusion artistiques, Agence parisienne de distribution et Marcireau*, 1964 and *Soc. des gens de lettres c. Soc. des films Marceau et autres*, 1966). By the same token the assignment of a text to a named author must be an indication of the author's consent to the published form of the text and to the way his text, is presented, to certain elements of the paratext (*S.A. Librairie Larousse c. André Hodeir*, 1986; *Soc. Éditions des Femmes c. Mme Farny*, 1988; *Moritz c. Soc. anon. Éditions Denoël*, 1987; *Chambelland et autre c. Paseyro*, 1993 and *Sté Edita et Sté Le comptoir du livre c. Jean Fondin et Jaques Remise*, 1994).

#### **IV Commentary**

Since 1814 literary works have been protected against modifications of numerous kinds: alteration, corrections, additions, omissions, supplements, suppressions, etc. Decisions in the period from 1880 to 1928, Stig Strömholm notes, developed a consistent protection of the right of integrity.<sup>386</sup> Authors were granted a right to protest against editors' revisions of their texts where revisions were could be said to distort or destroy the contents of the texts. Protection, however, did not exist for the sake of the literary

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<sup>386</sup> *Ibid.*

works themselves. Indeed, as Debois remarks, revisions may often be desirable to refine or improve a work.<sup>387</sup> But, as Pouillet emphasises, even well-founded corrections—say, corrections of data—are not allowed without the author’s permission.<sup>388</sup> The right of integrity was thus never a means for the conservation or stabilisation of texts. Rather it came into existence for the sake of the author as a private person with a legal responsibility. In the words of Pouillet: ‘Son droit est absolu, comme sa responsabilité devant la public’ (371): the author was to have absolute control over the printed version of his text so as to ensure that he was not made liable for a text he had not written. This included the paratextual features that would also be associated with the name that appeared on the volume. At worst a work ascribed to him might be libellous or might bring his name into disrepute. At this point, however, it is worth remembering that the right of integrity is not an absolute right. Adaptation, for example, is a mode of exploitation of a work within which alteration is by definition permitted. Moreover, editors who are not allowed to change submitted text have the option of withdrawing from the publishing contract if, say, they believe the work will disturb public order.<sup>389</sup>

It is significant that even though we speak of the ‘right of the author’ and of the ‘integrity of a literary work’ a main question of the analysed cases relate to the *reception* of the work. A common feature of all the decisions—representing case law over almost two centuries—is the awareness of the role of the public. As in *Larousse* where it is found that 1) given positive reactions from critics and readers, modifications of a work are not deemed harmful to the author’s reputation. And 2) if readers have been deceived into thinking that the text was the author’s unrevised work, his right of integrity has been infringed. In our cases courts continue to emphasize the need of the public to be protected against deception: there must be a guarantee that the name

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<sup>387</sup> Henri Desbois, *Le droit d’auteur en France* (Paris: Dalloz, 1966 (1950)), p. 488f

<sup>388</sup> Pouillet, Eugène, Georges Maillard, and Charles Claro. *Traité théorique et pratique de la propriété littéraire et artistique et du droit de représentation*. 3 ed. (Paris: 1908), p. 363. This is still the case. However the law distinguishes between genres. As regards for instance historical, biographical and pedagogical works the editor can propose modifications that concern ‘inexactitudes d’information, qui échappent à toute discussion’ and written consent by the author is not always required. Works of science, on the contrary, may not be subjected to revisions. Works of fiction may only be revised on the basis of common accord between the parties. See Henri Desbois, *Le droit d’auteur en France* (Paris: Dalloz, 1966 (1950)), p. 492ff and André Lucas and Henri-Jacques Lucas, *Traité de la Propriété Littéraire et Artistique*, 2 ed. (Paris: Édition Litec, 2001), pp. 336ff.

<sup>389</sup> Henri Desbois, *Le droit d’auteur en France* (Paris: Dalloz, 1966 (1950)), p.484 and p.487

subjoined to a text refers to the person who has written it, and that that person has given his consent to its publication. In *Bernanos* and *Charteris*, it was held that a cinema audience would appreciate the conditions for the diverging uses of effects in diverse media. Therefore the public would not be misled. Significantly, *Frank*, which did not follow *Bernanos* and *Charteris*, stands out among our cases. In all decisions except *Frank* the public reception of the work plays a decisive role. We will return to the reasons for this anomaly.

The two main issues of integrity rights protection of literary works in France—the author’s responsibility and the public interest in accuracy—are in line with Kant’s characterization of copyright. As we know, according to Kant, it is the immaterial element of a book, ‘*die Rede*’: the ‘speech’, which deserves exclusive protection. The ‘speech’ of a literary work is the author’s address to the public. And the author, whose name is tied to his book, is responsible in perpetuity for what he has uttered in public. Kant emphasises that a literary work is a piece of communication between an author and the public. Because of his responsibility for the published volume, the author needs an exclusive right to publication along with full control of what gets published. The public, conversely, relies on the printed book for access to the author’s ‘speech’ and needs assurance that the book is an accurate expression of the author’s intention. As is clear, Kant’s concept of copyright has much in common with the principles of the right of integrity; infringement of copyright would be a violation of the author’s—as well as the public’s—right to let the author speak under his own name.

## 2. THE RIGHT OF INTEGRITY IN WORKS OF ART

### I Before statutory protection

As we have seen the right of integrity was first recognised in relation to texts. A similar right in artworks emerged a few decades later, and this presented courts with fresh problems. Desbois cites two early cases. In the *Affaire Frénet* (1857) it was ruled that the purchaser of a fresco—of which the artist had reserved the right of reproduction—had the right to destroy it.<sup>390</sup> Unless specified otherwise by contract, there could be no exception to the absolute property right of the purchaser. However, a decision from 1862 turned in favour of the artist. In this case the purchaser of a statuette, meant for reproduction in bronze, had attempted to use the statuette as the main component of a candelabra. He was denied permission to include the sculpture in a new composition.<sup>391</sup>

Pouillet lists a number of cases from the 1890s. In 1894 the publisher of a journal was found not to have the right to modify an artistic work. The publisher had made suppressions among a series of designs to be published. Although, as the court acknowledged, the suppressed parts were of minor importance and the alterations almost unfelt, it was an offence to change a series which was intended to appear as a whole.<sup>392</sup> In 1894 the Tribunal of the Seine ruled that a copyrightholder—who was also the owner of a marble reproduction of a sculpture—is not allowed, without authorization from the artist, to break the unity of the artistic composition and sell fragments of the work. In other words, the copyrightholder was not allowed to make partial reproductions of the sculpture.<sup>393</sup> In 1896 a pictorial artist was granted the right to prevent the publication of a painting of his in which he had been made to accept a modification. The artist did not hold the copyright of the work.<sup>394</sup> A ruling from 1904 confirms that the publisher of the reproduction of a sculpture may not depict the work

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<sup>390</sup> Trib.civ.Seine, 24 déc.1857. See Henri Desbois, *Le droit d'auteur en France* (Paris: Dalloz, 1966 (1950)), p.395.

<sup>391</sup> Trib.civ.Seine, 31 déc 1862 . *Ibid.*

<sup>392</sup> Trib.civ.Seine, 7 avril 1894. Eugène Pouillet, Georges Maillard and Charles Claro, *Traité théorique et pratique de la propriété littéraire et artistique et du droit de représentation*, 3 ed. (Paris: Marchal et Billard, 1908), p. 367.

<sup>393</sup> Trib.civ.Seine, 29 oct. 1894. *Ibid.*, p. 368

<sup>394</sup> Trib.civ.Seine, 29 déc 1896. *Ibid.*, p. 367

upside down. The Tribunal found that an inversion distorted the balance of the original work.<sup>395</sup>

Several cases concerning integrity rights in artworks were tried in the higher courts. We shall take a closer look at six such cases from the period between 1850 and 1932.

A visual artist, Jean-Baptiste Clésinger—who was involved in a number of lawsuits—was the plaintiff in *Clésinger et Launeville c. Gauvain et cons*, in 1850.<sup>396</sup> At the centre of the dispute was a sculpture by Clésinger with the title ‘Femme piquée par un serpent’ of which infringing copies had been made.<sup>397</sup> Clésinger had been commissioned in 1846 by M. Mosselmann to make the sculpture for the price of 8000F. Clésinger gave up all rights in his work and Mosselmann acquired the exclusive right of reproduction and sale. In 1849 Mosselmann sold the sculpture to M. Launeville. A stipulation of the sale was that Mosselmann, still the holder of the copyright, would not make any use of it; he would not attempt to make reproductions of the work. Launeville, on his part, also obliged himself not to make any reproductions. Furthermore, any future sale of the sculpture was to be made under the condition that no reproductions be made. Launeville, the owner of the sculpture at the time of the offence, was to become the second plaintiff of the case.

The offence of M. Gauvain, the primary defendant, consisted of making a series of reproductions of the ‘Femme piquée par un serpent.’ However, while they were unmistakably reproductions of Clésinger’s sculpture, the casts deviated in certain details. For instance, a child had been appended in a ‘position non équivoque,’<sup>398</sup> adding an immoral aspect to the work. The serpent had been omitted; this gave the sculpture ‘un caractère tout autre que celui qu’a entendue lui donner l’auteur.’ (14) The changes made the casts appear with a wholly different character than that of Clésinger’s

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<sup>395</sup> Trib.civ.Seine, 2 juin 1904. *Ibid.*, p. 368

<sup>396</sup> *Clésinger et Launeville c. Gauvain et cons*. Trib. Corr. de Paris, 5 janv. 1850, D.1850.3.14

<sup>397</sup> Auguste Jean-Baptiste Clésinger’s (1814-1883) marble sculpture ‘Woman bitten by a Snake’ had caused a scandal at the Paris Salon in 1847. The rumour went that the daring sculpture had been taken from life: from the model Appoline Sabatier. Today the sculpture is to be found in the collection of Musée d’Orsay.

<sup>398</sup> *Ibid.* p. 14

sculpture. Gauvain's moulds were lacking altogether any sign of an attempt to reproduce the sculpture in a 'decent' or 'moral' way.

As sanctioned by the 1793 Act, the *contrefaçons* were seized. The seizure became an issue in itself during the case. It was asked how it could be legitimate for Clésinger, who had given up his copyright, and for Launeville, who had never owned the copyright, to claim seizure. The Court, however, declared that the contracts stipulating that no reproductions be made by the two did not imply that the work had fallen into the public domain. On the contrary, 'l'artiste, auteur de la statue, a action contre les contrefacteurs s'il justifie d'un intérêt légitime poursuivre le délit.'(14) If the author of an artwork can demonstrate legitimate interest in prosecuting the offence he is justified in taking legal action. The court then clarified that 'indépendamment de l'intérêt pécuniaire, il existe pour l'artiste un intérêt plus précieux, celui de réputation.'(14) Independently of the pecuniary interest an artist needs protection of his reputation – which is the more precious to him. The diverging details of Gauvain's reproductions made them offensive to Clésinger's reputation as an artist. Launeville, too, had a legitimate interest in protection. As the possessor of an artwork his concern was to preserve the uniqueness of the work. Clésinger and Launeville were thus well founded in the suit that involved 'contrefaçons et préjudice matériel et moral.'(14)

Gauvain defended himself by reference to the fact that he had bought a copy—an *épreuve*—of the sculpture and used it as a model. This defence was in vain: the vendor was in no position to transfer to the purchaser a right of reproduction. He could not claim to have been in good faith, either, as Clésinger was 'connu de tout le monde artistique' and consequently 'tout détenteur d'épreuves contrefaites ne peut ignorer le nom d'auteur.'(14) Due to Clésinger well-established reputation no holder of a copy of his sculpture could be ignorant of the name of its author.

Gauvain was found by the Court to be the main culprit of the offence. He had not only 'contrefait l'œuvre de Clésinger' but in addition carried 'une atteinte grave à l'honneur et à la considération de de cet artiste.'(14) Not only had he produced infringing copies of Clésinger's work. Harm had also been done to the honour and prestige of the artist. Gauvain, therefore, was made to pay damages of 300 F to each of the plaintiffs. The second defendant, Piétri (or Pietry), was found guilty of having

effectuated the production and sale of a substantial number of statuettes. He was sentenced to damages of two times 200 F. Finally, the Court ordered the confiscation and destruction of the *contrefaçons*.

The case was appealed by all parties. The second court, the Cour de Paris, confirmed all elements of the first judgment but one, which was permitted reconsideration. In *Clésinger C. Gavin* the Court accordingly declared Clésinger ‘non revable dans son action.’<sup>399</sup> It was ruled that as Clésinger had given up all his rights in the ‘Femme piquée par un serpent’ he was not justified in his suit. The artist had claimed that Gauvain’s reproduction of the sculpture was defamatory; it prejudiced his ‘réputation d’auteur et d’artiste.’(159) The Court’s response was that this was not *contrefaçon*. Clésinger was in no position to receive damages. Launeville’s claims, however, were acknowledged. As the owner of the sculpture his right of protection against *contrefaçons* was acknowledged, notwithstanding any other agreements.

In a similar vein to *Clésinger*, the Court of Appeal rejected the claims of an architect in 1870. *Saint-Paul c. Pochet* concerned the right to preserve the integrity of an architectural work.<sup>400</sup> Pocher, an architect, was commissioned by Saint-Paul to renovate the façade of a block of houses: n<sup>os</sup> 14-17 rue Impériale in Marseille. The contract between the parties contained a clause allowing the architect to engrave his name into the facades of the buildings.

The architect surveyed the execution of the work almost till its completion. At that stage Saint-Paul attached two statues at the gate of number 17 ‘du plus mauvais goût, et dont l’exécution est si peu conforme aux règles de l’art, qu’elles avaient été refusées pour le portail d l’îlot 14.’(101) Two statues of such bad taste that they had been refused by number 14 were placed in front of number 17. According to the plans of the architect no statues had been planned for the facade of number 17. It had been designed in a simple and non-ornamental style. The first Court held that while, in principle, a house-owner has the right to change and modify his building and not to

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<sup>399</sup> Cour de Paris, 6 avr. 1850, D. 1852.2.159, p. 159

<sup>400</sup> *Saint-Paul c. Pochet*, Cour d’Aix, 18 juin 1868, D.1870.2.101. Appeal of *Pochet c. Saint-Paul*, Trib.civ. de Marseille, 17 janv. 1868.

follow the plans for a redecoration, this case was not as simple as that. The fact that the architect had reserved the right to inscribe his name on the façade—and partly due to this had received a lower price than was usual for a facade renovation—suggested a right that the facade was to conform to Pochet’s plans, and that no modifications were to be made. This included a right to object to (tasteless) statues covering the facade. As with other works of authorship, the author of an architectural work is not to ‘signer un ouvrage d’art qui aurait été modifié et dénaturé sans son concours et son approbation.’<sup>401</sup> An author ought not to sign a work that has been modified or distorted without his consent.

The Tribunal of Marseilles awarded Pochet damages of 600F and ordered Saint-Paul to restore the facade according to the architect’s plans. The Court of Appeals overturned the judgment. The Court ruled that the right of a property owner to absolute command of his property was not diminished by the contract between the two parties. Pochet was, therefore, not justified in his claim to have the statues removed. There was no foundation for damages either.

In 1877, Clésinger, again, became party to a legal dispute over the reproduction of his sculptures.<sup>402</sup> *Hellbronner c. Clésinger et syndic Mosler* does not deal directly with the right of integrity but its main issues are of relevance for the concept of integrity rights. One question concerned an artist’s right of ‘distortion’ of his own work. In 1869 Clésinger had sold a number of sculptures, including the copyrights in the works, to the *Société des marbres et bronzes artistiques de Paris* (whose legal representative was M. Hellbronner: the plaintiff). It was furthermore agreed that the artist would surrender all future models of the sculptures to the *Société*. However, various discrepancies occurred between the parties. Clésinger, despite his contract with the *Société*, went ahead and sold copies—or ‘répétitions’—of the sculptures to a third party. Hellbronner responded by accusing Clésinger of infringing the Society’s copyright in the works. Meanwhile, Clésinger had offered a series of works to the Society, which the Society had refused on

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<sup>401</sup> *Pochet c. Saint-Paul*, Trib.civ. de Marseille, 17 janv. 1868

<sup>402</sup> *Hellbronner c. Clésinger et syndic Mosler*, Cour de Paris, 3 mai 1878. D. 1879.2.11. Appeal from Trib. Civ. De la Seine, 17août 1877

the grounds that they were ‘absolument défectueuses sous le rapport de l’idée, de la forme ou de travail, ou ne porteraient pas la marque sincère de la main de Clésinger.’<sup>403</sup>

The pieces were claimed to be defective. They were considered incomplete in respect of idea, form and execution; the mark of the artist’s hand was distorted. The crux of the trial then became the questions of whether an artist is justified in repeating himself in new works and whether he can be said to misrepresent himself. On the first question, the Court declared that an artist is capable of infringing the copyright in his own work if he has indeed transferred the right to another: ‘il est devenu lui-même un tiers au regard de son cessionnaire.’ The artist then has no further rights in the work. Producing similar works would therefore constitute ‘contrefaçon ou, tout au moins, un fait de concurrence illicite.’(14) It would amount to unfair competition to make more copies of a work. Even so, only servile copying would cause the artist to infringe copyright in his own creations. In the field of visual art, similarities are to be tolerated due to the nature of art. Forms and themes repeat themselves. The Court was relying on expert testimonies to formulate this argument.<sup>404</sup> For an artwork to be deemed original in spite of repetitions of previous works it suffices to discern that

la pensée en soit autre, ou que les formes différent, ou que les dissemblances dans l’attitude, le geste ou le costume ne permettant pas entre les productions comparées entre elles une confusion de nature à déprécier la valeur de la première œuvre originale. (15)

Any difference in idea, form, approach, gesture or details that prevent confusion between the first and the second work is enough to render the second work original. The Court ruled that Clésinger had met these conditions, and, accordingly, had not infringed the copyright of the *Société des marbres et bronzes artistiques de Paris*.

On the issue of self-misrepresentation the statements by the art experts were once again relied on to confirm that the value of the pieces of work refused by the Society were incontestably the products of Clésinger’s artistic talent. Commissioning an

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<sup>403</sup> *Ibid.*, p. 14

<sup>404</sup> See *Ibid.*, p. 13

artist to create a work is to confide in his name and his signature. An artist may sometimes ‘s’elever’—improve himself—and his talent may also sometimes ‘descendre’ – deteriorate. But what matters for a commissioned work is that ‘l’œuvre livrée émane de lui, qu’elle porte, comme le disent les experts, le même air de famille, et qu’elle ait les mêmes mérites que ses autres productions.’(15) It sufficed that the delivered works emanated from Clésinger, that they shared likenesses with and carried the qualities of his work in general. Thus, the Court concluded that the works that were refused by the Society were all sufficiently original and independent to be up to the standard of Clésinger’s standard. They were executed and signed by him and were therefore in no way to be considered distorted, defective or incomplete. Hellbronner’s claims were rejected and Clésinger was awarded damages of 15,000F.

A case from 1899, *Agnès dit A. Sorel c. Fayard frères*, concerned cartoons.<sup>405</sup> Agnès was a cartoonist who worked under the pseudonym A. Sorel.<sup>406</sup> He published silhouettes with coloured backgrounds accompanied by stories and dialogue in a magazine called *Caricature*. The *Caricature* was originally published by a man called Stock, who then sold the magazine, including copyrights to the defendants, the Fayard brothers.<sup>407</sup> The artistic property of a cartoonist in his drawings was not disputed. That transfer of the property had taken place was not in question either. Agnès had conveyed the copyright in his cartoons to the first publisher, Stock, who subsequently handed it over to the Fayard Brothers. There was thus no pecuniary interest involved in the lawsuit. After the transfer of ownership a number of Agnès’ silhouettes appeared in another magazine – published also by the Fayard brothers – called *Jeunesse amusante*. The cartoons, however, appeared with alterations of legends and backgrounds. The dimensions of the figures had been changed too.

The Tribunal of the Seine declared that although an artist sells his work he

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<sup>405</sup> Trib. Civ. de la Seine 16 déc 1899; D.1900.2.152

<sup>406</sup> Not to be confused with Agnes Sorel (1421-1450), the mistress of King Charles VII of France.

<sup>407</sup> Now *Editions Fayard* (founded in 1857).

n'aliène pas l'espérance de réputation que peut lui assurer la publicité, parce qu'il s'agit là d'une chose inaliénable; qu'il a donc le droit, même lorsqu'il est dépouillé de sa propriété par une vente sans réserves de se défendre contre un fait qui consiste à lui imputer une œuvre différente de la sienne.<sup>408</sup>

The author of an artistic work never yields his reliance upon his own reputation, which assures him publicity: it is inalienable. After the transaction of his work, the author has the unconditional right to protest against having alien works imputed to him. If the purchaser of an artwork wishes to publish the work it must appear in the way it was sold to him. The Court confirmed that it would be a violation of the rights of artists if the work was in any way altered, modified or changed without the consent of the artist. An artistic work is to be considered a whole 'les silhouettes de Sorel s'accouplent et forment avec le dessin pour réaliser une idée comique, se complètent et forment avec lui une œuvre indivisible.'(152) The dialogue and the designs complemented each other to realise an humorous idea. Thus, the Fayard brothers, changing

les legends et les dialogues des dessins de Sorel et les publiant ainsi modifiés, avec la signature de celui-ci, dans la *Jeuness amusante*, ont placé sous les yeux du public des matières étrangères à Sorel et dénaturé le composition de son œuvre; que c'est donc à bon droit qu'il se plaint des publication dont les défenseurs lui font encourir, malgré lui, la responsabilité. (152)

To change the legends and dialogue while publishing the cartoons over the signature of A. Sorel was to lay the responsibility at his door, notwithstanding his wishes (*malgré lui*).

When all this was said the court remarked that Fayard's was no *grave* offence: 'il est constant que la réputation de Sorel n'a pas été atteinte au point de lui causer un très grave préjudice.' (152) Sorel's reputation had not suffered serious injury.

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<sup>408</sup> *Ibid.*, p. 152

Damages, accordingly, were settled to the modest sum of 500F. Any further claims by Agnès were judged unfounded.

*Legout-Gérard c. Dufour* (1918) was an appeal from a 1912 judgment by the *Tribunal civil de la Seine*.<sup>409</sup> Fernand Legout-Gérard, who was the official painter to the French Marine Ministry, had exhibited two ‘tableaux marine’—seascapes—at the *Salon de la Société nationale des beaux-arts* in 1903.<sup>410</sup> The illustrated catalogue of the exhibition showed a picture of each of the two paintings along with the information that both had been sold. In 1906 or 1907 Dufour, an art dealer, commissioned a young pictorial artist called Luce, to make a seascape. In his painting Luce merged the two works of Legout-Gérard into a single composition. The new painting imitated Legout-Gérard’s pictures in the placements of boats, the positions of persons, the view of the coasts in the background and the reflections of the light on the water. Luce was paid 30F for his work and died soon afterwards. Dufour exhibited the painting in his shop in rue Mogador where Legout-Gérard discovered it five or six years later, in January 1912. The artist claimed 5000F in damages from the art dealer for prejudice caused by the *contrefaçon* as well as harm done to his artistic property. The painting was sequestered.

The first Court remarked that the claim was made on the condition that Legout-Gérard had not lost all his rights in his work at the sale of it. A technical problem of the case was the absence of the original. The exhibition catalogue supplied only an unsatisfactory idea of the original works. The Tribunal, accordingly, expressed difficulty in judging whether, in particular, the nuances, the colours and the mode of technique of Legout-Gérard’s painting had been imitated. Moreover, the Court thought it very likely that the painting by Luce was overall so different from the work of Legout-Gérard that no one would think of attributing Luce’s work to the artist. This threw in doubt the claim that a violation had taken place at all. Dufour, besides, had been in good faith, as was recognised even by the claimant. The low price affixed to the *contrefaçon*, its lack of a signature and the absence of any indication of the painting’s

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<sup>409</sup> *Legout-Gérard c. Dufour*, Cour de Paris, 26 janv. 1918, D.1918.2.49. Appeal from Trib. Civ. de la Seine, 23 déc. 1912.

<sup>410</sup> Fernand Legout-Gérard (1856-1924) received this honourable title in 1900. His marine paintings that often depict Breton fishermen and ports are shown in museums all over France.

relation to the renowned painter all supported Dufour's case. The Tribunal of the Seine, therefore, ruled Legout-Gérard unfounded in his demands.

Legout-Gérard appealed the decision, claiming damages as well as the destruction of the *contrefaçon*. The *Cour de Paris* agreed with the artist. It considered the first court to have been wrong, at first, to acknowledge that the imitation might have the character of a *contrefaçon* while, subsequently, to deny the claims of the artist. The artist's moral right—a right independent of the copyright—was recognised by the Court of Paris:

la vente que Legout-Gérard a pu faire des tableaux ainsi reproduits sans son autorisation ne l'a pas dépouillé de la faculté qu'il tient de son droit moral de poursuivre la destruction d'une œuvre susceptible de porter atteinte à celui-ci et qu'il est fondé à demander réparation du préjudice matériel et moral que lui cause l'exposition en vente de cette reproduction illicite. (51)

Legout-Gérard had not given up the rights in his works upon the sale of them. He maintained a moral right to have infringing copies destroyed. The Court also agreed that the artist was well-founded in bringing a claim against anyone who put up for sale an infringing reproduction, causing him material and moral harm.

Another issue raised by the Court of Appeals was that of the quality of the reproduction – as touched upon by the first court. The Court argued that

on ne saurait utilement discuter la question de savoir s'il a ou non imitation du genre de l'artiste, puisqu'on se trouve en présence d'une copie dûment constatée de deux œuvres parfaitement déterminées, émanées de Legout-Gérard et qui ont été fondues en une seules. (51)

In this case, where it was fully established that the reproduction originated from Legout-Gérard's original, it would be futile to discuss whether the reproduction imitated the manner of the artist. It was likewise of little importance whether the reproduction was crude (*grossière*): this circumstance did not exclude the fact that there had been

infringement. On the contrary, it aggravated the violation of the rights and interests of the artist. The *Cour de Paris* invalidated the previous decision and ruled in favour of Legout-Gérard. Dufour was found guilty of having offered a *contrefaçon* for sale, not for having commissioned one. He was ordered to destroy it and to pay damages of 1F to the artist.

*Lacasse et Welcome c. Abbé Quénard*<sup>411</sup> (1832) was a case that concerned the destruction of frescoes in the Saint-Dominique Chapel in Juvisy-sur-Orge in Île de France, south-west of Paris. Welcome, one of the claimants, had offered to provide the larger share of the expenses for the decoration of the chapel. Welcome and the minister, Père Mouthiez, selected the artist jointly. The Saint-Dominique Chapel, which had been built in 1929, had been erected on land acquired by *l'association diocésaine de Seine-et-Oise* and on funds supplied by the association. It was not contested at the trial that the chapel was the property of the diocese and that it was governed according to its bylaws. Even so, the diocese had never been consulted on the matter of decoration. Once completed, the character of the frescoes turned out to be offensive to the taste of the religious community. Abbé Quénard—who was also the head of the diocese—on popular demand ordered a whitewash of the walls of the chapel without notifying the artist, let alone asking his permission. The diocese trusted this to be a fully legal destruction: the frescoes were their rightful property (they were exercising their right of ‘*abusus*’).

The artist, Lacasse, did not agree. He claimed that his right of integrity had been violated. The Tribunal civil de Versailles confirmed this in principle. The Court declared that in such a case, where no contract between the artist and the proprietor of the work existed, there is an ‘obligation négative’ of the proprietor not to destroy the work. The Diocese was thus not in a position to ‘user de la plénitude de son droit de destruction des peintures qu’elle ne jugeait pas convenir à la place qu’elles occupaient, sans avoir averti de son intention.’(488) The property rights of the owner of a piece of art were judged to be somewhat restricted by an obligation to preserve the work or at least to notify its author of any intention to destroy it. Lacasse was not found justified in

his claims but he was granted a symbolic victory in that the defendant's destruction of the artwork was 'condamné'. The Court declared that it was unlikely that the Diocese would not have been familiar with the name and address of the artist: the decoration of the chapel had lasted six months. Hence, the Diocese ought to have let him know of its 'intention de ne pas conserver dans un édifice qui lui appartenait, des peintures qu'il ne lui convenait pas d'y admettre.'(488)

While the Court found that the harm done to the artist—already remunerated for his work—lacked substance for any pecuniary reparation, Welcome's claims were acknowledged. Welcome had been the sponsor of an altruistic cause: the decoration of the chapel. He was awarded 1F in damages for the harm done to his investment and good intentions. The Court of Appeal, however, overturned the decision.<sup>412</sup> Lacasse was deprived of his symbolic victory. The *Cour de Paris* ruled that 'le droit de propriété comprend comme un de ses attributs naturels le droit de disposer de la chose et la détruire.'(386) Nothing in the case gave cause to exemption from the ordinary rules of property right.<sup>413</sup> There was no agreement stating otherwise between the artist and the proprietor. Both Lacasse and Welcome were ill-founded in their complaint against *Abbé Quénard*, whose destruction and lack of notification had been completely legal. Thus, the 'condamnation' of the *Abbé* was rescinded.

The clash between physical and immaterial ownership—as present in *L'affaire des fresques de Juvisy*—became an increasingly central problem in relation to the exercise of the right of integrity. Protecting moral rights obviously interfered with the full enjoyment of the rights of property owners. This conflict was most pressing in relation to the rights of disclosure and of regret and withdrawal. A real battle between the spirit and the matter thus took place in such legal disputes. In the following, accordingly, a few central cases will be looked at. First we will examine two cases relating to the ownership of manuscripts as opposed to ownership of literary works. Subsequently, we

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<sup>411</sup> *Lacasse et Welcome c. Abbé Quénard*, Trib. civ. de Versailles 23 juin 1932; D.H.1932.487.

<sup>412</sup> *Cour de Paris*, 27 avr. 1934; D.H.1934.385.

<sup>413</sup> As defined by the Code Civil, article 544.

will consider four cases—three of them landmark cases—pertaining to the rights of *divulgation* and of *retrait et repentir*.

The Law of 9 April 1910 defined the distinction between ownership of the first copy and of the right to copy.<sup>414</sup> Article L. 111-3 of the present Intellectual Property Code dictates that ‘La propriété incorporelle défini par l’article L.111-1 est indépendante de la propriété de l’objet matériel.’<sup>415</sup> Before 1910 Courts were negotiating the competing claims to works of literature and art. For example, in 1870 the Court of Appeal decided, in *De Chapuys-Montlaville c. Guillabert*, that a manuscript is to be considered devoid of pecuniary value until its author regard it as ready to be published. The defendant of the case had published letters sent to him by his friend, the late Baron Chapuys-Montlaville. The heir of the Baron took legal action on the part of the deceased. And the Court found the claimant justified in that

la pensée, alors même qu’elle est fixée par écrit, reste la propriété personnelle et exclusive de celui qui l’a produite, et qu’elle ne prend la nature des biens [...] que dans le cas où son auteur, par un acte de sa volonté, l’a dépouillée de son caractère intime pour la livrer à la publicité et la faire entrer dans la circulation commerciale; qu’ainsi le manuscrit d’un auteur, resté en sa possession, demeure sa chose propre, et que nul autre qui lui n’est juge de la question de savoir si le manuscrit représente sa pensée actuelle, s’il a reçu sa forme définitive et s’il doit devenir public à une époque quelconque.<sup>416</sup>

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<sup>414</sup> *La loi du 9 avril 1910*; DP 1911.4.32. The essence of the law was that ‘alienation d’une oeuvre d’art n’entraîne pas, à moins de convention contraire, l’aliénation du droit de reproduction.’

<sup>415</sup> The issue continues to be negotiated in court rooms. As recently as 1983 the Cour de Cassation ruled in a case that concerned the conflict between ownership of a cinematographic film and the right of showing it. The Supreme Court cited the 1957 Act and ruled that ‘toute représentation faite sans le consentement de l’auteur est illicite, que, si cependant l’acquéreur de l’objet matériel peut être investi du droit de représentation, c’est à la condition que le contrat de cession le mentionne expressément.’ *Cour de Cassation*, 11 octobre 1983; 119 RIDA janv. 1984, 196, p. 196.

<sup>416</sup> *De Chapuys-Montlaville c. Guillabert*, Cour de Dijon, 18 févr. 1870; D.1871.2.221.

The ideas of the author remain with him as his personal and exclusive property, even after their fixation by writing. The manuscript is not a commercial product. Only by the will of the author does his work enter the commercial circuit. And only the author can judge whether a manuscript is a true representation of his ideas.

In a similar vein *Demoiselles Modot c. Nicoullaud, Plon et Nourrit*<sup>417</sup>(1911), which went to the Supreme Court, confirmed that ownership of a manuscript does not include the right to publish it. The Countess of Boigne had left the manuscript of her memoirs to her universal heir, her nephew Osmond d'Osmond, but left it in the charge of her friend the Duke d'Audiffret-Pasquier to publish it.<sup>418</sup> At the death of the Countess, Osmond inherited a copy of the manuscript (the Duke was left with the two other existing copies). At some point, Osmond entrusted his manuscript to the defendant of the case, Charles Nicoullaud. The latter was sued when he arranged to have the work published with *Plon et Nourrit*, the publisher.

Osmond's heirs were plaintiffs of the case; Osmond himself had died in 1904. The Court of Appeal decided in favour of the heirs, stating that Osmond had not handed over the manuscript to the defendant in a way to make it his property. Nicoullaud and *Plon et Nourrit* were ordered to return the manuscript to the claimants along with the profit of the sale of the memoirs. In 1919 the *Cour de Cassation* overturned the ruling as relating to *Plon et Nourrit*.<sup>419</sup> The Publisher was found to have acted in good faith. Still, the principles of the 1911 decision were confirmed. It was stated that

la propriété d'un ouvrage est distincte de celle du manuscrit qui le contient, et n'en forme pas une accessoire; et que cette propriété littéraire,

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<sup>417</sup> *Demoiselles Modot c. Nicoullaud, Plon et Nourrit* Cour de Paris, 8 mars 1911.

<sup>418</sup> The four volume *Mémoires de la comtesse de Boigné née d'Osmond publiée d'après le manuscrit original par M. Charles Nicoullaud* continues to be for sale today in both the Paris: Plon-Nourrit, 1907 and the Paris: Librairie Plon, 1908 editions (for 550 € and 180 € respectively) in spite of their illicit origins. Many new editions of the popular work, including an annotated edition by Mercure de France in 1971, have appeared in the course of the twentieth century.

<sup>419</sup> *Plon et Nourrit et C<sup>ie</sup> c. Demoiselles Modot*, Cour de Cassation, 26 févr. 1919; D.1923.1.215.

objet incorporel, n'étant pas susceptible de possession matérielle, ne peut être transmise au moyen d'un don manuel. (216)

Ownership of a work is distinct from ownership of the manuscript that contains the work. Owning the manuscript does not include any rights over the work, which is independent of ownership of the material object. Transfer of copyright cannot take place by the handing over of the object (the manuscript).

In legal disputes over artworks the conflict between authors' rights and (physical) property owners' rights can be complicated. For example, the *Affaire Rosa Bonheur* was a quarrel over a hypothetical work.<sup>420</sup> In 1865 this case tested the author's right of regret and withdrawal. Rosa Bonheur, who was probably the most famous woman artist of the nineteenth century, had been commissioned to do a painting for M. Pourchet.<sup>421</sup> Bonheur had agreed to this in 1860. In 1864, nevertheless, she explained in a letter that she lacked inspiration and could therefore not deliver the promised painting. Pourchet sued for breach of contract. The *Tribunal de la Seine* ruled that Bonheur—although she had received no payment for her work—had failed to fulfill her contractual obligation. When the artist appealed the *Cour de Paris* confirmed this decision. Bonheur was bound by an 'obligation de faire' (202). She was ordered to pay damages.

Such humiliations of artists came to an end with *William Eden c. Whistler*; a famous case that went to the *Cour de Cassation*.<sup>422</sup> The painter J.M. Whistler was fined at the first courts—like Bonheur—but won in the Supreme Court. At the heart of the dispute was a commissioned portrait of Lady Eden. (*Brown and Gold: Portrait of Lady Eden*

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<sup>420</sup> *Rosa Bonheur c. Pourchet*, Cour de Paris, 4 juill. 1865; D.1865.2.201.

<sup>421</sup> Rosa Maria Bonheur (1822-1899) was a realist painter most famous for her depictions of animals (especially horses) in photographic detail. As was very rare for women at the time, Bonheur pursued a successful career as a professional artist. She exhibited at the Paris Salon from 1841 onwards. She was the first woman to receive the Cross of the Legion of Honour. Famously, Rosa Bonheur had a police certificate giving her permission to dress as a man in public due to health reasons. The artist used the male attire when, for artistic reasons, she attended horse fairs and watched dissections in slaughterhouses where a woman's costume would make a stir.

<sup>422</sup> *William Eden c. Whistler*, Cour de Cassation, 14 mars 1900; D.1900.1.497. Appeal from Cour de Paris 2 déc. 1897; D.P.98.2.465.

(1894) now hanging in the Hunterian Art Gallery in Glasgow.) The story goes that Whistler was displeased with the advance payment from Sir William Eden who had ordered the painting of his wife. In court however the painter expressed dissatisfaction with his artistic achievement. In any event, Whistler failed to deliver the portrait to Sir William. After exhibiting it at the salon of *Champ des Mars* Whistler withdrew the painting and replaced the face of Lady Eden in the painting with—as the court had it—‘the face of another person.’

The first two courts had ordered Whistler to deliver the portrait – which, by then, had actually ceased to be a portrait of Lady Eden. The Supreme Court reversed the judgement and confirmed the painter’s right to refuse to deliver the portrait despite both the contract of commission and the advance. Commissioning an artist to make a painting at a fixed price, the court declared

constitue un contrat d’une nature spéciale, en vertu duquel la propriété du tableau n’est définitivement acquise à la partie qui l’a commandé, que lorsque l’artiste a mis ce tableau à sa disposition, et qu’il a été agréé par elle.(500)

It was ruled by the Supreme Court that the contract in which a painter engages himself to carry out a portrait is of a special nature in that commissioner’s ownership of the painting is not definite until the artist has left it at his disposition, having agreed to do so. Until that moment the painter remains the owner of his work. It is worth mentioning that the Court did stipulate that any advance sum must be returned. And, importantly, that the painter would not be free to sell the work to a third party. In this way a distinction was born between works of art and other things made to order. *Eden c. Whistler* defined works of authorship as goods of a special kind—different from other commodities—in relation to contracts.

A case from 1927, *Camoin et Syndicat de la Propriété artistique c. Francis Carco, Aubry, Belattre et Zborowski*<sup>423</sup> was heard by the Court of Appeals in Paris. The *Cour de Paris* confirmed the artists' right of disclosure.<sup>424</sup> Charles Camoin, the plaintiff, was a visual artist.<sup>425</sup> One evening in 1914 clearing up his studio he found himself dissatisfied with a number of paintings. He tore the canvasses out of their frames and ripped each of them into 6 or 8 pieces. He then threw the pieces in the rubbish bin. But this was not their final destination. The next morning the pieces were found by a rag picker who sold them to an art collector. The canvasses then passed through the hands of several owners, and at some point they were pieced together into their original form (*'toiles entière'*). Eleven years later, in 1925, Camoin discovered that four works by him had been put up for sale, and, moreover, that the works were identical with the ones that had long ago been torn to pieces and trashed. The restored paintings now belonged to the art collection of Francis Carco, the key defendant. A seizure was ordered on request from Camoin.

Camoin's main objection was to the works being *'divulgués'*—disclosed—as in the sales catalogue, without his consent. The legal battle then revolved around the conflict between physical ownership and the artist's rights in the immaterial image. According to Roman law the right of ownership of the canvasses had been forfeited when they were abandoned. When Camoin's case was upheld the *'droit de divulgation'*—the right of disclosure—was established in France. The justification for allowing this right—even at the expense of the right of property—was the special relationship between an artist and his work: only the artist knows when a work is ready—if ever—to be exposed to the public. By disclosing the restored work, the defendants had violated the author's personality, that which, in the words of the court, is the *'plus sacré et d'intangible.'* (93) An artist is entitled to unconstrained control over his work precisely because it is *'l'expression de sa pensée, de sa personnalité, de son talent, de son art, et l'on pourrait dire en termes de philosophie, son moi individual.'* (92)

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<sup>423</sup> Trib.Civ.de la Seine 15 nov 1927; DP.1928.2.89. Judgment confirmed in *Carco et autres c. Camoin et Syndicat de la propriété artistique* Cour D'Appel de Paris 6 mars 1931; DP.1931.2.88.

<sup>424</sup> For the right of disclosure see also *Cons. Bowers c. Cons. Bonnard-Terasse* Trib. De la Seine 10 oct 1951, D.1952.390; Cour de Paris 19 janv. 1953; Cass.civ. 4 déc. 1956; Cour d'appel d'Orleans, 18 févr. 1959; D.1959.440.

A work of authorship was characterized by the Court as the expression of its originator's thought, his personality, his talent, his art, and, in 'philosophical terms', of his individual self. The Court confirmed that seizure of the four restored canvasses had been legitimate and ordered damages of 5000F against each of the four defendants.

*Cons. Vollard c. Rouault*<sup>426</sup> was a principal case upholding the author's *droit de repentir*. Georges Rouault, one of the most important artists of the twentieth century, had used a room in the house of his art dealer, Vollard, as his atelier.<sup>427</sup> At the sudden death of Vollard, his heirs claimed the property right to 807 (eight-hundred-and-seven) of Rouault's works deposited at the estate of the deceased. Before his death Vollard had entered into a contract with Rouault regarding those works. At the time of his death, the works remained unfinished and the artist maintained that transfer of ownership had not yet taken place. Several facts supported his case. The paintings were not signed and it was mentioned in the contract that Rouault was authorized to alter them until he considered them finished. Moreover, Vollard had been careful separating finished and unfinished works in his house. Completed works were made inaccessible to the artist.

Rouault's claims were met with sympathy by the Court. It was ruled that according to the principle of the moral right of the author, 'la vente d'une toile inachevée n'a pas transféré la propriété, puisque, jusqu'à ce qu'elle ait atteint le degré de perfection dont le peintre est le seul juge' (98). Unfinished canvasses do not become the property of their purchasers until the artist—who is the sole judge of this—deems them to have reached the point of perfection. As a sign of its completion, we are told, it is customary for the artist to add his signature to his paintings. This gesture, the Court

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<sup>425</sup> Charles Camoin (1879-1965) was associated with *Fauvism* (1905-1906).

<sup>426</sup> *Cons. Vollard c. Rouault*, Cour de Paris, 19 mars 1947; D.1949.20. Appeal from *Rouault C. Cons. Vollard*, Trib.Civ.de la Seine, 10 juillet 1946; D.1947.2.98; S.1947.2.3.

<sup>427</sup> Georges Rouault (1871-1958) was also associated with Fauvism but later he became famous for his strong Christian motifs. Ambroise Vollard (1865-1939) had become Rouault's sole agent in 1916. Vollard had commissioned the artist to create one hundred prints for a two-volume book entitled *Misère et Guerre* where the images would be joined by poems by the poet André Suarès. Rouault to create the series of images used the complicated technique of heliogravure (photographing preliminary drawings to transfer them onto copper plates), followed by reworking each plate by the means of aquatint, drypoint and etching processes. As a result of this work method as many as fifteen successive impressions of each image were made. This accounts for the large number of works left in Rouault's atelier at Vollard's death. After the legal dispute had been settled Rouault published his collected prints in a single volume *Misère*.

declared, could be compared to the '*bon à tirer*'—ready to be published—put by writers on their completed manuscripts.

Ownership of Rouault's unfinished paintings had never been transferred to Vollard. This was confirmed by, first, the *Tribunal de la Seine* and, next, the Court of Appeals. The artist alone had the right to determine when his works were ready to be sold. The heirs of Vollard were ordered to hand over the paintings to the artist, and Rouault to return his advance payment.

## **II After *La loi du 11 mars 1957***

Since their confirmation by statutory law in 1957, artistic integrity rights have occasioned a series of controversial cases. Twenty cases have been selected here to display movements in the protection of integrity rights in works of art. Cases fall under five different headings. Firstly, four suits are over *modifications and distortions*. Secondly, some courts have understood integrity rights to protect *the personality of the artist* regardless of whether a particular work was involved. Five cases represent this view. Thirdly, conflicts between physical property rights and moral rights—especially in relation to *the right of destruction* of property owners—have become a recurring theme. Five of the cases test the limits of the property rights of art owners. Fourthly, a confusion between *originals and copies* have been a source of controversy in the protection of integrity right. Three cases deal with this. Lastly, in three cases *references* to an original work rather than a *reproduction proper* of it have been found to infringe the right of integrity of its artist.

### **a) Modifications and distortions**

The famous *Affaire Buffet* which was first heard in 1960 was concluded by the Supreme Court five years later, in 1965.<sup>428</sup> Bernard Buffet (1928-1999) had decorated six

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<sup>428</sup> *Bernard Buffet c. Fersing*, Trib.gr. inst. Seine, 7 June 1960; Cour d'Appel de Paris, 30 May 1962, D.1962.570; Cour de Cass., 6 July 1965, *Gaz. Pal.* 1965.2.126.

refrigerators with original paintings in 1958.<sup>429</sup> The refrigerators were sold at a public auction in a gallery for the benefit of a child charity. Buffet's work, named *Nature morte aux fruits*, had consisted of six tableaux in the shape of panels decorating each of the refrigerators: three covering the door, one attached on the top and one placed on each of the sides. M. Fersing, the defendant, was responsible for putting individual panels up for sale. He had bought one of the refrigerators and dismantled it in order to sell the panels individually at a higher price than what he had paid for them in their original setting. According to the first court Fersing was free to do as he pleased with his refrigerator as long as it remained within his home. Nothing could prevent him from hanging the tables on his own walls, but he was only allowed to sell the refrigerator as 'a work of art' if it were intact. The Court of Appeal rejected the decision and declared that Fersing had abused his right of property:

rien ne lui interdisait de rechercher à spéculer sur l'œuvre qu'il avait acquise, il ne pouvait le faire le faire qu'en la revendant dans son intégrité ; qu'en divulguant un fragment de cette œuvre, dans les conditions sus-rapportées, il a fait un usage abusive de son droit de propriété. (572)

As long as it remained intact it was not illegal to use the refrigerator as an object of economic speculation. But to divide it into fragments was an infringement of Buffet's right of respect in the work as a whole. The *Cour de Cassation* confirmed this and ruled that cutting the individual panels from the refrigerator had mutilated Buffet's work and destroyed its unity. Having bought it as a work of art the rules protecting such works must be conformed to. What was not addressed was the question of whether simple negligence would have amounted to infringement of the artist's right of integrity.

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<sup>429</sup> Bernard Buffet has enjoyed great popularity as a painter and engraver both in France and internationally. He received the *Prix de la Critique* (French critics' price) when he was merely twenty.

Like *Agnes* from 1899, a decision from 1983, *René Borg et autres c. Sté Eurodif*,<sup>430</sup> concerns cartoons. René Borg, the claimant, was one of a group of cartoonists who had created a set of animations called *Ulysse – 31*. In 1981 the right to use the animated characters in a series of ‘storybooks’ and colour albums had been transferred to a company named Eurodif, the defendant. Later in 1981 Eurodif went ahead and published eight books with the cartoons. At this point the claimants’ attention was drawn to the fact that the volumes edited by Eurodif represented ‘une image très déformée des personnages et qui ne peut que nuire à la série’(164). The cartoons were distorted to a degree that threatened to discredit the whole series in the view of an editor of children’s television programmes. Borg and his colleagues accordingly sued for breach of the right of integrity in the figures.<sup>431</sup> Two aspects of the claim that the cartoons were misrepresented were considered by the Court: the ‘*graphisme*’ (‘line’) of the characters and the ‘*caractère*’ (‘personality’) of the characters. As to the ‘line’ of the cartoons the poor execution had rendered them almost unrecognisable, according to the Court. In terms of the cartoons’ ‘personalities’ many changes had been made too. *Ulysse-31* had been created with all the properties of the Homeric character: good looks, courage, perseverance, audacity, etc. In Eurodif’s version he was represented as aggressive and violent, his face often deformed by grimaces. This amounted to a ‘déformation, presque systématique’ (169) of the principal character of *Ulysse-31*. Eurodif maintained that ‘le personnage d’*Ulysse-31* reflète parfaitement ce qui a été créé par les auteurs’ (169).

The judgement turned out in favour of the cartoonists. Eurodif was found to have infringed the integrity right of Borg and his colleagues. Damages were awarded against the company and the contract between the parties was annulled.

*Decharnes c. Soc. Le Figaro et autres* (1985) upheld a photographer’s right of integrity.<sup>432</sup> The claimant had portrayed a well-known painter whose latest work had thematised ‘the disaster.’ In the picture the painter figured in a tragic pose surrounded

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<sup>430</sup> *René Borg et autres c. Sté Eurodif* Trib. De Grande Instance de Paris, 1 décembre 1983, 120 RIDA avril 1984.

<sup>431</sup> The case also dealt with a number of other problems relating to the contract.

by symbolic objects. For technical reasons, *Le Figaro*, the defendant, had altered the picture for publication. Thus part of the symbolic decor of the picture did not appear in the newspaper. The Court ruled that it violated the photographer, Decharnes', right of integrity to alter the photograph in such a way as to remove 'de l'image l'ensemble du décor volontairement créé et mis en place par l'auteur, lequel fait partie intégrante et essentielle de l'œuvre en lui donnant sa signification profonde et son symbolisme' (184). Albeit merely the 'background' of the portrayed person the decor was not to be cut out. It constituted part of the composition and the Court acknowledged its symbolic contribution to the picture. *Le Figaro*, accordingly, was found guilty of having violated the Decharnes' right of integrity by presenting a partial reproduction of his photographic work.

*Fabris c. Loudmer*, which was heard by the court of appeal in 1991, dealt with the right of citation in relation to artworks.<sup>433</sup> Although the right of integrity was not officially in question the line of reasoning of the ruling is relevant to it. The defendant, Guy Loudmer, who was an art dealer, had published a catalogue in 1986 containing illustrations of paintings for sale. Among the represented works were two paintings by Maurice Utrillo<sup>434</sup> of which Jean Farbis, the plaintiff, owned the copyright. Farbis complained that Loudmer had infringed his right of reproduction. The Court, however, ruled in favour of the defendant. It was acknowledged that he had merely exercised his right of 'citation artistic.' Despite the fact that whole works had been reproduced the citations were found to be sufficiently 'short' as the format had been reduced considerably. There would hence be no risk of confusion or competition between actual reproductions and the citations. Furthermore, the Court noted, had Loudmer decided to show partial reproductions of the works he might well have made himself guilty of 'dénaturation': of infringement of the integrity right in the works.

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<sup>432</sup> *Decharnes c. Soc. Le Figaro et autres* TGI de Paris 26 June 1985, D.1986.184.

<sup>433</sup> *Fabris c. Loudmer* Cour d'appel de Versailles, 20 November 1991.

<sup>434</sup> Maurice Utrillo (1883-1955) was a renowned painter of urban scenes, especially of Montmartre in Paris. *Fabris c. Loudmer* is not the only court case over a catalogue that the artist has been involved in. While Utrillo was still alive a London gallery was showing a number of his works, stating in the catalogue that he had perished from alcohol. Maurice Utrillo then had to convince a British court that he was still alive and working.

**b) The personality of the author**

In the 1960s a few important cases tested the degree to which the artist as a person rather than the work of art was the legitimate object of integrity rights protection. *Guille c. Colmant* (1966),<sup>435</sup> a decision from the Court of Appeal in Paris, thus confirmed that an artist's right of integrity had been violated although no particular work was involved.<sup>436</sup> At the heart of the case was a contract dated 15 June 1963 between the two parties. François Guille, an artist, had agreed to deliver at least twenty paintings per month to Jean Colmant. The latter then selected some for resale while others were destroyed. In December the artist changed his mind about the arrangement and sold works intended for Colmant to a third party. Colmant accordingly sued for breach of contract and was awarded damages of 10,000 F in the first court. The Court of Appeal overruled the decision however. The contract between Guille and Colmant was found to infringe the artist's integrity right: 'il méconnaît le droit de Guille à sa qualité, en l'astreignant, pour une longue durée, à une rythme intensif et continue de travail qui devait inéluctablement nuire à sa renommée' (285). To compel an artist to produce such a large amount of paintings over a long period would necessarily harm his reputation. Furthermore, it was found that the contract 'méconnaît le droit de Guille au respect de son œuvre en prévoyant la destruction d'une partie de celle-ci, à la suite d'un choix arbitraire de Colmant' (285). Allowing Colmant, arbitrarily, to pick out a number of paintings for destruction violated Guille's right of integrity in his work in general. In other words, the artist's right of integrity had been infringed doubly: by another man's turning himself into the master of the destiny of the works, and by the harm his reputation had suffered from the overproduction of works. On these grounds the Court of Appeal annulled the contract between the parties.

A similar case, *Martin-Caille c. Bergerot* (1968),<sup>437</sup> went to the Supreme Court. Martin-Caille, the plaintiff, was an art dealer in Provence. The defendant, Bergerot, was an

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<sup>435</sup> *Guille c. Colmant* Cour d'Appel de Paris, 15 November 1966, D.1967.284

<sup>436</sup> An additional question of the right of paternity was tried in this case.

<sup>437</sup> *Martin-Caille c. Bergerot* Cour de Cassation, 3 December 1968, D.1969.2.73.

artist from the same region. In 1961, the latter had been engaged by Martin-Caille to deliver eight oil paintings and ten watercolours per month, and to be paid in return a retainer fee. Martin-Caille as a business practice calculated a market rate (*'côte'*) for art works, awarding points on the basis of motif, size, talent and distinction. The retail prices of paintings were then settled accordingly.

After a few years Bergerot failed to deliver the required number of works. Martin-Caille then started to lower the prices on Bergerot's works. He offered works by Bergerot, which had formerly been valued at 9000F, at a reduced price of 900F. In the first court the painter maintained that such drastic reductions in price would inevitably ruin his reputation and harm the overall value of his works. Bergerot, moreover, claimed that it was an infringement of his moral rights. The court in Nîmes was sympathetic and ordered Martin-Caille to pay damages; in addition, in the future, Martin-Caille was to sell Bergerot's paintings only after an art expert had estimated a fair price. Martin-Caille then took his case to the Court of Appeal where the judgement was overturned. No infringement of the artist's *droit moral* was acknowledged by the Court of Appeal. On the contrary it was declared that:

the distinction and reputation of an author or artist is not one of the aspects of his moral right and, accordingly, cannot be abusively compromised under the author's right to respect for his name, quality and work, the law protecting the rights of authors offering no specific defence of the distinction and reputation of an author and his work, inasmuch as these are constituted only by a social sanction of the value of the work and the merit of the artist, independently of any right to respect for the integrity of the work or for the paternity of the artist; only these are to be protected by the law.<sup>438</sup>

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<sup>438</sup> 'La notoriété et la réputation d'un auteur ne sont pas l'en des attributs de son droit moral et ne peuvent être abusivement comprises dans le droit du respect du nom, de la qualité et de l'œuvre de l'auteur, la loi n'accordant, sous l'angle du droit d'auteur, aucune protection spécifique à la notoriété et à la réputation de l'auteur et de son œuvre, lesquelles ne constituent qu'une sanction sociale de la valeur de l'œuvre et du mérite de l'artiste indépendante du respect de l'intégralité de l'œuvre, et de la paternité de l'artiste, seules protégées par la loi', p.76.

To put it briefly, according to the Court of Appeal, the law cannot recognise harm to the prestige or reputation of an artist, if the damage is not directly related to an actual work. But this decision was, in its turn, overruled by the *Cour de Cassation* which stated that the Court of Appeal had made a false or inappropriate application; and that the law does indeed protect the author's intellectual property rights as they relate to both the reputation of the artist and the pecuniary value of his work.<sup>439</sup> As confirmed in *Guille c. Colmant*, the right of integrity applies to the artist as a person and not merely to his creation, the work.

The third case in this category involves the celebrated French sculptor, Jean-Philippe Dubuffet (1901-85). *Dubuffet c. Régie Nationales des Usines Renault* was heard by the Supreme Court in 1980.<sup>440</sup> In 1973 the Renault factory had commissioned Dubuffet to create a monument for their site in Boulogne. Dubuffet made a model of the sculpture, called *Salon d'été*, and its construction was begun. Before its completion, however, Régie Renault halted the project and—without consulting or even informing Dubuffet—started to demolish the structure, allegedly because of a problem with its infrastructure. Dubuffet claimed that this was an infringement of his integrity right. No fewer than five cases were heard in various courts in the years 1977 to 1983. Crucial for the outcome of Dubuffet's case were two stipulations in the contract. First, it had been agreed that, if Renault failed to construct the monument, Dubuffet would receive compensation. The Tribunal and the Court of Appeal in Paris deduced from this that Renault had retained an option not to construct the monument. These courts agreed that a half-built structure could not be classified as an original work; Dubuffet discovered that he had no claim to any rights in this thing.

The second stipulation in the contract specified that Dubuffet would be consulted as to choice of materials, colours, etc. during the construction of the sculpture.

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<sup>439</sup> 'La cour d'appel a violé, par fausse application, le texte susvisé, qui ne protège que les droits de propriété incorporelle de l'auteur, quelle que soit sa notoriété ou la valeur de son œuvre', p.76.

<sup>440</sup> *Dubuffet c. Régie Nationales des Usines Renault* TGI de Paris, 23 March 1977, Cour d'Appel de Paris, 2 June 1978; Cour de Cassation, 8 January 1980, 104 RIDA April 1980; Cour d'appel de Versailles, 8 July 1981, 110 RIDA October 1981. *Régie Renault c/ J.-Philippe Dubuffet*, Cour de Cassation, 16 March 1983, 117 RIDA July 1983, p.80. At the 1983 case the *Cour de Cassation* was heard

This led the same courts to declare that Dubuffet could not therefore be regarded as the author of the monument. His rights were in the model only. The *Cour de Cassation*, however, annulled these judgements, on both counts, ruling that Dubuffet was the holder of rights not only in the model but also in the sculpture—albeit unfinished—realised on the basis of the model. The case was returned to the Court of Appeal in Versailles where the judge confirmed the decision of the *Cour de Cassation*, and stated that ‘one cannot dissociate the realisation of a model from the realisation of the monument.’<sup>441</sup>

The court decided that Dubuffet’s work consists of the ‘*conception*’ of the work. The model and the actual sculpture are worthy of protection on equal terms: both are manifestations of the work. And destroying a monument—whether complete or incomplete—is likewise a violation committed against the will (*‘la volonté’*) of the author. Renault was told that, by entering into contract with an artist—no matter the terms of the specific contract—they had ‘accepted responsibility for upholding Dubuffet’s interests in the construction of his work,’<sup>442</sup> and had committed themselves to ‘the effective and complete realisation of the work’<sup>443</sup> including its material realisation (*‘réalisation matérielle’*). The conclusion was that Renault had infringed Dubuffet’s rights, and Renault was ordered to resume construction of the monument. Apparently the monument was already demolished: it is nowhere to be seen today.

The famous cartoon Tintin was at the centre of a dispute in 1988. In *Mme Vve Hergé et autres c. Didier Wolf et autres*<sup>444</sup> the widow of the author of the Tintin series, *Aventures de Tintin*, claimed that her late husband’s moral rights had been infringed by a theatre piece. Hergé’s Tintin had been made the protagonist of the play *Coup de Crayon* by Didier Wolf. Wolf told the story about how Tintin, after the death of Hergé, met an

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as to whether Renault’s property right had been violated in the former decision. The Court rejected this claim and refused to invalidate the decision of the Court of Versailles.

<sup>441</sup> ‘On ne saurait dissocier le réalisation de la maquette et celle de l’œuvre monumentale’, p. 204.

<sup>442</sup> ‘Régie Renault a accepté de se charger des intérêts de Dubuffet dans l’édification de l’œuvre monumentale’, *Ibid.*

<sup>443</sup> ‘La réalisation effective et complète de l’œuvre’, *Ibid.*

<sup>444</sup> *Mme Vve Hergé et autres c. Didier Wolf et autres* TGI de Paris, 11 mai 1988, 142 RIDA, October, 1989, p. 344. Appeal to Cour d’Appel de Paris, 20 December, 1990, D.1991.532.

‘imaginary father’, a poor creature prone to alcohol and jealous of his son’s success. While both the first and the second Courts acknowledged that the plot and making of the play were original, it was also noted that the character created by Hergé was represented in the play with all physical and personal characteristics, dressed in his distinctive way. *Coup de Crayon*, furthermore, contained numerous references to the stories by Hergé and a character named *R.G.*—homophone with ‘Hergé’—had a part. Thus the reference to Hergé’s work was recurrent, if indirect. The first Court, the *Tribunal de Grande Instances de Paris*, remarked that the play offered a representation of the author’s ‘*univers du personnage*’(345).

Wolf and the theatre company argued that they had exercised their right of ‘*liberté d’expression*’ and that the play was a ‘*hommage*’: a tribute to Hergé. These claims, however, were not met with sympathy in any of the Courts. It was emphasized in the opinion of the Tribunal that depicting the familiar figure of Tintin in

situations totalement différentes de celles voulues par l’auteur au risque de dénaturer l’éthique de son œuvre, comme en faisant intervenir l’auteur désigné lui-même sous les initiales R.G., dont la ressemblance phonétique avec son nom est évidente, les défendeurs ont porté atteinte à l’intégrité de la création d’Hergé, et au droit moral de son héritière. (347)

Placing Hergé’s character in situations fundamentally different from those intended by the author carried the risk of distorting the ‘ethics’ of the author’s work ; letting Hergé himself appear under a homophone, the defendant likewise violated the integrity of the work. The Court of Appeal confirmed that violation had been done to the integrity of Hergé’s work. And added that due to the performance Tintin’s ‘*image est quelque peu modifiée dans l’esprit du public*’(533). Public feeling in relation to the figure was changed somewhat as a result of the play. Didier Wolf was ordered not to perform his play again and damages were awarded against him.

*Mlle Hong Yon Park et Spadem c. Association des Amis de la Chapelle de la Salpêtrière*, from 1995, confirms that the right of integrity protects authorial

intention.<sup>445</sup> Mlle Hong Yon Park is a visual artist who had made an agreement with the Society of Friends of the Chapel of Saint-Louis of the Saltpetre; the Chapel—which was a regular venue for shows of contemporary art—would house an exhibition of her work between 28 November and 20 December 1991. The dispute arose when the Society of Friends closed her exhibition after the *vernissage*. It was claimed by the Friends of the Chapel that they had been misled as to the type of work to be shown. Mlle Park had provided them with photos from an earlier exhibition. These works had been delicate little pictures and figures, which had appealed to the Friends of the Chapel. The installations put on display in the chapel, however, consisted of several rows of lavatory bowls put together with sanitary towels arranged in boxes bearing a resemblance to coffins. According to the Friends of the Chapel the installations were disrespectful of the surroundings. Mlle Park, on her part, complained that her right of integrity had been infringed. This was confirmed by the court, who found that the Society of Friends had obliged themselves to show Mlle Park's work. By dismantling the exhibition they had 'prevented the artist from showing her works in public.'<sup>446</sup> If the chapel had proved an inappropriate location, an alternative venue should have been provided. In the end the Friends of the Chapel were ordered to pay damages of 1F, and costs of 10,000 FF were awarded against them.

### **c) Destruction**

Many disputes over the right of integrity in works of art concern whether the ownership of the physical artwork includes a right of destruction. An aspect of *Dubuffet* was related to this question. Dubuffet's sculpture was not completed and the case is therefore atypical. In a number of other cases, however, the conflict is quite clear: whose right is dominant? Does the moral right of the creator prevail and prevent the destruction of a work of art? Or is the owner of the material artwork allowed to exercise his full property rights?

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<sup>445</sup> Cour d'appel de Paris, 10 April 1995, 166 RIDA October 1995.

<sup>446</sup> 'Qu'en agissant ainsi l'Association a définitivement empêché l'auteur de présenter son œuvre au public, sinon à l'intérieur de la Chapelle dans laquelle l'exposition avait contractuellement pris fin, du moins dans un autre ensemble architectural similaire ou équivalent', p. 323.

In *Scrive c. S.C.I. Centre commercial Rennes-Alma* (1975)<sup>447</sup> a conflict arose between the creator of a fountain and the owner of the *Alma* shopping centre in Rennes where the fountain served as decoration. In 1971 the directors of *Alma* had commissioned the sculptor, Scrive, to make a fountain. The fountain was placed in the hall of the centre as had been determined by the artist. It was made of a series of plastic tubes and the jets of water were illuminated by electric lights. Soon after the fountain had been erected a series of technical problems began to haunt it. A number of repairs were undertaken but water continued to leak on the floor of the hall. Not only did it make the floor slippery, the visitors were also at risk of electrocution. The spilled water constituted a conductor for the 220V electrical supplies for the lighting and the water pumps. Due to its danger to the public, the directors of *Alma* decided to have the fountain removed. Scrive complained that this was an infringement of his right of integrity. The first court did not agree with him: the directors were at liberty to dispose of their property as they saw fit. Yet it was acknowledged that in general the placement of a work of art is significant and that this might be considered in relation to the moral rights of artists. The Court of Appeal in Paris overturned the decision. A ‘juste et raisonnable équilibre entre la prétention à la pérennité d’une idée née du génie créateur de l’homme et le droit à la protection légitime d’un élément objectif du patrimoine’ (344). On the one hand ideas born out of the creative genius of man need safeguarding, on the other hand the legitimate rights of property owners are to receive protection. According to the contract between Scrive and the directors of *Alma* the fountain was to be placed ‘non à la jouissance exclusive et égoïste de son acquéreur, mais à la décoration du hall d’un centre commercial’ (344). The artist had expected his work to be enjoyed by a larger public and not just by its purchaser. He had had reason to believe that the fountain would be maintained by its owner. All these facts taken into consideration the directors of *Alma* had made themselves guilty of neglect of their obligations towards the artist. The Court accordingly ruled that Scrive’s right of integrity had been violated and the artist was awarded damages. However, Scrive’s demand that his work be resurrected was not accommodated.

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<sup>447</sup> *Scrive c. S.C.I. Centre commercial Rennes-Alma* Cour d’Appel de Paris, 10 July 1975, D.1977.342; 91 RIDA January 1977, p.114.

A ruling, *Sieur Roussel c. Ville de Grenoble* (1976),<sup>448</sup> a year after *Scrive*, rejected the demands of a sculptor whose work had been demolished. The *Tribunal Administratif de Grenoble* found that the artist's right of integrity had not been infringed. His sculpture had been exhibited in a public park for four years. In the judgement this time span was taken into consideration. The Court announced that

en maintenant ainsi cette œuvre exposée à la vue des promeneurs aussie longtemps que la sécurité n'était pas menacée, le maire de la ville de Grenoble a concilié les nécessités de la sécurité publique et le respect qui doit se'attacher au génie créateur de l'artiste et à son œuvre. (118)

The sculpture was built of iron that would naturally oxidize and break down. By exhibiting and maintaining the sculpture for four years before removing it the mayor of Grenoble had paid the sufficient respect to the moral rights of the artist. And he had taken the necessary precautions to protect the public. In this manner an appropriate balancing of the rights of the artist and of the property owner had been achieved.

*Roger Bezombes, A.D.A.G.P. c. M. L'Huillier et autres* (1980)<sup>449</sup> concerned a sculpture by Roger Bezombes (1913-) named *La condition humaine* which had been exhibited in church. In a deliberate act by members of the church community who found it blasphemous, the sculpture had been shattered. Contrary to the first court the Court of Appeal did not allow any provocative element of the sculpture to serve as a justification of the destruction. The defendants' claim of good faith as a defence of their act was not acceptable. It was ruled that the artist's right of integrity had been infringed. He was awarded damages and granted the right to have the judgment published in two newspapers of his own choice.

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<sup>448</sup> *Sieur Roussel c. Ville de Grenoble* Tribunal Administratif de Grenoble, 18 February 1976, 91 RIDA January 1977, p.116.

<sup>449</sup> *Roger Bezombes, A.D.A.G.P. c. M. L'Huillier et autres* Cour d'Appel de Paris, 25 November 1980, 108 RIDA April 1981, p.162.

A decision by the Supreme Court, *Hamon* (1986),<sup>450</sup> establishes that moral rights do not take precedence over the rules of public order: in this case the city plan. It was ruled that the *Code de l'urbanisme* applies to a sculpture; and that the sculpture had been erected illegally, without building permission. Order was accordingly given for the sculpture to be removed.

*Zobda et autre c. Mlle Farrugia et autres* (1996)<sup>451</sup> confirmed that the owner of frescoes decorating the inside of a church had a right to destroy them. The destruction had been ordered after it was discovered that the frescoes had been damaged by dampness. This was considered a valid reason for obliteration by the Court of Appeal. In view of the basis of the artwork, the artist was in no position to expect it to endure.

#### **d) Originals and copies**

Certain decisions debate whether the right of integrity relates to a unique (physical) original or whether the (immaterial) original work is consistently distinct from 'copies' of it. (This was also an element of *Dubuffet*.) In *Dame Adam et autre c. Dame Gatien et autre* (1971)<sup>452</sup> the dispute revolved around the sketches and patterns for a work of tapestry along with the tapestry itself. Adam, a sculptor, had designed the tapestry in 1951 while using the atelier of Dame Goubely. The latter then produced the tapestries according to Adam's directions and patterns, and delivered them to the artist. She, however, was never fully paid for her work. In 1964 Adam reclaimed his sketches and patterns that he had left in the atelier thirteen years ago. Dame Goubely replied by presenting him with the unpaid bill. Holding back his materials until he had paid up would normally be in accordance with a debtor's *droit de retenir*. This disagreement went to the Supreme Court. One of the major factors of the case was Adam's—and later the artist's widow's—claim that his right of integrity had been infringed by the retention of the sketches and patterns. The claim was rejected by the Supreme Court: the retention, in itself, did not constitute infringement of the artist's right of integrity. An

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<sup>450</sup> *Hamon* Cour de Cassation, 3 June 1986, D.1987.301.

<sup>451</sup> *Zobda et autre c. Mlle Farrugia et autres* Cour d'Appel de Basse-Terre, 30 Septemebr 1996, D.1998.58.

interesting line of reasoning preceded the dismissal. To establish that Adam was indeed the holder of the moral rights in the tapestry, a distinction was introduced between ‘*la conception*’ and ‘*la réalisation*’ of a work. It was noted that ‘le droit moral s’attache au fait de la création et non à la simple réalisation de l’œuvre, le réalisateur n’ayant aucune part à la création de celle-ci’ (489). Adam was the ‘creator’ of the work of tapestry. A sketch or a pattern by him was considered ‘*une œuvre inachevée*’: an unfinished work, liable for protection (490). And as the creator he was the holder of the moral rights. The fact that another had executed the tapestry was insignificant: the other was a mere ‘realisator’ without any share in the intellectual conception of the work. Therefore, it was recognized that the right of integrity applies only to the creator, not to the ‘*realisateur*’ even if this person has been responsible for carrying out the work.

The Supreme Court dealt with a similar problem in *Pierrel c. SCP Gérard Champin et Francis Lombrail* (1991).<sup>453</sup> Three bronze statues allegedly made from casting moulds by Rodin had been found not to conform to the exact dimensions of Rodin’s work. The *Cour de Cassation* decided that as a consequence the statues were to be considered reproductions rather than originals. And the *droit de suite* would accordingly not apply. Moreover, the Court affirmed that the Musée Rodin as the holder of the moral rights in Rodin’s works ‘garantissait seulement la qualité exceptionnelle et la fidélité à l’œuvre originale.’ (361) When a number of statues are made from one mould the same number of ‘originals’ come into existence. The *Cour de Cassation* declared that moral rights serve to guarantee and protect the quality and the accuracy of every version of Rodin’s original work. Statues that deviated from the original proportions were reproductions by definition. The right of integrity serves to assure the faithfulness of ‘originals.’ The inauthentic copies did not infringe the right of integrity; they were classified as reproductions instead.<sup>454</sup>

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<sup>452</sup> *Dame Adam et autre c. Dame Gatién et autre* Cour de Cassation, 4 June 1971, D.1971.489.

<sup>453</sup> *Pierrel c. SCP Gérard Champin et Francis Lombrail* Cour de Cassation, 5 November 1991, D.1992.361.

A decision that concerns the right of disclosure is relevant in the context of ‘originals and copies.’ According to the French Intellectual Property Code (Article L.335-6) infringing objects (*objets contrefaisants*) can be confiscated. This is typically taken to mean that infringing copies may be seized. In 1995 the Cour de Cassation ruled, in *Roger Bouvier et autres c. Jean-Pierre Cassigneul*,<sup>455</sup> that reproductions as well as unique artworks might constitute ‘infringing objects.’ Accordingly, the confiscation of a number of original paintings was legal.

#### **e) Reference/ reproduction**

Recently a number of decisions have affirmed that a visual reference to a work—for instance a brief display of the work in a film—is sufficient to constitute a reproduction of it. An unauthorized visual reference may thus infringe the right of integrity in a work. In *F. Pages c. Société Nationale de Télévision Française TFI* (1981)<sup>456</sup> a television station had shown brief film recordings of five photos from a magazine (*Paris-Match*) in a program called *Pleins Feux*. The photos, that were all in copyright, had been authorized for reproduction only in the magazine, and the Court of Appeal found that the representation in the broadcast amounted to an infringement of the photographer’s exploitation right. Moreover, as one of the photographs in the television program was displayed in part only, and without mention of the originator, the Court ruled that its author’s rights of integrity and paternity had been violated.

A similar case was heard also by the Court of Appeal. *S.A.Télé 2000 c. M. Claude Verlinde* (1986)<sup>457</sup> affirmed that the filming of a poster amounted to unauthorized reproduction of it. Claude Verlinde had designed a cartoon figure shaped like a spiral and had authorized the use of it on posters that announced the seventeenth *Festival de*

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<sup>454</sup> See also *Réunion des Musées nationaux et Athanasiou c. Époux Istrati*, Cour de Cassation, 20 December 1966, D.1967.159. Moral rights were not an issue in this case but the dispute concerned the making of doubles of works by Brancusi from moulds left by the late artist to the Istratis.

<sup>455</sup> *Roger Bouvier et autres c. Jean-Pierre Cassigneul* Cour de Cassation, 13 December 1995, 169 RIDA July 1996, p. 307.

<sup>456</sup> *F. Pages c. Société Nationale de Télévision Française TFI* Cour d’Appel de Paris, 13 February 1981, 112 RIDA April 1982, p.126.

<sup>457</sup> *S.A.Télé 2000 c. M.Claude Verlinde* (1986) Cour d’Appel de Paris, 17 December 1986, 136 RIDA April 1988, p.152.

*Marais* in 1980. Subsequently one of the posters appeared in a commercial advertising Ajax detergent. The public relations company Télé 2000 which was responsible for the advertisement claimed that the poster was merely one element, hardly distinguishable, of a whole kitchen interior appearing in the commercial. Besides, it was maintained, Verlinde had given up his right of reproduction to the *Association du Festival de Marais*. Verlinde, on his part, had complained that the slogan of ‘*la tornade blanche*’, which had been attached to the advertisement campaign, had now become associated with his spiral figure. The Court of Appeal agreed with Verlinde. It was ruled that Télé 2000 had ‘porté atteinte à ses droits patrimoniaux, qu’elle a également porté atteinte à ses droits moraux, son œuvre étant identifiable sur le film’ (154). Apart from his right of exploitation his right of integrity had been infringed. Although Verlinde did not hold the copyright in the posters it did not imply that he had stripped himself of the entirety of his exploitation rights in the spiral figure. He was thus ‘fondé [ ] à s’opposer à la reproduction de son œuvre sans son autorisation par une autre société et à d’autres fin’(154). Verlinde’s authorization was required by any other company that wished to exploit his work for some purpose other than announcing the *Festival de Marais*. As the spiral figure had been identifiable in the commercial, the right of integrity in it had also been infringed. Without authorization Verlinde’s work had been used for a sales purpose and had been linked to a commercial slogan. Télé 2000 was ordered to pay damages to Claude Verlinde.

*Sté Syn APS et Karen von Spreckelsen c. Sté Abeille Cartes* (1990)<sup>458</sup> confirmed that the making of postcards of the monument of *Le grande Arche de la Défence à Paris* was an infringement of the architect’s right of reproduction and of his right of integrity. Eight postcards on which the *Arche* appeared as a central element were found to be unauthorized reproductions of the architect Johan Otto von Spreckelsen’s original work. Some of the postcards moreover were found to be in bad taste: ‘par son caractère figuratif et sa vulgarité, elle blesse le parti-pris de pureté et d’abstraction qui a été celui de Johan Otto von Spreckelsen.’ (361) The vulgarity of the postcards harmed the purity

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<sup>458</sup> *Sté Syn APS et Karen von Spreckelsen c. Sté Abeille Cartes* TGI de Paris, 12 July 1990, 147 RIDA January 1991, p.359.

of abstraction of the architect's work according to the Court. Accordingly the widow of von Spreckelsen was awarded damages of 10,000F for the infringement of her late husband's right of reproduction and an additional sum of 10,000F in reparation for the infringement of the author's right of integrity.<sup>459</sup>

### **III Principles for integrity rights in works of art**

In moral rights cases involving works of art the claimant is the artist or his heirs; the opponent is typically an art dealer, a publisher or the owner of an artwork. The general idea of protection is somewhat confused. Many early claims by artists were rejected and the extent of the right of integrity was not clear. A number of nineteenth century art cases bear structural resemblance to the early literary cases, that is, when a work of art has been reproduced and distributed and complaints occur over modifications in the reproduction. Reparation can be offered to the artist on the basis that he has suffered involuntary liability for a modified work (Cases cited by Pouillet and *Agnés c. Fayard frères*, 1899). Most remarkable in early artistic integrity right is the concern of judges with the art market. A recurring theme is the artist's reputation. Integrity rights were seen as a 'droit de sauvegarder sa réputation artistique.'<sup>460</sup> Reputation was not understood in terms of libel—as in the literary cases—but refers to the commercial value of the artist's name. Courts refer to the 'inalienable publicity' (*Agnés*) of an artist, to the artist's reliance upon his name as a marketing tool (*Hellbronner c. Clésinger*, 1877) and to unfair competition (*Legout-Gérard c. Dufour*, 1918). Courts are also concerned with the commercial interests of artists in preserving the uniqueness of a work (*Clésinger c. Gauvain*, 1850) and in preventing imitations and counterfeiting (*Legout-Gérard*).<sup>461</sup> One court even judges bad imitations to be a more severe crime than good ones: they pose a greater threat to the reputation of the artist (*Legout-Gérard*).

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<sup>459</sup> See also the case of *La Géode*. (Cour de Paris, 23 October 1990, D.1990.298 IF). The decision of the Court of Appeal affirmed that postcards of the monument *La Géode* had constituted unauthorized reproductions of it. There was no issue of *droit moral* in this case.

<sup>460</sup> Stig Strömholm, *Le droit moral de l'auteur en droit allemand, français et scandinave avec un aperçu de l'évolution internationale*, 2 vols., vol. 1 (Stockholm: P. A. Norstedt & Söners Förlag, 1966), 293. Discussing the *Affaire Bouguereau* (1903).

Generally, in the nineteenth and early twentieth centuries the protection of moral rights of art was thus closely related to the regulation of the art market. One case stands out however. In *Hellbronner c. Clésinger* (1877) it is ruled that an artist cannot misrepresent himself and that it is practically impossible for artists to ‘repeat’ themselves. As a criterion for the originality of a work we are told that it must emanate from the artist. In other words: artists create originals, not reproductions. This judgment is based on an internal analysis of ‘creativity’ and not upon the conditions for commercial relations.

A different type of early cases concerns the conflicting rights of artists and art owners. A number of lower courts had met the claims of artists whose paintings or sculptures had suffered harm by their owners. But such judgments were rejected by the higher courts: the owner of a (physical) artwork has a right to destroy it; nothing was found to justify divergence from ordinary property law (*Lacasse c. Abbé Quénard*, 1832 and *Saint-Paul c. Pochet*, 1870). A full-scale clash between moral rights and property rights takes place in disputes over works made to order. Bonheur, Whistler, Camoin and Rouault were all artists who had been commissioned for a work and who sought to renege from their contracts. *Affaire Rosa Bonheur* (1865); *Eden c. Whistler* (1900); *Camoin c. Carco* (1927); *Vollard c. Rouault* (1947) meant a breakthrough for the rights of disclosure and of regret and withdrawal in French law.<sup>462</sup> Works of art were identified as distinct from other goods. An explicit definition of authorship—or ‘artistship’—followed the rulings. Artists are individuals whose talent and personality are expressed in artistic works (*Camoin*). Only the artist himself, moreover, has the competence to judge whether a work is complete and whether it is a true expression of his intention (*Whistler, Camoin*). Meanwhile, a similar conflict between physical and incorporeal property took place in the field of literature. Ownership of manuscripts was ruled not to include any rights in the written work (*De Chapuys-Montlaville c. Guillaibert*, 1870; *Modot c. Nicoullaud, Plon et Nourrit*, 1911). The distinction was confirmed by the Law of 9 April 1910. In order to found the distinction manuscripts

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<sup>461</sup> On forgery and the valuation of art see George Savage, *Forgeries, Fakes and Reproductions. A Handbook for Collectors* (London: Barrie and Rockliff, 1963).

<sup>462</sup> These are the principle decisions of what Strömholm calls the ‘droit de communication’ which contains the rights of disclosure and of regret and withdrawal.

were declared devoid of pecuniary value until its author regarded it as ready to be published. Manuscripts were found to be 'hors du commerce'. Literary works became entirely detached from the written text. A literary work exists only at the will of its author, not as a result of any fixation on paper.

Since the inclusion of moral rights in statutory law in 1957 the integrity right protection of art has become broader and more consistent. The same types of cases and problems, however, continue to occur. Modifications in reproductions of images are seen to discredit the creator, because in the eyes of viewers the artist gets identified with the flawed work. Courts here consider deformations on the basis of qualitative analyses (*René Borg c. Sté Eurodif*, 1983; *Decharnes c. Le Figaro*, 1985). This explains why it has been ruled that to reproduce an entire work in a reduced format is preferable to showing only a part of it. The risk of deformation justifies the full representation (*Fabris c. Loudmer*, 1991). If a physical artwork is modified several problems remain unresolved. For instance, is negligence a violation? Who are we to distinguish between an object as an article of utility and as an artwork? From positive judgment, it is clear only that breaking up a work for economic speculation is an infringement (*Affaire Buffet*, 1965).

An important development took place when the personality of the artist in itself became an object of protection. Integrity rights came to apply to the artist as a 'personality' and not merely through the medium of his work. Only the artist is to set the circumstances for his work: his mastery over it receives protection (*Guille c. Colmant*, 1966; *Martin-Caille c. Bergerot*, 1968). It is irrelevant whether or not a work is materially realised. Protection applies to the author's conception of his work. A model and a half-built 'realisation' of his work are therefore to be recognised as equal manifestations of the artist's immaterial work (*Dubuffet c. Régie Nationales des Usines Renault*, 1980). In fact, the whole of the artistic 'universe' is eligible for protection. The 'ethics' of his creative efforts may be harmed by censorship and even commentary (*Mme Vve Hergé c. Didier Wolf*, 1988; *Mlle Hong Yon Park c. Association des Amis de la Chapelle de la Salpêtrière*, 1995).

Property owners' rights continue to conflict with the artist's moral rights. In general, property rights seem to prevail but courts strive to balance the protection of

‘works of genius’ against the ‘legitimate interests’ of property owners (*Scrive c. S.C.I. Centre commercial Rennes-Alma*, 1975). Public safety and order justifies the removal of works of art individual objections to the work do not.<sup>463</sup> Maintenance is to be expected of owners, though active prevention of the natural processes of breaking down is not prescribed. (*Scrive; Roussel c. Ville de Grenoble*, 1976; *Roger Bezombes c. M. L’Huillier*, 1980; *Hamon*, 1986; *Zobda c. Mlle Farrugia*, 1996).

Moral rights apply to the creator of a work. Sometimes, however, it may be a problem to define who the creator is. Accordingly, a schism has been introduced between the ‘conception’ and the ‘realisation’ of a work (*Dame Adam c. Dame Gatién*, 1971). A mere ‘realisateur’ does not hold any moral rights in what he has made. The artist who conceives of the work holds the rights in it, even if he has produced only preliminary sketches. According to French copyright, ‘original works’ are protected by integrity rights. This also means that any version of the original work must conform to the properties designated for it. As a result, the versions of an original work, by definition, never show deviation; if they do, they are not originals. Deviation is thus a sign that something is a reproduction. (*Pierrel c. SCP Gérard Champin et Francis Lombrail*, 1991). Furthermore, infringement occurs not only in the process of reproduction; originals can themselves be ‘infringing objects’ (*Roger Bouvier c. Jean-Pierre Cassigneul*, 1995). If an original work is recorded and displayed, partially but recognizably, on television without the consent of the author it amounts to moral rights infringement (*F.Pages c. Société Nationale de Télévision Française TF1*, 1981). Likewise if a work is identifiable in the background of a commercial broadcast (*S.A.Télé 2000 c. M.Claude Verlinde*, 1986). Moreover, an original work is not to appear as a salient part of a cityscape on a postcard (*Karen von Spreckelsen c. Sté Abeille Cartes*, 1990). All these rulings confirm that visual references not only infringe reproduction rights, they also violate artistic integrity rights.

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<sup>463</sup> There is however a principle that the state has a particularly strong duty to maintain a work of art that is left in its care, for the sake of both the artist and the public. See Henri Desbois, *Le droit d’auteur en France* (Paris: Dalloz, 1966 (1950)), pp. 496ff.

## IV Commentary

### a) Destruction of artworks

Moral rights protection of artworks has presented courts with many difficult questions. This is because infringement can occur both in relation to a reproduction and to a unique original and copyright has no place for physical works. *Buffet* is emblematic of this. The responses of the courts were furthermore confused by the fact that a utility object and an art object were incarnated in one. At times it seems that the protection offered against distortion of a reproduction is more efficient than what is offered to a unique work. In fact a unique original—the *corpus mechanicum* of a work—may be left without any moral rights protection. That happened in *Saint-Paul c. Pochet* (1868). The architect—or ‘author’—of a building was denied protection against distortion of his work. Although the general dictum of law was that a signed work is not to be distorted without its author’s consent, the architect appealed in vain to his signature on the building. The owner of the house remained in absolute command of his property.

The idea of moral rights, including the right of integrity, is that they are to remain with the author after the expiry of pecuniary rights and after the sale of an artwork. Thereby the author retains some control over the presentation and treatment of works that continue to be designated as ‘his’. Around 1900 courts came under pressure to define the nature of literary and artistic property.<sup>464</sup> The Supreme Court decided that a strict distinction must be observed between the physical literary work—the manuscript—and the ‘literary work.’ Literary property cannot be transferred by handing

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<sup>464</sup> In the nineteenth century legal theorists had struggled to define the (immaterial) ‘work.’ Renouard prescribes that ‘La pensée dont il a déposé l’expression sur son œuvre originale lui confère un droit sur les objets où l’expression de la même pensée serait reproduite, en vertu et par application des mêmes principes que ceux qui confèrent le droit de copie à l’écrivain qui a confié sa pensée au papier.’ Augustin-Charles Renouard, *Traité des droits d’auteurs dans la littérature, les sciences et les beaux-arts* (Paris: 1838), vol. 1, p. 77. In a similar vein the 1879 edition of *Pouillet* states that: ‘La jouissance que la publication de l’œuvre procure au public ne touche en rien à celle de l’auteur ; l’une est tout intellectuelle, l’autre toute matérielle.’ (p. 22) The 1908 edition defines two types of property: ‘il faut distinguer la propriété matérielle et la propriété artistique, le droit de posséder le marbre ou la toile et le droit de reproduire l’idée, la composition représentée par cette toile ou ce marbre.’ (p. 399). Despite their struggle to emphasize the immateriality of the work it is remarkable that copying, in the conceptual framework of nineteenth century commentators, seems to require a material original. The copy is put against the original in analysis; is the copy done with skill, is it of good quality, is it servile, can it be confused with the original (note the double-meaning of ‘contrefaçons’: infringement as well as fraud). All of which has some influence upon the severity of the infringement. A metaphysics of presence directs the way copying is explained as a task done in relation to a book, a painting or a sculpture.

over a physical work. The decision was in line with the Law of 9 April 1910, which separated ownership of a literary or artistic work from ownership of a material work. This separation turned manuscripts and material artworks into mere *exemplaires*. The right of ownership in them was indistinguishable from ownership rights in a copy of a book or in a reproduction of a painting. *Whistler, Camoin, Rouault* were all well in line with the distinction between the immaterial and the physical work.<sup>465</sup> It was determined that the artist maintains control over the communication of his work: he alone decides when a work is complete and when it is fit to be disclosed or sold. An artwork is perceived as an immaterial work. For example, in the right of disclosure there is no discrimination between the display of an oil painting in an exhibition and the use of a reproduction as an illustration in a catalogue. Both constitute communications of a work and are to remain under the control of the artist. The right of regret and withdrawal dictates that contracts about works of authorship are unlike other contracts because their object is different. If the artist decides that a (physical) work is not complete then the material fixation, by definition, ceases to be a representation of his work.

However, in aesthetic terms the division between material and immaterial in relation to a work of art is paradoxical. The (physical) original is reduced to its physical matter: in legal terms it is a simple *exemplaire* of the author or artist's work. On the one hand, this serves to limit ownership rights over physical art works and manuscripts: they are devoid of literary and artistic property rights. On the other hand, it is due to this reductive definition that owners of (physical) originals have the right to destroy them. They destroy not the 'work' but only a representation of it. This might be meaningful in relation to literary work. However, the total disregard of the material is unfortunate when it is imposed upon artworks. It leaves nothing in the law to protect the artwork itself. According to article 544 of the French Civil Code persons have the right to neglect and destroy their own property: whether it be worthless reproductions or unique originals. Although destruction or mistreatment of the physical work can be seen as the ultimate act of disrespect, the right of integrity does not prevent it. This was what

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<sup>465</sup> Stig Strömholm notes that, in fact, the principles of *Whistler* are not coherent. A moral right—the right of communicating the work—is here exercised on the basis of corporeal ownership. Stig Strömholm, *Le droit moral de l'auteur en droit allemand, français et scandinavie avec un aperçu de l'évolution internationale*, 2 vols., vol. 2:2 (Stockholm: P. A. Norstedt & Söners Förlag, 1966), pp. 46f.

the artists had to face in *Lacasse*, *Scrive*, *Bezombes* and *Roussel*. Commentators on French law have not failed to point to this problem. Desbois notes that while the right of reproduction is secured by article 29 of the 1957 Act (now L. 113-3), this access to the work gives no power to prevent its destruction: ‘il n’a pas, tout ou moins expressément, précisé que l’artiste serait fondé à obtenir l’interdiction de détruire, en l’absence de tout projet de reproduction, et seulement pour assurer la sauvegarde de l’œuvre elle-même.’<sup>466</sup> Desbois and Colombet argue that courts tend to offer better protection of moral rights in works displayed in public than of privately held works.<sup>467</sup> If that is the case, it may be suggested that this is an example of the way moral rights protection serves to secure ‘undamaged’ transmission or communication of artworks rather than the works of art in themselves.<sup>468</sup>

*Le droit moral* is not an absolute right. As it stands now, the right of integrity in France cannot be relied on for the protection of unique originals.<sup>469</sup> Courts, faced with a legal dilemma, often favour physical ownership over incorporeal ownership. Yet this tendency runs contrary to one of the main purposes of moral rights, namely to qualify property rights in certain physical objects.<sup>470</sup> Works of art are seen to be of sufficient value to justify society’s intrusion upon an owner’s property rights. Swiss law contains a provision that makes this possible. Article 15 of the Swiss Federal Law on Copyright of 1992 prescribes a right to protection against destruction. It is stipulated that:

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<sup>466</sup> Henri Desbois, *Le droit d’auteur en France* (Paris: Dalloz, 1966 (1950)), p. 500

<sup>467</sup> *Ibid.*, p.498 Claude Colombet, ed., *Propriété littéraire et artistique et droits voisins*, 3. ed. (Paris: Dalloz, 1990), p. 173. Lucas & Lucas utter reservations about this view, André Lucas and Henri-Jacques Lucas, *Traité de la Propriété Littéraire et Artistique*, 2 ed. (Paris: Édition Litec, 2001), p.344.

<sup>468</sup> The French idea of ‘*patrimoine*’ also plays a role here.

<sup>469</sup> This is also the case under German law where full destruction of a work does not amount to prejudice to the author’s honor and reputation. In support of this, Adolf Dietz cites the decisions of 8 December, 1981; (1982 *Film und Recht*, 510) and of 3 August, 1982 (1982 *FuR*, 513), see Adolf Dietz, “The Artist’s Right of Integrity Under Copyright Law - A Comparative Approach,” *International Review of Industrial Property and Copyright Law* 25, no. 2 (1994): 177-194.

<sup>470</sup> As expressed by G. Michaélidès-Nouaros, ‘admettre le droit de destruction des œuvres d’art par leur propriétaire, c’est aller contre les tendances modernes, c’est permettre au propriétaire un acte manifestement antisocial et contre l’esprit véritable du droit.’ (Cited from Christophe Caron, *Abus de droit et droit d’auteur, Le droit des affaires Propriété intellectuelle* (Paris: Litec, 1998), p. 217.) It is against the spirit of the law to permit destruction of artworks. Under modern law, regardless of property rights, such a destructive act would be considered antisocial and unacceptable. Owners of artworks, in other words, have duties to the public.

where the proprietor of an original work, of which no further copies exist, has reason to assume that the author of the work has a justified interest in its preservation, he may not destroy such work without first offering to return it to the author. The proprietor may not require more than the material value of the work.<sup>471</sup>

A Swiss commentator, Werra, notes about the background for the law that:

Sous le régime de l'ancienne loi, la doctrine s'accordait à reconnaître que l'auteur était juridiquement démuné face à la décision du propriétaire de détruire l'exemplaire unique de l'œuvre qui lui appartenait. En effet, on considérait généralement que la destruction ne portait pas atteinte à l'honneur et à la réputation de l'auteur de l'œuvre (considérés alors comme le fondement du droit moral de l'auteur), car précisément l'œuvre n'existait plus. Or, un tel raisonnement fait peu de cas de la spécificité de la protection fondée sur le droit moral. Comme on l'a établi, la protection conférée par le droit moral vise à préserver les liens spécifiques liant un auteur à son œuvre, sans égard au critère de l'atteinte à l'honneur et à la réputation. Ainsi, il paraît incontestable que la destruction de l'exemplaire unique d'une œuvre porte atteinte au droit moral de l'auteur en détruisant définitivement toute trace originale d'une de ses créations.<sup>472</sup>

Under the old regime [in Switzerland] the law did not recognise the destruction of a work as an infringement of the rights of authors inasmuch as no harm to reputation or honour (the foundations of moral rights) was suffered as a consequence thereof: precisely because the work then ceased to exist. Authors had to succumb to the property rights of owners of their (physical) works. However, this reasoning is not in line with

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<sup>471</sup> Article 15 (1), Swiss Federal Law on Copyright of October 9, 1992. Amended 1994.

<sup>472</sup> Jacques de Werra, *Le droit à l'intégrité de l'œuvre. Etude du droit d'auteur suisse dans une perspective de droit comparé*, ed. H. Hausheer, *Etudes de droit suisse* (Berne: Stämpfli Éditions, 1997), p. 78.

the specific type of protection offered by the *droit moral*. The nature of moral rights is to preserve the bonds that tie the author to his work without regard to any criterion of violation towards honour or reputation. Thus it seems incontestable that the destruction of a unique work infringes the moral rights of the author, destroying definitively any original trace of one of his creations. And Werra concludes, to destroy a work is to ‘nier purement et simplement l’existence de l’œuvre, forme ultime de l’irrespect’(78). It is to deny the work its existence: the ultimate form of disrespect. On this rationale Swiss law offers protection for unique originals not only of fine art—say, sculpture and painting—but also for manuscripts, cinematographic reels and audio tapes and other works covered by copyright. In practice artists face a number of problems when trying to exercise their right against destruction. Many complaints from artists concern monumental sculptures, mosaics, or frescoes in which protection becomes somewhat hypothetical. Either the work cannot be repositioned or the artist cannot afford to remove it at his own expense. The alternative option of making a lasting reproduction of the work is likely to be redundant: the artist has his sketches. Besides, reproduction, might even conflict with someone else’s copyright in the work.

In principle, Swiss law provides what French moral rights lack: a means of preventing the destruction of unique originals. Yet, as we have seen, even the Swiss provision has its flaws. At this point it may be worth considering whether authorial rights are at all suited to protect physical artworks. An obvious conflict is when an artist wants to harm or destroy his own works. A legendary exerciser of this ‘right’ was Francis Bacon, who systematically destroyed his works, though not always successfully. After his death in 1992 it turned out that his handyman, Barry Joule, had kept over 700 works given to him by Bacon to destroy with the order: ‘You know what to do with this.’ The handyman explained that he had taken this to be Bacon’s way of handing over a gift. The Bacon Estate now disputes Joule’s title in the works. At any rate, many an admirer of Bacon’s work has expressed gratitude to the disobedient handyman. A further conflict in point is if an artist creates a work by destroying another artist’s work. This was the situation in 1998 when, at an exhibition of twentieth century art in Nîmes, the artist M.Pierre Pinoncely urinated on Marcel Duchamp’s urinal, claiming that ‘urine

a refait de l'urinoir œuvre d'art d'un simple pissotière.<sup>473</sup> The urine allegedly had retransformed Duchamp's artwork into a *pissotière*: a simple industrial object. Subsequently Pinoncely smashed the urinal and claimed by the gesture to have created a new artwork. As the *Tribunal de Grandes Instances* granted that the gesture was charged with artistic symbolism Pinoncely was not found guilty of vandalism or violation of moral rights. He was sentenced to pay only 60% of the price of the restoration of the urinal because the court recognised that he was an artist. Because the result of the destructive act was a new 'work of art,' the Duchamp ready-made stood without any protection by moral rights.

Regarding the protection of physical originals, moral rights suffer from the problem that art works are identified negatively in terms of their relation to an artist's personality. Edelman expresses the essence of this view when he says that: 'La création littéraire est au sens fort, une « œuvre de l'esprit » ; comme toute création, elle est une métaphore de la nature humaine.'<sup>474</sup> However, as long as artworks are conceived of as metaphors of artists—and that is the situation in copyright not only in France—we cannot begin to think of the intrinsic value of the works. The quality of the artwork is not taken into account when infringement is assessed. Authorship, alone, matters. Thus, French law offers no protection against neglect and destruction as the view is that it *does not* harm the author, while Swiss law protects against destruction as the view is that it *does* harm the author. But the (physical) artwork sustains its own existence. As such it will survive its originator. Furthermore, there are times when the quality of a work justifies care and preservation, and there are times when the world suffers no loss if it fades away or gets destroyed. Intrinsic and esthetic analysis is difficult, not to say impossible, within the framework of copyright. But art ought, to some extent even within the law, to be understood on its own terms. And a notable attempt in this direction actually exists in the 1979 California Art Preservation Act (Civil Code of

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<sup>473</sup> Bernard Edelman, "De l'urinoir comme un des beaux-arts : de la signature de Duchamp au geste de Pinoncely (à propos du jugement du TGI de Tarascon du 20. nov 1998)," *Le Dalloz (Chronique)*, no. 6 (2000): 98-102.

<sup>474</sup> Bernard Edelman, "Création et banalité," *Recueil Dalloz Sirey*, no. Chronique (1983): 73-77, p. 76.

California, section 987).<sup>475</sup> The California Art Preservation Act stipulates a right (which lasts until fifty years after the death of the artist) against alteration and destruction of art:

The Legislature hereby finds and declares that the physical alteration or destruction of fine art, which is an expression of the artist's personality, is detrimental to the artist's reputation, and artists therefore have an interest in protecting their works of fine art against any alteration or destruction; and that there is also a public interest in preserving the integrity of cultural and artistic creations.<sup>476</sup>

Two details are remarkable. One is that the interest of the public is emphasized. It is recognised that the preservation of art may serve the common good. What is also remarkable is that 'fine art' gets protected. Fine art is defined as 'an original painting, sculpture, or drawing, or an original work of art in glass, of recognized quality.'<sup>477</sup> Esthetic evaluation is undertaken by experts: 'In determining whether a work of fine art is of recognized quality, the trier of fact shall rely on the opinions of artists, art dealers, collectors of fine art, curators of art museums, and other persons involved with the creation or marketing of fine art.'<sup>478</sup> Because artworks may be damaged not only by acts of intentional vandalism, prohibited harm also includes 'gross negligence' which here means 'the exercise of so slight a degree of care as to justify the belief that there was an indifference to the particular work of fine art.'<sup>479</sup> A provision is also made to ensure that if the owner of an artwork, which is part of a building, wishes to remove it, the artist or his heirs or representatives have a right to remove it at their own expense. Title to the work then passes to the artist or his heirs or representatives.<sup>480</sup>

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<sup>475</sup> US Visual Artists Rights Act of 1990 now contains some of the elements of the California Art Preservation Act.

<sup>476</sup> Civil Code of California, section 987 (a).

<sup>477</sup> *Ibid.*, section 987 (b) – 2.

<sup>478</sup> *Ibid.*, section 987 (f).

<sup>479</sup> *Ibid.*, section 987, (c) – 2.

<sup>480</sup> *Ibid.*, section 987, (h) – 3.

The Art Preservation Act presents us with an overall effort to preserve artworks for the future. It also contains a bold attempt to distinguish works that deserve protection from works that lack sufficient aesthetic worth. A problem that may be foreseen, however, is where a work of art cannot be removed from a building: in this case rights are waived.<sup>481</sup> Another matter is that artists maintain a right to destroy or mutilate their own works.<sup>482</sup> Despite the law's concern for the interests of the public and its future enjoyment of art, the artist retains this ultimate mastery over the fate of his creations.

If copyright falls short of material protection of art there are alternative approaches to saving works from perishing. One such is the 'Save our Sculpture' campaign of the UK Public Monument and Sculpture Association. The campaign calls the public to identify works in need of restoration. Still, the strength of the Californian Act is that non-public artworks are also covered. Since the Act came into force it has served to secure the continued existence of many works in private hands. Indeed, a mural by David Hockney—which famously brought about the passing of the Act in 1979 when the mural was threatened with destruction—was successfully saved. Today the Hollywood Roosevelt Hotel proudly announces among its amenities the 'outdoor swimming pool, with its one-of-a-kind David Hockney mural.' We also learn that the pool has been 'recently restored.'<sup>483</sup> Without the Art Preservation Act, restoration would be always too late. Designated in plain language as 'one-of-a-kind', this is a value recognised by most holiday-goers.

#### **b) Personality rationale**

In the nineteenth century the principles for integrity rights in literary works were already quite clear. Authors had a right to prevent modification of their texts because the public would ascribe the legal responsibility for the texts to the authors. Art made

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<sup>481</sup> *Ibid.*, section 987, (h) – 1.

<sup>482</sup> *Ibid.*, section 987.

<sup>483</sup> [www.hollywoodroosevelt.com](http://www.hollywoodroosevelt.com).

the situation less straightforward. Art does not communicate a ‘message’ as might a text. Artists do not utter ideas in their works. Moreover, many works of art are never shown in public, nor are they distributed as reproductions. As a result the principles for moral rights protection as developed in relation to literary works did not fit art (except in cases such as *Agnès*). Alternative approaches were employed instead. Before the twentieth century, claims for protection were, as we have seen, typically based on arguments about market competition and about the commercial value of artists’ reputations. Courts, however, were generally not too willing to offer protection on this basis. *Hellbronner c. Clésinger* constitutes a prolepsis of the turn away from arguments based on ‘competition’. The court decided that a work of art deserves protection because it emanates from an artist. By the twentieth century this had become an axiom for courts. Thus emerged the rationale leading to the values fundamental to *le droit moral* today. Bearing resemblance to nineteenth century conceptions of authorship in aesthetics, as already described, moral rights in art were justified by reference to the claim that a work of art is the expression of its creator’s personality. This is evident in *Guille, Martin-Caille, Dubuffet, Mme Vve Hergé, Mlle Hong Yon Park* and is put most eloquently in *Camoin*: ‘the artwork is the expression of its originator’s thought, his personality, his talent, his art, and, in “philosophical terms”, of his individual self’. Today the personality rationale serves as the foundation of French copyright. As expressed by Edelman: ‘la création est le produit d’un travail intellectuel libre, exprimant la personnalité du créateur, et s’incarnant dans une forme originale.’<sup>484</sup> Accordingly, ‘la création est de même nature juridique que la personne elle-même’(19). Literary and artistic works are products of the intellectual labour of their creators. They are expressions of his personality, incarnated in an original form. Literary and artistic creations are, therefore, subject to protection just as is the person of the creator. Furthermore, as Desbois notes, according to the 1957 Act, an original work is protected ‘de seule fait de sa création.’<sup>485</sup> The French parliament has rejected the idea that works are protected because of the common good: moral rights exist solely for the

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<sup>484</sup> Bernard Edelman, *La propriété littéraire et artistique*, 3 ed., *Que sais-je?* (Paris: Presses Universitaires de France, 1989), p. 15.

<sup>485</sup> Henri Desbois, *Le droit d’auteur en France* (Paris: Dalloz, 1966 (1950)), p. 488.

sake of the authors and artists. Counter to the Berne Convention, creators do not have to prove that harm has been done to honour or reputation. ‘C’est l’arbitraire de l’auteur qui justifie la protection’: it is the opinion of the author which justifies protection, as Lucas & Lucas remark.<sup>486</sup>

Significantly the personality rationale was articulated most explicitly in cases that concern works of art. In the presence of a material original, courts had to maintain a strict distinction between the immaterial and the material work. Hence the emphasis in these cases upon the ‘conception’ of the work as the object of protection (*Adam, Dubuffet, Hergé*). The personality of the artist then served to add substance to the work as a ‘conception.’ This function of the artistic personality suggests why it has come to play such a central role. It fills out the category of the ‘work’ which was left vacant of properties when it was relaunched as a ‘conception’. As we know, the concept of the ‘personality’ has been less important in literary cases. But it is found in a case like *Christopher Frank c. Société Sofracima*. *Frank* went against recent case law which may be explained by the adherence to the principle of authorial personality as developed in art cases.

A consequence of the radical personification of the work of art is that it becomes hard to demarcate the object of protection. If the work is entirely independent of any fixation, in principle, there is no limit to the number of expressions emanating from the artist, all of which will deserve protection. Not only do sketches figure as ‘works’; with the trend of exhibiting artist’s effects—such as Brancusi’s studio at the Beaubourg and Francis Bacon’s in Dublin—anything that is associated with the artist (shopping lists or stains) might get included as artistic property. Moreover, preliminary and fragmentary ‘works’ are of equal status as a finished original. This was evident in the cases of *Adam* and *Dubuffet*. Another result of the lack of demarcation of the work is that infringement of integrity rights can be ‘contextual’. In *Hergé* no work by Hergé was in question. Only a second work—the infringing work—was discussed. As Edelman says ‘C’est donc bien *l’univers* de l’œuvre, en soi et pour soi, qui est pris en

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<sup>486</sup> André Lucas and Henri-Jacques Lucas, *Traité de la Propriété Littéraire et Artistique*, 2 ed. (Paris: Édition Litec, 2001), p. 334.

compte, peu important la qualité du public, la réputation, etc.<sup>487</sup> The universe of the work, in and for itself, is to be protected; the public's reception and appreciation is not to be considered. Understood as a 'universe' the work becomes a very elastic concept. This is why works of 'commentary' such as the play in *Hergé* can be held to infringe. A third effect of defining the work as a 'conception' is suggested by the legal commentator Sarraute. He notes that, because a work comes into existence with its conception, artists may find themselves producing 'involuntary works'. Therefore, Sarraute argues, artistic creations ought not to be defined as works until they are disclosed or published by the artist or author.<sup>488</sup>

Adolf Dietz presents a clue to the understanding of an analytical problem in the personality rationale. He argues that, in copyright terms, to define the right of integrity one ought to specify that it is the integrity of an artist 'embodied in an *individual or specific* work of art.'<sup>489</sup> Many types of attacks on an author's integrity do not involve infringement of copyright. This, however, is not fully appreciated when 'the work' is defined as its 'conception.' Copyright in this way gets deprived of one of its central analytical concepts, namely the work. Arguably, this means that attacks that rightly belong under the general means of civil or criminal law (*Guille, Martin-Caille, Hergé, Mlle Hong*), now get treated as infringements of moral rights.

### **c) Citation and allusion**

As noted before, moral rights infringement can occur in relation to both a (unique) original artwork and to a reproduction of it. Furthermore, the reproduction may consist of anything between an 'exact' representation (in the same medium, with the same dimensions and colours) and a bare image of it (not reproducing the material properties of the work). Sometimes it is indicated by the medium whether something is an original

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<sup>487</sup> Bernard Edelman, "Entre copyright et droit d'auteur: l'intégrité de l'oeuvre de l'esprit," *Recueil Dalloz Sirey* LI Chronique, no. 40 (1990): 295-300, p. 298.

<sup>488</sup> Raymond Sarraute, "La loi du 11 mars 1957 et le droit moral des artistes sur leurs oeuvres," *Gaz. pal.* 2 Doctrine (1959): 2-3, p. 3. In fact, the principle that a work of art does not come into existence until it is 'published' by the artist was proposed by the Court of Paris in 1828. (Cour de Paris 11 January 1828; S. 1828-1830. See Bernard Edelman, *La propriété littéraire et artistique*, 3 ed., *Que sais-je?* (Paris: Presses Universitaires de France, 1989), p. 30).

<sup>489</sup> Adolf Dietz, "The Artist's Right of Integrity Under Copyright Law - A Comparative Approach," *International Review of Industrial Property and Copyright Law* 25, no. 2 (1994): 177-194, p. 181.

or a reproduction. An engraving, for instance, has traditionally been a reproduction (of a painting). A photograph, on the contrary, does not contain any material evidence of its status. ‘Exact’ reproductions do not in themselves indicate that they are not originals. This is signalled by, for instance, a signature. Today there is a broad range of media in which to make reproductions. Some are of a sort to make representations of original works that are more accurately described as visual references than as duplicates. Such representations share no qualities with the work apart from being allusions to it. This was the situation in the decisions of *Pages c. Société Nationale de Télévision Française*, *S.A.Télé 2000 c. Verlinde* and *Karen von Spreckelsen c. Sté Abeille Cartes*. This points to a ‘dilemma’ expressed in *Fabris c. Loudmer*. The question is how to exercise the right of citation—as prescribed by article L.122-5 of the French Intellectual Property Code—in relation to art. Citations are allowed—under the condition of ‘*brièveté*’: ‘briefness’—for a number of purposes.<sup>490</sup> The dilemma however is how to make brief citations of visual works without distorting them. Images may be equally distorted by being partially shown and by being shown in a reduced format. Lucas & Lucas argue that citation is, in effect, always a kind of infringement of integrity rights. Nevertheless, as they argue, the practice of citation is justified by a long tradition in literature, as long as the citations are accurate. But there is no mention of a similar convention in art.<sup>491</sup> If it is not legal to ‘cite’ images, representation of public space will suffer in particular. In ‘*La rue et le droit d’auteur*’<sup>492</sup> Edelman discusses the effect of decisions such as that of *La grande arche de la Défense* and a ruling involving the artist Christo’s wrapping of *Pont Neuf* by which the artist obtained the monopoly on photographing the wrapped up bridge (Cour de Paris, 13.marts, 1986). Edelman argues that the decisions are part of a tendency of ‘*personification de la propriété*.’ If our landscape (or cityscape) is personalized and propertized and there is no means of exercising legal citation, we are no longer entitled to represent the world that surrounds us. To prevent this from happening courts have used the concept of ‘*apparition accessoire*’ which implies that

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<sup>490</sup> The purposes of criticism, polemics, research, education and information.

<sup>491</sup> André Lucas and Henri-Jacques Lucas, *Traité de la Propriété Littéraire et Artistique*, 2 ed. (Paris: Édition Litec, 2001), p. 345.

the appearance of an original works in an ‘auxiliary’ way in, say, a photograph or a filmrecording does not constitute reproduction.<sup>493</sup> It is not to say whether this provision is enough. As pointed out in *Spreckelsen*, the ‘hole’ of the Arche took up a larger share of the postcard than did the Arche itself. Yet the architectural work could not be rubricated as an *apparition accessoire*. Furthermore, there are other kinds of needs to cite images: art catalogues, criticism, research, educational publications, etc. An image cannot be paraphrased so there is no way of representing it other than by reproducing it. If there is no legal clarification that diminished and partial reproduction does not constitute infringement of copyright, we might look ahead to a future history of art without illustrations. As it stands the law offers no solution; courts have to deal with the problem on a case-to-case basis.<sup>494</sup>

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<sup>492</sup> Bernard Edelman, “La rue et le droit d’auteur,” *Recueil Dalloz Sirey*, no. Chronique XVIII (1992): 91-97.

<sup>493</sup> See decision of *Campagne campagne (Sté) c. Editions Atlas*, Cour de Cassation, 12 June 2001. Observations by Jeanne Daleau. Le Dalloz, 2001, no. 30. p. 2517. Edelman makes a distinction between *l’essentiel* and *l’accessoire* in order to analyse what may be reproduced from a work of art. Bernard Edelman: “De la nature des œuvres d’art d’après la jurisprudence” *Recueil Dalloz Sirey* 1969 (chron.), pp. 61-70.

<sup>494</sup> See Didier Jean-Pierre, “La courte citation d’œuvres d’art en droit d’auteur,” *Recueil Dalloz Sirey* Chronique (1995): 39-42 and Jean-Pierre Didier, “La courte citation d’œuvres d’art en droit d’auteur,” *Recueil Dalloz Sirey* 1995, no. 6 Chronique (1995): 39-42 and *Fabris c. Loudmer* (with note by Bernard Edelman).

#### 4. COPYRIGHT IN TEXTS AND IMAGES

In a decision concerning the estate of the deceased painter Pierre Bonnard, the Supreme Court decided that unfinished paintings left in his atelier were, legally speaking, to be considered ‘published’ works.<sup>495</sup> Consequently, artistic copyright in the works should be counted as part of their value. The ruling provokes Raymond Sarraute to compare a number of decisions that concern literary works. He finds that: ‘En matière littéraire, la Cour de cassation avait pourtant été autrement comprehensive.’<sup>496</sup> The *Cour de cassation* has confirmed in several instances that there is no deviation from the rule that an author (or his literary executors) has an absolute right to decide the moment of publication of his manuscripts. This right remains with him also in case of divorce and expropriation.<sup>497</sup> The question is: why discriminate between artists and authors? Sarraute ponders the matter and points out that ‘Sans doute, le tableau prend une individualité matérielle ; mais le manuscrit d’une livre ou une partition est lui aussi un bien corporel.’(12) To be sure, a painting assumes a material independence (and in that way it has come into existence as an artwork); yet, so does the manuscript of a book: a literary work is also, in part, a corporeal thing. This, however, does not prevent the *Cour de cassation* from maintaining that a piece of writing manifests itself as literary property only at the time it is published. This prompts Sarraute to ask rhetorically:

Si cette fiction est admise pour l’œuvre littéraire, pourquoi n’avoir pas décidé, par analogie, que l’œuvre d’art ne devient objet de commerce, n’acquiert une valeur patrimoniale et n’entre, en conséquence, en communauté que lorsque l’artiste, la considérant comme achevée, l’a signée, l’a exposée ou l’a mise en vente. (12)

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<sup>495</sup> *Cons. Bowers C. Cons. Bonnard-Terasse* Trib. De la Seine 10 oct 1951, D.1952.390; Cour de Paris 19 janv. 1953; Cass.civ. 4 déc. 1956; Cour d’appel d’Orleans, 18 févr. 1959; D.1959.440.

<sup>496</sup> Raymond Sarraute, “Le droit moral du peintre sur son oeuvre,” *Gaz.pal.* 1 Doctrine (1957): 11-13, p.12.

<sup>497</sup> He cites: *L’affaire Lecoq* (25 June 1902; Gaz. Pal. 1902.2.129; S.1902.1.305; D.1903.1.5) and *l’affaire Canal* (14 May 1945; Gaz.Pal. 1945.2.42; S.1945.1.101; D.1945.285).

Why, by analogy, can artistic works not be defined as coming into existence only at the time of their disclosure? The suggestion seems fair enough. If literary and artistic works are to be protected on equal terms by copyright, why are identical rules not applied? Sarraute's reasoning takes us right to the heart of a major problem in copyright: the widespread reliance upon analogy. Analogy must be employed with discrimination in order not to obscure the inherent differences; analogy is not assimilation. We might say that the *Cour de Cassation* discriminates between works of literature and works of art simply because they lack analogy.

The difference between literary works and other types of works is considered in the note of *Saint-Paul c. Pochet* where an architect was denied moral rights protection of his work. It is argued that the numerous decisions concerning literary property confirming

le droit absolu pour l'écrivain de s'opposer à toute modification de son œuvre, [...], étaient ici sans application possible. La raison en est claire. Lorsque l'écrivain traite avec un éditeur, ce n'est pas son œuvre qu'il aliène, mais seulement le droit de la publier, et de la publier, en conséquence, telle qu'il l'a créée. Au contraire, la convention intervenue entre l'architecte et le propriétaire est un contrat de louage d'ouvrage, aux termes duquel l'architecte s'engage, moyennant un prix déterminé, à diriger la construction d'une maison qui, une fois construite, sera la propriété exclusive du maître.<sup>498</sup>

Authors have an absolute right to object to modification of their works. This is due to the fact that authors do not give up ownership of their work when it is published: they transfer merely a right to publish it. The publication then brings the literary work into existence. Architectural works (and we may add: artistic works), on the contrary, are sold by contract at a fixed rate. And once constructed they come to constitute the physical property of their owners. In other words, there is no basis for moral rights in

works that have a physical presence because they are sold wholesale, without remainder.

This discussion points us back to Kant's essay on copyright, 'Von der Unrechtmäßigkeit der Büchernachdrucks', from 1785. Kant maintains that contrary to authors, who have an inalienable and exclusive right in their writings, artists cannot preserve any such rights after the sale of their works. Kant's reasons for discriminating between art and literature may assist us in understanding some of the problems concerning the role of moral rights in the protection of artworks today. As we have learnt in a previous chapter, the author of a book, according to Kant, has an exclusive right to his '*Rede*': what he utters in public, and that for which he is (in perpetuity) to be answerable. Works of art, however, should not enjoy such protection:

Kunstwerke, als Sachen, können dagegen nach einem Exemplar derselben, welches man rechtmäßig erworben hat, nachgeahmt, abgeformt und die Kopien derselben öffentlich verkehrt werden, ohne daß es der Einwilligung des Urhebers ihres Originals, oder derer, welcher er sich als Werkmeister seiner Ideen bedient hat, bedürfe. Eine Zeichnung, die jemand entworfen, oder durch einen andern hat in Kupfer stechen, oder in Stein, Metall, oder Gips ausführen lassen, kann von dem, der diese Produkte kauft, abgedruckt, oder abgegossen, und so öffentlich verkehrt werden; so wie alles, was jemand mit seiner Sache in seinem eignen Namen verrichten kann, der Einwilligung eines andern nicht bedarf. (415)

When a work of art has been lawfully acquired the owner may freely make copies and impressions of the work; he has furthermore the right to sell any such copies. The consent of the originator (or artist) is not required. Drawings, copper engravings, stone, metal, and plaster casts may all be reproduced and offered for sale in the same way as any other manufactured goods executed by a person in his or her own name. A copy—any form of copy or reproduction of an original work—is a new work issued under a new name, that of the person responsible for the copy. When an engraving is made of a

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<sup>498</sup> *Saint-Paul C. Pochet*, Cour d'Aix, 18 juin 1868, D.1870.2.101, Note (1), p. 101.

painting no confusion should arise as to who is the originator of the painting, and who of the engraving. (It is assumed by Kant that there can be no confusion between the original and the copy.) Each originator signs with his own name. The engraver puts his name to what he has executed and issued, and thereby takes responsibility; the painter has no right to withhold his consent. Indeed he has no right in the work at all after it has been sold. For Kant, a work of art contains no '*Rede*', nor any 'immaterial' property in which the painter would retain a right, or for which he could be held responsible.

Kant's bias against art is very useful in its bringing to light the distinct ontological properties of art (images) and literature (texts). The distinction is based, first of all, on the realization that one cannot have a picture without a base. Paintings, drawings, and sculptures are not separable from their materiality, from the *physical* entity. Texts, by contrast, are not crucially dependent upon the material of any or each printed copy. (Kant's theory is itself technologically determined by printing: his distinction would be meaningless among manuscripts.) The base of a text is not necessarily significant. A text contains what is said in it (the '*Rede*') and is in a merely contingent relation to the matter on which (e.g., paper) or through which (e.g., screen) it is presented. As a rule any copy of a printed book is replaceable without loss.<sup>499</sup> Another distinction between artworks and texts is that the work of art (e.g., the painting, the sculpture) is an end in itself, while a text is a means to an end. This is appropriately Kantian. When an author produces a literary work it is, in general, not intended to remain in that single form: it must be multiplied and disseminated in order to fulfil its purpose. After the invention of printing, manuscripts are not to be considered ends in themselves. In a print culture manuscripts (in themselves, apart from their use to printers) become curiosities whose significance is usually derived from the published works based thereon. Manuscripts in

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<sup>499</sup> The contrary might be argued, and has been. Undeniably, books are material things. Thus, recent material textual studies have emphasized the importance of 'the physical forms through which texts are transmitted to their readers' and it has been pointed out that readers 'are never confronted with abstract or ideal texts detached from all materiality.' Roger Chartier, *The Order of Books. Readers, Authors, and Libraries in Europe between the Fourteenth and Eighteenth Centuries*, trans. Cochrane, Lydia G. (Stanford: Stanford University Press, 1994), p. 28 and p. 3. See also D. M. McKenzie, *Bibliography and the Sociology of Texts. The Panizzi Lectures 1985* (London: The British Library, 1986). It can furthermore be argued that literary works, like artistic works, are governed or even constituted by their

an age of printing do not usually attract interest ‘in themselves’ but only as an effect of the printed work.

There is an obvious difference in the relationship between the actual work and the reproduction within an image and within a text. Thus in the case of a painting, sculpture or other image-work we have a relationship between a unique artwork and facsimiles which are not considered unique. Symptomatic is the way the idea of uniqueness is preserved by the numbering of photographs in limited editions or series. Furthermore, when a number of identical paintings have come from the same artist we like to consider one more ‘original’ than the others: perhaps it was made first or with more care. Yet in the case of a text we have a number of copies that are all principally interchangeable and indistinguishable. This is why if we have an unlawful publication of a book it is an infringement of copyright—there is no original to mistake it for—whereas an unauthorized replica of a work of art—seeking to be taken for the original—is a forgery. In visual art ‘the original’ means the unique physical work from which copies may be derived. In literature, always, but most obviously since the invention of printing, there is no such unique original work.

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‘paratexts’ – all aspects of their production and appearance. See Gérard Genette, *Paratexts. Thresholds of Interpretation*, trans. Jane E. Lewin (Cambridge: Cambridge University Press, 1997).

The law does not allow for the differences between art and literature.<sup>500</sup> No legal differentiation exists between artistic works (in the legal sense) that are means and those that are ends, between those that are serial substitutions and those that are unique pieces.<sup>501</sup> Such a differentiation in the law would, however, offer a more adequate

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<sup>500</sup> Renouard and Pouillet acknowledge no difference between art and literature. Henri Desbois, furthermore, ignores the ontological differences that have been pointed out here. However, he gives some thought to the two diverse processes of creation. According to Desbois, idea and composition are central elements of writing. The author of a literary work, at first, 'concevoir des idées ; puis, ces idées, il les compose, cherchant l'aménagement, le plan le mieux approprié à les mettre en valeur, à communiquer aux lecteurs sa conviction, ses sentiments, ses émotions, ses sensations. Après avoir choisi le moule approprié, il en vient à l'expression.' Henri Desbois, *Le droit d'auteur en France* (Paris: Dalloz, 1966 (1950)), p. 11. To begin with, the author has an idea, next, he looks for the most appropriate way of composing and arranging his ideas, communicating his thoughts and emotions to the reader. Finally, he adds expression to his structure. The formula of literary creation is thus: 'Idées, composition, expression'. Artistic creation happens somewhat differently: 'l'artiste va tout de suite à la figuration : il traduit en images ses idées, ses émotions, ses sensations, s'adressant immédiatement, non à l'intelligence par des signes conventionnelles, mais au sens et à la sensibilité. *L'image, dans l'ordre des Arts, exclut l'idée.*' (11) The artist moves straight to representation; he translates his ideas and emotions into images. He directs his audience in an immediate way; not through the intellect but through the senses. In visual art the idea is made redundant by the image. Composition, thus, means different things in literature and art. In literature the author 'composes' by connecting his ideas. The composition is integral to the work: a sort of skeleton. Artistic composition is 'la « préfiguration » de l'œuvre future' (12) which the artist carries in his imagination, which has not yet seen the day. Preparatory work on composition such as sketches and drawings are, accordingly, works in themselves apt for copyright protection. A number of very similar artworks can, hence, be individual original works. While the work process in art is thus paved with a number of original works, work on the composition of a literary work does not result in additional original works. Notes, outlines or extracts do not, according to Desbois' analysis, constitute original works. Extracts or versions of a literary work are 'exemplaires' of one-and-the-same original work. Their intellectual content is the same. In terms of composition they are identical, only more or less fleshed out. 'Expression' refers to disparate features in literature and visual art. In literature it applies to the organisation of signification, meaning, words, intentions, etcetera. Literary expression is not reliant on personal and manual execution of the work. Whether the author writes his ideas down himself or dictates them is irrelevant, the expression remains the same. Significantly, no personal aspect or expression is thus added to a book through the process of copying it by hand. In the arts, on the contrary, expression is precisely a matter of 'L'execution personnelle', which, Desbois maintains, constitutes the very touchstone of artistic creation. (13) Even if excuted meticulously and under the direction of the master, a work by a pupil does not equal a work by the master himself.

<sup>501</sup> Desbois confines himself to repeating the phrasing of the 1957 Act stating that original work may not be 'altéré, ni déformée dans sa forme ou dans son esprit' an artistic work furthermore is to be protected 'dans son intégrité et dans ses détails'. Lucas & Lucas observe that an artistic work is to be protected from dismantling, the adding of vernis or colours as well as from contexts that change the meaning of a work. The annotated *Code de la propriété Intellectuelle* sets up a typology of infringements of the right of integrity. The typology is based on a dichotomy between 'forme' and 'esprit' of the work. Infringements of the 'forme' of the work includes: mutilations, dismantlements, retouches, adjunctions, changes, juxtapositions, superpositions and executions in bad quality. Infringements of the 'esprit' of the work includes: publications of extracts of the work that deform the general idea (*pensée*) of the work, incorporation of musical works in film and *mise en scene* that is counter to the spirit of the work. Georges Bonet, Pierre Sirinelli, Frédéric Pollaud-Dulian and Sylviane Durrande, eds., *Code de la Propriété Intellectuelle. Texte du code, textes complémentaires, jurisprudence, annotations*, 3 ed. (Paris: Dalloz, 2002), p.79. This emphasis upon types of infringement conceals the fact that the rules necessarily apply to literary, artistic and other kind of works with different effects.

protection of the moral rights of the authors of artistic works. It would lead to a recognition that there is a difference between an ‘original’ painting and a postcard; and that the two require different types of protection. Art works have the potential to be passed on and appreciated over many generations. Artistic treasures need protection on their own terms (not merely as expressions of their maker’s personality) if we are to ensure their continued enjoyment. Hence, in the interest of the public as well as of the creator, there should be a distinction in law between the kinds of work that are to be protected by moral rights. A text needs no protection as a unique material entity; moral rights protect the integrity of the text in all its copies and disseminations. A text is in its very being only a means towards infinite multiplication and dispersal. An artwork, by strongest contrast, is an end in itself, valuable precisely in its singularity. According to the law as it stands today, moral rights afford protection to copies which can be forever replaced, but they afford no protection whatever to that which is utterly irreplaceable. Thus in one sense art is under-protected in French law: no consistent defence exists against the destruction of original artworks. However, in another sense art gets over-protected due to the lack of differentiation between art and literature: there is no consistent right of citation in art. The right of citation is defined in relation to texts and is meaningful as such. However, one does not ‘cite’ artworks; one refers to them or represents them. And that is a different matter.

Edelman seeks to bridge the gap between art and literature by using Kant’s categories against themselves. The role of guardian and intermediary that Kant ascribed to literary editors can be assigned to purchasers of art, Edelman argues:

celui qui s’engage à construire une œuvre monumentale se conduit comme un *gérant d’affaire*. Il se fait non seulement le gerant d’œuvre future mais encore le gardien de l’œuvre achevée. Il joue très exactement le rôle que Kant attribuait à l’éditeur, à savoir servir d’intermédiaire entre l’auteur et le public.<sup>502</sup>

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<sup>502</sup> Bernard Edelman, “Le droit moral dans les oeuvres artistiques,” *Recueil Dalloz Sirey Chronique* XXXVIII, no. 37 (1982): 263-266, p. 266.

This is another way of trying to resolve problems in copyright by creating analogies. As it is, copyright is at its best when a variety of interests are explicitly taken into account: the author's interest in accuracy and preservation of his work; the public's interest in having access to works that are presented in their original and authentic form and with the correct name subjoined; and, finally, a universal interest in the preservation of art. This requires differentiation and specification. It should be recognised, first of all, that the artwork exists materially, and is an end in itself. Whatever can be destroyed as a text is a destruction only of a means. In order to understand the different rights and protections to be extended to artworks and texts, we should begin by thinking of their respective potentials for destruction. We would do well to recall Horace's most celebrated Ode, 'Exegi monumentum aere perennius':

More durable than bronze, higher than Pharaoh's  
Pyramids is the monument I have made,  
A shape that angry wind or hungry rain  
Cannot demolish, nor the innumerable  
Ranks of the years that march in centuries.  
I shall not wholly die: some part of me  
Will cheat the Goddess of death, for while High Priest  
And Vestal climb our Capitol in a hush,  
My reputation shall keep green and growing.<sup>503</sup>

This is Horace's consolation, and that of every creator of literary works: their texts, fragile in any of their material instances, will yet outlast works of bronze. But there is no consolation for us when an offended sitter destroys a famous portrait, or when a jealous art collector destroys a painting by Van Goch—quite legally, of course.

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<sup>503</sup> *The Odes of Horace*, translated with an introduction by James Michie (Harmondsworth: Penguin Books, 1967), III, XXX, p. 207.

## **PART FOUR**

# **MORAL RIGHTS IN BRITAIN**

Moral rights in British law were introduced as recently as 1988. British law thus fell in accord with the Berne Convention, the signatories to which have an obligation to protect the moral rights of authors.<sup>504</sup> Even so, British moral rights have been watched from the other side of the Channel with some scepticism. Bernard Edelman observes that common law lacks the very foundation for moral rights.<sup>505</sup> In fact, a similar reaction can be found among the British themselves. William Cornish's reflections on the passing of the Copyright, Designs and Patents Act 1988 were as follows:

The British moral rights, although they occur in the Copyright Part of the new Act, are not part of copyright. There is no scheme of thought here that

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<sup>504</sup> The Berne Convention 1971, Paris Text, Article 6<sup>bis</sup> (1). The Berne Convention requires signatories to protect the author's 'right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which could be prejudicial to his honour or reputation.'

<sup>505</sup> Bernard Edelman, "Entre copyright et droit d'auteur: l'intégrité de l'oeuvre de l'esprit," *Recueil Dalloz Sirey LI Chronique*, no. 40 (1990): 295-300. See also David Saunders, "Bridging the Channel? It's Copyright in France but Moral Right in the UK," *Copyright World*, no. 1 (1988): 21-23 and Adolf Dietz, "Les Etats-Unis et le droit moral: idiosyncrasie ou rapprochement. Observations à propos d'une

an author enjoys both moral and economic rights, all of them equal in status. Instead we find distinct rights, which give rise to an action for breach of statutory duty, not for copyright infringement. [Copyright, Designs and Patents Act 1988, section 103 (1)] The rights are not given to ‘authors’ identified by the Act. That could not be, since the draftsman’s perverse logic led him to call all sorts of entrepreneurs ‘authors.’<sup>506</sup>

Historically, the British have been less than enthusiastic about moral rights. As Jane Ginsburg remarks: ‘in countries lacking a moral rights tradition, where legislators and copyright industries remain hostile to the premises of moral rights, enactment of a general statute may not effect substantial improvements.’<sup>507</sup> For long the general view was that the available remedies of UK law—‘passing off’, ‘slander of title’ and ‘defamation’—constituted sufficient equivalents to moral rights. In 1977 the Whitford Committee, finally, recommended the introduction of moral rights.<sup>508</sup>

Not many cases have yet been tried under the 1988 Act. Moreover, only very few of them have dealt specifically with art. Two judgments are relevant here. *Tidy v. Trustees of the Natural History Museum* (1995)<sup>509</sup> and *Pasterfield v. Denham* (1998).<sup>510</sup> In both these cases, moreover, appeal was made to the precedent of a Canadian case, *Snow v. The Eaton Centre Ltd.* (1982).<sup>511</sup> Moral rights as defined by the British Copyright Designs and Patents Act 1988<sup>512</sup> deviate from their French counterparts. First of all: moral rights under UK law can be waived. And there are more

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problématique révélée par l’adhésion des Etats-Unis à la Convention de Berne,” *RIDA* 142, no. Octobre (1989): 223-277.

<sup>506</sup> William R. Cornish, “Moral Rights Under the 1988 Act,” *European Intellectual Property Review*, no. 12 (1989): 449-452, p. 449.

<sup>507</sup> Jane C. Ginsburg, “Moral Rights in a Common Law System,” *Entertainment Law Review*, no. 4 (1990): 121-130, p. 129.

<sup>508</sup> For a further discussion see Gerald Dworkin, “Moral Rights in English Law - The Shape of Rights to Come,” *European Intellectual Property Review*, no. 8 (1986): 329-336.

<sup>509</sup> *Tidy v. Trustees of the Natural History Museum & Another* 29 March, 1995 [1998] 39 Intellectual Property Reports 501.

<sup>510</sup> *Pasterfield v. Denham and Another* 9&10 March, 1998 [1999] 26 Fleet Street Reports 168.

<sup>511</sup> *Snow v. The Eaton Centre Ltd. et al.* 8 December 1982, 70 Canadian Patent Reporter (2d) 105.

<sup>512</sup> For an authoritative guide on moral rights under British law see Sir Hugh Laddie, Peter Prescott, Mary Vitoria and et al., *The Modern Law of Copyright and Designs*, 3 ed., 3 vols., vol. 1 (London: Butterworths, 2000), pp. 585-609.

differences, as we shall see. Moral rights include 1) The right to be identified as author or director (the paternity right); 2) The right to object to derogatory treatment (the right of integrity); 3) The right to object to false attribution of a work; and 4) The right to privacy of persons depicted in certain photographs and films.

Our focus here is on the right to object to derogatory treatment—as the right of integrity is labelled—in relation to works of visual art. The text of the relevant parts of the 1988 Act is as follows:

**S. 80 (1)** The author of a copyright literary, dramatic, musical or artistic work, and the director of a copyright film, has the right in the circumstances mentioned in this section not to have his work subjected to derogatory treatment.

**S. 80 (2) (a)** ‘treatment’ of a work means any addition to, deletion from or alteration to or adaptation of the work, other than—

- i. a translation of a literary or dramatic work, or
- ii. an arrangement or transcription of a musical work involving no more than a change of key or register; and

**(b)** the treatment of a work is derogatory if it amounts to distortion or mutilation of the work or is otherwise prejudicial to the honour or reputation of the author or director;

**S. 80 (4)** In the case of an artistic work the right is infringed by a person who

**(a)** publishes commercially or exhibits in public a derogatory treatment of the work, or broadcasts or includes in a cable programme service a visual image of a derogatory treatment of the work;

**(b)** shows in public a film including a visual image of a derogatory treatment of the work or issues to the public copies of such a film, or

**(c)** in the case of

- i. a work of architecture in the form of a model for a building
- ii. a sculpture, or
- iii. a work of artistic craftsmanship

issues to the public copies of a graphic work representing, or of a photograph of, a derogatory treatment of the work.

The point at which the British right of integrity differs most significantly from the French *droit moral* is in the provision that ‘treatment of a work is derogatory if it amounts to distortion or mutilation of the work or is otherwise prejudicial to the honour or reputation of the author.’ French law does not (unlike the Berne Convention) admit harm to honour or reputation as criteria for infringement.

The status of moral rights in artistic works under British law has not been clarified in case law yet. In neither of the two British cases to be examined here was it held that the moral right of the artist had been infringed. The first of the two, *Tidy v. Trustees of the Natural History Museum* from 1995, was an application for summary judgment by the cartoonist Bill Tidy. Tidy had drawn a series of dinosaurs to be exhibited in the Natural History Museum. The Museum, subsequently, without informing Tidy, arranged to have the cartoons used as illustrations in a book published by the Museum. For this purpose the cartoons were reduced in size from 420 mm by 297 mm to 67 mm by 42 mm, which is to about a seventh of the original size.<sup>513</sup> Furthermore the drawings, originally black and white, were given a background colouring of pink and yellow. Tidy was successful in his suit against the Museum for breach of copyright in publishing his cartoons as a book without his permission. However, he also claimed that this publication constituted derogatory treatment and sought summary judgment. The application was refused. The judge found that there was a possible defence to the museum’s treatment of the cartoons.

Tidy had argued that by reducing the size of the cartoons some of the details had been lost to the human eye and the captions had become very difficult to read. These reproductions, as Tidy claimed, would give rise to the inference that he could not be bothered to redraw the cartoons in a suitable format for the book. This was especially serious as his authorship was acknowledged in the book, and therefore that he was answerable for these particular reproductions of his ‘work’. Tidy claimed the

reproductions to be distortions of his ‘work’ and thereby prejudicial to his honour and reputation.<sup>514</sup>

The judge agreed that the reduction and colouring of the cartoons amounted to ‘treatment’. For the treatment to be derogatory, however, according to the judge, the reproduction would have had to amount to a distortion or mutilation of the plaintiff’s work. The treatment must in some way be prejudicial to the plaintiff’s honour or reputation. And the judge did not accept the argument that a reduction in size of the designs, which had otherwise been faithfully reproduced, amounted to distortion. Furthermore, evidence that the reproductions were prejudicial to the artist’s honour and reputation must come from an objective test, by cross-examinations of witnesses. It is not sufficient that the artist feels his honour or reputation to be harmed.<sup>515</sup>

A second British case on the right of integrity in images is *Pasterfield v. Denham* from 1998. This case concerned artistic works, drawings in tourist leaflets promoting the Plymouth Dome. The plaintiffs, Mr and Mrs Pasterfield, were designers who had been commissioned to draw pictures for two leaflets and a brochure in 1988. The pictures had depicted a satellite and a formation of German bombers. And there had been a detailed cut-away drawing of the interior of the Dome, with accompanying text. In 1994 the designers Pasterfield gave leave to the City Council, the second defendant, to re-issue the leaflets in an updated form, and another designer—Denham, the first defendant—was commissioned to do this by the Council.

The designers of the first leaflet, the Pasterfields, claimed that the updated pictures constituted derogatory treatment of their work. A number of changes to the original work had been made: various details had been deleted, part of it had been reduced in size, the colouring had been significantly altered, shadows of depicted figures and cars were absent, and the text now bore the legend ‘Designed and produced by Denham Design.’ In preparing the updated pictures Mr Denham had not had access

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<sup>513</sup> The factor of reduction is 6 on the vertical and 7 on the horizontal.

<sup>514</sup> *Tidy v. Trustees of the Natural History Museum*, p. 502.

<sup>515</sup> *Ibid.*, p. 504.

to the original artwork. Working from a photographic proof had presented difficulties; many of the alterations were consequent upon this circumstance.<sup>516</sup>

The judge agreed that treatment of the original work had taken place. However, it was acknowledged that Mr Denham had been largely successful in his attempt to be faithful to the original in spite of the technical difficulties. The alterations were trivial. The colour variations were no more than what one could expect in a reproduction and the changes in size were minor. Moreover, in the judge's opinion the added text should not be considered part of the drawing, and was therefore not part of the 'treatment'. All in all the judge found that the 'differences may be such that the two versions could well be the subject of a Spot The Difference competition in a child's comic.'<sup>517</sup> Such alterations did not amount to derogatory treatment. Against this background the judge ruled that there had been no breach of the author's moral rights.

In both the *Tidy* and the *Pasterfield* cases the courts were referred to a Canadian case in which the artist's grievance against the treatment of his work had been taken into account. In *Snow v. The Eaton Centre Ltd* from 1982 the Canadian artist Michael Snow had sued a shopping centre for distortion of his work of art.<sup>518</sup> In 1977 Snow had created the fibreglass sculpture *Flight Stop*, a flock of Canadian geese flying in their migratory pattern. The artwork was hanging permanently under the ceiling of The Eaton Centre in Toronto; in December of 1982 the shopping centre had attached red and green ribbons to the necks of the geese as Christmas decorations. Michael Snow objected to what he asserted was a distortion of his work. He claimed the be-ribboned geese to be prejudicial to his honour and reputation. His naturalistic composition had been made to look ridiculous: 'not unlike dangling earrings from the Venus de Milo.'<sup>519</sup>

The Ontario High Court was satisfied that the ribbons did distort or modify Snow's work. And the artist's concern that this would be prejudicial to his

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<sup>516</sup> *Pasterfield v. Denham*, p. 178 and p. 180.

<sup>517</sup> *Ibid.*, p. 182.

<sup>518</sup> On Michael Snow and his work *Flight Stop* see:  
[http://www.artcyclopedia.com/artists/snow\\_michael.html](http://www.artcyclopedia.com/artists/snow_michael.html).

<sup>519</sup> *Snow v. The Eaton Centre Ltd*, p. 106.

honour or reputation was found to be reasonable. Accordingly, it was held that the applicant should succeed, and the ribbons were ordered to be removed.

These three cases ought not to be interpreted simply to indicate that Canadian law in general provides better protection of moral rights than does British law. Since 1931, when moral rights were introduced in Canadian law, Canadian courts, as David Vaver wrote in 1999, have

shown little inclination to press moral rights liability much beyond what the common law or the civil law would have imposed anyway. Claims relying purely on the Copyright Act may therefore be risky propositions unless strong common or civil law is also available.<sup>520</sup>

What is worthy of note, rather, is the unwillingness of the two British courts to follow the *Snow* decision in favour of the plaintiff's right of integrity. This unwillingness was most blatant in the *Tidy* case, where the application for summary judgment had been based principally on the *Snow* decision.

The modest quantity of data—just two cases on integrity right in artworks in fact—does not invite sweeping statements about the state of British moral rights protection. It is however remarkable that, twice, the upholding of moral rights in the *Snow* decision has been relied on, and twice, protection of the right of integrity has been rejected. In France *Tidy* and *Pasterfield* would have been obvious cases of infringement. It is tempting, therefore, to return to Kant's argument concerning the materiality of the work of art and its effects upon French law. As is clear, the 1988 Act does not differentiate between the unique original work and the reproduction, between the painting and the postcard, the sculpture and the cast. Yet we argue that there is an inclination to discriminate in court between the actual original and the copy, to recognize—even without legal warrant—an ontological difference between originals and copies. Both *Tidy* and *Pasterfield* dealt

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<sup>520</sup> David Vaver, "Moral Rights: The Irish Spin" (Copyright Association of Ireland on December 6, 1999, 1999), p. 7. See <http://www.cai.ie/1999%20Lecture%20papers/dv061299.pdf>.

with treatment of reproductions, which were not judged to deserve protection, whereas *Snow* was a case about a unique ‘original’ sculpture. Judicial evidence is as yet limited; we might still, cautiously, suggest that there is a greater readiness to protect the integrity of a unique ‘original’ than that of what is perceived to be a ‘reproduction’. This, as we have noted before, is hardly surprising, given that there is, in fact, though not in law, a significant difference between the two.

British moral rights have inherited some of the flaws of the French *droits moraux*. There is no recognition, in the text of the law, of the inherent qualities of art as distinct from literature. Therefore, acts of vandalism such as Lady Churchill’s destruction of the state-commissioned *Portrait of Sir Winston Churchill* (1954) by Graham Sutherland are still fully sanctioned by the law.<sup>521</sup> However, as our three cases illustrate, if the text of the law cannot provide differentiated protection of a unique work and a reproduction, there is always common sense to rely on. Surely, a work of art is material and deserves protection as such. A few alterations in a reproduction, on the contrary, are of no material consequence.

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<sup>521</sup> Lady Churchill burned the painting shortly before her husband’s death. The painting had earlier made Winston Churchill declare that ‘I look as if I was having a difficult stool.’ See <http://www.artcyclopedia.com/featuredarticle-2000-10-port5.html>.

## CONCLUSION

The aim of this thesis has been to present an aesthetic characterization of certain elements of copyright. British cases concerning pecuniary rights in literary and artistic works have been analysed, as have British and French integrity rights cases relating to art and literature. In principle such a study could have been developed to cover other types of cases. However, no attempt has been made to present a comprehensive study of copyright. Close analysis of carefully chosen cases has formed the core of the dissertation and this method has yielded a range of specific and detailed insights.

We have found that, over the years, the concept of ‘copying’ in British copyright has undergone certain important changes. Copying, in relation to literary works, originally meant to reprint an edition of a work in its complete form. Today, to ‘copy’ a work of literature refers to both the appropriation of single passages and to the imitation of structural and thematic elements. The elastic concept of ‘substantial taking’ in British copyright has been instrumental in this development. Gérard Genette’s theory of the paratext has been useful in describing the literary implications of the changing sense of copying in copyright. Under the Statute of Anne a literary work was protected both as a text and a paratext. Today, the paratext gets excluded from legal analysis in infringement cases; focus has been moved to immanent textual features such as plot and theme.

Copyright in works of art was born with the idea of ‘substantial taking,’ or ‘colourful imitation.’ To ‘copy’ a work of art has always implied total as well as partial copying. However, the concept of copying has undergone various other developments since the fine arts came under copyright in Britain in 1862. In the beginning, the legal concept of copying was tied to the technological process of printing. Copying meant mechanical replication and multiplication; substitution for the purpose of dissemination. But this changed into an understanding of copying, in relation to art, which entailed also a judgment of artistic dependency. Secondly, courts have practised a form of aesthetic analysis in which art has been conceived of as a ‘representation of nature.’ As a result, works of art that do not in any obvious way use this formula of representation, have been judged to be ‘copies’ rather than ‘originals.’ To prevent such an analytical confusion, it is suggested in the thesis that the critical concept of ‘framing’, taken from

art theory, is applied. Rather than viewing art through the dichotomy of art versus nature, a work of art can be viewed as a ‘framing.’ The ‘framing’ is the artistic vision that an artist shares with us through his work. Illegitimate copying occurs when a person presents his audience with the artistic vision of another artist, and this should be indicated by elements of framing such as composition, perspective and selection of material.

Walter Benjamin has pointed out how, in the age of mechanical reproduction, original artworks and copies thereof have essentially different properties and potentials. Originals have ‘aura’ while reproductions are characteristically anti-authentic. On this basis, we have found that when the link between copying and its technological context was excluded from copyright (in 1911), the result was an anachronistic application in copyright law of the terms copying and reproduction.

French integrity rights cases are indicative of the way the rationale for copyright in France has changed. When the right of integrity was introduced in 1814, in relation to a work of literature, it came with a double purpose. The right of integrity was granted to authors to enable them to protest against revisions of their texts—as well as against unwarranted responsibility for the modified works—and to offer the public a guarantee that the name subjoined to a text was that of the person who had written it. This was in line with Kant’s definition of copyright: it secures the author’s, as well as the public’s, right to let the author speak under his own name. From the mid nineteenth century the right of integrity was claimed by plastic artists as well as by writers; however, the artists’ appeals, on commercial grounds failed consistently. Only when the argument that a work of art deserves protection because it is the expression of its creator’s personality was the right of integrity successfully established in relation to works of art. In the process of developing the ‘personality rationale,’ the work of art has become personified. Today, the ‘work’ has thus lost its significance as an analytical concept in assessing copyright infringement while the personality of its creator is specified as that which receives protection by the right of integrity.

A general feature of copyright’s treatment of art is that its materiality is suppressed. Both literary and artistic works are defined as immaterial entities. This is of

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no particular consequence to a work of literature. An original piece of art, however, is reduced to a mere *exemplaire* by this means. As a result, the artwork receives no protection against destruction. Swiss law and the Californian Civil Code have introduced provisions against this flaw in integrity rights protection. Yet, the offered protection continues to be linked to the person of the artist and to rely on his expression of the wish to preserve a work, rather than on the public interest in the conservation of artworks for the future.

Despite the differences in jurisdiction, art and literature receive a fairly similar treatment in British and French law. Significantly, neither legal system allows for the distinct ontological properties of art and literature. No legal differentiations exist between works that are means and those that are ends in themselves. This causes works of art to be under-protected and over-protected at the same time. Art is under-protected in that integrity rights offer no protection against the outright destruction of artworks. Art is over-protected because there is no specified right of artistic allusion or 'quotation.' The right of citation has been defined in relation to literature, and this right does not fit the visual mode of representation.

Furthermore, from a legal point of view, all the features and changes described in this thesis have been synonymous with the broadening of the scope of copyright protection. The changes in the concept of copying, the marginalization of the concepts of the 'work' and the 'public' in legal analysis, the development of the personality rationale, and the lack of consistent distinction between art and literature, have all been steps in the direction of a more wide-ranging copyright law. Moreover entrepreneurial copyright has shifted the protected subject of copyright from the creator to an owner who is not the creator while claiming rights which are meaningless when separated from the the creator and the work. Entrepreneurial copyright holders have adopted a aesthetic terminology of the 'work', the 'author' and the 'public' which serves to advance mere protectionism. While copyright has developed into a well-oiled regulatory mechanism, the protection it offers has become less adequate from an aesthetic point of view. The inherent and distinctive qualities of literature and art are overlooked when aesthetic concepts become subordinated to a teleology of copyright in

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which protection is increasingly understood as protection only of the creator's rights (or the owner's rights). Beauty, it is said, is in the eye of the beholder: it is hard to sustain an aesthetics without a public.

## Chronological list of cases

### British cases

*Millar v. Taylor* (1769) 4 Burr. 2303

*Donaldson v. Beckett* (1774) 2 Bro PC 129

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## SUMMARY

Though its history extends over barely three hundred years, copyright is a concept now thoroughly established in law, and of fundamental importance to the production and circulation of literary and artistic works. While its benefits, for artists and writers, may seem obvious, copyright has itself given shape to cultural history: artists and writers are now regarded as owners of their work, and as personalities. Cultural, literary and aesthetic theories have developed in step with the legal developments. Today, however, information technology is challenging all the stable notions – of text, work, ownership, even ‘creativity’ – on which both legal and cultural theories have relied. ‘Intellectual property’ is a concept of recent currency, which attempts to define and make subject to legislation what is, in the new technology, likely to exceed all controls. The ambition of the present study is to offer an aesthetic account of intellectual property rights as they concern works of art and literature.

The thesis begins with a comparison of (British) copyright and (French) *droit d’auteur*, through a historical survey: licences and printing privileges in both countries, the Statute of Anne of 1710 as well as the Fine Arts Act of 1862 in Britain, and *La loi du 19 juillet 1793* in France. English and French legal literature and commentary (Parks, Feather, Patterson, Renouard, Dock) is combined with recent scholarship on the evolution of copyright and authorship (Rose, Hesse, Becourt, Loewenstein, Deazley, Baetens). After the historical survey, the dissertation considers the conflicting theories of copyright: the natural rights theory (Locke, Pufendorf, Kant, Diderot), the cultural argument (Condorcet, Kaplan) and the economic argument (Watt, Posner). This opening section concludes with a summary of thinkers sceptical or radically opposed to copyright (the judges in *Donaldson v. Beckett*, Barlow, Laddie, Lessig, Smiers)

The core of the thesis is a reading of selected legal cases in Britain and France from the early nineteenth century to the present. Cases concerning works of art and literature are closely analysed and compared in terms of their concern and consequences for the scope of protection, the justification for copyright, the concept of the work and of the author/creator, the notion of originality, and the concepts of copying

and infringement; in the cultural rather than the legal sphere, the dissertation examines the implications of these cases for critical and aesthetic judgments passed on works of literature and art. Cases are presented chronologically in order to expose trends and developments. Celebrated as well as unknown cases have been chosen for the study. British cases include decisions relating to works of fine art after the law of 1862, to the right of typographical arrangement after the law of 1956, and to moral rights protection following the legislation of 1988. The French cases concern the protection of the right of integrity from the first half of the nineteenth century until today.

The development of copyright and of authorial rights needs to be understood not only in isolation, within a national legal tradition, but also within a larger context, comparative in terms both international and interdisciplinary. The roles of copyright in British common law and of *droit d'auteur* in Continental law are compared in order to bring out the distinctive and enabling features of each system. It is of fundamental importance that one can establish the common ground on which one can compare copyright and *droit d'auteur* in a single dissertation. (Without such common ground, there is little hope that the EU will be able to achieve harmonisation of the diverse legal systems of the member states.)

The interdisciplinary argument proceeds by investigating some key concepts – the author, the work, originality, authenticity, imitation - and comparing the ways in which they have been received and deployed in the legal and cultural spheres. Plato, Aristotle, Edward Young, Locke and Diderot are used to explain the historical development of these concepts. Modern scholars - such as Stemplinger, White, Minnis, Abrams, Foucault, Bloom, Schwartz, Chartier, Genette - have contributed to our understanding of the historical and cultural variations in concepts that are often treated as fixed and immutable. Just as the law of copyright may have contributed to our modern understanding of the author as a property-owning individual, so aesthetic and cultural discourse has contributed to the legal understanding. This has not always been recognized; the dissertation considers the concepts of ‘representation’ and ‘reference’ in relation to copyright and its infringement; the concept of ‘personality’ as a rationale for copyright; and the functions of the ‘work,’ the ‘author’ and the ‘public’ in legal analysis. The dissertation aims to present, in outline, a conceptual history of

reproduction (as substitution, as multiplication, as appropriation), in order to understand the legal conflicts and inconsistencies in copyright law. These particularly concern the disparity between the ownership of an immaterial work and that of its material manifestation; and the lack of an appropriate legal distinction between images and texts.

## DANSK RESUMÉ

På trods af at ophavsret har eksisteret i mindre end trehundrede år er det et juridisk velfunderet begreb med afgørende betydning for produktionen og udbredelsen af kunstværker og litterære værker. Umiddelbart har ophavsret sørget for at sikre kunstnere og forfattere en fortjeneste for deres arbejde; men ophavsret har tillige været vigtig for den måde vores kulturhistorie har formet sig. Således bliver kunstnere og forfattere nu om dage anset for at være 'personligheder' og 'ejere' af deres værker. Kultur-, litteratur- og kunstteori er opstået i takt med den retlige udvikling. I dag truer informationsteknologi imidlertid med at destabilisere begreberne 'tekst', 'værk', 'ejerskab' og 'kreativitet' som har dannet grundlag for både rets- og kulturvidenskabelige tilgange. 'Intellectual property' er et relativt nyt begreb, som har til formål at definere og kontrollere udbredelsen af kunstneriske og litterære værker. Ambition i denne afhandling er at give en æstetisk redegørelse for *intellectual property rights* i forhold til kunst og litteratur.

Afhandlingen indledes med en sammenligning og en historisk gennemgang af britisk *copyright* og fransk *droit d'auteur*. Der ses på trykkeprivilegier, 'The Statute of Anne 1710', 'The Fine Arts Act 1862', samt på 'La loi du 19 juillet 1793.' Engelsk og fransk retshistorisk litteratur (Parks, Feather, Patterson, Renouard, Dock) samt nyere forskning i sammenhængen mellem udviklingen af vores forfatterbegreb og ophavsretten (Rose, Hesse, Becourt, Loewenstein, Deazley, Baetens) diskuteres. Efter den historiske opsummering ses der på en række teoretiske tilgange til ophavsret. Naturret (Locke, Pufendorf, Kant, Diderot), det kulturelle argument (Condorcet, Kaplan) og det økonomiske argument (Watt, Posner). Der afrundes med en gennemgang af kritiske og skeptiske tilgangsvinkler til ophavsret (dommerne i *Donaldson v. Beckett*, Barlow, Laddie, Lessig, Smiers).

Tyngdepunktet i afhandlingen ligger i en læsning af en række nøje udvalgte britiske og franske retssager fra en periode, der begynder i det tidlige nittende århundrede og strækker sig indtil i dag. Sager der omhandler kunstneriske eller litterære værker nærlæses og sammenlignes med henblik på deres tilgange til ophavsretsbeskyttelsens omfang; retfærdiggørelsen for ophavsret; værkbegreb; forfatterbegreb; idéen om originalitet og begrebet 'kopiering'. Inden for en kulturel,

snarere end en retlig ramme studeres det i afhandlingen hvad der er implikationerne af de kritiske og æstetiske domme, der fældes fra juridisk side over kunstværker og litterære værker. Retssagerne præsenteres kronologisk for at fremhæve udviklingslinierne i dem. Velkendte såvel som ukendte sager er blevet udvalgt til studiet. De britiske sager består af domme, der angår kunstværker under *The Fine Arts Act 1862*, og relaterer til retten til *typographical arrangement* under 1956 loven og af domme angående moralske rettigheder under 1988 loven. De franske sager angår moralske rettigheder, hovedsageligt respektretten, fra 1814 til i dag.

Udviklingen af ophavsret og forfatterrettigheder bør ikke kun forstås inden for deres nationale retlige tradition. De skal også anskues som en del af en større sammenhæng, der involverer ikke blot andre retlige tradition men også ikke-retlige forhold. De roller som *copyright* spiller i britisk *common law* og som fransk *droit d'auteur* spiller i kontinentalret sammenlignes for at betone de træk, der er karakteristiske for hvert system. Det er afgørende at en slags fælles grund kan etableres således at *copyright* og *droit d'auteur* kan studeres inden for samme ramme. (Uden en fælles ramme ville chancerne for en vellykket harmonisering af EU medlemslandenes forskellige retssystemer være ganske ringe).

Afhandlingens tværvideenskabelige argument udvikles ved at undersøge en række nøglebegreber såsom 'forfatter', 'værk', 'originalitet', 'autenticitet', 'imitation' og sammenligne de måder, som begreberne er blevet anskuet og anvendt i henholdsvis den retlige og den æstetisk-kulturelle sfære. Platon, Aristoteles, Edward Young, John Locke og Denis Diderot er med til at forklare begrebernes historiske udvikling. Moderne teoretikere som Stemplinger, White, Minnis, Abrams, Foucault, Bloom, Schwartz, Chartier, Genette har desuden tilført os en forståelse af at disse begreber, der ofte antages for at være absolutte og selvberoende, optræder i forskellige varianter der er bundet af historiske og kulturelle forhold.

Ligesom at ophavsret har påvirket vores moderne forståelse af forfatteren som et ejendomsbesiddende individ, så har æstetisk og kulturel diskurs haft sin indflydelse på den juridiske forståelsesramme – hvilket dog ikke har været alment anerkendt. I afhandlingen undersøges det hvordan begreberne 'repræsentation' og 'reference' forholder sig til ophavsret og krænkelse deraf. Der ses på begrebet

'personlighed' som et rationale for ophavsret, og på hvilken rolle begreberne 'værk', 'forfatter' og 'offentlighed' spiller i ophavsretlig analyse. Endvidere præsenteres der et bud på en begrebshistorie for 'reproduktion' (forstået som erstatning, mangfoldiggørelse, tilegnelse) som skal bidrage til forståelsen af en række uoverenstemmelser og konflikter i ophavsretten. Konflikt kan blandt andet opstå mellem ejerskab af immateriel kunstnerisk ejendom og ejerskab af kunstværker. Uoverenstemmelser kan stamme fra ophavsrettens manglende anerkendelse af den ontologiske forskel mellem billede og tekst.