

Summary of the thesis

For an ethics of copyright

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*Authors and creations in the information society:
symbolizing the human being or hostages of the cultural industry?*

English Version

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Summary of the thesis

The debates, sometimes vigorous, which started in Europe on the occasion of the Directive 2001/29/EC's transposition on the 22nd of May 2001, dealing with copyright and related rights in the information society have prompted the thesis' author to address the issue of copyright on a much more transverse plan than usual. This approach aims at a better understanding of both the challenges and the dynamic forces which have an effect on the different actors in this field.

The foundations

Epistemology

Before undertaking the criticism of the copyright law, it is probably useful to show how any criticism of the law is necessarily made taking into account other disciplines, and to remind the necessity of the "social sciences" to claim their own dignity. This dignity lies in their object, or rather in their subject, as they offer to study as such the *subjects* who are human beings - while sciences try to make an observation of objects, so that the author proposes to call them "disciplines of the subject". Thus, the present labor undertakes to clarify the characteristics of the *sujétité*, which can be translated by the "nature of any free subject ". The acts of the subject defined so are not reproducible and do not allow to apply the specific scientific methods, except to reduce or ignore what constitutes its essential characteristic, its "being subject". The study of the *nature of the person* enables to evaluate both the role that the Other plays in the individualization of subjects who are the people, and the place occupied by the creation in their own accomplishment. First taking the ethics of the empowerment of the subject as a fulcrum, then the author shows how this trend of the ethics is transdisciplinary by nature, the transdisciplinary knowledge drawing its unity from the subject apprehended as "unifying ontological point". These bases once reminded, it is possible to begin the questioning of the copyright law itself.

The three dimensions of ethics

The projects started in the disciplines in charge to cope with it constantly bring back to ethics, to the relationship with oneself and with the other, to the necessity of regaining a *direction and meaning* in emergency. The transdisciplinary unity builds itself from a level of reality to another,

by inclusion of the oppositions, in the Included third' dynamics. The first common point of transdisciplinarity and ethics of empowerment of the subject lies in their concern to include rather than to exclude. Anxious to respect what makes each of the people a unique source of expression of the being-self, by which the universe is prolonged and accesses to infinity, this trend of the ethics is committed to develop the integrity of each human being. It ensures everyone the conditions to access to the unique modality of expression of the Hidden Third which it has. Ethics understood as the *sujétité* guarantee, rather than being incorporated in a normative discipline which nowadays one hardly knows if it should be related to philosophy, religion or to the "social sciences", is in fact of an unclassifiable nature, properly transdisciplinary, present *at three levels: (1) methodological / ethical, (2) critical and (3) ontological.*

Defined as a reflection on the desirable human action, it acts on three concentric fields, in a deeper and deeper way. First, the ethics show the Included third as a *fundamental methodological principle* to all disciplines, practical as well as theoretical ones; thus it has to support the relationship of the practitioners with their own activity, regarded *as a human act*. Therefore, its intervention is not limited to the ethics but affects also the very nature of their method. In the sector of practical disciplines and, in general, of action's fields, the vocation of the ethics to help the man to determine himself according to his acts and whom they affect, fully gratifies it as a *non-normative common core of the different ethical practices*. Only applied to the disciplines of the subject, to the extent that their very sector deals with the human being, ethics must be at the center in their *critical* dimension – as to the attempts of explanations of the observed behaviors as well as to the very condition of the observation. Is not an "objective" observation of the subject, albeit possible, losing all its sense and interest at the moment it claims reaching to a knowledge of the subject as such, that is to say not considered in its *past* choices, or even *conditioned ones*, but in its *possible* choices ? Finally, the ethics of the autonomy of the subject is also intended to help the man to determine himself, through its acts, in relation with *Who he is*. As the expression of the subject's guarantee, it then announces the Hidden Third. This central position is justified by the fact that the *meaning* of a human life must guide the act, and that any human action, in order to be fully as such, must be aware and listed in the very meaning of the man's destiny. The ethics of the autonomy of the subject is an ethic which can best guide the *action* as it deals with the *being*.

Thus the integrity of the subject seems to be active at two levels. First of all, as an *ethical principle*, it brings spontaneity of feelings (Francis Hutcheson) and universal character of the reason (Immanuel Kant) together; therefore it constitutes a strong principle, common to all men and very personal for each one of them at the same time, which, in contrast to the ethics of the

suspicion, is based on a positive vision of the psycho-physical foundation of the human nature (the *myself*). This makes account of the conclusions of Michel Terestchenko, when he suggests that the complete man - therefore free – can be distinguished in that his *integrity* has priority on his simple biological survival. At a higher level, as an *expression of the sujeté* in the ethics sector, not only the integrity unifies the immediate awareness of the *myself* ("the conscience to exist") and the reflex awareness of the reason ("the conscience of oneself"), but it integrates them in a form of own awareness of the *oneself*. The latter is presented as a spiritual awareness "detached" from the myself, or rather which, as to the *myself*, is *indirect*. Sometimes called "*meta* awareness", it is the awareness of the wise who *sees himself* evolving among the men as in a withdrawal of his own *self*, "be as another". This attitude recalls this detachment expressed by Paul of Tarsus urging the Corinthians to cry "as one not crying" or to rejoice "as one not rejoicing" (I Corinthians 7: 30). This form of awareness enables to live a "dis-identified" life, which is just the opposite of the indifference. It is related to the "tiers lieu" of Donald Woods Winnicott, a learning space where one can "risk himself without danger", in other words without the deformations imposed by fear, which is precisely the role of the *game*. From there, the most inspired works start, those which teach one Who he is, which enable to enter in the space of the intersubjectivity, and that is why they *make sense* without being matter of censorship, whenever they escape to the reflexive awareness' speech. But, unlike the game, the indirect awareness has crossed fear, it no longer plays with it, it no longer tries to domesticate it when it integrates it; not all humans access to it in the course of their life. It is the hallmark of a "plus being", of a density of presence in the world of which integrity is the sign. The comprehension that it brings releases from the fear of failure or from the blindness caused by success, and enables to live fully and intensely the experiences for themselves, in accordance with one's deepest nature, without further need to use the fiction of the game. Body, reason and spirit are then "one".

Towards the Hidden Third

The analysis of the conditions for the construction of the person as an individual enables to go further, by making a detour by the issue of the motivation. The collection of testimonies of actors in time of war, completed with multiple social psychology research, enable to see that, in general, the human being is not devoid of ethical sense, even when he commits atrocities such as those that could have been observed during World War II. The "banality of evil" denounced by Hannah Arendt is then explained by the *suspension* of this ethical sense in certain circumstances, so that Michel Terestchenko prefers the concepts of "absence" and "presence to oneself" to the classical opposition between selfishness and altruism. However, this notion of "presence to oneself" seems to be insufficient. It suggests the existence of two principles of the personality, which are the

myself, principle of the psycho-physical foundation of the person, and the *oneself*, principle of the integrity and the spiritual basis of the person. Indeed, the *myself* does not enable the explanation of the unity, nor of the ontologically *unique* character of a man; it provides several paradoxes, of which the mains tend to make him believe he is unique while he perceives himself in competition, and claim the first place in any sector whereas, to do so, he is ready to submit himself to the judgment of others. There is nothing but expected matter, as the *myself* is the seat of the *direct* awareness, in other words of the "conscience to exist". The *myself*, especially, is unable to explain the altruistic behaviors of the human, in other words to design a human nature driven and performed by *the concern of oneself and the one of the other at the same time*. However they do exist. Michel Terestchenko is committed to show that the theories of the psychological egoism as those of the sacrificial altruism are not in order to the extent that the human motivations are pluralistic. The present work shows in a complementary manner that *the psychological egoism, when it reduces the person to a myself inextricably attached to the biological life, is not empowered, in the dimension that is by definition its own, to identify a "personal interest" in the pursuit of a goal posterior to the death, even if the subject pursues it as if it were an individual good (the "salvation of the soul" for example)*.

Once the theses of the psychological selfishness set aside, it is possible to address the issue of the relationship with the Other such as Emmanuel Levinas or Hans Jonas have considered it. If the *myself* is presented as a "given", such is not the case for the *self*, since it is possible for one not to be present in it. The spiritual journey of a man then consists, in a prime time, to change the seat of the awareness and to move from the *myself* to the *self*. The "presence to oneself" can then be referred to as "presence to *self*". The *self* and the *myself* should not be apprehended as opposed, but as complementary, the passage of the *myself* to the *oneself* allowing to go from a *given to a chosen*, allowing not to eliminate the *myself*, but to designate its place. The latter, although being fundamental, is not the first to be provided in a free man. The Other's supervision is essential in this journey, not that it *builds* one up, but in the sense that it *reveals* one to himself. Its importance is paramount as much as indispensable. Thus the Other acquires an incredible power over oneself, the one to make someone an eternal "stranger to himself", as in denying to one his very substance. However it does not build one up, even if it often tries to. One's freedom is not proved to be less abyssal, as it is also on personal choices that depend the accession of one's integrity and the revelation to the world of "Who he is". This revelation of oneself by the Other, whose meeting leads one back to his dignity, draws from one a commitment that exceeds the order of the considered choice: the Other's look or the presence to oneself need the whole being. For a thinker as Emmanuel Levinas, ethics thus precedes the action and the autonomous decision.

This status comes from his conception of the responsibility: to the extent that the latter "is born in the moment that the other affects me, and [that] this affectation makes me responsible despite myself", it becomes a condition of freedom; matching "the selfishness of the awareness", it introduces "the otherness within the very being". Then the ethics will have to realize the transverse unity within the subject. *The otherness within the very being*: that recalls the presence of *oneself*, in echo to the Other's look. Because the Other's look can act only if it finds resonance within the very subject in its presence. Furthermore, if one is unable to access to the *self* by himself, once built up, he acquires a form of autonomy - very different from the self-sufficiency - which releases him from any *radical dependence* regarding the Other as to the discovery of Who he is. This form of autonomy allows one to live his *self* and to access to a form of authenticity which in its turn supplies the exchange with the other. The subject, revealed to himself, can then become *source* and nurture the relationship it has with the Other.

To repeat what has been said about the *myself* and the *self*, the other's supervision makes one go from the immediate awareness of the *myself* to the reflexive awareness of oneself, and - once captured by the other - the answer that one decides to give will draw him nearer to the *self* or not, will make him become who he is more. In some way, the *direct awareness* of the very *myself* is to the self-consciousness what the latter is to the *indirect* awareness of the *self*. The person who lives in his *self* perceives it as "unknowable", while discovering it as "inexhaustible" at the same time. The respect and the welcoming of the other enables one to welcome the Other that he is for his *myself*, an "Other" inexhaustible, finally able to be included in a real relationship which is not only infinite due to the intersubjective relationship as a superficial reading of Emmanuel Levinas might suggest, but because it engages the communion of two infinities revealed to themselves. It is in such a relationship that the Hidden Third appears.

The person who lives in his *self* perceives it both as "inexhaustible", and as "unknowable" to be discovered endlessly, as "bases without substance". *Being of possibilities*, the subject can only be known in a comprehensive manner, because its essence is to be source - at least partially - of his own "be to the world", continuing the creation of the world in a way that he cannot foresee and which reveals him to himself: the authenticity can then become "surprenance". The *self* actually opens on the infinity of the Other that one is for himself once "off-centered" - of the *myself*, and is revealed to be fully open on the Hidden Third.

The author as subject

When it is admitted that the process of creation contributes to the individualisation of each creator, a deep link appears between the personalist principle of the copyright law and the

relationship with the other. *It is then possible to establish a link between the role of the Other in the constitution of one "being-himself" and the role played by the work in the unveiling of its author.* The work then becomes "the other of oneself". However the human relationship not only shows that the other's look is essential for one in order to gain access to the part of himself which is unknown to him, but also that this unveiling assumes an irreducible core in each of the people. Unless the recognition of these two poles that are the *other* and the *self*, not only the "unveiling" in question would dissolve in an infinite network of meaningless links, but the relationship would become a *manufacture* of the other - necessarily mutual and therefore paradoxical - rather than a respectful *unveiling* of its deepest identity. While the subject can only "genuinely realize its essence" through the other's look, during a process that evokes catalysis, similarly, the creation reveals to the author his own basis, principle of his *authenticity*, through the resistance that his motive opposes. If an irreducible share exists in the people, it is possible to say that in a sense the author draws his work from his very basis, and then the concept of *originality* becomes meaningful; but if it turns out that one also owes to the other a part of what he is for himself, it is *also* necessary to say that the civil society and the tradition have an influence on the development of the work, and that the author is liable for it. As it has been seen, this question of the relationship occupies - or should occupy - a vital place in the determination of the protection granted to the author: when it is true that one can only be himself under the other's look, is it reasonable to continue with the actual approach, resolutely individualist and marginalizing - and even, as it just has been shown, paradoxical? Should not one rather take also into account the interests of the civil society, independently of any *utilitarian* consideration, yet recalling that any legal act is based on a form of "social pact" ? In other words, is it not dealing with finally recognizing that the author is not more isolated than he is dead?

Thus, we understand how the copyright can only enter in contradiction with its foundations when it accepts a vision objectifying the author or when it considers the work without its link to the author. It is also better understood how the creative process, radically non-directive, is opposed to the process of production of the "cultural works". Since the essential discourse of such productions is to maximize the benefit of those who finance them, their process, in order to do this, the more often obeys to expected rules aiming at ensuring the success of its perception by the public. It is then no longer possible to recognize anything else than a simple *work*, and their protection can only be justified according to rules dealing with unfair competition.

The three perspectives

Once the ethics foundation set out, the copyright can be studied through three major fields of study: the economics, the historical of the copyright law and the creation. The first one aims at trying to understand the reasons and the consequences of the current changes which affect the copyright law, and which have sometimes changed it against the interests of the authors themselves; the second one aims at getting the nature of the authors' claims through the centuries and understanding how the captures of this law in favor of the intermediaries have been managed; finally, the third aims at a better understanding of the needs of the creators, the role played by creation in people's life and the conditions to settle in order to find an adequate perimeter of protection.

Economics

The economic analysis is required particularly because of the importance that the intellectual property gives to the law and economics, which is intended to submit the law to the demands of the market, judging from the perception and relevance of a law by its economic effects; in other words, the law and economics proposes to measure the law, comparing its actual consequences to the goal it aimed at thanks to analysis methods specific to the contemporary economics. These rules and methods have yet to be *neutral*. But the economics not being a science in the strict sense of the term, since it focuses on the *choices* of the commercial and financial actors, its rules are in all occasions considered as guides rather than as verifiable laws. For this reason, a criticism of the applied rules is necessary; even though it seems to be very rarely the case. In order to assess the possible neutrality of the economic rules, it would be appropriate to have a look on the capitalism's characteristics, the current reference model for the economy. It is clear from this analysis that they are not neutral.

The remarkable historical study of Ellen Meiksins Wood on the origins of capitalism (Ellen MEIKSINS WOOD, *The Origin of Capitalism. A Longer View*, Verso Books 2002) enables to set out the main characteristics of this system and to better understand their interactions. Thus there are five fundamentals of capitalism: constraint by the market; competitive production; constant improvement of the labor productivity; profit maximization; unlimited accumulation. Each one of them reduces the freedom of the actors, forcing them quite often to an expected behavior which they do not control. The concept of constraint seems surely to be the keyword of this system, which is very far from the concepts of "choices" and "the matching of supply and demand" which are too often proposed though as explanation. The consequences of these fundamentals are many. Among them are those that Karl Polanyi, one of the most inspired opponents to this system, has

identified as the "undoing" of the economy in relation to the civil society. This "undoing" is surely encouraged by the temptation proper to all the constituted disciplines to access to a self-referent status. But, with capitalism, the economy goes further. The capitalist ideology, in its way to reduce everything to the status of merchandise, intends to mediate the social relations via the market. Introducing the economy as autonomous in relation to the social and political sphere, it creates the utopia of the self-regulating market, set out as it is as a "natural law", where the pre-capitalist companies incorporated the economic relations as one of their balance's facets. This how society becomes blind, in matters of copyright as in other matters: because of only considering the social relations through their immediate costs, it only wonders about the most effective (quantifiable) means to achieve a purpose that it does not even bother to discuss anymore.

The desires of freedom of the capitalist economy are divided among several plans, whether being the ethics one, through the ideology of the self-regulation of the market, or the one of political and legal matters, and also the ones of science, of the transmission of knowledge and even of the epistemology. The adoption of a false mathematical formalism enables it to acquire a status of "exact science" for example while it is related to the disciplines of the subject by nature. In fact, through all of these desires, the capitalist economy is only trying to break free from the man, or, more exactly, from *the human being* in the man by rejecting all *measure likely to* supervise him or to make him discuss the goals that it is aiming at. Doing so, it shows that it does not consider the human as a measure of its action, but as an instrument exploited to achieve its goals, *unlimited* as much as illusory. Therefore, in the field of copyright as in other matters, one has to refuse to address the question of the value of knowledge and of the protection of creation through economics. The economic perspective suggests several essential conclusions concerning the law of copyright. The change of the nature of copyright that is found in the last few years is particularly embodied by the transmission of the jurisdiction in intellectual property from the UNESCO to the WTO and the WIPO during the 1980s. The responsibility of the capitalism in this genuine change is that it seems to be doomed to follow an inexorable logic of expansion. The latter leads to imposing its unified market to all the social actors, to all of their exchanges, without any exception. This expansion is mainly prolonged on two lines. The first one requires the integration of all the geographically disparate markets and to gather them into a single market: this is globalization. The second one, more devious, inexorably tries to transform any reality, whatever it may be, into merchandise, since the very moment the civil society gives any importance to it, in other words a certain "value" in the sociological and philosophical sense of the term. And the copyright law is modified in function of these two lines: by its international

uniformity on the one hand, which takes the copyright's substance away for the benefit of the mercantile vision that currently prevails in the country of *copyright*; and by the commoditization of information and culture, on the other hand. Thus, these are the explanations of the intrusion of the economy in the field of copyright and of the radical transformation that it imposes on this law, to the point of taking its very justification away.

By the necessary transformation of any reality into merchandise that it manages, capitalism is not only extremely reductive, but also fundamentally objectifying. Karl Polanyi, one of the greatest critics of capitalism, was not wrong, and made of it one of his focal points. He exposes in his book entitled *The Great Transformation* that this system has been able to impose to everyone to use the market in order to ensure his subsistence as a result of the transformation into merchandise of the soil, labor and currency, in disregard of their profound nature. Karl Polanyi qualifies them as "quasi-merchandise", to the extent that, to him, a merchandise is defined as a product firstly produced to be sold (Carl POLANYI. 2001. "The Great Transformation" *Boston*). Continuing the analysis of Karl Polanyi, Geneviève Azam shows that knowledge, now essential in our "information society", has suffered the same fate as the one of the "quasi-merchandise", while considering that it should rather be seen as a "fictitious merchandise" (Geneviève AZAM. 2007. "La Connaissance, une marchandise fictive"). This is how capitalism has transformed knowledge into merchandise managing a deep change of copyright; it has done the same with living organisms changing the nature of patent law.

The capitalist domination on the works of the spirit leads to two consequences in addition to their commodification: the knowledge being of all the sources of power the one which presents the highest quality, the privatization of knowledge that allows the intellectual property offers to capitalism in the first place a source of power unequalled in the past. In addition, this grip encourages the illusion that the capitalist market would have changed in nature, transforming a market with necessarily limited wealth in a source with "infinite" wealth. This expansion contributes to make more credible the limitless expansion on which it is based ; nevertheless it is still illusory, and this point emphasizes one of the major contradictions of the capitalist system in its double claim being global and private. Indeed, it is impossible to consider the immaterial works as common goods – wondering about the incredible thought of the "unlimited" capital which it induces – and as objects of property at the same time. The capitalist exercise of the ownership goes through a necessary fabrication of their rarity, therefore through a radical obstacle to their communication. And without property, there is no possible inclusion of intangible capital in the capitalist evaluation of wealth. Essentially materialistic, the capitalist market seems then to be doomed to remain *limited* and excluding.

Historico-legal

The history of copyright law enlightens several points which could inspire solutions for the future. The classic texts teach that the literary authors of the ancient Rome, by their desire to see their plagiarists covered with reproaches, already claimed a form of moral right on their works. Therefore, this aspect is fundamental, and shows how much the link between the author and his work is a kind of intimacy which is not negotiable. These claims must be taken seriously by the civil society, even in the Internet era. But in the Roman Age, this claim was accompanied with a certain flexibility in the demarcation that is needed to be established between plagiarism and original work encouraged by the tradition: from there too one should learn the lesson, the intolerances of the general public towards the current copyright law without doubt coming from - at least partially - an excessive level of protection which does not take into account the mechanisms of creation by appropriation or of collective creations that the Internet undoubtedly facilitates.

The history of copyright also makes one attentive to the strategies put in place over the centuries by the intermediaries in order to take away the rights granted to the author. However, the latter remains, despite the important role often played by the investor, the essential element of the cultural process. He is the one to be protected, before any other actor. The activity of the intermediaries seems to be rather dealing with the competition law. The movable-type printing is a perfect example for this. It notably enables to judge the effects of the technique on a law that the rules of leisure want to see amplified on the occasion of each technical developments. First, printing does not make an existing market evolving, but it creates a brand new one. The scarcity of books in the West before this invention is not only due to, as some declare a little too fast, difficulties related to the manuscript copy, but also to cultural reasons, particularly because of the control that the Church wanted to exercise on the knowledge. The number of printed copies will give the general public access to the book, beyond the traditional circle of manuscripts' readers being composed of of priests, teachers, students, secretaries, clerks, doctors and lawyers. In addition, printing enables the emergence of works of reference, each copy of an edition being strictly identical to the other, which ensures two distant scholars that they are talking about the same text, which the manuscript tradition does not guarantee. It also reinforces the individuality of the texts and the aura of the author, the latter becoming the direct referent to his readers. But the intermediaries between the author and his public continue to exist, even if they are identified more easily. The main of them is the printer / publisher. The members of this new and little regulated profession are competing without mercy. The first texts published, the greco-latin classics, required a huge critical work and a wide network of buyers to collect different

manuscripts of the same text through the Mediterranean world; it is clearly more easy to take the same text established by a competitor and even its layout than to create its own version from different sources. So the printers thought about obtaining from the civil authorities a form of monopoly on the text they carefully edited, the "privilege of publication". This privilege is then a stranger to the relation with the author, and is exclusively used in a competition context. However the protection obtained is disappointing: thought particularly in favor of the publisher, it was limited to a short period of time - five years on average. But the assurance to see, often for police and censorship reasons, the authors forced to give their rights away in order to get their texts published made them change their mind. They started to base their rights on the authors' to dispose of their work. This is how, in 1725, the Parisian publishers justified the systematic extension of their privileges, in order to meet the provincial competition. The author, already then, is economically disadvantaged compared to the editor, who imposes his rules of payment, when he does not shamelessly violate his rights. Thanks to their new position of "protectors" of the authors, the publishers can consider to inherit the perpetual rights recognized to the author: the non-applicability in view of five years, the benefit is obvious. Denis Diderot, as an author who does not forget his past of printer, then envisaged a two-step strategy: use the printer / publisher to reinforce the legal privileges of the author and to ensure the integrity of the texts against disturbing publications, before considering to break out from it. Thus, history shows the origin of the big confusion made between the interest of the publishers to prohibit the competition from unscrupulous competitors and the interest of the authors to make acknowledge their immaterial rights on their work.

This confusion is reinforced by the ambiguity insufficiently perceived by the specialists between the notion of property as understood by the capitalists and philosophers of the Enlightenment Age, to the point that even today the rules of leisure and their supports feel entitled to claim of the philosophers, while they pursue goals frankly opposed to the ideals they defended. The individual freedom is claimed by the philosophers within a paradigm very different from that of capitalism: far from basing the right of each against all, as Thomas Hobbes settled it, it appears like a guarantee given to each citizen in addition to the other's against the power of one, as known as the tyrant. It is to this perspective that the property belongs, which the philosophers set out as the material foundation of individual freedom and the guarantor of its practical exercise, to put it simply the dam the more concrete that can be opposed to the recurring confiscatory temptation of the political power. Thus, is the craftsman, seeing his property acknowledged as his heritage, ensured to be able to supply for the needs of his circle of relatives through the means of production and of existence which are his. The capitalist property, on the contrary, by its

exclusive characteristic, is proved to be deeply antisocial. In England, the "tragedy" of the commons (or "the enclosure movement"), which forcibly displaced tens of thousands of little farmers, had already demonstrated the radically marginalizing and antisocial nature of the capitalist property: does not the binding nature of the market influencing this system to remove any means of real action from the community?

At the center of the issue of copyright this difference in the intellectual property between capitalists and philosophers enlightens many points. By reinforcing in the XVIth century the concept of land ownership, moving from an balanced individual right, by the exercise of common customary rights (grazing rights for example) to the *exclusive* right of a single man on a land, the capitalist England should, according to John Locke, initiate an even more radical revolution, thinking this individual exclusivity as emblematic of the relationship to the body. In his *essay Concerning Human Understanding*, John Locke extends the "natural property" of the individual on his body to the "natural property" of the worker on the results of his physical activity. Thus, he uses a manicheism of the more trivial and marks a denial of the human condition by refusing to admit that the body is both *condition* and *root of* the existence, operating a fundamental confusion between the *being* and the having. Such a confusion has repercussions on the question of the *making* and freedom. Immanuel Kant will quite rightly states that the very notion of "property of oneself" is opposed to that of freedom; it seems to her "very much inconceivable" where on the contrary John Locke sees in it the condition of the freedom . Strange inversion of the values, in which the *having* becomes condition of the *being*, and that, in practice, replaces the *being* by the *doing*. Secondly, he applies this general principle to the relationship between the worker and his production, as being the result of his activity. In contrast with the philosophers, whose aim is to ensure the autonomy of thinking and action of the authors in relation to the political power, the aim pursued by John Locke is very different: to justify the transfer of the property of the paid work's results for the benefit of the employer, which, in the field of copyright, is the same as justifying the alienation by the author of his work to the benefit of a third party, his editor for example. Once the artist considered as alien to his body, it is completely logical that the English legislator will apply "the net dissociation between the author and the work" and establish the *copyright* as a property right in which the merchant dimension predominates, where the copyright double the original property right on the work of an individual right, the work being stated as the *expression* and *communication* of the author. Nevertheless, the French revolutionaries have not been able to see the *original* identity of the property right and of the individual right, both issuing from the same creative act. Indeed, the editor inherits of economic rights by contract, act of a legal nature fundamentally different from the mode of

acquisition in the original right recognized to the author on his work. This "blind area" of the copyright will have many consequences. For not having understood the difference of acceptance of the notion of property between capitalists and philosophers, the Revolutionaries *juxtapose* the moral rights in relation to already identified property rights instead of acknowledging their unity and proclaiming their equal assignability, as the current German law does.

John Locke, in addition to not correctly apprehending the relationship of an author with his work, reduces the creation to a purely physical activity, in other words to a simple *work*, thus avoiding to address the difficult question of the originality of a work, in other words of the relationship that it maintains with the tradition on the one hand, and with the personality of its author on the other hand. This is how the *copyright* is based on one of the most trivial dualistic vision, and on a reduction of the reality bringing it to completely overlook the specific character of the creative act, which anthropology yet certifies that it has created the man in his very humanity ...

The process of individualization is often presented as a condition of the social recognition of the figure of the author and therefore as a condition of the assumption of the copyright to the positivity: however the emergence of a social claim is not always reflected by the acquisition of a positive law; in addition, the subjective conditions at the origin of a law can lose some of their influence within the society, or even disappear, and the positive law which they produced rarely stays after their extinction. This is what the individualization could be, condition of the emergence of the figure of the author and of the specific right which he is currently acknowledged. Most of the specialists in the history of the copyright law study the History as the story of a gradual and almost linear emergence of this figure from ancient times to our days, with, sometimes, a parenthesis between the end of the Roman Empire and the XIIth century. Yet, in the West, it is not from the XIIth century that come the individualization and the social recognition of the status of author that it is conditioning, but from the Roman antiquity, not regarding the graphic (or representative) arts, but the literary ones. Indeed, the Roman authors already fulfilled all the required conditions: the distinguished name - more generally the identity, the signature, the capacity to put his mark on a work (thanks to the seal and the style) acknowledged by the civil society, as well as the endorsement of a responsibility for his own acts. In the literary field, to the Roman *persona*, which founded the legal and personal responsibility of the citizen, is added the responsibility of the one who writes, the *I* of the historian or of the philosopher who expresses himself in quality of witness, as Herodotus, or guarantor of the meaning, as Plato. However, there is no doubt that the individuality, under the threats of the barbarian invasions, has

vanished in the IIIrd century of our era only for reappearing ten centuries later, and this fact teaches that the individualization is not an irreversible phenomenon.

But if the individualization is a condition to the assumption of the positivity of the copyright law, it is not the first reason: since the first cave paintings of the Paleolithic period, the author is protected, this must not be forgotten, due to his role in the development of the work. Thus the "death of the author" trend does not detract anything from the need of copyright. Therefore, a review of the foundations of the protection of the copyright law invoked along the History enables showing how the personalist anchorage, once deprived of the psychological readings that some have been able to develop, seems to be the more relevant; even so, it inspires and resumes several foundations recently defended by the doctrine, such as the advertising of speech or some fundamental rights. However the present work proposes to adopt a foundation which, from an openly personalist inspiration, is more based on the author understood as producer of his works than as social figure: it deals with the *human creation*, apprehended in its very nature, as a factor of humanity which is in everyone, such as the artistic perspective presents it.

Artistic

The current copyright reveals a big failure, mainly due to its extreme convenience for the industry, at the expense of the authors. In France for example, it hosts pell-mell in the perimeter of protection the satellite pictures, the bolts, the plastic salad spinner (most importantly *due to their very material ...*), the panties and the software, raising doubts that all of these works meet the two conditions of the originality and of the form set out by the case law, or that they belong to the "literary, scientific and artistic fields" (Berne Convention, art. 2 al. 1), except to belie the dictionary. Other inconsistencies, of which the more little was certainly not the refusal of protection to a picture of a landscape on the pretext that it reiterated the construction of the Masters of the XVIIIth century, supplement the Scoreboard and impose a review of the current protection criteria. In order to do so, it is suggested to start from the first artistic and literary works protected, to express their principles of protection before considering how far the protection can be extended to: indeed, nowadays it seems excluded to restrict the scope of copyright only to artistic and literary works, which would mean protecting the works according to their *kind*.

The analysis of the creative phenomenon enables to expose a characteristic which stretches to the scientific works, such as the research work: the one of the *transformation* of the author by his work in the same time that he is developing it. The choice of this basic criterion is essential in more ways than one. Thus, it is the difficulty experienced by the legislator to find an objective

criterion of distinction between the *artistic production* properly speaking and the *applied arts' one* which would be at the origin of the thesis of the art's unity: a poster could very well present undeniable aesthetic qualities, whatever its purpose. Aesthetic: if the field of copyright has been able to expand far beyond the corpus of literary and artistic works, it is precisely because of the narrow conception - in other words *aestheticising* - of the art that one had at that time. Actually, it is the thesis of the art's unity which allows businesses to capture for their profit the theoretical protection granted to the authors. Paradoxically, such a thesis would not have been unable to impose itself if a greater opinion about art had been settled, or, even better: *a basic one*, as the notion of *transformation of the author while developing the work* lets one guess. This thesis of the art's unity, which is opposed to the one of its autonomy, supported here, assumes that one should not exclude a work from the protection due to its *kind*, its *merit* or its *destination*. If the fight against censorship - in perfect consistency with the thesis of the art's autonomy - justifies that a work should not be judged according to its merit or even to its kind, it is very different concerning the criterion of the destination. Indeed, the criterion of the destination introduces a factor which ruins both the art's autonomy and the criterion of the author's freedom in the development of his work, as the copyright law is thus authorized to protect productions which elaboration may be *constrained by* their function or by the program of the investor, when the ultimate destination of the work is to maximize his profit. However, with the exception without a doubt of Agnes Tricoire, very few seem to be the authors who perceive a fundamental difference between the criterion of the destination and the other criteria defended by the thesis of the art's unity. Yet this is what appears when one bothers trying to find a criterion capable of justifying the art's autonomy - the notion of fiction according to Agnes Tricoire.

On the other hand, many are the work which, in the last few years, have focused on the notion of work criticizing the classical opposition between form and idea in order to try to include the installations of the "conceptual art" in the scope of the copyright protection. It is mainly a matter of knowing whether the work must define itself in its relation with the author, in an immanent way or regarding its perception by the public. In this balance, most of the authors neglect at least one of these three poles. By diverting themselves from the author or the creative process, they lose sight of the perspective according to which it is the very special nature of the relationship between the author and his work which justifies the protection; neglecting the work, they forget that design and development of the work are influencing each other and proceed from the same act of creation engaging the whole being, to the extent that it always unveils and transform - more or less - both the author and his initial project through the "submersion in the undifferentiated"; finally forgetting the public, they lose sight of that only it unveils the ontological polysemy of the

work, as the author is never completely aware of the set of his possible interpretations, and how it exceeds him. And if the work can *exceed* its author, it is because of the opening up of the *myself* on the *self* that initiated this submersion. To each of the three components of the equation corresponds a particular type of idea ; thus the framework of the creation is made of three *discontinuous states* , direct consequence of the submersion in the undifferentiated, to which the work and the *self* bring, each one in its own way, the essential element of consistency. While the work connects the *initial project* of the author to his *material results* and *interpretations* that can be made, the *self* connects the *myself* to his *inner opening* on the world by the experience of the "submersion in the undifferentiated " and the universal *echo* that the work in resulting finds in the most intimate aspect of each spectator. The *self* must then be understood as a manifestation of the Hidden Third.

It is essential to question the very notion of creation under the phenomenological angle in order to avoid the trap of these theoretical constructions which perceive it as a purely intellectual process, while it is certainly not one. Two fundamental findings have guided the analysis of the work developed in the framework of this thesis: the creation is a *mystery* , including and perhaps especially for the author, and any analysis which would forget this is condemned to be away from the reality as seen by the authors; its mysterious dimension, which must not hide with a cliché of complaisant inaccuracies, is due to the fact that the creation includes the author *in his whole* : making it a purely mental activity as the members of the conceptual art (indicated below: CA) would like to truncates singularly its wealth and changes its nature more than it purifies it. Wanting to make of the art and of the creation in general an intellectual activity dooms to get confused between *work of art*, on the one hand, and *work*, or even *information*, on the other hand. This confusion sometimes denotes a refusal to take charge of the human condition and of its embodied dimension. With all due respect to the CA, one *is* his body - at least in the perspective of the *myself* and of the immediate consciousness of which it is the seat -, hence the creation must necessarily integrate it or it is sentenced to be only an activity without submersion in the undifferentiated, not enabling "the author" to transform, nor to reveal himself deeply.

Just as knowledge, the creative experience is an intentional act; thus it is indispensable for whom wants to "sense, to feel or to the experience the world " (DESCHAMPS, Chantal. 2002. "Le Chaos créateur"). As Jacques Gastinel say " the main specificity of the human being is to bring to the form his relation to the world " ; it is even possible to see that the art having created man (Jean-Paul JOUARY. 2012. "Préhistoire de la beauté – Et l'art créa l'homme"), it is the preferred means to get back with the "felt-believed-thought" undifferentiated of one's origins from which it has emancipated him, allowing him to evolve and to access little by little to the reflexive awareness.

Nowadays, the practice of art and of any form of creation enable one in turn to live in his intimate space offering him the possibility to join his complete and fundamentally not determinable being. In the end, as Michel Terestchenko said, creativity is a form of "presence to self" (TERESTCHENKO, Michel. 2005. "Un si fragile vernis d'humanité"), *either it leads to it* – and this establishes its therapeutic effect –, *or it attests it*. In reality, there is always of both, since the creative process transforms one at the same time that he transforms the material into a work. Creativity, as expression of the personality, is therefore one of the effects the most spectacular of the transcendence and of the fundamental freedom of the human being. It is due in large part to these reasons that it is extremely dangerous to submit the creative experience to the sole economic prerogatives: that would be tantamount to submit one of the main ways of learning about oneself and the world to the merchant benefit, and so marking the supreme "regulation" of the civil society by capitalism. At the current stage of reinforcement of the intellectual property, what is at stake is not only the possibility of living of his activity of author, but also the assimilation of his predecessors' works and their appropriation - in particular by transposition - without fear of a trial.

The historico-legal perspective has shown that the appearance of the *figure* of the author was linked to the progress of the individualization in the West, and consequently that the approach which the better justified the protection of the author through History was of a personalist nature; it enabled to verify that this protection, since the first legal formalisations, was extended to all the literary and artistic works rather than to the sole works presenting an aesthetic aspect, without being confused though with any human artifact. The phenomenological examination of the creative process confirms in its own way, the personalist thesis, insisting on the role that the author plays as a *factor* of works, a function all the more essential than his *figure* . This fundamental role of the author existed way before the emergence of the individualization but still *committed the whole person* of the author since the first beginnings of the History.

The artistic perspective enabled to make a step further, through the review of the three conditions of the protection that are the freedom of execution which the author enjoys, the originality of the work and its formatting. In the light of the first, the *creation* is ending - and the protection of the copyright law should be too - where begins a *work* with a result managed by a program and obtained by the implementation of a method or of precise instructions allied to a simple know-how; it enables to exclude from the protection the utilitarian productions which process of elaboration has been obliged by the initial project or by the function of the object, refusing any real freedom of execution to the intervenor. First it is proposed to radically distinguish any assimilation of the *originality* to the *novelty* . The originality is of a subjective nature, while the

novelty, of an objective and technical nature, neglects the particular relation existing between the work and its author. It must be admitted that this confusion relies on the ambiguity of the very notion of originality, which oscillates between *authenticity* (drew from its own basis) and *novelty* (a "unheard of" idea). Many are the reflexes which assimilate the originality to the novelty: from the research for prior art to the absence of banality, what is without equivalent would be original, something which would be *added* to the corpus of existing works. Many are the doctrinaire and the judges who sooner or later reach the stage of giving an objective aspect to originality. However the *objective* theses of the originality doom themselves to confuse originality and form, the first one being inferred from the the second ; in other words, the originality is then reflected by a *new form* . In order to emphasize the *necessarily subjective* character of the criterion of originality and to avoid the consequences of the semantics ambiguity which affects the notion, it is proposed to adopt, the notion of "authenticity" in lieu of the classic "originality" as a condition of protection. The two criteria are then complementary in more ways than one: the *subjective* approach of the authenticity defended here responds meaningfully to the necessarily *objective* characteristic of the form, based on the very structures of the forms of expression analysis; while the *authenticity* is based on the nature of the creative process and on the *inner transformation of the author that it* operates, the criterion of the form relates to its *material result* , in other words to the work. Thus, the two main meanings of the ambiguous term of "creation" are expressed here (both the *action of creating* and the *result*), relayed by the two main meanings of the concept of "originality" (both "drew from its own basis" – talking about the author - and "novelty" - in reference to the work).

According to some authors, including Ivan Cherpillod , Agnès Tricoire , Philippe le Tourneau and Julien Cabay, the distinction form / ideas would not make sense anymore and would not enable to establish the limit between the "free" ideas and the protected works, a form necessarily conveying an idea and an idea only being transmitted – and so existing for the third parties - by a form. Therefore, they propose to forget the criterion of the form, and are backed up in their approach by the members of the CA and of the industry. The first ones plan to protect installations reduced to their simplest formal expression, to the point that they are presented as the *illustration of an idea* rather than as the *expression of a personality* , their contribution, as a result of their very emptiness of execution, can only be understood once extended to the series of works incorporating the same formal concept. For its part, the industry wants to, using the theory of the art's unity, protect the "intangible productions" of the business world in the wake of the protection granted to the authors, at the same time confusing *works* and simple *information* and placing knowledge under supervision through the conferred monopoly.

The criterion of the form and the taking into account of the submersion in the undifferentiated enable to identify three types of "ideas" in the creative process: the "initial project", which remains by definition unexpressed ; the "idea of the work ", inextricably linked to its form; the personal representations that each one supposes of a work from the multiple impressions that it evokes and which belong to his very property. Only one type of ideas, which would enable to considerate the work and the interpretations that the public draws from them, is often stated as fully defined by the initial project. However, the experience seems to reject this vision, for the benefit of a "submersion in the undifferentiated" which induces a *break* , a *discontinuity* in these three steps and justifies the presence of three types of ideas instead of just one. Of these three types of ideas only the second one corresponds to the idea that these authors talk about and is included in the granted protection. The other two cannot under any circumstances claim to be identified as a form, either *by definition* for the first one, according to Ivan Cherpillod, or because of the "ontological polysemy" of the works of fiction that Agnès Tricoire fiercely defends with the principle of the art's autonomy and that the circle of Iéna's German romantics asserted before her.

Two limits of the protection enable to specify the perimeter to protect: before the work, on the course of its elaboration, are excluded the means of expression of which structure is too basic to enable the *transmission* of what the author bears in him and tries to express ; after the work, the extrapolations developed by the public belong to him at the moment when they go beyond the formal framework of the work: this will be for example the continuation of a known work, or the reinterpretation of one of its major themes. Admitting the protection of the idea carried out by the work as inextricably linked to its form enables to escape from the traps of a too rigid protection that would excessively focus on a fixed form, harming the author, increases the legal uncertainty in all minds and does not extend the granted protection to what the author *transmits* through his work. Thus, are two sentences of the same meaning and of the same structure already included in the same protection, the use of synonyms not changing anything to the key elements expressed by the first one: one has to detect the sign that the protection is not only dealing with the form, but also with what it carries out (its "inner form") and of which it is the issuance. Furthermore, the approach defended here enables to better justify the exclusion of the *processes* and of the *rules of production* of the works, which protection falls under the law of patents, and not to see in it an exception to the principle of protection of the ideas in the work as Ivan Cherpillod seems embarrassed to admit at the end of his thesis (CHERPILLOD, Ivan. 1985. "L'Objet du droit d'auteur", Lausanne). The acknowledgment of the key role that the submersion in the undifferentiated plays in the creative process; the inability to establish a rational and immediate

link between the initial project of the author and the idea carried out by the work, or between the latter and its multiple possible interpretations; the distinction of the three types of ideas interesting the resulting copyright law; the attention paid to the two processes of abstraction located upstream and downstream of the formalized work, all these details put in collaboration enables to defend the personalist thesis, the claim for a protection of certain ideas through the one of the form and of the maintenance – with precision - of the classic distinction between form and ideas.

The analysis of the two main conditions of protection that are the authenticity and the form shows the legal uncertainties to which their judicial review currently leads, accentuated by a law deficiency with regard to definitions which let the judges by themselves and make them, in their syllogisms, masters of both the major and the subsumption. Therefore, it is proposed to further formalize the judicial review in the field of counterfeiting, in order to make it more predictable while better defending the needs of the creative process. The nature of the required evidence would vary depending on whether the author is plaintiff or defendant in the trial for forgery which would oppose him to the third parties, in such a way as to take into account the fact that a dispute for counterfeiting is always opposing two authors and that to unduly favor a party tantamount to weakening the position of all the authors.

In terms of authenticity, it is the creative process which is at the centre of the question of proof. It is necessary to review the burden of proof by requiring the complainant to make the authenticity of his work at least *credible*, as well as the lack of authenticity of the work which he alleges the infringement. The credibility of the authenticity of his own work will be based on subjective criteria that he only is able to provide ; for example, by stating the course of his assimilation work and the circumstances or the approaches which have motivated him, as surely did for example, with a true happiness, Helene Maurel-Indart , Michel Terestchenko or Paul Amselek . The credibility of the absence of originality of the work accused of infringement will be decided with an examination for similarity. The examination for similarity responds to the marginalizing and objectifying logic of *copyright*¹ more, to the extent that it protects the *novelty* , than to the one of copyright, which intends to protect the originality - understood in the sense of *authenticity* ; it always advantages the author of the work of reference, as it tends to consider any similarity with the latter as an issuance of plagiarism, while it can be the result of a parallel borrowing of a common heritage or of a style shared by most of the authors of an era. It is for this reason that it is essential to consider that the examination for similarity can never achieve to establish proof of

¹ Note : in English in the text

a forgery, but its *credibility* at best. In terms of authenticity, the differences must weight *heavier* than the similarities, because of the phenomenon of the *parallel creations* ; this is why only the analysis of the differences enables to provide proof with regard to authenticity.

Regarding the criterion of the form, it has been shown how this is not so much the external and fixed form of the work which is protected but its *inner form* (to be distinguished from the "internal shape" for Philippe Gaudrat): the fact that the practice of "differentiation" is considered as an infringement proves it well enough. This does not question the classic distinction form / ideas, but rather enriches the concept of form. The protection of the form in terms of the means of expression, through the *process of digressive abstraction*, makes the author to start with general and universal elements to then customize them by their connections always more structured as the work is developed. Then, only the second border of the perimeter of protection is yet to be determined. It is given by the *process of progressive abstraction*, by which the public interpretes the work and owns it.

If the debate is set from the ethical point of view, the issue of copyright grows to the point of including the recognition of what makes one *human* . To consider technical instruction manuals or computer programs and works of fiction on the same level, is dooming people to lose sight of who they are; it is reducing the creation to the transmission of an *information* , or to a simple *intellectual work* which merit is judged by the time spent to complete it - the type of assessment of the value that capitalism has developed for the man. The extreme enlargement of the circle of the protected property, illustrated by the semantic change of "work of art" into "intellectual property", commands in reaction to exclude of the protection *a minima* the texts and other technical works which submission to the initial discourse does not enable to claim for the necessary freedom of execution, or to reach an internal structure able to transmit a real *personal intention*. In the name of what an instruction manual corresponds to the definition of a work and is given a *protection of the same nature* as the one granted to a novel? These productions of a technical inspiration, limited to the *information they contain* , often closely re-used by various cross-sources and which are the product of a simple *job*, can they reasonably justify the radical transformation of a law adapted to the "*creations of the spirit*" and not to all of its *productions* ? Surely, these works can now be denied any protection as they are not able to justify a sufficient originality; but does not the current system encouraging an unacceptable legal uncertainty by allowing the appearance on such productions of hallmarks of an ownership claim, which companies are very fond of? Thus, the consistency of the protection granted by the intellectual property is at stake, having to be shared – in the field under consideration - between the copyright

law, the patent law and the law of industrial designs, without ignoring the existence of the competition law and the jurisprudence developed in the area of parasitism.

The proposed reforms

In addition to a strict interpretation of the originality as a synonym of authenticity and the proposals formulated with regard to the management of the evidence in authenticity and form, a number of concrete proposals flow from the previous statements.

The strengthening of the author's position

Originally, the rights granted to the author were firstly given so to protect him from the intermediaries - more precisely from his printer and from the counterfeit competitors of the latter - and not from the general public. However the dualistic solution chosen by the revolutionary legislator let the author by himself again against these intermediaries by which he is forced to go and which currently take the appearances of economic actors such as the editors, sponsors, broadcasters, producers, employers ... This capture is always generated by the need of the author to call on them to produce or spread his work. The legislator's solution comes from an historic legacy in the first place, the copyright having been built up during the royalty period in the wake of the monopolies granted to publishers. Therefore, it dealt exclusively with economic rights; it is only from the implementation of the second revolutionary legislation, in January 1791, that the moral right of authors is acknowledged, but as an "additional layer" ; this unfortunate historic legacy obscures a yet capital fact, as to know the very justification of the granted right, which is of a personalist nature not only according to the moral aspects, but also to the economic ones. Indeed, this is the particular link of the author to his work which justifies in the countries of copyright *all* the granted rights to authors and their position of *original owners of the work*. However, the dualism of the French copyright law is attached to its dual basis, the moral rights being linked to the personality rights whereas the economic rights, based only on the Copyright Act, are assimilated to a property right, or even to a monopoly.

The History shows that the only way to effectively protect the author is the acknowledgement of the nontransferability of the patrimonial rights, except in the event of the death. Otherwise, any reinforcement of the rights specific to the author eventually strengthen the intermediaries. The authors, throughout the XIXth century , have never stopped wondering how the reinforcement of copyright failed to give them satisfaction and eventually ended up serving quite different interests from those originally targeted. This nontransferability would ensure the key position of the author without preventing the commoditization of his works, and therefore without removing the

possibility for him to live off it. To claim otherwise would be like forcing the owner of a field to give up his property - even solely in a fiduciary capacity- in favor of his architect so that he could hope for his home to get built... Furthermore, Germany, probably under the influence of Immanuel Kant to whom the intermediaries of a book *cannot be owners* of the content of the work, has adopted, a *monistic personalist position*, which requires that all the copyright laws are matters of the rights relating to the personality and are acknowledged a nontransferability characteristic. In Switzerland, the moral right is not directly related to the rights relating to the personality anymore (art. 27 and 28 Swiss Civil Code), as it is still the case in France.

The ability for one to assign his economic rights, presented at the time - and it is still too often the case - as an advantage acknowledged to the author, actually harms him in addition to ignore, as it has just been said, the intangible nature justifying the rights - including economic ones - conferred. The *capture* of this right by the intermediaries is firstly due to the assignability of the economic rights, whereas this assignment, even for a highly reproducible type of work as the literary text, is not essential to ensure the safety of the relationship between authors and publishers. However, the current system has been successful in favor of the intermediaries. When the assignment of the economic rights is possible, the intermediaries vigorously *require* it from authors wishing to make a name for themselves, who since then have no other choice but to do it. Considered as indispensable to ensure the distribution, the advertising and the sales, they impose their conditions, which are clearly not profitable for the authors. Many are the young authors who suffer from this system, while they are among those who need the most to be confirmed in their career.

On the contrary, if the bill would proclaim the assignability of the economic rights, the writer, disappointed of his editor or the musician of his producer could - even in the case of an exclusive contract - legally contract with one of their competitors, as they would still be the holders of the rights on their work. During the time of the procedure, they could also- unless they lose on provisional measures - see their creation produced in good conditions and get the rights which belong to them on the sales, which would provide them the financing of the legal actions that the ousted intermediary could take. The author is then in a much stronger position, without the law offering the intermediaries to his whims. One might even imagine that the author, if his notoriety enables it or if the actuality of the work justifies it, can be promised the financial coverage of his legal expenses by his new partner in the event of legal actions taken by the first editor. Thus, this is how one can see through the strategic nature of the nontransferability of his economic rights for the author.

Restriction of the protection

In addition to the significant strengthening of the author face to the market intermediaries, it is important to restrict the application of the granted protection. The first improvement of the system consists in a restriction of the scope of the protection. This restriction is the specific consequence of the direct exclusion from the protection of the works which the utilitarian or the essentially mercantile destination conditions the elaboration. This rectification of the theory of the art's unity should be reinforced by the requirement for a free execution of the work. Moreover, in order to protect the creation through appropriation, these measures should be accompanied with a limitation of the protection only to the "initial purpose" of the work, in other words, with a limited understanding of the concept of derivative work. To protect the author does not mean to protect him from all the possible uses of his work, as soon as he has disclosed it to the public. Thus, should the protection be limited to the "initial purpose" of the work, that is to say, to the main use which is its own: if for example it is desirable to protect the plans of an architect with the copyright law by preventing the construction of other similar buildings without his agreement, it is however not permissible that an architect could prohibit under his copyright pictures of his works to be taken, *particularly* when these are visible from the public domain. The protection granted to the architect should be limited to the field of architecture, where he can suffer from a damage affecting his future activity. Surely, this limitation of the intellectual property gives the impression that it only protects the unfair competition more than the personal relation which links the work to its author. But in the end, is not such a limitation justified by the ambition of the copyright law, which, in the heritage field, is to enable the author to live off his creation, not to maximize his profits or to supply a binding market? The limitation of the protection to the "initial purpose" of the work sets the work free from the commercial machinery with which it is accompanied sometimes: thus a film does not have to be the occasion of a maximization of profits by becoming the showcase of "derivative products" that it may inspire. When the scenario of a film like *Jurassic Park* is simply a tool designed to ensure the promotion of gadgets, one might wonder if it is still a work since its structure has been largely conditioned by the expected benefits of the "derivative products": the production then fails to fulfill the condition of the freedom of execution.

Besides, the exceptions to copyright should not be restrictively interpreted anymore, but they should be seen as rights since the copyright law itself is an exception to the principle of the free circulation of ideas. However, these rights must be precised, in order to avoid some excesses, particularly on the Internet. The human being owes his wealth to his own basis, but the latter is only revealed to him with the Other's supervision, as well as the inspirations of the author do not

only come from his own basis but also reach him by a collective culture from which he must be able to get inspiration. The private copy must be fully acknowledged for what it is: a right, that no anti-copy protection process should be able to restrict. The DRM or processes like the "zoning" of audiovisual works do not need to be protected by the law, on the contrary, they must be easily bypassed when the right to the private copy justifies it. That is the case for example, in case of a copy of the work from a format to another according to the programmed tribulations of the technical "progress" in the field of consumer electronics.

Plurality of the protection regimes

Given the current need to not limiting the protection only to artistic and literary works, and in order to avoid lowering the requirement of originality for all so that other works could be included in the protected perimeter, it seems necessary to construct a typology of protection regimes: can a simple article published in a scientific magazine expect from the author the same type of involvement as in a novel, even if it is possible to *produce* novels according to proven methods in order to make them "*blockbusters*"? The prohibition of judging a work according to its merit must lead to the similar treatment of works of the same type, the most authentic of them justifying the protection granted to the others. But to claim that all the *creations of the mind* must belong to the same regime of protection, tantamount ignoring that their creation does not pursue the same goals, nor for the author, or for the public that he is aiming at. The clarity of the protection, supported by the theory of the "art's unity" - more precisely by the prohibition of judging a work according to its destination - harms the authors in the end.

Richard Stallman has proposed a typology based on the criteria of public interest and of originality giving rise to three different protection regimes, hereafter listed by increasing order of protection (STALLMAN, Richard. 2001. "Copyright and Copyright and Globalization in the Age of Computer Networks"): the one attached to the "functional and reference works", which would be much like the GNU GPL license regime, with the right to publish modified versions; the one for the proper works aiming at "communicating what a person thinks, has seen, or believes in", and the one for the proper "artistic (aesthetic) or leisure works", where "the most important is the sensation felt while watching the work". This typology established in a context of *copyright*, interesting in more ways than one, is however not immuned from criticism in the copyright law perspective. It is therefore appropriate to use this typology and try to carry it out further, by adopting the criteria of distinction which have been mentioned. These criteria enable to appreciate the following typology proposal, listed below by decreasing order of protection :

- The literary (fiction) and musical works of art, as well as the works of the decorative arts

free from any other functionality than the aesthetic one (for example tapestries), which elaboration coincides with a transformation of the author through a more or less strong form of "submersion in the undifferentiated"; they correspond to the creations of the *visionary mode* according to Carl Gustav Jung ;

- The scientific and opinion papers, including the philosophical articles and the documentaries, which inspiration is part of a rational framework although the production of the work also involves - albeit to a lesser extent - the transformation of the author; they correspond to the creations of the *psychological mode* according to Carl Gustav Jung ;
- The works in which a part of the development process is conditioned by their functionality (the works of art applied to the crafts, the works of decorative arts such as jewelry, the works of architecture, as well as the video games, but also the photo montages and the films, given the possible complexity of their structure ;
- The works in which the formalization process is mechanical to the point of assimilating the choice of the author to the simple staging or to the interpretation (and not to the representation) of a given reality (pictures, including edited ones) ;
- The textbooks and reference books, the collective works (for example the articles of the Wikipedia encyclopedia, the articles of some publications which editorial policy is extended to the style) or the works carried out in the professional context, including the works traditionally commissioned (such as the texts in cookbooks), the first ones due to their purpose, and the second ones because their design, as their execution, is more based on learned recipes and proven templates than on the experience of the confrontation to the unknown.

The industrial works should not be part of this list, as to know the utilitarian objects of an aesthetic appearance produced by graphic designers and industrial designers ("*designers*"²), the softwares, the data bases, the instruction manuals, the contracts, the reports and other productions which freedom of execution is greatly reduced by the utilitarian purpose that they are aiming at or by the precise instructions given by their sponsor. Regarding the databases, they simply gather pre-existing data and should never have joined the works protected by a right similar to copyright.

Inside the perimeter of the copyright law, the notion of *fiction* will ensure a secure sharing between the literary and artistic works and the representations which are not so. But a more precise typology will enable to classify the works according to the degree of *authenticity* that they

² Note : in English in the text

can require due to their kind – Jean-Yves Leloup would speak of the "place" where the person of the author is expressed –, regardless of their merit or of their aesthetic characteristic.

The different protection regimes should vary according to the duration of the granted protection (with a maximum of 25 years) and to the scope of the conferred rights, including the ability to object to a non-commercial exploitation of the work, the right to object to any alteration of the work or the right to establish or not derivative works.

Towards a different vision of the world

This work, after trying to establish the general causes and principles of copyright ("why"), and then deducing its perimeter and the desirable criteria of protection ("what"), leave to others the exploration of the best way to manage the economics of copyright according to these principles ("how"). But first of all, it invites to have an "other vision" of the world.

The copyright law is in crisis, and the development of the Internet does not seem to be the cause of this, but rather the demonstrator. It is necessarily in crisis since the civil society does not respect it anymore and sees in it a mean of control by few people on others' lives, which the defense of the interests of the authors is no more than a pretext. The civil society are urging that the copyright law is more the result of intermediaries of the creation than of the authors', so that the current reinforcements will by no means promote the latter. But current the aberrations of the copyright law are not only a social reality. First of all, they submit the activity that has *made* people human beings and which, still today, reveals themselves and enables them to live being aware of their intimate space, to the exacerbated control and individualism that seem to characterize the present society. This struggle between the members of the reinforcements of the intellectual property and its opponents hides a deep split, which for several centuries opposes the ideals of sharing and emancipation carried out by the philosophers of the Age of Enlightenment to the slavish projects of capitalism; it questions this economic system which harms people more and more and takes no account of who they are.

If one really wants to put an end to the merchant hegemony, the unique reading of the world must be questioned. One must be aware of the need to open up to a less narrow design of the reality, by integrating many of its levels and by adopting a compatible approach with the principle of the included third. In such an approach, the ethics of empowerment of the subject proves to be of a valuable assistance. In order to do this, it must not close itself as in a system of thought, or it will betray its profound vocation and its transdisciplinary nature, but instead it must remain open on the Hidden Third.

This reorientation will enable a return of the transcendence question: transcendence of the person, but also of the creativity, served by a stronger copyright but more focused. Only a return of the transcendence, corresponding to the adoption of a *direct awareness* of the existence and to the acceptance of the responsibility attached to it, will protect people from the current impossibility of the mercantile society to satisfy their deepest and most powerful vocation: to become Who they are.