SUMMARY OF THE REPORT ON THE CSPLA's MISSION REGARDING 'TRANSFORMATIVE WORKS'

This mission has revealed that the way in which 'transformative creations' are dealt with by copyright in the internet age gives rise to different questions, primarily due to the fluidity of the concepts, the complexity of the categories and the public lack of acceptance thereof. Our task was to attempt to gauge the practical implications and try to deduce the legal definitions. For this purpose, we reviewed French and European copyright law in order to determine the applicable substantive parts, and, wherever possible, to highlight the areas of freedom for creators implied by such laws. **We believe that this analysis of existing law, through the filter of creative freedom, is necessary in order to forestall some representational biases in the area of French** copyright **legislation**. Without being idealistic, we simply returned to the rules in question and their judicial practice and deduced that copyright is in fact not always as reluctant as it is said to be as regards the acceptance of transformative creation. **There are of course restrictions, but the creation of transformative works is in no way silenced in France, whether in fact or in law.** There is room for manoeuvre both in defining the scope of rights and in the **interpretation of the exceptions of quotation and parody, which has recently been liberalised by the Court of Justice.**

We have also worked on the assumption that not all use of a work represents a 'transformative creation'. There is therefore a distinction to be made between the circumstances that entail an intellectual creation – which is generally identified under the category of derivative or composite works – and circumstances under which the work, although not transformed, is distributed in a 'transformative' context. This apparently clear distinction can sometimes seem blurred, particularly under the influence of American law, which, following changes to 'fair use' case law has introduced exemptions to exclusive rights in the event of a transformative use of the work. It is also obscured by the often inappropriate invocation of quotation to cover such use.

In our opinion, transformative use covers the exploitation of the work with no creative input but within an innovative technological framework, does not require the same solutions as transformative creation. The objectives are not of the same nature given that in one case, the aim is to set up mediation between the authors and their right holders in relation to intellectual creations, whereas in the other case, it is about reflecting the sharing of the value between the creators and industries who promote new products or services using their works. We deemed that this issue did not fall under the scope of the present mission, and it is not our place to decide if new copyright laws ought to be introduced in order to promote the emergence and distribution of innovative services. However, we considered it helpful to draw the Ministry's attention to the fact that **the issue of transformative use is, in our opinion, entirely separate to that of 'transformative creation'**, requiring further reflection on the social benefits of innovation, the need to adapt the methods used to distribute works to the technological environment, and more generally on the balance that must be maintained between intellectual property and business freedom in the internet age.

The other pitfall encountered by the mission related to the confusion surrounding the terminology used in the literature between transformative creation and 'user-generated content' (UGC). The de Wolf report, which was submitted to the European Commission in December 2013, chose to escape from this impasse by aligning the two concepts, and by restricting UGC solely to 'transformative' content. And yet at least three different UGC categories can be identified: content that is genuinely original which is made available by the author, content which is protected or not made available by people that are not the author of such content, and content that combines pre-existing works with original input, leading to a transformative creation. Again, we have chosen to limit our comments to the final category. However, the problems shared by these three examples cannot be ignored, namely the **deprofessionalisation of the public distribution of works** through the democratisation of access to distribution tools. Thus, for right holders, the explosion in numbers of distributors undeniably raises the issue of whether there is any financial logic in granting licenses when transaction costs are not proportional to the gains. Furthermore the potential contractual solutions, namely **systems to centralise the relationship between 'users' and right holders**, are probably relevant to at least two of the UGC categories. Current licensing practice on certain platforms (on which we have unfortunately

received little information) seems to no longer/not to make a distinction between content on a platform which purely and simply reproduces a primary work and content which transforms the work. Such practice also seems, as regards the current interpretation of the Directive on Electronic Commerce and the LCEN (French law to support confidence in the digital economy), to be based on precarious legal foundations.

We also noted that **shared solutions inspired by consumer law could be applied to the relationships between internet users and hosting platforms, to take into account the non-professional or amateur nature of the practices in question**, regardless of whether the UGC is transformative. The other solutions put forward primarily through the work of the 'Quadrature du Net' to resolve the issue of distribution through amateur channels, with the aim of granting **shared rights or statutory licensing systems, are by no means exclusive to the issue of transformative works.** They require up-to-date reflection on the opportunity to develop legal tools in this area, particularly from an economic and social point-of-view, which exceeds the scope of our mission. We have neither the desire nor the means to resolve the problem of how P2P is handled by copyright as part of our dedicated thinking on transformative works.

That said, we reviewed the various proposals put forward in relation to 'transformative creations' in the narrowest sense of the term, in order to gauge the potential need for a change in practice and/or in the law in the light of the identified challenges. Several recommendations have been made, including some general recommendations such as promoting the increase in the availability of copyright information, and other more specific suggestions as reiterated below. Other potential ways forward (such as the adoption of the American concept of 'fair use' or the Canadian UGC exception) have been rejected, either because the French legislator does not have jurisdiction to act, because they are premature, or because they are simply not appropriate in order to achieve the desired balance between creative freedom, compliance with copyright and the dissemination of culture and knowledge. However, these rejections are only relative insofar as many different contextual aspects are likely to bring changes to this constantly evolving field, and due to its complexity it is likely that the issue will be resolved by an equally complex response which brings together several proposals.

In the light of the recommendations that punctuate this report, **but which are far from summarising all of the reflection that took place**, and with the aim of grouping them together in a logical order, we believe that action is likely to take place on several fronts and using various forms of intervention.

1. Ensure proper access to 'creative materials', primarily by improving information on rights

2. Reconsider existing exceptions on a national and European scale in order to define exceptions for transformative creations.

3. Specifically recognise authors' rights for transformative works

4. Support and continue reflection on the implementation of contractual and legal solutions regarding the distribution of works by 'amateurs'.

o ENSURE PROPER ACCESS TO 'CREATIVE MATERIALS', PRIMARILY BY IMPROVING INFORMATION ON RIGHTS

Increase reflection on the intellectual public domain

In order to add to the debate on creative freedom, public reflection should be launched in order to positively define the 'intellectual' public domain, how it is governed and its enforcement to avoid the development of appropriation or intimidation practices which may hinder (for no lawful reason) or even block access to shared cultural resources. (Recommendation no. 1).

Maintain access to the work for a certain set of exceptions

The conditions for accessing and reproducing protected works through technological protection measures should be adapted in order to allow the exceptions for quotation, analysis, press reviews, news reviews and caricature, parody and pastiche to be fully exercised. Such a provision requires a revision of Directive 2001/29. (Recommendation no. 5).

Consider the public availability of files

In the area of copyright, support reflection on the need for digital files to be publicly available in open standard. (Recommendation no. 8)

o **RECONSIDER EXISTING EXCEPTIONS ON A NATIONAL AND EUROPEAN SCALE IN ORDER TO DEFINE EXCEPTIONS FOR TRANSFORMATIVE CREATIONS**

Distinguish the regime of exceptions according to whether they are dealing with transformative creations or simply transformative use.

For example, if the legislator decides to enshrine in law the exception for incidental inclusion that is already accepted in practice by case law, then the exception should be dealt with differently according to whether or not the re-use gives rise to a transformative creation. Thus the inclusion could be understood in a broader sense (voluntary, provided that it remains accessory) in such a creation, although its importance must remain limited (accessory and unintended or restricted) when incorporated into a simple product or service (intertwining criterion). (Recommendation no. 3)

While Directive 2001/29 is being revised, reconsider the conditions of the quotation exception without however extending them vaguely to transformative creations without defining the aims.

The changes entailed by Court of Justice case law for Eva-Maria Painer as regards the quotation exception should be fully assessed, as the exception requires French law to review the conditions its sets out both in law and in case law in order to ensure that it is compliant with
EU law. The exception should be applied to all intellectual works with no distinction as to type, and quotation to the extent required by the specific purpose. (Recommendation no. 6).
Moreover, the removal of the reference to the quoting work in the Court's case law should draw the attention of the EU authorities with a view to the potential revision of Directive 2001/29, in order to more specifically determine the scope of the exception and its purposes, in compliance with the three-step test.
The questions raised by the Painer judgment, particularly as regards the requirement to quote the source (an essential condition under not only international treaty law, but also under the ethical code of creation and knowledge), means that the actual wording of the exception must be re-examined if the Commission intends to revise Directive 2001/29. In addition to the issue of the source, the exact purposes to which the exception can be applied need to be specified. (Recommendation no. 7).
Any relaunch of the quotation exception must be instilled on a European level, and cannot be planned unilaterally by the French public authorities. The incorporation of a creative or transformative purpose into the quotation exception would upset the balance of this mechanism which is based on the essentially informative dimension of the work in the context of the quotation. In order not to contradict the three-step test, it would require the rules governing quotation to be distinguished according to the specific purpose. We do not believe that it is appropriate to enshrine such a distinction within a single exception. (Recommendation no. 9).

Do not acculturate foreign exception mechanisms such as fair use or the Canadian exception into French law, given the uncertainty surrounding their implementation in their States of origin.

The transposition of the Canadian exception into European law is not recommended given the uncertainty pervading its interpretation, and in the light of the judicial practice for intermediary liability rules in EU law. It would risk providing increased value of the utilisation to the platforms, depriving both the authors of the original works and the authors of transformative works from being associated with this value. In current legislation, the ad hoc exception system would not be capable of instilling the desired balance between the various stakeholders in the value chain. (Recommendation no. 10).

o **SPECIFICALLY RECOGNISE COPYRIGHT FOR TRANSFORMATIVE WORKS**

Avoid automated take down procedures for transformative works.

Develop fast and simple procedures involving all parties in order to resolve inappropriate blockages of lawful transformative creations by certain digital watermarking systems. Encourage mediation procedures to resolve conflicts and ensure that lawful transformative works are accessible on networks. (Recommendation no. 2).

Restrict infringement law suits against transformative works solely to cases in which the work can be identified by the public and not merely by a machine.

In the absence of a clear definition of the concept of adaptation in French law, we propose that the starting point for the exclusive rights of authors of the original work should be based on the criterion of the public recognition of the original work in the secondary work. Indeed the existence of the public communication of the work which is perceived as such by the public should be required in order to meet the criteria for the enforcement of exclusive rights. Thus, the transformation of the original work will only require the authorisation of the authors of re-used works if it is communicated to the public in such a way that it can be immediately identified by human beings. (Recommendation no. 4).

Clarify the rules governing composite works, which can be done at a national level.

Confirm the creative freedom of a work by an author in the legislation, including protected works, together with the free activation of the rights of the author of the secondary work, on the condition that the utilisation of the secondary work is authorised by all authors whose works can be easily identified by the public (and not simply through technical identification by matching digital fingerprints). (Recommendation no. 11).

o **SUPPORT AND CONTINUE REFLECTION ON THE IMPLEMENTATION OF CONTRACTUAL AND STATUTORY SOLUTIONS REGARDING THE DISTRIBUTION OF WORKS BY 'AMATEURS'**

As regards distribution platforms, promote central authorisation and mandate systems to enable distribution by amateurs to be legalised, where necessary with the help of consumer law.

Implement a central authorisation system where distribution is managed by a platform intermediary, either by directly integrating an act of use into the platform following a reinterpretation of the rules governing liability, or through representation systems (contractual or statutory) in order to obtain the required authorisations to be provided by the platforms on behalf of their clients. Such a solution implies that the representation of right holders is also 'centralised', and that amateur distributors are actually protected by consumer law (and, if they are authors, intellectual property law) in their relationships with platforms. (Recommendation no. 12).

In relation to decentralised exchanges between individuals, return to the considerations launched in the 2000s in order to gauge if the arguments raised against the proposed solutions (global license) are still relevant in the light of current proposals (non-profit sharing), as well as any changes to practice. (Recommendation no. 13).