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182, rue Saint-Honoré, 75033 Paris cedex 01
☎ 01 40 15 79 13 – 01 40 15 79 99

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Author's rights economies
The place and role of literary and artistic property in the economic operation of branches of the cultural industry
V. Summary

Françoise Benhamou and Dominique Sagot-Duvauroux*

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Foreword

The author's rights economy is not single but multiple. It depends on changes in branches of the cultural industries, their players, modes of operation, the forms of works, the markets… Sector studies (books, photography, audiovisual, cinema and music) have discerned often strong specific features related to the characteristics of the branches, their traditions and their degree of insertion into world markets. All, however, show common features and share strong trends. These five branches dominate the economic analysis of author's rights based economies.

Contractual or institutional practices are more and more separated from the rules of intellectual property law (the* Code de la propriété intellectuelle*), often raising questions of the equity or clarity of the applicable law. Collective management tends to take an increasing share of management methods without conditions of simplicity and clarity of sharing always progressing at the same rate. The question of the adaptation of author's rights to the new forms of authorial economic activity (collective work, amateur practise…) is raised in a larger number of branches. The generalization of flat fee remuneration is increasing and, in part, contrary to the principle of proportional remuneration arising from contractual negotiation. Finally, the development of a command economy, which is appearing in the most integrated branches (audiovisual and cinema in particular), leaves less room for the effectiveness of negotiable author's rights.

These changes in the author's rights economy in branches of the cultural industries notably bring into question the matching of rights to practices, the State's arbitration and mediation function, the linking of intellectual property rights to social rights at a moment when all branches of the cultural industries are confronted by reconstruction arising from modifications of their value chains under the direct or indirect effects of digital.

P. C.

* Respectively professor at the University of Rouen and Sorbonne Economics Centre, University of Paris 1 (francoise.benhamou@univ-paris1.fr), and professor of economic science and director of GRANEM, University of Angers.

Publishing director: Philippe Chantepie, Head of the *Département des études, de la prospective et des statistiques* (DEPS)
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Introduction

Several studies were undertaken for DEPS in 2005 and 2006 with the objective of analyzing the place and role of literary and artistic property in the economic operation of the branches of the cultural industries. They concerned the book, television, cinema, photography and recorded music sectors[1]. If the choice of a sectorial approach allowed the exploration of why, in each sector, the question of this place had an answer, in contrast, it has not allowed the analysis of common questions, for example, the remuneration of the author of original music intended to accompany televised fiction.

Despite the specific organizational, economic and technological features of each industry, several conclusions are common to the work undertaken. All the studies observe that the methods of distributing works have been diversified and transformed in the last few years, notably under the pressure of new technologies and the adjustments that are imposed; important changes in market structures have resulted from the entry of new participants who contest the *leadership of the majors*; these new actors and new outlets have increased the complexity of operation of the industries and the mechanisms for feeding royalties back to authors.

In fact, while the cultural industries employ an increasing number of persons who claim relative stability in their remuneration, the system of author's rights, designed in the beginning with reference to the book industry – generally on author/distribution methods –, reveals itself to be poorly adapted to collective and/or collaborative works, and the new forms of exploiting works. In particular we observe numerous sources of asymmetries in information between the authors and the downstream part of the chain, in which television supplies an example: although article L. 132-28 of the Code of intellectual property (CPI) says that the producer is required to supply, to each author and to coauthors, a statement of receipts arising from the exploitation of the work for each mode of exploitation, these provisions are in fact never applied.

The heterogeneous nature of the methods for applying remuneration systems, sometimes at the margins of legality, means that we face a great diversity in economic models and modes of author remuneration. But, whatever the concrete modes of remuneration, the trend to flat fees is confirmed to the detriment of proportional royalties. From this, we can even question the foundations of author's rights, which are understood to be based on remuneration for the receipts generated by marketing of the work.

These changes have not yet fundamentally overturned the distribution of the added value released by the cultural industries. Not only does the multiplication of outlets not appear as an increase in author's income, but we observe astonishing reversals of history, for example, the revenue generated by live events is gaining over that from recorded music. Finally, it appears from these five studies that there is a considerable tension between the system of author's rights understood as a legal provision for the protection of the work and the creator's rights and the system of author's rights as a method for paying authors.

Questions of method

Difficulties have been encountered in all sectors, whether in accessing the data or evaluating the reliability of what is available. These difficulties arise from the sources that allow remuneration to be assessed: the data are far from being exhaustive, and their unequal quality and heterogeneous nature means that they can rarely be compared with each other.

Depending whether access to contracts for the sale of author's rights was possible or not, two distinct methodologies were employed:

– The studies of cinema and television are based on previously unpublished data, which have been gathered from those contracts to which access was possible. For television, the study is also supported by a series of interviews with professionals and the managers of the distribution companies;

– For the other three studies – book, photography and recorded music –, the absence of a central organization or register has made a reliable statistical survey of the diversity of contracts linking the authors to the downstream parts of the chain impossible. In consequence a double methodology was adopted: an analysis of the existing economic information on the industry and interviews with the different players to define the contractual practices and use them to assess the issues in the reconstruction of business models posed by the

1. This summary provides a common approach that has completed the sector approaches (with the exception of recorded music) published respectively in the "Culture études" (Culture Studies) collection: 2007-4 book, 2007-5 cinema, 2007-6 television, 2007-7 photography, available to download from http://www.culture.gouv.fr/deps heading Publications.

development of new production and distribution technologies.

It is doubtless in photography that the evaluation of remuneration has been most difficult, taking into account the splitting of the markets and the absence of centralized data. Remuneration in the form of salaries (a majority in the press) is unknown. The AGESSA data (see Box) on author's rights only cover part of photographers'income and do not allow an approximation to the origin of these rights. The study thus offers an outline view of the markets and remuneration.

In the book sector the difficulties in evaluation result from the fact that creation activities can be paid as author's royalties, payments for services or salaries. Author's rights are subject to multiple declarations with three organizations collecting data: AGESSA, the collective management societies and the *Syndicat national de l'édition* (SNE, The National Publishing Syndicate), the royalties declared to the latter including proportional royalties and flat fees, including photographic royalties.

Most publishing houses, on the other hand, do not pay advances directly into authors'accounts, they only appear as the amount covered by the royalties calculated on sales and remain subject to a provision for depreciation and are thus charged as this provision is recognized. Any advance not covered is then treated as a loss. This system induces a long delay between the payment and the accounting recognition of royalties: An advance can remain provisioned throughout the duration of the literary property if the work is still being sold. The amount of royalties is thus underestimated.

For music, although there is much macro-economic data on the sector economy[2], they are often disputed, notably by small labels, and do not allow a statistical analysis of author's royalties. The study has consequently adopted the approach of summarizing existing economic information and characterizing the different business models that are revealed in this industry, which is marked, more than any other, buy the digital revolution.

To analyse the place of author's rights in the audiovisual industries (cinema and television), the studies are based on a file of rights sale contracts – the Public Cinematographic and Audiovisual Register (RPCA) – available at the National Cinematographic Centre (CNC), completed by data coming notably from the author's societies.

In the television sector, the study took author's rights sale contracts into account for three years – 1995, 2001 and 2003-2004. The author can receive sums at two times: in advance and in arrears. For advance remuneration, comprising premium and minimum guaranteed advance, the authors of the study have collected and processed the information on remuneration that is specified in the contracts. For remuneration in arrears, which includes payments made by the collective management companies and additional payments from the producer for uses outside the collective management societies (when the sums obtained by applying the remuneration rates provided for in the contract exceed the advance), the study is based on data relating to the sale of rights and the related remuneration in the SACD[3] database.

In the cinema sector the study covered 100 films produced in 1996 and 2001, for which contracts for the sale of author's rights were analysed; the remuneration data included in these contracts were completed by information provided by the collective management societies (SACD, SCAM, ADAMI, SACEM, PROCIREP and ANGOA). These 100 films have lead to 296 authors contracts.

For television as for cinema, the originality of this method and the previously unpublished character of the data provide added value for the studies. The chosen years may appear surprising, given the frequent changes in these two industries, but the study managers have been careful to take the media chronology into account, and to be able to go back far enough to collect all the payments made for the selected works (these in fact being made over a period of several years).

AGESSA files

AGESSA keeps two distinct files:
- an Authors file that allows the income of affiliated authors* to be known, but this income only represents part of the royalties paid to authors (about 10%);
- a Businesses file that records all the royalties paid by the companies. These are grouped into branches corresponding to the main destination of the royalties paid. For example, branch 40 groups together companies that have mainly paid royalties to photographers.

* Meaning that the income is sufficient to be able benefit from author's social security provision.

2. Notably published by professional organizations like the *Syndicat national de l'édition phonographique* (SNEP – The National Phonograph Publishing Syndicate).
3. The database includes 196 fiction works, refers to 468 author's contracts (461 French authors and 7 foreign authors) and 185 agents contracts. There are 120 different producers in the contracts as a whole.

Author's rights as a legal provision

The author's right is first a legal provision granting authors two types of rights: Property rights, in principle proportional to the commercial results from the work, and moral rights. This system is based on an imprecise definition of what a work and an author are. Moreover, the author's social regime in fact only concerns a small part of them, which raises the question of a unique social status for authors. Finally, if author's rights link an author and a work, the law requires that a certain number of rights pass through a collective management company.

Television.
The question of the classification of works by the collective management companies

The impact of the classification of a work on the remuneration is considerable: For the same distribution period, one work can be valued ten times higher than another. The foundation of this differential treatment is the principle of the proportion of original creation compared to the reuse of preexisting elements. But as noted in the report by the Control Commission for Royalty Collection and Distribution Societies (*Commission de contrôle des sociétés de perception et de répartition des droits*), other criteria are more disputable, such as the differentiation, by SACD, between a work derived from a literary work (category C1-coefficient 95) and a work derived from a theatrical, sound radio or audiovisual work (category C2-coefficient 85). So we discover, not without surprise, that a theatrical work is not a literary work, and that this distinction entirely in degree implies a penalty for a work that has been considered as a derivative of another.

What is an author? What is a work?

Whatever the sector, the studies emphasise that the concepts of work and author are imperfectly defined and partially unsuited to developments in the cultural industries. The frontiers between categories of authors are badly marked, all authors are not creators, and even the term creator covers very uncertain content.

Ambiguities in the definition of the work…

It is in photography and television that the definition of the work is most delicate. If a book, a piece of music or a film are unambiguously considered as works, a television programme and even more a photograph do not obviously have this status.

The law of 3 July 1985 in principle protects all original photographs. But is a photograph of an object in a publicity catalogue or of a tableau in a museum an original work? The study work on photography shows the variety of profiles of photographers, from the technician working for a company, through the artist to the author. The status of authors is not acquired by all and for the remainder, in many cases, notably that of certain salaried company photographers, the photographer does not consider himself, or is not recognized as an author.

The definition of a televisual work is also a delicate question. The remuneration paid to authors for the use of a catalogue goes through a qualification procedure for the work that raises major questions. The distribution society in fact applies a classification at the time when the author declares his work, a classification that has direct influence on the remuneration of authors by the set of coefficients applied to the basic tariff (see Box).

… to that of author

The recognition of the status of author refers to both the development of forms of artistic creation – with the bringing forward of the original role of new players (conductors, directors…) – and the balance of power, which, at a given moment, allows a category of players to obtain recognition as authors[4]. Moreover the question of the definition of the author is posed in the case of a work requiring the collaboration of several persons, among who some are recognized as authors and others not.

In cinema and television, the law provides a list of presumed coauthors: The author of the scenario, the adaptation, the spoken text, the musical compositions specifically made for the work, the director. This is not limiting, other contributors can be regarded as coauthors when they have really taken part in the preparation of the work: This can be the wardrobe master in a period film, or any other contributor the imprint of whose personality is identifiable in the common work. When the audiovisual work is drawn from a still protected preexisting work or scenario, the authors of the original work are assimilated into the authors of the new work. Series work on the basis of writing teams, with well specified specializations. The plurality of authors relates to specific features linked to the fact that these are "collaborative works", characterized by indivisibility, in the sense that each has the same rights in the work. Finally, the interpretative artist

4. See Nathalie Moureau and Dominique Sagot-Duvauroux, « Quels auteurs pour quels droits ? Les enjeux économiques de la définition de l'auteur » ["What authors for what rights? The economic issues in the definition of author"], *Revue d'économie industrielle,* nº 99, 2002.

is a quasi-author under the 1985 law on related rights, a law that grants them attenuated rights.

Furthermore studies of television and cinema show the conflicts of interest that can exist between authors and nevertheless related professions. So despite high porosity between the roles of directors and scriptwriters, we observe a cleavage between them in remuneration methods and levels that leads to divergences of interest, notably in relation to remuneration in arrears.

In the book publishing sector, several categories of participants receive proportional rights (with or without an advance) and are considered as authors: The authors of texts, the authors of illustrations, literary translators, work or collection directors, and even *packagers* who undertake all or part of the editorial work.

This temptation to widen the concept of author to include new professions comes out of all the studies. The description of author can thus become abusive when it only arises from the simple search to reduce the charges to be paid (this is the case in television for example). But it has as its counterpart an increase in transaction costs related to the exploitation of the works by multiplying demands for authorization, notably for moral rights.

The concept of an author in a command economy

The status of author and the role that he plays in the industries are also in the middle of a complete upheaval. In a globalised cultural economy, in very vertically integrated industries dominated by the downstream part (distributors and broadcasters), the trend is towards the development of a logic of orders passed to authors, who must then comply with a series of imperatives dictated by the commissioners leaving them little room for manoeuvre. This is particularly true in television, but this can also be emphasized in photography and for music, notably in telephone ring tones.

The television sector works as a command economy: If the author is still, in a large minority of cases at the origin of a creation and its implementation, the stations, which have become commissioners, are more and more the origin of projects. The traditional scheme of the producer proposing a project to the broadcaster is thus reversed. The author's room for manoeuvre is thus often limited. In contrast, in the cinema, the director remains the initiator of the project. This contrast in operation no doubt arises from the respective status of television and the cinema, in France at least, where the first is part of the media industry, whereas the second is much more like a cultural industry.

As French law considers a work of fiction to be a "collaborative work", the producer and, *a fortiori,* the commissioner are excluded from the status of author. It would have been otherwise if fiction had been considered as "collective works", for which the author is whoever arranges the collaboration of several persons on the same project for which he defines the main characteristics. This is the concept that prevails in the cinema in the United States, where the producer is considered as an author. In these polar opposite concepts we find the tension between commercial logic and that of the "French" author's right.

Diversity of status, diversity of social regimes

The ambiguity of the legal concept of author and the diversity of professional situations have the consequence of a diversity of social regimes that authors can claim. In principle, AGESSA is the natural social regime for authors, in reality, very many are affiliated to other systems, either because of regulations, or for economic consideration related to differences in the social charges of one regime compared to another. This is notably the case where an author's work is remunerated by both salary and author's royalties: The directors of televisual fiction or composer interpreter authors are in this situation. The remuneration of authors is in fact at the intersection of two laws, the employment law and the law of property[5].

Photography is without doubt the most developed example of this diversity of status. Among the photographers surveyed by INSEE, only 20% benefit from the AGESSA regime[6]. Those who work for the press must in principle be paid a salary and so affiliated to the general regime – this concerns about a quarter of photographers – but when they undertake work for a business *(Corporate)* they are paid in royalties and pay subscriptions to AGESSA without being affiliated to it. Others again, notably those who keep a shop, are affiliated to the independent workers regime. Finally, the "artist" photographer is in general affiliated to the *Maison des artistes*. One type of work can thus lead to very dif-

5. See Francine Labadie and François Rouet, *Régulations du travail artistique* [Artistic work regulations], Paris, Deps, Ministère de la Culture et de la Communication, coll. « Culture prospective », 2007-4.
6. At the same time, only 10% of the photo royalties paid by AGESSA are destined for affiliated photographers.

ferent social security contributions, a situation that can be made use of to pay the lowest possible contributions. Certain press agencies, who represent author photographers, invoke the absence of a subordination link for the photographers, who for the most part, recognize that they are independent workers. Under this heading they claim the option of invoicing services in the form of author's royalties, which is the subject of lively conflict between the social protection organizations, the agencies and the photographers.

Collective management

We remember that intellectual works are public goods, in the sense that they are characterized by two properties, non-rivalry and non-exclusion, which imply that once these works have been created and produced, it is easy for anyone to appropriate them. Non-rivalry expresses the fact that the consumption of unit of a property by an agent does not prevent the consumption of the same unit of this property by another agent (several persons can watch the same television programme at the same time). Non-exclusion refers to the fact that it is not possible simply to eliminate a consumer by the application of a price. These two properties justify the adoption of author's rights, which in principle allows the establishment of a monopoly for the author or rights holders on the use of the work. When the individual management of this right is rendered difficult or excessively costly, the logic is to call on collective management, which appears as a form of regulated or contractual adaptation of the author's rights system to more and more complex economic channels, characterized by the multiplication of methods of obtaining value from works.

Collective management by authors'societies developed when direct payment by the unit of works consumed is costly, or impossible, as in the case of audio-visual works (radio and television). This method of remuneration has increased in extent with the downloading of works over networks. Collective management thus covers increasing flows of royalties due to the multiplication of institutional legal licence arrangements created to provide remuneration to authors and producers when it is impossible to individualise consumption.

It is based on two categories of societies: Those who collect royalties from music users and pay them to redistribution societies, and redistribution societies that divide the sums between the different rights holders. There are five solely collection companies: SDRM, SPRE, Copie France, SORECOP and SCPA, who pay the revenue collected, after deduction of management expenses, to the different distribution companies in accordance with percentages established by legislation and regulation.

Collective management societies manage two categories of rights; Obligatory rights and voluntary rights (see Box p. 47).

If collective management has appeared to be a suitable solution for the changes imposed on author's rights by new technologies, we nevertheless note that in all sectors, it appears costly and raises important problems in distributing royalties.

Finally, the legal provisions for author's rights, which have been in phase with the economic models for obtaining value from works, now conflict with the actual diversity of remuneration practices for authors.

Author's rights or employment? A theoretical explanation[a]

Economic theory distinguishes the employment contract and contract for services or hire; this contrast refers to the two polar opposite cases that comprise the hierarchy (the internalization of the function of salaried author within the company) and the market (the purchase of a final product or service from an independent company, or an independent work, an author in this case). This is how Herbert Simon analyses the two possible "institutional arrangements" when this relates to obtaining the production of certain services: The employment contract and the sale contract[b]. An employment contract stipulates certain aspects of the behaviour of workers, whereas other aspects are placed under the authority of the employer, and others are left to the discretion of the worker. In contrast, the sale contract allows the individual to escape the authority of the employer; it is the final product that is the subject of the transactions.

The multiplication of hybrid cases where the employee produces an intellectual work for which he intends to remain the owner brings this contrast into question. The author's rights are then mixed into the employment relation, and the contract that binds the employee to the firm must take this into consideration. This hybrid configuration is a suitable field for economic analysis to help in casting light on whether the law is well founded. On the one side, the creator becomes, according to the expression employed by the Paris high court (*Tribunal de grande instance*), a "worker on the creation[c]" this belonging *de facto* to the producer who uses it as he wishes. In this case, employment law must suffice to control the status of the salaried creator. But as a rule French law erects an indifference of the employment contract or the order contract to the assignment of author's rights: These belong to the person and cannot be transferred to the firm. So author's rights prevail over the common employment law[d].

a. See Françoise Benhamou, « La création salariée, objet d'arrangements institutionnels hybrides » [Salaried creation, subject to hybrid institutional arrangements], *Archives de philosophie du droit,* 2004, 48, p. 399-412.
b. Herbert Simon, "A Formal Theory of the Employment Relationship", *Econometrica,* 1951, 19, p. 239-305.
c. TGI Paris, 4 October 1988, D. 1990, Jur. P. 54, note B. Edelman, « Le copyright désavoué » [Copyright repudiated], Paris, Le Dalloz, 23, 2001, 1868-702001.
d. Raphaël Hadas-Lebel, « Mission sur la mise en œuvre du droit d'auteur dans le cadre du statut de salarié de droit privé », *Rapport au ministre de la Culture et de la Communication*, ["Assignment on the implementation of author's rights under the status of employee in private law", *Report to the Ministry of Culture and Communication*], miméo, Paris, 2002.

Table 1 – Distribution of primary rights

in millions of euros

	2002	2003	2004
Author's royalties			
Rights other than below	542,96	575,09	606,59
Mechanical reproduction	248,89	259,86	246,91
Multimedia programmes	0,77	0,74	1,01
Reprographic reproduction	21,84	23,10	24,34
Cable transmission	4,74	4,11	5,92
Related rights			
Private sound copy	65,34	85,88	81,34
Private audio copy	56,35	53,97	71,95
Equitable remuneration	56,88	61,23	63,51
Royalties collected abroad	124,90	123,48	99,84
Total	**1 122,67**	**1 187,46**	**1 201,41**

Source: Permanent SPRD Control Commission (*Commission permanente de contrôle des SPRD*)/DEPS

AUTHOR'S RIGHTS AS A METHOD OF REMUNERATING CREATION

The author's right is a method of remunerating artistic creation where the author is in principle remunerated in proportion to the receipts obtained by his creative work. This system has a double economic foundation: To proportion the costs of creation to results in an economy marked by uncertainty in outlets; to manage the problems of moral hazard between authors and producers. The five studies show the fragility of these foundations: In fact we see that the trend to reduce the proportionality of author's remuneration in favour of flat fee payments reducing transaction costs is strong and the problems of moral hazard are far from being resolved.

A remuneration method based on sales results first comes up against the question of the transparency of the databases used to calculate it. Further, author's remuneration methods appear to be very diverse but bring out the development of flat fee payments to the detriment of proportional payments. For the remainder, the distinction between employment remuneration and property remuneration is sometimes not clear. Finally, the actual remuneration methods for authors are often in tension with the legal provisions for author's rights.

Opaque databases for calculating rights…

Whereas authors must, in principle, have a precise idea of the databases on which their remuner-

Obligatory rights

The are four types of obligatory rights:

– Remuneration for private copies. Royalties on blank video cassettes and DVDs are collected by Copie France who distribute the sum collected in three equal parts to producers, authors and interpretative artists. The share for authors is paid to SDRM *(quid?), which* shares it between the different industries. Duties on floppy discs and CD-ROMs are collected by SORECOP;

– Reprographic reproduction rights. This was introduced by the law of 3 January 1995. The *Centre français d'exploitation du droit de copie* (The French Centre for the Exploitation of Copying Rights) (CFC) is the authorized society responsible for the management in France of this right for the press and publishing;

– The lending library right. The law of 18 June 2003 creates a legal licence regime for the loan in libraries of works published in the form of books, matched by remuneration of their authors and publishers. For photography, only photographers who have the benefit of a publishing contract (in general, monographs, fine art books…) are concerned;

– The equitable remuneration right. Created by the 1985 law, it rewards the broadcasting of commercial recordings on radio, television, discotheques and sound systems in public places. It is collected by the *Société civile pour la perception de la rémunération de la communication au public de phonogrammes de commerce* (The Commercial Recordings Public Performance Rights Collection Society*)* (SPRE).

Voluntary collective rights

Authors can entrust authors'societies with the management of certain rights such as the television station or Internet broadcast rights, and the resale rights. To manage these rights, the author's societies can sign "General Representation Agreements" with television companies. These are contracts that allow television stations, against a single flat payment, to have access to all the works in the cocontractors'lists. The royalty takes the form of a percentage of turnover, which is then distributed between the authors on the basis of a broadcast report that the broadcasters have a legal obligation to supply. It should be noted that for cable and satellite television, in addition to television stations, cabled networks and satellite packages also pay part of their turnover, these sums being collected by which is responsible for distributing them between the different authors'societies. This "global envelope" is shared between the broadcast works, then between the authors.

As far as the distribution between the different coauthors is concerned, SACD and SCAM allow the authors to agree between themselves the key to sharing their rights.

The complexity of situations

Television authors can collect a flat fee remuneration for the use of their works by the *Institut national de l'audiovisuel* (National Television Institute) (INA). The sending by the INA of a list of works used (with indication of title and duration) to the different collective management companies allows evaluation of the distribution of the receipts between the different rights holders. The sums collected from INA are added to those paid by the broadcasters. For interpretative artists and actors who do not appear in the programme credits, collective management operates for cable broadcast. If the producers (owners of related rights) appear most often to manage their rights themselves, this is not the case for retransmission by cable. For cable broadcasters, the legislator imposes collective management. Revenues from the use of French works abroad are covered by the same collective management. Finally remuneration for private copies is collected, on behalf of the rights holders, by one or more rights collection and distribution societies (SPRD).

ation is set, part of the receipts is not know to them and these increasingly diversified databases can be manipulated by downstream players in the chain, thus creating problems of moral hazard.

The cinema is a good example of this complex situation and the problems that it can cause. The producer must provide his operating accounts to the author – and so employ time and personnel – and pay him his part of the proportional remuneration depending on the method of use. Consequently there can be great temptation for them, as the sole holder of the figures, to block a certain number of uses. The clauses for handing over the accounts that are found in all contracts are thus purely formal and rarely respected in practice[7].

Furthermore, all studies show the major difficulty of obtaining rights from abroad.

… and with variable geometry

For the use of a film in video recording form, the longstanding rule was to set the authors'remuneration on the basis of net producer receipts, but these are very difficult to check by the authors and the collective management societies representing them. This practice was condemned by the Appeal Court in 1998, which required royalties to be based on the sale price excluding taxes. Faced with the difficulty of knowing this price taking into account the absence of unique price and numerous discount policies, the authors'societies prefer the negotiation of collective representation agreements based on the turnover of video publishers.

The same method prevails for television use rights. General representation agreements are negotiated between author's societies and television chains on the basis of their operating receipts. The impossibility of precisely determining the real audience of a televised work, notably for use on cable and satellite and the absence of payment of a price by the public preventing the application of the principle of remuneration proportional to receipts to the public price. The turnover thus having been chosen as the basis for remuneration, the result is that the remuneration of authors is independent of the purchase price of the film by the television stations.

For the related rights of interpretive artists, the basis of calculation is the net producer revenue (RNPP). However this RNPP is not precise enough and its content is difficult to check, notably in the estimation of the financial expenses – expenses for copying, dubbing, publicity media transfers, transport, customs duties – that are deducted from the sums actually taken, with these expenses being able to show large variation depending on the type of production. The budgets are inflated at the start to allow public assistance and private financing to be obtained: It is thus particularly difficult to amortize a film, and as the producer is in fact the only one to be able to say if it is amortised, this is likely to introduce important moral hazard problems.

The same uncertainty is found in other sectors, the bases being poorly known and difficult to check. When the basis for the calculation of proportional remuneration cannot be practically determined, this favours the development of flat fee remuneration practices, also provided for by article L 131-4 of the CPI. In this respect, general remuneration agreements are a form of remuneration that is tending to become general, taking the broadcasters'resources into account (television, internet…).

Very varied remuneration rates depending on organizational forms

The contract that links the author to the publisher, to the producer, to the photo agency… defines the method for calculating the royalties.

• In publishing, rates seem to obey well established standards. For books, the number of copies sold and the public price excluding taxes are taken into account (PPHT). Any deductions are covered in the contract. Some contracts stipulate a credit – meaning an advance on royalties –, which is acquired once and for all under certain conditions concerning the acceptance of the manuscript.

The standardized character of the contracts hides what are in fact very varied contractual practices, with remuneration rates varying considerably depending on the reputation of the authors (from 3 to 18% of the PPHT). Translators generally benefit from large advances but low rates. The remuneration of *packagers* is similar on one side to that for authors, from the other to that for a services supplier. In all cases the completion of the work is delegated, a role that may or may not include the signature of author's contracts in his name. Some works are entirely remunerated in flat fee royalties. Collaborative works combine several types of remunerations: The collection or work director and one or more authors (text or image) are paid proportionally; preexisting or specially created illustra-

7. We observe the same shortcoming in television, where accounts are never rendered and sometimes even in publishing where certain publishers wait until authors claim their royalties before paying them.

tions and photographs are paid a flat fee. In contrast, others are only paid by proportional royalties. This is often the case in scientific publication where the authors are first seeking symbolic remuneration.

The publisher values the secondary exploitation rights (sale of pocket rights, translation, direct sale, theatrical representation rights and audiovisual rights…) according to the following general principle: The acquirer of the rights remunerates the publisher in the form of royalties, the latter paying the author part of the sums received. The sale can be done for a flat fee. If the original publisher generally pays over 50% of all sums received to the author and to all persons with a proportional interest in sales, this proportion can vary markedly, notably depending on the reputation of the author. The author's share is often calculated on a sum with all expenses deducted, intermediaries' commissions for example. This system in fact has the result that the publisher receives 50% of the royalties against the work of his internal department, but makes the author bear all the other expenses.

• The same variety is at work in photography. Certain photographers negotiate their orders and sometimes their archives directly with the commissioners. They prepare an invoice for the sale of rights distinguishing any flat fee part corresponding to the work in designing the report or the portfolio and must be declared as independent workers. Others choose to create a company that obtains value exclusively for their work on different media (sale of rights, sale of *vintage*, derived products). Others combine to create an agency that they control (the model started by the Magnum agency) or entrust the task of obtaining value from their work to an agency. Depending on the company's statutes, they receive royalties, dividends or salaries in the event of press work.

There is another configuration, frequent in press agencies and notably with telegraphic agencies, where the agency can employ salaried photographers alongside independent photographers. In this case, the photographer transfers to the agency the right of reproduction and/or representation (property rights) of the image that he has created. For this, he receives a fixed monthly remuneration and possibly royalties in the event of secondary use of his photos. As an author, he retains his moral rights.

The sale of rights is formalized in writing to provide for the extent of the sale (number of examples of the reproduction for example), the use (meaning the distribution method: press, advertising…), the duration (appearing in a number of a magazine for example), the location (in France, worldwide). Taking account of the rapidity with which technologies develop, contracts often provide a clause of the "sale for inexisting or unknown media" type, which is only legal if it provides for proportional future remuneration. The photographer retains his property rights for all other uses than those covered in the sale contract and, *a fortiori,* his moral rights, which cannot be transferred.

Finally, in galleries, the sale amount is shared in a proportion whose norm is 50/50, with production expenses deducted. In the event of sale of one of his works, the photographer can benefit from resale rights.

• In the television sector and for fictional works, the variety of models is related more to the level of remuneration than to other elements. In fact analysis of contracts has allowed several points of convergence to be brought out: Lengthening of the period for which author's rights are sold, stability in the number or authors per work, mostly declining changes in remunerations but with marked inequalities related to reputation, the type of works and the distribution range, with *prime time* and full length films being treated better than other categories.

• In the music industry, contracts are numerous and specific. Negotiation covers the rates, the duration of the contract or the number of albums to be made for an interpretive artist, but also the limits of geographic application of the contract. The interpretive artist generally signs an exclusive contract with the producer, called an "artist's contract", that provides for the transfer of the artist's rights for the benefit of the producer for the legal duration of the interpretive artist's rights and for determined territories. The contract specifies a defined number of productions for which the artist recognizes that the producer has the property in the *master* tapes. It has been progressively replaced by the licence contract, under which the producer transfers the exclusive use of the tapes that he owns to a phonographic publisher for a given duration and territory, the licensee paying the producer a percentage of the operating receipts for the record. As for the distribution contract, this is signed between the phonographic publisher or the record house and a company with a sales force. It covers a finished product: The distributor is responsible for entering the references for the discs delivered by the producer in his catalogue and ensuring their use.

Creation marginally remunerated *via* author's rights?

There are many authors who receive double remuneration: One direct, from their work and another linked to property rights that they hold on the work that they have created. In this case we notably find directors and interpretative artists.

• The directors of films or television fiction receive a so called "technician" salary and author's rights. The salary that remunerates the work of supervising the production does not correspond to author's rights, and only the bonus and the minimum guaranteed advance that remunerate the creative work relate to these rights. As far as the distribution between these two remunerations is concerned, the recommended rule is a minimum of 60% of remuneration paid as salaries and 40% in author's rights, but it is far from being respected. As far as the work of interpretive composers is concerned, it is paid in the form of fees and rights. These authors thus come under the temporary workers regime and the author's social regime and thus under AGESSA.

• In the book field, creative activities can be remunerated in author's rights, payments for services or salaries but the respective share of the different categories of remuneration is very poorly known.

• In recorded music, royalties represent essentially all the income of authors/composers, and only a minor or even marginal fraction of the income of other interested parties in the creation process such as interpretive artists, musicians and producers/publishers. The problems posed for the music industry by the development of Internet piracy have increased the share of the income drawn from concerts in the remuneration of musicians.

• In the photography sector, authors, on the occasion of orders, can distinguish, on their invoices, the remuneration that relates to the work to be done and the remuneration from the sale of rights properly so called.

Interpretive artists remuneration, from record to mobile telephone

Currently, and for on line music, and if the record house possesses its platform, the interpretive artist receives 0.04 € of the price including taxes of the piece sold, or a *royalty* rate around 5.7% of the gross price before tax. For a mobile phone ring tone downloaded for the sum of 3€, the artist will receive about 0.11 €, or about 14.4% of the gross price. This rate is very variable and depends on the status of the musician and the contract signed with the producer. In any case, all the questions of the low remunerations paid to the majority of artists, the transparency of information and the associated transaction costs arise.

Fixed rights/proportional rights. Good principles poorly applied

In the five sectors studied, whereas the Intellectual Property Code (article L. 131-4) stipulates that the sale by the author of his rights in his work "must include for the benefit of the author proportional participation in the receipts arising from sale or use", the payment of proportional remuneration is made in a very unequal way. However, when the basis for the calculation of a proportional share cannot be determined, the remuneration of the author can be evaluated as a flat fee, and this in several cases: In default of the means of checking the application of the share, when the expenses of the calculation and checking operations would be out of proportion with the results achieved, or "when the nature or the conditions of use make the application of the proportional remuneration rule impossible".

• In the cinema sector, the principle of proportional remuneration is short circuited by the payment to authors of a guaranteed minimum defined as an "advance" on future royalties. In general, these minima are much greater than the sums that the authors would have received if the remuneration provided in the contracts had been applied. In the majority of cases, once the guaranteed minimum has been paid to the authors, the producer has nothing more to pay. Even though the standard SACD contract provides that once the cost of the film has been amortised, the author will receive a percentage of the sums paid by the distributors to the producers, this clause is only rarely put into practice. It follows that the very essence of the principle of author's rights – associating the author with the success of the works – is brought into question. So, for cinema and television film distribution, for which the distributors pay large sums to ensure exclusive rights, authors must be content, in addition to the payment of a guaranteed minimum, with a percentage of the distributor's turnover that passes through the collective management societies. The chance for the author of increasing their remuneration is all the less because in reserving exclusive distribution to a station, the producer contractually prevents the distribution of the work by a competitor, which reduces the amount of royalties that can be collected by the authors through a collective management society.

• On television, the author receives two upstream remunerations of different natures: The order or writing premium and the advance. The first – also described as the "new work" or "exclusivity premium", or again the "flat fee sum" – remunerates the time spent in the creation of the work or again

the exclusivity granted to the producer. The second, the minimum guaranteed advance, is a payment on account on the percentages negotiated in the contract, calculated on the receipts for use of the work that related to individual management. This advance is definitely acquired by the author and the producer will reimburse himself for all the sums that will be due to the author using the percentages provided. If the sums collected by the producer remain less than the advance paid to the author, the producer cannot exercise any recourse against him to require the repayment of the difference. The guaranteed minimum can thus be considered as a reflection of the share of the risk assumed by the producer. In fact, as a general rule, for other than SACD use, the proportional remuneration rates are so low that the author does not receive anything beyond the advance received (minimum guaranteed advance). A detailed analysis of the contracts in fact shows average percentages, even if they are a little higher for directors than for scriptwriters, that are distinctly low: 1.60% to 4.24% for the first, 0.99% to 2.08% for the second. Taking the advance sum into account, the work must thus be extremely successful for the author to receive additional remuneration.

• Similarly, in the publishing sector, if a flat fee is in principle an exception, the legislator allows their relatively free use. Only general literary works, for the contribution of the main author, are really bound by the proportional principle. Other publishing sectors can easily use the flat fee as the remuneration method. In addition, for many players, remuneration can be indirect. For example, this is the case where for the author the book is only one component of their professional strategy: The publisher is then tempted not to pay an advance, or to pay a symbolic amount that only has the role of confirming the contractual agreement or may even seek to minimize the rates for the first sales until the break even point for the book is achieved. Similarly, if the author (and there are many like this) is seeking gratification – to see his work published, to contribute to the discussion of ideas… –, he is not so preoccupied by negotiating a just remuneration.

• In the recorded music sector, apart from the importance of salaried income in the form of fees, the advance is in practice not repaid by the artist to the producer in the event of low sales. It is often the only remuneration that the artist obtains from the sale of an album: In fact, in many cases, these sales remain modest and, in consequence, proportional remuneration that is great enough to exceed the initially paid sum cannot be expected.

• Finally, in the photographic sector, the rapid development of the "royalty free" photographic market has been observed, with the Jupiter company making itself its champion. The commissioner

The amounts at stake

In 2003, the 8,700 affiliated authors received author's royalties for a total of 300 million €. This sum represents about 10% of all the royalties collected. Half the authors shared 10% of all the revenues whereas 10% received half the royalties distributed.

Books – The total of author's royalties reached 427 million € in 2004 (these amounts include the royalties paid to all the holders of exploitation rights, whether French or foreign, authors or publishers). The totals for rights sold must be between 150 and 200 million €. Collective remuneration systems must represent, for the authors, about 10% of all the royalties received in the short term.

Photography – Photographers affiliated to AGESSA received, in 2003, 75 million € in royalties, or 25% of the 300 millions € paid to authors, a lesser proportion than they represent in number of authors (32%). They are thus relatively less well paid than other authors. Nevertheless they appear to be the main beneficiaries of royalties, ahead of writers (62 million €), music composer authors (49 million €) and the authors of audiovisual works (44.5 million €).

Television – Three sources are employed: The DDM/INSEE data allow the evaluation of the total royalties at 268 million € in 2002. This sum covers all the author's rights and related rights paid by the general broadcasting stations (excluding initial fees). But we cannot distinguish between royalties received for television, cinematographic or musical works. Any study of the distribution of remuneration among the different rights holders (scriptwriters, producers, interpretative artists) is also impossible. The date of AGESSA (44,494,331 € in royalties, 4.396 million € in salaries and 381,434 € in self employed income in 2003), which records the income declarations of affiliated authors, and the declarations of payments of royalties made by third parties ("distributors"), present the advantage of taking account of the author's rights paid under both individual management and collective management. They also allow the evaluation of the financial situation of authors working mainly for television. But they must be interpreted with the greatest care, because they are not homogeneous and can combine non commercial income and profits. They underestimate the population of authors, and so the revenues received for author's royalties, whilst overestimating the average income. The annual accounts of collective management societies show 219 million € in 2004 for rights belonging to the audiovisual field – or over there times less than the royalties received by SACEM (726 million € in 2004) alone. The net royalties distributed to the rights holders are estimated at 165 millions €.

Music – The revenue from collective management increased to 635 million € (but only 460.4 million € if we exclude the effects of double counting related to record sales and live events). For 2005, contractual management represented 926 million € excluding taxes if we only count recorded music. Live music represents a little over a quarter of the total turnover of the music industry (about 2 billion €) and generated 540 million € turnover in 2005. Its revenues mainly go to benefit interpretative artists. In addition, income related to the sale of music parts increased by 17% over the period 2002-2004. The live musical event corresponds to about 372 million € according to the *Centre national de la chanson de la variété et du jazz* (National Singing, Variety and Jazz Centre), and to 550 million € according to SACEM estimates. For film distribution in cinemas SACEM received 16 million €.

buys from an agency, or directly from the photographer, a series of images on a specific theme that he can then use as much as he wishes without having to pay further royalties to the authors. This practice, although it considerably reduces the transaction costs for the images, not only brings the principle of proportional rights into question but also raises questions in terms of the moral right of authors. Its economic impact is also important because by allowing unlimited use of the images, it encourages the commissioners to reuse the same image many times, which creates a loss of income for the authors.

In the five sectors studied, but to varied degrees, the introduction of flat fee scales for the distribution of works *via* different media, coexists with a system of proportional rights that is difficult to manage and induces high costs, whilst retaining the recognition of the authorship rights of the creator: generalized advances in the cinema and television sector, royalty free photographs; flat fee remuneration in publishing, notably for collective works… Contractual practices thus lead in fact (and not in law) to separation from the prevailing principles in intellectual property. In all cases, the double nature of remuneration for creation (remuneration for work and remuneration for property rights) favours complicated tradeoffs between salaries, advance and proportional rights based on differences in social security charges and the balance of power between the contracting parties.

Great inequalities

In all sectors, we observe large inequalities, with on the one hand a few stars, and on the other, authors who, for the most part, earn their living with difficulty. This situation arises from both the organization of the industries and the low recognition enjoyed by most authors, but with differences depending on the industry, cinema authors being in general better regarded than television authors for example[8].

In the television sector, we observe a worsening, at least apparently, in advance remuneration, which testifies to a certain increase in the precarity of authors situations. Behind this situation, we observe marked inequalities in income both between authors, and between categories of authors. Advance remunerations of producers and scriptwriters are notably very unequal. The study shows that, whatever the method of calculation (with or without taking into account producers'technician salary), producers (and in particular the best paid among them) have the benefit of a distinctly more favourable situation.

Linked to this first source of inequality is that related to the broadcast time slot for the work (with a significant advantage for the first part of the evening). Where categories are concerned, it appears that series authors are disadvantaged compared to television film authors; but it is difficult to interpret this inequality, which can also related to considerations of the duration and time slot that were assumed on creation, combined with a relatively high remuneration, which plays in favour of the television film. In contrast, taking downstream remuneration into account makes the differential in remuneration between scriptwriters and producers disappear, and even tends to reverse it (slightly) in favour of scriptwriters (in 2000-2001 and 2003-2004), without taking the technician salary into account. It is on the basis of this observation, often advanced but never quantified, that producers claim the establishment of the same division between the different authors as that prevailing in the cinema industry: 40% scriptwriter, 40% producer, 20% adapter.

For recorded music, the standard deviation in sales is extremely high. So, on the French record market in 2004, the 10 most sold albums represent a fifth of the volume (21%), the *top* 100 representing three quarters in themselves. This concentration explains why only about 20% of albums produce profits, according to professional sources specialising in the sector, and allow an understanding of why interpretive artists receive royalties proportional to sales.

New business models, new sources of remuneration?

The development of digital and the Internet has profoundly affected the cultural industries. In the reorganizations that flow from it, authors have more often found themselves to be losers than winners.

8. In 2003, AGESSA paid about 3 billion € in author's royalties. If the revenues paid by this organization have gone, in constant euro, from an index of 100 in 1994 to an index of 124 in 2003, they have fallen, all authors combined, since 2001 (in 2003, nearly 46% received revenues less than the SMIC (Minimum wage) against only 40% in 2000). Conversely, only 4.5% received income greater than 128,138 €, or about 10,000 € per month.

• In books, the effects of digital technologies are not yet very present, except in the manufacturing chain and some markets such as encyclopedias[9]. The sector study, which has covered the analysis of contractual methods as a function of editorial strategies, has brought out four cases, depending whether the publisher prefers analysis in terms of financial risk, commercial risk, expected margin or financial profitability (see Box).

Publishing strategies and contractual methods. The book publishing case

The development of the use of management tools itself encouraged by computerization, which allows project by project analyses, influences the method of calculating royalties. Authors'royalties are not an external parameter passed on to the sale price, although it may mean increasing the print run, but an internal variable to be acted on: The publishing manager works on the products of various forms of use and on the negotiation of the related rights. He is driven by the desire to maintain competitive prices.

Whether calculated in proportion to sales or as a flat fee, authors'royalties represent one of the rare items on which publishers can act in the short term: Organisation expenses are fixed and often reduced to a minimum for small houses. The weight of manufacturing expenses, except for fine art books, varies very little. The temptation to bear down on royalties is thus strong.

Author's remunerations thus constitute an adjustment variable, the latter have not profited in any way from the productivity gains that new technologies allow in the manufacturing process.

• The photographic industry has undergone a complete transformation in the last fifteen years, whether in the manufacture of equipment, the film market, the art market or specialized agencies. In the agency sector, and more directly for professional photographers several notable developments merit a reminder. The historic press agencies, that mostly appeared at the end of the 1960s and which dominated the market until the start of the 1990s (Gamma, Sipa, Sigma) have given way to new players (Corbis, Getty, Jupiter). In a few years, these have become market *leaders* through acquisition strategies and heavy investment in digitizing printing and in developing image search software or use by picture researchers (see Box).

In parallel, professional photographers have found themselves threatened by individuals. Internet sites like Fotolia offer amateur photographs at prices that are impossible for professional agencies. Finally, the development of portals that offer different remuneration models – fixing the photograph price on simple portals, control by photographers of the images placed on line and the sale contracts on advanced portals – has multiplied the business models in photography.

New photo agencies for the digital era

Generally unfamiliar with the photographer's professional culture, the new agencies have imported new business models and overturned usual practices on both the photographers'and picture researchers'sides. In a few years the Jupiter company has thus become the number three in the sector by positioning itself on "royalty free" photography. In the same way, the purchase by Corbis of the Sigma agency gave rise to a very tough legal confrontation with the agency's photographers on the question of contracts and the ownership of images. While various independent agencies and collectives were set up, the protest movement by the profession against the pressure by the agencies on contracts lead to a ruling by the Appeal Court in 2001 that established the property rights of photographers in their images.

• In the television industry, despite recent changes (deregulation, multiplication of stations), we observe a structural weakness in remuneration linked to new technologies and the different categories of derived revenues, as well as an equally striking weakness in remuneration linked to private copies, which "naturally" goes as a priority for the authors of new and *prime time* works. The new stations, with small financial resources, only buy low cost programmes, and new uses, which remain very much on the margin of the author's remuneration system, only create modest spin off for the latter. It is from interactive practices on the Internet that we can expect real new uses, and in the long term, new revenues. For video on demand (VoD) for example, the producer is the rights manager; the exploitation of works makes the identification of the rights holders necessary. However, it frequently happens that it is quite simply costly or even impossible to trace them. In this case, the author's right constitutes an obstacle to access to heritage works. In telephony, it must be hoped that authors will not be forgotten in a review of the new programmes, which are more concerned for the continuity of the production support system than the fate of authors and creation.

• Finally, in the recorded music sector, if the revenues of authors/composers and interpreters and musicians appear at the moment to be little affected by the current changes, it is not the same for the producers/publishers, despite the explosion of on

9. However we observe that some parts of publishing (school and practical books) are required to transform themselves rapidly and that the growth in digital libraries raises questions about the validity of author's rights and the costs of its application.

line sales or the development of music videos: In future the new on line distributors are in fact better able than the producers to obtain value from the music. This phenomenon is leading producers to modify their business model and transform themselves more into service suppliers than intermediaries assuming the risks of discovering and promotion artists and the production/marketing of their works (see Box).

The new business models for recorded music

Technological developments favour the appearance of two business models in this sector:

– The first aims at a quick return on investment on products corresponding to variety music. It is based on *versioning*, which allows differentiation and discrimination between consumers to make them pay prices close to their reserve price depending on the criteria governing their musical consumption. This model implicitly assumes that eventually any musical creation will circulate freely;

– The second reflects the construction of communities dedicated to a musical genre and made responsible for financing its production. It applies to musical genres whose audiences are smaller and more distinct. The distributors play the role of value added service suppliers and community organizers. They build their business model on the joint exploitation with the producers of the various sources of recorded and live music revenues, meaning on distribution in different formats and at different prices *via* various channels of recorded music that is either bought for itself or combined with other products.

• In music and photography and, to a lesser extent, in publishing, new models that blur the boundary between professionals and amateurs are appearing and favour the appearance of new mechanisms to access fame. Community phenomena, which allow the sharing of information and experiences, discussions and collaboration, constitute mechanisms for reducing research costs and the uncertainty associated with the consumption of experience goods. They create and unmake reputations *via* word of mouth effects, and encourage loyalty building by the solidarity that is constructed between the members. The free music distribution platforms, Jamendo or Dogmazic.net for example, encourage surfers to pay authors in the form of donations. In these models, consumers choose to make voluntary donations in exchange for access to and use of free lists. They become opinion formers and vectors. In all cases, technological changes have lead to important modifications in the structure of production costs in the different industries (relative reduction in downstream costs compared to upstream cost), without these modifications so far having had much effect on the sharing of added value, notably in favour of authors.

In summary

- The legal rules are not necessarily clear or applicable
- Collective management is a limited solution
- New models blur the boundary between professionals and amateurs and favour the appearance of new mechanisms to obtain reputation
- Flat fee remuneration is becoming general
- Many sectors are becoming command economies which reduce the author's room for manoeuvre
- Industries more and more dominated by downstream, in which authors appear to be in a weak position in sharing added value

Conclusion

High pressure for the contractualisation of author/producer relations

The difficulty of applying a proportional remuneration method and respecting moral rights in economies characterized by a multiplicity of models for obtaining value from works that are very often collective encourages the players to simplify the relations between players in the industry using contractualisation. This trend is reinforced by the globalization and commoditization of cultural markets which reinforces the power of the distributors.

Moreover, the digital revolution has caused the appearance of new players in the industries – Internet access suppliers, search engines, mobile telephone network managers – who do not wish to burden themselves with the rules patiently prepared among the historic players in the cultural industries, including *majors*, independents, authors'societies…

All these components are overturning a system of author's remuneration that, even though it has been endlessly revised and added to, appears to be engaged in a pursuit race with the technological and economic changes that are affecting the industries for which it was prepared. ■