MINISTRY OF CULTURE
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HIGHER COUNCIL OF LITERARY AND ARTISTIC PROPERTY (CSPLA)

LITERARY AND ARTISTIC PROPERTY LAW, DATA AND DIGITAL CONTENT

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Report presented to the CSPLA on 11 October 2018

Its content reflects solely the views of the authors

Report translated by Atenao

September 2018

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SYNTHESIS AND PROPOSALS

1. **The liberal character of the definitions of subject matter protected by literary and artistic property and of the terms "data" and "digital content" leads to these notions intersecting, a source of confusion as to the rues applicable.**

The different literary and artistic property instruments cover a heterogeneous ensemble of works, services, sound sequences, images wherein the individual or massive transfer represents a growing challenge in this "*Big Data*" era **Consequently, far from being accidental, the convergence of literary and artistic property reservation mechanisms with new "intangible" asset regulations fuelling digital exchange flows, becomes systemic.**

As regards the notion of digital content, which has its origins in the technical architecture of Internet and whose definition remains vague, it implies a commoditization which is frequently consistent with its purpose as illustrated by *net neutrality*, which decrees to prohibit the discrimination of content transiting through the host layer, irrespective of whether it is protected or not by intellectual property rights.

No special processing principle exists for content protected by intellectual property rights in texts regulating digital content in general. Although this particularity is regularly taken into consideration through derogation regimes, it is not done so in a systematic way or *a priori*, and is frequently expressed as an exception whose relevance requires regular re-examination.

The question of linking texts relating to digital content and to the rules of literary and artistic property remains delicate, like the ambiguities of the draft directive concerning specific aspects of digital content provision contracts, whose discussion enabled the text to evolve in a way wherein the infringement of intellectual property rights was clearly perceived as a failure to comply, which was not evident in the initial version.

The notion of data is not detailed any more than that of digital content but, given the plethora of regimes which are related to its various meanings, the rules applicable to data are likely to interfere with those of literary and artistic property.

As such, the past public policy ambiguities as regards public data opening cast some uncertainty, which tends to decrease, as to their conciliation with public entities and third parties exercising their intellectual property rights

The changes in French public policies, driven by European standards yet irrespective of their statutory requirements, resulted in moving from restricted availability of public data with strict access conditions such as the request for personal communication for non-commercial purposes, to active dissemination of this data, associated with the greatest possible opening for the use of this data by citizens.

Conciliating these public policies with intellectual property law is highly-distinctive depending on whether the rights of third parties or of the public entity itself are at stake. Third-party intellectual property rights are one of the exceptions as regards the dissemination of the data in question and its reuse. However, public entities can no longer take advantage of their intellectual property rights to inhibit data opening. The implications of public officials' copyright, reformed by the French Act of 1st August 2006, on the boundaries of this differentiation, remain uncertain, in particular as a result of the failure of the regulatory authority to issue the implementing decree. Likewise, in spite of the clarity of the legal given, the existence of

diverging interpretations within public authorities as to the scope of reuse of subject matter considered under third-party intellectual property rights calls for a clarification of practices.

The possibility, for public entities, to perceive royalties from the dissemination of public data, which also embraces intellectual works covered by *open data* rules, leads to acrimonious debate. Even though it is now acknowledged that such royalties cannot be applied for under a public entity's intellectual property rights, views have not yet been finalized as regards the possibility of demanding remuneration in return for the use of this "data" on other grounds (access right, use of the image of the assets, etc.) and the choice of free use which would be more conducive to the simple use of fonds and, as a result, to broad dissemination of cultural content.

The combination of a generalized world-scale "datafication" movement and a particularly comprehensive approach to personal data adopted by the European legislator, inevitably fostered the convergence of literary and artistic property law with that of personal data. This fuelled the contention as regards online anti-counterfeiting measures and has become strategic in the race for controlling client relationship which focuses on the individualization of users.

The measures for identifying counterfeiters and for filtering brought about a succession of contentions which, to date, have led judges to conclude a balance of interests in issue between protecting intellectual property and protecting personal data. Notwithstanding, it is the very principle of the overall preservation of electronic communications metadata which is currently at issue, following the CJEU's *Tele2 Sverige* judgement in 2016, with challenges which go well beyond those of anti-counterfeiting yet which could call HADOPI's access to these into question.

In the digital world, movements for data sharing and movement coexist, and sometimes clash, with others for the affirmation of new property rights or other forms of reservation, which shake up the traditional position held by intellectual property.

In the scientific field, the movement in favour of open access received the support of public authorities, which increasingly make it a condition for their research grants and forbid publishers from preventing the researcher's publication in an open archive. The combination of this *open content* or *open knowledge* policy and the enjoyment of publishers' rights leads to complex situations where, paradoxically, the author or the scientific institutions occasionally find themselves in a situation which is less favourable that the one offered by the public policy provisions of the Intellectual Property Code in relation to the publishing contract.

The strategy defined by the European Union as regards establishing a single digital market also leads to encouraging the movement of data, through the recognition, by successive legal instruments and in various ways, of the portability of personal data, of that of non-personal data and, finally, of the cross-border portability of digital content. This momentum which, for the time being, disregards works and subject matter protected by intellectual property rights would be better of making the effort to embrace this, as such enabling holders of literary and artistic property rights to maintain and even to increase the ability to control the data accompanying protected subject matter, as such associating them with the *data driven economy*.

The acknowledgement of a data property law occasionally presented as a measure intended for encouraging data movement, would on the other hand pose a host of difficulties, in particular as regards the definition of its scope and its holders and in its linkage to intellectual property law. The balances of this law, which conciliates the interests of the holder and those of the users through the various exceptions, could be threatened by the affirmation of a new data property law. Intellectual property law could also be replaced by a combination of

contractual and technical audit, in the aftermath of the Court of Justice *Ryanair* judgement of 2015 or through the reactivation of the 96/9 Directive on database protection, outside the restrictive scope of application in which the Court has established it since 2004.

2. **The rise in platforms overwhelmingly accompanied the increase in data and digital content volume, with their intermediation services becoming indispensable for browsing. Instruments for regulating loyalty on platforms generally drawn from consumer law are likely to offer a model for tackling power and information asymmetries which are likely to emerge as regards content protected by literary and artistic property rights.**

Platforms have gained a new, vital position in the digital content distribution economy in general and that of protected works and subject matter in particular. Based on a variety of legal models, some of these platforms play this role without having intellectual property rights on the works which they offer access to, protecting themselves under the definition of host pursuant to the Directive of 8 June 2000 on electronic commerce.

As such, a competitive fracture has been created between the platforms which expressly initiated contact with the holders to negotiate use rights, and those - often powerful - which refused to accept literary and artistic property rules and preferred to impose unilateral conditions in agreements which were voluntarily concluded. New regulations borrowing from consumer law, from competition law and from tax law are striving to re-establish a balance between the different categories of players on the one hand, and to impose new obligations to be assumed respectively by the co-contracting parties, on the other hand. The emergence, over recent years, of legal regimes for platforms in multiple French law and Union law texts, henceforth aims at grasping their specific role, different from that of a simple host, and at asserting their responsibilities. Although it breaks with an established tradition of legal regime segmentation, this transversal regulatory method for disseminating digital content is likely to provide opportunities for establishing a better balanced contractual relationship between holders of rights and digital distribution players, in particular against a background of economic concentration.

The intervention of consumer law, in this sense, holds promise through specific obligations as regards platform loyalty - including social media - for their content ranking and highlighting activities. By directly placing the liability on certain platforms for disseminating protected works and other subject matter pursuant to Article 13 of the draft CDSM Directive marks an additional step in this respect.

3. **The fact that "big data" operators indiscriminately use aggregates wherein protected works and subject matter lose their individuality in the mass interferes with literary and artistic property law, established on individualized, static representation of works.**

The use of infinitely big and infinitely small quantities of protected works and other subject matter causes new difficulties for holders, where they are expected to provide evidence of the protection they intend to make use of, as the subject matter is lost in the mass or is fragmented in such a way that it is hardly identifiable.

Given the volumes to be processed, the transactional costs for finding evidence are often disproportionate to the potential profit in the process, whenever it comes to proving the originality of the works or the substantial investment for creating the database.
The issue of the difficulty of proof when faced with volumetric processing could be resolved through the acknowledgement of new presumptions – which is the subject of a new CSPLA mission.

The rather diffuse nature of the protection conditions of some related rights places the latter in a paradoxically more favourable position than that of authors for availing of their rights, with disregard for the traditional hierarchy between copyright and related rights. The proposal to create a related right for press publishers strives to reduce this conflict, yet not without difficulty.

The volumetric analysis of the use thresholds for protected works and subject matter which require authorization is likely to vary depending on whether the appraisal is made by the judge or by algorithmic systems. The existence of mass uses moreover implies activating appropriate procurement tools.

The quantitative analysis of the loan can, in the current situation, lead to two totally opposite conclusions. If it is related, as is the case in jurisprudence, to analysing the elements extracted on the basis of the original characteristics of the original work, it can lead to dismissing the application of copyright of the holder of the first work in the event that these characteristic elements are not identifiable in the larger ensemble in which the elements are integrated. Conversely, if "pure" quantitative logic, made possible through digital watermarking and fingerprinting technologies, is applied, we can conclude that the work is present through the mere coincidence of the identification of the fingerprinting file data, regardless of the transfer of these characteristic elements.

Determining dissemination volume is not, in principle, relevant in triggering exclusive right. Notwithstanding, several rules and jurisprudence appreciate these threshold effects, for focusing on the quantity of subject matter used, in particular as regards exceptions related to quotations and extracts, or for appreciating the volume of persons to whom dissemination is addressed.

These threshold or stream effects should lead to tailoring the terms and conditions for exercising rights, in particular by privileging pragmatic, overall solutions for facilitating the procurement of rights in cases of mass use.

4. **The informational value of protected works and other subject matter or the data around them constitutes the core of the data economy, yet it is hardly appreciated by literary and artistic property instruments.**

The subtle balances which literary and artistic property aims to maintain between the perimeter of exclusive rights and freedom of expression give rise to precarious, complex solutions given their sources, in such a way that it is difficult to even appreciate the position of activities essentially focused on this informational value like indexing, mining and referencing.

The economic prospects opened by the data economy on the one hand, and the necessary accessibility of information wherein certain innovating, of-public-interest activities can thrive on the other hand, call for the clarification of the legal situation on these issues, in particular as regards indexing and SEO for which the draft CDSM Directive only deals summarily with.

The adoption in the draft CDSM Directive of an optional exception of more extensive mining than that which is acknowledged for search purposes represents a major challenge for the artificial intelligence economy and will imply careful review of the balances to be established between a fair remuneration for holders and the freedom of trade and industry, in particular on the market of services derived from data mining activities where the value produced is hard to relate to the corpus of subject matter mined.

Associating rights holders to the indexing and referencing activity of their protected works and other subject matter is also a key challenge in a society where information

on the work or around the work tends to have increasing value and is the condition for free informational movement. A first piecemeal answer was issued with the adoption of a compulsory collective management regime for video walls still activated in French law, pending European validation which is exposed in ongoing debates regarding the CDSM Directive.

The project for processing links and other descriptive tools remains to be established, as illustrated by the instability of the links regime in the jurisprudence of the Court of Justice and in the press publishers' related right.

The mechanisms for centralizing authorizations provide a useful answer to the use by the multitude. Article 13 of the draft CDSM Directive provides two innovations in relation to this; the first, still controversial, aims at tailoring the security perimeter mechanisms which certain intermediaries have been taking advantage of since the "electronic commerce" Directive, to take the "active" aspect of some of these into account; the second, less focused on yet just as important, is related to the use procurement mechanism by the platform on behalf of its users, enabling the latter, when using for non-professional reasons, to be exempt from fulfilling obligations for requesting prior authorization.

In this respect, "blocking" and "filtering" solutions must be accompanied by guarantees for reducing the negative effects. For this purpose, the proposals set out in the CDSM Directive focus on initiating procedures enabling people who are victims of abusive filtering to invoke their rights of defence against a natural person, in a framework of equality of arms.

Taking into account all these considerations, and the result of hearings, the mission decided to formulate several non-exhaustive proposals which focus on three pillars.

Pillar 1: Adjust the institutional framework of literary and artistic property to the digital environment and to the transversal nature of the notions of data and of content

Proposal No. 1: Improve networking between the Ministry of Culture and Ministries responsible for subjects implying challenges for literary and artistic property (consumption, taxation, competition, etc.);

Proposal No. 2: Establish a standing watch and analysis group between French administrations and the civil society players in question on literary and artistic property subjects;

Proposal No. 3: Develop the cooperation between the CSPLA and the CNNum (French Digital Council), for example by nominating a member who belongs to both bodies, by developing reciprocal exchanges prior to publication on shared interest draft reports or by establishing joint working groups for drawing up joint reports;

Pillar 2: Accompany instead of enduring the smooth flow of protected works and subject matter to ensure their exposure in this new realm

Proposal No. 4: Remove uncertainties related to the copyright of public officials, by ensuring that the publication of administrative documents is always covered by legal cession and by revoking the reference to the implementing decree;

Proposal No. 5: Promote the legal deposit by enabling its remote consultation in a secure framework which is equivalent to on-site consultation and by opening the exception of text and data mining to depository institutions, pursuant to the latest guidelines of the draft CDSM Directive;

Proposal No. 6: Set up a multidisciplinary mission on the economic and cultural opportunity of a policy for placing digital copies of works held by museums online;

Proposal No. 7: Develop the mechanisms for encouraging rights holders to invest in "datafication", for example by considering that the investment made in metadata or in standardizing formats is an investment admissible for protecting a database under the *sui generis* right;

Proposal No. 8: Envisage trans-register procurement mechanisms to cover the diversity of types of protected works and subject matter in mass processing and, in a more prospective way, develop reflection around the adequacy of copyright with aggregation mechanisms such as the notion of repository, of fonds, of collection and even of community;

Proposal No. 9: Develop the use of procurement mechanisms on behalf of third parties provided for in the draft CDSM Directive as regards certain platforms, and extend it to other points of assumption;

Pillar 3: Encourage the digital use of protected works and subject matter in a data economy whilst associating rights holders with the value created

Proposal No. 10: Develop remuneration mechanisms tailored to mass uses and to fragmented uses of content, in particular as regards a possible mining exception for commercial purposes;

Proposal No. 11: Create, for the benefit of holders, a right on the "portability" of use data of protected works and subject matter, which could include a special extension for the original author; ensure that the sharing of the data collected by he platforms and other distributors is made possible whilst respecting the rights of third parties;

Proposal No. 12: Acknowledge a right for authors of scientific writings specific to data on citing their writings for which scientific journal publishers would be liable.

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INTRODUCTION

After having revolutionized uses… Everyone can see how much, over the last twenty years, the boom in digital technologies has revolutionized the way works can be accessed and has redesigned their production and distribution economy[1]. By proposing a new writing method, digital offered new use opportunities, which reduced production costs and increased dissemination possibilities. Digitalization also creates new distribution channels for protected works and subject matter, which circulate as per fragmented forms, are accessible based on specific reading formats and generate new ways of consuming protected works and subject matter moving increasingly away from the tangible media economy which, until then, had prevailed in the analogue world.

Yet, literary and artistic property law never appeared to be fundamentally undermined until now. The European Parliament and Council Directive of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society, the bedrock of European Union law on the subject and whose title illustrates well the intention to address these new challenges, consisted above all in harmonizing, on community level, the key notions of this branch of law: works, copyright and related rights, communication to the public, reproduction, exceptions, etc. The debates over these last twenty years focused mainly on anti-counterfeiting measures, encouraged by digital, and on how to create a new attractive legal offer, yet little as regards these key notions. Copyright, threatened in practice, appeared however to be solid as regards its perimeter and its definitions.

… henceforth, digital interferes with the constitutive definitions of LAP law. Nevertheless, the time is ripe for digital to be covered in the definition of literary and artistic property itself. The field, which was envisaged as an autonomous branch for a long time, was gradually engulfed by "digital law", as seen through these university programmes which, more often than not, mix these dimensions together to deliver teaching suitable for apprehending the needs for practice[2].

Several events bear witness to this reconfiguration of which the emblematic attachment of the copyright division, until then associated with the industrial property division within the DG Markt, at the European Commission's DG Connect. Henceforth, the European copyright policy falls within the European Commission's digital strategy. In France, the quasi-simultaneous adoption of two texts, the Act of 7 July 2016 on freedom of creation, architecture and cultural heritage under the aegis of the Ministry of Culture, and the Act of 7 October for a Digital Republic under the control of the Secretary of State for Digital Technology, whilst, at the same time, demonstrating the double prism with which the subject can be grasped, highlighted the needs for making public action coherent in the field of literary and artistic property.

Three transformations ensue from this growing interpenetration between literary and artistic property and digital.

Erasure of the distinction between media and subject matter. Numerous examples illustrate this: the distinction between the media and the subject matter it conveys became

[1] *Business analytics, market intelligence, data intelligence, data mining…* advances in advanced content and data processing technologies has opened up new areas for collecting and analysing information. These developments and the uses which they generate on "content" – intelligent crawl, enrichment, mining, etc. - call intellectual property into question

[2] Rapprochement symbolized by the widely-used acronym "IP/IT", for "Intellectual Property / Information Technology".

increasingly clouded as media lost its tangible aspect. It was necessary for jurisprudence to specify, for example, that a MP3 file contains a phonogram as defined under the Intellectual Property Code[3]. The jurisprudence of the Court of Justice shattered the distinction between the distribution of a work on tangible media and that undertaken via a file transmitted by a network in the *UsedSoft*[4] judgement by focusing on a principle of functional equivalence, and brought to the fore the issue of the exhaustion of rights when digital transmission takes place, yet without confirming this approach in subsequent jurisprudence.

Content commoditization Digital writing also has a commoditization effect on content, treated in a unique way through this convention, irrespective of its intrinsic value and the legal qualifications which characterizes it. As such, in this age referred to as Big Data, search engines, social media, pure players, ingest and produce enormous quantities of content and data of different kinds – works, personal data, metadata, traffic data, etc. – which are technically processed based on the same protocols. This moving-informational asset approach in particularly led to envisaging intermediation systems irrespective of the nature of content transmitted as illustrated in the electronic commerce Directive and the lightened liability regimes which it established. It also contributes to new forms of regulation which target "content" and "data" indiscriminately[5].

Source diversification. Several recent and adoption-pending texts in fields a priori far removed from intellectual property have seen notions flourish like that of "digital content" and "data" for which it quickly became apparent that they covered in particular protected subject matter, without this occurrence always being taken into account during the legislative exercise. Consumer law, electronic communications law, data law, commerce and taxation law: "Rome is no longer just within the walls of Rome" (Rome n'est plus seulement dans Rome, Sertorius, Act III, Scene 1) and the future of intellectual property is as much at stake in these subjects as in the texts devoted to it.

Data and digital content, two unavoidable figures in LAP today. Data and digital content, omnipresent realities of the digital world, are also increasingly notions of positive law which underpin a number of legal regimes. The study of the complex relationships between LAP and these regimes, overlapping between notions, uncertainties surrounding the definitions and conflicts as to purposes which may exist between legislations is one of this study's key aims. LAP law was created around the work, a subject envisaged in its oneness and in its uniqueness. The notions of data and content impact this focalization through opposite movements: data pulls the work towards the infinitely small, even the tiniest sense-imperceptible extract is a piece of data; content towards the infinitely big, the work becomes a component of a stream, *streaming*, which is increasingly becoming the dominant consumption pattern. These changes in perspective raise new legal questions.

Necessary understanding for opening new avenues for value sharing. The study does not intend to be doctrinal. More than ever before, it is important to think about the current and potential levers likely to associate holders with the different forms of use resulting from this processing. Digital, combined with transmission via networks, has revolutionized the perception of functions and professions attached to tangible physical representations and to traditional distribution channels.

The increased accessibility to protected works and other subject matter via new players like platforms has led to multiple reactions from encouraging opening to promoting technical control, tracking and filtering solutions. Information about the content as well as related

[3] See *below*.
[4] CJEU, Grand Chamber, 3 July 2012, *Usedsoft GmbH v/ Oracle International Corp.*, C-128/11.
[5] N. Colin et H. Verdier, *L'âge de la multitude. Entreprendre et gouverner après la révolution numérique* (The age of the multitude. Entrepreneurship and governance after the digital revolution), Armand Colin, 2015 (2nd edition).

consumption habits have become key sources of value for operators, who have reorganized distribution methods based on recommendation algorithms founded on individuals' preferences, tracked during their digital peregrinations.

In this new equation, traditional players who create, produce and distribute works and other subject matter protected by literary and artistic property occasionally struggle to find tools which enable them to be better associated with the value created by and around this content. The draft directive on copyright in a single digital market, currently under debate at the date this study was transmitted, is woven with these challenges. The study, whilst taking fully into account this changing legal environment, strives to provide a longer term perspective, in order to open new avenues.

The authors of this study were driven by a conviction: to accompany changes in literary and artistic property, full awareness of this new environment and ability to activate the levers and to forge new alliances are required. The reader is invited to explore this "*Brave New World*" of data and digital content, not Alodus Huxley's dystopian realm, but the one conducive to wonder, in spite of the pretence it harbours, on which Miranda gazes in Shakespeare's Tempest.

Plan. The study does not seek to reproduce all the issues related to the emergence of digital technologies and networks as regards literary and artistic property where some have already been dealt with in previous reports transmitted to the CSPLA[6]. In the first part, it strives to

[6] *CSPLA Commission Report on the distribution of works on Internet*, P. Sirrinelli, J.-A. Bénazéraf, J. Farchy, H. Cassagnabère and B. Larère, 07.12.2005; *CSPLA Commission Report on the open availability of works*, V.-L. Benabou, J. Farchy and D. Botteghi, 16.07.2007; *CSPLA Commission Report on Internet service providers*, P. Sirrinelli, J.-A. Benazeraf, J. Farchy et A. De Nerveaux, 14.10.2008; *CSPLA Commission Report on cloud computing*, A.-E. Crédeville and MM. J.-P. Dardayrol, J. Martin, and F. Aubert, 24.10.2012; *Commission Report dedicated to referencing works on Internet*, V.-L. Benabou, J. Farchy and C. Méadel, 09.07.2013; *Mission Report on image banks on Internet,* A.-E. Crédeville; F. Benhamou, C. Pourreau, 15.07.2013**;** *CSPLA Mission report on text and data mining*, J. Martin, L. de Carvalho, 16.07.2014; *CSPLA Mission Report on transformative creations*,

comprehend the impact of destabilization on literary and artistic property law resulting from the appearance of competing or all-embracing notions in legislation such as data and digital content (I.) and, in the second part, to assess the ability of the system to address the challenges created by this new era of mass processing digital streams (II.). Finally, the report formulates proposals intended for better promoting creation in this new environment (III.)

24.12.2014; V.-L. Benabou, F. Langrognet; *Commission Report dedicated to the second life of digital cultural assets*, J. Farchy, J.-A Benazeraf, A. Segretain, 26.05.2015; *CSPLA Mission Report on the linkage between Directives 2000/31 "electronic commerce" and 2001/29 "information society*", P. Sirinelli, J.-A. Benazeraf, A. Bensamoun,14.12.2015; *CSPLA Mission Report on the creation of a related right for press publishers*, L. Franceschini, S. Bonnaud-Le Roux, 12.09.2016; *CSPLA Exploratory Mission Report on the digital economy of the distribution of protected works and other subject matter and on financing creation*, J. Farchy, M. François Moreau, Co-Chairs of the Mission, and Mrs Marianne Lumeau, 17.11.2016; *CSPLA Mission Report on the right to communicate to the public*, P. Sirinelli, J.-A. Benazeraf, A. Bensamoun, 09.01.2017; *CSPLA Mission Report on tools for recognizing works on online platforms*, O. Japiot, L. Durand-Veil, 26.07.2017; *CSPLA Mission Report on the interoperability of digital content*, 22.05.2017; J.-Ph. Mochon, E. Petitdemange; *CSPLA Mission Report on the free licence economy in the cultural sector*, J. Farchy, M. de laTaille, 12.01.2018.

1ST PART: MULTIPLE OVERLAPPING BETWEEN LITERARY AND ARTISTIC PROPERTY LAW AND THE NOTIONS OF DATA AND DIGITAL CONTENT

Normative overlapping. The subject matter protected by literary and artistic property presents the particularity of coexisting with other subject matter encompassed in other branches of law. Let's take the example of the book: it is an intellectual work, whose expressive form is likely to be protected by copyright if it is original, and a subject matter which is traditionally published in the shape of a set of sheets of paper bound together whose purpose is to be disseminated to the public. It is therefore the base of other legislations whose purpose is to accompany the terms and conditions for this public dissemination and to define the framework for lawful expression[7]. Insofar as the book-work circulates in book-media, the rules applicable to the latter are likely to interfere with the rules concerning the former. As such, a ban related to protecting children could impede the use of economic and moral rights (UK: copyrights) on the work. This "endured" convergence is arbitrates according to the respective level of obligation of the norms competing.

Digital media, far from removing this normative overlapping actually increases it. The modification of the writing convention and the transformations of distribution mechanisms induce new consequences which the legislator appreciates progressively as practices move away from traditional media and vectors.

As protected works and subject matter concepts are defined in broad terms (1.) they are now aligned with new notions such as those of digital content and data. This overlapping needs to be identified and interferences induced by rules applicable to these competing notions on the literary and artistic property regime need to be comprehended. These potential overlaps imply successively envisaging the application of rules relative to digital content (2.), and to "data" (3.), even if, for lack of stable definitions, the scope of the distinction must not be exaggerated.

3. The subject matter protected by literary and artistic property likely to include notions of data and content

The coincidence between "data" and the literary and artistic property scope is not evident, insofar as it is generally accepted that "raw data" is excluded from the copyright reservation perimeter (1.1.). It is conspicuous however whenever different literary and artistic property instruments enable parties to indirectly take advantage of rights on specific data, data aggregates and content (1.2.).

3.1. The exclusion of "raw" data from the literary and artistic property field

Questing the notion of data. The notion of data appears, at a first glance, to relate to a reality which is more elementary than that of work, which seems to refer to a level of conception which is more advanced than that of "raw" data. Ubiquitous notion par excellence, a portmanteau word, data would nevertheless become a key concept of the digital world, where it has progressively overtaken in popularity the term "information" without being the exact synonym[8].

[7] ISBN publication identification, law on fixed price for books, laws on child and youth protection, laws on protecting privacy rights of individuals, laws encompassing libel, etc.

[8] Yet, for the sake of simplicity and on the basis of the definitions issued by jurisprudence, here we will acknowledge an equivalence between the notion of raw information and that of data. V. S. Abiteboul, Data Sciences: From First-Order Logic to the Web, Inaugural lecture given on 8 March 2012 at the Collège de France, §10: "*A piece of data provides a basic description, typically numerical for our purposes, of a given reality. It can be, for example, an observation or a measurement. Drawing on the collected data, information is obtained by organizing and structuring data so as to derive meaning. By understanding the meaning of information, we obtain knowledge, in other words,*

Data would refer to "*a fact, a notion or an instruction represented in a conventional form suitable for communication, for interpretation or for processing by humans or by computerized means*"[9], thus establishing that "*symbolization, in a conventional form for purposes of communicating, interpreting or processing*"[10] constitutes the essential element. Data, through its ability to absorb reality and to "*grammatize*" it[11], could thereupon cover "*any linguistic utterance from simple information to literary work*" which has been digitalized[12]. Some stress the interesting ambivalence of the term "data" whose technical exception refers to any digital product from digitalization intended for the computer, from the entire file to bytes, whilst the general meaning covers any natural or conventional subject which, applying to humans, is likely to be digitalized. The container, likely to be automatically processed (the file in its digital format), should as such be differentiated from the content (which has been digitalized) which will be restored by the data[13].

If "data" is progressively appreciated by law, its definition quizzes. This voluntarily-indefinite term reflects characteristics which are so distinctive from what it is trying to name: circulating, flow, movement, streams, and, data, which in many instances is co-developed and non-rival can definitely not be limited to a single meaning. This explains data's plural definition related to the "datafied" subject matter, to the person who issues it and even given the role which it is assigned[14].

Data and literary and artistic property. The convergence of literary and artistic property law with the notion of data is complex insofar as the issue is to determine if this law covers "data" or not within the meaning of the term as understood by other texts. Most do not define it, which leaves the scope of interpretation wide open. We will begin by considering the assumption wherein data is not, per se, subject matter protected by literary and artistic property but a rudimentary element of information covered by freedom of expression. The classical principle of copyright are founded on a theoretical *summa divisio* which, by opposing the form and "raw" information, appears to reject the principle of protecting simple data by the literary and artistic property law.

Clichéd image: data in its natural status versus the intellectual work. In a traditional approach, "data" or "raw information" cannot be assimilated in principle, per se, to intellectual works, which require a degree of conception and creation which is not the case of "simple" data. This vision is based in part on the – highly-speculative – idea that data (or information) would exist in its natural status, whilst the work would be the result of a phenomenon of human creation; it justifies the principles for excluding raw data or information from the scope of application of copyright law so as to preserve the "commons".

"facts" held to be true in an individual's world, and "laws" (logical rules) governing this world": "Temperature measures taken every day in a weather station are data. A graph showing the evolution of the mean temperature over time, in a given place, is information. The fact that the temperature on Earth increases as a result of human activity is knowledge".

[9] According to the AFNOR definition.

[10] Ph. Gaudrat and F. Sardain, *Traité de droit civil du numérique* (Treatise on Digital Civil Law), Larcier, volume 1, 2015, No. 10.

[11] B. Stiegler uses the term "grammatization" of reality to define "the process of describing and formalizing human behaviour (calculations, language and gestures) into letters, words, writing, and code so that it can be reproduced" (http://cultureandcommunication.org/galloway/pdf/Stiegler%20glossary.pdf). This leads to expressing "disparate realities (sounds, images, texts, natural phenomena, human behaviour, industrial processes, etc.) in a common, universal language, created from the combination of 0 and 1, offering the possibility to process them systematically and to link them" (French Council of State, *Le numérique et les droits fondamentaux*, (Digital technology and fundamental rights), Annual study 2014, La documentation française, p. 42).

[12] P. Gaudrat and F. Sardain, op. cit., §10.

[13] Everything would, as such, become "potentially" digital and, what is digitalized, would no longer be information: P. Gaudrat and F. Sardain, op. cit., §11.

[14] As illustrated in the General Data Protection Regulation as regards personal data and the texts relating to the opening of public data.

The form and idea distinction, a copyright "vulgate". The legislator remained extremely discreet as to the notion of work because neither the Intellectual Property Code nor the European harmonization texts define it in a clear way; the latter is often determined implicitly on the basis of well-established doctrinal and jurisprudential distinctions. As such, it is generally accepted that the purpose of an intellectual work, subject to copyright protection, is a *form of expression*[15] and not the ideas which it conveys. This principle is generally expressed by a "maxim" whose normative force is acknowledged in jurisprudence[16]: "*ideas are free to be used"*. This exclusion is set out under Article 9 paragraph 2 of the TRIPS Agreement according to which: "*Copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such.*"

A distinction based on the principle of commons or of the public domain. This distinction, which is woven into the ensemble of intellectual property rights, which in principle does not focus on simple ideas, forms an essential border for preserving the public domain and is the guarantee of the principle of freedom of expression (even creation[17]). The idea is not a work[18] because it falls under the commons, under what any person may think without undertaking formatting work or, more so, which exists irrespective of the ensemble of forms of expression which it may cover. Excluding ideas from the definition of works comes down to dismissing them from the "reservation" mechanism and, as such, preserves them from any risk of appropriation[19]. We must be able to think, express ourselves and debate ideas freely even if the latter are issued by third parties without requiring prior authorization, technically impossible to collect and socially impossible to tolerate in a democratic society.

The criteria for differentiating idea and form is however difficult to implement[20] and has been widely criticized[21]. As an illustration of the artificial nature of the distinction, Michel Vivant and Jean-Michel Bruguière[22] cite a judgement of the Marseille Civil Court[23] according to which "*in the field of archaeological science, the rules and methods of research and knowledge, the material data resulting from mining and discoveries must be considered as acquired in the commons, but each scientist is able to formulate hypotheses, explanations or reconstructions which remain personally acquired. In such a field, creation consists in an original rapprochement of material and intellectual data."* We can also cite a decision which acknowledged copyright in the process of selecting images from archives[24].

The exclusion of "raw information". As this decision attests, the mechanism for excluding certain subject matter from the scope of intellectual property extends, without, moreover, the difference of concepts being always specified by excluding "raw" information from the influence

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[15] Ph. Gaudrat, "Réflexions sur la forme des œuvres de l'esprit" (Reflections on the form of intellectual works), Liber amicorum in honour of André Françon, Dalloz 1995, p. 195.

[16] V. in particular C. Cass. Com. 29 November 1960, *RT_DCom. 1961*, p. 607, obs. Desbois: "an idea or a teaching method in itself is not prone to private appropriation" or even the First Civ. 17 June 2003 for which "*literary and artistic property does not protect ideas or concepts but solely the original form under which they are expressed*"; C. Cass. First Civ. 13 November 2008, *Paradis*; under the dir. of M. Vivant, *Les grands arrêts de la propriété intellectuelle* (Major intellectual property decisions), 2nd ed., 2015, note M. Clément-Fontaine, p. 43 et al.

[17] Principle recently enshrined in the French Act on freedom of creation, architecture and cultural heritage (referred to as CAP in French) (Article 1 and Article 2 for freedom of dissemination and creation).

[18] One of the etymological origins of the French world "œuvre" (translated in this report as "work"): 1st half 12th c. *ovre* "object created through activity, the work of someone"; as well as *ca* 1145 *uevre* "action, undertaken for making something"
http://www.cnrtl.fr/etymologie/oeuvre

[19] N. Binctin, *Droit de la propriété intellectuelle* (Intellectual property law), LGDJ, 3rd ed., No. 28

[20] C. Caron, Droit d'auteur et droits voisins, (Copyright and related rights) Litec, 3rd ed. No. 65 et al.

[21] Ph. Le Tourneau, Folles idées sur les idées, (Crazy ideas about ideas)*Electr. com. com.* 2001, chron. 4; v. C. Caron, op. cit. No. 75.

[22] M. Vivant, J.-M. Bruguière, *Droit d'auteur et droits voisins* (Copyright and related rights), Précis Dalloz, 3rd ed. 2016, No. 140.

[23] Civ. Ct. Marseille, 11 April 1957, *D*. 1957, 369.

[24] CA Paris, 4th ch. A 12 December 1995, regarding the archives of the RATP, *Dalloz* 1997 p. 237.

of copyright. The formula is regularly reproduced in the doctrine, despite its relative lack of clarity. According to some authors, "*raw information is ultimately only information considered in a state prior to any enrichment*[25]", akin to "*primary commodities (...) intended to be freely accessible*". In this respect, it should be recalled that the Berne Convention excludes from its scope *news of the day* or *miscellaneous facts which are considered as mere press information* (Article 2 paragraph 8).

According to jurisprudence, this category of "*resource information*[26]" includes press news or agency dispatches[27]; public data[28] such as those compiled by the IGN (National Geographic Institute) and INSEE (National Institute for Statistics and Economic Studies). Thus, the judges were able to exclude from copyright protection "*stock exchange quotations and transactions (which) are raw information and are a common good for all upon publication*" [29]or, in a *Météo France* case, "*messages collected and presented without any original input, in accordance with international standards and recommendations and internal regulations.*"[30]

Part of the doctrine emphasizes the need to make this distinction an element for defining protection. In essence, this means that work implies, on the part of its author[31] -, an increase in reality through the creation of a form. Thus the Lucas Treatise considers that "*copyright only encompasses works, not information. However, not all information is work and it is only through an overly simplistic approach that works are reduced to information.*"[32]

At first sight, the coexistence between raw data/information and literary and artistic property law would be achieved in a simple way through making a distinction between the former envisaged as *res communis*, free to be used and protected subject matter requiring a more sophisticated form of creation which, alone, would be subject to protection, excluding the elementary data which constitute it. If we observe this distinction, there is no risk of confusion between the rules relating to "data" and those governing the protection of literary and artistic property.

However, this conclusion would be hasty insofar as, in the absence of clear criteria as to the definition of data and information, an "indirect" reservation of the latter is possible, not only through the copyright mechanism but also through other "private" measures included in the Intellectual Property Code.

3.2. The "indirect" reservation of data and content through literary and artistic property

Diversity of reservation techniques. Despite the distinction between raw information and work, which is dear to copyright, it is acknowledged that data included in the works may be subject to indirect reservation through copyright. The *sui generis* right in databases also offers the possibility of attaching an enforceable right to certain data aggregates when its conditions for implementation are met. Even more generally speaking, related rights, because of the operative event giving rise to protection, enable their holder to have control over the data.

[25] Vivant, afore. No. 144 et al;
[26] Id.
[27] C. Cass. req., 23 May 1900, *D*. 1902.1.405, case *Havas*.
[28] Civ. Ct. of the Seine, 10 February 1875 and C. Cass. req. 15 May 1878, *D*. 1979.1.20: exclusion of copyright from the series of settlement prices for building works developed by a town. V. J.-M. Bruguière, *Les données publiques et le droit* (Public data and law), Litec, 2002.
[29] Compiègne High Court, 2 June 1989, DIT 1989/4, note N. Poujol, p. 60.
[30] Paris, 18 March 1993, J.-M. Bruguière, Cahiers Lamy Informatique, supp. No. 56, Feb. 1994.
[31]From the Latin *augere, meaning increase, augment, swell.*
[32] A. Lucas, A. Lucas-Chloetter, C. Bernault, *Traité de la propriété littéraire et artistique* (Treatise on Literary and Artistic Property), Litec, 5th ed. No. 65.

Finally, the consequences of applying DRM to the data and metadata of the work should be considered.

3.2.1. The indirect reservation of data or content through copyright

Complex work / information or data distinction Unlike the simple presentation that has just been mentioned, the distinction between what is protected by copyright and what is not is complex to implement, insofar as, intrinsically, information[33] requires a form of expression and where the data does not exist in its natural state but is often "produced" by the human mind. Data or information is also a form of expression, although often rudimentary. The knowledge which features in the information or in the data is very strongly embedded in the form which conveys it and which guarantees its intelligibility[34].

Contrariwise, the difficulty comes from the fact that an original form can also be the root of a piece of information, as the work conveys data inside it or about it (metadata)[35]. For example a photo on a topical issue: the form of the photo can be original and lead to copyright protection yet conceal data/information - the subject of the photo - which is difficult if not impossible to realize without reproducing the original shape. Thus, it could have been upheld that the work itself had an "informational nature[36]" yet this analysis is criticized.

In any case, the informational *function* of the work is obviously present when its purpose is to deliver information such as press work, but it also applies to other types of works which are not so directly related to information. Consequently, beyond assuming the conclusion according to which copyright does not protect "raw" information, there is a possibility of recreating data exclusivity through copyright tools when such data is part of a protected work and cannot be separated from it. This lies at the root of the debate on the *Text & Data Mining* (referred to as *TDM*) exception.

Copyright of the owner of the work on the metadata which is extracted from said work. The question of applying copyright is not limited to the data contained *in* the work but may also relate to data *on* the work or metadata. As for the description of the work, it is likely to trigger the exercise of the owner's right over the work when it borrows constituent elements which testify to the originality of the work, such as certain extracts as well as the title of the work. The Intellectual Property Code states, with regard to titles, that they are protected like the work itself, i.e. to the extent of their originality.

However, in a famous *Microfor* judgement, jurisprudence was able to consider that a title, even an original one, can be freely used to produce a documentary index[37]. Thus, unless there is a massive transfer of the work, the copyright owner does not seem to be able to oppose the creation of metadata as long as they fulfil this simple function of indexing the work. The fact

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[33] Etymologically, to inform comes from "to given form to"; from the Latin *informare* "to shape, to form" fig. "to represent ideally, to form in the spirit", from Middle English "informen, enformen" taken from old French "*enformer*" "to give form to" (1174, Guernes de Pont-Sainte-Maxence, *St Thomas*, ed. E. Walberg, 3078), http://www.cnrtl.fr/etymologie/informer in French and https://www.etymonline.com/word/inform in English
V.-L. Benabou, Pourquoi une œuvre de l'esprit est-elle immatérielle ? (Why is intellectual work intangible?) *RLDI,* No. 1, p. 1.

[34] Lucas, op. cit. No. 66: "*press news can only be copyrighted if the raw fact is provided in an original form. This does not mean that a news agency press dispatch is excluded from copyright protection in principle. But it is clear that information itself cannot be monopolized.*"

[35] C. Caron, op. cit. No. 76: "*Copyright does not traditionally block access to the substance which it merely expresses in a particular form. It is clear that this is no longer the case today. Copyright increasingly tends to protect creations of informational forms which are information before actually being works. As a result, access to information is limited because of the existence of the monopoly.*"

[36] B. Hugenholtz, *Auteursrecht op informatie*, Deventer, 1989.

[37] Ct. Cass. Plenary Assembly, 30 October 1987, *Microfor*, *JCP* G 1988, II, 20932, rapp. Nicot and note Huet; *D*. 1988, p. 21, concl. Cabannes ; *RIDA* 1/1998, p. 78, concl. Cabannes.

that this decision was given before the advent of the information society nevertheless raises the question of the persistence of this solution in light of developments[38] since then.

The question also remains as to the use of moral rights as an instrument for controlling certain indexing operations. Would it not be possible for the right to respect and integrity of the work as well as the right to authorship in certain cases allow the author to object to the use of a certain number of elements of a work to identify it, or oblige operators to introduce data on the quality of the various authors or performers who have contributed to the creation of a work?

Copyright for the creator of metadata? *Microfor* jurisprudence is not sufficient to exclude all copyright issues because the creation of metadata can potentially lead to protectable works, which has been held in relation to jurisprudence summaries[39]. The Lucas Treatise[40] notes that "*like summaries, they (the abstracts) can be materialized through personal expression which can be separated from the function. As such, we cannot exclude their originality*." In this case, it is the author of the metadata - the librarian, the archivist, for example - who could exercise an intellectual property right over its use.

Notwithstanding, the possibility of such a qualification is not systematic, as the second committee of experts on copyright issues arising from the use of computers convened by WIPO and UNESCO[41] recommended, for example, that bibliographical indications be excluded from copyright but that collections containing such indications be protected. Moreover, with regard to bibliographic records, the high degree of standardization of the information contained within seems to run counter to the possible acknowledgement of an originality and thus constitute a barrier to the recognition of a copyright. The answer is therefore not unambiguous when it comes to the protection of metadata by copyright. **If its rudimentary and constrained form in principle precludes such a qualification, it is possible that the reproduction of certain elements of the work in the metadata is subject to the copyright of the author of the work, just as it is possible that the metadata is the product of an original creation by its author.**

The protection of the database by copyright. The intricacy of the data and the work is still illustrated in particular in databases protected by copyright, under Article L. 112-3 of the Intellectual Property Code[42]. Admittedly, copyright is not intended, in principle, to protect the data contained within the database, but only the original structure of the database. Article 3 paragraph 2 of Directive 96/9 on databases establishes that "*The protection of databases by copyright provided for in the Directive hereof does not cover their content and is without prejudice to any remaining rights as regards such content.*"[43] Notwithstanding, the qualification of database as adopted by jurisprudence enables indirect reservation of the informational value of the data it contains.

According to the Court of Justice, the database is a broad and functional concept. The Court of Justice adopted a resolutely comprehensive understanding of the concept of a

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[38] See *below*, part II.
[39] Civ. Ct. Seine, 1st June 1883, CA Paris, 5 August 1884, DP 1893, 2, p. 177; Civ. Ct. Seine, 7 May 1896, *Ind. Propr. Ann.*. 1898, p. 44.
[40] Lucas, No. 134.
[41] *Copyright* 1982, p. 234.
[42] A database is considered as a collection of works, *data* or other independent elements, arranged in a systematic or methodical manner, and individually accessible by electronic or any other means. Initially, French law only covered collections of works and amended its formulation to include data collections, pursuant to Recital 17 of the Directive.
[43] See also Article 10 paragraph 2 of the TRIPS Agreement, which states that "Compilations of data or other elements, whether reproduced on a machine-readable medium or in any other form, which, by reason of the choice or arrangement of subject matter, constitute intellectual creations will be protected as such. This protection, which will not extend to the data or elements themselves, will be without prejudice to any remaining copyright in the data or elements themselves."

database in a judgement of 29 October 2015, *Freistaat Bayern v/ Verlag Esterbauer GmbH*,[44] in which it acknowledged that a ***topographical map could be qualified as a database,*** despite its analogue nature. Referring to its previous judgements[45], the CJEU considers that the concept of database should be given a broad scope, free of formal, technical or material considerations (pt 12), as the Directive grants protection to these databases, "*whatever their form*". It considers that the notion of database "*draws its specificity from a functional criterion*" (pt 16) and thus notes that the map serves as a "basic product" (sic) by means of which by-products are produced by the selective extraction of elements from it (pt 19). More specifically, the database is conditioned by the existence of a collection of "*independent* elements", i.e. elements which can be separated from each other, without impacting the value of their informative, literary, artistic, musical or other content.

In the end, **to demonstrate the existence of the database, it is sufficient to prove the existence of an independence of the elements which compose it, which depends on their *autonomous information value* at the end of their extraction from the database.** With regard to the example of the topographical map qualified as a database by the CJEU, its possible protection by copyright, if it is original, means that the prior consent of its author is required for the reproduction and communication to the public of the map but also of the elements contained within, unless an exception to copyright can be invoked.

The notion of an element independent of the database. Henceforth, the qualification of a database seems to depend on the ability to extract without cancelling out the informational value of the data contained in it. It should also be noted, however, that the Court admits that part of this informational value may disappear during the extraction process. As such, if the value of an element of a collection is increased by being placed in a database "*likely to add value to the constituent elements of that database by virtue of its placing in a systematic or methodical and individually accessible manner*", the fact that its extraction may possibly lead to a corresponding reduction in value will not, however, affect its qualification as an "*independent element*" within the meaning of Article 1 paragraph 2 of Directive 96/9/EC, "*if it retains an autonomous informative value*" (pt 23). In other words, **the difference in value between the aggregate data and the isolated data does not preclude the conclusion that a database of independent elements exists, as long as the element retains its own value after extraction.**

Towards a systematic qualification of a database? However, the increasing sophistication of exploration tools makes it possible to confer an informational value specific to the data in the database, possibly different from the one for which the data appeared in the database. Should we continue to focus on the order (structure) in which the data has been stored to determine whether or not there is a database or should we include in the category any arrangement of data, including unorganized data, whenever there are means developed by third parties to extract the informational value of the data, as the CJEU seems to think?

If we follow this trend, which also corresponds to the technical development of unstructured "databases" in the era of massive data known as "*big data*", database qualification becomes almost systematic. Provided that a creation of form is understood in its functional dimension, we may, in light of the criteria identified by the Court, qualify any work as a database as the autonomous informational value of the elements extracted may exist at the end of this extraction by most digital processing means of the works: literary works, of course, but also images, music etc. The new forms for exploring works through text and data mining - have

[44] CJEU, 29 October 2015, *Freistaat Bayern v/ Verlag Esterbauer GmbH*, case C-490/14, V.-L. Benabou, A topographical map is a database because of its informational value, *Dalloz IP/IT*, 2016 p. 89.

[45] CJEC 9 November 2004, *British Horseracing Board [BHB] v/ William Hill Organisation*, case C-203/02; CJEC 9 November 2004, *Fixtures Marketing v/ Organismos prognostikon agonon podosfairou [OPAP]*, case C-444/02; CJEC 9 November 2004, *Fixtures Marketing Ltd v/ Oy Veikkaus*, case AB C-46/02; CJEC 9 November 2004, *Fixtures Marketing Ltd v/ Svenska Spel AB*, case C-338/02, *RTD com*. 2005. 90, obs. F. Pollaud-Dulian.

specifically the effect of producing an autonomous informational value of the elements (alone or newly assembled) of a work after extraction. The protection of the data set could be at stake, subject to the condition of originality[46].

Possibility of indirect reservation of the data by protecting the form. Whenever the work containing data is protected by copyright, the extraction of the data will not always be possible without the consent of the copyright owner on the aforementioned work pursuant to the principles governing protection. The right of reproduction and the right of representation conferred on it vest it with an exclusive right to authorize or prohibit ***any*** reproduction of the work in question (see Article 2 of Directive 2001/29 on copyright and related rights in the information society), whatever the form and methods and ***any*** communication to the public, subject to the exceptions listed in the Intellectual Property Code.

Let us mention the *Infopaq I*[47] judgement in which the Court of Justice ruled:

> "*An act performed during a **data acquisition process**, which consists in storing in computer memory an extract of a protected work composed of eleven words and printing that extract, may fall within the notion of partial reproduction within the meaning of Article 2 of Directive 2001/29/EC if - which it is for the national court to verify - the elements as such reproduced are the expression of the author's own intellectual creation.*"

"Indissociation" of data and form. Whenever the data takes a form which results from the original intellectual work, dissociation is difficult. It is admittedly permissible to envisage circumventing the difficulty by recomposing an alternative form of expression of information from scratch but, in addition to requiring a particular effort, this alternative is not always possible if the information is subject to a technical or contractual barrier which prevents free access or if the very value of the information comes from reproducing the form. This is particularly the case whenever the veracity of a scientific proposal is discussed or whenever the words of a person are related in an interview. Changing the form of expression would be akin to distorting the "data" itself. According to copyright principles, if the information is inseparable from the work, the reproduction required for its processing and dissemination must, therefore, require the prior consent of the owner, subject to the absence of originality of the form taken and the set of exceptions.

With regard to copyright, the possible additional qualification of a work as a "database" with regard to the functional criterion does not in principle imply any essential divergence of the legal regime with that of the work envisaged with regard to the artistic field to which it relates. The principles governing the protection or influence of exclusive rights and exceptions are not fundamentally different except for the exception of private copying for "electronic" databases, which is excluded by Article L. 122-5 of the Intellectual Property Code (and, as a consequence, the compensatory mechanism attached to it). However, this absence of a private copying exception for digital databases is likely to further reduce the ability of individuals who could not take advantage of other exceptions to use the information. On the other hand, there is an exception under which the author may not prohibit acts required for accessing the content of an electronic database for the purposes and within the limits of the use provided for by contract.

3.2.2. The indirect reservation on databases through the sui generis right

Protecting database "content". In addition to the protection of databases by copyright, Directive 96/9 introduced a *sui generis* right transposed into French law in 1998. Without going into detail about the regime of this right, which was the subject of a recent European

[46] See *below*.
[47] CJEU, 16 July 2009, *Infopaq International A/S v/ Danske Dagbledes Forening*, case C-5/08.

Commission consultation[48], it is necessary to determine to what extent this right allows a reservation of the data in the database. The objective of the *sui generis* right was precisely to enable the person[49] who made a quantitative or qualitative substantial investment in the development of the database to oppose the quantitative or qualitative extraction of the content of the database, namely the data contained therein[50]. As such, if the *sui generis* right does not authorize exclusivity on particular data, it organizes a form of reservation on a "mass" of data, and even on only some of them, provided that the substantial investment is proven.

Moreover, Article L. 342-2 of the Intellectual Property Code provides that "*the producer may also prohibit the repeated and systematic extraction or reuse of qualitatively or quantitatively unsubstantial parts of the content of the database where such operations clearly exceed the conditions of normal use of the database*". Consequently, the scope of the right to exclude is not limited to a single extraction but takes into account "real-time" extraction when it produces the same result as a one-time extraction.

Since the reference standard, i.e. what clearly exceeds normal conditions of use of the database, is not defined *a priori*, users will, in practice, be encouraged to limit themselves to the extractions permitted in the contract which determines the database terms and conditions of use. It is difficult to consider that there is freedom to extract data covered by the *sui generis* right, even though the Intellectual Property Code in Article L. 342-3 expressly provides that "when a database is made available to the public by the rights holder, the latter may not prohibit the extraction or reuse of an unsubstantial part, assessed in a qualitative or quantitative manner, of the content of the database by the person who has lawful access to it". The risk of *a posteriori* qualifying the extraction as substantial may dissuade users from proceeding with it. In any case, **the question arises as to the threshold above which it is permissible to copy and use data without requesting permission from the producer of the database to do so**.

However, despite a very sound protection mechanism, the *sui generis* right on databases does not seem to have very convincing practical applications, although the European Commission's evaluation report[51] suggests that database producers are satisfied with the legal security provided by the instrument. The hearings undertaken by the mission illustrated a certain lack of interest in this protection, particularly in view of the difficulty of providing the proof required to enter protection, namely the existence of a quantitative or qualitative substantial investment[52]. The exclusion of the investment of the production of data from the scope of the ***sui generis* right established by the 2004 judgements contributed to the lack of interest of operators for this type of protection**[53].

3.2.3. The indirect reservation through related rights

Multiple rights Literary and artistic property at both national and international level acknowledges protection for subject matter other than works through rights known as related rights; the performances of performers, phonograms, videograms and, to a certain extent, the programmes of audiovisual communication companies. These rights, which are more recent and have different definitions, are granted according to multiple criteria that cannot be

[48] V. For an overall study: Study in Support of the Evaluation of Directive 96/9/EC on the Legal Protection of Databases, under the direction of L. Bentley and E. Derclaye, European Union 2018 and the COMMISSION STAFF WORKING DOCUMENT Evaluation of Directive 96/9/EC on the Legal Protection of Databases {SWD (2018) 147 final} of 25 April 2018.
[49] On the definition of the database producer, cf. Article L. 341-1 of the Intellectual Property Code.
[50] Article L. 342-1 of the Intellectual Property Code.
[51] Afore. report, p. 23.
[52] On the contrary, the report mentions rather welcoming jurisprudence in comparative law, concerning the level of investment, p. 27.
[53] Cf. *below*, I.3.3.2.

extrapolated from the definitions of copyright. As regards the possible reservation of data by related rights, it follows different logics depending on the rights in question.

Closeness between the performer's right to his performance and copyright. Performers' related rights suppose a certain kinship to copyright. Moreover, historically-speaking, performer performances may have been protected by copyright for a time. In French law, protected performance refers to the performance of a work which illustrates a personal character[54], a notion which is very close to originality. As such, it is compulsory for the performance to relate to a work[55], without, moreover, being clearly indicated whether the work in question must be original or not[56]. In any case, it does not need to be "still" protected by copyright because a theatre actor's performance can be protected as well when performing a piece of contemporary repertoire as a work in the public domain. The threshold of requirement may be quite low, as evidenced by the granting of protection for the reading performance provided as part of a technical audiovisual documentary[57]. On the other hand, the mere image of a performer is not a protected performance, unless it is considered to be a demonstration of the performance.

Data / Performance distinction. With regard to the distinction between "raw information" and performance, if a work is the subject of a personal performance such as the reading of a text by an actor, the reproduction of the data contained in the text does not constitute a violation of the artist's right when there is no reproduction of the voice reading, for example at the end of a written transcription. If, on the other hand, the "data" is oral, the performance is part of it. As with copyright, the hypothesis of accumulation of qualifications may then arise. Quite often, it will be a matter of context. In an anthology of French cinema, Bernard Blier's performance of "Les tontons flingueurs" ("Crooks in Clover", also known as "Monsieur Gangster") has specific informational value: history of cinema, pedagogy on acting, etc. which is separable from his acting in the film. Alternatively, it may be considered as a performance protected by intellectual property law, data or content depending on its use.

Producers' related rights. "Data" and/or "content" may also be reserved via phonogram and videogram producers' related rights. The operative event giving rise to protection is not clearly defined because the analysis hesitates between the criterion of financial investment and that of fixing. If we adhere to the letter of the law, the attribution of the producer's right is the responsibility of the person who took the initiative and the responsibility for the first fixing of a sequence of sounds[58] or images. It was held that "*the financial participation of a company in the production of recordings, to whatever degree it is established, is not sufficient to confer on it the status of co-producer since it does not involve any initiative or responsibility.*[59]". The protected subject matter is independent of the media[60], which means that fixing can be part of

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[54] The right of the performer, according to jurisprudence, can only be acknowledged for personal performances*:* V. Cass. 1st civ., 24 Apr. 2013, No. 11-20.900, SARL Du jamais vu v/ X., 2nd esp.: JurisData No. 2013-007959; *Electr. Comm. com.* 2013, comm. 75, note C. Caron; *Légipresse* 2013, No. 307, III, p. 418, comm. G. Querzola; *Electr. Comm. com.* 2013, chron. 9, No. 7, – Adde, most recently, CA Paris, Pole 5, ch. 1, 15 March 2016, No. 14/17749, Éric F. v/ SARL JTC and SA Marc Dorcel: *Intell. Propr.* 2016, No. 60, p. 320, obs. J.-M. *Bruguière; Electr. Comm. com. 2016, chron. 11, No. 2*.

[55] Against the recognition of the related right regardless of the requirement of a work, M. Vivant and J.-M. Bruguière, No. 1223 for whom "*performance implies a source work*", citing in support of this idea the jurisprudence "Être et avoir" (To Be and To Have), First Civ. Ct. Cass., 13 November 2008, *Intell. Propr.* April 2009, p. 172, obs. A. Lucas; *Electr. Comm. com.* comm. 2, note C. Caron; *RTD Com.* 2009, 128, obs. F. Pollaud-Dulian, excluding the possibility of performance in a documentary in which the teacher merely appeared in their everyday activity.

[56] The doctrine does not appear to adopt this requirement, v. discussion *below*.

[57] CA Paris, 4th ch., 10 October 2003, *RIDA* 2/2004, p. 324; *Intell. Propr.* 2004, p. 560, obs. A Lucas.

[58] Article L. 213-1 of the Intellectual Property Code.

[59] 1st Civ. Ct. Cass., 28 June 2012, No. 11-13.875: JurisData No. 2012-016355; CA Paris pole 6, 2nd ch., 14 Feb. 2013, No. 11/01750*: Intell. Propr.* 2013, No. 47, p. 208, obs. J.-M. Bruguière*; Eectr. Comm. com.* 2014, chron. 4, No. 21, obs. X. Daverat.

[60] Paris High Court, 3rd ch., 15 Jan. 2010*: Intell. Propr.* 2010, p. 719, obs. J.-M. Bruguière*; Gaz. Pal.* 17 Feb. 2010, p. 24, obs. L. Marino*; RLDI* Feb. 2010, No. 1886, obs. L. Costes*; RLDI* Apr. 2010, No. 1941, obs. P.-F. Rousseau,

any tangible or intangible material[61]. A CD or an mp3 file are not phonograms, but "comprise" phonograms.

It is not necessary for fixing to relate to a work, or to a performance by a performer because *"the mere fixing of images gives rise to rights for the benefit of the person who creates it, independently of any intellectual work*[62]". Subject matter which is not original may be covered by an exclusive right. It was, for example, held that a recording of a concert which does not have the character of an original audiovisual work is nevertheless likely to receive protection under the videogram producer's related right[63].

Potential overlaps. As evidenced by the broad definitions of subject matter protected by producers' rights, some are likely to cover the notion of data (sounds, images), or at least sequences of data. The justification for protection in respect of phonograms and videograms lies essentially in the idea of a risk combined with the investment necessary to achieve the *first* fixing. The scope of application of protection is conditioned by this statement, i.e. the producer will not be able to claim a right if the fixing for which he was responsible is not transferred. As regards the intersection with the notion of data or content, it can be deduced that the producer has no right to authorize or prohibit the recreation of an identical sequence by other means, as long as it does not reproduce the fixing. As such, the information-data contained in phonograms and videograms may be extracted by recreation. On the other hand, any use of the initial fixing, in whole or in part, including non-original elements[64], requires the producers' authorization, subject to the various exceptions. Notwithstanding, the German Constitutional Court ruled that a right with an unlimited scope of application would be contrary to artistic freedom which is constitutionally protected in Germany[65].

Content and audiovisual communication company rights. As regards the related right of audiovisual communication organizations, the very purpose of protection is discussed. Some texts consider that it is the signal[66] (electric beam), others deem that it refers to the notion of emission[67] or that of programme[68], which also remain vague in their definition, showing that it

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confirmed by CA Paris, pole 5, 1st ch., 7 March 2012, No. 10/01369*: RLDI* Apr. 2012, No. 2707, obs. L. Costes*; Electr. Comm. com*. 2012, chron. 9, obs. P. Tafforeau.

[61] 1st Civ. Ct. Cass. 11 Sept. 2013, No. 12-17.794, SPEDIDAM v/ SARL iTunes and a.: JurisData No. 2013-018957*;* JCP G 2013, 1071, N. Binctin*; Electr. Comm. com*. 2013, comm. 100, Ch. Caron; *D.* 2013, p. 2388, note G. Querzola*; Juris Art*, 7 Nov. 2013, p. 42, obs. J. Brunet; *RLDI* Nov. 2013, No. 3238, obs. A. Singh and L. Biyao; RLDI Jan. 2014, No. 3304*; Légipresse 2*013, No. 310, p. 604, comm. P. Tafforeau

[62] CA Paris, pole 5, 2nd ch., 3 Oct. 2014*: Electr. Comm. com.* 2015, chron. 9, No. 3, obs. P. Tafforeau.

[63] CA Paris, pole 5, ch. 2, 3 Oct. 2014, No. 13/21736, SARL Chicken's Chicots Production v/ Sté TF1 et a.: *Electr. Comm. com*. 2015, chron. 6, "Un an de droit de l'audiovisuel" (A year of audiovisual law), No. 6, B. Montels; *Intell. Propr.* 2015, No. 54, p. 69, obs. J.-M. Bruguière.

[64] In its *Metall auf Metall* decision, BGH, 20 November 2008, case I ZR 112/06, *GRUR* 2009, 403, the Bundesgerichtshof extended the related right to each note of a sound recording because the producer's investment is reflected in each - even the smallest - part of the recording.

[65] German Constitutional Court 31 May 2016, case 1 BvR 1585/13 of, *GRUR* 2016, 690, followed by *Metall auf Metall III*, BGH, 1st June 2017, case I ZR 115/16.

[66] Article 6 of the draft treaty examined by WIPO provides that,

0) The protection provided by this treaty on the protection of broadcasting organizations examined by WIPO stipulates: "The protection provided by this treaty shall extend only to signals (...)" (*SCCR/12/2 Rev. 2*).

[67] Both Article 13 of the Rome Convention of 26 October 1961 on the Protection of Performers, Producers of Phonograms and Broadcasting Organizations and Article 14, 3, of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) of 15 April 1994 are based on the notion of emission. The Rome Convention formally defines its purpose in Article 3, f):

"f) "*broadcasting emission" the broadcasting of sounds or images and sounds by means of radio waves, for the purpose of reception by the public* (...)".

[68] D. Lefranc, *Jurisclasseur PLA,* Fasc. 1470, Related right of audiovisual communication companies, No. 16: For the National Commission on Communication and Freedoms, a programme is made up of the *"continuation of broadcasts broadcast by an audiovisual communication service between the opening and closing of the antenna"*. As for the broadcast, it is *"any programme element individualized by a specific cedit roll" (Dec. No. 87-361, 31 Dec. 1987: OJ 13 Jan. 1988, p. 581*, terminology note relating to certain terms or expressions used, as regards television programmes in CNCL decisions).

is difficult to determine whether the right relates to the vector or to the "content" conveyed. It has been possible to bring to the fore the idea that since the programme constitutes the identity of the channel, it also stems from the logic of distinctive signs[69]. Recent jurisprudence has shed some light on the notion[70] in French law regarding the notion of "programmes", the definition of which is given in the Freedom of Communication Act[71], namely "*an ordered sequence of emissions containing images and sounds*" for audiovisual programmes, "*an ordered sequence of emissions containing sounds*" for radio programmes. As such, a live radio broadcast consisting of sounds and songs of nature constitutes a *programme*, which is also audiovisual "content". The reproduction of such a programme in principle requires the authorization of the audiovisual communication company which broadcast it, including when it is made available to the public[72], following an interpretation of French law in light of Directive 2001/29.

The question of whether the right extends to isolated content elements arose, in particular as regards photos taken from the programmes and intended to illustrate the programming presentation. The drafters of the Rome Convention, who had perceived the difficulty, had refused to take a position, but nevertheless stressed that "*leaving entirely free the possibility of photographing television broadcasts and reproducing in the press the most striking photos is likely to compromise relations of broadcasting organizations with news agencies*." Germany adopted a law specifically acknowledging the broadcaster's exclusive right to take photos of its broadcasts and disseminate them. But neither the draft treaty currently under discussion at WIPO on the protection of broadcasting organizations nor French law has explicitly enshrined such a right to prohibit the reproduction of photos from programmes[73] to the holder of the related right. As such, it is difficult to say whether such an act constitutes a partial reproduction falling within the monopoly of use or whether the photo, without being an animated image, cannot be assimilated to a part of the audiovisual programme.

3.2.4. Influence of DRM on data and content availability

Access control through technical protection measures. During the WIPO treaties of December 1996[74] but also when they were implemented into European law by Directive 2001/29[75], there was much discussion, as regards anti-counterfeiting measures, of "DRM". (Digital Right Management), known in French as "mesures techniques de protection et d'information" (technical measures for protecting and informing) in their dual aspect of controlling access and traceability of works on Internet. The massive possibilities of counterfeiting linked to the digitalization of works and their rapid dissemination on networks led to a technical-legal response consisting of introducing legal protection against the circumvention of technical protection measures in order to control access and the copying of works and other subject matter protected by intellectual property. Member States created sanction mechanisms against measures to circumvent these systems. Consequently, when a

[69] D. Lefranc, *Jurisclasseur PLA,* Fasc. 1470, Related right of audiovisual communication companies, No. 19.
[70] V. P. Tafforeau *Electr. Comm. Com.* No. 10, October 2017, chron. 11; CA Paris, pole 5, ch. 1, 2 Dec. 2014, No. 13/08052, TF1 et a. v/ Dailymotion: *Intell. Propr.* 2015, No. 54, p. 73, obs. C. Bernault; Paris High Court, 3rd ch., 1st sect., 9 Oct. 2014, No. 13/01249, SAS Playmédia v/ Sté France Télévisions-FTV: JurisData No. 2014-035867*; RTD com.* 2014, p. 820, obs. F. Pollaud-Dulian*; LEPI* Dec. 2014, No. 167, p. 1*; Intell. Propr. 2*015, No. 54, p. 70, obs. A. Lucas*; Légipresse* 2014, No. 322, literary and artistic property synthesis, p. 704, obs. C. Alleaume.
[71] L. No. 1986-1067, 30 Sept. 1986, Art. 2, par. 4 and 5.
[72] CA Paris, pole 5, ch. 1, 2 Dec. 2014, No. 13/08052, TF1 et a. v/ Dailymotion*: Intell. Propr.* 2015, No. 54, p. 73, obs. C. Bernault.
[73] On the other hand, the Court of Cassation acknowledged such a right for the organizers of a sports event, considered as the owners of the rights to use the image of the event, in particular by disseminating photographic snapshots taken on that occasion: Cass. com., 17 March 2004, No. 03-12771, Andros Trophy: Civ. Bull. 2004, IV, No. 58, p. 60; *Electr. Comm. com. 2004*, comm. 52, obs. Ch. Caron.
[74] Article 12 of the WIPO Copyright Treaty and, in substantially similar terms, Article 19 of the WIPO Performances and Phonograms Treaty (WPPT).
[75] Directive 2001/29, Article 7.

protected work or other subject matter is subject to such a technical control system, it is not possible to directly access or copy, in violation of this system, the protected work or other subject matter, or the data it contains, under penalty of criminal sanctions. Rights holders have the opportunity to control access to and use of data through this tool. Arbitrations are provided for in the law to enable certain exceptions to be made, but there is no general right of access to the information contained in the works or subject matter protected by DRM.

It should be noted that the sanctions for circumvention provided for in the Intellectual Property Code are only applicable if the circumvented measures are attached to subject matter protected by an intellectual property right. The balances concluded are, however, without prejudice to the application of other legal measures which sanction intrusion into or retention in an automated data processing system[76].

Possibility of indirect reservation of metadata by the regime relating to information on the rights regime. As regards metadata, we can also question the application of mechanisms relating to rights regime information. According to Article 12 of the WIPO Copyright Treaty, the expression "*rights regime information"* means "*information identifying the work, the author of the work, the owner of any right in the work or information on the terms and conditions of use of the work, and any number or code representing such information, when any of such information is attached to the copy of a work or appears in connection with the communication of a work to the public.*" This provision was transposed in 2006 into the Intellectual Property Code and is now included under Article L. 331-11 which establishes protection for information in electronic form concerning the rights regime of a work, which is understood, in a rather similar but distinct form, as **"*any information provided by a rights holder*** *that makes it possible to identify a work, a performance, a phonogram, a videogram, a programme or a right holder, any information on the terms and conditions of use of a work, a performance, a phonogram, a videogram or a programme, as well as any number or code representing all or part of such information.*"

This definition, which focuses on the identification elements of the owners and the work and information relating to its use, partly covers metadata relating to the work (or other subject matter protected by literary and artistic property rights). In essence, it is used to establish a regime to prevent the removal or modification of such information and to prevent the distribution of protected subject matter which has been deprived of such information or whose information has been modified with the intention of facilitating counterfeiting. As such, strictly speaking, there is no "private law" on information concerning the rights regime, but a possibility of criminal prosecution of persons who delete or modify it without authorization. However, the question may be raised as to what extent these provisions do not give rights holders of works a power of control over the metadata which accompanies them. The wording of French law - similar to that of the Directive - differs from the Treaty text by envisaging to grant protection only to information "*provided by a right holder*" and not to all information whatever its origin. As such, the *ratio legis* does not consist in establishing protection on the veracity of the information against its misuse but in giving the holder the possibility to remain in control of the information on the work "attached" to the provision of the latter.

It is not excluded that, by invoking their ability to continue to modify the information, a copyright owner of the work may prevent a third party from making metadata different from that which it has itself affixed to the work, on the grounds that such modification would be likely to "facilitate copyright infringement". What about the librarian who would like to make a copy of the work available via an electronic file whose information said librarian would update? It may be retorted that the moral element of the offence, required by the Intellectual Property Code, in particular Article L. 335-3-2, is as such missing. To our knowledge, these provisions have not led to any dispute which would allow us to better define the conditions for their implementation.

[76] Articles 323-1 to 323-8 of the French Criminal Code.

It is generally accepted that raw data cannot be the subject of an intellectual property right. Yet, a more detailed analysis shows that various mechanisms induce or could induce an indirect reservation of data and content by literary and artistic property: copyright of the creator of metadata or of the owner of the work on the metadata extracted from it; protection of the database content by the *sui generis* right, the producer may object to the extraction of any part quantitatively or qualitatively substantial; right of the phonogram producer or the audiovisual communication company to prevent the reproduction of any part; control of access to the data contained in the work through technical protection measures.

The different literary and artistic property instruments cover a heterogeneous ensemble of works, services, sound sequences, images wherein the individual or massive transfer represents a growing challenge in this "*Big Data*" era. **Consequently, far from being accidental, the convergence of literary and artistic property reservation mechanisms with new "intangible" asset regulations fuelling digital exchange flows, becomes systemic.**

4. Massification of content implying links between subject matter protected or not protected by literary and artistic property

"Digital content" first referred to a notion of Internet technical and economic vocabulary before entering into positive law. Present today in several texts in effect or under discussion, the notion of content is characterized by an absence of definition or by incomplete definitions, which is probably quite acceptable in terms of the purposive vocation of these legal regimes.

The emergence of the notion of digital content interferes with literary and artistic property law in two respects. On the one hand, the notion itself conveys commoditization between subject matter protected by literary and artistic property and those which are not, all under this encompassing heading (2.1.) On the other hand, the legal regimes established pursue purposes other than those of literary and artistic property (Internet neutrality, consumer protection), which may conflict with it (2.2.). The linkage between these new legal regimes and that of LAP must therefore be clarified (2.3.).

4.1. Content, technological and economic notion attached to Internet architecture

To understand the emergence of the notion of digital content, we must return to the architecture of Internet, which harbours it, as well as the principle of commoditized processing of this content.

TCP/IP protocol and layered architecture, the cornerstones of Internet. The power of Internet lies in the fact that it enables its users to use a wide variety of services (sending a text, reading a newspaper, voice communication, watching a video, using the computing power of a remote computer, etc.) using a single communication protocol. This protocol, called TCP/IP (*Transmission Control Protocol / Internet Protocol*), defined in 1973 by Robert E. Kahn, DARPA engineer, and Vinton Cerf, researcher at Stanford, is based on open architecture: any local network can connect to Internet without needing to modify it. Moreover, communication on Internet is performed in "layers". Basically, we can distinguish two layers[77], the "media layer",

[77] This is a simplified presentation. TCP/IP protocol distinguishes four layers: network interface, Internet, transport and application (bottom-up order). The OSI (*Open Systems Interconnection*) standard, defined by the International Organization for Standardization, totals seven layers.

which is the one of infrastructures ensuring the routing of electronic signals, and the "host layer", which is the one where the services used by Internet users operate. Whenever an Internet user wants to use a service (e.g. send an e-mail), the transmitted data is first translated from the host layer to the media layer (the text of the message is converted into "bits", i. e. a succession of 0s and 1s), then conveyed in this form by electronic communications networks, then retranslated from the media layer to the host layer. The media layer is where electronic communications operators, including Internet service providers (ISPs)[78], operate, the host layer where those which the law calls "*providers of online public communication services*"[79], who implement the services used by Internet users (e-mail, website hosting, etc.), operate.

A notion that in itself conveys a vocation to commoditized processing. The notion of digital content derives from this architecture. The generic name for digital content refers to everything which passes through the "host layer" of Internet. The French Postal and Electronic Communications Regulatory Authority (ARCEP) occasionally uses the term "*content and application service provider*" (CSP) or "*content, service and application providers*"[80] to refer to host-level players, as opposed to ISPs who are media-level players.

This architecture also results in the commoditization of digital content. Not only does the TCP/IP protocol make it possible to provide all types of content delivery services on the host layer of Internet, but it implies that operators in the media layer process all these services in the same way because they are blind to the content being transmitted. Whenever data is translated from the host layer to the media layer, it is "encapsulated": in a very schematic way, the data which is the subject of the communication (the email or website page) is wrapped in technical data useful for communication, in particular the IP addresses of the sender and the recipient. Operators of the media layer read only this technical data and it is only at recipient level that the data is "decapsulated" and can be processed by host layer services.

Economic distinction between "pipes" and "content". Although a technical notion, digital content is also an economic one, since the architecture just described makes it possible to distinguish two types of economic players, Internet access providers and content providers. The distinction between "pipes" and "content", commonplace in the economic analysis of telecommunications and media sectors, is based on the inherent duality of Internet. However, it does not constitute a watertight partition: the convergence strategies between "pipes" and "content" regularly make the economic headlines and the services provided by the players in the host layer can compete with those in the media layer. These economic dynamics were also one of the factors behind the emergence of legal regimes based on the notion of digital content, such as the principle of net neutrality.

4.2. An intangible definition underlying purposive legal regimes

From a borderline notion to the definition of guarantees for Internet users. The first occurrence of the notion of digital content occurred in electronic communications law, but it was only a question of marking the limit of the latter and defining the area in which it did not have to intervene. Directive 2002/21/EC of the European Parliament and of the Council of 7

[78] Article L. 32 (15°) of the Postal and Electronic Communications Code defines the operator as "*any natural or legal person operating an electronic communications network open to the public or providing an electronic communications service to the public*". Among operators, ISPs are those which are in direct contact with end users and provide them with an electronic communications service. Other operators simply manage networks through which communications pass and are not in direct contact with end users.

[79] Article L. 32 (23°) of the CPCE (French Code of Civil Enforcement Procedures) as such qualifies "*any person providing content, services or applications relating to communication to the public online*", which is itself defined by Article 1 of Act No. 2004-575 of 21 June 2004 on confidence in the digital economy as "*any transmission, upon individual request, of digital data which is not of a private correspondence nature, by an electronic communication process enabling a reciprocal exchange of information between the sender and the recipient*".

[80] See in particular ARCEP, *Neutralité de l'internet et des réseaux. Propositions et recommandations* (Internet and network neutrality. Proposals and recommendations), September 2010.

March 2002 on a common regulatory framework for electronic communications networks and services, known as the "Framework Directive", states in recital 5 that it "*is necessary to separate the regulation of transmission from that of content*". Article 1 provides that the framework directive, like the other directives in the "telecoms package", does not impact "*content regulation*"; in particular, it was necessary to distinguish between the regulation of electronic communications and audiovisual sector ones.

Since then, the notion has been reiterated in other texts with positive content, tending to ensure new rights for Internet users. Electronic communications law and consumer law appear as its two fields of choice:

- Within electronic communications law, a principle of "Internet neutrality", which can be defined simply as equal processing of content by electronic communications operators, has gradually been affirmed, first in flexible legal instruments and then in Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015 laying down measures concerning open Internet access[81] and the French Act of 7 October 2016 for a Digital Republic. Adopted in similar terms by other major nations in terms of the number of Internet users, such as India or Brazil, net neutrality was, on the other hand, abandoned by the United States in December 2017, with the Federal Communications Commission repealing its previous regulations.

- In consumer law, the notion was introduced when the European Union's consumer law directives were recast in 2011[82]. The aim was simply to affirm the full applicability of this right to the consumption of non-tangible goods and services, without making any specific provisions for it. Specific rights were then gradually established, first in French law to set out the principle of platform loyalty (which defines itself by the classification or referencing of content put online by third parties)[83], and then at Union level in the draft directive currently under discussion concerning certain aspects of contracts for the supply of digital content[84].

A missing or incomplete definition. Many of these texts do not provide any definition of the terms "content" or "digital content" which they use. This is the case with the Directive of 7 March 2002 and the Regulation of 25 November 2015 on electronic communications, as well as Article L. 111-7 of the Consumer Code (the term content is used to define that of platform but which is not defined itself).

The Directive of 25 October 2011 and the draft directive on certain aspects of contracts for the provision of digital content make an effort to define them, but leave many questions yet unanswered[85]. Article 2.11 of the Directive of 25 October 2011 is brief and general ("*digital content*" means "data produced and provided in digital form"), referring to the broad and undefined notion of "data" itself and suggesting that everything which is digital is digital content within the meaning of this text. This generality contrasts with the indications given in recital 19, which states that "digital content means data which is produced and provided in digital form, such as computer programmes, applications, games, music, videos or texts, whether access

[81] Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015 laying down measures concerning open Internet access and amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services and Regulation (EU) No 531/2012 on roaming on public mobile communications networks within the Union.
[82] Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council.
[83] Article L. 111-7 of the Consumer Code, in its version resulting from the law of 7 October 2016 for a Digital Republic.
[84] 2015/0287 (COD).
[85] V.-L. Benabou, Entrée par effraction d'une notion juridique nouvelle et polymorphe : le contenu numérique, *(The forceful entrance of a new, multifaceted legal notion: digital content.) Dalloz IP/IT*, January 2017, No. 1, p. 7-14.

to such data takes place by means of downloading or streaming, from a physical medium or by any other means". According to these lists, the notion of digital content is still vague, but it is essentially focused on cultural content. Primarily, it would therefore not be aimed at mere raw elements of information in relation to other subject matter, but subject matter in itself, which gives rise to a use as such. The deviation from the definition by the notion of data can as such appear as a false lead.

Confusion between content and services. The draft directive on certain aspects of contracts for the provision of digital content, in the Commission's original version, introduced an additional difficulty by including in the definition of digital content the service giving access to it or enabling content provided by other users to be shared. In a rather incomprehensible way, digital content was about both the subject matter and the service which is used to create, preserve and/or share it.

This assimilation, which was strongly criticized[86], was abandoned by the Council and the European Parliament, whose following versions[87] distinguish between:

- digital content, the definition of which is identical to that given by the Directive of 25 October 2011, with the same examples;
- digital services, which in the Council text include any "*service allowing the sharing of data in digital form provided for download or created by the consumer and other users of this service or allowing any other interaction with such data*"; this includes, in particular, according to the recital, of "*software on demand, such as word processing, audio and video file processing, games and any other software offered in the cloud, sharing and other forms of file hosting*".

The difficulty arising from the indeterminacy of the definition given by the Directive of 25 October 2011, which arrived 'through the back door', in the context of a text dealing essentially with consumer rights, persists, however, since this definition is reiterated without further clarification. In addition, the examples relating to the definition of digital services show that the legislator is not finished with questionable assimilations since software - intellectual creation determining functionalities (even delivered on demand or in the cloud) - is something other than the service which delivers it.

The confusion is exacerbated by the concomitant adoption of Regulation (EU) 2017/1128 of the European Parliament and of the Council of 14 June 2017 on cross-border portability of online content services in the internal market, which adopts a narrower definition of content. According to its Article 2.5, "online content services" are audiovisual media[88] services or services "whose essential characteristic is to provide access to protected works and other protected subject matter or transmissions made by broadcasting organizations". Only content related to pre-existing legal categories of audiovisual media services or literary and artistic property is therefore concerned here.

Purposive legal regimes which accept the vagueness of definitions. However, the imprecision of the definitions is understandable in view of the purpose of the texts in question. A vague definition makes it possible to embrace broadly and thus better serve their purposes, even if it is at the cost of a certain unpredictability. In the face of the rapid evolution of digital

[86] N. Sauphanor-Brouillaud, J. Sénéchal, N. Anciaux, M. Behar-Touchais, V.-L. Benabou, G. Brunaux, N. Martial-Braz, P. Pucheral, J. Rochfeld, C. Zolynski, Dossier Contenus Numériques, (Digital Content Dossier) *Revue Contrats Concurrence Consommation*, 2017.

[87] The Council text was adopted as an annex to the general approach in June 2017. The European Parliament's text is the result of the joint report of the Internal Market and Consumer Protection (IMCO) and Legal Affairs (JURI) Committees, adopted in November 2017. The Directive is currently being discussed in a "trialogue" between the Commission, the European Parliament and the Council, with a view to reaching a joint text which can be definitively adopted by the latter two institutions.

[88] Whose definition is specified in Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 referred to as the "Audiovisual Media Services Directive".

technologies, it also promotes adaptation to uses which did not exist or were marginal when these instruments entered into effect.

In electronic communications law, the principle of net neutrality was established to maintain the open nature of the Internet architecture. It is not intangible, as different processes allow media layer operators to differentiate the processing of content and several economic reasons may encourage them to do so (competition between content providers and operators[89], the latter's desire to free up new resources to finance their investments in very high-speed broadband). As the European legislator wished to maintain equal processing of content, the regulation of 25 November 2015 [90]requires Internet service providers to process "all traffic equally and without discrimination, restriction or interference, whatever the sender and recipient, the content consulted or broadcast, the applications or services used or provided or the terminal equipment used" (Article 3.3). The absence of a definition of content and its connection to "applications" and "services", which are not defined themselves, makes it possible to apply the principle of equal processing to everything that circulates on the host layer of Internet.

In consumer law, the challenge is to fully guarantee consumer rights for new uses which do not clearly fall within the traditional *summa divisio* between the sale of goods and the provision of a service. One could have imagined that the new digital-related consumption patterns would be divided between these two categories, which, according to the definitions given by the same Directive of 25 October 2011, seemed to exhaust the scope of what can be consumed[91]. Any digital content can undoubtedly be associated with a service which provides access to it. However, the European legislator, followed by the national legislator, chose a different path. Digital content is as such characterized, in this perspective, in a vague but inclusive way, like everything which is intangible and can nevertheless be consumed.

4.3. Sensitive linkage between regulating content and protecting literary and artistic property

Notion overlapping. Texts dealing with digital content include works and other subject matter protected by literary and artistic property rights, such as databases. Many of the most popular services in the digital economy are popular because they provide access to works, whether it is Internet access services, video sharing platforms, *streaming* sites or news media. Yet, all the legal regimes described above have in common that they apply to all digital content regardless of whether it qualifies as a work. For example, Internet neutrality applies to all content, whether or not it is protected by literary and artistic property law.

This situation does not appear to be problematic at first glance. Since the purposes of these legislations are other than those of intellectual property law, it is logical that their subject matter should not be defined in the same way. If we retain the independence of legislation as a paradigm, the fact that the same subject matter is qualified as a work by one of them and as digital content by another does not call for any further questioning. Notwithstanding, the paradigm of legislative independence has its limits. The emergence of legal regimes for digital content has implications for intellectual property law, because their purposes interfere with it.

[89] This can be explained by the vertical integration between operators and content providers or the development by the latter of new services which compete with those of operators (for example IP telephony or instant messaging applications, which are alternatives to telephone communication and SMS messages).
[90] Regulation (EU) 2015/2120 laying down measures concerning open Internet access.
[91]According to Article 2.6, the service contract is defined as "*any contract other than a contract of sale under which the trader provides or undertakes to provide a service to the consumer and the consumer pays or undertakes to pay the price for this*".

Issues raised by commoditization. The legal regimes for digital content, in that they tend to process all such content indiscriminately, can create difficulties for intellectual property law. For example, the dissemination of digital content, whenever it is a work, constitutes an act of communication to the public and must in principle be authorized by the author or the rights holders pursuant to Articles L. 122-1 and L. 122-2 of the Intellectual Property Code, failing which penalties for counterfeiting are incurred.

Exception to the principle of net neutrality in favour of the fight against illegal content, including infringing content. A maximalist interpretation of net neutrality, involving equal processing of all content by Internet service providers, could have prevented them from contributing to the protection of intellectual property rights. But the Regulation of 25 November 2015 laying down measures on open Internet access was careful to provide, amongst the exceptions to the prohibition on blocking specific content, for the actions necessary to "*comply with Union legislative acts or national legislation which is in conformity with Union law (...) or with measures, in conformity with Union law, giving effect to such Union legislative acts or national legislation, including decisions of a court or public authority vested with the necessary powers*" (Article 3.3.a). As specified in recital 13 of the Regulation, this exception is to be interpreted strictly and compliance with Union law implies the proportionality of the measure. Notwithstanding, since the possibility of issuing such injunctions to intermediaries is expressly provided for by acts of Union law[92] and has already been accepted in several judgements of the Court of Justice of the European Union[93], the possibility for rights holders to take advantage of the exception provided for by the Regulation to net neutrality does not seem doubtful.

The possibility of requiring Internet service providers to take measures to block the dissemination of infringing content, and in so doing, to differentiate its processing, is as such preserved. In French law, Article L. 336-2 of the Intellectual Property Code allows the High Court to order them, without it being necessary to establish their liability, "*any measures likely to prevent or put an end to such an infringement of a copyright or a related right* (...)"[94]. These provisions also transpose those of Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (Article 9.1.a).

Regulation on the geoblocking and territoriality of literary and artistic property rights. The second illustration of the risk induced by the commoditized processing of content is provided by Regulation 2018/302 of the European Parliament and of the Council of 28 February 2018 on countering unjustified geographical blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment in the internal market, known as the "geoblocking regulation". Whilst this text does not use the term "digital content", it governs all "electronically provided services", which include services providing access to digital content[95].

By prohibiting any differentiation according to the nationality, place of residence or establishment of the customer for access to electronically supplied services (Article 4), the "geoblocking regulation" could have called into question the principle of territoriality in the

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[92] Article 8.3 of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society and Article 11 of Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights.

[93] CJEU, Grand Chamber, 12 July 2011, *L'Oréal SA and others v/ eBay International AG and others*, C-324/09; CJEU, 24 November 2011, *Scarlet Extended SA v/ SABAM*, C-70/10.

[94] See for a recent implementation against Internet service providers and search engines for access to several sites such as Papystreaming, Sokrostream and Zone-Téléchargement, Paris High Court, 15 December 2017, No. 17/3471.

[95] According to Article 2.1 of this Regulation, "*electronically supplied services*" are "*services provided on Internet or on an electronic network whose nature makes the provision largely automated, with minimal human intervention, and impossible to provide in the absence of information technology*".

distribution of works. Acknowledged by international law[96] and the jurisprudence of the CJEU[97], the principle of territoriality implies that the authorization to use a work must be given by the rights holders separately for each national territory, within the framework of the legislation of each State, which does not exclude the conclusion of multi-territorial licences if the rights holders consent.

The application of the geoblocking regulation to services providing access to works and other subject matter protected by literary and artistic property was claimed by certain stakeholders, in particular consumer associations, in view of the quantitative importance of works in "consumed" digital content. The risk of such an application, allowing consumers unrestricted access to works distributed in other countries, was to weaken the mechanisms of exclusivity of territorial distribution on which the current financing of certain works is based, particularly in the cinematographic sector[98]. The text adopted by the European Parliament and the Council finally excludes protected works and other subject matter from its scope[99], but Article 9 of the Regulation provides that this exclusion will be subject to review within two years, i.e. as of 2020. The regime applicable to works covered by an exception to the digital content regime therefore appears precarious.

An ambiguity to be removed in the Digital Content Directive. Finally, in the version adopted by the Commission, the draft directive on certain aspects of contracts for the supply of digital content provided in Article 8 that "*at the time of its supply to the consumer, digital content shall be free of all third party rights, including those based on intellectual property, in order to be able to be used in accordance with the contract*". The most natural interpretation of this wording was that it placed the responsibility for the absence of infringement of intellectual property rights on the digital content provider, who had to ensure that the content was "rights-free", i.e. that it had been subject to the necessary authorizations to be exploited and used. This interpretation was supported by the explanatory memorandum of the proposal, which characterizes Article 8 as an "additional compliance requirement".

However, concerns were expressed, particularly during the hearings undertaken by the mission, on the basis of another possible interpretation of this wording according to which, in order to guarantee consumers the peaceful enjoyment of digital content, the Directive would have made it unenforceable for them to infringe any intellectual property rights with which they might be affected. The consumer protection objective induced by the approach in terms of digital content would have, as such, weakened copyright protection. To remove any ambiguity, the Council's general approach adopted in June 2017 retains another wording of Article 8: in this version, it provides that "*digital content or service shall not infringe any rights of third parties, in particular rights based on intellectual property*", and explicitly characterizes the infringement of these rights as a lack of conformity, giving rise to the right to compensation provided for in the following Articles of the Directive. The version adopted by the European Parliament in November 2017 having maintained the Commission's wording for this article, the outcome is not yet certain, as the text is currently being discussed in a "trialogue".

[96] Since the Berne Convention for the Protection of Literary and Artistic Works of 9 September 1886.
[97] Since the *Coditel* I and II judgements (18 March 1980, C-62/79 and 6 October 1982, C-262/81).
[98] CSPLA, P. Sirinelli, A. Bensamoun et C. Pourreau, *Report of the mission on the revision of Directive 2001/29/EC on the harmonization of certain aspects of copyright and related rights in the information society*, October 2014, p. 48 to 53; Council of Europe, European Audiovisual Observatory, F. J. Cabrera Blazquez, *La territorialité et son impact sur le financement des œuvres audiovisuelles* (Territoriality and its impact on the financing of audiovisual works), IRIS Plus 2015-2, 2015.
[99] On the one hand, Article 1.5 provides that the Regulation "*will not affect the rules applicable in the field of copyright and related rights"*. On the other hand, Article 4 makes an exception for "*services whose main characteristic is to provide access to or use of copyrighted works and other protected subject matter, including the sale in intangible form of copyrighted works or protected subject matter*".

The notion of digital content, which has its origin in the technical architecture of Internet, implies a commoditization, which justifies, amongst other things, the principle of net neutrality, which decrees to prohibit the discrimination of content transiting through the host layer.

The inclusion of this notion, without it being defined, in many recent texts with different purposes, adds to its indeterminacy. But the examples provided in some provisions show that it is likely to cover subject matter otherwise protected by literary and artistic property.

Although the overlap of the notion of digital content with this subject matter is not in itself a difficulty, it is likely to disrupt the applicable regime or requires an exception to be made in order to take into account their specificity within digital content in general.

This approach is indirectly followed in the regulation of 25 November 2015 allowing for a derogation from the principle of net neutrality to block infringing content in accordance with the law. It is also at work in the geoblocking regulation, which authorized, but for a probationary period of two years, a derogation from the prohibition of geoblocking for works and subject matter protected by literary and artistic property.

However, the question of the structuring of texts relating to digital content and the rules of literary and artistic property remains a delicate one, as evidenced by the initial ambiguities of the draft directive on certain aspects of contracts for the supply of digital content. It is important that the final text clearly establishes the infringement of intellectual property rights as a failure to comply.

5. Literary and artistic property law in relation to the data production and movement regulation

Data as "representations". Many texts of national or European origin declare a desire to create public policies in the field of "data". A schematic approach to "data" seems to shed light on the policy in this area, which is based on the identification of various allegories[100]. The first of them refers to the well-known metaphor of data as "*new oil*", which would be a raw material to be valued. This image makes it possible to explain the reactions of some players who intend to protect their data sources by sitting on this "gold heap" which they are not (yet) able to transform for fear of being "uberized" by a third party into the capacity to do so. Data can still be described as an *infrastructure* which aims to think about the movement of this non-rival subject matter, whose plural reuse makes it possible to maximize its economic and social value, an analysis which has in particular founded the deployment of open data policies with these new infrastructures being provisioned by the State. Last but not least, data should also be analysed in its *environment*, which encourages reflection on the relationships which players have with these new infomediaries who constitute and control vast data silos. The Act of 7 October 2016 for a Digital Republic, because it intended to deal with a multitude of subjects related to data movement in a comprehensive approach, appears to be emblematic of the public authorities' desire to "*seize the data ecosystem by law*"[101].

In view of the overlap between data and protected works and subject matter highlighted above, legal regimes based on the notion of data were intended to interfere with literary and artistic property law, giving rise to potential conflicts of legislation to be settled through texts or through jurisprudence. As regards public data, different solutions have been adopted based on whether

[100] V. S. Chignard and L.-D. Benyayer, *Datanomics, Les nouveaux business models des données* (Datanomics, new business models for data), FYP, 2016.
[101] L. Cluzel-Métayer, "La loi pour une République numérique : l'écosystème de la donnée saisi par le droit." (The Act for a Digital Republic: the data ecosystem seized by law), *ADJA* 2017 p. 340.

the intellectual property law is that of the public authorities themselves or that of third parties (3.1.). As regards personal data, the main linkage issue, even if it is not the only one, is that of the data processing required for anti-counterfeiting measures (3.2.). Finally, it is important to reflect on new considerations regarding the reservation or movement of data in general (3.3.)

3.1. Public data: a regime of openness which preserves third-party intellectual property rights yet takes precedence over those of the public entity

3*.1.1. Key milestones of opening public data*

Three key milestones[102] can be highlighted in establishing a right of access to public data: the creation of the right of access to administrative documents (a); the creation of the right of re-use of public information (b); the development of an active policy of data openness, with an increase in free access (c). In each of these milestones, France has been part of an international movement, within which it has nevertheless sought to occupy the first places.

c) *Creation of the right to access administrative documents*

The CADA Act (Commission on the access to administrative documents). The Act of 17 July 1978 on various measures to improve relations between the administration and the public and various administrative, social and fiscal provisions[103] acknowledged, in its terms, "*freedom of access to administrative documents*", which is part of a broader right to information. Any person has the right to request communication from the State, local authorities, public institutions and any person entrusted with a public service mission of any non-nominative administrative document. Exceptions to this right are defined restrictively by law, and relate in particular to the respect of various secrets (secrecy of government deliberations, national defence, private life or in commercial and industrial matters) or to public interests such as the investigation of offences or the conduct of court proceedings. An independent administrative authority, the Commission d'accès aux documents administratifs (CADA - Commission on the access to administrative documents), is responsible for ensuring that freedom of access is respected and issues an opinion prior to any contentious appeal in the event of a refusal to disclose by an administration.

The law of 17 July 1978[104] is part of a movement to strengthen citizens' rights with regard to the administration, which is reflected, at the same time, in the acknowledgement of the right to the protection of personal information and an obligation to provide reasons for administrative decisions[105]. There is no room for economic concerns. Article 10 of the Act of 17 July 1978, in its initial version, excludes any right to reproduce, distribute or use the documents communicated for commercial purposes.

b) *Creation of the right to reuse public information*

[102] M. Moralès, La réutilisation des données publiques : le cas particulier de la culture (The reuse of public data: the specific case of culture), *RFDA* 2018, p. 39.
[103] Act No. 78-753 of 17 July 1978.
[104] Through this law, France was moving closer to the most advanced democracies in this field, such as Sweden, which had acknowledged this right since 1776, the United States, which had adopted the *Freedom of Information Act* (FOIA) in 1966, and Spain, which had included the principle in its 1978 constitution.
[105] Respectively by Act No. 78-17 of 6 January 1978 on information technology, files and privacy and Act No. 79-587 of 11 July 1979 on the motivation of administrative acts and the improvement of relations between the administration and the public.

PSI Directive. The directive of 17 November 2003 on the re-use of public sector information[106], known as the "PSI" Directive, which was the driving force behind the second milestone of the opening of public data, is based on economic concerns. The recitals of the Directive note that the public sector produces and disseminates a large amount of information and that this information "*constitutes an important raw material for digital content products and services*". The Directive is based on the need to ensure the proper functioning of the internal market by approximating national legislation[107].

Indiscriminate openness to commercial or non-commercial purposes. Paradoxically, this Directive does not create any obligation for States to authorize access to or re-use of administrative documents[108]. It only provides that where reuse is permitted, it must be for commercial and non-commercial purposes. The possibility of collecting royalties in return for the provision of data is regulated, with total revenues not exceeding the "*cost of collection, production, reproduction and dissemination, while allowing a reasonable return on investment*"[109].

Transposition beyond the obligations of the Directive. In France, the PSI Directive is transposed by an ordinance of 6 June 2005[110], which inserts a new chapter on the reuse of public information into the law of 17 July 1978. The right of re-use resulting from the Directive of 17 November 2003 is therefore combined in France with the right of access to administrative documents recognized since 1978: the information contained in any administrative document communicable under Chapter I is, in principle, reusable "by any person who so wishes for purposes other than those of the public service mission for the purposes of which the documents were drawn up or are held"[111]. By this combination, **French law thus guarantees effective freedom of reuse much greater than that imposed by the PSI Directive. The main contribution of transposition into French law is to have put an end to the prohibition on the re-use of administrative documents for commercial purposes.**

d) Development of an active data-opening policy, accompanied by growth in free access

Open data movement. In the early years of 2010, it was as part of an international movement that the opening up of public data in France gained new momentum. The initiative comes from the Anglo-Saxon world, with the United States and the United Kingdom setting up government platforms for sharing public data at the same time, in a so-called open data approach. Nevertheless, France very quickly sought to join this dynamic, not without success in terms of international recognition[112].

The objectives of this movement to open up public data are both citizen (greater transparency of public action guarantees better democratic control) and economic (administrative data can support many economic activities and should be disseminated as widely as possible). We can therefore find the foundations of the two milestones described above, but in a new context marked by the considerable growth of technologies and the digital economy.

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[106] Directive 2003/98/EC of the European Parliament and Commission.
[107] It is taken pursuant to Article 95 of the Treaty establishing the European Community (now Article 114 of the Treaty on the Functioning of the European Union).
[108] Even today, European Union law still provides such a right only in respect of the acts of the Union institutions themselves; this right is enshrined in Article 42 of the Charter of Fundamental Rights.
[109] Article 6.
[110] Ordinance No. 2005-650 of 6 June 2005 on Freedom of access to administrative documents and the reuse of public information. All the provisions in this area now constitute Book III of the Code for Relations between the Public and the Administration (CRPA).
[111] Article 10 of the law of 17 July 1978 as amended; now Article L. 321-1 of the CRPA.
[112] Marked in particular by several international rankings in which France ranks high (the fourth according to the Open Data Index established by the Open Knowledge Foundation, behind Taiwan, Australia and Great Britain) and by the French presidency of the Open Government Partnership, an international organization dedicated to promoting the transparency of public data, during the year 2016-2017.

Open data at the French Ministry of Culture. In April 2013, the French Ministry of Culture adopted an "*open data roadmap*", containing ten actions for a digital strategy for the dissemination and reuse of digital public data in the cultural sector. This data is put online on a dedicated platform, data.culturecommunication.gouv.fr[113]. A Ministry report on the opening of public data[114] identifies three types of data concerned by the opening: statistical and economic data of cultural institutions (attendance, revenues, subsidies, etc.); cultural metadata, i.e. bibliographic records and more broadly data associated with works (location; description; description; author; associated works; price; owner); image files and digital copies of works entered the public domain. It is perhaps the latter type of data which presents the most obvious cultural policy issues, since the opening of public data here gives access to the work itself, at least to its digital copy. Works protected by copyright or a related right may not be reused, but works entered into the public domain fall fully within the scope of the opening of public data, without, moreover, taking full account of moral rights. Beyond the "*open data*", it is a policy of "*open content*", of opening up cultural content, which can be implemented.

Dissemination obligation. Active access. As part of this last milestone, two new principles were added to the legislative framework for the opening of public data. First, the **Act of 7 October 2016 for a Digital Republic[115] created an obligation for administrations to disseminate** a certain number of documents, in particular those included in the "*repository*" of the main documents they must keep up to date, databases and "*data, updated on a regular basis, the publication of which is of economic, social, health or environmental interest*"[116]. As such, the Act for a Digital Republic marks the transition from "*passive access*" (administrations should only communicate documents to those who request them) to "*active access*" (administrations are obliged to put documents online on their own initiative)[117].

Free reuse. Secondly, a revision of the PSI Directive[118] has restricted the possibilities of receiving royalties. Whilst the initial text made it possible to include, in addition to covering costs, a "*reasonable return on investment*", and in so doing, remuneration for the intellectual property rights of the public person, Article 6.1 of the amended Directive now limits royalties to "*marginal costs of reproduction, making available and distributing*". Following two successive transposition acts[119], Article L. 324-1 of the Code of Relations between the Public and the Administration (CRPA) goes even further by explicitly establishing **a principle of free reuse**, the possibility of receiving royalties within the limits set by the Directive being reserved by exception to administrations "*required to cover by their own revenue a substantial part of the costs linked to the performance of their public service missions*".

Decree No. 2016-1036 of 28 July 2016 states that only organizations "*whose main activity consists in collecting, producing, making available or disseminating public information, where less than 75% of the costs related to this main activity are covered by tax revenues,*

[113] Among the most popular data sets are the list of buildings protected as historical monuments, the attendance of museums in France and the repository of addresses of public libraries.
[114] C. Domange, *Ouverture et partage des données publiques culturelles. Pour une (r)évolution numérique dans le secteur culturel* (The opening and sharing of cultural public data. For digital (r)evolution in the cultural sector)), December 2013.
[115] Act No. 2016-1321 of 7 October 2016.
[116] See Articles L. 312-1-1 and L. 322-6 of the CRPA.
[117] For the distinction between passive and active access, see M. Van Eechoud, Friends or Foes? Creative Commons, Freedom of Information Law and the European Union Framework for Reuse of Public Sector Information, in L. Guibault and C. Angelopoulos (dir.), *Open Content Licensing: From Theory to Practice*, Amsterdam, Amsterdam University Press, 2011, p. 169-202; cited by M. Dulong de Rosnay, "Données ouvertes (open data)", in M. Cornu, F. Orsi and J. Rochfeld (dir.), *Dictionnaire des biens communs* (Dictionary of common goords), Paris, Quadrige, PUF, 2017.
[118] Directive 2013/37/EU of the European Parliament and of the Council of 26 June 2013 amending Directive 2003/98/EC on the re-use of public sector information.
[119] Act No. 2015-1779 of 28 December 2015 on free and reusable public sector information and the Act of 7 October 2016 for a Digital Republic.

endowments or subsidies" are authorized to collect reuse royalties under Article L. 321-1 (CRPA, Art. R. 324-4-1). In addition, Decree No. 2016-1617 of 29 November 2016 (CRPA, Art. D. 324-5-1) states that only certain State administrations may avail themselves of this first derogatory regime and only for certain information. Cultural information held by the State and its public administrative institutions is concerned. The exception to the principle of free access concerns the reuse of public cultural data "*when it concerns information resulting from the digitalization of the holdings and collections of university libraries, museums and archives, and, where applicable,* associated information when the latter are marketed jointly" (CRPA, Art. L. 324-2).

Synthesis. In summary, the evolution of French public policies, driven by European standards but even beyond their requirements, has resulted in a shift from restricted availability of public data to strict access conditions such as the request for personal communication for non-commercial purposes, to a strategy of active dissemination of such data combined with the widest and most unconditional openness to use by citizens. As the fantasy of the gold heap having lived ouht its days, the prospect of monetizing this data when it is used for commercial purposes by third parties has gradually been abandoned in favour of a culture of free reuse. Notwithstanding, the case of cultural data is still an exception, since it is possible to derogate, in certain circumstances, from this principle of free access.

3.1.2. Opening which preserves third-party intellectual property rights but not those of public entities themselves.

The texts on access to administrative documents and the reuse of public data have always provided for an exception for intellectual property rights. As of its initial version, the Act of 17 July 1978 provided that "*administrative documents are communicated subject to literary and artistic property rights"*. The Ordinance of 6 June 2005 added that information contained in documents "*on which third parties hold intellectual property rights*" does not constitute public information which can be freely reused[120]. The same exclusion is provided for in the PSI Directive[121]. These texts lead to very different consequences depending on whether the owner of the intellectual property right is the public person (a) itself or a third party (b).

c) Opening public data takes precedence over the intellectual property of the administration in question

Impossibility for the public person to exercise their right to prohibit. The question of whether the administration could use its own intellectual property rights to prevent the right of communication or reuse has only recently been decided[122]. A dispute had arisen between Notrefamille.com, publisher of a genealogy site, and the Vienne department, due to the latter's refusal to authorize the reuse of its digitalized database based on civil registry records. The Bordeaux Administrative Court of Appeal had ruled that a cultural service producing a database could prohibit the reuse of all or a substantial part of the content of a database on the basis of the *sui generis* right of the database producer, notwithstanding the right of reuse guaranteed by the Act of 17 July 1978[123]. The Council of State overturned this judgement by ruling that the provisions of this Act prohibited public persons from relying on their own *sui generis* right to oppose the extraction or reuse of the content of databases, when that content has the nature of public information; the public person itself is not a third party "*within the*

[120] See currently, in identical terms, Articles L. 311-4 and L. 321-2 ofthe CRPA.
[121] Article 1.2.b) of the Directive amended.
[122] For a full account of this controversy, see C. Bernault, "Ouverture des données publiques et propriété intellectuelle" (Opening public data and intellectual property), *Dalloz IP/IT* 2018 p. 103.
[123] Bordeaux ACA, 26 February 2015, *Notrefamille.com*, C+, No. 13BX00856.

meaning and for the application of Article 10(c) of the Act of 17 July 1978"[124]. The Act of 7 October 2016 for a Digital Republic, which was not applicable to the dispute, confirmed this interpretation of the texts for the future[125] and the proposal to revise the Directive on public sector information should enshrine it at European Union level[126]. The right to reuse public data therefore limits the possibility for administrations to exercise their *sui generis* right over the databases they produce.

Possibility of receiving royalties under European law. On the financial level, French law initially favoured the idea that the royalties received for the communication of public data should include the remuneration of the public entity's intellectual property rights. In the context of a dispute between INSEE and direct mail companies concerning royalties for the reuse of the SIRENE business directory, the Council of State's Disputes Assembly has ruled that "*no legislative or regulatory provision or principle prevents a remuneration received on the occasion of the communication by the State to third parties of public data with a view to their commercialization from being accompanied (...) by the collection of private rights fixed by contract and relating to intellectual property, provided that such communication can be regarded, within the meaning of the laws on literary and artistic property, as intellectual work*"[127]. Whilst the *sui generis* right of the database producer had not yet entered into effect, the Council of State acknowledged the existence of a State copyright on the SIRENE database, on the basis of the collective work. He deduced from this that the royalties could cover, in addition to the cost of the service provided, the remuneration of these private rights.

On the occasion of the transposition of the PSI Directive of 17 November 2003, which made it possible to include in the pricing a "*reasonable return on investment*", the Ordinance of 6 June 2005 codified this jurisprudence by providing that the administration could, in addition to the costs of making available, collecting and producing information, "*include in the royalty base a reasonable remuneration for its investments including, where appropriate, a share in respect of intellectual property rights*"[128].

Prohibition of remunerating intellectual property rights under French law. In order to proactively promote the opening of public data, and on the basis of the conclusions of the "Trojette Report"[129], the Acts of 28 December 2015 and 7 October 2016 put an end to this possibility. **Only the costs of provision, collection and production may be covered, by way of exception to the no-payment principle and in the cases restrictively defined by law. Remuneration of intellectual property rights when public data is reused is, as such, now prohibited by law.** In doing so, the French legislator went beyond what was required by the transposition of the Directive of 26 June 2013 amending the PSI Directive, which allowed reasonable remuneration for investments in certain cases, in particular where the public body is required to generate a substantial proportion of its own revenue. In its public opinion on the draft Act on free access to and re-use of public sector information, the Council of State considered that the legislator could lay down provisions more favourable to the re-use of public information than the Directive, which only lays down minimum harmonization rules.

Cultural institutions chose to disseminate their content beyond what is required by the legal framework. The policy of opening cultural content requires prior digitalization, which may

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[124] CS, 8 February 2017, *Notrefamille.com*, CR, B, No. 389806.
[125] Article L. 321-3 of the CRPA, – see on this point T. Azzi, Open data and intellectual property, *D*. 2017, p. 583, spec. No. 32 & s.
[126]Draft directive of the European Parliament and of the Council on the re-use of public sector information (recast), 2018/0111 (COD), Article 1.5: "*The right for the maker of a database provided for in Article 7(1) of Directive 96/9/EC shall not be exercised by public sector bodies in order to prevent or restrict the re-use of documents pursuant to this Directive*".
[127] CS, Ass., 10 July 1996, *Direct Mail Promotion and others*, No. 168702.
[128] Article 15 of the Act of 17 July 1978 amended.
[129] M. A. Trojette, *Opening of public data. Are all exceptions to the principle of free access legitimate?* Report to the Prime Minister, July 2013

require significant investment. It is in view of these investments that the Act of 28 December 2015 has maintained the possibility of collecting royalties for the reuse of this content. The collection of these royalties, which under Article L. 324-2 of the CRPA may cover the costs of collecting, producing, disseminating and acquiring intellectual property rights, is a matter of law and does not have to be authorized by decree in the Council of State, unlike the ordinary law regime.

However, as a recent CSPLA report on free licences noted[130], it is significant that since the Act was passed, several cultural institutions have decided not to make use of this option and to broadcast works which have entered the public domain free of charge:

- In July 2017, the National Archives opted to apply non-payment for the reuse of all their public information, repealing a pricing decision of 10 December 2010. A partnership was concluded with the Wikimedia Foundation to allow the free distribution of over 500 remarkable digitalized documents[131].
- The Institut national d'histoire de l'art (INHA - National Institute for Art History) has licenced all the content of its digital library under an open licence.
- The city of Toulouse decided to apply non-payment for the reuse of data from all its cultural institutions (municipal archives, libraries and museums).
- The Rennes Métropole library has digitalized all its documents entered in the public domain and has made them available for free access under the Creative Commons "Public Domain Mark" licence.

At the international level, the Rijksmuseum in Amsterdam and the Paul Getty Museum were pioneers in opening their digital collections. The challenge of a policy of opening cultural content is to make it known to as many people as possible and to prevent copies of works visible on the Internet from being of poor quality or being monopolized by intermediaries who would capture their value.

Conflicting trends between free dissemination and promotion of content. In addition to the specific provision resulting from the Act of 7 July 2016, relating to the right to an image on national domains[132], broader considerations on the enhancement of the image of cultural institutions were conducted, with a view to increasing these establishments' own resources. A report by the General Inspectorates of Finance and Cultural Affairs[133] as such states that "*revenues on image rights could be further developed subject to legislative and regulatory changes*" and invites to assess broader developments, such as the acknowledgement by law that the image of properties in the public domain (in the sense of public domain) is an integral part of it; this is precisely what the Assembly of the Council of State's Disputes[134] rejected on

[130] CSPLA, J. Farchy and M. De La Taille, *Free licences in the cultural sector*, December 2017.

[131] For example, there are digitalized copies of Marie-Antoinette's death sentence issued by the Revolutionary Court, the marriage certificate of Joachim Murat and Marie Annonciade Bonaparte (Napoleon Bonaparte's sister) and even the "constitutional acts" of Marshal Pétain.

[132] Article L. 621-42 of the French Heritage Code. National areas or national domains are defined in Article L. 621-34 as "*real estate ensembles with an exceptional link with the history of the Nation and of which the State is, at least in part, the owner*". To date, they are acknowledged as Chambord National Domains, the Louvre and the Tuileries, the Pau Domain, Angers Castle, the Elysée Palace and the Rhin Palace, but this list may be supplemented by decree by the Council of State. This provision adopted a few months before the panorama exception by the Act of 7 October 2016 for a Digital Republic, although not having the same scope of application, testifies to the confrontation of two contradictory logics and sends divergent signals of encouragement to free dissemination and priority to promoting.

[133] IGF-IGAC (General Inspectorate of Finance-General Inspectorate of Cultural Affairs, *Evaluation of the policy for developing state cultural bodies' own resources*, March 2015.

[134] CS, Ass., 13 April 2018, *Public establishment of the Chambord National domain*, No. 397047. As explained by the public rapporteur Romain Victor, this would have introduced a difference of processing which is difficult to justify with private persons, the Court of Cassation having ruled that the owner of a thing does not have an exclusive right over its image, but can only oppose the use of that image by a third party when it causes it an abnormal disorder (Plen. Ass., *SCP Hôtel de Girancourt v/ SCIR Normandie and a.*, No. 02-10.450, Bull. Ass. plén. 2004 No. 10, *RTD*

13 April 2018 by aligning its jurisprudence with that of the Court of Cassation and by refusing to acknowledge that the image of the property constitutes the property of the person who owns the property. The same report also recommends that cultural institutions "*endeavour to limit free access to digital offerings which promote heritage*".

An unsuccessful reflection on the comparative benefits of free dissemination and promotion. It seems in fact that the doctrinal work which made it possible to favour openness over promotion in the field of public data was not sufficiently carried out in the case of digital cultural content. The Trojette Report had established in 2013 that the financial value of royalties for the use of public data was much lower than the economic and social value generated by their free availability. Until similar work is carried out to assess the benefits of opening up the digital content of cultural institutions, in terms of the dissemination of culture and the indirect revenues generated by promotion[135], and compare them with the revenues to be expected from paid digital broadcasting, the policy on digital cultural content will remain torn between contradictory impulses.

d) Third-party intellectual property rights impede public data communication and reuse

Position of the CADA (Commission on the access to administrative documents). A constant CADA doctrine considered that Article 9 of the Act of 17 July 1978, now codified in Article L. 311-4 of the CRPA, did not prevent communication but only a possible commercial reuse of public data when it was the subject of third-party intellectual property rights. As it states: "*This provision has neither the purpose or effect of prohibiting communication to the public of documents falling within the scope of the Act of 17 July 1978 or the Intellectual Property Code, in particular those which have the character of intellectual work. When the matter is referred to the Committee, it merely recalls the prohibition, laid down by this code, of the collective use which could be made of it, and in particular prohibiting the reproduction, dissemination or use of the documents communicated for commercial purposes.*"[136].

Preservation of the right of disclosure. In 2017, the Council of State adopted an opposite interpretation of the law, ruling that this article "*implies, before proceeding with the communication of educational materials which have not already been disclosed, within the meaning of Article L. 121-2 of the Intellectual Property Code, to obtain the consent of their author*"[137]. As can be seen from the conclusions of the public rapporteur Aurélie Bretonneau, this decision is justified in particular by the concern to respect the author's moral right, which includes the right to authorize or not disclosure. It also takes into account that, under the Act of 7 October 2016 for a Digital Republic, the same reservation of literary and artistic property rights applies to the obligation to disseminate on Internet[138]. Nonetheless, differences in interpretation existing with regard to the exercise of the right of disclosure are likely to introduce uncertainties as to the scope of the decision of the Council of State and the possibility for holders of intellectual property rights outside the administration to oppose certain practices for making the aforementioned available.

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civ. 2004 p. 528; *D*. 2004, 1545, note J.-M. Bruguière and E. Dreyer; *JCP* 2004 II 10085, note C. Caron; *Intell. Propr.* 2004, No. 2, p. 817, obs. V.-L. Benabou).

[135] The free dissemination of digital content can encourage users to discover it on-site during a paid visit; V. M. Cornu, Ouverture des données : les trompe-l'œil de la loi (Data opening: the window-dressing of the law), *Dalloz IP/ IT* 2016, p. 515.

[136] Cf. in particular CADA (Commission on the access to administrative documents), council, 11 July 2002, No. 20022799; 16 March 2006, *President of the Urban Community of Bordeaux*, No. 20061210; 27 November 2008, *Mayor of Mazières les Metz*, No. 20084340; 30 April 2009, *Prefect of the Côte d'Or*, No. 20091473; 13 April 2006, *Mayor of Aubervilliers*, No. 20061574; 11 May 2006, *President of the interdepartmental joint development and promotion association of the Vidourle and its tributaries*, No. 20062039.

[137] CS, 8 November 2017, *Association spirituelle de l'Eglise de scientologie Celebrity Centre*, CHR, A, No. 375704.

[138] Articles L. 311-4 and L. 312-1-1 of the CRPA.

Regarding public officials. The case wherein an official is likely to claim ownership of the right does not fit particularly well in this binary scheme between the intellectual property of the public person and the intellectual property of the third party: if the official is a third party to the administration, it is not easy to determine in which case they may avail of a copyright which has not been transferred to their administration.

The Act of 1st August 2006 on copyright and related rights in the information society[139] brought the situation of the public official closer to that of the private-law employee, by providing that the status of an agent of a public person does not in itself entail any derogation from the enjoyment of copyright[140]. This acknowledgement is, however, accompanied by a legal transfer of the right of use as soon as it is created "*to the extent strictly necessary for the fulfilment of a public service mission*"[141]. For the commercial use of a work, the public person only has a preferential right. Finally, these mechanisms of legal transfer and preferential right are not enforceable against officials whose disclosure of works is not subject to any prior control by a hierarchical authority, such as university professors and lecturer-researchers[142].

This state of law raises several questions about the implications of public officials' copyright for the opening of public data. A recommendation from the COEPIA (Advisory Board for State Pubication and Administrative Information), which is based on opinions from the CADA (Commission on the access to administrative documents) and a study by the APIE (State Intangible Heritage Agency), echoed this in 2010[143]. The COEPIA notes that much of the content produced within administrations, in particular databases, should be qualified as collective works[144] and that as the administration is the right holder, there is no obstacle to the reuse of public data. On the other hand, for content which does not fall within this category, such as photos, the COEPIA considers that "*the linkage of the provisions of the Intellectual Property Code with the Act[of 17 July 1978] is potentially a source of difficulties for the implementation of the right to reuse*". Likewise, Mohammed Adnène Trojette's Report on the openness of public data expressed "*a strong concern, given the risks which wide acceptance of public officials' copyright would pose to the legal qualification of public information*". Both the COEPIA and the Trojette report called for clarification in the context of the decree in the Council of State provided for by the Act of 1st August 2006 to lay down the procedures for applying the legal transfer and the preferential right. This decree never intervened.

As regards co-contracting parties. The protection of third parties' intellectual property rights also applies, in principle, to co-contractors of the administration, for example, to the work of a design firm or to a project submitted within the context of an architectural competition[145]. The FEVeM (French Federation of Media Monitoring Companies) however indicated to the mission that "*respect for third-party intellectual property rights (in this case FEVeM service providers) is far from ensured in practice when work is dually qualified as intellectual or a database and public data*", a flexible interpretation of the legal data by certain public bodies exposing them to difficulties, because "*even when the law does not require the opening of certain data, in*

[139] Act No. 2006-961 of 1st August 2006.
[140] Paragraph 3 of Article L. 111-1 of the Intellectual Property Code.
[141] Article L. 131-3-1 of the same Code.
[142] Last paragraph of Article L. 111-1.
[143] COEPIA (Advisory Board for State Pubication and Administrative Information) , "Recommandation relative à l'articulation du droit d'auteur des agents publics et du droit à réutilisation" (Recommendation on the linkage of public officials' copyright and the right to reuse), November 2010.
[144]According to Article L. 113-2 of the Intellectual Property Code, "*a work is referred to as collective when it is created on the initiative of a natural or legal person who edits it, publishes it and discloses it under their direction and name and in which the personal contribution of the various authors involved in its preparation is merged into the whole for which it is intended, without it being possible to grant each of them a separate right over the whole achieved*". According to Article L. 113-5, a collective work is, unless proven otherwise, the property of the natural and legal person under whose name it is disclosed.
[145] Cf. CADA, council, 30 April 2009, *Prefect of the Côte d'Or*, No. 20091473; opinion, 16 April 2009, *Director of the centre hospitalier de Béziers*, No. 20091401.

particular because of the existence of third-party intellectual property rights (for example, those of FEVeM service providers on their analyses or databases), public entity customers of service providers require an "open data entry" of service providers' deliverables (unless they contain content protected by the intellectual property rights of other third parties such as press publishers"). The interpretation given by the *Association spirituelle de l'Eglise de scientologie Celebrity Centre* decision of the Council of State mentioned above, is, in principle, likely to reduce this type of difficulty. Nevertheless, it appears that better information for public bodies on the extent of legal obligations to open up, as well as better coordination of open policies, would facilitate the award of public contracts for operators whilst ensuring them the legitimate protection of their intellectual property rights.

Today, public data law, stemming from three successive layers of legislation (Act of 17 July 1978 which created CADA, Ordinance of 6 June 2005 transposing the Directive on public sector information, Act of 7 October 2016 for a Digital Republic), is characterized by the principles of openness, freedom of reuse and free access.

Conciliating it with intellectual property law is highly-distinctive depending on whether the rights of third parties or of the public entity itself are at stake. Third-party intellectual property rights are one of the exceptions as regards the dissemination of the data in question and its reuse. However, public entities can no longer take advantage of their intellectual property rights to inhibit data opening.

The implications of public officials' copyright, reformed by the French Act of 1st August 2006, remain uncertain, in particular as a result of the failure of the regulatory authority to issue the implementing decree.

Likewise, in spite of the clarity of the legal given, the existence of diverging interpretations within public authorities as to the scope of reuse of subject matter considered under third-party intellectual property rights calls for a clarification of practices.

3.2. Personal data

3.2.1. Personal data regulation

Constitutional protection. The Personal Data Protection Act, stemming from the acts of a few pioneering States, including France, with the Act of 6 January 1978 on information technology, files and privacy, enshrined at European Union level by Directive 95/46 of 24 October 1995[146], has just been considerably strengthened with the entry into effect on 25 May 2018 of the General Data Protection Regulation (GDPR)[147]. It is guaranteed at the highest

[146] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

[147] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC. The French LIL (Loi Informatique et Libertés - Act on information technology, files and privacy) was amended by Act No. 2018-493 of 20 June 2018 on the protection of personal data in order to adapt it to the GDPR and to activate the margins of manoeuvre left to the Member States - see A. Debet, Libertés et protection des personnes (Freedoms and personal protection) *JCP G* 2018, doctr. 907; N. Martial-Braz, Quand la French Touch contribue à complexifier l'édifice du droit de l'Union européenne ! (When the French Touch plays a role in complicating the European Union's legal system), *JCP G* 2018, 786; M. Bourgeois and M. Moine, La nouvelle loi informatique et libertés. Une transposition du RGPD ? (The new French Data Protection Act. A transposition of the GDPR?), *JCP E* 2018, 1417 and *Dalloz IP.IT* 2018, p. 458, dossier on "L'adaptation de la loi informatique et libertés au RGPD" ("Adapting the French Data Protection Act to the GDPR") by J. Rochfeld, N.

level of the hierarchy of norms, both in domestic law (the Constitutional Council deducing it, like the right to privacy, from the freedom set out in Article 2 of the Declaration of the Rights of Man and of the Citizen)[148] and in European Union law (it is set out in Article 8 of the Charter of Fundamental Rights, which is specifically devoted to it).

Extended territorial application. Unlike the United States, which only provides data protection in certain sectors defined by law (health, banks, minors' data, etc.), European Union law defines its tangible scope in a transversal way. Personal data means "*any information relating to an identified or identifiable natural person*" (Article 4.1 of the Regulation); even if the identity of the data subject is not apparent, the data is personal if it can be re-identified[149]. The territorial scope extends not only to processing operations performed by controllers established in the territory of the Union, but also to those established outside that territory where the processing operations are related to the supply of goods or services to persons residing in the Union or to the observation of their conduct (Article 3). This form of "extraterritoriality" is intended to guarantee greater protection for European citizens: as the CJEU had already ruled on the basis of Directive 95/46 in its famous *Google Spain* judgment on the "right to forget"[150], "*the Union legislator intended to prevent a person from being excluded from the protection guaranteed by it and this protection from being circumvented, by providing for a particularly wide territorial scope*"[151].

Fundamental principles. Without claiming to be exhaustive, personal data law can be summarized here by its fundamental principles, which are in particular those recalled by Article 8 of the Charter of Fundamental Rights of the European Union: the broad definition of its scope; the obligation to determine the purposes of each processing operation; the requirement of the data subject's consent or another basis; the guarantee of the data subject's rights (information, access, rectification, opposition); the role of independent administrative authorities.

Purpose of processing. Article 8 of the Charter provides that data must be "*processed for specified purposes*", a principle taken up by the GDPR, which specifies that it must be "*collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes*" (Article 5.1.b). This is a cardinal principle of European legislation: although personal data may circulate, its use remains governed by the initial purposes of collection. Although its dissemination or use may be the subject of business contracts, personal data cannot therefore be assimilated to a commodity, the transfer of ownership of which renders its purchaser totally in control. Correlatively-speaking, the data collected must be proportionate to the purpose pursued (the so-called principle of minimization of data) and its storage period must not exceed what is necessary for that purpose[152].

Consent or legitimate basis. Article 8 of the Charter also provides that data must be processed "*on the basis of the data subject's consent or some other legitimate basis laid down by law*". The person's consent is thus acknowledged as the primary basis for the processing of their data. However, it is neither a sufficient condition for the lawfulness of the processing operation (principles such as the determination of purposes and the minimization of data must

Martial-Braz, K. Favro and C. Zolynski. An ordinance needs to reform domestic law again to bring these reforms into line with each other.

[148] Decision No. 2012-652 DC of 22 March 2012, *Identity Protection Act*, §8; Decision No. 2018-765 DC of 12 June 2018, *Data Protection Act*, § 47.

[149] This is the case, for example, with voice recording or mapping an individual's journeys.

[150] Although the processing performed by Google's search engine is technically implemented outside the Union, it considered that it fell within the territorial scope of Spanish law.

[151] On this point, see F. Jault-Seseke and C. Zolynski, Le règlement 2016/679 /UE relatif aux données personnelles. Aspects de droit international privé (Regulation 2016/679 /EU on personal data. Aspects of private international law), *D*. 2016, p. 1874.

[152] V. F. Gaullier, Le principe de finalité du traitement dans le RGPD : beaucoup d'ancien et peu de nouveau (The principle of the purpose of processing in the GDPR: a lot of old and a little new), *Electr. Comm. com.* 2018, study No. 10.

also be respected) nor a necessary condition: other grounds are possible, such as the existence of a legal obligation, the exercise of a public service mission or the legitimate interest of the data controller. Where consent is the basis of the processing operation, it must be "*any freely given, specific, informed and unambiguous indication of the data subject's agreement*" and take the form of a "*statement*" or "*clear affirmative action*" (Article 4.11); it cannot therefore be a mere absence of opposition[153].

Rights not available. The data subject will enjoy rights with regard to data which concerns him or her and which is processed, rights which the data subject may not alienate. First of all, the data subject must be informed of the processing operation and its purposes, a right which conditions the exercise of others (Article 13). The data subject has the right to access the data (Article 15) and to request its rectification or erasure (Articles 16 and 17), in particular if the data processed is inaccurate or no longer necessary for the purposes for which it was processed. The data subject may withdraw his or her consent at any time when the processing is based on it and exercise a right of objection when it is based on the legitimate interest of the controller[154]. The GDPR also created a right to portability[155] (Article 20), according to which data subjects have the right to receive personal data concerning him or her and to transmit them to another controller. This right must promote consumers' free choice for digital services, as the fear of losing all personal data collected by one of them could be a major obstacle.

Administrative regulation and co-regulation. Finally, compliance with legislation on personal data is guaranteed in each Member State by an independent authority (Article 8.3 of the Charter)[156]. Whilst there are IAAs in many areas, this is probably the only one in which the existence of such an authority is guaranteed by the primary law of the European Union. Whilst the Act of 6 January 1978 in its initial version placed the emphasis on *a priori* control of processing operations by the CNIL (French Data Protection Authority), involving declarations or requests for authorization, the GDPR introduces a so-called "*compliance*" logic, made up of the empowerment of the players who process the data, co-regulation and *a posteriori* control[157]. Controllers must document all their processing operations, in many cases appoint a Data Protection Officer and carry out impact assessments for the most massive and sensitive processing operations. They are exposed to severe penalties imposed by the independent authority for violations, up to 25 million euro or 4% of total worldwide annual turnover (Article 83).

3.2.2. Points of convergence with literary and artistic property

Attractiveness of personal data. Personal data is now the focus of much attention. On the part of operators, when, working to develop a new information paradigm, promoting data makes it possible to improve its production processes and renew customer relations in a logic

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[153] On this point, see A. Debet, Le consentement dans le RGPD : rôle et définition (Consent in the GDPR: role and definition), *Electr. Comm. com.* 2018, study 9.

[154]The controller shall no longer process the personal data , "*unless the controller demonstrates compelling legitimate grounds for the processing which override the interests, rights and freedoms of the data subject or for the establishment, exercise or defence of legal claims*" (Article 21).

[155] See *below* 3.3.2.

[156] V. K. Favro, La CNIL, une autorité à l'âge de la maturité (The CNIL (French Data Protection Authority), an authority which has reached the age of maturity), *Dalloz IP. IT* 2018, p. 464 and J. Deroulez, Les autorités de contrôle en droit des données personnelles (Supervisory authorities in personal data law), *Electr. Comm. com.* 2018, study 7.

[157] In this respect, I. Falque-Pierrotin, L'Europe des données ou l'individu au cœur d'un système de compliance (Data Europe or the individual at the heart of a compliance system), *in* Frison-Roche M.-A. (dir.), *Régulation, supervision, compliance*, Dalloz 2017, p. 29; G. Perronne and E. Daoud, Loi Sapin II, Loi Vigilance et RGPD, pour une approche décloisonnée de la compliance (Sapin II Act, Vigilance Act and GDPR, for an open-ended approach to compliance), *Dalloz IP.IT* 2017. 584; C. Zolynski, Droit des données personnelles et compliance (Personal data law and compliance), in *Compliance* : l'entreprise, le régulateur et le juge (Compliance: the company, the regulator and the judge), dir. N. Borga, and J.-C. Marin, J.-C. Roda, Dalloz, coll. Thèmes et commentaires (Topics and comments), 2018, p. 129.

of personalization[158]. Regulators also, because of the tensions which data collection and use create between the growth prospects associated with the new services built around this data, the risks of major infringements of the fundamental rights and freedoms of the data subjects, and the ongoing redefinition of the main market balances in many sectors[159]. On the part of individuals, who still oscillate between the desire to benefit from these new personalized products and services and that of preserving their digital sovereignty in a context of generalized surveillance and the development of practices to capture their attention.

The combination of a generalized world-scale "datafication" movement[160] and a particularly comprehensive approach to personal data adopted by the European legislator, inevitably fostered the convergence of literary and artistic property law with that of personal data. This fuelled the contention as regards online anti-counterfeiting measures and has become strategic in the race for controlling client relationship which focuses on the **individualization of users**.

- **Purposes to be reconciled for anti-counterfeiting**

Personal data and anti-counterfeiting. Personal data law and literary and artistic property law both have protective purposes[161], but they do not protect the same thing. This difference in the protected subject matter may require the reconciliation of the two legal corpuses, in particular as regards anti-counterfeiting measures. In a digital environment, the detection of acts of counterfeiting and the identification of their perpetrators require the processing of personal data. Without seeking to be exhaustive, three contentious episodes illustrate how, without preventing anti-counterfeiting, the protection of personal data can impose certain limits on it, with the national or European judge carrying out a classic exercise of reconciling two fundamental rights of equal normative value.

The first episode took place on the occasion of the transposition into French law of Directive 95/46[162]. Reserving in principle the processing of data relating to offences, convictions and security measures to public authorities and judicial officers, the Act of 6 August 2004 provided for an exception in favour of firms collecting and managing copyright and related rights and professional defence bodies. The Constitutional Council accepted this exception, considering that this measure tended to "*combat the new counterfeiting practices which are developing on Internet*" and that it "*[met] as such the general interest objective of safeguarding intellectual property and cultural creation*"[163]. It noted the presence of several guarantees, in particular the fact that these processing operations are subject to authorization by the CNIL (French Data

[158] Or "*consumer relationship management*".*V.* D. Boulier, *Sociologie du numérique* (Digital sociology), Armand Colin, 2016, p. 183. Adde, F. Rochelandet, *Economie des données personnelles et de la vie privée* (The personal data and privacy economy), La découverte, coll. Repères, 2016.

[159] Conseil d'Etat, *Etude annuelle (Council of State annual study) 2017. Puissance publique et plateformes numériques : accompagner l'« ubérisation »* (Public power and digital platforms: accompanying "uberization"), September 2017.

[160] Others refer to the "*era of ambient data*" in which "*we think and act in a "digital copy" of the world*": H. Verdier, Introduction, *in Les Big data à découvert* (Big data uncovered), dir. M. Bouzheghour and R. Mosseri, CNRS ed., 2017, p. 45.

[161] Thus, Article 17.2 of the Charter of Fundamental Rights of the European Union states that "*intellectual property is protected*" and the French DADVSI Directive (Droit d'auteur et droits voisins dans la société de l'information (copyright and related rights in the information society)) of 22 May 2001 states as its ambition "*a high level of intellectual property protection*" (recital 4).

[162] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data was the first piece of Union legislation in this field. It was replaced by the GDPR which took effect on 25 May 2018.

[163] Decision No. 2004-499 DC of 29 July 2004, *Act on the protection of natural persons with regard to the processing of personal data and amending Act No. 78-17 of 6 January 1978 on information technology, files and privacy*, §13; V.-L. Benabou, Droit d'auteur versus vie privée (et vice versa) (Copyright versus privacy (and vice versa)), *Intell. Propr.* 2005, No. 16, p. 269-276.

Protection Authority) and that the personal identification of data subjects could only take place within the context of legal proceedings.

Protection of personal data and prohibition of general filtering. The *Scarlet v/ SABAM* case[164], which is the second episode, limited the obligations which could be imposed on Internet service providers to prevent access to infringing sites. The CJEU was approached as regards a preliminary ruling by a Belgian court as to whether a national judge could order an Internet service provider to implement, at its own expense, a generalized filtering system for electronic communications to block the transfer of musical works by using peer-to-peer software. Interpreting the combination of the relevant directives on copyright and personal data protection with regard to several fundamental rights (intellectual property rights, but also protection of personal data and freedom of expression), the Luxembourg Court ruled that these provisions precluded such an injunction to set up a generalized filtering system.

Preserving metadata and privacy issues. The final episode is part of a legal imbroglio whose stakes go far beyond the sole field of literary and artistic property. Acts of 2000 and 2001[165] required Internet service providers, hosts and telecommunications operators to keep connection data (data relating to the sender, recipient, duration and location of a communication, excluding its content) for a period of one year, at the time only to enable the search for the perpetrators of criminal offences, in the context of criminal police investigations. Access to this data was then successively extended to many authorities for various purposes, including intelligence services in the context of the fight against terrorism and the protection of national security, but also HADOPI by the Act of 12 June 2009[166], which created it. Access to "metadata" has been at the heart of HADOPI's missions since its creation, as it is the key to knowing the identity of Internet users who have performed peer-to-peer download operations without rights[167].

By a Grand Chamber judgement of 21 December 2016[168], the CJEU ruled that the "Privacy and Electronic Communications" Directive of 12 July 2002[169], read in the light of several articles of the Charter of Fundamental Rights of the European Union, including Articles 7 and 8 on the protection of privacy and personal data, precludes national legislation providing for generalized and commoditized storage of metadata, even for the purpose of tackling crime. To date, the French legislator has not followed up on this judgement, as the public authorities consider the general preservation of metadata to be essential for the protection of national security, particularly in the context of a terrorist threat. Recently, the Council of State decided on a preliminary ruling which, as the conclusions of the public rapporteur Edouard Crépey clearly show, aims to reverse the CJEU's position[170].

If the general preservation of metadata were to be discontinued, this would of course have the effect of preventing all access which exists today, including that of HADOPI. Moreover, even

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[164] CJEU, 24 November 2011, *Scarlet Extended SA v/ Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)*, case C-70/10.

[165] Act No. 2000-719 of 1 August 2000 amending Act No. 86-1067 of 30 September 1986 on freedom of communication and Act No. 2001-1062 of 15 November 2001 on daily security.

[166] Act No. 2009-669 of 12 June 2009 promoting dissemination and protection of creation on Internet.

[167] The related data processing is organized by Decree No. 2010-236 of 5 March 2010 on the automated processing of personal data authorized by Article L. 331-29 of the Intellectual Property Code entitled "Management system for measures to protect works on Internet". Articles R. 331-37 to R. 331-38 of the French Intellectual Property Code define the conditions for interconnection between this processing operation under the responsibility of HADOPI and those performed by electronic communications operators, for the purpose of identifying persons who have unlawfully downloaded or made available protected works or subject matter.

[168] CJEU, Grand Chamber, 21 December 2016, *Tele2 Sverige AB versus Post- och telestyrelsen and Secretary of State for the Home Department versus Tom Watson e.a.*, cases C-203/15 and C-698/15.

[169] Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (frequently referred to as the "e-privacy" Directive).

[170] EC, 26 July 2018, *Quadrature du net and others*, CHR, B, No. 394922.

if the CJEU were to revisit the *Tele2 Sverige* judgement, it is not clear that this access could be maintained under the current conditions. In this judgement, the CJEU made a distinction between tackling serious crime, which is the only way to justify the preservation of metadata (even if the Court ultimately considers that the infringement of fundamental freedoms is disproportionate), and other purposes. In addition, under domestic law, the Constitutional Council has censored access to communication metadata held by staff of the Autorité des marchés financiers (AMF - French Financial Markets Authority), on the basis of texts similar to those of HADOPI[171]. It ruled that since AMF access was not subject to any guarantee other than the authorization of officials and respect for professional secrecy, the legislator had not reached balanced conciliation between the right to privacy and the search for offenders. As Audrey Lebois[172] points out, the fact that the obligation of vigilance provided for in Article L. 336-3, which is at the heart of the HADOPI system, is the main subject of contraventional sanctions, does not make a case for assimilating it to the fight against serious crime.

A recent CJEU ruling suggests the possibility of a more pragmatic approach by the CJEU on access to certain metadata, modulating the level of requirements according to the seriousness of the privacy breach. As regards access by public authorities to data aimed at identifying the holders of SIM cards activated with a stolen mobile phone, the CJEU considered that it involved an interference with their fundamental rights, but that it was not so serious that such access should be limited, in terms of the prevention, investigation, detection and prosecution of criminal offences, to the fight against serious crime[173]. With regard to HADOPI, the data processed does not concern the location of persons, which is considered particularly sensitive by the *Tele2 Sverige* judgement, or telephone data.

A recent study commissioned by HADOPI highlighted these differences and the guarantee represented by the intervention of an independent administrative authority, and proposed to legally empower the HADOPI data access system from the general system provided for in the Postal and Electronic Communications Code[174].

- **A growing overlap between protected works, subject matter and personal data**

Overlapping situations. Two situations may arise in which the respective protection of literary and artistic property rights and personal data interfere: those in which personal data is, moreover, intellectual property subject matter; and those, in greater numbers, in which intellectual property subject matter contains personal data.

Combination of interests. In the first case, there would be an overlap between the concepts of works or services and personal data. This hypothesis is not purely theoretical, insofar as a work or performance of a performer is linked to the identity of their creators and can as such be analysed as personal data. The work implies originality, which itself implies a particular imprint of the person, and therefore the connection to that person, a criterion for defining personal data. Since the work speaks of the author, in particular through the moral right of authorship, there is no contradiction between the two bodies of legislation but rather an accumulation of protections; it will be permissible for the author to require third parties to respect both intellectual property rights and the protection of personal data. As such, an author wishing to oppose the dissemination of their work could act both on the basis of their moral

[171] Decision No. 2017-646/647 QPC of 21 July 2017.
[172] A. Lebois, "Lutte contre la contrefaçon et données personnelles" (Tackling counterfeiting and personal data), *Dalloz IP_IT* 2018 p. 107.
[173] Grand Chamber, 2 October 2018, *Ministerio Fiscal*, C-207/18.
[174] L. Dutheillet de Lamothe and B. Gaschet, *La procédure de réponse graduée de la HADOPI* (HADOPI's graduated response mechanism), December 2017.

right of withdrawal, in the case of intellectual property, and on that of their right of opposition or their right to withdraw consent, in the case of the protection of their personal data incorporated in or peripheral to the work.

Third party data. It is also possible that a work may incorporate third party identifiers and in this case, conflict is possible, particularly when an author states information about another person which identifies that person. There are two opposing rationales: that of the author who wishes to disseminate their work and that of the person who wishes to restrict, if necessary, this dissemination. In reality, arbitration will often take place, not with regard to copyright but with freedom of expression, to determine whether, for example, the public interest in the journalistic processing of information takes precedence over the individual's interest in controlling that same information[175]. However, the author may claim their copyright in order to freely reproduce or distribute their work, which may also be analysed as processing of third party personal data. This situation will also occur when a database is used. The *sui generis* right on databases confers on the producer an almost exclusive right to the quantitatively or qualitatively substantial content of the content of the database, which may consist of personal data. **This may lead to a possible antagonism between a proprietary claim and an aspiration to control or retain certain personal data by individuals.**

In this case, a conciliation must be made between the author's proprietary interest in using their work or the producer, their database, which presupposes that they can freely transfer their rights to third parties for them to use, on the one hand, and the intervention of the individual whose data is contained in the work or database, on the other hand. By merely stating in recital 48 that its provisions are "*without prejudice to the application of data protection legislation*", the Directive of 11 March 1996 on the legal protection of databases does not seem to resolve all issues, and the DADVSI Directive of 22 May 2001 does not go into any great depth as to the practical linkage between rationales[176].

Difficult linkage between privacy protection and commercial data use. The DADVSI Directive merely states in recital 57 that "*The aforementioned systems concerning information of the rights regime may also, depending on their design, process personal data relating to the consumption habits of individuals with regard to protected subject matter and enable online behaviour to be observed. These technical means must, in their technical functions, incorporate the principles of privacy protection, pursuant to Directive 95/46/EC*". Reference is therefore made to the principles of *privacy by design* for determining the architecture of solutions relating to rights regime information.

The draft CDSM Directive, in the version resulting from Parliament's vote on 12 September 2018, reiterates the obligation to comply with the fundamental principles of the Charter, the GDPR and specifically mentions the right to forget (recital 46). It emphasizes, in recital 46a, "*the importance of anonymity when processing personal data for commercial purposes*" and adds, "*in addition, in the use of online platform interfaces, the option of not sharing personal data should be encouraged as a "default" option*". This positioning may make it more difficult to share this data between platforms which are at the heart of the customer relationship on the one hand and rights holders on the other hand, since the rights holders would be deprived of access to this information to re-establish direct contact with their customers, contrary to the needs expressed by the rights holders to develop a greater individualization of users, since these services also correspond to the latter's aspirations.

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[175] Cf. See also the judicial jurisprudence on the respect of privacy by so-called documentary-fiction works, borrowing from real facts: for example Paris High Court (ord. Ref.) 10 February 2006 *M. Bolle v/ France Télévision interactive, Arte France, France 3 and others*; 1st First Cass., 7 February 2006, *Jean X. and Editions du Palémon v/ Mrs Y*, appeal No. 04-10941; 1st First Cass., 30 September 2015, No. 14-16273.

[176] Recital 60: The protection provided under this Directive should be without prejudice to national or Community legal provisions in other areas, such as industrial property, data protection, conditional access, access to public documents, and the rule of media use chronology, which may affect the protection of copyright or related rights.

The legislation on personal data protection, whose practical scope was strengthened by the GDPR which entered into effect on 25 May 2018, is likely to converge with intellectual property law in at least two ways.

The first concerns anti-counterfeiting, the means for implementing this, which involve the collection and processing of personal data, must not affect their protection rules. The balance which resulted in particular from a decision of the Constitutional Council in 2004 and the *Scarlet* judgement of the CJEU in 2011 could be destabilized by the *Tele2 Sverige* judgement of 2016 of the same court which, by calling into question the general preservation of metadata, is likely to undermine the missions of HADOPI which uses this data, despite the guarantees which already surround the High Authority's activity.

The second, less obvious but not theoretical, concerns situations of overlap between works and personal data, whether the data is that of the author or that of third parties.

Finally, the linkage between personal data protection and the possibility of monitoring the use of works should be considered, through technical protection measures relating to the regime on the information of rights. The approach of the CDSM Directive is, for the time being, to encourage anonymity and non-sharing of the data collected by the platforms. However, the combined interest of holders and users, when they consent, could argue, on the contrary, for the sharing of this information, while respecting the privacy of individuals.

3.3. Data at the crux of tension between movement and reservation

In the digital world, movements for data sharing and movement coexist, and sometimes clash, with others for the affirmation of new property rights or other forms of reservation.

3.3.1. Movements advocating free movement of data

- **A public policy of openness of scientific and cultural data**

***Open access* in scientific publishing, a challenge for the dissemination of knowledge**... A vast movement to open up scientific data was launched at the initiative of researchers, which spread to other sectors to the point of leading institutions to consider genuine public policies for "open" dissemination. "*An old tradition and new technology have converged to make possible an unprecedented public benefit. The ancient tradition is the willingness of scientists and academics to publish the results of their research in scholarly journals without remuneration, for the sake of research and knowledge. The new technology is Internet. The public benefit they make possible is the worldwide electronic dissemination of peer-reviewed journal literature with completely free and unrestricted access to all scientists, scholars, teachers, students and other curious minds.*". These few sentences introducing the Budapest Initiative[177] clearly reflect the reasoning behind the movement for open access to scientific publications: digital technology, by drastically reducing the costs of reproducing and distributing publications, offers a new opportunity to realize the values of knowledge sharing inherent in scientific research. Open access includes not only the publication but also the data resulting from the research. The opening of experimental data contributes to the dissemination

[177] Budapest Open Access Initiative, 14 February 2002.

of knowledge and the verification of results. In particular, the publication of failed experiments is developing, thus ensuring other researchers do not waste time exploring dead ends.

... and a reaction to the growing power of publishers. Notwithstanding, digital technology does not spontaneously lead to the free sharing of knowledge and to a change in publishers' practice regarding the promotion of intellectual property rights. On the contrary, it has strengthened the concentration of the scientific publishing market, which is dominated by four major publishers (Elsevier, MacMillan/Nature/Springer, Thomson Reuters and Wiley), which alone publish 50% of the high-impact journals[178] and manage to capture the activity of most learned societies. This leads to cost inflation despite productivity gains[179]. The progress of the open access movement is partly explained by a reaction of scientists to the growing economic power of publishers, and the attentiveness it has received from governments out of concern for them to limit the increasing costs incurred by their research institutions in accessing the results of scientific production which is largely financed by them.

A sure but contrasting development. Open access publishing remains a minority practice but it has acquired an essential place in the scientific publishing landscape. The number of journals published in open access is expected to increase from 20% to 30% per year, with a growing proportion of high-impact publications[180]. According to the European University Association, 53% of European universities have an open access policy and 40% are in the process of developing it. However, the same survey shows that only one-third of researchers have good knowledge of open access policies and that the fear of being less well perceived than publishing in conventional journals remains a significant barrier. In particular, the question of the consideration by the evaluation bodies of publications of this type in the promotion of academic careers remains sensitive.

Several systems of openness. It is customary to distinguish two modes of publication in open access, "green open access" and "gold open access". Green open access consists for the researcher to submit their article to an archival repository with free and open access. Amongst the most widely used repositories are HAL, developed by the CNRS and which is today the largest database for French-speaking research, OpenAIRE, which is a European network of open access repositories, and ArXiv for physical and mathematical sciences. Gold open access is to go through journals which are fully open access. These are based on other forms of financing than the traditional reader payment model, the models are varied: author financing (so-called "author-pays" model), subsidies by a *sponsor* (public institution, learned society, etc.), *freemium* model (free consultation and paid services[181]) as well as participatory financing.

Open access should not be too schematically opposed to the conventional model. Green open access is by its nature compatible with the latter and only limits the publisher's right of exclusivity, by allowing, in addition to conventional publication, publication on a free archive after an embargo period. Gold open access, whilst quantitatively dominated by non-profit players[182], is used by many for-profit publishers, for whom it represents a new business model. 80% of new journals launched on the market today are open access journals[183]. The excesses of some open access journals, which require payments from authors without offering any

[178] *L'édition de sciences à l'heure numérique. Dynamiques en cours (2015)* (Science publishing in the digital age. Dynamics at play), CNRS, Scientific and Technical Information Division.
[179] Survey by the ADBU (French Association of Directors of University Libraries) on UL procurement budgets: http://adbu.fr/wp-content/uploads/2014/03/Enqu%C3%AAte_ADBU_2014.pdf: in France, between 2002 and 2014, expenditure by research laboratories on electronic literature rose by 450%.
[180] E. Poltronieri et al., "Open access publishing trend analysis: statistics beyond the perception", *Information Research*, vol. 21 No. 2 June 2016.
[181] For example, the production of statistics or the article reading in improved formats.
[182] According to an estimate by the Directory of Open Access Journals in 2015, a collaborative repository of open access journals, two-thirds of these journals are funded by grants.
[183] CNRS, *op. cit*.

services in return, have led some to describe them as "predatory journals"[184]. **While the relationship between the journal and the researcher who publishes it is similar to a contract on an author's account, which is not a publishing contract according to Article L. 132-2 of the Intellectual Property Code, profit-making companies using these journals tend to take advantage of the prerogatives of the publisher, for example to charge for text and data mining, which constitutes a deviation from the system.**

An approach supported by the European Union. Under the impetus of the European Commission - not DG Connect but DG Research - the European Union has been providing constant support for the dissemination of open access research for several years. This is a condition for European research grants; Article 18 of the Regulation of 11 December 2013 establishing Horizon 2020 - the Framework Programme for Research and Innovation (2014-2020)[185] provides that "*open access to scientific publications resulting from publicly funded research under Horizon 2020 shall be ensured*", while open access to research data shall be "*encouraged*", subject to intellectual property rights or the protection of personal data. The European Commission also recommends that Member States, as far as their competence is concerned, define policies in favour of open access; the recommendation of 25 April 2018, which replaced the recommendation of 17 July 2012, invites States in particular to provide that all publications resulting from publicly funded research should be open access by 2020 at the latest.

Open data in the Act for a Digital Republic. In France, Article 30 of the Act of 7 October 2016 for a Digital Republic provides that a scientific article resulting from research financed at least half by public funds may be published by its author on an open archive (green open access), notwithstanding the exclusive rights granted to the publisher, after an embargo period of one year for human and social sciences and six months for the other disciplines. These public policy provisions as such constitute a limit to the exclusive transfer of rights to the publisher[186]. The path taken by France has been followed under similar conditions by the United States, Germany, the United Kingdom and Italy.

The converged between copyright and the policy of open scientific data is based here on a dissociation of the exercise of the right by the author and the publisher, creating an asymmetry of control between the two types of ownership - original and contractual. The author remains responsible for choosing open dissemination; there is no legal obligation. As for the publisher, they loses their power to prohibit and their exclusivity in the event that the author submits their work in one of these open archives, which they are encouraged to do by the public policies implemented by the institutions and by the academic community[187].

- **"Cross-platform" movement and data platforms**

Moving, fluid, and often co-constructed, data seems to respond to a new logic which it would be possible to lean on or, at the very least to draw inspiration, in order to enable rights holders to benefit from the data driven economy.

[184] The collaborative "Stop Predatory Journals" site as such proposes a blacklist of predatory reviews, based on ten criteria (exorbitant rates in view of the absence of peer review and editorial supervision, acceptance of articles of poor quality or even hoaxes, posting in editorial committees of non-existent personalities or whose consent has not been requested, etc.). https://predatoryjournals.com/about/

[185] Regulation (EU) No 1291/2013 of the European Parliament and of the Council of 11 December 2013 establishing Horizon 2020 - the Framework Programme for Research and Innovation (2014-2020)

[186] V. T. Azzi, "Open data et propriété intellectuelle" (Open data and intellectual property), afore.

[187] Uncertainties about obligations under intellectual property law, however, remain a possible barrier to the open access dissemination of cultural or scientific data or content. According to the European University Association study, 75.1% of researchers report fear of counterfeiting as a significant barrier to submitting their articles to open archives.

Aspirations for greater data portability. Data is at the heart of control and value creation strategies, whether it entails business models for companies or improving public policies. To take full advantage of data's informational value and promote the emergence of new data-based services, **many players are now calling for greater data portability which would encourage data sharing, avoid foreclosure effects and thus promote competition and innovation through the creation of new services.** The portability of content has also been encouraged since the adoption of the Regulation on the cross-border portability of content[188]. It is as such defined as the possibility of providing remote access to subscribers of an online content service so that they can use it when they are temporarily present in a Member State other than their Member State of residence. While these two concepts - portability/recovery of data and portability/access to content - should not be confused, they are part of the same strategy to build a single digital market in the European Union through better movement of these digital assets[189].

Right to portability/recovery established: positive law and ongoing reforms. The right to data portability is already enshrined in the GDPR for personal data and in the Act for a Digital Republic of 7 October 2016 for data associated with user accounts. This new right for individuals is intended to promote control over their data by giving them the possibility to recover and transmit it to another service provider or to manage it themselves[190] (thanks to the new *Personal Information Management Systems*, called *"PIMS"*). As such, data portability has a twofold objective. The right to portability can be analysed first of all as an essential prerogative to restore the person's control over their data; it illustrates the principle of informational self-determination which extends the personalist and non-heritage approach to the subject[191]. Data portability can still be analysed from a competitive perspective, as it improves access to data and thus maximizes its value through the emergence of an innovative ecosystem[192].

As such Article 20 of the GDPR provides that "*the data subject shall have the right to receive the personal data concerning him or her, which he or she has provided to a controller, in a structured, commonly used and machine-readable format and have the right to transmit those data to another controller without hindrance from the controller to which the personal data have been provided*". As for the Act for a Digital Republic, it has introduced new texts into the Consumer Code covering more generally all the data associated with the user account as well as the files posted online[193]; these are however intended to apply only to the most important service providers[194] and establish a deliberately consumerist approach which reserves the

[188] Regulation (EU) 2017/1128 of the European Parliament and of the Council of 14 June 2017 on cross-border portability of online content services in the internal market.
[189] On this point, see M. Leroy and C. Zolynski, "La portabilité des données personnelles et non personnelles. Pour une politique européenne de la donnée" (Portability of personal and non-personal data. Towards a European data policy), *Légicom* 2018/1, p. 105.
[190] New services dedicated to the management by an individual of their data are developing, known as *Personal Information Management Systems* (PIMS).
[191] In this respect, Conseil d'Etat, *Etude annuelle 2014. Numérique et droits fondamentaux* (Council of State annual study 2014. The digital world and fundamental rights), September 2014; J. Rochfeld, Contre l'hypothèse de la qualification des données en tant que biens (Against the hypothesis of the qualification of data as goods), *in Les biens numériques* (Digital goods), PUF, 2015, p. 214.; Les géants de l'internet et l'appropriation des données personnelles : plaidoyer contre la reconnaissance de leur 'propriété (Internet giants and the appropriation of personal data: advocacy against the recognition of their 'ownership'), *in L'effectivité du droit face à la puissance des géants de l'internet* (the effectiveness of law in relation to Internet giants), dir. M. Behar-Touchais, IRJS ed., 2015, p. 73 - Adde, Conseil national du numérique (National Digital Council), *Rapport sur la neutralité des plateformes "Réunir les conditions d'un environnement numérique ouvert et soutenable"* (Report on platform neutrality "Creating the conditions for an open and sustainable digital environment"), May 2014, p. 37.; J.N. Purtova, *Property Rights in Personal Data. A European Perspective,* Kluwer Law International 2012.
[192] OECD, *Maximising the Economic and Social Value of Data*: http://www.oecd.org/sti/ieconomy/enhanced-data-access.htm
[193] Cons. C. Art. L. 224-42-3.
[194] Cons. C. Art. L. 224-42-4.

benefit of this right to consumers only[195].

Since the implementation of these reforms, users can easily store or transmit their data from one information system to another for personal use, thus promoting the emergence of new services around data. It should also be noted that a right to data recovery had also been envisaged by the draft directive on certain aspects of contracts for the supply of digital content, in the event of breach of the contract or breach of a long-term contract concluded between the provider of digital content or service and its consumer co-contracting party[196]. As such, these various texts or draft reforms seem to reflect an evolution of public authorities in favour of greater control of data by users and make it possible to observe the progressive construction of a data law.

***Free flow of data* and right to portability (*a minimum*?).** Insofar as this new prerogative constitutes an instrument conducive to the free flow of data between operators, some now advocate extending it beyond the scope of personal or individual data[197]. This proposal is based on the observation that economic players and consumers make extensive use of external cloud computing solutions on which they may find themselves dependent. However, smaller structures often do not have the human and material resources to negotiate contracts with operators to their advantage, and face difficulties in recovering their data when they wish to migrate to another service when the contract is terminated. The right to portability could then allow them to recover all the data which they have "generated" and which is stored and/or processed with a digital service provider, so as to transfer it to another service provider. As such, it would be a tool for promoteing competition and innovation in the European cloud computing market. More generally-speaking, by giving control of data back to the players, portability could be an instrument to rebalance the power asymmetry between users and services in the digital economy. Such a right would make it possible to tackle the effects of foreclosure and value leakage by making it possible to develop services internally or at the level of a professional sector. Finally, new third-party services based on the cross-referencing of several data sources could be developed through portability[198].

However, it should be noted that only a *minimum* consecration is currently on the agenda in EU law, since Article 6 of the draft Regulation of 13 September 2017 on the free movement of non-personal data[199] merely recommends facilitating the transition from one service to another for professional users, in particular by setting standards and promoting contractual

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[195] On these various texts and their implementation, see M. Leroy and C. Zolynski, afore. art.

[196] See Articles 13 and 16 of the draft Directive of the European Parliament and of the Council on certain aspects of digital content supply contracts of 7 December 2015, COM (2015) 634 final 2015/0287 (COD). For a comparative analysis of the various texts, see C. Berthet, C. Zolynski, N. Anciaux et P. Pucheral, Contenus numériques, récupération des données et empouvoirement du consommateur (Digital content, data recovery and consumer empowerment), *Dalloz IP/IT* 2017, p. 29. *Adde*, J. Rochfeld, Le contrat de fourniture de contenus numériques : la reconnaissance de l'économie spécifique contenus contre données » (Digital content supply contracts: recognition of the specific economy content versus data), *Dalloz IP_ IT*, 2017, p. 12.
At the end of the first negotiations, the text was amended to rule out a possible patrimonialization of personal data which would be contrary to the foundations of the GDPR and Article 8 of the EU Charter of Fundamental Rights in that it could not be analysed as a counterpart (see the opinion of the European Data Protection Supervisor, 14 March 2017, https://edps.europa.eu/sites/edp/files/publication/17-03-14_opinion_digital_content_fr.pdf).

[197] In this respect, see the opinion of the CNNum (French Digital Council) on the free movement of data in the European Union, afore.

[198] See the examples on intelligent buildings in Conseil national du numérique (French Digital Council), *Fiche sur la consécration d'un droit à la portabilité des données non-personnelles* (Data sheet on the establishment of non-personal data portability right), July 2017, https://cnnumerique.fr/files/2017-10/Cr%C3%A9ation-dun-doit-%C3%A0-la-portabilit%C3%A9-des-donn%C3%A9es-non-personelles.pdf

[199] At the time of publication of this report, the Regulation had been finally adopted by the European Parliament on 4 October 2017, but had not yet been published.

transparency. It is therefore far from establishing a real general right to data portability[200]. This mechanism has not yet been considered in the texts on intellectual property.

3.3.2. Will a data property right be established?

The stillborn project of data property? In contrast to the movement to promote facilitated access and data sharing, the temptation to strengthen exclusivity mechanisms by establishing a new data property right is also resurfacing. However, this approach, which was for a time envisaged by the European Commission in its strategy to promote the single digital market, is the subject of many fears[201] and serious reservations.

Scope of the law. The difficulties would arise first of all from identifying the subject matter of the right and its holder. This raises questions about the purpose of the protection. Should it be the raw data resulting from an activity; or should it be the "cleaned" data, organized, or even the extracted metadata; or should it be the qualified, cross-referenced data which has been algorithmically processed to extract new information, for example? How can we establish property rights on subject matter as mobile as data in the era of "*big data*", whose wealth comes from the "3 V" (volume, variety, velocity)[202]. How, again, can the difficulties arising from the porosity of the distinction between this data and personal data whose patrimonialization is excluded by the GDPR be resolved[203]? Moreover, who would be the holder of this new right when many players are involved in data production and processing? To be able to answer these questions, it would first be necessary to identify the added value to be protected, which is, for the time being, at the very least delicate, at the risk of limiting, without sufficient justification, the freedoms of information and entrepreneurship.

Contrary to the objective of clarification sought, such enshrinement could multiply litigation and increase legal insecurity, not to mention that the contractual asymmetry between the various operators would not necessarily be reduced with regard to the likely insertion of automatic assignment clauses to the benefit of the player in a dominant position. Above and beyond this,

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[200] For a critical analysis of this proposal, see M. Leroy and C. Zolynski, afore. art.; Avis du CNNUM sur la libre circulation des données dans l'Union européenne (Opinion of the CNNUM on the Free Movement of Data in the European Union), April 2017, p. 3.

[201] European Commission 'Building A European Data Economy', Communication from the Commission to the European Parliament, the Council, 10 January 2017, COM (2017) 9 final, 13; European Commission, 'Staff Working Document on the free flow of data and emerging issues of the European data economy', Brussels, 10 January 2017, SWD (2017) 2 final, 33-38.

[202] In this respect, see P. Bernt Hugenholtz, "Data property: Unwelcome Guest in the House of IP", https://www.ivir.nl/publicaties/download/Data_property_Muenster.pdf, p. 12; see Also the position of researchers from the Max Planck Institute, J. Drexl, R. Hilty, L. Desaunettes, F. Greiner, D. Kim, H. Richter, G. Surblyte, K. Wiedemann, Data Ownership and Access to Data - Position Statement of the Max Planck Institute for Innovation and Competition of 16 August 2016 on the Current European Debate (August 16, 2016). Max Planck Institute for Innovation & Competition Research Paper No. 16-10, https://ssrn.com/abstract=2833165 or http://dx.doi.org/10.2139/ssrn.2833165

[203] On the criticisms addressed on the thesis in favour of the patrimonialization of personal data, see in particular the CNIL's French Data Protection Authority) annual report for 2017, p. 53 &f and already, report No.441 to the French Senate presented on 24 May 2009 by Y. Détraigne and A.-M. Escoffier, ***Respect de la vie privée à l'heure des mémoires numériques*** (Privacy in the age of digital theses), p. 106 as well as Conseil d'Etat (Council of State), *Numérique et droits fondamentaux* (Digital technology and fundamental rights), afore. and also Conseil national du numérique (National Digital Council), Rapport sur la neutralité des plateformes "Réunir les conditions d'un environnement numérique ouvert et soutenable" (Report on platform neutrality "Creating the conditions for an open and sustainable digital environment"), May 2014, p. 37. *Adde*, J. Rochfeld, Contre l'hypothèse de la qualification des données en tant que biens (Against the hypothesis of the qualification of data as goods), *in Les biens numériques* (Digital goods), PUF, 2015, p. 214 and Les géants de l'internet et l'appropriation des données personnelles : plaidoyer contre la reconnaissance de leur 'propriété (Internet giants and the appropriation of personal data: advocacy against the recognition of their 'ownership'), *in L'effectivité du droit face à la puissance des géants de l'internet (the effectiveness of law in relation to Internet giants),* dir. M. Behar-Touchais, IRJS éd., 2015, p. 73.

the patrimonialization of this data could jeopardize a traditional paradigm by undermining the fragile balance established by Directive 96/9 at the cost of bitter discussions, to avoid any reservation of information[204].

The economic opportunity of such a right in question. The opportunity of such an enshrinement is also hotly debated. Some[205] consider that the enshrinement of a data property right is based on an outdated vision which seems to forget that data has a subjective value, a use value which does not necessarily result from the data *per se* but rather from "*what it leads to doing and the strategic positions to which it gives access*"[206]; a use value which is produced, in the context of the data-driven economy, from the cross-references between different data sets.

Consequently, the issue is no longer so much the protection of investment for the creation of large databases as the incentive to recontextualize them. However, in a very large number of cases, collection and qualification activities are carried out in an ancillary way, to serve an industrial process: they are a means rather than an end. On the other hand, cross-referencing with other data serves a new purpose; it is therefore possible to consider that it is this phase which should be supported as it covers the true potential of big data and the emergence of new services. There would then be a great risk that competition and diversity would be limited by the creation of information monopolies, which could run counter not only to the objective of promoting innovation but also to pluralism of information.

These considerations are now key in the context of the Artificial Intelligence revolution. With the deployment of machine learning in particular, the question of data access becomes crucial insofar as, if artificial intelligence algorithms are developed under open licences, the only competitive advantage then lies in access to the data used for producing the algorithms[207]. Acknowledging an exclusive right to data could then have the effect of reserving the development of this key technology for a few companies able to capture a sufficient amount of data and retain it. Societal and geostrategic issues are crucial when artificial intelligence is presented as "*one of the keys to tomorrow's power in a digital world*": these techniques are intended to determine "*our ability to organize knowledge, to give it meaning, to increase our ability to make decisions and control systems*", which explains why, in recent years, we have seen a real "*race for artificial intelligence*" on a global scale[208]. In addition to the industrial battle, there is also a cultural battle which leads to the question "*with which data, and therefore from which cultural patterns will the artificial intelligences which will play such a decisive economic and social role be educated*"[209].

Threat to the balance of literary and artistic property. The last complaint against this proposal was formulated by academics specialized in intellectual property. They argued that the establishment of an overall data property right would have detrimental effects on intellectual property, not only because of the risks of non-theoretical overlap between the two

[204] This has since been confirmed by decisions of the Court of Justice: see not. CJEU, 9 Nov. 2004, No. C-203/02 and No. C-46/02. On this analysis, see the opinion of the Conseil national du numérique sur la libre circulation des données dans l'Union européenne (Opinion of the CNNUM on the Free Movement of Data in the European Union), April 2017, https://cnnumerique.fr/files/uploads/2017/04/AvisCNNum_FFoD_VFinale.pdf.

[205] In this respect, see the opinion of the Conseil national du numérique (French Digital Council) on the free movement of data in the European Union, afore.

[206] V. S. Chignard and L.-D. Benyayer, *Datanomics, Les nouveaux business models des données* (Datanomics, new business models for data), FYP, 2016, p.15.

[207] On this point, see the report of the mission chaired by C. Villani, Donner du sens à l'intelligence artificielle. Pour une stratégie nationale et européenne (Give meaning to artificial intelligence: for a national and European strategy), March 2018, p. 23 & s.

[208] Afore. Villani Report, p. 26.

[209] H. Verdier, preface in *Les données comme infrastructure essentielle* (Data as key infrastructure), rapport de l'administrateur des données sur la donnée dans les administrations (report of the data administrator on data in administrations), 2016-2017, La documentation française, p. 3.

types of ownership, but also by altering the systems of reward and incentives for innovation which it stimulates and the balances between ownership and free use which it incorporates. The granting of a property right over simple data without any other qualitative criteria could have a dissuasive effect on creation and investment since it would be sufficient to be at the origin of a data flow to have legal control over it, without having to make any effort. Moreover, insofar as these rights would head-on oppose intellectual property rights on inseparable subejct matter, they would give rise to frequent conflicts for which the Commission's proposal provided no remedy. Finally, without providing for exceptions to the mechanism of the same nature as those existing in intellectual property, such as the one, during the adoption of a text and data search, the data property right would lead to an immediate shift in the claims of copyright and related rights holders on this ground to avoid being confronted with exceptions, or the non-protection of raw data in copyright. Such a transition would take place with disregard for the public interest which these mechanisms convey.

Reservation by contractual and technical control. The delicate balance between property and use is also threatened by the *Ryanair* jurisprudence of the Court of Justice[210], which ruled that a database which is neither protected by copyright nor by sui generis law is subject to use solely by recourse to contracts, excluding the set of exceptions relating to databases provided for in Directive 96/9. In the present case, the contractual conditions for access to the airline's website stipulated that it was prohibited to use "*automated systems*" *to* "*extract data for commercial purposes*", unless a specific written licence was concluded, in which the party concerned was given access, solely for the purpose of price comparison, to Ryanair's information on prices, flights and schedules. In a homeric dispute between the airline and companies developing a price comparison engine, the Dutch judge had decided that the database was not protected either by copyright, for lack of sufficient originality, or by *sui generis* law, for lack of evidence of a substantial investment in the operations of creating the database other than the creation of the data. In its preliminary ruling, however, the national court asked the Court whether, despite this lack of protection by an intellectual property right, the guarantees offered to the legitimate user provided for in Article 6 of Directive 96/9 of 11 March 1996 enabling them to perform the acts necessary for such use and Article 15 of the same text prohibiting any contrary contractual provision were meant to apply.

The Court of Justice gave a negative answer, holding that the fact that a database meets the definition of Directive 96/9 did not allow the provisions of that Directive to be applied if it did not satisfy the conditions for copyright protection or *sui generis* right. Consequently, the CJEU ruled that Directive 96/9 "*does not preclude the adoption of contractual clauses concerning the conditions of use of such a database*". The decision leads to this logical and paradoxical result that the absence of a claim to an intellectual property right on a database allows the person in charge of its control to stipulate less favourable contractual conditions of use than those they could have foreseen if they had been able to avail themselves of these rights. The acknowledgment of rights to legitimate users is only conceivable in the event that the holder can invoke an exclusive right, and not when they only avails themselves of the freedom of contract.

Fragility of the public domain and user rights. As such, the combination of the contract and the technical access control measures allows the database manager to subject the user to conditions of use which do not guarantee them as many freedoms as those they enjoy if the database is protected by a literary and artistic property right, in particular by limiting their extraction capacities, even if they are not substantial, or by prohibiting the recovery of raw data which is not protected. To state, as the CJEU does, that the person responsible for the database enjoys in this case a more fragile protection than that of the exclusive right is partially inaccurate, when we know that it is possible to pursue fraudulent introduction into an automatic

[210] CJEU, 15 Jan. 2015, *Ryanair Ltd v/ PR Aviations BV,* case C-30/14, *Intell. Prop*., April 2015, No. 55, p. 211, obs. C. Bernault.

data processing system by criminal prosecution. On the other hand, this solution demonstrates the precariousness of the protection of public domain[211] and user rights, whose opposability remains singularly limited to the existence of a formal exclusive right but gives way to the contract. However, some foreign courts have concluded that contractual clauses are unenforceable, which would prevent legitimate use, even in the absence of legal protection[212].

Reactivation of the sui generis right? The European Commission's report on the evaluation of Directive 96/9 pointed to the relative inadequacy of protection to address new mechanisms for creating value from data. The interpretation of the text given by the Court of Justice in the *British Horseracing* and *Football Dataco*[213] judgements significantly limited the potential of this right to capture investments made in data creation on the one hand and databases automatically generated by machines on the other. However, the report points out that some national courts had developed a more comprehensive approach to protection, in particular in a 2010 decision of the *BundesGerichthof* called *Autobahnmaut*[214], in which the German Supreme Court recognized a *sui generis* right on a database generated by a toll machine. Far from welcoming this possible extension, the Commission considers that the scope of the law as restricted by the CJEU strikes a satisfactory balance between the interests of producers and those of the free movement of information. Like the authors of the preliminary study Lionel Bentley and Estelle Derclaye, and of the first evaluation of the Directive in 2005, it does not therefore recommend reactivating the Directive, worrying on the contrary about the consequences of a possible reversal of future CJEU jurisprudence.

In the digital world, movements for data sharing and movement coexist, and sometimes clash, with others for the affirmation of new property rights or other forms of reservation.

In the scientific field, the movement in favour of open access received the support of public authorities, which increasingly make it a condition for their research grants and forbid publishers from preventing the researcher's publication in an open archive. The combination of this *open content* or *open knowledge* policy and the enjoyment of publishers' rights leads to complex situations where, paradoxically, the author or the scientific institutions occasionally find themselves in a situation which is less favourable that the one offered by the public policy provisions of the Intellectual Property Code in relation to the publishing contract.

The strategy defined by the European Union as regards establishing a single digital market also leads to encouraging the movement of data, through the recognition, by successive legal instruments and in various ways, of the portability of personal data, of that of non-personal data and, finally, of the cross-border portability of digital content. This momentum which, for the time being, disregards works and subject matter protected by intellectual property rights would be better of making the effort to embrace this, as such enabling holders of literary and artistic property rights to maintain and even to increase the ability to control the data accompanying protected subject matter, as such associating them with the *data driven economy*.

[211] S. Dusollier, *Etude exploratoire sur le droit d'auteur et les droits connexes et le domaine public* (Exploratory study of copyright and related rights and the public domain), WIPO, 4 March 2011, CDIO/7/INF/2, p. 8.
[212] CA Amsterdam, *Pearson v Bar Software*, 22 November 2016. See Study 2.3.2.
[213] CJEC, Grand Chamber, 9 November 2004, case C-203/02 and C-46/02.
[214] Autobahnmaut (BGH) 25 March 2010, I ZR 47/08.

The acknowledgement of a data property law occasionally presented as a measure intended for encouraging data movement, would on the other hand pose a host of difficulties, in particular as regards the definition of its scope and its holders and in its linkage to intellectual property law. The balances of this law, which conciliates the interests of the holder and those of the users through the various exceptions, could be threatened by the affirmation of a new data property law or by its replacement by a combination of contractual and technical audit, in the aftermath of the Court of Justice *Ryanair* judgement of 2015 or through the reactivation of the 96/9 Directive outside the restrictive scope of application in which the Court has established it since 2004.

2ND PART: LITERARY AND ARTISTIC PROPERTY CHALLENGES AS REGARDS THE MASS PROCESSING OF DIGITAL STREAMS

Infinitely large and infinitely small. By relating complex subject matter to their smallest unit of account, digitalizing permits processing to the infinitely small and infinitely large. As such, using this writing convention, operators can split a set, in such a way that it loses its original identity, but also jointly process an enormous volume of information, a "*data soup*[215]" likely to lead to a commoditization of the elements contained in the mass. Finally, these operations are performed as the result of the ability to reproduce at a very low cost.

How resilient is protection? Literary property law refers in principle to specific subject matter with certain specific and singular characteristics, which allows the owner to control the uses resulting from it within the limits of what is provided for by law. Traditionally, it gives its holders control over the public dissemination of protected subject matter, which also includes certain operations for preparing such dissemination, such as the reproduction in large numbers of such subject matter. The new possibility of reproducing very small units of this subject matter and/or aggregating these units into huge sets questions the resiliency of protection. What is the vocation of the holders to participate in the value created from these processes in which the singular subject matter tends to fade away? How can the mechanisms of the exclusive right relating to a particular subject matter be linked with the dilution of that subject matter in a flow, so that it constitutes only a secondary element, or with its reduction to an expression which no longer makes it possible to identify its original form?

In this realm where the singular and the unique tend to fade away, the question of the variable influence of literary and artistic property instruments on certain forms of content and data processing[216] arises as soon as they are likely to reproduce sets - aggregation or flow logic - or, on the contrary, fragments, segments of protected subject matter - extraction logic.

The challenges faced by rights holders due to the mass use or flow of protected subject matter are not unprecedented, but the major reconfiguration of digital content distribution channels requires new responses. These are not necessarily found within literary and artistic property law, but it is possible to extend their effects to this field (1.). This new situation also calls for a reconsideration of the instruments specific to literary and artistic property in order to better involve rights holders in these new volumetric and informational processing of protected works and subject matter (2.).

2. Necessary reconfiguration of relationships between creators and "users" in the big data era

Whilst the possibility of dissemination through decentralized protocols suggested a fragmentation and multiplication of content distributors, it was an inverse movement of centralization of large masses of content and concentration of players which prevailed (1.1.). The economic models of the latter are essentially divided in two according to whether they perform these acts of dissemination in the traditional circuit of authorization mechanisms or free themselves from them in favour of a welcoming legal regime, thus creating strong competitive disruptions (1.2.). The gradual emergence of transversal regulation of platforms (1.3.), the evolution of the regime of hosting providers, particularly in the context of the CDSM Directive (1.4.) as well as the deployment of consumer law in the face of the practices of certain

[215] As David Lefranc stated, during the hearings conducted by the mission.
[216] The term "processing" is deliberately used here, which is more familiar in personal data law than in intellectual property law, but which better reflects the protean nature of the operations performed with regard to digital data and content than the categories of exclusive right referring to the act of dissemination.

infomediaries (1.5.) testify to an overall movement that irrigates literary and artistic property law and builds the foundations for a new balance.

1.1. From belief in disintermediation to irresistible reintermediation

Internet first appeared to be a factor of disintermediation between the transmitters of cultural content and their consumers. In the late 1990s and early 2000s, the rise of Internet led to the belief that there was a movement of disintermediation between cultural content transmitters and their consumers, a movement hoped for by some and feared by others. Previously, anyone who wrote an article or book, composed a piece of music or shot a film could only hope to reach the public through one or more professional intermediaries, whether they were publishers, producers or distributors. The emergence of Internet and digital technologies called these functions into question, on the one hand because of the almost zero cost of reproducing on a digital medium, and on the other hand because of the possibility of universal dissemination given to everyone.

The creation of Napster in 1999, followed by the emergence of other peer-to-peer download services, gave substance to this prospect of decentralized dissemination. These services, when they concerned works whose exploitation had not been authorized by the owners, were a massive attack on the interests of those who wanted to control broadcasting within the legal framework of prior authorization. Nevertheless, some rights holders were able to call for the development of new "disintermediated" modes of dissemination, combined with fair remuneration. In the field of scientific publishing, the 2002 and 2003 Budapest, Bethesda and Berlin declarations in favour of free access to publications (see *above*) carried this logic, "green open access" allowing researchers to reach their public by simply submitting their article to an open archive. For music, the idea of a "global licence", resulting in the legalization of the non-market sharing of works between individuals associated with the establishment of a remuneration distributed among authors, was supported by some right-holder companies such as Adami or Spedidam, in particular during the debates on the law on copyright and related rights in the information society in 2005-2006.

However, the legal framework did not evolve in this respect, as the legislator considered that the mechanism of the exclusive right should not be called into question by mechanisms likely, on the one hand, to cap the total remuneration paid and, on the other hand, to disregard the respective value of the various creations by adopting distribution systems which are indifferent to the success of the works. Many rights holders were hostile to it, preferring to retain bargaining power with the various dissemination services whose bloom was announced.

Far from initial expectations, access to cultural content is now dominated by a small number of intermediaries, often referred to as platforms. Contrary to these initial forecasts, the following decade saw the emergence of new intermediaries which reached an unprecedented level of concentration. In France, in 2017, 87% of paid streaming revenues were concentrated on four audio platforms: *Deezer*, *Spotify*, *Napster* and *Apple*[217], whilst *YouTube* and *DailyMotion* concentrated most of the free streaming streams. Worldwide, 125 million households subscribe to Netflix and watch it for an average of two hours a day, consuming one fifth of the Internet bandwidth for this service alone[218]. The concentration of scientific publishing on four major platforms is described above.

According to the definition adopted by a growing number of positive law texts, **platforms can be characterized as players offering online services for classifying or referencing**

[217] *L'économie de la production musicale* (The music production economy), 2017 report by the SNEP (French National Phonographic Industry Union).
[218] "The tech giant everyone is watching", *The Economist*, 30 June 2018.

content, goods or services offered by third parties or for establishing contacts with a view to selling a good, providing a service or sharing content.

The intermediation role of platforms is also characterized by the fact that they are the support or mode of access to activities implemented by third parties to the platform operator: sellers for a marketplace, developers for an application store or video game console, website publishers for search engines, etc. A platform is all the more attractive because a large number of companies offer their services there. To this end, platforms often provide access to their digital resources (data, software resources, computing power) to third parties through "application programming interfaces" (APIs).

Concentration dynamics inherent in the digital economy. Three factors can be highlighted to explain the trend towards reintermediation by distributors and their concentration:

- First of all, **the profusion of content accessible online creates the need for classification and referencing services** which enable Internet users to identify content and find what suits their tastes. From search engines to playlists offered by streaming sites and recommendation algorithms, the success of the above-mentioned players often depends on this type of service;

- **These services are all the more efficient when they are personalized, which means that personal data is exploited through algorithms**. Knowledge of users' tastes is a determining factor in new forms of economic competition, particularly through the use of correlations between their preferences (so-called "collaborative filtering" algorithms[219]). This grants a central role to the players capable of collecting this data and designing the algorithms;

- Concentration is increased by the interplay of network effects. In economics we talk about network effect whenever user satisfaction increases with the number of users of the service. **Network effects are generated here by the advantage derived from the depth of the catalogues (the greater the amount of content to which the platform gives access, the more attractive the service),** the two-sided nature of the markets (a platform has two types of users, cultural content senders and their users; the more there are users on one side, the more satisfied users on the other side will be) and the role played by the collection of personal data (the more users a platform has, the larger the personal database it has and the more efficient the algorithms it designs).

The emergence of platforms has not made traditional intermediaries disappear. Some of these platforms are themselves involved in the production and editing of content, while traditional intermediaries are developing services similar to those of the platforms. However, it is undeniable that platforms have destabilized the economy of cultural content distribution, particularly by occupying the last link in the value chain, that of connecting with the user.

3.2. Players providing access to "content" actually lean on different business and legal models

Different categories of players in digital distribution. Whilst the rise of platforms is the result of the common explanatory factors which have just been outlined, they are based on a plurality of economic and legal models. Two main categories of platforms providing access to digital content can be distinguished: platforms which hold intellectual property rights by virtue

[219] Users who have purchased an item will be recommended other items which are appreciated by users who have purchased the same item as them.

of a direct or indirect transfer by authors or other rights holders and those which perform their intermediation function without being rights holders.

First category, the platforms holding rights. In the first category, some platforms have the status of publishers as regards both intellectual property law and press law. As regards intellectual property law, the publisher is the person to whom the right to make copies of the work has been transferred by the author, with the onus on the former to ensure its publication and dissemination[220]. As regards press law, the publisher is the one who assumes primary responsibility for publication, both under the Act of 29 July 1881 on freedom of the press and under the Act of 21 June 2004 on building confidence in the digital economy. Scientific publishing platforms are publishers: they ensure and assume the publication of researchers' articles in their journals. These are "traditional" players (Springer was founded in 1842, Elsevier in 1880) which have been able to develop their profession to enter a logic of platforms, by positioning themselves as intermediaries between learned societies and readers[221] and by developing digital services useful to researchers (advanced research functions, watch, laboratory journals, etc.).

According to a similar scheme, other players are positioning themselves as buyers of rights. Legitimate streaming services operate through agreements with collective management bodies, for both music and audiovisual services. Unlike publishing platforms, these services have only marginal direct relationships with authors or holders of related rights: if they use intellectual property rights, it is by virtue of an indirect relationship, resulting from the authorization for rights management granted by the author or holder of related rights to the collective management organization, followed by an agreement on exploitation between this organization on the repository it manages and the company operating the streaming service[222]. **However, both models have in common that they are based on the race for size (it is decisive in competition to offer the greatest possible "catalogue depth",** whether it consists of scientific journals, films or pieces of music) and that they are positioned on the last link in the value chain, the one which ensures the direct relationship with the end user and, consequently, the collection of the user's data.

In a logic of vertical integration, some of these companies also develop production activities, as defined by the Intellectual Property Code[223]. *Netflix* announced film or series production spending of 12 to 13 billion dollars for 2018, much higher than the largest "traditional" content producers such as major Hollywood studios or major television channels[224]. Television channels are also expanding in the video-on-demand broadcasting markets, particularly in streaming.

The second category, the "pure" intermediaries. The second category of platforms covers services which play a pure intermediation role, without their operator having any intellectual property rights itself. These include search engines (which are often the first service used by the Internet user when searching for cultural content) and sites for sharing user-generated content. Social media can also play such a role.

A dissemination of untitled works in intellectual property law, which raises questions. Giving access to protected works or other content without permission is the subject of much controversy. With regard to search engines, the CJEU held that referring by hypertext link to a

[220] Article L. 132-1 of the Intellectual Property Code.
[221] Learned societies enter into so-called "leasing" agreements with these platforms, which allow them to promote their journals in exchange for royalty payments. Learned societies enter into such agreements because the royalties are higher than the income they received from managing their own publications.
[222] Or by virtue of the extension of the legal licence to this type of dissemination, in the case of phonogram producers and performers' related rights.
[223] Articles L. 213-1 and L. 215-1 of this Code.
[224] *The Economist*, *ibid*.

work already accessible without restriction on Internet was not an act of communication to the public[225]. This jurisprudence, which protects the freedom to create links between websites, which is at the heart of the architecture of the web and the economic model of search engines, may have been criticized by a previous CSPLA report because of its distance from the texts which the CJEU was mandated to interpret[226]. Since then, the CJEU has clarified its approach, confirming the non-application of the exclusive right to the link when the link is made by a person acting on a non-profit basis, whilst emphasizing the liability of the linker acting on a profit basis when pointing to infringing content[227].

As regards content sharing sites, their activity has been sheltered behind the system of liability for technical intermediaries provided for by the Directive of 8 June 2000 on electronic commerce, its guiding idea is that only the person who has put work or other protected content online is liable, the sharing site which gives access to it is only required to remove infringing content when its existence is notified to it. This limited liability regime is currently under debate (cf. *below* II.3.4).

While their model did not *a priori* give them the intention to enter into agreements with rights holders, major platforms in the second category have concluded agreements with collective management bodies in recent years, the main purpose of which is to implement automatic content recognition systems. On the basis of the contents or their "fingerprints" communicated to it by the rights holders, the platform automatically checks all the contents posted online. When identical content is identified, the rightful claimant has the choice between obtaining its withdrawal, statistics on its use or a share of the advertising revenue generated by its consultation (an option often referred to as "monetization"). These tools, now implemented on a voluntary basis, have become very important in practice: according to *Google*, 98% of copyright disputes on the *YouTube* platform are processed through its Content ID automatic recognition tool, compared to only 2% through the legally mandatory "notification and withdrawal" procedure[228].

The coexistence of two legal models on the same market. The fact that both categories of platforms enter into agreements with rights holders should not cause misuse as to the differences between these agreements as regards legal and practical terms. For the first category, these are transfer agreements governed by the Intellectual Property Code, which give rise to the remuneration of copyright or related rights; for the second, agreements giving rise to the sharing of data or advertising revenues, which may give the impression of being transactions, the rightful claimants waiving the right to initiate the withdrawal action which is legally open to them. The revenues generated for rights holders by the second category are much lower than those of the first category, in absolute terms and in proportion to use: whilst *YouTube* is now one of the leading means of viewing audiovisual content, it is far behind the major paid streaming sites in terms of the proportion of revenues generated. Likewise, whilst some news aggregators conclude agreements with publishers with a monetary counterpart, search engines or social media play a partly similar role without rights and without direct monetary transfers[229]. As such, there are platforms with distinct economic and legal models on the same market, that of the dissemination of digital content, with unequal participation of the rightful claimants in the revenues generated.

[225] Cf. in particular CJEU, 8 September 2016, *GS Media BV v/ Sanoma Media Netherlands BV e.a.*, case C-160/15.
[226] CSPLA, P. Sirinelli, J.-A. Benazeraf and A. Bensamoun, *Mission on the right to communicate to the public*, January 2017.
[227] CJEU, 14 June 2017 *Stichting Brein versus Ziggo BV and XS4ALL Internet BV*, case C-610/15.
[228] CSPLA, O. Japiot and L. Durand-Viel, *Copyright protection on digital platforms: existing tools*, *best practices and their limits*, December 2017.
[229] Even if it can be argued that they bring traffic and therefore indirectly revenues.

3.3. Gradual phasing-in of platforms in positive law

A rapid entry into many positive law texts since 2015. Like "digital content", "platforms" were a reality before entering into positive law. However, based on the work of the French National Digital Council[230] and the Council of State[231], they quickly found their place between 2015 and 2016 in the fields of consumer law, tax law and labour law. Although the objectives of these legislations are varied, there is some consistency in the definitions.

Consumer law is the first to welcome the notion of a platform, with a view to imposing a principle of loyalty on these players. According to the definition proposed by the Council Of State in its 2014 annual study, loyalty consists in "*providing the classification or referencing service in good faith, without seeking to alter or divert it for purposes unrelated to the interests of users*". The Act of 6 August 2015 for growth, activity and equal economic opportunities introduces a first definition of the platforms and the obligations to which they are subject, supplemented by the Act of 7 October 2016 for a Digital Republic. The provisions currently contained in Article L. 111-7 of the French Consumer Code define platforms as "*any natural or legal person offering, on a professional basis, whether remunerated or not, an online communication service to the public based on: 1° The classification or referencing, by means of computer algorithms, of content, goods or services offered or put online by third parties; 2° Or the linking of several parties with a view to the sale of a good, the provision of a service or the exchange or sharing of content, a good or a service*". The Consumer Code imposes transparency obligations on them, in particular on the criteria for classification, referencing and dereferencing, and the definition of best practices in this area.

Consistent definitions in French law. Tax law and labour law are based on similar definitions. The 2016 Finance Act requires companies which "*connect persons remotely, by electronic means, for the purpose of selling a good, providing a service or exchanging or sharing a good or service*" to provide their users with clear information on their tax and social obligations[232]. Here, we find the second category defined by the Consumer Code. The Act of 8 August 2016 on work, the modernization of social dialogue and the security of career paths applies to platforms as defined by the General Tax Code, when they define the price and characteristics of the service offered by self-employed people through them[233], and imposes obligations on them as part of their "social responsibility" (respect for freedom of association and the right to strike, coverage of vocational training and occupational accidents)[234].

The establishment of the notion of platforms and their obligation of loyalty at European Union level. In European Union law, the concept of platforms appeared in a proposal for a regulation promoting fairness and transparency for companies using online intermediation services, adopted by the European Commission on 26 April 2018[235]. Unlike French law, which deals with relations between platforms and consumers (platform-to-consumer or "P2C"), the proposed Regulation deals with relations between platforms, known as "*intermediation services*", and user companies (platform-to-business or "P2B"). This may be explained by the fact that the Directive of 8 June 2000 on Electronic Commerce permits Member States to impose obligations justified by consumer protection on companies providing information

[230] CNNum, *Neutralité des plateformes. Réunir les conditions d'un environnement numérique soutenable* (National Digital Council, Report on platform neutrality "Creating the conditions for an open and sustainable digital environment), May 2014.
[231] Conseil d'Etat, *Le numérique et les droits fondamentaux. Etude annuelle 2014* (French Council of State, Digital technology and fundamental rights, Annual study 2014), September 2014.
[232] Article 242 *bis* of the French General Tax Code, contained in a sub-section entitled "*Information of their users by electronic networking platforms*".
[233] These include platforms offering passenger transport services (Uber, Private Driver, etc.) and meal delivery services (Deliveroo, Foodora, etc.).
[234] Articles L. 7341-1 to L. 7342-6 of the French Labour Code.
[235] 2018/0112 (COD).

society services established in other Member States, whilst it leaves them no room for manoeuvre as regards relations between companies.

The definition of intermediation services given by the draft directive is very close to the second category defined by Article L. 111-7 of the French Consumer Code; the regulation also covers search engines, which fall within the first category defined by that Article. The obligations imposed by the draft regulation relate in particular to the transparency of the conditions for classification and dereferencing: the conditions of use must be clear and define precisely the grounds for suspension and termination; reasonable notice must be given before any change is made to these conditions; suspension and termination decisions must be justified; the main parameters determining classification must be accessible. These rules are as such in line with the principle of loyalty provided for in French law, even if the regulation does not use this term.

The field of literary and artistic property is concerned by the transversal provisions of the Consumer Code and would be concerned by those of the regulation if it were adopted. Content sharing platforms, search engines and marketplaces must apply transparency rules on the criteria for classifying and dereferencing the content they use[236]. Cultural businesses could benefit from the rebalancing of their relations with major platforms brought about by the regulation.

3.4. A liability exemption regime under the guise of being defined host, still in progress

All these provisions relating to platforms have not appeared in positive law for the sole doctrinal pleasure of defining them. The history of platform law is that of the changeover from a regime of limited liability, long considered as impregnable (on the scale of the history of Internet), to the rise of a multitude of regulations gradually defining the contours of platform liability, distinct from that of the publisher but nevertheless substantial.

The liability exemption regime of the electronic commerce Directive. The Directive of 8 June 2000 on electronic commerce defines the category of "intermediary service providers", which includes the simple transport of information, temporary storage known as caching and hosting. All these service providers benefit from a limited liability regime. In particular, with regard to hosting, defined as "*where an information society service is provided that consists of the storage of information provided by a recipient of the service*", Article 14 exempts them from liability for information stored at the request of a recipient, provided that they do not have knowledge of unlawful activity or information and that they act promptly to remove the information or make it inaccessible from the moment they acquire such knowledge. Article 15 also prohibits Member States from imposing general supervision obligations on all technical service providers.

Disputes over the qualification of "web 2.0" services, most of which confirm their quality as hosts. At the time, the authors of the Directive were only aware of the activity of hosting in the strict sense, which consists in offering storage space for files so that they could be consulted on Internet. The question of whether search engines and "web 2.0" services (social media, content sharing sites, marketplaces) could avail themselves of the qualification of host has since then animated the contentious debate. The CJEU set the framework for this by two Grand Chamber judgements[237] relating to Google's sponsored search (Adwords service) and marketplaces such as *eBay*. With regard to sponsored research, while Advocate General Poiares Maduro considered that *Google* could not be regarded as having a "*purely technical,*

[236] As these provisions took effect on 1st January 2018, it is still a little early to judge their proper application.
[237] CJEU, Grand Chamber, 23 March 2010, *Google France SARL and Google Inc. v/ Louis Vuitton Malletier*, case C-236/08; CJEU, Grand Chamber, 12 July 2011, *L'Oréal SA and others v/ eBay International AG and others*, case C-324/09.

automatic and passive"[238] role since it promoted results based on commercial relations with advertisers, the CJEU ruled that "*the only circumstance that the SEO service is not free, that Google sets the remuneration terms (...) cannot have the effect of depriving Google of the liability exemptions provided for in Directive 2000/31*" and that "*on the other hand (...) the role played by Google in drafting the commercial message accompanying the promotional link or in establishing or selecting keywords*" (§ 116 and 118) was relevant.

With regard to marketplaces, it held that where the operator "*has provided assistance, in particular by optimizing the presentation of the offers for sale in question or by promoting these offers, it should be considered that it has not occupied a neutral position between the seller customer concerned and the potential buyers, but has played an active role in giving it knowledge or control of the data relating to these offers*", depriving it of the benefit of the exemption from liability (§ 116). In both judgements, it referred to the national courts to apply these rules on a case-by-case basis.

This led the French judges to confirm the hosting qualification for the *Adwords*[239] service and for the content sharing sites *YouTube*[240] and *Dailymotion*[241]. Only the marketplaces suffered a different fate, as the Court of Cassation confirmed that the *eBay* marketplace could not avail of it, using the criterion given by the CJEU[242]. As summarized in the CSPLA's mission on tools for recognizing works on online platforms, "*when platforms emerged which allow users to put content online themselves, by making it accessible to the general public or user groups, the jurisprudence adopted a broad definition of the concept of storage or hosting*[243]".

Towards mitigating in the liability exemption regime. As such, it was not by reducing the scope of the hosting regime that platform accountability took place, but by making adjustments to this scope. Faced with the wide dissemination on platforms of infringing content as well as content which is hateful, incites terrorism or child pornography, or tends to influence the results of an election, national and European public authorities were not able to settle for the "notification and withdrawal" system which follows on from the Directive of 8 June 2000. This allows only a punctual and after-the-fact response, whereas the dissemination of this content can be "viral" and cause significant damage.

The European Commission adopted a recommendation on 1st March 2018 on measures to effectively tackle illegal content online[244]. The first part is devoted to the processing of notifications and as such remains in line with the Directive of 8 June 2000, whilst providing practical details. More innovatively, the Commission also recommends that hosting service providers implement "*proactive measures*", including the use of automated processes to detect illegal content. The Commission announced that if the main platforms did not voluntarily take satisfactory measures, it would consider proposals of a binding nature. This perspective was again raised, with the Financial Times echoing a preliminary draft text providing for financial penalties of up to 4% of global turnover[245].

As the recommendation recalls, such binding measures are already being discussed under the audiovisual media services and copyright Directives in the single digital market. With regard to the latter Directive, the Commission's proposal provided that content sharing

[238] According to recital 42 of the Directive.
[239] CA Paris, 9 April 2014, *Google France Inc. and Ireland v/ Voyageurs du monde and Terres d'aventures.*
[240] Paris High Court, 29 May 2012, *SA TFI and others v/ Youtube LLC*, no. 10/11205; Paris High Court, 29 January 2015, *SARL Kare Productions and SARL Delante Films v/ YouTube LLC and SARL Google France*, No. 13/09290, about the broadcasting on YouTube of the film "Le nom des gens" (The Names of Love).
[241] First Civ. Ct., 17 February 2011, No. 09-67896.
[242] Com., 3 May 2012, No. 11-10.508.
[243] O. Japiot and L. Durand-Viel, *Copyright protection on digital platforms: existing tools, best practices and their limits*, report presented to the CSPLA, December 2017.
[244] C (2018) 1177 final.
[245] *Financial Times*, "Brussels to act against tech groups over terror content", 19 August 2018.

platforms should take measures, "*such as the use of effective content recognition techniques*", in cooperation with rights holders, to prevent making protected works and other protected subject matter available. It did not specify the link with the Directive of 8 June 2000, whereas the obligation to take such measures was likely to contradict the prohibition of general surveillance obligations laid down in Article 15 of that text, nor did it take a position on the classification of acts of communication to the public in the event of making a work available on the platform.

The direct application of the exclusive right to the platform. Both the negotiating mandate adopted by the Council on 25 May and the text adopted by the European Parliament on 12 September 2018 break with this ambiguity. **It is expressly provided that online content sharing platforms shall perform acts of communication to the public**. Recital 37*a* of the European Parliament's text explains the underlying reasoning well: "*The definition of an online content sharing service provider under this Directive shall cover information society service providers one of the main purposes of which is to store and give access to the public or to stream significant amounts of copyright protected content uploaded / made available by its users, and that optimise content, and promote for profit making purposes, including amongst others displaying, tagging, curating, sequencing, the uploaded works or other subject-matter, irrespective of the means used therefor, and therefore act in an active way. As a consequence, they cannot benefit from the liability exemption provided for in Article 14 of Directive 2000/31/EC.*". The platform is no longer seen as a mere intermediary between individuals who alone are responsible for putting it online, but as the organizer and beneficiary of the service.

As a result, platforms must conclude licencing agreements with rights holders. If they do not do so because the owners do not wish to do so, they are at least obliged to cooperate with them and to take effective and proportionate measures to prevent protected works and subject matter from being placed online without their authorization. Without explicitly providing for the adoption of automatic content recognition systems, the texts under discussion strongly invite this. Exceptions are provided for non-profit platforms and SMEs. In addition, both texts stress that platforms must ensure that they do not prevent the provision of copyright-compliant content, particularly in the context of exceptions.

Article 13 of the CDSM Directive may not immediately lead to significant practical changes, as the cooperation it imposes between rights holders and platforms has already been set up on a voluntary basis by the principal between them. **However, in terms of principles, this is a considerable change, breaking with the vision of platforms as mere intermediaries which had prevailed for almost twenty years.**

Political pressure which continues to support greater platform responsibility. Beyond these texts currently under discussion, the next legislature could be marked by more important developments concerning the regulation of platforms. In an article published in the newspaper Les Echos, European Commissioner for Digital Economy and Society Mariya Gabriel and French Secretary of State for Digital Affairs Mounir Mahjoubi called for Europe to "*provide itself with greater resources to anticipate, think and intervene in the sphere of platforms and access their activities and operations in real time*" and "*explore the prospect of supervision based on existing regulatory frameworks for critical infrastructures or systemically important financial institutions*"[246]. The major platforms themselves seem more inclined to acknowledge their responsibility, aware that this is a question of the social and political acceptability of their role. At his hearing before the US Congress following the Cambridge Analytica case, Facebook CEO Marc Zuckerberg said he "*agrees that we are responsible for the content*".

[246] M. Gabriel and M. Mahjoubi, "Pour une régulation européenne des plateformes numériques" (For a European regulation on digital platforms), *Les Echos*, 25 April 2018.

In France, a recent report submitted to the Prime Minister on the fight against racism and anti-Semitism on Internet[247] recommends strengthening the obligations of hosters, by imposing a maximum period of 24 hours for the removal of clearly illegal content, and creating a new status of "*content accelerator*" with enhanced obligations for the most important social media and search engines. It invites to draw inspiration from the German Act on social media which came into effect on 1st January 2018, known as *NetzDG*[248], which has considerably strengthened the financial sanctions imposed on social media which do not comply with their obligations to remove illegal content. The report calls for changes in European Union law, without making it a prerequisite for amending French law. It is true that the fight against incitement to hatred is one of the grounds on which States, under the "electronic commerce" Directive, can impose rules governing the exercise of the activity on service providers established in other Member States[249]. This contribution is part of a more general movement to empower platforms in which literary and artistic property rights are an integral part.

3.5. Rebalancing asymmetries in social media as regards user generated content (UGC)

The example of social media. As the destiny of the principle of platform loyalty attests, consumer law is another lever which can be used to reduce the potential imbalances linked to the strategic situation of platforms. Social media feeds on content generated or relayed by its users. It is even an essential element of its definition insofar as these online platforms, sources of exchange and dialogue, "*allow personalities to create networks of users with common interests*" by offering their users the possibility to build a profile in order to put online and exchange different content - photos, columns or comments, music, videos or links to other sites - through interaction tools[250]. It is this content and its "data entry" which guarantees the existence of the media based on these exchanges, by exercising a strong power of attraction.

Three elements appear to emerge from the use of content covered by an intellectual property right in the context of social media. First of all, a renewal of the role of the target audience and now the source of the protected content, which is then called "user"[251] in order to underline its active approach both with regard to the use it makes of the technical tool - the social media - and with regard to its relationship, which could be described as "conversational", with the content which this tool allows to disseminate. Secondly, the interactivity which characterizes social media, emblematic tools of Web 2.0, and more generally nowadays of this new data-driven economy based on the enhancement of exchanges between users of social media. Finally, the evolution of the very status of the user whose uses, tinged with a friendly conviviality, question their apparently non-commercial purpose, whilst the social media model becomes more professional as a result of its growing success.

ToU and intellectual property licence: a necessary but unbalanced stipulation. In this context, the general terms and conditions of use (ToU) of the main social media service

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[247] K. Amellal, L. Avia and G. Taïeb, *Renforcer la lutte contre le racisme et l'antisémitisme sur internet* (Strengthening the fight against racism and anti-Semitism on Internet), September 2018.

[248] "*Gesetz zur Verbesserung der Rechtsdurchsetzung in sozialen Netzwerken*", literally "*Act to improve law enforcement in social media*".

[249] Article 3.4.

[250] Article 29 Data Protection Working Party, Opinion 5/2009 on online social media, 12 June 2009, 01189/09/FR, p.4-5 - See also L. Pailler, *Les réseaux sociaux sur internet et le droit au respect de la vie privée* (Social media on Internet and the right to privacy), Larcier 2012, p. 17 as well as V. Nior, Le réseau social : essai d'identification et de qualification (Social media: identification and qualification test), in *Droit et réseaux sociaux* (Law and social media), dir. V. Nior, Lextenso – Lejep, 2015, p. 7, spec. p. 14&f.

[251] In this respect, P. Léger, *La recherche d'un statut de l'œuvre transformatrice. Contribution à l'étude de l'œuvre composite en droit d'auteur* (The search for a status for transformative work. Contribution to the study of composite work in copyright), LGDJ 2018, No.3, see Report on transformative creations, CSPLA, 2014, V.-L. Benabou and F. Langrognet.

providers stipulate that the user grants the service provider a non-exclusive, worldwide, free, transferable and sub-licensable licence to use the site in order to ensure the operation of the site, and thus to make it lawful to put the content online, modify it for digital adaptation or, in particular, to share it with other media network members. These are all operations which the user-author must authorize under the reproduction and representation rights of which they are the owner as soon as the content is protected by Book I of the Intellectual Property Code. Beyond this, the service provider may also express its willingness to be granted a use right for purposes other than the strict technical functioning of the media, in particular in order to organize the enhancement of such content, in particular by means of sub-licences granted to its commercial partners. As regards the clauses included in the intellectual property licence, they sometimes seem to organize strong asymmetry between the rights and obligations of the service provider and those of the user-creator of content, sometimes to the extent that the effectiveness of the latter's exclusive right is called into question.

Applicability of consumer law. As a preliminary point, it should be stressed that there is no longer any doubt as to the applicability of this other set of rules *in favorem*. First of all, this application works insofar as the author of the content posted on the social media is acknowledged as a consumer if they make a strictly personal use[252] of the service or a mixed use in which professional use remains marginal[253]; it does not matter in this respect that the user participates in the content[254] or even has expertise, particularly with regard to the functioning of the service[255]. The service provider may also be qualified as a professional when presenting the service provided as "free", provided that it benefits from its activity by collecting data deposited free of charge by the user when accessing the platform and marketing them for a fee[256].

Interest in calling on consumer law: competent jurisdiction and applicable law. The application of consumer law can cover different purposes. First of all, it is necessary to exclude the application of the clauses stipulated in the ToU of social media service providers if they retain the jurisdiction of a foreign jurisdiction or the application of a foreign law[257]. As such, the Paris Court of Appeal was able to deduce from Regulation 44/2001 of 22 December 2000, known as "Brussels 1", the jurisdiction of the court of the consumer's domicile and hold that the clause is deemed unwritten in Articles L. 132-1 and R. 132-2 of the Consumer Code, because of the significant imbalance it generates between the rights and obligations of the parties and the serious obstacle it creates for a French user to take legal action[258]. Since the entry into application of Regulation No 1215/2012 of 12 December 2012, known as "Brussels

[252] CA Paris 12 Feb. 2016, No. 15/08624: *D.* 2016. 1045, obs. H. Gaudemet-Tallon et F. Jault-Seseke; *Electr. Comm. com.* 2016, comm. 33, obs. G. Loiseau and study 12, note F. Mailhé; *RTD civ.* 2016. 310, obs. L. Usunier; *Dalloz IP/IT* 2016, p. 214, obs. S. André and C. Lallemand.

[253] CJEU 25 January 2018, case C-498/16, *Schrems v/ Facebook*, pt. 38: *Electr. Comm. com*. 2018, comm. 19, obs. G. Loiseau; *Dalloz IP_IT* 2018. 371, note M. Combet; *AJ contract* 2018.124, note see Pironon; *Rev. Procedures* 2018, comm. 80, obs. C. Nourissat; *D*. 2018. 966, S. Clavel and F. Jault-Seseke and 1033, B. Fauvarque-Cosson and W. Maxwell as well as F. Jault Seseke and C. Zolynski, "Schrems II : Accès au juge en matière de protection des données, une solution en demi-teinte potentiellement remise en cause par le RGPD" (Schrems II: Access to the judge in data protection matters, a half-hearted solution potentially challenged by the GDPR), *D*. 2018, 2000.

[254] Paris High Court, 7 August 2018: *Electr. Comm. com.* 2018, comm. 74 obs G. Loiseau and already Commission des clauses abusives (Unfair Terms Commission), Recomm. No. 2014-02, 7 November 2014: *Electr. Comm. com.* 2015, comm. 4, G. Loiseau and study 3, S. Piédelièvre; *JCP E* 2015, 1136, A.-L. Falkman; *Intell. Propr.* 2015, No. 54, p. 59, J.-M. Bruguière; *RDC* 2015, p. 496, comm. A. Debet.

[255] CJEU 25 January 2018, *Schrems v/ Facebook*, case C-498/16, afore., pt. 39.

[256] This is all the more so since the qualification of free contract within the meaning of Article 1107 of the French Civil Code is irrelevant when determining the application of consumer law, Paris High Court, 7 August 2018, afore. and already Paris 12 Feb. 2016, afore.

[257] CA Paris 12 Feb. 2016, afore. Adde, CJEU 25 January 2018, *Schrems v/ Facebook*, case C-498/16, afore.

[258] CA Paris 12 Feb. 2016, afore. The Brussels I Regulation required the defendant's domicile to be retained in the EU, a condition satisfied in the case of Facebook Inc. in France through its French establishment.

1a", it follows from Article 18[259] that, if the French court is seised, the protective jurisdiction rules apply to any consumer domiciled in the European Union, whatever the domicile of the defendant professional.

As regards the applicable law, it is necessary to distinguish whether or not the ToU stipulate a choice of law clause. In the absence of such a clause, Article 6 of the so-called "Rome I" Regulation provides for the application of the law of the State in which the consumer has his habitual residence on condition that the professional "*carries on his professional activity in the country in which the consumer has his habitual residence*" or "*by any means, directs that activity to that country or to several countries*". Consequently, French law applies as soon as there is a body of evidence that the professional is directing his activities to France, the language of the accessible site considered as evidence[260]. In the presence of such a clause, Article 6.2 of the Rome I Regulation states that "*this choice may not, however, result in depriving the consumer of the protection afforded to him by the provisions from which he cannot be derogated by agreement under the law which would have been applicable*", French law therefore finds itself applicable, unless the clause refers to a law which is more protective of the consumer's interests. In this respect, the Court of Justice has clarified that the non-negotiated choice of law clause is unfair since it gives the consumer the impression that only the law designated by the clause applies to the contract, whereas they can benefit from the mandatory rules of the law of their habitual residence[261].

Interest in calling on consumer law for the intellectual property licence: ToU and clause(s) deemed unwritten. In the event that French law applies to the relationship in question, various terms may be deemed unwritten if they fall within the scope of the definition of unfair terms within the meaning of Article L. 212-2 of the Consumer Code, namely if they "*have the purpose or effect of creating, to the detriment of the consumer, a significant imbalance between the rights and obligations of the parties to the contract*". Some of them are relevant to the exercise of intellectual property rights, as evidenced by a recent judgement handed down by the Paris Regional Court concerning the Twitter ToU, which incorporates the recommendations made to this effect by the Commission des clauses abusives (Unfair Terms Commission)[262]. This is the case for the clause relating to the intellectual property licence if it is drafted in violation of the provisions of Articles L. 131-1, L. 131-3 and L. 121-1 of the IPC.

Scope of the rights transferred. With regard to the prerogatives they cover, intellectual property licences are in fact most often widely formulated, allowing significant use of content at the risk of unbalancing the rights and obligations of the user-contributor with those of the social media service provider, to the benefit of the latter. This is in contradiction with the formal requirement imposed by Article L. 131-3 of the IPC[263], especially since these contracts are subject to a principle of "retained right" according to which everything that has not been expressly transferred is deemed to be retained by the author[264] as well as a strict interpretation *in favorem* requiring the scope of the transfer to be limited to what has been expressly agreed by the user-creator. However, these legal conditions, which apply to any transfer, seem to apply by analogy to the intellectual property "licence" - a qualification used by most social

[259]Regulation No. 1215/2012, Brussels I bis, art. 18: "*A consumer may bring proceedings against the other party to a contract either in the courts of the Member State in which that party is domiciled or, regardless of the domicile of the other party, in the courts for the place where the consumer is domiciled*" (we emphasize).

[260] On the definition of the targeted activity, see CJEU, 7 Dec. 2010, case C-585/08, *Peter Pammer* and C-144/09, *Hôtel Alpenhof.*

[261] CJEU 28 July 2016, C-196/15, *VKI/Amazon*, *D.* 2016. 2315, note F. Jault-Seseke; *Dalloz IP_IT* 2017. 50, obs. E. Treppoz; *Rev. crit. DIP* 2017. (112, note S. Corneloup – Also in this respect, the recommendation of the Commission des clauses abusives (Unfair Terms Commission) afore., pt. 46.

[262] Paris High Court, 7 August 2018, afore. and Commission des clauses abusives (Unfair Terms Commission), Recomm. No. 2014-02, 7 November 2014, afore.

[263] In this respect, see la recommandation des clauses abusives (recommendation of unfair terms) 14/2 afore., No. 24 and Paris High Court 7 August 2018, afore.

[264] P.-Y. Gautier, *Propriété littéraire et artistique* (Literary and artistic property), PUF, 10th ed. 2017, No. 466.

media to authorize the author to make use rights available to the social media service provider[265], the terms "transfer" or "concession" are only very rarely used.

Licence duration. Such asymmetry may still result from the duration mentioned in this contractual document. The period of use granted is most often defined by reference to the legal duration of content protection[266], which may seem questionable in view of the primary objective of the licence - to ensure the proper functioning of the service. It would therefore be preferable to link the duration of use to the duration of the operation of the service user's account or the online posting of content if it were to be deleted once it is accepted that the licence finds its cause in the operation of the social media service. Uses of content not controlled by the service provider beyond this contractually defined period should be allowed where they are justified by technical considerations and strictly limited in time; in particular, back-up copies which persist for a certain period of time or content reproduced by other user accounts[267] could be covered, thereby safeguarding the rights of third parties[268].

Prohibition of the global transfer of future works. Moreover, Article L. 131-1 of the IPC provides that "*the global transfer of future works is null and void*", subject to the exceptions provided for in this respect, even if some mitigation is permitted in practice. As a result, the clause on the intellectual property rights licence, whenever it is too broadly formulated - in particular if it does not specify the rights granted and the use of the authorized content as well as the works concerned - should be considered unlawful in the light of this provision. The same applies to the clause making the concession apply to all content posted online, present and future, in that it appears to contravene the prohibition on the global transfer of future work "*unless the user accepts the general conditions of use each time they post new content online*"[269]. Such terms could be considered unfair if maintained in the contract.

Infringement of moral rights. Finally, it can be seen that many licences intend to call into question the exercise of the author's moral rights, in particular when they grant the service provider complete freedom to adapt the content in order to ensure its use. This means avoiding the principle of inalienability of moral rights laid down in Article L. 121-1 of the IPC, according to which the author cannot, however, definitively renounce action in the event of a modification of their content which would, for example, infringe the right to respect for the integrity of their work[270]. Such clauses will not be enforceable against the user-creator to preserve the effectiveness of their moral rights. Notwithstanding, occasional and temporary waivers could be allowed, provided that they remain strictly limited in scope and justified by the technical functioning of the social media service.

Contractual formalism - combination of the intellectual property code and the consumer code.. This asymmetry, which is tackled with regard to the content of intellectual property licences, can also be corrected with regard to their form. For most social media, in fact, the intellectual property licence is included among the service's ToU, this "*contractual document which governs the terms of use of a service between the supplier and the user*"[271] consisting

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[265] On the definition of the licence, see N. Blanc, *Les contrats du droit d'auteur à l'épreuve de la distinction des contrats nommés et innommés* (Copyright contracts standing up to the distinction between named and unnamed contracts, Dalloz, 2010, No. 304.

[266] On this point, see G. Vercken again, Clause de durée (Duration clause), *Intell. Propr.* 2011/41, p. 466, spec. p. 467.

[267] In this respect, G. Verken, op. cit., p. 468.

[268] Including the provisions of the General Data Protection Regulation establishing a right to data portability, subject to the protection of the rights of third parties (Regulation 2016/679, recit. 68).

[269] E. Derieux and A. Granchet, *Réseaux sociaux en ligne,* (Online social media), Lamy, coll. Axe Droit, 2013, No. 460.

[270] In this respect, E. Derieux and A. Granchet, op. cit., No. 461 – Adde, Recommandation des clauses abusives (Recommendation of unfair terms) 14/2 afore., n°25.

[271] J.-M. Bruguière, Les conditions générale d'utilisation sur l'Internet. Nouvelles règlementations de droit privé ? (General terms and conditions of use for Internet. New private law regulations?) in *L'entreprise à l'épreuve du droit*

of "*abstract clauses, applicable to all individual contracts subsequently concluded, drafted in advance and imposed by a contractor on their partner*"[272]. However, this form of expression of consent and definition of the prerogatives granted by the user to the service provider on the basis of a membership contract could call into question the effectiveness of the intellectual property right because of the power of the giant Internet co-contracting party. It is therefore open to question whether the consent of the author-user of the social media can be validly expressed by such a vector. It should first of all be recalled that the mere posting of the ToU online is not sufficient to make the user responsible for a contractual commitment; consent must be expressed through their acceptance.

The question then is whether simple browsing, simple use of the social media, is sufficient to express the user's consent. Beyond that, by being drowned in the ToU, the intellectual property licence does not seem to attract enough attention from the user-creator as to the scope of their commitment[273]. The purpose of formalism - to enlighten the author's consent - could therefore not be achieved. Such a practice may seem all the more questionable since the intellectual property licence is granted free of charge[274], which is expressly authorized by Article L. 122-7 of the Intellectual Property Code. However, given the scope of its commitment, it should be required that the user-author's consent be particularly informed on this point[275]. Consequently, the fact of stipulating such a licence in the ToU without the user's attention being sufficiently drawn to the scope of the commitment entered into under a licence, most often granted free of charge, could be considered as not complying with Article L. 211-1 of the Consumer Code according to which "*the terms of contracts offered by professionals to consumers must be presented and drafted in a clear and comprehensible manner*". Consequently, such a clause could be considered unfair if it entails a significant imbalance between the rights and obligations of the parties to the contract to the detriment of the user-consumer or non-professional.

ToU and unfair clauses: beyond the IPC. Some clauses may still be deemed unwritten because they are unlawful or unfair due to more indirect conflicts with IP rights. This would apply to the elusive liability clause of the service provider, providing that liability will be borne solely by the person who provided the content by totally exempting the host, since it is contrary to Article 6.I.2 of the Act on confidence in the digital economy and unfair within the meaning of Article R. 212-1 6°) of the Consumer Code. The same applies to the clause giving the supplier the right to remove content and immediately terminate the account, if it confers on the supplier too much discretionary power with regard to the acceptance or deletion of user-generated content, depriving the latter of the possibility of benefiting from notice, unless such withdrawal results from the removal of illegal content within the meaning of the Act on confidence in the digital economy and if it is exercised under the conditions provided for in Articles 6.I.2 and 6.I.5

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de l'internet, quid novi ? (The company standing the test of Internet law, quid novi?), dir. J.-M. Bruguière, *Dalloz-Cuerpi*, 2015, p. 10, spec. No.4.

[272] A. Seube, Les conditions générales des contrats, *Etudes offertes à A. Jauffret* (General terms and conditions of contracts, Studies offered to A. Jauffret), 1974, Aix-Marseille, p. 622.

[273] Recommendation of the Commission des clauses abusives (Unfair Terms Commission) 14/2, afore., No.28. Grégoire Loiseau sums up this issue perfectly by emphasizing that "*The organization of access to the general terms and conditions of the contract is thus conceived in such a way that it conditions the user to contractual indifference, and it is more generally the mechanism of adherence to the social media that diverts the user's attention from the contractual terms and the focus of the most excessive clauses*": Les maîtres du monde numérique coupables d'abus (The masters of the digital world guilty of unfairness), *Electr. Com. com.* 2015, comm. No.4.

[274] In this respect, the recommendation of the Commission des clauses abusives (Unfair Terms Commission) afore., No.27 and its comment by J.-M. Bruguière, *Intell. Propr.* 2015/54, p. 59: point 25 declares such a clause to be unfair in the event that the media user is a consumer

[275] Including M. Vivant and J.-M. Bruguière, *Droit d'auteur et droits voisins* (Copyright and related rights), Dalloz, 3rd ed., 2015, No. 669 as well as T. Azzi, La gratuité en droit d'auteur (Free access in copyright), in La gratuité, un concept aux frontières de l'économie et du droit (Free access, a concept on the fringes of economics and law), Lextenso, 2012, dir. N. Martial-Braz and C. Zolynski, p. 239, spec. p. 246. It would therefore be desirable for the intellectual property clause to stand out clearly in the ToU, for example by reserving a specific place for it in the presentation of contractual documents.

of this text. Clauses by which the supplier requires the user to comply with the applicable rules of law relating to intellectual property, while freeing itself from the same rules through another clause, could still be deemed unwritten.

The rise in platforms overwhelmingly accompanied the increase in data and digital content volume, with their intermediation services becoming indispensable for browsing. Platforms have gained a new, vital position in the digital content distribution economy in general and that of protected works and subject matter in particular. Based on a variety of legal models, some of these platforms play this role without having intellectual property rights on the works which they offer access to, protecting themselves under the definition of host pursuant to the Directive of 8 June 2000 on electronic commerce.

As such, a competitive fracture has been created between the platforms which expressly initiated contact with the holders to negotiate use rights, and those - often powerful - which refused to accept literary and artistic property rules and preferred to impose unilateral conditions in agreements which were voluntarily concluded. New regulations borrowing from consumer law, from competition law and from tax law are striving to re-establish a balance between the different categories of players on the one hand, and to impose new obligations to be assumed respectively by the co-contracting parties, on the other hand.

The emergence, over recent years, of legal regimes for platforms in multiple French law and Union law texts, henceforth aims at grasping their specific role, different from that of a simple host, and at asserting their responsibilities. Although it breaks with an established tradition of legal regime segmentation, this transversal regulatory method for disseminating digital content is likely to provide opportunities for establishing a better balanced contractual relationship between holders of rights and digital distribution players, in particular against a background of economic concentration.

Consumer law has also given rise to increased vigilance with regard to the practices of infomediaries, and in particular social media, subjecting the general terms and conditions of use to a control of contractual imbalance. Although these consumer law instruments do not apply *a priori* to "professional" rights holders, they allow content generating users (CGUs) to retain some control over their creations on platforms and can also serve as a model for establishing more balanced relationships beyond their jurisdiction.

4. Associate rights holders with the volumetric and informational processing of protected subject matter

Note. Many of the uses made by digital players, because they "pick" data or information from within the set, do not appear to reproduce the protected works or subject matter "as such" but remove alternately pieces, parts, extracts, a host of rudimentary expressions whose protection is called into question. These services also require, in most cases, the processing of huge amounts of "items" in which protected works and subject matter are drowned and lose their individuality. They constitute a source of resources from which operators obtain their supplies without necessarily using this subject matter for its intrinsic qualities, but with a view to capturing their "informational capital", as such marking a difference with the mass disseminations of the 20th century.

However, the classical instruments of literary and artistic property are often ill-equipped to deal with such volumetric approaches, breaking with the authorization mechanisms designed for the individual use of specific subject matter (2.1.). They also have difficulty understanding the informational capital related to this subject matter (2.2.), which calls for the development of new tools to address these issues (2.3.).

2.4. "Volumetric" and literary and artistic property approach

Note. The extraction and reuse of a large amount of data within a dynamic mass of content is a typical activity of massive data operators. This change of scale and this commoditization cause difficulties in enforcing literary property rights, traditionally designed to accompany the specific use of an individualized work which meets defined protection criteria. These difficulties arise both with regard to the proof, which it is incumbent on the owner to provide, the protectability of the elements used, with regard to aggregates or fragments of protected works and other protected subject matter (2.1.1.) and the determination of the use ratio subject to the exercise of rights. The amount of content is likely to influence the rights regime (2.1.2.).

2.4.1. The difficulty of evidencing protection on sets and fragments

Condition of originality and "partial reproduction" of a work. It should be recalled that although the condition does not appear in the intellectual property code, originality is the decisive criterion for subject matter's accession to copyright protection. Classically accepted as the imprint of the author's personality under French law, the criterion has evolved under the guidance of European judges who, in the aforementioned *Infopaq I* judgement, extended the expression "*author-specific intellectual creation*" used in the harmonization directives concerning software, databases and photos to all intellectual works. As such, in particular in light of the criteria set out in the CJEU's jurisprudence, the author's lack of freedom of choice and the absence of arbitrariness[276] in form are a logical sign of the rejection of protection.

In the *Infopaq I* judgement, the Court of Justice not only gave a unitary definition of originality, but also held that the parts of a work "*are protected by copyright as long as they contribute, as such, to the originality of the entire work.*"(point 38), which implies that they "*contain some of the elements which are the expression of the author's own intellectual creation.*" (point 39). The part is considered original if it reflects the originality of the whole. Consequently, if the elements constituting the originality of the overall work are present in the parts, they will be protected like the whole itself, but *a contrario*, they will not be protected if they do not bear witness to this originality and may in principle legitimately be used without the authorization of the author of the work from which they come. In short, the "extraction" of data from the work can in principle be performed freely if and only if the form of expression used by this data does not reflect the originality of the whole.

Originality ratio. The relationship between the originality of the part and the originality of the whole remains difficult to assess. Applied to the press articles in the aforementioned judgement, this reading grid led to the conclusion that "*Words as such are therefore not elements covered by protection.*" (point 46) However, the Court also held that "*However, in view of the requirement for a broad interpretation of the scope of the protection conferred by Article 2 of Directive 2001/29,* ***it cannot be excluded that certain isolated sentences, or even certain parts of sentences in the text concerned, may be capable of transmitting***

[276] CJEU, 16 July 2009, *Infopaq International A/S v/ Danske Dagbledes Forening*, case C-5/08; CJEU (Third Chamber), 1st December 2011, Eva-*Maria Painer versus Standard VerlagsGmbH and others,* case C-145/10; point 89; in contrast, CJEU, 4 October 2011, *Football Association Premier League e.a*, case C-403/08 and C-429/08 (point 98).

to the reader the originality of a publication such as a press article, by communicating to the reader an element which is, in itself, the expression of the author's own intellectual creation. *Such sentences or parts of sentences are therefore likely to be protected under Article 2(a) of that Directive.*" (point 47).

Difficulty for holders. This difficulty in assessing the threshold above which the elements subject to extraction are protected is at the heart of holders' concerns, as evidenced by the discussions between press publishers and content aggregators or search engines. The mechanical recovery of content by crawlers[277] is carried out from a perspective which is not necessarily the dissemination of the articles as such but the use of only part of these contents for various purposes. The same questions arise about access to scientific articles and their mining.

As such, the extraction carried out is likely to concern "bits" of works which may not have sufficient originality to be protected. As a result, the publisher, assignee of copyright or primary owner in respect of the collective work may be prevented from asserting their rights if the elements extracted are not original. In practice, the difficulty is often overcome through contractual agreements which determine the conditions under which aggregators can access and use digital files. But in addition to the fact that this technical and contractual protection is not enforceable against third parties, it can only apply to persons who agree to enter into negotiations to perform extraction operations. However, some players such as Google refuse to do this and put pressure on publishers to accept crawl operations by default prior to referencing or subsequent processing, otherwise they risk losing the visibility of their publications. It is because of this balance of power that publishers have campaigned for the creation of a related right which would not be thwarted by the requirement of originality.

Proof of originality and mass reproduction. The question of originality does not only arise in the context of operations to extract micro-fragments of works; it is also unavoidable in the case of mass reproductions. In the case, the proof of originality rests on the party claiming protection. As such, it is incumbent on the holder to provide proof, work by work, of the elements characteristic of this originality**,** which is likely to incur significant costs when the processing is carried out on huge quantities of works. Paradoxically, the more massive the rework, the more complicated it is for the owner to assert their rights because of the costs associated with this evidence. This is, for example, the situation of photographers faced with image engines who are doubly dissuaded from opposing the reuse of their images in the form of fragments, known as "snippets": unable to bear the costs of this proof, often out of proportion to the chances of judicial gains, they are exposed to oblivion if they use the alternative means of the "robot.txt" which is offered to them by engines to oppose indexation. The jurisprudence of the Court of Cassation[278] recently relaxed its requirements by acknowledging the "combination of characteristics[...] reflecting an aesthetic bias imbued with the author's personality" common to all 8779 photos. This situation had previously led the French legislator to establish a mandatory collective management system for image engines[279]. Notwithstanding, implementing decrees are still under consideration, in particular because of doubts about the validity of such a national system in the light of the *Soulier & Doke*[280] *jurisprudence.*

[277] A *crawler* is an indexing robot, which scans the pages of the web in search of specific content.
[278] Cass. com., 5 Apr. 2018, 13-21001, Artprice.com, unprecedented; previously the Court of Cassation refused to recognize any presumption of originality by requiring to "investigate whether and in what way each of the photos" is eligible for protection Cass. soc., 24 Apr. 2013, No. 10-16.063 and No. 10-30.676. However, it had recently introduced flexibility by allowing photos to be grouped "if necessary, according to their common characteristics" 1st Civ. Ct. Cass, 11 May 2017, No. 15-29374: *LEPI* 2017, No. 7, p. 2.
[279] See below.
[280] CJEU, 16 November 2016, *Marc Soulier and Sara Doke*, C-301/15.

Personal nature of the performer's performance. As we have seen, whilst the requirement of the originality of the work is not retained for the performer to be protected, the performance must, for its part, be of a personal nature[281]. In view of the proximity of the concepts of personal character and originality, it seems that the same reasoning can be applied *mutatis mutandis* to the performances of performers. The reproduction of fragments therefore raises the issue of identifying what is protected and the mass reproduction the issue of proving the personal nature of the service.

Threshold of quantitatively and qualitatively substantial investment. With regard to the *sui generis* right on databases, Article L. 341-1 paragraph 1 of the Intellectual Property Code requires that the producer can attest to a quantitatively or qualitatively substantial investment in "*obtaining, constituting, verifying or presenting*" the content of the database in order to benefit from a quasi-exclusive right on this content. However, the investment should not be in data creation. The CJEU made this clear in the four judgements of 9 November 2004[282]: "*the notion of investment linked to obtaining the content of a database within the meaning of Article 7 paragraph 1 of the Directive (...) must be understood as referring to the resources devoted to the search for existing elements and their collection in the database*", **excluding the "*resources used to create the elements constituting the content of a database.*"** Nor does the list include "*dynamic data analysis and processing activities which depend less on the ability to gather them in databases than on the ability to find, identify, select and process them, if necessary, in real time, in a mass of data which is permanently available but of a considerable volume*."[283], which makes the doctrine say that this right may "*appear, in these terms, somewhat outdated*".[284]

As for the scale of the investment, it must be "substantial", which is for the judges to assess. The doctrine notes that "*the judges of the merits are very embarrassed to determine the threshold above which private protection is justified, and most often settle for peremptorily asserting the substantial nature of the investment*[285]*.* "The study carried out for the Commission to assess the Directive concludes that it is necessary to provide for quantitative standards to help operators anticipate the thresholds above which protection is triggered[286]. The evaluation report also points out that the Court's jurisprudence in the *Innoweb* judgement upheld the *sui generis* rights of a specialized search engine, thereby preventing a meta-engine from extracting data even though it was only doing so in order to establish links, which was the subject of much criticism[287].

Threshold and related rights. Absence of criteria. With regard to the other subject matter of related rights, and although the doctrine is divided on the issue, the jurisprudence does not

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[281] 1st Civ. Ct. Cass., 6 July 1999, No. 96-43.749: JurisData No. 1999-003057; *Electr. Comm. com*. 1999, comm. 42, 1st esp., note Ch. Caron); CA Paris, pole 5, ch. 1, 15 March 2016, No. 14/17749, Éric F. v/ SARL JTC and SA Marc Dorcel: *Intell. Propr.* 2016, No. 60, p. 320, obs. J.-M. Bruguière.

[282] Afore.

[283] N. Courtier, *La nécessaire évolution du droit des producteurs de bases de données pour permettre son adaptation à l'émergence du Big data* (The necessary evolution of database producer law to allow it to be adapted to the emergence of Big Data) in INPI, La propriété intellectuelle & la transformation numérique de l'économie (Intellectual property & the digital transformation of the economy), Regards d'experts, 2015, p. 23-40.

[284] Lucas, No. 1358, p. 1057.

[285] Lucas, No. 1361, p. 1059 citing the jurisprudence and Ph. Gaudrat and F. Sardain, *Traité de droit civil numérique* (Treatise on Digital Civil Law), Larcier, v. 1, No. 1094.

[286] Bentley & Derclay Study, op. cit., "*The notion of 'substantial' investment is one of the most problematic provisions of the Database Directive, with polarised positions among stakeholders. Any amendment to this provision would need to be in line with its rationale: that is, to limit the protection of databases to those databases that would not be produced in the absence of legal protection. Therefore, the problem with the substantiality threshold is not that it exists, but where it lies and the associated uncertainty. In consequence, were the European Commission decide to amend the Database Directive, it may be recommended to consider identifying shared standards in this respect and thereby instilling legal certainty.*", p. VII.

[287] Afore. report, p. 29. CJEU, 19 December 2013*, Innoweb BV v Wegener ICT Media BV and Wegener Mediaventions BV*, case C 202/12,; ECLI: ECLI:EU:C:2013:850.

require that the fixed sounds[288] or images constitute a work in order to be covered by the producer's related right. As such, not only is reference to an original work not required to trigger protection, but the phonogram or videogram does not have to meet this condition. The only requirement retained by the doctrine is that of a certain "*continuity*" responding to the idea of sequence, although it is not very clear. As for the notion of fixing, it was broadly interpreted and covers both tangible media and digital files[289]. Finally, the investment criterion which is also used does not provide any more support for a threshold logic for entry into protection. Jurisprudence seems to require that the natural or legal person claiming its attribution must provide the triple proof that it has taken the initiative, responsibility and financial risk of the first fixing of a sequence of images, with or without sound[290], without it being really known what constitutes proof of a financial risk and how third parties could become aware of it.

Threshold and related rights. Asymmetry. The question of the absence of a defined protection criterion as regards related rights raises two sets of questions. The first is the asymmetry between the position of copyright owners, performers and database producers on the one hand, and producers of phonograms and videograms and audiovisual communication organizations on the other, the former being potentially in a less favourable position than the latter in terms of proving their protection against mass extraction or use. This potential superiority of the protection of certain related rights over copyright goes against the surreptitious hierarchy traditionally retained according to which copyright enjoys stronger protection than related rights, following a welcoming reading of Article 1 of the Rome Convention. The European legislator seemed sensitive to this criticism in the directive currently under discussion on copyright in the single digital market, which attempts to rebalance the relationship between the future related right of newspaper publishers and the right of journalists[291].

The second question is that of the validity of the recognition of an exclusive right over subject matter whose outline is not very well defined, which can lead to protection of anything by a monopoly, contrary to the classic balances of intellectual property mentioned in the first part of the report (non-protection of ideas and raw information). It is paradoxical that a person can claim exclusivity over subject matter when they cannot attest either to particular creativity or to a specific investment which would justify its granting. This would be tantamount to recognizing a monopoly on the person simply by collecting data, without further clarification. However, the necessary corollary of an intellectual property right is the clarification of the criteria for enjoying protection even if it is only jurisprudential. In addition, the absence of a protection threshold is likely to increase the number of rival private claims on moving subject matter

The use of infinitely big and infinitely small quantities of protected works and other subject matter causes new difficulties for holders, where they are expected to provide evidence of the protection they intend to make use of, as the subject matter is lost in the mass or is fragmented in such a way that it is hardly identifiable.

The transactional costs for finding evidence are often disproportionate to the potential profit in the process, whenever it comes to proving the originality of the works or the substantial investment for creating the database.

[288] CA Paris, 4th ch., 6 October 1979, *D.* 1981, p. 190, note Plaisant, *RTD Com*. 1980, p. 346; obs. Françon, welcoming the phonogram protection for a recording of bird songs which would not be eligible under copyright, even if the decision appears isolated.
[289] CA Paris, 4th ch., 16 June 2000, *Electr. Com. com.* 2000, comm. 126, note Caron; *JCP E* 2001, p. 1382, note Lefranc; First Civil Ct. Cass. 11 September 2013, SPEDIDAM, No. 12-17.794.
[290] CA Versailles, 1st ch., 1st sect., 23 Feb. 2017, No. 15/01978, SAS Innovaxiom v/ SAS Groupe industrie service info.
[291] See *below* as regards the press publisher's related right on the parts of the press publication.

The issue of the difficulty of proof when faced with volumetric processing could be resolved through the acknowledgement of presumptions.

The rather diffuse nature of the protection conditions of some related rights places the latter in a paradoxically more favourable position than that of authors for availing of their rights, with disregard for the traditional hierarchy between copyright and related rights. The proposal to create a related right for press publishers strives to reduce this conflict, yet not without difficulty.

2.4.2. The influence of use quantum on the rights regime

As of what quantity of protected subject matter or what level of dissemination should the operator request authorization to carry out "processing"? How can they obtain rights when they have to "digest" a large amount of information in order to deliver their service? Although these issues are not entirely new, the volumetric approach which emerges in players' practices is still largely empirical and would merit more in-depth reflection on the methods for assessing the volumes of subject matter used, the "quantity" of the public triggering the exercise of the right when, on the other hand, certain rules state that any total or partial use, regardless of its echo with the public, falls within the scope of the exclusive right. Moreover, the question of quantity must also be assessed in light of the authorization systems made available to operators which consume "data".

- **The volume of subject matter used**

Borrowing threshold and originality. The question of the threshold for "free" borrowing was addressed in an incidental manner in the *Infopaq* judgement concerning repeated extraction operations carried out by infomediaries on press publications. The Court of Justice ruled that "*the accumulation of extracts may lead to the reconstruction of extensive fragments which are capable of reflecting the originality of the work concerned so that they contain a number of elements which are capable of expressing an intellectual creation specific to the author of that work*" (point 50). As such, copyright protection of a work may prevent the free use of the data contained therein, if the reproduction of such data entails the reproduction of elements characteristic of the originality of the whole work. Consequently, **the quantitative importance of the loan is, in principle, an indication of this shift into the field of copyright.** On the other hand, it should be possible to extract elements which do not reflect this overall originality without prior authorization, which is confirmed by the proposal for a Directive on press publishers' related right[292].

It is however difficult to determine from when this transition occurs because extractions are not necessarily simultaneous but can occur consecutively and repeatedly. Thus, crawl or mining operations lead to an extraction each time limited to the purpose of the search performed - which may be below the threshold - but all these operations repeated over a period of time lead to reproducing a substantial part of the content subject to processing, in such a way that the originality threshold can be reached.

There is a temporal disjunction between the occasional processing of the protected subject matter, which may not be subject to authorization, and all successive processing operations, which may trigger the application of the exclusive right. French copyright law, unlike other laws, is ill-suited to this test of "substantiality"; it is essentially during the assessment of an

[292] See *above*.

infringement by the judge that the latter will have to determine whether the loan is sufficiently characteristic of a protected work and other protected subject matter to conclude that it is counterfeit. The doctrine[293] notes in this respect that "*the more original the second work is, the less likely the claim of counterfeit is to be upheld, which is in line with the solutions accepted under German law on the basis of the rule of free use adopted in Article 24 of the 1965 Act, or under American law on the basis of the doctrine of the merger doctrine according to which copying is not counterfeiting insofar as it is essential for taking the idea into account.*" But this solution is not very supportive of mass uses by operators which produce *services* from the reproduced elements and not from the *works* from which the similarities with the works from which the data are extracted should be compared.

Theory of the accessory, background. The theory of the accessory[294] sometimes arises in jurisprudence concerning the use of certain works in a larger ensemble, so that the visibility of these works is somehow "diluted" in this ensemble. As such, several high-profile cases have concluded that there is no counterfeiting if the work in question is exhibited in a set in which it is "*entangled*" but is not the subject of the image (*Place des Terreaux*) or because the importance or duration of the exhibition of the work is sufficiently fleeting that it is considered not to communicate the original features of the work[295]. The *Être et avoir* (To Be and To Have) case[296] dismissed the claim of an author of a work presented in the background by seeking a judicial transposition of the exception of accidental inclusion provided for in Directive 2001/29 but not incorporated into the Intellectual Property Code. Whatever the basis advanced, it testifies to the existence of a space of judicial appreciation and uncertainty as to the respective place of the original work and the broader set in which it is integrated.

As such, it would be open to the idea that when the work reproduced among thousands of others is not the subject of the processing operation but merely an accessory element of it, the exclusive right would not be intended to apply. However, this suggestion should be related to an *Aufeminin* judgement of 12 July 2012, in which the Court of Cassation considered that the notion of "*accidental inclusion in another product", (...) must be understood as an accessory and **involuntary** representation in relation to the subject processed or représented, which was not the case with the reduction of the photo to a vignette form*", opening the way to complex discussions on the intentionality criterion.

Substantial extraction of a base. The *sui generis* right does not give the producer a total right over all extraction operations in their database but only over those extractions which are quantitatively or qualitatively "substantial", non-substantial extractions are, in principle, free. As such, both the volume of the extraction and the quality of the extracted data are taken into consideration for the triggering of the right. The CJEU's jurisprudence was able to clarify the condition of "substantiality" of extraction through its judgements. In the *British Horseracing Board* judgement, it held that "*the notion of a substantial part, quantitatively assessed of the content of the database (...) must be assessed in relation to the volume of the total content of*

[293] V. Lucas, 5th ed., No. 332: link between the scope of protection and originality. The authors as such point out that it is "above all necessary to determine whether, according to the excellent formula of a judgement, the loan concerns characteristic elements by which the author of the first work has personalized the theme.

[294] There is a doctrinal divergence on this subject; some authors accepting this theory – see Vivant, Bruguière, No. 598; Caron, No. 358 – whilst others Lucas, No. 351 condemns the confusion between the scope of the law and the application of exceptions.

[295] As regards the reproduction of a tiny part of a fountain as part of a photo depicting a car on the Defence site, 1st Civ. Ct. Cass., 16 July 1987, No. 85-15.128, Bull. civ. I, No. 225; *RIDA* 1/1998, p. 94. See also Paris High Court, 1st ch., 28 May 1997, *RIDA* 1/1998, p. 329, imprecise reproduction of sculptures; CA Paris 4th ch. 22 February 2002, *Ind. Prop.* 2002, comm. 48, note Kamina: knife models only two-thirds visible on a poster, without reproduction of these characteristics

[296] See in this respect, 1st Civ. Ct. Cass. 12 May 2011, *RIDA* 3/2011, p. 457 and p. 341, obs. Sirinelli; *JCP* G 2011, 814 and JCP E, 1560, note Vivant; *D*. 2011, p. 1875, note Castets-Renard; *Electr. Com. Com.* 2011, comm. 62 note Caron; RLDI 2011/72, 2371, obs. Bensamoun; *Intell. Prop*. 2011, p. 298, obs. A. Lucas; *RTD com* 2011, p. 553, obs. Pollaud-Dulian.

the database" (point 70) and that a quantitatively negligible part of the content of the database may represent "*an important human, technical or financial investment.*" (point 71). According to the European judges, extraction is quantitatively substantial when it takes up a significant part of the database: it is therefore a measure of mathematical proportion between the elements contained in the database and those subject to extraction. With regard to qualitatively substantial extraction, the expression had raised questions insofar as a subjective approach to the notion could have created a monopoly on all the information contained in the database, since extraction was always qualitatively substantial for the person with an interest in it. The CJEU decided otherwise, considering that the extraction was qualitatively substantial when it concerned data or part of the database which had been the subject of a quantitative or qualitative substantial investment. As such, the test must be assessed, either in terms of the volumes extracted or in terms of the investment value of the extracted element.

It has already been pointed out that the lack of interest in the *sui generis* right is partly due to the difficulty of proving a substantial investment in the database as a whole, which is even more difficult to administer when it comes to reporting it to certain parts of the database, or even to certain data, bearing in mind that the CJEU's jurisprudence rules out investment in data creation from the types of investments eligible for protection[297].

Repeated and systematic extraction of a non-substantial part. Normal conditions for using the base. Database law has also focused on understanding flow activities which are likely correspond to the digital economy and mass processing of content. As such, Directive 96/9 had provided that the assessment of the substantial loan could not always be carried out on an ad hoc basis and that it was also necessary to consider the extraction activity in its continuity, so as to grasp its importance over time. Consequently, Article L. 342-2 of the Intellectual Property Code provides that the producer may prohibit the repeated and systematic extraction or reuse of even a non-substantial part of the content, "*when the operations clearly exceed the conditions of normal use of the database*". However, it is difficult to define an *a priori* ratio of normality of conditions of use, which calls for reasoning here *a posteriori*, as in the case of unfair competition, and deprives the principle of prior authorization of part of its usefulness.

Use of parts of protected subject matter in the context of exceptions: quantitative approach. Although they can almost always be linked to a specific purpose, exceptions to the exclusive right also reveal, in an incidental manner, a quantitative approach; whether it is the volume of the loan with regard to the concepts of quotation and extracts or its volatile nature or the extent of the target audience. As such, an abundant body of jurisprudence in French law has focused on the analysis of the relationship between the cited work and the citing work in order to determine the condition of brevity which accompanies the "short" citation exception. This approach should in principle give way to an analysis of the purposes since the CJEU, in the *Painer* judgement[298], stated that the citation should be measured in terms of the purpose pursued and not the quantity reproduced from the original work. The notion of extract also appears in several other exceptions such as those relating to teaching and research purposes or exceptions relating to the use of graphic or visual works in the context of a current relationship. It is also underlying in the press review exception. Finally, the definition of the *sui generis* right itself excludes non-substantial extractions from the database from its scope, which are implicit both in the definition of the right and in Article 8 of the Directive on the legitimate rights and obligations of the user.

Blurred boundary between exclusive right and exception with regard to the quantitative ratio of use. A tension between the quantitative approach and the purpose of the exception is apparent, yet which is not conclusively resolved, as evidenced, for example, by the sibylline

[297] Commission's evaluation report afore.
[298] CJEU, 1st December 2011, *Eva-Maria Painer versus Standard VerlagsGmbH and others*. C-145/10.

text of Article L. 122-5 according to which "*reproductions or representations which, in particular by their number or format, are not in strict proportion to the exclusive purpose of immediate information pursued or which are not in direct relation with the latter give rise to remuneration of authors on the basis of the agreements and tariffs in force in the professional sectors concerned*." It should be noted that the exception for teaching and research purposes gave rise to the same type of extension with regard to collective agreements concluded between rights holders and the French Ministry for National Education, the objective of which was to collectivize authorization mechanisms for the recovery of works which would go beyond the notion of extracts envisaged in the wording of the exception. These examples show that the boundary between the scope of application of the exclusive right and that of the exception is difficult to grasp since it is necessary to "weigh" the quantity of the return of the protected work and other protected subject matter in light of the purpose justifying the exception. The same difficulty of assessment prospers in the area of *sui generis rights*, because uncertainty remains as to the quantum of what is covered by the right under the control of the extraction or use of a substantial part of the database and what falls within the rights and obligations of the legitimate user.

Exception of temporary provisional copy. With regard to the transitional provisional copy exception, it is not so much the mass of content reproduced that is in question as the "temporal" weight of the use. The exception was designed to exempt operators from reproduction authorization when they deal with works and other protected subject matter in the context of a technological transfer operation in which the economic value of the work is not exploited. Jurisprudence has clarified the meaning of the conditions attached to the exception and insists on the fact that the transaction must be devoid of autonomous economic significance, and above all that it must be provisional - i.e. it must not give way to a permanent - and transitional copy - that it must not exceed the time necessary to perform the technical operation it carries out. In this case, it is the transience of the use that justifies its freedom. This exception is particularly useful for justifying reproduction operations necessary for search (browse) and information collection (crawl) and may, to a certain extent, cover data mining operations[299]. Moreover, the draft CDSM Directive, while creating an *ad hoc* exception to extend the possibilities of use to cases not covered by the transitional provisional copy exception which are too restrictive to allow the conservation of mining documents[300], recalls that the latter may still apply to mining operations, regardless of any scientific purpose (recital 10 of the draft).

The transitional temporary copy exception was probably the first to grasp the new uses which digital technology can derive from protected works and other protected subject matter and it is possible that it will be tested by the new artificial intelligence services. It should be noted however that, being of public order and free of charge, it constitutes a particularly favourable gateway for infomediaries for mass processing as soon as they are able to develop a business model which is not based on the value of the reproduction of works but on the value of the services induced by the processing of the data or metadata they generate[301]. The whole question therefore focuses on whether massive data processing is deemed to take advantage

[299] See *below*.
[300] *CSPLA mission report on text and data mining*, *op. cit.*
[301] Ordinance of the CJEU (third chambre), 17 January 2012, case C-302/10, *Infopaq International A/S v. Danske Dagblades Forening.* The Court held that "*The productivity gains resulting from the implementation of provisional acts of reproduction, such as those at issue in the main proceedings, do not have such independent economic significance, provided that the economic benefits derived from their application are only realized when the reproduced subject matter is used, so that they are neither distinct nor separable from the benefits derived from its use." (*Point 51*)*. "*On the other hand, an advantage derived from a provisional act of reproduction is distinct and separable if the author of the act is likely to make profits as a result of the economic use of the provisional reproductions themselves.*"(Point 52). "*The same applies if the provisional acts of reproduction result in a modification of the reproduced object, as it exists at the time of the initiation of the technical process concerned, because the said acts are thus intended to facilitate not only its use but also the use of a different object*" (Point 53).

of the value of the provisional reproduction per se or to modify the reproduced subject matter, in which case the exception could not cover the activity.

Threshold for assessing counterfeiting. The difficulty of the puzzle. When analysing counterfeiting, the judge compares the protected subject matter with the one suspected to be counterfeit. In principle, this operation is performed with regard to similarities and not differences between the two pieces of subject matter compared. However, the simultaneous identification of any element present in the protected subject matter and in the suspected counterfeit subjct matter is not sufficient to characterize counterfeiting. If the judge fails to identify, recognize the protected subject matter in its essence, or its characteristic elements, through the fragments which are reused, they will not conclude that there is counterfeit. If the data extracted from the protected work or protected subject matter is used by the service provider in a centrifugal and not centripetal manner and is infinitely diluted within the service it provides, the restoration of the original element will be extremely difficult to carry out.

Moreover, the counterfeiting action presupposes that the time at which the comparison will have to be made should be determined, by freezing the situation at a given time. However, this mechanism is not very effective in the face of dynamic data processing by infomediaries. It is almost impossible for the holder who wishes to act, on the one hand, to provide proof of all the successive states of the extraction or processing operations - for lack of always having this history or because of the costs of proof - and on the other hand, to carry out a convincing reconstruction of the multiple and successive uses made which would correspond to the identification of elements characteristic of the original subject matter. The aim is to remake a puzzle in which the figure of the original protected element would reappear, beyond the various dismantling operations carried out at the extraction and reuse stages.

As such, for example, during the process phase, retaining the responsibility of an operator of text and data mining whose services are performed on the basis of a mass of works available and which reproduce the information incorporated for purposes very different from the reconstitution of the original works may prove extremely difficult. In this case, often, only proof of the reproduction of the files, when they are digitally identified or when their access is protected, will allow the mining history to be traced. But if finding the trace of an identifiable work in the service derived from the mining operation is impossible, the characterization of the damage suffered will be excessively difficult.

Mechanical quantitative analysis? The "human" analysis of the identification of the presence or prior processing of data flows carried out by the infomediary can hardly conclude that there has been counterfeiting if the characteristic elements of the protected subject matter are no longer found at the end of this processing. The rights holders proposed to remedy this difficulty by suggesting that the weighing of the loan could be carried out through mechanisms of tattooing the works. It is this type of solution which is at work with Google identifying, *Content ID*, via this device, the fingerprints of the files are provided to it by the rights holders. As a result, the filtering system is triggered even if human identification of the original work is not possible or, often criticized, when use is an exception.

The gap between the principles of counterfeiting interpretation and filtering systems. The paradoxical result is that by adopting a molecular approach to protected subject matter through agreements between holders and platforms based on this type of fingerprinting tool, uses which would not be considered counterfeiting are nevertheless prohibited from being disseminated or monetized. There is as such a delta between the systematic application of a reproduction right based on a mechanistic vision of the work envisaged as the sum of the information contained in a digital file and its appreciation by humans, which presupposes an identification of the characteristic elements of the work in relation to its use. This contradiction is all the more critical as the practice has developed with regard to technical solutions whose

principles are set by economically dominant operators who, moreover, consider that they are not liable to pay entitlements for the processing operations they carry out.

The quantitative analysis of the loan can, in the current situation, lead to two totally opposite conclusions. If it is related, as is the case in jurisprudence, to analysing the elements extracted on the basis of the original characteristics of the original work, it can lead to dismissing the application of copyright of the holder of the first work in the event that these characteristic elements are not identifiable in the larger ensemble in which the elements are integrated. Conversely, if "pure" quantitative logic, made possible through digital watermarking and fingerprinting technologies, is applied, we can conclude that the work is present through the mere coincidence of the identification of the fingerprinting file data, regardless of the transfer of these characteristic elements.

- **Dissemination threshold**

De minimis. Several foreign legislations on literary and artistic property retain a *de minimis* principle which is not included in the Intellectual Property Code. French jurisprudence is also reluctant to accept such a principle. However, it appears that under the influence of European law, such a logic tends to be gaining ground, which is tantamount to admitting that certain uses of protected works or subject matter may not be covered by intellectual property rights if they are of a minimal nature which is unlikely to cause significant harm to the owner. This logic is at work in European jurisprudence on the right of communication to the public[302], which requires that the public to whom the protected subject matter is disseminated be sufficiently "numerous". On the other hand, a *de minimis* threshold would apply which would have the effect of excluding the application of the exclusive right when the public of the work covers a very small number of persons.

The criteria for applying the mechanism however are not precise as it is a form of "tolerance". Such an assessment also runs counter to the idea that "any" reproduction or communication to the public of a protected work or protected subject matter exposes the person concerned to counterfeiting without authorization and that the right of representation is triggered regardless of the actual presence of the public. As such, there would be a grey area in which use could be considered without prior authorization because it would not exceed a certain "threshold" which it is delicate to anticipate.

Cumulative effects theory. In the wake of the *de minimis* logic, the CJEU's jurisprudence led to the emergence of a cumulative effects theory with regard to the right of communication to the public. The question was to determine at what threshold the public is sufficiently important for the right of communication to the public to be effective. The question arose in particular with regard to the broadcasting of commercial phonograms within a dental practice. In the *del Corso* judgement, the Court held that, in assessing the existence of an act of communication to the public, all patients passing through the dental practice and not only those present when a particular phonogram is broadcast should be taken into consideration. The reasoning was later repeated with regard to clients at a physical rehabilitation site in the *OSA* judgement[303]. This analysis, which makes it possible to characterize an act of communication to the public even though the protected works or protected subject matter are individually perceived by a small number of persons, makes it possible to reconcile the requirement of a "quantity" of

[302] In this respect for the "quantitative" assessment of the public in the right of communication to the public, CJEU 15 March 2012, SCF (C-135/10, EU:C:2012:140, point 86), judgement referred to as *del Corso*, concerning a broadcast in a dental practice.
[303] CJEU, 27 February 2014, *OSA*, case C-351/12.

persons with the assertion that the act of communication to the public is constituted regardless of the actual number of persons who have access to the work. Combining the two implies considering that the public to which the work is addressed must be quantitatively sufficient, even if the public actually reached is insignificant or even non-existent. This approach breaks with the idea dear to French law that the law should be applicable as soon as the act exceeds the family circle, regardless of the number of potential recipients.

New public and quantitative approach. The CJEU's jurisprudence has also extensively developed the analysis of the new public, in particular its *Svensson* jurisprudence on hypertext links, suggesting that there is no act of communication to the public since the work was already freely accessible on Internet without restriction and the link did not have the effect of generating a new public. However, it refused to use the same logic for the reproduction of a photo on one website to make it available on another website. In his conclusions on the so-called *Cordoba* decision[304], the Advocate General[305] stated that dissemination on a site other than the site of origin of the dissemination on which a photo was freely accessible did not constitute an act of communication to the public, in so far as it did not generate an "additional" public compared to the one who could visit the site of origin, stressing moreover that the potential public of the school site was quantitatively minor. The Court of Justice did not follow the conclusions of its Advocate General, considering that there were different audiences for the sites in question, even though the work was freely accessible on the first site. Nor did it consider that the low number of potential visitors to the school site constituted an obstacle to the qualification of communication to the public, leaving it to the national judge to determine whether a pedagogical exception could be made. As jurisprudence currently stands, it is therefore not required that the person who initiated a redissemination of a protected work or protected subject-matter reach a larger audience than the original public in order for there to be an act of communication to the public. There is no quantitative public increase condition to characterize the existence of a new public.

Antagonistic trends. In the end, the analysis of the jurisprudence as to the extent of dissemination remains delicate. There is some support for a virtual exhaustion of the right of communication to the public on Internet, suggesting that making a work available without restriction of access is tantamount to implicit authorization to redisseminate, without prejudice to the owner, unless the potential audience of the work is increased. Such an interpretation, particularly by the opt-out advocates, goes in the direction of ensuring the smooth flow of "content" when it is available without technical or contractual limitations. It convinced the judges with regard to link operations because they "*contribute in particular to the proper functioning of Internet by allowing the dissemination of information in this network characterized by the availability of immense quantities of information*[306]". Another trend, followed by the *Cordoba* judgement, is illustrated by a more favourable interpretation for rights holders, justifying the right to control each act of communication to the public of the work, without requiring an increase in the number - potential - of persons constituting the public as a condition of implementation. Thus, each dissemination of the work gives rise to the exercise of the exclusive right regardless of whether it is made available without hindrance on the network. From a third perspective, some decisions assess the public in a diachronic way when it comes to streaming. This last trend is in line with the rights procurement practices concluded with users of large repositories that disseminate in streams.

- **Mass authorizations**

Notion of repository. One of the answers provided by the practice of intellectual property law to the use of flows and masses relates to the general representation contract, which Article L.

[304] CJEU (Second Chamber), 7 August 2018, *Land Nordrhein-Westfalen versus Dirk Renckhoff*, case C-161/17.
[305] Conclusions from the Advocate General, Manuel Campos Sanchez-Bordona, 25 April 2018, case C-161/17.
[306] CJEU, 8 September 2016, *GS Media*, C-160/15, EU:C:2016:644, point 45.

132-28 of the Intellectual Property Code provides that it confers on a entertainment entrepreneur the right to represent, during the term of the contract, current or future works constituting **the repository** of a professional body of authors under conditions determined by the author or their rights holders. According to Article L. 132-29 of the same Code, this contract has three essential characteristics; it is stipulated for a limited period of time or for a limited number of communications to the public; it does not in principle give the entertainment entrepreneur an operating monopoly unless otherwise stipulated; the contract may not be transferred to a third party without the express written consent of the owner. However, the notion of repository is not otherwise clarified[307]: it covers in principle a set of protected works or protected subject matter whose rights management has been entrusted voluntarily or by law to a collective management body.

The granting of authorization of use does not concern a specific work but a set of protected subject matter with a texture that varies in time and space. Thus, the co-contracting party obtains by this means the authorization to use a set of subject matter without having to identify the ones they use. The so-called flat-rate clause mechanism leads to the payment of a global royalty for the whole set regardless of the portion of the repository actually used. Contested for its anti-competitive nature, it has nevertheless been validated by CJEU jurisprudence[308]. It was considered to be favourable to users as it avoids the transaction costs associated with partial authorizations. The general representation contract and the lump-sum clause seem particularly adapted in their principles to the issues of procuring mass authorizations required by infomediaries - access to a repository, non-exclusivity, temporary duration. The difficulty relating to the general representation contract is not so much its existence as the willingness of certain operators to avoid it, considering that they are either covered by a liability exemption system which exempts them from it, or that they use elements which are below the protection threshold.

Mandatory collective management. Flow. Simultaneous retransmission without change. Another solution exists in the legislative arsenal to meet the need for mass processing of works; it is the mandatory collective management, activated for example in Directive 93/83 in the case of simultaneous cable dissemination. This option is being extended in the draft of a so-called "cable/satellite" regulation[309], still under discussion, Article 3 of which provides for the application of mandatory collective management for the retransmission of television or radio programmes other than by cable.

These two devices, to which may be added the legal licence for the broadcasting of commercial phonograms, are appropriate responses to the need to simplify the authorization or procurement mechanism for the mass use of protected works and other protected subject matter during streaming, since the system of individual prior authorization is then impractical. They can be mobilized to deal with massive data processing where the quantity of elements is more important than their individual characteristics and the ease of drawing from a data repository at a frequency which can be contractually defined. However, their implementation requires an evolution of the players' respective positions and system adaptation to the flows of data and content, not all of which are covered by literary and artistic property law.

[307] It is rarely mentioned in the Code (see, however, Article L. 324-3 of the Intellectual Property Code): Contracts concluded by collective management bodies with users of all or part of their repository are civil acts). It does not even constitute an entry into the Lucas Treaty.
[308] See CJEC judgement, 13 July 1989, Tournier. On this issue, see in particular the CSPLA report on cross-border collective management of musical works online.
[309] Draft regulation of the European Parliament and of the Council laying down the rules on the exercise of copyright and related rights applicable to certain online broadcasts by radio broadcasters and retransmissions of television and radio broadcasts, 14 September 2016, 2016/0284 (COD).

Determining dissemination volume is not, in principle, relevant in triggering exclusive right. Notwithstanding, several rules and jurisprudence appreciate these threshold effects, for focusing on the quantity of subject matter used, in particular as regards exceptions related to quotations and extracts, or for appreciating the volume of persons to whom dissemination is addressed.

These threshold or stream effects should lead to tailoring the terms and conditions for exercising rights, in particular by privileging pragmatic, overall solutions for facilitating the procurement of rights in cases of mass use, inspired by existing formulas such as the general respresentation contract and the legal licence.

2.5. Protected works and subject matter addressed as "informational capital"

Shifting the value of protected subject matter. Digitalization has led to a phenomenon of content commoditization linked to the uniqueness of the writing convention and, as a result, allows protected subject matter to be processed as pure "informational" subject matter. This phenomenon is not new because it goes back to the use of computers. However, it is taking on a new dimension with the sophistication of the tools and the availability of a large amount of information in a digital format. In particular, identification and tracking processes which are not necessarily perceptible to humans offer new perspectives for the use of protected works and other protected subject matter, such as text & data mining, which aims to produce models, trends and correlations.

Factual, underlying and peripheral data. The ability to explore protected subject matter using digital tools also raises new questions: they do not only constitute "factual[310]" data sources corresponding to content identifiable from the protected subject matter, but also an underlying data source or attached data source whose value is that of the value assigned by listing or indexing operators. All the information *contained in* the protected subject matter or *produced during* its use constitutes a source of economic value, the aim being to involve the owners in sharing it. It is therefore necessary to consider the ability of literary and artistic property law to capture this underlying value whilst respecting the freedom of information and the public's right to information.

- **The use of protected works and subject matter as informational objects**

In principle, the "informational" use of protected subject matter does not exempt from authorization. As long as the subject matter is protected by literary and artistic property law, there is no real difference in processing according to the nature of the use. For example, there is no rule according to which the use of a legitimately protected work for information purposes is not subject to the authorization of the owners. As such, whatever it is intended for, the owners are supposed to control its use and participate in the creation of value associated with this use.

However, in a traditional approach, the act of end-use, namely the "consumption" of the work and its informational capital, escaped the control of the exclusive right. Once the media had been put into circulation, the possibility for an individual to intellectually avail of the "content" of the protected subject matter was beyond any claim on this basis. However, this freedom of use is now hindered in the digital world, since it gives rise to an act of reproduction necessary

[310] We reproduce here the proposals for distinctions mentioned during the mission's hearings by Maitre Lefranc and M. Kavannagh.

for the simple reading of the subject matter, on the model of the "licences" developed in the field of software, with such an act of reproduction forming the basis for the exercise of the exclusive right. This increased influence is not without renewing the question of reconciling proprietary logic with fundamental freedoms. As it stands, only certain exceptions and a few jurisprudential decisions are aimed at achieving this reconciliation.

The purpose of information in exceptions. The Intellectual Property Code provides, within the exceptions, areas of freedom of use of protected subject matter, as long as such use is for information purposes. The Code expressly refers to it in the exception of analysis or short quotation, the condition of which is that it must be justified by the "*critical, polemical, educational, scientific or informative nature of the work in which it is incorporated*"; in the exception relating to press reviews, the jurisprudence of which has specified that it is for a strict informative purpose; in the exception relating to "*the dissemination, even in its entirety, by means of the press or television, as news information, of speeches intended for the public delivered in political, administrative, judicial or academic assemblies, as well as in public meetings of a political nature and official ceremonies*" and finally in the exception relating to "*reproduction or representation, in whole or in part, of a graphic, visual or architectural work of art, by means of the written, audiovisual or online press, for the exclusive purpose of providing immediate information and in direct connection with it, provided that the author's name is clearly indicated.*" It is understood that in the latter case, the exception does not apply "*to works, in particular photographic or illustrative works, which themselves aim to reflect the information*" and that "*reproductions or representations which, in particular by their number or format, would not be in strict proportion to the exclusive purpose of immediate information pursued or which are not in direct relation with the latter give rise to remuneration of authors on the basis of the agreements or pricing in effect in the professional sectors concerned*."

All these provisions allow the factual data contained in the work to be used in such a way as to convey the elements necessary for the purpose of the information accompanying its transmission. The purpose here is to be able to talk about the protected works and protected subject matter and to authorize their reproduction and communication to the public for this purpose. It should be noted, however, that legal tolerance is very strictly regulated; either the legislator requires that only a part of the work be used, or that they limit the use within the temporal limit of "current events". The exception relating to auctioneers' catalogues, although it allows for the complete reproduction of works, nevertheless requires that it be made *before* the sale and for the sole purpose of describing the works of art offered for sale. No withdrawal of such a catalogue could take place after the said judicial sale without the owners' authorization.

As such, both the quantum and the freshness of the information constitute adjustment variables for its use. However, it has already been pointed out that use ratios are likely to vary the cursor of the exception and the exclusive right. When the loan becomes quantitatively significant, the benefit of the exception disappears, the volumetric approach then combines with the intended purpose. **The fact that operators process large volumes of digital objects is therefore likely to crowd out the exception, notwithstanding the information purpose of some services.**

Judicial enforcement of Article 10 of the ECPHRFR. Judicial judges have sometimes found that the scope of legal exceptions is too narrow to accommodate certain uses based on freedom of expression and/or the public's right to information[311]. Inaugurated in France by a

[311] In this respect, V.S. Dusollier, M. Buydens, Y. Poullet, Droit d'auteur et accès à l'information dans l'environnement numérique (Copyright and access to information in the digital environment), Bull. DA, Unesco, vol XXXIV, No. 4, 2000, p. 4.; C. Geiger, Application de l'article 10 de la Convention EDH dans le domaine du droit d'auteur (Application of Article 10 of the European Convention on Human Rights in the field of copyright), JCP G, 2004,21, 955; De la nature juridique des limites au droit d'auteur. Une analyse comparatiste à la lumière des droits fondamentaux (The legal nature of copyright limitations. A comparative analysis in the light of fundamental rights),

decision of the Paris High Court of 23 February 1999 concerning the reproduction of a painting by *Utrillo* during a report on the painter's exhibition, the article's application was not confirmed on appeal[312]. It subsequently led to the insertion of a dedicated provision in the law of 1st August 2006 to cover this type of use with one of the exceptions listed above. Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms was reiterated in a spectacular way in the *Les Misérables*[313] judgement concerning the freedom to create a sequel to a novel which had fallen into the public domain. This conciliation mechanism, affirmed by the European Court of Human Rights[314], is now regularly invoked by the French judge, although mainly in cases relating to freedom of creation[315]. This application is nevertheless subject to judicial uncertainty and raises the question of operators' anticipation of the proportionality test of the interests involved. For the time being, it therefore does not offer a satisfactory answer to the question of mass content reproduction in the context of big data processing, even when this reproduction is for informational purposes.

Microfor* jurisprudence**, **Act I.** A balance between exclusive right and use for information purposes, with a view to this computer processing, was sought, from the very beginning of documentary computing, in the *Microfor* jurisprudence, which was delivered, it is true, before the adoption of the "database" Directive, but which cannot be affirmed that it has, since, become obsolete. A long dispute between *Le Monde* and *Microfor*, which produced indexes and summaries of articles from Le Monde and Le Monde diplomatique, led to two spectacular decisions by the Court of Cassation, one of which was a plenary session. In the first judgement[316], the Court ruled that Article 40 of the Act of 11 March 1957 (now Article L. 122-4 of the Intellectual Property Code) "*is not applicable to the publication, by any means whatsoever, of an index of works enabling them to be identified by keywords*"; nor did it apply to "a purely descriptive analysis*** *carried out for documentary purposes, excluding a substantial statement of the content of the work, and not allowing the reader to dispense with the need to use the work itself*[317]".

It had also applied the citation exception, holding that the informative character of the citing work justified the interplay of the exception in the present case and adding that "*when it has an informative character, which was the case in the present case according to the findings of the judges of the merits, the material of the second work may be constituted, without comment or personal development of its author, by the linking itself and the classification of short citations borrowed from the works.*"

Microfor* jurisprudence by the Plenary Session.**In the Plenary Session judgement delivered a few years later, in 1987[318], the Court of Cassation had, in a principled expectation, held that "*if the title of a newspaper or one of its articles is protected like the work itself,* ***the publication for documentary purposes, by any means whatsoever, of an index containing a

Intell. Propr. 2004, No. 13, p. 882; Droit d'auteur et droit du public à l'information (pour un rattachement du droit d'auteur aux droits fondamentaux) (Copyright and the public's right to information (for a link between copyright and fundamental rights)), *D*. 2005, 38, 2683; A. Strowel, Pondération entre liberté d'expression et droit d'auteur sur internet : de la réserve des juges de Strasbourg à la concordance pratique par les juges de Luxembourg (Balance between freedom of expression and copyright on Internet: from the Strasbourg judges' reserve to the Luxembourg judges' practical concordance), RTDH, 2014, 100, 889; J. Ginsburg, A. Lucas, Droit d'auteur, liberté d'expression et libre accès à l'information (étude comparée de droit américain et européen) (Copyright, freedom of expression and free access to information (comparative study of American and European law)), *RIDA,* No. 29, July 2016, p 4-153

[312] Paris Court of Appeal, Fourth Chamber, section A, 30 May 2001, Fabris versus France 2.

[313] 1st Civ. Ct. Cass., 30 January 2007, No. 04-15.543

[314] ECHR *Ashby Donald versus France* 10 January 2013.

[315] More recently, 1st Civ. Ct. Cass., 15 May 2015, case *Klasen* complaint No. 13-27391 and on referral Versailles Court of Appeal, 1st Chamber 1st section, 16 March 2018, No. 15/06029 ; 1st Civ. Ct. Cass, 22 June 2017, *Dialogue des Carmélites* complaint No. 15-28.467 and 16-11.759;

[316] 1st Civ. Ct. Cass., 9 November 1983, complaint No. 82-10005.

[317] The Court of Cassation then quashed the appeal decision for lack of a legal basis for failing to investigate "*with regard to their content and purpose, what the nature of the "descriptive summaries" at issue was*".

[318] Ct. Cass. Plenary Session, 30 October 1987, complaint No. 86-11918.

reference to these titles in order to identify the listed works does not infringe the exclusive right of use by the author." With regard to summaries, it had admitted that they could be qualified as "short quotations" since these summaries **"***consisting only of short quotations from the work, which did not exempt the reader from using it, were inseparable from the "analytical section" of the publication by the set of references contained in that section, and that this set had the character of an information work*".

Repelling economic and moral rights (UK: copyrights) regarding the activity of indexing in a documentary-focused publication. The Court of Cassation strongly established that indexation practices did not fall within the scope of the exclusive right. It also held that moral rights could not in themselves justify the prohibition of such an activity, an index being, "***by its very nature****, exclusive of a complete statement of the content of the work*". In the absence of errors in the quotation, the moral right could not be activated, despite the criticism made by the newspaper Le Monde of the confusing nature of the juxtapositions of extracts made. As such, at the end of the *Microfor* judgements, neither economic nor moral rights can, as a matter of principle, prevent the performance of an indexation activity if it does not fall within the scope of the exclusive right. It should also be noted that the plenary session added the condition that indexation, whatever its technique, must be carried out as part of an "***publication for documentary purposes*****"**. This formula has not been clarified since then and raises the question of its adaptation to indexing activities carried out by infomediaries which do not necessarily include them in a publishing perspective for documentary purposes.

Competitive substitution test for the descriptive analysis activity. Whilst the exclusion of the application of copyright to indexing activity seems to be an extension of the distinction between idea and form[319], the exclusion of the activity of analysis for descriptive purposes (i.e. providing a summary presentation of the content to which it refers) implies that a competitive ratio is examined. Whenever the analysis replaces the consultation of the original work, by exempting the reader from going there and reproducing a "substantial" presentation of it, it falls within the scope of prior authorization. On the other hand, if it does not fulfil this substitute role, it does not have to be authorized by the owner of the work under analysis. The reconciliation of this solution with the new activities of infomediaries is delicate, as evidenced by the discussions on the role of search engines.

The issue with search engines. Two approaches to search engine activity have been in conflict in recent years. For some[320], this activity is in line with documentary I.T. and the links which lead to the original work are no more or less than footnotes facilitating the intertextuality of Internet. Far from being a threat, they ensure better exposure of works and other protected objects by generating incoming traffic. For others, given the extent of the elements used by search engines on their own sites, there is a diversion of attention from their source to the engines, the consultation of the latter "exempting" the reader, in some cases, from going to the original site. This is the same as the debates which led to the adoption of the *Microfor* decisions in the 1980s, except that some search engines now have considerable market power and have a right of life or death over the visibility of certain content when surfing on Internet. In France, the discussion focused mainly on image engines, as the jurisprudence of the Paris Court of

[319] E. Ulmer, Les problèmes de droit d'auteur découlant de l'utilisation d'œuvres protégées par le droit d'auteur dans les systèmes automatiques d'information et de documentation (Copyright issues arising from the use of copyrighted works in automatic information and documentation systems), The *DA*, February 1978, p. 67. "*In the case of the index method, the memorization and retrieval of bibliographic data (author of the text, title, publisher, etc.) does not generally constitute an infringement of copyright in the works to which the data relate*"; The *DA*, No. 7-8 July-August 1979, p. 196 "*The working group was of the opinion that there was no infringement when the usual indications of the author, title, publisher, etc. (index method) are stored on computer.*"; F. Gotzen, Le droit d'auteur face à l'ordinateur (Copyright and the computer), The *DA* January 1977, p. 19 *"The storage of indexes or tables containing only bibliographical data or keywords will remain free, because there is no reproduction of the works themselves.*"

[320] In particular, J. Litman, Digital Copyright (1st April 2017). Digital Copyright, Maize Books University of Michigan Press, 2017, ISBN 978-1-60785-418-0; SSRN: https://ssrn.com/abstract=1468400.

Appeal considered that the use of images in thumbnail form did not exceed what is necessary for the search function of the tool[321].

In fact, it is a question of combining three different imperatives; the legitimate expectation of users, who are fond of "signage" analysis enabling them to guide their navigation within an obese mass of information; the no less legitimate return on the investment made by engines in the search, collection, organization and presentation of this information and finally, the claim of rights holders not to be "disintermediated" by engines in the exhibition of their protected works and protected subject matter, or even to be associated with the benefit which the engine of this exhibition draws. A first response was provided by the French legislation on video walls, and the idea came to the fore during the discussion of the draft CDSM Directive[322]. In any case, it is only very fragmented and requires broader reflection.

The possibility of using the quotation exception in an information work consisting exclusively of extracts. *Microfor* jurisprudence paved the way for a very broad acceptance of the work of an informative nature and, consequently, of the citation exception. It established that the second work could be made only from elements constituted by the first works, thus rejecting the idea that the citing work must necessarily be different from the cited work in a proportion where the latter would only be marginal. However, subsequent jurisprudence has not always followed this approach, often retaining a very narrow definition of the citation exception, especially in the musical, audiovisual or visual arts fields, ignoring the purpose of information in these cases. The doctrine, too, may have been very critical of the *Microfor* judgement, attempting to limit its scope. The result is a legal landscape whose visibility is obscured by the mists of indecision.

The functional approach to intellectual property. Equally unstable is the question of the functional analysis of literary and artistic property, which is an issue in doctrinal debate and which sometimes emerges in jurisprudence[323]. Some authors[324] argue that, contrary to the idea of an absolute right, heir to a natural right, copyright (and a fortiori related rights) are functional rights whose influence and intensity must be measured in terms of the social purpose they have to fulfil. In trademark law, this logic has already led to considering that the referencing of a trademark in a search engine - *Google Adwords* - by means of tags does not constitute "trademark use" likely to trigger the exclusive right[325]. The *Être et avoir*(To Be and To Have) and *Place des Terreaux*[326] judgements are, to a lesser extent, an illustration of this approach, the Court of Cassation having ruled, in the first case, that "*illustrations are at no time presented in their use by the master and form part of the decor of which they constitute a usual element, appearing in short sequences but* ***never represented for themselves****." and in the second that there* was no need to request authorization insofar as the work was not *the subject* of the postcard. The right of the owner of the work is then erased behind the function assigned to it. Although the influence of this doctrinal trend is increasing, it remains difficult to measure its effects on jurisprudence and, above all, to draw operational conclusions for the regulation of the activities of infomediaries. Here again, reflection must be intensified.

- **The use of the information contained within or the informational value inferred**

[321] CA Paris, 26 January 2011, *SAIF v/ Google*: "a purely textual reference or any other conceptual representation would be difficult to use and not very appropriate to the objective of such a service; that in reality a visual overview such as the one set up is relevant as the *only one likely* to enable a normally competent Internet user, who simply intends to search for an image (using their own keywords), to be immediately and easily able to know the results of his research precisely and to make a choice."
[322] See *below*.
[323] On this issue, see CSPLA Report, *Referencing*, p. 19 et al.
[324] M. Vivant, Droit d'auteur et théorie de l'accessoire : et si l'accessoire révélait l'essentiel ? (Copyright and accessory theory: what if the accessory revealed the essential?) *JCP* G 2011 No. 28, p. 1360.
[325] CJEC, 23 March 2010, joined cases C-236/08 to C-238/08, case Louis Vuitton.
[326] 1st Civ. Ct. Cass., 15 March 2005, referred to as "place des Terreaux".

Underlying information and text and data mining. In 2016, French law introduced a new exception relating to text and data mining in paragraph 10 of Article L 122-5 of the Intellectual Property Code, under which the author may not prohibit "*Digital copies or reproductions made from a lawful source, for the purpose of exploring texts and data included or associated with scientific writings for the purposes of public research, excluding any commercial purpose*". This provision has not yet entered into effect, as the Council of State has issued an unfavourable opinion on the implementing decree on the grounds that the French exception does not comply with the closed list of exceptions in Article 5 of Directive 2001/29. The activation of this exception is dependent on its recognition in a harmonization directive, showing that Member States do not have a significant margin of manoeuvre in this area. Innovative models based on new exceptions require the European Union to legislate after a rigorous interpretation of the acquis and competences.

- **Information peripheral to protected works and subject matter: from the processing of use data to "*data-driven"* creation**

Profiling by the consumption data of the works. Data on the use of cultural and recreational content has become a decisive "*input*" into the economy of such content. Data and metadata relating to time and frequency of listening or reading, preferences and purchases made, to name but a few, may fall within the scope of the qualification of personal data if they make it possible to establish the precise profile of an individual; some may be particularly intimate, whilst others - like the consumption data of online games - are on the contrary very social. Their sources are also very varied, as noted in recent research according to which "*some are created well in advance, by creators, publishers, producers or management companies (such as SACEM), others are enriched by distributors. They can also be produced algorithmically by third party companies or created by users themselves voluntarily (tags, playlists, notes, comments)*"[327]. The processing of these data sources constitutes a real added value for the distributors of this content insofar as they make it possible to analyse the tastes and habits of their users and, consequently, to improve their services and/or propose a personalized offer. All this data will feed user assistance tools, such as recommendation algorithms which enable content distributors to feed and enhance their catalogue or reduce subscription attrition, such as the Netflix audiovisual content platform[328].

For the time being, **no French literary and artistic property law instrument allows holders to participate in this data-led economy, since they do not have access to the data held by infomediaries. This situation constitutes a strategic handicap** for holders who are not in a position to develop innovative services from the information activity generated by the use of protected works and subject matter.

[327] CNIL (French Data Protection Authority), *Les données, muses et frontières de la création* (Data, muses and frontiers of creation), Cahiers IP Innovation et Prospective No.3, 2015, p. 16 with computer graphics drawing up data typology.

[328] CNIL (French Data Protection Authority), *op. cit.*, p. 16 and p. 54 for a description of how the main recommendation algorithms work.

The informational value of protected works and other subject matter or the data around them constitutes the core of the data economy. The subtle balances which literary and artistic property aims to maintain between the perimeter of exclusive rights and freedom of expression give however rise to precarious, complex solutions given their sources, in such a way that it is difficult to even appreciate the position of activities essentially focused on this informational value like indexing, mining and referencing.

The economic prospects opened by the data economy on the one hand, and the necessary accessibility of information wherein certain innovating, of-public-interest activities can thrive on the other hand, call for the clarification of the legal situation on these issues, in particular as regards indexing and referencing for which the draft CDSM Directive only deals summarily with.

2.6. The search for new solutions within LAP to address data economy and movement challenges

A turbulent and fragile evolution. Several sensitive activities related to the mass processing of data and content such as exploration, aggregation and selection have led to an evolution of literary and artistic property instruments aimed at giving holders a form of control or financial association over these activities. These provisions, some of which are still in the process of being adopted at the time of writing, are the subject of intense controversy[329] because of the various consequences they have for freedom of expression, fluidity of navigation and the ability of operators to offer new services; they are also the subject of particularly strong campaigns of influence by all stakeholders - GAFAM, rights holders, civil society -. Their texture is non-consensual and unstable, as evidenced by the multiple versions of the texts discussed but also by the delayed implementation of some national solutions.

The various techniques present in the range of literary and artistic property solutions are mobilized: extension of intellectual property rights to new activities for new beneficiaries, exceptional mechanisms, mandatory collective management, forced contract or filtering obligation. Some mechanisms aim to capture the informational value of protected works and subject matter (2.3.1.), whilst others streamline systems for authorizing the use of content in a multi-media economy (3.3.2.), with these two objectives largely interrelated.

2.6.1. Apprehending informational value

Previous developments showed a relative inadequacy of literary and artistic property law tools to capture the informational value of the subject matter it protects, which will be the subject of new indexing, referencing, mining and aggregation services with which the owners have difficulty being associated. Tools are being rolled out to enable them to penetrate these markets, which are gradually becoming essential in a knowledge and data economy. These are the creation of a related right for the benefit of press publishers (a), the exception for the text and data mining (b) and the new regime for video walls (c).

[329] See, for example, the appeal signed by 145 associations on 26 April 2018 inviting the Council to reconsider the agenda for adopting the text and to reconsider certain principles, including in France, ASIC, Wikimedia France and SYNTEC; http://copybuzz.com/fr/copyright/over-145-organisations-ask-council-to-stop-a-rushed-eu-reform/#signatories , also see the appeal of 47 academics of 17 October 2017 whose content is explained in The Recommendation on Measures to Safeguard Fundamental Rights and the Open Internet in the Framework of the EU Copyright Reform, *European Intellectual Property Review, Vol. 40, Issue 3,2018, pp. 149-163.,* par M. Senftleben; C. Angelopoulos, G. Frosio, V. Moscon, M. Peguera; O.A. Rognstad.

d) Acknowledging related right for press publishers (and agencies)

Related right of press publishers. History. Press publishers advocated for the granting of a related right allowing them to be associated with new uses made by platforms, aggregators and search engines based on press content for which they have editorial responsibility. This claim was heard in Germany and Spain, two countries in which national law has established such a prerogative in their favour. However, the result was not very convincing insofar as the main SEO players decided not to include press content in their services if the related right were to be applied to their activity. Under this threat, and because of the market power of these operators in terms of the visibility of press content, publishers waived the implementation of the right and agreed not to charge royalties. However, this claim was reflected in the discussion on the draft CDSM Directive[330], when the impact study noted the failure of a solution negotiated on a voluntary basis between infomediaries - aggregators, search engines - on the one hand, and rights holders - authors, publishers - on the other.

Scope of the law. Digital use. As for press publishers' "related right" - entitled "protection of press publications with regard to digital uses" - it has undergone several changes since the initial proposal. Whilst the definition of press publication (Article 2 paragraph 4) remains almost unchanged[331], and continues to exclude scientific publications from its scope, the scope of the right and its enforceability have been substantially modified. Member States must in principle grant press publishers the rights provided for in Articles 2 and 3, paragraph 2 of Directive 2001/29/EC for "***the digital or non-digital use of their press publications by information society service providers*"**, Articles 5 to 8 of Directive 2001/29/EC and Directive 2012/28/EU applying *mutatis mutandis* to these prerogatives. But the term of protection initially intended to apply for 20 years from 1st January following the year of publication was reduced to one year in the Council version and five years in the Parliament version.

The scope of eligible activities is particularly broad since it refers indeterminately to all possible "uses" made by infomediaries, i.e. a subjective and potentially evolving approach to acts falling within the scope of the law, breaking with the traditional categories of reproduction and communication to the public. Notwithstanding, in the last known state of the text, it reserves individual users the right to legitimate private and non-commercial use. The benefit of the right has also been extended, in the latest version of the text, to news agencies.

Scope of the law. Links. In the version finally adopted by the European Parliament, the protection does not apply either to hyperlinks which are accompanied by only a few words. This question was central for a long time to the discussions, which focused on whether the link should be considered as a communication to the public[332] and included within the scope of the new related right. The potential restriction on the freedom to link was the subject of heated debate against the provision. The version submitted for discussion in Parliament on 12 September now excludes reference to the act of communication to the public and therefore removes hyperlinks with a few words from the scope of the law. On the other hand, if the ratio of use of the press publication exceeds this *de minimis* threshold, the link or, it should be said, the referencing system would be covered by the exclusive right.

Parts of the press publication. Factual information. There are still considerable uncertainties as regards the use of the **parts** of the press publication. The Council's version left Member States considerable leeway to determine what constitutes an unsubstantial part of a publication, by referring either to an originality criterion, a size criterion or both. As for the European Parliament's version, it remains silent on the subject, as did the Commission's initial

[330] Draft directive on copyright in the single digital market 14 September 2016, 2016/0280 (COD)
[331] Draft directive on copyright in the single digital market 14 September 2016, 2016/0280 (COD)
[332] CJEU, 14 June 2017 *Stichting Brein v/ Ziggo BV*, case C‑610/15.

proposal. On the other hand, it makes it clear that "factual information" is not covered by this right and that anyone can report factual information contained in press publications.

Linkage between the respective rights on press publications. The text of the draft directive also states that "*the rights granted to publishers leave intact and in no way affect the rights conferred by Union law on authors and other rights holders with regard to protected works and subject matter included in a press publication. These rights shall not be enforceable against authors and other rights holders and, in particular, shall not deprive them of their right to use their protected works and subject matter regardless of the press publication in which they are included*. This is without prejudice to any contractual agreements between publishers and other holders. Moreover, when a protected work or subject matter is incorporated into a press publication on the basis of a non-exclusive licence, the rights of the press publisher may not be invoked to prevent use by other authorized users. Nor can they be invoked to prevent the use of works or subject matter whose protection has expired.

What is the author's share? As regards relations between press publishers and authors of the elements contained in press publications, the draft directive seeks to establish a balanced relationship to prevent journalists from ultimately losing when a new law is established. In this respect, the principle of non-allocation of copyright by related rights is reiterated in the recitals (recital 35). As such, in theory, the right of the newspaper publisher does not go beyond the right of authors to their contributions and the latter are free to engage in an autonomous and possibly competing use of their works. It is also provided that authors must be provided with an "*appropriate share of new revenues.*"

Nonetheless, the economic relationship with infomediaries may lead to a decrease in the author's share since the publisher will negotiate both the authors' copyright (on the original parts) and its related right with them at a constant (or almost constant) price. As a result, despite the precautions taken by the Directive, authors risk seeing the amount of remuneration linked to the digital use of their works reduced, especially since the text provides for the possibility for publishers to be associated with remuneration resulting from compensation paid to authors under the exceptions.

Sharing value with infomediaries? More generally-speaking, it is open to question whether, in France, related rights will be able to contribute to a rebalancing of the forces at work between producers of value and infomediaries, according to the ratio legis set out in the explanatory memorandum of the draft directive? During the hearings conducted by the mission, some press aggregators argued that they had already entered into contractual negotiations with publishers under the copyright of which they were assignees - in particular under the presumption of transfer provided for by the HADOPI II law - and that they were not prepared to pay more under the autonomous related right that the publisher would enjoy after the possible adoption of the Directive. As such, it is not certain that the related right in its current version brings an effective gain to newspaper publishers in relation to their position as copyright assignees.

As regards infomediaries who refuse to make their crawl and referencing operations subject to the prior authorization of rights holders - in particular under copyright - it is doubtful that the creation of an additional right changes anything to their determination and that the threat already made in Germany by Google against German newspaper publishers is not repeated with the same results, despite the scale effect sought by harmonization. Assuming that operators finally comply with this new right, some voices argue that the new deal will lead to crowding out effects from small local players to the benefit of large global infomedaries who will be able to face the publishers' claim and negotiate the terms of the authorization in a way which will be favourable to them. Whilst this anti-competitive effect could cause fear, it should nevertheless be noted that it is already at work in the press sector today in a different sense

and that operators specializing in press aggregation precisely complain of unfair competition from search engines.

Alternative protection for databases? In view of the uncertainties surrounding the adoption of the related right, press publishers can also rely on database law as a basis for their bargaining power with infomediaries. As already mentioned in the first part, the very welcoming definition of the database enshrined in the CJEU's jurisprudence makes it possible to process any work as such provided that the element contained in the work can be given an autonomous value at the end of its extraction. Consequently, press publication, considered as a collection of works, subject matter or other elements, may endorse the qualification of a database, particularly with regard to the extraction processes used by infomediaries. Demonstration of the originality of the database will then be required to enjoy copyright protection, in the sense established by the *Infopaq* jurisprudence. It is also possible, on the basis of this same definition of the database, to claim a *sui generis* right from the producer of the database, which is what the press publisher will most often be.

The European Commission's recent report on the evaluation of the "databases" Directive, although it does not conclude that these rights should be abolished, nevertheless makes a harsh assessment of its effectiveness and its adaptation to the new economic situation. By excluding from the investments eligible for protection those dedicated to the creation of the data, it excludes an increasing number of databases produced in the context of the new economy[333].

File access control. Finally, as practice already shows, publishers can negotiate by virtue of the provision of files - information carriers, which is normally done after the publication has been processed in such a way that it can be easily processed by infomediaries - file format, metadata -. The contracts concluded with the press aggregators already contain these two components: the delivery of files on the one hand, and a licence to use the elements contained in the press publications on the other. As the two parts of the contract are highly interdependent, the question of the thresholds of legal protection is generally not discussed since the infomediary is required to negotiate a licence for all content - original or not, reflecting an investment or not - to access the flow necessary for the processing and development of new services.

e) The exception of text and data mining

Exception(s) of "text and data mining". Initially considered as a minor issue, the question of "text & data mining" has become essential in the discussion of the draft CDSM Directive. It should be recalled that the French exception adopted by law for a digital republic is currently frozen[334] pending the adoption of the exception at Union level[335]. The proposal has gradually welcomed the extension of the scope of the exception, or even its duplication, due to the major economic challenges associated with this "mining" activity, defined as an automatic analysis technique designed to analyse texts and data in a digital format in order to produce information such as models, trends and correlations. The aim now is, on the one hand, to acknowledge an exception to compulsory mining for *scientific purposes* to copyright and *sui generis* rights, in accordance with the initial draft, and on the other hand, to provide that Member States will be able to provide for such an exception for the use of artificial intelligence.

[333] On the inadequacy of protection for the challenges of the data economy, see Report, p. 35 et al.
[334] Article 38 of the Act of 7 October 2016, the implementing decree of which has not, however, been adopted, the Government preferring to wait for the stabilization of the European legal framework through the adoption of the CDSM Directive.
[335] However, other legislation has already introduced exceptions of this type: the United Kingdom, Article 29A of the Copyright Act; Estonia, Article 19 paragraph 3 of the Copyright Act; Germany, Article 60 of the Copyright Act.

Mandatory and free of charge exception for mining for research purposes. Considered beneficial to the research community and thus likely to promote innovation, the activity of text and data mining is likely to be hampered by literary and artistic property law when the operations necessary for such mining fall within its scope, which is the case, it should be recalled, only if the subject matter concerned is protected[336]. The exception is considered so important by the European legislator that it is intended to be doubly binding on Member States, on the one hand, which will not have the choice not to adopt it and on contracting parties, on the other hand, which cannot exclude it by a contrary clause. It is also provided for without compensation.

An important debate is taking place on the eligible operations. Some amendments to the draft text[337] sought to clarify the acts which would fall under the exclusive right in order to better define the contours of the exception. A distinction is as such made between the activity of reading, which would not in any case be covered by the exclusive right, and the activity of "standardization" when it involves extraction from a database or reproductions. Moreover, the exception applies without prejudice to the interplay of the transitional provisional copying exception for text and data mining techniques not involving the making of copies which fall outside the scope of that exception.

Beneficiaries. One of the controversial points[338] of the exception was the limited nature of its beneficiaries. The initial proposal of the Directive was not intended for a research purpose but for research institutions. Although the reference to the public nature of these organizations has been deleted, the idea remains that "*research results do not benefit a company which has significant influence on these particular organizations"*. But if the research is part of a public-private partnership, the company participating in the public-private partnership must have legal access to the protected works or subject matter, which seems a little contradictory. As such, it is difficult to know the exact scope of the rights of persons taking advantage of the exception. It should be added that only entities which have lawful access to mined subject matter are eligible for the exception, which is not unlike the conditions relating to the lawful user found with respect to software and databases to avail of the exceptions. As such, the combination of the exception with the contractual framework for access to works needs to be clarified, especially since the exception is a matter of public policy. Finally, the scope of the exception cannot go beyond its initial scope, as evidenced by the obligation to ensure the safe storage of reproductions and extractions performed for the purpose of text and data mining, which must ensure that the copies will only be used for scientific research purposes. The mandatory exception has however been extended to cultural heritage management bodies so that they can perform and have third parties perform mining operations of the fonds and collections they conserve.

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[336] No authorization is required under the draft directive for simple factual elements or unprotected data.

[337] Draft European Parliament legislative resolution on the proposal for a directive of the European Parliament and of the Council on copyright in the digital single market (COM (2016)0593 - C8-0383/2016 - 2016/0280(COD)), amendment 8a. *"In order to be able to carry out text and data mining, it is, in most cases, essential to first access the information and then reproduce it. As a general rule, it is only after standardization that information can be processed through text and data mining. Once legitimate access to the information has been established, it is when the information is being standardized that the use protected by copyright takes place, since standardization involves reproduction by modifying the format of the information or by extracting the information from a database and converting it into a format which can be used for text and data mining. In the context of the use of text and data mining technologies, the processes which are relevant from a copyright point of view are therefore not the mining itself, which is nothing more than a reading and analysis of standardized information in digital format, but the access process and the process by which information is standardized so that it can be automatically analysed by computer provided that the process involves the extraction of a database or reproductions. The exceptions for the purpose of text and data mining provided for in this Directive should be understood as exceptions to processes covered by copyright but necessary to enable text and data mining.*

[338] M. Kretschmer, T. Margoni, Data mining: why the EU's proposed copyright measures get it wrong, The Conversation, 24 May 2018.

Extended optional exception. Following the formulated criticism of the limited nature of the exception, the Council also introduced an extended exception for temporary reproductions and extractions of protected works and subject matter which are part of the mining process. This exception, adopted by the European Parliament on 12 September 2018 (Article 3a), which covers all literary and artistic property rights, including the new newspaper publishers' related right, remains at the discretion of the Member States. It is provided for on condition that the use of the protected works and subject matter has not been expressly reserved by the rights holders, in particular by computer reading processes. Fair compensation could be provided for rights holders. The vagueness surrounding the provision, the fact that it is not a mandatory exception for Member States and the lack of formulation with the exception of mining for research purposes gives an impression of haste which makes the whole thing inconsistent. Nor does it indicate what type of monetary association holders can expect to derive from the mining of the masses of subject matter for which they hold the rights.

Access control. One of the points of contention regarding the effectiveness of the exception is the maintenance of access control, which is expressly provided that it may consist of the application of measures to ensure the security and integrity of networks and databases where mined content is hosted. Many critics of the provision also argue that the linkage of the exception with technological protection measures has not been provided for - contrary to the exceptions contained in Article 6 of Directive 2001/29 - so that rights holders remain technically in control of access and thus determine the extent of lawful access which conditions the exception. As such, despite the assertion that such an exception is necessary for research and innovation, its benefit remains dependent on technical access control in the hands of rights holders. Access control is also provided under the optional exception, making it difficult to exercise an "exception" unless one can benefit from parallel access to information.

f) Video wall regime

Mandatory collective management. Video wall regime. In the long dispute between Google and SAIF[339] over video walls, powerful operators invoked the US[340] fair use rules or the lightened liability regimes of the Act on confidence in the digital economy to try to evade the authorization of rights holders over images reproduced in thumbnail form in image search engines. A few years after this dispute, French law came to provide an answer to the mass use of images in search engines. The Act of 7 July 2016 incorporated a mandatory collective management system into the Intellectual Property Code set out in Articles L. 136-1 to L. 136-4.

In particular, Article L. 136-2 provides that the publication of a work of visual, graphic or photographic art from an online public communication service entails the management, for the benefit of one or more collective management bodies, of the right to reproduce and represent that work within the framework of automated image referencing services. In the absence of designation by the author or by their right holder on the date of publication of the work, one of the accredited bodies shall be deemed to be the manager of this right.

These accredited bodies alone are entitled to conclude any agreement with the operators of automated image referencing services for the purpose of authorizing the reproduction and representation of visual, graphic or photographic works of art in the context of these services and to receive the corresponding remuneration fixed in accordance with the procedures laid down in Article L. 136-4. The agreements concluded with these operators lay down the procedures under which they fulfil their obligations to provide the accredited bodies with a

[339] On the history of this case, see the CSPLA Report, *Referencing works on Internet,* 2013, p. 25 et al.
[340] V. *Kelly v Arriba Soft Corp* 336 F 3d 811 (9th Circuit 2003) and especially *Perfect 10 v Amazon*, 508 F 3d 1146 (9th Circuit 2007). See also, Th. Maillard, Le(s) statut(s) des moteurs de recherche (Search engine status(es)), Dalloz IP/IT 2016, p. 177.

statement of the use of the works and all the information necessary for the distribution of the sums received to authors or their rights holders. France therefore opted for the qualification of an act of use but chose a pragmatic solution aimed at reducing the transaction costs of authorization for a global repository.

European Cacophony... in the process of being resolved? As such, it is placed in a very different perspective from other national systems within the European Union which considered either that copyright did not have to apply because of the size of the thumbnails - decision of the Austrian Supreme Court of 20 September 2011[341] - or that there was implicit consent to the reproduction of images in the form of a thumbnail by putting them online. For example, the German Federal Supreme Court ruled in two landmark *Vorschaubilder* judgements (I and II) of 29 April 2010 that online publishing without technical restrictions should be interpreted as implicit consent to indexing by a search engine, even if the site to which the search engine refers hosts the work illegally. This trend was confirmed in a judgement of the same court of 21 September 2017 *Vorschaubilder III* or *Backlink* holding that the presumption of knowledge of the illegality of the content to which the link leads for operators acting for profit does not apply to search engines because of their importance for the functioning of Internet.

This divergence as to how to approach the mass processing of works in reduced restitution formats, aimed at "informational" or "descriptive" uses, with regard to prerogatives which are deemed to be harmonized by Union law, justifies bringing positions closer together in order to place this issue in a common perspective. This reflection is all the more important as the *Soulier & Doke* decision creates uncertainty as to the European legality of a mandatory collective management system which would not have been provided for in a harmonization directive.

The proposal to set up a similar mechanism was adopted by the European Parliament on "*automated image referencing services*", which was discussed during the debate[342]. A new provision in the CDSM proposal requires that licence agreements be concluded with rights holders guaranteeing them a "*fair remuneration*" without further detailing the terms of the proposal, except to indicate that it may be managed by a collective management body.

Despite its relative imprecision, this text should strengthen French law in the light of the *Soulier & Doke* jurisprudence, and as such allow its implementation and perhaps reduce the gap between the extremely diverse interpretations of these successful practices among Member States. In any event, it has only a very limited purpose and does not make it possible to resolve more broadly the question of the legitimacy of the intervention of rights holders in the activities of referencing and indexing their protected works and subject matter.

The question of the informational value of subject matter protected by literary and artistic property law has become central to the texts recently adopted or under discussion. Because of the traditional principles of distinction between information and form, it was necessary to adopt new tools which transcend this distinction, such as press publishers' related right on press publications, which differs from the criteria of works and originality, and the exception of text and data mining, designed to allow mining activities necessary for scientific activity in the 21st century.

The adoption in the draft CDSM Directive of an optional exception of more extensive mining than that which is acknowledged for search purposes represents a major challenge for the

[341] *GRUR Int.* 2012, 817.
[342] Articles 13 *b* and 2.1.4 *d* for the definition of these services.

artificial intelligence economy and will imply careful review of the balances to be established between a fair remuneration for holders and the freedom of trade and industry, in particular on the market of services derived from data mining activities where the value produced is hard to relate to the corpus of subject matter mined.

Associating rights holders to the indexing and referencing activity of their protected works and other subject matter is also a key challenge in a society where information on the work or around the work tends to have increasing value and is the condition for free informational movement. A first piecemeal answer was issued with the adoption of a compulsory collective management regime for video walls still activated in French law, pending European validation which is exposed in the draft CDSM Directive.

The project for processing links and other descriptive tools remains to be established, as illustrated by the instability of the links regime in the jurisprudence of the Court of Justice and in the press publishers' related right.

2.6.2. Centralizing authorizations in economics of the multitude

Content dissemination platforming poses the difficulty of seizing, at reasonable cost, acts of use which take place in a fragmented manner by a multitude of entities with variable status. Literary property has the tools to centralize authorizations on the part of rights holders with collective management mechanisms, but the issue arises of identifying "co-contracting parties", since some platforms claim immunity status. By breaking the lock on the hosting provider's regime, the draft CDSM Directive brings about a kind of Copernican revolution as regards the organization of contractual relations by enabling mechanisms to be "centralized" for acquiring rights (a). This phenomenon is accompanied by a reduction in the liability of certain operators, amateurs, whose practices are now "lawful" by the intermediaries which expose the content (b). Such a process breaks away from the unsatisfactory balances which had existed until now, namely the combination of a contractual relationship with an uncertain basis and the implementation of filtering instruments. However, the question of maintaining such a solution in the new environment remains (c).

d) Centralizing the authorization as regards the platform

Implementing an ad hoc regime. As mentioned above, the draft CDSM Directive initially reconsidered the liability regime for platforms to involve them more in anti-counterfeiting by setting up "filtering" tools on the one hand, and to encourage them to conclude collective licences on the other hand.[343] The linking of these two tools is the subject of intense discussions after the text proposal was refused by the European Parliament in a vote on 5 July 2018. The evolution of the text attests to a hesitation between the option of fully and directly applying the principles of literary and artistic property to players who had hitherto been exempt from these obligations and the option of creating an *ad hoc* regime. The latest version of the text tipped the balance in favour of the first option, as some platforms are now subject to the obligation to negotiate agreements, not on a voluntary contractual basis, but because of the direct application of exclusive literary and artistic property rights[344] to the acts performed by them.

[343] As of May 2015, the Commission Communication "A Digital Single Market Strategy" envisaged "clarifying the rules on the activities of intermediaries with regard to copyright-protected content". In 2016, when the Commission published its communication on platforms, it confirmed that it did not intend to touch the E-commerce Directive but that it would endeavour to propose solutions to reduce market disparities ("level the playing field").

[344] In this respect, see the report presented to the CSPLA by P. Sirinelli, J.-A. Benazeraf and A. Bensamoun on the linking of Directives 200/31 and 2001/29, 3 November 2015 whose recommendations were very close to the first status of recital 38.

Providers of online content "sharing" services. Definition. Upon completion of the draft directive, and during the discussion, several amendments emerged aimed at clarifying the quality of the operators covered by the new regime. In particular, the notion of providers of online content sharing services was evoked, which would "encompass" information society service providers whose main objective is to store and disseminate protected works and subject matter which have been uploaded by their users, to offer them to the public and to optimize the content, in particular by promoting the copyright-protected works and subject matter which have been uploaded by displaying them, assigning them tags, ensuring their conservation and sequencing, independently of the means used for this purpose, and as such playing an active role. Several criteria are listed: they are information society service providers, **whose main purpose is to store and disseminate content protected** by literary and artistic property posted by third parties, which offer this content to the public, "optimize" it and thus play an active role. Optimization can take various, non-limitative forms: promotion by display, tagging, conservation, sequencing.

Providers of online content sharing services. Exclusions. The definition of providers of online content sharing services does not include, within the meaning of this directive, service providers which do not pursue a commercial purpose, such as online encyclopedias, or online service providers if the content is uploaded with the authorization of all relevant rights holders, including scientific and educational-focused repositories. Providers of individual-use cloud storage services which do not offer direct public access, open source software development platforms and online marketplaces whose main activity is the retail sale of physical goods online should not be considered as providers of online content sharing services within the meaning of this directive. A host of exclusions exist.

Players targeted by the mechanism. Quantitative approach? The text is primarily aimed at platforms such as *YouTube*, which has become a key player[345] in cultural content distribution in Europe. However, "platform" vocabulary is not the same as that used in the original text, which preferred the expression "*information society service providers which store and provide access **to a large number of protected works** and subject matter uploaded by their users".* The reference remains, as the legislator is committed to including only certain categories of infomediaries. In the body of the provision this condition does not appear and as such we move from a volume approach to a purpose approach - providing broad access - regardless of the quantities of information exchanged, with the consequence that smaller operators are likely to be on an equal footing with larger players. To lessen this competitive effect,[346] the text now

[345] Report by Joëlle Farchy and François Moreau presented to the CSPLA, *The digital economy of disseminating works and financing creation*, September 2016, p. 47: "*Although hosting platforms are massively used to access cultural content, only a limited and relatively modest portion of their advertising revenues is paid back upstream (around 10% worldwide and 20% in the French case).*" More precisely, the study establishes that the contracts between YouTube and copyright collectives are concluded on the basis of the payment of a percentage of the platform's total advertising revenue of around 5.5%. However, the latter cannot ensure the reliability of the amount of the base used because YouTube does not declare its advertising revenues in France. In the case of individual contracts between YouTube and rights holders, repayment since 2013 (previously flat-rate contribution) corresponds to a share of the advertising revenue associated with the videos concerned. The distribution base can be estimated at 55% for rights holders and 45% for the sharing site. In France, based on the hearings conducted, the mission estimated YouTube's advertising revenues at 80 million euros in 2014. On the basis of the sharing arrangements mentioned above, YouTube would pay approximately 4.4 million euros to all copyright collectives (80 × 0.055). As regards individual contracts, the mission estimated that the amount of the repayment to rights holders is 15.2 million euros. Overall, YouTube's contribution upstream of cultural channels would therefore be around 19.6 million euros for 2014, or 24.5% of the platform's advertising revenue that same year.

[346] ECS Opinion, afore. "*As with art. 11, we are concerned that proposed art. 13 will distort competition in the emerging European information market. The obligation for content platforms to implement "effective content recognition technologies" will privilege large incumbent platforms that have already successfully implemented such measures (such as YouTube), whereas entry to this market for newcomers may become all but impossible. The unforeseen effect of the provision may, therefore, be locking in YouTube's dominance in the EU*."; see also, V.-L. Benabou, S. Gossens, Où en est le "value gap" ? (What progress has been made with the value gap?), *Intell. Prop*., October 2017, No. 65, pp. 6-11: "*As for technology companies, most of them criticize a mechanism whose exorbitant*

provides that micro and small enterprises are not affected by the provision. In its last paragraph, it also specifies that the good practices to be developed between platforms and holders must ensure that the burden for SMEs remains "*acceptable*".

Providers of online content sharing services. Disruptive approach. The definitions proposed and the exclusions from the scope of application reflect a renewed approach and challenge traditional intellectual property law reasoning. As such, the notion of "sharing" content is alien to the usual categories of copyrights. It is also unusual to exclude a category of specific players from the scope of a right, regardless of the justification for such exclusion. The enforcement mechanism is in principle indifferent to the nature of the user/operator's activity, their specificity being taken into account at the exception stage. The exclusions listed in Article 2 paragraph 5 seem to be justified by this exclusion from the application of copyright rules a priori[347], reserving the application of Article 13 to the sole category of online trading platforms acting for profit. The aim is certainly to subject large platforms which derive part of their revenue from the exposing protected works and subject matter, without penalizing other players whose activity is less directly involved in this exposure or which do not derive any revenue from it, but the listing of vague categories opens the way for those who will wish to claim exclusion by emphasizing that they operate a private cloud service or that they also constitute a marketplace. Moreover, after the adoption of the text, will it be possible to make the activity of an operator which does not generate direct revenue but uses the content sharing service as a premium product for other services subject to authorization?

The only platforms? Moreover, as it stands, the text mainly targets platforms and seems to ignore the activity of several providers such as search engines, since it is not mainly dedicated to "*storing and disseminating protected works and subject matter which have been uploaded by their users*". The search and indexing mechanisms for the subject matter content of these engines are not uploaded by their users but are voluntarily processed directly by the engines.

Data sharing. The issue of sharing data relating to the operation performed by the platform when using a protected work or subject matter is strategic for rights holders, as it would enable them to keep a clear view of the operating conditions and adapt supply to demand after a constant process of identifying preferences and renewing services. Without this, holders can only be marginally involved in the data economy, which is an essential source of growth. This point is only marginally addressed in the draft directive and the guidelines adopted, which are based on the principle of minimizing the collection of personal data, do not support this sharing. Action should be taken on this point to ensure that holders are not excluded from information around the use of protected works and subject matter, whilst respecting the rights of individuals.

e) Authorization on behalf of third parties

"Global" licence? The other major innovation of the text is that the authorization paid by the platform is presumed to also cover acts of communication to the public by users of the platform - including those who post content - as long as they are not acting for profit[348]. In terms of

cost would only consolidate the dominant position of companies which are already dominant in this sector whilst erecting barriers to entry deemed impassable by new European entrants."

[347] See the interinstitutional note from the Presidency of the Council to the COREPER, of 23 April 2018, 2016/0280 (COD), No. 8145/18: "*The Presidency's consolidated text defines online content sharing service providers in a targeted way (Article 2(5)). Taking into account the views of the majority of delegations during the discussions, the Presidency considers that at this stage there does not seem to be enough support to further target the services covered, in particular with a carve out of SMEs."*

[348] Recital 38 d): Where online content sharing service providers obtain authorisations, including via licensing agreements, for the use on the service of content uploaded by the users of the services online, authorisations should also cover the copyright relevant acts in respect of uploads by the users but only in cases where the users

copyright, this system can claim to be analogous to the *SBS*[349] judgement of the CJEU, which considered, with regard to direct injection, that there was only one act of communication to the public covered by the authorization for final distributors only, excluding the broadcasters at the origin of the broadcast.

This "global" licensing mechanism also seems rational insofar as it centralizes the request for authorization with the solvent economic operator, without the rights holders having to multiply the costs of research and, above all, avoids exposing users of the service, who are unfamiliar with the mechanisms, complex procedures and the risk of criminal sanctions if they fail to comply with them[350]. Linkage with the exceptions remains delicate however, particularly with a view to the adoption of a "meme" exception. Whilst the proposed text states that the mechanism of Article 13 will apply notwithstanding the existence of such an exception, such a proposal is difficult to reconcile with the idea that there is only one act of communication to the public. Nor does it resolve the question of the application of the other exceptions. Moreover, could the free nature of the exception have an impact on the price paid by the platform?

New meme exception? This "disempowerment" of platform users includes the so-called "meme" exception described in the latest version of the text in recitals 21 et al. During the discussion in Parliament on the CDSM Directive, an amendment was inserted to create a new optional exception to copyright, related rights including the press publisher's related right, and *sui generis* right, relating to the "*legitimate use of short extracts and quotations from works and subject matter protected by copyright in content posted by users*" which would be publicly available. The purpose is to provide a citation exception for amateur users, natural persons acting for non-commercial purposes who include short extracts and brief quotations of works or subject matter in a work they have placed online, for the purposes of criticism or review, illustration, caricature, parody or pastiche. The exception concerns only protected works and subject matter which have already been lawfully made available to the public, accompanied by an indication of the source, in particular the name of the author, unless this is impossible, and provided that the extracts and quotations are in accordance with proper use and used to the extent justified by the purpose pursued.

The text also provides that platforms may not use the exception to limit their liability or the extent of their obligations under agreements concluded with rights holders, pursuant to Article 13 of the Directive. As such, the benefit of the exception would be reserved for the act of introduction into the process of communication to the public via the platform and would not concern the act of transmission by the platform to the public.

Amateur "content". Transformative use? The new exception aims to cover the "do-it-yourself" of protected works and subject matter made possible by information society services which allow individuals to access and make content available "*in various forms and for various purposes such as the illustration of an idea, criticism, parody or pastiche. Such content may include short extracts from pre-existing protected works and subject matter which such users may have modified, combined or transformed*.". The provision is part of an objective to facilitate access to works for personal use in a context of sharing on platforms. It goes beyond the citation exception since it does not serve any specific purpose but aims at a short and proportionate use of a citation or extract. The assessment of the three-step test would serve as an adjustment variable, with the assessment of prejudice to be taken into account "*as appropriate on the degree of originality of the content concerned, the length or size of the quotation or extract used, the professional nature of the content concerned or the degree of*

act in their private capacity and for non-commercial purposes, such as sharing their content without any profit making purpose.

[349] CJEU, 19 November 2015, *SBS*, case C- 325/14.

[350] Such a mechanism had been proposed in the report to the CSPLA on "transformative" creations to address the difficulties caused by "amateur" UGC on the basis of an ad hoc instrument to be created and in the report on the link between Directive 2001/29 and 2000/29 of 3 November 2015 on the basis of copyright.

economic (copyright) prejudice caused." This exception should be without prejudice to the moral rights of the authors of the protected work or subject matter. It can be analysed as an illustration of the effect of communicating vessels, with the freedom acquired here by Internet users balancing the management of their acts of dissemination by the platforms. It should be noted, however, that the framework for the exception remains

f) The alternative to filtering

Licence-filtering. The CDSM Directive Article 13 tandem[351]. During the process of discussing the text, the legislator oscillated between two different but not very reconcilable positions. The starting point of the proposal was essentially to introduce "duty of care"[352] to involve platforms in cooperation to tackle counterfeiting by setting up filtering mechanisms. The filtering issue is now left to the discretion of the parties.

Accumulation of criticism. The possibility of filtering therefore remains, even if the text of Article 13 no longer makes it an obligation for platforms, as in previous versions. This mechanism concentrated abundant criticism from GAFAM, civil society and academics[353], but also, more unexpectedly, from certain cultural players[354] and parliamentarians traditionally committed to defending the interests of rights holders[355]. Many denounced the potentially liberticidal nature of widespread filtering of Internet by platforms, under the leadership of rights holders, in defiance of both freedom of expression and creation and the prohibition of a general monitoring obligation in Article 15 of the E-commerce Directive.

Rights of defence. Although much more diffuse, the possibility of filtering has not disappeared under the term "cooperation" now included in Article 13, and the fact that it is based on voluntary mechanisms is not of a nature to silence the aforementioned criticisms. They may, however, be tempered by the many obligations placed on platforms to provide complaint and effective redress mechanisms for users whose content has been "*unfairly removed*". These arrangements must also make it possible to deal with the complaint quickly, which must be examined by a natural person (and not by an algorithmic procedure); at the end of a complaint which must be justified by the rightful claimants; in order to ensure respect for personal data; and even, beyond that, the absence of identification of users. Member States must also provide for legal remedies enabling them to assert before a judge or an independent body the "use" of a limitation or exception. Finally, best practices to be established between the parties must ensure that "*automatic content blocking is avoided.*"

The mechanisms for centralizing authorizations provide a useful answer to the use by the multitude. Article 13 of the draft CDSM Directive provides two innovations in relation to this; the first, still controversial, aims at tailoring the security perimeter mechanisms which certain

[351] See the report by the study mission on tools for recognizing copyrighted content on digital platforms, O. Japiot, L. Durand-Veil, CSPLA, 2017.

[352] Article 13 paragraph 3 of the Commission draft established an obligation for these providers to cooperate to ensure the effectiveness of the measures for identifying and filtering content defined in the agreements with rights holders, where appropriate under the guidance of public authorities (paragraph 3).

[353] In this respect, see the reaction of the European Copyright Society, from 2017 https://europeancopyrightsocietydotorg.files.wordpress.com/2015/12/ecs-opinion-on-eu-copyright-reform-def.pdf: *"Our Society is puzzled by the rather ambiguous text of Article 13 of the proposed DSM Directive, and unsure of its application. Furthermore, we do not understand how the proposed text relates to the existing provisions of the E-Commerce Directive (Directive 2000/31/EC), notably art. 14 (safe harbour for hosting service providers) and art. 15 (no general obligation to monitor)."*

[354] Recently, Pascal Nègre's article in Le Monde on 5 September "Ne sacrifions pas la prochaine génération de musiciens" (Let's not sacrifice the next generation of musicians).

[355] Next impact, 5 September 2018, Directive droit d'auteur : les compromis d'Axel Voss, la contre-proposition de Jean-Marie Cavada (Copyright Directive: Axel Voss' compromises, Jean-Marie Cavada's counter-proposal).

intermediaries have been taking advantage of since the Electronic commerce Directive, to take the "active" aspect of some of these into account; the second, less focused on yet just as important, is related to the use procurement mechanism by the platform on behalf of its users, enabling the latter, when using for non-professional reasons, to be exempt from fulfilling obligations for requesting prior authorization.

In this respect, "blocking" and "filtering" solutions must be accompanied by guarantees for reducing the negative effects. For this purpose, the proposals set out in the CDSM Directive focus on initiating procedures enabling people who are victims of abusive filtering to invoke their rights of defence against a natural person, in a framework of equality of arms.

3RD PART: PROPOSALS

The analyses drawn from the first two parts of the study highlighted a number of persistent inadequacies in literary and artistic property law to meet the challenges of the data economy and the mass distribution of content and the inappropriateness of establishing an *ad hoc* data reservation mechanism[356]. Without seeking to resolve all the difficulties caused by the emergence of new models, services and players, this report concludes with a forward-looking reflection on three complementary axes: institutional, cultural and economic. Improving literary and artistic property instruments in this threefold perspective requires, in particular, adjusting the institutional framework to the digital environment and the data economy (**3.1.**); accompanying and not enduring the better flow of protected works and subject matter to ensure they move in a timely manner in this realm (**3.2.**); and finally, encouraging the digital use of protected works and subject matter whilst associating rights holders with the value created (**3.3.**).

3.1. Adjust the literary and artistic property institutional framework to the digital environment

Brussels objective. The European Commission following the 2014 elections defined and implemented an exceptionally dense "digital agenda" which led to normative production on an unprecedented scale. Issues related to digital data and content are mainly dealt with in Brussels, within the framework of DG Connect, which has attached the Directorate in charge of literary and artistic property to it, reflecting an institutional convergence between digital and copyright. Despite this vertical integration, many of the consequences related to the interpenetration of digital technology and literary and artistic property law had not been identified or anticipated. It is as such necessary to exercise greater vigilance with regard to this globalizing approach, as witnessed by the French public authorities throughout the legislature which is coming to an end.

In this respect, it is worth recalling some important developments during this period:

- the revision of the Audiovisual Media Services Directive has made it possible to extend certain dimensions of audiovisual regulation to video sharing platforms and social media, strengthening the obligations to expose European works for video-on-demand services and adjusting the country of origin principle by allowing the country of destination to impose financial participation obligations on production;
- unlike the Commission's initial proposal, the finally adopted geoblocking regulation does not affect the rules on copyright and related rights;
- the Council's work on the draft directive on digital content provision contracts made it possible to clarify the linkage with literary and artistic property law, any infringement of this right constituting a lack of conformity on the part of the supplier, giving the consumer the right to compensation; this clarification remains to be confirmed in trialogue;
- finally, the European Parliament's adoption on 12 September 2018 of the of the draft CDSM Directive testifies to the collective awareness of the need to rebalance the overall relationship between infomediaries and rights holders, a position which France took during the preparatory phases of the text.

[356] See above on the criticism articulated against the data ownership project and on the reactivation of Directive 96/9 beyond the restricted scope to which it was assigned by the CJEU.

Improve institutional organization. Despite this assessment, the hearings conducted by the mission showed the existence of organizational difficulties linked to the diversification of sources of normative production. For example, with regard to the Directive on digital content provision contracts, awareness of the issues at stake for literary and artistic property was late and justified the launch of this mission. As we approach a new legislature in which digital issues will undoubtedly remain very present, it seems useful to formulate some ideas to strengthen the capacity to build and promote solutions in the field of literary and artistic property.

First of all, there is now a gap between a French organization which remains sectoral (only the Ministry for Culture is responsible for literary and artistic property) and a European normative production which largely falls outside this scope. Today, the challenges are not only in the texts dedicated to them, but also in those relating to consumer law, electronic communication law, commercial law and taxation.

The inter-ministerial coordination provided by the French General Secretariat for European Affairs (SGAE) certainly makes it possible to mobilize the expertise of the various ministries concerned. However, it necessarily shows its limits when it comes to early detection of the literary and artistic property implications of texts for which they are not obvious at first sight or to the construction of proposals mobilizing instruments from these other branches of law.

It would therefore be advisable to diversify the expertise within the Ministry for Culture and to refine the analysis of the issues as early as possible in the procedure for adopting European texts. In this respect, the hearings conducted by the mission reported the creation of a function within the relevant Ministry dedicated to this transversal approach, which is a step in the right direction. Informal horizontal exchanges between those in charge of digital strategy topics in the relevant ministries could be developed.

The second difficulty has already been identified in several reports[357] and on other subjects: it is due to the relatively low level of French contributions to public consultations, either before or after the adoption of the text proposals by the European Commission. On a text as important as the draft Directive on copyright in the single digital market, in the context of a public consultation organized within three months of its publication (between September and November 2016), no contribution from a French civil society organization was collected, unlike contributions from Germany, Austria and Flanders[358]. It could be relevant to set up a permanent watch and analysis group between French administrations and the relevant civil society players, so as to alert them to the European agenda, exchange relevant information and make French positions better heard as early as possible in the decision-making process.

Better coordination of inter-ministerial positions with rapid feedback would also have the advantage of highlighting the communities of interest existing between rights holders and users, beyond archetypal oppositions. Drawing inspiration from coalitions which may have emerged, for example, during the adoption of texts on the protection of personal data, could help to overcome occasionally-overplayed divisions.

The development of cooperation between the CSPLA and the National Digital Council (CNNum), whose membership is complementary in terms of associated stakeholders, could also help resolve this difficulty. Several forms can be considered: appointment of a common member of the two bodies or a CNNum representative to the CSPLA and vice versa; reciprocal

[357] Cf. in particular the Council of State, *L'administration française et l'Union européenne. Quelles influences ? Quelles stratégies ?* (The French administration and the European Union. What influences? What strategies?) 2007 annual public report Études et documents No. 58; C. Caresche and P. Lequiller, *L'influence française au sein de l'Union européenne* (French influence in the European Union), information report submitted by the National Assembly Commission for European Affairs, February 2016.

[358] European Commission, *Summary of feedback received on the copyright modernisation package*, April 2017, 8508/17.

exchanges before publication on draft reports; setting up joint working groups or drafting joint reports.

3.2. Accompany instead of enduring the smooth flow of protected works and subject matter to ensure their exposure in this new realm

The objective of ensuring better flow of data and content is not necessarily incompatible with intellectual property law, particularly when the holders are involved in the economic or symbolic enhancement of the dissemination of protected works and subject matter. To this end, it is necessary to dispel certain uncertainties regarding the rights regime so as to enable the enhancement of certain "digital commons", i.e. works and subject matter belonging to the public domain or subject to legal deposit, serving cultural dissemination policies (3.2.1.). It is also necessary to extend the reflection on the interest of rights holders in actively participating in the presentation of protected works and subject matter, so that they can be the subject of datafication, understood here as mass processing in interoperable formats (3.2.2.).

3.2.1. Promote "digital commons"

Promotion opportunities. In the digital content era, large private platforms have become almost compulsory gateways for access to works. Notwithstanding, digital technology is also an exceptional opportunity to widely disseminate the works held by public institutions. France is fortunate to have major cultural institutions which have been committed for several years to a determined digital broadcasting policy. Since its creation in 1997, the French National Library (BNF) has opened the Gallica digital library, which now has 4.3 million accessible documents and 15.8 million visitors in 2017[359]. The French National Audiovisual Institute (INA) offers 50,000 hours of programmes accessible to the general public and nearly 18 million accessible to researchers; in 2017, it had 47.3 million visitors on its site or associated platforms[360]. These figures are constantly increasing.

The creation of these "digital commons" of culture - an expression by which one can designate either catalogues and public collections relating to elements which are not or are no longer the subject of exclusive rights, or legal deposit[361] - is thus likely to generate real popular success, by opening up an abundant, accessible offer, carrying cultural diversity and conducive to innovative reuse. It should be conceived as such and become a systematic policy, applied to all cultural institutions.

To promote this movement, several measures should be adopted. They concern the different legal regimes of digital content held by cultural institutions: the opening of data; the digital dissemination of works; and the enhancement of legal deposit.

- **Remove uncertainties related to the copyright of public officials**

The status of public officials hinders the opening of public data. The uncertainties about the copyright of public officials, described above (cf. I.3.1.), constitute a barrier to the openness of public data. In the absence of knowing whether their officials can claim an intellectual property right, which would prevent both dissemination and reuse, administrations refrain from opening. The provisions resulting from the Act of 1st August 2006 raise two types of questions:

[359] 2017 Business Review.
[360] 2017 Business Review.
[361] Although it also concerns works which have not fallen into the public domain, it makes it possible to ensure their collection, conservation and, under certain conditions, consultation in the interest of all, and thus tends to constitute common heritage.

- If Article L. 131-3-1 of the Intellectual Property Code provides that the right to use the work created by a public official is automatically transferred to the public person who employs that official "*to the extent strictly necessary for the performance of a public service mission*", it is difficult to determine in practice the cases in which this legal transfer has taken place.
- As Article L. 131-3-3-3 refers to a Council of State decree the terms of application of the legal transfer and the preferential right, the absence of adoption of the decree casts doubt on the effective entry into effect of these legal provisions. Article 1 of the French Civil Code provides that "*the entry into effect of those of their provisions whose execution requires implementing measures is postponed to the date of entry into effect of these measures*"; can the legal transfer and the preferential right be implemented without regulatory implementing measures?

Openness and purpose of the service. On the first point, the current wording of Article L. 131-3-1 does not provide sufficient security for the conduct of the policy of opening public data. The freedom to reuse makes it possible to reprocess data for purposes other than those of the public service mission for which they were created; can it therefore be considered as a measure strictly necessary for the fulfilment of the public service mission? To remove any ambiguity, **it seems desirable to write explicitly in the law that the implementation of the dissemination obligations provided for in Article L. 321-1-1 of the Code for Relations between the Public and the Administration (CRPA) is always deemed necessary for the fulfilment of the public service mission**. Such a provision would be consistent with the spirit of the Act of 7 October 2016 for a Digital Republic, which has made the online posting of administrative documents an obligation for any public person.

Repeal the reference to the implementing decree. On the second point, it seems desirable to repeal the reference to a decree which has not been issued for more than twelve years. Its main interest would have been to regulate the arrangements for associating public officials with the revenue generated by the use of their works, but repealing the reference would not remove the principle of remuneration. In the absence of a decree, it would be up to each public person to negotiate these with their officials. Guidelines could be defined by the Advisory Board for State Pubication and Administrative Information (COEPIA); as a flexible legal instrument, they would provide a useful guide for the public persons concerned while allowing them to deviate from it.

- **Promote legal deposit**

Purpose of legal deposit and evolution. Created by the Montpellier Ordinance of King Francis I of France of 28 December 1537, the purpose of legal deposit is, according to Article L. 131-1 of the French Heritage Code, to ensure the conservation of all documents, whatever their form and medium, made available to the public and to allow their consultation in compliance with intellectual property rights. It is carried out in three institutions, the French National Library (BNF), French National Film and Moving Image Centre (CNC) and the French National Audiovisual Institute (INA)[362]. Over its long history, legal deposit has evolved to include new forms of expression, particularly in recent years for software, databases and websites. In the version adopted by the European Parliament, the CDSM Directive also establishes a legal deposit of the European Union, which would cover any electronic publication dealing with subjects related to the Union (Article 10*a*).

[362] The French National Audiovisual Institute (INA) is in charge of sound and audiovisual documents broadcast on television and radio, as well as media websites; the French National Film and Moving Image Centre (CNC) of cinematographic documents; the French National Library (BNF) of printed documents, software and databases, phonograms and videograms and websites.

However, there is now a gap between the scope of legal deposit, which has continued to expand, and its dissemination possibilities, which are still as limited as ever. Articles L. 132-4 to L. 132-6 of the French Heritage Code provide for an exception to copyright, related rights and the right of the database producer for on-site consultation by duly accredited researchers. No other use is permitted.

Legal deposit cannot affect the substance of the author's right to authorize acts of use of their work. However, some of the current restrictions do not seem justified and prevent promotion.

On the one hand, the legal requirement to allow consultation of the legal deposit only on the premises of the depositary institution severely limits the possibilities of research. As far as the French National Audiovisual Institute (INA) is concerned, the texts have certainly been interpreted in such a way as to allow consultation on the premises of partner institutions, the number of which has gradually increased[363]. However, it would be desirable to go further by enabling remote consultation under secure conditions prohibiting any disclosure of documents. The necessary technical solutions exist today[364].

Broaden consultation capabilities. The difficulty lies in the fact that the requirement for consultation on the premises of depository institutions is provided for by the French DADVSI Directive (copyright and related rights in the information society) itself[365]. It could be deleted in the context of the CDSM Directive, whilst leaving it to the States to establish comparable conditions for consultation, in accordance with the principle of functional equivalence. **At the national level, the regulatory texts would provide that consultation must take place under technical conditions which prohibit all exports.** If it were not possible to amend the Directive, a flexible interpretation should be defended: if the technical solution induces the same restrictions as an on-site consultation (apart of course from the requirement of physical movement of the person), it could be considered as satisfying the requirement of consultation on the institution's premises.

Authorize depository bodies to "mine". On the other hand, depository bodies should be allowed to use the funds entrusted to them themselves, through text and data mining methods, without, of course, disclosing subject matter protected by intellectual property rights. The hearings conducted by the mission show that there is now a real demand for fund analysis, which depository institutions cannot satisfy under the current legal framework. The extension of the exception provided for in the draft directive to heritage promotion bodies is a step in the right direction in this respect.

Whilst the Commission's text only opened the exception of text and data mining to research organizations, the Council's version, adopted by the European Parliament, extended the benefit to cultural heritage management institutions. The definition adopted covers all the bodies responsible for legal deposit in France.

- **Study the economic and cultural opportunity of a policy for placing digital copies of works held by museums online**

In France, the general online availability of museum collections remains the responsibility of a few institutions and is still far from being widespread, particularly as concerns major national museums. Several advantages could be expected from such a policy: free and massive dissemination of collections; visibility of a much larger number of works than can be

[363] The contract of objectives and means (COM) between the State and the National Audiovisual Institute (INA) for the period 2015-2019 provides for the opening of 50 consultation points.
[364] In the case of particularly sensitive personal data, such as tax and health data, remote consultation has been accepted using a technical solution developed by the Centre for Secure Data Access (CASD) of the Group of National Schools of Economics and Statistics (GENES), which prohibits any copying or export by the researcher.
[365] It results from the combination of Articles 5.2.c and 5.3.n.

exhibited[366]; greater online presence of French museums; better control of access to works when Internet users search for them online, whereas they are often directed today towards foreign platforms, with sometimes uneven reproduction quality; openness to innovative reuses, especially to reach new audiences.

Potential negative consequences are occasionally highlighted, such as the substitution of online consultations for physical visits to museums and the loss of revenue which could be associated with the paid dissemination of these digital resources. It is now desirable to move beyond speculation and make a precise assessment of the benefits of placing collections online. A multidisciplinary mission should be set up for this purpose, which would assess the consequences in terms of the dissemination of culture, museum attendance and the evolution of institutional revenues. It would be based in particular on the assessment of experiences conducted in France and abroad.

3.2.2. Make works "suitable" for datafication[367]

Rights holders are at the forefront of strengthening the ability of protected works and subject matter to be processed digitally, in a twofold movement: on the one hand, to consider the burden of technical standardization necessary for effective processing and, on the other hand, to develop procurement mechanisms capable of addressing the processing of large volumes of information and volatile data flows*.*

- **Encourage owners to tailor the media and vectors of protected works and subject matter to datafication**

As pointed out in a previous report presented to the CSPLA by Jean-Philippe Mochon[368], the issue of content interoperability does not present the same difficulties in all cultural sectors. However, owners should be encouraged to develop procedures to enhance this interoperability, understood according to this previous mission as "*the ability for legally-acquired digital content to remain available without restriction of access or implementation, regardless of the software or hardware environment in which it is provided*". More generally, it is also necessary to establish standardized procedures and develop international identifiers[369] enabling digital content containing protected works and subject matter to be processed digitally on a mass basis.

As evidenced by the issues related to text and data mining activities, but also to a lesser extent by the adoption of a related right for press publishers, there are currently few incentives to open up content, and owners continue to use technological tools to apply access control measures to protected works and subject matter. This leads to paradoxical situations in which a public policy exception is introduced to encourage mining, which is considered to be of general interest but where, moreover, nothing is provided for as regards the standardization of the contents which are the subject of the mining, which makes it singularly difficult, or even likely to discourage mining projects. The investments required for this standardization are, however, not minor and it is understandable that publishers are discouraged from proceeding with it if they cannot expect a return on this investment, in particular with a free exception or if

[366] As such, the Museum of Brittany exhibits 3,000 works on its premises but placed 170,000 online during the general opening of its collections in September 2017.
[367] V. Mayer-Schönberger, K. Cukier, Big Data, A Revolution That Will Transform How We Live, Work and Think, London 2013. Datafication was translated in the French version by "placing the world in data".
[368] CSPLA mission on the interoperability of digital content, Report drawn up by Mr Jean-Philippe Mochon, Mission Chair, and Mrs Emmanuelle Petitdemange, Mission Rapporteur, on 22.05.2017.
[369] Report by the study mission on tools for recognizing copyrighted content on digital platforms, O. Japiot, L. Durand-Veil, CSPLA, 2017.

they cannot monetize this effort as part of a balanced negotiation, due to the lack of goodwill of the co-contracting party.

The natural movement is therefore to go through a system of contractualization of access to files, without, moreover, the rules of intellectual property always being taken into account in this contractual relationship, and therefore disregarding the exceptions. This situation is unfortunate insofar as it depends essentially on the balance of economic power and not on a balance of interests.

As regards the opening of public data, practical limits remain as long as each administration develops different and incompatible digitalization practices, allowing the user to access a real mix of file formats and metadata which are unlikely to be subject to mass processing. Assuming that the rights opening regime is applicable in a homogeneous manner at the end of the law, the heterogeneity of the content hinders the achievement of the objective.

It is therefore necessary to promote all mechanisms which encourage the creation of metadata, identifiers and open formats which can increase the visibility, location and movement of protected works and subject matter: standardization policy, public assistance, co-construction of data with users, etc. On the other hand, this undertaking should remain voluntary, otherwise it would be tantamount to introducing a mechanism of mandatory formalities contrary to the Berne Convention and ignoring the author's moral right to choose the form in which they wish to disclose their work.

Since mass processing is supposed to contribute to the fulfilment of the general interest, such as the promotion of scientific research for text and data mining or in order to maintain the reliability of information through editorial processes, **it is justified that rights holders who assume this responsibility when they are at the origin of natively digital content can receive a compensation for their effort**.

It could be provided, as proposed in the optional mining exception, that an economic compensation mechanism be adopted once the owner has made a data set processable in an open format. Other compensation or incentive systems are possible.

In view of the interpretation made by the European authorities of the *sui generis* right on databases, it is possible that this protection cannot be claimed on the basis of investments made by the owners, unless it can be demonstrated that these investments relate to something other than the creation of the data itself. As such, pursuant to the recommendations of the study carried out at the request of the Commission on the evaluation of the Database Directive[370], it is important to clarify the types of acts eligible for the evaluation of the substantial investment triggering protection. **The incentive could then be provided by a recital, according to which investment in the production of metadata for a dataset or in the standardization of open formats constitutes an admissible investment for protection, provided that it is substantial.** However, this may benefit repository and catalogue managers more than individual owners of rights in works.

The negative effects of public-private partnerships should also not be repeated when digitalizing archive or library fonds. **The objective of standardization must not be an**

[370] Study in support of the evaluation of Directive 96/9/EC on the legal protection of databases, under the direction of L. Bentley and E. Derclaye, 2018; p. IV: "*However, the Fixtures Marketing and British Horseracing Board decisions of 2004 address in a way the problem of data thereby generated and their consequence on competition by excluding investments in data creation from the scope of the protection under the sui generis right and therefore avoid 'sole source data situations'. It is unclear whether such data can also be said to be recorded and the status of recorded data is unclear under these decisions. Therefore, a clarification of the status of recorded data would be welcome.*"

opportunity for dominant economic players to impose certain formats or processing systems favouring their own services, at the expense of smooth content flow.

- **Propose simple and balanced solutions for rights' procurement**

The rapid processing of a mass or flow of protected works or subject matter is a challenge which literary and artistic property has taken up since technical means of broadcasting such as television, radio and simultaneous cable retransmission have existed. Instruments exist such as general representation agreements, compulsory collective management, extended collective agreements or legal licensing - such as in the field of library lending, broadcasting, private copying or image referencing - when it comes to access either to particular repositories or to all works or subject matter falling within a legal category. Massive use of protected works and subject matter should be permitted without the obtaining of authorizations constituting an obstacle to the practices in question, without however depriving rights holders of their rights.

Content commoditization may lead to a review of some of these practices linked to the traditional segmentation of uses, in particular to create **trans-repository authorizations** without calling into question the very principle of the mechanisms.

The specific difficulty comes, as shown during the study, from a normative architecture which has set imputation principles which split responsibility for acts into individual sources of dissemination rather than centralizing the burden on platforms which focus users' attention. Without prejudice to developments in the draft CDSM Directive, it is worth noting the interest of the least controversial mechanism provided for in Article 13, namely that the **platform procurement mechanism "covers" acts performed by users** acting in a non-commercial capacity through it.

This mechanism is compatible with a certain interpretation of the right of communication to the public which makes it possible to determine that, despite the presence of two links in the chain, there is only one single act of transmission for which the person having direct contact with the public can be held responsible, as the Court of Justice ruled in the *Airfield* judgement[371].

Assuming that the intermediation of platforms escapes this qualification, or that the "portage" mechanism remains limited to platforms covered by the exclusive right, it would nevertheless be possible to maintain the principle of this mechanism through a distinction between the original debtor of the authorization - the user of the content sharing service - and the person required to contract the authorization on behalf of all of the latter. This proposal was formulated in the report to the CSPLA on transformative works, in the case of UGC. This idea was then considered under a consumer law logic, as a guarantee of peaceful enjoyment of the services which the platform makes available to its users in return for the remuneration they receive from the exposure of the posted content and the data collected from all users of its services on the occasion of this exposure.

Moreover, as evidenced by the discussions on the draft CDSM Directive, it may be appropriate to use mediation mechanisms to facilitate negotiations between stakeholders and develop practices which are in line with emerging needs. The use of an **impartial mediation body** is likely to facilitate the availability of protected works and subject matter.

- **Support reflection on the aggregate movement and sharing regime in a more forward-looking way**

[371] CJEU, 13 October 2011, *Airfield NV and Canal Digitaal BV versus Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (Sabam)* (C-431/09) and *Airfield NV versus Agicoa Belgium BVBA* (C-432/09).

The reconfiguration of players and practices calls for more forward-looking reflection on the concepts which correspond to the mass uses of commoditized content.

Notions of repository, collection, information fonds. As such, the concepts of repository, collections, information fonds which have not been very convincingly defined by doctrine and to which no specific legal regime is attached could be explored, in conjunction with the evolution of databases towards greater destructuring and volatility. Some authors advocate linking these mechanisms to the idea of **universality of law or fact** which serves as a basis for concepts such as goodwill[372]. The idea here is to accept that the whole is different from the sum of the parts, which fluctuate, which makes it possible to envisage a capacity to control this whole, independently of the segmented mobilization of the parts. The reflection seems all the more fruitful as the "goods" in question are not rivals and can belong to a group and pursue an individual destiny. It is also interesting because it ensures the persistence of an overall unit despite the constant recomposition of these elements by input or output.

Notion of flow. In the same way, the analysis of solutions tailored to the notion of "flow" or streaming or the provision of protected works and subject matter as a service could be developed, following the example of what has long existed in software in SaaS ("*Software as a Service*") systems. The conversion of the use of protected works and subject matter from a purchasing logic to a service logic continues to be misunderstood, whether by intellectual property law tools which ignore the digital distribution right or by the draft directive on the contract for the provision of digital content which, despite commendable efforts, continues to confuse the provision of digital goods and the services which convey them.

Emergence of new communities. Consideration could also be given to the existence of collective bodies capable of representing the **interests of a community[373]**. Collective management organizations and trade unions have traditionally played this role, particularly in the field of literary and artistic property. However, content commoditization tends to shake up sectoral solidarity, so that these players may appear to be out of step with new uses. Moreover, either the absence of such bodies in certain creative sectors - the university community, the "users" generating content - or the desire of some authors to break with practices based on exclusive rights - the *Creative Commons* community - open the way for the emergence of new forms of organization and governance in these communities. In this respect, in reaction to certain forms of "uberization", the idea of returning to short circuits or developing other types of platforms based on community principles is emerging.

3.3. Encourage the digital use of protected works and subject matter in a data economy whilst associating rights holders with the value created

Plural involvement with the different value of data. The participation of rights holders in the data and content economy cannot be achieved without a legitimate counterpart, made all the more necessary by the fact that protected works and subject matter, although embedded in a mass, constitute elements whose informational added value is often greater than that of other types of content. It is therefore necessary to think about ways of involving rights holders with the value created, where possible. This association, can take different financial or

[372] In this respect, see in particular N. Binctin, Droit de la propriété intellectuelle (Intellectual Property Law), *op cit*., No. 255.

[373] In this respect, see M. Clément-Fontaine, Les communautés épistémiques en ligne : paradigme de la création (Epistemic communities online: paradigm of creation), *RIDA*, January 2013, No. 135, p.3 and the research undertaken by this author as part of an ongoing French-Canadian research project: Communities and community practices.

"informational" forms which are likely to be cumulated.

3.3.1. Financial association

Using content and using data. Two types of situations which are unequally disruptive should be distinguished here. The first is to consider forms of content exchange, sharing and dissemination - some of which are protected by intellectual property rights - which aim to promote the value of this content as such. In this case, the principles of remuneration mechanisms related to intellectual property are not called into question since it is still a question of taking advantage of the direct use value of protected works and subject matter. The second concerns the fragmentary or recomposed uses of data which is part of or hovers around protected works and subject matter. Be it in terms of intellectual property principles or practical monitoring possibilities, these uses pose theoretical and implementation issues which require innovative solutions.

Remuneration for the use of works in the big data context. As already explained, the remuneration systems provided for by intellectual property rights can, like procurement mechanisms, adapt to these new modes of use despite the mass of content used and the speed of movement. General representation agreements provide for flat-rate clauses which enable access to the entire repository for a price, which may consist of a fixed sum of money or a percentage of turnover relating to the use of this repository. Apart from the objection of a need for trans-repository procurement, there is no obstacle to using this type of remuneration mechanism, as long as it is possible to identify what the uses are. In the context of the use of streams and where overlapping rights are likely to discourage use, it is also possible to use a legal licensing mechanism, the amount of which would be fixed either at the end of a contractual agreement or, in its absence, by an administrative commission - following the example of the mechanism devised for the video wall. Finally, it is possible to individualize remuneration mechanisms as soon as a technical mechanism makes it possible to "track" the destiny of a particular work, but apart from exposing rights holders to substantial costs and often proving unsuitable for the needs of operators, these mechanisms are likely to pose difficulties with regard to the protection of users' personal data, which should be anticipated in processing systems.

Extraction and use of data and basis for remuneration. More complex, on the other hand, is the situation in which the nature of the subject matter being used is far removed from the value of the work or subejct matter as such. It is sometimes the very principle of the application of literary and artistic property rights that is in question, and therefore the existence and not the modalities of remuneration. As such, raw data which, in principle, is outside the scope of protection, the use working peripheral data - metadata, consumption or traffic data - which do not fall within the scope of exclusive rights. In the case of such peripheral data, the link with literary property is very distant, unless it can be proven that the owner can claim rights to the metadata, which will often not be the case.

Admittedly, we have seen that various forms of protection are likely to "indirectly" cover the integrated or underlying data, it is precisely this indirect nature which undermines traditional authorization and remuneration systems. In many cases, the only possibility of having a use covered by an exclusive right is limited to an often volatile process of reproducing a digital file, which is not accompanied by communication to the public of the protected work or subject matter. Remuneration systems based on the operating revenue of the public dissemination market are therefore difficult to apply. This solution is all the more complicated to implement as the identification of the parts, of the original data is often impossible in the service derived from the use of the data.

Like private copying, it is possible to **set up mechanisms for "flat-rate" and "mutualization" of the cost**, based on a mechanism which is indifferent to derived uses but based on the

possibility of copying offered. As such, collection at the source of the extraction could be provided for, as long as it is substantial or systematic, as is the case with the *sui generis* right on databases, or the imposition of a lump sum related to a quantity of bandwidth used or because of the recurrence of server visits, the latter suggestion having the advantage of avoiding saturation of the servers by too many and recurring queries. However, unlike private copying, there is no prejudice to be compensated if the extraction does not concern protected subject matter and the implementation of a *sui generis* right will, in most cases, be impossible without fulfilling the conditions for granting it.

Example of text and data mining. The difficulty of finding suitable remuneration systems is illustrated in text and data mining. Within the discussions, two distinct proposals emerged, the first relating to mining for research purposes is the subject of a free exception. Here, the legislator decided not to set up a compensatory mechanism, but left the possibility open for holders whose data will be mined to receive remuneration during the access contractualization stage, with the benefit of the exception being subject to the condition of lawful access to the works. Remuneration is therefore based, not on the exercise of intellectual property rights, but on the agreement authorizing access to content. The amount of this remuneration will be all the more higher as the data sets will be made suitable for processing by standardizing formats.

The exception of mining intended for private operators was introduced to promote the development of artificial intelligence and to close the gap between European operators and other nations such as the United States and China. During the discussions, the idea emerged that such mining, insofar as it benefits economic players, to the exclusion of any public interest, should result in compensation for the benefit of the holders. In addition to the fact that the text is currently in an unstable state, there is however no indication according to which criteria such "compensation" would be required to be applied[374].

3.3.2. "Informational" association or data sharing

Digital technology is rich in new approaches which can irrigate literary and artistic property law to renew its mechanisms and best defend the interests of rights holders, while respecting users' rights. As this study has shown, the rules relating to digital content, without distinction, are likely to provide solutions relating to intellectual property law: in particular, it is possible to draw inspiration from the instruments currently designed by data law to benefit from the value of data use - i. e. from "*what they make it possible to do and the strategic positions to which they give access*"[375] - or to mobilize them to empower an actor to act. In light of this model, it is, for example[376], possible to propose the creation of a right to the portability of use data for the benefit of holders of literary and artistic property rights.

- **Create a right to the "portability" of use data of protected works and subject matter to correct information asymmetry.**

Strategic role of use data. The control of data generated by the use of protected works and subject matter plays a key role in the power acquired by major intermediation platforms (cf. *above*), whether it deals with scientific publishing, music or audiovisual content. The

[374] Finally, given the nature of the practice in question, it could certainly be technically difficult to individualize the distribution of remuneration between the works used. One solution could be to use the sums received to finance the collective missions of rights management and distribution bodies, namely actions to promote culture and the provision of social, cultural and educational services, pursuant to II of Article L. 321-1 of the French IPC.

[375] S. Chignard and L.-D. Benyayer, *Datanomics, Les nouveaux business models des données* (Datanomics, new business models for data), FYP, 2016, p. 15.

[376] We may also imagine drawing inspiration from the right to dereferencing enshrined in the Google Spain jurisprudence and partially reiterated by the GDPR to establish a more balanced relationship between rights holders and search engines in their content ranking activity.

positioning of platforms on this last link in the value chain, the one which puts them in contact with users, enables them to constantly enrich their service offer by offering personalized recommendations, by accurately understanding new trends or by positioning themselves on bringing together individuals who share similar tastes or interests. Cut off from this informational wealth, rights holders are placed in a subordinate position vis-à-vis those who hold the data to access this information. Although some contracts provide the terms and conditions for data availability by platforms, rights holders often encounter difficulties in aggregating and therefore using the data, due to the lack of appropriate programming interfaces[377].

In the digital content and data era, it seems necessary to break this asymmetry and to think about the conditions for rights holders to access use data relating to protected content[378]. Drawing on the logic and characteristics of data - which is by nature moving, co-constructed and non-rival - as well as instruments aimed at maximizing its use value[379], one possible approach would be to acknowledge a right to the availability or portability of use data as a new prerogative of the author, in line with a logic of free movement of "cross-platform" data[380].

Obligation to inform, principle of loyalty and transparency. Bases exist in positive law, namely the publisher's obligation to account, extended to digital publishing, for the representation of performances, audiovisual production and the transfer of performers' rights to a phonogram producer[381], these obligations having recently been reinforced in the name of the principle of transparency and fair contractual relationships. Clearly, however, these provisions bear the hallmark of the analog era, where all an author needed and could imagine knowing was the number of copies of their works sold and the revenue they received from them. Moreover, these provisions only deal with the transfer of rights and do not apply to the kinds of platforms which disseminate digital content without falling within this contractual scheme. The CDSM Directive (Article 14) currently under discussion aims to guarantee this right to information for authors and performers at European Union level, but without really reinforcing its substance or broadening its scope. It would be useful to go further and really move the rights holder's **information** into the digital age. These new information requirements could, for example, be part of the *Platform-to-Business* (P2B) Regulation currently being negotiated[382], the purpose of which is in particular to promote "*fairness and transparency for business users of online intermediation services*"; they could also, failing the above, stem from a national initiative.

Creation of an economic right to data "portability". A new economic right of "portability" of work use data could be granted to rights holders whose debtors would not only be operators within the meaning of the Intellectual Property Code, but also all those who provide the public with intermediation services giving access to protected works and subject matter - breaking with the distinction between publisher and host within the meaning of the "Electronic Commerce" Directive. The scope could cover all data generated by the use of the works and collected by the debtor of the obligation: time, volume, duration of use, user characteristics, preferences, etc. Aggregated or anonymized data could as such be communicated; the claim of the holders to have the capacity to identify users would also imply the inclusion of personal data, pursuant to the provisions of the GDPR and the Act of 6 January 1978 on information technology, files and privacy, in particular by implementing *Privacy by design* procedures. The

[377] In this respect, see the French High Audiovisual Council (CSA) Report, *Plateforme et accès aux contenus audiovisuels* (Platform and access to audiovisual content), September 2016, p. 44.
[378] On this issue, see the French High Audiovisual Council (CSA) Report, *Plateforme et accès aux contenus audiovisuels (Platform and access to audiovisual content)*, September 2016, enjeu (challenge) 8, p. 89.
[379] See *above*.
[380] As regards this movement, see the opinion of the CNNum (French Digital Council) afore.
[381] See respectively Articles L. 132-21, L. 132-25 and L. 212-15 of the French IPC.
[382] Draft Regulation of 26 April 2018, COM (2018) 238 final.

obligations set out in recitals 46 and 46a of the draft CDSM Directive as resulting from the vote on the text in Parliament on 12 September 2018 would therefore be respected.

Standardization or normalization. To ensure the effectiveness of this new prerogative, technical considerations such as restitution formats should also be taken into account to facilitate data reuse. Although these formats should vary across sectors, the efficient use of this data requires it to be structured, commonly-used and machine-readable. This would encourage stakeholders to work together to adopt common standards and interoperable formats.

Twofold economic value. This collected data would have a twofold value for holders. First of all, a use value, as it is interesting for an author, a related rights' holder or a publisher to know the uses of works, in particular to develop their creation or their catalogue, possibly related services. Secondly, a monetary value, because nothing would prohibit the beneficiaries of this data from monetizing it. Part of the issue of sharing the value generated by new ways of consuming works would therefore be solved. This solution is all the more feasible since data is non-rival whose enjoyment can be shared without automatic loss of value.

Possible collectivization of analytical expertise. It may be argued that small authors or operators would be quite helpless when faced with sending large amounts of data, in the absence of the necessary technical skills to use them. But there would be nothing to prevent the people concerned from joining forces to access data analysis services. Several avenues could be explored to this end:

- the creation of "shared governance management tools"[383] such as data boards operating on the logic of commons or "platform cooperatives";
- the promotion of data infrastructures by the State to facilitate this mutual access, in accordance with the State-platform approach already in use in some sectors[384];
- the use of blockchain technology could be considered to ensure a secure exchange of information based on a coopetition approach;
- the allocation of this new function to collective rights management and distribution bodies, which could then be part of a platform approach;
- at a minimum, the reuse of data could also be part of an API logic: a private player would then set up a platform for the reuse of the data they hold enabling the rights holder to take advantage of the use value of the data without holding it[385].

- **Associate authors with data to enhance their creativity and visibility**

Data Driven Creation. Use data can play a potentially important role in the creation process, in a logic of data driven creation. Various examples are mentioned in this respect by the CNIL (French Data Protection Authority)[386]. First of all, *Amazon's*, which proposes to remunerate its self-published authors on the page read. Such practices are not without certain concerns, since they could influence creative practices by forcing authors to favour content with a high engagement rate, such as **"**clickable bait" or "*click-based creation*"[387]. Other practices promote better interaction between the author and their readers, such as the Wattpad self-publishing

[383] In this respect, see the CNIL (French Data Protection Authority) Cahier de prospective, *La plateforme d'une ville, Les données personnelles au cœur de la fabrique de la smart city* (A city's platform, Personal data at the heart of creating the smart city), 2017, p. 46&f, spec. p. 50.

[384]*La donnée comme infrastructure* (Data as an infrastructure), report from the data administrator on data in administrations, 2016-2017, La documentation française.

[385] CNIL (French Data Protection Authority), *La plateforme d'une ville* (A city's platform), afore., p. 48.

[386] CNIL (French Data Protection Authority) Cahier prospective sur *Les données, muses et frontières de la création* (Data, muses and frontiers of creation), p. 30-31.

[387] Ibid. As such "*emerging economic models based on actual reading practices can lead to a multiplication of cliffhangers, i.e. the maintenance of permanent suspense to keep the reader captive - to the detriment of nuance and complexity*"; we can also mention the posting online of many particularly addictive videos aimed at keeping the user on the site for as long as possible to boost their attention to third parties.

platform, which gives authors the opportunity to access audience metrics (volume, quality) and dialogue with their audience, making it possible to assess their engagement and even adapt their creation. Some still envisage, in a more prospective way this time, a personalization of the work itself, for example according to the context for listening to music or the personality of the listener[388].

Special portability for the benefit of the author dedicated to creativity and research. Against the backdrop of data-driven creation, it would therefore be necessary to ensure that *authors* have access to this data, in order to be able to measure user engagement and take their wishes into account in their creative process. The acknowledgement of a right to the portability of use data could as such be envisaged, not only for the benefit of rights holders in general but also, more specifically, *for the benefit of authors* or to support their creativity or the promotion of their research work. For example, authors of scientific writings, whose citation by their peers is an element of evaluation of their work, should be guaranteed a feedback on the visibility of their content by being granted a right to portability of data on the citation of their writings for which publishers of scientific journals are liable.

- **From access to sharing: promoting data infrastructures?**

Finally, we could consider how to promote "*virtuous reassignment loops*"[389] of the data generated by the work to enable each stakeholder to improve their own service, based on a "coopetition" approach. Consideration should therefore be given to building an environment conducive to the reciprocity of the gains expected from the use of the data. In particular, the movement of data between operators could be facilitated by the development of "data infrastructures", similar to and beyond what is promoted by the General Data Administrator for public data, in a State-Platform approach[390].

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[388] See Professor Tod Machover's project cited by the CNIL (French Data Protection Authority), p. 56.
[389] *Les données comme infrastructure essentielle* (Data as key infrastructure), report from the data administrator on data in administrations, 2016-2017, p. 29.
[390] In this respect, see the developments and proposals made in the report of the data administrator on data in administrations, 2016-2017, *Les données comme infrastructure essentielle* (Data as key Infrastructure), afore.

List of hearings and written contribution

Administrations and public bodies

French Ministry for Culture, Directorate General of Media and Cultural Industries (DGMIC):
- Nicolas Georges, Deputy Director, responsable for books and culture;
- Jean-Baptiste Gourdin, Head of Department, Deputy Director General.

French Ministry for Culture, Legal and International Affairs Department (SAJI):
- Alban de Nervaux, Head of Department;
- Estelle Airault, Head of the European Affairs Office;
- Aurélie Champagne, Head of Mission for the European Affairs Office;
- Anne Le Morvan, Head of the Intellectual Property Office;
- David Pouchard, Deputy Head of the Intellectual Property Office;
- Samuel Bonnaud-Le Roux, Head of Mission for the Intellectual Property Office.

Secretariat General for European Affairs (SGAE):
- Renaud Halem, Legal Advisor;
- Julie Allermoz-Bouzit, Deputy Legal Advisor.

Interministerial Directorate of State Digital Transformation and Information and Communication System (DINSIC):
- Henri Verdier, Director;
- Perica Sucevic, Deputy Director of the Etalab Mission, Legal Advisor;
- Simon Chignard, Etalab Mission, Data Editor.

National Audiovisual Institute (INA):
- Jean-François Debarnot, Legal Director;
- Barbara Mutz, Head of the Legal and Regulatory Affairs Department;
- Eléonore Alquier, Head of Development and Missions Department;
- Jean Carrive, Head of the Digital Research and Innovation Department.

French National Research Institute for Digital Sciences (INRIA):
- Claude Kirchner, Research Director.

European institutions

European Parliament:
- Virginie Rozière, MEP of the Party of European Socialists;
- Catherine Lorrain, Legal Advisor of the Greens/European Free Alliance.

European Commission, DG Connect:
- Sarah Jacquier, Seconded National Expert;
- Caroline Colin, Copyright Unit.

European Commission, DG Just:

- Katja Viertiö, Deputy Head of the Contract Law Unit;
- Eleni Kostopoulou, Seconded National Expert.

Interested bodies

Syndicat de la presse quotidienne nationale (SPQN - Union of French National Daily Newspapers):

- Samir Ouachtati, Head of Legal and Social Affairs.

Groupe Les Echos – Le Parisien:

- Xavier Genovesi, Legal Director.

Centre français d'exploitation du droit de copie (CFC - French National Copyright Clearance Centre):

- Valérie Barthez, Legal Director.

Syndicat national de l'édition (SNE - French Publishers Association):

- Julien Chouraqui, Legal Director.

Société française des intérêts des auteurs de l'écrit (SOFIA - French Copyright Collective):

- Florence-Marie Piriou, Secretary General.

Société des gens de lettres (SGDL - French Writers' Association):

- Maïa Bensimon, Chief Legal Officer.

Groupe Madrigall (French Editorial Holding):

- Liliane de Carvalho, Chief Legal Officer.

Qualified Experts

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Alain Strowel, Professor of Law at the University of Saint-Louis Brussels and the Catholic University of Louvain